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From: Mr Johan DENOLF, Chairman of the OLAF Supervisory Committee  
date of receipt: 1 April 2014  
To: Mr Christos STAIKOURAS, President of the Council of the European Union

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Subject: Activity Report of the OLAF Supervisory Committee: February 2013 - January 2014

- ANNEX 9: Code of Conduct of the Members of the Supervisory Committee and Explanatory memorandum on safeguards of impartiality and risks of conflict in the exercise of the monitoring functions

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Delegations will find attached ANNEX 9 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014.

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Encl.: ANNEX 9: Code of Conduct of the Members of the Supervisory Committee and Explanatory memorandum on safeguards of impartiality and risks of conflict in the exercise of the monitoring functions



**Code of Conduct**  
**of the Members**  
**of the OLAF Supervisory Committee**

**Together with**  
**Explanatory**  
**memorandum:**  
**Safeguards of**  
**impartiality and**  
**risks of conflict of**  
**interest in the**  
**exercise of the**  
**monitoring functions**



**CODE OF CONDUCT**  
*of the Members of the OLAF  
Supervisory Committee*

1. Members of the Supervisory Committee of OLAF (SC) shall act in a manner respecting the dignity and public trust of their office. They shall refrain from any activities which may jeopardise or may appear to jeopardise the independence and impartiality of the SC.

2. Members of the SC shall not deal with a matter in which, directly or indirectly, they have any personal interest, in particular, any family or financial interests such as to impair their independence.

3. Members of the SC shall avoid participation in the examination of individual cases concurrently as the responsible officials of a competent national authority and as SC Members.

4. An SC Member shall withdraw from participation in the SC proceedings on an individual OLAF case if he or the services which he directs or over which he exercises effective control or influence are conducting or assist OLAF in conducting an investigation related to that case.

5. An SC Member shall withdraw from participation in the SC proceedings on an individual OLAF case if he directs or exercises effective control or influence over national judicial or administrative proceedings related to that case.

6. An SC Member in a judicial or administrative position may withdraw, in accordance with national provisions on impartiality, from national proceedings related to an individual case if he participated as SC Member in the SC proceedings related to that case.

7. SC Members shall inform the Chairman and the Secretary without delay of the situations referred to in paragraphs 2-6.

8. Documents drawn up following SC proceedings on an individual case shall clearly indicate if any SC Member withdrew from the proceedings or if any of them participated in his capacity as a national judicial or administrative official.

9. Prior to sending to an SC Member any information related to a case (to be) transmitted to his national authorities, the Secretariat of the SC shall provide such Member with an opportunity to withdraw from the SC proceedings on that case.

– Brussels, 9 October 2013 –

*For the Supervisory Committee,*

*Chairman*

**Explanatory memorandum**  
**on the Code of Conduct of the Members of the Supervisory Committee:**  
**safeguards of impartiality and risks of conflict of interest**  
**in the exercise of the monitoring functions**

## Introduction

1. The Supervisory Committee (SC) of OLAF, whose mission is to reinforce OLAF's independence by the regular monitoring of its investigative function, is composed of five independent members having experience in senior judicial, investigative or comparable functions relating to the areas of OLAF's activities<sup>1</sup>. The membership of the SC is a parttime function.
2. As such, the Members of the SC generally hold key functions in their national judicial system or administration, allowing them to act as a counterpart/partner of OLAF at a national level at any stage of an OLAF case. At the same time, they regularly monitor OLAF's cases, in particular those where information has been transmitted to national judicial authorities. Situations may thus occur when they are to deal with the same OLAF case both in the framework of their national duties and as the SC Members.
3. It is essential to make sure that dealing with a case in this dual capacity does not give rise to actual or potential conflicts of interest and then endanger impartiality and objectivity as well as the public trust in the impartiality and objectivity in the exercise of the national functions of the SC Members or in the discharge of their duties in the SC. Actual or potential conflicts of interests could have a negative impact on the impartiality of the decisions taken and on the quality of their work, could damage their reputation and undermine both the EU institutions' and the public's trust in the SC. Given the potential risks involved, it is important therefore to identify the risk areas for conflict of interest situations in order to prevent them.
4. To do so, after defining the conflict of interest (*part 1*), it is necessary to make an overview of the specific tasks of the SC Members which may possibly lead to conflict of interest situations (*part 2*), followed by an inventory of concrete situations when conflicts of interest may occur (*part 3*). Finally, a clear procedure on how to manage conflict of interest situations is also necessary (*part 4*).

### 1 - Definition of the conflict of interest

5. Apart from their obligation to act independently, without seeking nor taking instructions from any government or any institution, body, office or agency<sup>2</sup>, the Members of the SC are required to act in full objectivity and impartiality.
6. In general terms, the requirement of impartiality is enshrined in the European Union Charter of Fundamental Rights, which foresees that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union"<sup>3</sup>.
7. According to the case law of the European Court of Human Rights (standing as a source of general principles of the Union law in accordance with the Article 6(3) of the Treaty on the European Union), "*as a rule, impartiality denotes the absence of prejudice or bias*" and "*even appearances may be of a certain importance or, in other words, 'justice must not only be done, it must also be seen to be done'*"<sup>4</sup>.

<sup>1</sup> Article 18(2) of 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, OJ L 248, 18.9.2013.

<sup>2</sup> Article 15(7) of Regulation 883/2013.

<sup>3</sup> Article 41 of the Charter - right to good administration.

<sup>4</sup> ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, application no 21722/11, §§ 104-106.



8. The requirement of impartiality and objectivity and the obligation to avoid situations in which appearance may give rise to doubts with regard to objectivity and impartiality is also reflected in Article 298 of the Treaty on the Functioning of the European Union which stipulates that, in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. Independence here refers generally to objectivity and impartiality. Even though this provision concerns directly only the SC Secretariat (composed of EU officials), it expresses a general principle of Union law guiding also the activities of the SC itself.
9. The requirement of impartiality, applied to the execution by the SC Members of their tasks, includes an obligation to avoid conflicts of interest, as established in the Decision on their appointment and their Rules of Procedure which stipulate that the SC Members "*shall not deal with a matter in which, directly or indirectly, they have any personal interest, in particular, any family or financial interests such as to impair their independence*".<sup>5</sup>
10. The above mentioned acts do not define the concept of conflict of interest. A comprehensive definition can be found in the Guidelines of the Organization for Economic Cooperation and Development (OECD)<sup>6</sup>, which indicates also three types of conflict of interest:
- **Conflict of interest (actual):** "*a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*".
  - **Conflict of interest (apparent):** "*an apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case*".
  - **Conflict of interest (potential):** "*a potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future*".
11. It is also worth noting the Article 13 of Council of Europe's Committee of Ministers Recommendation No. 2000 (10):
- "1. *Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.*
  2. *The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto*".
12. This definition of conflict of interest has three dimensions: (i) the existence of a private or personal interest of a public official, which (ii) comes into conflict with his official duty, and thus (iii) leads to a conflict of interest interfering with professional principles. Essentially, in a conflict of interest

<sup>5</sup>Article 2 of Decision 2012/45/EU, Euratom of the European Parliament, the Council and the Commission of 23 January 2012 appointing the members of the Supervisory Committee, OJ L 26, 28.1.2012, p. 30–31; Article 4 of the Rules of Procedure of the Supervisory Committee, OJ L 308, 24.11.2011, p. 114–120.

<sup>6</sup> *Managing Conflict of Interest in the Public Service: OECD Guidelines and country experiences*, OECD, Paris, 2003, p. 28. Source of information: the European Court of Auditors' Special Report No 15/2012 "Management of conflict of interest in selected EU Agencies", <http://eca.europa.eu/portal/pls/portal/docs/1/18686746.PDF>.



situation, the private interest of the public official can or could influence the objective and impartial performance of his official duties<sup>7</sup>.

13. Conflict of interest was also defined in the EU case-law. The EU judiciary assessed the scope of the conflict of interest under the Staff Regulations, and gave it a broad definition<sup>8</sup>. Although the Members of the SC are not bound by the Staff Regulations, the interpretation of the Court is relevant on the matter since the wording of the legal provisions concerning conflict of interest - in the Staff Regulations and in the Decision on their appointment - is quite similar. They are an expression of the same underlying general principles of EU law enshrined in the Charter of Fundamental Rights.
14. The term *conflict of interest* as defined above does not, however, take into account expressly all the situations in which the impartiality and independence (as well as the appearance of impartiality and independence) of the SC Members may actually or potentially be endangered. Classic conflict of interest concerns situations in which a public official may have a private interest in conflict with his or her public duties. In the case of the SC Members, the independence and impartiality could be jeopardised also due to their dual roles as high national judicial or administrative officials and SC Members at the same time.
15. Generally, the national in-depth expertise is of great benefit for the discharge of the duties of the SC. Yet, in some situations, an SC Member might have a dual role related to a particular OLAF investigation. This may raise the issue as to whether the judgment of the SC is, or appears to be independent of the judgment and proceedings of national authorities, or whether the data protection and confidentiality requirements either by national law or by Union law are fully observed. In addition, it is important for the independence and impartiality of the SC Members that the third parties understand in all communications in which capacity the SC Members are acting. The analyses of and the measures related to the conflict of interest situations shall cover, in particular, the situation of concurrent duties as national officials and SC Members.

## 2 - SC Members' tasks which may lead to conflict of interest situations

16. The particular situation of the SC Members arises from the principle that they have their national duties as their primary public obligations. Article 15(2) of Regulation 883/2013 requires the SC Members to have experience in the senior judicial or investigative functions in the Member States and the appointing Decision specifies that the membership of the SC is a part-time function. As a result the SC Members usually exercise simultaneously their dual roles: national officials and SC Members.
17. When exercising their national duties, the SC Members (or a national office or service which is directed by an SC Member or over which an SC Member exercises effective control or influence)<sup>9</sup> may be involved in an OLAF case at different stages:

<sup>7</sup> See the Academic research report – Conflict of interest, drafted by Prof. Dr. Ömer Faruk GENÇKAYA, page 5 (this report can be found at <http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/tyec/1062-TYEC%20Research%20-%20Conflict%20of%20Interest.pdf>).

<sup>8</sup> Case T-89/01 *Willeme v Commission*, where the Court of First Instance analysed the scope of the concept of conflict of interest under former Article 14 of the Staff Regulations (currently, Article 11a).

<sup>9</sup> Judicial and administrative structures of the Member States differ substantially, which must be taken into account when establishing rules on potential conflict of interest. The expression "directs or exercises effective control over" comes from Article 25 of the Rome Statute of International Criminal Court which stands as a generally accepted legal definition of *de jure* or *de facto* direction or command. The expression "exercises effective influence" is an extension to cover situations in which an SC Member is not formally in the chain of command and thereby not necessarily exercises effective control over a case, but in which he can substantively influence the handling of a case by being, for example, an authority to be heard, actually or potentially, or by being in a position to comment or influence the handling of a case (for example, if an SC Member were a Deputy Prosecutor General and the officer working on an OLAF case reports to the Prosecutor General).



- they may provide information or assist OLAF in an investigation (e.g. during an on-the-spot check)<sup>10</sup>;
  - they may conduct a national investigation which may be coordinated by OLAF (coordination case) or requiring assistance from OLAF;
  - they may be the addressees of OLAF's reports drawn up following an investigation and of subsequent recommendations (of judicial/financial nature) based on the findings of the OLAF investigation<sup>11</sup>.
18. In their capacity as SC Members, they carry out the tasks laid down in Regulation 883/2013 and in Commission Decision 1999/352 establishing OLAF<sup>12</sup>. The duties of the SC include, *inter alia*, the regular monitoring of the implementation by OLAF of its investigative function, in order to reinforce the Office's independence in the proper exercise of its competences and, in particular, the monitoring of developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General of OLAF. In duly justified situations, the SC may ask OLAF for additional information on investigations, including reports and recommendations on closed investigations, without however interfering with the conduct of investigations in progress.

### 3 - Possible conflict of interest situations

19. Taken separately, both capacities in which the SC Members may act are official/public qualities. They are generally national officials, and as SC Members they are appointed by three EU institutions and exercise a mission of public interest. However, from the perspective of the definition of the conflict of interest, each of these two capacities could be regarded as a private interest when set against the other: when they act as national officials, their membership of the SC may be seen as a "private interest"; conversely, when they act as SC Members, their national duty could also be regarded as being a "private interest" in the widest sense of the term (personal interest).
20. The conflict of interest would then occur when the activity as SC Members would improperly influence the performance of their official national responsibilities and *vice versa*, when their activity as national officials would improperly influence the performance of their responsibilities as SC Members.
- (a) Situations when the national duties (as "private interest") could affect the performance of the SC duties (as "official duties")**
21. *Example 1:*
- *Assumption:* after being involved in an OLAF investigation in his national capacity, an SC Member becomes an addressee of an OLAF report to the SC on that investigation.
  - *Possible conflict of interest:* participation in a dual role in the same process (as an SC Member evaluating the proper conduct of an investigation in which he was involved at the national level as a national official).

22. *Example 2:*

<sup>10</sup> For example, in accordance with Article 3(3) of Regulation 883/2013, especially as the anti-fraud coordination service (AFCOS) of the Member State concerned pursuant to Article 3(4).

<sup>11</sup> Article 11(3) of Regulation 883/2013.

<sup>12</sup> As amended by Commission Decision 2013/478/EU of 27 September 2013, OJ L 257, 28.9.2013, p. 19–20.



- *Assumption*: after having received as a national judicial official an OLAF report on an investigation, possibly with recommendations to initiate judicial proceedings, an SC Member would have to evaluate compliance by OLAF in that investigation with fundamental rights and with procedural requirements as laid down by the national law.
- *Possible conflict of interest*: a dual role in the same process; use of inside (confidential) information<sup>13</sup>; lack of impartiality or lack of independence when acting under the authority of the national office.

23. *Example 3:*

- *Assumption*: after having received as a national judicial official an OLAF report on an investigation, with recommendations to initiate judicial proceedings, an SC Member would have to monitor the follow-up by his national judicial authorities of the recommendations made by OLAF.
- *Possible conflict of interest*: a dual role in the same process; use of inside information; lack of impartiality or lack of independence when acting under the authority of the national office.

**(b) Situations when the SC duties (as "private interest") could affect the performance of the national duties (as "official duties")**

24. *Example 4:*

- *Assumption*: after having evaluated an OLAF investigation as an SC Member (in particular with regard to the respect of the fundamental rights and of procedural requirements laid down in the national law), he could receive the case in his national capacity (as a judicial official to whom OLAF report and recommendations or a complaint related to them are addressed).
- *Possible conflict of interest*: a dual role in the same process; use of inside information; lack of impartiality (when acting in his national capacity, he would already have issued/expressed an opinion on the case in his capacity as an SC Member).

25. There may be potentially other situations where the risk of a conflict of interest is not that obvious. They should be assessed on a case by case basis in order to establish *in concreto* whether there are real risks of lack of independence or impartiality, liable to affect the capability to evaluate cases in an impartial and independent manner. The case-law suggests here a pragmatic approach based on the assumption that a purely abstract risk of a conflict of interest (between the dual national and EU role) is not sufficient to establish an infringement of the obligations of impartiality and integrity – it is necessary to identify a concrete factual element supporting the conclusion that there exists a conflict of interest.<sup>14</sup>

#### **4 – Procedure for dealing with conflict of interest situations**

26. The procedural steps for dealing with conflict of interest situations are currently set out in Article 4(3) of the SC Rules of Procedure: "The members of the Supervisory Committee shall inform it of

<sup>13</sup> "Using confidential information means that a public official disclose to others, or use to further their personal interest, confidential information acquired by them in the course of their official duties. A specific example of this is "insider information" which means the use of information that is gained in the execution of a public official's office and is not available to the general public to further or seek to further the member's private interest" (see page 7 of the Academic Report quoted in footnote 7).

<sup>14</sup> This pragmatic approach is taken, for example, by the EU judiciary in cases concerning the statutory obligations of the EU officials: see case T-157/04 *De Bry v Commission*, paragraphs 36 to 38. See also the Opinion of the Advocate General Mazak delivered on 27 March 2012 in joined cases *European Commission (C-553/10 P) and Lagardère SCA (C-554/10 P) v Éditions Odile Jacob SAS*, paragraphs 35-36.





any situation liable to compromise any of the principles governing its activity as referred to in paragraphs 1 and 2 so that the Committee may take appropriate measures".

27. The SC considers that in order to maintain the high integrity of the SC and to ensure a high level of public trust in the proper supervision of the investigative activities of OLAF and in the independence and impartiality of the SC, it will benefit from the establishment of more comprehensive guidance on the matter and more detailed procedures to be followed.
28. Therefore, the SC adopts hereby its Code of Conduct supplemented by this explanatory memorandum.
29. This Code of Conduct will be incorporated in the SC Rules of Procedure which require further amendment following the entry into force of Regulation 883/2013.