

OLAF MANUAL

Operational Procedures

1 December 2009

FOREWORD (TRANSMISSION NOTE) BY THE DIRECTOR-GENERAL

OLAF, the European Anti-Fraud Office, was created on 1 June 1999 by Commission Decision 1999/352/EC, ECSC, Euratom.¹ OLAF was given hybrid status: it is formally part of the Commission, enabling it to exercise Commission powers, but it enjoys budgetary and administrative autonomy, designed to make it operationally independent. Its mission is to protect the financial and other interests of the Union against fraud and irregular conduct liable to result in administrative or criminal proceedings.

OLAF replaced the Task Force for Coordination of Fraud Prevention, which succeeded the Unit for the Coordination of Fraud Prevention (UCLAF), created in 1988 by the Commission within its Secretariat-General.

As the reappointed Director-General of OLAF, I committed myself at an early stage to carrying out a substantial restructuring of the Office. As a result, a major reorganisation took effect on 1 September, 2006. The new organisation chart (Annex 1) shows the present organisational structure of OLAF and the broad division of tasks and responsibilities within the Office.

The four guiding principles of the restructuring were:

- to focus more clearly on OLAF's 'core business';
- to enhance supervision of quality;
- to create an efficient support platform for investigations and operations; and
- to centralise the general support function.

As a result, three Directorates out of four now deal with operational matters while the fourth Directorate is responsible for horizontal and general tasks. The new structure allows OLAF to focus on its main business and to manage its resources better, thus helping to improve further its overall performance.

The previous Manual was issued in February 2005. The reorganisation, together with a number of other developments, has made it necessary to update it.

Structure

These Operational Procedures are the core part of a set of documents that go to make up OLAF's internal rules and procedures: 'the Manual'. The Operational Procedures describe the processes of investigations, operations and follow-up. They are supplemented by a number of annexes containing details on other related procedures and administrative rules, plus a set of standard forms and other documents. All these are instructions issued by the OLAF Director-General to his staff. However, they are not intended to have any legal force: they simply determine the practice to be followed in order to implement the applicable legal framework.

¹ OJ L 136, 31.5.1999, p. 20.

The Operational Procedures are divided into five parts. Part 1 contains the introduction to OLAF's mandate and the general principles of its operational activities. Part 2 covers general rules, which apply throughout all the stages of operational activities. Part 3 sets out the rules and instructions to be applied during investigations and operations from the time initial information is received and assessed to the transmission of information on the case to other Union or national authorities for follow-up proceedings. Part 4 describes the follow-up phase. Finally, Part 5 is devoted to the rights of individuals, which OLAF employees must respect during their activities.

Language

The text uses the term 'must' or the present tense for those rules which must be followed at all times. The term 'should' or similar expressions introduce rules which must, in principle, always be followed too. Such rules may be departed from only under exceptional circumstances, which must be duly substantiated and recorded.

Basic terms used in the text are defined in a Glossary of Terms. For convenience, pronouns appear throughout the Manual in the masculine gender. However, these references are meant to apply to both men and women.

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GLOSSARY OF BASIC TERMS

- Archive

The OLAF Archive stores, preserves and archives OLAF case files. It manages the filing of operational documents and provides access to the original files and the loan of original case documentation to case handlers. The Archive manages EU Information Classification System (EUCI) documents for OLAF and is part of OLAF's Document Management Centre.

- Assisting follow-up agent

Is a Unit C2 or C3 follow-up agent appointed to support the live operational phase.

- Authorising Officer (AO)

Is the official within the meaning of Article 59 of the Financial Regulation (EC) No 1605/2002.

- Authorising Officer by Delegation (AOD)

Is the official within the meaning of Article 59 of the Financial Regulation (EC) No 1605/2002.

- Case

A case is an operational file covering an investigation or another kind of operation as described in Section 3.2.3, opened by decision of the Director-General, or by a Director with delegated power, to launch an action following an assessment.

- Case file

There is only one official case file in paper format kept in the Archive. It is also called the 'operational file' (OF). For practical reasons, there is also an electronic copy (an 'electronic file') in the Case Management System (CMS). This electronic file stores copies of most of the documents which are in the official file for the purposes of case management. It includes scanned and electronically generated documents except those that cannot be scanned (certain classified documents). The term 'case file' should not be used for files where no case has been opened yet. Such a file should be called only an 'operational file', an 'OF file' or a 'CMS' file.

- Case handler

The case handler is the OLAF employee who is responsible for a given case at a given time. Depending on the phase of the case, the case handler could be an evaluator, an investigator or associated investigator, a follow-up agent or an associated follow-up agent, or a judicial adviser.

- Case Management System (CMS)

The Case Management System (CMS) is a database providing a complete electronic version of each OLAF case file. It provides OLAF with a single resource for all information in relation to

our casework. The CMS allows case handlers to manage all information in relation to their case files and any requests they make for operational support to intelligence officers and legal advisers. It facilitates the management of data protection requirements under Regulation 45/2001 and the exchange of mutual assistance requests with the Member States.

- Coordination case

Coordination cases are cases that could be the subject of an external investigation, but where OLAF's role is to contribute to the investigation being carried out by other national or Union departments by, among other things, facilitating the gathering and exchange of information and ensuring operational synergy among the relevant national and Union departments; the main investigative input is provided by other authorities.

- Union body

A Union body is a European Union institution, body, office or agency.

- Criminal assistance case

Criminal assistance cases are cases for which OLAF has legal competence and in which the competent authorities of a Member State and in exceptional cases, candidate country or non-member country carry out a criminal investigation and request the assistance of OLAF or OLAF offers its assistance.

- External investigation

An external investigation is one in which investigative activities are conducted based on Regulation 1073/99 in conjunction with Regulation 2185/96, Regulation 2988/95 and the relevant sectoral rules and cooperation agreements that permit on-the-spot checks and inspections on the premises of economic operators in the Member States and non-member countries.

- Fact-finding activities/missions

Fact-finding missions are missions that OLAF conducts in addition to investigation activities to undertake any necessary, appropriate and proper action for fact gathering purposes. There are two types: preparatory and investigative fact-finding missions.

Preparatory fact-finding missions are missions carried out by OLAF to cross-check information in specific and duly reasoned instances so as to make an informed decision on whether OLAF should open a case.

Investigative fact-finding missions are those which are carried out in order to collect direct evidence in support of an open case.

- Final Case Report

A Final Case Report is prepared and submitted to the Executive Board at the end of an investigation or an operation. This report covers the activities performed by OLAF, its findings, conclusions and recommendations. The Final Case Report gives an objective account of the facts as they emerged and the conclusions that can be drawn from these facts. Where

appropriate, it makes recommendations for appropriate action to be taken by the competent authorities.

- Follow-up

Is action of an administrative, disciplinary, financial or judicial nature after the closure of the operational phase. The precise action to be performed is decided and commissioned by the Executive Board in respect of the case concerned.

- Follow-up agent associated

Is an agent appointed to support the follow-up agent in charge of a follow-up case, often dealing with a subsidiary sector (e.g. where the case involves more than one sector, such as import duties and also export refunds).

- Follow-up agent in charge

Is the main agent designated as responsible for the follow-up of a case.

- Informant

An informant is a natural person who voluntarily discloses factual information to OLAF concerning a matter within the competence of the Office. He can be a whistleblower or another person. An informant usually discloses information on his own initiative and as a private person. Consequently, a person acting in his public function, e.g. an official of a Member State authority, is normally not treated as an informant.

- Initial assessment

Assessment of initial information.

- Inspection on premises (internal investigation)

In accordance with Article 4(2) of Regulation 1073/99, OLAF has the right of immediate and unannounced access to the premises of Union institutions, bodies, offices and agencies and to any information held by them.

- Internal investigation

An internal investigation is an administrative investigation to fight the fraud, corruption and other illegal activity affecting the financial interests of the Union and to investigate serious misconduct of members of Union staff, carried out by OLAF within the Union institutions, bodies, offices and agencies. Internal investigations are carried out subject to the rules of the Treaties, in particular the Protocol on the Privileges and Immunities of the European Communities, and with due regard for the Staff Regulations. Basic rules are outlined in Article 4 of Regulation 1073/99, Decision 1999/396, the Interinstitutional Agreement of 25 May 1999 concerning the terms and conditions for internal investigations conducted by OLAF and the decision adopted by each institution, body, office or agency in order to implement this Agreement.

- Interview

An interview is a formalised dialogue with any person who is able to provide information relating to an investigation guaranteeing due application of the rights of defence within a specific procedure.

- Investigation

In accordance with Article 2 of Regulation 1073/99, an administrative investigation carried out by OLAF means all inspections, checks and other measures undertaken by employees of the Office in the performance of their duties, with a view to stepping up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union and to establishing, where necessary, the irregular nature of activities under investigation. OLAF administrative investigations do not affect the powers of the Member States to bring criminal proceedings.

- Judicial adviser

Is a member of the Judicial and Legal Advice Unit appointed to a case either to support the investigation or to deal with judicial and/or disciplinary follow-up of the case.

- Legal counsel

A legal counsel is a qualified lawyer or any other person who gives advice and assists the person in formal contacts with OLAF.

- Mutual assistance message case

Mutual assistance message cases are cases in the customs and agriculture sectors in which OLAF's sole role is to circulate formal mutual assistance messages to Member States and/or non-member countries and then to assess and, when necessary, act upon the responses received.

- OLAF employee

An OLAF employee is any person who works in any capacity under the instructions of the OLAF Director-General, irrespective of his formal status, e.g. as an official, temporary agent, auxiliary staff, contract agent or seconded national expert.

- Operation and operational activity

An operation is a case in which neither an internal nor an external investigation is conducted by OLAF, but relevant assistance and/or coordination is provided as described in Section 3.2.3.

- 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.

- Registry

The Registry is a functional department within OLAF as part of the Document Management Centre, by which a reference number is given to all documents handled at OLAF. This includes their scanning and/or the assignment of security classification/markings.

- Statement

A statement, as distinguished from a formal interview, is a written deposition by a person or an entity within the framework of an OLAF investigation. A statement is always signed by the person providing it. An 'explanatory statement' is a written deposition given within the framework of an assessment of initial information.

- Third party

A third party is a person or entity, but not a Union body or national authority, who/which is related to an OLAF case and has certain rights. He can be a person concerned, a witness, an informant, a whistleblower, etc.

- Union Law

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union now has legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon. Following this, the text of the Manual has been adapted in accordance with the terminology and the provisions of the Treaty on the Functioning of the European Union. However, the term 'Community law' will be used where reference is being made to the original text of legislation or case-law before the entry into force of the Treaty of Lisbon.

The European Atomic Energy Community (Euratom) continues to exist alongside the European Union. Given that the mandate of OLAF in respect of Euratom is, in principle, the same as in relation to the European Union, any reference to European Union law will also cover the law governing Euratom.

- Whistleblower

A whistleblower is a Union official or other member of Union staff who is under a statutory obligation (Article 22a of the Staff Regulations) to come forward with the information related to the possible illegal activity, including fraud or corruption detrimental to the interests of the Union or to serious failure to comply with professional obligations of officials of the Union they have discovered in the course of or in connection with their duties. As long as he complies with the rules, he is protected from adverse consequences on the part of the Union body.

- Witness

A witness is an individual who is not a person concerned but provides information concerning a matter within the competence of OLAF. A witness, as opposed to an informant, normally provides information on request.

1 STATUTORY AND PROCEDURAL PRINCIPLES

1.1 OLAF'S MANDATE

The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union (EU) and therefore of its citizens, and the reputation of the European institutions. It achieves this by investigating fraud, corruption and any other illegal activity affecting those interests, including misconduct within the European Union institutions and bodies; by assisting Union and national authorities in their fight against fraud; and by means of deterrence, prevention and strengthening legislation, making it more difficult for fraud and irregularities to occur and so contributing to public trust in the European project. OLAF employees must adhere to the highest standards of professional ethics. OLAF's Statement of Principles of Professional Ethics (Annex 2) reflects the standards and expectations that underpin the obligations of all OLAF employees.

OLAF's mandate covers in principle all revenues and expenditures of the Union. It includes the general budget, budgets administered by the Union or on their behalf and certain funds not covered by the budget, administered by the Union agencies for their own account. It also extends to all measures affecting or liable to affect the Union's assets. Finally, it covers other, non-financial interests, and concerns all activities designed to safeguard Union interests against serious irregularities liable to lead to administrative or criminal proceedings, including investigations in areas other than the protection of the Union's financial interests.

1.1.1 Definitions

This part offers definitions of the protection of the Union's financial interests and explains what is meant by 'fraud, corruption and other illegal activities'. Throughout the Manual, the expression 'Union institutions and bodies' has been used to cover what is referred to in Regulation 1073/99 as 'institutions, bodies, offices and agencies'. This is because 'bodies' covers all entities including offices and agencies established by or on the basis of the Treaty on the Functioning of the European² and Euratom Treaty³, other than the institutions referred to in Article 13 of the Treaty on European Union.⁴

1.1.1.1 The Union's financial interests

The Union's revenues, expenditures and assets constitute the financial interests of the Union.

(1) Revenues

Revenues are on the one hand funds derived from the first two categories of own resources referred to in Article 2(1) of Council Decision 2007/436/EC, Euratom on the system of the European Communities' own resources.⁵ This covers import duties in respect of trade with non-member countries and contributions provided for in the framework of the common organisation of the markets in sugar. Second, even if VAT is not collected directly for the account of the Union it makes a substantial contribution to the Union budget. Furthermore, the

² OJ C 83, 30.3.2010, p 47.

³ OJ C 84, 30.3.2010, p. 1.

⁴ OJ C 83, 30.3.2010, p 13.

⁵ OJ L 163, 23.6.2007, p. 17.

revenue from application of a uniform rate to the sum of all the Member States' gross national income (GNI), should also be mentioned as the fourth own resource, which is transferred by the Member States to the European Union.

(2) Expenditures

Expenditures are funds paid out from the general budget of the Union, as well as those from budgets administered by the Union or on their behalf. This includes subsidies and aid paid by the European Agricultural Guarantee Fund (EAGF), European Agricultural Fund for Rural Development (EAFRD), European Fisheries Fund (EFF), by funds in the area of cohesion policy (European Social Fund, European Regional Development Fund (ERDF) and Cohesion Fund)⁶, and Instrument for Pre-Accession Assistance (IPA)⁷ as well as direct expenditures of the Union (internal and external). The development funds administered by the Commission and the European Investment Bank are also included, as are certain funds not covered by the budget and administered for their own account by Union bodies which do not have institutional status.

(3) Assets

The financial interests of the Union include not only the revenues and expenditures covered by the Union budget but also those covered by the budget of the other bodies established by the Treaty on the Functioning of the European Union (including the ECB and the EIB). Accordingly, the concept of assets of the Union (including liabilities) can be understood to include movable and immovable property of the Union institutions and bodies, exchange reserves allocated to the European Central Bank (ECB), and bonds issued by the European Investment Bank (EIB).

1.1.1.2 Definition of fraud, corruption and other illegal activities

The terms 'fraud', 'corruption', and 'other illegal activities harmful to the Union's⁸ financial interests' are defined in various legislative acts, as described below.

'Fraud affecting the European Communities' financial interests' is defined in Article 1 of the Convention on the protection of the European Communities' financial interests,⁹ and 'serious fraud' is defined in Article 2 of the Convention.

'Corruption of Community officials' is defined in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union,¹⁰ together with the Protocol to the Convention on the protection of the European Communities' financial interests.¹¹ Separate definitions are provided for 'passive corruption' and 'active corruption'.

⁶ For the programming periods before 2007 the structural funds are European Social Fund, European Regional Development Fund (ERDF) and European Agricultural Fund for Rural Development (EAFRD) and European Fisheries Fund (EFF).

⁷ Instrument for Pre-Accession Assistance (IPA) replaced the Instrument for Structural Policies for Pre-Accession (ISPA) in 2006.

⁸ The text of the Manual has been adapted in accordance with the terminology and the provisions of the Treaty on the Functioning of the European Union. However, the term 'Community' is used where reference is being made to the original text of legislation before the entry into force of the Treaty of Lisbon.

⁹ OJ C 316, 27.11.1995, p. 49, Article 1.

¹⁰ OJ C 313, 23.10.1996, p. 2.

¹¹ OJ C 195, 25.6.1997, p. 2.

'Irregularity' is defined in Article 1(2) of Council Regulation 2988/95 on the protection of the European Communities financial interests.¹² For the purpose of the structural funds and the Cohesion Fund, a specific definition is used.¹³

Article 1(3) of Regulation 1073/99 specifies that OLAF is also charged with investigating serious matters relating to the discharge of professional duties, which are defined in that Article.

The concept of illegal activities affecting the financial interests of the Communities Union also includes laundering of the proceeds of Community fraud as defined in Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.¹⁴

1.2 OLAF'S POWERS AND LEGAL FRAMEWORK

OLAF must always have a legal basis for opening an investigation. This is the basis in Union law that empowers OLAF to conduct an investigation, and establishes its investigative powers.

OLAF undertakes administrative investigations, with the objective of detecting irregular behaviour liable to give rise to administrative or criminal proceedings against individuals or companies and to the recovery of payments evaded or funds unduly obtained. OLAF is responsible neither for internal¹⁵ nor for external¹⁶ audits. Anomalies detected during a routine check or audit can give rise to the need for an investigation. Audits are the responsibility of the authorising Directorates-General, in coordination with the Member States; investigations are the responsibility of OLAF.¹⁷

The sectoral legal bases listed in Annex 3 focus on the powers to carry out on-the-spot checks on economic operators. They can only be used as additional powers for the purpose of fighting fraud and other irregularities as defined by Regulation 2988/95. In conducting investigations, OLAF may not rely on those sectoral legal bases which only provide the Commission with the power to audit national authorities to see if they comply with Union legislative requirements.

¹² OJ L 312, 23.12.1995, p. 1.

¹³ Article 2(7) of Regulation (EC) No 1083/2006, OJ L 210, 31.7.2006, p. 36.

¹⁴ OJ L 166, 28.6.1991, p. 77.

¹⁵ Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organisation's operations. It helps an organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes.

¹⁶ The external audit body (Court of Auditors within the EU) assesses the collection and spending of funds. It examines whether financial operations have been properly recorded and disclosed, legally and regularly executed and managed.

¹⁷ The Court of Justice emphasised this distinction in its judgment in Case C-11/00 *Commission v European Central Bank* [2003] ECR I-7147, paras 141 and 158-159. It held that the legislature was entitled to take the view that notwithstanding the existence of financial control/audit mechanisms specific to the various Community institutions and bodies, it was necessary for the purpose of the fight against fraud to set up a control mechanism 'which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies', whose task is 'investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Community'. It distinguished this from 'forms of control which, like financial control, are likely to follow a more rigid pattern'.

All of the legal bases mentioned empower OLAF to conduct *administrative* investigations. OLAF has no power to carry out investigations on the basis of criminal law. If an OLAF investigator were to go beyond OLAF's powers in gathering evidence, this evidence might not be admissible in a national criminal proceeding. This act might also have the effect of depriving national judicial authorities of the opportunity to gather the evidence in a proper way, and therefore make it difficult or impossible to prove the case.

Note

This limitation does not prevent the OLAF investigator from securing information or documents from Member State authorities gathered by them in the course of national criminal proceedings, provided all national legal provisions are satisfied.

This section sets out the legal bases that may be relied upon for internal and external investigations, as well as coordination cases, criminal assistance cases, mutual assistance message (MAM) cases and monitoring cases, and specifies their scope and purpose.

1.2.1 General legal framework

1.2.1.1 Union law

The Union legal basis for action against fraud or any other illegal activities affecting the financial interests of the Union is Article 325 of the Treaty on the Functioning of the European Union.

OLAF fulfils its mission by conducting fully independent internal and external administrative investigations as defined in Regulation (EC) No 1073/99 and Regulation (Euratom) No 1074/99.¹⁸ Legal bases will always be identified in the formal opening of a case.

- OLAF is empowered to conduct internal investigations under Regulation (EC) No 1073/99 and the internal decisions adopted by Union institutions and bodies in accordance with the Model Decision¹⁹ contained in the Interinstitutional Agreement concerning the terms and conditions for internal investigations conducted by OLAF. The purpose of internal investigations is to fight fraud, corruption and serious misconduct within the Union institutions and bodies and to bring to light any serious matters concerning the discharge of professional duties by the staff of the Union that may be detrimental to the interests of the Union and liable to result in disciplinary²⁰ or criminal proceedings.
- OLAF is empowered to conduct external investigations based on Regulation (EC) No 1073/99 in conjunction with Regulation (EC, Euratom) No 2185/96,²¹ Regulation EC, Euratom) No 2988/95²² and the relevant sectoral rules that permit on-the-spot checks and inspections on the premises of economic operators who may have been involved in, or concerned by, an irregularity or fraud. OLAF's investigators also comply with the

¹⁸ OJ L 136, 31.5.1999, p. 1 and 8. Where reference is made to Regulation (EC) No 1073/99, this also includes Regulation (Euratom) No 1074/99.

¹⁹ OJ L 136, 31.5.1999, p. 15.

²⁰ See also Article 86(2) of the Staff Regulations of Officials of the European Communities.

²¹ OJ L 292, 15.11.1996, p. 2.

²² OJ L 312, 23.12.1995, p. 1.

national procedural rules of the Member State in which they conduct an investigation. They work in close cooperation with the authorities of the Member State in question. The purpose of external investigations is to detect irregularities and to fight fraud and corruption detrimental to the Union's financial interests committed by economic operators in the Member States or non-member countries.

- OLAF also organises close cooperation among the competent authorities of the Member States and non-member countries in order to coordinate their investigative activities. OLAF provides Member States and non-member countries with the necessary support and technical know-how to help them in their anti-fraud activities, and cooperates closely with international organisations with parallel interests. These activities, other than internal or external investigations, are described as operations or operational activities.

Integral to these investigative and other operational processes are the information, intelligence and technical support functions of the Office.

This Manual describes the features common to operations and to internal and external investigations. Where the rules differ, the differences are pointed out.

1.2.1.2 National and international law

Besides Union law the investigators rely on other sources of law, national and international. National and international law apply where Union law (legislation and case law) refers to them.

(1) National law

National law is never the legal basis for investigations but should be respected. This is necessary to secure e.g. the admissibility of evidence before national courts. During on-the-spot checks and inspections, the Office's employees must adopt an attitude in keeping with the rules and practices governing officials of the Member State concerned (Article 6(4) of Regulation 1073/99). In practice, the involvement of national inspectors is one of the ways of securing compliance. If no national inspectors are present, e.g. where the Member State declines to take part, OLAF inspectors must be at all time in a position to comply with the rules applicable in the territory of the Member State.

(2) International law

International law such as international conventions and bilateral and multilateral treaties with non-member countries are another important source of law providing OLAF investigators with the legal basis for investigations (see Sections 2.4.3, 3.3.6.3 and 3.4.3.4 on cooperation with non-member countries and international organisations).

1.2.2 Sectoral legal bases

Regulation 1073/99 specifies the scope of all investigations, but does not, in itself, provide a legal basis for external investigations. Other Union legislation, either horizontal (Article 2 of Regulation 2185/96) or sectoral (Article 9 of Regulation 2988/95), must be relied upon as the legal basis for external investigations.

Article 2(1) of Commission Decision 1999/352 provides that the Office also exercises the Commission's powers to carry out external administrative investigations for the purpose of

strengthening the fight against any act or activity by operators in breach of Union provisions other than those affecting the Union's financial interests. This power may be exercised when the specific sectoral legal basis is not limited to financial interests. For instance, this is the case for Regulation (EC) No 515/97²³ (as amended by Regulation (EC) No 766/2008).

Many sectoral legal bases exist under Union law; the legislation most frequently relied upon is listed in Annex 3. For the assessment of incoming information, see also Section 3.1.7.

1.3 INDEPENDENCE

1.3.1 Director-General

The Director-General is appointed by the Commission, following consultation with the European Parliament and the Council, for a term of five years. In performance of his duties with regard to the opening and carrying out of investigations, the Director-General does not seek or take any instructions from any government, Union body or anybody else.

The opening, conduct and closing of an investigation is a matter under the exclusive competence of the Director-General acting in his independent capacity. OLAF investigators act under his direction, delegated authority and control. Accordingly, OLAF employees act as agents of an independent investigative body when undertaking operational investigative activities.

In contrast, regarding general administration activities, participation in the Commission's legislative and policy initiatives, international cooperation, etc., OLAF employees act as agents of the Commission subject to its internal rules and powers.

1.3.2 Supervisory Committee

The Supervisory Committee was established for the purpose of reinforcing OLAF's independence by the regular monitoring of its investigative function, whilst refraining from interfering with the conduct of investigations in progress. The independence of the Committee is a key factor in safeguarding OLAF's own independence. The Supervisory Committee is appointed by common accord of the European Parliament, the Council and the Commission and is composed of "five independent outside persons, who possess the necessary qualifications in their respective countries to occupy senior posts relating to OLAF's areas of activity"²⁴. They take no instructions from any government, institution, body, office or agency and are also careful to avoid any conflict of interest which might impair their independence: in particular, any family or financial interests.

The Supervisory Committee's duties also include assisting the OLAF's Director-General in discharging his responsibilities. The Supervisory Committee discharges its role principally by delivering opinions to the Director General and by the submission of reports to the Union institutions.

²³ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

²⁴ Article 11 of Regulation (EC) 1073/1999, OJ L 136, 31.5.1999, p. 6.

The Director-General keeps the Supervisory Committee regularly informed of the Office's activities, investigations, the results thereof and the action taken on them. Where an investigation has been in progress for more than nine months, the Committee is to be informed of the reasons and the expected time for completion. The Committee is also to be informed where a Union body has failed to act on the recommendations made by OLAF and of the cases requiring information to be forwarded to the judicial authorities of a Member State.

1.4 GENERAL PRINCIPLES

OLAF investigators must perform their activities in accordance with the principles of legality, integrity and proportionality. They must act impartially, handle case work within a reasonable time span, respect the authority of the hierarchy, comply with the procedures relating to the protection of Union privileges and immunities, and observe professional secrecy and confidentiality, as indicated below. OLAF employees respect the fundamental rights and freedoms of individuals at all times, including the protection of personal data.²⁵ More detailed rules are set out in Section 5 of this Manual.

1.4.1 Legality and integrity

All activities are carried out in full compliance with the applicable legal rules. In addition, OLAF employees must adhere to the highest standards of ethics as provided for in the Commission's codes of conduct and the Code of Good Administrative Behaviour.²⁶

1.4.2 Proportionality

When carrying out their tasks, investigators must take into consideration the seriousness of risks inherent in the exercise of the intended concrete operational actions for the Union and its citizens, the rights of others, the overall interests and mission of the Union.

1.4.3 Efficiency

Investigators conduct their cases in an efficient and effective manner. Management always seeking to maximise the value for taxpayers' money constantly takes into consideration the likely duration and the costs of the operational activities and the limited resources of the Office and follows the prioritisation principles described in Section 2.3.

1.4.4 Impartiality

By virtue of the rules which apply to it, OLAF conducts investigations falling within its competence in compliance with the Treaties and the general principles of Union law, in particular the requirement of impartiality and the Staff Regulations, Article 14 (old Staff

²⁵ Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p. 1.

²⁶ Annex to the Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom), OJ L 267, 20.10.2000, p. 63.

Regulations) of which in particular seeks to avoid a situation where there is a conflict of interest on the part of officials.²⁷ The impartiality of investigative and operational activities presupposes the absence of any potential conflict of interest that might occur on the part of the investigator. In accordance with Article 11a of the Staff Regulations,²⁸ an OLAF employee must not, in the performance of his duties, deal with a matter in which, directly or indirectly, he has any personal interest (in particular family or financial interests) such as to impair or appear to impair his independence.²⁹

At OLAF, a conflict of interest on an operational matter may arise either at the time of receipt of initial information, during the initial assessment, while the matter is in its active stage, or during follow-up. For instance, an investigator may have personal relations with an individual or company that may be involved in the subject matter of the enquiry, or may have previously worked in a DG or for a private company that may be implicated in a case. The investigator should prepare a Note to the Director-General concerning a possible conflict of interest (Annex 4, Note O/F1). If the Director-General concludes that a conflict of interest, or the appearance of a conflict, is present, he will instruct the line manager to assign a replacement. Each decision of this nature and the reasoning behind it will be recorded at the bottom of this note, and signed by the Director-General.

The involvement in the investigation of one of OLAF's case handlers who could have a conflict of interest constitutes a serious and manifest breach of the requirement of impartiality and objectivity.³⁰

1.4.5 Inquisitorial nature of investigations

During investigations and operations OLAF investigators must gather and take into account any relevant information, both *inculpatory* and *exculpatory*.

1.4.6 Fairness

OLAF investigators must conduct investigations with full respect for human rights and fundamental freedoms, in particular for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of the investigation may be based solely on elements which have evidential value.

²⁷ Case T-309/03 *Camós Grau*, paragraph 105.

²⁸ OJ 45, 14.6.1962, p. 1385.

²⁹ In Case T-89/01 *Willeme v Commission*, the Court of First Instance considered the scope of the concept of conflict of interest under Article 14 of the old Staff Regulations (the predecessor to the current Article 11a). The Court held that the concept of conflict of interest should be broadly interpreted to cover any situation where an official, in the performance of his duties, is called upon to decide on a matter which could appear, in the eyes of an external third party, as a possible source affecting the official's independence on the matter. The Court observed that this interpretation was necessary, in the light of the fundamental character of the Article's objectives of independence and integrity, and that it requires the official to inform the Appointing Authority of the conflict *before* dealing with the underlying matter. Article 11a is worded even more strongly than the former Article 14, in that it not only requires the official to notify the Appointing Authority of the possible conflict, but also prohibits the official from working on the matter.

³⁰ Judgment of the Court of 6 April 2006 in *Camós Grau v Commission* (Case T-309/03).

1.4.7 Reasonable duration of cases

OLAF investigators always conduct investigations and operations continuously within a reasonable time span, taking into account the complexity of the case, the division of responsibilities between national and Union authorities and any other relevant circumstances. If the case is still ongoing nine months after being opened, the investigator prepares a report for the Supervisory Committee summarising the allegations, the status of the case and the reasons for the delay and the estimated time for completion. Another report following a similar internal procedure must be prepared for the management 18 months after the opening of the investigation.

1.4.8 Presumption of innocence

The Office must under all circumstances respect the principle of presumption of innocence as laid down in the instruments of international public law on fundamental human rights, such as Article 6(2) of the European Convention on Human Rights or Article 48(1) of the EU Charter of Fundamental Rights. Until the final judgment (*res judicata*) is delivered by a court, OLAF employees should refrain from referring to any persons concerned by the investigations in a way which would give the impression that these persons are guilty of a criminal act. The employees responsible for communication with the public must be especially attentive to this principle when informing about the outcome of OLAF investigations. The Office also invests considerable effort to prevent any sort of unauthorised leak of information, which would breach this fundamental right. The principle of presumption of innocence is without prejudice to the more detailed rules on protection of personal data as described further in the DP Guidelines.

1.4.9 Authority

All employees undertaking an investigation or an operation must be duly authorised. When carrying out their tasks, they must produce written authorisation showing their identity and their capacity. For each measure they take, they must have written authority indicating the subject matter of the investigation (see Section 3.3.1.1).

1.4.10 Immunities

Internal investigations are conducted in accordance with, *inter alia*, the Protocol on Privileges and Immunities³¹ and the Staff Regulations³². In relation to national authorities, OLAF specifies in the letter to be sent that the Protocol requires each Union body to waive its own immunity. In its general provisions, the Protocol states that each institution of the Union is required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.

³¹ Protocol (No 36) on the privileges and immunities of the European Communities (1965), OJ C 321E, 29.12.2006, p. 318.

³² Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385.

The lifting of personal immunities can be requested within the context of an OLAF investigation. In this case, OLAF advises the national authority to contact the relevant Union body in order to request that the immunity be lifted (Annex 4, Letters O17, O19, O/F2). See also Sections 3.3.1.3 and 5.4.1.

Upon receipt of the results of an internal investigation, any request from national police or judicial authorities regarding waiver of immunity must be transmitted to OLAF's Director-General for his opinion.

A request for immunity to be lifted is necessary whenever an official has to appear as a witness. The Court of First Instance of the European Union ruled that the Protocol did not permit the Community institutions to neglect the duty of sincere cooperation with the national authorities, and in particular the judicial authorities, a duty which is, moreover, referred to in Article 19 of the Protocol itself.³³ This means:

- presenting to the national court the documents it requires, unless there are imperative reasons relating to the need to avoid interference with the functioning and independence of the Union justifying refusal to do so; and
- authorising officials to be examined as witnesses, in accordance with Article 19 of the Staff Regulations.

1.4.11 Use of confidential information in legal proceedings: duty of discretion

Article 19 of the Staff Regulations provides that an official may not disclose information of which he has knowledge by reason of his duties in legal proceedings without the permission of the Appointing Authority. This means that for OLAF employees and former employees who are no longer working for the Commission the permission of OLAF's Director-General is required. For former OLAF employees who are, at the time of the request, working with another department of the Commission, the permission of the Director-General of that department is required. Permission can be refused only when the interests of the Union so require and the refusal would not entail consequences for the official in criminal law. An official is bound by this obligation even after leaving the service.

Accordingly, if an employee were to request permission to use confidential information forming part of an OLAF investigative file in a legal proceeding, permission should normally be granted. It should be refused only if the interests of the Union so require. In order to request permission, the employee should submit a Note to the Director-General (Annex 4, Note O/F2) together with the summons of the court. The Director-General takes a decision after reviewing the request. He may at his discretion seek the advice of the Commission Legal Service for this purpose.

Article 16(3) of Annex IX to the Staff Regulations provides that the Disciplinary Board may hear investigating officials from OLAF in cases where an investigation was initiated by the Office. The obligations set out in Article 19 of the Staff Regulations do not apply to an official giving evidence before the Disciplinary Board of an institution, or before the Court of Justice of the European Union.

³³ Case C-2/88 *Zwartveld* [1990] ECR I-3365 and I-4405.

1.4.12 Professional secrecy and confidentiality

The information obtained during an investigation or operation is subject to professional secrecy, which must be observed at all times. This obligation is based on Article 339 of the Treaty on the Functioning of the European Union, Article 17 of the Staff Regulations, Article 8 of Regulation 1073/99 and Article 8 of Regulation 2185/96 and on the sectoral regulations.

Information obtained in the course of an investigation or operation is provided only to persons and bodies whose professional duties require them to know that information (need-to-know principle), and the use that can be made of the information is limited to preventing fraud, corruption or any other illegal activity.

The confidentiality rules applicable to OLAF investigations must be interpreted as aiming not only to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the persons concerned by these investigations.³⁴ In particular, as a matter of principle, no information containing personal data should be communicated to the public during an ongoing investigation unless it is necessary to clarify misleading information already published or to protect an important public interest. However, even in such a case, the responsible OLAF employees should seek the agreement of the data subject concerned.³⁵

1.4.13 Data protection

(1) Legal basis

The protection of personal data, defined as any information relating to the data subject, is a fundamental right, enshrined in Article 8 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and based on the constitutional traditions of the Member States. As such, it is protected under the Union legal order as a general principle of Union law, as reaffirmed by Article 6(3) of the Treaty on European Union.

Article 16 of the Treaty on the Functioning of the European Union stipulates that data protection requirements apply to Union institutions or bodies, and that an independent supervisory body responsible for monitoring the application of data protection rules within the Union institutions is to be set up. European Parliament and Council Regulation (EC) No 45/2001 establishes the data protection rules applicable to Union institutions and bodies, including OLAF.

Regulation 1073/1999 lays down specific rules for the legal protection of personal data, with Article 8(3) making a dual reference to national and Union provisions. Under these rules, the Director-General of OLAF must ensure that the Office's employees and other persons acting under his authority observe the Union and national provisions on the protection of personal data, in particular those provided for in Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

³⁴ Judgment of the Civil Service Tribunal of 2 May 2007 in Case F-23/05 *Jean-Louis Giraudy v Commission*, paragraph 161.

³⁵ Judgment of the Court of First Instance of 12 September 2007 in Case T-259/03 *Kalliopi Nikolaou v Commission*.

(2) Data Protection Guidelines

It is essential that all OLAF employees fully respect data protection requirements, and actively consider the processing of personal data at each step of their work. A breach of data protection requirements can result in legal action for damages against the Commission (Article 340 of the Treaty on the Functioning of the European Union and Article 32(1) of Regulation 45/2001). This could lead to disciplinary action against a staff member who commits the breach, intentionally or through negligence (Article 49 of Regulation 45/2001 and the Staff Regulations). For more detailed rules and procedures see the 'Guidelines for OLAF staff regarding practical implementation of data protection requirements' (hereafter the DP Guidelines, Annex 5). The DP Guidelines outline general data protection requirements applicable to all employees and all actions that must be taken by operational staff in order to comply with those requirements during all stages of OLAF investigations and operations (assessment, active phase, follow-up) and related activities.

(3) CMS Data Protection Module

The CMS Data Protection Module has been designed to help case handlers fulfil all data protection requirements in handling their cases. The Module is entered through the CMS case file. The module consists of the following tabs:

- Data subject details tab;
- Information tab;
- Request of the data subject tab;
- Transfer of personal data tab;
- Complaint of the data subject tab.

The Data Protection Annex is generated on request by the Data Protection Module. This annex is attached to the Assessment of initial information (Annex 4, Form O5), the Interim Case Report (Form O22), the Final Case Report (Forms O28, O29), and the Closure of Follow-up Report.

2 ORGANISATIONAL AND INSTITUTIONAL ISSUES

2.1 EXECUTIVE BOARD

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.

(1) Recommendations of the Executive Board

The Investigations and Operations Executive Board ('the Executive Board' or 'the Board') delivers recommendations to the Directors on decisions relating to the treatment of cases, in particular with regard to:

- opening cases,
- classifying non-cases and monitoring actions,
- changing case types,
- modifying the scope of cases already opened,
- closing cases,
- opening follow-up paths when cases are closed,
- closing follow-up paths,³⁶
- applying the pending stage to appropriate financial follow-up cases.

(2) Composition of the Board and rules of procedure

The Board is chaired by either Director A or Director B. Other members are the Heads of Unit of Directorate A or B as appropriate, and the Heads of Units C1, C2 and/or C3 and C4. Membership may be delegated. An Assistant of the Director-General, the two Case and Board Advisers and the Board Coordinator also attend as observers.

For each case a proposal is submitted to the Board by the responsible unit. Recommendations in the Board are adopted by consensus. Once the meeting is over, a Board Recommendation Form (Annex 4, Form O27) is signed by the Chair indicating approval or rejection and possible comments. This document will be registered and a copy will be included in the documentation submitted to the Director for the eventual case decision.

If consensus cannot be reached, voting will take place with each member having one vote. Recommendations will be adopted by simple majority and the minutes of the meeting will reflect the result of the voting.

³⁶ For the final closure of financial follow-up paths, for which the Board has previously decided the application of the pending stage, the case is not referred to the Board. See Section 4.3.4.

In cases of disagreement on substance, where at least one member strongly disagrees with the substance of the position taken by the majority, the minutes of the meeting will record such disagreement. The proposal will be adjourned while the Chair puts the matter to the Director-General for his decision. The Board Members will be informed about the Director-General's decision by the Chair.

The Board meets weekly, normally on Tuesdays, alternately as Board A and as Board B, in order to discuss and, as appropriate, approve or postpone case-related proposals on which agreement has not previously been reached, in particular, through the electronic procedure. Discussions in the Board may also address the quality standards and clarity of the reporting documents and the proposed priority recommendations.

By 12:00 hours on the previous Thursday, the Board Coordinator prepares the agenda for the next meeting. Documents may be added to the agenda electronically after the normal deadline has passed. The Board coordinator notifies all Board members by e-mail that an additional case has been added to the agenda.

Important

In cases of extreme urgency, where there is a need for immediate investigative activity, cases may be opened following a verbal instruction of the Chair of the Board or the Director-General without reference to the Board. Such decisions must be confirmed in writing by the Director-General or the Chair of the Board within 2 working days and reported at the next Board meeting.

Detailed discussions during Board meetings are confidential and should only be disclosed outside the Board on a need-to-know basis.

(3) CMS Board Module

The administration of the Board is the responsibility of the Board Coordinator and is supported by the CMS Board Module. The module allows case-related proposals to be prepared and circulated electronically, with automatic generation of the Board agenda. It also establishes a system for managing and auditing work flows through the Board and ensures an accurate flow of information from the Board back to the case handlers.

The module also allows the electronic approval of proposals on non-controversial issues which, being submitted for electronic consultation via the CMS Board Module Fast Track procedure, meet no objections from any of the other Board members. This will normally be the case of technical follow-up path opening actions as described in Section 4.3.1.2. Further information on the CMS Board Module can be found in the online CMS User Manual, Annex 6.

2.2 THE INVESTIGATION FILE

(1) Content and handling of the investigation file

The Archive maintains the official file for all cases in a uniform manner, in compliance with the Commission Decision on document management.³⁷ Accordingly, only one official file is

³⁷ Commission Decision 2002/47/EC, ECSC, Euratom, OJ L 21, 24.1.2002, p. 23.

maintained for each case and all documents in the file, including all working papers that contain important information which is not short-lived, must be originals and must be registered. For more information see the 'Document Management Manual' (Annex 7).

The file must include:

- assessment stage documents (including letters, official reports or notes and accompanying evidence constituting the initial information, the assessment form, correspondence and file notes made during the assessment stage);
- investigation stage documents (including the decision to open the investigation, the investigation authority, investigator authorisation, documents, evidence, correspondence and notes (including notes of all meetings, telephone calls and other events related to the case) made or collected during the investigation stage);
- follow-up stage documents.

Every file must be paginated in continuous order.

Case handlers requiring access to original documents should contact the Archive. Access to documents in the Archive will normally be given immediately. Requests for archived files must be answered promptly, normally the afternoon of the same day if requested before noon, or the following morning if requested in the afternoon.

When originals are to be used in court proceedings, the Archive must keep a certified copy of them. Only the Archive can make certified copies.

(2) Duties of case handlers

Case handlers document each investigative step and significant event in order to ensure a thorough paper trail of the case.

- Investigators are required to prepare a Minutes of operational meetings form (Annex 4, Form O/F5) or a Note for the file (Annex 4, Form O21) to record all significant events related to a case that are not recorded elsewhere.
- Investigators and judicial advisers assigned to a case are together responsible for preparing an Interim Case Report (Annex 4, Form O22) when a case is being sent to a Member State authority but has not yet been completed (see Section 3.3.6.1.2).
- Investigators must prepare a Case Status Summary (Annex 4, Form O25) when an investigator leaves OLAF and the responsibility for a case is being transferred to a different investigator or when the Head of Unit so requests. This should provide a summary of the situation and an analysis of matters outstanding.

Case handlers may keep their own personal files for the cases assigned to them. Such files should contain only copies of documents; all originals are to be kept in the case file maintained by the Archive.

Note

The case handler's case files should be kept in a secure place, such as in a locked room, and EU RESTREINT documents only in a locked cupboard. Such documents should not be left accessible and unattended in the investigator's office. Arrangements for immediate access of line managers to these files should be established.

When the case is closed, the investigators should hand over to the Archive all case-related documents in their possession which are not yet kept by the Archive, in particular all originals, accompanied by an Archives Note (Annex 4, Form DM1). The Archive will then compare the two sets of files and duplicate documents will be destroyed. Similarly, when the follow-up phase is closed, the follow-up agent should hand over to the Archive all case-related documents in his possession. These documents must be accompanied by an Archives Note prepared by the follow-up agent.

Note

1. Case related information that is sensitive or confidential must not be sent by regular e-mail without security precautions.
2. While on mission, OLAF employees must take all security precautions to protect confidential information in both documents and laptop computers.

(3) Access to file

There is no specific right of access to OLAF case files. The right of access is governed by the general rules on access to documents and information described in Section 5.2.3 and the relevant Annex 8.

2.3 OPERATIONAL PRIORITIES

Article 325(1) of the Treaty on the Functioning of the European Union establishes that Member States take measures to counter fraud affecting the financial interests of the Union. Accordingly, there is often a responsible authority within each Member State which could investigate any given case, so that the protection of the financial interests of the Union can be guaranteed without activity by OLAF. It follows from this provision, as well as the principles of subsidiarity and proportionality inherent in Union law, that OLAF has the discretion to decide which cases it considers appropriate to investigate under its own responsibility and using its own resources. The Office has finite resources and must apply them in accordance with an objective system of priorities.

After a case is opened, the prioritisation of the casework during operational actions will be decided in close cooperation between the investigator in charge of the case and the responsible Head of Unit. OLAF's annual activity programme required by Article 11(7) of Regulation 1073/1999 contains further guidelines with regard to OLAF's priorities.

In the area of administrative 'anti-corruption' investigations within the EU institutions and bodies and in the field of direct expenditure, OLAF has a more limited margin of discretion with respect to the opening of cases that fall within its sphere of competence. It applies a so-called 'zero tolerance' policy towards misconduct. The *de minimis* principle, however, helps to pursue the 'zero tolerance' objective in a rational way. OLAF investigates serious matters. To ensure zero tolerance, other matters are referred to disciplinary units of the EU institutions and bodies or the Security Office, as appropriate. For further details on the *de minimis* rules see Annex 9 on *de minimis*.

As far as the transmission of Final Case Reports is concerned, the general rule is that, in accordance with Article 10(2) of Regulation 1073/99 and the Commission's policy of 'zero tolerance', national judicial authorities are systematically informed of the results of internal

investigations in which a suspicion of criminal acts committed by staff and Members of the institutions has arisen.

2.4 OPERATIONAL COOPERATION

Operational cooperation is the full range of case-related exchanges and assistance activities carried out by OLAF in accordance with its mandate outside an investigation of its own. It is aimed at facilitating the protection of the Union's financial interests in collaboration with OLAF's operational partners at national, European and international level.

Operational cooperation may be supported by memoranda of understanding to put the cooperation between OLAF and its partners on a more stable footing. These memoranda describe OLAF's practice but do not amend the provisions of the applicable legal instruments, which provide the legal basis for those activities.

2.4.1 Cooperation with EU institutions and bodies

As far as internal investigations are concerned, all EU institutions and bodies have adopted decisions in line with the Model Decision attached to the Interinstitutional Agreement concerning the terms and conditions for internal investigations conducted by OLAF. These decisions clarify the conditions under which the staff of the EU institutions and bodies cooperate with OLAF. The Interinstitutional Agreement applies also to the European Central Bank (ECB) and the European Investment Bank (EIB) even though they are not financed from the Union budget.³⁸

Note

The complete list of these documents can be found in Annex 10 and online at:
http://s-olaf-prod5:95/PROD/legal_matters/internal_decisions/index_en.html

2.4.1.1 Eurojust

Eurojust is the EU body established by Council Decision 2002/187/JHA in order to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime. Its competence comprises among other things fraud and corruption and any criminal offence affecting the European Union's financial interests as well as laundering of the proceeds of crime. Based on requests emanating from a competent authority of a Member State, Eurojust may stimulate the coordination of investigations and prosecutions between competent authorities in the Member States, in particular by facilitating the execution of international mutual legal assistance.

Eurojust is composed of national members from each Member State, some of whom are acting as 'judicial authorities' and with whom OLAF may directly exchange information under Article 26(4) of the Eurojust Decision. Article 26(3) of the Eurojust Decision, however, limits collaboration to instances where the competent national authorities do not oppose OLAF's collaboration, and it is up to the concerned national member of Eurojust to verify this.

³⁸ For more details see also Case C-11/00 *Commission v European Central Bank* [2003] ECR I-7147 and Case C-15/00 *Commission v European Investment Bank* [2003] ECR I-7281.

OLAF contacts Eurojust in connection with cases under investigation or judicial follow-up with a view to taking advantage of Eurojust's possible assistance facilities with regard to national judicial authorities where two or more Member States are involved in a case. Also, national judicial authorities may directly contact Eurojust on such cases.

A team composed of members of Unit C1 and Eurojust national members meets regularly to coordinate and organise the collaboration. The collaboration is based in particular on the exchange of case summaries containing general information on a case dealt with either by Eurojust or by OLAF and describing the main features of aspects of the case. When Eurojust is to be informed about an OLAF case it is the members of the team in Unit C1 in consultation with Directorates A and B who prepare the case summaries with a view to identifying appropriate cases requiring cooperation with Eurojust. Based on the case summaries, Eurojust identifies the competent Eurojust national member or members, who will then directly deal with the case with OLAF. There are two categories of case summaries to be exchanged: cases for possible action for Eurojust and cases exchanged with Eurojust only for information.

Directorates A and B inform Unit C1 about OLAF cases in which collaboration with Eurojust seems possible.

2.4.1.2 Europol

Europol is the European Law Enforcement Organisation set up under the Europol Convention. Europol's competencies comprise, among other things, fraud and corruption and any criminal offence affecting the European Union's financial interests as well as laundering of the proceeds of crime provided that factual indications of an organised crime structure are involved and two or more Member States are affected by this form of crime. Europol's tasks are to facilitate the exchange of information, to collect and analyse information and intelligence, and to aid Member State investigations by providing relevant information. Its brief includes also the provision of specialist knowledge of investigating procedures, strategic intelligence, situation reports and threat assessments, crime prevention methods, technical and forensic police methods.

Given that the Europol legal framework does not allow it to forward information containing personal data to OLAF, cooperation is limited to fraud prevention and other policy matters and, where considered useful, the possible invitation of Europol staff to meetings on assistance cases.

2.4.2 Arrangements for cooperation with Member States

Cooperation takes place with all the Member States. For details, see especially the sections on external investigations.

During the accession process, the acceding countries set up special cooperation structures, which have become the 'Anti-Fraud Coordination Services'³⁹ (AFCOS). Similar arrangements are currently being established with the other candidate countries.

³⁹ These were earlier named 'Central or Single Contact Points'. The name change was prompted by the recognition that their competencies should be much broader than merely acting as a point of contact with the Commission and the Member States, and should encompass wide-ranging coordinating powers.

Each AFCOS is established in accordance with the national administrative system of the country concerned, and has responsibilities regarding both legislative and operational matters. As to the former, the AFCOS is responsible for initiating and monitoring legislation designed to ensure effective protection of the Union's financial interests. As to the latter, it should facilitate cooperation among the national administrative, investigation and prosecution authorities, as well as between these authorities and OLAF.

The AFCOS must be informed by the relevant units of developments in cases being conducted in their country, unless the nature of the mission is inconsistent with such communication.

2.4.3 Other operational cooperation

2.4.3.1 Cooperation with non-member countries

As specified in Section 3.3.2.2.4 'Inspections outside the European Union territory' of this Manual, there are a number of Union Regulations on cooperation with non-member countries providing that any agreement or convention resulting from their implementation must contain provisions ensuring the protection of the Union's financial interests in accordance with Regulations 2988/1995, 2185/96 and 1073/1999 and must also explicitly authorise the Commission to carry out on-the-spot checks and inspections in accordance with Regulation 2185/96.

2.4.3.2 Cooperation with international organisations

There are a number of international agreements with international organisations, which create legal bases for operational cooperation.

(1) United Nations

On 29 April 2003 the European Community and the United Nations signed the Financial and Administrative Framework Agreement (FAFA). Based on this agreement OLAF has the power to request access to documents and information concerning projects managed by the UN and (co)financed by the Union. Furthermore, the FAFA gives OLAF the power to request information about financial programmes, project accounts and other technical information, but not to question or otherwise interview UN staff if they do not cooperate on a voluntary basis. The agreement is limited to the UN Secretariat and those organisations belonging to the UN system which adhere to it. Several UN agencies have individually joined the FAFA. More information can be found at:

http://europa.eu.int/comm/europeaid/tender/gestion/cont_typ/onu/index_en.htm

(2) Other

There are other agreements, which can be found on the OLAF intranet:

N:\COMMON\gauthier - compendium\Règlement financier\compendium_direct exp-external aid.htm

and at:

http://europa.eu.int/comm/development/body/legislation/int-agree2_en.htm#Cotonou

3 CASE PROCEDURES

3.1 SOURCES OF INITIAL INFORMATION

OLAF may receive information from any source, including Union bodies, Member State and non-member country authorities, international organisations, informants, whistleblowers, witnesses, anonymous sources. OLAF also uses its own intelligence resources to search for indications of fraud as outlined in Sections 3.1.9 and 3.3.5 below. For more details on the rights of the individuals involved, see also Section 5.

In compliance with the Commission's Code of Good Administrative Behaviour, whenever the information originates from an identifiable person, OLAF investigators acknowledge receipt of such information within 15 working days of its registration by OLAF (Annex 4, Letters O1, O2 and O3). Likewise, whenever either a non-case or a closure decision has been agreed, this individual or body will be notified in writing of the decision unless such information would be harmful to an ongoing investigation by a law enforcement authority.

Information from anonymous sources is assessed according to the same standard as any other information received. Members of the public can contact OLAF to provide information of investigative interest. Appropriate communication tools will be made accessible on OLAF's website.

Initial information may be received at OLAF in written form, such as a letter or note from another Commission DG or other source, or in oral form. Information that may give rise to the opening of a case may also be gathered internally, on a proactive basis.

Information that is received orally must be put in writing using a Note for the File form (Annex 4, Form O2) and registered. After registration and obtaining a case file reference (OF), such information is passed on to the Head of Unit in the relevant sector, who must generate a staff appointment form (Annex 4, Form O/F1) in order to assign the file to an evaluator who will, in turn, be responsible for carrying out the initial assessment.

Prima facie non-case

Information received by OLAF must always be subject to the assessment procedure, except where a Head of Unit decides that the issue falls outside the competence of OLAF. In such cases, the procedure to be followed is outlined in Section 3.2.3.8 concerning prima facie non-cases. If such information might be more relevant to another authority, then it is to be transmitted to that authority.

3.1.1 Informants

An informant is a natural person who voluntarily discloses factual information to OLAF concerning a matter within the competence of the Office. He can be a whistleblower or another person. An informant usually discloses information on his own initiative and as a private person. Consequently, a person acting in his public function, e.g. an official of a Member State authority, is normally not treated as an informant.

3.1.2 Whistleblowers

A whistleblower is an EU official or another EU staff member (temporary staff, auxiliary staff, local staff, contract staff and special advisers) of the Union institutions and bodies who comes forward to OLAF with information he has discovered in the course of or in connection with his duties concerning matters which may be within OLAF's competence. As long as he complies with the rules, he is protected from adverse consequences on the part of the Union body. In contrast to other informants, EU officials and other EU staff are under a legal obligation to come forward with such information.

3.1.3 Other identified sources (witnesses)

A witness is an individual who is not a person concerned and who provides information concerning a matter within the legal competence of OLAF. Witnesses do not normally request or require anonymity. A witness, compared to an informant, normally provides information on request.

3.1.4 Anonymous sources

From time to time, OLAF receives information from anonymous sources. The anonymity of the sender does not invalidate the need to verify the accuracy of the information provided. Information from anonymous sources is to be assessed according to the same standards as any other information received. However, it requires particular attention as to whether the information provided can be verified from other sources. For this reason, it is important to emphasise on the Assessment of Initial Information form (Annex 4, Form O5) that the initial information came from an anonymous source.

3.1.5 Free Phone and Fraud Notification System (FNS)

(1) Free Phone

Members of the public can contact OLAF to provide information of investigative interest. A Free Phone has been set up to encourage members of the public to provide information to OLAF, free of charge. Designated OLAF employees (review officers) listen to messages from their home countries or from those in whose languages they are proficient. Review officers must respect the Free Phone listening timetable.

The Quality Assurance Team manages access to the Free Phone. Specific operating instructions on how the Free Phone equipment functions can be obtained from the Quality Assurance Team.

Messages received can be classified in three categories:

- blank messages where either there is no message recorded or the message is incomprehensible and no action can be taken;
- messages where the information given is clearly of no relevance to OLAF. Such information may be relevant to other authorities;

- messages where the information may be relevant and should be subject to the standard assessment procedure.⁴⁰

(2) The Fraud Notification System (FNS)

The Fraud Notification System (FNS) is a web-based information system that OLAF has put at the public's disposal in order to facilitate the collection of information to use in the fight against fraud, corruption and other illegal activities affecting the financial interests of the Union. The functions of this system are basically the same as the OLAF Free Phone Service and can be divided into three stages:

1. Stage one

Members of the public can provide the information in two different ways. First, they can complete a questionnaire (on <https://fns.olaf.europa.eu>), which includes a free text field and to which they may also attach a file. Second, they can register to have two-way communications with OLAF, which take the form of electronic messages transmitted within the FNS. The system allows the user to provide the information anonymously and offers a secure communication channel.

2. Stage two

The initial review of the messages within the system is carried out as follows:

- (a) Automatic review of questionnaires by the system.⁴¹
- (b) Human review. Review officers will review all messages that have not been deleted in the first phase described above⁴².

⁴⁰ Where the caller asks to be called back, the review officer on duty should contact the person during the listening session or, if necessary, later and record further details rather than simply recording the phone number. After listening to the messages, the review officer must write a brief description of each call on the Free Phone using the OLAF Free Phone First Screening form with the necessary details (date, log number, etc.) (Form O1). Forms must be completed for statistical purposes even if no message has been left. A summary of the information provided to the Office via the Free Phone is reported by the Quality Assurance Team in the monthly report on the operational activities of the Office. The reference number for the call must be provided on the form, as this allows identification of a particular call at a later stage. Completed forms should be given to the Quality Assurance Team officer responsible for the Free Phone, who will pass on to the appropriate departments the forms requiring further action.

Those messages that fall within OLAF's mandate and require assessment will be forwarded to the Registry for encoding and will be subject to the standard assessment procedure by the relevant Unit of Directorate A or Directorate B.

⁴¹ A. If they are totally devoid of any content (i.e. no free text, no attachment and no other fields have been selected), then the system will automatically generate a message to the user that the questionnaire has not been submitted.

B. If they contain no free text and no attachment, but one of the other fields has been selected, then the system places them in the 'blank folder'. The review officer can either mark it for deletion, in which case it will be passed to the System Administrator (who can either definitively delete it from the system or deem it relevant and assign it to the Head of Unit responsible for the sector concerned), or deem it to be relevant, and assign it to the Head of Unit responsible for the sector concerned. If individuals leave messages with information that is irrelevant, the message should not be retained.

C. If the system deems them to be irrelevant, based on statistics accumulated from previously classified messages, then it places them in the 'irrelevant folder'. The messages in this folder are handled in the same manner as messages in the 'blank folder,' described in the previous paragraph.

3. Stage three

The further review of the message by the unit responsible for the sector concerned by the message is as follows. Upon receipt, the Head of Unit will transfer irrelevant messages to the Head of Unit responsible on the quarterly rota for handling prima facie non-cases. They will be treated in accordance with the procedures laid down in Section 3.2.3.8 'Prima facie non-cases'. Relevant messages will be forwarded to an investigator in his unit. The investigator will first determine whether a communication channel has been selected by the user. If so, the investigator may activate the communication channel with the user, and thereby correspond with the user through the system via the anonymous mailbox. Once he has received any further information through such communications, the investigator will handle the information as any incoming information, in accordance with procedures described in this Manual. OLAF investigators should avoid asking questions that would lead informants to disclose information that is irrelevant for OLAF.

The System Administrator is responsible for managing the investigators' access, reviewing and deleting messages marked for deletion by review officers, accessing system-generated statistics, and verifying the backup and audit logs.

Data protection

Certain actions must be taken in observance of the data quality principle (DP Guidelines, Sections 1.3 and 1.4).

3.1.6 Union institutions and bodies

Article 7 of Regulation 1073/99 requires the Union institutions and bodies to forward to OLAF without delay any information relating to possible cases of fraud, corruption or any other illegal activity. The Union institutions and bodies must also forward to the Office any documents or information relevant to an internal investigation, or to the fight against fraud, corruption or other illegal activities affecting the Union's financial interests.

3.1.7 Member States

(1) Council Regulation 515/97

In accordance with Articles 17 and 18 of Council Regulation (EC) No 515/97,⁴³ OLAF receives information, including the following, from the competent authorities of the Member States:

⁴² The System recognises the language of the incoming questionnaire and allocates it automatically to the review officer who is assigned to that language. The review officer decides whether the information is relevant or irrelevant. The questionnaire/message is sent by the review officer via the system to the Head of Unit responsible for the sector concerned.

⁴³ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

- any information the Member State authorities consider relevant concerning goods which may have been the object of breaches of customs or agricultural legislation, methods or practices which may have been used to breach customs or agricultural legislation, and any other information liable to be evidence of fraud;
- any operation that may constitute a breach of customs or agricultural legislation of particular relevance at Union level, especially where it may have ramifications in other Member States or where it appears likely that similar operations have also been carried out in other Member States.

In the latter case, OLAF can make a reasoned request for this information and any relevant documents which the Member State authorities have not already forwarded.

(2) Commission Regulation 1848/2006

Article 3 of Commission Regulation 1848/2006⁴⁴ requires Member States to communicate to OLAF irregularities relating to the common agricultural policy that have been the subject of primary administrative or judicial findings of fact. To this end, Member States must, to the extent possible, provide detailed information concerning the nature and circumstances of the irregularity, the provisions infringed, the *modus operandi*, the names of natural and legal persons concerned, and the amounts involved.

When a matter is before a Member State judicial authority, the prior approval of such authority is necessary to transmit any information that is subject to the requirements of judicial secrecy. Article 4 stipulates that the information should be immediately transmitted to the Commission and the Member States concerned when it is anticipated that harmful effects will occur outside the territory of the Member State of origin, or when the information concerns a new fraudulent practice. Article 5 requires Member States to provide the Commission with detailed information of the procedures instituted with respect to the cases mentioned. The Commission stays in close contact with the Member States to complete the information received in accordance with Articles 3 and 5.

(3) Commission Regulation 1681/94

As the previous regulation is applicable for the Common Agricultural Policy, Article 3 of Commission Regulation 1681/94⁴⁵ requires Member States to communicate to OLAF irregularities relating to the Structural Policies concerning the programming period 2000-2006 and earlier, that have been the subject of primary administrative or judicial findings of fact. To this end, Member States must, to the extent possible, provide detailed information concerning the nature and circumstances of the irregularity, the provisions infringed, the *modus operandi*, the names of natural and legal persons concerned, and the amounts involved, recovered and the amounts that can not be recovered and the reasons why these amounts should be borne by the Union budget in order to allow the Commission to decide who shall bear the financial consequences. Furthermore, as regards cases linked to judicial and administrative procedures, Member States are obliged to report to the Commission the same information as in the case of agriculture domain.

⁴⁴ OJ L 335, 15.12.2006, p. 56.

⁴⁵ OJ L 178, 12.07.1994, p. 43, as amended by Commission Regulation (EC) N° 2035/2005 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field, OJ L 328, 15.12.2005, p. 8.

In area of Cohesion Policy for the programming period 2000-2013, Article 28 of Commission Regulation 1828/2006⁴⁶ requires Member States to communicate to OLAF as mentioned above. However, the provisions concerning the follow-up of irregularities were more aligned with the agriculture sector by decoupling the financial information from the information related to outcome of the administrative or (and) judicial procedure used to perform risk analysis.

(4) Other Union legislation

Other Union legislation requiring communication of irregularities to OLAF includes:

- Council Regulation 1150/2000 implementing Decision 94/728/EC, Euratom on the system of the Union's own resources;⁴⁷
- Commission Regulation 498/2007 laying down detailed rules for the implementation of Council Regulation (EC) No 1198/2006 on the European Fisheries Fund;⁴⁸
- Commission Regulation 1831/94⁴⁹ as amended by Commission Regulation (EC) No 2168/2005 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organisation of an information system in this field.⁵⁰

3.1.8 Non-member countries

OLAF also receives information from non-member country sources which is relevant to the protection of the financial interests of the Union. Such information can be divided into two broad categories as follows:

(1) Customs matters

The procedures for receipt of and action on information in this category are governed by long-standing customs legislation and conventions (including Convention on International Trade in Endangered Species (CITES)). Specifically, in relation to such customs issues information on matters which appear to constitute breaches of customs legislation may be received from non-member countries on the basis either of agreements on customs cooperation and mutual assistance or on the basis of protocols on mutual (administrative) assistance in customs matters [http://s-olaf-prod5:95/PROD/tools_procedures/customs_coop_contacts_3rd_c.pdf].

The parties to these agreements (the Union and the Member States as well as the non-member country or countries concerned) are required to provide mutual assistance and exchange information on request and spontaneously. Assistance on request involves the communication by the requested authority to the requesting authority of all information necessary for the latter to ensure the correct application of customs legislation. This includes all information concerning matters that constitute or appear to constitute violations of customs legislation.

⁴⁶ OJ L 371, 27.12.2006, p.27, as last amended by Commission Regulation (EC) No 846/2009, OJ L 250, 23.9.2009, p. 1.

⁴⁷ OJ L 130, 31.5.2000, p. 1.

⁴⁸ OJ L 120, 10.5.2007, p.1.

⁴⁹ OL L 191, 27.07.1994, p. 9

⁵⁰ OJ L 345, 28.12.2005, p.15.

Spontaneous assistance also involves the parties providing each other with the information and assistance that they consider necessary to take corrective action and provide for the correct application of customs legislation. This should also include information on new or suspected methods (fraud or irregularity methodologies) being employed in such matters and constituting possible or known breaches of customs legislation on import, export, transit, or any other customs procedure.

Requests for assistance in customs matters are to be made in accordance with the relevant agreements/protocol, in writing, in an official language of the requested authority. If requests are made orally then such requests should be confirmed in writing as soon as possible thereafter. The request should include at least a summary of the relevant facts, the legal basis and the natural or legal persons that are the subject of the suspected breaches of the customs legislation in force. The Compendium on Mutual assistance agreements in customs matters can be found on the OLAF intranet [http://ec.europa.eu/dgs/olaf/assist_3rd/index_en.html].

(2) Direct Union budget funding and/or other forms of EU funding involved

Such funding includes pre-accession aid (Phare, Ispa, etc.), humanitarian aid and development aid, research and development (R&D), technical assistance aid, etc. and the receipt of and action on information received in such matters is generally governed by the financial conventions/agreements signed between the European Union bodies* [ref] and the competent national authorities in the pre-accession countries or non-member countries concerned and/or the direct and specific contractual arrangements entered into between the European Union bodies and the contracting party in the pre-accession country or non-member country concerned. In such matters the financial agreements/conventions and/or specific contractual arrangements entered into generally provide that the competent authorities in the non-member countries concerned have a duty to inform the European Union bodies concerned of any matter concerning possible irregularities or fraud affecting the European Union budget and/or the European Development Fund, as the case may be.

Finally, insofar as both broad categories of activity are concerned, information may also be received from other parties relating to such funding matters in non-member countries, and in such circumstances OLAF evaluates the information received in accordance with its standard assessment of information procedures as provided for in Section 3.2.2 below.

3.1.9 Strategic intelligence and operational intelligence

Strategic intelligence is intended to provide a source of information for OLAF. Strategic intelligence assessments may lead to the opening of specific cases, or provide more general guidance relevant to policy development and operational strategy. An intelligence assessment may also be desirable before the decision is taken to open a case. The strategic intelligence function within OLAF is fulfilled by Units C2 and C3. Detailed rules on this activity can be found in Annex 11.

Operational Intelligence provides specific case-related operational support in the framework of an ongoing OLAF assessment as well as during the life cycle of a case. However, case-related tactical or operational analysis may also generate results that require additional cases to be opened. This is described in ‘Procedures for intelligence-generated cases’ in Section 3.3.5 ‘Operational intelligence’.

3.1.10 Information on suspicious financial transactions (money laundering information)

Information on financial transactions which raise suspicions that they constitute laundering of proceeds from Union fraud may provide an early indication of fraudulent activities to the detriment of the Union's financial interests. This information will normally be communicated to OLAF by Member States' Financial Intelligence Units (FIUs), which collect it from banks, financial institutions, insurance companies, high-value goods dealers and others subject to reporting duties under the Money Laundering Directives.⁵¹ It may also be provided by other Member State institutions, including investigation departments.

3.2 ASSESSMENT

3.2.1 Key principles applicable to assessments

- All information received by OLAF is to be made available to the Office, and not withheld by any individual member of its staff, and must be given a reference number by the Registry.
- Directorates A and B are in charge of carrying out assessments, but a multi-disciplinary approach can be followed where appropriate. Other OLAF units can carry out assessment activities at the request of Directorate A or Directorate B.
- No investigative activities may be carried out until a case has been formally opened following a recommendation of the OLAF Board. However, fact-finding or information clarification activities are a necessary part of the assessment process. Specific provisions apply in cases of extreme urgency (see Section 2.1).

3.2.2 Assessment of initial information⁵²

(1) Initiation of the assessment of initial information

All information, including anonymous information, is registered, a CMS file is opened and a case handler is assigned to conduct a preliminary review to see whether it relates to a matter within OLAF's competence.

If the information clearly and unequivocally does not fall within the competence of OLAF, or it clearly does not justify the use of OLAF resources, the Director, on the basis of a proposal prepared by the relevant unit, classifies it as a *prima facie* non-case. In these circumstances the information can be referred to another Union department or national or international authority.

Otherwise, the matter proceeds to the assessment. The purpose of the assessment is to evaluate whether the information received appears to be reliable and whether the suspicions are sufficiently serious to recommend to the Director-General that a case should be opened.

⁵¹ Directive 2001/97/EC of the European Parliament and the Council amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ L 344, 28.12.2001, p. 76.

⁵² For more structured information see the 'Assessment of initial information flowchart' (Flowcharts - Annex 12).

During the assessment phase, OLAF evaluators make all appropriate enquiries in order to clarify or corroborate initial information, including intelligence assessment.

(2) Duration of the assessment

The initial assessment of a case should normally be completed within two months of receiving the initial information. If this two-month time limit cannot be met then the investigator must complete an Extension of Assessment Stage form (Annex 4, Form O4) outlining the reasons why an extension is warranted and submit it to the responsible Head of Unit, who in turn must set the extended deadline for completion.

The authorisation of the extension of the initial assessment period must be recorded in the CMS. The initial assessment must then be completed within a period authorised by the responsible Head of Unit, which may not be more than six months after receipt of the initial information. If the information required for completing the assessment is still not available after six months, only the appropriate line Director can prolong the assessment phase. Any subsequent decision to prolong an assessment period must also be registered in the CMS.

Urgent assessment

In cases where an urgent assessment of a possible case must be carried out the investigator should meet with the responsible Head of Unit to carry out an oral assessment to enable an investigation to be opened by the Director-General or Director. The oral assessment should be confirmed in writing within 48 hours (see Section 2.1).

(3) Objectives and activities

At this point, a case has not yet been formally opened. Evaluators must therefore limit their action only to clarifying the initial information with the source and with other Union institutions and bodies and authorities involved in Member States or non-member countries, which will provide information to OLAF on a ‘voluntary’ basis. This enables OLAF to evaluate and verify the accuracy of information against other information and intelligence sources.

(a) Objectives

The evaluator’s objective will be to clarify the complaint by:

- ascertaining whether the information received indicates that a potential irregularity or fraud has occurred, and whether the grounds for suspicion are sufficiently serious. This may include preparatory fact-finding missions;
- checking which provisions have allegedly been infringed and whether the alleged irregularity is within the legal competence of OLAF.

Clarifying the complaint will enable the evaluator to draw up an initial plan of steps to be taken and to determine what resources are required to conduct the case.

(b) Activities

Activities during the assessment may include:

- requesting information (letter of request, Annex 4, Letter O5);
- verifying the initial facts alleged by taking an explanatory statement (invitation letter, Annex 4, Letter O4);

- requesting corroborative information and documents from the source of the information;
- making contacts with other departments of the Union institutions and bodies, and the competent national authorities, to confirm basic details of the allegations, such as receipt and enjoyment of a benefit;
- conducting desktop research using open sources or sources available within the institutions (such as databases);
- making simple checks such as confirming whether an item that has allegedly been removed has in fact been removed;
- carrying out the preparatory fact-finding missions so that OLAF can, in specific and duly reasoned instances, cross-check information so as to make an informed decision on whether OLAF should open an investigation. Such preparatory fact-finding missions can also be carried out in order to plan or make preparations for possible investigative activities and may also, for instance, be undertaken to consult an expert in a matter where specific technical expertise is required or to visit a location for the purpose of observation. Such missions may be carried out within the EU or in non-member countries with the mission team usually consisting solely of OLAF employees; in these cases a Fact-finding Mission Report (Annex 4, Form O/F4) has to be completed.

Preparatory fact-finding missions should not include investigative activity as defined below.

(c) No investigative powers to be used at the assessment stage

Before the opening of an investigation OLAF may not engage in acts which require the use of its investigative powers. These acts include:

- formal interviews of witnesses or interested parties;
- access to the personal file of staff members of the European institutions or bodies;
- inspections of premises;
- forensic examination of computers;
- on-the-spot checks.

3.2.2.1 Advice and assistance available to investigators during the assessment phase

Initial assessments are normally carried out by investigators from the operational directorates, Directorate A or Directorate B as appropriate. Judicial advisers from Unit C1 may be appointed as evaluators in exceptional cases. In conducting assessments investigators should consider seeking the help and advice of Directorate C or Directorate D for information, legal, technical or other appropriate forms of assistance deemed necessary to complete a duly informed and legally sound assessment of the information received.

(1) Operational Intelligence

Operational Intelligence begins by making necessary background checks to verify initial information during the preliminary review and during the assessment stage, where the accuracy of the information is crucial in determining immediate and longer-term actions. During the assessment stage the case handler together with the intelligence officer should plan and identify

the scope of the intelligence requirements foreseen for the investigation stage of casework. Section 3.3.5 ‘Operational intelligence’ refers in detail to this.

For confidentiality reasons, the case handler may request intelligence verification checks to be carried out using institutional database access without potentially alerting the individual concerned on the one hand, and with a view to identifying false allegations on the other hand. Sections 3.3.5 ‘Operational intelligence’ and 3.3.5.2 ‘Access to data’ refer in detail to this.

(2) Legal advice

There are four units with responsibilities for giving legal advice, each having specific expertise: Unit C1 on national and international law in criminal matters, Units C2 and C3 on some specific sectoral legislation, including the Financial Regulation, and Unit D2 on any question of Union law. Unit D2 should be consulted on any contact with the Commission’s Legal Service by other parts of the Office.

Use should be made of the legal advice function of Unit C1, in particular, when one of the following criteria is met:

- possible criminal infringements are at stake where advice is needed on circumstances that are complex or out of the ordinary;
- transmission to judicial authorities is likely;
- inspections of premises in internal cases, in order to protect fundamental rights of people concerned;
- OLAF is contacted by whistleblowers.

Relations with judicial authorities in Member States and non-member countries are a key responsibility of Unit C1.

Data protection

Specific actions must be taken during and at the conclusion of the assessment stage to meet data protection requirements concerning information given to the data subject, special categories of data, and transfers of personal data (DP Guidelines, Sections 2.2.2 and 2.2.3).

Specific actions must be taken if the case is classified as a prima facie non-case prior to assessment (DP Guidelines, Section 2.2.1.1) or, at the conclusion of the assessment, it is classified as a non-case or a monitoring action, coordination or criminal assistance case is opened (DP Guidelines, Sections 2.2.3.1 and 2.2.3.2).

If any personal data is transferred outside OLAF, the rules concerning transfers of personal data must be observed (DP Guidelines, Section 1.7)

3.2.2.2 Preparing the Assessment of Initial Information form

At the conclusion of the initial assessment, the evaluator prepares an Assessment of Initial Information form (Annex 4, Form O5) presenting the information gathered and making a recommendation as to whether an investigation should be opened. The assessment form requires the evaluator to give the following information:

(1) Background

A brief explanation of the background to the information, the date when received, the source and the content of the initial information, the Union institutions and bodies and/or the economic operators concerned.

(2) Legal basis

Specification of the legal basis on which OLAF could open a case.

(3) Sufficiently serious suspicion

- (a) Allegation: a brief explanation of the fraud or irregularity alleged and the evidence provided to support it. If there is no supporting evidence, or if the information has been provided in an anonymous letter, this should be specified;
- (b) Source reliability and probability of information being accurate: an assessment of the likely accuracy and reliability of the information. See in particular Section 3.3.5 'Operational intelligence'.

(4) Procedural recommendation

This section should include:

- a recommendation as to whether a case should be opened; and, if so
- the type of case;
- the requirements of the investigation team in terms of expertise and language skills (to be discussed with any investigators named as possible team members and with the Head of Unit). For example, if the case involves a large number of documents in a particular language, the investigation team should include at least one person who is able to conduct the case in that language; and
- if possible, an estimation of the time needed to complete the investigation or the initial phase of the case, including support resources.

If no proposal is made as to the composition of the investigation team (other than the number of investigators required), the resource allocation may be discussed with the Head of Unit after the decision is taken to open the case.

Judicial advisers from Unit C1 are appointed as investigators in charge by Director A or B only in exceptional cases and for stated reasons. The Head of Unit C1 must be consulted on such possible appointment.

Judicial advisers from Unit C1 are associated as judicial advisers in all criminal assistance cases. In other cases the association of judicial advisers is decided on a case-by-case basis if the competencies of the unit are concerned (national or international criminal law; see above Section 3.2.2.1).

If a new investigator is added or substituted in the course of the investigation, a new Investigation Authority will be required to authorise him to undertake the investigation: see Section 1.4.9.

If the recommendation is that a case should not be opened, then the reason for this recommendation should be specified (e.g. it is outside the legal competence of OLAF; it should be referred to another authority).

(5) Financial impact and possible recovery

Assessment of the financial impact should focus on the following: impact on Union's financial interests; other impact; estimation of financial impact by external source or by OLAF; amounts already established by the Member State(s) or other competent authorities, distinguishing between actual financial damage incurred and damage prevented from occurring. This section should also demonstrate how the estimate of financial/other impact was calculated (e.g. *'the case involves an alleged irregularity causing a loss to the Union budget amounting to ____'*). If it is not possible to specify the financial impact, the assessment should in any event provide some indication of the magnitude of the potential loss (e.g. *'the case involves a contract providing for payment of €1 million'*).

(6) Priority assessment

An indication should be given of the level of priority to be allocated to the case, based on the operational priorities of the Office.

(7) Initial work plan suggestions

This section should outline the scope and the main investigative steps insofar as they can be anticipated at this stage of the procedure. The following items, aimed at informing the Board as to the main aspects of the investigation, should be included into an investigation plan:

- data, information and documents to be secured;
- other information to be obtained and from what source;
- investigation activities to be undertaken and where possible, the expected time for their completion;
- indication of costs and benefits of planned actions.

The case handler together with the intelligence officer should plan and identify the scope of the intelligence, technical and computer forensic requirements foreseen for the investigation stage of casework (see Section 3.3.5).

(8) Resource allocation suggestions

If substantial costs are anticipated the OLAF Budget Unit (Unit D6) should be consulted to ensure that the requirements of the Financial Regulation are fulfilled and that sufficient resources are available.

(9) Revision of initial work plan

Each revision of the work plan shall be documented.

Data protection

The Data Protection Annex must be printed out from the DP Module and attached to the Assessment report (DP Guidelines, Sections 2.1.2 and 2.2.3).

When the assessment form and other documents required (see Section 3.2.2.3) have been completed, they should be forwarded to the OLAF Board for consideration in accordance with the timetable set out in Section 2.1.

3.2.2.3 Authorisation and documents required to open a case

The Director-General of OLAF has established practical arrangements for exercising the power to take the decision to open an investigation pursuant to Article 5 of Regulation 1073/99. This Article provides that the decision may be taken on his own initiative for both internal and external cases. In addition, for external cases, the decision may be taken following a request from a Member State concerned. For internal cases, it may be taken following a request from the Union body within which the investigation is to be conducted. In order to trigger this decision, the responsible Head of Unit presents the results of the initial assessment to the Board.

(1) Internal or external investigation

Where the assessment recommends that an OLAF investigation should be opened, it should be accompanied by the following forms:

- Opening of Internal Investigation form (Annex 4, Form O7), or
- Opening of External Investigation form (Annex 4, Form O8), and
- A draft Staff Appointment form for the case team (Annex 4, Form O/F1; this form lists the investigators and other employees authorised to conduct the investigation).

(2) Coordination case

Where the assessment recommends that a coordination case should be opened, it should be accompanied by the following forms:

- Opening of a Coordination Case form (Annex 4, Form O9), and
- A draft Staff Appointment form for the case team (Annex 4, Form O/F1; this form lists the investigators and other employees authorised to conduct the case-related activities).

(3) Mutual assistance message case

Where the assessment recommends that a mutual assistance message case should be opened, it should be accompanied by the following forms:

- Opening of a Mutual Assistance Message Case form (Annex 4, Form O11), and
- A draft Staff Appointment form for the case team (Annex 4, Form O/F1; this form lists the investigators and other employees authorised to conduct the case-related activities).

(4) Criminal assistance case

Where the assessment recommends that a criminal assistance case should be opened, it should be accompanied by the following forms:

- Opening of a Criminal Assistance Case form (Annex 4, Form O10), and

- A draft Staff Appointment form for the case team (Annex 4, Form O/F1; this form lists the investigators and other employees authorised to conduct the case-related activities).

(5) *Monitoring action*

Where the assessment recommends that a monitoring action should be initiated, it should be accompanied by the following forms:

- Monitoring Decision (Annex 4, Form O12), and
- A draft Staff Appointment form for the follow-up team (Annex 4, Form O/F1; this form lists the follow-up agents and other employees authorised to conduct the case-related monitoring activities). See also Section 4.3.2.

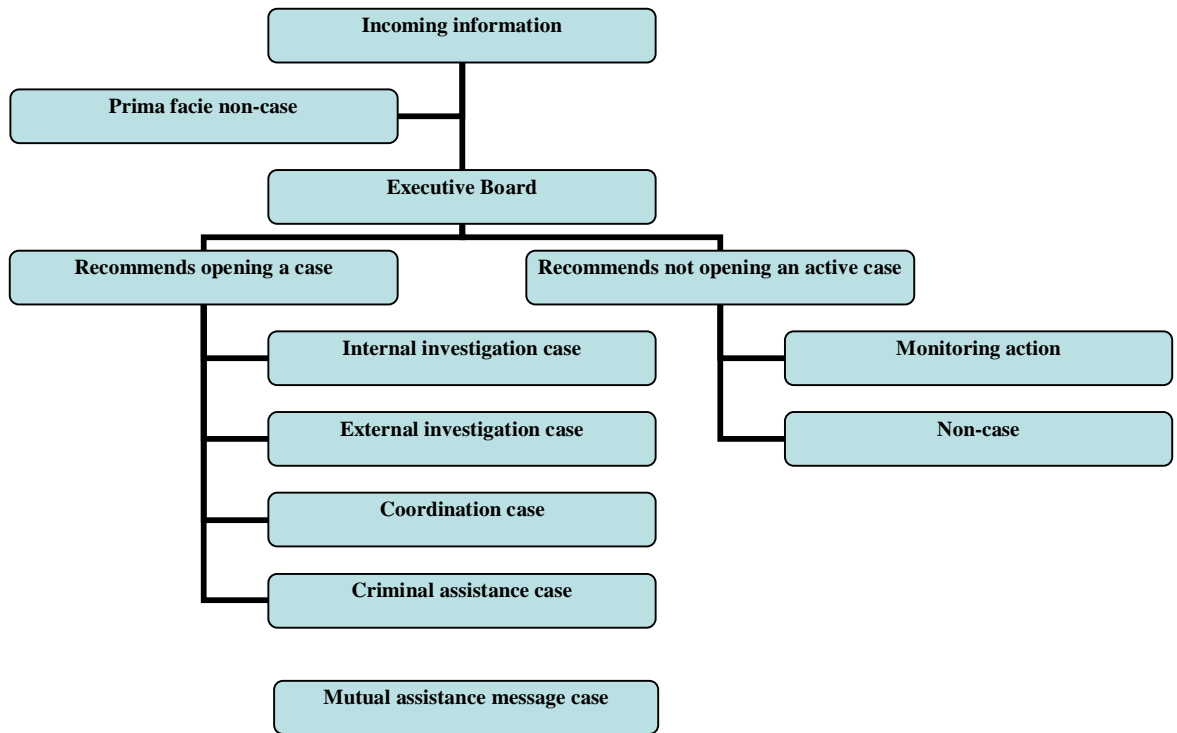
(6) *Non-case*

Where the assessment recommends that the matter is a non-case, it should be accompanied by a Non-Case Decision form (Annex 4, Form O13).

If, at any time during the lifetime of a case, the composition of the case team changes, additional Staff Appointment (Annex 4, Form O/F1) or Release forms (Annex 4, Form O/F2) must be generated.

3.2.3 Concluding an assessment — types of cases and non-cases

At the conclusion of the assessment phase, the evaluator makes a recommendation as to whether a case should be opened. When making a recommendation to open a case, the evaluator must determine which type it should be. OLAF classifies its cases under five administrative categories: internal investigations, external investigations, coordination cases, customs mutual assistance cases and criminal assistance cases. If the recommendation is not to open a case it should be classified in one of two categories: monitoring and non-cases. When an evaluator intends to recommend that information is to be followed up as a monitoring action, it is strongly recommended that the appropriate follow-up unit be consulted in advance. Each of these categories is described below.



The classification of a given case may be changed only with the approval of the Board. This section summarises the investigative tools and means used by OLAF case handlers with regard to the different types of cases.

3.2.3.1 Internal investigations

(1) Purpose

Internal investigations are administrative investigations within the Union institutions and bodies for the purpose of detecting:

- fraud, corruption, and any other illegal activity affecting the financial interests of the Union;
- serious matters relating to the discharge of professional duties that constitute a breach of the obligations of officials and other servants, Members of the institutions and bodies, heads of offices and agencies, or members of staff, and are liable to result in disciplinary or criminal proceedings.

Important

All individuals who work in Union institutions and bodies on the basis of personal contracts with a European institution can be subject to internal investigation. In addition to officials, this includes temporary agents, contract staff and seconded national experts, as well as Members of the European Parliament or the consultative Committees. Persons whose employment contract is not directly with a European institution cannot be the subject of an internal investigation.

(2) Activities

OLAF investigators may use the following means, in particular, within an internal investigation:

- collecting documents and information in any format which can be used as evidence after technical and/or forensic examination;
- conducting operational meetings with the departments and parties concerned;
- conducting interviews with any person who is able to provide information relating to an investigation;
- carrying out checks on the premises of the Union body concerned. Members and staff of the bodies concerned are required to cooperate fully with and supply assistance, information and explanations to OLAF.

3.2.3.2 External investigations

External investigations are administrative investigations outside the Union institutions and bodies for the purpose of detecting fraud or other irregular conduct by natural or legal persons. They may be carried out under either horizontal or sectoral legislation. Such cases are classified as external investigations where OLAF provides most of the investigative input.

Within an external investigation OLAF investigators may use the following means, in particular:

- collecting documents and information in any format which can be used as evidence after technical and/or forensic examination;
- conducting operational meetings with the departments and parties concerned;
- conducting interviews with any person who is able to provide information relating to an investigation;
- taking statements from any person who is able to provide information relating to an investigation;
- carrying out on-the-spot checks and inspections;
- carrying out control missions in non-member countries under the terms of sectoral legislation or mutual assistance provisions;
- taking samples for scientific examination.

3.2.3.3 Coordination cases

Coordination cases are cases that could be the subject of an external investigation, but where OLAF's role is to contribute to investigations being carried out by other national or Union departments by, among other things, facilitating the collection and exchange of information and ensuring operational synergy among the relevant national and Union departments; the main investigative input is provided by other authorities. OLAF's role includes facilitating contacts and encouraging the responsible authorities to work together.

OLAF employees help to maintain the operational platform for mutual administrative assistance (MAA) to facilitate investigations and operations in the customs and agricultural sectors (Regulation 515/97⁵³ (as amended by Regulation 766/2008)). This functions at a number of levels:

- between the competent authorities of Member States;
- between the competent authorities within Member States;
- between the competent authorities of Member States and the Commission (OLAF); and
- between the competent authorities of Member States, the Commission (OLAF) and the designated authorities of non-member countries.

OLAF investigators may take part in national checks subject to sector-specific legal rules.

Note

Where OLAF intends to conduct investigations of its own, an external or internal investigation needs to be opened. Where OLAF investigators need to conduct checks in non-member countries the case becomes an external investigation.

3.2.3.4 Mutual assistance message cases

Mutual assistance message cases are cases that arise from OLAF's statutory obligations under Regulation 515/97 (as amended by Regulation 766/2008) in the customs and agriculture sectors, in which OLAF's sole role is to circulate formal mutual assistance messages to Member States and/or non-member countries (either on OLAF's own initiative or at the request of a Member State or Member States) and then to assess and, when necessary, act upon the responses received. Such cases differ from coordination cases in that no case facilitation or other type of inter-Member State and/or non-member country coordination activity is required other than that which is laid down in the mutual assistance arrangements in the Regulation.

At the formal closure of such mutual assistance message cases, and when deemed necessary, follow-up paths may need to be opened by the appropriate follow-up units. These include:

- the sending of AM messages to Member States and/or non-member countries;
- the receipt of responses within the time frame set down;
- appropriate analysis of the responses received and action taken. Such action may include distribution of these responses to other Member States and/or non-member countries and/or third parties to alert recipients to suspected or ongoing fraud methodologies and make them aware of the need to take preventive or remedial action. At this stage the case may be closed with or without follow-up.

⁵³ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

3.2.3.5 Criminal assistance cases

Criminal assistance cases are cases within the legal competence of OLAF in which competent authorities of a Member State carry out a criminal investigation and request OLAF's assistance or OLAF offers its assistance. Such assistance can also be provided to the candidate country or non-member country if legal instruments allow it. In the course of criminal assistance cases OLAF can conduct the following types of activities:

- where necessary and desirable, coordination of the administrative activities of the competent authorities of the Member State or Member States insofar as they relate to the ongoing criminal case;
- facilitation or other types of assistance activities in order to facilitate and target operations undertaken by other administrative or judicial authorities and provide assistance to judicial authorities.

Note

In the course of criminal assistance cases OLAF can conduct coordination, facilitation or other types of assistance activities only in order to facilitate and target operations undertaken by other administrative or judicial authorities and provide assistance to judicial authorities. No investigation activities may be undertaken by OLAF in the course of a criminal assistance case.

3.2.3.6 Monitoring actions

OLAF will initiate a monitoring action if it would be competent to conduct an external investigation, but where a Member State or other authority is in a better position to do so (and is usually already doing so). The information is passed directly to the authority judged competent to handle it. No OLAF investigation resources are required, but, as the interests of the Union are at stake, OLAF will follow up, via the appropriate follow-up units, with requests for reports on developments at regular intervals.

OLAF may also undertake monitoring activities with regard to action undertaken by other Union, international or national authorities where such action is deemed to have an impact on the Union interests. In this context such Union, international or national authorities may be requested to provide information.

3.2.3.7 Non-cases

A matter is classified as a non-case where there is no need for OLAF to take any investigation, coordination, mutual assistance, coordination or monitoring action. Non-cases result from assessments agreed by the OLAF Board that conclude that the allegations made are not credible or insufficiently serious, or Union interests do not appear to be at risk from irregular activity, or other relevant factors indicate that no case should be opened. This would occur, for example, if only one Member State is concerned, and it is already dealing with the matter in a satisfactory manner. This process may result in the transmission to Member States of information about possible offences not related to the protection of EU interests. These matters are subject to the standard assessment procedure.

3.2.3.8 Prima facie non-cases

Where information is received which clearly and unequivocally does not fall within the competence of OLAF, or clearly does not justify the use of OLAF resources, then the responsible Head of Unit may propose to the line Director not to refer the information to the OLAF Board for assessment. In so doing the Head of Unit must complete a Prima Facie Non-Case form (Annex 4, Form O6), which must be approved and countersigned by the line Director concerned. The duly signed Prima Facie Non-Case form and the initial information should then be sent to the Registry for a reference number. A CMS record will then be opened for it but the case will appear in the CMS as closed. No preliminary investigation is conducted in cases of this kind.

3.3 INVESTIGATIONS AND OPERATIONS

The purpose of investigations is to collect the evidence needed to establish the facts of the case in order to verify whether an irregularity, fraud, corruption or serious misconduct detrimental to the Union's financial interests has occurred. OLAF investigators carry out their mandate to investigate by collecting information, reviewing documents, and carrying out on-the-spot checks, inspections and interviews. The purpose of operations is to assist or coordinate with other national administrative and judicial authorities in their investigations and other related activities.

Note

Except where explicitly stated otherwise, the procedures set out for the conduct of internal and external investigations also apply to coordination and criminal assistance cases, which are an integral part of OLAF's operational activities.⁵⁴

Relations with judicial authorities in Member States and non-member countries are a key responsibility of Unit C1. In opened cases, contacts made by Directorates A and B are to be conducted under the supervision of management directly in charge of the case and notified to Unit C1.

3.3.1 Specific conditions for conducting investigations and operations

This section covers how to ensure the traceability of the decision to open an investigation, the authorisation needed in order to carry out an investigation and what to do when the scope of an investigation is widened.

3.3.1.1 Authorisation and authority

(1) General authority

OLAF personnel who are engaged in carrying out investigations must ensure that they carry with them a formal authorisation. This comprises at least the decision to open the investigation

⁵⁴ For more structured information see the 'Investigations and operations flowchart' (Flowcharts - Annex 12).

(Forms O7, O8, O9, O10 and O12) and the Staff Appointment forms (Annex 4, Form O/F1), listing all persons participating in the investigation.

(2) Special authority

In addition, a special authority is required to carry out each of the following specific investigation activities (Annex 4, Form O14). It shows the subject matter and details of the investigation activity and is signed by Director A or Director B or in their absence a Director acting on their behalf. This document is the ‘authority’ required in Article 6 of Regulation 1073/1999 and Article 6 of Regulation 2185/96:

(a) Inspections of premises (internal cases only)

For the inspection of premises of the EU institutions and bodies, two notes should be submitted by the responsible Head of Unit to Unit C1 for advice, and thereafter to the Director-General for approval. They are:

- a note to the Head of Security of the Union institution or body concerned, requesting assistance in conducting the inspection, which should be prepared and presented for signature by the Director-General if the assistance of the Security Office is required either to guarantee access or simply to be present during the inspection (Annex 4, Note O2);
- a note to the Secretary-General and/or President of the Union institution or body concerned (Annex 4, Note O3).

(b) On-the-spot checks under Regulation (EC, Euratom) No 2185/96

A letter is sent to the Member State authority that has been designated to receive this information, containing the relevant personal data transfer clause (Annex 4, Letter O11).

In addition, a letter is sent to the economic operator that is the subject of the on-the-spot check, containing a privacy statement (Annex 4, Letter O10). The letter may be prepared either by OLAF or by the competent national authority, and presented to the economic operator at the latest at the time of the check. For more details, see Section 3.3.2.2.1 on preparation of on-the-spot checks.

(c) Relations with judicial authorities in Member States and non-member countries

This is a responsibility of Unit C1. In opened cases, contacts made by Directorates A and B should be conducted under the supervision of management directly in charge of the case and notified to Unit C1.

3.3.1.2 Changing the scope of a case

The subject matter of a case is always defined at the time the case is opened. Whenever the subject matter changes substantially, it is necessary to modify the scope of the case or to open a separate case.

To do so, the same procedures must be followed as those used to open a case. Specifically, an assessment must be presented to the OLAF Board. The Board makes an appraisal of the information presented by the investigator in the Assessment of Initial Information form. Where the assessment recommends that a case be opened, it should be accompanied by an Opening of Internal Investigation, External Investigation, Coordination Case or Criminal Assistance Case

form (Annex 4, Forms O7, O8, O9 or O10), depending on the type of case involved, and a Staff Appointment form (Annex 4, Form O/F1).

During an external investigation, it may become necessary to open a separate but complementary internal investigation in order to make enquiries falling outside the scope of the ongoing external investigation. In this case it is necessary to open a separate investigation, following the procedures for opening a case.

Conversely, in the course of an internal investigation, it may become necessary to open a separate but complementary external investigation in order to make enquiries falling outside the scope of the ongoing internal investigation. However, according to Article 4(3) of Regulation 1073/99, within the context of an internal investigation, OLAF may carry out the on-the-spot checks at the premises of economic operators concerned. Thus, it is not necessary to open an external investigation in this case. See section 3.3.2.1.

Important

Particular attention must be given to this aspect as OLAF's powers and obligations differ in internal and external investigations. OLAF's classification of its own investigative action may be re-qualified by the European Courts and deemed a procedural error.⁵⁵

3.3.1.3 Duty of discretion ('devoir de reserve')

Where a member of OLAF is requested by the national judicial authorities to provide evidence in the course of criminal or civil proceedings, it is necessary to have an Authority signed by the Director-General of OLAF, as the Appointing Authority, in order to do so (Annex 4, Note O/F2, see also Sections 1.4.10 and 5.1.4). This should be done in liaison with Unit C1.

3.3.1.4 Traceability of the relevant decisions

Any decision of the Director- General, or the Directors as well as the recommendations of the Executive Board to the Director- General concerning the opening of a case, the authorisation, the authority and the staff appointment forms must be registered to ensure the traceability of the decision- making process.

3.3.2 On-the-spot checks and other inspections and the recording thereof

3.3.2.1 Internal investigations

(1) Inspection of premises in internal investigations: definition

⁵⁵ Judgment of the European Court of First Instance of 8 July 2008 in Case T-48/05 *Yves Franchet and Daniel Byk v Commission*, paras 116-124.

In the framework of an internal investigation, OLAF has the right of immediate and unannounced access to the premises of a Union institution or body for the purpose of gathering any information relevant to such an internal investigation. This includes the right to enter the premises; to enter any room, open any cabinet, inspect, take a copy and/or obtain extracts from any document (including accounts) or data medium, and, if necessary, take custody of such document or data medium to ensure that it does not disappear; to request oral information from Members of institutions and bodies, from managers of offices and agencies, and from staff of Union institutions and bodies. Concerning forensic and technical examinations of data media, see Section 3.3.4.4.

Important

These are far-reaching powers, and OLAF investigators must take great care to apply them lawfully.

(2) Authorisation and assistance

Apart from the Investigation Authority mentioned above (Section 3.3.1.1), a Note (Annex 4, Note O2) to the Head of Security of the Union institution or body concerned is sent, where necessary requesting assistance in conducting the inspection. Note O2 should also be presented for signature to the Director-General. Their assistance may be required either to guarantee access, or simply to be present during the inspection.

In addition, a Note to the Secretary-General and/or President of the Union institution or body concerned (Annex 4, Note O3) should be presented. The responsible Head of Unit submits these documents to the Judicial and Legal Advice Unit, and thereafter to the Director-General for approval. Approval will be given only if an inspection of premises is deemed to be necessary for achieving the goals of the investigation. Concerning the flow of information, see also Section 3.3.6.2.

(3) Conducting the inspection

The official concerned by an internal investigation need not be present during an inspection of his office. A member of the Union institution or body in question, or of its Security Office, must, however, be present. In exceptionally complex cases requiring a thorough legal analysis, a member of the Judicial and Legal Advice Unit should also be present. If the investigator encounters difficulties in gaining access to the premises, the Security Office of the Union institution or body (if there is one) may be called upon to assist.

Originals of documents and other data media that may be relevant in a judicial procedure should be taken if only originals will be admissible in evidence in the Member State concerned. Otherwise, certified copies should be made by the competent person in the Union institution or body concerned or the OLAF Archive. The opinion of the Judicial and Legal Advice Unit should be obtained as to whether originals or certified copies will be required. Originals and certified copies must be stored in the OLAF Archive case file (see Section 2.2).

Address books or diaries that are found on the premises may be considered to be used for professional purposes and may be seized if relevant to the goal of the inspection, unless it is clearly indicated that they are used only for private purposes. Wallets, handbags, and obviously private papers should not be seized. Medical documents should only be read, copied or seized if they concern one of the main purposes of the investigation, and special care must be taken in handling them. The matter must be referred to the Judicial and Legal Advice Unit before the inspection commences.

Documents or other material may be found during the inspection that appear to be evidence of an irregularity or crime not covered by the OLAF Investigation Authority under which the inspection is being conducted. In such circumstances, the OLAF agents should either immediately seek an extension of the written authority to cover such material, remaining on the premises until it has arrived, or request the representative of the Security Department to ensure that the material is properly secured until further measures can be taken. In circumstances requiring urgent action, for instance during an inspection at night, the OLAF agents may obtain authorisation to extend the inspection orally from the Director-General or the Director of the relevant operational Directorate. This oral authorisation must be confirmed in writing within 48 hours.

Note

To the extent possible, the inspection should be conducted without disturbing the work of the service.

OLAF investigators cannot be accompanied by Member State officials, unless authorised by the institution concerned, in conformity with Article 1 of the Protocol on Privileges and Immunities. However, Member State officials serving as seconded national experts with OLAF may participate in the inspection without such an authorisation.

(4) Inspection report

A detailed report on the inspection must be prepared immediately upon completion of the inspection, while still on the premises, based on the Report on Inspection of Premises form (Annex 4, Form O16), which contains a privacy statement. All individuals present at the inspection should sign the report; if anyone refuses to sign, this should be noted.

(5) On-the-spot checks at the premises of economic operators in internal investigation

Article 4(3) of Regulation 1073/99 states that, within the context of an internal investigation, OLAF may carry out the on-the-spot checks at the premises of economic operators concerned, in order to obtain access to information relating to possible irregularities which such operators might hold under the conditions and in accordance with the procedures laid down by Regulation 2185/96.

Whenever the conditions laid down in Article 4(3) of Regulation 1073/99 and Regulation 2185/96 are fulfilled an on-the-spot check can be carried out within the framework of an internal investigation. These two legal bases must be clearly indicated on the relevant CMS forms, stating that Article 4(3) and Regulation 2185/96 conditions apply. It is not necessary to open an external investigation in this case, but on-the-spot checks must be carried out in accordance with the procedures described in Section 3.3.2.2.

If an internal investigation has been opened solely on the basis of Regulation 1073/99, but as a result of a change of circumstances the conditions laid down in Article 4(3) of Regulation 1073/99 and in Regulation 2185/96 are fulfilled during the investigation, on-the-spot checks and inspections can also be carried out under the conditions and in accordance with Regulation 2185/96 procedures. However, the legal basis has to be amended accordingly. An authorisation to change the legal basis signed by the relevant Head of Unit will be attached to a case note, stating that Article 4(3) of Regulation 1073/99 and Regulation 2185/96 conditions apply.

Important

The information sought must be relevant to the internal investigation. Any on-the-spot check that is not linked to an internal investigation will entail the opening of an external investigation.

3.3.2.2 External investigations

OLAF exercises the power conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot inspections and checks at the premises of economic operators concerned in order to obtain access to information relating to possible irregularities⁵⁶ which such operators might hold. All areas of Union activity relating to the protection of the Union's financial interests are covered. For more detailed rules and procedures see the 'Guidelines on OLAF's application of Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the Union's financial interests against fraud and other irregularities (Annex 13) and the 'On-the-spot check in external investigation flowchart' (Flowcharts - Annex 12).

3.3.2.2.1 *Planning on-the-spot checks*

(1) Objective of on-the-spot checks

According to Article 5 of Regulation 2185/96, on-the-spot checks and inspections are carried out 'on economic operators to whom Union 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'.

OLAF may (Article 2 of Regulation 2185/96) carry out checks and inspections:

- for the detection of serious irregularities or irregularities that may involve economic operators acting in more than one country, or
- where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests, or
- at the request of the Member State concerned.

(2) Coordination of checks

OLAF is required by Article 3 of Regulation 2185/96 to '*ensure that similar checks and inspections are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of Union sectoral regulations*'.

Note

Planning: It is necessary to check in advance with the relevant Directorate-General whether the economic operator is already being checked on a similar basis.

⁵⁶ "'Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure' (Article 1(2) of Regulation (EC, Euratom) No 2988/95).

If checks or inspections are in progress when OLAF is contemplating them, those in progress under the sectoral rules must be suspended before on-the-spot checks can be commenced under Regulation 2185/96.

Regulation 2185/96 requires OLAF to *'take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation'* (Article 3, second paragraph).

Important

The requirement whereby OLAF must take into account inspections in respect of the same facts in a Member State is a flexible formulation: OLAF is not prohibited from acting simply because a Member State has already performed an inspection. OLAF may draw on evidence arising from current or past national inspections which warrants further investigation.

In addition, a first check in the Early Warning System (EWS) may need to be carried out.

(3) Establishing a partnership with the national authorities

Article 4 of Regulation 2185/96 provides that *'the competent authorities of the Member State concerned ... shall be notified in good time of the subject, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help'*. Regarding the object of checks, OLAF must make its intentions quite clear. The purpose of checks is to detect irregularities within the meaning of Article 2 of Regulation 2185/96 in a given business which OLAF must specify to the Member State. The legal basis is Regulation 2185/96 itself.

When this information is being provided, OLAF may also ask the national authority concerned for assistance, including the presence of national officials and their participation in on-the-spot checks. If deemed necessary by the Investigation Unit, assistance may also be provided by Unit C1 or D2 on determining national authorities' powers of access to premises and to information, and powers to safeguard evidence.

(4) Time limits for informing the Member State

The competent authority or authorities in the Member State concerned by an on-the-spot check must be notified early enough to allow sufficient time for receipt and initial examination of the information provided by OLAF. A period of two weeks is adequate in practice.

The authority or authorities in the Member State concerned by an on-the-spot check must be notified by means of a letter from the Director-General of OLAF or by the member of OLAF's management responsible for the inspection in question (Annex 4, Letter O11).

The two-week time limit may be shortened in exceptional circumstances. However, the need for prior notification of the Member State remains. Such 'exceptional circumstances' are strictly defined. They would arise only where OLAF had obtained information just before taking any action and where any delay would result in failure.

(5) Notifying the Member State authority

In the letter notifying the national authority of the subject, purpose and legal basis of the on-the-spot check, OLAF makes a formal request for access *'under the same conditions as national administrative inspectors and in compliance with national legislation, to all the*

information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections' (Article 7 of Regulation 2185/96).

Important

OLAF must give adequate information to enable a successful inspection, but avoid divulging confidential information to departments that have no need to know it.

OLAF and the competent authorities of the Member State will agree on whether to inform economic operators of the imminence of an inspection. The competent authority and OLAF may agree, in line with the principle of proportionality, that the circumstances are such that the economic operator should not be notified until the day of the check itself.

(6) Composition of the inspection team

The Commission decides on the composition of its inspection team, in accordance with Article 6(1) of Regulation 2185/96: *'On-the-spot checks and inspections shall be carried out on the Commission's authority and responsibility by its officials or other servants, duly empowered.'* Inspectors may be officials, contract agents or members of the temporary or auxiliary staff. Article 6(2) of Regulation 1073/1999 provides that *'The Office's employees shall carry out their tasks on production of a written authorisation showing their identity and their capacity, together with a document indicating the subject-matter and purpose of the on-the-spot check or inspection.'* National experts on secondment may 'assist in such checks and inspections'.

The Member State may decide whether or not to take part in on-the-spot checks. If the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities.

Note

It is wholly desirable that national inspectors be involved. Active participation by the national authorities contributes to an efficient on-the-spot check.

Difficulties may arise in practice. A Member State that is reluctant to participate or puts off indefinitely the decision to participate might jeopardise the effectiveness of the inspection. In the absence of a specific statement from the Member State confirming that it wishes to participate, or if the Member State does not wish to participate, OLAF may proceed alone, although national inspectors may join in at a later stage if a decision to participate is subsequently taken.

An on-the-spot check may be carried out without the consent of the Member State concerned. However, the Member State may object that one of the conditions laid down in Regulation 2185/96 is not fulfilled in a given case: in such circumstances, OLAF will consult the competent national authority and ask it to justify its position. If OLAF feels that the objections of the Member State are justified, it will not carry out the check; otherwise it may carry out the check alone, although the Member State may take action before the Court of Justice of the European Union.

Even if the economic operator concerned is opposed to the check being carried out, the Member State must give OLAF inspectors such assistance as they need to allow them to discharge their duty, where necessary by asking the national courts to grant access to premises.

Important

If, irrespective of whether the economic operator concerned resists the check, the Member State considers as unlawful the inspection carried out without the participation of national officials, it should be reminded of the principle of primacy and direct application of Union law.

3.3.2.2.2 *Performing the inspection/on-the-spot check*

(1) Compliance with national law

‘During on-the-spot inspections and checks, the Office’s employees shall adopt an attitude in keeping with the rules and practices governing officials of the Member State concerned’ (Article 6(4) of Regulation 1073/1999). If needed, Unit C1 or D2 may provide advice on compliance with national law.

(2) Economic operators

On-the-spot checks and inspections may concern any economic operator where there is reason to believe that the latter has committed, by act or omission, an infringement of Union law which may lead to the imposition of administrative measures or penalties under the general conditions laid down in Regulation 2988/95 concerning protection of the financial interests of the European Communities.

These may be natural or legal persons or other institutions or bodies recognised by national law (individuals, firms, public establishments or local authorities, with the sole exception of the Member States in the exercise of state authority), wherever their conduct, as economic operators, may have had the effect, through incorrect application of Union law, of damaging or attempting to damage the Union budget. Economic operators (natural or legal persons) who have assisted in an irregularity or who are liable for it or have responsibility for preventing it are also covered.

An on-the-spot check at the premises of other economic operators may be deemed indispensable in order to gather crucial material concerning an irregularity committed by an operator with whom they have or have had regular or occasional relations. This might involve, for example, all the service providers used by the operator under investigation: examination of the commercial documents of insurers, suppliers, storage companies, etc. may enable certain transactions, movements of goods, or invoices to be verified.

This type of inspection is available in strictly defined circumstances, as set out in the third paragraph of Article 5: ‘*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.*’

(3) Access to operators’ premises

The second paragraph of Article 5 of Regulation 2185/96 provides that ‘economic operators shall be required to grant access to premises, land, means of transport or other areas, used for business purposes’. This wording means that the business use factor is the common denominator. Business use obviously contrasts with exclusively personal use of private premises.

Note

‘Operators premises’ are defined broadly — premises, land and other areas — to cover every possible situation, and means of transport are also included. Private

premises (such as an apartment or a house) used for both business and personal purposes are considered as business premises when they are used regularly for business.

(4) Access to information

Article 7(1) of Regulation 2185/96 provides that ‘*Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections.*’

It also states that ‘*they may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.*’

Important

These are fundamental provisions conferring on the inspectors the very broadly framed right to acquaint themselves with, and take copies and samples of, all the information they need under the same conditions as national inspectors. This does not comprise enforcement (search) powers.

The access to information also includes the possibility for OLAF inspectors to take oral statements from economic operators who are the subject of an inspection, provided that these statements are taken in compliance with the national rules on administrative checks.

In the case of electronic data, OLAF inspectors must, in order to ensure that the necessary technical expertise and safeguards are in place, obtain prior authorisation from the Director-General of OLAF to obtain such information while respecting national and Union law. In this regard see Section 3.3.4.4.

Regardless of its form, information collected or assembled must be covered by a document signed by all the relevant participants.

For electronic data, an OLAF forensic examiner fills in Computer Forensic Operation Report (Annex 4, Form O17), detailing the work performed to acquire the data and from which equipment, noting details of security backup.

Important

The word ‘administrative’ is important. The Regulation does not confer on OLAF inspectors the same powers to act as criminal investigators.

Should access to any information be denied to OLAF, OLAF investigators may ask the national authority present during the on the spot check to make arrangements to secure evidence, in accordance with national law. Should access to electronic data be denied, OLAF forensic examiners can assist the national authority in securing the data in order to guarantee the integrity of the data both for the data owner and to secure the validity of evidence. Form O17 also acts as a receipt, a copy of which is to be retained by the economic operator.

Regulation 2185/96 was enacted under the EC Treaty as a Community instrument and not in the context of Title VI of the Treaty on European Union. Therefore, the third paragraph of Article 1 of the Regulation provides that: ‘*This Regulation shall not affect Member States’ powers regarding the prosecution of criminal offences or the rules governing mutual assistance in criminal matters between Member States.*’

OLAF and national inspectors are on an equal footing; the former cannot be denied access to information if the latter have access to it.

Where an OLAF inspection is taking place in parallel with a request for mutual assistance from the criminal courts, OLAF may decide to discontinue its inspection in order to allow the information to be conveyed under the mutual assistance scheme.

(5) Refusal to grant access to premises, to information or to assist with the securing of evidence

The economic operator is entitled to be assisted by a legal counsel.

Refusal to allow access or to assist with the securing of evidence is a breach of Union law. This obligation on the part of Member States is confirmed in Article 6(6) of Regulation 1073/1999: ‘The Member States shall ensure that their competent authorities, in conformity with national provisions, give the necessary support to enable the Office’s employees to fulfil their task.’ The provision of assistance to OLAF inspectors is thus an obligation imposed by Union law that has to be implemented by means of the enforcement measures, including criminal and/or emergency measures, available in the Member State.

If the assistance given by the Member State turns out to be insufficient or non-existent, the OLAF inspectors must ask their management to take the steps needed to avoid interrupting the inspection of the economic operator.

Note

If OLAF considers that the obligations under Union law have not been respected, this non-compliance is dealt with in accordance with the procedures laid down in the Treaty on the Functioning of the European Union. The OLAF Supervisory Committee and COCOLAF must be informed.

(6) Use of external experts to provide technical assistance

OLAF may call on external experts when carrying out an on-the-spot check on the basis of Regulation 2185/96. Article 6(2) of Regulation 2185/96 states that OLAF may call on outside bodies acting under its responsibility to provide technical assistance. OLAF must ensure that the aforementioned officials and bodies give every guarantee as regards technical competence, independence, integrity and observance of professional secrecy.

Important

In accordance with Regulation 1073/99, OLAF is responsible for carrying out investigations. It is therefore not possible to delegate any part of the investigation function to external entities. In no case should technical expertise be used as a substitute for OLAF's investigative action.

Technical experts may be legal or natural persons dealing with technical areas. The type of technical expertise sought must be of a type not already available within OLAF. The expertise should be provided at the time of the on-the-spot check on the basis of Regulation 2185/96. The aim of the external expertise will be to enable OLAF to collect or analyse evidence of a technical nature, which can then be used in court if needed.

Note

The type of expertise that can be sought will be strictly restricted to technical areas where OLAF lacks expertise.

The expertise should be provided at the time of the on-the-spot check on the basis of Regulation 2185/96. The presence of OLAF staff is obligatory during all contacts between the expert and staff or systems of investigated entities.

A request for external expertise should be duly motivated by the investigator and proposed to the Head of Unit, together with precise specification for the work to be carried out. The Director will then decide whether to authorise the request, on the basis of the motivation and of the specification.

3.3.2.2.3 Use of information obtained

OLAF inspectors are subject to three categories of obligation: ranging from the general to the particular, they relate to professional secrecy, non-disclosure of information, and protection of personal data.

(1) Professional secrecy

This is the broadest obligation incumbent on OLAF employees, being imposed both by Article 339 of the Treaty on the Functioning of the European Union and by Article 17 of the Staff Regulations of officials and Conditions of Employment of other servants of the European Communities. It is reaffirmed in Regulation 1073/1999 (Article 8(1): *‘Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions’* and in the Regulation on on-the-spot checks by reason of the specific nature of the powers conferred on OLAF inspectors visiting economic operators.

Article 8(1) of Regulation 2185/96 provides that *‘Information communicated or acquired in any form under this Regulation shall be covered by professional secrecy and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.’*

Included in the information obtained under Regulation 2185/96 are all the documents relevant to the proceedings and therefore the complaints, in whatever form, that prompted the OLAF investigation.

Note

Any violation of professional secrecy by an OLAF inspector or by a person assisting him will render the perpetrator personally liable.

(2) Non-disclosure of information

The obligation not to divulge information obtained is more narrowly defined than the obligation of professional secrecy. The second subparagraph of Article 8(1) of Regulation 2185/96 provides that *‘Such information may not be communicated to persons other than those within the Community institutions or in the Member States whose functions require them to know it nor may it be used by Community institutions for purposes other than to ensure effective protection of the Communities’ financial interests in all Member States.’*

The obligation not to disclose information to persons other than those whose functions require them to know it is incumbent both on the relevant authorities and on the Member States.

Note

Information thus received may not circulate within the Commission. Departments that might be interested in information obtained in the course of an on-the-spot

check will not be given access to it if the protection of the Union's financial interests is not endangered.

The Regulation on on-the-spot checks does not place the same restrictions on the Member States' right to disclose. They may envisage using information obtained by officials participating in an on-the-spot check in another Member State for other purposes (the situation already considered in relation to Article 6(2) of the Regulation), but they must first 'seek the agreement of the Member State where that information was obtained' (end of second subparagraph of Article 8(1) of the Regulation). OLAF inspectors have no role to play here.

(3) The inspection report

The material and supporting documents collected during an inspection are annexed to the inspection report (Annex 4, Form O20; this is a summary of the activities carried out during the inspection and contains a privacy statement) and sent to the national authorities without delay. If the report concerns a joint inspection within the meaning of the second paragraph of Article 4 of Regulation 2185/96, the national inspectors who took part in the inspection should be asked to countersign it.

Account should be taken of the inspection report in the final investigation report drawn up in accordance with Article 9(1), (2) and (3) of Regulation 1073/1999.

Article 8(3) of Regulation 2185/96 deals with the preparation of inspection reports. It lays down a general obligation for Commission inspectors to take account of national procedural requirements: '*Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned.*'

Note

The inspection report must be drawn up in the official language of the Member State in which the inspection took place.

OLAF inspectors may therefore draw up their reports, using the annexes as supporting information. The annexes will contain documents that bring together material collected on the ground and documents containing a transcription of any questions put orally to the economic operators during the inspection and of their answers or statements. In any proceedings that may be brought following an on-the-spot check, the OLAF inspectors' reports are placed on an equal footing with those drawn up by their national counterparts in comparable cases. Regulation 2185/96 provides that '*They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.*'

The final sentence of Article 8(3) of Regulation 2185/96 provides that '*Where an inspection is carried out jointly, pursuant to the second subparagraph of Article 4, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the Commission inspectors.*' The countersigning does not imply formal approval by the national inspectors of the content of the report. It has a quite different significance — it is an information measure providing the Member State with a record of the activities carried out during the on-the-spot check.

Note

The countersigning has no impact on the admissibility of the OLAF inspectors' report in administrative or judicial proceedings. The only requirement imposed by

Article 8(3) of the Regulation is that national inspectors be asked to countersign. The inspection report must contain all the observations made by the national inspectors and must record any refusal to countersign.

Drawing up inspection reports is at all times the exclusive responsibility of the OLAF inspectors who carried out the on-the-spot checks, even in the case of joint inspections.

Lastly, the representatives of the economic operator(s) concerned should sign only the parts of the report relating to the statements made and answers given by the economic operator(s) and the material collected. (Note that the transcription of oral requests for information from the operator(s) and of the responses and statements made by the latter, together with the material collected during the check, must be annexed to the report.)

(4) Notification of the Member State (see also Section 3.3.6.1.2)

Article 8(2) of Regulation 2185/96 provides that *‘The Commission shall report as soon as possible to the competent authority of the State within whose territory an on-the-spot check or inspection has been performed any fact or suspicion relating to an irregularity which has come to its notice in the course of the on-the-spot check or inspection. In any event the Commission shall be required to inform the aforementioned authority of the result of such checks and inspections.’*

The obligation to report is a blanket obligation and includes ‘suspicions’, and this very fact underscores the powers conferred by Regulation 2185/96 on OLAF inspectors to assess and qualify the facts they observe.

Note

The obligation to report applies irrespective of whether or not the Member State decides that its own inspectors will take part in the inspection.

The obligation to report applies only in relation to the Member State where investigations are undertaken.

If the Member State is not involved in the inspection, OLAF must consider whether a report should be made to another Member State concerned by the fraud but not directly involved in the inspection. In any event, information provided to another Member State must be limited to that which is required to protect the financial interests of the Union, and it should be provided only to the persons responsible for handling such information in the government departments of that Member State.

It should also be noted that, although there is no explicit obligation under Union law to transmit the report to the economic operator(s) concerned, this must be done if national legislation requires it to support the reports drawn up by national administrations and ensure that they can be used as evidence.

The passing on of information collected in the course of a check to Europol and Eurojust is governed by the Memoranda of Understanding concluded between OLAF and Eurojust and between OLAF and Europol.

3.3.2.2.4 Inspections outside the territory of the European Union

The territorial scope of Regulation 2185/96 is the same as that of the Treaty on the Functioning of the European Union.

Nevertheless, whenever an international agreement or convention on cooperation with a non-member country refers to the possibility for OLAF to conduct on-the-spot checks and inspections, and in particular where, in the presence of such an international agreement or convention, a contract with an economic operator in the non-member country mentions that such on-the-spot checks and inspections may be carried out by OLAF, the Office may decide, if appropriate, to exercise the power conferred by Regulation 2185/96.

The relevant legislation is listed in Annex 3. It should be noted that all the listed Regulations provide that any agreement or convention resulting from their implementation must contain 'provisions ensuring the protection of the Union's financial interests' in accordance with Regulations 2988/1995, 2185/96 and 1073/1999 and must also explicitly authorise the Commission to carry out on-the-spot checks and inspections in accordance with Regulation 2185/96.

Article 8(5) of Regulation 2185/96 deals with reports prepared after investigations outside the Union: 'Where on-the-spot checks or inspections are performed outside Community territory, reports shall be prepared by Commission inspectors in conditions which would enable them to constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary.'

Important

OLAF must continue to respect the principles concerning individual rights set out in the Charter of Fundamental Rights of the European Union.⁵⁷

Where a particular item of information concerns a non-member country, even if it has not taken part in the check, and where an agreement on mutual exchange of information has been concluded, OLAF must communicate the information to the non-member country in question.

3.3.3 Interviews and the recording thereof

3.3.3.1 Definitions

An interview is a formalised dialogue guaranteeing due application of the rights of defence within a specific procedure. It is the questioning of a person with the aim of gathering information relevant to an OLAF investigation. Interviews are carried out after a case has been opened.

Explanatory statements can be taken (a record is taken of what is said) but interviews (where further questions are asked) cannot be conducted at the stage of assessment or outside the remit of the Investigation Authority, except in specific circumstances where it would clearly not be practicable to postpone the interview. In the latter case, the interview should be conducted in agreement with the direct line management and the new case should be opened immediately after the interview.

Important

A person suspected of having committed an irregularity or fraud ('person concerned') should be interviewed before drawing conclusions referring by name to

⁵⁷ Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p. 1.

such a person, giving the person concerned the opportunity to express his views on all the facts which concern him.

3.3.3.2 Legal basis

In external investigations, the power to carry out interviews is derived from Article 2 of Regulation 1073/99 in conjunction with Article 7 of Regulation 2185/96. It is one of the ‘other measures’ that OLAF may carry out in order to obtain relevant information. There is no power of compulsion.

(1) External investigations

For external investigations, this means that OLAF may invite persons in a position to assist OLAF with its enquiries with a view to interviewing them, but these persons may decline to attend the interview. Even if they agree to attend, they may decline to reply to some or all of the questions put to them by OLAF. Interviewees may also interrupt or terminate the interview at any time. Cooperation is purely voluntary.

(2) Internal investigations

The situation differs in relation to interviews carried out within the framework of internal investigations. OLAF may request oral information from Members, managers and staff of the institutions and bodies, in accordance with Article 4(2) of Regulation 1073/99. Other persons may agree to provide information in the course of an interview, on a voluntary basis.

Where the possible implication of a Member, official or servant of the Commission emerges, the person concerned is informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Union body may not be drawn once the investigation has been completed without the person concerned being given the opportunity to express his views on all the facts which concern him.

Important

Transmissions of information have to be carefully evaluated with a view to determining whether by their nature they contain a conclusion referring by name to a Member, official or servant. This would normally be the case when the information is contained in a Final Case Report. The content of any information transferred to other authorities may however be re-qualified by the European Courts as containing a conclusion by name.⁵⁸

In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member or official or servant of the Union body to give his views may be deferred in agreement with the President of the Union body or its Secretary-General respectively.⁵⁹

⁵⁸ Judgment of the European Court of First Instance of 8 July 2008 in Case T-48/05 *Yves Franchet and Daniel Byk v Commission*, paras 127-162.

⁵⁹ Article 4 of the Model Decision annexed to the Interinstitutional Agreement of 25 May 1999 concerning internal investigations by OLAF, enacted by the Commission as the Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity

Note

The requirement to provide a person concerned with the opportunity to express his views on the facts concerning him is fulfilled by inviting the person to interview.

3.3.3.3 Notification

(1) Internal investigations

A person concerned or a witness may be invited by the investigator in charge to attend an interview on an agreed date. This is done by using Letter O8 for interested parties in internal investigations and Letter O9 for witnesses in internal investigations. These letters set out the reasons for the interview, the legal basis for the case and the rights of the person. The person concerned is also informed that the investigation may lead to one or more of the following outcomes: no further action; financial recovery; referral of the matter to the disciplinary authorities of the Union body concerned; and/or referral of the file to the judicial authorities. These letters also contain a privacy statement.

The letter of notification to the person concerned (Annex 4, Letter O8) is sent by registered mail, no later than ten working days before the date of the interview. If the person concerned agrees, the notification time may be shorter.

(2) All notifications

A person concerned or witness may agree to be invited to the interview by e-mail, telephone or orally (for example, during an inspection), or other convenient means accepted by the interviewee, or where it is not possible for practical reasons for a letter to be sent. A copy of the letter may in addition be sent as an attachment where this will facilitate its transmission to the person concerned. A note for the file should be established when the notification is made by telephone; notifications by e-mail should be stored in the CMS.

Whenever the notification is made orally, the person should be informed that:

- a legal counsel may assist him during the interview (or other independent person/confidant, provided that that person is not connected with the matter under investigation);
- he has the right not to make self-incriminating statements;
- he has the right to be interviewed in one of the Union official languages of his choice;
- an official written record of the interview will be drawn up;
- the interviewee will have the right to request that the documents he produces in the course of his interview be annexed to the interview record and sent with the case documents to the judicial authorities or to the disciplinary unit of the relevant Union body;
- he will have the right to read and suggest modifications to the record of the interview before signing it. However, it is up to the investigator to decide whether to accept the suggestion;
- he will be able to request that his evidence/statement be recorded in the form of a statement;

detrimental to the Communities' interests (1999/396/EC, ECSC, Euratom); Article 1 of Annex IX to the Staff Regulations (which requires the agreement of the Appointing Authority).

- he will be able to annex documents in his possession to the record of the interview;
- the official record of the interview may be used as evidence in disciplinary or court proceedings;
- he will receive a paper copy of the interview record after the interview, as soon as practicable.

3.3.3.4 Conducting the interview

All interviews must be conducted in a way assuring their status as admissible evidence in administrative and judicial proceedings in the Member States concerned.

Video-conferencing facilities may be used whenever appropriate.

Interviews should be carried out by at least two OLAF employees, one of whom must be an investigator responsible for the case. At least one of the interviewers should be fluent in the language used in the interview, whereas the other should have a good knowledge of it. However, if this is not possible, interpretation by a reliable interpreter can be used. In accordance with Article 6 of Regulation 1073/99, the interviewers must be able to show an Investigation Authority signed by a Director (Annex 4, Form O14) stating the subject matter of the investigation and indicating that interviews will be carried out. Persons should be interviewed individually.

The interviewee may be assisted by one or more legal advisers or other independent person(s), but only the interviewee may reply to questions. The interviewers should begin with the following introductory statement:

‘The interview is being conducted at [location] on [date] at [time]. The interviewee is [name]; the other persons present are [names]. The interviewer[s] is[are] [name(s)]. The purpose of this interview is to verify the basic facts alleged and to gather information as to [subject]. As previously agreed, the interview will be carried out in [language]. You have the right to speak in any of the official Union languages; the right to have a legal or other representative present; and the right not to incriminate yourself. You may request that any documents you produce be appended to the official record of this interview. Upon completion of the interview, you will be asked to read the interview record, and if you agree with its contents, to sign it. It may be used as evidence in any administrative, disciplinary, legal or penal procedures.’

As an exception, when the interviewee cannot express himself in one of the official languages of the European Union, the interview may be conducted in a language known by the interviewee, with the assistance of appropriately qualified independent translators/translation facilities, if the investigators are not familiar with that language.

The interviewers should identify themselves and invite the interviewed person and the other persons present to show proofs of identity, explaining that this is necessary to ensure that another person does not make a statement in their place. Any refusal should be recorded in the interview record. The identification check may be dispensed with if the check has already been carried out (for example, when an interview is being conducted in a Commission building).

Note

If, within the framework of an interview carried out during an on-the-spot check within the EU, the interviewee refuses to cooperate, either by failing to appear or by

refusing to answer questions, OLAF may decide to refer the matter to a Member State judicial/prosecuting/law enforcement authority.

In addition to the rules mentioned above, if the interviewee is a Member, manager or staff member of an institution or body, the introductory statement must be completed with:

‘Pursuant to Article 6 of Regulation (EC) No 1073/99, 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. In addition, in accordance with Article 1 of [internal decision of relevant Union body], you have a duty to cooperate fully with OLAF, to lend assistance required to the investigation, and to supply OLAF with all useful information and explanations, unless this infringes your right to avoid self-incrimination’.

Important

The interview should include the disclosure of the elements collected against the person concerned, with the request that he express his views on them. OLAF should not disclose information collected during the investigation that does not directly concern that individual.

The interview should end by reading out the closing statement set out in the Written Record of Interview form (Annex 4, Form O15), which contains a privacy statement.

3.3.3.5 Recording

All interviews must be recorded in the Written Record of Interview form (Annex 4, Form O15) that must be established during the interview and signed at the end of the interview by the interviewers, the interviewee and all the persons present. The written record of the interview can also be simultaneously recorded on an electronic medium with the agreement of the interviewee. However, the interviewee may not make his own recording of the interview.

The interview record (Annex 4, Form O15) must contain the following information:

- the case identification (CMS number and title);
- the names and function of the interviewers;
- the name, date and place of birth, home address and, if available, number of identity document of the interviewee;
- a standard introductory statement;
- all the questions asked and the replies provided;
- a standard closing statement;
- signatures of the interviewers, interviewee, and all the persons present. They should also sign with their initials on every page. If they refuse to sign, this refusal is recorded in the interview record.

The draft interview record is printed out and given to the interviewee for checking. Once all necessary corrections have been made, the interview record is initialled on each page and signed on the last page. A photocopy is subsequently made, marked ‘copy for the interviewee’, and handed over to the interviewee. Documents annexed should be listed in the interview record and initialled by the interviewers and the interviewee.

Whenever the interview is recorded on an electronic medium, a sealed copy of the medium may be provided for the interviewee, if requested. The interviewers can provide the interviewee with his copy some days later, whenever the needs of the investigation require it. If the interview is conducted in a language other than an official Union language, a copy of the interview record in that language should be provided for the interviewee.

The interviewee is entitled to a copy of the interview record, although the provision of this copy may be delayed, dependent upon the needs of the investigation.

3.3.4 Other investigative acts

3.3.4.1 Inspections and checks under sectoral legislation

Article 3(2) of Regulation 1073/99 in conjunction with Article 9(1) of Regulation 2988/95 and the following sectoral legislation confer on OLAF the power to carry out inspections and checks:

- Article 18(5) of Regulation 515/97⁶⁰ (inspections in Member States' offices for the purpose of obtaining information and copies of documents in order to ensure the correct application of the law on customs and agricultural matters);
- Article 20 of Regulation 515/97 (administrative and investigative cooperation missions in non-member countries in order to ensure the correct application of the law on customs and agricultural matters);
- Article 18(3) of Regulation 1150/2000 (on-the-spot inspections and access to the supporting documents concerning the establishment and making available of own resources);
- Articles 36 and 37 of Regulation 1290/2005 (on-the-spot inspections related to the management of expenditure from the EAGF and the EAFRD);
- Article 38 of Council Regulation 1260/99⁶¹ laying down general provisions on the Structural Funds (financial control) concerning programming period 2000-2006, Article 12 of Council Regulation 1164/94⁶² establishing a Cohesion Fund (financial checks) concerning programming period 1994-2006) and Article 72 and 73 of Council Regulation 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund (on-the-spot audits, including sample checks, on the operations financed by the Structural Funds and on management and control systems, in order to ensure that Member States have smoothly functioning management and control systems so that Union funds are efficiently and correctly used with regard to the programming period 2007-2013);

⁶⁰ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

⁶¹ OJ L 161, 26.6.1999, p.1.

⁶² OJ L 130, 25.5.1994, p. 1

- Article 72 and 73 of Council Regulation 1198/2006 on the European Fisheries Fund (on-the-spot audits, including sample checks, on the operations financed by the European Fisheries Fund on management and control systems, in order to ensure that Member States have smoothly functioning management and control systems so that Union funds are efficiently and correctly⁶³;

These inspections are generally subject to specified horizontal conditions, including the following: that notification of such checks is given in good time; that the agreement of the competent national authority has been given; that the check is conducted in accordance with the arrangements laid down by the competent national authorities and is conducted by duly authorised agents; that national agents may take part in the check and that the results are exchanged between the Union and national authorities. Finally, it is also necessary that the Union and national authorities coordinate checks in order to avoid duplication of work and optimise the use of resources.

3.3.4.2 Investigative fact-finding missions

In addition to the investigation activities listed in the previous subsections, OLAF conducts fact-finding missions the purpose of which is to undertake any necessary, appropriate and proper acts for fact-gathering purposes. Apart from the general legal approval conferred on OLAF by Regulation 1073/99 for the conduct of such fact-finding missions no other specific legal basis is required for their execution.

Investigative fact-finding missions are carried out in order to collect direct evidence in support of an open investigation. They may be carried out within the EU or in non-member countries and the mission teams concerned can consist of staff from both OLAF and Member State authorities. Representatives of other Commission departments may also participate. An interview in accordance with Section 3.3.3 may be carried out during such a fact-finding investigative mission.

Such fact-finding investigative missions must always be conducted in accordance with the legal provisions applying in the Member State or host country concerned and any evidence gathered in the course of their execution should meet the evidential requirements of the countries in which it is likely to be used. The advice of Units D2 or C1 may be sought on this issue.

On completion of the mission, a mission report is prepared, containing a privacy statement (Annex 4, Form O/F4).

3.3.4.3 Written requests for information

The draft Memorandum of Understanding between OLAF and the Commission (doc. SEC(2003) 871 consolidated; see also Section 3.3.6.2) establishes rules for the Commission to provide replies to OLAF's written requests for information on internal investigations. It states that the Director-General of OLAF may submit a written request to the Commission, a Member of the Commission or an official or other agent of the Commission to provide all necessary information in order to carry out the duties assigned to OLAF (point 2).

⁶³ OJ L 223, 15.8.2006, p. 1.

When requesting such information, OLAF should state the purpose of the request, what information is required, and the time limit within which the information is to be provided, in a Note to the Secretary-General containing the relevant clause on the transfer of personal data (Annex 4, Note O5). The request and the reply should be included in the case file.

If the information is required from the College of Commissioners, the request should be addressed to its Secretary-General; if the information is required from a Member, an official or another agent of the Commission, the request should be addressed to the person in question. However, the President of the Commission or its Secretary-General, respectively, should be informed.

Note
The Commission (its Secretary-General) or the requested person should reply within the time limit set, unless OLAF agrees to an extension of the deadline.

3.3.4.4 Forensic and technical examination

(1) Definition and OLAF powers to conduct forensic and technical examinations

A computer forensic examination may be defined as a technological, systematic inspection of the computer system and its contents for information which may be relevant to an ongoing investigation, and may eventually be used as evidence in court proceedings. Persons concerned and economic operators are obliged to allow access to their computer data, however, OLAF investigators need to be cautious that an unknown amount of personal data could be collected and processed. Thus, special care must be taken to ensure that all relevant data protection requirements are met in conducting such examinations.

Note
OLAF's Protocol of 'Standard Operating Procedures' for conducting computer forensic investigations is attached at Annex 14 and must be followed by all staff concerned when this service is required.

Section 3.2.2 'On-the-spot checks and other inspections' outlines OLAF's powers to carry out forensic acquisition and examination investigative actions, which are subject to an internal prior authorisation procedure: internal investigation procedures include the right to seize the computer or to copy the contents of the computer's storage devices; external investigation procedures include the right to copy the contents of the computer's storage devices.

OLAF often conducts forensic examinations in cooperation with national computer forensic departments, which may also give advice in relation to national practices and, if necessary, carry out certain forensic actions. This depends on applicable Union sectoral rules or on national legislation in the country where the operations are to be performed and in other jurisdictions where any resulting evidence may be used (e.g. where the alleged offence may be of a transnational nature).

During the assessment stage the responsible investigator and, where necessary, the responsible member of the Judicial Advice Unit must identify the scope of the forensic requirements foreseen for the investigation phase according to the specific legal basis of the case.

(2) Computer Forensic Principles

OLAF adheres to the following four main general ACPO⁶⁴ Computer Forensic Principles:

- Principle 1: No action taken by law enforcement agencies or their agents should change data held on a computer or storage media which may subsequently be relied upon in court.
- Principle 2: In exceptional circumstances, where a person finds it necessary to access original data held on a computer or on storage media, that person must be competent to do so and be able to give evidence explaining the relevance and the implications of their actions.
- Principle 3: An audit trail or other record of all processes applied to computer-based electronic evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result.
- Principle 4: The person in charge of the investigation (the investigator in charge) has overall responsibility for ensuring that the law and these principles are adhered to.

(3) Good practice methods

In addition, OLAF adheres to the following good practice methods:

- Digital evidence by its very nature is fragile and can be altered, damaged, or destroyed by improper handling or examination. Examination is best conducted on a copy of the original evidence. The original evidence should be acquired in a manner that protects and preserves the integrity of the evidence.
- To ensure integrity and compliance with the ‘evidential’ and ‘custody’ chains, electronic data should be treated in a manner similar to that of traditional forensic evidence retrieval: all activity relating to the seizure, access, storage or transfer of digital data must be fully documented, preserved and available for review.

3.3.5 Operational intelligence

In this Manual the term ‘operational intelligence’ is used to refer to the operational information, intelligence and technical support provided by Unit C4 in the whole process from receipt of initial information in OLAF, through the various stages of OLAF investigations and operational activity and in cooperation with OLAF’s partners.

Director C decides annually on which employees have full read-only access to the CMS case file. This depends on the nature of their function and tasks. He will inform Directors A and B of the decisions taken, and of any amendments made. Otherwise, access to CMS case files is based on specific CMS intelligence requests introduced by the case handler.

(1) Background

With reference to the section ‘OLAF’s powers and legal framework’, operational information and intelligence support are essential aspects of OLAF’s mandate to fight fraud, corruption, and any other illegal activity affecting the financial interests of the Union, and serious matters

⁶⁴ Association of Chief Police Officers, UK.

relating to the discharge of professional duties, as established in Article 1 of Regulation 1073/1999 and Article 2(5) of Commission Decision 1999/352/EC.

This support is provided on request for specific cases, operations and investigations with a view to ensuring the optimum accuracy and relevance of information received, disseminated and otherwise processed for intelligence, financial, administrative, disciplinary and judicial use. Additionally, the traditional reactive stance is enhanced by a more proactive role as OLAF operational intelligence analysis increasingly triggers new casework or redirects existing cases.

Increasingly, information and data are obtained, processed and stored electronically and cannot be dealt with in a traditional manual manner. Operational intelligence developments and increased expert resources have led to enhanced intelligence output to make information of value to the case handler. High volumes of personal data could be collected and processed and special care must be taken to ensure that all relevant data protection requirements are met.

Operational Intelligence follows good practice methods and techniques to ensure the quality of its work, integrity and compliance with the 'evidential' chain: the specific analytical tools used by the analysts offer an audit functionality to verify the steps involved in the processing, analysis and dissemination of a specific piece of information. Each piece of information stored in the analytical databases is linked to its supporting document, justifying the reasons for processing, demonstrating its origin for potential use in court cases.

(2) Support and resources

Types of support available are: operational information, intelligence, analyses, data preparation and technical solutions. These include:

- initial checks and information using in-depth knowledge of the Commission (audit departments, financial cells and information delivery services); checks and information on business (company details, vessels and ports, containers, trade statistics), verification checks (e.g. persons working in the institutions); checking against open and closed sources. These are considered to be *indicators* to assist the case handler in verifying if initial information or allegations could have a real basis or later to confirm the direction of the investigation or other operational activity. This level of support may enrich a lack of data with relevant open source information when asked for an assessment of vague allegations;
- simple or complex research to assess and evaluate information; production of analyses to build a clearer picture of connected factors, including personal data; other analytical reports such as flow chart analysis, comparative analysis, offender group analysis, specific profile analysis and investigations analysis;
- high volumes of data which cannot be readily assimilated and examined need technical and analytical solutions. These solutions bring in a level of data preparation that results in a higher quality of data analysis. This can include scanning, processing for optical character recognition and indexing high volumes of data, including data cleaning and text processing. The technical experts can assist in identifying and developing case-based technical solutions for further handling of information so that it is made compatible with analytical tools allowing its subsequent analysis.

Some specific analytical projects with a critical mass in terms of complexity or volume require an intelligence database environment, created with specific software, i.e. *iBase*, which consists

of interlinked analytical tools that allow appropriate management of data, visualisation on charts and maps and some statistical analysis.

(3) Data sources

(a) Closed access to sources

Operational Intelligence continuously develops its sourcing capacities. Closed access to sources includes:

- sources that provide information with limited access or distribution, such as Commission and institutional databases. Access to data is further explained in Section 3.3.5.1;
- OLAF CMS data: in order to optimise OLAF's data pool so that the most accurate, up-to-date and relevant results are obtained, all documentation, electronic or otherwise, related to the file must be included in the CMS file (see Section 2.2 'The investigation file'). This includes other operational and administrative documents and transmitted documents once they are identified as being connected to the case. Checks, information or intelligence provided can only be as accurate and relevant as the available searchable data;
- data resulting from forensic examinations on the authority of the case handler;
- data exchanged under specific legislation (or where there is an agreement or arrangement to permit use of the data) with OLAF's control or enforcement partners within the institutions and in the Member States, international organisations and non-member countries via controlled access and special security measures. To enhance this data for analysis purposes it may be put in one format, cleaned, standardised and consolidated into dedicated databases with restricted and controlled access;
- commercial, company or trade data purchased in one format, cleaned, standardised and consolidated into dedicated databases for analysis purposes with restricted and controlled access; high-volume commercial, company or trade data gathered and consolidated for analysis purposes working together with other Commission DGs. This may be stored in another DG's server with password access for OLAF users.

(b) Open access to sources

This includes:

- media, the internet, library sources; directories; websites of international organisations;
- company or trade data, which is accessible for free or at low cost;
- commercial, company or trade data where OLAF or the Commission may pay for direct access for OLAF and/or its partners and where there is an agreement, arrangement or contract.

Operational Intelligence develops and maintains contacts with private companies with a view to identifying and obtaining items which include: data and access to data (with or without financial cost), analytical tools and software, specialist technical equipment, forensic software and equipment and any related training and development work.

Details of how Operational Intelligence manages the supervision of these contacts are given in Annex 15.

(4) Procedures for case-related requests

(a) General rules

Requests may be made at any time during the life cycle of a case. The CMS case file reference (OF) must be used for all information, intelligence and technical support for OLAF casework using the intelligence request module from the related request tab of the OF case concerned.

This provides CMS case file access rights to the intelligence officer; ensures continuity of date and treatment of files and streamlining within intelligence, thus making better use of resources and expertise; avoids duplication of requests or seeking a variety of replies to the same question; and enables Operational Intelligence to identify if the subject matter is involved in more than one case.

Note

On request, Operational Intelligence provides necessary background checks to verify initial information during the preliminary review and during the assessment stage.

(b) Planning and identifying the scope of the intelligence requirements

The case handler together with the intelligence staff member(s) should plan and identify the scope of the intelligence requirements foreseen for the investigation stage. This includes:

- considering the necessity, proportionality and feasibility of conducting high-volume scanning and indexing, research and analyses in relation to the matter under investigation, taking into account resources and timescale, targeted requirements, and the potential use and exploitation of the information and data. Care should be taken to avoid double tasking. Such consultation is highly recommended;
- the intelligence staff member determines which information sources, analysis techniques and tools can best be used to respond to the request and in complex matters may be able to propose specific solutions or identify important gaps in information available. Relevant source data are identified, extracted and used for individual searches as well as simple and complex queries.

(c) Operational intelligence priorities

Operational Intelligence prioritises case support, especially during the assessment and pre-evaluation stages, to deal effectively with the workload. The request must include detailed context and requirements as well as the Priority marking as agreed by the Board to facilitate support priority-setting (see Section 2.3).

In exceptional cases where there may be competing requests for operational intelligence in implementing these priorities, the following procedure will be followed and the Head of the Operational Intelligence Unit will be informed of the outcome:

If the urgent requests emanate from:

- the same investigation unit, that unit's Head of Unit must decide the priority;
- different units in the same directorate, their Director must decide the priority;
- units in different directorates, the Directors of both directorates must agree the priority.

(d) Feedback and evaluation of the intelligence input

The case handler is requested to provide feedback and evaluation of the intelligence input into a case to enable assessment of the quality of the services provided to so that intelligence resources are prioritised towards cases that have targeted and viable needs.

- The case handler may make a one-off or recurring request. Once the response is given, the case handler should confirm that the task is complete, or request further explanatory information. On completion the case handler closes the initial CMS intelligence request. The intelligence officer will no longer have specific access rights to that CMS case file based on the request. If the intelligence officer closes the request, the system allows a 30-day period for the case handler to continue the dialogue if more clarification or subsequent checks are necessary. Further requests for intelligence support on the same CMS case require a new CMS intelligence request.
- The case handler may request (based on criteria such as the weight of the case, complexity, sensitivity, specific nature, knowledge, expertise and experience) the intelligence analysts to be involved as *associated intelligence analysts*, in which case he must include them in forms related to resource allocation, staff appointment forms, and operational meetings (see Section 3.2.2.3).
- The case handler may request that the analyst or technical expert accompanies the case handler during on-the-spot checks and missions and takes part in and supports the authorised investigative actions (e.g. the analyst takes the case data set to verify events in a timely manner), with the result that the intelligence analyst or technical expert is involved as *investigator*, in which case he must include him in the resource allocation, case team, operational meetings and in the *Investigation Authority* (see Section 3.2.2.3).

In the two latter situations, the case handler completes only *one* CMS intelligence request for the duration of the intelligence activity on the case, providing ongoing dialogue and feedback, and finally indicates closure of the request. The impact is that the analyst is fully involved in the case, and provides ongoing assistance and, where applicable, advice and direction to the case.

The high level of analytical and intelligence input required in certain cases tends to provide intelligence that the investigator can act upon: actionable intelligence that can be supporting evidence for a case. In preparing the Interim and Final Case Reports, the case handler considers the evidential and targeting value of the intelligence output and its contribution, if any, towards any disciplinary, judicial, administrative or financial outcome.

(e) Results

Case-related results, analytical reports and other outcomes can be registered by Operational Intelligence following the procedure laid down in Section 2.2 and linked to the CMS Case file under the CMS DOC tab, evaluation and investigation sub-tabs and then ‘intelligence support’, or under the results /intelligence Output tab of the intelligence request module. Extra-large intelligence output can be linked to the relevant CMS-Intel request as embedded files.

Working copies of the intelligence files may be kept in the course of involvement with a case or operational activity. Working files in relation to closed CMS-Intel requests will be put on a CD ROM for LISTING by the Archive after a 5-year period. OLAF data retention policies for OLAF investigations and operations in relation to the specific case will apply to that folder.

(5) Access to files of a personal nature

The processing of special categories of data (revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or concerning health or sex life) is generally prohibited (DP Guidelines, Section 1.4). OLAF case handlers must therefore avoid inclusion of these categories of data in the files unless it is necessary for the establishment, exercise or defence of legal claims in the specific case at hand.

The intelligence staff member informs the case handler when any relevant material contains data of a sensitive personal nature, including photographs of persons. The case handler records this fact in the Data Protection Module, Data Subject Details tab. Information containing such personal data and determined to be necessary for analytical purposes is stored in a stand-alone highly secure and auditable environment.

Note

When an intelligence officer comes across sensitive data that is not relevant to the case, after informing the case handler of this fact, the data will be deleted from the file without further delay under conditions which create an appropriate audit trail.

(6) Procedures for intelligence-generated cases

When Operational Intelligence identifies sufficient cause for suspicion of an irregularity or fraud, the intelligence staff member, in agreement with the Head of the Operational Intelligence Unit, will forward this to the Registry for a reference number and the matter will be subject to the standard assessment procedure by the relevant unit in Directorate A or Directorate B.

Examples of such cases are:

- relationships that are identified among apparently unrelated cases;
- ongoing/closed cases redirected based on new information provided by intelligence;
- operational alerts initiated by operational intelligence;
- information based on trade alerts;
- information received from intelligence contacts, operational partners, private companies;
- requests which evolve into tactical operations when the intelligence request indicates that the problem has a wider scope. In these cases broader and systematic checks of the *modus operandi* in question will be conducted in agreement with the other Commission departments and OLAF heads of unit from intelligence and operations after assessing their appropriateness and proportionality.

Requests may be ongoing activities that have been agreed upon to support a permanent operational check on flows of incoming information that are systematically matched against the existing data collection in a specific operational domain.

Analytical findings revealing cases of fraud, requiring urgent action, may lead to operational intelligence preparing an operational alert. Analytical findings revealing cases of fraud with a similar pattern, for example, may result in the identification of previously unknown types of fraud. This information will then be passed to OLAF strategic intelligence analysts for further risk analysis.

(7) Procedures for non-case-related requests

Requests for non-case-related intelligence analysis may come from cooperation with other Commission departments, for example to supplement in-depth audit risk analyses in order to fight fraud and irregularities on the expenditure side of the budget. Cooperation on this scale can lead to intelligence generated alerts or additional information for an ongoing case.

Requests for non-case-related information and intelligence from Commission departments, national or international bodies are introduced into the CMS intelligence module by operational intelligence staff on their behalf. This includes requests transmitted through AFIS and where another partner has an interest in the same information, OLAF will advise the two parties to consult with each other. Where an OLAF case handler has an interest in the information Operational Intelligence will highlight the intelligence request for the attention of the case handler, who must include this in the CMS case file.

Logistical, information and intelligence analytical support is provided to the participants in Joint Customs Operations to facilitate the exchange and evaluation of intelligence using the Virtual OCU via the AFIS portal.

3.3.5.1 Access to data

Relevant information obtained from internal as well as external data sources is of key importance for intelligence analysts in providing support to investigations and operations, and resources are spent identifying, evaluating and testing information sources.

Article 7 of Regulation 1073/99 requires the Union institutions and bodies to forward to OLAF without delay any information relating to possible cases of fraud, corruption or any other illegal activity. The Union bodies and the Member States must also forward to the Office any documents or information relevant to an internal investigation or to the fight against fraud, corruption or other illegal activity affecting the Union's financial interests.

For internal investigations, Article 4(2) of Regulation 1073/99 allows the Office to access documents and information in any format, including any data medium, subject to an internal prior authorisation procedure.

Additionally, in order to continue to improve access to information and databases within the Union or other institutions and public and private sources, Operational Intelligence negotiates for access or for improvements to such access, as a basic requirement to fulfil its own support obligations.

This includes access to a limited number of key databases within the Commission which are agreed at DG level and managed at Head of Unit level. For confidentiality reasons OLAF needs to avoid asking for information about a person on whom an assessment/case is ongoing. OLAF needs a mode of access that is based on a routine but commonly agreed discreet procedure.

In the context of a CMS case file, the case handler may request intelligence verification checks to be carried out without potentially alerting the individual concerned on the one hand, and with a view to preventing false allegations leading unjustifiably to an opened case on the other hand. In these instances the access rights are limited to a few named and trained operational intelligence users and the case handler is informed of the result in line with the rules set out in the subsection 'Procedures for case-related requests'.

Procedures in relation to special categories of data are to be found in the subsection ‘Access to files of a personal nature’.

3.3.6 Transmission of information during cases

The information obtained while a case is open is subject to professional secrecy. Article 339 of the Treaty on the Functioning of the European Union and Article 17 of the Staff Regulations stipulate that professional secrets must not be disclosed.

The professional secrecy requirements applicable to OLAF investigations are set out more specifically in Article 8(1) of Regulation 1073/99, Article 8(1) of Regulation 2185/96, and the sectoral regulations.

An official who breaches the above confidentiality requirements could be subject to disciplinary action under the Staff Regulations and possibly criminal sanctions. Before transmitting any information subject to the professional secrecy requirements outside OLAF, an investigator should contact Unit D2 for advice as to whether disclosure of any information or document is allowed under these rules and the rules discussed below.

Data protection

Specific rules on transfers of personal data must be observed whenever personal data is transmitted outside OLAF (DP Guidelines, Section 1.7).

3.3.6.1 Transmission of information to competent authorities of the Member States

3.3.6.1.1 Transmission of information to judicial authorities of Member States

(1) Background

Information may be transmitted either during the investigation or when the investigation is completed. When it becomes apparent already in the course of the investigation, before preparation of the Final Case Report, that a criminal offence may have been committed, it may be appropriate to transmit already at this stage information to the competent Member State judicial authority. For the necessary analysis the investigator must consult the Legal and Judicial Advice Unit; see Sections 3.2.2.1 and 3.3.1.

The transmission of information during an ongoing investigation is normally carried out when the investigation requires recourse to means of criminal investigation in a case falling within the competence of national judicial authorities (e.g. house searches, access to information on bank accounts), and there is a risk that evidence might be destroyed.

(2) Legal basis

Article 10(1) of Regulation 1073/99 provides, for external investigations, that the Office may at any time, as appropriate, forward to the competent authorities in the Member States concerned information obtained in the course of external investigations.

Article 10(2) provides, for internal investigations, that the Office must forward to the judicial authorities of the Member State concerned the information obtained during internal investigations liable to result in criminal proceedings.

(3) Procedure to be followed

The investigator and the designated member of the Legal and Judicial Advice Unit prepare a Note for the attention of the OLAF Director-General. The investigator first prepares the statement of facts in the form of an Interim Case Report (Annex 4, Form O22), making reference to the documentary evidence, which should be listed and attached. The investigator then provides the statement of facts to the judicial adviser of Unit C1, who prepares the legal analysis, which should identify the criminal offences committed under national law, the judicial authorities competent to receive the information, and the time limit beyond which the offence cannot be prosecuted.

The note, consisting of the statement of facts and the legal analysis after approval by the operational unit, is submitted to the Executive Board (see Section 2.1), together with a proposal to open a judicial follow-up path (Annex 4, Form F2) and the Data Protection Annex (see the DP Guidelines, Sections 2.1.2 and 2.3.2).

Article 11(7) of Regulation 1073/99 requires the Director of OLAF to inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities of a Member State. Accordingly, the Legal and Judicial Advice Unit prepares a Note to be signed by the OLAF Director-General to inform the OLAF Supervisory Committee pursuant to Article 11(7) of Regulation 1073/99, containing the relevant clause on the transfer of personal data (Annex 4, Note SC1, for internal investigations; Note SC2, for external investigations). This information must be provided on the basis of the 'Standard Form' at least 5 working days before transmission.

The Legal and Judicial Advice Unit prepares a cover letter addressed to the national authority, containing the relevant clause on the transfer of personal data, to be signed by the OLAF's Director-General. With this cover letter, the note with the attached evidence is transmitted (Annex 4, Letter O17 for an internal investigation, Letter O18 for an external investigation).

Note

In practice, a *signataire* is prepared by the secretariat of Unit C1, containing the note for the attention of the Director-General, the note for the Supervisory Committee, and the letter of transmission to the judicial authorities. The secretariat of Unit C1 then sends the note to the Supervisory Committee, and the letter of transmission and report to the judicial authorities.

(4) External investigations

In external investigations, OLAF investigators enable the person concerned to express his views on all the facts that concern him before drawing any final conclusions. Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority.

(5) Internal investigations

(a) Person concerned

The person concerned must normally be given the opportunity to present his views on all the facts which concern him, unless absolute secrecy needs to be maintained for the purposes of the investigation. In this case it is necessary to first obtain the agreement of the Secretary-

General of the Union body concerned (or when a Commissioner is personally involved, the President of the Commission).

In practical terms, a *signataire* is prepared by the Legal and Judicial Advice Unit, which will prepare a note to the Secretary-General of the Union body concerned (or when a Commissioner is personally involved, the President of the Commission), containing the relevant clause on the transfer of personal data, to be signed by the OLAF's Director-General (Annex 4, Note O10). The note for the attention of the Director-General is attached. The secretariat of Unit C1 sends the note to the Secretary-General; upon receipt of his agreement, it sends the note (Annex 4, Note SC1) to the Supervisory Committee, the note for the attention of the Director-General and the letter (Annex 4, Letter O17) of transmission to the judicial authority.

Note

Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority.

(b) Secretary-General

In cases where the person concerned has been interviewed, the Secretary-General of the Union body concerned (or when a Commissioner is personally involved, the President of the Commission) will be informed by a note which will be prepared by the Investigations and Operations Directorates, containing the relevant clause on the transfer of personal data (Annex 4, Note O7), to be sent at the time of the transmission of information to the judicial authorities. The secretariat of the responsible directorate sends this note.

3.3.6.1.2 Transmission of information to other competent authorities of Member States

OLAF transmits information to the competent Member States' authorities already while a case is open for the purpose of ensuring effective protection of the Union's financial interests in all Member States.

(1) Legal basis

Article 8(2) of Regulation 2185/96 establishes the rule on compulsory reporting of any fact or suspicion relating to an irregularity which has come to the Commission's notice in the course of an on-the-spot check or inspection. It requires such information to be reported as soon as possible to the competent authority of the Member State within whose territory the check occurred.

Article 8(1) of Regulation 2185/96 establishes the rules on discretionary transmission of information communicated or acquired in any form under the Regulation. It provides that such information may be distributed to persons within Member States whose function require them to know (see more details on these issues in Section 3.3.2.2.3).

Article 10(1) of Regulation 1073/99 provides, for external investigations, that the Office may at any time, as appropriate, forward to the competent authorities in the Member States concerned information obtained in the course of external investigations.

The sectoral regulations (e.g. Council Regulation 515/97 (customs cooperation), as amended by Regulation 766/2008⁶⁵, Commission Regulation 1848/2006 (common agricultural policy), Commission Regulation 1681/1994⁶⁶ (Structural Funds - for programming period 2000-2006 and earlier), Commission Regulation 1831/94⁶⁷ (Cohesion Fund), Commission Regulation 1828/2006⁶⁸, Articles 27-36 (European Regional Development Fund, European Social Fund, Cohesion Fund), Commission Regulation 498/2007, Articles 54-63, (European Fisheries Fund), Council Regulation 1469/95 ('Black List') establish the rules on distribution of the information obtained under these provisions. They provide that such information can be sent only to persons within Member States whose duties require that they have access to it, unless the Member State supplying it has expressly agreed otherwise (see also Section 3.1.6).

(2) Procedure to be followed

The material and supporting documents collected during an inspection (see Section 3.3.2.2.1) are annexed to the inspection report (which is a summary of the activities carried out during the inspection) and sent to the national authorities without delay. If the report concerns a joint inspection within the meaning of the second paragraph of Article 4 of Regulation 2185/96, the national inspectors who took part in the inspection should be asked to countersign it.

For further procedural requirements, see Section 3.3.2.2.3 above.

3.3.6.2 Transmission of information to Union institutions and bodies

OLAF transmits information obtained during a case to Union bodies for the purpose of ensuring effective protection of the Union's financial interests.

(1) Legal basis

Under Article 10(3) of Regulation 1073/99 the Union body concerned may be informed at any time in internal investigations. The Union body will be informed where the internal investigation shows that it should take appropriate steps to safeguard its interests. The way in which these rules are to be implemented has been elaborated in the draft Memorandum of Understanding (see below procedure to be followed (internal investigations)).

Article 8(2) of Regulation 1073/99 establishes the rules on discretionary disclosure of the information subject to professional secrecy obtained in the course of an internal investigation. It limits distribution to Union officials whose duties require them to know and limits the uses that can be made of the information to preventing fraud, corruption or any other illegal activity.

Article 8(1) of Regulation 2185/96 establishes the rules on discretionary distribution of all information communicated or acquired in any form under the Regulation. It provides that such information may be distributed to persons within Union institutions and bodies whose function require them to know. This would include, for example, officials in other departments of the

⁶⁵ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

⁶⁶ OJ L 178, 12.07.1994, p. 43, as amended by Commission Regulation (EC) N° 2035/2005, OJ L 328, 15.12.2005, p. 8.

⁶⁷ OJ L 191, 27.7.1994, p. 9, as amended by Regulation (EC) N° 2168/2005, OJ L 345, 28.12.2005, p.15.

⁶⁸ OJ L 371, 27.12.2006, p.27, as last amended by Commission Regulation (EC) No 846/2009, OJ L 250, 23.9.2009, p. 1.

Commission who are responsible for taking follow-up action on the case in question. It provides further that the information may be used by Union institutions only for the purpose of ensuring effective protection of the Union's financial interests.

The sectoral regulations (e.g. Council Regulation 515/97⁶⁹ (customs cooperation), Commission Regulation 1848/2006 (common agricultural policy),

Commission Regulation 1681/94⁷⁰ (Structural Funds – programming period 2000-2006 and earlier), Commission Regulation 1831/94⁷¹ (Cohesion Fund), Article 37 of Commission Regulation 1828/2006⁷², (European Regional Development Fund, European Social Fund, Cohesion Fund), Article 68 of Commission Regulation 498/2007, (European Fisheries Fund) establish the rules on discretionary distribution of the information obtained under these provisions. They provide that such information can only be sent to persons within the Union institutions whose duties require that they have access to it, unless the Member State supplying it has expressly agreed otherwise.

(2) Procedure to be followed in internal investigations

The main lines of a draft Memorandum of Understanding concerning a code of conduct in order to ensure timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission were established in July 2003 (doc. SEC(2003) 871 consolidated). The MoU provides a structured framework aimed at facilitating the practical application of the provisions of the existing legal framework governing exchange of information.

The provisions of this MoU are substantively the same as those set out in the subsections that follow. While the Memorandum applies only to the information flow between OLAF and the Commission in internal investigations, the provisions apply with respect to all Union institutions and bodies unless otherwise specified.

(a) Information flows within the Commission

The draft Memorandum of Understanding provides that whenever OLAF informs the Commission of any matter, it must inform the Secretary-General of the Commission in writing. Where, however, the case concerns a Member of the Commission or the Secretary-General, or an inspection of their offices, it must instead inform the President of the Commission in writing.

Information provided by OLAF should be treated as confidential by all its recipients and transmitted only on a need-to-know basis. In normal practice, the Secretary-General or the President should transmit this information to the Commissioner responsible for the portfolio and to the Director-General of the Directorate-General or Service concerned. The Secretary-General should also transmit information on ongoing internal investigations when the

⁶⁹ Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1, as last amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008, OJ L 218, 13.8.2008, p. 48.

⁷⁰ OJ L 178, 12.07.1994, p. 43, as amended by Commission Regulation (EC) N° 2035/2005, OJ L 328, 15.12.2005, p. 8.

⁷¹ OJ L 191, 27.7.1994, p. 9, as amended by Regulation (EC) N° 2168/2005, OJ L 345, 28.12.2005, p.15.

⁷² OJ L 371, 27.12.2006, p. 27, as last amended by Commission Regulation (EC) No 846/2009, OJ L 250, 23.9.2009, p. 1.

Commission's interests are at stake, information on transmissions of information to national judicial authorities (see Section 3.3.6.1.1) and the OLAF Final Case Report (see Section 3.4.3.3) to the Commissioner responsible for Administration, Audit and Anti-Fraud.

Important

When OLAF considers that the information given by it to the Secretary-General or the President should not be transmitted to certain persons, it must write to the Secretary-General or the President giving the reasons why such information should not be disclosed.

When OLAF has bilateral contacts with Directors-General concerning dossiers within their DGs, a Note for the file (Annex 4, Form O/F8) should be made, a copy of which may be transmitted to the Secretary-General, if necessary.

(b) Informing the Union institution or body of an internal investigation on its premises

Art 4(4) of Regulation 1073/99 provides, in internal investigations when OLAF conducts an investigation on the premises of a Union institution or body, that the respective Union institution or body must be informed in advance. If the circumstances of the investigation so require, notification may be delayed until the time of the visit, at the latest.

The aim of this rule is to protect the bodies from unannounced physical investigative actions; it does not apply to written requests. Previous announcement can be useful in order to obtain the necessary cooperation from the institution or body concerned.

In practical terms, a Note will be used to inform the Secretary-General and/or the President of the Union body concerned in advance of, and at the latest at the time of, conducting the investigation on the premises, containing the relevant clause on the transfer of personal data (Annex 4, Note O3). This note must include:

- the CMS reference of the internal investigation concerned;
- the main investigative steps that OLAF intends to take on the premises.

If the subject of the search is another Commission DG, and when it would not be detrimental to the internal investigation, the Director-General of OLAF will also inform the Director-General of the DG concerned by means of a similar letter at the latest at the time of the visit, so that access to the premises may be arranged. When the internal investigation is carried out on the Commission premises occupied by its Members or by the Secretary-General, OLAF should inform the President of the Commission.

However, if OLAF has reason to believe that informing in advance would be detrimental to the internal investigation, the provision of such information may be deferred until OLAF's investigators produce, at the time of gaining access to the Union body's premises, the written authorisation showing their identity and their capacity and the written authority to conduct the internal investigation as required by Article 6(2) and 6(3), respectively, of Regulation 1073/1999, and in accordance with Section 3.3.1.1 of this Manual.

Copies of these written authorisations, and of any request by OLAF's Director-General to the Commission's Security Office for assistance in the practical conduct of the investigation, are supplied by OLAF to the Secretary-General of the Commission or, if such investigation is carried out on Commission premises occupied by its Members or by the Secretary-General, to

the President of the Commission (see also Section 3.3.2.1 concerning inspections of premises in internal investigations).

(c) Informing the Union institution or body when it becomes apparent in the course of an investigation that an official is involved

OLAF investigations do not, from their inception, always involve an identified official. Article 4(5) of Regulation 1073/99 applies where an internal investigation reveals that a staff member may be personally involved. The Union body to which he belongs must then be informed, giving the following information.

In practical terms, a Note will inform the Secretary-General and/or President of the Union institution or body concerned as to involvement of the servant (Annex 4, Note O1). The note contains the relevant clause on the transfer of personal data. Where the initial information originated from a Commission Director-General a similar note should be sent to him as a matter of courtesy.

Important

When the subject of the investigation is a Member of the European Parliament, the President of the Parliament should be notified; when the subject is a Member of the Council of Ministers, the Secretary-General and the President of the Council of Ministers should be so notified.

The note must include:

- the identity of the person concerned;
- a summary of the facts;
- information as to whether the person has already been notified of the evidence against him or, where appropriate, on the need to postpone such notification to avoid jeopardising the investigation.

This initial information will usually be communicated to the Union institution or body as soon as OLAF opens an investigation concerning one of its Members, officials or other servants, so that it can take appropriate steps to safeguard its interests. Such information will usually also be communicated whenever it emerges in the course of an existing investigation that a Member, official or other servant of the Union institution or body is involved.

The transmission of information may be deferred in cases requiring absolute secrecy for the purposes of the investigation, or requiring recourse to means of investigation falling within the competence of a national judicial authority, in accordance with Article 4(5) of Regulation 1073/99. However, the Regulation does not define what a 'case requiring absolute secrecy' is.

In practical terms the OLAF Head of Unit in charge of the case, having consulted with Director A, should state in writing the reasons for the deferral in a Note for the file (Annex 4, Form O23). This document should be included in the case file. As soon as specific reasons for such deferral no longer exist, the Union institution or body should be informed, as specified above, setting out the reasons for the deferral.

The Union body will be informed by OLAF that information has been forwarded to national judicial authorities in internal investigations. The information to the Union body may be deferred in exceptional cases where absolute secrecy is required or transmission of information

could jeopardise the objective of the investigation, or if so requested by the national judicial authority.

In practical terms, a Note from the Director-General of OLAF (or Director A/B acting on his behalf) containing the relevant clause on the transfer of personal data will inform the Secretary-General of the Union institution or body (or, when a Commissioner is personally involved, the President of the Commission), if the person concerned has been interviewed (Annex 4, Note O7). If the person concerned has not been interviewed, the Secretary-General will have been so informed through a request for agreement not to interview the person concerned (see Section 3.3.6.1.1). This note (Note O10) is prepared and transmitted by Directorate A. The note must include:

- the CMS reference of the internal investigation and the date on which the case was opened;
- the identity of the person(s) under investigation;
- a summary of the facts giving rise to the decision to transmit the case to the judicial authorities concerned, including relevant provisions of criminal law that may have been violated;
- any other information that may assist the Union institution or body in deciding whether to take measures to protect or preserve its own interests or security.

(d) Informing the Union institution or body about ongoing internal investigations when its interests are at stake

A Note will promptly inform the Secretary-General of the Union institution or body (or, when a Commissioner is personally involved, the President of the Commission) whenever internal investigation results show that the Union institution or body could take appropriate steps to safeguard its interests (Annex 4, Note O6). The note contains the relevant clause on the transfer of personal data. The note must include:

- the CMS reference of the internal investigation in which the party is involved and the date on which the case was opened;
- the identify of the person(s) under investigation;
- a summary of the facts giving rise to the suspicion that offences may have been committed and of the evidence collected to date;
- any other information that may assist the Union institution or body in deciding whether to take measures to protect or preserve its own interests or security;
- where OLAF considers that measures should be taken by the Union institution or body in order to ensure the efficacy of the investigation, it may make such recommendations as it deems appropriate to the Union institution or body. (If it makes such recommendations to the Commission, the Secretary-General of the Commission will inform OLAF's Director-General in writing of the follow-up given to such recommendations.)

3.3.6.3 Transmission of information to competent authorities of non-EU countries and to international organisations

Relations with non-member country authorities are an integral aspect of OLAF's work, in view of, among other things, the commitment of large amounts of Union funds in non-member countries.

OLAF cooperates with the competent authorities of non-member countries and international organisations on the basis of its investigative competences and on the basis of existing financing agreements or other cooperation arrangements. In the customs sector, information can be communicated to non-member country authorities pursuant to the protocols on mutual assistance for the correct application of customs legislation. In case of doubt regarding the legal basis, the investigator should consult Directorate C (Units C1, C2 or C3) and Unit D3 for advice.

Before OLAF gives information on possible cases of fraud or other illegal activity affecting the financial interests of the Union to judicial authorities of non-member countries, it needs to consider carefully whether it is necessary to act in concert with the other Commission departments concerned, considering local circumstances. Unit C1 is in charge of organising the necessary consultations.

Note

A disclaimer is to be attached to all transmission letters, stating that the transmission cannot be understood as a tacit waiver of immunity or as a complaint on behalf of the institution, and providing information on the relevant procedures.

Concerning the procedure to be followed, see Section 3.3.6.1.1.

Data protection

Specific rules on the transfer of personal data to non-member countries and international organisations must be followed. See the DP Guidelines, Section 1.7.

3.3.6.4 Transmission of information to the OLAF Supervisory Committee

(1) Background

In accordance with Article 11(7) of Regulation 1073/99 information on cases is transmitted to the OLAF Supervisory Committee in the following situations:

- nine months report;
- cases where the Union body has failed to act on recommendations;
- cases requiring information to be forwarded to judicial authorities.

In addition:

- the Director-General can decide whether information on specific cases is made available to the Supervisory Committee.

(2) Statutory information to the Supervisory Committee

(a) Nine months report

Article 11(7) of Regulation 1073/99 provides that where an investigation has been in progress for more than nine months, the Director-General informs the Supervisory Committee of the reasons why it has not yet been possible to conclude the investigation, and of the expected time for completion. This report is also used as a supervision tool and if necessary refers to a revised work plan, covering every investigative step envisaged and where possible, a timetable for each step. Work carried externally should be clearly indicated in the report (for example audit).

In practice the investigator in charge prepares and signs the ‘Information to the OLAF Supervisory Committee: Case opened for more than 9 months’ form (Annex 4, Form SC1), which contains the relevant clause on the transfer of personal data. The signatures of the responsible Head of Unit and Director A/B are also required.

(b) Cases where the Union institution or body has failed to act on recommendations

OLAF must also inform the Committee of cases where the Union institution or body concerned has failed to act on the recommendations made by it. A Note, which contains the relevant clause on the transfer of personal data, prepared by the responsible follow-up unit, is sent in this regard (Annex 4, Note SC4).

(c) Cases requiring information to be forwarded to judicial authorities

See Sections 3.3.6.1.1 and 3.4.3.2.1.

(d) Information provided by the Director-General on specific cases

Apart from these obligatory reports, it is for the Director-General and Director A/B to decide whether information subject to professional secrecy about a specific case should be made available to the Supervisory Committee. Before any documents are provided to the Committee, the written authorisation of Director A/B is required (Annex 4, Form SC2) and a ‘Record of information put at the disposal of the Supervisory Committee’ form must be completed (Annex 4, Form SC3).

(3) CMS — Supervisory Committee Module

The CMS — Supervisory Committee Module facilitates the discharge of the duties of the Supervisory Committee while respecting data protection obligations and the need-to-know principle.

Note

Removal of original case documents from the Document Management Centre is allowed only upon completion of the relevant form (Annex 4, Form SC2) and updating of the GLIB (Grefte Library) module of the CMS; a separate entry should be made for each document. Under no circumstances may originals or copies of operational documents be removed from the OLAF building.

EUCI and Special Handling documents are not scanned and are not available electronically. They may be read in the secure reading room; copies may not be taken.

3.3.7 Advice and assistance available to investigators

A variety of advice and assistance is available to investigators from all Directorates of OLAF. See also Section 3.2.2.1. Requests for advice should always be made sufficiently in advance to allow reasonable time for the preparation of advice. Advice will be provided promptly.

3.3.7.1 Legal Affairs Unit

Investigators may avail themselves of Union-law-related legal advice from Unit D2 on the operational matters within OLAF’s sphere of independence. This includes:

- advice on issues that arise in specific cases concerning the interpretation of the Union legal framework which governs OLAF's performance of its investigative tasks, as well as other, more general, Union legal requirements such as professional secrecy, extent of immunities, law of EU working places, territorial scope of application of OLAF investigative powers, extent and limits of OLAF's independence, relations with the Commission, the other Union institutions and bodies and Member States, etc.;
- advice regarding problems experienced in the performance of OLAF's operational duties requiring solutions that concern the Commission's sphere of competence (e.g. infringements by Member States of their duties to cooperate with OLAF during an investigation);
- advice on the establishment of practical arrangements for cooperation with other institutions and bodies such as Europol and Eurojust, taking into account the overall legal framework of the European Union.

3.3.7.2 Judicial and Legal Advice Unit

Investigations undertaken in either an EU Member State or a non-member country must comply with national rules of the jurisdiction in question, as well as the national rules of the jurisdiction in which any criminal or disciplinary proceedings are likely to be taken. Failure to do so may result in inadmissibility of the evidence gathered. Consequently, a member of Unit C1 should be added to the case team, as appropriate, from the beginning of the assessment phase, as soon as potential criminal activity is suspected (see Section 3.2.2.1).

Important

The responsibility of the Unit is to ensure that in the whole lifecycle of a case, the evidence necessary for a future criminal case is collected in an appropriate way so that it can subsequently be used in national proceedings.

Close cooperation between investigators and Unit C1 is crucial to the operational success of OLAF. Legal advice given by Unit C1 in an operational context should normally be followed. If there are serious differences of opinion that cannot be resolved by the responsible Head of Unit, then the Head of Unit and the Head of Unit C1 make their submissions to Director A/B for a final decision. Where a member of Unit C1 is assigned to a case team, differences should be resolved by the normal operational hierarchy.

Relations with judicial authorities in Member States and non-member countries are a key responsibility of Unit C1. In opened cases, contacts made by Directorates A and B should be conducted under the supervision of management directly in charge of the case and notified to Unit C1.

For more detailed criteria see Section 3.2.2.1 above.

3.3.7.3 Fraud Prevention and Intelligence Unit, Mutual Assistance and Intelligence Unit

Units C2 and C3 will, as required, provide prompt advice and assistance to investigators regarding:

- sectoral legislation (including direct expenditure and external aid);

- monitoring of the financial aspects in order to allow proper financial follow-up from the time the investigation is opened (in some Member States, recovery actions are possible before OLAF has closed an investigation);
- assessment of information on possible infringements of financial regulations and public procurement rules.

In case of potential recovery of direct expenditure and external aid, specific advice can be given as to:

- collecting and evaluating evidence in order to make available all material necessary to achieve the objectives of both criminal prosecution and civil recovery;
- participating in recovery actions involving insolvency procedures;
- assessing whether the investigation results correspond to the initial estimation of recoverable funds.⁷³

When recovery issues arise while a case is opened, Directorates A and B coordinate their activities with the follow-up units.

3.3.7.4 Data Protection Officer

Advice on any matters relating to data protection may be requested from, or provided spontaneously by, the OLAF Data Protection Officer.

3.4 CLOSING A CASE

This section covers the procedure for closing a case and adopting the Final Case Report.

3.4.1 Final Case Report

At the end of an investigation or an operation, a Final Case Report is prepared and submitted to the Executive Board. This report covers the activities performed by OLAF, its findings, conclusions and recommendations. The Final Case Report gives an objective account of the facts as they emerged and the conclusions that can be drawn from these facts. Where appropriate, it makes recommendations for appropriate action to be taken by the competent authorities (Directorates-General, other Union bodies, national or other international authorities).

The Executive Board may request amendments to be made before the Final Case Report is accepted for further processing and distribution. Where appropriate, the Final Case Report should also record any ‘lessons learned’ that might be implemented at a later stage. On the basis of the Final Case Report, the Board may recommend closing the investigation phase of a case with or without recommendations for various types of follow-up.

⁷³ See Commission Communication COM(2002) 671 final, page 6, second paragraph.

3.4.1.1 Legal basis

Article 9 of Regulation 1073/1999 provides that:

- on completion of an investigation carried out by the Office, the latter must draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken;
- in drawing up such reports, account must be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They are subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and are of identical value to such reports.

3.4.1.2 Content of the Final Case Report

The Final Report should include:

- (a) a case history specifying the date the case was opened, the initial source of information, the investigating activities carried out, the information provided by the source of the information and the interested parties concerned (e.g. Commission Directorates, other Union bodies, Member State authorities or non-member country authorities, including judicial and administrative authorities), the identification of the source of funding (programme, contract reference, contracting/paying agency) or revenue concerned;
- (b) facts established: the facts constituting the suspected fraud or irregularity supported by sound and genuine evidence formally acceptable in judicial proceedings;
- (c) the findings of the investigations: for each suspected fraud or irregularity, specific reference should be made to each piece of evidence/information collected, and the investigation activities carried out in order to obtain the evidence;
- (d) the legal classification of the facts, if possible: the legal classification of the suspected irregularities (under administrative, civil, disciplinary or criminal law), should be included. Where alleged criminal offences are concerned, the assistance of Unit C1 should be requested to liaise with the competent national authorities;
- (e) financial consequences: the amount that should be recovered. In cases of shared management with Member States, the amounts for each individual Member State should be recorded in order to define the specific potential financial liability. For cases detected before payment, the potential loss that the European budget would have suffered if the investigation had not been carried out should also be specified;
- (f) the recommendation of the Director of the Office on the action that should be taken by the competent partners (Commission Directorate, Union body, Member State or non-member country authority). These recommendations can concern administrative, financial (recovery) or disciplinary action to be taken by these partners concerned. To this end the unambiguous elements provided in the Final Case Report must enable these partners to launch directly the necessary actions (e.g. evidence of any negligence/lack of due diligence by Member State authorities or

suspected corruption by national officials so that the appropriate authorising Commission DGs by delegation can consider claiming financial responsibility against the Member State concerned in order to ensure protection of the EU budget where debts are irrecoverable from economic operators because of such facts) without being obliged to wait for confirmation by their own additional investigative actions, while fully respecting the principle of the presumption of innocence (see Section 1.4.8);

- (g) the follow-up proposed: which OLAF unit should carry out the follow-up, and an outline of the follow-up needed.

3.4.1.3 Structure of the report

(1) Irregularities or frauds have been committed

When, according to the Final Case Report, irregularities or frauds have been committed, the structure of the report will be the following:

- initial allegations (either at the beginning of the report or under item ‘legal analysis’);
- chronology of the case, with a list of the evidence collected and the results of processing it;
- legal aspects, including potential time-barring items (unless excessively burdensome);
- final considerations, including detailed presumed financial consequences;
- recommendations for next steps, including various follow-up issues.

(2) Irregularities or frauds have not been committed

When, according to the Final Case Report, no irregularities or frauds have been committed, the structure of the report will be the following:

- initial allegations;
- chronology of the investigation, with a list of the evidence collected and the results of processing it or the established absence of proof;
- final considerations and recommendations.

Data protection

The Data Protection Annex should be printed out from the Data Protection Module and attached to the Final Case Report (DP Guidelines, Sections 2.1.2 and 2.3.3).

The Final Case Report should be validated and signed by all members of the investigation team, with the endorsement of the Head of Unit involved and the competent Director. All relevant documentary proof — including those documents necessary for further actions by OLAF’s operational partners — should be annexed.

Important

The report cannot be distributed other than to the authorities entitled to receive it and conclusions from the report cannot be publicly presented to such an extent as would undermine the protection of individual rights, in particular those based on the principle of the presumption of innocence.

3.4.2 Procedure for case closure

(1) Documents to be submitted to the Board

In order to close a case, the investigator submits the following documents to the Executive Board:

- Final Case Report (Annex 4, Form O28 or O29), together with Data Protection Annex: discussed in Section 3.4.1;
- Dissemination sheet (Annex 4, Form O30): specifies the competent Member State and Union authorities to whom the Final Case Report should be disseminated, in accordance with Article 9(3) and 9(4) of Regulation 1073/99 (see Section 3.4.3). Preparation of the Dissemination sheet and actual dissemination of the Final Case Report is the responsibility of the investigator in charge;
- OLAF Follow-up Recommendation (Annex 4, Form O31): specifies the type of follow-up (administrative, disciplinary, financial, judicial or legislative), the steps to be taken in the follow-up phase of the case, and any information useful to the follow-up team. It should ideally contain details of the exact amount to be recovered and from whom. If this is not possible or if the investigators' obtaining this information would lead to delay in closing a case where all operational activity has been completed, an explanation should be provided. For direct expenditure cases (including external aid), it should also provide numbers of the relevant projects and contracts and a list of recovery orders;
- OLAF Lessons Learnt Sheet (Annex 4, Form O32): summarises the lessons that can be drawn from experience during the case and recommends actions to be taken based on this experience, such as improvements in OLAF's internal organisation, in investigative techniques, in other departments, in cooperation with national authorities. These reports should be disseminated under the authority of Director A or Director B;
- Written statement from the Member State concerned: if a case is closed without follow-up on the basis that all amounts have been recovered, this must be supported by written documentation confirming that the recovery has taken place. The investigator, with the assistance of the appropriate follow-up unit, must obtain a written statement to this effect from both the Member State and from the authorising Directorate-General (effective payment). There is no prescribed format for written statements from Member States and authorising Directorates-General but the elements which they contain must be sufficient in order to satisfy the Executive Board that the necessary recovery action has indeed taken place. They should therefore include a description of what the amounts actually refer to, precisely how much was collected, when and by whom. Details of corresponding entries in the accounts (i.e. at national level for Member States and Union level for the authorising DGs) including related transaction numbers would be additionally helpful where this information is available.

(2) Documents to be submitted to the Board if necessary

If necessary the following documents are submitted by the investigator to the Executive Board:

- Case Closure Note (Annex 4, Form O33): this note signifies that the case is closed, either with or without follow-up;
- Archives Note (Annex 4, Form DM1): this note details all case files. The investigator should identify specific key documents which may be of assistance to the follow-up units.

(3) Transfer of documents to the Archive

Once the decision has been taken to close the case, all case-related documents which are not yet registered are transferred to the Archive together with an Archives Note (Annex 4, Form DM1).

The responsible follow-up agent is then given access rights to the relevant files in the CMS.

Data protection

Certain actions must be taken with respect to the provision of information to the data subject, special categories of data, and retention of data. See the DP Guidelines, Section 2.3.3.

3.4.3 Transmission of information once a case is closed

3.4.3.1 Dissemination of the Final Case Report

The Final Case Report should be disseminated by the unit in charge of the investigation or other type of case, within one month after its adoption, to the different addressees which have an identified role to play in the various follow-up actions recommended (authorising DGs or DG BUDG for own resources cases, lead administrations of Member States, candidate countries or non-member countries, as appropriate).

The supporting documentation (appendices to the Final Case Reports) must be attached unless this would be harmful to the investigation by an authority of a Member State or non-member country (judicial secrecy).

Data protection

Any transfers of personal data outside OLAF must comply with the rules on transfers. See the DP Guidelines, Sections 1.7, 2.1.1 and 2.3.3.

3.4.3.2 Transmission of information to authorities of Member States

3.4.3.2.1 *Transmission of information to national judicial authorities*

OLAF transmits information to the competent Member State judicial authority at the end of the investigation when the investigation establishes that a criminal offence may have been committed. For the necessary analysis the investigator must consult Unit C1.

Important

OLAF must clearly specify whether the person concerned has been given the opportunity to present his views on the facts.

(1) Legal basis

Article 9(3) of Regulation 1073/99 specifies for external investigations that the Final Case Report on an external investigation and useful related documents must be provided to the competent authorities of the Member State responsible for taking follow-up action.

Article 10(2) of Regulation 1073/99 is the legal basis for internal investigations. It requires that the judicial authorities of the Member State concerned be informed of matters liable to result in criminal proceedings.

(2) Procedure to be followed

The investigator prepares the Final Case Report. The designated member of the Legal and Judicial Advice Unit prepares a note for the attention of the OLAF Director-General, to be signed by the member of Unit C1 and the responsible Heads of Unit. This note includes a description of the facts established, making reference to the evidence which is listed and attached, and a legal analysis identifying the criminal offences committed under national law, the time limit applying and the judicial authorities competent to receive the information.

Article 11(7) of Regulation 1073/99 requires the Director of OLAF to inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities of a Member State. Accordingly, the Legal and Judicial Advice Unit prepares a note containing the relevant clause on the transfer of personal data to be signed by the OLAF Director-General to inform the OLAF Supervisory Committee pursuant to Article 11(7) of Regulation 1073/99 (Annex 4, Note SC3).

Important

This information should be made on the basis of the Final Case Report at least 5 working days before transmission.

The Legal and Judicial Advice Unit prepares a letter of transmission to the national authority (Annex 4, Letter O19) for signature by the OLAF Director-General. With this letter, the note with the attached evidence is transmitted.

In practice, a *signataire* is prepared by the secretariat of Unit C1, containing the note for the attention of the Director-General, the note for the Supervisory Committee (Annex 4, Note SC3), and the letter of transmission to the judicial authorities (Annex 4, Letter O19). The secretariat of Unit C1 then sends the note to the Supervisory Committee, and the letter of transmission and report to the judicial authorities.

For the additional details of the procedure to be followed in external and internal cases, see Section 3.3.6.1.1.

3.4.3.2.2 Transmission of information to other national authorities

OLAF transmits information to the competent Member State authorities at the end of the investigation for the purpose of ensuring effective protection of the Union's financial interests in all Member States.

(1) Legal basis

Article 9(3) of Regulation 1073/99 provides for compulsory distribution of the OLAF Final Case Report for an external investigation to the competent authorities in the Member States in

question. It provides that the report and any useful related documents are to be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations. The way in which this rule is to be implemented when there is transmission to judicial authorities is set out above (see Section 3.4.3.2.1).

Article 10(1) of Regulation 1073/99 provides, for external investigations, that the Office may at any time, as appropriate, forward to the competent authorities in the Member States concerned information obtained in the course of external investigations.

Article 8(2) of Regulation 2185/96 establishes the rule on compulsory distribution of any fact or suspicion relating to an irregularity which has come to the Commission's notice in the course of an on-the-spot check or inspection. It requires such information to be reported as soon as possible to the competent authority of the Member State within whose territory the check occurred.

Article 8(1) of Regulation 2185/96 establishes the rules on discretionary distribution of information communicated or acquired in any form under the Regulation. It provides that such information may be distributed to persons within Member States whose function requires them to know (see also Section 3.3.2.2.3).

The sectoral regulations (e.g. Council Regulation 515/97) establish the rules on distribution of the information obtained under these provisions. They provide that such information can only be sent to persons within Member States whose duties require that they have access to it, unless the Member State supplying it has expressly agreed otherwise.

(2) Procedure to be followed

See Section 3.3.6.1.2.

3.4.3.3 Transmission of information to Union institutions and bodies

In accordance with Article 9(4) of Regulation 1073/99, the OLAF Final Case Report for an internal investigation has to be transmitted to the Union body concerned.

(1) Internal investigations

The Director-General of OLAF will promptly forward all final reports concerning internal investigations and any useful related documents to the Union institution or body concerned with a Note to the Secretary-General of the Union institution or body (or, when a Commissioner is personally involved, the President of the Commission) (Annex 4, Note O8). If they are transmitted to the Commission, the Secretary-General should also transmit such Final Case Reports to any other relevant Commissioner or Director-General. Upon receipt of such reports, the institution or other Union body will take all appropriate actions and will report to OLAF's Director-General on all such action taken within a time limit laid down by the latter.

The Union body concerned is informed that information has been forwarded to the national judicial authorities in internal investigations. Informing the Union body may be deferred in exceptional cases where absolute secrecy is required or transmission of information could jeopardise the objective of the investigation, or if so requested by the national judicial authority.

In practical terms, a Note from the Director-General of OLAF (or Director A/B acting on his behalf), containing the relevant clause on the transfer of personal data, will inform the Secretary-General of the Union institution or body (or, when a Commissioner is personally involved, the President of the Commission), if the person concerned has been interviewed (Annex 4, Note O7).

If the person concerned has not been interviewed, the Secretary-General will have been so informed through a request for agreement not to interview the person concerned prepared by the Legal and Judicial Advice Unit (see Section 3.3.6.1.1).

In cases where the person concerned has been interviewed, the Secretary-General of the Union body concerned (or when a Commissioner is personally involved, the President of the Commission) will be informed by a note containing the relevant clause on the transfer of personal data to be prepared by the Investigation and Operations Directorates. This note must include:

- the CMS reference of the internal investigation and the date on which the case was opened;
- the identity of the person(s) under investigation;
- a summary of the facts giving rise to the decision to transmit the case to the judicial authorities concerned, including relevant provisions of criminal law that may have been violated;
- any other information that may assist the Union institution or body in deciding whether to take measures to protect or preserve its own interests or security.

The Union body concerned should also be informed that a case is closed with no further action by a note containing the relevant clause on the transfer of personal data (Annex 4, Note O9).

(2) External cases

In external cases OLAF provides the authorising DG with the Final Case Report or informs the authorising DG of the relevant facts in order to allow the Authorising Officer to carry out his financial follow-up activities.

3.4.3.4 Transmission of information to non-member countries and international institutions

See Section 3.2.6.3.

3.4.3.5 Use of confidential information in legal proceedings: duty of discretion

See Section 1.4.11.

3.4.3.6 Notification

3.4.3.6.1 Person providing initial information

In some instances, the initial information that gave rise to a case may have come from an individual who may have an interest in the outcome. It is OLAF's practice not to provide such individuals with any information about the case while it is still ongoing. Upon completion of the case (or at the time a case is classified as a non-case or *prima facie* non-case), it is good administrative practice to send a brief letter to such person, informing him of the completion of the case and, in general terms, of its main results, using the Completion of investigation letter containing a privacy statement (Annex 4, Letter O16). However, the letter should not reveal any confidential information or professional secrets.

3.4.3.6.2 Person concerned

(1) Internal investigations

OLAF will notify the person concerned at various stages of an internal investigation: at the initial phase, to arrange the interview and at the closure of the case.

At the closure of the investigation two scenarios are possible:

(a) Case may be closed without follow-up

In this case, in accordance with Article 5 of the Model Decision and Article 1(3) of Annex IX to the Staff Regulations, the person concerned will be informed by a letter from the Director-General of OLAF (or Director A/B acting on his behalf), using the Notification of case closure without follow-up letter, stating that the case has been closed without follow-up action and containing a privacy statement (Annex 4, Letter O14). Article 1(3) of Annex IX to the Staff Regulations also requires that the official's institution or body be notified in writing that the case has been closed with no follow-up. In practical terms, a copy of the letter sent to the official should also be sent to the institution or body. This Article provides that the official may request that the decision be inserted in his personal file.

(b) Case may be closed with follow-up

In this case a letter from the Director-General (or Director A/B acting on his behalf) will normally be sent to the person concerned, using the Notification of case closure with follow-up letter containing a privacy statement (Annex 4, Letter O15), informing him that the case has been passed on, unless this would be detrimental to the follow-up action.

OLAF reports to the European Parliament, the Council, the Commission and the Court of Auditors on the results of investigations and operations. This reporting is, however, carried out respecting the confidentiality of these investigations and operations, the legitimate rights of the persons concerned, data protection rules and national provisions concerning judicial proceedings.

(2) External investigations

In external investigations, OLAF investigators inform the person subject to the investigation, as long as this would not be harmful to the investigation. OLAF investigators also inform the person concerned when the investigation has been closed as long as this would not be harmful to any further action.

3.4.4 Re-opening cases

A closed case may be re-opened only if new material evidence appears that could challenge the conclusions drawn at the closure stage or if a national authority requests additional investigative steps to be carried out by OLAF. Such a decision will be taken following an initial assessment of the new facts, as specified in Sections 3.2.2 and 3.2.3 and in accordance with the procedures for opening a case (see Section 2.1). A new CMS record must be created.

Closed cases fall into two categories, namely:

- cases closed with follow-up ongoing, and
- cases closed without follow-up or with follow-up completed. The process of re-opening such cases should follow the respective procedures detailed in Sections 3.4.4.1 and 3.4.4.2 as set out below.

3.4.4.1 Cases with follow-up

(1) Background

A decision to re-open a closed case which is still in follow-up may be taken only when new information or material facts, of a nature likely to alter the outcome of the already closed case, have come to OLAF's attention during the follow-up stage or a national authority requests additional investigative steps to be carried out by OLAF, e.g. conducting interviews with EU staff members.

When received, such new information/material facts should be subject to the standard assessment procedures for opening new cases with the matter of the receipt of new information/material facts also being drawn to the attention of the OLAF follow-up unit(s) and the authority or Union body dealing with the case.

Thereafter, depending on the outcome of the new assessment and the type of follow-up action underway, it may be necessary in circumstances where it is proposed to re-open the case for the OLAF follow-up unit(s) and any other authority or Union body dealing with the follow-up of the previously closed case to suspend its follow-up work in the matter and await the outcome of the new case.

In the circumstances of such case re-opening and with due regard to the various types of follow-up action underway the following particular procedural requirements should also be observed.

(2) Disciplinary follow-up

In cases of disciplinary follow-up OLAF should advise the competent disciplinary authority of the receipt of the new information/material facts. Moreover, if the assessment of the new information/material facts reveals, for the first time, possible violations of criminal law and a decision to re-open the case has been taken, the competent disciplinary authority should be informed of this course of action.

(3) Financial follow-up

In cases of financial follow-up OLAF should advise the competent financial authority of the receipt of the new information/material facts. Moreover, if the assessment of the new information/material facts shows that there is probable material change in the financial

recovery aspect of the case, the competent financial authority should be apprised without delay and arrangements put in train for appropriate adjustment of the financial recovery processes (including possible suspension of such financial recovery processes pending the outcome of the new case).

(3) Judicial follow-up

In cases where judicial follow-up is ongoing, any such new information/material facts should also, as a matter of course, be transmitted to the unit responsible for judicial follow-up, which will in turn transmit them to the relevant judicial authority. Thereafter, on the basis of this new information/material facts, the judicial authority may request OLAF to provide additional evidence because, for instance, the evidence in the file does not fully establish all elements of the alleged crime under national law or the amount of damages, and gathering that evidence requires additional investigation activities which OLAF is in a better position to undertake than the requesting authority (e.g. interviewing an EU official, gathering additional documents).

Important

A decision to re-open the OLAF investigation in such circumstances may also be dependent on whether, under both national and Union law, an administrative investigation is still permissible at this stage.

The new investigation will be carried out by a designated investigator, assisted by the relevant member of the unit responsible for judicial follow-up. If the assessment leads to the opening of an internal investigation and if this investigation leads to (new) conclusions with regard to persons concerned or conclusions with regard to persons that have not yet been treated as such, the procedures outlined in Sections 3.3.6.1.1 and 3.4.3.2.1 are to be followed.

In respect of any or all of the procedural steps outlined above, appropriate CMS records must be created.

3.4.4.2 Cases without follow-up

In a situation where a case has been closed without follow-up, or follow-up has been completed, any decision to re-open such cases may only be taken when new material facts of a nature likely to alter the outcome of the previous investigation have come to OLAF's attention after the closure of the investigation and any follow-up.

4 FOLLOW-UP

4.1 LEGAL BASIS AND PRINCIPLES

(1) Legal basis

The main legal basis for OLAF's follow-up activities is Article 9 of Regulation 1073/99. Articles 1 and 11 of the same Regulation are also pertinent, as is Article 53b of the Financial Regulation 1605/2002. In addition, Article 7(2) and (3) are particularly relevant to judicial follow-up action and Article 9(4) to disciplinary follow-up.

OLAF's important support role to authorising Directorates-General with regard to the financial follow-up of frauds and irregularities in the indirect expenditure sectors under shared management (common agricultural policy and structural actions) is precisely defined in Working Guidelines adopted by the Commission on 27 November 2007⁷⁴.

Article 325 of the Treaty on the Functioning of the European Union can also be cited in support of follow-up activity with Member States in order to protect the Union's financial interests, and the relevant provisions of Regulation 515/97 are utilised where appropriate to assist follow-up and recovery actions in the customs and agricultural sectors.

(2) Follow-up principles

Follow-up⁷⁵ includes various activities designed to verify that the competent EU institution and/or Member State authorities have taken into account the administrative, disciplinary, financial and judicial measures recommended by OLAF in its Final Case Reports (or Assessment Notes where monitoring cases are concerned) and have met the obligations stemming from EU legislation. Follow-up measures of a legislative nature take the form of fraud prevention (fraud-proofing) activities and are generated from the analysis of OLAF's investigative activities by fraud-proofing and strategic intelligence officers. Each sector of investigative activity or each policy family is analysed by a fraud-proofing agent. The output of fraud prevention (fraud-proofing) is consequently wider than follow-up paths and requires flexible cooperation from investigators.

A case is transferred from the investigation stage to the follow-up stage when the Executive Board recommends closing it with at least one follow-up 'path' (recommendation type). However, appropriate follow-up activities also need to be initiated while the investigation is still ongoing if this action is helpful to support the case and/or to avoid possible further negative consequences, especially for the Union budget.

⁷⁴ Communication to the Commission from VP Kallas and Mrs. Grybauskaitė in agreement with Mrs. Fischer Boel, Mrs. Hübner, Mr. Spidla and Mr. Borg on the division of responsibilities between OLAF and the Authorising Officers by delegation in the Commission concerning the financial follow-up of irregularities in the domain of Community expenditure under shared management in the agricultural and structural actions areas (C(2007)5709; SEC/2007/1611/2).

⁷⁵ For more structured information see the 'Follow-up flowchart' (Flowcharts - Annex 12).

Monitoring (where OLAF itself does not perform any investigative activity) is also processed within the follow-up environment, including extension of this type of action to cover also those circumstances where the Member State authority or other department (EU or international organisation) has not yet opened a case/audit/other appropriate procedure.

Unit C1 is responsible for all matters relating to disciplinary and judicial follow-up; Unit C2 for administrative and financial follow-up in the direct expenditure (including internal investigations and external aid) and structural actions sectors; Unit C3 for administrative and financial follow-up in the agricultural expenditure and own resources sectors.

(3) CMS Fraud Prevention Module

OLAF's case management system (CMS) includes a Fraud Prevention Module, which is a tool used by the team implementing the fraud-proofing policy (mainly Units C2 and C3). The module can be used to consult the *modi operandi*, kind of irregularities by sector, financial implications by geographic scope or, *inter alia*, policy activities most targeted by fraudsters. The descriptive part of the module contains anonymous information about the cases filtered for fraud-proofing. The follow-up part of the module contains the recommendations addressed to Commission departments, Union institutions and bodies, and their replies.

4.2 DEFINITIONS

There are four different kinds of follow-up. This section explains what they are and the kinds of measures typically involved.

4.2.1 Definition of administrative follow-up

Administrative follow-up consists of verifying that all necessary measures are taken by Member States' administrative authorities or by the EU institutions and bodies with regard to the implementation of EU legal and policy requirements. It includes:

- case-specific measures: verifying that the authority in question has taken the necessary administrative measures to remedy the fraud, irregularities or other illegal activity at issue in a specific case (including the application of any precautionary measures); and
- more general measures with wider relevance, such as ensuring that all the appropriate information (e.g. notifications on fraud and irregularities) has been supplied by the Member States' authorities to the Commission departments.

Administrative follow-up actions may typically also include:

- the application of administrative measures such as flat-rate corrections or registration in the Commission Early Warning System (EWS). For more information concerning Early Warning System see the 'Early Warning System OLAF Guidelines' (Annex 16);
- the implementation of EU policies and execution of specific measures in the sector concerned;
- the fulfilment of Member States' obligations with regard to EU law;
- the application of sanctions; and

- cooperation/mutual assistance matters between Member States' authorities, non-member countries' authorities and OLAF in respect of both investigation and follow-up activities.

In carrying out these tasks, the responsible follow-up unit establishes the necessary contacts with Member States, EU and (where applicable) non-member country authorities, as appropriate.

4.2.2 Definition of financial follow-up

Financial follow-up is concerned with optimising the conditions and defining the appropriate approach for successful recovery of unduly paid amounts or evaded own resources relating to the Union budget. In the event that financial recovery issues arise while a case is still open, the Investigations and Operations Directorates immediately coordinate their activities with the follow-up units and identify the necessary respective tasks to be performed (see Section 4.3.1.1).

The approaches towards financial follow-up activity differ according to the requirements of the very diverse budget sectors involved and the working arrangements in place with the respective authorising DGs. The broadest distinctions are between revenue and expenditure and between the shared and direct expenditure sectors. Specific criteria, including indicative minimum financial thresholds, are applied in the context of the Board decision procedure when closed investigation cases are considered for possible transfer to financial follow-up. Details of the criteria, thresholds and other applicable parameters concerned can be found in Annex 17.

Where OLAF has completed all of its own financial follow-up tasks in respect of an investigation case and the remaining action needs to be taken by an authorising DG (e.g. DG Budget for the traditional own resources sector in order to evaluate the possibility of building a financial responsibility case against Member States where there is evidence of negligence or lack of due diligence in establishing, notifying or recovering import duty), the case passes from 'active' financial follow-up to the 'pending' stage in CMS after endorsement of this status change by the Executive Board. An illustration of this 'devolved' processing is provided in specific guidelines for financial follow-up in the direct expenditure area (see Annex 17). When all the necessary remaining action has been completed, a form 'Closure of pending stage for financial follow-up' (Annex 4, Form F6) is used to transfer the case out of the 'pending' stage and definitively close it.

4.2.3 Definition of judicial follow-up

Judicial follow-up consists of verifying whether the competent national authorities have acted on the recommendations of OLAF to open criminal proceedings, monitoring these proceedings and collecting the final results of the criminal cases in the Member States. It includes:

- transmission of information obtained by the Office during external or internal investigations to the competent national judicial authorities in cases liable to result in criminal proceedings;
- subsequent monitoring of these proceedings;
- providing assistance to the judicial authorities in their proceedings when needed.

Judicial follow-up activities may already begin while the investigation is still ongoing, if this is deemed necessary, e.g. if during an investigation it becomes apparent that criminal acts may have been committed and the forwarding of information to the competent national authorities seems appropriate. Members of Unit C1 are also to be associated from the outset with all criminal assistance cases as follow-up agents (see Section 4.3.1.1).

4.2.4 Definition of disciplinary follow-up

Disciplinary follow-up consists of verifying whether the competent Union authorities have acted on the recommendations of OLAF to open disciplinary proceedings, monitoring these proceedings and collecting the final results of the disciplinary cases in the Union institutions and bodies. It includes the transmission of information to the relevant disciplinary authority and the subsequent monitoring of its proceedings. Disciplinary follow-up also includes providing assistance to the disciplinary authorities in their proceedings if needed.

4.3 FOLLOW-UP PROCEDURES

4.3.1 Opening of the follow-up path

Follow-up paths are usually opened once the closure of the investigation stage and recommendations for specific types of follow-up actions are accepted by the OLAF Executive Board. However, they may also be opened following a decision on a proposal for a new follow-up path while a case is still open or is in the follow-up phase. If information is received which requires the opening or change of a follow-up path, the follow-up agent prepares a Proposal for new follow-up path (Annex 4, Form F2). The form is submitted to the OLAF Executive Board, together with a draft Decision on the opening of a new follow-up path (Annex 4, Form F3); see Section 2.1.

4.3.1.1 Opening of a follow-up path during the investigation phase

If a follow-up path is opened during the operational phase, the designated OLAF employee of the relevant follow-up unit is given ‘Assisting follow-up agent’ (C2/C3) or ‘judicial adviser’ (C1) status by means of Staff Appointment form (Annex 4, Form O/F1). This status is only granted if there is a clear need and discernible added value in taking such action.

Decisions are necessarily taken on a case-by-case basis, but typical reasons are:

- financial recovery action is being initiated or has already taken place;
- specialist support is required to optimise the conditions for subsequent successful recovery;
- precautionary measures need to be taken (e.g. to secure any possible financial guarantees);
- pending payments should be frozen in order to prevent further financial losses from occurring;
- a criminal investigation is open at national level related to an OLAF investigation which needs to be followed;
- information needs to be forwarded to national judicial authorities during the investigation phase.

4.3.1.2 Opening of a follow-up path after the closure of the investigation phase

According to the circumstances of the case and to the type of additional/different follow-up actions required, the workflow for processing the forms can differ. The variations are explained in this section.

(1) ‘Technical’ items (correcting errors, etc.)

Follow-up-path opening actions of a technical nature can be corrected by submitting the forms for rapid electronic consultation via the CMS Board Module Fast Track procedure (e.g. where the Executive Board may have opened an administrative follow-up path but on detailed examination the action required is in fact financial follow-up). The Quality Assurance Team makes the necessary path changes if no objections are raised.

(2) ‘Sensitive’ items (new information received)

Follow-up-path opening actions due to new information received require the work forms to be submitted to the Executive Board for formal discussion at one of its weekly meetings and examination of the changed material circumstances. The Board recommends the required follow-up path opening action.

4.3.2 Appointment of the follow-up team

When a follow-up path is opened, the Head of the relevant follow-up unit completes a Staff Appointment form (Annex 4, Form O/F1) to assign (a) member(s) of the unit’s staff to be responsible for the case. The designated follow-up agent(s)/judicial adviser(s) maintain(s) regular contacts for the case in question with the relevant units inside OLAF, the Commission authorising Directorates-General, DG Budget, the Legal Service (where forced recovery and/or civil action is already underway or required) and, as necessary, the competent Member State authorities according to the sector and circumstances of the case. If the follow-up agent/judicial adviser assigned to a case changes, the responsible Head of Unit completes a Staff Release form (Annex 4, Form O/F2) together with a new Staff Appointment form and specifies the new member(s) of the follow-up team.

Use of the judicial competence of investigators with a professional background as prosecutors, judges or agents working in other units of OLAF: in cases where an employee of another part of the Office is called to work on a case falling under the responsibility of Unit C1, the agreement of the Director in charge of this employee is to be requested by Unit C1.

A list of persons with such expertise will be set up and kept up-to-date by Unit C1 in liaison with Unit D5. The Job Description of the staff concerned by this list should be adapted to reflect the possibility of this kind of additional task.

Staff of other units work under the supervision of the Head of Unit C1 when providing judicial expertise to Unit C1.

Note

The duration of the follow-up phase can vary according to the individual circumstances and degree of complexity of each case. The follow-up phase can often be very protracted, especially when judicial, civil or administrative proceedings are involved.

4.3.3 Cooperation between units in charge of different sectors/mixed type follow-up cases

A follow-up case may on occasion cover two or more sectors which cut across the work of more than one follow-up unit. Where this happens, the two Heads of Unit concerned consult to determine who should have the lead. Follow-up agents/judicial advisers from each unit will be subsequently appointed and will work closely with each other to coordinate the processing of the necessary tasks. A configuration of ‘follow-up agent in charge’ and ‘follow-up agent associated’ may be agreed according to the sectors in which the major/minor interests lie.

Mixed type follow-up cases (e.g. a single case involving both agricultural import duty and export refunds) within the same unit may also require a lead follow-up agent/judicial adviser to be appointed by the Head of Unit for the major sector and a subsidiary follow-up agent for the minor sector. These agents also work closely together to ensure the proper coordination and execution of the required actions.

A single follow-up case can have several sectors open in CMS simultaneously, so data input by the different agents concerned is separated, but is automatically consolidated at a higher level for reporting purposes in respect of the whole case.

4.3.4 Preparation of a Follow-up Closure Report

Once all appropriate measures have been taken and the follow-up of the case has been completed, a Closure of Follow-up Stage form (Annex 4, Form F4 for Unit C1, or Form F5 for Units C2 or C3) is prepared by the follow-up agent/judicial adviser responsible for the case in Directorate C. The closure report sets out the conclusions of the follow-up stage and the results obtained (e.g. amounts recovered/not yet recovered/written off, administrative sanctions, fines, penalties applied and criminal sentences imposed, if available) and is presented to the Board for approval. The forms, with appropriate supporting documents, are prepared and submitted via the Head of Unit for signature by Director C for transmission to the Executive Board at the earliest possible opportunity.

Where the Executive Board recommends to put a financial follow-up case in the ‘pending’ stage, the subsequent ‘Closure of pending stage for financial follow-up’ (advice of definitive closure) Form F6 does not have to be submitted to the Executive Board when all outstanding actions have been completed. Instead, it is directly introduced into CMS by the follow-up unit concerned and notified to Unit D8, which changes the stage of proceedings from ‘pending’ to ‘closed’.

Data protection

The Data Protection Annex (printed out from the Data Protection Module) must be attached to the Closure of Follow-up Stage Report. See Sections 2.1.2 and 2.4.2 of the DP Guidelines.

After formal acceptance of the closure report by the Executive Board, the follow-up agent/judicial adviser or indicated department forwards all case-related documents to the Archive, accompanied by an Archives Note (Annex 4, Form DM1).

Data protection

Certain actions must be taken relating to information to the data subject, special categories of data, and retention of data. See Section 2.4 of the DP Guidelines.

Any transfers of personal data must meet the relevant requirements. See Sections 1.7 and 2.4.2 of the DP Guidelines.

4.3.5 Informing partners of results and the closure of a follow-up path/case

The responsible follow-up agent/judicial adviser informs partners via his line management of the closure of the follow-up path/case according to the requirements of the sector. For all cases in the direct expenditure sector in which a Commission department is involved, the Secretary-General is also informed.

Important

In internal cases with disciplinary follow-up the Secretary-General must always be informed.

If the result of judicial follow-up shows that a legal entity is in one of the situations mentioned in Article 93 or 94 of the Financial Regulation (e.g. final judgment for fraud, corruption or other illegal activity) the information note has to include the recommendation that the Authorising Officer in the Commission department concerned should consider the need for a W5 flagging in the Early Warning System (EWS).

4.4 ADMINISTRATIVE AND FINANCIAL FOLLOW-UP

The processing of administrative and financial follow-up casework is performed on the basis of clearly defined and structured procedures involving data/information recording and work form handling via the CMS. Detailed descriptions of the steps involved are provided in this section.

(1) Documents are made available via CMS communication

The documents submitted to the Executive Board for its recommendation on the closure of the case (see Section 3.4.2) (consisting of the Final Case Report (Annex 4, Form O28), the Case Closure Note (Annex 4, Form O33), the Follow-up Recommendations form (Annex 4, Form O31) and any respective attachments), as accepted by the Executive Board, are made available via CMS communication to the appropriate follow-up unit(s). The case is assigned to a follow-up agent through registration in the Unit C2/C3 ARS (Administration and Registration System) database and CMS.

(2) Steps taken by the follow-up agent

The follow-up agent:

- (a) makes a check on the contents of the file with respect to the relevant financial provisions, sectoral provisions and contractual provisions, as appropriate;
- (b) defines and identifies in detail the (administrative and/or financial) follow-up activities required;
- (c) coordinates subsequent follow-up actions as necessary with the responsible investigator and/or member of the Judicial and Legal Advice Unit, and particularly with respect to the other Commission departments involved.

(3) Evaluation of the possibility for civil action

The follow-up agent evaluates the possibility for civil action by the Commission, in particular when direct expenditure cases have been submitted to Member States' judicial authorities for criminal proceedings.

(4) Contacts with partners

The follow-up agent also contacts, where applicable, the authorising DG, DG Budget, the Legal Service and Member State authorities to establish the status of implementation of recommendations in the Final Case Report (administrative/financial). These partners are encouraged to take the measures required to implement the recommendations in question and are assisted as necessary throughout this process. The CMS case file is updated to reflect actions, results established, the current state of play and the next steps planned.

(5) Monitoring progress

The responsible follow-up agent regularly checks progress made in the recovery procedures and the application of any administrative sanctions through regular contact with the authorising DGs, DG Budget, the Legal Service and the competent Member State authorities, as appropriate, using the relevant legal instruments and sectoral provisions.

4.4.1 Monitoring progress in administrative and financial follow-up

Progress made in all related administrative and financial follow-up actions is closely tracked and monitored until the case is finally ready to be closed. In terms of administrative follow-up the case is closed when the requested administrative measures are implemented or where the entity provides acceptable justification as to why it has not acted on OLAF's recommendation.

For financial follow-up, the case is closed either when the amount due is recovered and made available to the Union budget or when there is enough evidence to confirm that no amount should be recovered or can be recovered. The necessary action is taken in order to verify the adoption of appropriate measures by the competent authorities.

Important

Any delay or omission at this stage could possibly lead in due course to a financial loss for the Union budget.

4.4.2 Assistance to partners

(1) Background

Assistance activity during the follow-up stage can be defined as the support that OLAF can provide in order to ensure smooth and rapid conclusion of the case.

Assistance is usually provided to several subjects (hereafter partners) who are involved, at different levels, in the proceedings aimed at implementing the administrative measures (administrative follow-up) and/or recovering the amounts due (financial follow-up).

OLAF's partners can differ according to the area of the case. Nevertheless, they might be grouped as follows: authorising DGs and authorities of Member States, accession countries, candidate countries, non-member countries and international organisations.

The assistance that OLAF can provide to its partners may take the form of a broad set of activities, all geared towards finalising the follow-up proceedings.

(2) Types of assistance

The most common types of assistance are as follows:

(a) Providing information

EU rules on data protection and confidentiality must be complied with when providing any information held by the Office (see Section 5.2.4).

As regards the data protection aspect, any doubts can be addressed to the DPO (Data Protection Officer) within OLAF, while the need for confidentiality should be assessed on a case-by-case basis. However, it is usually an issue when criminal investigations are ongoing at national level. In this case the Judicial and Legal Advice Unit and the relevant Investigation Unit must be contacted in order to gather from the national judicial authority the necessary authorisation for the dissemination of the confidential data. This feature must always be highlighted when the data is disseminated to the partners concerned.

(b) Issuing opinions

OLAF may also be requested to express its opinion on a particular aspect related to the follow-up activity. Often, these requests are made by the authorising DGs in order to assess the financial liability of the stakeholders.

The follow-up agent can provide further explanations etc. as appropriate but must point out that any decision taken by OLAF's partners, even taking account of OLAF's opinion, falls within their own responsibility and not within that of OLAF.

(c) Coordinating the activity of partners

Coordination activity is another of the assistance activities that OLAF can carry out. It is usually requested when the administrative and/or financial follow-up is being performed in different countries and it consists of coordinating and facilitating contacts among the respective administrations concerned.

4.4.3 Meetings, contacts and exchanges of information with partners during the follow-up phase

As a general rule, the appropriate follow-up unit is responsible for meetings, contacts and exchanges of information with partners during the follow-up phase. The investigation staff concerned are informed of developments via their 'observer' status in the CMS.

However, in the event that investigative as well as follow-up information needs to be provided, internal coordination between the appropriate Investigation and Operations Directorate for the sector concerned and Directorate C (responsible for all types of follow-up) takes place. The information requested relating to the investigation (including assessment) stage is provided by the investigator; the information requested relating to the follow-up stage is provided by the follow-up agent. This division of responsibilities also applies in respect of any questions which may subsequently arise in connection with the information provided. Where the outcome of

such meetings or contacts with partners could have an impact on investigation or other specific operational activity, the follow-up unit immediately informs the relevant investigation unit.

With regard to cases in the area of Union expenditure under shared management, i.e. agricultural and structural actions, OLAF organises biannual meetings with the Authorising Officers (AOs) in order to ensure the accuracy and completeness of the information concerned (see Article 3 of Annex I to the Working Guidelines adopted by the Commission on 27 November 2007⁷⁶).

4.4.4 Transmission of documentary material to external partners (DGs, Member States, non-member countries)

Internal coordination between the Investigation and Operations Directorates and the Directorate in charge of follow-up is required for those cases in which the Final Case Report, including the follow-up results, is requested from OLAF before this documentation can be supplied in a case file to our partners.

Information must be exchanged in a timely fashion in order to ensure a consistent information flow from OLAF to external partners, especially in cases where the judicial and/or administrative procedures have not been launched or finalised. In view of the possible financial and legal consequences, the Directorate in charge of follow-up will coordinate the OLAF reply and inform all internal partners of the results (via the CMS). A note for the file has to be completed on the agreed allocation of responsibilities.

All documents relating to the actual specific investigation stage itself (e.g. Final Case Reports, Mission Reports) are distributed by the investigator (via his line management) to the necessary recipients, as the formal *Data Controller* for this information. Any subsequent queries are properly dealt with by the Directorate A or B employees familiar with the specific elements of the investigation itself (e.g. interviews, evidential material, content of reports, operational decisions taken). By contrast, any documents generated during the follow-up stage itself are distributed by the follow-up agent (via his line management) to the appropriate external partners.

4.4.5 Capturing follow-up results in CMS

Version 6.4 of CMS introduced a substantial upgrade to the financial follow-up processing environment within the system. Further details on the database can be found in the Case Management System - Principles (Annex 6) and more specific assistance in the on-line help facility. The key features are as follows:

- recording of different and/or multiple sector types for the same follow-up path/case;
- recording of financial data at a lower level of organisational detail (e.g. by Member State);

⁷⁶ Communication to the Commission from VP Kallas and Mrs. Grybauskaitė in agreement with Mrs. Fischer Boel, Mrs. Hübner, Mr. Spidla and Mr. Borg on the division of responsibilities between OLAF and the Authorising Officers by delegation in the Commission concerning the financial follow-up of irregularities in the domain of Community expenditure under shared management in the agricultural and structural actions areas (C(2007)5709; SEC/2007/1611/2).

- recording of financial losses prevented (in the traditional own resources sector);
- data validation and warning message generation;
- mandatory mathematical balancing facility for all financial follow-up data input;
- consolidation of all the financial results for a follow-up case in a single summary format.

Data protection

Informing the data subject

A data subject providing information to OLAF in the course of follow-up activities should receive the privacy statement from the follow-up agent or judicial adviser. This is done by means of Letter DP3.

At the closure of the follow-up stage where notification has so far been deferred due to operational reasons, the privacy statement is provided to the data subject by means of Letter DP4.

4.5 JUDICIAL FOLLOW-UP

Once an external or internal investigation has been closed, the Final Case Report may contain recommendations relating to forwarding of information to the relevant judicial authorities where the case is liable to result in criminal proceedings. If such a follow-up recommendation is approved, the Judicial and Legal Advice Unit ensures the follow-up with the relevant judicial authorities. A judicial follow-up path is automatically opened in CMS.

A judicial follow-up path is also opened in CMS during the investigation when information is transmitted to a judicial authority in the course of the investigation following the agreement of the Executive Board on the Interim Case Report prepared by the investigator and the legal analysis by a member of the Legal and Judicial Advice Unit (see Section 3.3.6.1.1).

It can further be opened in the course of an investigation when there is already an ongoing criminal case in a Member State and the investigator requests the association of a follow-up agent/judicial adviser to follow this procedure.

A judicial follow-up path is also opened in CMS when ongoing criminal cases need to be monitored. In these cases no assistance is provided to the national judicial authorities (Section 3.2.3.6).

4.5.1 Appointment of judicial adviser(s)

First of all the Head of Unit C1 appoints the judicial adviser responsible for the case. As the different members of Unit C1 are responsible for different Member States/candidate countries, several judicial advisers can be appointed.

4.5.2 Transmission to the judicial authority

Where an investigation brings to light evidence of possible criminal acts and such information has not been forwarded to national judicial authorities in the course of the investigation, the Final Case Report must mention this fact and recommend that the case be referred to the competent national judicial authorities for further investigation and prosecution. Where such a

recommendation is approved the case is referred to Unit C1 for transmission to the competent national judicial authorities (for the procedure, see Sections 3.3.6.1.1 and 3.4.3.2.2).

4.5.3 Assistance to the judicial authority

The appointed judicial adviser provides such assistance or support as is required by the competent national judicial authorities. Such assistance may concern necessary waivers of immunity (see Section 1.4.10), authorisations to testify as witnesses (see Section 1.4.11), the provision of legal advice, etc. It is provided in close cooperation with Directorates A/B.

Note

If investigative activities are necessary or are requested by the competent national judicial authorities, the case must be re-opened according the procedure described in Section 3.4.4.1.

4.5.4 Regular contacts with the judicial authorities

The appointed judicial adviser maintains regular contacts with the competent national authorities to ensure that the recommendations contained in the Final Case Report are followed.

4.5.5 Monitoring of progress in the case

The appointed judicial adviser monitors progress with the case in the Member States from investigation to prosecution in order to provide relevant information in relation to the status of the case.

4.5.6 Interim Follow-up Stage Report

The appointed judicial adviser produces an Interim Follow-up Stage Report when the judicial proceedings in the country he is responsible for come to an end. The relevant conviction or decision is to be annexed to this Report with a translation into English or French. This Interim Report will be used by the judicial adviser in charge of drafting the Closure of Follow-up Stage Report.

The judicial adviser informs the responsible department of the Union institution or body concerned of the interim results of the judicial follow-up. In practice, a note from the OLAF Director-General is sent to the department concerned and the Director/Secretary-General of the Union body describing the results received. The relevant decision is attached to this note.

4.5.7 Preparation of a Closure of Follow-up Stage Report

The appointed judicial adviser in charge or, if there are several judicial advisers in charge, the judicial adviser in charge of the country from which the last judicial results are received prepares a Closure of Follow-up Stage Report at the conclusion of the investigation or prosecution by the competent national judicial authority.

The report sets out the background to the case, the follow-up activities taken, the results obtained in follow-up such as convictions, dismissals, etc. as well as a legal analysis of the

case. To be annexed to the report are the Final Case Report, the relevant conviction or decision — with a translation into English or French (for the procedure, see Section 4.3.4), and the Data Protection Annex (See DP Guidelines, Sections 2.1.2 and 2.4.2).

4.5.8 Capturing results in CMS

Once a case is closed with judicial follow-up a judicial follow-up path is opened in the CMS system. The judicial adviser(s) in charge constantly capture(s) information on the judicial follow-up in the follow-up path in the CMS system.

For each subject investigated and prosecuted by the national judicial authorities the judicial adviser opens a judicial action in the follow-up path as soon as he is appointed as judicial adviser. A judicial action is opened by pressing the button ‘Add New Action’ and introducing the name of the individual or the company. If names are not known the judicial adviser selects ‘unknown’ for the action in question.

In the Administrative Details part of the action the Member State authority in charge of the case has to be named. There is a pick-list of national authorities of all Member States. The offence investigated is to be mentioned too. There is another pick-list of possible offences (corruption, criminal organisation, customs and other tax offences, forgery, fraud, insolvency offence, misappropriation of Union funds, money laundering or other handling of proceeds of crime, theft/embezzlement). The legal basis has to be indicated (Article 10(2) for internal cases, Articles 10(1) and 9(3) for external cases), the EU institution concerned, whether the Supervisory Committee has been informed of the case, and whether there have been contacts with the EJM or Eurojust.

In the Proceedings part of the action the current stage of the national proceedings has to be introduced. There is a pick-list of all stages (OLAF internal review, report sent to national authorities, criminal investigation, trial, ruling, appeal, end of proceedings). The stages list must be constantly amended by the judicial adviser according to the current stage of the procedure.

In the Penal Results part of the action the results obtained are to be recorded when they are received. There are two alternatives: case dismissed or judgment. For cases dismissed there is a pick-list with the reasons for this decision (lack of evidence, low priority, no public interest, no legal basis, prescription, procedural errors, other). For judgments there are different fields to be filled in: provisional or definitive judgment, acquittal, suspended sentence, imprisonment, financial penalty, damages or other.

4.6 DISCIPLINARY FOLLOW-UP

(1) Opening of a disciplinary follow-up path

Once an internal investigation has been closed, the Final Case Report may contain recommendations relating to the opening of disciplinary proceedings by the appropriate EU authorities (DG ADMIN and the disciplinary departments of the other Union institutions and bodies). If such a follow-up recommendation is approved, the Judicial and Legal Advice Unit ensures the follow-up with the relevant disciplinary authorities.

(2) Following steps

The follow-up process encompasses the following steps:

- appointment of follow-up agent(s);
- transmission to the disciplinary authority;
- assistance to the disciplinary authority;
- regular contacts with the disciplinary authority;
- monitoring of progress in the case;
- preparation of a Closure of Follow-up Stage Report;
- capturing results in CMS.

4.6.1 Appointment of follow-up agent(s)

First of all the Head of Unit C1 appoints the judicial adviser(s) responsible for the case.

4.6.2 Transmission to the disciplinary authority

Final Case Reports on internal cases recommending referrals to the appropriate EU authorities for appropriate disciplinary actions are forwarded by Directorate A to the appropriate EU authorities (see Section 3.4.3.3)

4.6.3 Assistance to the disciplinary authority

The judicial adviser provides such legal or investigative assistance as is required by the appropriate EU authorities. Such assistance is provided in close cooperation with Directorates A/B.

4.6.4 Regular contacts with the disciplinary authority

The judicial adviser maintains regular contacts with the appropriate EU authorities to ensure that the recommendations contained in the Final Case Report are followed.

4.6.5 Monitoring progress in the case

The judicial adviser monitors progress in the case from the investigation stage to disciplinary proceedings and sanctions in order to provide the relevant information in relation to the status of the case. In this regard, Article 26 of Annex IX to the Staff Regulations requires the Disciplinary Board to send OLAF copies of the decisions taken with respect to any disciplinary proceedings following from an OLAF investigation.

4.6.6 Preparation of a Closure of Follow-up Stage Report

The judicial adviser prepares a Closure of Follow-up Stage Report at the conclusion of the investigation or the disciplinary proceedings. The report sets out the background to the case, the follow-up activities taken and the results obtained in follow-up such as convictions, dismissals, etc. as well as a legal analysis of the case. Annexed to the report are the Final Case Report and the relevant decision, and the Data Protection Annex (for the procedure, see Section 4.3.4) (DP Guidelines, Sections 2.1.2 and 2.4.2).

4.6.7 Capturing results in CMS

Once a case is closed with disciplinary follow-up a disciplinary follow-up path is opened in CMS.

For each person the judicial adviser opens a disciplinary info in the follow-up path as soon as he is appointed as judicial adviser for the case. A disciplinary info is opened by pressing the button 'Add New Disciplinary Info' and introducing the name of the individual(s) for which disciplinary actions are recommended.

In the Administrative Details part the judicial adviser introduces the allegation. There is a pick-list of allegations (improper receipt of payments, irregular payments, budget irregularity, improper conduct in the discharge of official duties, improper use of information, irregularities in selection procedure, undeclared conflict of interest).

In the Proceedings part the judicial adviser constantly updates the current stage of the proceedings. There is a pick-list (OLAF internal review, report sent to disciplinary authority, disciplinary procedure, Appointing Authority decision, appeal, end of proceedings).

In the Disciplinary Results part the judicial adviser introduces the results of the investigation or procedure when he receives them. There are two alternatives, case dismissed or Appointing Authority decision. If a case is dismissed the reason has to be indicated. There is a pick-list for this (e.g. lack of evidence, prioritisation, procedural error, time barred, other). If there is an Appointing Authority decision, there is also a pick-list for the different decisions (acquittal — closure of the case without disciplinary measures, warning (written), reprimand, salary/grading adjustment, removal from post).

5 INDIVIDUAL RIGHTS AND INFORMATION DUTIES

Investigations and operations undertaken by OLAF are administrative in nature but nevertheless must be undertaken with full respect for the rights of persons and fundamental freedoms, especially those enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights, in particular the principle of fairness, the right of the person concerned to express his views on all the facts which concern him, and the principle that conclusions of a case may be based solely on facts which have evidential value.

5.1 RIGHTS AND OBLIGATIONS OF PERSONS CONCERNED

OLAF employees must respect the rights of persons directly implicated in a case (persons concerned).

The internal decisions of each Union body setting out the terms and conditions under which internal investigations may be conducted are applied as appropriate.

5.1.1 Right to be informed (notification duties)

5.1.1.1 Internal investigations

OLAF must notify the person concerned at various stages of an internal investigation: at the initial stage, to arrange an interview, and at the closure of the case.

(1) Initial stage: investigation opened by OLAF

Article 4 of the Model Decision attached to the Interinstitutional Agreement (and consequently the internal decisions) and Article 1 of Annex IX to the Staff Regulations stipulate that the person concerned has the right to be informed of his possible implication in an investigation under certain specified circumstances. An official who may be implicated must be informed as soon as the evidence indicates his possible implication, provided that the investigation is opened, if it would not be harmful to the investigation to do so. In practice, the OLAF Head of Unit in charge of the case, having consulted with the responsible Director, will set out in writing the reasons for any deferral of this notification in a Note for the file (Annex 4, Form O35). This document will be added to the case file.

In practical terms, a letter from the Director-General of OLAF or the Director of one of the Investigations and Operations Directorates, acting on his behalf, will inform the person concerned in writing, using the Notification to person concerned letter (Annex 4, Letter O6), which contains a privacy statement. This letter should emphasise that, in accordance with Article 4(6)(a) and (b) of Regulation 1073/99 and Article 1 of the Model Decision, the person concerned has a duty to cooperate with and supply information to the Office, unless this infringes his right not to incriminate himself.

It must also include:

- the CMS reference of the internal investigation in which the party is involved and the opening date of the case;
- a summary of the allegations;
- an indication of the possibility to produce documents or provide oral evidence;
- an indication that he will, in due course, receive an invitation for an interview providing him an opportunity to express his views on all the facts which concern him.

(2) Notice of interview

Article 4(1) of the Model Decision and Article 1 of Annex IX to the Staff Regulations provide that conclusions may not be drawn referring by name to a Member, official or servant of a Union body once the investigation has been completed without first giving the person concerned the opportunity to express his views on all the facts which concern him. Thus, the person concerned is normally invited for an interview before conclusions are drawn which refer to him by name in a Final Case Report.

Important

Transmissions of information have to be carefully evaluated with a view to determining whether by their nature they contain a conclusion referring by name to a Member, official or servant. This would normally be the case when the information is contained in a Final Case Report. The content of any information transferred to other authorities may, however, be re-classified by the European Courts as containing a conclusion by name.⁷⁷

The interview procedures set out in Section 3.3.3 must be followed. At the interview, OLAF should not disclose information collected during the investigation that does not directly concern that individual, and that has not been used to draw the conclusion referring to him by name.

However, in accordance with Article 4(2) of the Model Decision (and the analogous provisions of all of the internal decisions), in cases necessitating the maintenance of absolute secrecy and requiring the use of national investigative procedures, OLAF may, with the agreement of the Union institution or body concerned, decide to defer inviting the person concerned to express his views. Whenever the Director-General of OLAF (or the Director in charge, acting on his behalf) decides to defer inviting the person concerned for an interview, there is no legal obligation to inform the person concerned of this decision. The Union institution or body concerned is, however, informed by means of the request for its agreement sent to its Secretary-General (Annex 4, Note O10), which contains the relevant clause on the transfer of personal data (see Sections 3.3.6.1.1 and 3.4.3.2.1).

(3) After the closure of the case by OLAF

(a) Case is closed with no follow-up

⁷⁷ Judgment of the European Court of First Instance of 8 July 2008 in Case T-48/05 *Yves Franchet and Daniel Byk v Commission*, paras 127-162.

If the case is closed and no further action taken, the person concerned is informed in writing. In accordance with Article 5 of the Model Decision and Article 1(3) of Annex IX to the Staff Regulations, the Director-General of OLAF (or the Director in charge, acting on his behalf) will inform the person concerned that the case has been closed without follow-up action, using the Notification of case closure without follow-up letter (Annex 4, Letter O14), which contains a privacy statement. Article 1(3) of Annex IX to the Staff Regulations also requires that the official's institution be notified in writing that the case has been closed with no follow-up. In practical terms, a copy of the letter sent to the official should also be sent to his institution or body. This Article also provides that the official may request that the decision be inserted in his personal file.

(b) Case is closed with follow-up

If the case is closed with follow-up, the person concerned is informed in writing to which authority the case has been passed on, unless this would be detrimental to the follow-up action. The Director-General (or the Director in charge, acting on his behalf) will normally write to the person concerned, using the Notification of case closure with follow-up letter (Annex 4, Letter O15), which contains a privacy statement, informing him that the case has been passed on, unless this would be detrimental to the follow-up action.

(c) Follow-up requires absolute secrecy

Where the follow-up requires absolute secrecy, or at the request of a national judicial authority subject to national law, notification of the person concerned may be deferred, on the basis of a reasoned written decision. In this case, OLAF may ask the Union body not yet to inform the person concerned. As soon as the reasons for the deferral cease to apply, the information will be forwarded to the person concerned.

5.1.1.2 External investigations

In external investigations, OLAF investigators inform the person subject to the investigation, as long as this would not be harmful to the investigation. OLAF investigators also inform the person concerned when the investigation has been closed as long as this would not be harmful to any further action.

5.1.2 Contradictory procedure

5.1.2.1 Internal investigations

5.1.2.1.1 Duties of EU officials

OLAF investigators must take into due consideration the fact that Members, officials and servants of Union bodies are required to cooperate with OLAF in its investigative efforts. This duty extends not only to an obligation to provide information, but also to cooperate in any other aspect as required by OLAF in the conduct of an internal investigation.

5.1.2.1.2 Expressing views before conclusions are drawn

Conclusions cannot be drawn referring by name to a Member, official or servant of a Union body once the investigation has been completed, without first giving the person concerned the

opportunity to express his views on all the facts which concern him. Thus, the person concerned is invited to an interview before conclusions which refer to him by name are drawn in a Final Case Report (see Section 5.1.1.1). At the interview, OLAF employees may only disclose the information necessary to reach conclusions affecting the interviewee directly.

Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority.

5.1.2.2 External investigations

In external investigations, OLAF investigators enable the person concerned to express his views on all the facts that concern him before drawing any final conclusions. Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority.

5.1.3 Defence rights

Investigators inform the person concerned of the following defence rights:

- the right not to make any statements which might be self-incriminating;
- the right to be assisted by a legal counsel of his choice;
- the right to be interviewed in any one of the official Union languages of his choice. In the letter of invitation (Annex 4, Letter O8), interviewees are requested to inform the investigator of their choice of language for the interview. Whenever appropriate, investigators may use an interpreter, which is noted in the interview record;
- the right to provide his statements in any one of the official Union languages of his choice.

See Sections 3.3.3.3 and 3.3.3.4.

5.1.3.1 Self-incrimination

Not only natural persons but also economic operators have the right not to make any statements which might be self-incriminating. The Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove.⁷⁸

⁷⁸ Competition cases: Case 374/87 *Orkem*, paras 34 and 35; Joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg*, paras 61 to 65; Joined Cases C-65/02P and C-73/02P *ThyssenKrupp*, para. 49.

5.1.3.2 Access to files (including personal data, reference to access to documents)

Without prejudice to the rules on transparency of the European public administration, in particular the right to request public disclosure of documents under Regulation 1049/2001,⁷⁹ and the rules on the protection of personal data under Regulation 45/2001,⁸⁰ throughout OLAF's operational activities the person concerned (or his legal counsel) has no specific right of direct access to the OLAF investigation file.

OLAF files can, however, be accessed indirectly, during follow-up proceedings conducted by the Union or national authorities, through these authorities, subject to applicable procedural rules. This can be, for example, in the context of disciplinary proceedings or sanctions before another Union body or national administrative or judicial proceedings. In disciplinary proceedings, the person concerned has the right of access to '*all documents directly related to the allegations made against him*' (Articles 90-91 and Annex IX, Article 2 of the Staff Regulations).

Data protection

A data subject can request access to his own personal data being processed by OLAF. See the DP Guidelines, Section 1.6.

5.1.4 Waiver of immunity

Internal investigations must be conducted in accordance with, among other things, the Protocol on Privileges and Immunities and the Staff Regulations.⁸¹ However, the Protocol requires each institution to waive the immunity when it would not be contrary to the interests of the Union to do so.

In cases where a competent national judicial authority has initiated criminal proceedings and would like to carry out an investigation on EU premises, it may be necessary to waive certain immunities. In particular, it may be necessary to:

- lift the inviolability of the premises concerned;
- lift the diplomatic immunity of an EU official alleged to have committed a criminal offence.

As to the inviolability of the premises concerned, Article 1 of the Protocol on Privileges and Immunities provides in part that '*The premises and buildings of the Communities shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation.*'

As to the diplomatic immunity of an EU official, Article 12(a) of the Protocol provides that officials are to be '*immune from legal proceedings in respect of acts performed by them in their official capacity, including words spoken or written.*'

⁷⁹ OJ L 145, 31.5.2001, p. 43.

⁸⁰ OJ L 8, 12.1.2001, p. 1.

⁸¹ Regulation 1073/99, Recital 10 and Article 4; Interinstitutional agreement, Recital 5, paragraph 1, and Recital 5 of Model Decision (appended).

With respect to the lifting of both of these immunities, the competent national authority must request the Union institution or body concerned to initiate the procedure leading to the waiver of immunity. The unit responsible for the judicial follow up will assist the national authority by sending it a draft letter requesting waiver of immunity (Annex 4, Letter O/F2), which should be completed and sent by the authority to the institution or body concerned. Where appropriate, the request should specify that both the inviolability of the building and the diplomatic immunity of the officials and staff concerned (whose names should be specified) are to be lifted. In any case, the two aspects must be clearly distinguished.

In terms of procedures concerning the Commission, the Secretary-General will then forward a copy of the letter to DG ADMIN, which will draft the necessary documentation to implement the procedure. See Sections 1.4.10 and 3.3.1.3.

Upon receipt of the results of an internal investigation, any request from national police or judicial authorities regarding waiver of immunity must be transmitted to OLAF's Director-General for his opinion.

5.1.5 Compliance with national rules on rights of the defence

National legal provisions on the rights of defence must be respected. It is beyond the scope of this Manual to discuss the particular requirements of each Member State in this regard. The unit responsible for the judicial follow-up should be consulted for advice on what rights an interested person has under any particular Member State's law, and what actions must be taken by an investigator in respect of those rights.

5.1.6 Review and remedies

5.1.6.1 Internal review — Director-General

OLAF applies high standards of ethical behaviour. All persons concerned have the right, in accordance with Article 90a of the Staff Regulations and Article 14 of Regulation 1073/99, at any time to complain to the Director-General against an act adversely affecting them and committed by the Office as part of an investigation. The Director-General will appoint an OLAF senior agent, who was not involved in the investigation giving rise to the complaint, to act as an independent expert and to review the complaint (the 'Review Adviser').

The Director-General will inform the person concerned of the review findings and any action taken to remedy such a situation, in particular in cases where non-respecting of the procedural rules and guarantees might have an impact on the outcome of the investigations. The reply must be sent without delay.

The Review Adviser must have access to all relevant documentation and all members of staff must provide him with full assistance without delay and in the form requested. When reviewing the case, the Review Adviser acts in complete independence. He may neither seek nor take any instructions from anyone other than the Director-General of OLAF.

5.1.6.2 External review — Ombudsman, European Data Protection Supervisor, Court of Justice of the European Union

This internal review is without prejudice to complaints made under Article 90a of the Staff Regulations and to the general right to bring an action before the Court of Justice of the European Union. In cases of alleged maladministration, any person may also refer the issue to the Ombudsman. A data subject may refer any matter concerning the processing of his personal data to the European Data Protection Supervisor. See the DP Guidelines, Section 1.8.

5.2 OTHER RIGHTS

5.2.1 Informants and whistleblowers

5.2.1.1 Whistleblowers

5.2.1.1.1 General

(1) Definition

A whistleblower is an EU official or other member of EU staff who is under a statutory obligation (Article 22a of the Staff Regulations) to come forward with the relevant information. As long as he complies with the rules, he is protected from adverse consequences on the part of the Union body.

Relevant information relates to:

- possible illegal activity, including fraud or corruption;
- serious failure to comply with professional obligations of officials of the Union they have discovered in the course of or in connection with their duties.

The duty to come forward only concerns facts discovered in the course of or in connection with the duties of the staff member. Staff members are under a legal obligation to come forward without delay and provide the information in writing.

(2) Reporting channels

Staff members have two reporting channels. The whistleblower can report:

- to the hierarchy (immediate superior, Director-General, Secretary-General), who are obliged to transmit the information without delay to OLAF; or
- directly to OLAF.

Therefore, while the staff member has a choice of reporting channels, the information should reach OLAF in a short period of time.

On receipt of information from a whistleblower, OLAF or the institution must:

- inform the staff member concerned within 60 days how much time is needed to take appropriate action;
- take appropriate action within the period of time indicated to the staff member.

In case of possible illegal activities or serious professional misconduct within OLAF, there is the complementary possibility for OLAF employees of reporting to the President of the Supervisory Committee of any factual information and evidence on possible illegal activities or serious professional misconduct within OLAF of which they become aware.

(3) Protection

Staff members meeting the conditions set out above must not, in accordance with Article 22a(3) of the Staff Regulations, suffer any prejudicial effects on part of the institution or other Union body provided that they acted reasonably and honestly.

A number of these protective measures have been specified for Commission staff in the Commission Communication of 6 February 2004 (SEC(2004) 151/2) and relate to the identity of the whistleblower, mobility and the staff report of the person concerned. Naturally, in order for the Commission to apply protective measures, the person will be expected to identify himself as a whistleblower and to observe the procedures outlined above.

(4) External whistleblowing

If neither the institution or other Union body nor OLAF has taken appropriate action within a reasonable period of time, the staff member may turn to another EU institution. He has the right to bring his concerns to the attention of the President of either the Commission, the Council, the European Parliament or the Court of Auditors, or to the European Ombudsman.

However, the duties of discretion and loyalty to the institution/other Union body to which staff members are bound imply that this is an option of last resort, justifiable only if the staff member honestly and reasonably believes that the information disclosed and any allegation contained in it are substantially true and if he has allowed the institution/other Union body or OLAF a reasonable period of time to take the appropriate action.

5.2.1.1.2 Procedure on contact with a whistleblower

OLAF has established in the Judicial and Legal Advice Unit a Helpdesk as an initial contact point to provide advice and assistance to whistleblowers. It can be contacted during normal Commission working hours on (32 2) 29 67732.

If a person, who is to be considered a whistleblower according to the definition provided above is contacting OLAF, be it through this Helpdesk or in another way, the following procedure should be observed:

- If the whistleblower provides information in writing, the correspondence will internally be assigned to the Judicial and Legal Advice Unit.
- If a potential whistleblower contacts OLAF orally he should be directed to the Judicial and Legal Advice Unit.
- In collaboration with the Investigations and Operations Directorates an interview with the whistleblower is organised in which he will be advised of his rights and obligations and is given the possibility to provide the information in a formal interview (as the information has to be provided by a whistleblower in writing in accordance with the Staff Regulations). A form 'Record of information from whistleblower' (Annex 4, Form O3) is used to take down all information offered by the whistleblower.

- Thereafter the case will be forwarded to the responsible Investigations and Operations Directorate for assessment in the normal manner (see Section 3.2.2).
- Within 60 days the whistleblower has to be informed in writing whether or not an investigation has been opened and, if so, in what timescale OLAF will finalise the investigation.

If OLAF does not take appropriate action within the period of time indicated, the staff member may turn to another EU institution. The staff member has under Article 22b of the Staff Regulations the right to bring his concerns to the attention of the President of either the Commission, the Council, the European Parliament or the Court of Auditors, or to the Ombudsman (see ‘External whistleblowing’ above). In CMS the investigator in charge should under ‘Information’ tick ‘whistleblower’ as the major source (there is a pick-list of major sources).

Data protection

The identity of a whistleblower should not be disclosed in response to a request for access to personal data. See the DP Guidelines, Section 1.6.

5.2.1.2 Informants

5.2.1.2.1 General

An informant is a natural person who voluntarily discloses factual information to OLAF concerning a matter within the competence of the Office. He can be a whistleblower or another person. An informant may use the Free Phone or the Fraud Notification System (FNS). He may also make contact with the EU institutions or other Union bodies and/or OLAF directly by phone or correspondence.

There is no Union legislation on informants. However, many Member States have a legal framework governing dealings with informants. Where the informant has identified himself to the authorities, the prosecuting authorities may have a duty to identify the informant to either the court or the defence.

In many Member States the approach is that the safety of the witness cannot be a justification for denying the accused a fair trial and the decision on the confidentiality of the source is left to the court on a case-by-case basis. The European Court of Human Rights held in *Kostovski*⁸² that a conviction which rested heavily on anonymous information was a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights.

Note

OLAF should conduct the investigation in such a way as to avoid the disclosure of an informant if he so wishes, in particular by founding the conclusions on other evidence.

5.2.1.2.2 Procedure on contact with an informant

⁸² Judgment of the European Court of Human Rights of 20 November 1989 in case *Kostovski v Netherlands*, Series A No 166.

If a person who is to be considered an informant according to the definition provided above is contacting OLAF the following procedure should be observed:

- (1) If an informant provides information in writing, the correspondence will internally be assigned to the unit in charge of the sector.
- (2) If an informant contacts OLAF orally he should be directed to the unit in charge of the sector.
- (3) An interview with the informant is to be organised, in which he will be advised that:
 - (a) While OLAF will make its best efforts to respect the informant's desire for anonymity, it cannot guarantee or promise anonymity once the case has been passed on to national authorities or disciplinary authorities;
 - (b) OLAF does not offer payments to informants.
- (4) Thereafter the case will be assessed and dealt with in the normal manner (see Section 3.2.2).

In CMS the investigator in charge should under 'Information' tick 'informant' as the major source (there is a pick-list of major sources).

Data protection

The identity of an informant should not be disclosed in response to a request for access to personal data. See the DP Guidelines, Section 1.6.

5.2.2 Witnesses

A witness is an individual who is not a person concerned but provides information concerning a matter within the competence of OLAF. A witness does not normally request or require anonymity. However, general rules on confidentiality and data protection apply.

5.2.3 Access to documents and information

Access to OLAF documents and information, including OLAF case files, is governed by the following rules, which are developed further in the relevant annexe (see Annex 8).

(1) Access to documents

Subject to the applicable rules on data protection, professional secrecy and confidentiality, OLAF employees help to implement European rules on transparency, in particular with respect to public access to documents. Any EU citizen or legal entity registered in the EU can request public disclosure of a document produced or held by OLAF in accordance with Regulation 1049/2001. The specific nature of such disclosure is that the document, once disclosed, is provided in the same form to anyone and possibly published on the internet. Therefore, such disclosure should not be confused with access to a file by any person concerned. When providing an applicant with access to a document, the investigator or any other employee may not disclose any information that cannot be disclosed to the wider public.

When a case handler receives a request for access to documents, he must register it in the OLAF Registry and inform the Legal Affairs Unit without delay. The procedure for handling the request is described in Annex 8. Standard letters (Annex 4, Letters DM1, DM2, DM3 and DM4) are to be used.

(2) Access to information

Requests for information will be treated subject to the Commission's Code of Good Administrative Behaviour. Inquiries by members of the public should be answered as soon as possible but not later than 15 working days from the date of receipt. If a reply cannot be sent within this deadline and in all cases where the reply requires other work on it, such as interdepartmental consultation or translation, the employee responsible should send a holding reply, indicating a date by which the addressee may expect to be sent a reply in the light of this additional work, taking into account the relative urgency and complexity of the matter.

If the reply is to be drawn up by a department other than the one to which the initial correspondence is addressed, the person making the enquiry should be informed of the name and address of the person to whom the letter has been passed. The member of the public should never be asked to contact another department of the same institution. If another department in OLAF is responsible, it will reply directly without any additional correspondence being issued.

The reply should be provided by the responsible official or unit holding the information. Requests should be answered in the language of the enquiry provided that it is an EU official language. The reply should identify the person responsible for the matter and state how he may be contacted.

The reply should provide as much information as is deemed useful for the applicant within the principle of proportionality and taking into account the requirements of confidentiality of OLAF's investigative activity. It must be borne in mind that any information obtained by OLAF during an investigation or operation is confidential and subject to professional secrecy pursuant to Article 339 of the Treaty on the Functioning of the European Union, Article 8(1) of Regulation 1073/99, and Article 17 of the Staff Regulations (see Section 3.3.6).

Detailed procedures for handling requests for access to documents are to be found in Annex 8.

5.2.4 Communication

The Director-General ensures that information for the public is given in a neutral and impartial way and respecting the rights of the individuals involved, professional secrecy and the relevant provisions of Union and national law.

A culture of accountability has grown up within the Union institutions, responding in particular to the public's wish to be informed and assured that malfunctions and frauds are identified and, as appropriate, duly eliminated and punished. The consequence of that requirement is that officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account the possible existence of a justified need to communicate a degree of information to the public.

As a matter of routine, all directorates/units inform the OLAF Spokesperson or the Spokesman, Communication and Public Relations Unit of emerging items in their field that may have potential positive or negative impact in the media and provide the OLAF Spokesperson or the Spokesman, Communication and Public Relations Unit with the relevant line to take. Material for communication is to be prepared by the competent unit in due time.

Any request received from a journalist for information about an investigation, whether ongoing or closed, should be referred to the OLAF Spokesperson. An OLAF official should never

provide information to a journalist without first receiving authorisation to do so from the Director-General or, on his behalf, from the OLAF Spokesperson. For more information see the 'OLAF Guidelines on media relations' (Annex 18). For matters not related to OLAF investigations, the general Commission rules on media relations apply.

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