

CJEU Rules on Guarantees in OLAF's External Investigations (Case Vialto)

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News

On 28 October 2021, the CJEU ruled in an appeal judgment (Case C-650/19 P) on the right to be heard in administrative proceedings involving several authorities. The case concerned the Hungarian company *Vialto* which was part of a consortium that carried out an agriculture project funded by the EU's Instrument for Pre-Accession Assistance (IPA). After an investigation of alleged corruption and fraud by OLAF, the competent Directorate General for Enlargement of the European Commission advised the national authority, which managed the funds, to exclude *Vialto* from the contract in question. *Vialto's* appeal against the judgment of the General Court of 26 June 2019 (Case T-617/17) was successful in so far as the Commission's Directorate did not confer an opportunity to be heard to the appellant before it sent a letter to the national management authority in which it informed about the breach of obligations by the company at issue and recommended to take appropriate measures.

The CJEU emphasised the importance of the right to be heard as part of the right to good administration (Art. 41(2a) CFR) and as general principle of Union law. That principle requires that the addressees of decisions which significantly affect the interests of those addressees should be placed in a position in which they may effectively make known their views with regard to the evidence on which those decisions are based. Although the final decision on appropriate measures against a beneficiary of EU funds is taken by the national authority in programmes of decentralised management, the Commission's intervention was an important – perhaps even a decisive – step in this process. Therefore, it must be maintained that the intervention is liable to affect the interests of the person/undertaking concerned and he/she/it must be heard by that Union institution, body or agency. The hearing can also not be replaced by the fact that the person/undertaking concerned was heard by OLAF during its investigations, because the role of OLAF is only to submit non-binding recommendations to the competent Commission service.

Other grounds for appeal were, however, rejected by the CJEU. They concerned important questions in relation to the way in which OLAF carries out external investigations and, more specifically, the limits of digital forensic operations. In addition, the case raised issues regarding the impact of commitments given by OLAF at the beginning of an on-the-spot check in the light of the principle of legitimate expectations. In particular, the CJEU backed the interpretation by the General Court that Art. 7(1) of Regulation 2185/96 covers the possibility that OLAF makes a "digital forensic image" of a company's data for the purpose of a subsequent sifting of relevant data for the investigation in question. The Court emphasised that such digital forensic images do not mean a copying of all data sets and media owned by a controlled company, but are only an intermediate step for further sifting operations of the relevant documents.

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ISSN: 1862-6947

<https://euclid.eu>



Lastly, the CJEU ruled that an undertaking cannot rely on the principle of the protection of legitimate expectations, if it refuses to cooperate with OLAF and therefore does no longer want to follow a proposed derogating practice in its favour in the framework of on-the-spot checks pursuant to Art. 7 of Regulation 2185/96. (TW)

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The project is co-financed by the Union Anti-Fraud Programme (UAF), managed by the [European Anti-Fraud Office \(OLAF\)](#).



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