

OPINION No 6/2005**on a proposal for a Regulation of the European Parliament and of the Council amending Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)***(pursuant to the second subparagraph of Article 248(4) and to Article 279(2) of the EC Treaty)*

(2005/C 202/02)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 280 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 160c thereof,

Having regard to the proposal for a Regulation of the European Parliament and of the Council amending Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999,

Having regard to the request for an opinion submitted to the Court of Auditors by the Council on 8 March 2004,

HAS ADOPTED THE FOLLOWING OPINION

The background to the proposal

1. The proposal is based on the progress report submitted by the Commission in April 2003 under the terms of Article 15 of Regulation (EC) No 1073/1999 of the European Parliament and the Council concerning investigations conducted by OLAF ⁽¹⁾. It is also a follow-up to the undertaking given by the President of the Commission to the Committee on Budgetary Control on 18 November 2003 during the presentation of the Commission's legislative and work programme for 2004. The Commission proposal seeks to strengthen OLAF's operational efficiency by allowing it to concentrate on its priorities and to speed up its investigations by clarifying certain procedures. However, the President's statement went further than the proposal put forward by the Commission in that, apart from adjustments to the investigation procedures, it held out the prospect of a reorganisation of the Office itself.

⁽¹⁾ COM(2003) 154 final of 2 April 2003.

2. The President of the Commission had, in fact, stated that refocusing OLAF's activities meant that 'there might be a case for reassigning to Commission departments certain horizontal tasks that are unrelated to investigations', and that the governance of OLAF needed to be reconsidered ⁽²⁾. Finally, he proposed 'to increase the effectiveness of OLAF — as it faces a growing workload in an enlarged Union — by increasing its staff resources, refocusing its tasks on its investigative function and adapting the Regulation ...'. Of the proposals made by the President of the Commission, only the last one (adaptation of the Regulation) is concerned by the proposal to amend Regulation (EC) No 1073/1999. A refocusing of the Office's actual tasks would have necessitated an amendment to the Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office ⁽³⁾.

3. The preamble shows that the aim of the proposal is to amend the Regulation in five main areas, without in any way calling into question the powers and responsibilities of the Member States, whilst respecting the principles of subsidiarity and proportionality. These five areas are as follows:

- (a) as regards cases to be pursued actively, the Office should be free to decide, on the basis of its own priorities, whether or not to open an investigation (assertion of the principle of discretion in the opening of investigations);
- (b) as regards internal investigations (administrative investigations within the institutions, bodies, offices and agencies), the Office should inform the institutions or bodies where investigations are in progress or where administrative measures may be required in order to protect the Union's interests;
- (c) in internal investigations and in cases of fraud in connection with contracts financed by Community funds (direct expenditure being dealt with by external investigations), the Office should be able to carry out inspections on the premises of economic operators in the Member States in accordance with the procedures laid down by Council Regulation (Euratom, EC) No 2185/96. It should also have unimpeded access to information held by the Community institutions and bodies when carrying out external investigations;

⁽²⁾ 'Governance' must be understood to mean not only the management arrangements but also the supervisory arrangements (the Supervisory Committee).

⁽³⁾ Decision No 1999/352/EC, ECSC, Euratom of 28 April 1999 (OJ L 136, 31.5.1999).

(d) for the sake of fairness and legal certainty, the procedural guarantees relating to the rights of individuals should be clarified as regards both internal and external investigations;

(e) the role of the Supervisory Committee should be extended to monitoring the duration of investigations and to protecting individuals, both in internal and external investigations. It is therefore proposed to increase the number of Committee members by two. The Commission also proposes that one member of the Committee should be responsible for preparing the work on the Office's observance of individual rights.

4. The comments which follow take into account the findings of the audit of the Office, as set out in Special Report No 1/2005 of the Court of Auditors.

Application of the principle of discretion in the opening of investigations

5. The application of the principle of discretion in the opening of investigations can be looked upon as a matter of efficiency, and the Court welcomes the change. However, the immediate practical effect will be limited. As is shown in the Special Report, the number of well-founded denunciations that the Office receives is not so large that it is obliged to make a choice between investigations to undertake.

6. Setting priorities and time-tabling are related matters. Experience has shown that many of the investigations undertaken by the Office take longer than a reasonable period (12 to 18 months). That being so, it would be useful to fix deadlines for the investigations.

Duty to inform

7. The Court supports the proposal to reinforce the Office's duty to inform the institutions or bodies concerned about the opening of an investigation. The deletion in the present Article 4(5) of the right to defer such information makes, however, for a certain ambiguity. The lack of a provision on this point means that the possibility of withholding information is not excluded. The Commission's proposal ought to be modified in order to ensure that the requirement to notify is not set aside without justification on the pretext that secrecy is necessary to guarantee the efficiency of the investigation.

Extended use of the inspection procedures in Regulation (Euratom, EC) No 2185/96 ⁽¹⁾

8. Regulation (Euratom, EC) No 2185/96 provides for 'on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests' concerning agricultural support, Structural Funds and own resources.

9. The proposal provides for the application of this regulation to be extended to direct expenditure (internal policies, external aid, etc.). This ought to strengthen the range of intervention measures available to the Office, in particular as regards cooperation with the national authorities. The Court's audits have confirmed that a weakness in this respect exists. On this point, therefore, the Commission's proposal is to be welcomed.

Strengthening of procedural guarantees

10. The Commission considers it appropriate for the fundamental principles that should govern investigations to be stated in the regulation. The Court endorses that view.

The role and number of the members of the Supervisory Committee

11. Compliance with the legal procedures for investigations must be ensured. According to Regulation (EC) No 1073/1999 (Article 14), complaints during the course of an investigation regarding enquiries by OLAF investigators are to be made to the Director of the Office. This is not a satisfactory solution as it does not grant the complainant an independent review of the demand. As an alternative, individuals under investigation have turned to the Ombudsman when they considered that their fundamental rights had been infringed. This procedure has proved to be unsatisfactory and it has on occasions led to situations where the Ombudsman has been perceived of as intervening in the course of investigations. The Commission's proposal entrusts the Supervisory Committee with the task of controlling the conduct of the investigators. This is not a better solution, since it runs counter to the principle that the Committee should not intervene in investigations in progress.

12. The review of the legality of investigative actions ought to be entrusted to a body which is impartial and cannot become involved in the conduct of investigations because of other aspects of its mandate.

⁽¹⁾ OJ L 292, 15.11.1996.

13. The Commission's proposal does not clarify the role of the Supervisory Committee as regards the incompatibility between the principle of non-intervention in investigations and the duty to obtain an opinion from the Committee during an investigation, which arises either where the 12-month period has been exceeded or where the Committee has to be informed before a case is forwarded to the judicial authorities. It therefore appears necessary to state even more clearly the principle that the Supervisory Committee shall not intervene in ongoing investigations.

14. The Commission proposes to increase the number of members of the Supervisory Committee from five to seven. This is not based on any objective analysis of the Committee's tasks and operating procedures. The members' duties are sporadic and

do not enable them to study the files in depth. In order for them to be able to work more effectively, it would be preferable for at least some of them to have earlier experience in Community affairs, especially in the investigative field.

15. According to Regulation (EC) No 1073/1999 (Article 11(6)), the Supervisory Committee is obliged to hold at least 10 meetings per year. However, if the Committee is to concentrate on safeguarding the independence of OLAF's investigative function, it must not be put under an obligation to meet almost monthly. Furthermore, a review of the Supervisory Committee's role and operational procedures should lead to a reduction in the number of posts in its secretariat.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 9 June 2005.

For the Court of Auditors
Hubert WEBER
President
