



**JUSTICE written evidence on OLAF prepared  
for the House of Lords Select Committee on the  
European Union (Sub-Committee E)**

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1. JUSTICE is an independent all party law reform and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists. JUSTICE has a history of engagement with European justice and home affairs issues. In particular, it seeks to ensure that the rights of the defence are not adversely affected by the far-reaching developments taking place in EU police and judicial co-operation in criminal matters.
2. JUSTICE is concerned at the widening gap between EU measures designed to facilitate prosecutions and investigations across the EU, and the lack of instruments to safeguard the rights of those subject to such investigations and prosecutions. Moves at EU level to enhance police and judicial co-operation in criminal matters have been based since the 1999 Tampere European Council on the principle of mutual recognition, which is premised on all member states having trust in eachothers' criminal justice systems. The first measure to implement this principle in the field of criminal law was the European arrest warrant, which has been followed by a raft of other framework decisions and proposals. In the absence of adequate and enforceable EU-wide safeguards, there is a danger that the rights of the defence will suffer as a consequence of greater co-operation between member states. Previous JUSTICE briefings document in greater detail the grounds on which it is argued that the European Convention on Human Rights ('ECHR') cannot provide either an adequate level of protection or the degree of consistency merited by EU co-operation.<sup>1</sup>
3. JUSTICE therefore fully supports the initiative of the European Commission in this field to develop a framework decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU<sup>2</sup> and to amend Regulation 1073/99 ('the OLAF proposal'), notably by the insertion of a new article 7a. These are important acknowledgements by the Commission that mutual recognition alone will not suffice to protect the rights of the defence.
4. However, the proposal that was finally published by the European Commission on procedural safeguards is in fact significantly weaker than the Green Paper it presented in

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<sup>1</sup> See, in particular, JUSTICE briefings on the European arrest warrant, available at [www.justice.org.uk](http://www.justice.org.uk)

<sup>2</sup> COM/2004/328.



February 2003. While the Preamble states that it is intended to enhance 'confidence in the criminal justice systems of all the member states which in turn will lead to more efficient judicial co-operation in a climate of mutual trust', it also explicitly states that its provisions 'do not impose obligations on Member States that go further than the ECHR'. Indeed, in some areas, such as legal aid, it would not even seem to reach the minimum standards set by article 6 ECHR. If the framework decision is adopted without substantial improvement, there would be a clear need to supplement it with specific proposals. However, JUSTICE considers that these should adopt a thematic approach to the core defence rights rather than being agency/institution/body specific, as is the case with the present OLAF proposal.

5. While the OLAF proposal is a positive step towards improving the procedural guarantees for *some* suspects, namely those subject to OLAF investigations, JUSTICE is concerned that member states appear to be willing to protect the rights of some more than others. There is no justification for offering one set of suspects or defendants, namely those subject to OLAF investigations, greater protection than another, for instance those subject to investigations that involve Europol. By contrast, some of the protections envisaged by the Commission proposal on procedural safeguards, such as rights to legal aid or interpretation/translation services, are not reiterated in the OLAF proposal, creating a further layer of confusion and potential inequality between suspects and defendants across the EU. The development of ad hoc safeguards in this manner is also likely to result in greater complexity of legislation, which in itself will work against the objective of improving the visibility of fundamental rights in the EU. This will further impede the accessibility of these rights to EU citizens. It is only through the coherent development and application of EU-wide procedural safeguards - that extend further than the ECHR provisions - that the rights of *all* those affected by EU police and judicial co-operation in criminal matters will be protected. This, in turn, will genuinely substantiate the trust that underlies the principle of mutual recognition, and on which the success of the EU mutual recognition programme itself depends.
6. Subject to the points made above, the remainder of this briefing will focus on the specific provisions of the new article 7a.

**Should the rights of natural and legal persons investigated by OLAF be strengthened?**

7. Reg (EC) No 1073/1999 confers extensive powers on OLAF to conduct internal and external investigations. For example, in the course of these investigations OLAF has the right of 'immediate and unannounced access to any information held by the institutions,

bodies, offices and agencies, and to their premises'. It may inspect their accounts, take copies, assume custody of documents and data and request oral information from their members, managers and staff. OLAF may carry out on the spot inspections at the premises of economic operators concerned and ask any person to supply any information it considers pertinent to its investigations. In the course of its investigations, OLAF will have access to highly sensitive personal data. Reports drawn up by OLAF constitute admissible evidence in administrative or judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. Investigations undertaken by OLAF are likely to lead to the instigation of criminal proceedings by member states.

8. Given the extent of its powers and the potential consequences of its reports, investigations conducted by OLAF should comply with a high level of procedural safeguards in order to guarantee the rights of those involved, notably to a fair trial. Presently, OLAF must respect the ECHR and the constitutional traditions common to the member states as directed by article 6 TEU, as well as the provisions of Council Regulation (EC) No 1073/1999, notably recital 10 and article 4(6)(b), Council Regulation (Euratom, EC) No 2185/96 concerning on the spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities,<sup>3</sup> the Community rules on data protection, notably Directive 95/46/EC, and the national law of the member state concerned.
9. JUSTICE considers that while fundamental rights are significantly better protected under the first pillar than under the third due to the compulsory jurisdiction of the ECJ and the application of the EC data protection directive, the absence of adequate minimum standards in this field will result in the application of variable and insufficient levels of protection to those investigated by OLAF. JUSTICE is also concerned that existing procedures do not satisfy even the basic requirements of Regulation 1073/99. The most recent OLAF Supervisory Committee Report<sup>4</sup> highlights that

As regards the protection of fundamental rights, the measures taken by OLAF are not sufficient to implement the objectives defined in Recital 10 of Regulation 1073/99.<sup>5</sup> In the absence of specific rules of procedure, the way OLAF operates at present entails

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<sup>3</sup> OJ L 292 15/11/1996 p2.

<sup>4</sup> Opinion No 2/03, 18 June 2003.

<sup>5</sup> Recital 10 requires OLAF investigations to be conducted 'with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value'.

a fairly significant risk for the protection of the fundamental rights of persons under investigation.<sup>6</sup>

JUSTICE therefore has concerns with regard to both the present level of protection as well as the consistency of that protection across the EU.

### **If rights do need to be strengthened, is new Article 7a adequate?**

10. The OLAF proposal includes:

- The right to be informed
- The opportunity to comment
- The right to be assisted by a person of choice
- The privilege against self incrimination
- A list of rights
- Record of interview and access granted to interviewee

11. The OLAF proposal does not extend to certain essential rights necessary to safeguard the rights of the defence, notably in the context of complex international fraud investigations. These include the right to legal representation, the right to legal aid and the right to free interpretation/translation services where necessary. As emphasised above, such safeguards would be most appropriately addressed by a framework decision that applies robust and enforceable safeguards to all suspects and defendants whose rights are affected by measures taken pursuant to EU JHA co-operation instruments. If negotiations on the Commission's proposal on procedural safeguards ultimately fail to deliver such standards, JUSTICE urges the UK to fight to secure adequate protection for suspects in other ways. The specific provisions of article 7a of the OLAF proposal are examined below for compliance with the rights of the defence.

The right to be informed

12. The protections of article 6 ECHR (fair trial rights) apply to everyone charged with a criminal offence. The notion of being 'charged' in this context means 'the official

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<sup>6</sup> Ibid, at p24.

notification given to an individual by the competent authority of an allegation that he has committed a criminal offence' and would include being informed of the existence of an OLAF investigation that concerned that individual.<sup>7</sup> The purpose of the right to be informed of the investigation is the same as that under article 6(3)(a), namely to provide the person concerned with the information necessary to begin the preparation of his/her defence.<sup>8</sup> It is essential to preserve both the fairness of any eventual trial and the equality of arms principle between the prosecution and the defence.

13. Article 6(3)(a) is drafted in greater detail than the article 7a(2) provisions on the right to be informed and its terms should be more closely reflected in the OLAF proposal. It includes the requirements that the information be provided 'promptly', 'in a language which he understands' and 'in detail'. These are essential components of the right to be informed and must also be incorporated into article 7a(2). Equally, article 7a should specify that the person has a right to know the 'nature' and 'cause' of the investigation against him/her and not simply that an investigation is taking place.
14. Any limitations on the right to be informed should comply with the ECHR requirements of necessity and proportionality. As presently drafted, article 7a(2) only allows this information to be disclosed 'provided that this does not hinder the conduct of the investigation'. JUSTICE considers that this threshold does not take adequate account of the rights of the defence and should be modified to incorporate necessity and proportionality requirements.

#### The opportunity to comment

15. Individuals are given the opportunity to comment on all matters concerning them before any conclusions that refer to them are drawn at the end of an investigation. To facilitate this opportunity, a summary of such matters must be included in the invitation to the interview. The invitation must give eight working days notice, except with the prior agreement of the invitee. The invitation must include a list of the rights of the person interviewed.
16. The obligation to invite individuals to comment fails to include a guarantee that the invitation and the summary of matters being investigated must be in a language the person understands. This requirement must be inserted to ensure the right to comment is meaningful and can be exercised.

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<sup>7</sup> Fox, Campbell and Hartley v UK (1991) 13 EHRR 157 at para 73. Eckle v Germany (1982) 5 EHRR 1.

<sup>8</sup> Bricmont v Belgium No 10857/84, 48 DR 106 (1986).

17. The obligation to invite the person to comment may be deferred where 'strict secrecy must be maintained for the sake of the investigation and where investigation methods have to be employed which come under a national judicial authority or, in the case of an external investigation, a competent national authority'. JUSTICE seeks clarification of what is envisaged by 'investigation methods...which come under a national judicial authority...or a competent national authority'. JUSTICE is also concerned that no temporal restriction is placed on how long the obligation to invite comment may be deferred. The obligation to notify the Supervisory Committee in advance of the Director's decision to defer constitutes a welcome additional protection. However, the Committee is not obliged to give its opinion – the requirement is optional only, nor are those opinions it gives binding on the Director.

The right to be assisted by a person of choice and the privilege against self-incrimination

18. JUSTICE welcomes the explicit inclusion of the right to be assisted by a person of choice who is not in any way involved in the matter under investigation, and the privilege against self-incrimination. However, in order to effectively safeguard that privilege, as well as to ensure that the conclusions of OLAF investigations are not subsequently found to be inadmissible for breach of article 6 ECHR fair trial rights in any criminal proceedings that ensue, the suspect must be guaranteed, and informed of his/her right to, *legal* assistance. This will be particularly important in the type of complex international fraud cases that OLAF investigates. Adequate time and facilities to consult with legal counsel prior to the commencement of the interview are also inextricable elements of the right to legal assistance.

19. Article 6(3)(c) ECHR guarantees everyone charged with a criminal offence the right to legal assistance. As noted above, the word 'charged' in the ECHR context does not necessarily correspond to that under UK law and has been held to include knowledge of an investigation.<sup>9</sup> Article 6(3)(c) does not clarify at what stage this right begins but the case law affirms that the application of article 6(3)(c) to pre-trial proceedings is not excluded.<sup>10</sup> *Murray v UK*<sup>11</sup> addressed the issue of access to a lawyer during police questioning directly and concluded that where adverse inferences can be drawn from silence during police questioning 'it is of paramount importance for the rights of the

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<sup>9</sup> It should also be noted that article 48 of the EU Charter recognises article 6(3) ECHR as individual rights outside the characterisation of 'criminal charge'.

<sup>10</sup> *Imbrioscia v Switzerland* (1994) 17 EHHR 441.

<sup>11</sup> Appln no 18731/91, judgment of 8/2/1996.

defence that an accused has access to a lawyer at the initial stages of police interrogation'.<sup>12</sup> By analogy, where there is a danger that a suspect may say something from which adverse inferences can be drawn, access to a lawyer will also be imperative to satisfy the requirements of article 6 ECHR. Reflecting this position, the rights protected by the Commission proposal on procedural safeguards apply 'from the time when [the individual] is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence until finally judged', and the right to receive legal advice is specifically guaranteed 'before answering questions in relation to the charge'.

20. JUSTICE also notes that failure to provide such legal assistance or to inform the suspect of his/her right to it may result in the outcome of any OLAF investigations being inadmissible at any subsequent criminal proceedings in the member states and so impede the effectiveness of OLAF investigations.

21. In the UK context, investigations conducted by the Serious Fraud Office (SFO) must comply with the s67(9) Police and Criminal Evidence Act (PACE) that requires persons other than the police who are charged with the duty of investigating offences or charging offenders to comply with the PACE code, including legal representation and adequate time and facilities to consult. The exception is where the SFO exercises its compulsory powers under s2 Criminal Justice Act 1987 (CJA). However, these powers are rarely used post *Saunders v UK*<sup>13</sup> precisely because of the problems which may arise at trial with regard to the admissibility of any evidence obtained.

22. In order to protect the rights of the defence, in compliance with article 6(3) ECHR and article 48 of the EU Charter and reflecting the recent Commission proposals on defence rights, article 7a of the OLAF proposal must include the right to legal assistance prior to being interviewed, the obligation on OLAF to inform the suspect of this right in the invitation to interview and the provision of adequate time and facilities to consult with a lawyer prior to the commencement of any interview.

23. The right to receive legal advice will in some cases entail the provision of free legal aid. This is a right guaranteed by article 6(3)(c) ECHR and article 47 EU Charter where the interests of justice require it. The Commission proposal on procedural safeguards requires member states to provide free legal aid where 'these costs would cause undue

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<sup>12</sup> (1996) 22 EHRR 29, at para 66.

<sup>13</sup> Appln no 19187/91, judgment of 17/12/1996.

financial hardship to the suspected person or his dependants', a test which would seem to be inferior to that under article 6 ECHR and article 47 EU Charter. JUSTICE advocates the insertion into article 7a of a provision that requires member states to provide free legal aid to suspects who lack sufficient means to pay for legal assistance, in accordance with an interests of justice test. This will bring the OLAF proposal into line with the ECHR minimum requirements on legal aid.

24. While the distinction drawn by the proposal between legal and natural persons for the purposes of the privilege against self incrimination is permitted by the ECHR, JUSTICE considers a procedural check should be inserted so that if, in the course of investigating a company, the ambit of that investigation widens to include individual directors or managers, their right to avoid incrimination will be protected. Those conducting the investigation should have an obligation to caution those individuals of their right.
25. The OLAF proposal also fails to address the right of suspects to free interpretation/translation services, as guaranteed by article 6(3)(e) ECHR, article 48 EU Charter and article 6 of the Commission proposal on procedural safeguards. The availability of these services is particularly important in cross border cases where the likelihood of a suspect being interviewed in a member state other than his own is amplified. Provision must be made for the availability of free interpretation/translation services for those that cannot speak or understand the language used. This must extend to those with hearing or speech impairments, as does the Commission proposal on procedural safeguards. All interviews conducted with the assistance of an interpreter should be audio or video recorded to guarantee quality control, as provided for in article 9 of the Commission proposal.

#### The list of rights

26. JUSTICE welcomes the suggestion to include a list of rights in the invitation to comment. These will improve the suspect's ability to realise his/her rights, particularly in a cross-border context which is likely to be unfamiliar and complex. The list of rights should reflect the guarantees of the ECHR as developed by the case law of the ECtHR, the EU Charter and the highest protections applied in the EU member states. It should build upon article 14 of the Commission's proposal for a framework decision on procedural rights, notably by being available in languages other than the official Community languages.

#### Record of interview and access granted to interviewee

27. JUSTICE welcomes the obligation on OLAF to keep a record of the interview and to grant the person interviewed access to that record so that he/she may approve it or add observations. This in fact extends beyond the PACE requirement to supply suspects with a taped copy of the interview.

**Should the Supervisory Committee have a specific role in monitoring procedural safeguards?**

28. JUSTICE welcomes article 11 of the OLAF proposal that expands the role of the Supervisory Committee, notably in relation to the monitoring of procedural safeguards. JUSTICE is particularly pleased to note that 'persons concerned' may directly request an opinion of the Committee on procedural safeguards. However, the proposal does not make it clear what the consequences would be of a finding by the Committee that individual rights had been or would be breached by OLAF. This ambiguity compounds the findings of the most recent OLAF Supervisory Committee Report that highlighted 'the uncertainties of inadequately monitored procedures'. While there appears to be an implicit presumption that the opinions of the Supervisory Committee will be followed (for instance the Director must inform the Committee of cases where its recommendations have not been acted upon), JUSTICE urges the Select Committee to consider whether a negative opinion of the Supervisory Committee should have greater consequences and in fact be permitted to impact upon the conduct of the investigations in progress.<sup>14</sup>

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<sup>14</sup> Article 11(1) states that the Committee may deliver opinions on the activities of OLAF at the request of the Director or on its own initiative 'without however interfering with the conduct of investigations in progress'. This provision is however distinguished from its opinions on procedural safeguards.