**Reporting irregularities to OLAF**

**1.<u>Reporting to OLAF on cases related to suspected fraud.</u>**

**Question:**

We would like to be clear at what stage (when) do we report to EC/OLAF on cases related to suspected fraud? In the seminar the explanation given was that we have to report to the EC/OLAF just when the prosecution procedures starts, before that (when the case is submitted to the competent authority), the case can be classified as secret and if we want to inform OLAF about it, we have to ask special permission from competent authority and therefore suggestion was that MS does not report suspected fraud cases until the competent authority has made the decision that it is the case.

Up to now our practice proof, that we report to EC/OLAF, whenever the case documents have been submitted to competent authorities for the first investigation.

Please clarify since we would like to reduce our workload and yours as well but do not want to get into trouble with wrong interpretation and negative audit conclusions later.)

**OLAF's answer:**

The EU legislation (Article 28 § 1 of Regulation (EC) N ° 1828/2006) requires from the Member States to communicate, during the two months following the end of each quarter, cases of irregularities which have been the subject of primary administrative or judicial findings.

Article 27 b) of Regulation (EC) N ° 1828/2006 defines the " primary administrative or judicial finding" as following:

b) "primary administrative or judicial finding" means a first written assessment by a competent authority, either administrative or judicial, concluding on the basis of specific facts that an irregularity has been committed, without prejudice to the possibility that this conclusion may subsequently have to be revised or withdrawn as a result of developments in the course of the administrative or judicial procedures;

The “primary finding of fact” is not necessarily the formal document closing an administrative or judicial procedure, according to which the existence of an irregularity has actually been established, since the Member States must communicate at a later date any information relating to the irregularity which were not available when the facts were first reported (see Article 28(3) of Regulation (EC) No 1828/2006). The Member State must also inform the Commission subsequently of the initiation, conclusion or abandonment of any procedures imposing administrative or criminal penalties related to the reported irregularities as well as of the outcome of such procedures (see, Article 30 (1) of Regulation (EC) No 1828/2006).

It follows from this that the reporting requirement for the Member State already exists well before all the facts establishing the irregularity have been gathered; it applies from the moment of detection.

This approach is an integral part of the aim of the notification system set up by Community legislation to facilitate rapid intervention by the Commission and by other Member States which might be concerned (see Article 29 of the above mentioned regulation).

To give the communication system full effect, the primary finding of fact must be taken to be the first demonstration by the administration or the courts that an irregularity exists, even if this is merely an internal document, as long as it is based on actual facts. This does not prevent the administrative or judicial authorities from subsequently withdrawing or correcting this first finding on the basis of developments in the administrative or judicial procedure (see article 28, 3 of the above mentioned regulation).

Regarding the moment of reporting, the EU legislation does not differentiate the cases of "suspected fraud" from the irregularities as "suspected fraud" is specie of irregularity and the final classification could be different.

**2. Irregularities under the reporting threshold.**

**Question:**

In the seminar was mentioned that the reporting threshold is 10 000 € concerning the amounts related to the EU funding. Can you please reconfirm this and specify where this norm is stated? Up to now we treat this threshold for the whole amount of irregular case.

The following is confusing and can be interpreted differently:

In the Regulation 1828/2006 Art. 36 (1) „Irregularities under the reporting threshold" is determined :

Where the irregularities relate to amounts of less than EUR 10 000 chargeable to the general budget of the European Communities,

Member States shall not send the Commission the information provided for in Articles 28 and 30, unless the Commission expressly requests it.

Till now Latvia has reported to EC/OLAF about all irregularities which are equal/greater than 10 000 euros in total (including – EU funding, national), following the EC Regulation 1828/2006.

**OLAF's answer:**

Article 36 (1) of Regulation (EC) N ° 1828/2006 clearly states that "Where the irregularities relate to amounts of less than EUR 10 000 chargeable to the general budget of the European Communities, Member States shall not send the Commission the information provided for in Articles 28 and 30, unless the Commission expressly requests it". That means EUR 10.000 community share. It is to be noted that this provision concerns the reporting of irregularity and not the recovery of these amounts. Member States have the obligation to recover any amount unduly paid independently of the size of it. Attention should be paid also to the artificial splitting of a set of operations so as to avoid the reporting requirements. With regard to the irrecoverable amounts below the threshold of EUR 10.000, please consult the attached Draft Commission Decision to be presented to the next COCOF Committee.

**3. <u>The end of irregularity procedures.</u>**

**Question:**

It was mentioned that the end of the recovery procedures concerning "simple , pure irregularities" should be completed within 4 years and 8 years concerning irregularities concerned fraud. Can you please specify, where this norm is stated.

**OLAF's answer:**

The EU legislation does not provide any deadline for the recovery of undully paid EU funds from the beneficiary and the national provisions are applicable to this end. However, the Commission in order to assess the negligence or fault of a Member state concerned (see Article 70, 2 of Regulation 1083/2006) uses some criteria linked to the procedure.

More specifically, following a case law of the ECJ, a MS is considered as negligent in any case if it remains inactive for 4 years (except 8 years for judicial procceedings) or if the Commission has material indicating that the national procedures have not been respected and the judicial arsenal in the field of recovery has not been used for the recovery of community funds. The ECJ also holds that 12 months without any recovery action can be qualified as negligence.