

OLAF Supervisory Committee

OPINION 2/2002

on

**THE GREEN PAPER
ON THE CRIMINAL-LAW PROTECTION
OF THE COMMUNITY'S FINANCIAL INTERESTS
AND THE ESTABLISHMENT
OF A EUROPEAN PUBLIC PROSECUTOR**

In presenting a Green Paper and making it widely available on the Internet, the Commission chose to give priority to an open and participatory concept of democracy which makes a valuable contribution to transparency. After the Nice European Council in December 2000 decided not to act on its proposal to create a legal basis in the EC Treaty for establishing the European Public Prosecutor for the protection of the Community's financial interests, the debate had to be relaunched. The formula selected, based on a statement that was both objective and precise, was to provide the general public with information and provoke the expression of well-founded opinions free of all prejudice. The Supervisory Committee can only give its support for such an initiative, which follows the same principle as its own policy, as an authority guaranteeing independence in the fight against fraud, of promoting transparency in the practices, on which their legitimacy depends.

The Introduction to the Green Paper recalls that in the Opinions requested of it by the Community institutions the Supervisory Committee had repeatedly supported the establishment of a European Public Prosecutor for the protection of the financial interests of the EU.¹ During its first two years of operation the Committee has been able to evaluate the state of the protection of the financial interests by OLAF, both directly and in cooperation with the national authorities. It considered that the evolution that began with the establishment of OLAF must be continued and amplified, as proposed incidentally by other authorities, in particular Parliament and the Committee of Independent Experts.

The Committee based these opinions on its analyses of the operation of OLAF and of the investigative function. Prior to the restructuring launched by OLAF, the first effects of which are now being felt, the working methods and organisation of UCLAF/OLAF were directed primarily towards examining cases of fraud and irregularities referred to them. The aim of the reform is to develop a proactive policy, to set priorities for investigations and to have greater regard for their disciplinary and criminal purpose. But in the current legal framework, the prospects that this mechanism might evolve towards greater effectiveness and legitimacy remain limited. In considering the questions raised by the Green Paper, the Committee plans to take stock, on the basis of its most recent work, both of current difficulties in the protection of the Community's financial interests, to which the European Public Prosecutor would be a response, and of the questions raised for OLAF by the development of its institutional environment.

In permanent contact with OLAF'S investigation activity, the Supervisory Committee has observed a number of weaknesses attributable to the old working methods. There was a high degree of fragmentation and very little transparency in management, and resources were dispersed. As a consequence, very few cases were referred to the disciplinary and/or criminal authorities, and very few actually produced results, and investigations took a very long time. They did not always shield investigators from pressures, and there were disputes as to compliance with fair rules of procedure and in particular with respect for individual rights. Lastly, investigations on this basis were somewhat ineffective as investigators had purely administrative powers of dealing with facts that properly belonged in the criminal sphere.

¹ Opinion 5/99 (OJ C 360, 14.12.2000, p. 28); Opinions 2/2000 (OJ C 360, 14.12.2000 p. 30); First activity report, Chap. III.B.2.b. (OJ C 360, 14.12.2000 p. 24); Opinion 3/2001 (OJ C 365, 20.12.2001 p. 22); Second activity report, chap. V.2.2. (OJ C 365, 20.12.2001 p. 19).

The aim of the reform at OLAF, extending to both organisation and methods, is to strengthen transparency in management, effectiveness in the use of the human resources and means of investigation, and regularity of procedures. But there is little doubt that the establishment of the Prosecutor proposed by the Green Paper is the only way of making the structural and functional improvements (I) that are essential for genuine protection of the European Union's financial interests. But this agreement in principle of the Supervisory Committee to the main options of the Green Paper does not exclude certain criticisms concerning structural inconsistencies (II) and functional weaknesses (III). Finally the Committee deems it necessary also to examine possible developments beyond the proposals of the Green Paper (IV).

I - Structural and functional improvements

The Green Paper proposals constitute undeniable progress since the European Public Prosecutor would have clear rules giving him independent status and the powers needed for his task.

I - 1. The Prosecutor's independent status

In its first two annual reports, the Supervisory Committee stressed the provisional character of the mechanism set up by Regulation No 1073/99 to settle the question of the independence of investigations. OLAF has been able to operate its dual functions – both preparing legislation for the Commission and running investigations as an autonomous service – because it has applied a constructive interpretation of its ambiguous status. But the question of the legal guarantee of the investigation is not settled satisfactorily.

This problem, which weakens the legitimacy of the investigation mechanism, was stressed by the legislature when it made the principle of the independence of investigations one of the main objectives of the Regulation.

With regard more precisely to the weaknesses noted by the Committee in the objectiveness of the management of investigations, only the European Public Prosecutor's independent status can bring a stable and complete solution to the problems of independence with regard to the parties to the lawsuit, the Member States and the Community institutions and bodies. In particular, this status is probably the best way of guaranteeing that investigations will be conducted impartially on both sides and with the sole objective of ascertaining the truth.

The Green Paper, by defining an independent status for the European Public Prosecutor along with rules for his accountability before the European Court of Justice, proposes solutions adapted to the Community environment. The rules concerning the structure and internal organisation of the European Public Prosecutor (point 4.1.1) are to some extent inspired by the provisions for the independence of the Members of the Court of Justice, which have shown their effectiveness.

The Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Communities could also apply, as they are not in themselves an obstacle to the independence of the Prosecutor.

I - 2. The powers needed for the legitimacy and effectiveness of investigations

The Committee has observed a number of shortcomings from the point of view of the effectiveness of investigations, owing to the dispersal of inquiries and prosecutions between national authorities whose coordination remains difficult and which are subject to very different rules of procedure and organisation. In this respect, the scope of the European Public Prosecutor, extending to the whole of the European Communities and covering the direction and coordination of investigations and prosecutions, is the only coherent approach (see points 6.2.3.1 and 6.3).

The obligation for national and Community authorities to refer fraud cases to the European Public Prosecutor should give the Prosecutor the means of fulfilling this task. And the lack of priority from which OLAF cases referred to the national judicial authorities sometimes suffer should disappear since prosecutions would be brought by the European Public Prosecutor, who would handle the defence of the Communities' financial interests from investigation to judgment. In addition, effective and uniform protection of these financial interests also means that the European Public Prosecutor, as proposed in the Green Paper, can operate under harmonised Community legislation defining both offences and penalties.

Incidentally, subject to the possibilities for conditional closure of cases provided for by the Community legislation, the legal formula envisaged by the Green Paper for mandatory prosecution would, as point 6.2.2 of the Green Paper makes clear, ensure a uniform approach to prosecutions throughout the European law-enforcement area.

Lastly, the current defects of the system for reviewing the regularity of OLAF investigation measures, where, despite a major effort to codify practices, management and control responsibilities are not separate and the only judicial review procedures – by the Court of First Instance and the Court of Justice – are remote and come late in the procedure, can be reduced only by establishing a European Public Prosecutor who directs and controls investigations and prosecutions.

He could apply for measures that restrict individual rights during the investigation and check that investigators respect fundamental rights and rules of procedure. But progress would be complete only if all the European Public Prosecutors enjoyed the same status and implemented common rules of procedure. Hence the Supervisory Committee's reservations on the following points.

II - Structural inconsistencies

In its Green Paper, the Commission, in accordance with the subsidiarity and proportionality principles, has endeavoured to propose only "the minimum needed for the European Public Prosecutor to operate effectively ... and the minimum necessary

in order to ensure effective and equivalent prosecution of unlawful conduct harmful to the Community's financial interests anywhere in the Community" (point 3).

But on certain points it has proposed such a restrictive concept of this "necessary minimum" that the very consistency of its draft is affected by it.

This applies in particular to the options that it proposes for the status of the Delegated European Public Prosecutors, which remains dependent on specific national situations, and to the relations between the European Public Prosecutor and European investigation services and for the review of committals for trial.

II - 1. The status of the Delegated European Public Prosecutor

In the current situation, since prosecution measures and most investigation measures are taken by national authorities, the execution of these functions in the fight against fraud against the Community budget is extensively fragmented, with the result that investigations and prosecutions run in competition, are incomplete or do not take place at all. The decompartmentalisation effect sought with the European Public Prosecutor would be heavily compromised if his powers were in practice exercised by Delegated Prosecutors having a national status and possibly being able, under one of the options proposed, to combine their European powers with national powers. Such combination would imply a dual statute and a dual loyalty, and it would not be possible to guarantee that the Community interest prevailed in the event of competing pressures on the Delegated Prosecutors in their two functions.

II - 2. The European Public Prosecutor's relations with European investigation services

One purpose of establishing the European Public Prosecutor is to remedy a weakness in the current mechanism that has been stressed several times by the Supervisory Committee:² the absence of a legal guarantee as regards OLAF's investigation measures (generally internal). Such a guarantee can exist only if the investigation is carried out under the direction and under the control of the judicial authority, and the objective of the Green Paper is "to provide an opportunity to think in greater depth than hitherto about the judicial guarantee at the preparatory stage and on the relevant level - national or Community - at which such measures should be managed and controlled."³

Even so, the Green Paper, in the case of investigations carried out by national services, falls short of this objective: in one of its options it envisages conferring on the European Public Prosecutor a role of directing and controlling investigations, but its preference is for a mechanism in which the national systems of relations between the police and the courts is not affected by the establishment of the European Public Prosecutor.

² First activity report, chap. III. B. 2. b: "Obviously, this is completely inadequate, and a judicial body should permanently supervise all OLAF activities ..."; also see Second activity report, chap. V. 2.2.

³ Point 6.2.3.1. of the Green Paper.

In the case of the European investigation services – Europol and OLAF – the Green Paper again does not envisage a role for the European Public Prosecutor of directing and controlling investigations but simply one of cooperation and mutual information procedures. The Commission seems to want to avoid stating a view on the future powers of these bodies. In any event, if Europol and OLAF are to have operational powers in matters in which the European Public Prosecutor has jurisdiction, which is obviously the case of OLAF at least, it goes without saying that the legal guarantee on these activities could be secured only if they were subject to the jurisdiction of the European Public Prosecutor.

II - 3. The review of committals for trial

The Supervisory Committee has observed on many occasions that the choice made by UCLAF/OLAF of the court to which it refers information or investigation files, a case sometimes even being spread over several countries, did not always correspond to clear and objective criteria and that such inconsistencies seriously hampered the effectiveness of proceedings. Likewise a number of cases referred to the national courts were unlikely to come to judgment because of the inadequate evidence.

By giving the European Public Prosecutor the power to decide on committals for trial, the Green Paper ensures that this decision will generally be taken in accordance with the Community interest. But the Commission also chooses to leave for the national courts the power to review the European Public Prosecutor's decisions on the choice of court and on the contents of the referral. Yet this option does not constitute a sufficient guarantee with regard to the danger of inconsistencies already mentioned. In a situation where the national legal environment determines both the effectiveness of the proceedings and the level of the sentences incurred or passed, the choice of trial court substantially determines the success or failure of the proceeding. Neither this option, nor the assessment of the regularity of the pre-trial procedure, should depend on a national court, acting alone in reviewing the European Public Prosecutor's committal decisions.

The Committee stresses here that the Commission's argument in favour of a national court is based primarily on the fact that the question of establishing a Community committal court was not envisaged in its contribution to the IGC. Advantage should be taken of this delay to improve the mechanism proposed at Nice.

The establishment of a European Pre-Trial Chamber, on the model of the Chamber set up by the Rome Statute of the International Criminal Court, appears to be necessary as a means of reviewing the preliminary phase and securing unity in the application of the law and equity in the determination of the trial court.

III - Functional weaknesses

On the basis of its knowledge of the operation of OLAF, the Supervisory Committee has also identified functional weaknesses in the options proposed by the Commission which, without calling into question the consistency of the draft, are likely to compromise its effectiveness.

This particularly concerns the proposals concerning the drawing up of records of questioning and the more general question of rules on the admissibility and exclusion of evidence.

III - 1. The European record of questioning

The Commission's argument on the substance – that unified rules of procedure for records of questioning would be out of proportion to the objective of the Green Paper, which is simply to seek ways of making the prosecution function effective – is not very convincing with respect to the disfunctioning that flows from the scale of the procedural differences between Member States.⁴ All the more so as the European record could facilitate the national authorities' work when they are dealing with a case concerning the Community's financial interests: it is precisely for the sake of effective prosecution that such a solution needs to be considered, as it would remove the difficulties inherent in international letters rogatory. As so many judges have stressed so often since the Geneva Appeal, many investigations fail because international letters rogatory are so slow and there are so many hurdles to be overcome.

But precisely on this point, the Green Paper wishes to merely establish the principle, posited by the Tampere European Council, of mutual recognition of the admissibility of evidence gathered under national law and transmitted by the traditional judicial cooperation procedures: "evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, subject to the rules applicable there".⁵

It must be stressed, however, that the European Council was not referring specifically to the protection of financial interests but to the fight against cross-border crime in general within the framework of third pillar procedures. By making this reference, the Commission is no longer relying on the specific character of the protection of the Community's financial interests, even though it stressed this itself.

The Green Paper (points 6.3.4.1. and 6.3.4.2.) refers to the possibility of establishing "a European record of questioning to serve as a model for the European Public Prosecutor", for cases where he questions witnesses himself without going through the national investigation authorities. The Supervisory Committee has repeatedly drawn OLAF's attention to the need for precise rules on the subject and must therefore support a formula which, in its view, should become a mandatory rule to be applied by the European Public Prosecutor and the investigators working under his direction. And it must be stressed that the admissibility of evidence gathered in a

⁴ See the analyses of the vol. IV of the *Corpus juris*, Intersentia, 2002,

⁵ Tampere European Council, Presidency Conclusions, point 36.

Member State other than the trial State should in any event be predicated on unification of the conditions of validity of European records of questioning.

III - 2. The rules on admissibility or exclusion of evidence

The Green Paper sets out also the unfortunate consequences of the differences between national regulations on recognition of evidence for the success of investigations in cross-border fraud cases. The Supervisory Committee can only confirm this. On the one hand, a number of actions in the national courts on the basis of evidence gathered by OLAF or by authorities of another Member State have failed because these courts did not admit the evidence. On the other hand, the Supervisory Committee regularly receives complaints from litigants about the procedures by which evidence is gathered.

To solve these difficulties, the Green Paper merely proposes, for the admissibility of evidence, a mutual admissibility rule (item 6.3.4.1.) and, for the exclusion of evidence, the applicability of the exclusion rules valid in the Member State where the evidence was gathered and not the rules of the trial State (item 6.3.4.2.). These solutions are, therefore, based mainly on national law, but they are a move in the direction called for at Tampere, being based on the mutual recognition principle as is possible wherever there is a high degree of mutual trust, provided fundamental rights are respected (Brussels Convention of 29 May 2000 on judicial cooperation in criminal matters between Member States of the European Union, third recital). But they do not bring about the simplification sought by the Corpus Juris and may raise difficulties of judicial review at the pre-trial stage that can be solved only by establishing a European Pre-trial Chamber.

As regards administrative investigations, the Commission proposes that the constraints of criminal procedure always be acted on, even in administrative investigations, so as to secure the highest level of protection. The Supervisory Committee fully supports this proposal, which matches its own recommendations to OLAF. The Commission also envisages the possibility that evidence gathered in the course of an investigation be mandatorily admissible in the national courts if it has been gathered with full respect for fundamental rights. The Supervisory Committee believes that this approach should apply not only to administrative investigations but to all investigations conducted by the European Public Prosecutor.

Far from constituting a departure from national traditions, these proposals pursue the harmonisation process effectively launched by the two European Courts under Article 6 of the European Human Rights Convention, to which it will be remembered that Article 6 of the EU Treaty refers.

IV - Possible developments

The Commission wished to maintain its proposals within its own framework of the draft revision of Article 280 of the EC Treaty submitted to the Nice IGC, which was confined to the protection of the Community's financial interests.

The Committee would point out that Regulation No 1073/99 defines the Community's financial interests as covering not only the management of budget appropriations but extending "also to all measures affecting or liable to affect their assets". Likewise, the European Public Prosecutor's jurisdiction could be seen as potentially covering all forms of crime against Europe, including euro counterfeiting.

The Commission also refers in the Green Paper (point 5.2.3.) to the extension of the European Public Prosecutor's jurisdiction to the general criminal-law protection of the European public service. Although proposals for legislation have been on the table since 1976, the question of the criminal liability of members, officials and servants of the Community institutions and bodies, and the related question of their protection, is currently not properly regulated. OLAF's powers for internal investigations deal with only part of the problem, because the ordinary criminal procedure and criminal law are applicable, with all the disadvantages, noted by the Committee, that this entails for the treatment of crime against Europe by the Belgian and Luxembourg judicial authorities.⁶

Lastly, the relationship between the European Public Prosecutor and the European arrest warrant, which is not to be implemented across the fifteen Member States until 2004, must be looked into already. At a time when the Convention to consider the reform of the institutions is beginning its work, the Supervisory Committee sees the need to consider making the two mechanisms coincide and to envisage extending the European Public Prosecutor's jurisdiction to the forms of cross-border crime concerned by the draft Framework Decision on the arrest warrant.⁷

Conclusion

This opinion highlights the fact that the status of OLAF will have to be seriously reviewed when the European Public Prosecutor is established. The Commission rightly notes that it is too early to go into the details of future relations between the European Public Prosecutor and OLAF as long as OLAF's activity has not been evaluated in detail. The Committee wishes to stress that such an evaluation will be possible and useful only when the restructuring started by OLAF takes effect. In addition, the evaluation provided for by Article 15 of Regulation No 1073/99 is conceived as an interim report (*mid-term review*) that could be accompanied by "proposals to modify or extend the Office's tasks" but not by a thorough change in the status of OLAF, awaited at the time of the next Treaty amendment. The Committee's third annual report and the opinion that it is to give under Article 15 of Regulation 1073/99 will provide input for such an amendment.

Lastly, the Committee wishes to recall that both OLAF and the European Public Prosecutor envisaged by the Green Paper must be evaluated in an evolutionary perspective as stages in the construction of a complete and coherent project for which the *Juris Corpus* could serve as a model.

⁶ See Second activity report, point 3.1.1.

⁷ See the Brana Report, Delegation of the French National Assembly for the European Union, 13.2.2002: La Tribune, 15.2.2002.