

"Procedural guarantees in investigations by the European Public Prosecutor and by OLAF"

Introductory remarks: I have served for the past 11 years as a member of the European Parliament's Budgetary Control Committee, and have chaired that Committee since last year. I was/am Rapporteur for:

- i. the revised OLAF Regulation, in force since 2013, and
- ii. the PIF Directive, currently the subject of trilogue negotiations with utterly unwilling Member States.

Let me share with you various impressions of law-making around OLAF at the European level. The first OLAF Regulation of 1999 had 14 articles, setting up the office under the leadership of a strong Director-General having overall responsibility, with a Supervisory Committee, and a recital on procedural rights. It is important to note that, at the level of the Member States, the Ministries of Finance were and are the competent bodies for negotiating and implementing the OLAF Regulation. It is important to note the rather robust approach to fundamental rights and procedural guarantees; this was, and remains, part of the problem.

As is apparent from the history of OLAF and the revision of the OLAF Regulation, a lot of serious problems have arisen, mainly around procedural rights.

The Commission presented two legislative proposals, one of which it subsequently withdrew. Both of those proposals were completely contradictory about the question of a Controller. It took a total of ten years to come to a result.

I drafted and tabled 120 amendments, tried to integrate the relevant Court rulings, and faced an utterly reluctant and unwilling Council in more than 11 trilogues. In the end, we adopted a text which, on the question of the review adviser, was completely different from what the Commission had proposed and what Parliament had voted. No additional posts, said the Council. They rejected the review adviser idea because it necessitated the creation of two additional posts – only to end up with a situation where control of ongoing cases is nearly impossible and control of closed cases and procedural guarantees continues to be extremely difficult.

Where are we now?

The current President of OLAF's Supervisory Committee, the only control body of OLAF, Mr. Pöysti, who is also the President of the Finnish Court of Auditors and as such the chief controller of the Finnish secret services, has said that it is much easier to control the secret services of Finland than OLAF via closed cases.

As to procedural guarantees and fundamental rights, Prof. Hans-Heiner Kühne, an expert on criminal law, told us at a hearing in October 2013 that he considers OLAF to be the last vestige of the Middle Ages as compared to modern times, in which citizens are afforded procedural guarantees and individual rights vis-à-vis law enforcement authorities. OLAF does carry out administrative enquiries – and hitherto the legislature has not clarified the legal value of these investigations. This is another very serious problem that we need to tackle better.

Let us have a close look at the results of the reform of OLAF brought about by Regulation (EU, Euratom) No 883/2013, which entered into force on 1 October 2013. Was this a good reform?

No, it was not. I strongly believe that we failed in our efforts to achieve a satisfactory level of protection of the rights of persons under investigation.

Let me start at the beginning: within the Parliament, acting as Rapporteur for the OLAF Regulation, I focused my attention on procedural guarantees.

INITIAL ASSESSMENT

In one of my 9 working documents accompanying the OLAF reform, I devoted particular attention to the procedural guarantees and the rights of the defence. As Rapporteur, indeed, I noticed that the previous OLAF legal framework had opened up a number of shortcomings which were mainly linked to the lack of clear rules applicable to OLAF investigations, particularly when the rights of persons concerned by such investigations were at stake, and a lack of transparency of the investigative procedure and accountability.

In view of all these shortcomings, **my main objective as Rapporteur was to propose a set of amendments aimed at reinforcing the procedural guarantees**, whilst ensuring at the same time that OLAF's investigative powers and independence would remain untouched.

First, I wanted to introduce better definition and clarification of the rights of persons concerned by OLAF investigations, and second, I supported the idea of

an independent review controller having the exclusive task of responding to complainants who claimed that their rights had been abused in the course of OLAF investigations.

Additionally, I strongly favoured the formal setting-up of a judicial unit (the so-called "*unité des magistrats*"), to ensure that the legality checks were carried out during the entire investigative phase. All these measures were to me necessary in order to create a legal framework which would fully respect the fundamental rights of the persons under investigation.

The amendments suggested by me as Rapporteur included provisions in respect of:

- the right of a person to be informed about an investigation;
- recognition of the principle of the presumption of innocence, and of the principle of the impartiality of investigations;
- the right of the person concerned to give his opinion on the final report drafted by OLAF at the end of its investigation (including certain exceptions where an investigation has to be kept totally secret);
- the rules applicable to interviews;
- the protection of journalists' sources; and
- better rules designed to tighten up and monitor the length of investigations... In this regard, let me say that the monitoring power of the Supervisory Committee plays a fundamental role.

However, during the negotiations on the Commission's draft proposal, my intention as Rapporteur to really improve the legal framework of OLAF investigations in terms of procedural guarantees was partially dismissed by the Council, and by the Commission and OLAF itself.

For instance, the idea of setting up an independent controller function met with strong opposition, and the legal review process, which I wanted to apply throughout the whole of the investigation period, was limited only to the beginning and the end of the investigation.

The rules applicable to the person concerned (at an interview or at different stages of the investigation) were likewise diluted...

.... along with other amendments which we supported in Parliament with a view to ensuring a good balance between the rights of the defence and the smooth running of investigations in third countries, where the urgency of the need to access documents and to interview people can play an important role.

I don't intend to spend a great deal of time describing the current legal framework, since the subject-matter of this conference is also intended to cover OLAF's operational powers and legal framework. And I guess you have already heard enough about the status quo.

However, let me say that I am unsatisfied with the way in which, after seven years of negotiations, the reform of OLAF was finally concluded in 2013. We had the opportunity to clarify and strengthen the procedural guarantees and the rights of the defence, without interfering with the quality of OLAF's operational activities, and we failed to grasp this unique chance. Looking back at the trilogues, it was certainly a big error not to bar the new Director-General of OLAF from attending the negotiations. On the Commission's side, he played a very active role during the substantive legislative work and prevented the introduction of important checks and balances envisaged by Parliament's amendments. The purpose of those amendments was also to protect him in his strong role as the person with overall responsibility under the rules governing OLAF. The past has shown the dangers and shortcomings inherent in this overall responsibility.

Those shortcomings were very soon brought to light, even before the adoption of the reform, during the so-called "Dalli case".

THE DALLI CASE

I mention this case only because it shows the urgency of the need for a more profound reform of OLAF, and in particular of the rules applicable to the rights of the defence, and the entire set of procedural guarantees.

The events surrounding the resignation of the Commissioner for Health in October 2012 have brought to light certain issues that would, in normal circumstances, have called for an immediate reaction from the European Commission and the EU legislature. The Dalli case is probably now the best documented closed OLAF case. It therefore serves as an illustration of how OLAF works.

This case has made two things clear: First, that the procedural guarantees and rights of individuals under investigation by OLAF were not respected.

The following are just a few examples of incidents that came to light:

- **phone calls being recorded on OLAF's premises with the support, and under the supervision, of the investigator responsible,**
- **using false names to call witnesses with a view to obtaining information,**
- **requesting telecommunications data in Members States without a court order,**
- **searching property without sufficient grounds.**

These incidents are clearly illegal, yet nothing is being done because OLAF is not prepared to abide by the law. OLAF is insisting that the matter be brought to court, so that the burden of proof is reversed.

When, in July 2013, the revised text of the OLAF Regulation was put to the vote, an attempt was made to remove its flaws. Unfortunately, that attempt was unsuccessful, falling two votes short in plenary of the required three-fifths majority.

The second thing which has been made clear is that OLAF does not efficiently or adequately protect the financial interests of the Union. More resources than usual were used in the Dalli case, and great efforts were made to prove that the Commissioner was guilty of misconduct. The investigation was therefore not conducted impartially by producing incriminating and exonerating evidence, but was prejudiced from the beginning, with the sole aim of proving the allegations.

Figures show that, of all the interviews conducted with persons concerned in 2012, 7.5 % were connected with the Dalli case. Statistically, only one in 20 cases involves any interview at all.

So, given this incredible case, what were the lessons learnt?

The Commission realised that what Parliament was requesting loudly, even shortly before the adoption of the reform, was indeed an inevitable reality. The rights of the defence and the procedural guarantees in OLAF investigations need further improvement. Indeed:

- the legality check within OLAF is not sufficient,
- the procedural guarantees are not fully respected,

- the person concerned has limited immediate tools at his disposal, once an OLAF investigation starts, with which to appeal against acts that harm him and do not ensure full protection of his rights of defence.

These are loopholes that can no longer be tolerated. We need to find a better balance between the need to investigate misconduct and the imperative of ensuring that fundamental rights are fully protected.

THE CONTROLLER OF PROCEDURAL GUARANTEES

On 11 June 2014, the Commission adopted a proposal for a regulation amending the OLAF Regulation as regards the establishment of a Controller of procedural guarantees. For us, this was a case of *déjà vu*: it involved a function with which we were already, in part, very familiar, under the title of "review adviser". However, the Controller was given additional tasks affecting the independence of OLAF investigations, because the Director-General is required to seek an **authorisation** from the Controller before taking steps against **members of the institutions**.

The establishment of the function of Controller of procedural guarantees introduces a **two-class system of procedural guarantees** – for the members of the institutions, and for other persons. The Commission's proposal may take into account the special way in which members of EU institutions were elected or appointed, as well as their special responsibilities, but it is quite clear to everybody that this way of proceeding will raise other serious questions.

For example,

- the Controller would review whether the notice period for members was respected, without however taking any position on whether and how to conduct any interview;
- concerning procedural rights, the Controller would listen to both parties involved before issuing a non-binding recommendation to the Director-General of OLAF. If the Director-General decides not to follow the Controller's recommendation, he should state the reasons for his decision in a note attached to the final investigation report submitted to the national authorities or, where relevant, to the EU institution, body, office or agency concerned.

The Dalli case served as a lesson and as a background to this proposal – it was one of the last proposals the Barroso Commission submitted.

I am grateful to the Juncker Commission and Vice-President Georgieva for not having withdrawn the proposal. Yes, they considered withdrawing it! This gives Parliament now the opportunity to rework it, and to gather ideas on how best to do so. I will start work on this very soon – it seems to be urgent and useful, as the EPPO file is encountering reluctance in the Council and the negotiations concerning the PIF Directive get stuck whenever it comes to defining the concrete tasks to be performed by the EPPO. The Council has refused to pick up the file – Parliament will do so because things cannot remain as they are.

In light of the last three years' experience with OLAF, we are witnessing a regulation with significant loopholes and disagreements regarding the competences of the Supervisory Committee, which has been placed in a position making it difficult for it to do its work. We have seen how the Supervisory Committee is being prevented from doing its work by bureaucratic procedures verging on sabotage.

And we have seen, of course, a lack of interest in the results. 72% of the Supervisory Committee's recommendations were not implemented by OLAF – some recommendations cannot be assessed as OLAF did not provide "sufficiently substantial information", according to the Committee. "OLAF has provided insufficient information to enable the SC to properly and effectively monitor the investigative function" criticises the Committee. These are worrying elements in a relationship which illustrates the one and only problem besetting OLAF: the Regulation assigns a very strong role to the Director-General without providing for any checks and balances or any effective control. If a Director-General is not willing to see supervision as a chance for accountability and trust, we face, all in all, a difficult situation.

THE SUPERVISORY COMMITTEE

The Supervisory Committee is an independent high-level committee of external experts appointed by common accord between the European Parliament, the Council and the Commission. The Committee has its own role to play in the governance and accountability of OLAF, with a mission to ensure that the investigative function of OLAF is fully independent and to monitor developments throughout investigations and in the application of procedural guarantees.

The legal bases of its task in the field of procedural guarantees are:

Article 15(1), second subparagraph, of Regulation (EU, Euratom) No 883/2013, which provides:

The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees (...);

Article 17(7) of Regulation (EU, Euratom) No 883/2013, which provides:

The Director-General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned (...).

In discussing the procedural guarantees, I would like to point out in particular the duration of the OLAF investigations, and also the fact that the duration of investigations is a key element of the SC's mandate.

First, it is directly connected to the fundamental right of persons affected by the investigations to have their cases dealt with in a reasonably timely manner, without unnecessary delays or unjustified periods of inactivity (the principle of proportionality).

And second, it is an important performance indicator of OLAF's efficiency.

The 2013 OLAF Regulation states clearly that, if an investigation cannot be closed within 12 months after it has been opened, the Director-General must, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation.

Furthermore, OLAF investigations are only the preparatory part of judicial, administrative or disciplinary procedures leading to a final decision or ruling. The duration of OLAF investigations must therefore be seen in the wider perspective of the whole procedure and, consequently, investigations should be conducted expeditiously and without any undue delay.

If we look at one of the main outcomes of the SC's Annual report, we can see that, during the reorganisation of OLAF in 2012, its Director-General opened 423 cases on the same day without any appropriate assessment of information and without even establishing that there was a sufficiently serious suspicion of fraud or corruption. This is a clear breach of the legal requirements for opening an OLAF investigation as stated by the Court of Justice. The side-effect of this exercise also gives rise to a very significant concern: the figures for completed cases were boosted and the average duration of investigations was lowered.

Moreover, the SC points out that OLAF changed its methodology for calculating the average duration of investigations in 2011, now including on-going investigations as well. This has led to a further artificial reduction of the figures. Finally, the SC found that in 2012 and 2013, OLAF split up a large case into a multitude of smaller cases, which were subsequently closed with no discernible investigative activities, once again artificially boosting OLAF's work speed.

In fact, when you compare the average duration of an OLAF investigation with and without all the various distorting effects, the figure jumps from 17.3 to 32 months for 2012, and from 17.5 to 26.8 for 2013, which means that the average duration has actually increased since 2010!

CONCLUSION

- OLAF will continue playing an important role even after the EPPO has been set up, and will have important competences for all those Member States opting out – Denmark, the UK and Ireland. The overall set-up and cooperation between Eurojust, the EPPO and OLAF needs to be clarified.
- Clarify what constitutes an "administrative investigation" – we need to recognise that these investigations are of penal nature.
- Ensure ex-ante controls of investigative measures and real and timely ex-post judicial controls.
- Train OLAF staff, including the Director-General, to respect the rule of law in their actions.
- Defend parliamentary immunity.
- Grant persons concerned access to the OLAF report.
- Abolish the immunity of OLAF staff members – OLAF is the only investigative police authority in Europe whose staff members are not accountable under either the civil or the criminal law.

- Reform OLAF to improve the procedural guarantees – we need a solution around the Supervisory Committee in order to avoid conflicts of competence with respect to the supervision of OLAF as well as duplication of work. We should turn the Supervisory Committee into a real Controller!
- We need to revisit the structure of OLAF and all the internal problems that I have mentioned. Parliament will follow up on this.

We need trust in OLAF – that's why we need a real reinforcement of procedural guarantees!

Thank you for your kind attention.

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