

Decision of the European Ombudsman closing his inquiry into complaint 1697/2010/(BEH)JN against the European Anti-Fraud Office

Decision

Case 1697/2010/JN - **Opened on** 03/09/2010 - **Decision on** 15/03/2013 - **Institution concerned** European Anti-Fraud Office (Critical remark) |

In the course of his professional duties as an official of the European Court of Auditors (the 'ECA'), the complainant came across information relating to a closed investigation of the European Anti-Fraud Office ('OLAF'). Considering that the information fell under the reporting duty set out in Article 22a of the Staff Regulations, he provided OLAF with the information but received no reply. In his complaint to the European Ombudsman, the complainant alleged that OLAF failed to comply with the procedure set out in Article 22b of the Staff Regulations. He took the view that, on the basis of his disclosure, OLAF could have pursued its investigation. In its opinion, OLAF argued that it did not need to apply the said procedure because the complainant's disclosure was related to the audit on which he was working.

The Ombudsman did not agree with OLAF. He closed the case with several critical remarks. First, the Ombudsman considered that OLAF wrongly assessed the nature of the complainant's disclosure, i.e., that it was not a disclosure under Article 22a of the Staff Regulations. Second, OLAF failed to deal with the complainant's disclosure pursuant to Article 22b of the Staff Regulations, namely, to inform the complainant, within 60 days, of the period of time it had set for itself to take appropriate action. Third, the Ombudsman considered that OLAF failed to provide the complainant with the protection granted to whistleblowers by the Staff Regulations, in that (i) it took a critical stand *vis-à-vis* the complainant and the compliance of his disclosure with his professional duties as an auditor in a letter to the ECA, and (ii) it forwarded the complainant's note to a Member and also to a Director of the ECA.

Finally, in light of all the evidence submitted to him, the Ombudsman took the view that OLAF failed properly to justify why it did not wish to contact the former President of the organisation concerned by its investigation and identified by the complainant.

The background to the complaint

1. The present complaint relates to a whistleblower complaint submitted to the European



Anti-Fraud Office ('OLAF').

2. In 2010, the European Court of Auditors (the 'ECA') carried out an audit concerning OLAF's activities, during which, *inter alia*, OLAF's investigation in case X was examined (as part of a sample of cases). That investigation concerned the implementation by an NGO ("the organisation in question") of a grant agreement with then European Communities on the execution of an EU external assistance project in country Y.

3. The complainant is an official of the ECA. In the course of his professional duties, he came across OLAF's external investigation in case X. OLAF closed that case in February 2009 without recommending any follow-up, essentially on the grounds that it had not been possible to identify the responsible representatives of the organisation in question.

4. On 31 March 2010, the complainant, invoking Article 22a(1) of the Staff Regulations [1], sent a note (the 'note') to OLAF and pointed out that it was possible to identify the former President of the organisation in question through an internet search using the information contained in OLAF's Case Management System ('CMS'). The note was printed on the ECA's official letterhead, marked confidential and was signed by the complainant whose function at the ECA was mentioned. The subject of the letter was specified as information pursuant to Article 22a(1), subparagraphs 1 and 3, of the Staff Regulations. The complainant enclosed the CV of the former President of the organisation in question, who at that time held an important political position in the EU institutions.

5. OLAF received the complainant's note on 8 April 2010. No response has been addressed to the complainant.

6. On 11 May 2010, OLAF received the ECA's statement of preliminary findings on its audit, including the following comment on the investigation in case X: "... *CMS does not demonstrate that sufficient efforts were made to contact senior figures within the organisation concerned to establish what happened on liquidation and to establish the rights of creditors. On the basis of information available on CMS and through a simple open source research on the internet, it would have been possible to identify the former President of the organisation concerned who was an MEP in [years Z] and subsequently a member of an EU [body] until March 2010.* "

7. The complainant submitted his complaint to the European Ombudsman on 27 July 2010, and the Ombudsman opened an inquiry on 3 September 2010.

8. On 21 October 2010, OLAF [2] sent a letter to the Member of the ECA responsible for the audit of OLAF. A copy of the complainant's note was attached to the letter. A copy of the letter was also sent to the Director in the ECA responsible for the audit of OLAF. The letter contained, among others, the following passage: "*Unfortunately, this Note was brought to my personal attention only recently, so I regret that it is only now that I am bringing it to your attention.*" It further explained why OLAF considered that the complainant's note was not to be dealt with under Article 22a of the Staff Regulations and confirmed that OLAF was not to adopt any further action in the closed case on the basis of the information brought to its attention by the



complainant. It stated: *"as was clear from the file made available to the Court during the audit, the reason for closure was that the (...) judicial authorities [of one of the Member States] had closed their judicial file, so it was not possible for OLAF to proceed with judicial follow-up."* The letter ended with the following passage: *"I leave it to the appreciation of the Court whether the actions described in the Note of 31 March 2010, and that Note itself, are in accordance with the normal professional auditing practice of the Court."*

The subject matter of the inquiry

9. In his complaint to the European Ombudsman, the complainant submitted the following allegation and claim.

Allegation:

Contrary to Article 22b(1)(b) of the Staff Regulations [3], OLAF (i) failed to inform the complainant of the period of time it set for itself to take appropriate action following the complainant's note dated 31 March 2010 and (ii) failed to take appropriate action.

Claim:

OLAF should properly investigate the case in light of the information contained in the complainant's note.

10. In his observations, the complainant submitted the following five new claims:

1. OLAF should acknowledge that, by sending the note dated 31 March 2010, the complainant acted correctly and in conformity with the Staff Regulations.
2. OLAF should recognise that, in dealing with the complainant's note, it did not comply with the Staff Regulations and its 'Manual-Operational Procedures'.
3. OLAF should apologise to the complainant and bring its apology also to the attention of all persons, both within and outside of the Commission, who were informed of the complainant's note.
4. OLAF should, on the basis of the complainant's note, consider reopening its external investigation in case X in line with the applicable procedures foreseen in the OLAF Manual. To this end, it should pursue a comprehensive assessment of the dossier.
5. OLAF should consider, in light of the complainant's submissions, opening an internal investigation in line with the applicable procedures foreseen by the OLAF Manual.

11. The Ombudsman considers the additional claims listed under (4) and (5) above to be covered by the complainant's original claim ("OLAF should properly investigate the case in light



of the information contained in the complainant's note."). Therefore, he decided not to include these two claims as separate claims in his inquiry and to consider them in the assessment of the complainant's original claim. However, he decided to include the complainant's additional claims (1), (2) and (3) in his inquiry.

12. Finally, in his observations, the complainant suggested that, should the Ombudsman consider it appropriate to include in his analysis the relevant ECA's findings concerning OLAF, the latter would have to submit to the Ombudsman the ECA's entire findings in relation to the investigation in case X, as well as its own replies thereto. The complainant added that, to his knowledge, OLAF did not at all address the ECA's preliminary findings on investigation X. Given that the present case concerns a dispute between the complainant and OLAF and not between the ECA and OLAF, the Ombudsman does not consider it useful to follow the complainant's suggestion.

The inquiry

13. On 27 July 2010, the complainant submitted his complaint to the Ombudsman.

14. On 3 September 2010, the Ombudsman opened an inquiry in relation to the allegation and the original claim, and asked OLAF to provide an opinion on the complaint. OLAF's opinion, as well as a separate letter addressed to the Ombudsman by OLAF, was forwarded to the complainant with an invitation to submit observations.

15. On 28 November 2010, the complainant sent further correspondence regarding his complaint. On 6 December 2010, in response to the complainant's further correspondence, the Ombudsman provided the complainant with a copy of his reply to the aforementioned letter of OLAF.

16. On 20 December 2010, the complainant sent his observations.

17. On 3 March 2011, the Ombudsman asked OLAF for a supplementary opinion on the three additional claims mentioned above which were included in the inquiry on the basis of the complainant's observations. On the same occasion, he put several questions to OLAF [4]. OLAF was invited to submit its opinion and respond to the questions by 30 April 2011.

18. On 8 June 2011, OLAF eventually submitted its supplementary opinion in English. On 5 August 2011, it submitted the translation into the language of the complaint. Both versions were forwarded to the complainant. On 18 July 2011, the complainant sent additional observations.

19. On 31 January 2012, the Ombudsman carried out an inspection of the OLAF file. A copy of the inspection report was sent to the complainant and to OLAF.

20. On 20 February 2012, the complainant submitted his observations on the inspection report. On 8 January 2013, the Ombudsman's services entered into contact with the complainant as



regards the possibility of a friendly solution to his complaint.

The Ombudsman's analysis and conclusions

Preliminary remarks

21. In its submissions to the Ombudsman, OLAF challenged in substance the admissibility of the present complaint for the following two reasons: (i) first, because the *"complaint does not in any respect relate to the complainant's status as a private citizen nor does it relate to a matter of legitimate personal concern to him as an official"* ; and (ii) second, because the review of how OLAF exercises its discretion when deciding on its investigations is, in OLAF's view, beyond the Ombudsman's mandate. This review should be left to the courts. Referring to Case T-4/05 [5] , OLAF pointed out that the Court of Justice was mindful of the margin of discretion OLAF enjoys.

22. In this respect, the Ombudsman points out that his role is different from that of the courts. According to his Statute [6] , the Ombudsman conducts all inquiries which he considers justified to clarify any suspected maladministration in the activities of the EU institutions and bodies. Contrary to judicial review [7] , such inquiries can be conducted even *proprio motu* and are not conditioned by any adverse (individual, direct) effect on the complainant. Therefore, not only is the Ombudsman not precluded from reviewing OLAF's actions, but his review is all the more important in cases where judicial review may be excluded.

23. The Ombudsman further recalls that the 'whistleblower provisions' contained in Articles 22a and 22b of the Staff Regulations are construed in a two-fold way [8] . While Article 22a essentially provides for a duty to report to certain officials in the whistleblower's own institution or to OLAF ('primary reporting'), Article 22b provides for a right to report to the office-holders of certain other EU institutions, including the European Ombudsman ('secondary reporting').

24. Thus, the protection offered by the whistleblower provisions of the Staff Regulations is also twofold. Article 22a(3) protects whistleblowers who have reported to one of the persons within their own institution, or to OLAF, against any prejudicial effects, provided that they acted reasonably and honestly. As regards Article 22b, its effective purpose (*effet utile*) is to offer the reporting official an external remedy if he or she does not find a responsive addressee within his or her own institution or within OLAF on the basis of the procedure set out in Article 22a. In sum, the Staff Regulations explicitly foresee the European Ombudsman as an additional remedy for whistleblowers [9] .

25. Therefore, when reporting officials (such as the complainant) turn to the Ombudsman under article 22b of the Staff Regulations, he handles their submissions as complaints, in accordance with Article 228 TFEU and his Statute.

26. As regards OLAF's handling of whistleblowers' disclosures, the Ombudsman's longstanding view is that the substantive assessment of the information disclosed under Article 22a of the



Staff Regulations to the relevant persons in charge within the Institutions mentioned in that Article or to OLAF should be carried out carefully, impartially and objectively. The primary obligation of the EU authorities is thoroughly to evaluate the information disclosed before deciding on the appropriate follow-up action. Whatever that decision may be in the end, the authority informed should give reasons for it. Doing so properly and explaining to the whistleblower the steps taken in the handling of his or her disclosure can avoid giving the impression that the file was not assessed at all or that there was collusion between the authority and the persons concerned by the disclosure [10] .

27. It follows that the Ombudsman's inquiries into the complaints submitted to him on the basis of Article 22b of the Staff Regulations normally focus on the procedure applied in the investigations carried out by the institutions to which the whistleblowers turned. In his review, the Ombudsman follows the standards laid down in the relevant case-law of the Court of Justice [11] .

28. During the inquiry in the present case, it became clear that the complainant's original allegation (referred to in point 9 above) should be understood as containing two parts. For that reason, in the present Decision, the Ombudsman will first examine the alleged failure by OLAF to respond adequately to the complainant's disclosure, and then will turn to the alleged failure to react adequately to the substance of that disclosure.

A. Alleged failure to respond adequately to the complainant's disclosure

Arguments presented to the Ombudsman

29. In his complaint, the complainant argued that OLAF had failed to inform him of the period of time it had set for itself to take appropriate action following his note. In accordance with Article 22b of the Staff Regulations, OLAF should have done so within 60 days after the disclosure.

30. In its opinion on the complaint, OLAF took the view that the complainant's note addressed to it on 31 March 2010 should not be regarded as a disclosure under Article 22a of the Staff Regulations, but rather as a communication from the ECA in the course of its ongoing audit. It put forward the following reasons.

31. OLAF pointed out that the note was based on facts that had come to the knowledge of the complainant in his professional capacity. Thus, the facts had come to the complainant's attention in the course of his duties while auditing OLAF. Further, the note described by the complainant as a disclosure under Article 22a of the Staff Regulations was printed on ECA letterhead. OLAF therefore considered that the complaint was a matter between itself and the ECA, not between itself and the complainant.

32. OLAF added that this interpretation was confirmed by the " *the specific chronological and*



thematic context ". Indeed, the complainant sent his note to OLAF on 31 March 2010. On 11 May 2010, OLAF received the ECA's statement of preliminary findings, which were critical of OLAF's handling of the investigation in case X. On 21 June 2010, OLAF replied to the ECA's statement of preliminary findings. On 23 July 2010, the complainant turned to the Ombudsman. Against this sequence of events, OLAF acknowledged that the reporting rights and obligations pursuant to Articles 22a and 22b of the Staff Regulations also applied to staff members of the ECA who found themselves in a situation described in Article 22a of the Staff Regulations. However, in OLAF's view, the specific context in which the note had been submitted warranted the conclusion that the matter concerned was between the ECA and OLAF.

33. As a result, OLAF considered that it had taken all action necessary in relation to this matter. In fact, adequate replies had been given orally to the complainant in his official capacity. At the same time, in its letter of 21 June 2010, OLAF provided the ECA with explanations concerning its statement of preliminary findings. Therefore, OLAF acted correctly and in conformity with the Staff Regulations and its internal rules (OLAF Manual). Finally, OLAF also expressed its regrets to the ECA over the fact that, because the note had not been brought to the attention of OLAF's senior management upon its receipt, the ECA senior management had not been informed of its content at an earlier date.

34. In his observations, the complainant challenged OLAF's views. First of all, he insisted that the complaint to the Ombudsman concerned OLAF's disregard for Article 22b of the Staff Regulations, which, alongside Article 22a, is also applicable in the framework of audits by the ECA, as recognised by OLAF itself. Therefore, it would be pointless to comment on the contacts between the ECA and OLAF in the course of the audit carried out by the ECA.

35. The complainant maintained that his note to OLAF was to be regarded as a disclosure within the meaning of Article 22a of the Staff Regulations. The complainant submitted that the wording of that provision explicitly requires that an official become aware of the disclosed information " *in the course of or in connection with the performance of his duties* ". This Article thus imposes on officials a duty to report in such situations. In the case at hand, the complainant was not released from this duty by the simple fact that he had become aware of the relevant facts in the course of an ECA audit. The complainant added that the correctness of that view was confirmed by the wording of Article 22a of the Staff Regulations, which provides for an exception only as regards " *documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.* " The correctness of that view was further confirmed even by Article 5.2.1.1.1 of the OLAF Manual, which reads, *inter alia* , that the " *duty to come forward only concerns facts discovered in the course of or in connection with the duties of the staff member.* "

36. The complainant argued that, even if OLAF had doubts about the legal nature of his 31 March 2010 note, those doubts must have been dispelled once it became aware of his complaint to the Ombudsman. As a result, OLAF provided no plausible explanation as to why it did not deal with his note pursuant to Article 22a of the Staff Regulations and in accordance with its own Manual.



37. In the complainant's view, it appears that OLAF considers that it has the right to decide which information is to be regarded as information falling under Article 22a of the Staff Regulations and which information is not to be regarded as such. If such an approach were to be followed, the guarantees for officials set out in Article 22a would become illusory and the object and purpose of this provision would be undermined.

The Ombudsman's assessment

38. At the outset, the Ombudsman notes that OLAF chose to justify its course of action by arguing that the complainant's note of 31 March 2010 was not to be regarded as a disclosure pursuant to Article 22a(1) of the Staff Regulations. The complainant challenged that view.

39. Given that the duty to inform the reporting official within 60 days, of the period of time OLAF needs to take appropriate action within the meaning of Article 22b of the Staff Regulations, is triggered by a communication made under Article 22a(1), the Ombudsman first has to determine whether or not the complainant's note can be regarded as a disclosure under that provision.

40. As the complainant rightly observed, OLAF conceded in its opinion that Articles 22a and 22b of the Staff Regulations are applicable even to ECA officials. It maintained however that the specific circumstances of the case at hand, such as the chronological context, the letterhead on which the note was printed and, in particular, the alleged fact that the complainant used information obtained in the performance of his duties in the specific audit carried out by the ECA, justified the conclusion that the complainant's note should not be qualified as a disclosure under Article 22a of the Staff Regulations, but rather as part of the communication between the ECA and OLAF.

41. The Ombudsman cannot agree with OLAF.

42. *First*, the complainant specified that the subject of his note was information pursuant to Article 22a(1), subparagraphs 1 and 3, of the Staff Regulations. The content of the note corresponded to that subject.

43. Moreover, the information brought to OLAF's attention in the note can be objectively seen as being of a rather serious nature, since it implied possible deficiencies in the conduct of an OLAF investigation and a possible implication of an EU political representative in a case of possible fraud.

44. Thus, the Ombudsman is of the view that, regardless of the letterhead on which the note was written, it must have been clear to anyone having read the note, or at least its subject, that the complainant intended to make a disclosure under Article 22a(1) of the Staff Regulations. Nevertheless, if OLAF had any doubts, it should have clarified the nature of the note at once and contacted the complainant without delay in this respect. OLAF failed to do so.



45. *Second* , the wording of the provision of Article 22a of the Staff Regulations alone (that is to say, a literal interpretation), to which the complainant correctly alluded, justifies the conclusion that reporting under this article should indeed be based on the information received in the course of performance of duties, whatever they may be, including auditing duties.

46. *Third* , the Ombudsman does not see what impact the timing of the complainant's note could have on OLAF's conclusions concerning its nature. The complainant's note had been sent to OLAF more than one month before the ECA sent OLAF the preliminary findings on the audit. Even if these conclusions were, in the relevant part, similar to the content of the complainant's note, the note and the ECA findings were submitted to OLAF in the framework of two different procedures, and therefore they should have been dealt with accordingly, and not combined and dealt with together within the framework of one procedure. In any event, the Ombudsman cannot accept that no response whatsoever was given to the complainant, and instead, one was given to an ECA Member, and only a little less than seven months after the receipt of the complainant's note. The Ombudsman notes that the response to the Member of the ECA came only after OLAF had been informed of the complainant's complaint to the Ombudsman and the opening of an inquiry.

47. In light of the forgoing, the Ombudsman considers that OLAF failed to justify its assessment of the nature of the complainant's note, according to which it was not a disclosure under Article 22a of the Staff Regulations. This wrong assessment constitutes the first instance of maladministration. It was followed by a series of further instances of maladministration, which are set out below.

48. Given that OLAF wrongly considered that the note was not a disclosure under Article 22a, it failed to deal with it pursuant to Article 22b of the Staff Regulations, namely, to inform the complainant within 60 days of the period of time it had set for itself to take appropriate action.

49. Moreover, in its letter to the ECA dated 21 October 2010, OLAF took a critical stand *vis-à-vis* the complainant and the compliance of his disclosure with his professional duties as an auditor. Thus, rather than a genuine response issued in good faith, OLAF's letter can be regarded as a report or complaint to the complainant's superiors. This is not compatible with the protective nature of the Staff Regulations' whistleblower provisions.

50. By the same token, the Ombudsman is struck by the fact that, despite both the complainant's indication on his note that it should be treated as confidential and the sensitive nature of the matter, OLAF forwarded the complainant's note to the Member of the ECA responsible for the audit and also to the Director in the ECA responsible for the said audit.

51. According to his Statute, the Ombudsman is required to seek a friendly solution if he finds an instance of maladministration. However, from contacts with the complainant in this respect, it is apparent that a friendly solution would not be useful. The Ombudsman decides therefore to close this aspect of the case with a critical remark.



B. Alleged failure to respond adequately to the substance of the complainant's disclosure

Arguments presented to the Ombudsman

52. The complainant argued that OLAF failed to take appropriate action following his disclosure. He took the view that, in substance, on the basis of the information he had disclosed, OLAF could identify the former President of the organisation in question and, as a result, it should have reopened the external investigation in case X or conducted an internal investigation.

53. OLAF did not agree that it should have done so. It explained that, in the course of its investigation in case X, it needed to identify and locate the persons in charge of the administration of the organisation in question. For that reason, it contacted the auditor of that organisation in one of the Member States. The latter refused to provide the relevant information to OLAF on the grounds of professional confidentiality but stated that (i) he could only communicate the information to the judicial authorities of that Member State, and (ii) he had, in fact, submitted the information concerning the organisation in question to the same judicial authorities in 2004. "*In order not to interfere with the procedure by these authorities and being aware that OLAF (...) unlike the judicial authorities - [has no] coercive powers, OLAF decided to liaise with these national authorities*". OLAF contacted the relevant authorities of that Member State (Prosecution office), from which it repeatedly requested information, in substance, as to who could have been responsible for the management of the organisation in question. On 21 June 2007, the relevant judicial authorities informed OLAF that they had closed the judicial file, given that they could not obtain information from persons responsible for the organisation in question. On 4 April 2008, OLAF was informed that "*the file in relation to [the organisation in question] had been lost.*" OLAF therefore closed its investigation in February 2009. "*OLAF was thus in a situation where the only person who could provide OLAF with useful information was bound by professional secrecy and would only communicate with the (...) judicial authorities [of the Member State] but that these authorities had closed the case.*"

54. In reply to the Ombudsman's further question [12], OLAF clarified that the reason for closing its investigation was not that all efforts to locate and identify the President of the organisation in question had been unsuccessful, but rather that OLAF (i) was unable to identify the persons in charge of the administration of the organisation in question, and (ii) its attempts to obtain information through cooperation with the judicial authorities of the Member State had not been successful.

55. OLAF submitted that, before contacting the auditor of the organisation in question in that Member State, it had unsuccessfully tried to contact its Secretary General, as the persons in charge of this function had signed, in 2000, the contract which was the subject of OLAF investigation X, and, in 2002, an amendment to that contract.

56. The reason for OLAF's not having contacted the President of the organisation in question



was that the presidency, being a purely honorary function, did not mean that the person concerned was in charge of the administration of that organisation. Indeed, the persons who were chosen to carry out the representative duties of President, and who, after the end of their term of office, became honorary presidents, were well-known persons in the field.

57. OLAF added: "*the (...) judicial authorities [of one of the Member States] actually [had] tried to contact the President of the [organisation in question] [...] [but] if [that person] would have been active in the administration of the [organisation in question, that person] would have replied to those authorities. The absence of a reply confirmed OLAF in its assessment that the President was not in charge of the administration of the [organisation in question].*"

58. OLAF finally submitted that a case, once closed, could only be reopened in view of new material evidence which could challenge the conclusions drawn at the closure stage, or if a national authority requests OLAF to carry out additional investigative steps (section 3.4.4 of the OLAF Manual). Details about the former President of the organisation in question disclosed by the complainant in his note however do not constitute sufficient grounds for reopening. Making contact with the President "*would not be expected*" to provide OLAF with the possibility of obtaining new material evidence, given that that person is not considered to have been in charge of the management of the organisation in question.

59. In his observations, the complainant essentially considered that OLAF should have reopened its external investigation and/or opened an internal investigation. In fact, his disclosure made it possible to identify an individual responsible for the administration of the organisation in question. In 2007, when OLAF prepared its initial assessment of the case, it was still possible to find a complete table of steering committees of the organisation in question and its statute on its website. Pursuant to Article X of the statute, the President of the organisation in question was its legal representative and had signing authority. Moreover, pursuant to Article XII of the Statute, the Board was in charge of the administrative and financial management and included also the President, who presided over it. Despite all this, it appeared from the relevant documentation that OLAF did not make any serious attempt to identify the President in order to enter into contact.

60. Moreover, it appears that, at the relevant time, both OLAF and the authorities of one of the Member States considered useful to contact the President. One of the confidential documents submitted by OLAF to the Ombudsman during the inspection [13] shows that the persons within OLAF in charge of the investigation expressed their intention to contact the President of the organisation but failed to locate and identify that person. The fact that the President did not reply to the relevant judicial authorities did not necessarily support the conclusion that that person was not in charge of the management of the organisation.

61. The complainant challenged OLAF's argument that it could not have pursued its investigation without receiving relevant information from the judicial authorities of one of the Member States, since this information constituted only one out of a number of sources of information available. Relevant information could have been obtained by a simple internet search.



The Ombudsman's assessment

62. As the Ombudsman points out in his preliminary remarks in point 26 above, the Institution to which the disclosure has been made under Article 22a(1) of the Staff Regulations should act with due diligence in deciding whether any steps should be taken on the basis of the disclosure. Whatever its decision is, it should explain its decision to the whistleblower. Regrettably, in the present case, it was only in the course of the Ombudsman's inquiry that OLAF explained to the complainant why it considered that no steps should be taken following his disclosure. This explanation, however, does not appear to be adequate.

63. In the Ombudsman's understanding of OLAF's position, the complainant's disclosure did not amount to new information which would constitute material evidence in relation to OLAF's external investigation in case X, and therefore there were no sufficient grounds for reopening that investigation.

64. The Ombudsman does not consider that he should seek to determine whether the information disclosed by the complainant in his note of 31 March 2010 amounted to new information for OLAF or whether it had already been aware of the relevant data concerning the President of the organisation in question before disclosure by the complainant.

65. Nevertheless, during the Ombudsman's inspection of documents, OLAF acknowledged that, after case X had been closed, it did indeed receive new information, namely, details concerning the organisation's statute.

66. The Ombudsman shares the complainant's view that it is clear from that statute that OLAF's assertion that *"the presidency of the [organisation in question] was a purely honorary function"* and that the President was *"not in charge of the administration of the [organisation in question]"* is incorrect [14]. In fact, article XII of the statute indicates that the Board is in charge of administrative and financial management of the organisation. It further provides that the Board includes the President. Moreover, the complainant rightly argued in his observations, which were forwarded to OLAF by the Ombudsman and remain unchallenged, that pursuant to article X of the statute, the President of the organisation in question was its legal representative and had signing authority. Apparently, that person also presided over the Board.

67. It follows that the complainant's disclosure, taken together with the new information on the statute of the organisation in question, provided OLAF with new elements which could justify, if not reopening the external investigation in case X, at least, opening an internal investigation, as suggested by the complainant, of which the first step could reasonably be directly contacting the former President of the organisation in question.

68. However, it emerges from OLAF's explanations that it decided not to do so because it considered that the President would not be able to provide it with any new material evidence, since that person was not considered to be in charge of the management of the organisation in



question. OLAF apparently took into account the outcome of the investigation in one of the Member States, where the competent authorities decided not to continue their efforts to contact the President, despite the fact that they had received evidence on the financial management of the organisation in question from the auditor of that Member State. OLAF thus apparently concluded that such contacts would have no "*effet utile*" for the clarification of the relevant matter.

69. From a formal and procedural viewpoint, the Ombudsman finds it reasonable for OLAF, in principle, to rely on the findings of the Member State's authorities.

70. However, OLAF's explanation does not appear adequate in the circumstances of the present case, for the following reasons: (i) OLAF's decision is based on OLAF's interpretation of the national authorities' decision, which cannot be corroborated by evidence, since the relevant file was lost by the national authorities; (ii) OLAF's decision also appears to be contradicted by information obtained by OLAF after the investigation was closed, which concerned the responsibilities of the President, as laid down in the relevant statute; and (iii) the present case involves a person holding a high public position in the EU, and all possible doubts about the involvement of such public persons in potential fraud accusations should be avoided in the latter's own interest and in the interests of the Union and its citizens.

71. In light of the foregoing, the Ombudsman considers that OLAF failed properly to justify why it did not wish to contact the former President of the organisation in question. It is worth noting in this respect that contact with the former President of the organisation in question would have constituted a reasonable step following the disclosure of information by the complainant, taken together with the new information obtained by OLAF on the statute of the organisation. In the Ombudsman's understanding, OLAF's functioning depends much on individual disclosures, which should not be discouraged. The Ombudsman points out in this respect that, according to a report referred to by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, "potential "whistle-blowers" tend to remain silent for two main reasons: the primary reason is that they feel their warnings will not be followed up appropriately, and only the secondary reason is fear of reprisals" [15] .

72. OLAF's failure properly to justify why it did not wish to contact the former President of the organisation in question was a further instance of maladministration. For the reasons explained in point 51, the Ombudsman will not make a proposal for friendly solution. Moreover, in light of OLAF's reply to the Ombudsman's additional questions, the Ombudsman sees no prospect of OLAF's being able to provide a better explanation if the present inquiry were to be pursued. Therefore, the Ombudsman closes this aspect of the case with a subsequent critical remark.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remarks:



OLAF wrongly assessed the nature of the complainant's note of 31 March 2010, i.e., that it did not constitute a disclosure under Article 22a of the Staff Regulations. This was the first instance of maladministration.

Subsequently, OLAF failed to deal with the complainant's note pursuant to Article 22b of the Staff Regulations, namely, to inform the complainant, within 60 days, of the period of time it had set for itself to take appropriate action. This was the second instance of maladministration.

Moreover, OLAF failed to provide the complainant with the protection granted to whistleblowers by the Staff Regulations, in that, (i) in its letter of 21 October 2010 to the ECA, it took a critical stand *vis-à-vis* the complainant and the compliance of his disclosure with his professional duties as an auditor, and (ii) it forwarded the complainant's note to the Member of the ECA responsible for the audit and to the Director in the ECA responsible for the audit. This was the third instance of maladministration.

Finally, OLAF failed properly to justify why it did not wish to contact the former President of the organisation in question. This was the fourth instance of maladministration.

The complainant and OLAF will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 15 March 2013

[1] Article 22a(1) of the Staff Regulations reads as follows: " *Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European*



Anti-Fraud Office (OLAF) direct.

Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution. "

[2] The same person as the one to whom the complainant sent his note.

[3] Article 22b(1) of the Staff Regulations reads as follows: "*An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:*

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days. "

[4] The Ombudsman's questions were as follows:

"a) In its opinion, OLAF submitted that it would not have been possible to pursue its investigation without receiving relevant information from the (...) judicial authorities [of one of the Member States]. Could OLAF please give reasons why it considered that information to be decisive when it was apparently possible to identify and locate the former President of the [organisation in question] through other sources of information?

b) In its opinion, OLAF submitted that the fact that the complainant found details about the former President of the [organisation in question] did not constitute sufficient grounds for OLAF to reopen the case. Could OLAF please explain why, in light of the impossibility to identify and localise the persons in charge of the administration of the [organisation in question] asserted in the Final Case Report, it does not consider the information provided by the complainant, apparently allowing for the identification and localisation of the President, to amount to facts justifying the reopening of its external investigation?

c) The complainant submitted that, according to OLAF's Final Case Report in case X, "*all the investigations with the intention to locate and identify*" the President of the [organisation in question] "*had obtained a negative result*". Could OLAF please specify which steps it took in the course of its investigation with a view to locating and identifying the President of the [organisation in question]?"



[5] Case T-4/05 *Strack v Commission* , Order of the Court of First Instance of 22 March 2006, [2006] FP-I-A2-83, paragraph 39.

[6] Articles 2(1) and 3 of the European Ombudsman's Statute.

[7] Art. 263 TFEU reads as follows: "[...] *Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them [...]*". In the *Strack* order to which OLAF referred, the Court of First Instance merely stated that, while OLAF enjoys a certain discretion, an official reporting to OLAF under Article 22a of the Staff Regulations cannot challenge OLAF's decision to close an inquiry by way of an action for annulment, unless he or she can demonstrate that the decision produces binding legal consequences liable to directly affect his or her legal situation, otherwise the challenged decision cannot be interpreted as an act adversely affecting him or her.

[8] See the decision on complaint 1068/2011/RT (points 21 et seq.).

[9] Ibid.

[10] See *mutatis mutandis* the decisions on complaints 1068/2011/RT, paragraph 29; 1069/2011/RT, paragraph 22; and 1039/2011/RT, paragraph 25.

[11] See the decision on complaint 1342/2010/MHZ, paragraph 29.

[12] Question c): "The complainant submitted that, according to OLAF's Final Case Report in case X, *"all the investigations with the intention to locate and identify"* the President of the [organisation in question] *"had obtained a negative result"* . Could OLAF please specify which steps it took in the course of its investigation with a view to locating and identifying the President of the [organisation in question]?"

[13] The Ombudsman did not disclose to the complainant any confidential document he inspected. The complainant's observation results from his guess as to the content of the document identified in the report on the inspection as "a fiche recording OLAF's draft replies to questions put to it in the framework of the audit by the ECA".

[14] The relevant part of the statute was submitted to the Ombudsman by the complainant in his observations of 18 July 2011, and its wording was not challenged by OLAF.

[15] See the Report "The protection of "whistle-blowers"", document no. 12006, 14 September 2009, paragraph 8,
<http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN>