Policy on the Prevention, Detection and Investigation of Fraud

1. INTRODUCTION

The prevention and detection of Fraud are objectives to be achieved through the internal control process of the Agency, which is applicable at all of its management levels. According to the ESA Financial Regulations, "The Director General shall implement an overall system of internal control regarding effectiveness and efficiency of operations, reliability of financial and operational reporting and compliance with applicable laws and regulations." The internal control system shall in particular ensure that the "assets of the organisation are safeguarded through the establishment and effective implementation of procedures to prevent, detect, inquire on and remedy errors, irregularities and fraud, which complement the relevant rules and regulations." As outlined in the Charter of Values, ESA must ensure that its funding is used responsibly and to good purpose and in compliance with applicable laws and regulations. While the Agency can be confident in the effectiveness of its internal control processes, targeted measures are essential in order to address specific exposure to Fraud in a satisfactory manner.

2. POLICY

The Agency does not tolerate any kind or level of Fraud and endeavours to recover any amount or asset lost as a result of such acts. For the purpose of preventing, detecting and investigating Fraud, this Instruction sets out, in addition to the ESA Risk Management Policy a specific policy, which ensures compliance with fair process by establishing certain principles such as prohibition of retaliation, preservation of confidentiality, protection from false accusation and protection of basic rights. The aim of this Instruction and its Annex is to give a structured framework to the current practice of investigating potential cases of Fraud through investigation teams set up on an ad hoc basis.

1 Article 49 of the ESA Financial Regulations at the time of entry into force of the present Instruction and its Annex.
The present policy safeguards existing rights and obligations of ESA Staff Members, and as the case may be, of other persons or entities as provided for in the existing rules, regulations and legislation as applicable to each case.

This Instruction does not preclude the investigation and sanctioning of Fraud under applicable national laws by the competent national authorities which might initiate an inquiry and proceedings independently from the procedures set out hereinafter.

3. SCOPE

This Instruction and its Annex cover Fraud adversely affecting the financial interests of the Agency, its Contributors and/or its other Funding Entities. It shall concern acts committed by ESA Staff Members or any other persons or entities who have contractual relations with the Agency (such as contractors, their personnel, consultants, experts, research fellows and trainees), as well as any person affiliated to the Agency’s social security scheme or pension scheme, including family members of ESA Staff Members, even if the reference to articles in the ESA Staff Regulations, Rules and Instructions applies only to ESA Staff Members.

4. DEFINITIONS

4.1 Fraud
For the purpose of the policy set out in this Instruction and its Annex and in line with the International Standard on Auditing, Fraud is defined as a wilful act or wilful omission by one or more individuals involving in particular the use of deception, to obtain an unjust or illegal advantage to their own benefit or to the benefit of a third person. This definition comprises as well other acts of wilful misconduct, such as embezzlement, corruption, bribery or the misuse of entrusted funds. The acts in question must have the effect of adversely affecting the financial interests of the Agency, its Contributors and/or its other Funding Entities. Fraud also comprises assistance to such acts.

For example, Fraud is perpetrated by individuals in order to obtain money, property, including intellectual property, or services; to avoid payment or loss of services; or to secure personal or business advantages; Fraud can also be committed through non-disclosure of information when there is an obligation to disclose such information.

4.2 Contributors
In accordance with the definition of Annex I to the ESA Financial Regulations this term shall encompass Member and Participating States legally bound to pay contributions to the Agency.
4.3 **Other Funding Entities**
In accordance with the definition of Annex I to the ESA Financial Regulations, other Funding Entities are entities other than Contributors legally bound to provide funding to the Agency under agreements concluded in accordance with the Agency’s rules and procedures.

4.4 **Investigation Team**
The persons designated to investigate alleged Fraud and this in accordance with the Annex to this Instruction.

4.5 **Acts Concerned**
Any act of Fraud compromising the financial interests of the Agency, its Contributors and/or its other Funding Entities committed by an ESA Staff Member or by any other persons or entity who has contractual relations with the Agency (such as contractors, their personnel, consultants, experts, research fellows and trainees) or by any person affiliated to the Agency’s social security scheme or pension scheme, including family members of ESA Staff Members.

4.6 **Person(s) Concerned**
Any person concerned by reports on Fraud or otherwise suspected of having committed an Act Concerned.

5. **PRINCIPLES**

This Instruction and its Annex are based on the following general principles:

5.1 **Prevention**
The most effective way of avoiding Fraud is through a culture of integrity and high ethical standards; therefore the Agency places a high priority on prevention by assigning clear responsibilities and defining appropriate controls.

5.2 **Reporting**
Protecting the integrity of ESA and its financial interests necessitates the active support of every person who has knowledge or learns of instances of Fraud (as defined for the purposes of this policy); therefore and in line with Staff Regulations\(^3\), each ESA Staff Member, in the exercise of his/her functions, has a duty to report in writing either directly to the Internal Audit or through his/her line management, upon obtaining knowledge of or learning of instances of Fraud. Managers and controllers have in the fulfilment of their responsibilities a particular duty to report. Persons and entities other than ESA Staff Members are invited to report to the Internal Audit any suspicions they may have of occurrences of Fraud. In any case, anonymous reporting shall not be considered.

\(^3\) Staff Regulation 2.1 at the time of entry into force of the present Instruction and its Annex
5.3 **Confidentiality**
The Agency shall ensure that confidentiality is respected during the investigation, in order to preserve the reputation of the parties involved, in particular of the Person(s) Concerned and any person reporting to or cooperating with the ESA Internal Audit and/or the Investigation Team.

5.4 **Prohibition of retaliation**
In line with ESA Staff Rules\(^4\), any person reporting facts to or cooperating with the ESA Internal Audit and/or the Investigation Team in accordance with this Instruction must not be subject to any direct or indirect detrimental action recommended, threatened or taken for having provided in good faith information regarding an alleged act of Fraud. The violation of this principle by an ESA Staff Member may result in disciplinary action. In case of violation of this principle by a non-staff member, the Director General may take appropriate measures.

5.5 **Prohibition of false accusation and defamation**
Accusations made in bad faith and/or with malicious intent, as well as accusations resulting in defamation, constitute an offence liable to disciplinary action.

5.6 **Financial Liability**
In line with ESA Staff Regulations\(^5\) and independently from a disciplinary procedure, the Agency may hold a Staff Member financially responsible for the damage that he causes to the Agency as a result of a wilful act or gross negligence.

5.7 **Fair process**
Investigation procedures are to be conducted following a rigorous, transparent and fair process, guaranteeing the rights of the Person(s) Concerned as well as the impartiality and objectivity of the Investigation Team.

6. **PREVENTION OF FRAUD**

Prevention is the most effective approach to Fraud. When compared to project or organisation risk, Fraud is characterized by a different risk quality – Fraud often has a lower scale of financial impact, but badly affects the reputation of an organisation – and different skills are required for its assessment and prevention. Therefore, a specific and structured Fraud risk management process shall be put in place in addition to the main risk management process. Management is responsible for prevention and defines controls commensurate to the identified risks, according to their likelihood and significance in order to ensure the effectiveness of internal control systems regarding the risk of Fraud. The ESA Internal Audit shall lead a periodical agency-wide Fraud risk assessment exercise and elaborate an action

\(^4\) *Staff Rule 5/2 at the time of entry into force of the present Instruction and its Annex*
\(^5\) *Staff Regulation 2.3/1 at the time of entry into force of the present Instruction and its Annex*
plan, which will result in decisions regarding mitigation of risks and awareness actions in each directorate.

7. DETECTION OF FRAUD

In addition to the reporting set out in Article 5.2 of this Instruction, Fraud can be detected in various ways, such as controls by controllers and managers, through management supervision and also by Internal Audit.

8. INVESTIGATION OF FRAUD

Any investigation of Fraud must be conducted in compliance with the principles set out in the Annex to this Instruction and in full respect of basic rights, in particular the principles of confidentiality, fairness and the right of the Persons Concerned to express their views on the facts concerning them and the right not to make self-incriminating declarations. Conclusions of investigations shall be based solely on facts supported by evidence. At the end of the investigation, the Investigation Team shall submit a report to the Director General with the findings of the investigation and a recommendation on actions to be taken in consequence.

While such investigation is not a disciplinary procedure, the evidence collected during the investigation procedure and the report of the Investigation Team may serve as a basis for or be used in a subsequent disciplinary action in accordance with ESA Staff Rules.

The investigation procedure initiated to inquire as to alleged Fraud is set out in the Annex to this Instruction.

9. ROLES AND RESPONSIBILITIES

9.1 *ESA Staff Members*

Each ESA Staff Member has, in the exercise of his/her functions, a duty to report in writing, either directly to Internal Audit or through his/her line management, upon obtaining knowledge of or learning of occurrences of Fraud.

---

*Staff Rule 26/1 at the time of entry into force of the present Instruction and its Annex*
9.2 **Managers and Controllers**
Managers and controllers have in the fulfilment of their responsibilities a particular duty to report instances of Fraud.

9.3 **Directors and Head of the Director General’s cabinet**
Directors and the Head of the Director General’s Cabinet are responsible for:

i. the definition and implementation of an effective mechanism for the prevention of Fraud within the internal control process of their respective Directorates and this in collaboration with the Head of the ESA Internal Audit, as set out in the present Instruction; and,

ii. the monitoring and reporting of cases of Fraud. The results of such monitoring shall be fully recorded in the following documents:

   - Statement of Fraud disclosure, addressed by DG to all Directors in view of the drafting of DG’s Letter of Representation regarding ESA’s Financial Statements;
   - Survey of Provisions and Contingent Liabilities in the Published Financial Statements, addressed by the Department in charge of financial matters to all Directors. This survey does not address Fraud specifically, but any required provision to be recorded, such as against the attempted recovery of a Fraud.

9.4 **Head of the ESA Internal Audit**
The Head of the ESA Internal Audit is responsible for:

i. Leading the Fraud risk assessment process and the elaboration and implementation of a related action plan in collaboration with Directors and the Head of the Director’s General Cabinet;
ii. Conducting a preliminary fact finding on alleged or suspected instances of Fraud, opening the investigation or dismissing any unfounded report;
iii. Chairing the Investigation Team in accordance with this Instruction; and,
iv. Reporting annually to the Director General and establishing the lessons learned.

9.5 **Investigation Team**
The Investigation Team established in accordance with the Annex to this Instruction is responsible for carrying out the investigation procedure.
9.6  **Department in charge of personnel matters**

The Department in charge of personnel matters shall provide regular fraud awareness training to ESA Staff Members taking into account the lessons learned from investigated cases.

10. **REFERRAL TO THE COMPETENT AUTHORITIES OF THE MEMBER STATES**

This Instruction does not preclude the right of the Director General to refer the case to the competent national authorities at any time.

11. **ENTRY INTO FORCE AND VALIDITY**

This Instruction and its Annex enter into force on the day of their publication and they are valid for a period of four years as from the date of their entry into force. This Instruction and its Annex shall be reviewed by the Head of the ESA Internal Audit to establish whether they require any amendment.

12. **SUPERSEDED INSTRUCTION**

This Instruction supersedes ESA/ADMIN/IPOL(2014)01, except for investigations started under ESA/ADMIN/IPOL(2014)01 which remain to be governed by that Instruction.

13. **PUBLICITY**

As this Instruction and its Annex concern acts committed by ESA Staff Members or any other persons or entities and this in accordance with Article 3 of this Instruction, they are releasable to the public.

[Signature]

Director General
ANNEX

PROCEDURE GOVERNING THE INVESTIGATION OF FRAUD

1. Introduction

The present Annex determines the rules and procedures governing the investigation of Fraud to be initiated by the Head of the ESA Internal Audit.

This procedure is limited to establishing and gathering facts and collecting evidence of acts in order to determine whether an alleged case of Fraud has genuinely occurred, and if so to report it to the Director General. It is not a disciplinary procedure, but the evidence collected during the investigation set out herein and the report to the Director General may serve as a basis for or be used in a subsequent disciplinary action in accordance with Staff Rules7.

2. Preliminary fact finding and initiation of investigation

When the Head of the ESA Internal Audit receives a written report on suspected Fraud in accordance with Article 5.2 of the present Instruction, or when grounds for such suspicion come otherwise to his/her attention or that of his/her services in the exercise of their function as set out in Article 7 of the present Instruction, he/she shall undertake a preliminary fact-finding exercise within five working days from the date he/she has received the report or been made aware of the facts8.

The purpose of the preliminary fact finding is solely to evaluate the reliability of the information with a view to determining whether the suspicions are sufficiently serious and warrant further investigation. It should be limited to that purpose and be conducted in a discreet and expeditious manner. The preliminary fact finding shall be solely based on available documented evidence, including electronic evidence. If necessary, the ESA Internal Audit may additionally clarify the information received with the person who has submitted the report.

---

7 Staff Rule 26/1 at the time of entry into force of the present Instruction and its Annex
8 Calculation of time periods under this Instruction: the day after the starting date shall be counted as the first date in the calculation of the end date (e.g if a start date is the 1st June then this day counts as “day 0” and the 2 June counts as “day 1” in the calculation of the end date). When the calculated end date of a time period is a Saturday, Sunday or a bank holiday, the next working day after shall be the last date of the time period.”
Where the Head of the ESA Internal Audit determines that there is a sufficient basis to merit further investigation, and that the financial interests of the Agency, its Contributors and/or its other Funding Entities might be compromised, the investigation procedure shall be opened to establish the substance and the circumstances of the matter.

3. Purpose of the investigation

The purpose of the investigation procedure is to collect the factual evidence of the case in order to determine whether or not Fraud detrimental to the financial interests of ESA, its Contributors and/or its other Funding Entities has occurred and the responsibilities concerned.

Where the investigation detects possible weaknesses in internal control and management practices in relation to Fraud, improvements and risk mitigation actions shall be recommended accordingly.

4. Investigation Team

The Investigation Team shall be composed of:

- The Head of the ESA Internal Audit, or his designated representative from the ESA Internal Audit, who shall chair the team;
- a member of the Department in charge of personnel matters, should a Staff Member be concerned;
- a member of the Department in charge of legal affairs;
- a member of the Department in charge of procurement matters, should contractors or contractor personnel be concerned;
- a member of the Directorate(s) concerned by the fraud; and,
- any other persons the Head of the ESA Internal Audit considers necessary to include in the team.

The Investigation Team shall however not exceed five members. The members of the Directorates/Departments listed above shall be designated by their respective Director(s)/Head of Department. Should however the respective Director/Head of Department be a Person Concerned by the investigation, his/her Directorate/Department will not be represented in the Investigation Team.

The Investigation Team may request the expertise of other services within the Agency as well as that of external experts.
Members of the Investigation Team shall be independent and impartial. To that effect they shall confirm at the time of, or at any time subsequent to their nomination, that they are not directly involved in the matter to which the investigation relates, nor have any direct interest or close association with any of the Persons Concerned. The Members of the Investigation Team shall sign a confidentiality undertaking.

5. Rights of the Investigation Team and investigation procedure

The Investigation Team carries out the investigation by collecting information and documents, and in particular by carrying out on-the-spot checks, inspections (including inspections of computers and databases) and interviews within the limits of the applicable rules, in particular the ESA Security Directives and the applicable rules on Personal Data Protection. Each ESA Staff Member shall fully cooperate with the Investigation Team during the investigation procedure and report fairly and truly the relevant facts known to him, irrespective of whether or not these facts favour the Person Concerned. Persons and entities other than ESA Staff Members are invited to fully cooperate with the Investigation Team.

The Investigation Team may carry out the different acts described in this Instruction and the present Annex jointly or through one of its members designated by the Chair of the Investigation Team. In this case any reference to the Investigation Team shall be taken to mean the member designated by the Chair of the Investigation Team.

6. Rights of Person(s) Concerned and witnesses

The Chair of the Investigation Team must notify in writing the Person(s) Concerned of the opening of the investigation procedure within three months after the preliminary fact finding, except where the Investigation Team has serious reasons to believe that such notification might endanger the outcome of the investigation; such reasons must be stated in a written decision of the Investigation Team. The decision shall be attached to the investigation report drawn up in accordance with Article 8 of the present Annex.

The Person Concerned has a right to know the allegations that are made against him/her as well as the right to be heard, to bring forward any oral or written evidence he/she sees fit and to call for witnesses. The Investigation Team shall duly record and take into account such evidence.
If the Person Concerned is a Staff Member, at the time of the interview, he/she may:

- be assisted by one active Staff Member of his/her choice, typically by a representative of the ESA Staff Association;
- if he/she is prevented from appearing due to duly justified health reasons, elect to be represented by a Staff Member of his/her choice;

without prejudice of the possibility for the Staff Member to have otherwise recourse to the assistance and support by an external lawyer during the Investigation Procedure, e.g. for the preparation of the interview and written comments.

The Investigation Team shall remind the Person Concerned of the above possibilities in advance of the interview.

At the end of any interview, records will be drawn up in writing and signed by the persons present. They will be attached to the investigation report and subsequently might be used as evidence in disciplinary action or court proceedings. The person interviewed shall receive a copy of the record of his/her interview or the record of the interview conducted with his/her representative.

In order to guarantee confidentiality during the investigation procedure, persons interviewed and persons assisting or representing them in the interview shall sign a confidentiality undertaking.

At the end of the investigation procedure, the Chair of the Investigation Team shall notify in writing the Person(s) Concerned if the Director General has decided not to take further action.

7. Duration of the investigation

In general, the investigation procedure shall not exceed 40 working days from the date that the Person Concerned has been notified of the opening of the investigation procedure; it may however be extended by a further period of 20 working days and in exceptional circumstances even further.

8. Summary of findings and recommendation

At the end of the investigation procedure, the Investigation Team shall draw up an investigation report, specifying the facts established, the financial loss if any or a best estimate of such loss and the findings of the investigation. The Investigation Team shall also report on the lessons learned and give recommendations on the actions to be taken in consequence. The official records of the interviews shall be annexed to the report. The report and the recommendations shall be signed by all the members of the Investigation Team and submitted to the Director General.
After receiving the investigation report, the Director General shall decide on the course of actions to be taken. In the event of Fraud being established, the Director General may in particular decide to take disciplinary action by referring the case to the Director of the ESA Staff Member and the Head of the Department in charge of personnel matters, as the case may warrant, or refer the case to national administrative or judicial authorities. The investigation procedure established in the present Annex does not preclude the immunity granted to the ESA Staff Members of the Agency under Annex I of the ESA Convention, nor the duty to waive such immunity under the conditions set out in Annex I of the ESA Convention.

9. Confidentiality and personal data protection

All aspects of the investigation shall be conducted confidentially, with due regard to preserving the privacy of the Person Concerned and respecting the ESA Security Directives and the applicable rules on Personal Data Protection. Information obtained in the course of the investigation, in whatever form, may not be communicated to persons other than those with a need to know, nor may it be used for purposes other than the investigation or resulting actions or proceedings. If following the investigation, disciplinary proceedings are opened, the Person(s) Concerned shall have access to the facts established during the investigation, without prejudice to other persons’ right of privacy and confidentiality.

The ESA Internal Audit shall enter all cases of preliminary fact-finding and investigation procedures into a repository. The records in the repository shall not contain any personal data. If following the preliminary fact-finding exercise, the Head of ESA Internal Audit decides not to open an investigation procedure, the grounds for that decision shall be given and recorded. Only the Director General, the ESA Internal Audit and the Audit Advisory Board shall have access to the repository.

In accordance with the ESA Financial Regulations, the Audit Commission shall be notified annually of all suspected or known instances of fraud affecting the financial statements.

The reports referred to in Article 8 of the present Annex might further be used (by the Director General) to suspend economic operators from participating in the Agency’s procurements in accordance with the ESA Procurement Regulations, if they have been found guilty of grave professional misconduct proven by any means which the Agency can justify.

---

10 Article 50.2 of the ESA Financial Regulations at the time of entry into force of the present Instruction and its Annex.

11 Articles 18.1f) and 19.3 of the ESA Procurement Regulations at the time of entry into force of the present Instruction and its Annex.