

Draft recommendation to the European Anti-Fraud Office (OLAF) in complaint 1840/2002/GG

Recommendation

Case 1840/2002/GG - Opened on 29/10/2002 - Recommendation on 18/06/2003 - Decision on 20/11/2003

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

THE COMPLAINT

The complainant is the Brussels correspondent of the “Stern”, a German weekly newspaper. In two articles published on 28 February and 7 March 2002, the newspaper covered a number of accusations concerning alleged irregularities that had been raised by an EU official, Mr Paul van Buitenen, and the inquiries carried out by the European Anti-Fraud Office (OLAF) regarding these accusations. The articles were based on the report of Mr van Buitenen and confidential OLAF documents that the newspaper had obtained. According to the complainant, no other newspaper had obtained copies of these documents by that time.

On 27 March 2002, OLAF published a press release in which it pointed out that “a journalist” had obtained a number of documents relating to its inquiry into the points that had been raised by Mr van Buitenen and that OLAF had therefore decided to open an internal inquiry, in accordance with Article 5 (1) of Regulation (EC) no. 1073/1999 (2) , regarding the suspected disclosure of confidential data. According to the press release, this internal inquiry would also cover the allegation that the relevant documents had been obtained “by paying a civil servant”. (3) In its edition of 4 April 2002, the newspaper “European Voice” quoted an OLAF spokesman as having said that OLAF “had been given *prima facie* evidence that a payment may have occurred”.

The complainant and his newspaper considered that although no name had been mentioned in OLAF’s press release, the accusation of bribery contained therein had to be understood as directed at them. In the complainant’s view, OLAF had departed from its normal practice by publicising the fact that an internal inquiry had been opened and by publishing allegations that were based on rumours and for which no factual evidence existed. By way of comparison, the complainant referred to allegations that had been made against the spokesman of the president of the European Commission in respect of which OLAF had, in his view, reacted differently. He further submitted excerpts from the minutes of the meeting of OLAF’s supervisory committee held on 9 and 10 April 2002 according to which the members of the committee had declared



themselves to be “surprised” about the fact that OLAF’s press release had referred to a payment that had allegedly been made. The complainant suspected that OLAF’s behaviour might have been due to pressure that had been exercised by the Commission. In this context, he referred to the minutes of the meeting of the Commission of 6 March 2002.

The complainant also submitted a copy of an internal e-mail circulated within OLAF by Mr Buttice (OLAF’s spokesman) on 11 April 2002. In this e-mail, Mr Buttice pointed out that the only facts that were certain at that time were that a confidential OLAF document had been leaked to the press and that there were rumours according to which this document had been even paid for, with even an indication of the price paid: “qu’il y avait des ‘rumeurs’ qui circulaient autour de l’OLAF et autour de la Commission européenne selon lesquelles ces documents auraient même été ‘payés’ (avec même l’indication d’un montant...)”.

The complainant and his newspaper submitted that they never made any payments to EU staff or other persons to obtain the documents concerned. On 28 March 2002, the “Stern” published a press release to that effect. The complainant queried whether by opening the relevant inquiry, OLAF had not exceeded its mandate which was exclusively to act in order to protect the financial interests of the Community. These financial interests had not been jeopardised by the publication of an article in the “Stern”. On 3 April 2002, the newspaper wrote to the president of the supervisory committee of OLAF. In his reply of 11 April 2002, the president of this body pointed out that the information provided by the newspaper had been noted. He also expressed the view that the minutes of the meeting of the Commission of 6 March 2002 did not show that the Commission had exercised any pressure on OLAF.

In a letter dated 29 July 2002, the complainant addressed himself to the Director-General of OLAF to complain about the press release of 27 March 2002. The complainant asked OLAF to withdraw this press release or to inform the public that it had no grounds of suspicion against himself and the newspaper. In addition to that, the complainant pointed out that from an answer given by the Commission in reply to a written question by a member of the European Parliament it appeared possible that OLAF had monitored or allowed to be monitored the e-mails and telephone calls of OLAF staff in order to find out the possible sources the newspaper had used. He therefore asked OLAF to confirm that it had at no time monitored his telephone or e-mail communications with OLAF staff. In case such monitoring should have taken place, the complainant asked OLAF to specify the legal basis for such interference with his private sphere and when and how such interference had been authorised by a judge. The complainant finally asked what personal data relating to himself OLAF had thus obtained.

On 22 August 2002, OLAF replied to the complainant’s letter. OLAF pointed out that it had mentioned neither the complainant nor his newspaper in its press release and that no further press release in this matter was envisaged at the present time. It furthermore stressed that OLAF always ensured that its methods of inquiry were in conformity with the law and added that OLAF possessed no personal data relating to the complainant apart from his professional address, telephone number etc.

In his complaint to the Ombudsman, the complainant essentially made the following allegations:



(1) OLAF had acted wrongly by making public, in its press release of 27 March 2002 and in comments to “European Voice”, allegations of bribery that had to be understood as directed at the complainant and his newspaper.

(2) OLAF had failed to provide an answer to all the questions submitted in the complainant’s letter of 29 July 2002.

The complainant claimed that OLAF should withdraw the allegations of bribery, preferably in the same way as they had been raised, i.e. by a press release and a separate communication to “European Voice”. He further claimed that OLAF should provide a complete answer to the questions in his letter of 29 July 2002.

THE INQUIRY

OLAF’s opinion

In its opinion, OLAF made the following comments:

OLAF’s press release of 27 March 2002 stated that (a) the Office had opened an internal investigation under Regulation 1073/1999 into an apparent leak of confidential information included in a report prepared within OLAF and (b) that, according to information received by the Office, a journalist had received a number of documents relating to the so-called “Van Buitenen” affair, and that it was not excluded that payment might have been made to somebody within OLAF (or possibly another EU institution) for these documents.

The decision to announce that an internal investigation had been opened was taken after careful consideration. The reasons for the announcement were:

(1) The confidential information then being published in the media was damaging OLAF’s effectiveness, and therefore the fight against fraud, by prejudicing current inquiries;

(2) The leak of information, if attributable to an OLAF official, would constitute a violation of OLAF’s legal obligations, in particular Article 8 of Regulation 1073/1999, Article 287 of the EC Treaty and Article 17 of the Staff Regulations, on professional secrecy, and Article 286 of the EC Treaty and Regulation 45/2001, on the protection of personal data.

(3) Article 8 (3) of Regulation 1073/1999 required the Director of OLAF to “ensure that the Office’s employees and the other persons acting under his authority observe the Community and national provisions on the protection of personal data.” Article 8 (4) required the Director of OLAF to “ensure that this article [on confidentiality of information collected during an investigation] and Articles 286 and 287 of the Treaty are applied.” Accordingly, the actions undertaken in response to the leaks were in fulfilment of the Director’s legal obligations to take action in the event of such occurrences.

It was also important to protect OLAF’s credibility with the public by making it known that actions



were being taken against these breaches. Given the serious implications of the possibility that an OLAF official was responsible for the illegal disclosure of confidential information and personal data, OLAF's Director decided to announce publicly and in the most transparent way possible that OLAF was investigating these breaches in order to identify those responsible, and to prevent any such further violations.

Moreover, on the basis of specific information which OLAF had received, it had reason to believe that on at least one occasion, payment had been made to an OLAF official or other EU official for the supply of confidential documents. If this had indeed occurred, then the official would be guilty of corruption, a criminal offence, and would have violated various articles of the Staff Regulations. Enquiries as to whether this had in fact occurred were still ongoing.

OLAF had never speculated which journalist(s) or which media organisation(s) might have paid OLAF or other EU officials for confidential documents. The complainant had not provided any evidence to substantiate of his claim that he alone in the media possessed the documents in question at the time the OLAF investigation was opened. On the contrary, there was evidence that other media had obtained the same documents. OLAF rejected the complainant's allegation that the suggestions that payment may have been made were to be understood as directed against himself and his employers.

The complainant's letter of 29 July 2002 had posed a number of detailed questions about OLAF's operational methods, in particular the possible use of surveillance techniques related to e-mail and telephone communications. There were circumstances under which OLAF or the Member State authorities with which OLAF collaborated investigations might legally obtain information by methods which fell under this general heading. Such a possibility was, for example, addressed in the Commission's recent notice to its staff about the proper use of the e-mail system by officials. However, OLAF was not at liberty to discuss the investigation methods being used with respect to an ongoing investigation. OLAF had neither the technical nor legal means to wiretap telephone lines.

OLAF expressed the view that in the light of the above it had handled this matter in an entirely appropriate manner.

The complainant's observations

In his observations on OLAF's opinion, the complainant maintained his complaint and made the following further comments:

OLAF's right to proceed against possible "leaks" inside the Office was not disputed. The complaint exclusively concerned the methods used by OLAF when proceeding with this aim. OLAF had mentioned the aim to proceed in "the most transparent way possible". However, transparency was about facts whereas the present case concerned "rumours". It was highly irresponsible to work with rumours that had not been proven.

Although this case of maladministration potentially affected a number of journalists, the complainant was the main victim of the rumours spread by OLAF. The complainant submitted a number of newspaper and press agency clippings to show that only the "Stern" had been



named as the source of the story about Mr van Buitenen's revelations. Even if other journalists should also have possessed the relevant documents (without quoting from them), the suspicion of bribery spread by OLAF would fall primarily on the complainant, since he had quoted first and most extensively from these documents.

Concerning the letter of 29 July 2002, OLAF still refused to reveal what the provisions were that were applied here. It was unacceptable not to be informed about the legal basis of such a possibly serious interference with the private sphere.

FURTHER INQUIRIES

After careful consideration of OLAF's opinion and the complainant's observations, it appeared that further inquiries were necessary.

Request for further information

The Ombudsman therefore asked OLAF (1) to explain, particularly in the light of the evidence submitted by the complainant in his observations, why it considers that other persons were or could have been meant by the reference to "a" journalist in its press release of 27 March 2002, (2) to comment on the fact that according to the internal e-mail of Mr Buttice of 11 April 2002 the only facts ("faits") that were certain were that there had been a leak and that there were rumours that were circulating ("qu'il y avait des 'rumeurs' qui circulaient") and (3) to specify on what basis measures like a surveillance of the telephone or e-mail correspondence could be adopted.

OLAF's reply

In its reply, OLAF made the following comments:

The reason that the reference to "a" journalist was neutral and did not implicate any specific individual was that, in fact, other journalists had published articles before OLAF's 27 March 2002 press release based on the same internal document that was referred to by the complainant in his article of 28 February 2002. For instance, on 3 March 2002, Le Monde had published an article which referred to the document in question. On 22 March 2002, the Belga news agency reported on OLAF investigations, referring to the document in question. On 26 March 2002, the same agency reported that the Chairperson of the Budgetary Control Committee of the European Parliament, Mrs Theato, had complained that it was not "acceptable that members of the press had a confidential OLAF report on the latest revelations of Paul Van Buitenen and we don't". Accordingly, the reference to "a" journalist could have meant either the complainant, the journalists who had written the above-mentioned articles or other journalists referred to by Mrs Theato.

Indeed the reference could also have been to any other journalist, since OLAF had not stated that the investigation was linked to any specific material that had already been published.

OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents. No specific journalist or person had been implicated for having made such a payment.



OLAF did not have powers to take measures of telephone or e-mail surveillance of a private individual, and had never taken any such measures with regard to the complainant. In reply to the hypothetical question as to the legal basis upon which any such measures could be adopted, only the competent authorities of the Member States had such powers. The exercise of these powers was subject to the principles set out in Article 8 of the European Convention on Human Rights.

The complainant's observations

In his observations, the complainant made the following comments:

The fact remained that the “Stern” had been the first publication to quote from the documents. The wording “a journalist” was thus bound to create the impression that the complainant was meant.

OLAF had not explained why rumours spread by members of the European Parliament should have higher evidentiary value than rumours circulated by other persons.

The question regarding the surveillance of the telephone or e-mail correspondence did not concern the complainant's own (private or professional) telecommunications links, but the possibility that OLAF might have obtained information on the complainant by supervising its own employees. The question as to the legal basis of the surveillance of the telecommunication traffic between OLAF officials and third parties (like the complainant) and of the storing of such data thus remained unanswered.

THE DECISION

1 Publication of allegations of bribery

1.1 The complainant is the Brussels correspondent of the “Stern”, a German weekly newspaper. In two articles published on 28 February and 7 March 2002, the newspaper covered a number of accusations concerning alleged irregularities that had been raised by an EU official, Mr Paul van Buitenen, and the inquiries carried out by the European Anti-Fraud Office (OLAF) regarding these accusations. The articles were based on the report of Mr van Buitenen and confidential OLAF documents that the newspaper had obtained. On 27 March 2002, OLAF published a press release in which it pointed out that “a journalist” had obtained a number of documents relating to its inquiry into the points that had been raised by Mr van Buitenen and that OLAF had therefore decided to open an internal inquiry regarding the suspected disclosure of confidential data. According to the press release, this internal inquiry would also cover the allegation that the relevant documents had been obtained “by paying a civil servant”. (4) In its edition of 4 April 2002, the newspaper “European Voice” quoted an OLAF spokesman as having said that OLAF “had been given *prima facie* evidence that a payment may have occurred”.

1.2 The complainant considered that OLAF had acted wrongly by making public, in its press release of 27 March 2002 and in comments to “European Voice”, allegations of bribery that had to be understood as directed at himself and his newspaper.

1.3 OLAF took the view that the reference to “a” journalist in its press release was neutral and



did not implicate any specific individual. It furthermore claimed that on the basis of specific information which it had received, it had reason to believe that on at least one occasion payment had been made to an OLAF official or other EU official for the supply of confidential documents.

1.4 The Ombudsman considers that he is not in a position to determine whether the allegations of bribery which OLAF has raised are well-founded. This question is covered by OLAF's inquiry that has not yet been terminated. The Ombudsman's analysis in the present case therefore focuses exclusively on the question as to whether OLAF acted correctly when providing information relating to its inquiry to the public through its press release of 27 March 2002 and through information that was used in an article published in the newspaper "European Voice" on 4 April 2002. The Ombudsman notes that OLAF has not challenged the complainant's argument that this article was based on information provided by OLAF.

1.5 It is good administrative practice to ensure, when taking decisions, that the measures adopted are proportional to the aim pursued. In particular, the administration ought to avoid restricting the rights of citizens when those restrictions are not in a reasonable relation with the purpose pursued by the action. (5) These standards ought to apply not only to decisions, but to the activity of administrations in general. They are therefore also relevant for the provision of information.

1.6 The Ombudsman considers that OLAF has the right to open an inquiry in cases where confidential documents that have been drawn up by it or that are in its possession are leaked to third parties. He further accepts that OLAF is entitled to inform the public about the opening of such inquiries in an appropriate way, provided that the principle of proportionality is respected. As a matter of fact, such information furthers transparency in a field that more often than not is marked by secrecy and lack of information.

1.7 The complainant's case rests on two assumptions, namely (1) that OLAF's press release, although not mentioning any name, had to be understood as referring to him when referring to "a journalist" and (2) that OLAF was not entitled to insinuate that the document (6) had been obtained through bribery.

1.8 The Ombudsman considers that the complainant has submitted sufficient evidence to show that he was the first to quote, in his article of 28 February 2002, from the documents concerned. The complainant has also submitted a considerable number of articles published in other newspapers and of reports by press agencies that refer to the complainant's newspaper as the source of their knowledge about these documents or that mention that the "Stern" had obtained these documents. The informed public was therefore well aware of the fact that the "Stern" had been the first newspaper to draw from this source. In these circumstances, and although no specific name was mentioned, the reference to "a journalist" in OLAF's press release must have been likely to be understood by the informed public as referring to the complainant. In its reply to a question put to it by the Ombudsman, OLAF relied on three articles or reports to establish that the authors of these articles or reports or any other journalists could have been meant by the reference to "a journalist" in its press release. The Ombudsman considers, however, that



what is relevant are not the theoretical possibilities as to how the press release could be interpreted but the interpretation that it most likely received. Furthermore, the articles and reports to which OLAF referred were all published after the complainant's article of 28 February 2002 (on 3, 22 and 26 March 2002) and before the date of OLAF's press release. If OLAF should indeed have assumed that the relevant documents had been obtained through a leak from within OLAF or other EU institutions by more than one journalist, it would be very difficult to understand why the press release referred to "a journalist" in the singular. As to the statement of Mrs Theato, OLAF has not shown why it should be relevant for the purpose of interpreting its own press release that was published two days afterwards. The Ombudsman thus concludes that OLAF's press release of 27 March 2002 was likely to have been understood as referring to the complainant and his newspaper. Even if OLAF should not have intended to refer to the complainant, it must have been aware of the impression its text was bound to create.

1.9 The European Ombudsman considers that OLAF has, in its opinion, satisfactorily explained why it considered it necessary to inform the public about the opening of an inquiry into the apparent leakage of documents. The Ombudsman notes, however, that OLAF did not only provide this information but also informed the public, in its press release and in the information provided to the newspaper "European Voice", that there was reason to suspect that the documents had been obtained through bribery. It thus remains to be examined whether OLAF was correct in publishing this suspicion.

1.10 The Ombudsman considers that OLAF has not been able to establish that the publication of this suspicion was necessary for the purpose of its work and proportional to the aim pursued. The fact that OLAF should have decided to proceed in the "most transparent way possible" in the present case by providing details about the scope of its inquiry to the public is certainly to be welcomed in principle, given that such an approach is in conformity with the obligation imposed on the institutions and bodies of the EU to take decisions as openly as possible (Article 1 of the Treaty on European Union). However, an insinuation of bribery is a serious allegation which is likely to tarnish the reputation of a journalist. Such insinuations must therefore not be made in public without a sufficiently serious basis that can be scrutinised publicly.

1.11 The Ombudsman notes that OLAF's press release refers to "information" obtained by OLAF to support its view that some payment "may" have occurred and that the newspaper "European Voice" even quotes OLAF as having received "*prima facie* evidence that a payment may have occurred". During the course of the inquiry conducted by the Ombudsman, OLAF has not submitted any further precisions, apart from alleging that it had received "information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents", let alone submitted the evidence it claimed to have received. The Ombudsman considers that the evidentiary value of "information" according to which a payment "may" have been made must by necessity be very limited. On the basis of the evidence submitted to the Ombudsman, the complainant's view that OLAF effectively relied on nothing but rumours does therefore not appear to be unreasonable. This view is furthermore corroborated by Mr Buttice's e-mail of 11 April 2002. The Ombudsman does not exclude the possibility that OLAF may be entitled to open an inquiry on the basis of mere rumours, provided the acts that have allegedly been committed are sufficiently serious. He also accepts that OLAF



may be reluctant or unable to comment on aspects of an ongoing inquiry. However, if OLAF decides to provide information on an ongoing inquiry it must take into account the negative consequences such information can have for the reputation of the persons concerned by the allegations OLAF chooses to make public. The Ombudsman considers that by proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration.

2 Failure to provide a reply to questions in letter of 29 July 2002

2.1 The complainant alleged that OLAF had failed to provide an answer to all the questions submitted to it in his letter of 29 July 2002. In this letter, he had asked OLAF to confirm that it had at no time monitored his telephone or e-mail communications with OLAF staff. In case such monitoring should have taken place, the complainant asked OLAF to specify the legal basis for such interference with his private sphere and when and how such interference had been authorised.

2.2 OLAF took the view that it had answered these questions.

2.3 The Ombudsman notes that in its reply of 22 August 2002 to the above-mentioned letter, OLAF explained that it always ensured that its methods of inquiry were in conformity with the law and added that it possessed no personal data relating to the complainant apart from his professional address, telephone number etc. In its opinion, OLAF added that there were cases where it could obtain information through surveillance techniques related to e-mail and telephone communications but that OLAF itself had neither the technical nor legal means to wiretap telephone lines. OLAF further pointed out that it was not at liberty to discuss the investigation methods being used with respect to an ongoing investigation. In its reply to a question put to it by the Ombudsman, OLAF submitted that it did not have powers to take measures of telephone or e-mail surveillance of a private individual, and had never taken any such measures with regard to the complainant.

2.4 The Ombudsman notes that OLAF's answers leave open the possibility that it might have taken measures regarding the surveillance of the e-mail correspondence of its own officials or of officials of other EU institutions. (7) However, OLAF has also informed the complainant that it does not possess any personal data relating to him apart from his professional address, telephone number etc. The Ombudsman considers, however, that information gathered from any possible surveillance of e-mail correspondence between the complainant and EU officials would however constitute "personal data" of the complainant within the meaning of Article 2 (a) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. (8)

2.5 In these circumstances, and considering that OLAF's inquiry is still ongoing, the Ombudsman considers that OLAF appears to have answered the questions the complainant submitted to it in his letter of 29 July 2002.

2.6 On the basis of the above-mentioned considerations, there appears to be no



maladministration on the part of OLAF in so far as the second allegation is concerned.

3 The complainant's claims

3.1 The complainant claimed that OLAF should withdraw the allegations of bribery, preferably in the same way as they had been raised, i.e. by a press release and a separate communication to "European Voice". He further claimed that OLAF should provide a complete answer to the questions in his letter of 29 July 2002.

3.2 OLAF has not commented on these claims.

3.3 As indicated above, the Ombudsman considers that there is maladministration on the part of OLAF in so far as the first allegation is concerned. The Ombudsman takes the view that this instance of maladministration can and should be eliminated by withdrawing the allegations of bribery that were published and that was likely to be understood as directed at the complainant. The Ombudsman will therefore make a draft recommendation to that effect. OLAF may wish to contemplate the complainant's proposal as to how this draft recommendation could best be implemented in practice.

4 Conclusion

In view of the above, the Ombudsman considers that by proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration.

The Ombudsman therefore makes the following draft recommendation to OLAF, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

OLAF should consider withdrawing the allegations of bribery that were published and that were likely to be understood as directed at the complainant.

OLAF and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, OLAF shall send a detailed opinion by 30 September 2003. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 18 June 2003

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, page 15.

(2) Regulation (EC) No. 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999



No. L 136 p. 1. Incidentally, internal inquiries appear to be covered by Article 5 (2) rather than Article 5 (1) of the Regulation.

(3) The English text of this press release which is available on OLAF's website contains slightly different wording: "According to information received by the Office, a journalist has received a number of documents relating to the so-called 'Van Buitenen affair'. It is not excluded that payment may have been made to somebody within OLAF (or possibly another EU institution) for these documents."

(4) The English text of this press release which is available on OLAF's website contains slightly different wording: "According to information received by the Office, a journalist has received a number of documents relating to the so-called 'Van Buitenen affair'. It is not excluded that payment may have been made to somebody within OLAF (or possibly another EU institution) for these documents."

(5) Cf. Article 6 of the Code of Good Administrative Practice, available on the website of the European Ombudsman (<http://www.ombudsman.europa.eu> [Link]).

(6) In its opinion, OLAF referred to confidential "documents" that had been leaked. In its reply to the Ombudsman's request for further information, however, OLAF spoke of "the same internal document that was referred to by the complainant in his article of 28 February 2002" (i.e., the report from Mr van Buitenen). Given that the complainant appears to have obtained possession of further internal OLAF documents (at least some of which were annexed to the complainant), the present decision generally refers to "documents".

(7) In its reply to a question put to it by the Ombudsman, OLAF mentioned that it did not have the power to take such measures in relation to "private individuals".

(8) OJ 2001 No. L 8 p. 1. Article 2 (a) provides that for the purposes of the Regulation, 'personal data' shall mean "any information relating to an identified or identifiable natural person".