

## II

*(Preparatory Acts)*

## COMMISSION

**Proposal for a Council Regulation (EC, Euratom) establishing a European Fraud Investigation Office**

(1999/C 21/06)

*COM(1998) 717 final — 98/0329(CNS)**(Submitted by the Commission on 4 December 1998)*

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 all illegal activities detrimental to 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 for the effective attainment of these objectives the requisite autonomy in the investigative function should be secured; whereas to boost the means available for combating fraud a body should be established with adequate legal, administrative and financial autonomy to enable it to exercise, in full independence, the on-the-spot

checks and inspections provided for by Community law, without jeopardising the responsibilities and powers exercised by the institutions in accordance with the Treaties;

- (4) Whereas a body should accordingly be established with legal personality, to be known as the European Fraud Investigation Office (hereinafter referred to as 'the Office') and to be responsible for anti-fraud administrative investigations in the Member States and within the institutions and bodies established by or on the basis of the Treaties;
- (5) Whereas to boost the effectiveness of the fight against fraud and other illegal activities detrimental to the Communities' financial interests it is necessary that the Office assist the Commission and, where appropriate, the other institutions and bodies established by the Treaties or by secondary legislation; whereas it is important in this context that the Office should be able to conduct its investigations without affecting the Commission's role and responsibilities for implementing the budget, for monitoring the application of Community law and for coordinating the Member States' anti-fraud activities, or the responsibilities of the Court of Auditors for verifying the legality and regularity of Community revenue and expenditure;
- (6) Whereas the Commission must be in a position to instruct the Office to conduct on-the-spot checks and inspections in the Member States or to take part in them, notably for the purpose of detecting irregularities as required by Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests<sup>(1)</sup> and Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections

<sup>(1)</sup> OJ L 312, 23.12.1995, p. 1.

carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities<sup>(1)</sup>, or in accordance with the sectoral regulations; whereas to that end the conditions governing such investigations should be laid down in a separate instrument to determine the allocation of tasks and organise the smooth functioning of cooperation between the Commission and the Office, in particular with respect to the preparation of investigations with the Member States and action thereafter;

- (7) Whereas, given the need to boost internal investigations in the institutions and other bodies established by the Treaties and secondary legislation, the Office should be given the requisite authority to conduct such investigations in full independence;
- (8) 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 agents should be laid down;
- (9) Whereas, for the sake of successful cooperation between the Commission and the Office and between the Office and the Member States, the relevant institutions and other bodies, the 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;
- (10) Whereas, to ensure that the results of investigations conducted by the Office's staff are taken into account and that the Commission is able to take the requisite follow-up action, their reports should have the status of admissible evidence in administrative and judicial proceedings, and whereas, to that end, they should be drawn up in a manner compatible with the rules governing administrative reports in the Member States;
- (11) Whereas the Office should enjoy the fullest autonomy in the discharge of its function; whereas the Board of Management should accordingly be composed not only of representatives of the institutions directly responsible for the protection of the Communities' financial interests but also of independent personalities being experts in the Office's field of activity;
- (12) Whereas administrative investigations should be conducted under the sole responsibility of the

Director of the Office, in full independence from the Community institutions and bodies and from the Board of Management;

- (13) Whereas entrusting to an independent body 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 provision should accordingly be made for jurisdiction to be conferred on the Court of Justice of the European Communities to review the legality of acts performed by the Office and to rule in cases concerning the non-contractual liability of the Office; whereas officials and other servants of the Communities should enjoy legal protection equivalent to that provided for by Articles 90 and 91 of the Staff Regulations of officials of the European Communities and by the conditions of employment of other servants of the European Communities;
- (14) Whereas the activities of the Office should be assessed after a three-year period;
- (15) 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 the establishment of an independent Office to conduct the external administrative investigations in this area hitherto conducted by the Commission is accordingly in full compliance with the subsidiarity principle laid down by Article 3b of the EC Treaty; whereas the establishment of the Office is accordingly likely to boost the fight against fraud and other illegal activities affecting the Communities' financial interests and is therefore compatible with the proportionality principle;
- (16) Whereas the EC Treaty confers no powers for the adoption of this Regulation other than those provided for by Article 235, and the EAEC Treaty confers no powers other than those provided for by Article 203,

HAS ADOPTED THIS REGULATION:

*Article 1*

**Establishment of the Office**

A European Fraud Investigation Office (hereinafter referred to as 'the Office') is hereby established.

<sup>(1)</sup> OJ L 292, 15.11.1996, p. 2.

*Article 2***Objective and tasks**

In order to step up the fight against fraud and any other illegal activity affecting the financial interests of the European Community and the European Atomic Energy Community, the Office shall assist the Commission and the other institutions and bodies set up by, or on the basis of, the EC and EAEC Treaties establishing these Communities (hereinafter referred to as 'the institutions and bodies'), by conducting administrative investigations in the Member States and within the institutions and bodies.

The Office may also:

- (a) support the Commission in developing a concept for the fight against fraud and any other illegal activity affecting the financial interests of the Communities;
- (b) help develop the necessary infrastructure;
- (c) help collect and analyse information;
- (d) take part in the Commission's cooperation with the Member States;
- (e) give technical support to the Commission, the other institutions and bodies and the competent national authorities.

*Article 3***Investigations**

1. The Commission may, on its own initiative or at the request of a Member State or the Office, ask the Office to:

- (a) carry out on-the-spot inspections and checks in the Member States as provided for in Regulation (Euratom, EC) No 2185/96;
- (b) carry out on-the-spot inspections and checks as provided for by the sectoral rules referred to in Article 9(2) of Regulation (EC, Euratom) No 2988/95;
- (c) take part in the on-the-spot inspections and checks by the Commission in the Member States referred to in Article 9(1) of Regulation (EC, Euratom) No 2988/95.

These inspections and checks, and the participation in these inspections and checks, hereinafter referred to as 'external investigations', shall be carried out under the

conditions and in accordance with the procedures provided for by the instruments conferring on the Office the power to carry out external investigations.

2. Every institution or body may confer on the Office the task of carrying out administrative investigations internal to that institution or body (hereinafter: 'internal investigations'), by way of a decision laying down the conditions and rules under which internal investigations are to be conducted.

The institutions shall collaborate on the content of such a decision.

3. The Office may be asked to undertake investigations in other fields.

*Article 4***Investigations procedure**

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

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

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

4. During the on-the-spot inspections and checks, the inspectors shall adopt an attitude compatible with the rules and practices governing the officials of the Member State concerned.

5. The Member States shall ensure that their competent authorities give the necessary support to enable the inspectors to perform their task.

*Article 5***Exchange of information**

1. The Commission and, if necessary, the other institutions and bodies, 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.

2. The Commission may send the Office any document or information it holds which is useful in a general sense for the fight against fraud or any other illegal activity affecting the Communities' financial interests.

3. The Member States shall send the Office any document or information which they consider useful to a current investigation. They may also send the Office any document or information that they consider useful, in a general sense, in the fight against fraud or any other illegal activity affecting the Communities' financial interests.

4. Without prejudice to Articles 6 and 7, the Office may at any time, if it considers it appropriate, send information obtained in the course of external investigations to the Commission and to the competent authorities in the Member States in question, and also any information obtained in the course of internal investigations to the institution or body making the request for the investigation. In the latter case, the Office may also inform directly the prosecuting authorities of the Member State concerned if it considers this necessary given the seriousness of the information obtained.

#### *Article 6*

##### **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.

Such information may not be communicated to persons other than those within the Community institutions or in the Member States whose functions require them to know it, nor may it be used by Community institutions for purposes other than to ensure effective protection of the Communities' financial interests in all Member States, without the prior consent of the Member State in which the information was gathered or of the institution or body concerned.

2. The Director shall ensure that the inspectors 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<sup>(1)</sup>.

<sup>(1)</sup> OJ L 281, 23.11.1995, p. 31.

#### *Article 7*

##### **Investigation report**

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

2. In drawing up the final reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. The 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 Commission.

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

5. The Commission or, if necessary, the institution or body concerned shall decide how to follow up the investigation on the basis of the report drawn up by the Office.

#### *Article 8*

##### **Legal personality**

1. The Office shall have legal personality.

2. The Office shall enjoy, in each of the Member States, the most extensive legal capacity accorded to legal persons under their respective laws.

#### *Article 9*

##### **Board of Management**

1. The Office shall have a Board of Management composed of nine members, as follows:

(a) three independent persons having expertise in the Office's field, appointed by the European Parliament;

- (b) three independent persons having expertise in the Office's field, appointed by the Council;
- (c) two representatives of the Commission;
- (d) one representative of the Court of Auditors.

2. The term of office of the members referred to in paragraph 1(a) and (b) 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. Decisions by the Board of Management shall be taken by a majority of two-thirds of its members.
- 4. The Board of Management shall appoint its Chairman from the members referred to in points (a) and (b) of paragraph 1.
- 5. The Board of Management shall adopt its own rules of procedure.
- 6. At the Director's request or on its own initiative, the Board of Management shall give its opinion to the Director on the Office's activities, without, however, interfering with investigations in progress.
- 7. The Board of Management shall adopt the annual report and transmit it to the institutions.

#### *Article 10*

##### **Director**

- 1. The Office shall be headed by a Director appointed by the Board of Management on a proposal from the Commission for a period of five years, which shall be renewable.
- 2. The Director shall be the legal representative of the Office.

#### *Article 11*

##### **Staff**

- 1. The Staff of the Office shall be subject to the Rules and Regulations applicable to officials and other servants of the European Communities.
- 2. The Director shall exercise in respect of the staff the powers devolved upon the Appointing Authority.

The Board of Management shall exercise disciplinary authority over the Director.

- 3. The Board of Management, in agreement with the Commission, shall adopt the rules necessary for implementing paragraphs 1 and 2.

#### *Article 12*

##### **Privileges and immunities**

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Office.

#### *Article 13*

##### **Budget**

- 1. Estimates shall be drawn up of all the Office's revenue and expenditure for each financial year, which shall correspond to the calendar year, and shall be entered in the Office's budget.
- 2. By February 15 of each year at the latest, the Director shall draw up the preliminary draft budget for the following financial year. The preliminary draft budget shall cover the operating expenditure scheduled for the following financial year. The Director shall submit the preliminary draft, together with an establishment plan, to the Board of Management.
- 3. The revenue and expenditure shown in the budget shall be in balance.
- 4. The Office shall be financed from the general budget of the European Communities, without prejudice to other resources.
- 5. The Office's expenditure shall include staff remuneration, administrative and infrastructure expenses and operating expenses.
- 6. The Board of Management shall adopt the draft budget and transmit it to the Commission. On this basis, the Commission shall draw up the corresponding estimates in the preliminary draft general budget of the European Communities, which it places before the Council pursuant to Article 203 of the EC Treaty and Article 177 of the EAEC Treaty.
- 7. The Board of Management shall adopt the Office's final budget before the beginning of the financial year, adjusting it where necessary to the Community subsidy and the Office's other resources.
- 8. The Director shall implement the Office's budget.
- 9. Monitoring to the commitment and payment of all the Office's expenditure and of the establishment and recovery of all its revenue shall be carried out by the Commission's Financial Controller.

10. By 31 March each year at the latest, the Director shall send the Commission, the Board of Management and the Court of Auditors the accounts for all the Office's revenue and expenditure in respect of the preceding financial year.

The Court of Auditors shall examine these accounts in accordance with Article 188c of the EC Treaty and Article 160c of the EAEC Treaty.

11. The Board of Management shall give a discharge to the Director for the implementation of the budget.

12. The Board of Management shall, after consulting the Commission and the Court of Auditors, adopt the internal financial provisions specifying in particular the arrangements for establishing and implementing the Office's budget.

#### *Article 14*

##### **Judicial review**

1. The Court of Justice of the European Communities shall have jurisdiction in actions brought against the Office under the conditions provided for in Articles 173 and 175 of the EC Treaty, without prejudice to the procedure provided for in paragraph 2.

The Office shall take the necessary measures to comply with the Court's judgment.

2. Any official or other servant of the Communities may submit to the Board of Management a complaint against an act adversely affecting him committed by the Office as part of an internal investigation. The complaint must be lodged within three months of the date on which the person concerned became aware of the act.

The Board of Management shall take a decision on the merits of the complaint within one month. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it.

Any decision, explicit or implicit, by the Board of Management shall be subject to appeal under Article 91 of the Staff Regulations of Officials of the European Communities.

#### *Article 15*

##### **Liability**

1. The Office's contractual liability shall be governed by the law applicable to the contract in question.

The Court of Justice shall have jurisdiction to give judgment pursuant to an arbitration clause contained in a contract concluded by the Office.

2. In the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Office or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The personal liability of servants towards the Office shall be governed by the provisions applying to the staff of the Office.

#### *Article 16*

##### **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 with proposals, if appropriate, to modify or extend its tasks.

#### *Article 17*

##### **Entry into force**

This Regulation shall enter into force on the day following the date of the decision by the competent authorities on where the seat of the Office should be located.

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