

III

(Preparatory acts)

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

(2011/C 254/01)

THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 325(4) thereof,

Having regard to the Commission's amended proposal ⁽¹⁾,

Having regard to the European Parliament's request for an opinion on the abovementioned proposal, received at the Court on 13 May 2011,

HAS ADOPTED THE FOLLOWING OPINION:

Introduction

1. The European Anti-Fraud Office (OLAF) was created in 1999 ⁽²⁾. OLAF is a Directorate-General of the Commission but is functionally independent with respect to its investigative work. Regulation (EC) No 1073/1999 ⁽³⁾ (hereinafter 'the OLAF Regulation') assigns OLAF the general objective of contributing to the protection of the Union's financial interests, and confers on it two principal tasks: conducting administrative investigations and providing the Member States with assistance in

order to protect the Union budget against fraud, including contributions to the design and development of methods of fighting fraud and any other illegal activity affecting the financial interests of the Union.

2. Furthermore, the Commission has entrusted OLAF with the preparation of Commission legislative and regulatory initiatives with the objective of fraud prevention, and any other Commission operational activity in relation to the fight against fraud, including the management of funding programmes.

3. For its investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union, the Office cannot rely on the OLAF Regulation alone. The use of an additional legal basis is always necessary to empower the Office to perform investigative measures in specific cases, both for external investigations in the Member States and for internal investigations within the EU institutions, bodies, offices and agencies ⁽⁴⁾.

4. In addition, OLAF is also empowered by the Commission to investigate any other act or activity in breach of EU provisions, including serious breaches of obligations linked to the performance of their professional activities by staff and members of the institutions and bodies of the Union ⁽⁵⁾. The OLAF Regulation is not applicable to such cases which do not have an impact on the financial interests of the Union. OLAF has to rely instead on Article 86 of the Staff Regulations, and/or on internal decisions adopted by the institutions, that envisage such investigations.

⁽¹⁾ COM(2011) 135 final of 17 March 2011 – 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.

⁽²⁾ Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20).

⁽³⁾ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1). The provisions of Regulation (Euratom) No 1074/1999 are identical to those of Regulation (EC) No 1073/1999 but have been adopted on a different legal basis (Article 203 of the Treaty establishing the European Atomic Energy Community).

⁽⁴⁾ For the most important legal instruments see the Annex to this opinion.

⁽⁵⁾ See Article 2 of Commission Decision 1999/352/EC, ECSC, Euratom.

5. The revision of the OLAF Regulation has been under constant discussion since 2003 ⁽¹⁾. This amended proposal is the third attempt to modify the OLAF Regulation. The two earlier proposals failed to obtain a consensus ⁽²⁾. To prepare the ground for the third amended proposal, a reflection paper on the reform of OLAF was issued in July 2010 ⁽³⁾.

6. A draft for an amended Commission decision ⁽⁴⁾ has also been presented with a view to maintaining OLAF's current status as a Commission Directorate-General.

7. The political guidelines formulated by the Commission's President ⁽⁵⁾ to the effect that OLAF should be given full independence outside the Commission have not been addressed ⁽⁶⁾. 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 ⁽⁷⁾.

8. The observations which follow take into account the recommendations made in previous opinions ⁽⁸⁾ of the Court as well as the findings of the audit of the Office, as set out in Special Report No 2/2011 ⁽⁹⁾.

⁽¹⁾ See the Commission report on the evaluation of OLAF's activities, COM(2003) 154 final of 2 April 2003.

⁽²⁾ The first proposal was issued in February 2004 (see COM(2004) 103 final of 10 February 2004) and withdrawn in March 2007. The second proposal was issued in May 2006 (see COM(2006) 244 final of 24 May 2006) and is now superseded by the amended proposal under examination in this opinion.

⁽³⁾ SEC(2010) 859 of 6 July 2010.

⁽⁴⁾ Preliminary Draft Commission Decision amending its Decision (1999/352/EC, ECSC, Euratom) of 28 April 1999 establishing the European Anti-Fraud Office, SEC(2011) 343 final of 17 March 2011.

⁽⁵⁾ '(...) I would like to see further steps, for instance in the area of financial management: now that it is well-established, OLAF should be given full independence outside the Commission.' See p. 37 of the Political Guidelines for the next Commission by President Barroso, 28 October 2009: http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf

⁽⁶⁾ In his mission letter of 27 November 2009 the President tasked the Commissioner with responsibility for Taxation, Customs Union, Audit and Anti-Fraud to prepare the establishment of OLAF as a fully independent service outside the Commission. See: http://ec.europa.eu/commission_2010-2014/mission_letters/pdf/semeta_taxation_en.pdf

⁽⁷⁾ To the 'extent necessary to preserve the Office's independence' (proposed new Article 6(1) of the Decision).

⁽⁸⁾ Opinion No 8/2005 on a proposal for a Regulation of the European Parliament and of the Council on mutual administrative assistance for the protection of the financial interests of the Community against fraud and any other illegal activities (OJ C 313, 9.12.2005, p. 1) and Opinion No 7/2006 on a 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) (OJ C 8, 12.1.2007, p. 1).

⁽⁹⁾ Follow-up of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office: <http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions>

General observations

9. The Court agrees with the Commission that there is a need to improve the efficiency, effectiveness and accountability of OLAF, while safeguarding its investigative independence ⁽¹⁰⁾.

A need to simplify and consolidate anti-fraud legislation

10. The Court regrets that the Commission has not followed up the Court's repeated recommendation ⁽¹¹⁾ to simplify and consolidate the anti-fraud legislation currently in force and to address weaknesses in OLAF's powers and procedures in this context ⁽¹²⁾. Any such recasting should include the OLAF Regulation, Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities' financial interests ⁽¹³⁾ and Council Regulation (Euratom, EC) No 2185/96 concerning the on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities ⁽¹⁴⁾.

11. 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 (see also paragraphs 22 to 24 and 35).

A need to clearly define the notion of 'financial interests of the Union'

12. The Court reiterates its recommendation ⁽¹⁵⁾ that the notion of 'the financial interests of the Union' which is central to all anti-fraud legislation should be clearly defined.

⁽¹⁰⁾ See in particular recitals 2, 5, 7, 9, 11 and 19 of the amended proposal and the Commission note IP/11/321 of 17 March 2011 which provides a summary of the amended proposal.

⁽¹¹⁾ See paragraph 36 of Opinion No 8/2005, paragraph 5 of Opinion No 7/2006, paragraph 112 of Special Report No 8/2007 (OJ C 20, 25.1.2008, p. 1) and paragraph 71 (follow-up recommendation 3) of Special Report No 2/2011: <http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions>

⁽¹²⁾ The European Parliament took up the Court's recommendation as early as 2006 (see paragraphs 28 to 32 of the European Parliament Resolution on protection of the financial interests of the Communities and the fight against fraud – 2004 annual report of 15 June 2006 (P6_TA(2006)0277) (OJ C 300 E, 9.12.2006, p. 508)). The Council also advocated that the legal instruments to combat fraud should be consolidated into a single regulatory framework (see paragraph 6 of the Council conclusions on the reform of the European Anti-fraud Office, as adopted by the Council on 6 December 2010: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/118236.pdf).

⁽¹³⁾ OJ L 312, 23.12.1995, p. 1.

⁽¹⁴⁾ OJ L 292, 15.11.1996, p. 2.

⁽¹⁵⁾ See paragraph 38 of Opinion No 8/2005.

13. Furthermore, the Court draws attention to the case-law of the Court of Justice⁽¹⁾, which rejected in 2003 a restrictive interpretation of the notion 'financial interests' based on the definition of 'irregularity' in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95. However, the Commission never proposed to amend the Regulation in the light of this jurisprudence.

14. Amending⁽²⁾ Council Regulation (EC, Euratom) No 2988/95 is particularly important in connection with the fight against VAT fraud⁽³⁾. Such fraud is a major threat not only to the Member States' budgets but also to the collection of the Union's own resources⁽⁴⁾.

A need for independent control of the legality of investigations in progress

15. The Court appreciates the proposal to introduce provisions for procedural guarantees and takes note of the proposal for an internal review procedure (see also paragraphs 37 to 40). The Court 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

16. The Court points out that the former Article 280(4) EC has been reworded to Article 325(4) TFEU, which 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⁽⁵⁾. While the Court understands that the inherent nature of certain insti-

tutions, bodies, offices or agencies of the Union may require to be taken into account, it also 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

17. As 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 European Union⁽⁶⁾. 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

18. 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⁽⁷⁾ and is further complicated by the introduction of specific provisions for delegating the Director-General's powers to other staff of the Office. Another example is the vague wording of the proposed new Article 4(6) which stipulates that 'the Office shall use appropriate alternative channels of information' to provide notification to an institution of cases where its highest management or political level is concerned by an investigation.

Specific observations

Priority of the core investigative function

19. The Court recommends that a new wording of Article 1 of the OLAF Regulation should clearly stress the priority of

⁽¹⁾ Paragraphs 82 to 95 of the Judgment of the Court of 10 July 2003 in Case C-11/00 *Commission of the European Communities v European Central Bank* (OJ C 213, 6.9.2003, p. 1).

⁽²⁾ Unless the issue is addressed by a recast of anti-fraud legislation.

⁽³⁾ VAT-based revenue is part of the EU's own resources. However, the definition of the notion of 'irregularity' by Council Regulation (EC, Euratom) No 2988/95 does not cover VAT fraud as it only applies to infringements affecting own resources collected directly on behalf of the Communities.

⁽⁴⁾ See Special Report No 8/2007 concerning administrative cooperation in the field of value added tax (OJ C 20, 25.1.2008, p. 1).

⁽⁵⁾ See Article 4(1) of Regulation (EC) No 1073/1999.

⁽⁶⁾ See Article 86(2) of the Staff Regulations.

⁽⁷⁾ The current Regulation, starting from the assumption that the Director-General holds all decision-making powers conferred upon the Office, seeks to distinguish between situations where the Director-General is allowed to delegate his powers to other staff of the Office and situations where the Director-General is not allowed to delegate his powers. See also in this connection the draft recommendation by the European Ombudsman of 9 December 2010 in his enquiry into complaint 856/2008/BEH against OLAF, paragraphs 92 to 104.

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

20. The Court welcomes the intention to define a number of key notions in the proposed new text of Article 2. However, the proposal is incomplete as it only covers the terms 'administrative investigations', 'person concerned' and 'Staff Regulations'. Definitions, or references to the relevant legal texts where such definitions already exist ⁽¹⁾, of other basic terms such as 'fraud', 'corruption', 'serious crime', 'irregularity', 'competent authority of the Member State', 'directly concerned', 'indirectly concerned', 'witness', 'informer', 'interview' and 'statement' should also be included. Furthermore, the Regulation should define what is to be understood by 'administrative investigations of the Member States' and should use distinctive terminology to cover situations where the initial allegations against a person concerned could not be substantiated ⁽²⁾.

21. The Court draws attention to the fact that the definition of the notion of 'administrative investigation' given in the proposed Article 2 is inconsistent with the proposed wording of Article 3(2). Article 2 limits OLAF's task to establishing the irregular nature of the activities under investigation ⁽³⁾. The Office is not required to establish whether an irregularity has occurred as a consequence of an intentional act or omission. Article 3(2) provides that OLAF should aim at establishing that there has been fraud, corruption or any other illegal activity. As a consequence, OLAF would thus need to investigate individual responsibilities of natural persons not belonging to the EU institutions, bodies, offices or agencies for acts which are likely to result in penal sanctions.

Amendments to Regulation (EC) No 2185/96 are required

22. The current Article 3 of the OLAF Regulation provides that, for the purpose of its external investigations, OLAF exercises the power conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot checks and inspections on economic operators. The proposed new Article 3(2) and the proposed amendment to Article 4(3) extend the use that can be made of the procedures laid down in Regulation (Euratom, EC) No 2185/96 to a number of situations which are not envisaged in the Regulation ⁽⁴⁾.

⁽¹⁾ Unless the anti-fraud legislation is recast.

⁽²⁾ See paragraph 35 of Special Report No 2/2011.

⁽³⁾ Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 provides that 'irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

⁽⁴⁾ For example, to obtain evidence relevant for the purpose of internal investigations.

23. At the same time, the proposed new Article 3(2) limits the conducting of on-the-spot checks and inspections to cases related to unjustified expenditure, whilst Regulation (Euratom, EC) No 2185/96 also applies in cases of irregularities prejudicing revenue accruing from own resources collected directly on behalf of the Union.

24. As neither a recasting of the anti-fraud legislation (see paragraph 11 above) nor any amendment of Regulation (Euratom, EC) No 2185/96 is proposed, it will not be clear to the reader of this regulation that it also applies for other purposes and under different conditions from those set out therein. As the Court pointed out in its Opinion No 7/2006 ⁽⁵⁾, this is contrary to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation which requires the drafter of acts to take account of the persons to whom they are intended to apply with a view to enabling them to identify their rights and obligations in an unambiguous manner ⁽⁶⁾. If a recasting cannot be agreed, the Commission should propose the consequential amendments to Regulation (Euratom, EC) No 2185/96 in accordance with paragraph 19 of the Agreement.

Stepping up cooperation with the Member States' competent authorities

25. The Court stresses that Article 4(3) TEU requires the Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union. The Court takes note of the proposed new Article 3(3) which aims to ensure that OLAF's staff are allowed access, under the same terms and conditions as the Member States' competent authorities and in compliance with national law, to all information and documents relating to the matter under investigation which prove necessary for the on-the-spot checks and inspections to be carried out effectively and efficiently. The Court understands that this requirement relates not only to information and documents held by economic operators ⁽⁷⁾ but also to any such information held by the authorities and bodies involved in the shared management of Union funds.

26. A new Article 3(4) is proposed, obliging Member States to designate an anti-fraud coordination service which shall ensure effective cooperation and information exchange with the Office. While better coordination is welcome, such a coordination service alone will not be sufficient to address the difficulties OLAF encounters when carrying out on-the-spot

⁽⁵⁾ See paragraph 5.

⁽⁶⁾ See paragraph 3 of the Agreement. Paragraph 16 goes on to stipulate that a legal text should keep references to other legal acts to a minimum (OJ C 73, 17.3.1999, p. 1).

⁽⁷⁾ For economic operators, a similar provision already exists in Article 7 of Regulation (Euratom, EC) No 2185/96.

checks and inspections in the area of direct expenditure. The problem in this specific area is that not all Member States have set up or designated authorities with the necessary powers to support OLAF's investigative measures effectively ⁽¹⁾. The Court suggests that the proposed new Article 3(3) should be amended in such a way that OLAF may be assisted by an appropriate enforcement authority, to enable it to conduct its checks and inspections ⁽²⁾.

Clarifying the importance of the Staff Regulations for internal investigations

27. The Court recommends that an amended Article 4 on internal investigations should contain a clear reference to the Staff Regulations given their importance for OLAF's internal investigations. Article 22a of the Staff Regulations requires transmission to OLAF of any evidence which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, and Annex IX to the Staff Regulations provides rules for the conduct of administrative investigations with a view to disciplinary proceedings.

Avoiding confusion with regard to the opening of investigations

28. The proposed Article 5 on the opening of investigations contains complicated provisions that are vaguely worded. Article 5(1) could be interpreted in the sense that the Office has liberty not to investigate suspected fraud or corruption or other illegal acts affecting the financial interests within the EU institutions, bodies, offices and agencies, even when sufficient suspicions exist.

29. Furthermore, amendments are introduced in Article 5(4) and (5) which complement the procedures laid down in Articles 22a and 22b of the Staff Regulations for cases where a staff member provides information to the Office relating to a suspected fraud or irregularity. For reasons of clarity, it would be more appropriate to propose such amendments to the Staff Regulations instead, also taking into account that their scope is broader than that of the OLAF Regulation (see paragraph 4).

Speeding up the initial assessment and subsequent investigation of cases

30. The Court welcomes the proposed new wording for Article 5(4) which requires the Director-General of the Office to take a decision whether or not to open an investigation within 2 months of receipt by the Office of a request from one of the institutions, bodies, offices or agencies of the Union or from a Member State concerned. The Court

recommends that a maximum duration for assessments should also be set for cases where the Office is provided with initial information from other sources.

31. The new wording of Article 6(6) stipulates that, where it is found that an investigation cannot be closed within 12 months after it has been opened, the Office shall inform the Supervisory Committee of the reasons at intervals of 6 months; such information currently has to be given only once after 9 months. The wording of the new provision is not clear and might be interpreted in the sense that the Supervisory Committee is to be informed for the first time after 18 months.

32. To address the issue of the long duration of OLAF's investigations more effectively ⁽³⁾, it would be appropriate to introduce a standard duration of 12 months, extendable by up to 6 months at a time only on the basis of a decision taken by the Director-General of the Office after informing the Supervisory Committee ⁽⁴⁾.

Reinforcing procedural guarantees

33. The proposed Article 7a(2) on procedural guarantees sets out rules for interviewing witnesses and persons concerned. It should be clarified that the interviewee has the right to refuse approval of the record of the interview prepared by the Office. Furthermore, it should be made explicit whether there is an obligation for persons not belonging to the EU institutions, bodies, offices or agencies to accept OLAF's invitation to an interview or to sign the record of such an interview. Finally, prior to the taking of statements in the context of on-the-spot checks, the persons to be interviewed should be informed about their rights; and they should be given access to the record of their statements as drawn up by the Office.

34. In the view of the Court, the proposed Article 7a(4) should not allow exceptions to the rule that the person concerned is entitled to use the official Union language of his or her choice in an interview with the investigators of the Office.

35. The Court notes that the proposed wording of Article 7a(4) allows for a more extensive use of the option of deferring the fulfilment of the obligation to ask the person concerned to make their views known. The proposed text stipulates that the Director-General may take such a decision when two conditions are met: that a case entails the use of investigative proceedings falling within the remit of a national

⁽¹⁾ See paragraphs 40 to 42 of Special Report No 2/2011.

⁽²⁾ A similar provision exists in Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

⁽³⁾ Article 41 of the Charter of Fundamental Rights of the European Union provides that every person has the right to have his or her affairs handled within a reasonable time by the institutions, bodies, offices and agencies of the Union.

⁽⁴⁾ The Commission proposed such a procedure in its reply to paragraph 80 of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF) (OJ C 202, 18.8.2005, p. 1). See also paragraph 27 of Special Report No 2/2011.

judicial authority and that it is 'necessary to preserve the confidentiality of the investigation'. This wording is not in line with Article 1(2) of Annex IX to the Staff Regulations which is more restrictive in this respect as it limits the use of this option to 'cases that demand absolute secrecy'.

36. Once OLAF has opted to defer a hearing, its investigators are often precluded from asking the persons concerned to make their views known as long as proceedings of a national judicial authority continue. As a consequence, OLAF cannot close the case, even in situations where no further investigative activities are to be carried out by the Office. As such situations are not in line with the requirement set out in Article 6(5) of the OLAF Regulation that investigations have to be conducted continuously, appropriate provisions should be introduced to deal with them.

Internal review procedure

37. The new Article 7b provides for an internal review procedure at the request of any natural person concerned by an OLAF investigation regarding the respect of procedural guarantees by the investigators of the Office. It is envisaged that the OLAF staff member(s) entrusted with the review procedure shall not take instructions from anyone and that they may inform the Supervisory Committee if they consider that a measure taken by the Director-General calls their independence into question.

38. Nevertheless, 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.

39. The proposed review procedure would be launched only at the request of a person concerned. It would not cover cases where the persons concerned do not know that they are subject to an OLAF investigation as their information has been deferred in order to preserve the confidentiality of the investigation.

40. Instead, the Court suggests creating the function of a review officer. He should neither be appointed by the Director-General nor be subject to his authority. The review officer should not only be required to issue binding opinions at the request of the persons concerned but should also be empowered to issue such opinions in all cases where the transmission of information to the national judicial authorities is envisaged by the Director-General or where investigations last for more than 2 years. To that end, the review officer should

have full access to OLAF's relevant case files. He should address his opinions to both the Director-General and the Supervisory Committee.

Cooperation with Eurojust, Europol and international organisations

41. The proposed Article 10a introduces provisions for the Office to cooperate with Eurojust, Europol and international organisations. OLAF's obligations to inform Eurojust of suspected serious crime in the form of fraud, corruption or other illegal activities are described in a vague manner. 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' ⁽¹⁾.

Clarifying the role of the Supervisory Committee

42. With regard to the proposed amendments to Article 11 on the Supervisory Committee, the Court welcomes the proposal that the Committee shall, in future, monitor the functioning of information exchange between the Office and the institutions, bodies, offices and agencies. The Court recommends that the Committee's monitoring should also extend to exchanges of information between the Office and the authorities of the Member States, including the exchange of information through Eurojust.

43. According to the proposed new Article 11(1), the extent of the Supervisory Committee's access to information on investigations and to OLAF case files would be almost entirely left to the discretion of the Director-General of the Office. The Court 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.

44. In order to reinforce the independent role of the Supervisory Committee, the Court recommends that the proposed Article 11(6) should provide that the Committee's secretariat must act solely in accordance with the Committee's instructions and independently of OLAF, and may not be appointed by or subject to the authority of the Director-General ⁽²⁾.

⁽¹⁾ Point 5 of the Agreement stipulates that, with a view to identifying appropriate cases for collaboration, OLAF will inform Eurojust as soon as possible of the existence of any case where it appears that it directly involves judicial cooperation between the competent authorities of two or more Member States, or where the case concerns a Member State and the Community (OJ C 314, 9.12.2008, p. 3).

⁽²⁾ Various options exist, see for example the provisions laid down in Decision No 235/2008/EC of the European Parliament and of the Council of 11 March 2008 establishing the European Statistical Governance Advisory Board (OJ L 73, 15.3.2008, p. 17). Article 4(4) of the Decision stipulates that this high-level advisory body set up with a view to enhancing the independence, integrity and accountability of Eurostat shall be assisted by a secretariat which shall be provided by the Commission but which must act independently thereof.

45. The Court recommends taking into account the Court of First Instance's judgment of July 2008 ⁽¹⁾, which held that an important function of the Supervisory Committee is to protect the rights of persons who are the subject of OLAF investigations. The Court notes that the Committee's role in this respect is likely to be diminished as, pursuant to the proposed new Article 11(7), the Director-General of OLAF will no longer ⁽²⁾ be obliged to inform the Committee of cases requiring information to be forwarded to the judicial authorities of a Member State before they are transmitted. In the Court's view, this could be compensated for by introducing the function of a review officer reporting to the Committee (see paragraph 40).

The 'exchange of views procedure' may undermine investigative independence

46. The proposed new Article 11a introduces a regular exchange of views at political level to discuss the Office's policy of investigations obliging the Office in Article 11a(4) 'to take appropriate action taking into account the opinions expressed in the exchange of views'. Such a procedure could be perceived as undermining the independence of the Director-General in identifying and defining the investigative priorities of the Office ⁽³⁾. 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.

47. If the proposed new Article 11a intends to achieve a greater involvement by all the Institutions in the operating of

the Office, transforming OLAF into an interinstitutional office ⁽⁴⁾ would be a better option. Such a solution would also reflect the changes brought about by Article 325 TFEU with regard to an effective and equivalent protection of the financial interests of the Union in all the Union's institutions, bodies, offices and agencies.

Clarifying the role of the Director-General

48. The Court sees no valid reasons for the Commission's proposal to delete from the current Article 12(3) the obligation to report to the Court of Auditors on the findings of investigations carried out by the Office.

49. The Court notes the proposed new Article 12(5) empowering the Director-General to delegate the exercise of certain of his functions to other members of the Office's staff, in particular concerning decisions to open investigations or powers to direct the conduct of investigations. The Court draws attention to the risk that the proposal might result in diluting key responsibilities of the Director-General.

50. The proposed new Article 12(6) stipulates that the Director-General shall be assisted by an 'internal body' which he shall consult on the opening of an investigation, before the closing of an investigation and whenever he deems appropriate. The Court draws attention to the risk that such a consultation procedure might prevent the Director-General from acting swiftly in situations of urgency.

This Opinion was adopted by Chamber IV, headed by Mr Igors LUDBORŽS, Member of the Court of Auditors, in Luxembourg at its meeting of 12 July 2011.

For the Court of Auditors

Vítor Manuel da SILVA CALDEIRA

President

⁽¹⁾ Case T-48/05 *Franchet and Byk v Commission* of 8 July 2008 (OJ C 209, 15.8.2008, p. 44).

⁽²⁾ Currently Article 11(7) of the OLAF Regulation provides that the Director of the Office shall inform the Supervisory Committee of 'cases requiring information to be forwarded to the judicial authorities of a Member State'. The Court of First Instance stipulated in paragraph 168 of its judgment in Case T-48/05 that '... it cannot be disputed that the requirement to consult that Committee before forwarding information to the national authorities is intended to confer rights on the persons concerned.'

⁽³⁾ See guiding principle No 3 set out in Resolution (97)/24 on the twenty guiding principles for the fight against corruption adopted by the Committee of Ministers of the Council of Europe on 6 November 1997, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=593789&>

⁽⁴⁾ See as an example for such an interinstitutional office the decision establishing the European Communities Personnel Selection Office EPSO (Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 (OJ L 197, 26.7.2002, p. 53)).

ANNEX

MAIN LEGISLATION CONCERNING OLAF'S INVESTIGATIVE ACTIVITIES**Decision setting up OLAF**

Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20).

General legislation on the protection of the financial interests ⁽¹⁾

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (also known as the 'PIF' Regulation) (OJ L 312, 23.12.1995, p. 1).

General rules for investigative activities ⁽¹⁾

Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1).

Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 8).

On-the-spot checks and inspections on the premises of economic operators ⁽¹⁾

Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

Rules on data protection

Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

Cooperation with Eurojust

Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1), as most recently amended by Council Decision 2009/426/JHA of 16 December 2008 (OJ L 138, 4.6.2009, p. 14).

Internal investigations within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties

Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1), as most recently amended by Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 (OJ L 311, 26.11.2010, p. 1) ('the Staff Regulations').

About 50 different internal decisions adopted by the institutions, bodies, offices and agencies pursuant to Article 4 of Regulation (EC) No 1073/1999.

Where these internal decisions follow the 'Model Decision' annexed to the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 15), they go beyond the protection of the financial interests of the Union and provide the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Union's interests.

Further information can be found on OLAF's website ⁽²⁾.

⁽¹⁾ Only applicable in the case of investigations concerning the protection of the financial interests.

⁽²⁾ http://ec.europa.eu/dgs/olaf/legal/index_en.html