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Exchange of views on Procedural guarantees during OLAF investigations in the
European Parliament Committee on Budgetary Control (CONT)

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ECA Press

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Introduction

Ms Ingeborg Grassle, President; Members of the Committee on Budgetary Control; Colleagues of the EU Institutions – the Court appreciates the invitation to participate in your exchange of views this afternoon on a very important subject.

Today's meeting is very timely. It is the starting point for a new round of debate and reflection on how best to strengthen procedural guarantees for persons under investigation by OLAF.

As the Court's rapporteur on this subject I am responsible for preparing the Court's opinion under Article 325 of the Treaty when changes to the OLAF Regulation are envisaged. However, the views I express today are my own and with no prejudice to any future Opinion the Court may adopt on the subject.

I will limit myself in this intervention to three points:

- 1) First, I would like to qualify some of the **guiding principles** necessary before commenting on the details of the proposal;
- 2) Second, to recall some of the **Court's past observations and recommendations** related to earlier rounds of reform; and
- 3) Third, to comment on some of the **recent/proposed** changes since the last reform and to highlight a **number of issues that remain unaddressed by the proposal**.

Some guiding principles

My starting point is an assertion that the Court of Auditors attaches great importance to the protection of the financial interests of the Union, and to the fight against fraud, corruption and other illegal activities. Citizens' trust in public institutions as well as basic good governance demands this. For this to be possible, a strong effective OLAF, enabled and capable of performing its functions, is a prerequisite, and any reforms must ensure that this strength is preserved and enhanced, and not undermined.

My second assertion is that the protection of individual rights, and therefore strong procedural guarantees for persons under investigation by OLAF, is of fundamental importance.

There is a risk that this delicate debate turns the issue into one of a trade-off between, on the one hand, protecting individual rights, and, on the other, maintaining OLAF's strong investigation powers. My view is that both these objectives are intertwined and must be pursued simultaneously and definitely not one at the expense of another.

Experience everywhere shows that any justifiable investigative act can be seriously undermined by a lack of respect for individual rights, and this reinforces my view of the importance of this subject for OLAF and its mission.

Ensuring full respect for individual rights not only enhances OLAF's credentials as an EU body in full consonance with the observance of the rule of law, but it is also crucial for the final effectiveness of OLAF investigations.

This departure point underlies all my comments hereunder.

The Court's recommendations in previous rounds of reform

The Court has already made some proposals to enhance the control of procedural guarantees of persons under investigation. In July 2011, the Court issued Opinion No 6/2011 for a reform which was concluded by Parliament and Council on 11 September 2013, almost exactly one year ago.

Let me recall some of the salient messages from this opinion which in my view are still relevant for today's discussion:

The issue of timing: Independent ex-post scrutiny exists but no independent control of investigations in progress

The Court identified a need for independent control of the legality of OLAF investigations in progress. An effective independent control is currently only in place once OLAF has finalised its investigation reports. They are then open to review by the national and by the EU courts and to the review by the OLAF Supervisory Committee and by the European Ombudsman. Weaknesses of the existing ex-post scrutiny arrangements in place are that:

- a) it is in most cases too late for OLAF to correct and make good for errors and mistakes which occurred during an investigation;
- b) it usually takes a long time before the results are known and, as a consequence, there is - often after an already rather lengthy investigation – a further prolonged period of uncertainty.

The issue of people not being informed of their investigation

In its Opinion the Court highlighted the need to deal with cases where the persons concerned have no possibility to make their point of view known to the OLAF investigators in a timely manner, particularly where the persons concerned have not been informed that they are subject to an OLAF investigation.

The option not to inform the person concerned of an investigation is provided for in Article 9 (3) of the OLAF Regulation. This article allows exceptions to the general rule that persons concerned have to be given the opportunity to comment in a timely manner.

According to the regulation, such exceptions are possible in duly justified cases where it is necessary to preserve the confidentiality of the investigation and/or entailing the use of investigative proceedings which fall within the remit of a national judicial authority.

Our concern here remains – there is no effective mechanism in place to verify ex ante whether the use of the exception clause – not to inform the person concerned of an investigation – is actually limited to duly justified cases.

The need for an independent Review Officer

To enforce the observance of procedural guarantees in all problematic situations, the Court has suggested creating the function of a review officer with the power to issue binding opinions.

The review officer should neither be appointed by the Director-General of OLAF nor be subject to his authority. He should be independent of OLAF and also be seen as being independent in order to enhance the credibility of the review process and the trust in such a process.

The review officer should not only be required to issue binding opinions at the request of the persons concerned.

He should also be empowered to issue such opinions in all cases where OLAF envisages the transmission of information to the national judicial authorities or in cases where investigations last for more than two years.

To that end, the review officer should have full access to OLAF's relevant case files. He should address his opinions to both the Director-General and the Supervisory Committee.

These proposals of the Court have not been taken on board for the 2013 reform of the OLAF regulation.

Recent changes proposed and issues that remain unaddressed

Let me now turn to the question whether there were any developments which have addressed the Court's concerns of 2011, or whether the most recent Commission proposals of June 2014 address these same concerns.

New provisions concerning procedural guarantees but no independent review procedureindependence still remains an open issue

As you will recall it was the intention of the EU legislator to strengthen the protection of procedural guarantees applicable in OLAF's investigations

- 1) (first) by inserting in the Regulation detailed provisions concerning the procedural guarantees; and
- 2) (second) by enforcing procedural guarantees through a systematic review procedure.

As a result, Article 9 of the 2013 reformed Regulation explicitly states now a number of procedural guarantees. Reference is made to several fundamental rights such as the right to an impartial treatment, the principle of the presumption of innocence, the right to avoid self-incrimination, the right to be assisted, the right to be informed and the right to be heard.

However, although the EU institutions involved in the legislative process all seemed to agree on the need for an enhanced review of potential violations of fundamental rights, no consensus was reached on how best to achieve this.

As a consequence, the reformed OLAF Regulation does not set out any such review procedure. The Regulation leaves it to the Director-General to put in place an internal advisory and control procedure, including a legality check (see Article 17 (7) of the Regulation).

Such procedures for internal checks have always existed within OLAF, despite the fact that they were not explicitly required under the former OLAF Regulation. However, the effectiveness of these internal checks has been limited as they were not combined with any external, enforceable verification mechanism.

Independent review is crucial for ensuring that OLAF is not *Ultra Vires*, and for protecting especially those who are not informed of being investigated. I believe it is in OLAF's interests to be, and be seen to be, in full adherence with the rule of law.

The independent Controller of procedural guarantees is a step in the right direction

The Controller of procedural guarantees which is now proposed by the Commission is definitely a step in the right direction. His independence from OLAF would be guaranteed through an inter-institutional process of appointment to and, if necessary, removal from duties.

However, in my view, his independence could be further enhanced if he were not to be administratively attached to the Commission or to some other institution involved in his appointment.

The proposed scope of intervention is too narrow

My major concern is that the scope of intervention of the Controller is too narrowly confined.

Firstly, under the Commission proposal he would only intervene when a person concerned has lodged a complaint in connection with measures taken in the framework of an investigation. For lodging a complaint one would have to be aware, in the first place, that one is under investigation.

However, the Controller cannot intervene on his own initiative in situations where a person concerned is not made aware of the investigation.

As a consequence, under the Commission proposal, no mandatory intervention of the Controller would be required in those cases where OLAF has the intention to suspend the most important procedural guarantees provided for in the OLAF Regulation.

Secondly, the Commission proposes that the Director-General of OLAF must obtain the prior authorisation of the Controller for inspecting, in the course of an investigation, the professional office of a Member of an EU institution.

I have two queries here:

- c) Is it compatible with the principle of equal treatment that the Controller's prior assessment should be required only in the case of Members of EU institutions but not in the case of EU staff?
- d) Is the inspection of a professional office the only intrusive measure at OLAF's disposal which can seriously affect the rights of a person concerned, and therefore subject to the proposed prior authorisation? What about, for example the transmission of information on a person concerned to the national judicial authorities, especially when it takes place without giving this person the opportunity to comment on the facts concerning him? Can this not even more seriously affect a person concerned than the inspection of his professional office?

To sum it up: it seems to me that, under the current proposal, there is a mismatch between the investment linked to the establishment of the Controller of procedural guarantees and the limited scope proposed for his interventions.

The unsolved issue of investigations not related to financial interests of the Union

Last but not least there is the unsolved issue of OLAF's powers when it investigates cases not related to the financial interests of the Union.

Being based on Article 325 TFEU, the scope of the OLAF Regulation is limited to investigations concerned with irregularities affecting the financial interests of the Union.

However, there are cases of serious misconduct which do not concern the financial interests of the Union but are nevertheless liable to result in disciplinary and/or criminal proceedings, or in proceedings before the European Court of Justice.

Such cases may, for example, occur during the legislative process when undue influence is exercised by interest parties on the actors involved in the EU institutions (e.g. Commission or Council officials, Members of Parliament or their assistants).

There is a need for clear rules whether, to what extent and how OLAF should investigate such cases of serious misconduct.

Existing legislation in this respect is very succinct and applies only to staff concerned by the Staff Regulations and the Conditions of Employment of Other Servants of the European Union.

The Court believes that the legislator ought to consider what options are available under the Treaty in order to ensure that all cases of serious misconduct are properly investigated.

Conclusion

Yet once again, a proposal is being made to improve the regulatory framework within which OLAF operates – this time by another attempt to strengthen the procedural guarantees during OLAF investigation. Experience over the years since OLAF came into being has flagged a number of grey areas and legal loopholes.

The creation of the function of a Controller of procedural guarantees is a strong positive step in the right direction. But I suspect it will not be long before we return to another exchange of views on a number of issues which are still hanging in the air. The Controller alone will not prove to be the ultimate satisfactory solution to problems that have arisen, and will continue to arise, in the field of individual rights of persons concerned.

Could not this be the opportunity where one attempts to eliminate the grey areas and close the legal loopholes in a well-thought-out holistic fashion rather than in the somewhat piecemeal way we have adopted so far?

Thank you very much for your attention.