III

(Preparatory acts)

COURT OF AUDITORS

OPINION No 1/2016

(pursuant to Article 325, TFEU)

concerning a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF)

(2016/C 150/01)

THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 325(4) thereof,

Having regard to the Commission's proposal of 4 March 2016 for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF) ([1]),

Having regard to the European Parliament's request for an opinion on the abovementioned proposal, received at the Court on 4 April 2016,

Having regard to the Council's request for an opinion on the abovementioned proposal, received at the Court on 15 March 2016,

HAS ADOPTED THE FOLLOWING OPINION:

Introduction

1. The European Anti-Fraud Office (OLAF) is a directorate-general of the Commission but is functionally independent with respect to its investigative work. The Office was created in 1999 and the rules applicable to investigations carried out by the Office (hereinafter 'The OLAF Regulation') have been revised in 2013 ([2]).

2. OLAF's set-up includes a supervisory committee which is tasked to 'regularly monitor the implementation by the Office of its investigative function, in order to reinforce the Office's independence in the proper exercise of the competences conferred upon it' ([3]). In particular the Committee has to monitor developments concerning the application of procedural guarantees and the duration of OLAF's investigations.

3. The Supervisory Committee is composed of five independent members having experience in senior judicial or investigative functions or comparable functions relating to the areas of activity of the Office. They are appointed by common accord of the European Parliament, the Council and the Commission.

4. Pursuant to Article 15(8) of the OLAF Regulation the secretariat of the Supervisory Committee is provided by OLAF, in close consultation with the Supervisory Committee. Article 18 of the OLAF Regulation places the budgetary appropriations for the Supervisory Committee and its secretariat within the budget line of the Office and provides that the establishment plan of the Office includes that of the Supervisory Committee and of its secretariat.

([1]) COM(2016) 113 final of 4 March 2016.
([2]) Regulation (EU, Euratom) No 883/2013 of the European Parliament of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).
([3]) See Article 15(1) of the OLAF Regulation.

5. While the secretariat is functionally attached to the Supervisory Committee, the secretariat staff is administratively subordinated to the Director-General of OLAF. The Director-General holds the powers of the appointing authority and decides, for example, on promotions and transfers of the secretariat staff. According to the Supervisory Committee this situation led to conflicts of interest and exposed the secretariat staff to conflicting instructions, as for example was the case with the disclosure of the Supervisory Committee's Opinion No 2/2012 ([4]).

6. Under the proposed Regulation, the secretariat of the Supervisory Committee will be provided by the Commission, and no longer by OLAF. The budgetary appropriations for the secretariat of the Supervisory Committee will be moved from the budget line and the establishment plan of OLAF to that of the Commission. Finally, the proposal provides that the competence of OLAF's Data Protection Officer will continue to cover the processing of data by the secretariat and that the secretariat's staff will continue to be subject to the same confidentiality rules as before.

Observations

7. The Court recalls that it has recommended already in 2011, during the latest revision of the OLAF Regulation, to include a provision that the Supervisory Committee's secretariat must act solely in accordance with the Committee's instructions and independently of OLAF, and may not be appointed by or subject to the authority of the Director-General of OLAF ([5]).

8. Against this background, the Court welcomes the proposal that the secretariat of the Supervisory Committee should no longer be provided by OLAF. However, the new provisions to replace the last sentence of Article 15(8) ([6]) could be completed in order to clarify that the secretariat must act independently not only of OLAF but also of the Commission and that it is under the authority of the Supervisory Committee. The Court proposes therefore the following amended wording:

> 'Its secretariat shall be provided by the Commission, independently from the Office and in close cooperation with the Supervisory Committee. The Commission shall refrain from interfering with the functions of the Supervisory Committee. <u>The Supervisory Committee's secretary shall be appointed by the Commission after a favourable opinion of the Supervisory Committee. The secretary shall act on the instructions of the Supervisory Committee and independently of the Commission.'</u> (additional text underlined)

9. The Court notes that the upcoming overall evaluation of the OLAF Regulation in 2017 will be an opportunity to examine and, if necessary, overhaul the governance of OLAF including its supervisory arrangements ([7]). However, in the light of recent developments ([8]), it would be advisable not to wait for this overall evaluation to clarify the procedure for lifting the immunity ([9]) of the Director-General of OLAF or of any other member of OLAF staff at the request of a national judicial authority. When a national judicial authority issues such a request, the independence of OLAF might need an additional safeguard. The Court therefore recommends that Article 17 of the OLAF Regulation should be completed by a provision that the Commission has to inform the Supervisory Committee of any such request in a timely manner and has to consult the Committee before taking a decision ([10]).

This Opinion was adopted by Chamber IV, headed by Mr Milan Martin CVIKL, Member of the Court of Auditors, in Luxembourg at its meeting of 5 April 2016.

For the Court of Auditors

Vítor Manuel da SILVA CALDEIRA

President

([4]) See paragraph 56 of the 2014 activity report of the OLAF Supervisory Committee.
([5]) See paragraph 44 of Opinion No 6/2011 (OJ C 254, 30.8.2011, p. 1).
([6]) See Article 1(2) of the proposal.
([7]) Article 19 of the OLAF Regulation provides that, by 2 October 2017, the Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. That report shall be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation.
([8]) In March 2016, the Commission has lifted the immunity from legal proceedings of the Director-General of OLAF at the request of the judicial authorities of a Member State.
([9]) Article 11(a) of the Protocol on the Privileges and Immunities (PPI) of the European Union stipulates that staff members shall 'be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office;'.
([10]) Similarly Article 17(9) of the OLAF Regulation already provides that the Commission has to consult the Committee before imposing any disciplinary penalty on the Director-General.