

Decision of the European Ombudsman closing the inquiry into complaint 1183/2012/MMN against OLAF

Decision

Case 1183/2012/MMN - Opened on 07/06/2012 - Recommendation on 15/11/2013 - Decision on 23/06/2014 - Institution concerned European Anti-Fraud Office (Draft recommendation accepted by the institution) |

The case concerned a complaint lodged with the European Anti-Fraud Office ('OLAF') by a former employee of the Fundamental Rights Agency ('FRA') against the latter. The complainant brought to the attention of OLAF certain irregularities allegedly committed within the FRA. *OLAF informed the complainant that, following its investigation, it had concluded that no further action should be taken but addressed a number of issues to the management of the FRA. The complainant contacted the Ombudsman, considering that OLAF infringed its duty to state the reasons for its decision to close the investigation. Indeed, OLAF had said that it is not its policy to explain or give reasons for its decision to close an investigation.*

The Ombudsman inquired into the issue and recommended that OLAF should inform the complainant of the reasons for its decision to close its investigation in the case. OLAF accepted the draft recommendation as well as the general principle and policy underlying it.

The background

1. This case concerns a complaint lodged with the European Anti-Fraud Office ('OLAF') by a former employee of the Fundamental Rights Agency ('FRA') against the latter.
2. The complainant brought to the attention of OLAF certain irregularities allegedly committed within the FRA.
3. Subsequently, OLAF informed the complainant that, following its investigation, it had concluded that no further action should be taken. However, OLAF added that it had addressed a number of issues to the management of the FRA.
4. The complainant wrote to OLAF challenging its decision to close the investigation, and requested clarifications concerning the reasons for that decision.



5. In the absence of any reply, the complainant contacted the Ombudsman who invited OLAF to reply to the complainant's request for clarifications concerning its reasons to close the investigation against the FRA.

6. OLAF then provided the Ombudsman with a copy of the reply that it had sent to the complainant. This reply informed the complainant that:

" it is not OLAF's policy to explain or give reasons for its decision to close an investigation. I would only add that all such decisions are taken after careful reflection and discussion between investigators and their management. "

7. The complainant expressed his dissatisfaction with OLAF's reply [1] .

Allegation of failure to state the reasons for OLAF's decision to close the investigation

The Ombudsman's draft recommendation

8. The complainant argued that, by failing to state the reasons for its decision to close the investigation into the alleged irregularities reported by him, OLAF violated its duties flowing from EU law and the principles of good administration. Thus, he claimed that OLAF should provide him with the reasons for its decision to close the investigation.

9. When addressing the draft recommendation to OLAF, the Ombudsman took into account the arguments and opinions put forward by the parties. In particular, OLAF put forward six arguments to justify its policy on this matter, which the Ombudsman, however, did not find convincing.

10. First, the Ombudsman noted that there is a general obligation for EU institutions to state reasons for their decisions. [2]

11. Second, the Ombudsman considered that the need to preserve the confidentiality of OLAF's investigations could not justify an outright refusal to provide reasons for a decision closing an investigation. In any event, giving reasons for such a decision does not necessarily require divulging confidential information.

12. Third, the Ombudsman found it difficult to understand how providing reasons for a decision to close an investigation could possibly compromise the independence of OLAF or of its Director-General. If OLAF's argument were to be accepted, it would imply that the obligation to state reasons would compromise the independence of all the EU institutions which are subject to such an obligation.

13. Fourth, concerning the lack of legally binding effects of OLAF's decisions, the Ombudsman



noted that the case-law cited by OLAF merely clarified that it was not possible to bring an action for annulment against the decisions by OLAF to close an investigation or to transmit its reports to the EU institutions or to national authorities. In fact, particularly in situations in which the possibilities of bringing an action before the EU Courts are limited or non-existent, providing reasons for a decision adopted by an EU institution is all the more important in order to ensure that the institutions are accountable to citizens.

14. Fifth, as regards the argument concerning transparency, the Ombudsman welcomed the fact that OLAF had decided to publish the Instructions to Staff on Investigative Procedures ('ISIP') [3] and the Investigation Policy Priorities [4], on which its decisions were based. However, the publication of these documents could not replace the obligation to state reasons in a specific case. Neither the ISIP nor the Investigation Policy Priorities provided any indications as to why, in a specific case, OLAF decided to close an investigation.

15. Sixth, the Ombudsman questioned the logic of OLAF's argument that a whistleblower affected by the alleged irregularities reported to OLAF would be better off turning to his employer for assistance. The rules on whistleblowing were introduced precisely to provide whistleblowers with the option of informing a third party, such as OLAF, of alleged irregularities in their respective institution. In any event, such an argument had no bearing on the issue as to whether OLAF failed to provide reasons for its decision to close the investigation.

16. In light of the above, the Ombudsman considered that OLAF's refusal to state reasons for its decision to close the investigation amounted to an instance of maladministration. She therefore made the draft recommendation below:

" OLAF should inform the complainant of the reasons for its decision to close its investigation in the present case ."

The Ombudsman's assessment after the draft recommendation

17. In its detailed opinion, OLAF said that Regulation 1073/1999 [5] did not impose on it the obligation to inform whistleblowers of the reasons for closing an investigation without recommendations. Moreover, neither the Staff Regulations nor the Commission's Communication on whistleblowing imposed such an obligation.

18. OLAF further argued that, since the Supervisory Committee of OLAF monitors closely OLAF's investigative activities, its decisions are fully accountable.

19. Therefore, OLAF maintained that it had committed no instance of maladministration in the present case. However, OLAF added that, following the entry into force of Regulation 883/2013, [6] it has decided to amend its policy and inform whistleblowers of the reasons for closing an investigation.



20. Thus, OLAF provided a copy of the internal template which will be used for these purposes, as well as a copy of the letter sent to the complainant in the present case, in which it stated that the reason for its decision to close the investigation was that " *the investigation did not confirm the initial allegations of fraud against the concerned person* ".

21. In his observations, the complainant indicated that he appreciated the Ombudsman's draft recommendation. However, he added that, in his opinion, OLAF did not correctly implement this draft recommendation because it only referred to one of his allegations (namely, his allegation of fraud). According to the complainant, OLAF's letter did not address his other allegations (e.g., incorrect recruitment practices, budgetary manipulation and backdating of contracts; use of an incorrect legal basis for certain expenditure; irregular tender procedures; etc).

22. The Ombudsman invited OLAF to provide additional clarifications as regards its reasons to close the investigation. OLAF said that it had carefully analysed all the allegations put forward by the complainant. It said that, although the investigation pointed at certain irregularities and poor management practices, the allegations of fraud against the person concerned were not confirmed. The elements identified were insufficient for issuing recommendations.

23. Although the complainant was not entirely satisfied with OLAF's additional clarifications, he thanked the Ombudsman for her intervention.

24. The Ombudsman welcomes OLAF's decision following the draft recommendation to amend its policy and, in the future, to inform whistleblowers, such as the complainant, of the reasons for closing an investigation. OLAF has therefore decided to accept the Ombudsman's draft recommendation as a matter of principle in order to address the underlying concern.

25. As regards the specific case, the Ombudsman notes that, although the complainant has expressed his agreement with the draft recommendation, he is dissatisfied with OLAF's statement of the reasons for closing the investigation. The Ombudsman further notes that OLAF has informed the complainant that the investigation was closed because the allegations of fraud had not been confirmed during the investigation and that, although the investigation confirmed certain irregularities and poor management practices, this was insufficient to take further action.

26. The fact that the complainant appears to disagree with OLAF's reasons for deciding to close its investigation does not alter the fact that OLAF decided to comply with the Ombudsman's draft recommendation and to provide the complainant with the reasons for its decision to close its investigation. Thus, in this case the Ombudsman considers that OLAF has correctly implemented her draft recommendation.

Conclusion

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusion:



The draft recommendation was accepted by OLAF.

The complainant and OLAF will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 23 June 2014

[1] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/52516/html.bookmark>
[Link].

[2] In support of this finding, the Ombudsman referred to Article 296 TFEU, Article 41(2)(c) of the Charter of Fundamental Rights, Article 18(1) of the European Code of Good Administrative Behaviour and the case-law of the Court of Justice.

[3] See http://ec.europa.eu/anti_fraud/documents/about_us/instructions-to-staff-120201.pdf
[Link]

[4] The Investigation Policy Priorities are published together with OLAF's annual management plan in the European Commission's intranet.

[5] 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 L 136 p. 1.

[6] Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L248, p. 1).