

15.10.2012

1183-2012-MMN-

**MORAIS BISMARQUE GASPAR Ana Gloria**E2012-163412

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**From:** [REDACTED]  
**Sent:** 15 October 2012 10:51  
**To:** EORegistry  
**Subject:** Complaint 1183/2012/MMN  
**Attachments:** Letter to Ombudsman THOR 2012 23709.pdf

Dear Sir,

For your attention, please find attached a letter signed by Mr Kessler regarding the above-mentioned subject.

Yours faithfully,

**Peggy White**

Assistant to Mr Wasmeier  
Legal Advice Unit

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EUROPEAN COMMISSION  
**EUROPEAN ANTI-FRAUD OFFICE (OLAF)**  
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15/10/2012



EUROPEAN COMMISSION

Thor 15. 10. 2012  
N° 23708

**European Anti-Fraud Office**

The Director General

**P. Nikiforos Diamandouros**

European Ombudsman

1 Avenue du Président Robert

Schuman

Strasbourg

FRANCE

Brussels,

C.4/SW/2012/D/

Subject: **Complaint 1183/2012/MMN**

Dear Mr Diamandouros,

In complaint 1183/2012 MMN, [REDACTED] claims that OLAF failed to give reasons for its decision to close the investigation into the alleged irregularities he reported. He also claims that he was directly affected by at least some of the alleged irregularities reported to OLAF. These two issues are addressed here.

**1. OLAF failed to give reasons for its decision to close the investigation**

[REDACTED] was a Temporary Agent employed by the FRA. He had a renewable contract of 4 years starting on 1.1. 2004, but he resigned on 31 October 2007. The EU Staff Regulations apply.

Article 22a of the EU Staff Regulations requires any official who becomes aware of certain facts during the performance of his duties, to report them to his hierarchy or to OLAF. These facts must give rise to a presumption of the existence of possible illegal activity, including fraud or corruption detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties and which may constitute a serious failure to comply with the obligations of officials of the Communities. In this case, [REDACTED] fulfilled his duty and informed OLAF in writing on 13-14 September 2007.

In two decisions, the European Ombudsman has clarified the whistleblower's right to be informed about the outcome of the investigation<sup>1</sup> and his right to be informed about the duration of the investigation.<sup>2</sup> [REDACTED] was informed in writing on 14.12.2007 that an investigation was supposed to be completed within 15 months at the latest.

Article 22b 1 (b) of the Staff Regulations implies that OLAF should contact an official reporting under Article 22a of the EU Staff Regulations, in order to inform him of the period of time needed to take appropriate action.

<sup>1</sup> Decision 1625/2002/IJH against the European Anti Fraud Office of 3.7. 2003.

<sup>2</sup> Decision 140/2004/(BB) PB against the European Anti Fraud Office of 6.6. 2005.



The OLAF Manual<sup>3</sup> applying in 2007 states '[U]pon receipt of information from a whistleblower, Unit 04 will advise the official in writing of his rights and obligations [...] and inform him of the period of time within which OLAF will take appropriate action. This must occur within 60 days from the date on which the official reported the concern. A letter to the official reporting information to OLAF should be sent.' This letter explains that OLAF will decide whether to open an investigation within two months. In this instance, OLAF fulfilled its obligation by informing ██████████ that it had closed the investigation. In February 2012, OLAF adopted Instructions to Staff on Investigative Procedures<sup>4</sup> (ISIP). Article 7(1) of the ISIP states that the Investigation Selection and Review Unit must inform the source of the Director-General's decision to dismiss the case.

No change is proposed to the status quo in the latest proposal to amend Regulation 1073/99. The following wording has been proposed '[W]here a member or staff member of an institution, body, office or agency, acting in accordance with Article 22a of the Staff Regulations, provides information to the Office relating to a suspected fraud or irregularity, the Office shall inform him or her of the decision whether or not to open an investigation into the facts in question.' If adopted, this will confirm existing practice.

There are several reasons why OLAF prefers not to justify its decisions to dismiss cases in detail. They include a lack of rules concerning the duty to justify the act of not opening an investigation, the confidentiality of investigations, the independence of the Director-General of OLAF, the lack of legal effect of the act and the fact that transparency is ensured through specific procedures. They are considered below.

#### (i) Lack of rules

The scope of the Code of Good Administrative Behaviour – Relations with the public does not extend to staff relations. This means that the duty to justify decisions in part 3 of the Code does not apply to staff relations. We must therefore turn to the Staff Regulations and the Rules applicable to other servants of the European communities for a duty by OLAF to justify the closing of an investigation. Neither the Staff Regulations nor the 2004 Communication of the Commission on whistleblowing<sup>5</sup> require OLAF's Director General to justify the opening or closing of an investigation to a whistleblower, although a duty to give reasons exists in other contexts (see for example Articles 51(2) and 55a(1) of the Staff Regulations). The proposed guidelines abrogating the 2004 Commission Communication on whistleblowing state that 'it should be noted that the whistleblower is entitled to be informed within 60 days of the time needed to take appropriate action, but it is up to OLAF and/or the Commission to determine the appropriate course of action'. This is in line with the rulings in ██████████ v Commission. A whistleblower who alleges that irregularities have taken place can under no circumstances oblige OLAF to launch an investigation of the allegations. The fact that OLAF did not tell the whistleblower what time limit had been set for the action needed was not prejudicial to the whistleblower.<sup>6</sup>

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<sup>3</sup> Version of 25.2.2005.

<sup>4</sup> [http://ec.europa.eu/anti\\_fraud/documents/about\\_us/instructions-to-staff-120201.pdf#page=1](http://ec.europa.eu/anti_fraud/documents/about_us/instructions-to-staff-120201.pdf#page=1)

<sup>5</sup> Document SEC (2004) 151/2 Comment améliorer l'application efficace des règles concernant les fonctionnaires qui dénoncent des actes répréhensibles ou des dysfonctionnements graves au sein des services ainsi que la protection de ceux-ci, Communication de M. Kinnock 6 février 2004.

<sup>6</sup> Order of the General Court of 22 March 2006 in Case T-4/05, ██████████ v Commission, p. 39, 44, and 46 confirmed with Order of the Court of Justice of 8 March 2007 in Case C-237/06 P, ██████████ v Commission.

(ii) Confidentiality of investigations

Investigations are confidential. Article 8(2) of Regulation No 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the officials or servants concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.<sup>7</sup> The communication of information forwarded or obtained in the course of internal investigations to persons other than those whose function require them to know can constitute an illegality that can incur liability of the Community.<sup>8</sup> In this context, OLAF prefers not to disclose the details of a case to a whistleblower.

(iii) Independence of the Director-General of OLAF

According to Article 6(1) of Regulation 1073/99, the Director of OLAF must direct the conduct of investigations. According to Article 12(3) of the same regulation, the Director of OLAF must neither seek nor take instructions from any government or any institutions, body, office or agency in the performance of his duties. For the Director General of OLAF to enter into a contradictory dialogue with a whistleblower in order to justify his decision not to open a case would compromise his independence. In this respect, OLAF is subject to the supervision of its Supervisory Committee, whose role it is to reinforce OLAF's independence by regular monitoring of the implementation of the investigative function (Article 11(1) of Regulation 1073/99).

(iv) Lack of legal effect

The duty to give reasons exists primarily to enable an administrative decision to be subjected to effective judicial review. This means that the decision must be capable of having binding legal effects. In this context, the Courts of Justice of the European Union ruled that the transmission of recommendations to a judicial authority by OLAF could not be annulled, because this act had no binding legal effects.<sup>9</sup> This is because such a transmission imposes no obligations, even of a procedural nature, on the authorities to which it is addressed. In the same way, the act of closing an investigation is one that cannot be challenged in court.

(v) Transparency ensured through specific mechanisms

The duty to give reasons is meant to ensure that decisions are carefully thought through, which in turn aids in the control of administrative discretion. The decisions of OLAF's Director General to open or close cases are carefully thought through. OLAF's discretion is circumscribed in internal rules for the opening of investigations, which ensure that all incoming information is subjected to the same tests and checks to determine whether or not it should lead to the opening of an investigation. The selection procedure for the opening of cases is detailed in ISIP (previously in the OLAF Manual), which is made public.

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<sup>7</sup> Judgment of the Civil Service Tribunal of 2 May 2007 in Case F-23/05, [redacted] v Commission, p. 161.

<sup>8</sup> Judgment of the General Court of 20 May 2010 in case T-261/09P, Commission v [redacted] and [redacted], para 63.

<sup>9</sup> Cases T-309/03 [redacted] v Commission and in T-193/04 [redacted] v Commission [2004] ECR-3575, paras 38 to 47; confirmed in appeal case C-521/04PR [2005] ECR I-3103, paras 28 to 34; T-215/02 [redacted] v Commission [2003] ECR II-1685, para 50 et seq; T-259/03 [redacted] v Commission [2007] ECR II-99.

This ensures the transparency of the Director's decisions. Articles 5 and 6 of ISIP spell out the selection procedure. Article 5(4) in particular states that when OLAF evaluates whether the information is sufficient to open an investigation or coordination case, consideration is given to the reliability of the source and the credibility of the allegations. In addition, all information collected during the selection process is taken into account in justifying the opening of an investigation or coordination case. The IPP (Investigation Policy Priorities) set out the criteria to be applied in determining whether an information falls within an established investigative priority. The Investigation Policy Priorities are reviewed and published annually in OLAF's Management Plan. All Commission DGs' Management Plans (including OLAF's) have been published.<sup>10</sup> Prior to this, the OLAF Manual showed the assessment criteria for the opening of an investigation.<sup>11</sup>

## **2. The claimant was directly affected by some of the alleged irregularities**

██████ claims that he was directly affected by at least some of the alleged irregularities reported to OLAF. ██████ does not say whether he means that he was affected by OLAF's procedure or whether he was affected by his employer's procedure towards him as a whistleblower. Any complaint relating to a lack of protection against retaliation is perhaps best addressed to the employer.

The following explanation may assist in relation to the possible effects of OLAF's procedure on ██████ OLAF's decision did not affect ██████ legal position. The act of closing an investigation had no legally binding effects on ██████ and thus was not capable of adversely affecting him. In *Strack v Commission*, the Court ruled that the guarantees offered (by the appointing authority) to the whistleblower under Articles 22a and 22b of the Staff Regulations are in no way undermined when OLAF decides to close the investigation opened on the basis of the information received as, under these circumstances, the whistleblower continues to be protected by the same guarantees if he meets the conditions set out in those Articles.<sup>12</sup> OLAF understands that the forthcoming Commission guidelines on whistleblowing will articulate the protection to be accorded to whistleblowers by their employers and welcomes this new approach.

OLAF understands that ██████ felt unsupported. Article 22a of the Staff Regulations states that an official has a duty to report wrongdoing, however neither the Staff Regulations nor the Commission Communication of 2004 makes provision for a whistleblower to receive independent advice and/or support. OLAF understands that this state of affairs is about to be rectified in guidelines abrogating the 2004 Commission Communication. OLAF views this development positively.

Yours sincerely,

████████████████████  
Giovanni KESSLER  
10 OCT 2012

<sup>10</sup> Please see [http://myintracomm.ec.europa.eu/corp/sg/en/spp/Pages/amp\\_overview.aspx](http://myintracomm.ec.europa.eu/corp/sg/en/spp/Pages/amp_overview.aspx).

<sup>11</sup> OLAF Manual, version of 25 February 2005, see 3.3.3.3. 'Preparing the assessment of initial information form', pp 77-78.

<sup>12</sup> Order of the General Court of 22 March 2006 in Case T-4/05, ██████ v Commission, p. 39, 44, and 46 confirmed with Order of the Court of Justice of 8 March 2007 in Case C-237/06 P, ██████ v Commission.