

NOT CONFIDENTIAL (scroll down to change)

Date of complaint :	08 May 07	2 years rule :	<input checked="" type="checkbox"/> tick if within 2 years
Date registered :	09 May 07	Prior approaches :	<input checked="" type="checkbox"/> tick if made
Date of summary :	17 Aug 07	Petition :	<input checked="" type="checkbox"/> tick if no petition
	(NB: the handling of the complaint was suspended in April, hence delay)		
		Legal proceedings :	<input checked="" type="checkbox"/> tick if no proceedings
		Grounds :	<input type="checkbox"/> tick if grounds

Name of complainant : Mr Guido STRACK
 On behalf of (*if relevant*) :
 Language : German
 Country of address : Germany
 Nationality : German

SUMMARY

Complaint against :

OLAF

Concerning:

The complainant asks the EO reopen (or inquire anew into) his case 140/2004/(BB)PB, which the EO closed on 6 June 2005. The case concerned OLAF's handling of a whistle blowing complaint submitted to it by the complainant. In that case, the EO had

"decided to conduct further inquiries. He requested OLAF to provide a supplementary opinion in which it addressed the complainant's allegation that there was a lack of a thorough investigation and a lack of an effective response in case OF/[reference number] by OLAF, as well as the complainant's claim that OLAF should reopen the inquiry" (point 1.4 of the Decision part).

However, *"the Official Journal reported that the complainant had brought an action against the European Commission before the Court of First Instance. The complainant was reported to claim (a) that the Court should annul the decision of 5 February 2004 to close OLAF investigation OF/[reference number] and the final case report on which that decision was based, and (b) that the Court should order the Commission to reopen the investigation. Thus, the complainant's action before the Court of First Instance appeared to relate to the new allegation included in the inquiry through the Ombudsman's further inquiries (concerning the adequacy of OLAF's investigation). The Ombudsman therefore*

wrote to the complainant on 9 March 2005 to give him the opportunity to submit his views as to the possible significance that Articles 1(3) and 2(7) of the Ombudsman's Statute(5) may have for his case. In his reply, the complainant accepted that there was "a connection" to his case before the Court. However, he argued that the Ombudsman should nevertheless continue the inquiry into that allegation and claim (i) because the Court had not yet decided on the admissibility of his case, and because there was therefore no court decision with which the Ombudsman's review could interfere, and (ii) because the case before the Court was against the Commission, not against OLAF. He proposed that the Ombudsman should continue his inquiry into all the allegations and his claim." (Point 1.7.)

The EO examined and decided on this matter as follows: "With regard to the complainant's action before the Court of First Instance, it appears that the issues before the Court and the new allegation included in the inquiry through the Ombudsman's further inquiries (concerning the adequacy of OLAF's investigation) concern essentially the same issue. The Ombudsman therefore considers that it would be inconsistent with Articles 1(3) and 2(7) of the Ombudsman's Statute to review that new allegation. The fact that the complainant's action is against the Commission rather than OLAF cannot give rise to a different conclusion. The Ombudsman points out that court actions concerning acts by OLAF are dealt with as actions against the Commission by the Community Courts(6). There would in any case be an inevitable overlap of review if the Ombudsman and the Court were both to review the adequacy of the same investigation, irrespective of whether the court action is against the Commission or OLAF. The Ombudsman has accordingly decided (a) not to review the new allegation that there was a lack of a thorough investigation and a lack of an effective response in case OF/[reference number] by OLAF, and (b) not to review the complainant's claim that OLAF should reopen the inquiry. If, however, the complainant's action before the Court of First Instance is either dropped or rejected by the Court as inadmissible, the complainant would be free to complain to the Ombudsman again." (Point 1.9.)

In his present complaint, the complainant cites the last sentence of the point just quoted, and refers to the fact that (a) the CFI rejected his application as inadmissible on 22 March 2006 (T-4/05), and (b) on 8 March 2007 the ECJ rejected the complainant's appeal against the CFI's decision (C-237/06 P)¹. Both the CFI and the ECJ have concluded that the complainant does not have standing to challenge OLAF's decision to close its internal investigation. The decisions of the courts in this respect are clear. However, the order of the CFI contains findings that are additionally relevant to the EO's handling of the complainant's present complaint. In paragraph 40 and 41, the CFI

¹ The ECJ's summary for the OJ is as follows:

"Appeal brought against the Order of the Court of First Instance (First Chamber) of 22 March 2006 in Case T-4/05 Strack v Commission by which the Court dismissed as inadmissible an action seeking, first, annulment of OLAF's decision to close an investigation initiated after allegations of fraud made by the appellant, and of the final report of the investigation, and, second, re-initiation of that investigation and the drawing up of a new final report - Meaning of "act adversely affecting an official" in the Staff Regulations of Officials of the European Communities - Obligation to refer the case to the Civil Service Staff Tribunal."

(which, as noted, only decided on the *admissibility* of the complainant's application) stated the following:

"40 Il convient d'ailleurs de relever que, contrairement à ce que soutient le requérant, le rapport final d'enquête du 5 février 2004 a été réalisé à l'issue d'une enquête approfondie et d'une analyse détaillée des faits en cause. Ainsi, ce rapport expose clairement les différentes allégations présentées à l'OLAF par le requérant et détaille les mesures adoptées par l'OLAF pour instruire cette affaire pendant la période allant du 18 octobre 2002 au 5 février 2004. Dans le cadre de cette instruction, l'OLAF a utilisé la base de données Sysper pour recueillir des informations sur les fonctionnaires visés, organisé plusieurs entretiens – en novembre 2002, puis en septembre et en décembre 2003 – réunissant le requérant et des membres de l'OLAF ou son directeur général, et examiné les documents relatifs au contrat litigieux. À l'issue de cet examen détaillé, l'OLAF a conclu que les agissements faisant l'objet de l'enquête visaient à régulariser les relations contractuelles entre l'Office des publications et son prestataire extérieur, qu'il n'y avait aucune irrégularité de la part des fonctionnaires de l'Office des publications et, partant, qu'il y avait lieu de clore l'enquête.

41 Dès lors, c'est à tort et contrairement à ce que révèlent les faits de l'espèce que le requérant reproche à l'OLAF de ne pas avoir rempli ses obligations en matière d'enquête, qu'il soutient que les informations qu'il a fournies n'ont pas donné lieu à des suites régulières, mais ont été escamotées, et qu'il allègue que la Commission a agi de manière abusive et arbitraire. La thèse du requérant, selon laquelle la réalisation régulière de l'enquête aurait permis de constater une grave violation du droit, est dépourvue de tout fondement et de toute rationalité. Cela équivaudrait à préjuger du résultat de l'enquête en admettant comme fondées les allégations du requérant, et ce sans tenir compte des pouvoirs d'appréciation de l'OLAF dans le cadre de l'enquête interne."

In the appeal before the ECJ, the complainant put forward that the CFI had gone too far by actually assessing the substance of the matter. On this point, the ECJ's decision refers to a statement by the Commission that "...les points 40 et 41 de l'ordonnance attaquée ont en effet le caractère d'un obiter dictum". Deciding on this point, the ECJ referred to case-law according to which appeals merely concern points of law, implying that it can only examine the facts if these appear to have been wrongly stated by the CFI. In the ECJ's view, the case did not show any distortion of the facts on the part of the CFI (paragraphs 137 - 142).

A decision of the EO to open an inquiry is based on the finding that there are grounds for the inquiry. In light of the above-mentioned decisions of the Community Courts - and without needing to examine the applicability of Article 1(3) of the EO Statute, and without examining the possible obiter dicta character of the CFI's above-quoted statements - it is, first, not evident that the EO could conclude that there are such grounds in the present case without implicitly challenging the CFI's above-quoted findings and the ECJ's corresponding omission to challenge those findings.

It should furthermore be noted, for the purpose of the present summary (but not as part of the reason stated in the letter to the complainant), that the likelihood of a change in the Commission's and OLAF's position in the matter, following a hypothetical finding of maladministration, appears rather minimal in light of the above-mentioned court decisions.

Thus, it is proposed that the complaint should be rejected on the basis of Article 195 ECT, "insufficient grounds".

PROPOSAL

Reject for insufficient grounds, Article 195 ECT.

Prior checking : JSA approved 22 August 2007

Date :

Approved by the Secretary General :

Date :

(cases where **no inquiry** takes place)

1. Please fill in both sides of this information sheet by circling the appropriate answer when several possibilities are given, or by filling in the blanks.
2. Attach the COMPLAINT SUMMARY on a separate sheet. Please also copy the COMPLAINT SUMMARY under :

E:/LEGAL/Complaint summaries/Admis or Inadmis/
 name of the file : number of complaint (4 numbers)-
 year of registration.
 language of complaint

ex : 0050-99.fr

(please use Read-Only option)

Case reference : 1330/2004/03 Date of closure of file:.....
 Confidential : Yes/No No
 On behalf of : (fill out when needed).....

Kind of complainant : Specify if it is a :
physical person (man or woman?) specify if Community staff or MEP -
 legal person : company - lawyers office - association - non profit organisation - or other.....
 For both categories mention any information you have such as : **nationality** (if possible) cyprus
 Area of activity e.g. : journalist - farmer - student - doctor - dentist - vet - teacher - other.....

Transmitted : directly - by a MEP - by transfer from the Committee on Petitions of EP -
 Other :

Institution or body complained against : OLAF
 Eur.Commission (+DG or service, when possible. See "E:\LEGAL\RESOURCES) - Eur. Parliament (+ DG, when possible); Court of Auditors - Court of Justice - Committee on Petitions of EP - MEP
 other.....
 if it concerns a **national body or institution**, please be as precise as possible :
 mention the country :
 and circle the appropriate answer among the following proposals, or complete the heading "other" :
 government; administration; Courts; Social security; police; tax authorities; Health service; prisons;
 other :

Keywords (NB: Keywords " 2", "3" and "4" are only given for within the mandate, admissible, but **not grounded** complaints):
 1. streak - whistleblowing complaint
 2. state - other with question
 3. other maladministration
 4.

Within the mandate ?

Yes

No *

Outside mandate because :

1 - Not an authorized complainant

2 - _____

3 - Court of Justice and Court of First Instance acting in their judicial role (Art. 195)

4 - Does not concern maladministration (Art. 2.2)

Not against a Community institution or body (Art.2.1)

National authorities

- Purely national matter

- Community law

Other bodies

. cross border problem (freedom of movement)

. diplomatic protection

. elections

. other fields

Admissible ?

Yes

No *

Inadmissible because :

1- Author/object not identified (Art.2.3)

2- Alleged facts are or have been the subject of legal proceedings (Art 195)

3- Dealt with or has been settled by a court (Art. 1.3)

4- Time limit exceeded (Art. 2.4)

5- Prior administrative approaches not made (Art. 2.4)

6- Internal remedies not exhausted in staff cases (Art. 2.8)

No grounds for investigation (Art 195) :

- dealt with or being considered by another competent body

(please specify :)

- other

Not sufficient grounds for investigation (Art 195) :

- claims too general in nature

- not enough supporting evidence supplied

* Advice to go to other agencies ? No

Yes : Committee on Petitions EP -

National/Regional Ombudsman or Committee on Petitions (mention the COUNTRY) :

EC (DG) - EP (DG.....) - Other :

* Transferred to : Committee on Petitions EP - National/Regional Ombudsman or Committee on Petitions (COUNTRY :)-

Other :

could decision would be put into question.