

I

(Resolutions, recommendations, guidelines and opinions)

OPINIONS

COURT OF AUDITORS

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)**

(pursuant to Article 280(4), EC)

(2007/C 8/01)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THE FOLLOWING OPINION:

Having regard to the Treaty establishing the European Communities, and in particular Article 280(4) thereof,

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

Having regard to the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ⁽¹⁾,

Having regard to the requests for an opinion submitted to the Court of Auditors by the European Parliament on 14 July 2006 and by the Council on 21 September 2006,

Having regard to the previous opinions issued by the Court of Auditors ⁽²⁾,

1. The proposal replaces an earlier proposal ⁽³⁾ made by the Commission in February 2004. The initial proposal aimed at amending Regulation (EC) No 1073/1999 in order to boost the procedural rights of individuals, to ensure better control over the duration of investigations and to improve the exchange of information between the Office and the institutions or bodies concerned and the efficiency of operational activities. In the explanatory memorandum, the revised proposal states that it aims to further improving OLAF's operation while taking into consideration recommendations made by the Court and the conclusions of the public hearing on the reinforcement of OLAF organised at the European Parliament in July 2005.
2. The revised proposal has largely taken into consideration the observations made in the Court's previous opinion of 9 June 2005, the main exception being the view expressed in paragraph 7 thereof. This concerns the need to ensure that the requirement that the institution, body, office or agency concerned should be notified of the opening of an investigation is not set aside without justification on the pretext that secrecy is necessary to guarantee the efficiency of the investigation.

⁽¹⁾ COM(2006) 244 of 24 May 2006.

⁽²⁾ Opinions No 2/1999 of 14 and 15 April 1999 (OJ C 154, 1.6.1999, p. 1), No 6/2005 of 9 June 2005 (OJ C 202, 18.8.2005, p. 33) and No 8/2005 of 27 October 2005 (OJ C 313, 9.12.2005, p. 1).

⁽³⁾ COM(2004) 103 final of 10 February 2004.

3. Article 14 of the proposal provides for the introduction of a Review Adviser to monitor compliance with procedures. The Court welcomes this introduction. However, the role and responsibilities of the Review Adviser should be explicitly set out in the Regulation, as should the review of the legality of investigative measures envisaged for this function. Furthermore, the qualifications and experience required to occupy this function should be reflected in the Regulation. The Court also stresses the need for complete independence in the post, as stated in Article 14(2) in the Commission's proposal, but considers that the independence may be compromised by the Director-General's authority to instigate disciplinary measures concerning the Review Adviser after consultation with the Supervisory Committee. It should also be considered, in order to avoid conflicts of interest, that the Review Adviser, who is to monitor ongoing investigations, should no longer intervene once the results of an investigation have been transmitted to the authorities concerned.
4. A new provision ⁽¹⁾ grants the Director-General discretionary powers in deciding whether or not to submit a final report to the Member States' judicial authorities where the Director-General considers that internal measures are available which would ensure more appropriate follow-up. However, the circumstances under which this discretionary power may be exercised need to be more clearly established. Moreover, if such a decision necessitates an assessment of national legislation and case-law it should be left to the judicial authorities in the Member States.
5. In its Opinion No 8/2005 the Court recommended that the Commission should simplify and consolidate the Community's anti-fraud legislation. However, the new proposal makes even more extensive reference to 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 ⁽²⁾ (the purpose of which have been considerably extended ⁽³⁾). As no amendment of Regulation (Euratom, EC) No 2185/96 is proposed it will not be clear to a reader of this Regulation that it also applies for other purposes. This is contrary to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation ⁽⁴⁾. Finally the Court notes that although the new proposal includes procedures and guarantees to be observed by the Office's employees when conducting internal investigations the Commission does not propose to delete the current Article 4(6)(b). This could be a source of confusion and give room for deviations.

This opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 6 December 2006.

For the Court of Auditors
Hubert WEBER
President

⁽¹⁾ Article 9(3a).

⁽²⁾ OJ L 292, 15.11.1996, p. 2.

⁽³⁾ According to recital 4 and the amendments to Articles 3 and 4 in the new proposal.

⁽⁴⁾ The Agreement stipulates that legal text should keep references to other legal acts to a minimum. Where the impact on other legal acts is substantial the Agreement requires a separate amending act (OJ C 73, 17.3.1999, p. 1).