

OTHER ACTS

EUROPEAN COMMISSION

Decision of the Controller of procedural guarantees adopting implementing provisions for the handling of complaints

(2022/C 494/07)

THE CONTROLLER,

Having regard to Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 ⁽¹⁾, and in particular Articles 9a and 9b thereof,

Having regard to the Charter of Fundamental Rights of the European Union, ⁽²⁾

Whereas:

- (1) Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council ⁽³⁾, amending Regulation (EU, Euratom) No 883/2013, establishes the internal function of the Controller of procedural guarantees ('the Controller') for the purpose of protecting and complying with procedural guarantees and fundamental rights. The Controller shall examine complaints regarding OLAF's compliance with procedural guarantees as well as on the grounds of an infringement of the rules applicable to investigations by OLAF, in particular infringements of procedural requirements and fundamental rights.
- (2) Article 9b (11) of Regulation (EU, Euratom) No 883/2013 requires that the Controller adopt implementing provisions for the handling of complaints, after consulting the Supervisory Committee of OLAF ⁽⁴⁾.
- (3) The Supervisory Committee of OLAF was consulted on 29 September 2022.

HAS DECIDED AS FOLLOWS:

*Article 1***Definitions**

For the purpose of this Decision and without prejudice to the definitions provided for by Regulation (EU, Euratom) No 883/2013 ('the OLAF Regulation'), the following definitions shall apply:

- (1) 'OLAF investigation' means an administrative investigation conducted by OLAF based on Article(s) 3, 4, 12e (1) (c) and/or 12f of the OLAF Regulation;
- (2) 'person concerned' shall mean any person or economic operator subject to an OLAF investigation;

⁽¹⁾ OJ L 248, 18.9.2013, p. 1.

⁽²⁾ OJ C 326, 26.10.2012, p. 391.

⁽³⁾ Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (OJ L 437, 28.12.2020, p. 49).

⁽⁴⁾ Article 15 of the OLAF Regulation.

- (3) 'witness' means any natural or legal person who can provide the Controller with information relevant to ascertaining the facts relating to a pending complaint.

Article 2

Subject-matter and principles

1. This Decision lays down rules to be followed in relation to the lodging, processing and follow up of complaints submitted to the Controller under Article 9b of the OLAF Regulation.
2. The Controller examines complaints independently, including from OLAF and the Supervisory Committee, without interfering with the conduct of ongoing OLAF investigations.
3. The Controller is bound by the general principles of EU law, including the principles of fairness and good administration.
4. The Secretariat of the Supervisory Committee ('Secretariat') provides the Controller with all necessary administrative and legal support for the purposes of the complaints mechanism. In particular, the Secretariat carries out the administrative tasks relating to the complaint-handling process, such as registration of complaints and related documents, administrative correspondence and exchange of documents with the parties.

Article 3

Lodging of complaints

1. Complaints are submitted in writing, either electronically or by post. Complainants are strongly encouraged to use the complaint form available on the Controller's website. Complainants have the right to be represented and/or assisted by a person of their choice.
2. The complainant may use any of the official EU languages. The Controller shall communicate with the complainant in that language. When necessary, in order to speed up the procedure, pending the translation of the necessary documents in the language of the complaint, the Controller may agree with the complainant to exchange correspondence in another EU language.
3. The complaint shall make clear reference to (i) the identity of the complainant, (ii) the object of the complaint, and, if possible, (iii) to the case reference of the OLAF investigation that is the subject of the complaint. In particular, the complaint shall comprise: (i) a clear and concise description of the relevant facts, and (ii) a clear and concise description of the alleged breach(es) of the procedural guarantees and/or the rules applicable to OLAF investigations. The above information shall be sufficient to enable the Controller to determine the scope of the complaint. If necessary, the complainant may attach relevant supporting documents to the complaint.
4. Complaints lodged with the Controller shall not affect time limits for judicial proceedings. Nor shall they have any suspensive effect on the conduct of the investigation that is the subject of the complaint.

Article 4

Registration of complaints

1. Complaints are registered, at the latest, the following working day from the date of receipt of the complaint, and are attributed a unique complaint number.
2. Upon registration, the Controller shall send the complainant an acknowledgement of receipt and forward at the same time the complaint to the Director-General of OLAF.

Article 5

Initial processing

1. Within 10 working days of the date of receipt, the Controller determines whether the complaint is admissible.
2. The Controller shall dismiss a complaint as inadmissible if:
 - (a) it is submitted by a person other than a person concerned;
 - (b) it does not concern an OLAF investigation;
 - (c) it does not concern alleged breach(es) of procedural guarantees and/or infringement(s) of the rules applicable to OLAF investigations;
 - (d) it is submitted outside the time-limits set out in Article 9b (2) of the OLAF Regulation ⁽⁵⁾.
3. The Controller shall also declare inadmissible any complaint raising issues that fall under the competence of the European Data Protection Supervisor (EDPS), that is complaints relating to the application of Regulation (EU) 2018/1725 ⁽⁶⁾ and the respect of the fundamental right to the protection of personal data.
4. The Controller shall also examine, within the same time limit, whether the complaint is manifestly without merits, repetitive or abusive.
5. If the Controller finds the complaint inadmissible, manifestly without merits, repetitive abusive, the Controller shall close the file and inform without delay both the complainant and the Director-General of OLAF of the reasons for doing so.

Article 6

Legal proceedings

Whenever the Controller becomes aware that the facts, which have been put forward in the complaint, are or have been subject to legal proceedings, the Controller shall close the case and inform the complainant and OLAF accordingly.

Article 7

Adversarial procedure

1. The Controller shall not complete the assessment of a complaint before having heard the complainant and OLAF. Both parties shall be given the possibility to state their case and submit any supporting documentation. They shall also be informed of each other's submissions and be given the possibility to comment on them within the time-limit set by the Controller.
2. In duly-justified circumstances, the Controller may decide not to communicate to a party information or material that is relevant for the assessment of the complaint, if the other party has requested a confidential treatment. When deciding on the matter, the Controller weighs, among others, the need to protect the confidentiality and efficiency of the OLAF investigation against the observance of the adversarial principle. The complainant shall not obtain documents from the OLAF case file to which the complainant is not entitled to access under other legal provisions or to which OLAF has already refused access.

⁽⁵⁾ Article 9b (2) provides: *Complaints shall be lodged within one month of the complainant becoming aware of the relevant facts that constitute an alleged infringement of the procedural guarantees or rules referred to in paragraph 1 of this Article. In any event, they shall be lodged no more than one month after the closure of the investigation. Complaints related to the notice period referred to in Article 9(2) and (4) shall, however, be lodged before the expiry of the 10-day notice period referred to in those provisions.*

⁽⁶⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ, L 295, 21.11.2018, p. 39).

Article 8

Information gathering actions

1. OLAF shall ensure that the Controller has timely and adequate access to case-related documents necessary for the assessment of the complaint.
2. The Controller shall invite OLAF to provide its views on the complaint or on specific aspects of it within a specified time limit that is normally no more than 10 working days. OLAF may request an extension of this time limit. The Controller may ask OLAF to provide further information and/or access to (part of) the case-file. The Controller may also ask OLAF to provide a translation of its comments into the language of the complaint.
3. The Controller shall invite the complainant to comment on OLAF's submissions within 5 working days. The complainant may request an extension of this time limit. The Controller may also ask the complainant to provide additional information or documents, or to clarify information or documents already provided to the Controller.
4. Taking into account the contribution they can make to the clarification of the relevant facts, the Controller may ask witnesses to provide information if such course of action does not affect the confidentiality and effectiveness of the ongoing OLAF investigation and the rights of the persons concerned. The Controller transmits to both the complainant and OLAF copy of any witness statements relevant to the complaint.
5. The Controller may request the information described in paragraphs 2-4 in writing or through oral hearings.

Article 9

Hearings

1. The Controller may organise and conduct hearings. The purpose of hearings is (i) to obtain information relevant to the complaint and/or (ii) to seek a rapid solution to the complaint. The Controller cannot conduct hearings without the presence of both OLAF and the complainant. However, the Controller hears witnesses *in camera* without the presence of neither OLAF nor the complainant.
2. Hearings may take place at the premises of the Controller or virtually through videoconference. They are not public.
3. The Controller determines the date, duration and modalities of the hearing. The Controller invites the participants in due time and indicates the main points for the hearing. The complainant can be represented and/or assisted by his/her legal representative. The Controller is assisted by the Head of the Secretariat and its staff, who attend the hearing.
4. The Controller shall produce a record or a summary of the hearing and shall make it available to both the complainant and OLAF. They can both submit their comments within two working days. The record shall be included in the file of the complaint.

Article 10

Finding of no breach of procedural guarantees or of the rules applicable to OLAF investigations

If the Controller, after assessing all the collected information and evidence, finds that the alleged breaches are not proven, the Controller closes the case and informs the complainant and the Director-General of OLAF accordingly.

*Article 11***Invitation to resolve the complaint**

1. If the Controller finds that OLAF did not comply with the rules referred to in Article 9b (1) of the OLAF Regulation, he or she shall invite OLAF to take action to resolve the complaint. The Controller may suggest specific actions to be taken.
2. OLAF shall inform the Controller of any action taken or to be taken in this respect within 15 working days.
3. The Controller shall provide the complainant with a copy of OLAF's reply with a request to submit comments within 5 working days.
4. If the Controller finds the solution provided by OLAF satisfactory, the Controller shall close the case and inform OLAF and the complainant accordingly.

*Article 12***Recommendations**

1. If the Controller does not find the solution provided by OLAF satisfactory and considers that the complaint can be resolved, he or she shall issue a recommendation on how to resolve the complaint within the time limits set by Article 9b (5) of the OLAF Regulation.
2. If the Controller does not issue a recommendation or a closing decision within the time limits set out by Article 9b(5) of the OLAF Regulation, the Controller shall be deemed to have dismissed the complaint without a recommendation.
3. Before issuing a recommendation, the Controller shall consult the Supervisory Committee for its opinion. To this end, the Controller will prepare a report containing all necessary information for the Supervisory Committee to issue its opinion. The report shall not contain, to the extent possible, personal data or other information that could lead to the identification of the complainant or jeopardise the confidentiality of the OLAF investigations. The Supervisory Committee shall respond within the time limit set out by the Controller, which cannot be less than 5 working days.
4. The Controller shall recommend to OLAF to take, within a specified timeframe, concrete actions to resolve the complaint, including, but not limited to, amend or repeal its recommendations or reports, repeat investigative activities, or introduce improvements in its procedures in relation to the matters subject to the complaint. The Controller shall inform the complainant of the recommendation issued.

*Article 13***Follow up to recommendations and closure**

1. The Director-General of OLAF shall inform the Controller of the action(s) taken to implement the recommendation(s) within the time limit set out therein. In duly justified cases, the Director-General of OLAF may request an extension of the time limit. The Controller shall close the case and inform both OLAF and the complainant accordingly.
2. If the Director-General of OLAF decides not to follow the recommendation, he or she shall inform the Controller and provide the main reasons for his/her decision. The Director-General shall also inform the complainant to the extent that such communication will not affect the on-going investigation. The complainant may provide comments within 5 working days. After analysing the Director-General's decision and any comments submitted by the complainant, the Controller shall close the case setting out definitive findings.
3. The Director-General of OLAF may decide to deviate from the recommendation, if, in the meantime, he or she becomes aware of circumstances relating to:
 - (a) any pending legal proceedings before the Court of Justice of the European Union or national jurisdictions, pertaining to the OLAF investigation which is subject to the complaint;

- (b) the legal framework governing the relations of OLAF with the European Public Prosecutor's Office (EPPO), and in particular the obligation of OLAF to discontinue any investigation when the EPPO is investigating into the same facts. In such case, the Director-General of OLAF shall inform the Controller of these circumstances and their impact on the recommendation.

Article 14

Duty to cooperate

In line with the principle of sincere cooperation, OLAF shall cooperate with the Controller in all matters falling within the competence of the Controller.

Article 15

Advisory opinions

The Director-General of OLAF may request the opinion of the Controller on any matter related to the interpretation or the application of procedural guarantees or fundamental rights that falls within the Controller's mandate, including on a decision to defer informing the person concerned under Article 9(3) of the OLAF Regulation. The Director-General shall indicate in any such request the time limit within which the Controller shall respond.

Article 16

Confidentiality and data protection

1. The Controller shall be bound by the obligation of professional secrecy in the exercise of his/her functions and shall ensure that the information and documents provided by OLAF are treated confidentially. The Controller shall ensure the confidentiality of investigations even after their closure.
2. The Controller shall ensure the application of Regulation (EU) 2018/1725. The Controller shall be assisted in this respect by the Secretariat of the Supervisory Committee, represented by the Head of the Secretariat that acts as 'data controller' for the purpose of Regulation (EU) 2018/1725. The Controller shall also cooperate with the OLAF Data Protection Officer.

Article 17

Requests for access to the file of the complaint

A complainant has the right to have access to his or her complaint file, while respecting the legitimate interests of confidentiality and of professional secrecy, pursuant to Article 41 of the Charter of Fundamental Rights of the European Union. The complainant shall not have access to OLAF documents, which he or she cannot access under the legal framework applicable to OLAF investigations. The Controller will consult OLAF before giving access to investigation-related documents.

Article 18

Requests for public access to documents

Requests for public access to documents held by the Controller will be dealt in accordance with the conditions and limits provided for in Regulation (EC) No 1049/2001 ⁽⁷⁾ and Commission Decision 2001/937 of 5 December 2001 amending its rules of procedure ⁽⁸⁾.

⁽⁷⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

⁽⁸⁾ OJ L 345, 29.12.2001, p. 94.

*Article 19***Supervisory Committee**

1. Being independent from the Supervisory Committee, the Controller shall establish working relations with it based on mutual trust and good cooperation.
2. The Controller consults the Supervisory Committee before issuing a recommendation in accordance with Article 12 (3) of these rules.
3. Without prejudice to the obligation to ensure the confidentiality of OLAF investigations, even after their closure, the Controller shall inform the Committee:
 - (i) of all the recommendations issued following the opinion of the Committee;
 - (ii) of any systemic issues stemming from the assessment of complaints;
 - (iii) of the recommendations not followed by the Director-General of OLAF.

*Article 20***Entry into force**

This Decision shall enter into force on the day of its adoption.

Done in Brussels, 16 November 2022.

Julia LAFFRANQUE
The Controller of procedural guarantees
