

## European Ombudsman Draft recommendation to the European Anti-Fraud Office (OLAF) in complaint 3446/2004/GG

Recommendation

**Case 3446/2004/GG - Opened on 13/12/2004 - Recommendation on 31/05/2005 -  
Decision on 12/12/2005**

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

### THE COMPLAINT

#### *Background*

The complainant, a German journalist, used to be the Brussels correspondent of the *Stern*, a German weekly newspaper. On 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 article was based on the report of Mr van Buitenen and a confidential OLAF document 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 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”. 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. According to the complainant, this accusation was unfounded.

#### *Complaint 1840/2002/GG*

In October 2002, the complainant turned to the Ombudsman (complaint 1840/2002/GG).

The Ombudsman took the view that the relevant press release had to be understood as referring to the complainant and that OLAF had not put forward any evidence to support the accusation it had made therein. He therefore addressed a draft recommendation to OLAF



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

In its detailed opinion, OLAF informed the Ombudsman that it had accepted the draft recommendation and published a new press release on 30 September 2003. However, this press release contained the following wording: "OLAF's enquiries have not yet been completed, but to date, OLAF has not obtained proof that such a payment was made."

The Ombudsman considered that OLAF had thus not properly implemented his draft recommendation. In his decision closing the case, he made the following critical remark: "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."

#### *Subsequent developments*

In its edition of 9/10 June 2004, the *Süddeutsche Zeitung* ran an article on the complainant's case under the title "Much too thin - The T. case ( 'Stern' ): An abyss of an Office's failure". The main contents of this article may be summarised as follows: according to the author, the overall picture was that of an abyss of dilettantism on the part of the authorities and a text-book example of the consequences of journalists being garrulous. Mr G., a former spokesman of a member of the Commission, had told OLAF's spokesman on 22 March 2002 that he had been informed that the complainant had obtained confidential documents from an OLAF official in exchange of remuneration amounting to EUR (or DM) 8 000. Having been asked by OLAF to verify his story, Mr G. had subsequently named Mr K. from the *Stern* as a source who had confirmed that the *Stern* could pay for information as in the complainant's case. Mr K. vehemently denied having spoken to Mr G. in recent years. Mr G. afterwards confirmed this and told the *Süddeutsche Zeitung* that the relevant conversation had not been "really concrete". He also told the newspaper that he had not approached Mr K. as regards the present case but rather asked whether it was "still usual" for *Stern* journalists to pay for information.

On 9 June 2004, the *EUobserver* ran an article on the case in which it summarised the main contents of the above-mentioned article. The *EUobserver* concluded by mentioning that OLAF's deputy spokesperson had told it that, at first sight, he did not see any reason for a disclaimer as regards the article published in the *Süddeutsche Zeitung*.

In its press review for June 2004 which was made available on its website, OLAF referred to the two articles published by the *Süddeutsche Zeitung* and the *EUobserver*. According to this text, it emerged from the article in the *Süddeutsche Zeitung* that a journalist and former spokesman of a member of the Commission had told OLAF's spokesman in 2002 that he had been informed by a colleague that the complainant may have paid for the information concerned. OLAF's text further stated that, according to the article published by the *EUobserver*, this former spokesman of the European Commission had confirmed that the complainant had paid DM (or EUR) 8 000 and had named a member of the staff of *Stern* as his source. OLAF'S text also mentioned that the *EUobserver* had reported that the deputy spokesperson at OLAF had told it that at first sight there was no reason for a disclaimer as regards the article published in the *Süddeutsche Zeitung*.



On 1 September 2004, the complainant wrote to OLAF in order to ask it to correct what he considered to be wrong and misleading statements in this press review and in a document referred to in one of OLAF's press releases. The complainant criticised in particular that OLAF's text gave the impression that it was an undisputed and confirmed fact that he had been accused, on the basis of information received from a colleague at the *Stern*, of paying a civil servant. According to the complainant, however, the article in the *Süddeutsche Zeitung* had not mentioned that Mr K. had been the source for the statement according to which the *Stern* had paid DM or EUR 8 000 to somebody. He further pointed out that this article had clearly stated that this colleague had denied having spoken to Mr G. In the complainant's view, OLAF had thus omitted to mention facts that were essential for the understanding of the article published in the *Süddeutsche Zeitung*.

The complainant added that OLAF's text had correctly quoted the *EUobserver*'s statement that OLAF's deputy press spokesman saw no reason for a disclaimer as regards the article in the *Süddeutsche Zeitung*. In the complainant's view, however, this passage was misleading as long as readers of the website were not informed that this article had contained a damning appraisal of OLAF's work and had reported about wrong statements made by OLAF. The complainant pointed out that the *EUobserver* had correctly reported about this article but that OLAF's text had rendered it in a wrong and misleading manner.

In his reply of 21 September 2004, the Director-General of OLAF informed the complainant that the relevant passage in its press analysis section had been modified in the light of the comments he had made.

The revised text of this press analysis section for June 2004 now reads as follows:

"1. OLAF investigation into possible misconduct by an EU official suspected of corruption and/or having revealed confidential information concerning ongoing investigations

In June some critical articles about an OLAF investigation into a possible misconduct by an EU official suspected of corruption were published. For example, *EUobserver* reported on 2 June that *Stern*'s Brussels correspondent '*had filed a case against the European Commission at the Court of first instance asking for damages of 250,000 euro and demanding that the case against him be annulled*' (Annex 1). (...)

The same online service reported on an article published in *Süddeutsche Zeitung* on 9 June under the headline: 'Much too thin – The T. case ( '*Stern*' ): An Abyss of an Office's Failure' (Annex 2), according to which '*before the first public allegation of bribery was made in an OLAF press release*' a journalist and former European Commission spokesman '*had met OLAF's spokesperson in 2002 and mentioned that he had heard from a colleague that the Stern's correspondent may have paid for the information*'. According to the article this former European Commission spokesman had '*reconfirmed the allegations that the Stern's correspondent had paid 8000 mark or euro and mentions a stern-staff member as his source*'.



Regarding the *Süddeutsche* article *EUobserver* reports that '*the deputy spokesperson at OLAF had told them that at first sight there was no reason for a disclaimer*'.

(...)"

*The present complaint*

In his complaint to the Ombudsman lodged in November 2004, the complainant alleged that the above-mentioned text was still misleading.

The complainant alleged that by citing the relevant articles of the *Süddeutsche Zeitung* and the *EUobserver* in a manner that distorted their meaning and that was tendentious, OLAF had failed to behave objectively and impartially as required by Article 11 of the Staff Regulations for officials of the European Communities.

The complainant claimed that OLAF should immediately withdraw or correct its misleading text.

## THE INQUIRY

### OLAF's opinion

In its opinion, OLAF made the following comments:

OLAF's press analysis was intended to present a summary of press articles published about OLAF each month. It was prepared in a printed version, with annexes containing the full version of the articles mentioned, that was provided to the OLAF Supervisory Committee and the secretary of Parliament's Budgetary Control Committee and that was circulated within OLAF. In the interests of transparency, the analysis was also made available to the public on OLAF's internet site.

The paragraph challenged by the complainant had stated the following when originally placed on the website:

"[ *The EUobserver* ] reported on an article published in *Süddeutsche Zeitung* on 9 June (Annex 2) according to which '*before the first public allegation of bribery was made in an OLAF press release*' a journalist and former European Commission spokesman '*had met OLAF's spokesperson in 2002 and mentioned that he had heard from a colleague that the Stern's correspondent may have paid for the information*'. According to the article this former European Commission spokesman had '*reconfirmed the allegations that the Stern's correspondent had paid 8000 mark or euro and mentions a stern-staff member as his source*'."

On 1 September 2004, the complainant had written to OLAF, expressing concerns similar to those expressed in his present complaint to the Ombudsman. On 21 September 2004, OLAF had informed him that it had modified the June 2004 press analysis in response to his concerns. In particular, the headline of the article published in the *Süddeutsche Zeitung* had been added.

The complainant alleged that the statement in the June 2004 press analysis concerning the articles in the *Süddeutsche Zeitung* and the *EUobserver* "*grossly falsifies and distorts*" the



contents of these articles, because it creates the impression that "it is an undisputed fact that, on the basis of information received from a colleague at *Stern*, I stand accused of having paid an official." The complainant argued that OLAF had not included quotes of Mr G. that would call into question his earlier statements.

However, there was no such declaration in the statements cited. Rather, with the addition of the heading made following receipt of the complainant's letter of 1 September 2004, it was clear that the *Süddeutsche Zeitung* and the *EUobserver* articles were critical of OLAF, as they suggested that the evidence against the complainant was "much too thin". (These three words were, in fact, a quotation from Mr G.) Moreover, viewed in the context of this section of the press analysis in its entirety, it was clear that these articles were substantially critical of OLAF. Thus, the summary presented could not be read as grossly falsifying and distorting the relevant articles.

OLAF had not been willing to amend this paragraph with all the details that the complainant had requested to have included, as it was not the purpose of the press analysis to provide an exhaustive description of what each article contained. Rather, its purpose was to provide a brief overview of the major press coverage of OLAF for the month, together with some highlights of what those articles report.

On the basis of the above considerations, OLAF submitted that it had presented a fair summary of the relevant press articles in its press analysis section.

#### **The complainant's observations**

In his observations, the complainant maintained his complaint. He pointed out that Mr G. had stated, in an affidavit dated 6 August 2004 (a copy of which the complainant submitted to the Ombudsman), that he had told the *Süddeutsche Zeitung* that he had not approached Mr K. as regards the present case but had asked in general terms whether it was still usual to pay for information. Mr G. had added that he had been cited by the *Süddeutsche Zeitung* in its article of 9 June 2004 accordingly. According to the complainant, the statements in this affidavit were known to OLAF.

The complainant further alleged that OLAF had clearly made incorrect statements in its "background" paper to a press release (concerning complaint 2485/2004/GG) that it had published on 11 March 2005. In this paper OLAF had stated that the complainant had lost his case against Mr G. before German courts because Mr G. had made his statements incriminating the complainant in the context of an exchange of information "within a public authority". The complainant considered this to be incorrect, given that in his view Mr G. had only escaped a condemnation due to the immunity he enjoyed as a former civil servant of the EU.

## **THE DECISION**

### **1 Introductory remarks**

1.1 In his complaint lodged in November 2004, the complainant, a German journalist, objected to the contents of the press analysis for June 2004 that had been prepared by the European Anti-Fraud Office (OLAF) and published on OLAF's website. The complainant considered that



the relevant text was misleading.

1.2 The Ombudsman sent the complaint to OLAF for an opinion. In his observations on OLAF's opinion, the complainant submitted a further allegation according to which OLAF had made incorrect statements in its "background" paper to a press release that it had published on 11 March 2005.

1.3 Article 2 (4) of the Statute of the European Ombudsman provides that a complaint to the Ombudsman must be preceded by the appropriate administrative approaches to the institutions and bodies concerned. Given that the complainant does not appear to have made any such approaches to OLAF with regard to his second allegation, the Ombudsman is unable to deal with this allegation at present. The complainant remains free to submit a new complaint regarding this allegation after having made the appropriate prior approaches to OLAF.

## **2 Allegedly misleading or tendentious statements made by OLAF in its press analysis for June 2004**

2.1 In its edition of 9/10 June 2004, the *Süddeutsche Zeitung* ran an article on the complainant's dispute with OLAF (2). On 9 June 2004, the *EUobserver* published an article in which it summarised the main contents of the above-mentioned article. In its press review for June 2004 which was made available on its website, OLAF referred to the two articles published by the *Süddeutsche Zeitung* and the *EUobserver*. After the complainant had objected to this text in a letter of 1 September 2004, OLAF informed him, by letter of 21 September 2004, that the text had been modified.

The relevant section of the amended text of OLAF's press review for June 2004 reads as follows:

"1. OLAF investigation into possible misconduct by an EU official suspected of corruption and/or having revealed confidential information concerning ongoing investigations

In June some critical articles about an OLAF investigation into a possible misconduct by an EU official suspected of corruption were published. For example, reported on 2 June that *Stern*'s Brussels correspondent '*had filed a case against the European Commission at the Court of first instance asking for damages of 250,000 euro and demanding that the case against him be annulled*' (Annex 1). (...).

The same online service reported on an article published in *Süddeutsche Zeitung* on 9 June under the headline: 'Much too thin – The T. case ( '*Stern*' ): An Abyss of an Office's Failure' (Annex 2), according to which '*before the first public allegation of bribery was made in an OLAF press release*' a journalist and former European Commission spokesman '*had met OLAF's spokesperson in 2002 and mentioned that he had heard from a colleague that the Stern's correspondent may have paid for the information*'. According to the article this former European Commission spokesman had 'reconfirmed the allegations that the *Stern*'s correspondent had paid 8000 mark or euro and mentions a *stern*-staff member as his source'.

Regarding the *Süddeutsche* article *EUobserver* reports that '*the deputy spokesperson at OLAF*



*had told them that at first sight there was no reason for a disclaimer' .*

(...)".

2.2 In his complaint to the Ombudsman, the complainant alleged that the above-mentioned text was still misleading. The complainant criticised in particular that OLAF's text gave the impression that it was an undisputed and confirmed fact that he had been accused, on the basis of information received from a colleague at the *Stern* , of paying a civil servant. According to the complainant, however, this was not what the article had said. The complainant alleged that by citing the relevant articles of the *Süddeutsche Zeitung* and the *EUobserver* in a manner that distorted their meaning and that was tendentious, OLAF had failed to behave objectively and impartially as requested by Article 11 of the Staff Regulations for officials of the European Communities. He claimed that OLAF should immediately withdraw or correct its misleading text.

2.3 It should be noted from the outset that the present case does not concern the question as to whether the accusations that have (or may have been) made by Mr G. against the complainant are well-founded. The present complaint focuses exclusively on the issue as to whether OLAF provided misleading information on two articles published in June 2004 in its press analysis for June 2004.

2.4 In its opinion, OLAF explained that its press analysis is intended to present a summary of press articles published about OLAF each month. According to OLAF, this press analysis is prepared in a printed version, with annexes containing the full version of the articles mentioned, that is provided to the OLAF Supervisory Committee and the secretary of Parliament's Budgetary Control Committee and that is circulated within OLAF. OLAF added that in the interest of transparency, the analysis is also made available to the public on OLAF's internet site.

2.5 The Ombudsman considers that it is good administrative practice to ensure that the information provided by EU institutions and bodies is correct and not misleading and to correct promptly any errors that may occur.

2.6 In the Ombudsman's view, the relevant section of OLAF's press analysis for June 2004, as revised following the presentations made to OLAF by the complainant, contains the following two statements: (1) According to the article published in the *Süddeutsche Zeitung* , a journalist and former European Commission spokesman had met OLAF's spokesman in 2002 and mentioned that he had heard from a colleague that the complainant may have paid for the confidential information he had obtained; (2) according to the same article, this former Commission spokesman had "reconfirmed the allegations that the *Stern* 's correspondent had paid 8000 mark or euro and mentions a stern-staff member as his source".

2.7 The Ombudsman considers that the first of these two statements is basically correct. It is true that the article in the *Süddeutsche Zeitung* also mentions that the person (Mr K.) whom Mr G. (the "journalist and former European Commission spokesman") had ultimately named as his source denied having spoken to Mr G. The Ombudsman considers, however, that this fact does





not affect the correctness of the above-mentioned statement made in OLAF's press analysis. Mr K.'s statement may well call into doubt the value of the statement that Mr G. made to OLAF's press spokesman in 2002, but it does not alter the fact that this statement was made.

2.8 As regards the second of the above-mentioned statements, OLAF's text clearly implies that Mr G. confirmed (or reconfirmed, as OLAF put it) his accusations against the complainant after having been questioned by the newspaper. The Ombudsman notes, however, that this was clearly not what the article said. According to the article published by the *Süddeutsche Zeitung*, Mr G. had, when confronted with Mr K.'s statement, admitted that the relevant conversation had not been "really concrete". Still according to this article, Mr G. had also told the newspaper that he had not approached Mr K. as regards the present case but rather asked whether it was "still usual" for journalists at the *Stern* to pay for information. It is thus clear that, contrary to OLAF's press analysis, it does not emerge from the article in the *Süddeutsche Zeitung* that Mr G. "reconfirmed the allegations that the *Stern*'s correspondent had paid 8000 mark or euro and mentions a stern-staff member as his source" (3). In these circumstances, the relevant part of OLAF's press analysis must indeed be considered as being misleading. This conclusion is not affected by the fact that the current version of OLAF's text mentions the title of the article published in the *Süddeutsche Zeitung* which shows that its author was very critical of OLAF's behaviour. The Ombudsman considers that hardly any person who has read the second of the above-mentioned statements will surmise that the title of this article quotes Mr G. himself who, according to the article, told the newspaper that the information he had provided to OLAF was in his view "much too thin" to open an inquiry.

2.9 In its press analysis section for June 2004, the above-mentioned section is followed by a paragraph that is worded as follows: "Regarding the *Süddeutsche* article *EUobserver* reports that 'the deputy spokesperson at OLAF had told them that at first sight there was no reason for a disclaimer'." It should be noted that the article in the *EUobserver* reported what had been written in the article in the *Süddeutsche Zeitung*, namely that Mr G. had admitted that he had not talked "very concretely" with Mr K. and that he had only asked whether *Stern* staff in general still used the practice of paying for information. The Ombudsman considers that omitting this information distorts the meaning of the statement that OLAF's deputy spokesman did not consider it necessary to react to the article in the *Süddeutsche Zeitung*. In the absence of correct information on the relevant contents of the articles that were published in the two newspapers, this statement in OLAF's press analysis for June 2004 thus also has to be considered as being misleading.

### **3 Conclusion**

On the basis of his inquiry into the present complaint, the Ombudsman concludes that OLAF did indeed, as the complainant alleged, continue to provide misleading information in its press analysis for June 2004. This constitutes an instance of maladministration.

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

#### **The draft recommendation**

OLAF should review and correct the information concerning the two articles published by the *Süddeutsche Zeitung* and the *EUobserver* that is contained in its press analysis section for June





2004.

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 31 August 2005. 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, 31 May 2005

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, p. 15.

(2) The background of this dispute is set out in detail in the special report that the Ombudsman addressed to the European Parliament on 12 May 2005 in case 2485/2004/GG. The special report is available on the Ombudsman's website ( <http://www.ombudsman.europa.eu> [Link]).

(3) Given that the above result already follows from the interpretation of the article itself, there is no need to consider the affidavit of Mr G. that was submitted by the complainant with his observations on OLAF's opinion (which would in any event confirm this interpretation).