



OLAF Supervisory Committee

OPINION No 4/2011

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

Brussels, 20 September 2011



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1 INTRODUCTION

1. The Supervisory Committee (SC) welcomes the amended 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) and repealing Regulation (Euratom) No 1074/1999. The Committee appreciates the efforts made by the European Commission to set in motion the reform of Regulation (EC) No 1073/1999 and the Commission's intentions to reinforce the efficiency, effectiveness and accountability of OLAF, while preserving its independence in the field of investigations. However, the SC recommends that certain aspects of the reform would benefit from further clarification and some amendment.

2. The SC has analysed both the proposals for the revised text prepared by the Commission¹ and amended by the Council² together with the European Parliament's resolution³. In addition, the SC has taken into account its own previous opinions on the reform of Regulation (EC) No 1073/1999⁴, together with the opinions of the European Court of Auditors⁵ and of the European Data Protection Supervisor⁶. This opinion follows the objectives set by the EC in its amended proposal of 17 March 2011.

2. STRENGTHENING THE EFFICIENCY AND EFFECTIVENESS OF INVESTIGATIONS

2.1. Clarifying OLAF's role

3. The SC notes that the term "administrative investigation" as outlined in the current regulation⁷ covers both investigations within the institutions and external investigations relating to economic operators. Experience has shown that this dichotomy has often proved artificial and confusing. Indeed, if an economic operator has enjoyed an unfair advantage, it may have been as a result of the actions of a person subject to the Staff Regulations. It is

¹ 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 - /* COM/2011/0135 final - COD 2006/0084 */.

² See the amended text of the Council dated 28.06.2011.

³ European Parliament legislative resolution of 20 November 2008 on the 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) (COM(2006)0244 — C6-0228/2006 — 2006/0084(COD)), OJ C 16E , 22.1.2010, p. 201–223.

⁴ Opinion No 2/2006; Opinion No 03/2010 on the Commission's Reflection Paper.

⁵ 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, OJ C 254, 30.8.2011, p. 1–8.

⁶ Opinion adopted on 1.06.2011.

⁷ Article 1.



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therefore necessary to clarify Article 1 of the new regulation, to indicate that OLAF was set up in order to conduct administrative investigations, these investigations being either internal, external or both. It should be noted that OLAF's roles also include co-ordinating operations between the competent authorities of Member States (MS).

4. The SC welcomes the effort made in Article 2 of the text to define certain concepts such as "administrative investigations", "person concerned" and "Staff Regulations". Even were this exercise to be worthwhile, it remains limited to the extent that it should have defined the many other concepts relating to the fight against fraud such as "financial interest of the EU" or "corruption" contained in Regulation (EC) No 1073/99. This exercise will be complete only when the legislator consolidates the texts of all the relevant EU anti-fraud legislation.

5. The SC is disappointed to note that OLAF's competence to conduct investigations has not been clearly defined, especially relating to investigations within the institutions, bodies, offices and agencies. The wording of Article 1 of the amended proposal excludes from OLAF's competence cases which have no impact on the financial interests of the EU⁸. However, the SC notes that other legal instruments that are still in force empower OLAF to conduct internal investigations on matters which go beyond the protection of the financial interests of the EU⁹. Moreover, recent experience has shown that there is a need to have clear rules concerning investigations within the institutions of allegations of serious misconduct by persons not subject to the Staff Regulations, which may have no impact on the financial interests of the EU, but may result in disciplinary or criminal proceedings. Consolidation of the anti-fraud legislation might have avoided such inconsistencies or filled in the gaps of the texts currently in force. The SC believes that, in the absence of such consolidation, which it regrets, the definition of OLAF's competence in the amended proposal needs further clarification.

⁸ Article 1 stipulates that OLAF "shall conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity *affecting the financial interests of the European Union. To that end* it shall investigate serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Union liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of officials and the Conditions of employment of other servants of the European Union".

⁹ For example, the EC Decision of 28 April 1999 establishing OLAF (999/352/EC, ECSC, Euratom) empowers it "to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities" (Article 2). Such an approach is confirmed in the 6th recital of the preamble, which underlines that "the responsibility of the Office should involve, over and above the protection of financial interests, all the activities linked with the protection of Community interests from irregular acts likely to lead to administrative or penal proceedings". Moreover, Article 86 of Staff Regulations empowers OLAF to launch administrative investigations to verify whether failure by an official or former official to comply with his obligations under these Staff Regulations has occurred.



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6. The SC therefore considers that the Director General of OLAF (DG) should be empowered to bring an action before the Court of Justice if he considers that a measure taken by any institution (and not only by the Commission, as proposed) calls into question his independence or the independent conduct of his investigations. Similarly, he, or any OLAF staff member delegated by him should be empowered to intervene in cases, in connection with the conduct of OLAF's investigations, brought before the national courts, as proposed in Article 12 a) of the EP resolution.

2.2. Shortening the duration of investigations

2.2.1. Shortening by OLAF of the duration of investigations

7. The SC has always urged strongly that OLAF carry out investigations within the shortest timeframe possible. The SC notes that the resources available to OLAF are limited and this will remain the case during times of budget austerity. Institutions must nevertheless clearly demonstrate that even during such times, the fight against fraud remains a priority. OLAF must set realistic priorities in its investigation policy, focus its strength on investigative activities and the fight against fraud and assist MS in judicial follow-up. The reduction in the duration of investigations can only be achieved through greater involvement of management in controlling the investigations including careful planning of these investigations¹⁰. The time taken to open investigations must also be strictly limited regardless of the information source¹¹.

8. The SC considers that the amended proposal does not sufficiently take into account cases where national investigations are conducted in parallel with OLAF's investigations. Where OLAF's obligation to ask the person concerned to make his or her views known is deferred in order not to prejudice an investigation carried out by national authorities, OLAF cannot close its investigation as long as the national investigation is still open. The amended proposal should take this aspect into consideration, in order to allow OLAF to conduct its investigations "continuously", as required by Article 6.

2.2.2. Monitoring the duration of investigations

9. The SC shall be informed of the *reasons* why OLAF has failed to complete an investigation within 12 months. This notification must be repeated every six months thereafter¹². Monitoring by the SC of the duration of investigations would be effective only if

¹⁰ See SC's Opinion No 4/2010.

¹¹ See Article 5 (4) of the EC proposal.

¹² Article 6 (6) of the EC proposal.



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the amended proposal stipulates that the SC shall also be regularly informed of the measures envisaged to speed up the investigation¹³ and the estimated time for its completion¹⁴.

10. The SC notes that the person entrusted with the review procedure shall give, at the request of a person concerned, an opinion regarding the duration of an investigation¹⁵. This opinion should also be sent to the SC to enable the SC to monitor developments concerning the duration of investigations, in the light of the opinions and analysis reports regularly drawn up by the person entrusted with the review procedure¹⁶. In this regard, the SC notes that the text of the amended proposal needs to be revised¹⁷.

2.3. Improving cooperation and information exchange with institutions, bodies, offices and agencies

2.3.1. Provision of information by OLAF to institutions, bodies, offices and agencies

11. The current regulation provides that where investigations reveal that a member, manager, official or other servant may be personally involved, the EU institution, body, office or agency to which he belongs shall be informed¹⁸. The provision of such information may be deferred in cases requiring absolute secrecy for the purposes of the investigation or where the investigation falls within the competence of a national judicial authority. The SC considers it important to maintain these exceptions in the new regulation. Indeed, at the beginning of an investigation it is not always possible for OLAF to identify all persons involved and uncontrolled disclosure may be detrimental to the effectiveness of investigation and harmful to the institution concerned. The SC therefore strongly disagrees with the new wording of Article 4 (6) second paragraph¹⁹. Besides being vague, this provision deprives OLAF of any discretion and the ability to keep its investigation confidential, at least for some time. An unconditional obligation of this kind could undermine OLAF's independence. The SC suggests that the decision to defer information could be taken every 3 months, via a reasoned, written decision which would be attached to the case file. The SC and the person entrusted with the review procedure should be informed. This would enable the person entrusted with the review procedure to act on his own initiative in the event of a serious problem e.g. a potential violation of procedural rights in cases where the person concerned was not informed of the ongoing investigation.

¹³ As stated in the Council's proposal.

¹⁴ As currently stated in Article 11 (7) of Regulation (EC) No 1073/1999.

¹⁵ Articles 7 b (3) and 6 (4) of the amended proposal.

¹⁶ Article 11 (1) b) and (8) of the amended proposal.

¹⁷ Article 7 b stipulates that the person entrusted with the review procedure shall communicate his opinion only to the Director General and send a reasoned reply to the person concerned.

¹⁸ Article 4 (5) of Regulation (EC) No 1073/1999.

¹⁹ The EC proposal is drafted as follows: "In exceptional cases where the confidentiality of the investigation cannot be ensured, the Office shall use appropriate alternative channels of information".



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12. The amended proposal provides that OLAF shall, without delay, inform the institution, body, office or agency concerned of the investigation in progress where it appears that it might be appropriate to take precautionary administrative measures to protect the financial interests of the EU²⁰. The SC would accept this obligation where it is possible to defer the provision of this information, both in internal and external investigations. The SC therefore prefers the text adopted by the European Parliament.

2.3.2. Follow-up by institutions, bodies, offices and agencies of OLAF's recommendations

13. The institutions, bodies, offices and agencies shall inform OLAF of the follow-up given to the recommendations made in reports following an internal investigation²¹. Moreover, the DG must inform the SC where these bodies have failed to act on the recommendations in OLAF's report²². The SC is disappointed to note that, in the past, OLAF has not made regular use of this opportunity. In the future this provision will be important in the framework of the exchange of views with the institutions as a means to overcome any difficulties.

2.3.3. Access by OLAF to information held by institutions, bodies, offices and agencies

14. The SC remains concerned that OLAF does not have unrestricted access to staff databases held by the institutions. Despite the fact that Article 4 (2) first paragraph of Regulation (EC) No 1073/1999 (which remains unchanged in the amended proposal) recognises clearly the right for OLAF to have immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, in reality the institutions are reluctant to give OLAF rapid and discreet access to some categories of personal data, because of a very restrictive interpretation of Regulation (EC) No 45/2001²³. In the SC's view, such a position is a sign of mistrust vis-à-vis OLAF and could also undermine its investigative independence.

15. The SC believes that allowing OLAF quickly and discreetly to verify facts without disseminating the allegations made would avoid any perceived risks. The new regulation should therefore include provisions allowing a fair balance between the need for OLAF to have access to information held by the institutions prior to the opening of a case and at any stage of an investigation and relevant data protection rules.

²⁰ Article 6 (5) of the amended proposal.

²¹ Article 9 (4) of the amended proposal.

²² Article 11 (7) a) of the amended proposal.

²³ 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. 1–22.



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2.4. Improving cooperation and information exchange with Member States

2.4.1. Operational assistance from Member States

16. Increased efficiency of OLAF's operational activity requires better cooperation with MS. When monitoring the implementation of OLAF's investigative function, the SC has noted that OLAF has often had difficulty in identifying the national competent authorities able to provide it with the assistance needed, for example when carrying out on-the-spot checks on the premises of economic operators. This difficulty is even more important in cases related to direct expenditure, where the institutions or agencies, but not the MS, manage EU funds. The amended proposals are intended to set up an anti-fraud coordination service, which will facilitate proper coordination between all competent authorities at national level and ensure an effective cooperation and information exchange with OLAF²⁴ or alternatively facilitate an effective cooperation and information exchange with OLAF²⁵. The new regulation should oblige each MS to identify quickly the relevant national competent authority to assist OLAF in investigations, especially those related to direct expenditures.

2.4.2. Transmission of information by OLAF to Member States

17. In line with the ruling of the Court of First Instance of the European Union (Case T-48/05 *Franchet and Byk*), the SC has always verified the quality of transmissions by OLAF to judicial authorities of the MS. Without interfering in ongoing investigations, the SC has seen a steady improvement in the quality of these transmissions. The SC has also expressed concern about the assistance provided by OLAF to the national judicial authorities during criminal proceedings related to the protection of the financial interest of the EU which have been previously opened on their own initiative and the relatively disappointing outcomes. The SC believes that monitoring of judicial follow-up by the SC must remain a priority. It is important that the SC continues to receive copies of the transmissions to the judicial authorities of MS as it is currently done.

18. OLAF may at any time forward information obtained in the course of external investigations to the competent authorities of the MS concerned²⁶ or has the obligation to forward to the judicial authorities of the MS concerned information obtained in the course of internal investigations concerning facts which require investigative proceedings within the jurisdiction of a national judicial authority²⁷. In the latter case, OLAF must first inform the institution concerned. Prior to transmission, the person concerned must have been allowed to comment on the facts alleged against him in accordance with Article 7a (4). However, it is possible to defer this requirement with the approval of the institution concerned. If the institution does not respond within one month, it shall be deemed to be accepted. The SC

²⁴ Article 3 (4) of the EC proposal.

²⁵ Article 3 (4) of the Council's proposal.

²⁶ Article 10 (1) of the amended proposal.

²⁷ Article 10 (2) of the amended proposal.



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considers this provision to be very complex and to provide little protection for the person concerned. It would also be likely to have a negative effect on any national criminal investigation. The SC suggests that the procedure be entrusted to the person charged with the review procedure, who alone has full access to the case file and can appreciate the interests of all concerned. The proposal also does not address the problem where an institution refuses to approve the deferral of the right of the person concerned to make his or her views known.

19. Where the report²⁸ drawn up after an *internal* investigation reveals the existence of facts which could give rise to criminal proceedings, OLAF has an obligation to transmit this information to the judicial authorities of the MS concerned, unless internal measures allowing for more appropriate follow-up are available in the light of the nature of the facts and the scale of the financial impact. The SC notes that, despite having its own specialists in criminal law, OLAF has no competence to act in the area of criminal law. Indeed, OLAF's main task is to conduct "administrative investigations", which should not affect a MS bringing criminal proceedings²⁹. The SC notes that the Commission's intention was to clarify the "*de minimis*" policy and to allow OLAF to forward the case to the Investigation and Disciplinary Office of the Commission (IDOC) or to the institutions, bodies, office or agency concerned, instead of sending it to the competent national judicial authorities. However, IDOC or the institutions, bodies, office or agency concerned could also decide not to forward to these authorities the information received from OLAF. Were this to be the case, the MS would be deprived of any power to bring a criminal prosecution. The SC therefore strongly disagrees that there should be any exception in the regulation which could prevent OLAF's notifying MS of facts which could give rise to domestic criminal proceedings.

20. The SC is also disappointed to note that the obligation to inform the judicial authorities of the MS concerned, where the report drawn up reveals the existence of facts which could give rise to criminal proceedings, does not apply to *external* investigations. It is not clear if this possibility is provided for by Article 9 (3). Therefore, further clarification of the text is required.

2.4.3. Follow-up by Member States of OLAF's recommendations

21. When requested by OLAF, the competent authorities of the Member States must inform it regarding the action taken following transmission by OLAF of its investigation reports³⁰. The SC considers it important for OLAF to have a regular exchange of information on cases transmitted to MS, especially since not only does OLAF have an obligation to report to the SC on cases in which the competent authorities of the MS have failed to act upon OLAF's recommendations³¹, but, additionally, the exchange of views as established in Article

²⁸ Article 9 (5) of the EC proposal. The Council's proposal envisages internal administrative measures, in particular disciplinary and financial sanctions.

²⁹ Article 2 of the amended proposal.

³⁰ See Article 9 (3) of the EC proposal and Article 9 (4) a) of the Council's proposal.

³¹ See Article 11 (7) a) of the EC proposal. The Council maintained this obligation only regarding institutions, bodies, offices or agencies and deleted the reference to the MS authorities.



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11a might refer to the relations between OLAF and the competent authorities of the MS. The SC therefore supports the EP proposal to put in place a regular reporting obligation for MS. Such an obligation would improve cooperation between OLAF and MS, without necessarily introducing cumbersome and formal procedures.

2.5. Encouraging cooperation between OLAF and Europol, Eurojust, third countries and international organisations

22. Article 10a of the amended proposal³² allows OLAF to agree to administrative arrangements with Eurojust, Europol, third countries and international organisations, aimed at facilitating their cooperation. The SC considers it important for OLAF to be able to agree to such arrangements, in order for it to better protect the financial interests of the EU. These arrangements would allow a reinforced cooperation, which would be to the benefit of all parties concerned.

3. ENHANCING OLAF'S ACCOUNTABILITY

3.1. Strengthening procedural rights

23. The SC emphasises that the amended proposal should maintain a balance between the protection of the rights of persons and the independent conduct of investigations. The SC has already expressed its concerns regarding the requirement for OLAF to obtain the prior agreement of the Secretary General or the President of the institution to which the person concerned belongs, when deciding whether to defer the obligation to ask the person concerned to make his or her views known³³. The SC considers that this requirement could impair the operational independence of OLAF in the event of refusal or delay, as has occurred several times in the past, despite appearing to represent a guarantee of the rights of defence. The SC considers that the new regulation should contain provisions allowing for the avoidance of such situations in the future (see point 29 of this opinion). Indeed, the provision in the amended proposal stipulating that failure of the institution, body, office or agency to reply within one month shall be deemed to be agreement thereto³⁴, demonstrates that no progress has been made in this area. This is not sufficient, given the lack of any alternative in the event of refusal. The SC reiterates its wish to be informed systematically of all cases in which institutions, bodies, offices or agencies have refused to give their agreement to defer the obligation to ask the person concerned to make his or her views known.

³² This Article was considerably modified by the Council.

³³ SC's Opinion No 5/2010.

³⁴ Article 7a (4).



3.2. Setting up a review procedure

24. The SC notes that the Review Adviser proposed by the Commission in 2006 was replaced by a review procedure to be set up by the DG within OLAF. The SC is not convinced that this new procedure fully meets the objective of the amended proposal to further reinforce the procedural rights of persons concerned in OLAF's investigations. Indeed, the review procedure does not allow a *regular* control of the legality of investigations, nor does it establish sufficient guarantees in order to ensure the independence of the person(s) entrusted with it. The SC therefore suggests that the new regulation should allow for both a regular internal control of the legality of investigations at precise stages of the investigation as well as a complaints mechanism or review procedure to be carried out by an independent person reporting to the SC.

3.2.1. Need for regular control of the legality of investigations

25. As the SC has already stated³⁵, ensuring the respect for fundamental rights and procedural guarantees of persons under investigation is first and foremost the responsibility of the Director General of OLAF and of the management team. Therefore, it falls within the remit of the DG to put in place adequate internal controls and monitoring mechanisms.

26. The SC considers that the amended proposal does not allow for the setting up of such a *regular* control for two reasons. First, the review procedure would be initiated only at the request of a person concerned in an investigation. The cases where it is necessary to preserve the confidentiality of the investigation (and where the person concerned would not even be aware of the existence of the investigation) would systematically escape this form of control. Second, the mechanism proposed by the Commission (but not accepted by the Council) of an internal body to be consulted by the DG at different stages of the investigation (upon the opening of an investigation, prior to closing an investigation and whenever he deems appropriate)³⁶ is not the appropriate forum to redress any potential violation of the rights of the person concerned, since its composition, mandate and role are not clearly defined.

27. The SC therefore supports the idea of a regular review of the legality of OLAF's investigations to be carried out by those within OLAF who are experts in legal and investigative procedures and are qualified to hold judicial office in a MS, prior to the opening and again prior to the closing of an investigation, as well as prior to any forwarding of information to the competent authorities in the MS concerned³⁷.

³⁵ SC's Opinion No 3/2010.

³⁶ See Article 12 (6) of the Commission's proposal.

³⁷ Article 14 of the EP resolution of 2008.



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3.2.2. Need for a complaints mechanism

28. The SC is aware of the difficulty of putting in place an independent control system to assess the legality of OLAF's investigative acts. The SC takes note and agrees with the opinions of the Court of Auditors with regard to the lack of adequate guarantees of independence for the Review Adviser proposed by the Commission in 2006³⁸ and for the person(s) entrusted with the review procedure as proposed in 2011³⁹. The SC repeats its view that, within the general architecture governing OLAF, the SC is the only body able to meet this requirement. However, neither the current regulation nor the amended proposal have entrusted the SC with the power to analyse individual complaints. The SC's role is rather to provide for systemic analysis. The SC considers therefore that there is a clear need to assign this task to an independent person.

29. The SC has expressed previously its concerns regarding the creation of a Review Adviser as proposed by the EC in 2006. However, the SC could agree with the creation of a review procedure or a complaints mechanism to be carried out by an independent person *i*) if the mandate and the role of this person were more clearly defined in order not to overlap with the powers and responsibilities of the SC and *ii*) if the guarantees of his or her independence were deemed to be adequate. In particular, the SC considers that this person should be able not only to analyse complaints against OLAF, but also to act on his/her own initiative by regularly ensuring the respect of procedural rights before information has been given to the person concerned in case of deferral of the obligation to ask the person concerned to make his or her views known and in cases transmitted to the national judicial authorities when the person concerned was not informed about the investigation. The SC also considers that the person entrusted with the review procedure should be informed of all decisions to defer the information of the person concerned and/or of the institution to which the person concerned belongs so as to be able to act on his/her own initiative. Indeed, it is particularly in these circumstances that his/her intervention might be important. This would make the intervention of the Secretary General or of the President of the institution concerned unnecessary.

30. He or she should have unannounced, automatic and permanent access to OLAF case files. New provisions could be inserted in the regulation in order to ensure the respect by this person of confidentiality of investigations and compliance with the rules of data protection. His/her opinions shall be sent to the DG. These opinions, if not binding, shall be followed by a reasoned reply from the DG in the event that he decides not to follow the recommendations made. The SC should systematically receive copies of the complaints and of the opinions of the person entrusted with their analysis. Moreover, in order to ensure the complete independence of this person, neither he nor she should be appointed by or be under the authority of the DG. Were this to be the case, the independence of such a person would be illusory were his or her evaluation and promotion to depend on the DG.

³⁸ See the Opinion No 2/2006.

³⁹ See the Opinion No 6/2011 of the Court of Auditors, points 15 and 37-40.



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3.3. Adoption of rules of procedures

31. The SC fully supports the idea of establishing clear rules of procedure aimed at reinforcing transparency and legal certainty. The SC favours the inclusion of these rules in a manual of procedures rather than a procedural code⁴⁰. Indeed, a procedural code would need a complex procedure both for its adoption as well as for any future amendments and would also need time for adoption and the involvement of all three institutions.

4. REINFORCING OLAF'S INDEPENDENCE

4.1. Clarifying the role of the Supervisory Committee

4.1.1. Role of the SC

32. The primary role of the SC is to reinforce OLAF's independence, by regular monitoring of the implementation of the investigative function. This role implies (but is not limited to⁴¹) monitoring the functioning of exchange of information between OLAF and the institutions, bodies, offices and agencies and the competent authorities of the Member States on the one hand, and monitoring developments concerning the application of procedural guarantees and the duration of investigations, on the other. It also implies monitoring of the effectiveness of OLAF's work and of the results of investigations.

33. The SC welcomes the new task of **monitoring the functioning of information exchange** between OLAF and the institutions, bodies, offices and agencies and favours the Commission's proposal, which would extend this task to the functioning of information exchange between OLAF and the competent authorities of the MS⁴².

34. The SC shall also **monitor developments concerning the application of procedural guarantees and the duration of investigations**. Therefore, the SC strongly disapproves of the new wording of Article 11 (7) b)⁴³. This modification ignores the rule established by the *Franchet and Byk* case, which recognised that the SC has a role to play with regard to the protection of the rights of the persons concerned by OLAF's investigations. Indeed, the SC's role in this field would be diminished, since the DG will no longer have the obligation to

⁴⁰ As proposed in Article 15 of the EP resolution.

⁴¹ Article 11 (1) second phrase of the amended proposal stipulates that the SC "shall *in particular*" monitor the functioning of information exchange....

⁴² The reference to the monitoring of the functioning of information exchange between OLAF and the competent authorities of the Member States was deleted by the Council.

⁴³ "The Director General shall inform the Supervisory Committee periodically (...) (b) of cases in which information has been forwarded to judicial authorities of the Member States and of cases in which he decided not to transmit information on internal investigations to the national judicial authorities concerned in accordance with Article 9(5)".



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systematically inform the SC *before* forwarding information to the national judicial authorities, but only to "periodically" inform it of cases in which information *has already been* forwarded to these authorities⁴⁴.

35. As is the case under the current regulation, the SC will continue to **monitor the results of investigations**, on the basis of information supplied by the DG regarding cases in which the institution, body, agency or office concerned has failed to act upon the recommendations made by OLAF. The SC is disappointed to note that, in the Council's proposal, this information does not include cases where the competent authorities of the Member States have failed to act⁴⁵. The SC considers it important to assess the reasons for such failure (for example, time barring) and thus detect any potential interference with OLAF's independence and to make appropriate recommendations. The SC believes that there is a clear need for the monitoring of the results of OLAF's investigations and is ideally placed to assume this task. The SC has serious doubts that the proposed exchange of views with the institutions should be the sole forum for discussions concerning the effectiveness of the work of OLAF with regard to investigations⁴⁶.

4.1.2. SC Support

36. The SC is disappointed to note that the increases in its responsibilities and the clarification of its role have not been matched with the appropriate support for both the SC and its secretariat. The SC reiterates its concerns and remarks expressed in its previous Opinion No 3/2010 with regard to the SC's resources (information transmitted by OLAF, SC's access to data, SC's secretariat), which should be appropriate and adequate to enable it to fulfil its role and perform its functions in full independence.

37. The SC shall perform its monitoring role on the basis of the information and documents sent to it by the DG and taking into account the opinions and analysis reports as drawn up by the person(s) entrusted with the review procedure⁴⁷.

38. The SC notes that the provisions of Article 7b (5) are not consistent with those of Article 11 (1) b: although Article 11 (1) b states that the SC shall "monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of (...) the **opinions** and **analysis reports** regularly drawn up by the person(s) entrusted with the review procedure", Article 7b (5) mentions that this/these person(s) shall present the SC "with regular **statistical** and **analytical reports**", and not the opinions issued following a request filed by a person concerned⁴⁸. The obligation for this/these person(s) to send regular

⁴⁴ See point 45 of the Opinion No 6/2011 of the ECA.

⁴⁵ Article 11 (7) a) of the Council's proposal.

⁴⁶ Article 11 (2) f) of the amended proposal.

⁴⁷ Article 11 (1) b) and (7) of the amended proposal.

⁴⁸ Indeed, according to Article 7b (3), the person(s) entrusted with the review procedure shall communicate their opinion only to the DG and shall send a reasoned reply (*NB: not the opinion*) to the person concerned.



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reports is not equivalent to the obligation to send each and every opinion to the SC, as should be the case.

39. Moreover, the SC disagrees with the proposal whereby the SC would no longer receive any regular information concerning the cases transmitted to national judicial authorities, for the reasons stated above.

40. The SC emphasises that its work, as an independent body, cannot and should not be based solely on information received from OLAF. The SC makes its own analysis using not only documents and information received from OLAF, but also any documentation the SC deems necessary for the purpose. The last sentence of Article 11 (1) of the amended proposal has only partially taken into consideration the need for the SC to have access to data and information held by OLAF, as requested in its Opinion No 3/2010⁴⁹. The SC considers that this provision is not sufficient to allow proper and adequate monitoring by the SC and thus the detection of potential interference with OLAF's independence, since the SC's access to information would be left to the discretion of the DG⁵⁰. The SC therefore needs permanent and unannounced access to all OLAF's *closed* case files. In order not to interfere with the *ongoing* investigations, the SC should have access to open case files upon written request.

41. Members of the SC are assisted in the performance of their duties by a secretariat. Although provided by OLAF, the secretariat shall work in complete independence under the chair of the SC and its members. In the opinion of the SC, independent functioning of its secretariat⁵¹ necessitates further guarantees provided by the text of the regulation itself: the secretariat shall be adequately staffed; members of the secretariat under the terms of the regulation shall be appointed by an Appointing Authority different from OLAF DG, at the suggestion of the SC; they shall be periodically evaluated solely by the SC⁵²; they shall act with loyalty and in full respect of the instructions received exclusively from the SC. As it is the case for the person entrusted with the review procedure, the SC considers that the requirement for the independence of its secretariat – and consequently for the SC – is illusory if the staff of the secretariat is appointed, administered and promoted by the service which it is in charge of monitoring.

⁴⁹ Point 2.2.3 of SC's Opinion No 3/2010. Indeed, Article 11 (1) last sentence stipulates that the SC may ask OLAF for additional information on investigations in duly justified situations, without however interfering with the conduct of investigations.

⁵⁰ The European Court of Auditors is of the same opinion (see point 43 of its Opinion No 6/2011).

⁵¹ As provided in Recital 17 of the amended proposal.

⁵² According to the opinion No 6/2011 of the ECA, the members of the SC secretariat shall not be appointed by or subject to the authority of the DG (point 44).



4.2. Clarifying the role of the Director General

42. While the SC is content with the form of the recruitment procedure for the post of the Director General which was followed after the death of the previous incumbent, it notes that the process took an inordinately long time and therefore recommends that a relatively short timeframe should be included in the Regulation for future appointments to this role.

4.2.1. Delegation of powers and deputy representation

43. The SC is not convinced that the power of the DG to delegate the performance of his functions to one or more members of OLAF staff is without risk to the independent conduct of investigations. The SC notes that some of the functions which can be delegated are directly linked to the conduct of investigations⁵³. Therefore, the person(s) entrusted with these functions shall act in full independence, in the manner of the DG.

44. It is important to ensure continuity in the independent conduct of OLAF's investigations by creating the function of a Deputy Director General to replace the Director General were the latter to resign, retire, be on sick-leave or otherwise be unable to fulfil his obligations. The deputy should be chosen among the Directors with the consensus of all three institutions.

4.2.2. Internal body to be consulted by the DG

45. The SC supports Article 12 (6) of the amended proposal imposing an obligation on the DG to consult an internal body on the opening of an investigation or prior to the closing of an investigation and whenever he deems appropriate, but only to the extent that appropriate guarantees be added to the text in order to prevent any possible delay in the event of an emergency.

4.3. Setting up an exchange of views

46. The SC supports the concept of an exchange of views at political level⁵⁴ to discuss OLAF's investigations policy providing the purpose is to support OLAF's activities and it

⁵³ The functions which can be delegated are notably the decision on whether or not to open an investigation (Article 5) or the management of investigations (Article 6 (1)).

⁵⁴ This exchange of views replaces the interinstitutional dialogue proposed by the previous texts on the reform.



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does not undermine its operational independence. The SC considers that the obligation for OLAF to take appropriate action whilst taking into account the opinions expressed in the exchange of views could undermine the independence of the DG. The DG could thus be put under pressure from the institutions, particularly regarding the establishment of the strategic priorities for OLAF's investigative policies⁵⁵. Moreover, the SC strongly disapproves of the amendment made by the Council which it believes could seriously jeopardise OLAF's independence, since it significantly changes the meaning of Article 11 a (1) in the sense that the participation of the SC in this exchange of views would not be mandatory on every occasion⁵⁶.

⁵⁵ Article 11a (2) a) of the amended proposal.

⁵⁶ In the Commission's proposal, Article 11 a (1) is drafted as follows: "The European Parliament, the Council and the Commission shall meet periodically **or upon request of one of these institutions**, the Office or the Supervisory Committee for an exchange of views at political level to discuss the Office's policy of investigations". This text was amended by the Council as it follows: "The European Parliament, the Council and the Commission shall meet periodically the Office or the Supervisory Committee for an exchange of views at political level to discuss the Office's policy of investigations ". The latest drafting can be interpreted as leaving to the institutions the possibility to meet the Office alone, without the SC being necessarily present.