



Supervisory Committee

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Introduction

In the first two years of its term of office, the Committee had to devote a considerable proportion of the time devoted to its dialogue with the Director to questions of organisation and the setting-up of structures and methods to safeguard investigatory independence. Thus, together with the Director, it analysed the problems of UCLAF's transition to OLAF and defined the objectives of a reorganised Office.

The point was to develop a structure transferred as it stood to the new Office from a situation where:

- UCLAF was fully integrated into the Commission structure and organisation and subject to its hierarchical authority;
- there was no investigation policy and some laxity in recording cases and information;
- responsibility for the management of investigations was scattered.

The Committee concluded its second report by stating that the transition of UCLAF to OLAF should be completed. In this third report,¹ it now wishes to take stock of OLAF's achievements in order to allow the responsible authorities to evaluate the result and decide to what extent and how it should be consolidated in a fully coherent system for protecting financial interests. Since the situation is constantly evolving, the Supervisory Committee will take account in its evaluation of views and proposals concerning both the present structure of OLAF and its possible incorporation into a system with the European Prosecutor at its centre.²

The evaluation was based partly on the special tasks provided for by the rules, such as consulting the Supervisory Committee on preliminary draft budgets, or requested by the Institutions or the Director of OLAF (opinion on Green Papers;

¹ The Supervisory Committee continued its meetings since September 2001 at the monthly rate it had decided when it started. It continued to hold regular hearings with the Director of OLAF and his colleagues. It also continued to maintain and develop contacts with the Institutions responsible for protecting Community financial interests: Parliament (the President and rapporteurs for the Committee on Budgetary Control and Mr Priestley, the Secretary-General; the Council (COREPER and the anti-fraud working party); the Commission (Ms Schreyer) and the Court of Auditors.

² Green Paper on criminal-law protection of the financial interests of the Community and the creation of European Prosecutor, see Opinion 2/ 2002.

participation in the procedures for the selection of managers) and partly on the activities that have been strongly refocused on monitoring investigations, the secretariat providing continuous monitoring of operational activities.

On the basis of the information provided by the scoreboards, the Supervisory Committee stepped up its monitoring of operational activities on the basis of reports submitted by OLAF concerning investigations that had lasted longer than the statutory nine months and the cases referred to the judicial authorities. It also carried out on-the-spot examinations of closed cases. And it continued to take note, by way of information, of complaints received by the Director from litigants, of which it receives a copy, as well as OLAF cases forwarded by litigants to the European Ombudsman.

This new evaluation should supplement the previous year's evaluation of the obstacles encountered by OLAF in setting up the new organisation, both those relating to internal organisation and those concerning the ambiguities of the Office's status.

As regards internal organisation, the legislature's aim was to encourage a form of organisation based on transparency and thus to clarify the allocation of management responsibilities, a prerequisite for independent investigations.

The measures set up to promote transparent management are not fully effective as they have been viewed occasionally as so many formal bureaucratic constraints (*Case Management System, Manual*). Training measures should speed up their use. The scoreboards are essentially used by the Supervisory Committee, although in future they may become useful tools for OLAF's own bodies, as much for the intelligence departments as for the Operations Executive Board. The registration procedures are now satisfactory, although unable on their own to guarantee rigorous management of cases and relevant documents, a task that only a registry could cope with.

The measures taken to clarify responsibility for investigations and to establish proper control of their management are also inadequate. Although the increased transparency of procedures certainly promotes clarity, the failure to define

an investigation policy and priorities at management level³ means that investigators are compelled to define their own criteria. They play a decisive part in the process of initiating an investigation, at the risk of having to decide which investigations they will carry out themselves and which will be entrusted to others. Lastly, the structures now in place have not completely eliminated fragmentation between sectors and units. The delay in appointing the Director of Directorate B and the fact that the setting-up of an Intelligence Service is a protracted business goes a long way towards explaining this situation.

Lastly, there has been little progress regarding the Office's autonomy. The administrative and budgetary position has advanced only slightly compared with the position described by the Committee in its second report.⁴ The draft code of conduct which was to govern OLAF's relations with the Commission and the other Institutions has not yet been adopted.⁵ As regards investigations, the definition of the role of the Judicial Advice Unit is encountering practical difficulties.

As regards the status of the Office, the positions taken by the Council⁶ and Parliament⁷ on OLAF's budgetary and administrative autonomy have had little effect on recruitment procedures and the drawing-up of the preliminary draft budget for 2003.

There is no doubt that the Commission has benefited from the synergy created by the co-existence within OLAF of independent operational services and services responsible for preparing its legislative and policy initiatives. Thus, drawing on OLAF's expertise, it followed its global strategic approach and 2001-03 action plan with a Green Paper on the criminal-law protection of Community financial interests and the establishment of a European Prosecutor. This project is likely sooner or later

³ It is to be hoped that this will be remedied as soon as the "Intelligence" Directorate becomes operational.

⁴ Introduction to the Committee's second Report.

⁵ In addition, a version that is probably final of the "Guidelines for OLAF's communication activities" was presented to Supervisory Committee members at the meeting on 18 June 2002.

⁶ Conclusions of the ECOFIN Council, point 3: "points out that the legislator's aim was to give OLAF complete independence to perform its operational tasks, strengthened by the Supervisory Committee, with autonomy in administrative and budgetary matters; notes that that aim has not yet been attained sufficiently" (Annex II to the second Report).

⁷ Resolution of 14 March 2001, points 3 to 6.

to alter the status and institutional environment of OLAF and enhance the evolving nature of its present status, which can now be seen as moving towards the European Prosecutor.

However, there are still a number of ambiguities, especially the scope of Article 280 of the Treaty as regards the full range of Community bodies and institutions, including members of the European Parliament. The judgment of the Court of First Instance of 26 February 2002 on an action brought by 71 Members of Parliament has not fundamentally altered the position and, as regards the EIB and ECB, the position is in suspense pending the Court of Justice judgment.

On the other hand, the Council decision of 28 February 2002 setting up Eurojust and providing it, as a third-pillar body, with powers to protect financial interests, and the Council decision of 6 December 2001 extending the areas covered by Europol to swindles, fraud and corruption, only increase the need to coordinate the activities of Eurojust, Europol and OLAF in order to bring together the various European powers currently used to combat organised crime into a unit that takes account of the need for operational efficiency and the demands of legal certainty and judicial review (see Chapter III below). Otherwise, the overlapping of poorly coordinated or uncoordinated authorities will only confirm the conclusion reached by one commentator already criticising the Nice Treaty on the ground that it contributed "a number of additional complexities for very little change".⁸ It can indeed be argued that the institutional imbalance is heightened by the failure to improve coordination "although this problem has become acute in recent years" and threatens to make enlargement even more difficult to achieve.

To provide the fullest possible evaluation, this report will present:

- an administrative and budgetary evaluation (Chapter I),
- an operational evaluation (Chapter II),
- an institutional evaluation (Chapter III),
- a conclusion.

⁸ F. Dehousse, *Le Traité de Nice: un tournant fondamental dans l'histoire de l'intégration européenne*, Journal des Tribunaux, 12 May 2001.

Chapter I
Administrative and budgetary evaluation

I – 1. Integrating OLAF into Community procedures

OLAF itself describes itself as a service that, for administrative purposes, is attached to the Commission, which has given it administrative and financial autonomy.⁹ In fact, OLAF's independence was conferred intentionally by the legislator, which wanted its Director, as head of a service separate from the Commission, to exercise broad and fully autonomous decision-making powers on personnel and budgetary matters. This autonomy is a vital corollary to the complete independence OLAF enjoys in its investigations. However, the principle of independence recognised by the legal texts is sometimes difficult to put into practice.

Since OLAF was set up in 1999, the Commission itself has practised a certain degree of decentralisation by transferring a series of responsibilities from the full Commission itself to Directors-General, particularly as regards the management of human and financial resources. To some extent this has brought the Commission's other departments more into line with OLAF.

Over the last three years the Director of OLAF has tried to put his administrative autonomy into practice, in most cases working smoothly with the relevant Commission departments. After some initial difficulties, cooperation with the Commission has gradually improved thanks to a greater awareness within the Commission of OLAF's tasks, role and special position. Discussions with Commission departments have focused, for example, on defining the principles of the autonomy granted to its Director, whereby the Commission has sometimes sought to ensure that its own internal rules to prevail.

Officials and other staff of OLAF are covered by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Communities and by the Financial Regulation. Other rules adopted to interpret and/or implement

⁹ See preliminary draft budget for 2003, working document, point II.

those instruments may also be binding, unless they are incompatible with the provisions of the Decision setting up OLAF.

OLAF's autonomy of management is recognised in a number of fields:

- General administration: with its own separate budget OLAF has full autonomy in respect of office automation and IT equipment, provided that it complies with the general rules governing contracts and procurement. On the buildings front, OLAF is dependent on the Commission's general buildings policy, but its present accommodation is fairly satisfactory, albeit somewhat limited and not always suitable.
- Organisation chart: in theory the Director of OLAF enjoys full autonomy here. The Committee and the Director have exchanged views on the question of changes to the organisation chart. The Committee feels it should be asked to give a formal opinion on such changes, given its budgetary responsibilities, and that OLAF should equip itself with the means to exercise its autonomy and assess human resources requirements on the basis of an analysis of posts and the links between them.
- Staff: the situation varies depending on the particular aspects of management:
 - Appointment of A2 Directors and A3 Heads of Division (officials): OLAF enjoys autonomy but must follow the customary Commission procedure, including referral to the Consultative Committee on Appointments in its ad hoc composition for OLAF.
 - Appointment of Directors, Heads of Unit and Advisers (temporary staff): OLAF enjoys autonomy within the rules on advertising calls for applications and on ensuring competition between candidates (no direct negotiation). These procedures may be laborious, but they have been designed to ward off criticism of a lack of transparency and avert the risk of disputes.
 - Appointment of A3 and A4 Heads of Unit: like all other Commission departments, OLAF enjoys autonomy under a new procedure in force since December 2000.
 - Staff selection procedures: OLAF appoints 2/3 of the members of the selection committees and competition selection boards which administer these

procedures; the remaining 1/3 are appointed by the Central Staff Committee, preferably chosen from among OLAF staff.

- Careers and promotions: because this area has a direct impact on the Commission budget, current practice is that promotions within OLAF are still subject to the rules applicable to all Commission departments. So, for promotion purposes, the appointing authority is the Commissioner responsible for personnel, who of course decides on the basis of a departmental proposal, but within the limits of a pre-determined rate of all staff eligible for promotion, depending on the budget available. Discussions are under way in OLAF to remedy the defects of this system, which deprives the Director of part of his decision-making powers on promotions (his power of proposal is unaffected) and is a tangible reminder for the workforce that they form part of the Commission's managerial staff.
- Budget: a distinction must be drawn between the preparation and implementation of the budget:

On the preparation side, the preliminary draft budgets for 2000, 2001 and 2002, presented by OLAF to the Commission's Director-General for the Budget under Article 6 of Decision 1999/352, were transmitted to the budgetary authority by the Commission with no amendments. The Supervisory Committee remarked in its two previous reports that this practice appears to be consonant with the principle of OLAF's budgetary autonomy.

However, during the preparation of the preliminary draft budget for 2003, when OLAF asked in its contribution to the APS procedure in January 2002 for the creation of 26 additional posts "to cater for eligible objectives under the three priorities set by the Commission",¹⁰ the Commission's Director-General for the Budget rejected the Director's request for 20 posts and 4 seconded national experts for the 2003 financial year¹¹ on the grounds that he had decided to submit no requests for new posts to the two arms of the budgetary authority (Parliament and the Council).¹²

¹⁰ Preliminary draft budget for 2003, working document, IV.A.2.

¹¹ Letter from Mr Mingasson dated 22 April 2002.

¹² OLAF has maintained its initial request.

The Director-General also proceeded to reduce appropriations. According to the Commission, the "zero" growth policy adopted in order to abide by the ceilings of the financial perspective meant that any increase in posts in one department would lead to an equivalent reduction in posts in another department.

On 10 April 2002 the Supervisory Committee delivered a favourable opinion on OLAF's preliminary draft budget for 2003,¹³ while regretting that "the preliminary draft was not produced on the basis of a clear and precise definition of OLAF's new tasks and a programme of activities presented for the Committee's Opinion" and noting that "the Office must set its overall priorities as regards investigations and follow-up at the same time as it fixes its 2003 budget in the light both of directives from the European institutions and of the risk sectors identified by OLAF itself".

In the absence of guidelines specific to OLAF, the Commission's priorities tend to prevail. It stands to reason that this state of affairs is incompatible with OLAF's independence.

As regards budget implementation, the legal instruments stipulate that OLAF has complete autonomy. However, in practice, OLAF turns to Commission departments for management tasks, as it lacks the necessary infrastructure. In its first two reports and in several opinions, the Supervisory Committee has recommended that OLAF equip itself with the functions it needs to exercise its independence. During the present financial year, the Commission has intervened in OLAF's management, notably through its Financial Controller, its Legal Service and DG ADMIN. The Supervisory Committee regrets that no action has yet been taken on its recommendations.

I – 2. OLAF's autonomy of management

Autonomy of management within OLAF is put into effect through its own structures. The Director does in fact exercise his powers as appointing authority and in relation to internal organisation. He recently set up an internal audit service and,

¹³ Opinion No 3/2002.

after repeated recommendations by the Supervisory Committee, is planning to equip OLAF with a system of budgetary control and management.

OLAF has not yet adopted the detailed rules which, pursuant to Articles 6(1) and (4) of Decision 1999/352, would enable it to lay down the framework for its autonomy, particularly in the field of recruitment and budget management.

OLAF should equip itself with suitable structures, particularly in the legal and budgetary fields and in personnel management, so that it can apply its own priorities and analyse, and possibly challenge, Commission initiatives that might jeopardise its autonomy of management. (see also Chapter III, points 2.2.1. and 2.2.2.).

I – 3. Independent status of staff

I – 3.1 Independence of the Director

Regulation 1073/99 sought to consolidate OLAF's independence by among other things laying down a special status for its Director,¹⁴ who is appointed by the Commission, on the basis of an agreement between the three institutions, from a list of candidates approved by the Supervisory Committee. The Director may even bring an action against the Commission before the Court of Justice if he feels that a measure taken by the Commission calls into question his independence.

However, in practice, this special status does not fundamentally mark out the Director of OLAF from Commission Directors-General.

First, the right to bring an action against the Commission does not in itself place OLAF's Director on the outside. The Director-General of Financial Control has

¹⁴ Article 12 of Regulation 1073/99 – Article 5(1) of the Commission Decision of 28 April 1999.

a similar right,¹⁵ although his status within the Commission hierarchy is not fundamentally different from that of the other Directors-General.

Second, the fact that the five-year term of OLAF's Director is renewable once and that the Commission enjoys a degree of discretion as regards the terms of renewal (e.g. whether or not to publish a call for applications in the Official Journal) means that, objectively, the Director is dependent on the Commission.

As regards OLAF's external relations, the Director's role does put him in a special position that is different from that of the Commission. In his contacts with national authorities and the other institutions, especially Parliament, the Director of OLAF has exercised his responsibility to manage investigations in an entirely autonomous manner.

But at the same time, relations between OLAF's Director and the Commission, the Commissioners and Commission Directors-General have naturally become interwoven in the complex web of relations between the body of Commissioners and the Commission's administrative apparatus without the emergence of any real separate OLAF identity within the Commission.¹⁶

I – 3.2 Independence of staff

In its second report the Committee examined the problems caused for OLAF by the origins of its staff and the links they might maintain with the organisations they came from.¹⁷ OLAF responded to the Committee's requests, pointing out that the obligations it imposes on all staff, irrespective of category, are clear and unequivocal. The Committee observed that OLAF had no internal rules allowing for the special nature of its mission. OLAF confirmed that in this respect it applied the provisions of Article 11 of the Staff Regulations of officials, which states that, "An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority,

¹⁵ Under the present Financial Regulation.

¹⁶ See Chapter III-2.2.1: Relations between OLAF and the Commission and Chapter II-2: Internal investigation practices.

organisation or person outside his institution". Under a procedure laid down in the OLAF Manual, whenever an investigator has the feeling that his independence is in jeopardy, he must report on the facts to his superiors.

OLAF also points out that application of these principles is a rather delicate matter, since, on the one hand, OLAF officials can pursue their career within the Commission's departments and, on the other, temporary staff come mainly from investigating services in the Member States to which they are likely to return at the end of their contract. OLAF warns that this situation could lead to a potential conflict of interest and affect the independence of the parties concerned in the performance of their duties.

Above all, the question of the independence of OLAF staff in performing their duties within OLAF has a bearing on the effectiveness and credibility of the Office's operational work. To minimise the risks for the independence of its officials - whether they be temporary or permanent - in OLAF's day-to-day operations, a series of measures have been taken to guarantee the independence of staff in the performance of their duties. For example, a certain geographical balance has been established in the hierarchy responsible for operational work. When teams are formed to take charge of a particular case, care is taken to ensure that knowledge of the national context is well complemented by special expertise in the sector concerned. Involvement of the Magistrates Unit at an early stage in investigations provides an extra guarantee in this respect. The Committee has also noted that in a particular case where OLAF was warned of a possible conflict of interests affecting an investigator who, in a previous post, had been involved in the management and control of the case under investigation, that investigator was taken off the case. It would be useful if systematic checks were carried out when a case is assigned to an investigator to ensure that such situations cannot arise.

On the recruitment front, OLAF itself defines the profiles of the staff to be taken on (e.g. legal/judicial expertise for certain posts such as director of operations, or specialists for internal investigations, intelligence analysis, etc.), publishes the

¹⁷ Second activity report, point 1.2.3.

vacancy notices (among other places on the Internet to avoid any particular "bias" in applications) and sits on the selection committees. So there are guarantees preventing Member States from placing or even imposing their own candidates.

On recruitment the successful candidates come under the responsibility of the relevant OLAF departments and are "adopted" by more experienced colleagues.

The initial compulsory training also includes information on the rights and obligations of staff, with the question of independence being tackled on the basis of the Manual, which incorporates the obligations laid down in the Staff Regulations. However, these provisions are not specific to OLAF, whose special role needs to be taken into account, and this information is provided at a rather late stage.

Finally, the Director of OLAF could exploit to the full the flexibility he enjoys as appointing authority to ensure a smooth transition to national careers by extending contracts where appropriate.

These initiatives should be backed up by a number of other measures:

Consideration could be given to the possibility of requiring OLAF staff to swear an oath before the Court of Justice of the European Communities, following practice in most Member States, which compel their own staff to complete such formalities when called on to investigate financial affairs. The quid pro quo for this oath-swearing procedure might be of interest to OLAF investigators: like their national colleagues, they could be given the right of requisition.

The length of temporary contracts is a relevant factor in the question of staff independence. Given the breakdown of posts between permanent officials and temporary staff, OLAF is faced with the difficulty of deciding on the nature and length of contracts and on the recruitment of temporary staff. Obviously, an excessive rate of turnover among temporary staff would be incompatible with effective investigations. Conversely, if contracts are too long, OLAF will have less scope to recruit staff from national services who have the most up-to-date knowledge of their field.

I – 4. Prospects

In its activity reports in the last two years the Committee has noted and highlighted the ambiguity of OLAF's status. The administrative and budgetary autonomy conferred on OLAF by the legislation is unclear and, in practice, confronted by a number of obstacles. Above all it is inconsistent with the independence of its investigative function vis-à-vis the other institutions and bodies, which was explicitly provided for by the legislator.

To establish consistency here, OLAF's budgetary and administrative arrangements should in the long term be similar to those of the European Ombudsman.¹⁸ Failing this, OLAF should be allowed to report to the European Parliament on administrative and budgetary matters.

The Committee feels that appropriate amendments to the provisions of the Financial Regulation concerning OLAF could go a long way towards making the Office more effective in performing its independent investigative role. Such amendments would also be entirely compatible with its role in assisting the Commission with legislative initiatives in pursuit of anti-fraud objectives.

The Committee believes that bringing OLAF's system of budgetary and administrative management into line with that of the European Ombudsman would be a very important step in laying a sound basis for the future European Public Prosecutor for the protection of the Communities' financial interests. Such amendments to the Financial Regulation would give effect to the principles of administrative and budgetary management set out in the Commission Decision of 28 April 1999 and in Article 13 of Regulation 1073/99, in line with the need for effective independence for OLAF in its investigations.

¹⁸ The Ombudsman's status is laid down in Articles 12, 19(1), 20(3), 22(2) and (5) of the Financial Regulation, as amended by Regulation (EC, ECSC, Euratom) No 2673/1999, of 13 December 1999.

Chapter II

Evaluation of operations

As far as operational activities are concerned, the transition from UCLAF to OLAF consisted mainly of introducing greater transparency (1) in the management of cases and laying down the broad outlines of a structure designed to ensure that such management formed part of a policy on investigations, the first requirement of the operational independence intended by the legislation. As the legislator's intentions were different for internal investigations (2) than for external investigations (3), different criteria must be used for assessing the extent to which they have been achieved. Nevertheless, in both cases the implementation of the legislator's intentions, measured in terms of the value added to OLAF's activities allowing for the resources allocated to the Office, is still only at the stage of sketching the broad outlines and requires further consolidation (4). In any case, this evaluation is only an interim review of the transition from UCLAF to OLAF, and should in no circumstances be considered an assessment of the application of Regulation No 1073/99, which will only be possible once its provisions have actually been applied on the basis of priorities established in a work programme, since this assessment can only be made in terms of such priorities.

Finally, it should be stressed that OLAF has not yet succeeded in overcoming the problem of cases opened by UCLAF and still pending, in which there could be new developments, which are taking up a substantial proportion of its human resources and consequently delaying the handling of new cases. It should be noted that a work and priorities programme would have enabled OLAF to put forward a solution in particular for the problem of politically sensitive internal cases. It should also be remembered that the handling of old cases using the new methods was not made easier by the fact that a number of staff inherited from the former UCLAF remained with OLAF for too long.

II – 1. Operational independence: transparency

The legislator's aim of clarifying responsibility for the management of investigations by entrusting them to the Director¹⁹ required OLAF to provide itself with a management structure and methodology which provided the necessary degree of transparency for monitoring and directing operational activities. The legislation also provided the ideal instrument for the supervision of these operational activities by requiring the Director to forward the Office's programme of activities to the Supervisory Committee each year. For the time being, however, for the reasons set out in point II – 4.1. *Need for an investigation policy*, the Office has at its disposal only those instruments necessary for formal transparency of management, namely the Manual, the *CMS* and the scoreboards. There can be no real transparency until operations are managed within the context of a genuine investigations policy.

II – 1.1 The Manual

Over the period in question, the Manual of internal procedures, especially those relating to OLAF, has not been updated.

OLAF's departments have therefore continued to operate on the basis of a manual which, although it had the advantage of a unified presentation and alerted all staff to certain internal rules, nevertheless had a number of shortcomings, due in particular to the fact that it includes instructions relating to completely different areas of activity, dealing with:

- the internal organisation and operation of OLAF,
- the procedural rules applicable to OLAF's investigations and findings.

With its occasionally imprecise and irrelevant instructions, the Manual would appear to be inadequate, while at the same time going into excessive detail in certain areas. After a year in force, it is clear that some provisions should be revised or added to, or even redrafted. This exercise would have to be carried out with the assistance or under the supervision of the magistrates' unit.

At the same time a reference to all the rules of procedure which apply to investigations in order to protect litigants' rights should be included in the manual.

II – 1.2 CMS

To judge by its name, the purpose of the CMS, or "*Case Management System*", should be to manage the Office's cases. In fact, this IT tool is used for referencing cases and the stages reached in investigations. The CMS is now proving to be very useful in improving the Office's transparency. However, its capacity for monitoring and analysing cases is limited and it is still proving to be less than fully reliable at the present time.

The CMS is at present more a referencing and case-monitoring tool, and offers only limited facilities for analysing frauds or producing synthesis studies on the basis of them.

The system does not at present allow for digital storage and classification of case documents. Moreover, the same case-file may, under a single registration number in the CMS, correspond to more than one investigation, or it may not correspond to any investigator and refer to classifications in different and unspecified places within the Office.

It is vital that the CMS should allow case documents to be scanned in the near future and should be developed so as to take account of the needs of the Intelligence Directorate. Half-way through its development, the CMS could be evaluated in terms of users' needs; these can vary widely, since the CMS should at once be a tool for managing investigations, a means of monitoring them and following them up, and the means of preference for providing information for analysis by the Intelligence Unit and providing the Institutions with information on trends in crime against the Community budget.

¹⁹ Opening of investigations: Article 5 of Regulation 1073/99; directing the conduct of

II – 1.3 Scoreboards

The scoreboards used for keeping the Committee informed are taken from the CMS database. Since data from before 1999 could not be recorded in reliable bases, it remains difficult to make use of specific items of information whenever old data has to be used.

For the period after 1999, however, the data from the CMS used to create the scoreboards which keep the Committee informed is acceptable and enable it to identify areas and cases for inspections.

This increase in the formal transparency of management via the Manual, the CMS and the scoreboards would have no impact on the quality and efficiency of operational activities were it not accompanied by strict case management structures, in particular the introduction of a Registry-like body.

II – 2 Practices in relation to internal investigations

The importance attached by the legislator to internal investigations in Regulation 1073/99, compared with external investigations, has no basis either in the number of cases or in the size of the amounts involved in the phenomenon of corruption and fraud within the institutions which, as far as one can tell, is no worse at Community level than in other similar situations. It is clear that the legislator intended in this way to give priority to and take steps to fill a gap in the protection of the Community's financial interests: the inadequacy of procedures for invoking the liability of Members and staff of Community bodies and institutions. To assess the extent to which this priority on the part of the legislator has been taken into account, the Committee examined the measures adopted during the period under consideration and tried to quantify the effect of these measures.

investigations: Article 6.

II – 2.1 Measures taken by OLAF

Over the period under consideration, the Committee wanted to be able to assess the impact of the measures taken by OLAF to take account of the comments made in its second activity report largely on the basis of an audit carried out by the magistrates. Following the second activity report, the Director-General of the Office decided to reorganise practices in the area of internal investigations by a decision in January 2002. This decision covered the following points:

- an active recruitment policy for new staff led to an increase in the number of investigators assigned to pool 1 from 19 in October 2001 to 30 on 1 April 2002. This increase was offset by a number of staff leaving OLAF;
- the unit responsible for the CMS sends the pool 1 managers a monthly report which can be used to identify investigations subject to abnormal delays and decide on appropriate action;
- creation of a standard document classification and inventory system;
- regular meetings between advisers and investigators to monitor the development of cases;
- involvement of the magistrates' unit from the earliest stages of investigations and advice from the magistrates' unit in serious cases of fraud;
- each new investigator is placed under the supervision of a "tutor", an experienced investigator, for the first few months of service;
- finally, the use of standard statement forms. Since the beginning of 2002, OLAF's investigation teams working on internal investigations have been using model statement forms prepared by the magistrates' unit for taking statements from suspects or witnesses.

These measures should bring about a real improvement in the quality of internal procedures conducted by OLAF. However, it is difficult to quantify the effects because they are very recent. It should be noted that they are necessarily limited by the fact that OLAF's investigative powers are too limited to be fully effective when evidence has to be gathered outside the Institution. Naturally, OLAF's officials make use of all the powers at their disposal and conferred on them by case

law,²⁰ and in most cases they are able to gather useful evidence using administrative resources. However, the case must be referred to the national judicial authorities when conclusive evidence must be obtained for acts under criminal law (searching a suspect's home or examining their bank account).

OLAF investigations occasionally also encounter problems in connection with the conditions for withdrawing immunity from Community officials or other staff. The national judicial authorities are sometimes surprised that, even when they are in possession of accusations made by the Director of the Office, they must themselves ask the Institution to lift the immunity of officials whose case has been reported by the Director of the Office. A procedure which is better suited to the needs of the investigation should be found.

II – 2.2 Practice

The Committee's assessment of internal investigative activities is based on information obtained from the scoreboards, the information sheets supplied by OLAF, the audit carried out by the magistrates in September 2001, the examination of investigation case-files selected on the basis of the scoreboards, the Committee's contacts with the Institutions and the national authorities, and the information sent to it in the context of complaints from litigants to the Director of OLAF and the European Ombudsman.

This assessment has not yet been able to cover a genuine typology of investigations, which would imply a synergy between the functions of gathering and analysing information and the investigative function which does not yet exist (cf. Chapter III.1). The assessment did, however, consider three main aspects.

²⁰ Judgment of the Court of First Instance in Case T 74/99 *Tzoanos*, 19 March 1998, paragraph 320: "In that regard, the question of any unlawful entry does not arise, since both the computer and the office which the applicant used in Unit XXIII.A.3 were provided by the Commission solely for the purpose of his duties as Head of Unit. Apart from the fact that the Commission remains the owner of these professional facilities, the applicant has neither shown, nor even claimed, that the Commission conferred on him any individual right over them, apart from the right to use them in the exclusive context of his duties. There is therefore no reason to consider that the Commission was guilty of unlawful entry when it accessed the data in the applicant's computer or entered the space occupied by his office."

- Volume and trends in internal investigations

According to the data from the CMS, the vast majority of investigations opened under the old procedure have now been closed, and 53 of the currently active investigations were opened after 1 March 2000. However, almost half of all current investigations have been open for more than nine months.

Internal investigations: stages in the procedure*				
Stage of the procedure	Commission	Other Institutions	Bodies, offices and agencies	Total
evaluation	7	1		8
active investigations	55	7	2	64
follow-up	20	1	3	24
closed without further action	22	6	2	30
not relevant	11	3	1	15
Total	115	18	8	141

* status on 7 June 2002; source: OLAF

- Cooperation with Community institutions, bodies, offices and agencies

Most of the internal investigations conducted by OLAF (evaluation, active investigations and follow-up) concern the Commission (110). However, OLAF's activities are gradually expanding and the other institutions and bodies, offices and agencies are now aware of the obligation imposed on them by Article 7(1) of Regulation 1073/99 to supply the Office with any information relating to possible cases of fraud or corruption or any other illegal activity. The extent of the obligation on the Institutions to forward this information should be clarified and it would be useful for OLAF to examine, at the same time, the content of the internal decisions implementing the interinstitutional agreement and the practices followed.

In the case of Parliament, most of the investigations were opened at the request of the institution. The investigations involving the Commission, on the other hand, are more varied in origin.

- The purpose of internal investigations

The Committee had pointed out in its second activity report that a feature of the management of internal investigations was the failure to take into account the disciplinary or criminal purpose of investigations. The measures adopted in January 2001 were designed to improve this aspect on a formal level. The institutions have not yet settled the question of how the administrative or disciplinary purpose of these investigations ties in with administrative or disciplinary proceedings against their officials.²¹ The Commission's work in preparing amendments to the Staff Regulations and the Financial Regulation in connection with disciplinary proceedings seems to take little account of the role of OLAF.²² As regards the other institutions, it is difficult to judge whether the opening of an investigation by OLAF should lead to the suspension of any administrative investigation under way.

The Office's links with the judicial authorities as regards internal investigations are in the process of development. The table below summarises the information on internal investigation case-files forwarded to the judicial authorities.

Information and internal investigation case-files sent to the judicial authorities*						
	2002	2001	2000	1998	No date	Total
Closed investigations, established before 1/3/2000	1	2	4	3	2	12
Closed investigations, established after 1/3/2000		2	1			3
Active investigations established before 1/3/2000	1					1
Active investigations established after 1/3/2000		2				2
Total	2	6	5	3	2	18

* (status on 7 June 2002; source: OLAF)

²¹ The Supervisory Committee had stressed the need to settle the question of how OLAF investigations should tie in with administrative and disciplinary proceedings in its first report (recommendation P3) and its second report (recommendation P2): recital 10 to Regulation 1073/99 refers to an amendment of the Staff Regulations of Officials to this effect.

²² Notes from Mr Brüner to Mr Mingasson and Mr Reichenbach dated 6 May 2002. Reply from Mr Mingasson dated 4 June 2002.

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 information²³ and has not been informed of any action taken in response to such recommendations.²⁴ Nevertheless, the Committee has been able to establish that some cases were referred to the judicial authorities when it was clear that the time-limit applicable in the Member State in respect of the crimes in question had lapsed and that consequently the judicial authorities had no choice but to close the case with no further action.

Experience shows that the relationship between OLAF and the courts in Brussels and Luxembourg is good but that it is sometimes difficult to instigate judicial action promptly on the administrative investigation carried out by OLAF. This question of cooperation with the national judicial authorities is a vital one, and the national authorities sometimes have difficulty in appreciating the priority of such investigations and their specific nature.

- Qualitative evaluation of internal investigations

The evaluation in the second activity report²⁵ was largely based on the audit carried out by the magistrates' unit. Since then, the Committee has examined ten internal investigation procedures, two of which were selected to serve as a reference, since they had followed the old methods and structures. It emerged that these two cases fully corroborated the results of the magistrates' audit and, in particular, that they did not take account of the disciplinary or criminal purpose of the investigation, since those responsible or the persons in question had neither been investigated nor questioned. The other cases, which were conducted in accordance with the methods established in January 2002, are significantly better presented. As regards investigative activity itself, and especially its role in protecting the Community's financial interests, the Committee has also taken account of information gathered from the institutions concerned and from national courts or contained in complaints to

²³ Article 9(4) of Regulation 1073/99.

²⁴ Article 11(7) of Regulation 1073/99.

²⁵ Chapter IV.1.

the Director of OLAF or the European Ombudsman. It has found that the effectiveness of investigations continues to be limited in the following areas:

- evidential value of investigations: this has occasionally been reduced because of the conditions in which certain statements were taken, because the independence of an investigator could be challenged or because the individual rights of the person under investigation had been infringed as a result of leaks;
- information gathered: in some cases the institutions involved felt that the information was insufficient or incomplete;
- recommendations made in the investigation reports: the institutions involved sometimes found them impractical;
- subject of the investigation: the institutions feel it is not always apparent that the Community's financial interests are in jeopardy in the investigations opened by OLAF.²⁶

The Office's internal investigation function is at last starting to benefit from the measures on transparency and harmonisation of procedures adopted early in 2001. It could, however, be improved by a clearer definition of "internal investigations", currently incorporated in the "anti-corruption" section, which would make it possible to set up, also within this section, an investigations policy managed by means of a body which would act as a registry. In particular, investigators dealing with internal investigations should be clearly identified, and they could be housed separately from their colleagues dealing with external investigations, since it is important that, in their dealings with the various departments in the institutions and bodies of the Community, OLAF investigators should be clearly identified in terms of their duties and that the people dealing with them should be left in no doubt as to whether they are dealing with investigators conducting external or internal investigations.

II – 3. Practices in relation to external investigations

The powers in respect of external investigations conferred on OLAF by Article 1(1) and Article 3 of Regulation 1073/99 derive from the transfer of the

²⁶ The scope of Article 2 of the Interinstitutional Agreement needs to be clarified in this regard.

powers conferred on the Commission as regards on-the-spot checks and inspections by Regulation 2185/96 and the sectoral regulations. In the process, these powers underwent a qualitative transformation in that the legislature incorporated them in specific and independent anti-fraud measures: these checks and inspections are carried out as part of investigations and have a different purpose from the checks which used to be carried out by the Commission's Directorates-General or even UCLAF. This intention on the part of the legislator should therefore be reflected in practice by making a clear distinction between investigations carried out in accordance with these powers to conduct on-the-spot checks and inspections on the one hand, and the powers of coordination and cooperation with the Member States provided for in Article 1(2) of Regulation 1073/99, which make use of other legal means. In fact, neither the procedures following the manual nor the data recorded in the CMS allow a clear distinction to be made between these two categories of activity. When OLAF refers to the use of a legal basis, in particular Regulation 2185/96, this does not seem to have any implications from the point of view of the purpose of the activity, and in particular the evidential value of the case.

In the absence of an audit of external operations carried out under the same conditions as the one conducted in September 2001 on internal investigations, the Committee's evaluation was therefore concerned with the quantitative aspects of external operations, coordination/cooperation with the Member States and the quality of case management, and took account of an analysis of these activities carried out by the magistrates' unit.

II – 3.1 Volume and breakdown of external operations

According to the CMS data, only thirteen investigations were carried out using the powers under Regulation 2185/1996, which is not in itself the only decisive criterion for investigations provided for in Article 3 of Regulation 1073/99. One of the investigation case-files examined by the Committee, which included an inspection on the basis of Regulation 2185/1996, was made up of an investigation report, which could in theory have been sent to the judicial authorities, consisting of a purely administrative report based on no independent findings and offering no evidence. The methodology of these autonomous inspections should consequently be improved.

The table below, provided by OLAF, shows that on 1 March 2002 2 921 items of information on investigations were archived and gives a breakdown by sector of activity. It shows that 646 investigations are in progress, 361 are at the evaluation stage, 586 are being followed up and 386 have been closed.

SECTORS												
	Agriculture	Alcohol	Anti corruption	Cigarettes	Customs	Expenses	Ext. Aid	Precursors	Structural Funds	Commercial ventures	VAT	Totals
Active investigations	63	11	66	43	117	65	85	2	85	87	22	646
Errors	3	-	-	-	-	-	1	-	1	-	-	5
Closed-IRENE	98	44	11	3	8	60	54	-	147	201	1	627
Evaluation	39	-	26	7	87	23	115	6	32	19	7	361
Existing cases	27	2	4	4	7	10	25	2	14	11	-	106
Follow-up	7	3	23	22	92	46	25	113	180	57	18	586
Non-cases	28	-	9	4	11	40	52	-	43	15	2	204
No action	23	15	10	50	55	14	31	48	26	100	14	386
Total	288	75	149	133	377	258	388	171	528	490	64	2921

II – 3.2 Coordination/cooperation with Member States

Most operations are assistance and coordination operations. OLAF does not act as the lead department in either area, the strategic or operational decisions in an investigation being managed by the national authorities. Its role in such operations is rather to act as a switching point, redistributing information from either Member States or Commission Directorates-General.

Its role as information hub can also involve giving impetus to that information, which can in turn result in OLAF departments calling on Member States to take further action.

In addition, OLAF's involvement in assistance or coordination activities make it possible to take stock of any fraud committed on European territory and its impact on the Community budget.

OLAF could play an important role by sending mutual assistance reports to Member States to inform them of the emergence of fraud cases identified by the Office. The following table provides figures on mutual assistance reports and shows an overall drop in the number of reports sent to Member States.

It would accordingly be desirable for the Office to carry out an internal evaluation of the management of such procedures and to draw up as soon as possible a guide on current mutual assistance procedures which could be of value to new officials and staff recruited by OLAF.

	New cases notified to Member States	AM supplements (existing cases)	Precursors	Total communications
<u>DG XXI</u>				
1990	65	37		102
1991	69	70		139
1992	87	80		167
1993	122	102		224
1994	107	89	7	203
<u>UCLAF</u>				
1995	60	83	24	167
1996	81	51	24	156
1997	76	41	21	138
1998	50	36	18	104
<u>OLAF</u>				
1999	42	25	15	82
2000	38	17	18	73
2001	15	8	12	35

II – 3.3 Case management in external operations

II – 3.3.1 *Origin*

External operations have a number of origins; several sources can be identified.

Firstly, the specialised Commission departments (TAXSUD, AGRI, TRADE) provide OLAF with important sources of information.

Apart from these administrative sources, a relatively significant source is the information given by firms that are victims of the unfair competition caused by fraud on the part of competitors. OLAF regularly receives information or complaints from specialised consultancy firms or even legal firms, some of which may have international status.

Processing the information obtained from these sources means that a proper investigation strategy should be in place from the moment the information is received. The Office is anxious to collect the maximum information and check its consistency and incidence in the light of frauds reported. It then carries out an initial evaluation of the information received and endeavours to obtain evidence from the complainants to add to the investigation file.

Depending on the case, the complaint or the accusation received by the Office will give rise either to a coordinating investigation or an independent investigation proper.

II – 3.3.2 Duration

External investigations relating to assistance or coordination operations are generally lengthy, in most cases exceeding the nine months provided for in Regulation No 1073/99. In March 2002, 300 investigations that had exceeded the nine months in question were notified to the Supervisory Committee.

The following table gives the details of the notifications.

Information notified to the Supervisory Committee Investigations lasting more than 9 months	
2002	27
2001	205
2000	68
Total	300

Even bearing in mind that these often complex investigations are necessarily lengthy and that nine months is thus inadequate, the period should be retained as a reference standard. Steps must therefore be taken to shorten the time needed to carry out investigations. One method would be to monitor each phase of each investigation more closely. Reducing investigation times is an objective that helps to enhance the credibility of the investigation services in the eyes of their interlocutors (Commission

Directorates-General, Member States, judicial authorities). From this point of view, credibility means wrapping up investigations rapidly, although the components of the closed file could be added to another file should new facts come to light.

II – 3.3.3 *Presentation and supervision of cases*

The way in which cases are presented is not entirely satisfactory.

First, the technical presentation of the files could be improved - the documents are not classified methodically, which makes it difficult to consult and understand them.

The files only rarely include summaries of the main facts of an investigation and an analysis of the consequences.

Similarly, apart from the recommendation signed by the Director when the case is closed, there is no reasoned **summary** of each case in each file giving an overall view of the investigation at a single glance.

The presentation of the files and their readability would be improved if the investigators drew up a report at the end of their inquiry explaining clearly the origin of the case, the facts, a summary of the mechanism of the fraud and the outcome. In addition, a summary of this kind should be decisive in any administrative, disciplinary or judicial follow-up. In particular, as regards financial follow-up and recovery operations, a document summarising the duties evaded or defrauded, country by country, and if necessary operation by operation, should be added to the investigation report. Naturally, when drawing up the document and the summary of duties evaded or avoided, Advisers should check the acts concerned. Advisers should also be more involved in the management of cases and of investigators' working time.

Assistance and cooperation operations entail regular supervision of the cases, even if responsibility for follow-up, in particular judicial and financial follow-up, is primarily a matter for the national authorities. It would thus be necessary to introduce activity monitoring, carried out regularly by the Advisers.

In general, external operations do not seem to be supervised regularly by Heads of Unit/Advisers. Thus in some cases, the decisions to close cases were sent for signing by the Director-General a year or a year and a half after the last document was added to the file. It is reasonable to wonder why the decision to close was taken after such a long time rather than being taken immediately.

It is also essential that Advisers are able at all times to see how cases are progressing and to take steps to control and reduce the time spent on each case. By monitoring the progress of a case it should be possible to take decisions at the right time.

In certain cases OLAF did not notify its counterparts in the Member States even though considerable periods of time had already elapsed (e.g. a year or two).

It should be noted, however, that OLAF departments have made a considerable effort to conclude investigations outstanding from the former UCLAF. The difficulties entailed are further increased by the need to manage new investigations initiated since OLAF was set up.

II – 4. Need for operational consolidation

The legislature's intention of placing investigations under the responsibility of an independent Director has not yet been fully achieved. Decisions to initiate and run investigations are still taken by the investigators who are unable to rely on or be guided by priorities, directives or rules defined for the Office as a whole, where the Director is deprived of an efficient management system. Although guidelines for management control by the Director have indeed been definitively adopted in the areas of structures and recruitment, the following areas require consolidation.

II – 4.1 Need for an investigation policy

The lack of an investigation policy affects not only transparency and responsibilities but also practical aspects. It makes it very difficult to manage the

volume of investigations and human resources, especially as regards the number of cases in the follow-up phase. The practical measures taken so far by OLAF to deal with these difficulties are not particularly effective: the proposals to open investigations submitted by investigators are systematically approved by the management bodies and incorporated *a posteriori* in a "prioritisation" plan. The response to the problem of the growing number of cases has been to recruit new staff. The lack of any policy also weakens OLAF when it is confronted with the priorities of other authorities that do not have the same responsibilities.

Yet an investigation policy was the aim of the legislator when it required an annual work programme to be submitted to the Supervisory Committee (Article 11(7) of Regulation No 1073/99). Thus it is not only necessary but also mandatory for efforts to be made by OLAF to attain that objective as soon as possible.

The policy should consist of two levels. At the first level, it should define OLAF's general objectives, as laid down by the legislator and specified by the Institutions, taking account of the result of the ongoing analysis of OLAF's various functions and tasks and their interconnection, on the basis of which the functional relations between the Office and its partners, institutions and Member States should be defined.²⁷ At the second level, the policy should identify the main features of the Office's operational action on the basis of priorities established according to the risk analyses carried out by the strategic intelligence unit and rules laid down by the institutions responsible for budgetary matters (Parliament, Council, Commission and Court of Auditors) in connection with those responsibilities, thus providing the Director with a tool for management control, transparency and responsibility.

In particular, an investigation policy should have an instrument to assess and supervise the initiating and running of investigations. The management tool role of the present "executive committee" needs to be more detailed and confirmed, possible in the Manual.

²⁷ As part of the service platform project.

II – 4.2 Supervision and control of the management of investigations and operations

It is difficult to produce a general evaluation of case management as practice continues to differ according to the sector. The differences are due less to the different nature of the activities of each sector than to the confusion between investigation activities and coordination/assistance activities, both of which involve the same procedures. The amount of work, the number of cases being evaluated or processed and the time spent on processing thus vary considerably from one investigator or sector to another, no precise picture being possible.

OLAF has not yet completed the task of closing old cases and continues to face the difficulty of having to absorb the stock of cases that have accumulated and not been processed. This has been made more difficult by the departure of a number of investigators whose cases were managed by the old methods.

The following tables provides an overall view of the activities of the departments. The figures show that the number of cases opened has risen significantly since 1999. The increase in the number of cases compared with the number of cases opened provides a quantitative picture of the effort to settle old cases.

Investigations by OLAF		
	Cases opened	Cases closed
2002 (January - April)	156	279
2001	499	1027
2000	336	449
1999	154	99
1998	200	133
1997	347	155
up to and including 1996 *	396*	4*

* The data for the period before the CMS was set up are not significant.

A closer look at the statistics obtained from the CMS shows that efforts to deal with the inherited caseload has been at the expense of the management of new

cases: in April 2002 the evaluation function had been delayed considerably, these cases in the initial phase comprising:

- 120 cases opened less than six months previously,
- 51 cases, more than six months and less than a year,
- 25 cases, more than a year and less than 18 months,
- 11 cases, over 18 months and less than 24 months,
- 63 cases, more than two years and less than three years,
- 16 cases, more than three years and less than four years.

OLAF's efforts to set up structures and procedures to improve the monitoring and control of the management of investigations should be continued and intensified. The following measures in particular are concerned:

- developing management tools both for investigations and for human resources based on the CMS, which should become a horizontal structure for all operational activities and prepare the way for a Registry;
- strengthening the management committee, which is to implement investigation policy, apply priorities and manage resources and interdepartmental cooperation; it will have a permanent structure and management and, if necessary, coordinate external and internal investigations;
- redrafting the Manual under the supervision of the Judicial Advice Unit in order to identify and specify both investigation and coordination/assistance procedures and evaluation and investigation functions.

II – 4.3 Review of legality and protection of individual rights

As regards investigation proper, the legislator set objectives in the area of observance of human rights and fundamental freedoms.²⁸ This requirement was recently referred to in a communication from the Ombudsman to the Director of OLAF. A proper response would require a body exercising judicial review, failing

²⁸ Recital 10 of Regulation No 1073/99 "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".

which it is urgent to complete the Manual by incorporating specific rules of procedure on this point (see Chapter II.1.1 above).

II - 4.3.1 *Judicial Advice Unit*

Right from its first meetings in 1999 the Supervisory Committee had backed the suggestion of the Committee of Independent Experts²⁹ that it repeat UCLAF's attempt to recruit judicial officers from the Member States in order to ensure that "cases were presented in a form that was acceptable to the national courts". The Unit was set up by decision of 8 September 2000 of the Director of the Office with the task of establishing appropriate relations with the judicial authorities and helping to strengthen the judicial dimension of OLAF's operational activities. OLAF's objective is to secure expertise on all the national systems; at present, nine legal systems are represented within the Unit. Recruitment for the remaining systems is under way. On the other hand, one Member State has not authorised the secondment of judicial officers recruited by OLAF.³⁰

The incorporation of this Unit within OLAF has encountered difficulties. Originally forming part of Directorate A - Legislation and Legal Affairs, it was attached in early 2002 directly to the Director-General both to emphasise the horizontal nature of its functions and to increase the separation between responsibility for supervision and for the management of investigations. The reform, however, failed to settle the question of the definition of the Unit's tasks and in particular its role in reviewing the legality of investigations.

Any such definition comes up against a question of principle, which is that responsibility for supervising and managing investigations was entrusted by the legislator to the Director of OLAF and that independent supervision must come from outside. The interesting proposal by OLAF to separate the functions of management and supervision in the internal organisation has practical and legal limits.

The main difficulty of that definition, however, lies in the vagueness that still characterises the definition and management of the various tasks and functions of

²⁹ Second report, point 5.11.12.

³⁰ There is the recent decision by the Director to recruit two Belgian judicial officers to improve the monitoring of internal investigations by the Belgian judicial authorities.

OLAF and their interconnections: evaluation, investigation, coordination/assistance and follow-up, the role of the Unit being different for each of these functions. In addition, it is also necessary to define the links between these different functions and the action of OLAF's partners, the Institutions and the Member States, an area in which the Unit should also have an important part to play. The essential need to consolidate the role of the Judicial Advice Unit means overcoming these difficulties.

II – 4.3.2 *Data protection*

The Committee continues to pay close attention to questions concerning the protection of personal data and examines complaints from litigants to the Director of which it receives a copy. It also examines the follow-up to each complaint, as well as the general measures taken by the Office to that end.

It therefore notes that an OLAF Data Protection Officer was appointed on 1 February 2002, pursuant to Article 24 of Regulation No 45/2001, and that the European Data Protection Supervisor is to be appointed at the end of 2002.

II – 4.4 *Effective follow-up*

Effective protection of financial interests and investigations is referred to throughout Regulation No 1073/99, Articles 9 and 10 of which detail the ways in which investigations must be followed up "in administrative or judicial proceedings of the Member State" for external investigations, and the action to be taken, "in particular disciplinary or legal", as regards the internal investigations. The manner in which investigations are followed up is indeed essential to an evaluation of the results of OLAF's activities and in highlighting the purpose of its activities.

OLAF took the legislator's intention into account in its organisation chart by creating within Directorate A a structure responsible for administrative and financial follow-up and by entrusting the Judicial Advice Unit with the task of judicial follow-up. In practice, however, the Committee's findings set out in its second report concerning the inadequate follow-up of internal investigations (point 3.1) and external investigations (point 3.2) are still generally valid.

On the one hand, the follow-up depends by definition on the quality of the investigation and especially the content of the final report and the recommendations it must contain under Article 9(1) of Regulation No 1073/99. The Committee has not identified improvements in this area.

In addition, OLAF is having difficulty in defining follow-up. As stated above, the powers of the Judicial Advice Unit had not yet been finalised and the links between OLAF's internal investigations and the administrative and disciplinary proceedings of the Institutions were still being discussed.

It is also often difficult for various reasons to define follow-up in coordination/assistance operations. The primary responsibility for administrative and judicial follow-up often lies with national authorities. As regards financial follow-up and recovery, the question of the allocation of powers between OLAF and the Commission departments (authorising departments, DG BUDG, Legal Service) has not been settled. The legal position can also hamper financial follow-up considerably if management responsibilities have not been clearly defined.

It is therefore necessary to consolidate the organisation measures taken by OLAF in order to ensure follow-up:

- by clarifying the definition of follow-up in connection both with organisation, in particular by distinguishing between investigation follow-up and the follow-up of coordination/assistance operations, and with investigation reports and recommendations;
- by clarifying the allocation of powers between OLAF and its partners;
- by defining the means and resources to be allocated to the powers thus defined;
- by improving Member States' involvement in recovery and monitoring the recovery of funds committed in error as direct expenditure (see White Paper, Part I: Reforming the Commission (COM(2000)200 final/2) and White Paper, Part 2, (COM(2000)200, 5 April 2000), Action No 96 "More effective management of recovery of unduly paid funds". See also communication from Mrs Schreyer to the Commission of 13 December 2000, document SEC(2000)2204/3 of 12 December 2000).

Chapter III

Institutional developments

From the institutional environment perspective, the transition from UCLAF to OLAF is reflected in the establishment by OLAF of specific relations with the Member States and the Institutions. The general outline of these relations has been defined, as the Committee pointed out in its second activity report,³¹ but OLAF still has to overcome numerous obstacles and resolve various problems if the legislator's objective of putting in place the institutional conditions for operational independence is to be implemented in full.

As regards the Member States, recitals 3, 13 and 21 and Article 1(2) of Regulation 1073/99 set out the principles governing relations between OLAF and the national authorities: subsidiarity and effectiveness. In connection with the Community platform of services project,³² the Office has undertaken a detailed analysis of its missions and functions with a view to defining and organising its cooperation with the Member States in particular. This project remains to be implemented on the basis of that analysis.

As regards the Institutions, the question of OLAF's independence essentially arises in connection with internal investigations within the Institutions concerned. The nature of OLAF's relations with those Institutions and its communication policy towards them (2) are determined by OLAF's conception of its own function and status, which should therefore be examined first (1). But those questions are also raised within a context of change which should be assessed in the perspective of OLAF's incorporation into the remodelled European law-enforcement area (3).

³¹ Second activity report, conclusions, 2.1

³² Activity report for the period 1 June 2000-31 May 2001, point 3.7 (OJ C 365, 20.12.2001 p.61).

III – 1. Functions and status of OLAF

In defining itself, OLAF continues to use expressions such as “a department coming under the Commission”³³ and refers to its status as “hybrid and complex”,³⁴ emphasising the coexistence of autonomous powers and compliance with the Commission’s internal rules. The Office has not yet stated exactly how its various functions are interlinked. The above-mentioned Community platform of services project should help to clarify matters in the longer term.

The ultimate aim of OLAF’s hybrid status under the legislation is, in particular, to enable all anti-fraud³⁵ functions³⁶ to be placed under the same structure so as to promote the synergy of those functions within a multidisciplinary framework. This structure should also enable the recruitment of highly qualified staff for all those functions which, according to Regulation (EC) No 1073/99, are as follows:

- the powers of investigation conferred on the Commission by the Community rules and regulations and agreements in force (Article 1(1) of the Regulation); exercise of the powers conferred on the Commission having been transferred to OLAF by the Regulation (this concerns powers to conduct external investigations as defined in Article 3 of the Regulation with reference to Regulation (EC) No 2185/96, Regulation (EC) No 2988/95 and the sectoral rules), this function being exercised, pursuant to Article 1(2), in close cooperation with the competent authorities of the Member States;

- within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, the Office carries out administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community (Article 1(3) of the Regulation); this power was created by the Regulation to enable OLAF to investigate serious misconduct by staff or members of the Institutions, bodies, offices and agencies which

³³ Preliminary draft budget for 2003, working paper, p. 4.

³⁴ *Ditto.*

³⁵ Existing or created by Regulation (EC) No 1073/99.

³⁶ As defined in Article 2(1) of Decision 1999/352.

may constitute offences likely to give rise to disciplinary or criminal proceedings; this concerns the powers of internal investigation conferred by Article 4 of the Regulation;

- *the design and development of methods of fighting fraud, the Office contributes to this as it is tasked with preparing legislative and regulatory initiatives of the Commission in this field* (Article 1(2) of the Regulation and Article 2(4) of the decision of 28 April 1999); it carries out these tasks in its capacity as a Commission department;

Lastly, it should be noted that Articles 5 and 6 of the decision of 28 April 1999 specify that OLAF *receives resources enabling it to organise with a view to carrying out the aforementioned functions.*

The current structure of OLAF takes account of all these different functions. However, given that the different departments' respective roles and responsibilities are not always clearly defined, their synergy is not yet organised in optimal fashion and is often limited to the effects of mere juxtaposition, which should be done as part of the Community platform of services project.

Synergy between the legislative and operational functions is definitely promoted by coexistence of the Legislation and Work Programme units and monitoring units in Directorate A. Part of the experience which helps to shed light on options for legislative activity is to be found in monitoring activities. However, this form of organisation limits the risks of contagion described by the Committee in its first activity report:³⁷ namely that the link of dependency in respect of the Commission, which is necessary for legislative activity, may spread to investigative activities. Contacts between monitoring and legislative activity are promoted in Directorate A; but the autonomy of monitoring arrangements for investigative activities limits the risks of contagion.

³⁷ Recommendation P2. Cf. conclusion of the 2nd report.

As yet there is no comprehensive, accurate definition of monitoring activities, and no system has been established for the contribution of monitoring to legislative activity.

In addition, the contacts which would be useful between the legislative units and Directorate B's investigation activities have been made more difficult by the compartmentalisation inherited from the previous period which has not yet completely disappeared and which is exacerbated by differences in the status of staff: Directorate A staff are generally officials who work in conjunction with Commission officials, whereas Directorate B staff are generally temporary staff.

Synergy between external investigation functions and administrative monitoring functions should allow lessons to be learnt from the investigators' regulatory or financial findings. It is based on the quality of cooperation between Directorate B and Directorate A which are responsible for those functions. It also assumes that OLAF's administrative monitoring functions have been clearly defined and that they have been clearly distinguished from the responsibilities retained by the Commission, for instance as regards debt recovery or discharge of accounts. These issues, which are still under discussion, should be resolved shortly, subject to an assessment of the workload and resources involved.

The proximity of external and internal investigation functions may disrupt this synergy as it may prompt Commission officials to distrust OLAF investigators if there is confusion between evidence-seeking functions in external and internal investigations. These two functions should therefore be more obviously separated.³⁸

Synergy between data collection and analysis functions and investigation functions should be promoted by the recent establishment of the directorate responsible for *intelligence*. The data collection and analysis function provides a working basis for OLAF investigators, for the legislation function, for the work programme and for the national authorities, and receives information from those

³⁸ Proposal P3 of the Supervisory Committee's activity report as incorporated into the proposals of the second report (3rd indent).

partners. Centralisation of this data collection and analysis should enable data processing and dissemination to be improved.

However, at present, OLAF does not yet have strategic intelligence; as for operational intelligence, it is still covered by Directorate B. In the absence of a clear definition of OLAF's relations with the Institutions, it is difficult to determine what OLAF's contribution in this area could be.

III – 2. Relations with the Institutions

OLAF's uncertainty as to its own function has been reflected in its relations with the Institutions at both operational level (OLAF's interinstitutional function with regard to internal investigations)³⁹ and at organic level (OLAF's position regarding interinstitutional relations and external operations), communication between OLAF and the Institutions being a particularly difficult issue in view of its political sensitivity.

III – 2.1 OLAF's interinstitutional function with regard to internal investigations

In the area of internal investigations, Regulation No 1073/99 has established new powers for OLAF within the Institutions, bodies, offices and agencies. Given that it was necessary to amend the Staff Regulations for these powers to be exercised and that the requisite amendment could not be envisaged in the short term, it was decided that this legal base should consist of decisions taken by each institution and body and that these decisions would be structured within an interinstitutional agreement. This package was adopted "pending amendments to the Staff Regulations"⁴⁰ and, where appropriate, the Financial Regulation, which were to lay down arrangements governing the liability of Community officials and the position and role of OLAF in these arrangements.

³⁹ Internal investigation activities should be assessed successively from an operational perspective (effectiveness of investigations: chapter II.2) and from an institutional perspective (impact on relations with Institutions: the current chapter III.2).

As it happens, the amendments to the Staff Regulations and the Financial Regulation are still pending and OLAF's role in these arrangements has therefore not been settled. The current proposals envisage spelling out OLAF's role within that framework and determining the division of labour with other newly created bodies or departments which are to play a role in this field (Investigation and Discipline Office (IDOC) set up by the Commission decision of 19 February 2002; Financial Irregularities Body (FIB) to be set up in each institution pursuant to Article 66(4) of the draft Financial Regulation). There are even plans to amend the legal instruments underpinning the creation of OLAF.⁴¹

In view of these problems, it is difficult for OLAF to provide a legal definition of its role and the limits on it or to spell out its place in these arrangements.

There are also practical difficulties. Administrative shortcomings in connection with the investigations referred to in Chapter II.2, such as the length of proceedings and the disputed validity of evidence or investigation reports, have made it more difficult to incorporate OLAF into the arrangements governing the liability of the officials of the various bodies and institutions.

The length of internal investigations, which suffered from a long-term shortage of funding because of their low priority status, represented another practical obstacle to effective cooperation with disciplinary proceedings on the part of OLAF. Noting that OLAF investigations generally took longer than a year to complete, institutions were unwilling to use its services in the interests of efficiency.

The evidential value of OLAF investigations, in particular reports on hearings or interrogations, has regularly been called into question by litigants owing to the procedures by which evidence was gathered. Arrangements have been made (cf. chap. II.1.1) to overcome these difficulties. At present, the Committee does not have information enabling it to determine whether the provisions of the Manual issued by the Director with a view to resolving these problems have worked. The Institutions may hesitate to demand evidence if there are doubts about its evidential value.

⁴⁰ Model decision, recital No 7 (OJ L 136, 31.5.99 p. 17).

The Committee also has little information to evaluate action taken by the Institutions on the investigation reports sent to them by OLAF under Article 9(4) of the Regulation, as it has not yet been informed by OLAF, as required by Article 11(7), of the action taken by the Institutions on the recommendations set out in the reports, or of their failure to do so. The Committee has also noted that only the European Parliament and the Commission have so far complied with the obligation to inform the Office of possible cases of fraud under Articles 7(1) and 7(3). However, an application was made in January 2000 by the ESC, further to repeated injunctions by the Council and Parliament, and a document issued by an official and referring to criminal offences was forwarded to OLAF by the Court of Auditors.

Ultimately, OLAF's contribution to the Institutions' and bodies' internal administrative procedures as regards the liability of their members, officials and staff cannot yet be assessed for reasons relating to the incomplete state of the legal framework for these procedures (Staff Regulations) and to the lack of data on the effects of the new methods and structures established by OLAF (operating aspects). In addition, OLAF's remit should be clarified in the light of administrative and disciplinary procedures within the Institutions so as to avoid the risk of confusion or contradictions.

III – 2.2 OLAF's role in interinstitutional relations

The arrangements chosen by the legislator for OLAF's status with a view to ensuring the transfer of powers to combat fraud from the Commission to OLAF and to promoting synergy between legislative and operational functions is based on the duality of functions and arrangements. In practice, this duality has given rise to confusion as regards OLAF's role in interinstitutional relations, particularly vis-à-vis the Commission and Parliament. The objective of independence for the Office was confronted not merely by the principles of responsibility and democratic control, but also by the constraints inherent in the Office's position in the Commission's administrative and budgetary structure.

⁴¹ White Paper on Administrative Reform of the Commission of 18 January 2000, p. 4.

III – 2.2.1 *Relations between OLAF and the Commission*

For the Commission, incorporating OLAF into its administrative and budgetary structure raised a problem of principle, namely that of political responsibility for OLAF's activities, and various practical problems in connection with adapting internal regulations to reflect OLAF's particular independent status.

The problem of principle was cleared up relatively quickly. The Commission made one of its Members, Ms Schreyer, responsible for protecting the Community's financial interests and combating fraud. She exercises political responsibility for the Commission's legislative and strategic powers as regards protection of financial interests with the assistance of the relevant OLAF departments. As regards OLAF's operational activities, which are governed by the principle of autonomy, the Commissioner's responsibility essentially concerns the award of resources and the material conditions of this autonomy, particularly in terms of the budget and human resources. The Commission mentioned in its first two activity reports that measures to organise the exercising of this responsibility were rapidly put in place. As regards this third year, it has been pointed out above that the lack of priorities specific to OLAF created an imbalance, as a result of which the Commission's priorities for the 2003 preliminary draft budget were imposed.

With regard to OLAF's position in the Commission's administrative structure, the question of principle, as the Committee pointed out in its second activity report,⁴² was resolved in the course of meetings with Ms Schreyer (in November 2000) and Mr O'Sullivan (in January 2001): "*it was agreed that a Code of Conduct governing relations between OLAF and the Commission would be prepared so as to give a constructive meaning to the ambiguities of OLAF's status noted by the Committee in its first report.*" In contrast, putting this political concept into practice proved to be difficult and the matter has not been definitively resolved. After OLAF had drawn up a preliminary code of conduct on the basis of a list of all the areas of cooperation with the Commission and its departments, it was eventually decided that

⁴² Introduction.

the provisions concerning OLAF's functioning as an independent investigations department and concerning the Office's administration and management would be annexed to the Manual. Matters relating to OLAF's remit as a Commission department or concerning interdepartmental relations were to be set out in another framework, such as a *MoU*.

There are probably several reasons for this unfortunate procrastination, such as the legitimate concerns of the Commission's Legal Service, which is the only body competent to represent OLAF in court in the event of legal action being taken against the Office, but also the unwillingness of certain Commission departments to acknowledge the specific features of OLAF's status, and OLAF's delay in acquiring the necessary structures and resources to manage this specific status as far as implementing the budget and personnel policy are concerned, although Article 6 of Decision (EC) No 352/99 expressly provides for that possibility.

The consequences are none the less prejudicial, as shown by the following example concerning the implementation of Regulation (EC) No 1049/2001 (EC) of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents in the case of documents concerning OLAF investigations. The Commission effectively delegated the power to reply to confirmatory requests for documents concerning OLAF investigations to the Director of the Office, but also made the exercising of that power subject to the prior agreement of its Legal Service. The Commission decision clearly did not take into account that this power of the Director had in fact already been included in powers granted by the legislator to the Director by virtue of arrangements for managing investigations, and that presenting it as an obligation enabled the Legal Service to interfere in the running of investigations. Efforts were made to find a *modus vivendi* whereby OLAF's independence regarding investigations would not be compromised.⁴³ However, the Director of OLAF did not exclude recourse to the courts to ensure that the independence of its investigations was guaranteed.

⁴³ See Supervisory Committee opinion 1/2002 of 25 February 2002.

III – 2.2.2 *Relations between OLAF and Parliament*

For Parliament, OLAF occupies a very important position in arrangements to protect the Community's financial interests, for which it claims and assumes responsibility vis-à-vis the European taxpayer. In addition to its prerogatives as co-legislator, Parliament exercises supervisory and budgetary powers in respect of OLAF. Parliament, which itself endorses the principle of OLAF's independence, should promote the exercise of that independence. However, it places OLAF's independence within its institutional framework and perceives it as functional independence which does not release OLAF from the obligations and responsibilities inherent in that institutional framework.

In the budgetary control field, Parliament regards itself as entitled to request OLAF to provide it with the necessary information and documents to carry out its checks, as is the case for all the Community institutions and bodies. However, this prerogative on the part of Parliament should not undermine OLAF's effectiveness and independence of action in investigations - which Parliament itself sought to establish. It should therefore have been possible to determine ways of exercising this supervision which take account of the needs of the investigation and the litigant's rights. In practice, however, the provision of documents and information to Parliament has remained the focus of serious tension, particularly where the purpose of Parliament's requests for information is to put the Commission under political pressure.

In the budgetary authorisation sphere, Parliament, together with the Council, acting on a proposal from the Commission, awards the appropriations and posts that OLAF needs in order to function. In order to exercise this responsibility, Parliament requires OLAF to provide the elements underpinning forecasts and, in particular, its objectives and priorities for the year in question.

The fact that OLAF was unable - as a result of restructuring - to spell out its objectives and provide the elements underpinning its forecasts for 2000 and 2001 raised a number of problems for Parliament, which could see no other solution than

setting certain objectives itself (on the basis of Regulation No 1073/99) and freezing the appropriations corresponding to the new headings.

In its annual report for 2000 (point 7.44), the Court of Auditors took the view that “this conditional grant of staff curtails the independence both of the Director and of the Office as a whole.” The Supervisory Committee has paid considerable attention to this issue of independence. It noted that Parliament’s action was not designed to prevent the realisation of objectives which OLAF had set its management, but on the contrary to free OLAF from the constraints and rigidities of the old structure.

In any event, the frozen headings and appropriations were unblocked in autumn 2001 following an opinion from the Supervisory Committee.

However, the lack of real priorities for the 2003 preliminary draft budget could create difficulties for the decision-making bodies.

III – 2.2.3 *Relations between OLAF and the Court of Auditors*

The question of relations between OLAF and the Court of Auditors can be taken in two parts.

First, the Court has an agreement with OLAF under which it systematically informs OLAF immediately of any information or document concerning potential fraud and irregularities which it collects as part of its checks and audits. For its part, OLAF intends to make systematic use of Court of Auditor reports and opinions for risk-analysis purposes within the framework of its intelligence activity.

Second, the Court of Auditors makes an overall or sectoral assessment of OLAF’s activity in special reports or its annual general report as part of its checks and audits.

Accordingly, in report 8/98, the Court evaluated OLAF’s activity, thus making a major contribution to the reform which gave rise to OLAF. The Court is closely monitoring follow-up to this report and the Supervisory Committee has

emphasised on several occasions that priority should be given to the improvements desired by the Court of Auditors.⁴⁴

III – 2.3 OLAF’s communication policy vis-à-vis the Institutions

Of OLAF’s relational problems with the Institutions, the provision of information and documents, which is highly sensitive politically, has given rise to a great deal of tension and has proved particularly difficult to resolve. The Supervisory Committee has had to get to grips with this matter because of its implications for the Office’s operational independence, but also because of the particular responsibility conferred on it by Regulation (EC) No 1073/99 with regard to confidentiality and data protection (Article 8(4)).

It has concluded that the following principles should apply:

- information and documents must be provided on the basis of clear, precise criteria which have been laid down in advance;
- these criteria must be based on an exhaustive list of legal provisions laying down rights and obligations whereby OLAF is required to provide information but also to protect the confidentiality of certain information;
- in accordance with the principles of Community legislation, OLAF must promote transparent management within the framework of its communication strategy;
- lastly, OLAF must endeavour to ensure equality of treatment for the various Institutions; however, this does not exclude taking account of their respective responsibilities.

To date, these guidelines have remained a dead letter and OLAF has often given communication with the media priority over communication with the Institutions. However, OLAF has just adopted, on the above-mentioned basis, a set of guidelines on the Office’s communication policy⁴⁵ conceived as an internal strategic tool and involving the creation of a communication unit responsible for

⁴⁴ For example as regards the administration of investigation files, checks on them by management, respect for individual rights in the course of investigations, checks at the time of recruitment, etc.

⁴⁵ Document provided to the Supervisory Committee at the meeting of 18 June 2002.

implementation; this should improve the current situation and lend a degree of cohesion to the Office's communication policy.

III – 3. OLAF's position within the European Judicial Area

Any assessment of OLAF's relations with EU bodies involved in cooperation on criminal law (Europol, Eurojust and the European Judicial Network) is faced initially with the difficulty that the remit of these bodies has not yet been defined and that they operate within different legal and institutional frameworks. These relations are therefore characterised by a provisional framework and *ad hoc* cooperation.

III – 3.1 The background to cooperation: a provisional framework

The existence of four different European bodies (OLAF, Europol, Eurojust and the European Judicial Network) with a remit to fight organised crime is explained in part by the arrangements governing the functioning of the European institutions, but also by the unwillingness of the Member States clearly to acknowledge a role for the European Community in this field. This situation requires a minimum amount of organisation in the ways in which these bodies interact, but this is not facilitated by the different legal frameworks within which they operate. The different bodies, which operate under the first pillar (OLAF) and third pillar (Europol, Eurojust and the European Judicial Network) respectively, have access to different resources and their respective tasks should in principle be sufficiently different to be complementary. But this complementarity (entailing power sharing between the first and third pillars) cannot resolve horizontal (trans-pillar) practical issues such as exchanges of information. The continuing uncertainty surrounding the remit of each of these bodies makes it more difficult to solve these problems.

If genuine complementarity, as opposed to more or less fair competition, is to be established between OLAF, Europol, Eurojust and the European Judicial Network, these bodies' respective tasks will have to be clearly defined. However, the current report highlights the fact that OLAF has not yet been definitively established. In addition, discussions are under way on extending Europol's action and reinforcing its

operational powers; as for the decision to set up Eurojust dated 28 February 2002,⁴⁶ it left the main issues of cooperation between Eurojust and its partners to be dealt with in future protocols.

III – 3.2 Contents of cooperation: the need for cohesion

The current state of cooperation between OLAF and Europol/Eurojust does not just reflect the provisional character of this legal framework, but also its lack of cohesion.

OLAF maintains periodic contacts with Europol which focus essentially on the nature and scope of future cooperation. OLAF has instructed three magistrates to maintain contacts with Eurojust on an informal basis for the moment.

OLAF has also launched discussions on guidelines for future cooperation, taking account of contacts between the Commissioner with special responsibility for these issues, Mr Vitorino, and the Supervisory Committee⁴⁷ and the analysis contained in the Green Paper.⁴⁸

The provisions of Article 26 of the Council Decision setting up Eurojust⁴⁹ envisage cooperation with OLAF purely from the viewpoint of a contribution by the Office to Eurojust's work in coordinating investigations and national proceedings within the framework of the FIB. The possibility of Eurojust contributing to OLAF investigations is not envisaged. It should also be noted that these provisions place Eurojust's relationship with its various partners solely within the framework of cooperation to complete Eurojust's remit of coordinating, assisting and supporting national investigations involving more than one Member State.

The need for cohesion in European arrangements for combating organised crime is shown by the complexity of relationships between the various parties involved. Even if the parties' respective powers and objectives have not yet been

⁴⁶ OJ L 63, 6 March 2002 p. 1.

⁴⁷ Cf. second activity report, introduction, *in fine*.

⁴⁸ point 7.2.

established definitively, it is not possible to ignore - as is the case at present - the functional aspect of these relationships which, since they concern investigation and justice departments, should be governed by the principle of the legal guarantee of investigations. In addition, given that the current distribution of material powers does not resolve problems of overlapping, it is necessary to state the principle that primary competence for protecting the Community financial interests should lie with the first pillar.

It is currently planned to set out the arrangements for this cohesion within the framework of the agreements or protocols provided for in Article 26 of the decision setting up Eurojust. This solution has a number of disadvantages. It is an *ad hoc* approach which is limited by the definition of Eurojust's remit to questions of judicial cooperation and coordination of cross-border national investigations. It is also a process which will have to take account of the way in which the various partners' respective powers develop and it will be a long-term affair. The Supervisory Committee takes the view that the perspective of a review of the treaties in 2004 on the basis of the Convention's work provides a late but not-to-be-missed opportunity for an overall, cohesive solution to all these problems.

⁴⁹ OJ L 63, 6.3.2002 p. 1.

Conclusion

This third activity report marks both the completion of the first Supervisory Committee's term of office and the end of the three-year period following which the institutions must examine how the system has operated in order to adapt or supplement it, where necessary. Having treated its last annual report as a general stock-taking exercise (1), the Committee has not formulated any proposals or recommendations, as it did in its first two reports,⁵⁰ but has concentrated on presenting an assessment of progress in achieving the objectives of the Regulation and of OLAF's status. On the basis of this stock-taking exercise, the Committee feels that OLAF's tasks must now be consolidated (2) so that it can be made to operate in a way that meets these objectives. This should pave the way (3) for the establishment of the European Public Prosecutor, which the Committee considers as vital for the establishment of a complete, coherent system for protecting financial interests.

1. Progress in achieving the operational objectives of Regulation 1073/99

In drawing up its progress report, the Committee has taken as its point of reference the objectives set by the legislator, the analyses made prior to the drafting of Regulation 1073/99, in particular the Court of Auditors' Report No 8/98 and the Bösch report of the European Parliament of 7 October 1998,⁵¹ and the report by the Committee of Independent Experts.⁵²

The Committee would point out here that, before being able to implement Regulation 1073/99, OLAF had to establish a structure that was suited to its new tasks, in both quantitative and qualitative terms. The delay in setting up this structure was such that, in the Committee's view, the aims laid down by Regulation 1073/99 for investigations have still only been partially realised, although a general outline of the solutions has been sketched out.

⁵⁰ The proposals and recommendations from the first two reports are attached in the Annexes.

⁵¹ C4-0483/98.

⁵² Committee of Independent Experts, Second Report on Reform of the Commission, Chapter 5.

1.1 A comprehensive, programmed approach to investigations

OLAF's responsibility covers "all activities relating to safeguarding Community interests against irregular conduct liable to result in administrative or criminal proceedings"⁵³ and is exercised through "the Office's programme of activities",⁵⁴ which must be submitted to the Supervisory Committee each year. OLAF has laid down the necessary conditions for implementing these provisions of the Regulation, but has not yet managed to put them into effect.

1.1.1 *Establishing an investigation policy and setting priorities*

By establishing an investigation policy and setting priorities, OLAF should be able: *first* to manage its affairs along more transparent lines, and in particular to allocate and assign the resources at its disposal in a rational manner and to organise interdepartmental cooperation by reference to predetermined objectives; *second*, on the basis of criteria matching these priorities, to make choices on the opening of cases and proceedings and on the means to be employed (OLAF investigation, cooperation with national authorities, etc). Up to now, all such decisions have been taken in a pragmatic and often ad hoc fashion by line managers themselves. Neither the Supervisory Committee — as part of its scrutiny of the programme of activities under Article 11(7) of Regulation 1073/99 — nor the budgetary authority has been given the opportunity to examine these priorities.

1.1.2 *Taking account of the purpose of investigations*

Throughout Regulation 1073/99, the legislator stressed the administrative, disciplinary or judicial ends to which investigations were to be conducted, stating that their purpose was to gather evidence in support of disciplinary, administrative or possibly judicial (i.e. criminal) proceedings. The Committee can only confirm here the assessment it gave in its second activity report regarding failings in the

⁵³ Recital No 5 of Regulation 1073/99.

⁵⁴ Article 11(7) of Regulation 1073/99.

disciplinary, administrative and/or judicial follow-up to both internal and external OLAF investigations.⁵⁵

1.1.3 *Clarifying relations with operational partners*

Regulation 1073/99 provides for cooperation in investigations between OLAF and the authorities of the Member States and the Community institutions and bodies. The detailed arrangements for such cooperation are very complex and need to be structured and coordinated in an overall plan setting out OLAF's tasks, which is the only way of ensuring consistency between those tasks (a platform of services). The analyses and discussions required to prepare such a plan have not yet been completed.

1.2 Guarantees of independence and of the proper conduct of investigations

Independence and the proper conduct of investigations are objectives set out in recitals 4, 10, 17 and 18 of Regulation 1073/99, which assigns various means to pursue those ends, in particular a special status for the Director of OLAF and, as a further safeguard, the establishment of a Supervisory Committee. The same objectives have prompted the Director to take a number of measures regarding OLAF's organisation and structure, the most important being the recruitment of magistrates from the Member States to form a department responsible for judicial advice and follow-up. However, the effectiveness of this measure depends on the tasks entrusted to that department and on its status. As pointed out in Chapter II, the Director's plan to strengthen his independence in his watching brief over the proper conduct of investigations, supported by the magistrates, has run up against practical objections.

1.3 New powers concerning internal investigations

Regulation 1073/99 puts internal investigations on a par with external ones, although obviously there is no comparison between them in terms of either the scope or the number of fraud cases. The legislator's intention was therefore to stress the political importance attached to the fight against fraud and corruption within the

⁵⁵ See Chapter II.... of this report and Chapters IV.1.2, IV.2.2 and IV.3.1.1 of the second report.

Community administration, not so much because of the extent of the phenomenon — there is no evidence that it is more widespread than in other public administrations — but to fill the vacuum (judicial rather than legal) which has characterised this field. So far it appears that too little attention has been paid to the legislator's intentions, both at a structural level and in terms of priorities. Moreover, as pointed out in the introduction, the position of the EIB and ECB remains unresolved, so that, as things stand, internal investigations cannot cover the full range of institutions and bodies.

2. The need to consolidate OLAF's status, structure and mission

In general, the legislator set an ambitious target for OLAF, entrusting it with overall responsibility for protecting the Union's financial interests in the operational and legislative fields and asking it to exercise these responsibilities on the basis of an annual activity programme. To this end, the legislator placed considerable means at OLAF's disposal, both in legal terms — investigative powers and independent status — and in budgetary terms, in particular by more than doubling its staff complement.

However, the legislator left many ambiguities in the legal instruments which have led to difficulties, or even conflicts, of interpretation. In particular, attaching OLAF to the Commission's administrative and budgetary structure was seen as the most effective way of ensuring it had the wherewithal to fulfil its mission, even where that mission implies operational independence. However, such an arrangement is feasible only if all the interested parties recognise and pursue the same objective. In practice, this report demonstrates that OLAF does not fully enjoy the legal, administrative and budgetary autonomy that would allow it to set up structures offering an adequate guarantee of its independence and of the proper conduct of investigations.

However, the Committee feels that, the decisive guidelines having been adopted, we can and must envisage consolidating OLAF's status, structure and mission, as a vital step towards achieving the aims laid down by the legislator.

Consolidation should cover:

- **OLAF's administrative, budgetary and legal autonomy, with its status probably developing along similar lines to that of the European Ombudsman (see Chapter I);**
- **the operational level, i.e. the development of an investigation policy, scrutiny and control of the management of investigations and operations, checks on legality, the safeguarding of individual rights and effective follow-up (see Chapter II);**
- **the definition of OLAF's mission and how it relates to the spheres of responsibility of its partners (institutions and Member States), in order to develop, spell out and enhance its specific role as an independent investigative body seeking to protect financial interests (see Chapter III);**
- **the function and the status of the Supervisory Committee as an independent interinstitutional body (see footnote 54).**

3. Preparations for institutional reform

A consolidation exercise of this kind, which could then be assessed by a management audit, would allow OLAF to function effectively and fulfil properly the mission assigned to it by the legislator. It would also prepare OLAF to take up its place in a complete, coherent system for protecting financial interests, the need for which no longer requires any demonstration. The moves which Parliament and the Commission have made in this direction will provide the Convention with the basis for what would appear to be an inevitable discussion of the need for an overall solution that guarantees the effectiveness, transparency and legitimacy of the bodies responsible for pursuing and penalising crime *in* and *against* Europe, and of the procedures they apply.

However, we must also have a clear vision of the requirements specific to the fight against crime, whether it be the legal status of OLAF and the Supervisory Committee or application of the principles of good governance.

OLAF's legal status is defined above all by what it is not: OLAF appears not to fall into any existing category. On the one hand, OLAF is not on the list of *regulatory agencies* (Memorandum from the Commission Legal Service of 20 February 2001 on the Community agencies, see also the Commission *White Paper on European governance*, July 2001). On the other hand, despite its name, it does not appear to fall within the category of *offices*, the differences between offices and agencies having been recently defined in the Commission Communication of 28 May 2002, *A new type of office for managing support and administrative tasks at the European Commission*: offices have no legal personality; they are set up by Commission or interinstitutional Decision; their posts appear in the Commission's establishment plan; and the powers of appointing authority are delegated to a varying extent according to the status of each office. Indeed, OLAF is set aside on the grounds that "the characteristics of the latter result from its particular mission and operating environment and, therefore, are not necessarily transferable on other offices", although no further light is shed on its legal status.

Taking national legal systems as a point of reference, OLAF is something approaching an administration with investigating powers, or a kind of CID dealing with financial affairs, yet its independent status marks it out from this category. That same independence suggests it should be categorised as an independent administrative authority; but OLAF lacks legal personality, has no recognised power to impose penalties and is watched over by a "Supervisory" Committee, which has the task of guaranteeing its independence, the legal nature of which is spelled out no further.

The need to clarify the status of both one and the other becomes even more pressing as questions arise regarding the internal organisation of the European and national institutions. Referring once again to the Commission *White Paper on European governance* (July 2001), it seems that the principles of "good governance" lead to a radical change of model: "the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels" (p.11).

If this formula were transposed to OLAF, it would mean operating a network structure based on feedback and co-regulation between OLAF and the national and European authorities exercising powers in adjacent spheres.

However it is not clear that such a concept is well-suited to the fight against crime. As the *White Paper* specifically points out, co-regulation, the preferred instrument of the new 'virtuous circle' model, "is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State." (p.21). Yet crime in Europe, and above all crime against Europe, in particular against its financial interests, fails on both counts: it affects fundamental basic rights and at the same time involves major political choices. This realisation should encourage us to go beyond the process of co-regulation and to reintroduce a certain hierarchy that will benefit the network leaders without whom log-jams or even breakdowns in the system are inevitable.

There is no doubt in our minds that an OLAF Supervisory Committee made up of leading figures exercising their own activities outside the institutions has neither the wherewithal nor the legitimacy to exercise such a control function, which should be a joint role for the various European bodies responsible for criminal matters.

The present structure (an independent OLAF and an external Supervisory Committee) can continue to operate only on a transitional basis. Even so, the ambiguities over status need to be removed by a clear statement of the Supervisory Committee's independence from OLAF: it is something of a paradox that a supervisory body should depend on the resources placed at its disposal by the body under supervision.⁵⁶

In any event, following on from our response to the Commission's *Green Paper* on the European Public Prosecutor,⁵⁷ we must again insist on the urgency of setting up a judicial authority (a prosecutor and if possible a pre-trial chamber) with

⁵⁶ If the Supervisory Committee's mandate is to be renewed, it is also vital that a clear solution be found to the recurrent problems of the last three years: recruitment and location of the Committee's Secretariat, publication of annual reports, status of the Committee's members, who should not be regarded as experts in a Commission department but as truly independent individuals, etc...

the task of supervising and reviewing all the networks involved in fighting crime in Europe and against Europe. The status of OLAF, and that of Europol, Eurojust and the European Judicial Network, should then be *subordinate* to this judicial authority, rather than *coordinated* by it. The Supervisory Committee could then depart from the scene, having fully completed its task.

⁵⁷ Opinion 2/2002; see Agon, No 34, pp.3 *et seq.*

Recommendations of
Progress report 1999 – 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's 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 Nos 5/1999 and 2/2000, which are annexed to this report.

Proposals of

Progress report 2000 – 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 Departments 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;
- specifying OLAF's function in relation to external investigations and cooperation with national authorities: setting up a structure and recruiting staff to handle this mission (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 investigations

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.

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.⁵⁸ 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

⁵⁸ 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).

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.

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:⁵⁹ 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."⁶⁰

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.

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,

⁵⁹ 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.

⁶⁰ Point 6.2.3.1. of the Green Paper.

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 dysfunctioning that flows from the scale of the procedural differences between Member States.⁶¹ 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".⁶²

⁶¹ See the analyses of the vol. IV of the *Corpus juris*, Intersentia, 2002,

⁶² Tampere European Council, Presidency Conclusions, point 36.

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 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.⁶³

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.⁶⁴

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

⁶³ See Second activity report, point 3.1.1.

⁶⁴ See the Brana Report, Delegation of the French National Assembly for the European Union, 13.2.2002; La Tribune, 15.2.2002.

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.

OPINION 03/2002

on the preliminary draft budget for OLAF for 2003

Rapporteur: Mr Alfredo José De Sousa

1. Introduction

The European Anti-fraud Office (OLAF) is to exercise its powers in full independence of the Commission, the Governments and the other institutions and bodies (Article 3 of Decision 1999/352).

The prime task of the Supervisory Committee is to reinforce OLAF's independence in the exercise of its investigation function (Article 11(1) of Regulation No 1073/99).

OLAF's independence is also expressed in budgetary terms by appropriations for its operation entered in a separate annex to Part A of the Commission budget. The posts set aside for OLAF are also provided for in an annex to the Commission establishment plan.

This is the context in which the Committee is to give the Opinion provided for by Article 6(2) of the Decision of 28 April 1999 and Article 25 of its Rules of Procedure on the preliminary draft budget presented by the Director of OLAF for 2003.

By way of introduction, the Committee notes that this is the first time that it is giving an Opinion on the preliminary draft budget on the basis of the official schedule.

But if the Committee is to do this, it must:

- Receive in good time the preliminary draft budget with figures for each heading and subdivision;

- Make the comparison with the 2002 budget and have information on the increases (if any) in each heading and subdivision, in particular as regards Articles 01 (staff expenditure) and 04 (financing anti-fraud measures);
- Be informed of priorities for investigation activities in 2003 underlying requests (if any) for additional posts.

Article 11(7) of Regulation No 1073/99 provides that “The Director shall forward to the Supervisory Committee each year the Office's programme of activities”, and Article 25(2) of the Committee’s Rules of Procedure requires the Director of OLAF to present “a regular report on the implementation of the budget”, so that an Opinion on the next preliminary draft budget can be prepared in sound conditions.

This information is important to enable the Committee to give its Opinion on the preliminary draft budget 2003. We regret that we were not given the information.

2. Circumstances in which the Opinion was prepared

At its meeting of 5 December 2001 the Committee was informed by OLAF that the broad lines of the structure of the preliminary draft budget 2003 would be put to it at the end of February 2002.

On 5 February 2002 OLAF informed the Committee that the following needs for additional posts (26) had already been identified for 2003: 11 for measures to support applicant countries’ anti-fraud activities; 7 to reinforce AFIS; 5 for protection of the euro; 3 for monitoring the Green Paper on the European Public Prosecutor.

The allocation of posts between units in the Office on the basis of the structure established by the latest change in the organisation chart on 1 February 2002 was as follows: 60 attached to the Director-General (including the Judicial Advice Unit); 54 in Directorate A (Policy, Legislation and Legal Matters); 127 in Directorate B (Investigations and Operations); 48 in Directorate C (Intelligence, Strategy, Operation and Information Technology); and 6 at the Committee’s Secretariat.

At its meeting of 5 March 2002 the Committee reminded the Director of the need to set priorities for action by the Office, in particular as regards investigations, noting that the Office’s organisation chart had been changed without priorities first being set.

At that meeting the Director undertook to present a document within two weeks, setting investigation priorities.

On 12 March the Committee sent the Director a note reminding him of the need to supply the rapporteurs for this Opinion with all the information they needed by 2 April, and in particular with OLAF’s priorities for 2003 and the grounds for all additional appropriations or posts requested.

The preliminary draft budget for 2003 prepared by the Office was given to the rapporteur, Mr De Sousa, on 5 April.

These are the circumstances in which this Opinion was prepared and adopted by the Committee at its meeting of 9 April 2002.

3. Budgetary and procedural framework for the preliminary draft budget

The budgetary authority has determined the budgetary framework within which OLAF is to operate. As regards the determination of appropriations, OLAF enjoys the budgetary autonomy generally conferred on Offices, enabling it to adopt its estimates on the basis of its own priorities. Regarding its establishment plan, the political authority gave it 300 budgetary posts in 2002, within which the Office is to establish structures corresponding to its tasks and status. In particular, OLAF is to manage the transition from 149 to 300 staff that the budgetary authority decided should proceed in two stages of 75 and 76 posts. The authority decided to make the approval of the second tranche subject to verification whether OLAF's organisation chart and staffing truly corresponded to its objectives.

For the preparation of its preliminary draft budget for 2003, OLAF began by informing the Commission (APS procedure, January 2002) of its forecast request for additional posts corresponding to new tasks, evaluated at 26 posts. The Commission observed that only 8 posts corresponded to priorities in its own activities, in particular in relation to enlargement.

According to the Commission, the remaining 18 posts should be found through internal redeployment in view, among other things, of the large number of posts still vacant.

The Committee had hoped last autumn that structures reflecting OLAF's own priorities would be in place for the preparation of the preliminary draft budget 2003. But the Director of Directorate C did not take up office until 1 February 2002 and was not able to present the Committee with guidelines for the future organisation of his department until the meeting of 5 and 6 March 2002. Since Directorate C will play a key role in determining OLAF's future policy on investigations, that policy, obviously, has not yet been established.

Regarding Directorate B, the situation is not much brighter as the Director has still to take up his post. The structure of Directorate B is not yet definitively established, and it is not yet possible to define the prospects for establishing and developing the OLAF project, in particular as regards the procedures for cooperation between the different poles and the role of the different poles and departments in this organisation.

An important factor for establishing this preliminary draft is therefore still absent on account of the circumstances: a clear, precise definition on a hierarchical basis of the new tasks that OLAF is planning to perform, chiefly in the context of its platform of services to formalise its relations with its partners.

4. Methods for establishing the preliminary draft budget

Apart from that, OLAF has endeavoured to evaluate its needs by asking its various units to calculate their respective workloads. The outcome of this exercise was a figure for estimated needs of more than 400 staff. OLAF then endeavoured to reconcile this evaluation with the framework set by the Commission by undertaking a severe selection process and accepting only those new posts which were indispensable for the satisfactory pursuit of its core activities on the basis of its new structure and corresponding basically to the priorities acknowledged for the Commission in the definition of its strategy for 2003.

To produce requests that are acceptable to the different authorities responsible for budgetary decision-making, the Office reduced its evaluations on the basis of the criteria and priorities followed by the Commission in the APS exercise and its anti-fraud strategy. As regards the effects of the reduction on its management, the Office shifts the responsibility for defining criteria for opening new investigations and for allocating tasks as between OLAF and the national authorities on to the Case Management Board, which will decide case by case. Reference is made to the priorities set for the Office by the Director, without further clarification.

Regarding the investigation function, the preliminary draft budget for 2003 presents no practical priorities.

OLAF establishes its requests for additional posts at 20 new post to be added to the establishment plan for 2003 (11 permanent and 9 temporary posts). It also envisages 8 auxiliary posts (for enlargement), financed from administrative appropriations, and 4 seconded national experts, whose salaries are mainly paid by their home departments.

The 32 new posts would be distributed as follows:

- Attached to the Director-General: **2 A** (1 security officer, 1 financial controller)
8 A (auxiliaries for enlargement)
- In Directorate A for administrative and financial monitoring: **8 A** (in Units A3, A4 and A5)
- In Directorate B: **2 A** (investigators)
- In Directorate C: **12 A** (intelligence analysts, IT experts)

The Committee notes that only 2 investigators are assigned to Directorate B and that priority is given to projects linked to enlargement (8), administrative and financial monitoring (8) and intelligence and IT (12).

According to the preliminary draft budget 2003, the staffing situation on February 2002 was as follows: 181 persons were paid, 43 were being recruited and 76 posts remained to be filled (21 already published).

In March 2002 posts were distributed as follows: 60 attached to the Director-General, of which 14 still to be filled; 54 in Directorate A, of which 11 still to be filled; 127 in Directorate B, of which 25 still to be filled; 48 in Directorate C, of

which 3 still to be filled; 6 at the Supervisory Committee, of which 3 still to be filled.⁶⁵

The progression in staff expenditure in 2003 remains moderate (+4.2%), given the automatic index-linking and increment functions; the same applies to the variation in administrative expenditure (+3.2%).

Additional operating appropriations (chapter B5-91), indispensable for the development of information exchange facilities (AFIS) with the Member States (the development of which was previously financed under the Customs 2000 programme) also rise only slightly (+4.1%), assuming a constant legal basis.

5. Conclusions

The Committee notes that the preliminary draft budget for 2003 presented by OLAF constitutes an evaluation of what is needed for the Office to operate on the basis of current conditions and assuming that all the posts entered in the organisation chart for 2002 will be filled by the end of the year.

The Committee:

- Regrets that this year again, the preliminary draft was not produced on the basis of a clear and precise definition of OLAF's new tasks and a programme of activities presented for the Committee's Opinion;
- Believes that recruitments should be speeded up to fill all the posts still vacant by the end of 2002, with effective definitions of missing profiles to prompt the right applications;
- Notes that the Office must set its overall priorities as regards investigations and follow-up at the same time as it fixes its 2003 budget in the light both of directives from the European institutions and of the risk sectors identified by OLAF itself;
- Observes that the Director will have more than 70 staff, including the Judicial Advice Unit, reporting direct to him and that posts should be better distributed over the three existing Directorates.

Finally, the Committee notes that in the third quarter of 2002 the Commission, acting under Article 15 of Regulation 1073/99, is due to present proposals for the adaptation or extension of OLAF's tasks.

The potential impact of this could be a far-reaching revision of the Office's budget for 2003.

Subject to the four observations above, the Committee issues a favourable Opinion on the preliminary draft budget for OLAF for 2003 presented to it.

⁶⁵ The figures vary widely from time to time as staff come and go.