

Draft recommendation of the European Ombudsman in his inquiry into complaint 1450/2007/(WP)BEH against the European Anti-Fraud Office

Recommendation

Case 1450/2007/(WP)BEH - Opened on 22/06/2007 - Recommendation on 21/07/2009 - Decision on 13/09/2010

(Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1])

THE BACKGROUND TO THE COMPLAINT

1. Parliament's D3 building in Brussels was the object of a long-term lease contract between Parliament and the owner of the building, which was signed in 1992. The respective contract afforded Parliament an option to purchase the said building. Parliament exercised this purchase option in 1998. The present complaint relates to the financing for the acquisition of the D3 building by Parliament.

2. In 2002, the complainant, a journalist, contacted the President of the European Commission and alerted him to certain alleged irregularities relating to the acquisition of Parliament's D3 building, which might have possible criminal law implications. According to the complainant, in 1998, Parliament's Secretary-General charged a company with the financing of the building's acquisition, without publishing a call for tender. He did so, in spite of the large financial volume of the operation.

3. On the basis of the information provided by the complainant, OLAF opened an investigation (OF/2003/0026), during which witnesses and experts were heard and consulted. On 11 August 2006, OLAF closed the case and recommended no further follow-up apart from providing Parliament with a copy of OLAF's Final Case Report and from informing the complainant of the results of the investigation.

4. On 1 September 2006, the complainant requested access to (i) the Final Case Report, (ii) OLAF's interim report and (iii) the opinion of a legal expert who was consulted in the framework of the investigation. OLAF granted access to anonymised versions of the Final Case Report and the expert's opinion. As regards the interim report, OLAF relied on a number of exceptions contained in Article 4 of Regulation 1049/2001 [2] and stated that it could not disclose it.



5. In a letter of 27 September 2006, the complainant asked OLAF a number of questions relating to its investigation. He also requested access to a number of further documents. By letter of 19 October 2006, OLAF informed him that it would reply separately to the different issues within six weeks.

6. On 29 October 2006, the complainant made a confirmatory application for access to the documents requested on 27 September 2006. On 30 October 2006, he received a letter, dated 23 October 2006, informing him that, due to the large number of documents to which he requested access, the period for processing his application would have to be extended by 15 working days. However, since that time, he did not receive any further correspondence from OLAF.

7. On 21 May 2007, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

8. In his complaint to the Ombudsman, the complainant made the following allegations.

(1) In its inquiry into the financing of Parliament's D3 building, OLAF failed seriously and objectively to examine the applicability of Directive 92/50/EEC [3] ('the Directive') relating to the coordination of procedures for the award of public service contracts.

(2) OLAF failed to examine the possible impact of this case on the financial interests of the Community.

(3) OLAF failed to indicate the rules, according to which the complainant's offer to answer OLAF's questions in a written procedure could be rejected.

(4) OLAF failed properly to handle his application of 27 September 2006 for access to documents.

(5) OLAF wrongly rejected his application for access to the interim report ("*Zwischenbericht*"), which OLAF had to send to the OLAF Supervisory Committee nine months after the opening of its inquiry.

9. On 21 December 2007, the complainant submitted his observations on OLAF's opinion (see paragraph 10 below). On this occasion, he submitted the following further allegations.

(6) OLAF failed to react to his letter of 27 September 2007, in which he had asked OLAF to eliminate from its Final Case Report certain passages relating to him.

(7) OLAF failed to provide him with explanations concerning certain issues regarding its investigation, although, in its letter of 19 October 2006, it had announced that it would do so.



(8) In its correspondence with the complainant, OLAF failed to address/react to the complainant's offer to answer OLAF's questions in a written procedure.

THE INQUIRY

10. The complaint was forwarded to the Director-General of OLAF for an opinion. OLAF's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 21 December 2007. In light of his observations, further inquiries by the Ombudsman proved necessary. Thus, in a letter of 11 June 2008, the Ombudsman requested OLAF to provide him with further information concerning the complainant's original allegations. In the same letter, the Ombudsman also asked OLAF for an opinion on the further allegations, which the complainant made in his observations on OLAF's opinion.

11. OLAF's supplementary opinion, which dealt with the complainant's further allegations, as well as the Ombudsman's request for additional information, was forwarded to the complainant with an invitation to make observations. On 17 October 2008, the complainant sent his observations.

12. In his letter of 17 October 2008, the complainant, among other things, informed the Ombudsman that, on 18 September 2008, the European Data Protection Supervisor decided that OLAF had to correct information contained in its Final Case Report, which related to the complainant. Against this background, the complainant explained that he saw no need to pursue his sixth allegation further.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

13. Given that the complainant stated that he sees no need to pursue his sixth allegation further, the Ombudsman understands that he wishes to drop this allegation. The present draft recommendation will therefore only deal with the complainant's allegations (1)-(5) and (7)-(8).

14. In view of the fact that both the complainant's third and eighth allegations relate to OLAF's position on the proposal for a 'written procedure' made by the complainant, it appears useful to deal with them together.

A. Alleged failure to examine the applicability of Directive 92/50/EEC (the complainant's first allegation)

Preliminary remarks



15. In his observations on the further comments submitted by OLAF, the complainant pointed out that OLAF incorrectly quoted the minutes of a meeting of Parliament's Presidium. The minutes relating to the involvement of the developer in the re-financing referred to an " *irregular practice* " whereas, in its further comments, OLAF spoke of a " *regular practice* " (" *nach gängiger Praxis* "). The Ombudsman has compared the English original version with the German translation of OLAF's additional comments. It appears that the German translation deviates from the English original version, given that the former speaks of a regular practice whereas the latter refers to an irregular practice. Given that the original English version corresponds to the information contained in OLAF's Final Case Report, the Ombudsman considers the English version to be authoritative, whereas the German translation is apparently affected by a translation error. The complainant has been sent the original English version of OLAF's additional comments. Against this background, the Ombudsman will consider the English version of OLAF's further comments as the basis for his examination of the issue at hand.

Arguments presented to the Ombudsman

16. The complainant alleged that, in its investigation into the financing of the acquisition of Parliament's D3 building, OLAF failed seriously and objectively to examine the applicability of the Directive.

17. In support of his allegation, he argued that OLAF consulted an external expert, who concluded that there was no reason to assume that the Directive was not applicable to the financing for the acquisition of Parliament's D3 building. Nevertheless, in its Final Case Report, OLAF stated that the applicability of the Directive was " *at least debatable* ". In his letter of 27 September 2006 to OLAF, to which he referred in his complaint, the complainant essentially stated that, by not organising a tendering procedure for the contract to refinance the D3 building, Parliament breached the Directive.

18. In its opinion, OLAF stated that, as was apparent from the Final Case Report, it had examined the applicability of the Directive during the course of its administrative investigation. It took the view that the complainant's allegation was not supported by evidence and that the question concerning the applicability of the Directive had been addressed.

19. In his observations, the complainant remarked that OLAF did not comment at all on the statements made in his letter of 27 September 2006, to which he referred in his complaint. He submitted that, in the framework of OLAF's investigation, statements made by him were seriously and objectively analysed by an external expert. The external expert concluded that the application of the Directive was to be expected. However, statements made by persons heard by OLAF in the framework of its investigation were not subjected to a serious and objective analysis. As a result, OLAF concluded that the applicability of the Directive was " *at least debatable* ".

20. The complainant also reiterated the statements contained in his letter of 27 September 2006 that, as regards the financing of the D3 building, the contract between Parliament and the



developer charged the latter, as an intermediary, to perform two services: first, to consult the financial markets, and, second, to act as an interim debtor vis-à-vis the lending banks.

21. The complainant further noted that, in the Final Case Report, one of the witnesses heard by OLAF was quoted as saying that, if, apart from a possible indemnity, no additional price is paid for such a service, such an agreement should not be considered a financial service contract within the meaning of the Directive [4]. The witness explained further that, in the present case, the developer only received an indemnity of BEF 2 500 000 (around EUR 62 000). The complainant took the view that the witness's statement contradicted the Directive, which, according to its clear wording, applied to financial service contracts concluded at the same time as, before, or after the contract of acquisition or rental of land, existing buildings, or other immovable property or concerning rights thereon, in whatever form (Article 1(a)(iii) of the Directive). However, OLAF apparently did not confront the witness with this legal situation.

22. In addition, the complainant submitted that the relatively small amount of indemnity was only due to the fact that the developer pulled out of the contract after a short period of time. However, had the contract been performed for 10 years, as stipulated, an amount in the millions would have been due. Again, according to the complainant, OLAF did not confront the witness with this aspect. Even if one were to assume that the said contract indeed only foresaw an indemnity of EUR 62 000, a tendering procedure would still have had to be organised, in line with Article 57 of the Financial Regulation, as it stood at that point in time.

23. Finally, the complainant pointed to a number of other aspects which, according to him, OLAF failed to take into consideration in the course of its investigation. According to a statement made by a then Vice-President of Parliament, it was irregular practice for a developer to be used for the provision of financial services after the building was finished, although this was current practice during the construction stage. Equally, OLAF accepted the statement made by Parliament's Secretary-General that (i) the formal application of the Directive was avoided in order to save time and (ii) the shortening of deadlines was the only substantial deviation from the Directive. However, as regards the latter aspect, the complainant pointed out that, given the possibility of an urgency procedure (Article 20 of the Directive), there was no need to depart from the time-limits foreseen in the Directive. Moreover, according to the expert witness's opinion, Parliament's Secretary-General departed from the rules of the Directive in more than one respect. It was not apparent from OLAF's Final Case Report that it had inquired further into this aspect.

24. In its reply to the Ombudsman's request for further information, OLAF explained that the indemnity of around EUR 62 000 was not mentioned in the complainant's submission, but rather established during the course of its own investigation. OLAF went on to state that "*[a]s the complainant's allegations were not confirmed, this 'flat indemnity' as such was not subject to further in-depth investigation. OLAF based itself for its conclusion - that it is 'at least debatable' to consider this a separate financial contract in the sense of Article 1 of the Directive - on the statement of the expert witness of the EP's legal service, on the one hand, and on its own reading of the Directive, on the other hand.*"



25. Moreover, OLAF pointed out that, since no clear-cut irregularity was established, the question as to whether the Directive was applicable, both as a matter of law and in the particular case, was not subject to further in-depth investigation. In the given context, OLAF took the view that internal investigations served to establish facts, as well as their possible irregular nature, with an eye to concluding whether these facts were liable to result in disciplinary and/or criminal proceedings against staff members of the institutions. Investigations were not aimed at answering hypothetical questions.

26. As regards the statements made by the then Vice-President and the external expert on the irregularity of the practice pursued, OLAF noted that, according to the Vice-President, it was irregular practice for the developer to be used for the provision of financial services when the building was finished. However, in the present case, the situation was different, given that the building contractor/owner refinanced itself. As regards the external expert's statements, OLAF pointed out that he qualified the transaction as not merely a private transaction, but as a 'pass-on loan'.

27. In his observations on OLAF's additional comments, the complainant noted that, according to OLAF, the 'flat indemnity' as such was not subject to further in-depth investigation. Nevertheless, in its Final Case Report, OLAF referred to the flat indemnity in support of its conclusion that it was at least debatable whether Parliament could qualify the financing of the acquisition of the D3 building as a separate financial contract. This confirmed the view that OLAF failed seriously and objectively to examine the applicability of the Directive. Instead, OLAF's conclusions were based on statements which had not undergone a serious evaluation.

28. The complainant also observed that, according to OLAF, the question whether or not the Directive applied was a hypothetical question. Nevertheless, in its Final Case Report, OLAF apparently accepted the statement made by Parliament's Secretary-General, according to which the refinancing of the D3 building took place under time constraints. Again, OLAF's conclusions could thus not withstand a serious evaluation. He also noted that OLAF did not comment on the need to organise a tendering procedure, in accordance with the version of the Financial Regulation applicable at that time.

The Ombudsman's assessment

29. The parties appear to be in agreement concerning the applicability, in principle, of the Directive to contracts for the supply of goods and services, as well as to contracts for purchase, lease and hire entered into by Parliament. The Ombudsman understands that the applicability of the Directive follows from Article 56 of the old Financial Regulation [5], according to which "*each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives*". However, there appears to be disagreement as to whether Parliament was under an obligation to apply the Directive in relation to the financing for the acquisition of its D3 building.

30. Before entering into an analysis of the allegation here under review, it appears essential to recall the tasks and duties entrusted to OLAF, in particular by means of Regulation 1073/1999



[6] . Pursuant to Article 1(3) of Regulation 1073/1999, OLAF shall conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community. To this end, it shall investigate serious matters relating to the discharge of professional duties, such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings. Against this background, it is apparent that OLAF's tasks involve (i) fighting irregularities (such as fraud and corruption), which affect the financial interests of the European Community and (ii), to this end, investigating serious matters relating to the discharge of professional duties of officials and other servants of the Communities.

Whereas the second aspect forms an integral part of OLAF's tasks, it does not appear that OLAF's tasks are limited to investigating cases in which the conduct of an official or other servant of the Community is liable to result in disciplinary or criminal proceedings.

31. In the Final Case Report, OLAF recommended no further follow-up to the case. This recommendation was based on its view that none of Parliament's staff members committed any irregularity that could possibly lead to disciplinary or criminal proceedings. Moreover, in its additional comments, OLAF stated that no clear-cut irregularity had been established. Consequently, the question as to whether or not the Directive was applicable was not subject to further in-depth investigation. Referring to the second aspect of its tasks, as identified by the Ombudsman above, OLAF pointed out that investigations are not aimed at answering hypothetical questions.

32. The question whether the conduct of an official or other servant of the Community is liable to result in disciplinary or criminal proceedings is only one aspect of an investigation conducted by OLAF. Bearing this in mind, the Ombudsman is not convinced by OLAF's view that there is no need for an in-depth investigation into the applicability of the Directive. If its view were correct, this would mean that OLAF could decline to investigate irregularities for the sole reason that these irregularities, if established, could in any event not give rise to disciplinary or criminal proceedings. Such a narrow understanding of its mandate could have the effect that OLAF would not be able to fully live up to its task of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community. It would furthermore be difficult to reconcile with Article 280 of the EC Treaty, on which Regulation 1073/1999 is based and which relates to fraud and any other illegal activities affecting the financial interests of the Community, regardless of whether such irregularities give rise to criminal or disciplinary proceedings. For the sake of clarity, it is worth pointing out that neither Article 280 of the EC Treaty nor Regulation 1073/1999 explicitly provide that only clear-cut irregularities would have to be fully investigated by OLAF.

33. The Ombudsman notes that, at first sight, the complainant's allegation is limited to the question whether or not OLAF seriously and objectively examined the applicability of the Directive. It thus relates to OLAF's approach as regards its examination of the Directive's applicability. At the same time, it is clear from the complainant's submissions that he also intends to challenge OLAF's findings relating to the applicability of the Directive. Assuming that the applicability was " *at least debatable* ", OLAF recommended no further follow-up to the case,



given that there was no clear-cut irregularity that could possibly lead to disciplinary or criminal proceedings. However, OLAF's reasoning could not be considered convincing, if a preponderance of arguments plead in favour of applying the Directive, whose applicability could, as a result, not be referred to as "*at least debatable*". This having been said, the Ombudsman needs to analyse whether, in the present case, OLAF seriously and objectively examined the irregularity alleged by the complainant, namely, Parliament's alleged failure to apply the Directive. In so doing, the Ombudsman needs to scrutinise whether or not the arguments advanced by OLAF, both in its Final Case Report as well as in the course of the present inquiry, sufficiently and reasonably support the conclusion it eventually reached, namely, that the applicability of the Directive was "*at least debatable*".

34. The complainant challenged OLAF's respective findings in its Final Case Report on a number of grounds. He took the view that, in its investigation, OLAF did not sufficiently take into account the relevance of the indemnity when examining the applicability of the Directive. Furthermore he submitted, that OLAF accepted the non-application of the Directive due to time constraints. According to him, OLAF failed to take into account that for the developer to provide financial services after the building had been finished it was an irregular practice. At first sight, it appears that the complainant submitted a number of arguments which could potentially cast doubt on OLAF's findings. It is, therefore, necessary to ascertain how far the objections formulated by the complainant have in fact been sufficiently addressed in OLAF's Final Case Report and/or whether OLAF put forward convincing arguments to address them in the course of the inquiry.

35. As regards the complainant's argument that OLAF did not sufficiently take into account the indemnity which Parliament paid to the developer, first, it is worth noting that the parties appear to agree that an indemnity was paid. Second, OLAF did not object to the complainant's assertion that the arrangement for the financing of Parliament's D3 building consisted of two aspects: (i) Parliament's order for the refinancing of the building (ii) and the execution of this order by the developer. In the complainant's view, it was in relation to the first aspect that the Directive was decisively breached.

36. According to the complainant, the fact that an indemnity was paid meant that the respective contractual arrangement between Parliament and the developer should be considered as a financial service contract within the meaning of the Directive. In contrast, OLAF, relying on a statement made by an expert witness of Parliament's Legal Service on the one hand, and on its own reading of the Directive, on the other, concluded that it was "*at least debatable*" to consider the respective contract as a separate financial contract.

37. The Ombudsman recalls that the text of Article 1(a)(iii) reads as follows:

" For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:



[...]

(iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive ; " [7]

Against this background, the Ombudsman considers that the wording of Article 1(a)(iii) supports the complainant's view that the Directive applies to financial service contracts concluded in relation to the acquisition of immovable property. OLAF referred to its own reading of the Directive as one of the reasons why the applicability of the Directive was debatable but did not further explain its reading. However, given the *prima facie* clear wording of the quoted provision, such an explanation was all the more necessary. It appears useful to add that, in view of the conclusions arrived at by the external legal expert consulted by it, one would have expected OLAF to explain why, in its view, the Directive did not apply.

38. Turning to the expert witness's statement, which OLAF relied upon, in addition to its own reading of the Directive, the respective statement is referred to in the Final Case Report. In that document, the expert witness is quoted as saying that if, apart from a possible indemnity, no additional price is paid for such a service (that is, the refinancing), such an agreement should not be considered a financial service contract within the meaning of the Directive. The expert witness went on to state that, in the present case, the developer only received a flat indemnity of BEF 2 500 000 (around EUR 62 000). Against this background, the expert witness concluded that the Directive did not apply to contractual arrangements providing for an indemnity only. However, from this statement, the Ombudsman is unable to see why the expert witness assumed that such contractual arrangement should be excluded from the scope of the Directive's application. It appears useful to add that, as convincingly argued by the complainant, the indemnity would have been significantly higher, had the contract been performed for the entire duration stipulated by it. The Ombudsman notes that OLAF does not appear to have contested the complainant's respective calculations.

39. In its reply to the Ombudsman's request for further information, OLAF stated that the indemnity as such was not subject to an in-depth investigation, because the complainant's allegations were not confirmed. The Ombudsman finds OLAF's respective position difficult to understand, given that, as pointed out by the complainant, OLAF itself referred to the indemnity in order to support its view that the applicability of the Directive to the financing arrangement was at least debatable.

40. Against this background, the Ombudsman concludes that, as regards the legal consequences of the indemnity paid by Parliament, OLAF has failed seriously and objectively to examine the applicability of the Directive.

41. Turning to the issue of time-constraints, the Ombudsman considers it impossible to accept that an otherwise applicable piece of legislation would not be applied due to time constraints. In its "*legal evaluation, conclusions and recommendations*", which is the last section of the Final



Case Report, OLAF referred to " *a certain urgency* " in dealing with the issue of (re)financing, given that the purchase option with regard to the D3 building had to be exercised by Parliament before a given date. Whereas OLAF did not explicitly endorse the view that urgency may have rendered the application of the Directive dispensable, the issue of time-constraints is clearly one of the aspects which led OLAF to conclude that the applicability of the Directive was at least debatable. However, as pointed out by the complainant, Article 20 of the Directive expressly acknowledges the fact that the normal time-limits stipulated by the Directive may not be practicable in cases of urgency. Therefore, Article 20 allows for deviations from the normal time-limits in such cases. Nevertheless, the Final Case Report did not analyse the question as to how far time constraints could have been accommodated by means of the urgency procedure foreseen in Article 20. Therefore, the Ombudsman concludes that, as regards the issue of time-constraints, OLAF has failed seriously and objectively to examine the applicability of the Directive.

42. In relation to the provision of financial services by the developer, the Ombudsman notes OLAF's view that, according to the said Vice-President of Parliament, it was irregular practice for the developer to provide financial services after the building was finished. However, OLAF also pointed out that, in the present case, the situation was different, given that the building contractor/owner itself refinanced the acquisition of the building at issue. The Ombudsman considers that OLAF's respective statement is unclear as regards Parliament's role in the refinancing of its D3 building. It equally does not shed light on the relevance of the Directive. Against this background, the Ombudsman considers that the information given by OLAF does not provide a sufficient basis for the conclusion that it seriously and objectively examined this aspect.

43. The Ombudsman also notes that the external legal expert took the view that Parliament departed from the rules of the Directive in more than one respect. However, neither the Final Case Report nor the statements made by OLAF in the context of the inquiry allow the Ombudsman to conclude that this statement resulted in any further examination by OLAF.

44. Although the Ombudsman need not arrive at definitive conclusions as to whether or not the Directive should have been applied, he concludes, for the reasons set out above, that OLAF failed seriously and objectively to examine the applicability of the Directive. This finding is further corroborated by the fact that OLAF heard an expert witness from Parliament's Legal Service and consulted an external legal expert. While the expert witness denied the applicability of the Directive, given that only a flat indemnity had been paid, the external legal expert concluded that one would expect the Directive to apply to the contractual arrangement for the financing of the acquisition of Parliament's D3 building which he qualified as a pass-on loan. The external legal expert's opinion, therefore, clearly supports the complainant's view that the Directive should have been applied. Nevertheless, OLAF concluded that the applicability of the Directive was at least debatable. It seems useful to add that, in light of the number of arguments pleading in favour of the applicability of the Directive, OLAF should have performed a particularly meticulous examination of the Directive's applicability.

45. In light of the above, the Ombudsman finds that OLAF failed seriously and objectively to



examine the applicability of the Directive. This constitutes an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. Alleged failure to examine the possible impact of the case on the financial interests of the Community (the complainant's second allegation)

Arguments presented to the Ombudsman

46. The complainant alleged that OLAF failed to examine the possible impact of the case on the financial interests of the Community. He referred to his letter of 27 September 2006, in which he pointed out that, according to OLAF's Final Case Report, the case had no such impact. The complainant explicitly objected to this assessment and stated that Parliament's final payment to the lending bank was due on 15 June 2008. Against this background, he essentially submitted that the interest level on the financial market was lower than the interest rate to be paid by Parliament. Had Parliament, in line with applicable rules, rapidly withdrawn from the contract, a significant cost reduction would have been achieved.

47. In its opinion, OLAF took the view that, since no irregularity was established, the question concerning the financial impact of the case was not an issue. It further submitted that the complainant did not provide any evidence suggesting that there was a possible impact on the financial interests of the Community. According to OLAF, the Final Case Report clearly indicated why financial aspects were not an issue.

48. In his observations, the complainant explained that, already at the initial-assessment-stage, and thus before opening an investigation with regard to a particular case, OLAF was obliged to assess the possible impact of the case on the financial interests of the Community. This obligation was apparent from the OLAF manual, which contained relevant instructions to investigators. Such analysis was indispensable in light of Article 1 of Regulation 1073/1999, according to which the existence of a possible impact on the financial interests of the Community was a precondition for an OLAF investigation. However, OLAF neither prepared a survey of all payments actually made, nor commissioned an independent analysis of the conditions for the refinancing of the D3 building. The absence of an examination of the impact of the case on the financial interests of the Community was furthermore incomprehensible, taking into consideration a resolution Parliament adopted on 30 March 2004. In this resolution, Parliament clearly expressed its expectation that all payments between the developer and the lending bank, as well as possible payments to third parties, would be investigated in the course of OLAF's investigation.

49. In addition, the complainant noted that OLAF did not comment on the issue of unfavourable interest rates applying to the financing of the D3 building, even though an independent analysis by a financial expert would have been possible. Instead, in its Final Case Report, OLAF simply referred to the fact that the costs for financing the acquisition of the building were clearly below



the costs of a long-term lease. According to the complainant, this statement did not answer the question whether the financing of the acquisition of the building was in line with favourable and usual market conditions.

50. In its reply to the Ombudsman's request for further information, OLAF confirmed the position taken in its opinion. It explained that, since the investigation did not establish a clear-cut irregularity, the question as to the financial impact was consequently purely hypothetical and of no relevance for the conclusions of its internal investigation. Thus, it was not subject to further in-depth investigation. OLAF furthermore acknowledged that it did not analyse the market conditions. However, it established that exercising the purchase option and ending Parliament's long-term lease was in the Community's financial interest.

51. In his supplementary observations, the complainant did not comment on this issue.

The Ombudsman's assessment

52. Article 1(3) first indent of Regulation 1073/1999 vests in OLAF the power to conduct administrative investigations for the purpose of "*fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community*" [8]. Therefore the complainant's view that an impact on the financial interests of the Community is a pre-condition for an investigation by OLAF appears to be correct. In its "*Information to the OLAF Supervisory Committee*" [9], OLAF pointed out that it was unclear whether financial damage may have been suffered by the European Community. At any rate, it seems that OLAF assumed that the case may have had an impact on the financial interests of the Community, given that it opened an investigation. This is in line with Article 1(3) first indent of Regulation 1073/1999, as well as point 3.3.3.3.v. of the OLAF manual.

53. On the basis of its view that no clear-cut irregularity was established, OLAF's assumption that the financial impact of the case was not an issue appears to be reasonable at first sight. At the same time, regard must be had to the fact that, in relation to the complainant's first allegation, the Ombudsman found that OLAF failed seriously and objectively to examine the applicability of the Directive. Consequently, OLAF's position that there was no need for an assessment of the financial impact can no longer be considered convincing, assuming that the Directive should have been applied.

54. Against this background, the Ombudsman recalls that a finding as to the applicability of the Directive would require OLAF to examine the impact on the financial interests of the Community of the case in question. He, therefore, makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

C. As regards OLAF's position on the written procedure proposed by the complainant (the complainant's third and eight allegations)



Arguments presented to the Ombudsman

55. The complainant explained that OLAF's Head of Operations Internal Investigations ('the HOII') twice invited him to a meeting. In spite of the complainant's request to this effect, the HOII did not indicate what the aim of the proposed meeting was. In an e-mail of 11 December 2005, the complainant questioned the impartiality of the HOII, given that he had been involved in investigations against another journalist who had reported on the financing of Parliament buildings in Brussels. He, therefore, explained that he was not available for any informal discussion on the issue. Nevertheless, he expressed his willingness to reply to written questions.

56. Following his e-mail, the complainant was first summoned to be heard as a victim and later on 'invited' to testify. Having, in a letter dated 19 March 2006, challenged the legal basis of both OLAF's letters, the complainant reiterated his readiness to reply to written questions. He went on to add that, in the event that OLAF continued to refuse applying this written procedure, he wished to be provided with the legal basis for this refusal. In a letter of 19 April 2006, OLAF took the view that the complainant's absence at the hearing was testimony to his refusal to participate in OLAF's hearing of witnesses. In his letter of 27 September 2006, the complainant described the sequence of events as set out above and questioned why OLAF could open an investigation on the basis of information submitted by him, but could not submit written questions to him.

57. He alleged that OLAF failed to indicate the rules according to which his offer to answer OLAF's questions in a written procedure could be rejected (the complainant's third allegation). Moreover, he alleged that, in its correspondence with him, OLAF failed to address/react to his offer to answer OLAF's questions in a written procedure (the complainant's eighth allegation).

58. In its opinion, OLAF submitted that it invited the complainant to an interview twice informally and twice formally. Given that he declined to accept its invitations, OLAF decided to draft the Final Case Report without asking him for further clarifications. OLAF considered that it enjoyed a certain discretion when determining its investigative strategy. Although it regretted the complainant's approach, it pointed out that there was no rule obliging it to accept an offer to answer questions in a written procedure. It added that the interviews pertinent to its investigation of this case had been recorded and the possibility to react on draft records was provided for.

59. In his observations, the complainant reiterated that he had doubts as to the impartiality of OLAF's investigators. Moreover, OLAF's summons lacked a legal basis. He took note that, according to OLAF, there was no rule obliging it to accept an offer to answer questions in a written procedure. From this, he inferred that there was equally no rule which would oblige OLAF to decline the offer made in his letter of 19 March 2006 to reply to questions in a written procedure. Still, he maintained his view that, in its letter of 19 April 2006, OLAF should have addressed and reacted to his offer to answer OLAF's questions in a written procedure and explain the reasons why it did not accept the offer.



60. In its supplementary opinion, OLAF reiterated and further explained that, on 19 April 2006, it informed him about its decision to close the investigation without requesting further information from him. According to OLAF, this implied its refusal to accede to his request. OLAF also recalled that the conduct of its investigations is directed by its Director. Informants could, at any time, refuse to communicate with OLAF.

The Ombudsman's assessment

61. Before addressing the complainant's allegation, it is important to recall that the allegations here under review do not include the legality of the summons/invitations for an interview which OLAF sent to the complainant. This aspect, to which both the complainant and OLAF referred in the Ombudsman's inquiry, is therefore not subject to the present inquiry. Instead it is covered by the Ombudsman's ongoing inquiry in complaint 856/2008/BEH.

62. As regards the complainant's allegation that OLAF failed to indicate the rules according to which his offer to answer questions in a written procedure could be rejected, OLAF took the view that there was no rule obliging it to accept such offers. The complainant acknowledged this statement, but submitted that there was equally no rule which obliged OLAF to decline such offers. The Ombudsman accepts that there appears to be no obligation on OLAF to decline offers to answer questions in a written procedure. However, this cannot mean that OLAF would have to accept any requests for a written procedure, given that, on the basis of Regulation 1073/1999, it enjoys a degree of discretion in relation to the conduct of its investigations. In view of the fact that, in the course of the inquiry, OLAF explained its position on the legal situation regarding the use of a written procedure, the Ombudsman considers that there is no need for further action on his part concerning the complainant's third allegation.

63. Turning to the complainant's allegation that, in its correspondence with him, OLAF failed to address/react to his offer to answer OLAF's questions in a written procedure, the Ombudsman notes that, in the given context, both the complainant and OLAF referred to OLAF's letter of 19 April 2006 to the complainant.

64. In this letter, OLAF explained the reasons why it considered hearing the complainant as a witness to be in line with Regulation 1073/1999. Moreover, OLAF stated that the complainant's absence at the scheduled hearing constituted testimony to his refusal to participate in OLAF's hearing of witnesses. On the basis of this, OLAF indicated that it would proceed to close the case without further delays.

65. In its supplementary opinion, OLAF took the view that informing the complainant of the intended closure of the case in its letter of 19 April 2006 implied that it refused his request for a written procedure. In contrast, the complainant took the view that OLAF did not address his offer to answer written questions and did not explain the reasons for declining the offer.

66. Point 4 of the Commission's Code of Good Administrative Behaviour states that "[t] he Commission is committed to answering enquiries in the most appropriate manner ..." It goes without saying that answering a letter sent by a citizen means that the issues raised in the



citizen's correspondence are addressed. It is clear that OLAF's letter of 19 April 2006 makes no explicit reference to the complainant's offer. The Ombudsman also notes that OLAF did not explicitly submit that it addressed the complainant's offer. However, it took the view that its intention to close the case, of which it informed the complainant, amounted to an implied refusal of the complainant's offer. In light of the content of OLAF's letter of 19 April 2006, it must have been clear to the complainant that OLAF would not accept his offer. In any event, it became apparent in the course of his inquiry that OLAF refused the complainant's offer to answer written questions. Thus, the Ombudsman finds that OLAF addressed and reacted to the complainant's offer to answer its questions in a written procedure. Against this background, he concludes that there has been no maladministration as regards the complainant's third and eighth allegations.

D. Alleged failure to handle properly the complainant's application for access to documents (the complainant's fourth allegation)

Arguments presented to the Ombudsman

67. The complainant alleged that OLAF failed to handle properly his application for access to documents dated 27 September 2006. He stated that he submitted a confirmatory application for access on 29 October 2006. On 30 October 2006, he received a reply dated 23 October 2006, in which OLAF explained that, as a result of the large number of documents requested, the time period for processing his application for access had to be extended by 15 working days. The complainant stated that he had not heard from OLAF since then.

68. In its opinion, OLAF confirmed the sequence of events submitted by the complainant and stated that, apart from its letter of 23 October 2006, no further reply was sent to him. This was due to an administrative oversight, which resulted from internal coordination problems. OLAF apologised for the way the complainant's request for access had been handled. At the same time, it submitted that, in the meanwhile, it had replied to the complainant's request.

69. In his observations, the complainant took note of OLAF's apology. At the same time, he doubted that it was because of an oversight that OLAF did not process his request for access further. According to internal correspondence available to him, OLAF suggested to the Commission's Internal Market and Services Directorate-General to discontinue corresponding with him. Against this background, he submitted that it appeared plausible to assume that OLAF applied this suggestion also to its own correspondence, and that this was the real reason for its failure to send any further letters.

70. In reply to the Ombudsman's request for further information, OLAF stated that it had never decided to discontinue correspondence with the complainant. This was corroborated by the fact that he received several letters of reply to his letter of 27 September 2006.

71. In his additional observations, the complainant submitted that, in its letters of 19 and 23 October 2006, OLAF announced that it would reply within a period of six weeks but then did not



act on its announcement [10] . Only after he turned to the European Data Protection Supervisor and the Ombudsman did OLAF continue corresponding with him. He furthermore noted that OLAF did not explain the reasons why it recommended to the Commission to discontinue corresponding with him.

The Ombudsman's assessment

72. It appears useful to recall at the outset that the present allegation concerns OLAF's failure to handle properly the complainant's application of 27 September 2006 for access to documents. The Ombudsman notes that, in his observations, the complainant took the view that OLAF recommended to the Commission's DG Internal Market and Services to discontinue correspondence with him. The Ombudsman considers that it is not clear from the complainant's submissions whether he wanted the Ombudsman to include this aspect in his inquiry. As a consequence, this aspect will not be dealt with in the present draft recommendation.

73. The Ombudsman notes that, according to OLAF, the complainant's application for access has, in the meanwhile, been dealt with. The complainant has not contradicted this fact. Taking into account the events which are not in dispute between the complainant and OLAF, it is clear that OLAF did not respect the time-limits foreseen in Regulation 1049/2001 for processing the complainant's application for access. However, OLAF apologised to the complainant for the delay that occurred. Moreover, OLAF appears to have given a reason for its delay which, at first sight, appears plausible. Whereas the complainant doubted the plausibility of the reason given, the Ombudsman, bearing in mind OLAF's letters of 19 and 23 October 2006 announcing a reply within a set period of time, is not convinced that OLAF deliberately discontinued its correspondence with the complainant.

74. In view of the fact that OLAF appears to have dealt with the complainant's application for access in the meanwhile and has apologised to the complainant for the way his request for access was handled, the Ombudsman sees no need for further action on his part with regard to the complainant's fourth allegation.

E. As regards access to the interim report (the complainant's fifth allegation)

Arguments presented to the Ombudsman

75. The complainant alleged that OLAF wrongly rejected his application for access to the interim report (" *Zwischenbericht* "), which it had to send to its Supervisory Committee nine months after opening its inquiry. He essentially submitted that, according to a letter from OLAF dated 1 September 2006, disclosure would seriously undermine the efficiency of future OLAF investigations. However, he considered that this reasoning was not convincing, given that the interim report necessarily contained substantially less information than the Final Case Report. It was, therefore, incomprehensible why OLAF could grant access to the Final Case Report, but did not grant access to the interim report.



76. In its opinion, OLAF explained that, in its decision on the complainant's confirmatory application for access, it informed him that the interim report was covered by four of the exceptions contained in Article 4 of Regulation 1049/2001. These exceptions concerned the privacy and the integrity of the individual (Article 4(1)(b)); the protection of commercial interests (Article 4(2) first indent); the purpose of inspections, investigations and audits (Article 4(2) third indent); and the institution's decision-making process (Article 4(3) second subparagraph). As a consequence, the interim report could not be disclosed.

77. OLAF explained that, after re-examining the matter, it felt that its conclusions were inappropriate. In particular, its assumption that disclosure would seriously impede the effectiveness of OLAF investigations in the future was general and unsubstantiated. Indeed, there was no specific risk in this case. However, given that some exceptions, notably those concerning the protection of privacy and integrity of individuals and of commercial interests, remained applicable, OLAF could only partly disclose the information which was sent to the Supervisory Committee. Thus, with its opinion, it enclosed a document of four pages entitled "*Information to the OLAF Supervisory Committee - Investigation opens [sic] for more than 9 months*", in which certain pieces of information had been blacked out.

78. In his observations, the complainant did not refer to his fifth allegation.

The Ombudsman's assessment

79. The Ombudsman notes that OLAF appears to have accepted the complainant's view that its reliance on an impediment to the effectiveness of investigations in the future was not convincing. Although OLAF maintained its view that certain other exceptions made it impossible to fully disclose the requested document, it made an edited version of the requested document available and enclosed it along with its opinion. In view of OLAF's partial disclosure of the document and the fact that the complainant did not comment on this issue in his observations, there are no grounds for further inquiries on the Ombudsman's part.

F. Alleged failure to provide explanations (the complainant's seventh allegation)

Arguments presented to the Ombudsman

80. The complainant alleged that OLAF failed to provide him with explanations regarding certain issues relating to its investigation, despite the fact that it announced it would do so in its letter of 19 October 2006. He pointed out that, in his letter of 27 September 2006, he submitted to OLAF a number of questions and observations in relation to the Final Case Report. In its reply of 19 October 2006, OLAF stated that he would receive its explanations on this matter within six weeks. However, he stated that he did not receive a reply.

81. In its opinion, OLAF submitted that, in its letter of 19 October 2006, it promised to provide



the complainant with further explanations regarding personal data relating to him and possibly held by it, and a decision regarding his request for access to documents. OLAF stated that it dealt with the complainant's requests as regards both issues. It added that informants do not have the right to receive explanations regarding the conduct of its investigations. In any event, it took the view that its comments in the course of the Ombudsman's inquiry satisfied the complainant's request for explanations.

82. In his observations, the complainant reiterated that, in its letter of 19 October 2006, OLAF promised a reply to the questions raised by him. It was clear from the text of OLAF's respective letter that the replies announced by it would not be limited to the issues of personal data and access to documents. The complainant further submitted that, contrary to its statement, OLAF did not comment on all of the issues raised in his letter in the framework of the Ombudsman's inquiry. As regards one issue, OLAF now explicitly refused to provide the reply which it had originally promised.

The Ombudsman's assessment

83. The Ombudsman notes that the complainant's letter of 27 September 2006 contained a number of questions and observations on OLAF's investigation, its Final Case Report, and the complainant's own role in the investigation, in particular as regards personal data held by OLAF [11] .

84. In its letter of 19 October 2006, OLAF summarised the complainant's questions and requests in 10 bullet points and invited him to inform it whether his questions and requests had been fully and correctly summarised. To the Ombudsman's knowledge, the complainant did not challenge OLAF's list. OLAF went on to state that the various aspects contained in the complainant's letter would be dealt with separately. Against this background, it stated the following:

" Sie werden innerhalb der kommenden sechs Wochen gesonderte Erklärungen erhalten betreffend eventuell vorhandene personenbezogene Daten (Punkt 3), betreffend Ihren Antrag auf Zugang zu den von Ihnen genannten Dokumenten (Punkt 10) und schließlich betreffend die Punkte, die sich auf die Untersuchung selbst beziehen [12] . "

85. The Ombudsman considers it clear from the quoted passage that OLAF promised to send to the complainant separate replies in relation to (i) personal data possibly held by it, (ii) his request for access to documents, and (iii) the issues concerning its investigation. In the course of the inquiry, OLAF did not dispute that it failed to reply to the issues under (iii) within six weeks. The Ombudsman therefore considers that OLAF did not live up to the unequivocal promise contained in its letter of 19 October 2006.

86. Even if one were to assume that OLAF did not promise a separate reply to the complainant's investigation-related questions, the general obligation to correspond with citizens, as well as its commitment to answer " *enquiries in the most appropriate manner and as quickly as possible* " (point 4 of the Commission's Code), would still oblige it to provide the complainant



with a reply on the issues he raised. This is equally apparent from Article 22(1) of the European Code of Good Administrative Behaviour, pursuant to which officials shall provide members of the public with the information that they request.

87. Although OLAF took the view that informants do not have the right to receive explanations regarding the conduct of its investigations, it also pointed out that its comments made in the course of the Ombudsman's inquiry satisfied the complainant's requests. According to the complainant, however, certain issues raised by him have still not been addressed by OLAF. The complainant, for instance, pointed out that OLAF did not reply to the fifth issue on the list in its letter of 19 October 2006. This issue related to the role of Parliament's project manager for its new buildings in the financing of Parliament's D3 building.

88. After analysing the submissions made by OLAF in the course of the inquiry relating to the list of issues in OLAF's letter of 19 October 2006, the Ombudsman shares the complainant's view that OLAF has not addressed all of the issues referred to in the letter of 19 October 2006.

89. Pursuant to Article 22(3) of the European Code of Good Administration, "[i]f, because of its confidentiality, an official may not disclose the information requested, he or she shall ... indicate to the person concerned the reasons why he cannot communicate the information." In its opinion, OLAF took the view that informants do not have the right to receive explanations regarding the conduct of its investigations. Against the background of Article 22(3) of the European Code, it cannot be excluded that there might be aspects relating to an investigation with regard to which OLAF cannot disclose information. At the same time, the Ombudsman recalls that, in such cases, OLAF would be required to indicate the reasons why the information requested cannot be disclosed. However, no such explanations have been given so far.

90. In light of the above, the Ombudsman finds that OLAF failed to reply to certain issues raised in the complainant's letter of 27 September 2006. This constitutes an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

G. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to OLAF:

Taking into account the Ombudsman's findings, OLAF should reconsider the results of its investigation as regards the applicability of Directive 92/50/EEC. If it finds the Directive to be applicable, OLAF should examine the impact of the case on the financial interests of the Community.

OLAF should reply, to the extent that it has not yet done so, to the questions raised in the complainant's letter of 27 September 2006.



OLAF and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 October 2009. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 21 July 2009

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Regulation (EC) No 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[3] Council Directive (EEC) No 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

[4] Pursuant to Article 1(a) of Directive 92/50, public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority. This Article goes on to exclude certain categories of contracts.

[5] Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, as last amended on 9 April 2001 and as repealed by Council Regulation (EC, Euratom) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

[6] Regulation (EC) 1073/1999/EC of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ [1999] L 136, p. 1.

[7] Emphasis added by the Ombudsman.

[8] Emphasis added by the Ombudsman.

[9] For details on this document, see the complainant's fifth allegation below.

[10] See the complainant's seventh allegation below.

[11] An annex to the complainant's letter contained an application for access to documents (see the complainant's fourth allegation above).



[12] English translation made by the Ombudsman's services: " *You will receive, within the next six weeks, separate replies as regards personal data possibly held [by OLAF] relating to your application for access to the documents you mentioned and, finally, as regards those issues, which relate to the investigation itself.* "