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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Improving OLAF's governance and reinforcing procedural safeguards in investigations:
A step-by-step approach to accompany the establishment of the European Public
Prosecutor's Office**

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Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office

1. Introduction:

The European Anti-Fraud Office was set up on 28 April 1999 by a Commission Decision to enhance the effectiveness of action to combat fraud and other illegal activities detrimental to the Community's interests. Council Regulation (EC) n° 1073/1999, Council Regulation (EURATOM) n°1074/1999 and the Inter-institutional Agreement of 25 May 1999 stipulate how OLAF should carry out investigations.

The Inter-institutional Agreement between the European Parliament, the Council and the Commission legally guarantees that internal investigations can be carried out under equivalent conditions in the three institutions and in all the other Community bodies, offices and agencies.

OLAF's external investigative powers are mainly those that were conferred upon the Commission under Regulations (EC, Euratom) Nos 2988/95 (protection of the European Communities' financial interests) and 2185/96 (on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests). OLAF also works on the basis of Regulation (EC) 515/97 on mutual administrative assistance.

Since the creation of OLAF, the protection of the financial interests of the Union has been strengthened. Experience gained over time showed that the governance of OLAF needed to be reinforced. Two legislative proposals were put forward by the Commission, the first in 2004 and the second in 2006. Both proposals were designed to reinforce the procedural guarantees applicable in OLAF investigations, as the regulatory framework of 1999 was almost silent on this issue.

2. The revised OLAF Regulation

On the basis of the Commission's proposal of March 2011, and after intensive negotiations, a compromise on the revised OLAF Regulation was approved (unanimously) on 25 February 2013¹ by the Council and on 3 July 2013 by the European Parliament².

The revised regulation is designed to strengthen the governance of OLAF, reinforcing procedural rights in internal and external investigations and OLAF's exchange of information both with the institutions and with the Member States' authorities.

3. Envisaged measures in order to further consolidate the legal framework

The establishment of the European Public Prosecutor's Office will bring about a substantial change in the way investigations concerning fraud and other illegal activities affecting the financial interests of the European Union are carried out in the Union.

In future, each time suspicions about criminal conduct falling within the remit of the European Public Prosecutor's Office arise, the ensuing investigations will be conducted by the European Public Prosecutor's Office as a *judicial* body, rather than – as today – by OLAF which carries out

¹ Position no 2/2013 of the Council at first reading adopted on 25/02/2013, OJ C 89 E/27.03.2013.

² P7_TA(2013)0308.

administrative investigations. This change will of course entail a substantial reinforcement of the procedural guarantees for the persons concerned by the investigations.

Under the proposed European Public Prosecutor's Office Regulation, whenever the European Public Prosecutor's Office opens an investigation all the reinforced procedural guarantees typical of judicial investigations will apply. Thus where it intends to carry out investigations vis-à-vis a member of staff of an EU institution, the European Public Prosecutor's Office will have to request the institution to lift the immunity of the individual(s) to be investigated in accordance with Protocol N° 7 of the Treaties (see also Article 19 of the proposed European Public Prosecutor's Office Regulation). These provisions would also apply to members of the Institutions, including the immunity of Members of the European Parliament and of Members of the Commission.

Furthermore, the European Public Prosecutor's Office will carry out its investigative measures in compliance with Article 26 of the European Public Prosecutor's Office proposal and the detailed rules of the national criminal law governing the respective measure. For a series of most intrusive investigative measures as proposed in Article 26 (such as searches and seizures, interceptions of telecommunications, covert investigations), there will be an EU level harmonised requirement for the European Public Prosecutor's Office to obtain a prior judicial authorisation to undertake the intrusive measure. The investigative measures taken by the European Public Prosecutor's Office may be submitted to judicial review by the competent national judge in accordance with the national rules of criminal procedure (see Article 36 of the proposed European Public Prosecutor's Office Regulation). National law may provide for direct judicial protection against an investigative act, thus allowing swift control of its legality during the investigative phase before a case is brought to trial.

A consequence of the future establishment of the European Public Prosecutor's Office is that OLAF's role in relation to possible criminal conduct affecting the EU's financial interests in internal matters (i.e., in the EU institutions, bodies and agencies of the Union) will be reduced. Once the European Public Prosecutor's Office is established OLAF will, in these cases, only provide preliminary evaluation of allegations reported to it. It will no longer conduct investigations but may provide assistance to the European Public Prosecutor's Office on its request (as it already does today to national prosecutors). This change will facilitate a speedier investigation process and will help to avoid duplications of administrative and criminal investigations into the same facts. In this way, the chances of a successful prosecution will be increased.

It is clear that this fundamental shift of approach from *administrative* to *judicial* investigations will necessarily entail also a number of changes in the OLAF Regulation. These should come into force concurrently with the European Public Prosecutor's Office Regulation. The Commission will table legislative proposals to that effect in due course. In the meantime, the Commission considers it appropriate to envisage further systemic improvements of the OLAF Regulation, which would come in addition to those achieved with the current reform. These are inspired by the procedural safeguards proposed in the European Public Prosecutor's Office Regulation which can be transposed, *mutatis mutandis*, into OLAF's administrative investigations. Specifically, two key elements should be considered, namely:

- creating the office of a "**Controller of procedural safeguards**" to perform a legal review of investigative measures, and
- providing for **enhanced procedural safeguards** where OLAF intends to carry out acts similar to searches and seizures in EU institutions, bodies, offices and agencies.

The office of a "**Controller of procedural safeguards**" would be administratively attached to the Commission. The office of the Controller would be expressly endowed with guarantees of complete independence vis-à-vis OLAF, the Commission and the other EU institutions by the revised OLAF Regulation. The Controller of procedural safeguards should be appointed by the Commission

following a procedure involving the Supervisory Committee, for a term of five years; he/she should have a judicial background and possess senior legal expertise in the fields of fundamental rights and criminal law. He/she should be tasked exclusively with the monitoring of compliance with the procedural guarantees applicable to OLAF investigations and of prompt handling of investigations to avoid undue delay. He/she should be able to intervene on his/her own motion or upon a complaint by any person concerned by an investigation. The Controller would be obliged to hear such complaints in a swift but adversarial procedure. His/her conclusions would not be formally binding upon the Director-General of OLAF, but OLAF could decide not to follow his/her findings only by means of a motivated note to be attached to the final report sent to the competent judicial authorities. The Director-General of OLAF would have a general right to consult the Controller of procedural safeguards on any matter related to the respect of procedural guarantees and, in particular, in certain instances where a person concerned must not be informed. The Controller of procedural safeguards should have the staff necessary for the swift performance of his/her duties.

This new office would not replace the current system of judicial control over OLAF's investigative action. It would however usefully complement it: individuals concerned by OLAF investigations would benefit from a new right of recourse, meaning that procedural irregularities allegedly committed by OLAF would less frequently come to scrutiny by a national judge at the trial stage or by the General Court in an action for damages. The Controller would monitor compliance in all investigations carried out independently by OLAF whatever their nature (internal/external, affectation of the Union's financial interests or not).

The function of the Controller of procedural safeguards should be clearly distinguished from that of the OLAF Supervisory Committee, which should continue to exercise its functions as defined in the currently revised OLAF Regulation. These include monitoring systemic developments regarding respect of certain conditions (such as procedural rights and reasonable deadlines for handling cases) without interfering in investigations in progress. To this end, the Controller of procedural safeguards should periodically give an overview to the Supervisory Committee about his activities.

Second, new **enhanced procedural safeguards** would be introduced for the most intrusive investigative measures that OLAF is empowered to take in internal investigations, i.e. the power to inspect offices and to take copies of documents or content of any data medium and take custody of such documents or data – a power similar to that of "searches and seizures". This is the only existing power of OLAF that is functionally comparable to the intrusive judicial investigative measures provided for in Article 26 of the European Public Prosecutor's Office Regulation. Conversely, OLAF has none of the other intrusive powers of European Public Prosecutor's Office; for example it has no power whatsoever to intercept telecommunications.

In developing these enhanced procedural requirements, the Regulation would reflect the objective difference existing between *staff* of the EU and *members* of its institutions, i.e. members of European Parliament, the President of the European Council, members of the Commission, Judges and Advocates-General of the EU courts, members of the Court of Auditors and of the decision-making bodies of the European Investment Bank and of the European Central Bank. This is justified given the special responsibilities of these members and their special mode of election or appointment under the Treaties, which distinguishes them from the staff whose rights and obligations derive from the Staff Regulations.

Where OLAF intends to make use of its power to inspect offices of *staff* and to take copies of documents or content of any data medium, it should be obliged to seek the prior opinion of the Controller of procedural safeguards. Where the Controller has doubts about the proportionality of the intended measure, OLAF could carry it out only after having stated detailed reasons in a motivated note to be attached to its final report.

Where OLAF intends to make use of its power to inspect offices of a *member of an EU institution* and to take copies of documents or content of any data medium, it would need to obtain a prior quasi-judicial authorisation. The role of granting such authorisations to OLAF, on request from its Director-General, should be entrusted to a person possessing the ability required for appointment to judicial office, ideally a former judge of the EU Courts. The person should be appointed in a special inter-institutional procedure for a term set in the Regulation, and work part-time. S/he should be assisted by the Controller of procedural safeguards and his/her staff.

4. Conclusion

In sum, the Commission considers that a step-by step approach is the best way to further strengthen OLAF's governance and enhance procedural safeguards in its investigations.

The Commission welcomes the fact that, as a first step, the revised OLAF Regulation will now enter into force.

As a second step, the Commission would consider it appropriate to envisage further systemic improvements of the OLAF Regulation, which are inspired by those procedural safeguards in the Commission's proposal on establishment of a European Public Prosecutor's Office that can be transposed to OLAF's administrative investigations and enacted even before the European Public Prosecutor's Office is established. Two such key improvements would be the strengthening of legal review of investigative measures through the new office of an independent Controller of procedural safeguards, and enhanced procedural safeguards for acts similar to searches and seizures carried out by OLAF in the institutions. The Commission will also propose the necessary changes to the OLAF Regulation resulting from the establishment of the European Public Prosecutor's Office. These should come into force concurrently with the European Public Prosecutor's Office Regulation. This will mean a system change, moving from administrative to judicial investigations, and bring about substantial changes to the way investigations on fraud and other criminal activities affecting the EU's financial interests are conducted. It will entail a substantial reinforcement of applicable procedural safeguards.

LEGISLATIVE FINANCIAL STATEMENT

FRAMEWORK OF THE PROPOSAL/INITIATIVE

Title of the proposal/initiative

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions

“Improving OLAF's governance and reinforcing procedural safeguards in investigations

A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office”

Policy area(s) concerned in the ABM/ABB structure³

Policy area: 24.01. Administrative expenditure of policy area Fight against fraud

Nature of the proposal/initiative

- The proposal/initiative relates to a **new action**
- The proposal/initiative relates to a **new action following a pilot project/preparatory action**⁴
- The proposal/initiative relates to **the extension of an existing action**
- The proposal/initiative relates to **an action redirected towards a new action**

Objective(s)

The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

Fight against fraud-Article 325 TFEU

Specific objective(s) and ABM/ABB activity(ies) concerned

Specific objective No. 7.1.a

ABM/ABB activity(ies) concerned

24.01. Administrative expenditure of policy area Fight against fraud

³ ABM: activity-based management – ABB: activity-based budgeting.

⁴ As referred to in Article 54(2)(a) or (b) of the Financial Regulation.

Expected result(s) and impact

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

The establishment of a “Controller of procedural safeguards” is expected to lead to:

- Enhanced protection of the procedural rights of persons concerned by OLAF investigations.
- Increased transparency in internal and external investigations
- Improved monitoring of compliance with the procedural requirements for investigations
- Possibility of intervention on complaint by any person concerned by an OLAF investigation before the “Controller of procedural safeguards”.

Indicators of results and impact

Specify the indicators for monitoring implementation of the proposal/initiative.

- Prompt handling of complaints without undue delay.
- Organisation of a swift adversarial procedure, independent from OLAF

Grounds for the proposal/initiative

Requirement(s) to be met in the short or long term

The establishment of the “Controller of procedural safeguards” should enhance the respect of procedural rights of persons concerned by OLAF internal and external investigations and raise OLAF’s accountability.

Added value of EU involvement

The added value of the “Controller of procedural safeguards” will consist in its ability to monitor the compliance with the procedural rights provided by the OLAF regulation and to promptly handle complaints by persons concerned without undue delay. The controller will ensure that the procedural rights of persons concerned are fully complied with by OLAF.

Lessons learned from similar experiences in the past

The **revised OLAF Regulation** which should enter into force in October 2013 provides for a set of procedural rights for the persons concerned by OLAF’s internal and external investigations, as well as for the witnesses.

The Commission has previously introduced in its previous proposal to amend Regulation No. 1073/1999 on investigations conducted by OLAF- COM (2006)244 final- the concept of a “Review adviser” and in its 2011 amended proposal – COM (2011)135- the concept of a “review procedure”. Both proposed functions were designed to ensure a swift control of the compliance with procedural rights of persons concerned by OLAF investigations.

However, both proposals were not acceptable to the legislator because of difficulties to reconcile a high degree of independence from OLAF with the need for cost-efficiency and cost-neutrality.

The Commission suggests now the office of a "Controller of procedural safeguards" would be administratively attached to the Commission. The office of the Controller would be expressly endowed with **guarantees of complete independence vis-à-vis OLAF, the Commission and the other EU institutions** by the revised OLAF Regulation. The Controller of procedural safeguards should be appointed by the Commission following a procedure involving the Supervisory Committee, for a term of five years; he/she should have a judicial background and possess senior legal expertise in the fields of fundamental

rights and criminal law. He/she should be tasked exclusively with the monitoring of compliance with the procedural guarantees applicable to OLAF investigations and of prompt handling of investigations to avoid undue delay. He/she should be able to intervene on his/her own motion or upon a complaint by any person concerned by an investigation.

This function should be separated from the mission of the Supervisory Committee of OLAF which will continue to supervise functions of monitoring systemic shortcomings and support the independence of OLAF.

Compatibility and possible synergy with other appropriate instruments

The revised OLAF Regulation: On the basis of the Commission's proposal of March 2011, and after intensive negotiations, a compromise on the revised OLAF Regulation was approved (unanimously) on 25 February 2013 by the Council and on 3 July 2013 by the European Parliament.

The revised regulation is designed to strengthen the governance of OLAF, reinforcing procedural rights in internal and external investigations and OLAF's exchange of information both with the institutions and with the Member States' authorities.

The Office of the Controller completes the revised Regulation with an independent handling of complaints concerning the rights provided in the revised Regulation.

The Regulation on the establishment of the European Public Prosecutor's Office: The establishment of the European Public Prosecutor's Office will bring about a substantial change in the way investigations concerning fraud and other illegal activities affecting the financial interests of the European Union are carried out in the Union.

In future, each time suspicions about criminal conduct falling within the remit of the European Public Prosecutor's Office arise, the ensuing investigations will be conducted by the European Public Prosecutor's Office as a prosecutorial body, rather than – as today – by OLAF which carries out administrative investigations. This change will of course entail a substantial reinforcement of the procedural guarantees for the persons concerned by the investigations.

The reinforcement of procedural guarantees of persons concerned by OLAF investigations through the establishment of a Controller of procedural safeguards represents a preparatory step in the direction of establishing the EPPO.

Duration and financial impact

- Proposal/initiative of **limited duration**
- Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY
- Financial impact from YYYY to YYYY
- Proposal/initiative of **unlimited duration**

Implementation with a start-up period from 2015 to 2016,
followed by full-scale operation.

Management mode(s) planned⁵

- Direct management** by the Commission
- Shared management** with the Member States
- Indirect management** by entrusting budget implementation tasks to:
 - international organisations and their agencies (to be specified);
 - the EIB and the European Investment Fund;
 - bodies referred to in Articles 208 and 209;
 - public law bodies;
 - bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;
 - bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;
 - persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

Comments

[...]
[...]

⁵ Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html

MANAGEMENT MEASURES

Monitoring and reporting rules

Specify frequency and conditions.

The “Controller of procedural safeguards” should periodically give an overview of its activities to the Supervisory Committee of OLAF.

Management and control system

Risk(s) identified

Processing of personal data in complaints by persons concerned by OLAF investigations.

Control method(s) envisaged

Ex- post controls by the European Court of Auditors

Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures.

Adoption of rules for the prevention and management of conflicts of interest in respect of its staff members.

ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number Heading 5 – Administrative expenditure	Diff./non-diff. (6)	from EFTA countries ⁷	from candidate countries ⁸	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	XX.YY European Commission	DIFF	NO	NO	NO	NO

New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Heading]	Diff./non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	[XX.YY.YY.YY]		YES/N O	YES/N O	YES/N O	YES/NO

⁶ Diff. = Differentiated appropriations / Non-Diff. = Non-differentiated appropriations.

⁷ EFTA: European Free Trade Association.

⁸ Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

Heading of multiannual financial framework	5	"Administrative expenditure"						
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EUR million (to three decimal places)

Controller of procedural safeguard	2015	2016	2017	2018	2019	2020	TOTAL
• Human resources	0.262	0.524	0.524	0.524	0.524	0.524	2.882
• Other administrative expenditure	0.012	0.025	0.025	0.025	0.025	0.025	0.137
TOTAL	0.274	0.549	0.549	0.549	0.549	0.549	3.019

TOTAL appropriations for HEADING 5 of the multiannual financial framework	0.274	0.549	0.549	0.549	0.549	0.549	3.019
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EUR million (to three decimal places)

	2015	2016	2017	2018	2019	2020	TOTAL
TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework	0.274	0.549	0.549	0.549	0.549	0.549	3.019
Commitments	0.274	0.549	0.549	0.549	0.549	0.549	3.019
Payments	0.274	0.549	0.549	0.549	0.549	0.549	3.019

Estimated impact on [body]'s appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ↓	2016		2017		2018		2019		2020		TOTAL	
	Type ¹⁰	Average cost	%	Cost	%	Cost	%	Cost	%	Cost	%	Cost
OUTPUTS												
SPECIFIC OBJECTIVE NO 1 ¹¹ ...												
- Output												
- Output												
- Output												
Subtotal for specific objective No 1												
SPECIFIC OBJECTIVE NO 2 ...												
- Output												
Subtotal for specific objective No 2												

¹⁰ Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

¹¹ As described in point 1.4.2. 'Specific objective(s) ...'

Estimated impact on [body]'s human resources

Summary

- The proposal/initiative does not require the use of appropriations of an administrative nature
- The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	2015 ¹²	2016	2017	2018	2019	2020		TOTAL
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Officials (AD grades)	0.196	0.393	0.393	0.393	0.393	0.393		2.161
Officials (AST grades)	0.066	0.131	0.131	0.131	0.131	0.131		0.721
Contract staff								
Temporary staff								
Seconded National Experts								

TOTAL	0.262	0.524	0.524	0.524	0.524	0.524		2.882
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Human resources Controller of procedural safeguard	2015	2016	2017	2018	2019	2020
Establishment plan posts (in headcounts)	2	4	4	4	4	4
- Of which AD	1,5	3	3	3	3	3
- Of which AST	0,5	1	1	1	1	1
Total staff	2	4	4	4	4	4

¹² During the first year in the start-up phase recruitment will grow progressively, hence 50% of the staff will be needed in 2016.

Estimated requirements of human resources for the parent DG

The proposal/initiative does not require the use of human resources.

The proposal/initiative requires the use of human resources, as explained below:

		2015	2016	2017	2018	2019	2020
• Establishment plan posts (officials and temporary staff)							
XX YY Staff EC		2	4	4	4	4	4
XX 01 01 02 (Delegations)							
XX 01 05 01 (Indirect research)							
10 01 05 01 (Direct research)							
• External staff (in Full Time Equivalent: FTE)							
XX 01 02 01 (CA, SNE, INT from the 'global envelope')							
XX 01 02 02 (CA, LA, SNE, INT and JED in the delegations)							
XX 01 04 yy	- at Headquarters						
	- in delegations						
XX 01 05 02 (CA, SNE, INT - Indirect research)							
10 01 05 02 (CA, SNE, INT- Direct research)							
Other budget lines (specify)							
TOTAL		2	4	4	4	4	4

XX is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary agents	Monitoring of compliance with the procedural guarantees applicable to OLAF investigations and of prompt handling of investigations to avoid undue delay. Handling of complaints in a swift and adversarial procedure.
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Description of the calculation of cost for FTE equivalent should be included in the Annex, section 3.

Compatibility with the current multiannual financial framework

- Proposal/initiative is compatible the current multiannual financial framework.
- Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.
- Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework¹³.

Third-party contributions

- The proposal/initiative does not provide for co-financing by third parties.

The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
Specify the co-financing body								
TOTAL appropriations cofinanced								

Estimated impact on revenue

- Proposal/initiative has no financial impact on revenue.
- Proposal/initiative has the following financial impact:
 - on own resources
 - on miscellaneous revenue

EUR million (to three decimal places)

Budget revenue line:	Appropriations available for the current financial year	Impact of the proposal/initiative ¹⁴					Enter as many years as necessary to show the duration of the impact (see point 1.6)
		Year N	Year N+1	Year N+2	Year N+3		

¹³ See points 19 and 24 of the Interinstitutional Agreement for the period 2007-2013.

¹⁴ As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25% for collection costs.

Article								
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For miscellaneous 'assigned' revenue, specify the budget expenditure line(s) affected.

[...]

Specify the method for calculating the impact on revenue.

[...]
