

ASSEMBLY OF THE REPUBLIC
EUROPEAN AFFAIRS COMMITTEE

OPINION

COM (2014)340 final

PROPOSAL FOR A REGULATION OF THE European PARLIAMENT AND OF THE COUNCIL amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees

PART I - INTRODUCTION

Pursuant to Article 7 of Law No 43/2006 of 25 August 2006 on the monitoring, examination and issuing of opinions by the Assembly of the Republic on matters relating to the construction of the European Union, as amended by Law No 21/2012 of 17 May 2012, and in accordance with the Guidelines for the Scrutiny of EU initiatives approved on 8 January 2013, the European Affairs Committee received the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees [COM (2014) 340].

Given its subject matter, the proposal was sent to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, which examined it and adopted the report annexed to this Opinion, of which it is an integral part.

PART II - RECITALS

Whereas:

1. The purpose of this initiative is to create a new role within the EU, the Controller of procedural guarantees for investigations by OLAF (European Anti-Fraud Office), to be filled by the holder and one substitute, both appointed by ‘mutual agreement’ by the European Parliament, the Council and the Commission, and endowed with its own secretariat, both administratively dependent on the Commission.
2. For over a decade there have been inconclusive discussions and various proposals aimed at setting up mechanisms to deal with complaints and review OLAF procedures, and so ensure that procedural rights are upheld in OLAF investigations.

3. The proposal to set up a European Public Prosecutor's Office, which is currently under discussion (COM (2013)534 final) might entail significant changes in the way fraud and other illegal activities that affect the financial interests of the European Union are investigated.
4. Criminal acts that are currently handled by OLAF would be investigated by the Public Prosecutor's Office instead, meaning that the due process typical of a judicial authority would be observed, so significantly changing the current framework.
5. With this proposed institution OLAF would merely handle administrative investigations.
6. After more than nine years of discussion in the European institutions, the OLAF Regulation was recently revised and came into force in October 2013; there was provision for a set of procedural rights for persons under OLAF investigation and an enhanced role for the Supervisory Committee, but it was less advanced than the proposal here as a result of the diverging positions of the Council and the European Parliament.
7. The Council expressed concern about a new initiative in this area and its possible impact, above all on the work of OLAF, noting that the rules that would be changed had been in force for less than a year.
8. There are a number of existing bodies in the Union that can deal with complaints or similar initiatives (the Ombudsman, the European Data Protection Authority, the Supervisory Committee of OLAF, the Court of Justice, etc.) or bodies under discussion (the European Public Prosecutor 's Office), not to speak of the proliferation of other supervisory authorities with different attributes and areas of competence.
9. The measures provided for in this initiative, through the creation of the role of Controller of procedural guarantees, are presented as a 'preparatory step' towards the setting-up of the European Public Prosecutor 's Office, thus leading to the setting-up of a new control structure with a five-year term of office.
10. The powers to be granted to the proposed body for dealing with complaints are not binding and are without suspensive effect, and its prior authorisations would be effective only for measures affecting members of the European institutions.
11. We agree with the report of the Ist Committee of this Assembly that there is no violation of the principles of subsidiarity and proportionality in this case but have

reservations as to the timeliness and appropriateness of this move in the present circumstances,

the following conclusions are adopted.

111 - CONCLUSIONS

1. There is no breach of the principle of subsidiarity, as the objective, the revision of an existing Regulation, cannot be sufficiently achieved by the Member States, while their powers to adopt measures stamp out fraud, corruption and any illegal activity detrimental to the Union's financial interests are not diminished.

2. Nor have we found any breach of the principle of proportionality, since the proposal is not inappropriate or excessive for its intended purpose (creating an office to better protect procedural rights), despite a question mark over the political advisability of this type of solution.

3. Political dialogue

3.1 We have reservations about the advisability - less than a year after the entry into force of the current OLAF Regulation, and while legislative initiatives with important implications in this area are under discussion - of moving towards the creation of a new European control authority, with the instability, muddle and expense that this might entail.

3.2 We think it advisable to make additional efforts to coordinate this with other initiatives, notably the setting-up of the European Public Prosecutor's Office, in order to avoid overlaps and fresh legislative adjustments, and the proliferation of supervisory bodies with hybrid functions and status, even 'para-legal' status, which always end up outliving the circumstances that gave rise to them.

Palácio de S. Bento, 16 September 2014

The Rapporteur

(Alberto Costa)

The Chairman of the Committee

(Paulo Mota Pinto)

**COMMITTEE ON CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND
GUARANTEES**

REPORT

**COM (2014) 340 final - Proposal for a Regulation of the European Parliament and of the
Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment
of a Controller of procedural guarantees (SWD (2014) 183 final)**

I. Preliminary remarks

Pursuant to Article 7 of Law No 43/2006 of 25 August 2006 on the monitoring, examination and issuing of opinions by the Assembly of the Republic on matters relating to the construction of the European Union, as amended by Law No 21/2012 of 17 May 2012, the European Affairs Committee asked the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees to draft a report on COM (2014)340 final and the accompanying SWD (2014)183 final.

The purpose of this report is to consider whether the principle of subsidiarity, as provided for in Protocol 2 to the Treaty on European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU) on the application of the principles of subsidiarity and proportionality, is complied with.

II. Purpose, substance and grounds

The legislative initiative in question is the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees.

In the recitals it is explained that in 2013 the EU institutions established new legal framework for OLAF investigations resulting in Regulation No 883/2013, which entered into force on 1 October 2013.

The Regulation brought substantial changes to OLAF's organisation and investigative procedures, in particular as regards strengthening the procedural guarantees of persons concerned by OLAF investigations.

In July 2013 the Commission adopted its proposal on the setting-up of the European Public Prosecutor's Office, which includes a series of Union-level procedural safeguards. Together with that proposal, on 17 July the Commission adopted a communication on 'Improving OLAF's governance and reinforcing procedural safeguards in investigations' (COM(2013) 533

final).

The communication called for a step-by-step approach to accompany the establishment of the EPPO and further measures to strengthen OLAF's governance, and pointed to the need to promote procedural safeguards in its investigations, even before the establishment of the EPPO.

In the area covered by the proposal the following legal acts are designed to protect the financial interests of the Union:

- (a) Council Regulation (EC, Euratom) No 2185/1996 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;
- (b) Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests;
- (c) the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office.

The objectives of the proposal under consideration here are to further strengthen the procedural guarantees in place for all persons under investigation by the OLAF (referred to in the Regulation as 'persons concerned').

They also take into account the special way in which members of EU institutions are elected or appointed, plus their special responsibilities, which may justify specific provisions aimed at ensuring the proper functioning of the institutions to which they belong.

It is therefore proposed that Regulation No 883/2013 on investigations by OLAF be amended to provide for the appointment of a Controller of procedural guarantees, who would have two functions:

- (a) reviewing complaints lodged by persons under investigation about the violation of their procedural guarantees,
- (b) authorising OLAF to adopt certain investigative measures in respect of members of EU institutions.

The recitals of the proposal highlight the need to reconcile a strengthening LOAF's capacity to defend the Union's financial interests (exercise its powers and prerogatives) with the protection of citizens' fundamental rights (see recital 1); a consistently high level of protection of

procedural guarantees means that persons involved in OLAF investigations should be offered enhanced remedies against any violation of their rights and be able to avail themselves of a transparent and efficient complaints procedure (recital 4). A Controller of procedural guarantees, external to and independent from OLAF, should therefore be established and be tasked with reviewing and ensuring compliance with the procedural guarantees laid down in Article 9 of Regulation No 883/2013 for persons concerned by OLAF investigations.

There is provision that the Controller should be recruited from outside the EU institutions, although, for administrative purposes, he/she should nevertheless be attached to the Commission, while benefiting from sufficient guarantees to ensure their full independence.

The Controller should examine the complaint in a swift, adversarial procedure, which should not normally last more than fifteen working days, and verify the legality of the investigative measure concerned, without prejudice to OLAF's independence and discretionary power to conduct the investigation under way (recital 10).

There would also be an ex-post control to ensure that the procedural guarantees of any person concerned by an OLAF investigation were upheld.

Inspections by OLAF staff of the offices of members of EU institutions with a view to taking copies of documents or any other data support would have to have prior authorisation from the Controller, who must carry out an objective assessment of their legality and decide whether the same objective could be achieved with less intrusive investigative measures (recital 11).

Recital 12 notes that Regulation No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies is applicable to the processing of personal data 'for the purposes of this Regulation'.

Regulation No 883/2013 would be amended as follows:

a paragraph 8 would be added after Article 2(7); a second sentence would be added to the fourth subparagraph of Article 9(2); Articles 9a, 9b and 9c would be inserted after Article 9.

The amendments can be summarised as follows:

- The new paragraph 8 defines 'member of an EU institution' for the purposes of the Regulation.
- The new second sentence of the fourth subparagraph of Article 9(2) enshrines the right of the person concerned to be informed of their rights when the taking of statements starts, in particular of their right to be assisted by a person of their choice.

- Article 9a, ‘The Controller of procedural guarantees’, entitles any person concerned by an OLAF investigation to lodge a complaint with the Controller of procedural guarantees concerning OLAF's failure to observe the procedural guarantees laid down in Article 9. It provides for the following: the time limit for lodging complaints, which is no later than one month after the complainant becomes aware of the relevant facts that constitute the alleged violation of his procedural guarantees; in agreement with the Director-General of OLAF, how to resolve the issue within 15 days; the issuing of a recommendation on the complaint; and the consequences of exceeding the time limit without issuing a recommendation; the consequences if the Director-General chooses not to follow the Controller's recommendation.

In this latter case, according to Article 9a(7), the Director-General must communicate to the complainant and to the Controller the main reasons for that decision, as long as it does not affect the on-going investigation, and state the reasons for not following the Controller's recommendation in a note attached to the final investigation report.

- Article 9b, ‘Prior authorisation for certain investigative measures’, lays down that the Director-General must first obtain the authorisation of the Controller when OLAF intends to exercise its power to inspect the professional office of a member of an EU institution at the premises of an EU institution during an internal investigation or to take copies of documents or of any data storage media located in this office, irrespective of the nature of the support on which the data is stored. This procedure is to be regarded as confidential. It also lays down very short deadlines, usually 48 hours, for responding to a request for authorization from OLAF.
- Article 9b(2) provides that, in taking his/her decision on whether or not to grant authorisation for the aforementioned investigative measures, the Controller must carry out an objective assessment of their legality and examine whether the same objective could be achieved with less intrusive investigative measures.
- Article 9c, ‘Appointment and status of the Controller’, sets out the procedure for appointing the Controller and his/her substitute.

It provides that both should be appointed ‘by common accord’ of the European Parliament, the Council and the Commission for a non-renewable term of five years. The Controller must be administratively independent from the Commission. The Controller and his/her substitute are to exercise their functions in 'complete independence' and 'neither seek nor take instructions from anyone in the performance of

their duties'.

Parameters are set for the exercise of their duties, the Controller and the substitute being required to take account of 'the need for effective application of the rules on the protection of the financial interests of the European Union and on the fight against fraud laid down in Union legislation'. Article 9c(4) requires the Controller to report annually on his/her activities to the European Parliament, the Council, the Commission, the Supervisory Committee and OLAF.

These reports must not refer to individual cases under investigation and must ensure the confidentiality of investigations even after their closure. Article 2 lays down that the Regulation will enter into force one year after its publication in the Official Journal of the European Union.

There are two annexes to the proposal: Legislative financial statement and impact assessment documents [SWD (2014) 183, final], giving as indicators:

- (a) prompt handling of the complaints by the Controller;
- (b) prompt delivering by the Controller of the authorisation requested by OLAF to inspect offices and/or take copies of documents of members of the EU institutions.

Legal basis

The legal basis is Article 325 of the Treaty on the Functioning of the European Union, which provides as follows:

'Article 325

- 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.*
- 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.*
- 3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.*
- 4. The European Parliament and the Council, acting in accordance with the ordinary*

legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.'

Principles of subsidiarity and proportionality

According to recital 13 of the proposal for a Regulation, 'This Regulation in no way diminishes the powers and responsibilities of the Member States to take measures to combat fraud, corruption and any other illegal activity affecting the financial interests of the Union.' Entrusting to an independent Controller the task of examining complaints and issuing prior authorisations to OLAF is accordingly in full compliance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union.

The appointment of a Controller of procedural guarantees is designed to achieve the following objectives:

- enhanced protection of the procedural rights of persons concerned by OLAF investigations;
- improved monitoring of compliance with the procedural requirements for investigations;
- ex-post control of respect for the procedural guarantees of any person concerned by an OLAF investigation by the Controller of procedural guarantees, acting on a complaint;
- prior authorisation by the Controller of certain investigative measures concerning members of EU institutions (verification of the legality and whether the same objectives could be achieved by less intrusive means).

In the opinion of the rapporteur, neither the principle of proportionality nor the principle of subsidiarity are infringed by this proposal.

OLAF is an EU body and therefore any additional mechanism of control should be established at the same level. The proposal for a Regulation provides for an additional procedure for lodging complaints against any violation of the rights of the 'persons concerned' and will also improve the perception of OLAF's accountability. We do not believe that this proposal will have any impact on the Member States' powers and responsibilities for combating fraud affecting the financial interests of the EU. It concerns only investigations carried out by OLAF, as provided for in EU legislation. These actions are also limited to what is necessary in order to attain the proposed objectives. It is thus compliant with the principle of proportionality.

The rapporteur thus holds, without reservations, that the strategic objectives of the proposal, its effectiveness and the safeguarding of the reputation of EU institutions could not, in view of the purpose of the proposal, be sufficiently achieved by the Member States. It can only be achieved by the EU. The legislation instrument in question is an amending Regulation. Given that the aim of the proposal is to change a Regulation in force, it would not be possible to use any other instrument.

III - Conclusions

In view of the above, the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees concludes as follows:

- (a) that COM (2014) 340 final - Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees - does not breach the principles of subsidiarity and proportionality.
- (b) that this report should be submitted to the European Affairs Committee.

Palácio de S. Bento, 14 July 2014

The rapporteur

(João Lobo)

Chairman of the Committee

(Fernando Negrão)