

# GC Clarifies Relationship between Union and National Law in OLAF External Investigations



## News

**Thomas Wahl**

On 3 May 2018, the General Court (GC) delivered an important judgment in which it clarified the relationship between Union law and national law when checks against economic operators are carried out by OLAF. The GC confirmed that checks are a matter of EU law, and national law is only relevant in cases of assistance by national authorities.

In the case at issue (T-48/16), OLAF conducted investigations against a French company (Sigma Orionis SA). OLAF revealed that the company had manipulated staff timesheets and excessively declared personnel salaries in projects funded by EU programmes. On the basis of OLAF's report, the Commission adopted administrative sanctions against Sigma Orionis, consisting of excluding the company from future participation in subsidies, suspending payments for current projects, and terminating several grant agreements.

Sigma Orionis initiated proceedings against this decision before the General Court, mainly arguing that the Cour d'Appel d'Aix-en-Provence (France) had stopped criminal pre-trial proceedings because certain pieces of evidence contained in OLAF's final investigation report cannot be used. The French Court argued that, during on-the-spot checks at the company's premises in France conducted by OLAF with the support of the French authorities, procedural guarantees and defence rights had not been respected. Therefore, the applicant argued that the Commission had to take into account this national decision, as a consequence of which it was not entitled to base its decision against the applicant on OLAF's conclusions.

The GC, however, rejected all arguments put forward in this context.

Regarding the first applicant's argument that the Commission did not respect the authority of the French court that annulled the investigative findings, the GC clarified that a decision of national courts not to use evidence in an OLAF report does not affect the Commission's possibility to found administrative decisions, such as those in question, on OLAF's findings. The GC ruled that only the European courts are competent to declare invalid an action by an EU body and that this is not up to the national courts.

Secondly, Sigma Orionis argued that the national law of France was applicable when OLAF carried out on-the-spot checks vis-à-vis the company. However, national provisions were not respected, since a warrant issued by a judicial authority had been missing, national police officers had not accompanied the OLAF investigators, and the company had not been informed about its right to oppose the checks. By contrast, the GC held that national law only comes into play if coercive measures are needed to impose checks. A "right to oppose" is not existent, however, in the applicable provisions. In the absence of opposition by the economic

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ISSN: 1862-6947

<https://eucrium.eu>

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operator (as in the case at issue), on-the-spot checks and inspections are conducted by OLAF on the basis of Regulation 883/2013 and Regulation 2185/1996 and based on written authorisation by the Director-General of OLAF. National law is then irrelevant. Since the applicant did not oppose to OLAF's checks and OLAF inspectors upheld Union law, no legal consequences can be drawn in favour of the applicant.

Regarding the third argument, that the inspections led by OLAF violated the company's fundamental rights (in particular its defence rights pursuant to Art. 47 CFR), the GC pointed out that, indeed, non-respect of fundamental rights by OLAF can ban suspension of payments or the termination of grant agreements by the Commission. The GC further ruled, however, that no violation of fundamental rights can be argued because Union law neither provides a "right to oppose" nor – *a fortiori* – a right to be informed of such a right. By making reference to the CJEU's decision in *Melloni*, the GC further argued that more extensive national rules (even if they are of a constitutional nature) cannot thwart this conclusion because this would infringe the Union's law "effet utile."

In sum, the judgment of the GC in *Sigma Orionis* further restricts the procedural safeguards of persons affected by OLAF inspections (if they do not oppose). In addition, the prevalence of Union law over national law in such cases has been affirmed.

The GC's judgment led the Commission to further clarify the extent to which national law applies in external OLAF investigations in its recent proposal on amending the current [OLAF Regulation 883/2013](#).

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Co-funded by  
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