

English edition

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I

(Information)

COURT OF AUDITORS

OPINION No 2/99

of the Court of Auditors on the amended proposal for a Council Regulation (EC, Euratom) concerning investigations conducted by the Fraud Office

(1999/C 154/01)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THE FOLLOWING OPINION:

Having regard to the Treaty establishing the European Community, and in particular Article 188c (future Article 248) thereof,

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

Having regard to the proposal from the Commission for a Council Regulation (EC, Euratom) establishing a European Fraud Investigation Office, submitted by the Commission on 4 December 1998 ⁽¹⁾ which was, in particular, a reaction to the European Parliament's Bösch report on UCLAF ⁽²⁾, adopted on 7 October 1998,

Having regard to the request made by the Council, on 22 December 1998, for the Court of Auditor's opinion, received by the Court on 11 January 1999,

Having regard to the amended proposal from the Commission for a Council Regulation (EC, Euratom) concerning investigations conducted by the Fraud Office, transmitted to the Court by the Commission on 29 March 1999 ⁽³⁾,

Having regard to the request made by the Council, on 9 April 1999, for the Court of Auditor's opinion on the amended proposal for a Council Regulation (EC, Euratom) concerning investigations conducted by the Fraud Office, received by the Court on 13 April 1999,

The Court's special report on UCLAF

1. In its special report 8/98 on the Commission's services involved in the fight against fraud, notably the 'Unité de coordination de la lutte anti-fraude' (UCLAF) ⁽⁴⁾, the Court of Auditors observed that:

- as long as the Convention and Protocols under the third pillar of the Treaty are not ratified, the Commission's powers in the fight against fraud remain limited,
- the organisational arrangements within the Commission and with Member States are not always clear and are often complicated and cumbersome,
- the cooperation with Member States is also hampered by the manner in which the privileges and immunities of the European Union's staff are respected; in addition, UCLAF in its inspections on Member States territories has to cope with serious constraints concerning national legislation,
- the quality of the information held in the databases and the use of that information was unsatisfactory; in addition, the coordination between UCLAF, the other DGs and the Member States in relation to databases and intelligence sharing needed to be improved,
- the procedures within the Commission and responsibilities concerning the fight against internal corruption are unclear and incomplete. There were no clear guidelines for investigations, there was no clear policy (zero tolerance) and there were doubts whether UCLAF, as presently structured, should deal with cases of corruption involving staff of the Commission,
- UCLAF has no power to carry out enquiries relating to other institutions.

⁽¹⁾ COM(1998) 717 final, 98/0329 (CNS) (OJ C 21, 26.1.1999, p. 10).

⁽²⁾ Resolution AU- 0297/98.

⁽³⁾ COM(1999) 140 final, 98/0329 (CNS).

⁽⁴⁾ OJ C 230 22.7.1998.

The structure of the proposal

2. The creation of a Fraud Office is treated in a number of documents:

- (a) a draft Council Regulation concerning investigations conducted by the Fraud Office;
- (b) a (draft) Commission Decision establishing a Fraud Office, which should be responsible for carrying out internal and external investigations, for developing concepts and legislation for the fight against fraud, and for any other operational activity in the fight against fraud (Article 2 of the Decision);
- (c) a draft Interinstitutional Agreement (IIA) concerning internal investigations by the Fraud Office, to enable the Fraud Office to carry out enquiries within the various Community institutions or bodies.

3. The Court's opinion covers the above documents in a global manner. Given the interdependence of the measures an isolated treatment of the draft Council Regulation would not be adequate.

4. Whereas the Commission Decision covers the Office as a whole, the draft Council Regulation, according to its title, only covers the tasks of investigation (internal and external) and the IIA reduces the scope further, dealing only with internal investigations. Thus more global aspects are covered by the Commission Decision and more specific aspects by the Council Regulation and the IIA respectively.

5. The proposal on the IIA serves a dual purpose. The Agreement is firstly necessary to provide the Office with the power of access to the other institutions and Community bodies. Secondly, the Commission justifies its proposal for an IIA as a temporary means of resolving certain problems pending a revision of the Staff Regulations. The Court notes the success of other interinstitutional agreements, such as that of 1998 on budgetary discipline and improvement of the budgetary procedures, as a pragmatic means of improving Community management, particularly in areas where the need for flexibility makes the framing of appropriate legislation difficult.

6. As regards access to the institutions (other than the Commission) and the other Community bodies, the operational independence of the Office will be heavily dependent on the satisfactory adoption and implementation of the proposed IIA and the underlying institutional decisions.

7. As regards future amendments to the Staff Regulations, it is regrettable that the Commission, in the documentation accompanying the revised proposal, has failed to provide a clear indication of the amendments it considers necessary. Without this information, it is not possible to form a view as to the precise content of the IIA and of the model institution decision annexed to the proposal. Furthermore, if it is necessary to amend the Staff Regulations, the Court has doubts as to the legality of any interim measures to overrule this legislation (i.e. the IIA and (model) institution decision).

The operational independence of the Office

8. Following the discussions in the European Parliament and the Council the Commission has presented a draft Council Regulation (in

conjunction with a draft Commission Decision and a draft Interinstitutional Agreement) by which far-reaching independence is given to the Fraud Office for investigative purposes. Indeed, according to Article 12 of the proposed Council Regulation and Article 3 of the draft Commission Decision, the Commission cannot give any instruction to the Director (and, therefore, to the Office) where investigations are concerned. Whereas the aim to create an independent body is pursued by all parties involved in the discussion, the construction of an independent body, as intended by the proposed texts, is rendered more difficult by the fact that the body is a part of the Commission. Indeed, even if the Office must be operationally independent, the ultimate responsibility for its acts rests with the Commission, since the Office remains part of its structure. This is confirmed by the fact that actions resulting from acts of the Office, including investigative acts, will be brought before the Court of Justice against the Commission and not against the Office directly.

9. Therefore, the text of the second paragraph of Article 12 of the proposed Council Regulation should be modified in order to make the operational independence of the Head of Office consistent with the exercise by the Commission of its responsibilities. In this respect, the status of the Financial Controller could serve as an example. On the one hand, the Financial Controller is independent in the performance of his duties and can even oblige his institution to respect this independence by a right of recourse to the Court of Justice (Article 24 of the Financial Regulation). On the other hand, however, the institution is able to exercise its final responsibility through the overruling procedure, subject to certain conditions of transparency (Article 39 of the Financial Regulations).

Supervisory Committee

10. The tasks of the Supervisory Committee are dealt with in both the Commission Decision (Articles 5 and 6) and in the draft Council Regulation (Article 11). The Court's report on UCLAF indicated that there is a need to ensure that the independence of the fraud investigation function is protected. While an independent Committee might have been able to fulfil such a role, and although the Committee is said to be intended to 'assist' the Office, its functions, giving its opinion to the Head of the Office on current activities, reporting directly to the other institutions, overseeing the preparation of the Office's budget and work programme, and indeed its very title suggest that in substance it would become a sort of independent board of management. This could prove a source of great difficulty both for the effective management of the Office by its Head, and adversely affect the discharge of his responsibilities towards the Commission, Council and Parliament. He would, in effect, be responsible to the Committee rather than to the institutions. The Court questions whether there is authority for such a management board within the present institutional structure laid down by the Treaty. Accordingly, the Court considers that the present proposal would be clearer and stronger without the Supervisory Committee; if consultation is needed between the three major Institutions concerned about the functioning of the Office, this could better be arranged through the established interinstitutional discussions as have taken place in the preparation of these proposals.

11. Whatever structure is put in place, it should remain clear that the Court of Auditors maintains its obligation and powers for external audits as given by the Treaty. Therefore, if Article 11 remains, it should begin:

'Without prejudice to the audits carried out by the Court of Auditors under Article 188c (future Article 248) of the EC Treaty, the Office shall be...'

The function of the Office

12. The legislation which is referred to for the tasks of the Office is, in Article 3 of the draft Council Regulation, limited to Council Regulations (EC, Euratom) No 2185/96 and (EC, Euratom) No 2988/95. In a revised draft proposal for a Commission Decision ⁽⁵⁾ it is made clear that OLAF will take over all of the tasks so far executed by UCLAF. The functions of the Office are specified in Article 2 of this draft Decision. It seems that the second paragraph of that Article also includes, as a task for OLAF, tasks which are presently executed by the Directorates General responsible for certain areas. It is doubtful whether the new Office could add these tasks, regarding all irregularities and illegalities, to the primary task of investigating cases of (possible) fraud, as defined, for example, in the Council Act of 26 July 1995 ⁽⁶⁾, without the risk of paralysing the latter activity.

The Office's rights of access to information

13. Articles 4(2) and 7 of the proposed Council Regulation provide for the exchange of information for investigation purposes between the institutions and the Office. No mention is made of the power to request, in general, information useful for the fight against fraud for the purpose of the intelligence task. At the same time, Article 1 of the model institution decision imposes the obligation on the institutions to inform the Office without delay of any fact of which they become aware which gives rise to a suspicion of fraud (etc). While this obligation can be implied from a reading of the relevant Articles of the proposed Council Regulation, it is of such importance that it should be explicitly mentioned therein, in addition to the more general provisions in the area of the exchange of information. This is particularly necessary as there is no guarantee that the institutions will adopt internal decisions that exactly reflect the model given in the present package.

14. In interpreting the first paragraph of Article 7 of the Council Regulation, it must be made absolutely clear that it is for the Head of the Office to determine the information that is 'necessary for current investigations'.

Appointment and dismissal of the Head of the Office

15. Article 5(1) of the Commission Decision and Article 12(1) of the proposed Council Regulation refer to the appointment of the Director of the Office being made after consulting the European Parliament and the Council.

16. The appointment and dismissal of officials and agents is governed by the Staff Regulations or by the Conditions of employment of other servants of the European Communities. Appointment and dismissal conditions, including consultation procedures, cannot be imposed by the proposed Council Regulation because rules on the appointment and dismissal of officials or agents should be adopted on the basis of Article 24(2) of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities. They should therefore be deleted from the proposed Council

Regulation. Rules on consultation could, however, be maintained in the draft Commission decision since nothing prevents the Appointing Authority from establishing consultation procedures.

17. Consideration should be given to adding to Article 12(1) of the proposed Council Regulation a provision on the communication of decisions relating to the Head of the Office's career to other institutions, as is the case for the Financial Controller (Article 24 of the Financial Regulation). The following text could be envisaged: 'The Head of the Office's appointment, his promotion and disciplinary rules or transfer, and any procedure shall be subject to reasoned decision to be forwarded, for information, to the European Parliament, the Council and the Court of Auditors'.

Other staff related matters

18. The Staff Regulations (Article 90(2)) contain rules by which complaints have to be dealt with by the Appointing Authority, which is to be designated by each institution according to Article 2 of the Staff Regulations. Article 14 of the proposed Regulation interferes in the procedures as laid down in the Staff Regulations and should therefore be deleted.

19. The Regulation should make it clear that the grade of the Head of the Office should be at the level of Director-General (A 1). This would be appropriate, given the functions and the status of the body and the responsibilities of its Head of Office.

Follow-up of action taken and its outcomes

20. It is the responsibility of the management of the institution to take appropriate follow-up action regarding the results of the Office's investigations. The efforts to establish an independent, effective and efficient investigative body will be futile if the follow-up given to its reports and recommendations by the institutions is inadequate. Follow-up procedures for external investigations can only become effective after ratification of the Convention under the third pillar of the Treaty. For internal investigations disciplinary procedures as well as procedures on the recovery of funds should be strengthened, as already proposed by the Court in its Opinion 4/97 concerning the proposal to modify the Financial Regulation of 21 December 1977 ⁽⁷⁾.

Financial provisions

21. The content of Article 13 of the proposed Council Regulation should be included in a Financial Regulation adopted on the basis of Article 209 of the Treaty rather than in the draft Regulation as presented under Article 235 of the Treaty.

⁽⁵⁾ Not yet adopted formally.

⁽⁶⁾ Council Act of 26 July 1995 drawing up a Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995).

⁽⁷⁾ Paragraphs 5.18 to 5.23 of the Annex (OJ C 57, 23.2.1998).

Interinstitutional Agreement

22. It is not made explicit which institutions and bodies should be covered by the IIA and to what extent account is taken of the obligations on confidentiality of information inherent to the function of certain Institutions.

Conclusion

23. In conclusion, the Court is of the opinion that:

(a) the main aim of the proposal seems to be limited to the creation of a structure that will allow internal investigations to be con-

ducted in all of the Community institutions and bodies; the Commission remains ultimately responsible for the actions of its services. Thus, the creation of a body that is intended to be independent but at the same time is within the Commission poses some practical as well as legal problems;

(b) the present proposal would be clearer and stronger without the Supervisory Committee;

(c) it seems that the tasks and members of staff will be transferred from UCLAF to the new Office. In this context, the Court draws attention to the observations contained in its special report 8/98, and in particular those concerning the managements of UCLAF and problems of cooperation with the Member States. These problems need to be addressed before any anti-fraud service can become fully effective.

This opinion has been adopted by the Court of Auditors in Luxembourg in its meeting of 14 and 15 April 1999.

For the Court of Auditors

Jan O. KARLSSON

President

OPINION No 3/99

of the Court of Auditors of the European Communities on an amended proposal for a Council Regulation (EC, ECSC, Euratom) amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (Proposal presented by the Commission in document COM(1998) 676 final of 20 November 1998)

(1999/C 154/02)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 209 thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 78h thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 183 thereof,

Having regard to the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities ⁽¹⁾, which has been amended on several occasions, and in particular Article 140 thereof,

Having regard, in particular, to Council Regulation (EC, ECSC, Euratom) No 2779/98 of 17 December 1998 ⁽²⁾, which is the most recent Regulation to amend the Financial Regulation,

Having regard to the Commission's initial proposal of 3 April 1998 ⁽³⁾,

Having regard to the amended Commission proposal of 20 November 1998 ⁽⁴⁾,

Having regard to the requests for an opinion on the amended proposal, which the Council sent to the Court of Auditors on 10 December 1998 and 9 March 1999,

Referring to Opinion No 9/98 concerning the initial proposal, which the Court of Auditors delivered on 22 October 1998 ⁽⁵⁾,

Whereas the object of the initial proposal was to deduce the implications for the Financial Regulation of the introduction of the euro as the single currency for some Member States of the Communities, the abolition of the common organisational structure for the Economic and Social Committee and the Committee of the Regions and the adoption of the Stability and Growth Pact (SGP);

Whereas, at Parliament's request, the amended proposal has added to the above three reforms a fourth concerning the creation of a specific section of the budget for the Ombudsman;

Whereas since the Commission's presentation of the amended proposal on 20 November 1998 the Council has adopted, on 17 December 1998, Regulation (EC, ECSC, Euratom) No 2779/98, which modifies the Financial Regulation to take account of the introduction of the euro and the adoption of the Stability and Growth Pact; whereas in consequence only two reforms are still capable of being adopted: the one which concerns the abolition of the common organisational structure and that which concerns the creation of the budget section for the Ombudsman; whereas attention should therefore be focused on those provisions of the proposal that apply to the implementation of the latter two reforms,

HAS ADOPTED THE FOLLOWING OPINION:

Formal presentation of the amended proposal

1. The proposal is set out in two columns, the first containing the text of the initial proposal and the second the amended text. Both columns contain numerous blank spaces. The significance of the blank spaces is totally different from one column to the next. In the first column the blanks correspond to the absence of any provision. In the case of the second column they concern parts of the text that have remained identical from the initial proposal to the amended proposal. Without examining them carefully one might well assume that these sections concern provisions of the initial proposal that have been deleted in the revised proposal. It would have been clearer to specify 'Provision unchanged'.

2. This unusual and elliptical presentation may have been the cause of one particular omission. From the initial proposal to the amended proposal Article 126a has become Article 132a. Under the circumstances the reference to Article 126a in Article 1(4) of the initial proposal should have been corrected in the amended proposal to a reference to Article 132a. The second column is, however, blank at this point.

Consequences of abolishing the common organisational structure for the Economic and Social Committee and the Committee of the Regions

3. The Court of Auditors is pleased to note that, in accordance with the latter's recommendation (paragraph 2 of Opinion 9/98), the Com-

⁽¹⁾ OJ L 356, 31.12.1977, p. 1.

⁽²⁾ OJ L 347, 23.12.1998, p. 3.

⁽³⁾ Doc. COM(1998) 206 final and OJ C 149, 15.5.1998, p. 21.

⁽⁴⁾ Doc. COM(1998) 676 final and OJ C 396, 19.12.1998, p. 18.

⁽⁵⁾ OJ C 7, 11.1.1999, p. 1.

mission and the Council have correctly followed up the fact that, unlike the introduction of the euro and the implementation of the Stability and Growth Pact, where provision for the repercussions on the Financial Regulation could be adopted without delay (Council Regulation (EC, ECSC, Euratom) No 2779/98), the provisions amending the Financial Regulation in connection with the abolition of the common organisational structure could not enter into force until the Treaty of Amsterdam had been ratified and must, therefore, be the subject of a separate Council Regulation at a later date (point 4 first indent of the explanatory memorandum and Article 2 of the amended proposal).

4. Moreover, for obvious practical reasons, it is inconceivable that the section of the budget common to the two Committees can be split into two separate sections from one day to the next. Article 2 of the Regulation amending the Financial Regulation should therefore provide that the provisions (already mentioned by the Commission in that Article) which take account of the implications of the disappearance of the common organisational structure will enter into force on the first day after the entry into force of the Treaty of Amsterdam and, that notwithstanding, the budget that is in course of implementation at the time of the aforesaid entry into force will continue to be implemented up to the time of its closure.

Introduction of a separate budget section for the Ombudsman

5. The Court of Auditors has no objection to the principle of creating a separate section for the Ombudsman. However, it does wish the reasons for the proposed solution to be stated. This is not the case as the amended proposal stands at the moment.

6. The explanatory memorandum offers three reasons. The first is not very convincing, the second is based on a false premise and the third is rather weak.

(a) The first suggests that since both the Economic and Social Committee and the Committee of the Regions will, in future, each have

their own specific section of the budget, '...this solution can also be extended to the Ombudsman'. The Court does not see any relation between the two cases. The reasons for the establishment of separate sections for the two Committees do not apply in any way to the Ombudsman.

(b) The second claims that if the Ombudsman is not given a separate section it '...would otherwise be the only body with a budget annexed to the section of another institution'. As it stands, this assertion is inaccurate. At the moment, the budget of the Publications Office is still an annex to Part A of the Commission section. It is true that the Publications Office is a purely technical structure.

(c) The third points out that, under Article 22(5), the Ombudsman is treated as an institution for the purposes of the Financial Regulation. However, Article 22(5) specifies '...save as otherwise provided'. One might easily think, therefore, that, in accordance with Article 22(5), the Ombudsman is to be treated as an institution in every respect other than the allocation of a budget section to each institution.

7. Even if the explanatory memorandum were to give more solid reasons for the creation of a new section, those reasons would need to be included in a summary form in a recital in the actual text of the proposed Regulation. The function of the recitals is, in fact, not to summarise the provisions which follow, which is all too often what happens, but to provide the main elements of the reasons justifying them. In this respect the proposed third recital provides no explanation as to the purpose of the Ombudsman section.

8. All unnecessary words should be deleted. In Article 20(2) instead of 'In the section for each institution', write 'In each section'. In actual fact, every section corresponds to an institution, or, at least, a 'quasi-institution' and the shorter form of words is, in fact, sufficient because, according to Article 22(5) of the Financial Regulation, quasi-institutions are treated as institutions for the purposes of that Regulation, unless otherwise provided (which in this case is not so). For the same reason the words 'the Economic and Social Committee, the Committee of the Regions and the Ombudsman' should be deleted from the third subparagraph of Article 26(4).

This Opinion was adopted by the Court of Auditors in Luxembourg at the Court meeting on 14 and 15 April 1999.

For the Court of Auditors

Jan O. KARLSSON

President