

Investigations by the European Anti-Fraud Office (OLAF)

2006/0084(COD) - 12/07/2011 - Court of Auditors: opinion, report

COURT OF AUDITORS OPINION No 6/2011 (pursuant to Article 325 TFEU) on the amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999

The Court of Auditors notes that the political guidelines formulated by the Commission's President to the effect that OLAF should be given full independence outside the Commission have not been addressed. On the contrary, the draft Commission decision reinforces the Commission's role in the process of selecting OLAF's Director-General and restricts the Director-General's appointing-authority powers with regard to the Office's staff. The Court's observations take into account the recommendations made in previous opinions (see summary of 6/12/2006) of the Court as well as the findings of the audit of the Office, as set out in Special Report No 2/2011.

General observations

A need to simplify and consolidate anti-fraud legislation: the Court regrets that the Commission has not followed up the Court's repeated recommendation to simplify and consolidate the anti-fraud legislation currently in force and to address weaknesses in OLAF's powers and procedures in this context. Any such recasting should include the OLAF Regulation, Council Regulation No 2988/95 on the protection of the European Communities' financial interests and Council Regulation No 2185/96 concerning the on-the-spot checks and inspections carried out by the Commission. Without such a recasting, legal certainty is undermined due to the coexistence of overlapping, incoherent or even incompatible provisions which are difficult to understand and apply.

A need to clearly define the notion of 'financial interests of the Union': the Court reiterates its recommendation that the notion of 'the financial interests of the Union' which is central to all anti-fraud legislation should be clearly defined, and amended in the light of recent jurisprudence. Furthermore, it draws attention to the need to amend Council Regulation No 2988/95 in connection with the fight against VAT fraud.

A need for independent control of the legality of investigations in progress: the Court appreciates the proposal to introduce provisions for procedural guarantees and takes note of the proposal for an internal review procedure. It regrets, however, that the objective of independent control of the legality of investigative acts in progress will not be achieved under the Commission proposal. For such a control to be effective it must be carried out by a body or a person independent of OLAF which has the power to issue binding opinions. This control of investigative acts in progress is particularly necessary for cases where the persons concerned are not informed that they are subject to an investigation in order to preserve its confidentiality.

A need for effective and equivalent protection of financial interests: the new Article 325(4) TFEU now explicitly requires the European Parliament and the Council to adopt the necessary measures with a view to affording effective and equivalent protection of the financial interests of the Union in all the Union's institutions, bodies, offices and agencies. Currently OLAF's investigations are subject to differing conditions laid down in individual internal decisions by the Union's institutions, bodies, offices and agencies. The Court believes that such internal decisions may not necessarily be justifiable in all cases and

may result in limiting the scope of OLAF's investigative activities and so jeopardising the effective and equivalent protection of the financial interests of the Union.

A need for clear rules to investigate serious misconduct in non-financial matters: since it is based on Article 325 TFEU, the scope of the OLAF Regulation is limited to investigations concerned with irregularities affecting the financial interests of the Union. There is a need for clear rules to investigate internal cases of serious misconduct which do not concern the financial interests of the Union but are liable to result in disciplinary and/or criminal proceedings, or in proceedings before the European Court of Justice. Existing legislation in this respect is very succinct and applies only to staff concerned by the Staff Regulations and the Conditions of Employment of Other Servants of the EU. The Court believes that the legislator ought to consider what options are available under the Treaty in order to ensure that all cases of serious misconduct are properly investigated.

A need to keep the text concise, clear and consistent: the Court considers that, taken as a whole, the amendments fail to ensure that the provisions of the OLAF Regulation are as concise, clear and consistent as possible. An example in this respect is the use of the terms 'the Office' and 'the Director-General of the Office' which does not seem to follow any particular logic and is further complicated by the introduction of specific provisions for delegating the Director-General's powers to other staff of the Office. The Court gives other examples of vague wording and unclear drafting.

Specific observations

Priority of the core investigative function: the Court recommends that a new wording of the OLAF Regulation should clearly stress the priority of OLAF's core investigative function over other tasks. OLAF's effectiveness critically depends on devoting a greater share of its resources to investigative activities.

Clarification of key notions needed: the proposal is incomplete as it does not correctly define all the required terms and certain definitions, such as "administrative investigation" require amendment.

Amendments to Regulation (EC) No 2185/96 are required, in order for it to be consistent with the proposal, which extends the use that can be made of the procedures laid down in Regulation No 2185/96 to a number of situations which are not envisaged in the Regulation.

Clarifying the importance of the Staff Regulations for internal investigations: the Court recommends that text on internal investigations should contain a clear reference to the Staff Regulations given their importance for OLAF's internal investigations.

Avoiding confusion with regard to the opening of investigations: the proposed text on the opening of investigations contains complicated provisions that are vaguely worded, and need to be clarified, with particular references to the time frames proposed.

Reinforcing procedural guarantees: the Court makes several recommendations particularly with regard to the rights of witnesses who are interviewed.

Internal review procedure: the Court considers that the required complete independence in the post is not guaranteed as those entrusted with the review procedure remain under the authority of the Director-General. Furthermore, it is not clear whether, and when, the Supervisory Committee will receive copies of the opinion which the person in charge of a review of a case has submitted to the Director-General and of the reasoned reply which has been sent to the person concerned.

The Court suggests **creating the function of a review officer**, who should neither be appointed by the Director-General nor be subject to his authority.

Cooperation with Eurojust, Europol and international organisations: the Court recommends that objective criteria should be introduced to identify appropriate cases for collaboration, similar to those contained in the 'Practical Agreement on arrangements of cooperation between Eurojust and OLAF'.

Clarifying the role of the Supervisory Committee: the Court recommends that the Committee's monitoring should extend to exchanges of information between the Office and the authorities of the Member States, including the exchange of information through Eurojust. It also recommends clarification that the Committee needs access to OLAF's case files in order to be able to detect instances of interference with the Office's independence.

The 'exchange of views procedure' may undermine investigative independence: such a procedure could be perceived as undermining the independence of the Director-General in defining the investigative priorities of the Office. Furthermore, such a procedure could evolve into a kind of de facto governing board of the Office without the responsibilities of those participating in it being clearly defined and without any indication of the procedural framework for such an exercise.

Clarifying the role of the Director-General: the Court sees no valid reasons for the Commission's proposal to delete from the text the obligation to report to the Court of Auditors on the findings of investigations carried out by the Office. It also draws attention to the risk that certain provisions in the proposal might result in diluting key responsibilities of the Director-General.