

Investigations by the European Anti-Fraud Office (OLAF)

2006/0084(COD) - 17/03/2011 - Modified legislative proposal

PURPOSE: proposal to reform the European Anti-Fraud Office (OLAF).

BACKGROUND: the European Anti-Fraud Office (OLAF) was established in 1999. In 2006, the Commission put forward a proposal for amending Regulation 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) with a view to achieving better operational efficiency and improved governance for the Office. The proposal of the Commission was discussed both in the Council and the European Parliament. The latter adopted a resolution on 20 November 2008 in first reading under the co-decision procedure. It put forward approximately one hundred amendments to the Commission's proposal. Many amendments have been welcomed by the Commission.

At the request of the Czech Presidency of the Council (January-June 2009) the Commission presented in July 2010 a Reflection paper on the reform of the Office. This document outlines possible solutions to take forward the current legislative process. The European Parliament welcomed in October 2010 the Reflection paper and asked the Commission to take up the legislative procedure again. On 6 December 2010, the Council adopted conclusions on the Reflection paper put forward by the Commission.

The Commission has now prepared an **amended proposal** that takes into account the positions expressed so far and looks forward to achieving the current legislative reform as soon as possible.

IMPACT ASSESSMENT: no impact assessment was carried out.

LEGAL BASIS: Article 325 of the Treaty on the Functioning of the European Union, in conjunction with Article 106a of the Treaty establishing the European Atomic Energy Community.

CONTENT: the aim of the amended proposal is to improve the efficiency, effectiveness and accountability of OLAF, while safeguarding its investigative independence. The proposal also aims to ensure that the fundamental rights of the persons under investigation are fully respected and even strengthened. The Commission focuses on certain key areas.

Establishing better procedures for cooperation and information exchange between OLAF, the EU institutions and other relevant bodies, such as Europol and Eurojust. Instead of a formal structured dialogue between the Supervisory Committee and the institutions on the investigative function of the Office, a **periodical exchange of views** is now proposed to increase the Office's governance while respecting its operational independence. The exchange of views will be established between the European Parliament, the Council, the European Commission, with the participation of the Office and the Supervisory Committee. This exchange of views should contribute to the exchange of information and opinion between the stakeholders for an improved efficiency of the Office's activity. The exchange of views should not interfere with the conduct of investigations and it should relate to the strategic priorities for the Office's investigative policies, the reports on the activities of the Supervisory Committee and that of the Director-General of the Office, the relations between the Office and the EU institutions, bodies, offices and agencies; the relations between the Office and the competent authorities of the Member States and the effectiveness of the work of the Office with regard to investigations and that of the Supervisory Committee. In line with the opinions expressed by the institutions, the exchange of views will be flexible: it will take place periodically or upon request of one of the above-mentioned institutions, the Office or the Supervisory Committee.

OLAF already has a cooperation arrangement with Eurojust, and the amended proposal gives OLAF the option of concluding administrative arrangements with Europol, as well as with third countries' competent authorities and with international organisations.

Facilitating improved relations between OLAF and Member State authorities in order to allow better on-the-ground investigations and greater follow-up on OLAF cases. The Commission proposes the following:

- an authority (anti-fraud coordination service) should be designated by each Member State to assist the Office in its collaboration with the national competent authorities. This does not mean that a new authority would be established. Experience shows that due to the different structures in each Member State, it is often very difficult for the Office to address the competent authority in a given Member State ;
- **regular monitoring** is especially important for internal investigations, to ensure that disciplinary action or other measures can be taken by IDOC or equivalent entities in other institutions, bodies, offices or agencies. It is therefore proposed that Member States report upon OLAF's request on the follow-up given to the information transmitted to them by OLAF. In order to avoid unnecessary administrative burden for Member States, the amended proposal provides that they will report to OLAF upon its request on the actions taken and progress made following transmission of information by OLAF. .

Clarifying OLAF's objectives and the role of the Director General, and looking at how OLAF's work can be carried out in a more efficient manner. Clear recommendations are set out on the **duration of investigations** and on the targeted use of OLAF resources. OLAF's Director General will continue to be ultimately responsible for deciding which investigations OLAF carries out. However, the Commission proposes that an **internal body should be established** within OLAF, to help with these decisions. The Director-General will consult the internal body when opening an investigation, before closing an investigation and whenever he deems necessary. To clarify the internal decision-making procedures with respect to the role of the Director-General of the Office, the Director-General may also delegate in writing the direct execution of investigations to individual members of the staff of the Office. The term of the Director-General should be non-renewable in order to reinforce his independence. To ensure continuity, and in light of recent experience, deputising rules are provided in the amended proposal. The Commission also proposes that:

- the Supervisory Committee should examine the length of investigations based on information supplied by the Office. In cases where investigations cannot be closed after 12 months, the Office should inform the Supervisory Committee of the reasons preventing the finalisation of the investigation at intervals of 6 months. This way, a continuous monitoring of the duration of investigations will be ensured until their closure;
- the institutions, bodies, offices and agencies whose member/staff member or budget is concerned by an investigation should be informed by the Office without undue delay. In that way, the institutions, bodies, offices and agencies may take precautionary administrative measures. It is their responsibility to ensure the best protection of the EU's financial interests and to avoid any continuation of an irregularity or potential increase of financial loss. Their information is therefore absolutely necessary. For exceptional cases, in which the confidentiality of the investigation cannot be ensured (for instance if the highest management or political level of an institution, office, body or agency is concerned), the Office should use appropriate alternative channels of information;
- the amended proposal further develops the **de minimis approach** of the 2006 proposal: with regard to the opening of investigations, the Office should take into account the investigation policy priorities and the need for efficient utilisation of OLAF's resources. With specific reference to internal investigations, OLAF should consider whether such investigations are best carried out by the institution, body, office or agency concerned, or by OLAF itself. Furthermore, in cases where OLAF, having carried out an internal investigation, considers that, in the light of the nature of the

facts and the scale of the financial damage, internal measures allow for more appropriate follow-up, it should forward the case to the Investigation and Disciplinary Office of the Commission (IDOC) or to the institutions, bodies, office or agency concerned, instead of sending it to the competent national judicial authorities. Thus, the de minimis policy (cases where the Office decides not to open an investigation or not to forward its findings to the competent national judicial authorities) has been clarified in the amended proposal. When implementing the de minimis policy, the Office should apply precise guidelines, as proposed by the Council in its Conclusions of 6 December 2010;

- the **distinction between internal and external investigations** should be limited to the extent strictly necessary. This would facilitate the conduct of investigations. As experience has shown, investigations can start as external ones and later lead to internal investigations or vice versa. Under the current legal framework, persons concerned in internal investigations have a duty to cooperate with the Office according to the Staff Regulations or the Protocol on the Privileges and Immunities of the European Union. The Office's investigative powers are also more detailed in internal investigations. The procedural and fundamental rights of the persons concerned have to be fully respected, be it in an internal or an external investigation;
- the **role of the Supervisory Committee** is further clarified. It should expressly be mandated to monitor information exchanges between the Office and the institutions, bodies, offices and agencies and the developments regarding the application of procedural guarantees. It should also monitor in a general and systemic way the developments regarding the duration of investigations, without interfering with the conduct of investigations. Regarding the appointment of the members of the Supervisory Committee, a staggered renewal is envisaged to preserve its expertise. The Supervisory Committee should be consulted for the appointment of the Director-General and the designation of the deputising Director(s) and should be informed about transmissions to judicial authorities.

Strengthen the procedural rights of persons concerned by the Office's investigations: the amended proposal makes the procedural guarantees clearer and more transparent and to have them apply to all investigations conducted by the Office, both internal and external. These guarantees respect the fundamental rights recognised in particular by the Charter of Fundamental Rights of the Union. Common procedural rights for both internal and external investigations are provided by this proposal. These include the right for the person concerned by an investigation to make his/her views known before conclusions referring by name to him or her have been drawn; the right to be given a summary of the matters under investigations and to be invited to comment on these matters; the right to be assisted by a person of his/her choice during an interview; the right to use the EU language of his or her choice; the principle that any person concerned by an investigation shall be entitled to avoid self-incrimination. The practical application of these rights should be reflected in the Office's manual of procedures for investigations (OLAFmanual) as adopted by the Director-General. In the proposal of 2006, the Commission proposed a Review Adviser to whom cases may be referred for his or her independent opinion regarding the procedural guarantees. In order to avoid overlapping with the tasks of the Supervisory Committee and to avoid additional formal structures while guaranteeing an effective, efficient, and independent handling of individual complaints, the Commission now proposes that a review procedure be set up, by the Director-General within the Office. The person or persons entrusted with the review procedure should act in full independence. The Director-General of the Office will report to the institutions about the measures taken for the setting up of the review procedure.

As to the fundamental right to the protection of personal data, the amended proposal provides for clarification and more detailed provisions implementing the principles of Regulation (EC) No 45/2001, in particular the requirement that OLAF appoint a Data Protection Officer.

The Director-General should adopt, after consultation of the Supervisory Committee, the person or persons entrusted with the review procedure, and the Office's Data Protection Officer, and the OLAF manual of procedures. This manual shall provide guidelines on the practical application of the administrative investigations by the Office.

BUDGETARY IMPLICATIONS: the proposal has no impact on the EU budget.