

Draft recommendation of the European Ombudsman in his inquiry into complaint 856/2008/BEH against the European Anti-Fraud Office (OLAF)

Recommendation

Case 856/2008/BEH - Opened on 23/04/2008 - Recommendation on 09/12/2010 - Decision on 11/11/2011

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

The background to the complaint

1. The present complaint originates from an internal investigation by OLAF into the financing of the European Parliament's acquisition of its D3 building in Brussels. This building was the object of a long-term lease contract between Parliament and the building's owner, signed in 1992, which afforded Parliament an option to purchase the building. Parliament exercised this purchase option in 1998.

2. In 2002, the complainant, a journalist, contacted the President of the European Commission and alerted him to certain alleged irregularities relating to Parliament's acquisition of the D3 building, which might have possible criminal law implications. According to the complainant, in 1998, Parliament's Secretary-General charged a company with the financing of the building's acquisition, without publishing a call for tender. He did so, despite the large sums of money involved. On the basis of the information provided by the complainant, OLAF opened an internal investigation (OF/2003/0026), in the course of which it heard witnesses and consulted experts. On 11 August 2006, OLAF closed the case and recommended no further follow-up apart from (i) providing Parliament with a copy of its Final Case Report, and (ii) informing the complainant of the results of the investigation.

3. On 21 May 2007, the complainant submitted complaint 1450/2007/(WP)BEH in which he alleged various shortcomings in the conduct of OLAF's internal investigation. The Ombudsman closed this case on 13 September 2010, essentially considering that OLAF had accepted his draft recommendation in that case.

4. The present complaint relates to three issues, two of which are connected with OLAF's investigation in case OF/2003/0026, but were not raised in complaint 1450/2007/(WP)BEH. The



third issue concerns the power to open and close OLAF investigations in general. These three issues are the following:

- (i) OLAF's qualification of the complainant, in the course of its internal investigation, as a 'person concerned', within the meaning of Regulation 1073/1999 ('the Regulation') [2] ;
- (ii) OLAF's correspondence with the complainant in relation to the conduct of a Head of Unit at the Commission; and
- (iii) OLAF's internal arrangements for taking decisions on the opening and closing of investigations.

5. As regards the first issue , on 7 February 2006, OLAF summoned the complainant to be heard as a witness at its headquarters in Brussels, invoking Article 4(2) of the Regulation [3] as a legal basis. The complainant objected to being summoned. OLAF therefore then invited the complainant to an interview, this time relying on Article 4(3)(2) of the Regulation [4] . It also apologised for erroneously invoking Article 4(2) of the Regulation as a legal basis in its earlier letter to the complainant. In his reply dated 19 March 2006, the complainant took the view that he could not be considered to be a 'person concerned', even under a broad interpretation of Article 4(3) of the Regulation, since Article 4(3) referred to *economic* operators concerned, of which he was not one. He moreover asked OLAF to confirm that it did not consider him as a 'person concerned' within the meaning of Article 4(3)(2) of the Regulation. In a letter dated 19 April 2006, OLAF stated that, in its view, a broad interpretation of Article 4(3) ("*im weiteren Sinne*") provided the legal basis for inviting the complainant to an interview.

6. The complainant requested an anonymised version of OLAF's Final Case Report in case OF/2003/0026, which was sent to him by letter of 1 September 2006. In a letter dated 27 September 2006, the complainant asked the Director-General of OLAF to confirm that OLAF would not make further inquiries relating to him. By letter dated 23 March 2007, OLAF informed the complainant "*that OLAF has no intention at this time to conduct any further enquiries about you*". In a letter dated 26 April 2007, OLAF made the following statement: "*Ich bestätige Ihnen, dass OLAF gegenwärtig nicht die Absicht hat, Erkundigungen über Sie einzuholen.*" [5] According to the complainant, these statements implied that OLAF had reserved the right to make inquiries regarding him at a later date. The complainant took the view that, given the absence of an applicable legal basis, OLAF had no right whatsoever to make inquiries relating to him in the framework of an internal investigation.

7. The second issue originates from OLAF's correspondence with the complainant. According to the complainant, OLAF announced in a letter addressed to him and dated 19 October 2006, that it would send to him its opinion on the question of whether a Head of Unit at the Commission had acted correctly in the complainant's case.

8. The third issue relates to OLAF's power to open and close internal investigations. The complainant pointed to Article 5 of the Regulation, pursuant to which internal investigations shall be opened by a decision of the Director of the Office. In the complainant's view, this meant the



Director-General of OLAF. However, neither the decision to open, nor the decision to close investigation OF/2003/0026 was taken by the Director-General.

9. On 18 March 2008, the complainant turned to the Ombudsman.

The subject matter of the inquiry

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

1) OLAF exceeded the limits of its powers (i) by treating him as a 'person concerned' within the meaning of Article 4(3) of the Regulation, and by refusing to withdraw this qualification; and (ii) by making inquiries concerning him in the framework of an internal investigation.

2) Contrary to the announcement in its letter dated 19 October 2006, OLAF failed to give to the complainant its opinion on the conduct of Mr X., Head of Unit at the Commission.

3) By delegating powers to open and close investigations to the Director in charge of investigations and operations, who is not the "Director of the Office" within the meaning of the Regulation, OLAF failed to comply with Article 5 of the Regulation.

He claimed that OLAF should (i) apologise for the conduct set out in the first allegation; (ii) clarify that there is no legal basis for making citizens who observe the work of the EU institutions, and draw attention to possible instances of maladministration, the subject of its investigations; and (iii) correctly exercise its powers in the future, and refrain from arrogating to itself powers which it had not been given.

11. Article 2(4) of the Statute of the European Ombudsman requires complaints to the Ombudsman to be preceded by the appropriate administrative approaches to the institutions and bodies concerned. In the letter opening his inquiry, the Ombudsman noted that the complainant did not appear to have explicitly drawn OLAF's attention to his third allegation. However, given that the allegation is closely linked to the overall issue of OLAF's competences, which the complainant repeatedly raised in its contacts with OLAF, the Ombudsman took the view that this allegation should be included in his inquiry. In addition, he pointed out that it was also in the interest of an efficient procedure to take up the complainant's third allegation in the framework of the present inquiry.

The inquiry

12. The complaint was forwarded to the Director-General of OLAF for an opinion. OLAF's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 29 September 2008. In light of these observations, further inquiries by the Ombudsman proved necessary. Thus, in a letter dated 26 May 2009, the Ombudsman requested OLAF to provide him with further information concerning the complainant's allegations.



13. OLAF's reply was forwarded to the complainant with an invitation to make observations. On 29 September 2009, the complainant sent his observations.

14. Having examined OLAF's reply against the background of the complainant's observations, the Ombudsman considered that there was a need for further clarification. By letter dated 7 December 2009, he therefore requested OLAF to provide him with further information concerning the complaint.

15. OLAF's reply was forwarded to the complainant with an invitation to make observations. On 23 March 2010, the complainant sent his observations. The complainant submitted supplementary observations on 15 May 2010.

The Ombudsman's analysis and conclusions

Preliminary remarks

16. In its opinion, OLAF invoked Article 2(4) of the Statute of the European Ombudsman, which provides that a complaint to the Ombudsman shall be made within two years of the date on which the facts on which it is based came to the complainant's attention. OLAF asserted that allegations based on facts that came to the complainant's attention prior to 18 March 2006 were inadmissible, given that his complaint to the Ombudsman was dated 18 March 2008. It is true that OLAF summoned the complainant to be heard as a witness by letter dated 7 February 2006. It should be noted, however, that the complainant immediately challenged the letter dated 7 February 2006, and that the subsequent communications concerning this issue were only concluded by OLAF's letter dated 19 April 2006. In order to prevent complaints from being submitted to him prematurely, the Ombudsman considers that, where ongoing communications are concerned, the deadline foreseen in Article 2(4) of his Statute should be considered to start running from the date on which the institution's final position becomes known. Given that the present complaint was submitted less than two years after the letter of 19 April 2006 was sent, OLAF's objection is unfounded.

17. In his observations, the complainant stated that OLAF had correctly interpreted the Regulation when it stated that he could not be subjected to an internal investigation. At the same time, however, he asserted that OLAF's investigators did not always comply with this limitation, and that they investigated persons outside the institutions, as was apparent from the Ombudsman's special report to Parliament in case 2485/2004/GG. The Ombudsman does not interpret the complainant's statement as meaning that he wished to submit a new allegation in this respect. There is, therefore, no need for the Ombudsman to address this aspect in the present draft recommendation.

A. As regards the complainant's first allegation and his



claim

Legal Framework

18. Article 2 of the Regulation reads as follows:

" Administrative investigations

Within the meaning of this Regulation, 'administrative investigations' (hereinafter 'investigations') shall mean all inspections, checks and other measures undertaken by employees of the Office in the performance of their duties, in accordance with Articles 3 and 4, with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation. These investigations shall not affect the powers of the Member States to bring criminal proceedings. "

19. Article 3 of the Regulation reads as follows:

" External investigations

The Office shall exercise the power conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot inspections and checks in the Member States and, in accordance with the cooperation agreements in force, in third countries.

As part of its investigative function, the Office shall carry out the inspections and checks provided for in Article 9(1) of Regulation (EC, Euratom) No 2988/95 and in the sectoral rules referred to in Article 9(2) of that Regulation in the Member States and, in accordance with the cooperation agreements in force, in third countries. "

20. Article 4 of the Regulation reads as follows:

" Internal investigations

1. In the areas referred to in Article 1, the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (hereinafter 'internal investigations').

These internal investigations shall be carried out subject to the rules of the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and with due regard for the Staff Regulations under the conditions and in accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency. The institutions shall consult each other on the rules to be laid down by such decisions.

2. Provided that the provisions referred to in paragraph 1 are complied with:

- the Office shall have the right of immediate and unannounced access to any information held



by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. The Office may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing,

- the Office may request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies.

3. Under the conditions and in accordance with the procedures laid down by Regulation (Euratom, EC) No 2185/96, the Office may carry out on-the-spot inspections at the premises of economic operators concerned, in order to obtain access to information relating to possible irregularities which such operators might hold.

The Office may, moreover, ask any person concerned to supply such information as it may consider pertinent to its investigations. ..."

21. Article 9 of Regulation 2988/95 [6] , to which Article 3 of the Regulation refers, reads as follows:

"1. Without prejudice to the checks carried out by the Member States in accordance with their national laws, regulations and administrative provisions and without prejudice to the checks carried out by the Community institutions in accordance with the EC Treaty, and in particular Article 188c thereof, the Commission shall, on its responsibility, have checks carried out on:

- (a) the conformity of administrative practices with Community rules;
- (b) the existence of the necessary substantiating documents and their concordance with the Communities' revenue and expenditure as referred to in Article 1;
- (c) the circumstances in which such financial transactions are carried out and checked.

2. In addition, it may carry out checks and inspections on the spot under the conditions laid down in the sectoral rules.

Before carrying out such checks and inspections, in accordance with the rules in force, the Commission shall inform the Member State concerned accordingly in order to obtain any assistance necessary."

22. Article 5 of Regulation 2185/96 [7] provides as follows:

"On-the-spot checks and inspections shall be carried out by the Commission on economic operators to whom Community administrative measures and penalties pursuant to Article 7 of Regulation (EC, Euratom) No 2988/95 may be applied, where there are reasons to think that



irregularities have been committed.

In order to make it easier for the Commission to carry out such checks and inspections, economic operators shall be required to grant access to premises, land, means of transport or other areas, used for business purposes.

Where strictly necessary in order to establish whether an irregularity exists, the Commission may carry out on-the-spot checks and inspections on other economic operators concerned, in order to have access to pertinent information held by those operators on facts subject to on-the-spot checks and inspections."

23. Recital 13 of Regulation 2185/96 reads as follows:

"Whereas, if action to combat fraud and irregularities is to be effective, the Commission must carry out inspections on the premises of those economic operators who may have been involved, directly or indirectly, in the irregularity in question and on the premises of other economic operators who might be concerned by that irregularity; ..."

24. The short version of the currently applicable version of the OLAF Manual, which dates from 2009, gives the following definition of a 'person concerned':

"A person concerned is the individual or entity to whom facts under an OLAF investigation or operation may be directly attributable. He is an individual or an economic operator who is suspected of having committed an irregularity or fraud." [8]

25. The full version of the 2009 version of the OLAF Manual gives the following definitions:

"• Person concerned (internal investigation)

An individual who belongs to the personnel of the Union body and who becomes a subject of specific suspicions of serious irregularities, fraud, corruption or other serious violations of professional duties. In accordance with Article 4 of Decision 1999/396, OLAF informs the person concerned as the interested party rapidly as long as this would not be harmful to the investigation.

• Person concerned (external investigation)

A person concerned in an external investigation is an economic operator to whom Union measures and penalties may be applied, when there are reasons to think that irregularities have been committed." [9]

Arguments presented to the Ombudsman

26. Against the factual background set out in paragraphs 5 and 6 above, the complainant



alleged that OLAF exceeded the limits of its powers by (i) treating him as a 'person concerned' within the meaning of Article 4(3) of the Regulation and refusing to withdraw this qualification; and (ii) making inquiries with regard to him in the framework of an internal investigation. He claimed that OLAF should (i) apologise for the conduct set out in his first allegation; (ii) clarify that there is no legal basis for making citizens who observe the work of the EU institutions, and draw attention to possible instances of maladministration, the subject of its investigations; and (iii) correctly exercise its powers in the future and refrain from arrogating to itself powers which it had not been given.

27. In its **opinion**, OLAF stated that the notions of 'economic operator concerned' and 'person concerned' within the meaning of Article 4(3) of the Regulation, both refer to sources outside the Union institutions and bodies. Given that the complainant was not employed by a Union institution or body at the material time, he could not be subjected to an internal investigation. However, according to OLAF, he was an informant who was likely to be holding information pertinent to its investigation. For this reason, he qualified as a 'person concerned' within the meaning of Article 4(3) of the Regulation. By inviting the complainant to a formal interview on 9 March 2006, OLAF had thus acted within the limits of its powers. OLAF did not specifically comment on the second aspect of the complainant's first allegation.

28. In his **observations**, the complainant maintained that OLAF's assertion that it never investigated him was inconsistent with the content of its letters referred to in paragraph 6 above. According to the complainant, OLAF's statements in both letters clearly showed that it even reserved the right to investigate him at a later date. OLAF did not comment on the relevance of the said letters. According to the complainant, OLAF had collected information about him, such as information concerning his present and former professional activities, and included this information in its Final Case Report.

29. He further submitted that OLAF did not comment on the definition of a 'person concerned' in the OLAF Manual, to which he had referred in his correspondence with OLAF. He considered that even a very broad interpretation would not render the contested term applicable to him. The complainant stated that the Regulation does not define a 'person concerned'. However, he pointed out that, according to Regulation 2185/96, in particular its Article 5, a 'person concerned' is an economic operator. Moreover, the OLAF Manual defines 'person concerned' as "*the individual or entity to whom facts under an OLAF investigation or operation may be directly attributable. He is an individual or an economic operator who is suspected of having committed an irregularity or fraud.*" The complainant submitted that he could not be considered to be an economic operator, or be suspected of having committed an irregularity or fraud, given that he had never, in any way whatsoever, been involved in the financing of Parliament's D3 building. As a consequence, OLAF could not lawfully rely on Article 4(3) of the Regulation. He, therefore, reiterated his claim, and emphasised the importance of this issue as a matter of principle.

30. In his first request for further information, the Ombudsman asked OLAF to specify its reasons for qualifying the complainant as a 'person concerned' within the meaning of Article 4(3) of the Regulation, against the background of Article 5 of Regulation 2185/1996, to which Article 4(3) of the Regulation refers, and the definition of a 'person concerned' in the OLAF Manual.



31. In its reply, OLAF stated that "[t] he reason for qualifying the complainant as 'any person concerned' was to invite him for a formal interview as a witness in order to obtain further information from him ". Furthermore, it essentially submitted that the notion of 'any person concerned' used in Article 4(3) of the Regulation is wider than the concept of 'person concerned' in the OLAF Manual. In its view, the former notion covers persons under suspicion, *and* persons who are not under suspicion, but who may hold relevant information. By contrast, Article 4(5) of the Regulation exclusively deals with the category of 'person concerned' within the meaning of the definition given in the OLAF Manual [10] . Relying on the concept of 'any person concerned' in the given circumstances did not, therefore, mean that the complainant was under suspicion.

32. OLAF also took the view that the 2005 version of its Manual, which was in use at the relevant point in time, used the term 'interested party' to designate a person under investigation. The term 'person concerned' was not introduced until after the letter of invitation (dated 9 March 2006) had been sent to the complainant. Against this background, OLAF submitted that the complainant sought retroactively to apply a new definition to past events. It also stated that the complainant was never considered to be an 'interested party', and had never been investigated by OLAF.

33. OLAF submitted that it relied on Article 4(3) of the Regulation, in conjunction with Article 5(3) of Regulation 2185/96, as the legal basis for inviting the complainant to attend an interview. By doing so, it treated the complainant as a person from outside the EU institutions who may hold information pertinent to its investigation. OLAF acknowledged that this might have created an ambiguous situation, which had not been its intention. OLAF stressed, therefore, that it wished to confirm again that it never suspected the complainant of committing fraud or an irregularity to the detriment of the financial interests of the EU, and that it had never been its intention to investigate the complainant.

34. In his observations, the complainant noted that OLAF did not explain why the terms used in the OLAF Manual did not have the same meaning as the corresponding terms in the relevant regulations. According to its preface, the OLAF Manual contains important instructions for investigators. Accepting OLAF's submissions would, therefore, mean that the definitions of basic notions given in the OLAF Manual were incorrect. He also submitted that the 2005 version of the OLAF Manual, which was available on OLAF's website, used both the notion of 'interested party' and the notion of a 'person concerned', the latter exclusively designating persons suspected of being responsible for breaches of the law. OLAF's broad interpretation of Article 4(3)(2) of the Regulation was not mentioned anywhere. As regards OLAF's statement that it had never been its intention to investigate him, the complainant observed that OLAF did not address the question as to the meaning of its letters referred to in paragraph 6 above. He reiterated his view that there was no legal basis for OLAF to collect information about him, or to conduct inquiries relating to him.

35. In his second request for further information, the Ombudsman asked OLAF to clarify whether, in its view, Article 4(3) of the Regulation, which entitles it to ask persons concerned "



to supply " certain information, provides a legal basis for asking citizens to attend an interview at OLAF's premises. The Ombudsman also invited OLAF to give its view on the second aspect of the complainant's first allegation, and the second aspect of his claim. Furthermore, he asked it to explain the significance of its letters to the complainant dated 23 March and 26 April 2007, in which it stated that it had no intention " **at this time** to conduct any **further enquiries** " [11] concerning him.

36. In its reply, OLAF pointed out that the concrete use of Article 4(3) of the Regulation depended on the context and circumstances of a given case. The purpose of this provision was to enable OLAF staff to verify available information, and gather further relevant information. It was within OLAF's discretion to choose the most appropriate investigative methods and techniques in each case. OLAF further submitted that, if necessary, Article 4(3) of the Regulation " *may indeed also be used as a legal basis for inviting witnesses from outside the EU institutions, bodies, offices and agencies to present themselves for an interview as was the case of the complainant* ". It went on to state that there was, however, no obligation to accept such an invitation for an interview.

37. OLAF added that the complainant turned down two offers it made to meet him informally in Luxembourg. It was only then that its investigators formally invited the complainant to an interview. OLAF explained that witnesses who travel to its premises are entitled to reimbursement of travel expenses and a daily allowance, and that it had informed the complainant accordingly in its letter dated 9 March 2006.

38. As regards the complainant's first allegation, OLAF emphasised that it was never its intention to investigate the complainant. In the framework of an internal investigation, it was not possible for OLAF to investigate an individual who is not a staff member of the EU. OLAF submitted that it was standard practice to assess the reliability of a source, and the accuracy of information provided during the assessment stage. It went on to state that "[a] part from this standard check OLAF did not specifically look for any information concerning the complainant ".

39. Commenting on the second aspect of the complainant's claim, OLAF confirmed that there is no legal basis for investigating citizens who observe the work of the EU institutions and draw attention to possible instances of maladministration, and that OLAF had never stated otherwise. OLAF further submitted that the complainant had never been the subject of any OLAF investigation, and that it had never been its intention to investigate him.

40. OLAF stated that the letters dated 23 March and 26 April 2007 were sent in reply to the complainant's communications, and that they contained replies to questions the complainant had raised in relation to the processing of his personal data. OLAF acknowledged that the wording used may have led to misunderstanding, for which it apologised. It submitted that it had merely sought to confirm that it did not intend to look for and collect any further information relating to the complainant regarding the reliability of the source. OLAF also stated that, in future correspondence, it would take greater care to avoid the use of wording which could be misinterpreted.



41. In his observations, the complainant submitted that OLAF did not inform him that he was not obliged to attend the interview. He confirmed that OLAF offered to meet him informally in Luxembourg. He added that he agreed to an informal meeting at first, but cancelled it when he learned that both OLAF investigators in charge of the case had been involved in investigating a journalist who worked for a German weekly magazine, and that they were, therefore, possibly biased.

42. Against this background, he considered being summoned ("*Vorladung zu einer Zeugenvernehmung*") as a 'person concerned' to be a bluff on OLAF's part, intended to intimidate him. The fact that he was to be heard as a witness at OLAF's premises suggested that OLAF considered that it would be easier to question him there in order to find out about his sources. He considered that OLAF could not have had any questions as to substance, given that, without giving any reasons, it had never accepted his offer to reply to its questions in writing.

43. In reply to the Ombudsman's second question, OLAF stated that it was standard practice to assess the reliability of a source, and the accuracy of information provided during the assessment stage. The complainant did not consider OLAF's explanation to be plausible in view of the fact that OLAF extended the invitation for an interview only in the final phase of its investigation, and not at the beginning. Quoting from the Final Case Report, the complainant drew particular attention to the part which showed that OLAF was trying to find out what his reasons were for turning to OLAF, and to discover his initial sources of information. In his view, therefore, it had to be assumed that OLAF was trying to find evidence that he was maliciously aiming to 'slander' Parliament. According to the complainant, it appeared that this was indeed the focus of OLAF's investigation, given that the Final Case Report stated that the case was not about the EU's financial interests, but rather about the reputation of the EU institutions in general, and of Parliament in particular.

44. Concerning its reply in relation to its letters mentioned in paragraph 6 above, the complainant accepted OLAF's apology, and considered this issue to be settled.

The Ombudsman's assessment

45. When alleging that OLAF exceeded the limits of its powers, the complainant distinguished between (i) OLAF's designating him as a 'person concerned', and (ii) OLAF's inquiries with regard to him in the framework of an internal investigation. In the following, the Ombudsman will consider both aspects in turn.

Whether OLAF was entitled to consider the complainant as a 'person concerned'

46. OLAF initially based itself on Article 4(2) of the Regulation, when summoning the complainant to testify. Following the complainant's objection, it apologised for choosing a wrong



legal basis and, invoking Article 4(3)(2) of the Regulation, it invited the complainant for an interview. The complainant objected once again. OLAF then informed him that the legal basis for the proposed interview was Article 4(3) interpreted "*in a broader sense*". In the course of the Ombudsman's inquiry, OLAF submitted that Article 4(3)(2) of the Regulation, in conjunction with Article 5(3) of Regulation 2185/96, served as the legal basis for inviting the complainant to attend an interview.

47. In view of the above, the Ombudsman will analyse and assess whether Article 4(3)(2) of the Regulation alone, or possibly in conjunction with Article 5(3) of Regulation 2185/96, empowered OLAF to invite the complainant to be heard as a witness.

48. It emerges from Article 4(3)(2) of the Regulation that OLAF may ask an individual "*to supply such information as it may consider pertinent to its investigations*", provided this individual can be considered a 'person concerned'. The Ombudsman, therefore, needs to assess whether OLAF was entitled to consider the complainant a 'person concerned' within the meaning of Article 4(3)(2) of the Regulation. At the outset, the Ombudsman considers that Article 4(3)(2) of the Regulation does not limit OLAF's respective power to a specific point in time in an investigation. The complainant's submission, therefore, that OLAF did not invite him to attend an interview until the final phase of its investigation is immaterial when analysing whether OLAF could lawfully do so under Article 4(3)(2) of the Regulation.

49. The parties agree that the Regulation does not define the term 'person concerned'. In order to assess the complainant's allegation, the Ombudsman is, therefore, required to present his own interpretation of Article 4(3)(2) of the Regulation. In so doing, he is mindful of the fact that, pursuant to Article 19 of the Treaty on European Union, the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. There can thus be no doubt that it is the Court, and the Court alone, which can authoritatively interpret EU law.

50. The Ombudsman considers that, in order to arrive at a correct interpretation of the expression 'any person concerned', the legislative context of Article 4(3)(2) of the Regulation needs to be taken into account.

51. Article 3 of the Regulation defines OLAF's powers in **external investigations**. External investigations are administrative investigations outside the Union institutions and bodies, undertaken for the purpose of detecting fraud or other irregular conduct by natural or legal persons [12]. Article 3 of the Regulation stipulates that OLAF shall exercise the powers conferred on the Commission by Regulation 2185/96, in order to carry out on-the-spot inspections and checks. Moreover, it shall carry out inspections and checks in the Member States (and, under certain conditions, in third countries), as provided for in Article 9(1) of Regulation 2988/95, and in the sectoral rules referred to in Article 9(2) of that Regulation. Article 3 of the Regulation, in conjunction with Regulations 2185/96 and 2988/95, therefore, endow OLAF with a number of investigative powers vis-à-vis third parties [13]. These powers range from on-the-spot checks to less intrusive methods, such as checking documents. In the Ombudsman's view, OLAF's powers in external investigations would appear to include requesting information from third parties who may hold information relevant to an external



investigation. It would, furthermore, appear from Article 9 of Regulation 2988/95 that OLAF could enforce relevant requests and, to this end, rely on the assistance of the Member States.

52. Article 4 of the Regulation provides for specific rules on **internal investigations**, that is to say, administrative investigations within the EU institutions, bodies, offices and agencies. Article 4(2) of the Regulation provides for powers of investigation vis-à-vis *the institutions, bodies, offices and agencies*. Thus, OLAF may, for instance, demand access both to information held by them and to their premises; inspect their accounts; and request oral information from their staff members. Article 4(3) of the Regulation details OLAF's powers vis-à-vis 'economic operators concerned' and 'persons concerned' *outside the institutions, bodies, offices and agencies*. As regards '**economic operators concerned**', OLAF may, under the conditions and **in accordance with Regulation 2185/96**, carry out on-the-spot inspections at their premises, in order to obtain access to information relating to possible irregularities which such operators might hold. As regards '**any person concerned**', OLAF may ask them to supply certain information.

53. Both in relation to "*any person*" and "*economic operators*", Article 4(3) of the Regulation specifies OLAF's powers by reference to their being 'concerned'. The question is, therefore, whether Article 4(3) of the Regulation thereby limits OLAF's powers to persons or economic operators **who are under suspicion**.

54. As regards 'economic operators', Article 5 of Regulation 2185/96 endows OLAF with the following powers: OLAF may carry out on-the-spot checks and inspections on (i) "*economic operators to whom Community administrative measures and penalties pursuant to Article 7 of Regulation (EC, Euratom) No 2988/95 may be applied, where there are reasons to think that irregularities have been committed*" and, (ii) "[w] *here strictly necessary in order to establish whether an irregularity exists*", on "*other economic operators concerned, in order to have access to pertinent information held by those operators on facts subject to on-the-spot checks and inspections*". It emerges from Article 5 of Regulation 2185/96, read in conjunction with recital 13 of that Regulation, that OLAF's relevant powers extend to economic operators under suspicion and, under certain circumstances, also to economic operators who are not under suspicion.

55. The notion of 'economic operators concerned', as used in Article 5 of Regulation 2185/96, encompasses economic operators under suspicion, and economic operators who are not under suspicion. Therefore, the reference to their being 'concerned' does not restrict OLAF's powers to economic operators who are under suspicion. This having been said, there appears to be no reason to interpret the reference to being 'concerned', within the context of 'any person', differently and/or in a more restrictive manner. Consequently, an interpretation which takes into account Article 5 of Regulation 2185/96 supports the view that OLAF's powers in relation to 'any person concerned' extend to persons who are under suspicion, and to persons who are not. This interpretation is corroborated by the fact that the purpose of Article 4(3) of the Regulation would appear to be to give OLAF the power to have access to information pertinent to its investigation (see also Article 5 of Regulation 2185/96). This suggests that Article 4(3) should be interpreted as giving OLAF the power to ask for information from those third parties who



might hold relevant information, regardless of whether they are under suspicion or not. At the same time, the Ombudsman notes that Article 4(3)(2) only refers to the possibility to ask 'any person concerned' for information that might be relevant. It does not clearly state that the addressees of such requests are obliged to reply to them. At first sight, and on the basis of a literal interpretation, it would appear that, unlike in external investigations, OLAF does not have the power to enforce requests for information. It should be noted, however, that the complainant stated, without being contradicted by OLAF, that he offered to reply in writing to any questions OLAF might have. There is, therefore, no need further to examine the question of whether requests for information made on the basis of Article 4(3)(2) of the Regulation need to be complied with.

56. The Ombudsman's provisional conclusion is, therefore, that a systemic interpretation of Article 4(3)(2) of the Regulation suggests that OLAF may ask individuals for information it may consider pertinent to its investigations, regardless of whether those individuals are or are not under suspicion. It follows that a person is not necessarily under suspicion if OLAF asks him or her for information.

57. The Ombudsman realises that his conclusion would be different if OLAF had issued internal instructions for a different interpretation of 'any person concerned'. In his submissions, the complainant referred to the definition of 'person concerned' in the 2007 version of the OLAF Manual. According to that definition, a 'person concerned' is a person under suspicion of having committed acts investigated by OLAF. If this definition is applied to the interpretation of Article 4(3)(2) of the Regulation, it would lead to the conclusion that the said provision could not serve as the legal basis for requesting information from the complainant, given that OLAF submitted that the latter had never been the subject of any OLAF investigation, and that it had never been its intention to investigate him. However, apart from submitting that the meaning of 'any person concerned' in Article 4(3)(2) of the Regulation differed from the definition of 'person concerned' in the 2007 version of its Manual, OLAF also pointed out that the latter definition was not contained in the 2005 version of the Manual, which was applicable at the time of the complainant's invitation. The Ombudsman agrees with OLAF that the 2005 version of the OLAF Manual must be considered as the relevant edition in relation to the complainant's invitation, which was made in 2006, given that the 2007 version of the Manual was not published until well after that date. Furthermore, in certain places, the 2005 version of the OLAF Manual refers to a 'person concerned', notably in relation to OLAF's internal investigations [14]. However, it does not define this expression. Moreover, the Ombudsman is not convinced that the few references to this expression in the 2005 version of the OLAF Manual allow the conclusion to be drawn that it refers to persons under suspicion. Likewise, the term 'interested party', as used in the 2005 version of the OLAF Manual, does not shed any light on the interpretation of 'any person concerned'. The 2005 version of the OLAF Manual does not, therefore, provide any guidance on how the expression 'any person concerned' should be interpreted within the meaning of Article 4(3)(2) of the Regulation.

58. The Ombudsman notes that the current version of the OLAF Manual (dated 1 December 2009) provides a definition of 'person concerned'. It clearly emerges from this definition, quoted in paragraphs 24 and 25 above, that a 'person concerned' is an individual or an economic



operator who is **suspected of having committed an irregularity or fraud**. In the course of the inquiry, OLAF explained that it started to include this definition in its Manual from 2007 onwards. At the same time, it emerges from OLAF's submissions that a 'person concerned' within the meaning of Article 4(3)(2) of the Regulation is **not necessarily under suspicion**. It is true that OLAF pointed out that the definition contained in the OLAF Manual from 2007 onwards differs from the notion of 'any person concerned' in Article 4(3)(2) of the Regulation. Irrespective of whether this is indeed the case, the fact remains that anyone asked by OLAF to provide information on that basis, and to whom the 2007 or a later version of its Manual applies, could easily be given the impression that he or she is indeed under suspicion. Given the absence of a definition of 'person concerned' in the Regulation, it would appear only logical to assume that a recipient of a request for information would be likely to consult the OLAF Manual in order to learn more about his or her legal position. In this context, it is worth recalling that, according to its preface, the OLAF Manual contains important instructions for investigators. If someone who receives a request for information consults the relevant definition in the OLAF Manual, he or she would inevitably conclude that they are under suspicion, given that the definition in the OLAF Manual does not clarify that it differs from the homologous expression in Article 4(3)(2) of the Regulation. The Ombudsman is aware that this aspect is not covered by the present allegation, which relates to events predating OLAF's 2007 Manual. However, he would like to take the opportunity of using this draft recommendation to draw OLAF's attention to the fact that the definition of 'person concerned' contained in the current version of its Manual is bound to give rise to misunderstandings. In the given context, the Ombudsman recalls that OLAF itself acknowledged that, in the complainant's case, it might have been the cause of an ambiguous situation (see paragraph 33 above). In the Ombudsman's view, such misunderstandings could easily be avoided if appropriate changes were made to the Manual. Alternatively, when OLAF writes to individuals asking them to provide information on the basis of Article 4(3)(2) of the Regulation, it could at least inform the addressee(s) that being treated as a 'person concerned' does not mean that they are under suspicion. Given that this aspect is not part of the present inquiry, the Ombudsman may consider opening an own-initiative inquiry into the matter.

59. Having established that Article 4(3)(2) of the Regulation empowers OLAF to ask someone in the complainant's situation to provide information it considers pertinent to an investigation, the question remains whether it also empowers OLAF lawfully to invite such a person to be heard as a witness. In this regard, OLAF submitted that the use of Article 4(3)(2) of the Regulation depends on the context and circumstances of the case. It referred to the purpose of that provision, which is to enable its staff to verify and gather further information. It also pointed out that, "*if needed*", it could indeed be used as a legal basis for inviting witnesses from outside the EU institutions, bodies, offices and agencies to attend an interview. The Ombudsman recalls that OLAF withdrew its original summons when the complainant objected to being called as a witness. Instead, it invited him to an interview on the basis of Article 4(3)(2) of the Regulation. It appears from its submissions, however, that OLAF believes that Article 4(3)(2) of the Regulation may serve as a legal basis for hearing a 'person concerned' as a witness. In light of the foregoing, the Ombudsman will, therefore, consider whether OLAF has the power (i) to invite a 'person concerned' for an interview, and/or (ii) to hear such a person as a witness.

60. The Ombudsman recalls that Article 4(3)(2) of the Regulation empowers OLAF to ask 'any



person concerned' *to supply such information as it may consider pertinent to its investigations* . Article 4(3)(2) of the Regulation, therefore, clearly empowers OLAF to ask a 'person concerned' to provide certain information. However, the Ombudsman considers that there is nothing to suggest that it could serve as a legal basis for inviting a 'person concerned' to attend an interview at OLAF's headquarters in Brussels. When interpreting Article 4(3)(2) of the Regulation, two possibly conflicting interests need to be taken into account. First, OLAF's interest in having all the powers it needs to carry out its mandate, and second, the interests of the persons to whom OLAF addresses its requests for information. As shown above, the Ombudsman considers that Article 4(3)(2) of the Regulation can be interpreted as enabling OLAF to request potentially relevant information for the purpose of internal investigations from persons who are not suspected of any wrongdoing themselves. However, if Article 4(3)(2) of the Regulation were to be interpreted in such a way as to mean that OLAF has rights which go beyond sending requests for information, the rights and interests of a 'person concerned' would not be adequately safeguarded. As seen above, such a person could be anybody holding information which OLAF considers pertinent to an investigation. The literal interpretation of Article 4(3)(2) of the Regulation leads to the conclusion that it does not provide a basis for inviting, or even mandating persons who might possess useful information to attend an interview at OLAF's premises in Brussels. There is nothing to suggest that this interpretation is unsatisfactory or inadequate. It should be recalled that OLAF itself has acknowledged that the complainant was entitled to refuse to give testimony.

61. The Ombudsman considers it useful to add, however, that the above finding would not necessarily prevent OLAF from inviting a 'person concerned' for an interview, provided that it makes it clear that there is no legal obligation for the addressee to comply with such a request. However, OLAF's letters to the complainant contained no such information.

62. The Ombudsman considers that, since there is no legal basis for inviting a 'person concerned' for an interview without previously informing such a person that they are free to accept or decline that invitation, it follows that Article 4(3)(2) cannot serve as a legal basis to invite a 'person concerned' to be formally heard as a witness, either.

63. For the above reasons, the Ombudsman concludes that Article 4(3)(2) alone, or in conjunction with other applicable provisions of the Regulation, did not provide a legal basis for inviting the complainant to attend an interview. On that basis, therefore, the Ombudsman concludes that OLAF was not entitled to invite the complainant to be heard as a witness either.

Whether OLAF otherwise made, or intended to make, unlawful inquiries about the complainant

64. In its letters to the complainant dated 23 March and 26 April 2007, OLAF stated that it had no intention " *at this time to conduct any further enquiries* " [15] concerning him. According to the complainant, these statements implied that OLAF reserved the right to make inquiries regarding him at a later date. The complainant considered that it had no right, at any time, or whatsoever, to make inquiries relating to him in the framework of an internal investigation. He



also stated that OLAF had collected information about him. The Ombudsman notes that, in the course of his inquiry, OLAF clarified its statements, and the fact that, apart from a standard check in order to assess the reliability of the source, it did not make any inquiries relating to the complainant. It also stated that it had never been its intention to investigate the complainant. OLAF acknowledged that the wording used may have led to a misunderstanding, for which it apologised. OLAF also stated that, in future correspondence, it would take greater care to avoid the use of wording which could be misinterpreted.

65. The complainant accepted OLAF's apology and considered this issue to be settled.

66. In view of OLAF's apology, which the complainant accepted, the Ombudsman considers that there is no need for further action on his part in relation to this aspect of the case.

Conclusions in relation to the complainant's first allegation and claim

67. In view of the above, the Ombudsman concludes that, by designating the complainant as a 'person concerned' and, on this basis, inviting him for an interview, OLAF exceeded the limits of its powers. This constitutes an instance of maladministration. The Ombudsman, therefore, taking into account the complainant's claim, makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. As regards the complainant's second allegation

Arguments presented to the Ombudsman

68. The complainant alleged that, contrary to the content of its letter dated 19 October 2006, OLAF failed to give its opinion on the conduct of Mr X., Head of Unit at the Commission. According to the complainant, the latter forwarded the complainant's communications with the Commission's services to Parliament, even though it was clear that this was not what the complainant intended.

69. In its opinion, OLAF submitted that it did not promise, in its letter to the complainant dated 19 October 2006, to give its opinion on Mr X.'s conduct. It also pointed out that its task was to establish facts in the course of an investigation, and not to "*give its opinion*". In so far as the complainant's allegation could be understood as a request for OLAF to open an investigation into the Head of Unit's alleged wrongdoing, OLAF recalled that the complainant had no "*right to have an OLAF investigation opened against anyone*". OLAF underlined the fact that it enjoyed a margin of discretion when deciding to open an inquiry.

70. In his observations, the complainant maintained that OLAF made the promise referred to in paragraph 69. He stated that his request was included as point 4 in OLAF's letter dated 19 October 2006. OLAF announced that it would reply to all the points listed in that letter within six



weeks. He insisted that he did not suggest that OLAF should open an investigation into Mr X's conduct, which would not have been necessary in any event, given that the relevant facts were already known to OLAF.

The Ombudsman's assessment

71. The Ombudsman recalls that, in his draft recommendation in complaint 1450/2007/(WP)BEH, he asked OLAF to reply, to the extent that it had not already done so, to the questions raised in the complainant's letter of 27 September 2006. In its letter dated 19 October 2006, OLAF summarised the complainant's questions and requests in 10 bullet points, and promised to send the complainant separate replies concerning the various issues raised within six weeks [16]. In its detailed opinion concerning complaint 1450/2007/(WP)BEH, OLAF submitted that it had already provided full replies to points 1-3 and 8-9 listed in its letter dated 19 October 2006. As regards points 4-7 (certain issues concerning OLAF's investigation), OLAF provided replies in its detailed opinion. In his observations on OLAF's detailed opinion, the complainant acknowledged that OLAF had replied to the questions raised in his letter dated 27 September 2006, but he considered OLAF's replies to be unsatisfactory. He also criticised the fact that its replies were delayed by over three years. He considered that OLAF had, nevertheless, implemented the relevant part of the Ombudsman's draft recommendation, and that no further action on the Ombudsman's part was, therefore, required.

72. Given that, in the course of the Ombudsman's inquiry into complaint 1450/2007/(WP)BEH, OLAF provided the complainant with a reply to the fourth point mentioned in its letter dated 19 October 2006, concerning OLAF's views on the conduct of Mr X., Head of Unit, the Ombudsman sees no need for further action on his part in relation to the complainant's second allegation.

C. As regards the complainant's third allegation

Arguments presented to the Ombudsman

73. The complainant submitted that it was not OLAF's Director-General ('the Director-General') who made the decision to open or close investigation OF/2003/0026, but rather the Director in charge of investigations and operations at OLAF. According to the complainant, such a delegation of power is contrary to Article 5 of the Regulation, which reserves certain powers to the Director of the Office and thus, to the Director-General. The complainant drew further support for his view from Article 12(6) of a Commission proposal for an amendment of the Regulation [17]. The amendment foresees the possibility of such delegation of powers. However, the Commission proposal had yet to be adopted by the Council and Parliament. Against this background, he alleged that, by delegating the powers to open and close investigations to the Director in charge of investigations and operations, who is not the "Director of the Office" within the meaning of the Regulation, OLAF failed to comply with Article 5 of the



Regulation.

74. In its opinion, OLAF drew attention to its hybrid nature, arising from the fact that it is an administrative organ, independent in its investigative function and, at the same time, a Directorate-General of the Commission. It further explained that the head of OLAF holds the rank of a Director-General, in line with the Commission's hierarchical structure. The Directorate-General OLAF is divided into Directorates headed by Directors. OLAF stated that, by virtue of Article 6(4) of Commission Decision 1999/352 [18], Commission decisions concerning the Commission's internal organisation also apply to OLAF.

75. OLAF further submitted that the Investigations and Operations Executive Board ('the Board') makes recommendations to the Director-General regarding case-handling decisions. The Director-General is responsible for taking decisions on matters which are brought before the Board, in particular, in relation to the opening and closing of investigations. For practical purposes, however, this responsibility has been delegated to a Director in charge of investigations and operations, under the supervision of the Director-General, "*though in some instances the Director-General himself takes the decision.*" OLAF finally pointed out that the delegation of tasks within an administrative structure was part of its daily business and, as such, did not constitute an instance of maladministration.

76. In his observations, the complainant stated that his complaint related to the delegation of certain powers which, by virtue of Article 5(2) of the Regulation, were explicitly reserved to the Director-General. His complaint did not, therefore, concern a mere "*delegation of tasks*", as stated in OLAF's opinion. Given that, pursuant to Article 5(2) of the Regulation, the power to decide to open an investigation lies with the Director of the Office, in the absence of a specific provision on closing an investigation, it has to be assumed that this power also lies with the Director of the Office. According to the complainant, this was not contradicted by OLAF.

77. The question, therefore, was whether, and if so, to what extent, the Director-General could delegate his respective powers.

78. Noting OLAF's reference to Article 6 of Commission Decision 1999/352, the complainant stated that, whereas this provision allowed for a delegation of powers in personnel and budgetary matters, it did not do so in relation to investigations. The complainant furthermore drew attention to the Commission's reply to written question E-3208/07 of 22 June 2007 concerning the "*Transfer of powers to OLAF staff members*". According to the complainant, in its reply, the Commission explained that its rules of procedure are fully applicable, and they provide that an OLAF Director may deputise if the Director-General is absent, on mission, on leave, or in the event of illness.

79. However, it appeared from OLAF's opinion that the Director-General transferred his respective powers to a Director on a permanent basis. The Director-General appeared to take decisions himself only in some cases. This begs the question why this situation was apparently not reported in the Commission's reply to the written question. Moreover, it raised the question as to why OLAF appeared to insist that it was not obliged to observe the applicable rules. The



consequences of such conduct were made clear in the judgment of the General Court in Case T-48/05 [19] , in which the Commission was ordered to pay damages for OLAF's failure to respect legal procedures.

80. In his first request for further information, the Ombudsman asked OLAF a number of questions designed to clarify the legal basis upon, and the extent to, which OLAF delegates the Director-General's power to open and close investigations to a Director.

81. In its reply, OLAF essentially submitted that this delegation of powers is a matter of its internal administrative organisation, the basis of which is the internal organisational power of the Director-General [20] . According to OLAF, the Director-General may delegate certain powers to staff members in order to secure the smooth functioning of the office, but such delegated powers can be withdrawn at any time.

82. OLAF further explained that the power to pursue investigations is linked to the *function* of Director-General, but not to his person as such. Thus, his respective powers could be delegated. Pursuant to Article 5 of the Regulation, investigations shall be opened by a decision of the Director of the Office. In OLAF's view, a decision taken by a delegated staff member, under the authority of the Director-General, retains the character of a decision of the Director of the Office. If this delegation respects the condition that the Director-General keeps control, and is able to substitute his own decision for the delegated one at any time, this practice could by no means constitute an instance of maladministration. If this were otherwise, the swift and smooth functioning of decision-making could not be organised effectively. OLAF added that, from 2003 until 2008, on average, 225 cases were opened, and 283 cases were closed per year.

83. OLAF also submitted that the Commission's reply to written question E-3208/07 concerned the post of Deputy Head of OLAF, that is, one of OLAF's Directors who was designated to deputise for the Director-General in his absence, in line with the principle of continuity of service. OLAF explained that the Deputy Head of OLAF has no specific powers to open or close investigations. However, in the Director-General's absence, he can act in the latter's name, and under his authority. The Commission's reply to written question E-3208/07 did not, therefore, concern the delegation of certain of the Director-General's powers to one or more staff members of the Office.

84. OLAF further submitted that deputising for its Director-General when he is prevented from exercising his functions is based on Article 6(4) of Commission Decision 1999/352 in conjunction with Article 24 of the Commission's Rules of Procedure " *applicable at that time* " [21] . OLAF also stated that Article 24 was subsequently amended, and now reads as follows: " *Continuity of Service - The Members of the Commission and the departments shall ensure they take all appropriate measures to ensure continuity of service, in compliance with the provisions adopted for that purpose by the Commission or the President.* "

85. As regards the purpose of Article 12(6) of the Commission's proposal for an amendment of the Regulation, OLAF submitted the following: " *In order to make the arrangements for the deputising of the Director-General more visible and transparent, on the one hand taking into*



account the new Article 24 of the Commission's Rules of Procedure and on the other hand experience based on operational practice which has shown that it is useful to allow the Director-General to delegate the exercise of certain of his functions to one or more members of the staff of the Office it was decided to insert a new provision (Article 12(6)) to that effect ...".

86. In relation to the issue as to the precise instances in which the Director-General himself decides to open or close investigations, OLAF submitted that, in principle, it is always the Director-General who takes the decision, since he is the person who is ultimately responsible. In this context, OLAF referred to the latter's discretion. OLAF further explained that, in practice, it is the Director-General himself who takes a decision in urgent and sensitive cases, and in cases where the Board cannot reach agreement on a recommendation. At the same time, OLAF emphasised that these were merely examples, bearing in mind that the Director-General could, at any time, substitute his own decision for a delegated one.

87. In his observations, the complainant pointed out that the MEP who submitted written question E-3208/07 asked about all delegations of powers within OLAF, and not only in relation to the Deputy Head of OLAF, as OLAF sought to argue. In its reply to the MEP's question, the Commission gave the impression that powers could be delegated only if the Director-General was prevented from exercising the powers himself. It appeared from OLAF's reply, however, that the Director-General had permanently delegated certain powers to other members of OLAF's staff, and not only for instances when he himself was prevented from acting.

88. Referring to the average numbers of cases opened and closed by OLAF, the complainant concluded that the Director-General would have to deal with two to three inquiries per day. He queried whether this would be too much to expect of a highly-paid, senior civil servant in charge of an Office, whose main task is to conduct inquiries.

89. The complainant furthermore submitted that OLAF's reply suggested that there were no clear criteria or procedures governing when the Director-General should exercise his powers in person, or delegate them to other staff members instead. Against this background, he took the view that it might be useful to ask OLAF to submit copies of decisions made by the Director-General in which he delegated his powers.

90. In his supplementary observations, the complainant essentially submitted that the 2009 version of the OLAF Manual confirmed that the Director General's practice of delegating powers is extensive. However, until such time as the Council and Parliament adopt the Commission's proposal to amend the Regulation which makes the delegation of powers possible, such delegation would have to be considered unlawful. The complainant also submitted that if actions challenging OLAF's investigations for procedural errors were brought before a court, they would stand a good chance of success, bearing in mind the Civil Service Tribunal's judgment in Case F-80/08 [22] .

The Ombudsman's assessment leading to a draft recommendation



Preliminary remark

91. At first sight, the complainant's argument regarding the scope of written question E-3208/07 could be understood as being directed at the Commission. As such, it would not form part of the present inquiry, which concerns OLAF. At the same time, the issue here is whether, and to what extent, the Director-General may delegate certain of his powers to other OLAF staff members. The complainant's argument should, therefore, be interpreted as relating to the question as to whether or not OLAF provided a convincing explanation of the legal basis for the delegation of powers by the Director-General. In light of these considerations, the Ombudsman sees no need to extend the scope of his present inquiry to another institution.

The Ombudsman's assessment

92. From the parties' submissions, the Ombudsman considers that the present dispute is clearly not about a temporary delegation of the Director-General's powers to the Deputy Head of the Office [23] , or any other member of OLAF's staff, in the event of the Director-General being prevented from exercising his functions. Instead, it is about a general delegation of certain powers from the Director-General to OLAF staff members, in particular, to the Director in charge of investigations and operations. Moreover, the parties appear to agree that the present allegation extends to OLAF's general practice in this regard, as well as to its practice as regards the opening and closing of its internal investigation in case OF/2003/0026.

93. The question to be addressed by the Ombudsman is whether, and to what extent, the Director-General may be entitled to delegate the power to open and close investigations to other OLAF staff members, in particular, to the Director in charge of investigations and operations. The complainant pointed out that, since the Regulation does not contain a specific provision as to who is empowered to close OLAF investigations, given that the Director-General has the power to open investigations, it had to be assumed that he also has the power to close them. Given that this view has not been contradicted by OLAF, the Ombudsman, in the following, will not distinguish between the power to open and close investigations.

94. In order to provide a factual basis for an assessment of the question under review here, it is useful to analyse in more detail OLAF's relevant practice, as this has emerged from OLAF's submissions. In its opinion, OLAF submitted that the responsibility for opening and closing investigations was delegated, under the supervision of the Director-General. At the same time, it pointed out that, in some instances, the Director-General himself takes such decisions. Although it referred to a "*delegation of a responsibility*", it would appear that OLAF in effect acknowledged that the power to take relevant decisions was delegated to a Director, given that it stated that the Director-General takes the decision himself only in some instances. While OLAF maintained that a decision taken by the Director keeps the character of a decision of the Director-General, who could any time substitute his decision for a delegated decision, it emerges from OLAF's submissions that, in cases where the Director-General has not reserved



decisions for himself, the Director takes *decisions which have not previously been approved by the Director-General*. As pointed out by the complainant, this practice appears to be confirmed by the current version of the OLAF Manual which contains the following passage: "*The Director-General is responsible for accepting recommendations and taking decisions on case-related matters referred to the Board. For practical purposes, the responsibility is delegated to Directors A or B, under the supervision of the Director-General, although in some instances the Director-General may choose to intervene personally.*" [24]

95. In support of its above practice, OLAF essentially invoked two separate reasons: first, the Director-General's internal organisational powers and OLAF's internal administrative organisation, and, second, certain provisions governing the Commission's internal organisation.

96. As regards the first reason invoked by OLAF, the Ombudsman notes at the outset the complainant's observation that the amount of work triggered by handling inquiries was not a valid reason for OLAF's Director-General not to take relevant decisions himself. In the Ombudsman's view, the question as to whether or not the Director-General may delegate certain of his powers to other OLAF staff members is primarily a legal question, and must, therefore, be assessed by reference to the applicable legal framework. Only to the extent that the legal framework refers to the workload, or other factual criteria as a precondition for justifying a delegation of powers, would such criteria have to be taken into account. In the course of the inquiry, OLAF submitted concrete figures as to the average number of inquiries it opens and closes each year. However, in view of the above, these figures have no direct bearing on the assessment of the legality of OLAF's internal arrangements for taking decisions on the opening and closing of investigations.

97. The Ombudsman recalls that the Court of Justice, in its case-law, distinguishes between a delegation of powers and a delegation of signature. The latter encompasses situations in which an official empowered to take a decision approves a decision and, subsequently, authorises another official merely to sign that decision. In such a case, the official authorised to sign does not act under a delegation of powers, but merely under an authorisation to sign or, in other words, under a delegation of signature. [25] In line with the case-law of the Court of Justice, a delegation of signature "*constitutes a measure concerning the internal organisation of the services of the Commission*" [26] and, as such, does not require a specific legal basis. However, as has been seen above, the Director in charge of investigations and operations takes decisions which have not previously been approved by the Director-General. Such a measure cannot be justified by mere reference to the internal organisation of a service. Instead, the Ombudsman is convinced that, against the background of the case-law of the Court of Justice, such a delegation of powers requires a basis in law in order to be legal.

98. In the Ombudsman's view, even if, as submitted by OLAF, one were to assume that every decision taken is ultimately the responsibility of the Director-General, this would not change the above assessment, given that OLAF made it clear that it is the Director in charge of operations and investigations himself who takes a decision. This would also clearly emerge from the decisions opening and closing OLAF's internal investigation in case OF/2003/0026, both of which were signed by the Director in charge of operations and investigations, without any



indication that the decisions had been given the prior approval of the Director-General. The Ombudsman, moreover, does not see how this reasoning would be affected by OLAF's argument that the decision-making power pertains to the function, and not to the person of the OLAF Director-General.

99. It follows from the above that OLAF's reference to its internal administrative organisation cannot justify the delegation of powers under review in this case.

100. The Ombudsman understands that the second reason OLAF relied on as a basis for its practice in delegating powers is based on Article 24 of the Commission's Rules of Procedure, as amended. It is true, as pointed out by OLAF, that Article 24 of the Commission's current Rules of Procedure obliges Commission departments to take all appropriate measures to ensure continuity of service. By contrast, Article 24 of the Commission's Rules of Procedure adopted in 2000 contained provisions on deputising for Directors-General, Heads of Unit and "*any other superiors*" in the event that they are prevented from exercising their functions. The fact that the current Article 24 (see paragraph 81 above) does not reflect the contents of the old Article 24, however, is not to say that the Commission's current Rules of Procedure would have disposed of provisions on deputising, and would instead rely on the principle of continuity of service. In fact, Articles 25-27 of the Commission's current Rules of Procedure retain and expand on the provisions on deputising, as formerly contained in Article 24 of the Commission's old Rules of Procedure. OLAF's view that Article 24 of the Commission's Rules of Procedure could as such serve as a legal basis for its practice is consequently not well-founded. Moreover, Article 27(1) of the Commission's current Rules of Procedure contains a provision on deputising arrangements for Directors-General. However, these arrangements only apply in cases where a Director-General is prevented from exercising his functions. If Article 24 of the Commission's current Rules of Procedure were indeed to be interpreted as allowing a general delegation of powers of the Director-General, the deputising arrangements foreseen by Article 27(1) of the Commission's current Rules of Procedure would be deprived of any practical effect. It follows that OLAF cannot invoke the Commission's current Rules of Procedures to justify delegating powers, unless such delegation is limited to cases where the Director-General is prevented from exercising his functions.

101. The Ombudsman furthermore recalls that Article 6(4) of Commission Decision 1999/352 provides that Commission decisions concerning its internal organisation shall apply to OLAF "*in so far as they are compatible with the provisions concerning the Office*". The rules on deputising set out in the Commission's Rules of Procedure are based on the idea that (i) either the deputy of the official prevented from exercising his functions, or (ii) another specially designated official shall deputise. In the event that the President of the Commission is prevented from exercising his functions, they shall be exercised by one of the Vice-Presidents or Members of the Commission (Article 25 of the Commission's Rules of Procedure). Given that Members of the Commission are appointed in the same way, from a legitimacy point of view, it makes no difference which Member of the Commission takes a particular decision.

102. However, the situation is different for OLAF's Director-General. Pursuant to Article 12(2) of the Regulation, the Commission appoints OLAF's Director-General after consultations with



Parliament and the Council. The Director-General's legitimacy is, therefore, special as compared to other staff members of OLAF. It should further be noted that the Regulation specifically stipulates that certain decisions, such as a decision to open an inquiry, must be taken by OLAF's Director. In these circumstances, the legislator could have been expected to make provision for the possibility of a general delegation of these powers to other members of OLAF's staff, if that had been its intention. However, no such provision was made. Even if OLAF's argument, namely, that its delegation of powers is justified in that it ensures continuity of service (in line with Article 24 of the Commission's Rules of Procedure, as amended), were to be considered convincing, in the Ombudsman's view the resulting practice would not be compatible with " *the provisions concerning the Office* " (Article 6(4) of Commission Decision 1999/352).

103. OLAF argued that Article 12(6) of the Commission's proposal for an amendment of the Regulation, which provides for the possibility of a delegation of powers, would merely make current deputising arrangements more visible and transparent. The Ombudsman considers that this argument must be rejected as unconvincing.

104. In view of the above, the Ombudsman concludes that OLAF did not establish that its practice of delegating the power to open and close decisions from the Director-General to the Director in charge of investigations and operations is in accordance with the law. This view applies to the decisions opening and closing investigation OF/2003/0026, both of which were signed by the Director in charge of operations and investigations [27] . It also applies to OLAF's general practice, which it outlined in the course of the present inquiry. This constitutes an instance of maladministration. The Ombudsman, therefore, makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

D. The draft recommendation

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

OLAF should acknowledge that Article 4(3)(2) of the Regulation does not empower it to invite a 'person concerned' to be heard as a witness. OLAF should, furthermore, apologise to the complainant for inviting him to an interview on that basis.

OLAF should reconsider its practice of delegating the power to open and close investigations from the Director-General to the Director in charge of operations and investigations.

The Institution and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 March 2011. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.



P. Nikiforos Diamandouros

Done in Strasbourg on 9 December 2010

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

[2] Regulation (EC) No 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.

[3] Article 4(2) of Regulation 1073/1999 reads as follows:

"Provided that the provisions referred to in paragraph 1 are complied with:

- the Office shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. The Office may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing,

- the Office may request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies. "

[4] Article 4(3)(2) of Regulation 1073/1999 reads as follows: *" The Office may, moreover, ask any person concerned to supply such information as it may consider pertinent to its investigations. ..."*

[5] *" I confirm that OLAF has no intention at this time to conduct any further inquiries about you. "* (Translation by the Ombudsman's services).

[6] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312, p. 1.

[7] Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ 1996 L 292, p. 2.



[8] OLAF Manual, p. 12-13 (<http://ec.europa.eu/dgs/olaf/legal/manual/OLAF-Manual-Operational-Procedures.pdf> [Link]).

[9] OLAF Manual, p. 12-13 (<http://ec.europa.eu/dgs/olaf/legal/manual/OLAF-Manual-Operational-Procedures.pdf> [Link]).

[10] The first sentence of Article 4(5) of the Regulation reads as follows: "*Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed.*"

[11] Emphasis added by the Ombudsman.

[12] OLAF Seventh Activity Report, 2006, p. 9.

[13] In the following, the term 'third parties' will be used to refer collectively to economic operators and persons outside the EU institutions and bodies.

[14] OLAF Manual (2005 version), p. 114 and 116. Although the 2005 version of the OLAF Manual no longer appears to be available on OLAF's website, the printed version of this version is in the public domain.

[15] Emphasis added by the Ombudsman.

[16] See paragraph 113 of the Ombudsman's decision on complaint 1450/2007/(WP)BEH.

[17] COM(2006)244 final. Article 12(6) reads as follows: "*The Director-General may delegate the exercise of certain of his functions under Articles 5, 6(3), 7b and 10(2) to one or more members of the staff of the Office by a written document specifying the conditions and limits governing the delegation.*" On 20 November 2008, Parliament approved the Commission's proposal as amended at the first reading (OJ 2010 C 16 E, p. 201). It appears that, since then, no agreement has been reached on the amendment of the Regulation.

[18] Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136, p. 20. Article 6(4) reads as follows: "*Commission decisions concerning its internal organisation shall apply to the Office in so far as they are compatible with the provisions concerning the Office adopted by the Community legislator, with this Decision and with the detailed rules implementing it.*"

[19] Case T-48/05 *Franchet and Byk v Commission* [2008] ECR II-1585.

[20] OLAF furthermore asserted that the delegation of powers is "*an administrative practice and a principle of administrative law*". According to OLAF, "[i]t is part of the organisational principles inherent" in an organisation like the Commission and "*part of the daily business*".

[21] Rules of Procedure of the Commission, C(2000) 3614, OJ 2000 L 308, p. 26. Article 24 of



this version of the Rules of Procedure reads as follows: " *Where a Director-General is prevented from exercising his functions, they shall be exercised by the most senior Deputy Director-General present, and in the event of equal seniority, by the one who is eldest, or, where this position does not exist, by an official designated by the Commission. If no such replacement is designated, the most senior subordinate present in the highest category and grade shall deputise, and in the event of equal seniority, the one who is eldest.*

A Deputy Head of Unit, where the position exists, shall deputise for the Head of Unit.

Where any other superior is prevented from exercising his duties, the Director-General shall designate an official in agreement with the Member of the Commission responsible. If no replacement is designated, the most senior subordinate present in the highest category and grade shall deputise, and in the event of equal seniority, the one who is eldest. "

[22] Case F-80/08 *Wenig v Commission* , Judgment of 30 November 2009 (not yet reported in the ECR).

[23] According to the Commission's reply to written question E-3208/07, the Deputy Head of the Office is one of OLAF's Directors designated to deputise for the Director-General in the latter's absence.

[24] OLAF Manual, p. 27 (<http://ec.europa.eu/dgs/olaf/legal/manual/OLAF-Manual-Operational-Procedures.pdf> [Link]).

[25] Case 8-72 *Vereeniging von Cementhandelaren v Commission* [1972] ECR 977, paragraphs 11-12; Case 55/69 *Cassella Farbwerke v Commission* [1972] ECR 887, paragraph 5; Case 52/69 *Ciba-Geigy v Commission* [1972] ECR 787, paragraph 5.

[26] Case 8-72 *Vereeniging von Cementhandelaren v Commission* [1972] ECR 977, paragraph 13; Case 55/69 *Cassella Farbwerke v Commission* [1972] ECR 887, paragraph 5; Case 52/69 *Ciba-Geigy v Commission* [1972] ECR 787, paragraph 5.

[27] The opening decision in investigation OF/2003/0026 contained the additional specification " *By order of the Executive Board* ", without this having an impact on the delegation of powers from the Director-General to the Director in charge of operation and investigations.