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COMMISSION

THE OLAF SUPERVISORY COMMITTEE ACTIVITY REPORT

**ACTIVITY REPORT**

**June 2003 to July 2004**

(2005/C 122/01)

**Members of the OLAF Supervisory Committee**

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(\*) Mr Noack resigned with effect from 1 September 2004. But this report reflects the contributions of all five members.



## INTRODUCTION

The Committee has now been in existence for five years. This report starts by assessing OLAF's fulfilment of the objectives established by the legislator. It therefore differs from the previous reports and opinions, in which the Committee's aim, in accordance with the last part of recital 17 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council <sup>(1)</sup>, was to support the establishment and organisation of OLAF while fully respecting the independence of its Director, on the basis of the experience gained in carrying out its task of reinforcing the Office's independence by regularly monitoring the investigative function. Since the report also happens to coincide with the political authorities' current examination of the future of OLAF, it should also be able to make a contribution to this work.

Between June 2003 and July 2004, the Committee continued to meet monthly; 10 meetings were held in this period, at which it received regular reports from the Director of OLAF and his staff. The Committee maintained its contacts with the institutions, either at its meetings or in connection with them; with Parliament (in particular with the Chairman and the rapporteurs of the Committee on Budgetary Control); with the Council (anti-fraud task force); with the Commission (in particular with Ms Schreyer and the Secretary-General, Mr O'Sullivan); and with the Court of Auditors (which it met twice).

## Methods <sup>(2)</sup>

Because the transitional period needed to establish structures suited to OLAF's new functions has been much longer than originally envisaged, in the last five years the Committee has had to dedicate more of its efforts than it would have liked to setting up new structures and methods. Since the introduction by OLAF of more transparent management methods, the Committee has been able to devote more of its time to the operational area and fully exercise the function assigned to it by Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 <sup>(3)</sup>: to regularly monitor OLAF's investigative role. In particular, on 1 January 2001 a comprehensive file registration system was introduced, acting on one of the recommendations of the Court of Auditors. Significant work on the codification and harmonisation of operational procedures was also carried out as part of the preparation of successive versions of an **OLAF 'Manual'** (last amended on 1 August 2003 and currently being revised). Lastly, since the end of the first half of 2001, all investigative procedures have been managed by a **Case Management System** (CMS), which is constantly being improved.

The Supervisory Committee has adapted its procedures to enable it to make use of the documentation and information that have become available as a result of the transparency introduced by OLAF's management. OLAF now has scoreboards, updated monthly, which track all the Office's operational activities and contain the essential information to be sent to the Committee according to Article 11(7) of the Regulation. The Committee uses these scoreboards, which supplement and provide a framework for the information sheets regularly submitted by OLAF on investigations that have been in progress for more than nine months, as well as the information given on the case files transmitted to the national courts, to identify priorities for its monitoring task. Since December 2003, it has had access to full documentation on the information or files transmitted to the judicial authorities, in principle before they are transmitted, and it comments to OLAF on the procedures followed in each case.

In addition, the Committee has been able to base its assessment of OLAF's operational activities both on the global viewpoint gained from the meetings of its rapporteurs with OLAF on questions of principle and the specific viewpoint obtained from analysis of a certain number of case files, supplemented if necessary by examination of files *in situ* at OLAF's offices.

Lastly, the Committee cooperates with OLAF in implementing the provisions of Article 8 of the Regulation on the protection of personal data.

In the light of its work these first five years, the Supervisory Committee would emphasise that the main challenge facing OLAF in fulfilling its investigative remit has been the fact that investigations that may result in criminal proceedings have to be carried out within a framework designed for administrative investigations.

The Committee has highlighted this problem from the outset, broadly in line with the comments made in the report of the 'Committee of the Wise Men' <sup>(4)</sup>. First, it drew the attention of OLAF's Director to the need to introduce a structure under which, due to their independence, OLAF's investigations would be clearly differentiated from purely administrative investigations.

To this end, the Supervisory Committee also recommended <sup>(5)</sup> adopting rules of procedure and introducing a mechanism to monitor compliance with these rules and an explicit methodology for the investigations.

<sup>(1)</sup> OJ L 136, 31.5.1999, p. 1; end of recital 17: '... the Committee's duties should also include assisting the Office's Director in discharging his responsibilities.'

<sup>(2)</sup> See Rules of Procedure of the Supervisory Committee of 17 November 1999, OJ L 41, 15.2.2000, p.12.

<sup>(3)</sup> OJ L 136, 31.5.1999, p. 8. For practical reasons, henceforth only Regulation (EC) No 1073/1999 will be referred to.

<sup>(4)</sup> Point 5.11.15 of the Report: 'We thus return to the issue which has lurked constantly in the background of this chapter. How can quasi-criminal investigations in OLAF, the need for some judicial control over such investigations and more effective criminal prosecutions of EU fraud be reconciled with the principle that criminal jurisdiction is and for the foreseeable future will remain a prerogative of national legal and judicial systems?'

<sup>(5)</sup> The Annex contains the proposals and recommendations made by the Committee in its previous annual reports and opinions.

## Observations

When making its assessment, the Committee must take into account both the definitions contained in Regulation (EC) No 1073/1999 and the activities effectively carried out by OLAF.

**The definition of OLAF's task contained in Regulation (EC) No 1073/1999** is based on the legislator's intention of creating an independent investigative function and integrating it in a viable structure until a more complete and coherent system can be introduced.

The legislator's approach echoes the objectives set out in Article 280 of the EC Treaty, in particular paragraph 4 <sup>(1)</sup>: to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. This Article also establishes the framework for and limits of this approach: in accordance with the principle of subsidiarity referred to in the preceding paragraphs, these measures shall not concern either the application of national criminal law or the national administration of justice <sup>(2)</sup>.

Regulation (EC) No 1073/1999 therefore maintains the existing distribution and balance of responsibilities between the national and Community levels. At Community level, its aim is to implement the means of conducting anti-fraud administrative investigations made available by the Commission (the creation of OLAF); with regard to fraud prevention, it requires the Office to contribute to the Commission's activities in the field of designing and developing methods to fight fraud. At national level, the Regulation requires the Office to 'coordinate' the cooperation between the competent authorities in the Member States provided for by Article 280(3) of the EC Treaty <sup>(3)</sup>.

Specifically, as regards the new investigative function, in the area of internal investigations, Regulation (EC) No 1073/1999 adds new means to those already in existence (Article 4), while for external investigations it transfers to OLAF the powers of carrying out on-the-spot checks and inspections in the Member States and in third countries conferred on the Commission by Council Regulation (Euratom, EC) No 2185/96 <sup>(4)</sup> (Article 3). It thus

empowers the Office, as part of the investigative function, to use the means of carrying out these checks and inspections created pursuant to Council Regulation (EC, Euratom) No 2988/95 <sup>(5)</sup> and the sectoral regulations to enable the Commission to monitor and manage its financial instruments.

For the functions of coordinating national activities and contributing to the design and development of methods of fighting fraud, Regulation (EC) No 1073/1999 (Article 1(2)) merely entrusts to OLAF the tasks previously carried out by OLAF on behalf of the Commission.

These provisions provide original solutions, still largely provisional, to the question of exactly how criminal investigations can be carried out in an administrative environment. The aim of Regulation (EC) No 1073/1999 does not presume to fully and definitively fulfil the objectives of Article 280, and the political authorities (in particular the constituent authority) envisage new developments for the protection of the Community's financial interests. In addition, no more than summary solutions are provided for the problems of the independence of investigations and the protection of fundamental rights, in particular as regards the question of how to coordinate OLAF's investigations with criminal, disciplinary and administrative procedures.

However, in its previous reports the Committee took the view that this arrangement could be viable as a transitional solution based on the guiding principle of 'constructive ambiguity'.

**The implementation of these arrangements by OLAF**, due to the incomplete and provisional nature of Regulation (EC) No 1073/1999, has been marked by a tendency to explore all the possibilities of the instruments adopted while pursuing the activities hitherto carried out by OLAF. It is only recently that programming has been introduced, which should ultimately make it possible to specify how the different tasks (investigations, coordination, assistance, legislation, strategy, intelligence, monitoring, etc.) are to be coordinated. It is therefore still difficult to clearly define OLAF's different tasks and how they tie in with one another and with the tasks of their partners.

In addition, the Office had to endeavour to avoid the uncertainties resulting from the political difficulties involved in completing the arrangements (how long will it be before the public prosecutor's office is introduced?) and the ambiguities inevitably arising from its administrative status (the problem of reconciling its functions as an independent investigative body with those discharged on behalf of or for the Commission, e.g. coordination, legislation).

<sup>(1)</sup> Article 280(4) of the EC Treaty: 'The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice'.

<sup>(2)</sup> It should be emphasised that these restrictions are omitted in the Treaty establishing a Constitution for Europe (Article III 415(4)).

<sup>(3)</sup> Without prejudice to other provisions of this 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.

<sup>(4)</sup> OJ L 292, 15.11.1996, p. 2.

<sup>(5)</sup> OJ L 312, 23.12.1995, p. 1.

To sum up, this report comes at a time when, on the one hand, the institutions are currently examining the amendments to Regulation (EC) No 1073/1999 proposed with a view to improving OLAF's functioning while, on the other, the Treaty establishing a Constitution for Europe adopted by the Intergovernmental Conference on 18 June 2004 envisages the creation '*of a European Public Prosecutor's Office responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, and for exercising the functions of prosecutor in the competent courts of the Member States in relation to such offences*' (Article III.274(2)). The report should therefore also provide a basis for resolving the problem of how to reconcile these two approaches.

The report will examine the means implemented by OLAF (I) and then assess the results obtained (II) before presenting recommendations on how to improve OLAF's functioning and prepare the transition to a European public prosecutor's office (III).

## CHAPTER I

### MEANS IMPLEMENTED BY OLAF IN ORDER TO CARRY OUT ITS TASKS

The Committee's recommendations on the means to be put in place in order to fulfil the objectives established by the legislator are based on Recital 17 of Regulation (EC) No 1073/1999 <sup>(1)</sup>.

As regards OLAF's organisation and functioning, the Court of Auditors is currently carrying out a management audit. In this area, therefore, the Committee merely notes that it had recommended, firstly, separating the functions discharged independently from those exercised under the authority of the Commission, and secondly, decompartmentalising operational areas.

As regards the more general question of the means available to carry out its tasks, OLAF needs to innovate. UCLAF, whose structures and personnel were inherited by OLAF, was not an investigative body and had neither the powers nor the instruments corresponding to such a body <sup>(2)</sup>. OLAF's first task was therefore to create these instruments in the areas of operations, administrative and budgetary management, and to introduce a registry (*greffe*). However, the question of how to monitor the legality of the investigations has not yet been resolved.

<sup>(1)</sup> End of recital 17: '... the Committee's duties should also include assisting the Office's Director in discharging his responsibilities'.

<sup>(2)</sup> Regulation (Euratom, EC) No 2185/96, which provided for a degree of investigative power, did not really have any effect under UCLAF.

## A. INSTRUMENTS FOR OPERATIONS MANAGEMENT

In the interests of efficient management and the independence of decisions, the Committee has advised OLAF to introduce proactive operations management. This involves dividing investigative powers between OLAF and the competent national authorities, in accordance with the subsidiarity principle; taking account of the need to set priorities for focused management to improve efficiency and resource management (the Office's means are limited in relation to the magnitude of the task); and defining objective criteria for the decisions to be taken in order to guarantee their independence.

However, it may seem paradoxical to try and plan an investigative activity in the same way as, for an example, an audit or inspection. Since investigations are triggered by the discovery of events that are by nature fortuitous, investigative activity tends to be reactive. But even if rigid planning of investigations is impossible, it is necessary to base investigative activities on an analysis of the phenomenon of Community budget fraud and to define priorities and criteria for decisions regarding investigations, as well as for planning and using resources. Furthermore, Article 11(7) of Regulation (EC) No 1073/1999 requires an annual programme of activities to be submitted to the Committee.

Once the principle of proactive management has been adopted, different approaches to management control can be taken at different levels, and OLAF has experienced several of these simultaneously. Firstly, a collective element can be introduced in decision-making to make its activities more coherent: to this end it has set up a **Board**. Secondly, instructions can lay down general criteria for decisions, as is the case in the **Manual**, and lastly, a strategic approach based on an analysis of the phenomenon of fraud could allow activities to be geared to priorities; OLAF has undertaken to present the priorities for its operational activities in a **programme of activities**.

### 1. The Board

During the transition phase, the Committee advised OLAF to take organisational measures to end the compartmentalisation of activities typical of the previous period. To this end OLAF set up the **Board**, whose composition and functioning are described in point 3.1.1 of the Manual. Its function is defined as being 'to assist the Director General in taking decisions relating to the treatment of cases, in particular with regard to whether to open or close a specific case'. This provides a framework of procedures for decisions on investigations, although these procedures have not yet been clearly defined.



## 2. *The Manual*

Partly in response to the Committee's recommendation that investigations should be conducted in accordance with rules of procedure <sup>(1)</sup>, OLAF has drawn up a Manual, one of whose functions is to establish a framework for the Office's activity by describing its tasks, legal environment, operating principles and structure.

Specifically, the Manual includes 'operational priorities' (point 3.2) which operate in practice as criteria which, when a decision is taken to open an investigation, automatically trigger or exclude OLAF's competence or govern the choice of the type of action to be taken by OLAF (investigation, cooperation, assistance, etc.).

The approach adopted for the programme of activities, while retaining these criteria, also seeks to take a dynamic approach by referring to an analysis of the phenomenon of Community budget fraud.

## 3. *The programme of activities*

The programme of activities, which is required under Article 11(7) of Regulation (EC) No 1073/1999, requires a strategic approach to be taken to the control of operational activities.

In March 2004, OLAF presented the Committee with a draft work programme for 2005 which summarises the numerous reflections there have been on the nature and purpose of the Office's activities and makes an essential contribution to achieving the aim of introducing proactive management of operational activities. However, the Committee considered that examination of this area should continue inasmuch as the analyses and assessments made in the work programme are largely determined by the current activities and structures. It has sent its comments on the document to OLAF.

This process of reflection, which the Committee has encouraged, on OLAF's own mission and the coordination of its different functions, is based on the 'strategic programming' and 'strategic intelligence' <sup>(2)</sup> functions. Efficient technical means, in particular the CMS, are available for these functions.

This programme of activities is based on a preliminary risk analysis that is useful in the attempt to define criteria for establishing operational priorities. In establishing these priorities the document distinguishes between principles of general policy (enlargement for external investigations and zero tolerance for internal investigations) aimed at bringing OLAF's activities within the Commission's priorities, in particular from the viewpoint of assigning additional resources, and the criteria for applying the discretionary principle <sup>(3)</sup>, which are not strictly speaking priorities but rather the conditions for OLAF's action or for selection of the procedure.

In an attempt to 'define a mechanism capable of identifying parameters making it possible to assess the potential priorities of the Office's antifraud operational activities' in order to assist management in allocating resources, OLAF has embarked on an exercise to quantify the factors that are either favourable or unfavourable to action by OLAF for each sector. The Committee has encouraged OLAF to develop this approach and make it more balanced.

## B. THE INSTRUMENTS FOR ADMINISTRATIVE AND BUDGETARY MANAGEMENT

In order to organise its structure and define the means of carrying out its task, OLAF's main concern was to acquire management instruments suited to the twofold nature of this task, bearing in mind the requirements arising from this dual role. These requirements are: independence in its investigative activity and regard for the Commission's priorities in the activities subject to the Commission's authority.

The Committee has concentrated on the means to be made available for exercising the independent function, and has made recommendations concerning budgetary and personnel management.

With regard to budgetary management, in its opinion 4/2000 the Committee recommended a system of budgetary autonomy for OLAF. This would enable the Office to set its own priorities for budgeting the expenses of the activities coming under its function of operational independence and to assess the means required by it. The Financial Regulation of 25 June 2002 defines OLAF as a European office subject to certain exceptions (Article 176). In successive opinions on the preliminary draft budgets, the Committee has emphasised the need for OLAF to base its budgetary requests on the priorities of its operational policy and has asked it to present this policy to the Committee within the framework of the programme of activities provided for in Article 11(7) of Regulation (EC) No 1073/1999.

<sup>(1)</sup> The Manual includes Title II concerning operational working instructions, essentially intended for the investigators. However, these are not true rules of procedure aimed at ensuring respect for legality, since they seek first at harmonising investigators' working practices.

<sup>(2)</sup> Operational intelligence, which is part of the investigative function occurring either before opening an investigation, assessment, exact limits necessary, or during an investigation, is subject to the same rules of procedure as the activities to which it relates.

<sup>(3)</sup> P. 10 of the document and Annex II.



With regard to personnel management, OLAF has been asked by the Committee and the Commission <sup>(1)</sup> to regard itself as an autonomous service with its own rules based on its own personnel policies in accordance with the Staff Regulations, enabling it to pursue a personnel management policy suited to its function <sup>(2)</sup>. For example, the recruitment of temporary staff for OLAF by simplified procedures is useful for functions that do not exist within the Commission and require very specific qualifications.

The current system has drawbacks for OLAF, but it is difficult to apply the same administrative and budgetary system to functions of a different nature integrated in a dual rather than mixed structure (independent functions co-existing with functions exercised under the Commission's direct responsibility), within which it would, in principle, be necessary to grant autonomy to the Office's independent activities while making the other activities subject to the Commission's general system <sup>(3)</sup>.

Lastly, the fact that in disciplinary matters the Commission has the powers corresponding to the appointing authority not only with regard to the Director (Article 12(4) of Regulation (EC) No 1073/1999) but also with regard to OLAF's other personnel (decision of 28 April 2004) may pose a problem of independence, since the Supervisory Committee is only consulted in the event of such disciplinary proceedings.

### C. THE REGISTRY

To provide OLAF with a reliable system for registering incoming documents, information and procedural documents and storing originals, the Committee recommended introducing a registry. OLAF has done so and the registry is functioning satisfactorily.

### D. MONITORING THE LEGALITY OF INVESTIGATIONS

The question of how to monitor the legality of investigations has not yet been resolved even though it has been regarded as

the thorniest point of the reform since OLAF was first set up <sup>(4)</sup>. At the outset, the Committee was in favour of assigning monitoring powers to the magistrates unit, which powers would have been different from hierarchical review. This is because the Committee considered that the external checks were too distant and therefore insufficient for investigations involving individual rights and, in particular, because the Ombudsman does not have the powers to monitor legality and is unable to remedy the shortcomings observed.

OLAF has opted to confine itself to hierarchical review and has assigned to the magistrates unit the task of advising on decisions regarding investigations.

The practice, initiated by UCLAF, of recruiting staff with professional experience as magistrates, has been continued by OLAF with a threefold objective: to ensure sound knowledge of national criminal law procedures, facilitate contacts with national judicial authorities and monitor the legality of investigations.

In practice, these staff have been assigned either to the magistrates unit or to management or directing the investigation services. Point 2.1.6 of the Manual, 'Magistrates, Judicial Advice and Follow-up', describes the activities of this unit: operational support, judicial advice, follow-up, the treatment of whistleblowers and informants and relations with national authorities. These provisions do not give the magistrates unit competences for monitoring the legality of investigations, as proposed by the Supervisory Committee <sup>(5)</sup>. The unit's role is therefore to advise on decisions rather than to monitor in the true sense.

<sup>(4)</sup> Point 5.10.12 of the Wise Men's Report: 'This lack of an overseeing judicial authority is much more obvious and potentially damaging in cases involving Commission officials. Here, UCLAF more overtly plays a *de facto* role of criminal investigation, but answerable to whom and with the authority of whom? As noted above, jurisdiction over the Commission, its officials and buildings, is acquired on a case-by-case basis by whatever national authority or authorities are competent. But no judicial authority holds permanent authority over UCLAF, authorises its investigations, verifies the conduct and quality of its inquiries or ensures (until after the event, when it may be too late) that its results meet admissible standards of evidence. Bizarrely perhaps, UCLAF is equipping itself with internal "judicial" expertise (i.e. a team of magistrates) in a partial response to this void'.

<sup>(5)</sup> Proposal 5 in the first activity report (OJ C 360, 14.12.2000, p. 1: page 25: 'P5: For the time being, the Supervisory Committee considers that what must be done is to adopt measures without delay relating to OLAF's internal organisation, such as the creation of a magistrates unit, in order to enhance the legitimacy of its investigations. Such measures would also foster the emergence of a European legal culture.'

<sup>(1)</sup> 'Article 15' report, recommendation No 15.

<sup>(2)</sup> See Point 3.1.2 of the Commission's 'Article 15' report.

<sup>(3)</sup> For example, it would be difficult to treat requests for posts differently depending on whether or not they related to independent functions.

The idea of giving the magistrates unit a clearly identifiable role in monitoring the legality of investigations, separate from that of directing investigations, has not been altogether abandoned <sup>(1)</sup>, but it would entail a complete restructuring of this service. OLAF is currently studying an alternative proposal, namely to give this task to the Board.

Under any scenario, it will not be possible to truly monitor the legality of investigations unless OLAF has precise rules of procedure, which at present it does not. In addition, it will be necessary to specify OLAF's role in relation to judicial and/or disciplinary procedures and the procedural arrangements for examining complaints addressed to the Director in accordance with Article 14 of Regulation (EC) No 1073/1999.

## CHAPTER II

### REVIEW OF OLAF'S OPERATIONS

Given that the Commission's recommendations on the resources needed to achieve the objectives set out in the legislation have only partly been put into practice, it is hard to tell what and how much effect they might have had on the efficiency and quality of OLAF's activities.

This assessment concerns the results of the various activities carried out using the resources put in place by OLAF. It does not aim to pre-empt the results of the assessments being prepared as part of the management audit undertaken by the Court of Auditors or of the supplementary assessment report carried out by the Commission at the request of the Council. It should also be noted that practices vary from sector to sector as the internal structure is still compartmentalised.

The main difficulty in assessing operations is the fact that the categories defined by the Manual <sup>(2)</sup> and taken over in the CMS's classifications <sup>(3)</sup> do not always correspond to the activities actually carried out. The Manual states that these definitions are based on quantitative and not qualitative distinctions; what distinguishes investigative activities from coordination activities is the

relative input of OLAF and national authorities in providing investigative resources to process the case <sup>(4)</sup>. This classification, which is based on the means and resources used, by definition, governs the issue of the appropriateness of the means to the case. It does, however, pose other problems: it brings about the possibility of independent activities and activities for which the Commission is responsible both being present in the same case or in the activities of the same agent and/or the same department. Moreover, while it is possible for a good assessment to help determine whether a case should be an investigation or a coordination case, this judgment will necessarily alter throughout the operation, forcing OLAF to use certain procedures in frameworks other than those for which they were intended <sup>(5)</sup>. The classification also makes it impossible to manage means and human resources on the basis of the nature (independent or otherwise) of the activities, which in turn prevents the Commission and the budgetary authority from accurately assessing the resources required for each activity.

Nevertheless, recent changes in OLAF's activities reveal two positive points: first, the success of efforts to clear cases opened by UCLAF, and second, the setting up of more efficient management methods, as reflected by the rise in the number of cases closed as given in the monthly statistics provided to the Committee.

A more accurate assessment of OLAF's actual activity should be based on the nature of the activity as defined in the Regulation and on OLAF's substantive powers. Account should also be taken of the fact that the Regulation provides for some of OLAF's operations explicitly and others only implicitly.

#### A. ACTIVITIES EXPLICITLY PROVIDED FOR BY REGULATION (EC) No 1073/1999

Article 1 of Regulation (EC) No 1073/1999 provides for two types of task: investigations, which aim to ascertain individual liability, and coordination, the purpose of which is to encourage coordinated activity with the responsible authorities of the Member States.

<sup>(1)</sup> Point 87 of the House of Lords' report: 'one possibility is for the magistrates unit within OLAF to take on an active role in monitoring compliance by OLAF investigators with procedural guarantees'; HL paper 139.

<sup>(2)</sup> Point 3.3.3.1.

<sup>(3)</sup> The classifications laid down in the CMS do not always correspond to the nature of the activity (cases classed as not involving investigative acts within the meaning of point 3.4.4 of the Manual) or are entirely absent (450 cases had not yet been classified at 30 April 2004), although a greater or lesser effort, depending on the sector, has been made to arrive at a more precise method of classification.

<sup>(4)</sup> 'external investigations are those where OLAF provides the majority of the investigative input'; 'for coordination cases, the majority of the investigative input is provided by authorities (other than OLAF)'. The Manual does not in theory rule out a distinction based on the nature of activities: it points out that coordination and criminal-assistance activities do not ordinarily involve investigations within the meaning of point 3.4.4 (access to premises and documents, interviews, on-the-spot checks provided for by Regulation (Euratom, EC) No 2185/96, etc.), but that in practice legal bases otherwise confined to investigations are sometimes seen being used in coordination cases.

<sup>(5)</sup> For instance, including legal conclusions or explanations in the information sent to judicial authorities under Article 10 of the Regulation. See II. A(1)(b), 'Transmitting information to the responsible authorities'.

## 1. Investigations

The unclear nature of OLAF's investigations makes the need for clear and definite procedures all the more urgent. Despite being administrative in nature, investigations are often targeted on a prosecution and involve putting in place resources related to the field of individual rights, defined in Articles 4(2) and 4(3) for internal investigations, and by Regulations (Euratom, EC) No 2185/96 and (EC, Euratom) No 2988/95 and sectoral regulations referred to by them, for external investigations. To this end, recital 10 of Regulation (EC) No 1073/1999 provides for the respect of fundamental rights and Article 9(2) requires investigation reports to be drawn up in the light of the procedural requirements for establishing admissible evidence for national administrative and judicial proceedings.

The guarantees that the investigations are independent (status of the Director and the role of the Supervisory Committee) go far beyond those given to ordinary investigative bodies (e.g. IDOC). They are currently subject only to administrative law <sup>(1)</sup>. However, given that they are ultimately targeted on a prosecution, they should also incorporate the rules of national criminal law and supranational principles (ECHR and the EU Charter).

A distinction must also be made depending on the nature of the investigation and the stage of the procedure.

### (a) The distinction between internal and external investigations

This distinction is based on the definitions given by Regulation (EC) No 1073/1999:

- internal investigations are a new responsibility carried out using the resources set up by Article 4 (in particular paragraphs 2, 3 and 6) of Regulation (EC) No 1073/1999,
- external investigations are carried out, as part of the unaltered distribution <sup>(2)</sup> of powers and responsibilities between Member States and the Commission <sup>(3)</sup>, using the resources and responsibilities provided for by Regulation (Euratom, EC) No 2185/96 (Article 3(1) of Regulation (EC) No 1073/1999), which itself refers to Regulation (EC, Euratom) No 2988/95 and to the sectoral regulations (Article 3(2) of Regulation (EC) No 1073/1999).

The main reason for this distinction is that the institutions which had a hand in drawing up the Regulation saw matters from different angles. The distinction criteria are not very precise, making the decisions on hybrid cases less transparent, bringing about duplicate investigations and having a negative effect on the protection of individual rights <sup>(4)</sup>.

### (b) Assessing how each stage of the procedure works

The Committee has observed improvements in the course of the reference period, in the form of greater attention to accuracy and efforts to be consistent. But these efforts have only a limited impact, given the rather vague dividing line between investigative acts and other operations: the meaning of different procedural acts is different for activities involving establishing individual liability as compared to, for instance, organisational activities regarding the coordination of different departments' actions. While the manual clearly states that coordination, legal assistance and monitoring do not involve investigative acts as defined in 3.4.4, it is less clear on the criteria of jurisdiction governing the choice between the different procedures and portrays the choice of a procedure (investigation, coordination, assistance, monitoring, etc.) as an issue of efficient action and adapting resources rather than distributing responsibilities across different levels (Community/national, or administrative/disciplinary/penal, as the case may be). While the manual mentions subsidiarity as one of the criteria for this choice, it is only one criterion among many. Past experience, as described by OLAF <sup>(5)</sup>, shows that practices vary from sector to sector (agriculture, customs, structural measures), while cooperation between OLAF and its partners can take very different forms and, in particular, may involve information- and evidence-gathering activities, which may encroach on issues of individual responsibility otherwise confined to independent investigations.

The unclear nature of the dividing line between investigations and other operations has repercussions on the other stages of an investigation provided for by the Regulation: the opening of investigations (Article 5), the investigations procedure (Article 6), the final report (Article 9), the transmission of information (Article 10) and the action taken (Article 11(7)) inasmuch as these procedures, which are intended for use in investigations, can also be used in other operations.

<sup>(1)</sup> The jurisprudence of the Court of First Instance in *Gómez-Reino* seems to assimilate them to decisions by the appointing authority (Order of the Court of First Instance of 18 December 2003, Case T-215/02).

<sup>(2)</sup> Established in particular by Regulation (Euratom, EC) No 2185/96.

<sup>(3)</sup> Recital 21 of Regulation (EC) No 1073/1999.

<sup>(4)</sup> Removal of access to appeal procedures, despite the appeal procedure provided for in Article 14 having drawbacks; see III. A(2)(a)) (control mechanisms); this policy tool discriminates between officials and non-officials by excluding the latter from the appeal procedure.

<sup>(5)</sup> Note sent to the Committee by Mr Brüner on 17 August 2004.

### *Opening of investigations*

As laid down in Article 5 of Regulation (EC) No 1073/1999, both internal and external investigations are opened by a decision of the Director of the Office, acting on his own initiative or following a request from one of the institutions or Member States.

Whereas the provisions of the Regulations only concern investigations and relate specifically to the responsibility of the Director-General, the Manual places this decision immediately after the Board's initial assessment of information and subsequent deliberation, making it a practically identical formality both for investigations and for other activities which fall under the responsibility of the head of operations, in line with the rationale of choosing activities based on efficiency rather than on substantive powers. In practice, however, these decisions are often signed by the Director-General.

But noteworthy improvements include the fact that the procedures for assessing initial information have become stricter and, on average, quicker. The Manual gives detailed instructions (point 3.3.3 and form 9) for this stage of the procedure, which was designed to allow the investigator heading the investigation to give suggestions on, in particular, the type of operation to be undertaken (investigation, coordination, assistance, etc.). In practice, OLAF now avoids giving the task of evaluating a case to the investigator who is to head it.

The opening-of-investigation stage may undergo changes if the opinions expressed in the activity programme for 2005 on the application of the discretionary investigation principle <sup>(1)</sup>, and in particular the first 'precondition' of OLAF's remit, are implemented. In practice, this could mean that the issue of OLAF's authority to open an investigation (e.g. subsidiarity, serious doubts, etc.) may be examined by an independent specialised department rather than as part of the Board's general deliberations.

The opening decision may become more formally linked with other procedures which, as yet, have no formal link at all, e.g. work plan (form 10) or investigation authorisation (form 14) which would allow the scope of the investigation to be defined more coherently and make it easier to check that the investigations are kept within the limits initially set out <sup>(2)</sup>. It would also be useful to specify at the outset of the

investigation whether an administrative, disciplinary or legal objective is being pursued for the purposes of Article 9 of the Regulation (content of reports).

### *Carrying out investigations*

Point 3.3.3.1 of the Manual states that both internal and external investigations involve certain investigative acts, which are defined at point 3.4.4, i.e. access to premises and documents, interviews, analyses of hard-drives, on-the-spot checks as referred to in Regulation (Euratom, EC) No 2185/96, etc. This definition requires further explanation:

- the Manual clearly states that coordination, legal-assistance and monitoring activities do not involve investigative activities of this nature, a possible criterion for distinguishing the two types of activity. However, the Manual adds a further, quantitative criterion: the majority share of OLAF <sup>(3)</sup> in the investigative work. In practice, this criterion is not in a consistent way used when it would be of most use, i.e. when a case is opened. Cases opened as investigations, for the most part external, often evolve with time in such a way that OLAF no longer has a majority share in the investigative work. Its contribution therefore becomes one of support and coordination,
- among the investigative activities described at point 3.4.4, the Manual confines access to premises and documents and the analysis of hard-drives to internal investigations. The Manual does not provide for the same restriction for interviews despite the fact that Regulation (EC) No 1073/1999 clearly allows for oral requests for information only in the case of internal investigations. In practice, efforts are being made to harmonise interview practice in external investigations, particularly as regards formal reports. As well as these regulatory differences between the investigative means available for internal and external resources <sup>(4)</sup>, there are also differences between different sectors of activity. Such a sectoral structure is, however, perfectly justified for follow-up, and even coordination, activities.

<sup>(1)</sup> Page 10 of the document; the criteria given in the work programme are an update of the 'Operational priorities' given in the Manual (point 3.2). The draft additional assessment report submitted to the Committee (point 1.3.1) confirms this trend: the decision to open an investigation depends on an affirmative reply to three questions, of which the first is 'Does this fall within OLAF's remit?'

<sup>(2)</sup> That said, the Manual does allow for additional authorisations (point 3.4.5). This would, in some cases, avoid discovering during the course of an investigation that OLAF does not have the means, resources or skills to carry it out.

<sup>(3)</sup> In relation to national authorities' share.

<sup>(4)</sup> The scale of the difference brought about by the Regulation and the Manual in the resources available for internal and external investigation is theoretically limited, since Article 7 of Regulation (Euratom, EC) No 2185/96 allows for similar powers to those allowed for in internal investigations by Article 4(2) of Regulation (EC) No 1073/1999.



Differences in the resources made available by existing regulations for internal and external investigations have sometimes led OLAF to choose between the two procedures on the basis of this and to conduct parallel investigations.

Finally, as regards OLAF's obligation to conduct its investigations continuously, good progress has been made recently, but the reasons given to extend investigations are sometimes based on 'low priority', 'unavailable resources' or 'strategic considerations'. It must also be highlighted that this obligation does not have the same meaning for investigative activities (interested parties' fundamental right to quick processing) as for cooperation activities, which are mainly the responsibility of national authorities.

#### *Final report*

Article 9 of Regulation (EC) No 1073/1999 contains provisions concerning the final report drawn up at the end of an investigation and making it possible to specify whether an administrative, disciplinary or legal objective is to be pursued. The report should give the facts and bring together the collected material evidence and proof in such a way that the set of documents will have proper evidential value for the authorities they are intended for; the conclusions should include the Director's recommendations for the authorities. The report is thus the main purpose of investigative activity.

The Manual's provisions for this stage of the procedure, and in particular the forms, are identical for investigations and operations carried out under the responsibility of the Commission. An advantage of this solution might be that operations that are less highly structured than investigations have to be carried out more strictly. It has the disadvantage, however, of diluting the purpose of investigations. In particular, recommendations are often sent to OLAF's follow-up units rather than the intended authorities and institutions <sup>(1)</sup>.

In practice, reports have not always made it possible to check whether the evidence had been gathered 'taking account of the procedural requirements laid down in the national law of the Member State concerned', and the conclusions were not always solely based on 'elements which have evidential value'. This study of cases and information forwarded to national authorities (24 cases since December 2003) has shown that things have clearly improved and that implementing new and clear procedural rules could help solve this problem.

Finally, the Committee would point out that interim reports allow recommendations to be formulated before the final report and the end of the investigation, with the concomitant risk that these recommendations bypass the procedural guarantees associated with the closing of the case.

#### *Transmitting information to the responsible judicial, disciplinary and administrative authorities*

Regulation (EC) No 1073/1999 provides for two ways in which OLAF can transmit evidence liable to warrant proceedings to responsible authorities.

Information is, in principle, transmitted at the end of the investigation (Article 9), and is in the form of the final report, which has evidential value and includes the ascertained facts and the Director's recommendations for action to be taken. Article 9 distinguishes between external investigations (Article 9(3)), for which the report is sent to the responsible authorities of the Member States concerned by the rules governing external investigation <sup>(2)</sup>, and internal investigations (Article 9(4)), for which the report is sent to the institution in question, which will be responsible for the disciplinary and judicial follow-up recommended by the Director. This form of transmitting information thus determines the nature and purpose of the investigation.

Article 10 of the Regulation provides for another way of transmitting information, more specifically, the small pieces of information gathered during the course of the investigation. It allows information to be sent quickly to the relevant authorities.

Given that the transmission of information is compulsory for internal investigations, the objective is to ensure the information reaches the judicial authority in time for it to exercise its jurisdiction.

As regards external investigations, information is transmitted on an optional basis and goes to the 'competent authorities of the Member States' referred to at Article 9(3). This type of information-transmission is essentially a precautionary measure.

The Regulation does not, however, set out the relationship between these two methods of transmitting information. The Manual deals with this at point 3.4.8.2 for external investigations, stating that the normal procedure for transmitting information is that laid down in Article 9(3) (final report) and that 'in certain cases, information can be directly forwarded

<sup>(1)</sup> Point 3.4.9.2 of the Manual (form 30): recommendations seem to be targeted more at follow-up units than at the intended authorities.

<sup>(2)</sup> Article 3 of Regulation (EC) No 1073/1999 refers to Regulation (Euratom, EC) No 2185/96, Regulation (EC, Euratom) No 2988/95 and sectoral regulations.

to the criminal prosecution authorities before the end of the investigation'. The Manual lays down the criteria for such exceptional cases: serious suspicion of a criminal offence, the risk of evidence being destroyed or the risk of a suspect fleeing. The Manual also states that the information sent to these authorities should present only facts and not conclusions.

OLAF considers at this point that it is able to continue the investigation itself <sup>(1)</sup> and, in general, gives a more or less formal offer of technical assistance to the relevant authority.

The abovementioned provisions of the Manual seek to avert certain risks, e.g. premature conclusions in the case of unfinished investigations, material lacking evidential value and consequently of little interest to national authorities, difficulties in respecting interested parties' right to be heard. Such risks could be reduced by clearer regulation.

#### *Follow-up to closed investigations*

In its previous reports <sup>(2)</sup>, the Committee noted that the data it had did not allow it, whether generally or in more detail, to assess the follow-up to procedures opened by national authorities in response to investigations files or information sent them by OLAF <sup>(3)</sup>. The Committee highlighted the fact that relations between OLAF and the judicial authorities were being developed and stated that efforts would need to be made on both sides to improve the follow-up procedure. The Committee now possesses clearer data: detailed data for certain sectors <sup>(4)</sup> as well as more general data. This data confirms that national authorities react late or not at all <sup>(5)</sup>, giving the following reasons for the latter case: lack of evidence (62 %), time-barred cases (18 %), lack of legal basis (5 %) and low-priority cases (5 %).

As regards the disciplinary follow-up, the issue of coordinating OLAF's investigations with disciplinary procedures had begun to be addressed with the new Staff Regulations of officials which entered into force on 1 May 2004, empowering OLAF to conduct disciplinary investigations <sup>(6)</sup>, and with a Memorandum of Understanding. But these provisions do not fully exhaust the issue of relations with the disciplinary bodies of other institutions <sup>(7)</sup>. The Committee has examined the institutions' follow-up to OLAF reports recommending disciplinary action and notes that the institutions do not always feel able to take these reports into consideration. In relation to the point made in its third Activity Report <sup>(8)</sup>, the Committee highlights that the institutions are now developing good cooperative relations with OLAF.

To sum up, the recommendations made in the final investigation reports give a varied picture of the nature of OLAF's investigative activities. Depending on the case, these include gathering evidence which can be used in administrative and judicial proceedings, assessing individual liability, assessing the efficiency of administrative or financial instruments, assessing the liability of institutions or departments, charging with a criminal offence on the basis of facts discovered by OLAF or others, sending requests to judicial authorities for the implementation of acts of procedure, etc. In general, as regards the results of investigative operations, the Committee feels that the assessment should not be confined to quantitative data and should take into account the response of the recipient authorities. Factors such as the deterrent effect of an investigative body cooperating with national prosecution bodies cannot be quantified.

In this context, the Committee notes that efforts are being made to have judicial authorities take greater account of OLAF's contributions, but highlights the fact that the lack of efficient legality review and the Office's 'hybrid' status may, to some extent, have weakened the legitimacy and credibility of its contributions <sup>(9)</sup>.

<sup>(1)</sup> In certain Member States, an administrative investigation cannot be undertaken if a judicial investigation is already open.

<sup>(2)</sup> Supervisory Committee Annual Report 2001 to 2002 (OJ C 328, 30.12.2002, p. 1) point II.2.2, third bullet-point: 'The Committee has not been able to obtain overall figures for follow-up action taken with regard to the transfer of this information. In particular, it has not been kept regularly informed of recommendations made to the competent authorities in connection with the transfer of the information and has not been informed of any action taken in response to such recommendations.'

<sup>(3)</sup> The efficiency of OLAF's operations is assessed in a report by the Court of Auditors and an assessment report by the Commission, both currently being prepared.

<sup>(4)</sup> Customs, direct expenditure, Phare and Tacis.

<sup>(5)</sup> The number of transfers to judicial authorities varies greatly from year to year (10 in 2002; 43 in 2003; 7 for the first half of 2004). Out of 57 negative decisions, 33 were put down to lack of evidence.

<sup>(6)</sup> Article 86. Annex 9 lays down the rules applicable to the procedure and to the protection of individual rights.

<sup>(7)</sup> For the Commission, a Memorandum of Understanding is only planned with IDOC.

<sup>(8)</sup> Supervisory Committee Annual Report 2001 to 2002, point II.2.2, third indent.

<sup>(9)</sup> In its report on the assessment of OLAF's activities (Article 15), the Commission considers that: 'recognition of the role of OLAF staff by national prosecution authorities would obviate an additional difficulty.'



## 2. *Coordination operations*

Article 1(2) of Regulation (EC) No 1073/1999 provides for the activities that OLAF undertakes as a Commission department. The second part of these provisions refers to OLAF's contribution to the creation and development of anti-fraud methods, particularly operational and strategic intelligence regarding illegal activities to the detriment of the Community's financial interests. The first part of these provisions refers to the Commission's assistance in organising close and regular cooperation between the authorities in the different Member States in order to coordinate their action to protect the Community's financial interests against fraud.

Article 1(2) as a whole targets the organisation of actions to protect financial interests but does not refer to investigative or operational activities. Nevertheless, the OLAF Manual, by linking Article 280(3) of the EC Treaty <sup>(1)</sup> to Article 1(2) of the Regulation, makes the latter a legal basis not only for 'coordination and criminal assistance' <sup>(2)</sup>, but also for supporting national jurisdiction, as well as giving it operational scope.

In practice, OLAF is as much involved in organising close and regular cooperation between the competent authorities of Member States, e.g. charring and providing secretarial services for COCOLAF <sup>(3)</sup>, as in providing operational support and coordination for national investigations. OLAF's role in these procedures is generally some kind of contribution to the investigations of national authorities which the Manual stipulates does not consist of investigative acts <sup>(4)</sup>. The Manual does, however, generally subject this support and coordination role to the same provisions as for investigations as regards the opening, processing (within nine months) and closing of cases. The legal bases used in certain coordination procedures can also, in practice, allow for scrutinies theoretically confined to external investigations (Article 3(2) of Regulation (EC) No 1073/1999; Article 9(2) of Regulation 2988/95) for which OLAF is independent. These activities are thus implicitly allowed for in Regulation (EC) No 1073/1999. In practice, these activities may be carried out at the request of national judicial or police authorities or on OLAF's initiative.

<sup>(1)</sup> Article 280(3) of the EC Treaty: 'Without prejudice to other provisions of this 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.'

<sup>(2)</sup> Point 3.4.1.3.

<sup>(3)</sup> Advisory Committee for the Coordination of Fraud Prevention.

<sup>(4)</sup> Point 3.3.3 of the Manual naturally confines investigative acts as defined in point 3.4.4 to investigations.

## B. **ACTIVITIES IMPLICITLY PROVIDED FOR BY REGULATION (EC) No 1073/1999**

By providing that OLAF should take over the whole remit of the former UCLAF, Article 1 of Commission Decision 1999/352/EC, ECSC, Euratom <sup>(5)</sup>, refers to a whole series of provisions, specified in point 3.4.1.3 of the Manual, which allow Commission agents to participate in national administrative scrutinies as part of mutual assistance in the fields of customs and agriculture. The Manual allows for these competences to be used as part of the support and coordination procedures and gives them several legal bases specified in point 3.4.1.3: Article 280(3) of the EC Treaty, Article 1(2) of Regulation (EC) No 1073/1999 as well as several provisions of sectoral regulations.

As part of administrative, judicial and disciplinary follow-up, OLAF also carries out activities involving cooperation with national authorities within investigative and coordination activities <sup>(6)</sup>.

Consequently, coordination/assistance activities and follow-up activities seem, in practice, to be very similar in nature, despite coordination and legal assistance being formally presented as independent activities and follow-up as part of the investigation or coordination procedure. Furthermore, any assessment of follow-up activities should take into account the fact that they follow on from and implement the recommendations of investigative or coordination activities.

Follow-up work, inasmuch as it consists in finding out about the action taken by recipients on the recommendations given in the final reports, is primarily an act of good internal administration allowing OLAF, among other things, to determine its priorities on a more complete and up-to-date basis and allowing inspection authorities to assess the impact of OLAF's work. Given that the action to be taken on the recommendations given in the final reports is basically a matter for the recipients of the recommendations, follow-up work in itself should not be viewed as imposing fresh obligations but rather as providing advice and support, even assistance. It thus largely depends on the quality of the recommendations. It should be noted that, in practice, follow-up work (particularly judicial follow-up) can be carried out before the investigation is closed.

Despite the fact that both the Manual and the OLAF reports present support and coordination procedures as constituting a whole and that they are procedurally treated in the same way, the activities they involve differ in nature depending on whether they concern relations with administrative authorities or judicial authorities and correspond to different roles of OLAF.

<sup>(5)</sup> OJ L 136, 31.5.1999, p. 20.

<sup>(6)</sup> Point 3.5.2 of the Manual, last indent.

## 1. *OLAF's cooperation with administrative authorities*

This is the main activity of several operational units and, by extension, the corresponding follow-up units. The purpose of this activity, which has been taken over from UCLAF under Article 1 of Decision 1999/352/EC, ECSC, Euratom <sup>(1)</sup>, is by definition determined by the remit of the Commission and national authorities (Member States and third countries) with which OLAF cooperates, and is essentially financial in nature. Due to its nature and the legal bases used, this activity is carried out under the formal responsibility of the Commission. In practice, it is sometimes difficult to distinguish activities which, within the same department of the Office or even within the same case, are carried out under the responsibility of the Commission and which have a financial purpose from those which are independent and intended to establish individual liability. To resolve this difficulty, interdepartmental protocols have been drawn up with a view to establishing, as clearly as possible, the respective remits of OLAF and the Directorates-General of the Commission. It is, however, difficult to find everyday solutions to problems which raise an issue of principle: the nature and purpose of OLAF's activities <sup>(2)</sup>, which, in the form of proposals, often have a crucial role in the decision taken by the authorising officer <sup>(3)</sup>.

This ambiguousness is also present in OLAF's cooperation with national administrative authorities, for which it would have been advisable to establish a concept and guidelines.

## 2. *OLAF's cooperation with judicial authorities*

The problems in the relationship between OLAF and the judicial authorities are due to the fact that its legal basis is unclear. They come into relation either during the judicial follow-up stage <sup>(4)</sup> or as part of the support activity <sup>(5)</sup>. Article 10(2) of Regulation (EC) No 1073/1999, to which paragraph 13 refers, explicitly allows for direct relations with national judicial authorities with a view to transferring information gathered during internal investigations. Such relations might implicitly be envisaged under Article 10(1) and also inasmuch as OLAF is obliged to inform the Supervisory Committee about the follow-up work done on its investigations (Articles 11(7) and (8)).

OLAF has set up a stage in the investigative procedure dedicated to follow-up work and has allowed for specific judicial follow-up work in its Manual. In practice, much activity has been developed on the following basis: on the one hand, 'follow-up' work (which, paradoxically, can be carried out during the OLAF investigation), and on the other hand, an OLAF investigation being carried out during the national judicial procedure.

The OLAF Manual has also set up support activities using the legal bases for 'coordination' intended for the activities carried out by OLAF as a Commission department.

Such activities have proved to be very useful in the context of relations with national judicial authorities and are an essential extension of investigative activities. They should, however, be considered as OLAF acting as an independent department rather than as a Commission department. Given that, by nature their purpose is criminal proceedings, they should eventually become part of the remit of the future European Public Prosecutor. In the meantime, these activities would bring about the adoption of internal rules governing OLAF's participation. The legislator would have the task of defining their legal basis and organisation.

## CHAPTER III

### RECOMMENDATIONS OF THE COMMITTEE: TO IMPROVE THE FUNCTIONING OF OLAF AND PREPARE THE TRANSITION TO THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Following the positions adopted by the Committee on the Commission report assessing OLAF's activity (Article 15 report) and then on the proposed amendments to Regulation (EC) No 1073/1999 presented by the Commission in February 2004, the prospect that a European public prosecutor's office would be established with competence for Community budget fraud emerged clearly when the Constitutional Treaty was adopted on 29 October 2004. Moreover, the urgent need for such a measure has become more evident in view of the crisis caused by the Eurostat case. The conclusions to be drawn from the first five years of OLAF's existence must therefore take into account the prospect of creating, in the mid-term, a European public prosecutor's office with responsibility in OLAF's sphere of competence for investigations, prosecutions and committal for trial in the competent national courts. In addition, it would be governed by rules on its functioning, procedures and, in particular, the admissibility of evidence, since a European public prosecutor's office created from Eurojust would obviously also have to be able to work with Europol.

<sup>(1)</sup> For instance, in agriculture, Annex 2 of Commission Decision of 10 February 1995 was not amended by the creation of OLAF (cooperation between UCLAF and DG VI in determining the financial consequences of the fraudulent amounts not recovered).

<sup>(2)</sup> In its Special Report No 3/2004 (OJ C 269, 4.11.2004, p. 1), the Court of Auditors states that, as regards the recovery of irregular payments related to the common agricultural policy, 'the involvement of both OLAF and the Commission's Directorate-General for Agriculture in decisions of writing off is a source of confusion and inefficiency.'

<sup>(3)</sup> For instance, in the framework of the DG AGRI – OLAF task force for recovery, OLAF, among other things, submits proposals to DG AGRI regarding the financial corrections to be applied to Member States as part of the account-clearance procedure based on the assessment of cases of irregularities made known by the Member States.

<sup>(4)</sup> Point 3.5.5.1 of the Manual.

<sup>(5)</sup> Point 3.3.3.1 of the Manual distinguishes 'criminal assistance cases' from other types of case.

The Supervisory Committee believes that the transition towards this more complete and coherent arrangement must be prepared if OLAF is to fulfil its mission and come to assume the role of a 'judicial support body' that was referred to by President Prodi when he set out the benefits of establishing a European public prosecutor's office <sup>(1)</sup>.

In setting out his action plan, President Prodi also underlined the need for reflexion on the need to refocus OLAF's activities on the task set by the legislature <sup>(2)</sup>, in view of the difficulties that the Office has encountered in defining its different tasks and how they tie in with one another and with those of its partners. In particular, the plan for a platform of services designed to achieve this aim appears to have been abandoned.

The Supervisory Committee's recommendations therefore have a threefold objective: to improve the coordination of the investigative function with OLAF's other functions (A), to reinforce the guarantees required by the criminal proceedings aimed at by the investigations (B), and to adapt the role of the Supervisory Committee (C).

#### A. COORDINATION OF THE INVESTIGATIVE FUNCTION WITH OLAF'S OTHER FUNCTIONS

The definition of OLAF's functions is complex. As defined in the Regulation, they comprise several very different tasks: investigations, support for investigations carried out by national authorities and contribution to the Commission's political and legislative action in combating Community budget fraud.

In the light of the experience gained, the question of the synergies between these different activities is now seen in new terms and the main difficulty is the coherence of all these activities.

Analysis of OLAF's activities reveals that interesting possibilities are being developed, often based on the activities of the old UCLAF, in addition to the strictly investigative function. A notable example of this is the wide-ranging support provided to national services, in particular in the form of intelligence, expertise in how Community funding works, assessment of the reliability of financial or accounting systems from the point of view of their vulnerability to fraud, and customs investigations.

In addition, the provision of assistance by OLAF to the Commission's Directorates-General in tasks related one way or another to anti-fraud investigations (recovery, clearance of accounts, customs and trade regulations) would share competences more clearly between OLAF and the Commission's DGs, against the background of the interdepartmental protocols currently in

preparation, and provide OLAF with a status corresponding to its tasks. This would entail both improving the organisation of OLAF's activities based on an investigation policy (1) and modifying its status (2).

#### 1. *The need for improved organisation of OLAF's activities based on an investigation policy*

In its programme of activities for 2005, OLAF outlined several categories of priority for its activities, relating chiefly to the financial impact, the organised nature of fraud and complementarity with national means. But OLAF must also take account of the priorities of the institutions, even if this means sacrificing a degree of consistency. In particular, its investigation programme must take into account priorities laid down in another context, such as zero tolerance or enlargement.

The 'operational criteria' set out in the Manual do not allow priorities to be defined on the basis of the analysis of fraud. Instead, they basically enable 'non-cases' (unfounded allegations or allegations that are outside OLAF's sphere of competence) to be removed and case files to be divided between 'investigations' and 'coordination/assistance'. Hitherto, this division has been theoretical, since the procedures and methods used are identical and the principle of independence is applied to all cases.

The Committee is in favour of applying the discretionary principle <sup>(3)</sup> for opening investigations. To ensure proportionality an investigation policy must be explicitly established specifying the criteria on which decisions are to be taken. These are necessary because of the subsidiarity principle and the limited means available. The independence of the Director's decision to open an investigation means that he can make a responsible choice based on these criteria.

On this basis, the decision to open an investigation could help the investigator by specifying more clearly the aim of the investigation, its scope, the means and resources to be used and the nature of the evidence to be sought <sup>(4)</sup>.

This investigation policy should also make it possible to define the role of OLAF's investigations in relation to national and Community procedures, rank priorities and make decisions more transparent and therefore more independent.

<sup>(1)</sup> Talk given on 25 September 2003 at Parliament's Conference of Presidents: 'In this context the question will once again arise of hiving off an Office that might come to assume the role of a judicial support body in internal investigations as well as external investigations.'

<sup>(2)</sup> Speech to Parliament on 18 November 2003, priority No 1.

<sup>(3)</sup> Proposal No 2 of Mr Prodi's action plan: '... the possibility for the Office to concentrate on its priorities. To this end, a discretionary principle should be established and included in the regulation', is along these lines.

<sup>(4)</sup> Points 3.3.3.4 and 3.4.5 in the Manual only refer to the persons to be investigated.



## 2. *The need to modify OLAF's status*

Regulation (EC) No 1073/1999 and Decision 1999/352/EC, ECSC, Euratom are based on the distinction between the Office's new fully independent investigative role and the tasks it carries out as a Commission service. In practice, the distinction is not always clear and this could affect the functioning of OLAF's internal organisation and the perception of the responsibilities of the different players.

### (a) **OLAF's internal organisation**

In OLAF's internal organisation the boundaries between its activities as an independent investigative body and its role in providing Member States with assistance from the Commission in coordinating cooperation between different States are not always clearly defined. At the time of its establishment, the Committee recommended that in order to avoid any confusion, and in particular in order to protect OLAF's independence in conducting its investigations, OLAF's internal organisation with respect to staff structure and regulations should keep its activities as an independent body separate from its activities as a Commission service. This would also have made it easier to implement the provisions on officials' accountability and to clarify the division of powers between OLAF and the Commission.

In practice, this differentiation has not been fully applied in all areas. For example, there is sometimes confusion between the functions of the investigator and the authorising officer. The Manual fails to prevent such confusion <sup>(1)</sup> or guarantee harmonisation of procedures, in particular those relating to the use of the legal bases. Some of the tasks carried out by the Office in providing assistance from the Commission are in fact conducted as independent activities.

In order to avoid this confusion, OLAF needs legislative provisions that determine its powers and functions absolutely unambiguously.

**Recommendation 1: establish a structure separating the services entrusted with independent functions from those entrusted with 'Commission' functions, and clarify the division of competences between OLAF and the Commission's services and DGs (memoranda of understanding are currently being negotiated) in the area of administrative cooperation;**

**Recommendation 2: establish arrangements for personnel (temporary staff or officials) adapted to their functions;**

**Recommendation 3: establish a budgetary system for the Office that will not hinder the independence of investigations.**

### (b) **Administrative status and accountability**

OLAF's administrative status as a part of the structure of the Commission could make the Commission subject to a conflict of interest in cases in which it is defending itself or OLAF in an action brought by one of its officials, which officials it has a duty to protect, against measures taken on the basis of an investigation

carried out by OLAF. Its situation would be equally difficult in cases of court actions brought by an official or member of another institution.

Similarly, regarding the status of OLAF's Director, the regulations, in particular Staff Regulations (Article 86 and 90a) <sup>(2)</sup>, confer the disciplinary functions of the appointing authority on him, since he is responsible both for directing investigations and investigating complaints against acts carried out during investigations. This is conceivable in administrative law but can cause problems in investigations carried out with the intention of bringing criminal proceedings. Such complaints constitute the first phase of what is in fact a means of redress aimed at protecting the individual's rights; these rights are usually protected if the investigation is aimed at establishing individual liability.

Furthermore, giving OLAF's Director the powers of the appointing authority <sup>(3)</sup> in internal investigations for all the officials of the institutions contravenes the principle of the administrative autonomy of the institutions since the action brought in the Court of Justice should be made against the Commission (Article 91a).

### (c) **OLAF's external relations**

The current relations between OLAF and the Commission highlight the problems caused by the fact that OLAF combines several co-existing functions and that the division of competences between OLAF and the Commission's services is not clearly defined. The discussions currently under way on the planned interdepartmental memoranda of understanding underline the complexity of the problems, in particular that of communication between OLAF and the Commission, the transmission of information from OLAF to the Commission or access by OLAF to the Commission's databases. But OLAF's role and position vis-à-vis the disciplinary authorities, which necessarily have an inter-institutional dimension, also continue to raise questions since the disciplinary authorities sometimes find it difficult to follow up the recommendations contained in the reports addressed to them. They have requested additional guarantees to make OLAF's decisions more objective <sup>(4)</sup>.

<sup>(2)</sup> Thus confirming point 46 of the Court of First Instance Order in the *Gomez Reino* case, which makes appeal pursuant to Article 14 of Regulation (EC) No 1073/1999, a special case of the means of redress established by Article 90(2) of the Staff Regulations.

<sup>(3)</sup> Whereas DG ADMIN is the appointing authority for OLAF's officials in disciplinary matters (Commission Decision of 28 April 2004).

<sup>(4)</sup> See, for example, the comments by the EESC and the CoR of 7 May 2004 requesting additional guarantees regarding the opening and duration of investigations concerning members, according to the Protocol of 8 April 1965, for example in the form of a prior opinion of the Supervisory Committee.

<sup>(1)</sup> See points 1.2, 1.3 and 1.4 of the Manual.

The provisions of the new Staff Regulations, which are based on a strictly administrative view of OLAF's role, do not for example address the question of investigations carried out by OLAF that may also have a bearing on facts coming under disciplinary law and criminal law. Relations between IDOC and OLAF show that the question of OLAF's role in the disciplinary procedure is not regulated <sup>(1)</sup>.

As indicated in Chapter II, the support role has proved to be very useful and is a necessary development of the investigative role. In the transitional period, internal rules would have to be adopted regarding OLAF's participation. The legislator should specify the legal basis and the framework for this participation.

**Recommendation 4: define precisely OLAF's tasks, position and relations with its partners and the role played by it in the different procedures <sup>(2)</sup>, in particular disciplinary: regulate OLAF's task of providing support to the judicial authorities by specifying its legal framework.**

#### B. MECHANISMS AND STRUCTURES REQUIRED FOR THE INVESTIGATIVE FUNCTION

The Office analyses its investigations as preparatory measures similar to traditional administrative measures. The new Staff Regulations of officials that came into force on 1 May 2004, which give OLAF powers to conduct disciplinary investigations <sup>(3)</sup>, underline the administrative nature of OLAF's investigative function and say nothing of the fact that it is aimed at bringing criminal proceedings.

Similarly, the Court of First Instance appears to confirm the administrative nature of OLAF's investigations <sup>(4)</sup>. It specifies that the judicial review to which they are subject under Article 14 of the Regulation, which applies only to officials and other staff who are subject to the Staff Regulations, is conducted only if an act adversely affecting staff within the meaning of Article 90 of the Staff Regulations has been committed and cannot be directly conducted in respect of OLAF's investigative measures.

<sup>(1)</sup> It is true that Article 4(2) of Commission Decision C/2004/1588 states that before IDOC opens an administrative inquiry, the Director-General for Administration consults OLAF to ascertain that that Office is not undertaking an investigation regarding the same facts. However, Article 4(7) of the same decision states that: 'After receiving an inquiry report from OLAF, the Director-General for Personnel and Administration may, if appropriate, either ask OLAF to supplement the report or decide to open an administrative inquiry himself or immediately open a disciplinary procedure or indeed close the file without any disciplinary consequences.' The role of the investigation conducted by OLAF with respect to the disciplinary procedure thus varies greatly. However, one thing seems clear: the administrative investigation prior to the disciplinary procedure is primarily a matter for OLAF. The particular nature (criminal law dimension?) of OLAF's investigation would thus be confirmed. Conclusions still have to be drawn on how to monitor legality.

<sup>(2)</sup> Recommendation No 8 of the Commission's 'Article 15' report: 'The Commission recommends that memoranda of understanding be concluded to make the practical breakdown of tasks between the Office and disciplinary bodies more transparent.'

<sup>(3)</sup> Article 86. Annex 9 lays down the rules applicable to disciplinary procedures and to the protection of individual rights.

<sup>(4)</sup> Article 90a: investigative measures are similar to traditional administrative measures and OLAF's Director has equivalent powers to the appointing authority for officials and other servants of the Community.

However, with regard to other litigants, the case-law of the Court of Justice is less clear as to the nature of these investigations. Paragraphs 49 and 50 of the *Rothley* judgment, applicable to members of Parliament, state that they have the option 'not to comply (with the obligations to cooperate with OLAF) if they are persuaded that it is open to them to do so without infringing Community law. If, in a specific case, one of the Members of the Parliament adopts that approach, any subsequent measures taken by the Parliament with regard to that Member and to his disadvantage will, in principle, be subject to judicial review' <sup>(5)</sup>.

With regard to individuals, OLAF clearly does not have all the coercive powers pertaining to criminal law. However, it does have significant powers, such as access to premises or documents (Article 4(2)(1) of Regulation (EC) No 1073/1999) or the power to request information (Article 4(2)(2)). OLAF's activities can therefore have an impact on individual liberties, which is why the Supervisory Committee considers that internal monitoring of legality is insufficient for action taken in this context.

This monitoring of legality is based on Article 14 of the Regulation and on the new Staff Regulations of officials. However, it has several drawbacks. It establishes a degree of discrimination between different categories of litigant (officials and other servants of the Communities; members of the institutions; citizens); it does not take full account of the fact that OLAF's investigations, which are often conducted in close cooperation with the national prosecuting authorities, using methods and means adapted to the purpose of the investigation, may result in criminal proceedings; and it treats appeals 'against an act adversely affecting (the official) committed by the Office as part of an internal investigation', as provided for in Article 14 as the equivalent of administrative appeals by officials against their appointing authority <sup>(6)</sup>. It is true that this equivalence is based on the fact that OLAF's Director is given equivalent powers to those of the appointing authority for all Community officials. But the appointing authority has a relationship of trust with the official, whereas that between OLAF's Director and the official is a relationship based on suspicion.

<sup>(5)</sup> Judgment of the Court of 30 March 2004; the Court has been criticised for issuing what amounts to an invitation to disobedience to the Members of Parliament concerned (AJDA 12/2004; note by B  lorgey, Gervagony, Lambert). However, it should be emphasised that the Court judgment is based on the Commission's assurance that there is effective monitoring of legality. In point 58 of his conclusions, Advocate-General Jacobs states that 'The Commission points to a number of legal acts which might be challenged in that way (*various opportunities to bring judicial proceedings*): the decision of the director of OLAF to open an internal investigation as required by the second paragraph of Article 5 of Regulation (EC) No 1073/1999; various measures taken by OLAF in the course of an investigation, including the decision to have access to an office, to seize documents or to request oral information; as well as the agreement, explicit or implicit, of the institution in question.'

<sup>(6)</sup> This is the position taken by the Court of First Instance in its *Gomez Reino* Order of 18 December 2003 and in Article 90a of the new Staff Regulations.

Whatever interpretation is placed on the provisions specifying OLAF's role and powers, the Committee considers that in order to ensure that the system works as well as possible, OLAF should follow up the Committee's recommendations to introduce precise rules of procedure and internal monitoring of legality that would be independent of the conduct of investigations.

### 1. Rules of procedure

Under the authority of the hierarchical superior, investigators must comply with the instructions in the Manual. This contains provisions on how to conduct investigative measures, in particular point 3.4.4. It also highlights the need to comply with certain principles <sup>(1)</sup> and certain rights of litigants are also mentioned, for example in points 3.4.4.3 (rights of interviewees), 3.4.10.1 (right of interested parties to be given prior notification when information concerning them is passed on to the competent authorities), and 3.4.10.2 (right of access to the investigation file).

However, the rules set out in the Manual do not sufficiently and effectively implement the principles laid down in Regulation (EC) No 1073/1999, in particular in recitals 10 <sup>(2)</sup> and 14 <sup>(3)</sup>, or other principles or regulations applicable to investigations.

This is corroborated by the case-law of the Court of First Instance, in particular the Order of 18 December 2003 in the *Gomez Reino* case <sup>(4)</sup>, which considers such rules of procedure necessary when it states that '... Failure to take account of this provision (*respect for rights to defence*) would constitute a violation of the substantial formal requirements applicable to the investigation procedure

and thereby affect the legality of the final decision.' It is not possible to monitor compliance with these principles or legality unless there are precise rules. OLAF has so far not provided a satisfactory response to this problem.

**Recommendation 5:** In order to take better account of the fact that investigations may result in criminal proceedings, the Committee reiterates the recommendation contained in its first activity report <sup>(5)</sup>, regarding the introduction of internal rules of procedure adapted to the different phases of the investigation, which should be sufficiently precise to ensure respect for the existing principles.

### 2. Monitoring the legality of the investigations

This question is regulated by Article 14 of Regulation (EC) No 1073/1999 <sup>(6)</sup>, 'Judicial Review'. Recital 10 of the Regulation also lays down the basis for monitoring legality and emphasises that the terms and conditions under which investigations are conducted are subject to the adoption of decisions by the institutions and to amendment of the Staff Regulations. Some of the difficulties encountered in conducting investigations have generated court actions.

With regard to monitoring the legality of investigative measures, OLAF recognises the need to respect the provisions referred to in Recital 10 of Regulation (EC) No 1073/1999, but transfers the responsibility to other bodies <sup>(7)</sup> at the risk of lessening the effectiveness of the monitoring.

Hierarchical control, by its nature, is subject to ambiguities and limitations. Furthermore, the disciplinary supervision of investigative measures is purely notional. Proof of this has been the failure to set up an internal monitoring function independent of the conduct of investigations. Similarly, OLAF has not yet succeeded in introducing objective and impartial treatment of litigants' complaints independent of the bodies conducting the investigation.

External monitoring, which, in principle, is more satisfactory from the point of view of independence, is also very limited. The Ombudsman's decisions are not always put into effect in practice, and he does not have the power to monitor legality. With regard to the monitoring carried out by the Supervisory Committee,

<sup>(1)</sup> Point 3.4 of the Manual states that certain principles must always be applied:

- The rights of the individual must always be respected
- The admissibility of evidence must always be preserved
- OLAF investigations must always be lawful and proportionate
- OLAF's obligations to its institutional partners must always be fulfilled.

The Manual does not indicate how these principles must be applied.

<sup>(2)</sup> '(10) Whereas these investigations must be conducted in accordance with the Treaty and in particular with the Protocol on the Privileges and Immunities of the European Communities, while respecting the Staff Regulations of officials and the Conditions of employment of other servants of the Communities (hereinafter referred to as the Staff Regulations), and 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, bodies, offices and agencies must lay down the terms and conditions under which such internal investigations are conducted; whereas consequently the Staff Regulations should be amended in order to lay down the rights and obligations of officials and other servants as regards internal investigations.'

<sup>(3)</sup> '(14) Whereas the terms on which the Office's employees will discharge their duties and the terms governing the Director's exercise of his responsibility for the conduct of investigations by the Office's employees should be laid down.'

<sup>(4)</sup> Case T-215/02, paragraph 65.

<sup>(5)</sup> Proposal P4; this proposal was reiterated in the subsequent reports.

<sup>(6)</sup> Monitoring by the Committee of the investigative function (the monitoring referred to in Article 11(1) of the Regulation is not strictly speaking monitoring of legality). See Chapter III.C.

<sup>(7)</sup> In its Order of 18 December 2003 in the *Gomez Reino* case the Court of First Instance rules that respect for these principles is a necessity, yet refuses to monitor it.



Regulation (EC) No 1073/1999 specifies that it does not affect the Director's independence in conducting investigations (recital 18), and its only opportunity for intervention (within its sphere of competence as defined in Article 11(1) of the Regulation) is at the time of the consultation that takes place before information is forwarded to the judicial authorities of a Member State (Article 11(7)). This consultation, which has given satisfactory results since the beginning of 2004, allows only an exchange of views with the Committee.

The Committee would therefore reiterate that since Regulation (EC) No 1073/1999 came into force, this weakness has been pointed out <sup>(1)</sup>, and that it has emphasised on many occasions that there was ultimately no alternative to establishing the European Public Prosecutor's Office. Since there is now a basis for this in the Treaty establishing a Constitution for Europe, the transition should be prepared by measures minimising the shortcomings of the current situation and taking account of the prospects and the context.

### C. ROLE AND STATUS OF THE SUPERVISORY COMMITTEE

Concerning the proposals to strengthen its powers in respect of monitoring legality, the Committee would point out that the two functions conferred on it by Regulation (EC) No 1073/1999 are regular monitoring of the investigative function (Article 11(1)) and assistance to the Director in discharging his responsibilities (recital 17).

The Committee must reinforce the Office's independence by 'regular monitoring of the investigative function' <sup>(2)</sup>, in other words by *ex post* checks to ascertain whether the investigations are being properly conducted, aimed at examining the objectivity of the procedures. This monitoring is therefore limited and subject to support for the Director's independence. This support might be given in certain cases if the Director was faced with pressure or an obstacle and called on the Supervisory Committee for assistance. In fact, in the five years since the Committee was set up the Director has never called on it in such circumstances. However, at his request, the Committee provided assistance to him while OLAF was being set up, whether with respect to the budget or in recruiting management personnel. Since the establishment of OLAF was completed, the Committee's activities have centred more on organising the investigative function (rules, procedures, programme of activities, assignment of resources). This is undoubtedly its main contribution.

The political authorities, both Community and national, are aware of the problem of monitoring legality and have made several recommendations for resolving it. Some of these do not directly concern the Committee, since they involve assigning responsibility for internal control to the magistrates unit, assigning responsibility for monitoring legality to the Community courts or basing the organisation of this monitoring function on the role of the Hearing Officer in competition matters <sup>(3)</sup>.

However, another suggestion that has been made is to reinforce the Supervisory Committee's powers to monitor the legality of investigations <sup>(4)</sup>. In other words, the Committee would be given a new role which it is forbidden to undertake under the current Regulation. The Committee has its doubts about this proposal. As it emphasised in a previous opinion, 'the independence of OLAF's investigations must not be compromised by any power of decision of the Committee in the conduct of the investigations, which would, moreover, alter this status by making it necessary for members to be in permanent attendance' <sup>(5)</sup>.

Due to the nature of its members (independent persons with senior posts in their respective countries relating to OLAF's areas of activity), which determines its functioning (monthly meetings), the Committee's main strength lies in the independence and impartiality of its evaluations. If it were given powers of decision regarding the conduct of the investigations, its status would necessarily be changed into a permanent status integrated in the Community institutions; this would increase its powers but might weaken its independence and impartiality.

For this reason, the Committee had suggested that an individual rights lawyer (*avocat des libertés*) be appointed to assist it in the exercise of its new functions. This person, who would belong to the Committee's Secretariat, would examine the Committee's opinions on complaints sent to the Director of OLAF on the basis of Article 14 of Regulation (EC) No 1073/1999 and of requests sent to it spontaneously by persons concerned by investigations. The principles governing cooperation between this individual rights lawyer and OLAF would be laid down in a Memorandum of Understanding between the Committee and the Office. OLAF would have to put in place the necessary structure for effective internal control <sup>(6)</sup>.

<sup>(1)</sup> Wise Men's Report, point 5.11.7: 'This final element is both the most interesting and unsatisfactory aspect of the OLAF reform. On the one hand, it is vital that there be some guarantor of the proper and effective conduct of OLAF's inquiries. The qualifications specified for the members of the Committee clearly reflect a concern that the supervision exercised be akin to that of a judicial authority (e.g. a *juge de l'instruction*), able to assess the conduct of investigations with a professional eye. But precisely here lies the problem, quasi-judicial authority is placed in the hands of a group whose authority and status, with all respect for the future nominees, will be open to question.'

<sup>(2)</sup> Article 11(1) of Regulation (EC) No 1073/1999

<sup>(3)</sup> Report of the Chamber of Lords 'Strengthening OLAF', HL paper 139, points 87 and 108.

<sup>(4)</sup> Proposal for an amendment of Regulation (EC) No 1073/1999 presented by the Commission (COM(2004) 103) Articles 7(7), 11, 14. Resolution of the European Parliament of 4 December 2003 on the evaluation of OLAF's activities (A5-0393/2003), points 52, 53, 54. French Parliament, information report No 1533 on OLAF's shortcomings, point 4 of the proposed resolution.

<sup>(5)</sup> Opinion No 1/2004 on the proposed amendment of Regulation No (EC) 1073/99, p. 3.

<sup>(6)</sup> Opinions Nos 3/2003 and 1/2004.

In addition, the transitional nature of OLAF within the measures for protecting the Community's financial interests is manifested, above all, in the difficulties encountered by it in regulating its relations with its partners, which are at the root of most of the problems raised by its operational activity. A comprehensive and coherent solution to these problems will not be found until the European public prosecutor's office provided for by the Constitutional Treaty is set up to coordinate the powers exercised by the different players involved. However, during the transition period, coherence could be enhanced by concrete proposals aimed at avoiding confusions or conflicts of competence relating to OLAF's operational activities. Since it started its work, the Supervisory Committee has considered the question of OLAF's relations with the other players involved in operational activities to protect the Community's financial interests to be an essential one. These players are not only the national judicial authorities and the Community disciplinary and/or administrative authorities to whom its investigation reports and support activities are addressed, but also Europol and Eurojust<sup>(1)</sup>, since the operational jurisdiction of these two bodies will be increased in the future. For these reasons, it would be desirable for the Supervisory Committee to be explicitly assigned the task of interinstitutional coordination.

**Recommendation 6: Explicitly assign the Supervisory Committee the task of interinstitutional coordination of the players involved in operational action to protect the Community's financial interests in order to avoid problems of confusions and conflicts of interest.**

With respect to its own status, the Committee reminds the institutions that it must have the necessary means to carry out its task, as regards both the enforcement of Regulation (EC) No 1073/1999, which specifies the information that must be made available to it, and its administrative and budgetary position, which must ensure that it functions smoothly<sup>(2)</sup>. In particular, it must be emphasised that the Supervisory Committee does not come under the Commission, but is an independent body reporting to all the institutions. To make this even clearer, the status of its members should be spelled out. In addition, the functioning of the Committee and its secretariat (establishment of the headquarters, recruitment and career path of personnel, budget, etc.) should be completely independent with respect to the bodies controlled<sup>(3)</sup>.

## CONCLUSION

The Treaty establishing a Constitution for Europe signed in Rome on 28 October 2004 makes specific provision for developing the current system for protecting European financial interests.

<sup>(1)</sup> See, in particular, the Committee's letter to Mr Vitorino of 10 May 2001; its Opinion No 2/2002 of 12 March 2002 on the Commission's Green Paper, point II.2; its Opinion No 2/2003 on the evaluation of OLAF (Article 15) of 18 June 2003, point IV.4.

<sup>(2)</sup> The Committee's Opinion No 3/2003 of 22 October 2003 on the Institutions' proposals aimed at reinforcing the role of the Supervisory Committee.

<sup>(3)</sup> The Committee's Opinion No 2/2003 of 18 June 2003 accompanying the Commission's report on the evaluation of the activities of the European Anti-fraud Office (OLAF).

Article III.273 of the Treaty states that European law will organise the procedures for the exercise of Eurojust's powers<sup>(4)</sup>, in particular as regards the initiation and coordination of criminal investigations in the area of the protection of financial interests. Article III.274 provides for the establishment of a European Public Prosecutor's Office from Eurojust, with responsibility for these tasks and also for bringing to judgment, where appropriate in liaison with Europol. These two provisions may be implemented at the same time.

The procedure for revising Regulation (EC) No 1073/1999, based on the Commission's proposal, should take account of this proposed development by considering this revision as a transition from the existing system to the future system based on the European Public Prosecutor's Office. The management audit currently being prepared at the Court of Auditors and the observations made by the institutions that have expressed their views<sup>(5)</sup> should suggest provisional solutions for this transition phase to the legislator.

In particular, as regards the nature of OLAF's activities, the fact that OLAF's investigations may result in criminal proceedings should be taken fully into account now that the Constitution envisages the establishment of a European Public Prosecutor's Office with powers for investigations and prosecutions in the area of Community budget fraud and thus confirm that the investigations are liable to result in criminal proceedings.

Regulation (EC) No 1073/1999 indicates that the conclusions and information obtained in investigations are liable to be used in criminal proceedings (Articles 9 and 10) and makes the conduct of investigations subject to respect for more restrictive rules and principles than those applicable to the investigations provided for in the Staff Regulations (recital 10), but the effect of these provisions has been insufficient. To prepare the transition towards a European Public Prosecutor's Office, it is therefore necessary to elaborate on the new provisions in the Staff Regulations (Article 86 and Annex IX, in particular Article 2)<sup>(6)</sup> and to provide a better guarantee of fundamental rights.

<sup>(4)</sup> Article III.273(1): '... In this context, European laws shall determine Eurojust's structure, operation, field of action and tasks. Those tasks may include:

- (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- (b) the coordination of investigations and prosecutions referred to in point (a);
- (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.'

<sup>(5)</sup> Parliament, the Council, the Commission, the Court of Auditors, the Court of Justice and the Court of First Instance, the Ombudsman, but also the Supervisory Committee.

<sup>(6)</sup> Article 2(1): 'The rules set out in Article 1 of this Annex shall apply, with any necessary changes, to other administrative enquiries carried out by the Appointing Authority.' This not only ignores the fact that OLAF investigations may result in criminal proceedings but makes it difficult to draw a distinction between the role and nature of investigations carried out by OLAF and by the Appointing Authority, in particular the IDOC, particularly since the same means of redress have been provided for in both cases.

Taking into account also the results of the audit carried out by the Court of Auditors, guidelines should be drawn up for preparing this transition and improving both OLAF's internal organisation and its relations with its partners.

It should therefore be possible to find solutions to many of the problems that have been encountered by OLAF and to facilitate the transition to a European Public Prosecutor's Office.

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**RECOMMENDATIONS**

- Recommendation 1:** establish a structure separating the services entrusted with independent functions from those entrusted with 'Commission' functions, and clarify the division of competences between OLAF and the Commission's services and DGs (memoranda of understanding are currently being negotiated) in the area of administrative cooperation.
- Recommendation 2:** establish arrangements for personnel (temporary staff or officials) adapted to their functions.
- Recommendation 3:** establish a budgetary system for the Office that will not hinder the independence of investigations.
- Recommendation 4:** define precisely OLAF's tasks, position and relations with its partners and the role played by it in the different procedure <sup>(1)</sup>, in particular disciplinary: regulate OLAF's task of providing support to the judicial authorities by specifying its legal framework.
- Recommendation 5:** in order to take better account of the fact that investigations may result in criminal proceedings, the Committee reiterates the recommendation contained in its first activity report <sup>(2)</sup> regarding the introduction of internal rules of procedure adapted to the different phases of the investigation, which should be sufficiently precise to ensure respect for the existing principles.
- Recommendation 6:** explicitly assign the Supervisory Committee the task of interinstitutional coordination of the players involved in operational action to protect the Community's financial interests in order to avoid problems of confusions and conflicts of interest.

<sup>(1)</sup> Recommendation No 8 of the Commission's 'Article 15' report: 'The Commission recommends that memoranda of understanding be concluded to make the practical breakdown of tasks between the Office and disciplinary bodies more transparent.'

<sup>(2)</sup> Proposal P4; this proposal was reiterated in the subsequent reports.

## ANNEX I

**Recommendations of Activity Report 1999 to 2000**

**P1:** The Supervisory Committee therefore stresses the need to support OLAF's efforts to establish the administrative structures and internal rules required to ensure its independence, in particular in the spirit of the conclusions of the Ecofin Council of 17 July 2000 (see point 12), for it considers this essential for the decentralised exercise of the functions laid down in the Financial Regulation (functions of authorising officer, accounting officer, financial controller, Consultative Committee on Purchases and Contracts) and by the Staff Regulations (appointing authority, Staff Committee, Joint Committee).

**P2:** Consequently, as far as OLAF's involvement in the preparation and drawing-up of legislative initiatives is concerned, the Supervisory Committee considers it advisable that OLAF be structured in such a way as to prevent any interference which could weaken its operational independence as far as investigative activity is concerned.

**P3:** The Supervisory Committee considers that the following ambiguities must be removed as a matter of utmost urgency at the appropriate legal level:

- scope of Article 280 of the EC Treaty,
- interrelationship of OLAF's internal investigations with disciplinary procedures and compatibility of an interinstitutional investigations body with disciplinary procedures proper to each institution and body,
- scope of OLAF investigations in relation to Members of the European Parliament,
- absence of an effective procedure for invoking financial liability.

Moreover, the Supervisory Committee considers that OLAF's role as regards internal investigations must be one of its key functions, to be performed by a team of sufficiently high hierarchical rank and possessing the skills needed in specific areas, especially anti-corruption measures, public procurement and budget and financial management. Lastly, OLAF's establishment plan must highlight the specific nature of this role.

**P4:** The Supervisory Committee recommends that the following measures, which are still on the drawing board, be put into practice without delay:

- definition and implementation of a reactive and proactive investigations policy based on the collection and analysis of all available information on the financial and criminal aspects of fraud against the Union, its financial interests,
- rationalisation of the conduct of investigations and the drawing-up of reports (in cooperation with magistrates recruited by OLAF on the basis of their expertise in the area of criminal procedure),
- reorganisation of the systems for registering cases and associated documents and standardisation of case file presentation,
- drafting of precise and detailed rules of procedure for the various stages of the investigations.

**P5:** For the time being, the Supervisory Committee considers that what must be done is to adopt measures without delay relating to OLAF's internal organisation, such as the creation of a magistrates unit, in order to enhance the legitimacy of its investigations. Such measures would also foster the emergence of a European legal culture.

At the same time, the Supervisory Committee fully supports the Commission's initiative of proposing to the IGC that a legal framework be created for establishing in the long term a European public prosecutor's office and the European Parliament's calls concerning, in particular, the establishment of a European public prosecutor for internal investigations. For more on this subject, see also Opinions No 5/1999 and No 2/2000, which are annexed to this report.

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## ANNEX II

**Proposals of Activity Report 2000 to 2001**

The Committee supports the various measures envisaged by OLAF to consolidate its budgetary and administrative autonomy (internal rules; specific structures) and to adapt its management of investigations to developments in its methods (manual, CMS).

The Committee considers that by and large the proposals made in its first report for submission to the institutions have been well received (see Chapter I).

The internal reorganisation of OLAF is proceeding in accordance with the guidelines set out in the first report. The Committee approves the measures taken and recommends that they be implemented as quickly as possible so that initial effects can be evaluated at the earliest opportunity, in particular as regards:

- establishing and implementing a reactive and proactive policy on investigations: integrate the Intelligence Directorate and the Operations Department in preparing the work programme, setting priorities and case-selection criteria and carrying out these tasks,
- involving the Magistrates Unit in the investigation process, from the decision to open the investigation to the follow-up stage, and defining its powers in the OLAF manual,
- raising the profile of the internal investigation function: taking account of the specific function, of the exclusive responsibility and of the increased powers of OLAF as regards investigations within the institutions; creating a clearly identified structure having the necessary qualified personnel to combat corruption, financial crime and crime in relation to public procurement,
- setting up a structure and recruiting staff to handle OLAF's function in relation to 'external investigations' and cooperation with national authorities (on the basis of a current stock-taking exercise).

On questions concerning OLAF's interinstitutional environment, the Committee can confine itself to proposals supplementing initiatives already taken:

**P1: Coordinate initiatives carried out to strengthen the legitimacy and effectiveness of OLAF**

The various initiatives to strengthen the legitimacy and effectiveness of OLAF investigations – internal reorganisation; prosecutor for internal investigations; European Public Prosecutor; criminal-law protection of financial interests – pursue the same objective and must be conceived in complementary terms.

**P2: Implement in the various institutions and bodies the obligations to cooperate with OLAF imposed by Regulation (EC) No 1073/1999**

The institutions should implement more systematically Article 7 of Regulation (EC) No 1073/1999 concerning the information to be supplied to OLAF. In particular, it must be stressed that any delay in communicating information can entail problems of limitation periods. In addition, it would be useful if OLAF could be informed of internal investigations relating to facts falling within its powers, even if the relevant institution sees no need for an OLAF investigation. Generally, further thought must be given to the relation between OLAF investigations and internal procedures in the institutions (administrative investigations; disciplinary proceedings; etc.).

**P3: Amplify the Regulations to consolidate OLAF's independence**

Relations between OLAF and the Commission were defined in the draft code of conduct on the basis of constructive interpretation of the dual functions of OLAF. Effect should be given to these definitions not only in practice but in the Regulations too. The institutions are therefore invited to promote the necessary reforms of the Staff Regulations and the Financial Regulation.

**P4: Establish clear communication between OLAF and the institutions**

The guidelines for a communication policy for OLAF should allow a transparent and foreseeable relationship with the institutions in this field. A dialogue should be established with the institutions on the basis of the document drawn up by OLAF.