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(Information)

COURT OF AUDITORS

OPINION No 8/2005

**on a proposal for a Regulation of the European Parliament
and of the Council on mutual administrative assistance for the protection
of the financial interests of the Community against fraud
and any other illegal activities**

*(Presented pursuant to Article 280(4) of the EC Treaty)**(2005/C 313/01)***CONTENTS**

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THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 280 thereof,

Having regard to the Council's request, dated 12 October 2004, for the Court of Auditors' opinion on the Commission proposal ⁽¹⁾ for a Regulation of the European Parliament and of the Council on mutual administrative assistance for the protection of the financial interests of the Community against fraud and any other illegal activities;

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTION

1. Pursuant to Article 280 of the Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities. Such administrative cooperation comprises notification of irregularities, administrative enquiries, on-the-spot checks and inspections, exchanges of information, withdrawal of wrongly obtained advantages and administrative penalties.

2. Based on Article 280 and other provisions of the Treaty, there is a common set of legal rules to be enacted for all areas. However, the bulk of Community anti-fraud legislation is comprised of the numerous and different detailed provisions governing the Community policies concerned.

3. The legislative proposal under examination seeks to enhance the Commission's role as a coordinator of Member States' activities in fighting fraud and other illegal activities affecting the financial interests of the Community. According to the explanatory memorandum submitted by the Commission, the existing legal framework for administrative cooperation is incomplete in providing for an active role for the Commission in supporting and coordinating Member States' activities. This would in particular be the case with regard to transnational VAT fraud and money laundering related to EC fraud.

4. A comprehensive system of cooperation, both amongst the administrative authorities of the Member States and between those authorities and the Commission (acting through the European Anti-Fraud Office OLAF ⁽²⁾), is proposed in order to collect and exchange information on irregular transactions which are of 'particular relevance at Community level'.

⁽¹⁾ COM(2004) 509 final of 20 July 2004.

⁽²⁾ Pursuant to Article 2 of Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20), the Office shall be responsible in providing the Commission's support in cooperating with the Member States in the area of the fight against fraud and for any other operational activity of the Commission in relation to the fight against fraud.

5. Such 'particular relevance at Community level' is defined by two criteria:

(a) The irregular transaction must have ramifications or links to operations in more than one Member State

and

(b) the irregular transaction is estimated to cause damage of 100 000 euro or more to the Community or to cause fiscal damage in the area of VAT in the Member States concerned in excess of 500 000 euro.

6. The proposed regulation would apply to all areas of Community revenue and expenditure, unless other Community legislation provides for more specific cooperation or for broader access to information by the Commission.

7. The Court has examined the Commission proposal in the light of its relevant audit work, also taking into account provisions on better law-making and guidelines for the quality of drafting of Community legislation laid down jointly by the European Parliament, Council and Commission ⁽³⁾.

II. GENERAL OBSERVATIONS

8. The European Parliament, Council and Commission have agreed ⁽⁴⁾ to update and condense Community legislation and significantly to simplify it. In spite of this objective, the Commission proposal entails no effort to simplify or amend existing legislation. A new regulation would be added to and co-exist with horizontal and sectoral anti-fraud legislation currently in force.

9. The Commission has committed itself ⁽⁵⁾ to taking due account in its legislative proposals of their financial or administrative implications, for the Union and the Member States in particular. However, in its proposal for the new regulation no information is given concerning the financial and administrative implications for the Member States.

⁽³⁾ Interinstitutional Agreement of 16 December 2003 on better law-making (OJ C 321, 31.12.2003, p. 1) and Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1).

⁽⁴⁾ See Article 35 of the Interinstitutional Agreement of 16 December 2003.

⁽⁵⁾ See Article 27 of the Interinstitutional Agreement of 16 December 2003.

10. The proposal introduces a broader definition of the notion of 'irregularities affecting the Community's financial interests'. Its scope is extended to include

(a) infringements of legislation relating to value added tax (VAT)

and

(b) money laundering.

These areas are not covered by the general definition of irregularities as laid down in Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests ⁽¹⁾. Such a juxtaposition of differing definitions of the notion of 'irregularities' throughout anti-fraud legislation entails a risk of confusion and legal uncertainty.

11. Uncertainty is further increased due to the fact that existing Community legislation does not contain any definition of the notion 'financial interests of the Community' ⁽²⁾. The new regulation proposed by the Commission does not provide such a definition either.

III. ADMINISTRATIVE COOPERATION IN THE FIELD OF TRADITIONAL OWN RESOURCES AND EXPENDITURE

12. The recent audit by the Court concerning the management of the European Anti-Fraud Office ⁽³⁾ has confirmed that there is a need for more effective cooperation with the Member States, both in areas of direct management and in areas where the management of Community funds is shared with Member States. Problems in existing cooperation are to a large extent linked to weaknesses in operational efficiency, at both Member State and Commission level.

13. In the special case of the mutual assistance procedure in the customs and agriculture sectors ⁽⁴⁾, it was found that there is no systematic follow-up, and that OLAF has established no rules for the continuous and consistent monitoring of progress within the framework of the procedures for requesting mutual assistance from the Member States, and that the results of such requests are not clearly recorded ⁽⁵⁾.

⁽¹⁾ OJ L 312, 23.12.1995, p. 1.

⁽²⁾ Some guidelines can be found in a judgment of the Court of Justice. In Case C-11/00 the Court of Justice stated 'that the expression "financial interests of the Community" in Article 280 EC is not restricted exclusively to the budget of the European Community in the strict sense'. (2003, ECR I-7147, paragraph 95).

⁽³⁾ See Special report No 1/2005, Summary, paragraph VI (OJ C 202, 18.8.2005, p. 1).

⁽⁴⁾ Pursuant to Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997, p. 1).

⁽⁵⁾ See paragraph 32 of Special Report No 1/2005.

14. In Special report No 3/2004 on recovery of irregular payments under the Common Agricultural Policy ⁽⁶⁾, the Court had concluded that the relevant Commission data bank concerning irregularities reported by Member States ⁽⁷⁾ cannot be considered reliable, complete and accurate.

15. In the case of structural policies, when auditing the application of the relevant regulation ⁽⁸⁾ in 2001, the Court found ⁽⁹⁾ weaknesses at every level, with the consequence that reported data on irregularities were incomplete, unreliable, misleading and out-of-date.

16. These weaknesses were due, *inter alia*, to difficulties in defining reportable irregularities in a uniform manner throughout Member States. The Court also found that information was often made available only after long delays and was not properly followed up by the Commission.

17. The new procedures introduced through the proposal would represent an additional workload, both for the administrative authorities in the Member States and for the Commission, as existing reporting obligations pursuant to other Community legislation are neither abolished nor streamlined. In practice, it would therefore be difficult to concentrate efforts and resources and prevent the Commission services from being overloaded with information and requests relating to cases of minor relevance, which is the declared intention ⁽¹⁰⁾ of the Commission.

18. Furthermore, the coexistence of the newly proposed rules with existing sector-specific regulations would increase the risk of difficulties of interpretation and harmonised application throughout the Member States. Inconsistencies with regard to criteria, deadlines and thresholds for reporting arise ⁽¹¹⁾.

⁽⁶⁾ See paragraphs 16 to 32 of Special Report No 3/2004 (OJ C 269, 4.11.2004, p. 1).

⁽⁷⁾ Pursuant to Council Regulation (ECC) 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ L 67, 14.3.1991, p. 11).

⁽⁸⁾ Commission Regulation (EC) No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field. (OJ L 178, 12.7.1994, p. 43).

⁽⁹⁾ See Special Report No 10/2001 concerning the financial control of the Structural Funds, paragraphs 107 to 126 (OJ C 314, 8.11.2001, p. 26).

⁽¹⁰⁾ See page 6 of the Explanatory Memorandum accompanying the Commission proposal.

⁽¹¹⁾ For example, pursuant to the proposed regulation, Member States must supply without prior request any relevant information in respect of irregularities which might have ramifications in other Member States and where the potential damage to the Community's financial interests is 100 000 euro or more. No deadlines for reporting are set. It could therefore be assumed that the information has to be provided as soon as the financial impact of a case can be assessed. Under Commission Regulation (EC) No 1681/94, each Member State is however already, regardless of the amounts involved, under an obligation to report forthwith any irregularities, where it is feared that they may very quickly have repercussions outside its territory.

19. A further complication is created because the scope of the newly proposed reporting obligations would also include cases where irregularities have not yet taken place but where information is available that irregularities might be planned ⁽¹⁾. It is doubtful whether such a requirement is realistic.

IV. ADMINISTRATIVE COOPERATION IN THE FIELD OF VALUE ADDED TAX

20. In its Annual Report for 2001 ⁽²⁾, the Court drew attention to the increasing problems of carousel fraud and to the need to address this problem through enhanced administrative cooperation in order to protect VAT revenue ⁽³⁾.

21. On 1 January 2004, Council Regulation (EC) No 1798/2003 ⁽⁴⁾ on administrative cooperation in the field of value added tax came into force. Its purpose is to strengthen cooperation between Member State tax authorities in combating VAT fraud. Regulation (EC) No 1798/2003 eventually set up a single legal framework. Before it came into force, the coexistence of two separate legal instruments for cooperation on VAT had hampered effective cooperation between tax administrations.

22. According to the Commission, those Member States which have already implemented specific detection and control measures to tackle carousel fraud have been successful ⁽⁵⁾.

23. The Court notes that the provisions of the newly proposed regulation are to a large extent similar or even identical to those already contained in Regulation (EC) No 1798/2003, notably with regard to exchanges of information and rules for administrative enquiries ⁽⁶⁾.

⁽¹⁾ See Article 5(3) of the proposal.

⁽²⁾ See paragraphs 1.45 to 1.55 of the Annual Report for 2001 (OJ C 295, 28.11.2002, p. 1).

⁽³⁾ In the case of VAT, fraud impacts indirectly on the Communities' own resources. The Communities' ability to meet its expenditure obligations does not depend on the degree of efficiency in collecting VAT and preventing fraud. The own resource based on gross national income (GNI) is meant to cover the balance of total expenditure not covered by other resources. The consequences of VAT fraud are thus borne not only by the Member State in which that fraud occurred but by all the Member States through an increased call for GNI own resources.

⁽⁴⁾ Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ L 264, 15.10.2003, p. 1).

⁽⁵⁾ See Commission report on the use of administrative cooperation arrangements in the fight against VAT fraud, COM(2004) 260 final of 16.4.2004, p. 18.

⁽⁶⁾ In its Explanatory Memorandum, the Commission explicitly mentions that it used the standards developed in Regulation (EC) No 1798/2003.

24. However, the proposal changes the role to be played by the Commission (including OLAF). Under Regulation (EC) No 1798/2003, the main task of the Commission is to examine and evaluate together with the Member States how the arrangements for administrative cooperation are working and how their effectiveness could be improved.

25. According to the new proposal, OLAF would be systematically involved in coordinating individual anti-fraud operations and might even play a central role in such operations through centralizing and analysing relevant information and through the possibility of requesting Member States to arrange for a special watch or to carry out administrative enquiries.

26. The Court draws attention to its recommendation in Special Report No 1/2005 ⁽⁷⁾, that OLAF's activities should be focused on its investigative function. A role as a coordinator of Member States' operations in fighting cross-border VAT fraud, which is attributed to OLAF under the proposed regulation, might diminish OLAF's capacity to carry out its primary function effectively.

27. Furthermore, practical difficulties would arise as the new proposal, unlike Regulation (EC) No 1798/2003, does not provide for direct contacts and cooperation with tax inspectors or staff of anti-fraud units. It is proposed that information shall be channelled through the respective central liaison offices and other tax investigation authorities only. This entails a strong risk that rapidity and flexibility of coordination activities would be hampered.

28. Comments made in paragraphs 17 to 19 of this opinion also apply to administrative cooperation in the field of VAT.

V. ADMINISTRATIVE COOPERATION TO COMBAT MONEY LAUNDERING

29. Pursuant to Council Decision 2000/642/JHA ⁽⁸⁾ Member States have set up 'financial intelligence units' (FIU). These FIUs have the task of collecting and analysing information with the aim of establishing links between suspicious financial transactions and underlying criminal activity in order to combat money laundering.

30. The Commission proposes that FIUs be included amongst the competent authorities which are required to cooperate under the proposed regulation on mutual administrative assistance for the protection of the Community's financial interests. The Commission would thus be allowed to request their assistance and ask them for the transmission of all information of relevance for the detection and prevention of irregularities.

⁽⁷⁾ See paragraphs XI and 94.

⁽⁸⁾ Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units for the Member States in respect of exchanging information (OJ L 271, 24.10.2000, p. 4).

31. The Court draws attention to the fact that the current wording of Council Decision 2000/642/JHA does not provide for any role for the Commission in relation to the FIUs. Some of its provisions ⁽¹⁾ could even be interpreted as excluding the Commission's services from any access to information collected and communicated through FIUs. Pursuant to Article 19 of the guidelines for the quality of drafting of Community legislation ⁽²⁾, it would therefore be advisable to clarify the situation.

32. Comments made in paragraphs 17 and 19 of this opinion are also relevant for administrative cooperation in combating money laundering.

VI. CONCLUSIONS AND RECOMMENDATIONS

33. The Court agrees with the analysis of the Commission that there is a need for more effective cooperation amongst Member States and between Member States and the Commission to protect the financial interests of the Community against fraud and other illegal activities.

34. The existing legal framework for combating fraud and irregularities is complicated and, as the Court's audits have shown, difficult to implement. The proposed new regulation adds further complexity, notably in terms of definitions and criteria for reporting.

35. Furthermore, the proposal to add another legal instrument conflicts with the objective agreed between the European Parliament, the Council and the Commission ⁽³⁾ to update and condense Community legislation and significantly to simplify it.

36. The Court suggests that the Commission should make an effort to propose a simplification and consolidation of Community anti-fraud legislation with a view to avoiding duplications and overlapping or contradictory provisions. Existing weaknesses in cooperation between the Commission and the Member States could be addressed in the framework of such an overhaul.

37. The Court recalls its recommendations on focusing OLAF's activities on its investigative function. Widening the scope of OLAF's role in coordinating Member States' anti-fraud operations might conflict with this objective.

38. The notion of the 'financial interests of the Community', which is central to all anti-fraud legislation, should be clearly defined. A single definition of 'irregularities' should be used throughout anti-fraud legislation.

39. As far as cooperation in the field of value added tax is concerned, the Court reiterates its recommendation ⁽⁴⁾ that the Commission should concentrate on its responsibility for identifying malfunctions in the national systems in the field of the fight against VAT fraud and putting forward adequate remedies to the Member States concerned.

This opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 27 October 2005.

For the Court of Auditors
Hubert WEBER
President

⁽¹⁾ See for example Article 5(4) which says that the FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this Decision is not accessible by any other authorities, agencies or departments.

⁽²⁾ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.

⁽³⁾ Interinstitutional Agreement of 16 December 2003 on better law-making.

⁽⁴⁾ See paragraphs 4.1. to 4.8. of Special report No 9/98 concerning the protection of the financial interests of the European Union in the field of VAT on intra-Community trade together with the Commission's replies (OJ C 356, 20.11.1998, p. 1).