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**REFLECTION PAPER ON THE REFORM OF THE EUROPEAN ANTI-FRAUD
OFFICE (OLAF)**

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1. INTRODUCTION: MAINTAIN AND STRENGTHEN THE INDEPENDENCE OF OLAF

The European Institutions have the duty to guarantee the best use of taxpayer's money and to fight against fraud, trans-national organised crime and any other illegal activity affecting the EU financial interests.

It is a major priority for the European Institutions.

In order to strengthen the means of fraud prevention and detection, the Commission established the European Anti-Fraud Office (OLAF) and the legislator regulated its investigative activity. The Office was given a special independent status and responsibility for conducting administrative anti-fraud investigations.

In the current situation where Member States are confronted with heavy obligations to reduce their budget deficits and more citizens are in precarious situations, it is even more important to ensure that the European budget is under strict control and fraud and misappropriation are prevented. OLAF has to be equipped with the appropriate tools to fight against fraud, corruption or any illegal activity that could prejudice the financial interests of the EU.

OLAF celebrated its 10 years anniversary in 2009. Much progress has been achieved since the creation of OLAF in 1999, but also some shortcomings have to be tackled. These have been addressed by the legislative proposal of the Commission of 2006 and the forthcoming contributions of the European Parliament, the Council, the Court of Auditors, the Supervisory Committee of OLAF and other stakeholders.¹

The purpose of this reflection paper is to identify convergent and divergent points in the Council and European Parliament's positions on the Commission's initial proposal, the questions which are still open to debate and need further reflection as well as possible options in order to achieve consensus on the main issues at stake. The legislative proposal of the Commission of 2006², the European Parliament resolution of 2008³ as well as the respective working document of the Council of 2007⁴ constitute the starting point for this reflection. The position of the Commission on the resolution of the European Parliament has been taken into account, too.

Annex 1 to this paper outlines the possible options for taking forward the legislative procedure, focussing on the points where there is a clear disagreement between the institutions.

Annex 2 provides a table with the positions expressed by the three institutions and a reference to the place where the topic is dealt with in this reflection paper or in its Annex 1.

Way forward

After the presentation of the reflection-paper and the subsequent inter-institutional dialogue with the European Parliament and the Council, the Commission will present an amended

¹ See Annex 1 p.3 for further references

² COM (2006)244 final.

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), P6_TA-PROV(2008) 553. For the preparing report see A6-0394/2008.

⁴ COMBUD 88/07

proposal, as outlined in the Commission's legislative work programme. The aim is to conclude the legislative process of the reform of by the end of 2011.

The Lisbon Treaty provides for the possibility to establish the European Public Prosecutor's Office from EUROJUST (EPPO, article 86 TFEU). The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators and accomplices in offences against the Union's financial interests. The role and function of OLAF in relation to the EPPO will require further discussions in the perspective of identifying the best options for the EPPO.

Moreover, the consolidation of the existing anti-fraud legislation that has been requested by the European Parliament and the Council should also be given further consideration. At the request of the European Parliament, the Commission examined the question of whether the different legal bases granting investigative powers to OLAF⁵ are in fact compatible with one another and whether they are applied in a homogeneous manner. The result was that there is no evidence that OLAF should be unable to carry out its tasks due to legislative incompatibilities.

The EPPO and the consolidation of the existing anti-fraud legislation need a thorough impact assessment and they should be handled at a later stage.

The reform of Regulation (EC) No 1073/1999 aims at improving OLAF's efficiency and effectiveness, by reviewing its governance and procedural rules. It should therefore be taken up immediately and not postponed until it is known whether and when an EPPO will be created and the existing anti-fraud legislation might be consolidated.

2. STRENGTHENING THE EFFICIENCY OF OLAF'S INVESTIGATIVE FUNCTION

All institutions and stakeholders agree that the efficiency and accountability of OLAF should improve further. To that end, several aspects have to be discussed:

2.1. Duration of investigations

While recognizing that OLAF works in a complex and difficult environment, the duration of its investigations remains a concern.

To *accelerate the procedures*, several solutions have been proposed:

Firstly, the Supervisory Committee should examine the length of procedures based on reporting obligations of OLAF at a general and systemic level.

Secondly, the possibility for a Review Adviser to handle individual complaints on the violation of procedural and human rights, among those, the right to a procedure without undue delay, might also contribute to accelerate the investigations.

The monitoring has to be efficient, effective, and designed without overlapping competences of the different stakeholders. Those solutions are outlined in Annex 1 point 5.

⁵ See the list provided in the Commission Staff Working Paper on the interoperability of the different legal bases granting investigative powers to OLAF, document SEC(2008)2304

To ensure that OLAF's resources are used in the most efficient and effective way and to improve the efficiency of OLAF, a *de minimis* approach has to be applied. Experience has shown that minor cases with a limited financial impact are not treated rapidly and effectively by judicial authorities at Member State level as they sometimes prefer to allocate their resources to other priorities. This can lead to no sanction at all if the case is time barred. In such cases, it is more effective and efficient to ensure the investigation follow-up by internal, disciplinary and/or financial means. The *de minimis* policy already developed in practice should be codified in the Regulation.

On the other hand, a *zero tolerance* policy towards fraud, corruption and irregularities has to be maintained and each fraudulent, irregular, or corrupt act has to be sanctioned, even if based on anonymous information. The cases not referred to national judicial authorities are to be forwarded to other bodies such as IDOC (Investigation and Disciplinary Office of the Commission). Overlaps of competencies have to be avoided in this respect. Possible solutions are outlined in Annex 1 point 7.

2.2. Efficiency of OLAF's investigations

Experience has shown that the staff of OLAF find it sometimes difficult to explain to the person concerned by an investigation his/her rights and obligations when conducting an investigation. In addition to the current written authorisation already foreseen in art. 6 paragraph 3 of the Regulation, the legal bases for the intervention and the investigative powers given by these legal bases could be detailed. This issue could be laid down also in the internal operational instructions on OLAF's operations (OLAF Manual⁶).

OLAF has also to make sure that the investigations are conducted in accordance with procedures which will enable items of evidence to be safeguarded and preserved. Whether all the technical aspects of evidence taking can be dealt with in the regulation itself is questionable. It could also be included in the operational instructions for investigators.

The distinction between internal and external investigations should be limited to the extent strictly necessary. This would facilitate the conduct of investigations. As experience has shown, investigations can start as external ones and lead later to internal investigations or vice versa. Under the current legal framework, persons concerned in internal investigations have a particular duty to cooperate with OLAF according to the Staff regulations or the Protocol on the Privileges and Immunities of the European Union. OLAF's investigative powers are also more detailed in internal investigations. The procedural and fundamental rights of the persons concerned have to be fully respected, be it an internal or an external investigation.

2.3. Cooperation between OLAF and the institutions, bodies, offices and agencies on its investigative function

All three institutions agree that the Director General shall each year, after securing the opinion of the Supervisory Committee, determine the programme of activities and the investigation policy priorities, in conformity with the legal framework.

The access of OLAF to information held by the institutions is an important issue. It is already foreseen that OLAF has immediate and unannounced access to information, but with the obligation to inform the institution, body, office or agency concerned. An "automatic" access

⁶ <http://ec.europa.eu/dgs/olaf/legal/manual/OLAF-Manual-Operational-Procedures.pdf>

in particular to databases cannot be granted as such, as information must always be justified on grounds of proportionality and need to know in accordance with the applicable rules, especially on data protection. The access of OLAF to information held by the institutions is already ensured under the current legislation, in particular Regulation No 45/ 2001⁷ in conjunction with the OLAF Regulation 1073/1999. The implementation of such an access is a question of administrative memoranda of understanding and OLAF has already negotiated such arrangements on immediate access to certain data. More details are explained in Annex 1 point 6.

On the other hand, the Institutions, bodies, offices and agencies shall be informed whenever OLAF conducts an investigation. OLAF has to ensure that information concerning the involvement of officials and the financial impact of an investigation is communicated to the institution, body, office or agency concerned as soon as possible. In this way the institution, body, office or agency concerned is able to decide on appropriate precautionary and/or administrative measures as it is their responsibility to ensure sound financial management and avoid any additional loss.

It has in any case to be guaranteed that investigations can be effectively conducted with the appropriate confidentiality and that the institution, body, office or agency concerned is able to decide on appropriate precautionary and/or administrative measures.

Whether an exception to this obligation to inform should be maintained in the Regulation for certain cases where the success of the investigation might be at risk, is questionable. Possible solutions are outlined in Annex 1 point 7.

2.4. Cooperation between OLAF and the Member States

Apart from the *de minimis* approach referred to above, cooperation with the Member States could be improved by other means. First of all, Member States should be obliged to *report to OLAF on the follow up* of the cases transmitted to them, and the measures taken, if any, before they open an investigation. In order to ensure transparency and appropriate control, while avoiding unnecessary administrative burden on Member States, reporting obligations should be limited to match information requirements, taking into account also the confidentiality of the investigations. Possible solutions are outlined in Annex 1 point 7.

The competent authorities of the Member States should *cooperate with OLAF already during the stage prior to the opening of investigations* and assist OLAF already at this stage. This obligation should be set out in the Regulation. In the past OLAF could not always easily identify the competent authorities of the Member State concerned when conducting on-the-spot-checks. OLAF should have an easy access to these authorities. This is especially of importance in cases when OLAF encounters resistance from the economic operator directly or indirectly concerned. Given the technical detail needed for the implementation of this cooperation, this should be more a question for administrative memoranda of understanding or implementing rules than for the Regulation.

⁷ 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

2.5. Cooperation between OLAF and EUROJUST and EUROPOL, international organisations and third countries

A more detailed definition of the cooperation in practice within the area of freedom, security and justice is desirable. OLAF is a Directorate General of the Commission and therefore it has no legal personality. The Regulation cannot empower the Commission either. The competence to conclude agreements with third countries and international organisations lies with the Council and the Parliament according to the TFEU. The cooperation could be confirmed in non-binding administrative cooperation arrangements negotiated by OLAF. In 2008 such an arrangement was agreed with EUROJUST. Whereas in the past a binding agreement with EUROPOL would have been necessary to allow for operation information exchange, the new Council Decision⁸ on Europol applicable since 2010 foresees that EUROPOL shall conclude working arrangements with OLAF for that purpose. Such arrangements exist also between OLAF and authorities of third countries and international organisations. These arrangements function within the legal framework of the applicable first level (association or partnership) agreement and relevant financing conventions recognising OLAF's investigative responsibilities. Another option could be that OLAF can base its work on legally binding agreements concluded by the Union. Possible solutions are outlined in Annex 1 point 8.

2.6. The role of the Director General of OLAF

The head of OLAF has been called up to now "Director". To underline his status, the Commission and the European Parliament propose to name the function "Director General", the Council prefers "Executive Director" to underline the specific independent status of OLAF. Despite the independence, the position has a hierarchical level comparable to a Director General. This might be less clear when using the term "Executive Director".

The three institutions disagree for the moment on the way in which the Director General is appointed, the term of his mandate, the requirements for this position as well as his competences in relation to proceedings at the European Court of Justice. Possible solutions are outlined in Annex 1 point 3.

All three institutions agree that the Commission has to consult the Supervisory Committee and that it has to hear as well the European Parliament and the Council before the Commission adopts any disciplinary sanction against the Director General. What remains open is only the question of whether this should happen in the context of the formalised dialogue (see below point 3.1).

Article 5 of Regulation 1073/1999 provides that OLAF investigations should be opened by a decision of its Director General. The Director General has implemented a so-called Executive Board chaired by the Directors for Investigations & Operations I and II, under the supervision and ultimate responsibility of the Director General whose assistant is present at the Board meetings as an observer. This has proven to be an efficient tool to assist the Director General in his decision making. For the sake of transparency, this method of using an Executive Board for the preparation of his decisions could be expressly mentioned in the Regulation but, as it is of an internal administrative nature only, a reference in OLAF's internal operational instructions (the OLAF Manual) could also be sufficient.

⁸ Council Decision 2009/371/JHA, of 6 April 2009 (Art. 22(2)), OJ L 121 of 15.5.2009, p. 37(48)

The Director General could also be explicitly empowered to *delegate* in writing to a director in OLAF to *direct the execution of investigation*. The delegation as such does not alter the final responsibility of the Director- General for these investigations.

3. POLITICAL GOVERNANCE: BALANCE BETWEEN INDEPENDENCE AND CONTROL OF OLAF AND LEGALITY CONTROLS OF OLAF'S ANTI-FRAUD INVESTIGATIVE ACTIVITIES

Enhanced governance, combined with the establishment of a review mechanism and provisions on the flow of information between OLAF and the institutions, bodies, offices and agencies concerned, should help to strike the right balance between independence and control of OLAF.

3.1. Exchange of information of OLAF with the institutions, bodies, offices and agencies

The relations between OLAF, the Supervisory Committee and the institutions, bodies, offices and agencies should be reviewed and closer cooperation should be established. Past experience has shown that there is a need for political governance regarding OLAF's investigative priorities and OLAF's efficiency and accountability.

All institutions agree that the European Parliament, the Council, the Commission and the Supervisory Committee should meet at defined intervals to discuss the priorities for OLAF's investigations and the cooperation of OLAF with other stakeholders.

Whether also the cooperation with Member States, EUROJUST, EUROPOL, international organisations and third countries and the work of the Supervisory Committee should be an issue, is debated. The institutions also disagree on the level of formalising these meetings. All institutions agree that the exchange of information has to increase. If such meetings are foreseen only once a year, a more structured approach might be more effective. While all institutions agree on the importance of the cooperation of all stakeholders, it might nevertheless be questionable whether it is recommended to extend the scope of such a meeting to some stakeholders. Possible solutions are outlined in Annex 1, point 1.

3.2. The Supervisory Committee of OLAF

There is a general agreement between the institutions that the Supervisory Committee should ensure that OLAF exercises its competences in full independence. The Supervisory Committee should therefore monitor the implementation of the investigative function of OLAF from a general perspective. The role of the Supervisory Committee should be further clarified.

All institutions agree that the Supervisory Committee should have additional tasks: It shall ensure that the rules governing information exchanges between OLAF and the institutions, bodies, offices and agencies are complied with and it shall monitor the developments regarding the application of procedural guarantees. It should also monitor the developments regarding the duration of investigations and the identification of the priorities for investigations, without interfering with the conduct of investigations.

The institutions foresee that the Supervisory Committee monitors these aspects on the basis of statistics supplied by OLAF and opinions and/or reports of the Review Adviser. The fact that

the Supervisory Committee receives only indirect information and has no direct access to the cases concerned, makes it more difficult for the Supervisory Committee to assess independently the facts. On the other hand, this guarantees that no interference with individual cases can occur. If there should be a need for further information, data on individual cases can be given to the Supervisory Committee on the basis of a duly justified request in accordance with its need to know. The role of the Supervisory Committee in the formalised information exchange with the other three institutions has still to be clarified: Should it be the body issuing invitations to these meetings or should it simply participate in these meetings as one of the stakeholders? Given the independent status of the Supervisory Committee, it might seem difficult to limit the function of the Supervisory Committee to a being a safeguard to the independence of the Director General of OLAF. Instead, it could be of assistance to all institutions when participating in its own right in these meetings.

Regarding the appointment of the members of the Supervisory Committee, a staggered renewal could be foreseen to preserve the expertise of the Supervisory Committee at least partly. Whether it is necessary that the members' term of office should be equal to that of the office of the Director General is questionable. Given the complexity of both appointments, it might even be preferable if both appointment procedures do not coincide.

Possible solutions for the role of the Supervisory Committee are outlined in Annex 1 point 2.

3.3. Public information by OLAF on investigations

OLAF's communication to the public has to preserve the confidentiality of investigations and the presumption of innocence. OLAF's communication should always be cautious and impartial. Article 8 of the current Regulation already foresees the obligation concerning confidentiality and data protection.

Those principles and implementing rules on the prevention of unauthorised distribution of information relating to OLAF's investigative activities are already part of the operational instructions of OLAF and more detailed rules are currently under revision.

3.4. Strengthening of defence rights

Any powers granted to OLAF should be subject to full respect for human rights and fundamental freedoms. This has been confirmed already by the ECJ in 2003 (C-11/00 Commission ./ ECB paragraph 139). Meanwhile the Charter of Fundamental Rights has the same value as the Treaties.

That a new article on procedural guarantees has to be inserted in the Regulation is not questioned. The same applies to the obligation of OLAF to conduct its investigations objectively and impartially, seeking evidence for and against the person concerned, in accordance with the presumption of innocence and the rights of the defence. These rights and guarantees have to be respected not only before the final report is drawn up, but also before information is transmitted to the national authorities.

All the institutions agree on the necessity to establish a set of procedural rights and guarantees for the persons concerned by the Regulation. Concerning the European Parliament's proposal that OLAF should adopt a "procedural code", an agreement could be built on the necessity to allow OLAF to implement a practical set of internal operating instructions corresponding to

the objective pursued by the European Parliament. Possible solutions are outlined in Annex 1, point 4.

Concerning internal investigations, the European Parliament has suggested that the Director General of OLAF can in *cases of absolute secrecy* decide himself to defer the information of the person concerned after having first informed the institution, body, office or agency concerned. The current framework foresees that this is done *in agreement* with the institution, body, office or agency concerned, taking into account the far reaching obligations for internal staff under the Staff Regulations and the extended investigative powers of OLAF for its internal investigations. As one of the objectives of the proposed revision of OLAF reform is to strengthen the procedural rights of the person concerned, proposals to diminish these rights should not be envisaged.

As far as feasible, concrete deadlines for the reaction of the Office to the person concerned and vice versa should be introduced. Whether 10 working days for the person concerned to react on the conclusions of the final report are adequate is debatable. A deadline of four weeks could also be envisaged.

3.5. Legality review of proceedings

Apart from the review of the duration of the investigations referred to above, all institutions agree on the need for a right to review concerning the potential violation of procedural rights.

Whether this should be undertaken by an independent Review Adviser with the participation of the Supervisory Committee, a Review Panel consisting of the Heads of OLAF's Directorates and a senior official of the Legal Service, or by two separate procedures (legality check by legal experts of OLAF and complaints to the Review Adviser via the Supervisory Committee), is finally not decisive. What is important is the creation of an efficient and effective independent review mechanism without any overlap of competences between the different stakeholders. Possible solutions are outlined in Annex 1 point 5.

Before information on investigations is transmitted to the competent authorities of the Member States, the institutions, bodies, offices or agencies concerned, the Director General might consult experts of OLAF or inform the Supervisory Committee. If such a procedural step is introduced, an overlap with the competences of the complaints review body and Supervisory Committee has to be avoided.

As regards the review of legality of OLAF's investigations and in particular the closure of investigations, it has been envisaged by the European Parliament to introduce a review of legality *before the opening and the closing of investigations* by the legal experts of OLAF. The necessity of formalising in the Regulation of such an internal legality control should be further discussed. Any overlap with the tasks of the Executive Board (see above point 2.6) should be avoided. The organisation of internal control at some stages of OLAF's investigations is part of internal management and could be left outside the Regulation. It could possibly better fit into the internal operating instructions. Possible solutions are outlined in Annex 1 point 5.

4. Way forward/Possible next steps

The present paper represents a basis for discussion with the institutional partners. Following this discussion, the Commission intends to first assess the options for a revised proposal and then draft an amended text.