



OLAF Supervisory Committee

Opinion No. 2/2006

concerning the reform of the Regulation (EC) No 1073/1999
concerning investigations conducted by the
European Anti-Fraud Office (OLAF)



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1. At its meetings of 21-22 February, 20-21 March and 25-26 April 2006 the OLAF Supervisory Committee (hereinafter “the Committee”) has discussed a proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (“draft”). Ms D. Theato and Mr K. Györgyi were appointed rapporteurs.

The Committee expressly welcomes the Commission’s determination to support OLAF’s work and to improve its operational efficiency and effectiveness wherever possible.

The following remarks focus on the problem areas highlighted by the Committee:

- the procedural rights of persons under investigation;
- the length of investigations;
- and institutional aspects of the draft.

2. The procedural rights of persons under investigation

The draft rightly points out the need to clarify the guarantees applicable to investigations. Clarification is needed to provide legal certainty and is also in the interest of anyone under investigation. The Committee therefore welcomes new Article 7a. In particular, it makes it clear that investigations should aim to uncover evidence both for and against the person concerned.

All OLAF investigations not concluded elsewhere are ultimately referred to an independent criminal court in a Member State, where they become the subject of official proceedings in accordance with national law and are covered by the usual procedural guarantees. However, the Committee is of the opinion that the rights of the person under investigation require further protection *de lege ferenda* than provided in the draft. In particular:

- The procedure must be fair and based on the assumption of innocence (Article 6 of the European Convention on Human Rights).
- According to the draft, the person concerned will be informed only of the conclusions and recommendations of the final report. However, these may not suffice to submit a complaint to the Review Adviser, as a complaint will challenge the way in which OLAF arrived at its final conclusions. It must be possible for the appellant to see how the decision was arrived at. And so, in order to enable



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appellants to exercise their right of defence, they must be guaranteed access to the entire report or to all items of evidence concerning them.

In exceptional circumstances the Director-General may withhold access to information concerning the person under investigation until it has been forwarded to the appropriate authorities/bodies. How can the Review Adviser exercise control in such cases? Is there no review in such cases?

- To ensure that the investigation is fair, where there are grounds to believe that investigators might not act independently in the performance of their duties, they should not be allowed to take part.

- The person under investigation should have the right to submit evidence.

Strengthening the procedural rights of the person under investigation would also enhance the credibility of OLAF investigations and their findings.

3. The length of investigations

Article 6 of the current OLAF Regulation requires investigations to be conducted without interruption. Their duration must be proportionate to the circumstances and complexity of the case. Under Article 11(7) of the current OLAF Regulation, where an investigation has been in progress for more than nine months, the Director must inform the Supervisory Committee of the reasons why it has not been possible to bring the investigation to a conclusion.

Under a special procedure provided for in Article 6(7) of the draft Regulation, investigations that have not been concluded within twelve months may be extended for up to six months and then further extended under the same conditions.

The Committee believes this sends out the wrong signal. The current nine-month period is in itself dubious. While a number of reasons may cause certain investigations to take longer, the Committee is of the view that the time allowed for the procedures should not be extended and recommends instead that the draft should incorporate the principle of urgency. The Committee believes that it may be possible in a number of cases to shorten the duration of the investigations by, for example, filling some 70 posts currently vacant or by stepping up managerial control over the duration of the procedure.



4. Institutional aspects

- The Supervisory Committee is of the opinion that the necessary independence of OLAF investigations should be further strengthened in law. It proposes incorporating the following main priorities in the draft:

- OLAF should have the discretion to decide independently which investigations to embark on and how they are to be conducted.
- OLAF should bear sole responsibility for the blueprint of its investigations.
- OLAF should devise its own operational policy, including its anti-fraud and corruption prevention policy, albeit in close coordination with all competent European and national bodies.
- Greater emphasis should be given to its mandate to combat fraud and corruption.

- Generally speaking, experience has shown that cooperation between OLAF and the Member States needs to be improved to ensure that the European Union's financial interests are protected effectively. Cooperation cannot be just a one-way street leading from OLAF to the Member States. There also needs to be an exchange of information between the Member States and, in particular, between the competent judicial authorities in the Member States and OLAF.

Special attention should be paid to OLAF's involvement in external investigations conducted by the authorities in the Member States.

- The Committee expressly welcomes the fact that, as a general principle, the draft retains the Supervisory Committee as an independent expert body that comprises representatives of the Parliament, Council and Commission only for the "structured dialogue with the institutions".

It should, however, be clear from the outset that the representatives of the three institutions in the structured dialogue have a mandate dictated by their institution and the independent persons have an open mandate. While the structural dialogue has many advantages, in particular with regard to relations between the institutions, it is likely to politicise to a certain extent OLAF's work. The standard political control of OLAF is already ensured by, for example, the budgetary discharge procedure without this structural dialogue.

In a structured dialogue between the institutions involving a single representative from the Council, Parliament and the Commission, the Supervisory Committee risks losing its independence on key matters that may even include the production of its activity report.



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It is unclear what is meant by “in order to devise common guidelines”.

Article 8 of the draft removes the Supervisory Committee’s co-responsibility for data protection and professional confidentiality without any reason whatsoever being given.

Article 11 of the draft restricts the Supervisory Committee’s rights to information. As a consequence of the amendment proposals contained in paragraphs 1 and 7, the Supervisory Committee will receive less factual information on investigations conducted by the Office than has hitherto been the case.

Article 12 of the draft raises questions regarding the inter-institutional nature of the powers of OLAF’s Director-General. The Director-General has, until now, been appointed by agreement of the Council and Parliament. This gives the position a special legitimacy. In future the Commission will merely consult the Supervisory Committee within the framework of a structured dialogue and will then designate the Director-General. The Supervisory Committee sees this as greatly undermining the Director-General’s legitimacy.

In view of the problems involved in renewing the mandate of OLAF’s current Director-General on completion of his first term, however, the Committee welcomes the proposal that the seven-year term should not be renewable. This should strengthen the Director-General’s independence and obviate the problem of undesirable interregnum periods. (The terms OLAF Director [*OLAF-Direktor*] and Director-General of the Office [*Generaldirektor des Amtes*] in the draft need to be harmonised.).

The current proposal regarding the Supervisory Committee’s secretariat does not go as far as the Commission proposal of February 2004, which attached the secretariat to the Commission for administrative purposes. The draft attaches it to the Office, which may impinge on the independence of the Supervisory Committee itself.

The Committee understands why the draft introduces the position of Review Adviser. However, it questions whether the Review Adviser can act “in complete independence” if he is appointed and possibly reappointed by the Director-General and depends on him administratively, especially for performance appraisal and promotion.



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The draft should also make it clear that the Supervisory Committee can act not only on the basis of statistical and analytical reports drafted by the Review Adviser. To be able to perform its primary task of regularly monitoring OLAF's investigations, the Committee must have access to cases and not just to the Review Adviser's statistics, analysis and observations. There should be a clear demarcation of duties, and the Committee's most important task, ensuring the Office's independence, must be safeguarded.

With all its references to other legislative instruments, Article 16 of the draft is by no means a shining example of clear legislation.

In general, the provisions contained in Regulation (Euratom, EC) No 2185/96 should be incorporated in the draft. This would consolidate all of OLAF's investigative powers in one legal instrument and thereby simplify and facilitate the application of the law.

5. These comments refer to the text that was submitted for inter-service consultation. Since then, the Supervisory Committee has received further oral information on 30 May, 14 June and 4 July 2006. It reserves the right to submit a supplementary opinion on the Commission's final written proposal.