

II

(Preparatory Acts)

COMMISSION

Amended proposal for a Council Regulation concerning investigations conducted by the Fraud Prevention Office ⁽¹⁾

(1999/C 131/04)

COM(1999) 140 final — 98/0329(CNS)

(Submitted by the Commission pursuant to Article 189a(2) of the EC Treaty on 29 March 1999)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Court of Auditors,

(1) Whereas the institutions and the Member States attach great importance to the protection of the Communities' financial interests and to the fight against fraud and any other illegal activities to the detriment of the Communities' financial interests; whereas the importance of action to that end is confirmed by Article 209a of the EC Treaty and Article 183a of the Euratom Treaty;

(2) Whereas all available means must be deployed to fully attain this objective, notably in terms of investigation functions devolved to the Community level, while the current distribution and balance of responsibilities as between the national and Community levels should be maintained;

(3) Whereas to reinforce the means available for combating fraud, the Commission, by Decision 1999/.../EC, ECSC, Euratom ⁽²⁾, established a Fraud Prevention Office (hereinafter 'the Office') among its own departments with responsibility for conducting administrative fraud investigations; whereas it gave this Office full independence to exercise the on-the-spot checks and inspections provided for by Community law;

(4) Whereas Decision 1999/.../EC, ECSC, Euratom provides that, for the purposes of investigations, the Office shall exercise the powers conferred by Community legislation, subject to the limits and conditions laid down thereby;

(5) Whereas the Office should be entrusted with the exercise of the powers conferred on the Commission by Council Regulation (Euratom, EC) No 2185/96 of 11 November 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 ⁽³⁾; whereas the Office must also be allowed to exercise the other powers conferred on the Commission to conduct on-the-spot checks and inspections in the Member States, notably for the purpose of detecting irregularities as required by Article 9 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests ⁽⁴⁾;

(6) Whereas, given the need to step up the fight against fraud and any other illegal activities to the detriment of the Communities' financial interests, the Office must be able to conduct internal investigations in the institutions and other bodies established by or on the basis of the EC and Euratom Treaties (hereinafter 'the institutions and bodies');

(7) Whereas investigations must be conducted with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value; whereas to that end the institutions and bodies must lay down the terms and conditions under which such internal investigations are conducted; whereas the Staff Regulations of officials of the European

⁽¹⁾ OJ C 21, 16.1.1999.

⁽²⁾ See page 11 of this Official Journal.

⁽³⁾ OJ L 292, 15.11.1996, p. 2.

⁽⁴⁾ OJ L 312, 23.12.1995, p. 1.

Communities and the conditions of employment of other servants (hereinafter 'the Staff Regulations') should be amended in order to lay down the rights and obligations of officials and other servants as regards internal investigations;

- (8) Whereas such internal investigations can be conducted only if the Office is guaranteed access to all premises of the institutions and bodies and all information and documents held by them;
- (9) Whereas to ensure that the Office is independent in carrying out the tasks conferred on it by this Regulation, its Director must be given the power to open an investigation on his own initiative, at the request of a Member State or, where appropriate, at the request of an institution or body;
- (10) Whereas it is for the competent national authorities or the institutions and bodies, as the case may be, to decide what action should be taken on completed investigations on the basis of the report drawn up by the Office; whereas to step up the fight against fraud, the Director should be authorised to send information on investigations in progress directly to the relevant judicial authorities at any time, if he sees fit;
- (11) Whereas the terms on which the Office's agents will discharge their duties and the terms governing the Director's exercise of his responsibility for the conduct of investigations by the Office's officials should be laid down;
- (12) Whereas, for the sake of successful cooperation between the Office, the Member States and the relevant institutions and other bodies, the reciprocal exchange of information must be organised, subject to rules of confidentiality where information is subject to professional secrecy, while ensuring that it enjoys the proper data protection;
- (13) Whereas, to ensure that the results of investigations conducted by the Office's officials are taken into account and that the requisite follow-up action is taken, the reports should have the status of admissible evidence in administrative and judicial proceedings; whereas, to that end, they should be drawn up in a manner compatible with the rules governing administrative reports in the Member States;
- (14) Whereas the Office should enjoy independence in the discharge of its function; whereas it must nevertheless be able to draw on the opinion of anti-fraud experts; whereas, to that end, the Office should be assisted by a

Supervisory Committee, made up of independent persons being experts in the Office's field of activity;

- (15) Whereas administrative investigations are to be conducted under the authority of the Director of the Office, in full independence from the Community institutions and bodies and from the Supervisory Committee;
- (16) Whereas entrusting to the Office the task of conducting administrative investigations for the protection of the Communities' financial interests should not have the effect of reducing the level of legal protection enjoyed by the persons concerned, in particular as regards the protection of personal data and respect for confidentiality of information gathered in the course of investigations; whereas officials and other servants of the Communities should be assured of legal protection equivalent to that provided for by Articles 90 and 91 of the Staff Regulations;
- (17) Whereas the activities of the Office should be assessed after a three-year period;
- (18) Whereas this Regulation in no way diminishes the powers and responsibilities of the Member States to take measures to combat fraud affecting the Communities' financial interests; whereas entrusting to an independent Office the task of conducting external administrative investigations in this area is accordingly in full compliance with the subsidiarity principle laid down by Article 3b of the EC Treaty; whereas the operation of the Office is likely to step up the fight against fraud and any other illegal activities detrimental to the Communities' financial interests and is therefore compatible with the proportionality principle;
- (19) Whereas the EC Treaty confers no powers for the adoption of this Regulation other than those provided for by Article 235, and the Euratom Treaty confers no powers other than those provided for by Article 203,

HAS ADOPTED THIS REGULATION:

Article 1

Objective and tasks

In order to step up the fight against fraud and any other illegal activity detrimental to the financial interests of the European Community and the European Atomic Energy Community, the Fraud Prevention Office (hereinafter 'the Office') shall conduct administrative investigations in the Member States and within the institutions and bodies set up by or on the basis of the EC and Euratom Treaties (hereinafter 'the institutions and bodies').

*Article 2***Definition**

For the purposes of this Regulation, 'investigations' shall mean all inspections, checks, and measures undertaken by agents of the Office in the performance of their duties with a view to combating fraud and any other illegal activities detrimental to the financial interests of the Communities and establishing, where necessary, the unlawful nature of such activities.

*Article 3***External investigations**

The Office shall exercise the power to carry out on-the-spot inspections and checks in the Member States conferred on the Commission by Regulation (EC, Euratom) No 2185/96.

As part of its investigative function, the Office shall carry out the inspections and checks referred to in Article 9 of Regulation (EC, Euratom) No 2988/95.

These inspections and checks (hereinafter 'external investigations') shall be carried out under the conditions and in accordance with the procedures provided for by this Regulation and by the instruments conferring on the Commission the power to carry out external investigations.

*Article 4***Internal investigations**

1. The Office shall carry out administrative investigations internal to the institutions or bodies, with a view to protecting the financial interests of the Communities.

These administrative investigations (hereinafter 'internal investigations') shall be carried out under the conditions and in accordance with the procedures provided for by this Regulation and, until such time as the Staff Regulations of officials of the Communities and the conditions of employment of other servants of the Communities (hereinafter 'the Staff Regulations') are amended, by decisions adopted by each institution and body. The institutions shall consult each other on the rules to be laid down by such decisions.

The Office shall have access to all information held by the institutions and bodies and to their premises. The institutions and bodies shall be informed whenever the Office's agents carry out an investigation on their premises or consult a document or information held by them. The Office may take a copy of any document or information held by the institutions

and bodies and, if necessary, confiscate it to ensure there is no danger or it disappearing.

Where it appears that an official or servant may be personally involved, the institution or body to which he or she belongs shall be informed if an internal investigation is opened or pursued regarding that person.

2. The conditions and procedures for internal investigations shall include the following rules:

- (a) a duty on the part of officials and servants of the institutions and bodies to cooperate with and supply information to the Office's agents;
- (b) the obligation for the Office to give prior notice of access to information and to the premises of the institutions and bodies, and on the opening or pursuit of an investigation regarding an official or servant who is personally involved;
- (c) the rules of procedure to be observed by the Office's agents when conducting internal investigations and guarantees of the rights of persons concerned by an internal investigation.

*Article 5***Opening of investigations**

1. External investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from a Member State.

2. Internal investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from the institution or body in which the investigation is to be conducted.

*Article 6***Investigations procedure**

1. The Director of the Office shall be responsible for the carrying out of the investigations.

2. The Office's agents shall exercise their powers on production of a written authorisation showing their identity and their position.

3. For each action, the Office's agents shall be equipped with a document issued by the Director indicating the subject matter and purpose of the investigation.

4. During on-the-spot inspections and checks, the Office's agents shall adopt an attitude compatible with the rules and practices governing officials of the Member State concerned, and, where appropriate, respect the Staff Regulations and the decisions referred to in the second subparagraph of Article 4(1).

5. Investigations shall be conducted continuously over a period proportional to the circumstances and complexity of the case. Where an investigation has been in progress for more than 12 months, the Director shall explain to the Supervisory Committee referred to in Article 11 why it cannot yet be concluded and state the estimated time required to complete the work.

6. The Member States shall ensure that their competent authorities give the necessary support to enable the Office's agents to fulfil their task.

Article 7

Exchange of information

The institutions and bodies and, insofar as national law allows, the Member States shall, at the request of the Office or of their own initiative, send the Office any document or information they hold which is necessary for current investigations.

They shall also send the Office any document or information they hold which they consider useful in a general sense for the prevention of fraud or any other illegal activity detrimental to the Communities' financial interests.

Article 8

Confidentiality and data protection

1. Information obtained in the course of external and internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given to similar information by the national law of the Member State in which it was collected and by the corresponding provisions applicable to the Community institutions and bodies.

Such information may not be communicated to persons other than those within the Community institutions and bodies or in the Member States whose functions require them to know it, nor may it be used for purposes other than to prevent fraud and any other illegal activities detrimental to the financial interests of the Communities, without the prior consent of the Member State in which the information was gathered or the institution or body concerned.

2. The Director shall ensure that the Office's agent and the other persons acting under his authority observe the Community and national provisions on the protection of personal data, in particular those provided for by Directive 95/46/EC of the European Parliament and of the Council⁽¹⁾.

Article 9

Investigation report

1. On completion of an investigation carried out by the Office, the latter shall draw up a final report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation.

2. In drawing up final reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

3. Reports drawn up following an external investigation and any useful related documents shall be sent to the competent authorities of the Member States in question.

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution or body concerned.

Article 10

Follow-up to investigations

1. Without prejudice to Articles 8 and 9, the Office may at any time, if it considers it appropriate, send information obtained during the course of external investigations to the competent authorities in the Member States in question, as well as information obtained during the course of internal investigations to the institution or body concerned. In the latter case the Office shall also directly inform the judicial authorities of the Member State in question if it considers it necessary in view of the seriousness of the information obtained. It shall inform the Supervisory Committee thereof.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

2. In the case of an internal investigation, the institution or body concerned shall decide on the action to be taken on the basis of the report drawn up by the Office.

Article 11

Supervisory Committee

1. The Office shall be assisted by a Supervisory Committee, composed of five independent persons who possess the qualifications required for appointment in their respective countries, to senior judicial or supervisory posts or for the teaching of public or criminal law at university level. They shall be appointed by common accord of the European Parliament, the Council and the Commission.

2. The term of office of members shall be three years. This term of office shall be renewable.

On expiry of their term of office, members shall remain in office until their appointments are renewed or until they are replaced.

3. In carrying out their duties, members shall neither seek nor take instructions from any government or any institution or body.

4. The Supervisory Committee shall appoint its chairman.

It shall adopt its own rules of procedure.

5. At the Director's request or on its own initiative, the Supervisory Committee shall give its opinion to the Director on the Office's activities, without, however, interfering with investigations in progress. Every year the Director shall lay the annual investigation programme before the Supervisory Committee.

6. The Supervisory Committee shall adopt an annual report and transmit it to the institutions.

Article 12

Director

The Office shall be headed by a Director, nominated by the Commission, after consulting the European Parliament and the Council, for a term of five years, which may be renewed once. With a view to nominating the Director, the Commission shall, after a favourable opinion has been given by the Supervisory Committee, draw up a list of several suitably qualified candidates following a call for applications which shall, if appropriate, be published in the *Official Journal of the European Communities*.

The Director shall neither seek nor take instructions from any government or any institution or body in the performance of his duties with regard to the opening and carrying out of

external and internal investigations or to the drafting of final reports following such investigations.

The Director shall report regularly to the European Parliament and the Council on the findings of investigations carried out by the Office, while respecting the confidentiality of those investigations, the fundamental rights of the persons concerned and, where judicial proceedings are instituted, respecting all national provisions applicable to such proceedings.

Article 13

Budget

The appropriations for the Office, the total amount of which shall be entered under a special budget heading within Part A of the section of the general budget of the Communities relating to the Commission, shall be set out in detail in an annex to that Part.

The posts allocated to the Office shall be listed in an annex to the Commission's establishment plan.

Article 14

Judicial review

Until such time as the Staff Regulations are amended, any official or other servant of the Communities may submit to the Director of the Office a complaint against an act adversely affecting him committed by the Office as part of an internal investigation, in accordance with the procedures laid down in Article 90(2) of the Staff Regulations. Article 91 of the Staff Regulations shall apply to decisions taken with regard to such complaints.

Article 15

Progress report

During the third year following the entry into force of this Regulation, the Commission shall transmit to the European Parliament and the Council a progress report on the Office's activities together, where appropriate, with proposals to modify or extend its tasks.

Article 16

Entry into force

This Regulation shall enter into force on 1 June 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.