

III

(Preparatory Acts)

COURT OF AUDITORS

OPINION No 6/2014

(pursuant to Article 325, TFEU)

concerning a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees

(2014/C 419/01)

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 proposal ⁽¹⁾,

Having regard to the European Parliament's request for an opinion on the abovementioned proposal, received at the Court on 16 July 2014,

Having regard to the Council's request for an opinion on the abovementioned proposal, received at the Court on 25 July 2014,

HAS ADOPTED THE FOLLOWING OPINION:

Introduction

1. The European Anti-Fraud Office (OLAF) is a directorate-general of the European Commission but is functionally independent with respect to its investigative work ⁽²⁾. OLAF carries out administrative investigations. The Office is not a judicial or police authority. However, the Office is empowered to address its reports directly to the national authorities for further action.

2. Since October 2013, OLAF's investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union have been governed by a partly revised legal framework ⁽³⁾. Regulation (EU, Euratom) No 883/2013 ⁽⁴⁾ (hereafter referred to as 'the OLAF Regulation') replaced two Regulations ⁽⁵⁾ which had been in force since 1999 when the Office was created.

⁽¹⁾ COM(2014) 340 final of 11 June 2014.

⁽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⁾ To perform its investigations, the Office cannot rely on the new OLAF Regulation alone. Even after the reform of October 2013, additional legal bases are still necessary to empower the Office to carry out investigations in specific cases, both for external investigations in the Member States and for internal investigations within the EU institutions, bodies, offices and agencies, e.g. 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).

⁽⁴⁾ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

⁽⁵⁾ Regulation (EC) No 1073/1999 of the European Parliament and of the Council (OJ L 136, 31.5.1999, p. 1) and Council Regulation (Euratom) No 1074/1999 (OJ L 136, 31.5.1999, p. 8).

3. The Commission proposal, which is the subject of this Opinion, seeks to strengthen the procedural guarantees in place for persons under investigation (referred to in the OLAF Regulation as 'persons concerned' ⁽¹⁾). The Commission proposes the establishment of a Controller of procedural guarantees (hereafter referred to as 'the Controller'), tasked with two functions:

- (a) reviewing complaints lodged by persons concerned about alleged violations of the procedural guarantees provided by the OLAF Regulation and issuing non-binding recommendations to the Director-General of OLAF on these complaints;
- (b) authorising OLAF to inspect the professional office of a member of an EU institution at the premises of an EU institution during an internal investigation or to take copies of documents or of any data support located in this office.

4. Under the Commission proposal, the Controller and his substitute would be appointed by common accord of the European Parliament, the Council and the Commission and would exercise their functions in complete independence.

5. The Court has assessed the Commission proposal in the light of the recommendations it made in Opinions No 6/2011 ⁽²⁾ and No 8/2012 ⁽³⁾ on the basis of the observations contained in Special Report No 2/2011 concerning the management of the Office ⁽⁴⁾. Given that the 2013 reform is still in the process of being implemented, and the relevant experience under the new rules is therefore still limited, it was too early for the Court to take account in this Opinion of the impact of the new rules on OLAF's operations.

Independent control of the legality of OLAF investigations in progress

6. The Court drew attention to the need for independent control of the legality of OLAF investigations in progress when it was consulted about the Commission's 2011 proposal to revise the OLAF Regulation ⁽⁵⁾. For such control to be effective, it must be carried out by a body or person independent of OLAF which has the power to issue binding opinions. At the time, the Court suggested creating the function of a review officer who should neither be appointed by the Director-General of OLAF nor be subject to his authority ⁽⁶⁾.

7. The Court welcomes the fact that, under the current Commission proposal, the Controller's independence from OLAF would be guaranteed by an interinstitutional process for appointing him and, if necessary, relieving him of his duties. Introducing such an external control function would be a major improvement compared with the current control procedure for individual investigations in progress, which is a purely internal mechanism ⁽⁷⁾.

8. The Commission proposes in Article 9c(1) of the draft regulation that candidates for the positions of the Controller and of his substitute should be 'suitably qualified'. The Court recommends that the regulation should provide that the Controller and his substitute are chosen from persons whose independence is beyond doubt and who possess the required qualifications for appointment to judicial office.

9. The **Court recommends** to further enhance the independence of the Controller. Contrary to what is proposed in Article 9c(1) of the draft regulation, neither the Controller nor his secretariat should be administratively attached to the Commission, nor to any of the other institutions involved in his appointment. Sufficient staff should be assigned to the Controller to carry out his tasks in an effective manner. The appropriations for the Controller and his secretariat should be entered under a specific budget line.

The Controller's scope of intervention in his advisory capacity

10. In Opinion No 6/2011, the Court pointed out that the control of investigative acts in progress is particularly necessary in cases where the persons concerned are not informed that they are under investigation, the aim being to ensure that the investigation remains confidential. The current Commission proposal provides for mandatory intervention by the Controller only in cases where a person concerned is aware of the fact that he is under investigation and has lodged a complaint in connection with measures taken as part of the investigation.

⁽¹⁾ According to Article 2(5) of the OLAF Regulation, 'person concerned' means any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by OLAF.

⁽²⁾ OJ C 254, 30.8.2011, p. 1.

⁽³⁾ OJ C 383, 12.12.2012, p. 1.

⁽⁴⁾ OJ C 124, 27.4.2011, p. 9.

⁽⁵⁾ See paragraphs 15 and 37-40 of Opinion No 6/2011.

⁽⁶⁾ The Court recommended that the proposed 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 of OLAF or where investigations last for more than two years.

⁽⁷⁾ Pursuant to Article 17(7) of the OLAF Regulation, the Director-General of OLAF is required to put in place an internal advisory and control procedure, including a legality check.

11. However, the Controller cannot intervene on his own initiative in situations where a person concerned has not been made aware of an investigation. Article 9 of the OLAF Regulation releases the Office, under certain conditions, from its obligation to inform a person concerned that he is under investigation, and from the obligation to give a person concerned the opportunity to comment on facts concerning him before conclusions referring to him by name are drawn up. As a consequence, under the Commission proposal, the Controller would not be able to intervene in all cases where the most important procedural guarantees for which Article 9 provides have been suspended in the course of an investigation.

12. A further limitation on the scope of the Controller's intervention is that, under the Commission proposal, he would deal only with observance of the procedural guarantees provided for in Article 9 of the OLAF Regulation. However, there are provisions in other articles of the Regulation (e.g. in Article 10 the Director-General's obligation to ensure that any case-related information that is made available to the public is neutral and impartial) which, if not observed, can seriously affect the rights of a person concerned. Furthermore, there is a risk that OLAF's investigative measures might also affect the rights of natural persons or economic operators who are not considered to be persons concerned but have other links to the cases under investigation, e.g. by being questioned as a witness.

13. The **Court recommends** that the Controller should be empowered to deal with any alleged violation of the fundamental rights and procedural guarantees provided for under EU law in connection with ongoing OLAF investigations. In cases where the Office derogates from its obligation to inform a person concerned that an investigation is ongoing, the Director-General should be required to seek the Controller's advice.

Prior authorisation for certain investigative measures by the Controller

14. The Court welcomes the fact that, under the Commission proposal, the Director-General of OLAF must first obtain authorisation from the Controller when the Office intends to exercise its power to inspect the professional office of a member of an EU institution at the latter's premises during an internal investigation, or to take copies of documents or of any data support located in this office.

15. According to the Commission, the Controller should carry out an objective assessment of the legality of the investigative measure OLAF intends to conduct and establish whether the same objective could be achieved by less intrusive means. In the light of the principles of proportionality and equal treatment, the Court is convinced that such an assessment should be required not only in the case of members of EU institutions but also in the case of EU staff or of economic operators under investigation ⁽¹⁾.

16. Apart from the inspection of a professional office, other situations may arise in the course of an OLAF investigation which can also seriously affect the rights of persons concerned, in particular the transmission of information about a person concerned to the national judicial authorities or the uncertainty created by an investigation which is conducted over a long period.

17. The **Court recommends** that prior written authorisation should always be obtained from the Controller when the Office intends to carry out on-the-spot checks and inspections. The **Court recommends** that such prior authorisation should also be required in all cases where:

- (a) the Director-General of OLAF, pursuant to Article 4(6) of the OLAF Regulation, intends to defer the provision of information to the institution to which the person concerned belongs;
- (b) OLAF intends, pursuant to Article 9(4) of the OLAF Regulation, to draw up conclusions referring by name to a person concerned before giving that person the opportunity to comment on facts concerning him;
- (c) the transmission of information about a person concerned to the national judicial authorities is envisaged by OLAF;
- (d) OLAF intends to prolong an investigation beyond two years.

18. Furthermore, the **Court recommends** that the OLAF Regulation should stipulate that the cases mentioned above constitute acts that might adversely affect a person concerned. The inclusion of such a provision would enable a person concerned, if need be, to apply to the EU Courts for the adoption of interim protective measures. In the Court's view, this would guarantee the legality of OLAF's investigations and safeguard the fundamental rights of the persons to whom they relate.

⁽¹⁾ In accordance with the provisions and procedures laid down by Regulation (Euratom, EC) No 2185/96, OLAF may carry out on-the-spot checks and inspections at the premises of economic operators.

Conclusion

19. The Court attaches great importance to the protection of the financial interests of the Union, and to the fight against fraud, corruption and other illegal activities. Public trust in the EU institutions and basic good governance demand no less. For this to be possible, a strong and effective OLAF is a prerequisite, and any reform must ensure that this strength is preserved and enhanced, and not undermined.

20. The protection of individual rights, and therefore strong procedural guarantees for persons under investigation by OLAF, is of fundamental importance. Experience shows that any justifiable investigative act can be seriously undermined by the perception of insufficient safeguards for the respect of individual rights.

21. Ensuring full respect for individual rights not only enhances OLAF's credentials as an EU body in full consonance with the observance of the rule of law, but is also crucial for the ultimate effectiveness of OLAF investigations. The amendments proposed by the Court in this Opinion seek to enhance such effectiveness.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 23 October 2014.

For the Court of Auditors
Vitor Manuel da SILVA CALDEIRA
President
