



European Ombudsman

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Presentation by the
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Committee on Budgetary Control

**Exchange of views on rules in the EU Staff regulation
applicable to (a) 'whistleblowing' and (b) disciplinary
actions for EU officials**

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1 Introduction

- Thank you for inviting me to address the Committee today about shortcomings and possible improvements in the rules concerning whistleblowing and disciplinary proceedings.
- As I have already informed your rapporteur, Mrs Grässle, my observations on these topics will refer not only to the Staff Regulations, but also to the rules that govern the work of the European Anti-Fraud Office (OLAF).
- In preparing these remarks, I had two questions in mind.
- The first question is: *how can we best promote ethical conduct and discourage unethical conduct by civil servants?* My comments about whistleblowing will be made from this perspective.
- The second question is: *what is the appropriate division of responsibilities between OLAF and senior managers in the various EU institutions, bodies, offices and agencies?* My remarks relating to the disciplinary procedure will focus on this institutional division of labour.
- Let me say at the outset that my contribution today does not contain detailed proposals. I shall identify the problems as I see them and the objectives that reforms should seek to attain, in my view. At this stage, however, it would be premature to suggest precise wording for amendment of the existing legal provisions.
- I should also make clear at the outset that my remarks are not intended as a comprehensive survey of all the changes that might be necessary or desirable, either to the Staff Regulations, or to the legal framework for OLAF's work.
- I do need to begin, however, by raising a fundamental issue concerning OLAF's role.

2 The role(s) of OLAF

- OLAF was established just over 12 years ago, in response to the fall of the Santer Commission and the work of the Committee of Independent Experts on allegations regarding fraud, mismanagement, and nepotism in the European Commission.
- Regulation 1073/1999, which is generally known as the "OLAF Regulation", empowers OLAF to exercise the Commission's powers to carry out external investigations through on-the-spot inspections and checks in the Member States.



- The Regulation also provides for OLAF to carry out internal investigations within the EU institutions, bodies, offices and agencies.
- This internal aspect of OLAF's work is what concerns us today.
- It is important to make clear that OLAF's power to carry out internal investigations is not based exclusively on the OLAF Regulation.
- The Regulation itself requires each institution to adopt a decision providing for internal investigations by OLAF¹. A model decision is contained in the interinstitutional agreement between Parliament, the Council and the Commission, which was adopted at the same time as the Regulation.
- The model decision envisages that OLAF may investigate possible cases not only of fraud, corruption and other illegal activity, but also of serious misconduct that could result in disciplinary proceedings.
- (By the way, I have just paraphrased a very complex provision. I will read to you the actual phrase: "... *evidence which gives rise to a presumption of the existence of possible cases of fraud, corruption or any other illegal activity detrimental to the interests of the Communities, or of serious situations relating to the discharge of professional duties which may constitute a failure to comply with the obligations of officials or servants of the Communities liable to result in disciplinary or, in appropriate cases, criminal proceedings, or a failure to comply with the analogous obligations of the members, managers or members of staff not subject to the Staff Regulations.*")
- In 2004, a simpler and broader provision was included in the Staff Regulations by amending Article 86. As amended, that Article allows either the Appointing Authority or OLAF to launch administrative investigations if they become aware of evidence of any failure by an official or former official to comply with obligations under the Staff Regulations, whether intentional or through negligence.
- The result of the multiple legal bases of OLAF's work is a double ambiguity as regards its role. I shall briefly explain both ambiguities, although for present purposes, only the second is important.

¹ See Case C-11/00, *Commission v European Central Bank*, 2003 ECR-I 07147, paragraph 183.



- The first ambiguity is that OLAF is called an anti-fraud office, but the OLAF Regulation gives it a much broader role in protecting the Union's financial interests against irregularities, which do not necessarily involve dishonesty.
- The second ambiguity is that other legal texts, including the Staff Regulations, envisage OLAF having power to investigate possible misconduct within the institutions, even if there is no impact on the Union's financial interests.
- In my view, this second ambiguity is particularly damaging, because it can lead to confusion and false expectations about what OLAF can and should do. I also believe that it tends to undermine what should, in my view, be the responsibility of the senior management of the institutions to ensure the highest ethical standards.
- I shall explain these points in detail later. Before doing so, however, I need to introduce the subject of whistleblowing.

3 Whistleblowing

- Although they don't use the term "whistleblower", Articles 22a and 22b of the Staff Regulations are widely understood to be "whistleblower" provisions.
- Basically, these Articles do two things.
- First, they define the circumstances in which certain kinds of whistleblower are protected against retaliation by the institution they work for.
- (The adequacy of whistleblower protection under the Staff Regulations is an important topic, which I know is of interest to members of this Committee. However, it is not the focus of my remarks today).
- The second thing that the provisions do, and here I refer principally to Article 22a, is to impose an obligation on civil servants to "blow the whistle". More formally, Article 22a obliges civil servants to report possible cases of fraud, corruption, other illegal activity, or professional conduct which may constitute a serious failure to comply with the obligations of officials.
- Basically, a civil servant may comply with the obligation to report either by informing his or her hierarchy, or by going directly to



OLAF. In the former case, the persons who are informed must transmit evidence of any irregularities to OLAF, without delay.

- These provisions call for a number of observations.
- First, their precise scope is uncertain because it is not obvious how they relate to a separate provision -- Article 21a. That Article concerns cases in which an official receives orders which he or she considers to be irregular, or likely to give rise to serious difficulties. The kinds of situation envisaged by this provision are not defined, but it seems highly probable that ethical matters will be involved in at least some cases.
- Second, the whistleblower provisions do not put responsibility on the management of the institution concerned to be active in responding to information from whistleblowers. The only action that seems to be envisaged is to put the matter in the hands of OLAF if the misconduct in question is considered “serious”.
- I believe that this is not a satisfactory approach, either in practice or in principle.
- In practice, the ambiguities I have mentioned concerning OLAF’s role do not appear to have been resolved through experience over time. It is not clear, at least it is not clear to me, whether OLAF regards its tasks as including internal investigation in cases of possible misconduct that do not affect the Union’s financial interests².
- There must, therefore, be a risk of the current legal provisions creating confusion about what OLAF can and should do in cases where the Union’s financial interests are not at stake. Such confusion could arise not only among whistleblowers and potential whistleblowers, but also among managers in the institutions and, perhaps, even in OLAF itself.
- That risk can only be increased by the complex and convoluted language of Article 22a of the Staff Regulations, which largely

² OLAF’s mission statement suggests that it does not regard such cases as falling within its sphere of responsibility:
The mission of the European Anti-Fraud Office (OLAF) is to **protect the financial interests of the European Union** by **combating fraud, corruption** and any other illegal activities, including serious misconduct within the European Institutions. (Bold in original)
http://ec.europa.eu/dgs/olaf/mission/index_en.html



reproduces the poor drafting of the model decision that I quoted to you earlier.

- Moreover, in principle, the task of promoting the highest ethical standards in the EU institutions and preventing unethical conduct should fall to the leaders and senior managers of the institutions. Telling them that it is someone else's job to deal with all serious cases of misconduct does not encourage them to accept that responsibility and to take appropriate steps to fulfil it.

4 The objectives of reform

- What I have said so far has focused on the problems that I see with the existing legal framework.
- In the rest of my presentation, I shall explain the objectives that I believe the Union legislator should have in mind when considering revision of that legal framework.
- First and foremost, the Staff Regulations should give clear expression to the idea that the institutions and, in particular, their senior managers, are responsible for maintaining the highest ethical standards and for preventing unethical conduct.
- Part of that responsibility should be to encourage and facilitate the reporting of professional misconduct and to take appropriate action in response to such reports.
- The definition of professional misconduct for this purpose requires careful analysis. As I have already mentioned, the kind of issues that are covered by the existing Article 21a of the Staff Regulations should also be included. That is to say, cases where an official receives orders which he or she considers to be irregular, or likely to give rise to serious difficulties.
- A focus on the responsibility of institutions and managers to encourage and facilitate reporting and to take action in response to reports would, in my view, be right in principle. It would also help correct an imbalance in the current whistleblowing provisions.
- As I have explained, these provisions focus on the duty to blow the whistle and on the purely negative requirement not to retaliate against whistleblowers. They do not encourage the institutions to see internal whistleblowing as a potential resource



to help managers discharge their responsibilities as regards ethical standards.

- There is an analogy here with complaints. A frequent reaction when faced with a complaint is to be defensive and to treat the complainant as a threat or, at best, a nuisance. This is the wrong approach, because it only makes matters worse. The right approach is to see complaints as an opportunity to get useful information, to explain one's actions and to take corrective action if necessary.
- As regards OLAF, it is essential, in my view, for the legislator to define clearly, and using plain language, the scope of the Office's competence to carry out internal investigations. It should also ensure that the Staff Regulations and the OLAF Regulation are consistent in this respect.
- The objective should, in my view, be for OLAF to assist the institutions to fulfil their responsibilities in ethical matters, not to relieve them of those responsibilities. Its role in helping to uncover cases of fraud, corruption and other kinds of misconduct should be framed accordingly.
- It seems obvious that internal investigations should be carried out by OLAF whenever they concern its core business; that is to say, fraud or corruption.
- Not all cases of misconduct concern these matters, however, and it is important that institutions should be able to carry out their own administrative inquiries when appropriate, as Article 86 of the Staff Regulations currently envisages.
- The current legal framework does not provide for consultation and agreement between OLAF and an institution as to who is best placed to carry out an internal investigation. Nor does it offer the possibility for an institution to request technical assistance from OLAF in the framework of its own internal investigation. These gaps should be addressed.
- The Commission's current proposal for amendment of the OLAF Regulation would risk making matters worse in this regard. It envisages, in substance, a unilateral decision by OLAF as to whether to undertake an internal investigation. If it decides to do so, the institution concerned would be barred from opening its own investigation into the same facts and, indeed, would have to close any investigation it had already launched.



- This, in turn, could have the consequence that the institution could not take any disciplinary action until OLAF's investigation was completed. Sometimes, that might be the right solution. That would be the case, for example, where there is a suspicion of fraud or corruption. In other cases, however, it might be quicker and more effective for the institution itself to carry out the administrative investigation, possibly in some cases with technical assistance from OLAF.
- Except in cases of suspected fraud or corruption, I do not think that a unilateral decision by OLAF should be the normal way to proceed. In other cases, it would be better to provide for consultation and agreement between OLAF and the institution. If no agreement was possible, OLAF's view should prevail only if it considered that the case involved protection of the Union's financial interests.
- I would like to add a final point as regards the disciplinary procedure. It concerns the situation envisaged by Article 25 of Annex IX SR; that is to say the situation where, to quote the English version, "*an official is prosecuted for those same acts*". Article 25 provides, again in the English version, that a final decision shall be taken in disciplinary proceedings "*only after a final judgment has been handed down by the court hearing the case*".
- The objective of this provision is clear and undisputed. However, I suggest that two points need further consideration.
- First, the English version of the Staff Regulations seems to mean that Article 25 begins to apply when a case is brought before a court and ceases to apply when the court gives judgment. However, other language versions could suggest that the provision starts to apply as soon as a criminal investigation begins and ends only when all possibilities of appeal against a conviction have been exhausted³.
- Second, a key notion also varies with the different language versions. The English version, for example, speaks of acts, whereas the French version speaks of facts (*faits*).
- I think that both these problems could be solved by re-drafting the provision so as to limit it to cases where the disciplinary

³ See in particular the French version: « *lorsque le fonctionnaire fait l'objet de poursuites pénales pour les mêmes faits, sa situation n'est définitivement réglée qu'après que la décision rendue par la juridiction saisie est devenue définitive* »



proceedings involve disputed facts that are also in dispute before a criminal court.

5 Conclusion

- In conclusion, I would like to share with you the outline of an idea. It is tentative and would require considerable reflection and consultation before it could be given legislative shape.
- I have already mentioned the circumstances in which OLAF was created. Somewhat inevitably, I am afraid, these same circumstances gave rise to public distrust not only of the Commission, but of the EU institutions generally. My hypothesis is that OLAF has been burdened from the outset, as regards its internal role, with an unspoken and, I believe, unrealistic, expectation: that is to say, that OLAF should provide an effective response to all the issues that legitimate whistleblowers in the institutions might raise.
- That would explain why the provisions of Article 22b of the Staff Regulations regarding further disclosure of information to the Presidents of the European Parliament, Commission, Council, Court of Auditors, or the European Ombudsman are undeveloped. In particular, there is no indication in these provisions as what these persons should do with such information.
- In the case of the Ombudsman, whistleblower communications are normally treated as complaints. But I am not aware of how the other persons mentioned in Article 22b deal with information that they may receive from whistleblowers.
- If you follow my suggestion to define OLAF's competences more clearly and precisely, it might also be appropriate to consider putting a little more flesh on the bones of Article 22b.
- There could, for example, be provision for the persons mentioned to consult each other, to share information about their procedures and to have a collective role in spreading best practice as regards professional ethics.
- I am aware that the Commission has already taken some important initiatives by nominating ethics correspondents and developing training programmes. It could be valuable to develop this work further and to give it an inter-institutional dimension. I would be ready to help in that process.



- Thank you for your attention.