

OLAF Supervisory Committee

Opinion 3/2001

on the possible establishment of a European public prosecutor responsible for internal investigations

Parliament stated that it wanted the Supervisory Committee to deliver an opinion assessing the extent to which the conduct of cases relating to internal investigations might be affected by establishing a European public prosecutor whose remit would be confined to such cases. The Committee has on several occasions supported the principle of establishing a European public prosecutor¹ and, in this opinion, considers, on the basis of its work in the context of monitoring investigation activity, the potential effects of establishing a European prosecutor responsible for internal investigations on the conduct of cases dealt with by OLAF.

The analysis made by the Committee covered OLAF's activity in the area of internal investigations in all the Institutions. It must be pointed out at the outset that such activity has been substantially limited owing to the dispute with the EIB and the ECB, as OLAF did not believe itself to be in a position to conduct investigations within those bodies. The establishment of a public prosecutor for internal investigations should resolve this problem.

The following differences need to be pointed out as regards the concept of internal investigations: in all Institutions, internal investigations relate to fraud or other unlawful activities² occurring in the field of administration and perpetrated by officials or other employees of the European Communities, i.e. expenditure on personnel or buildings management, the purchase and upkeep of equipment, documentation or information. At the Commission, this covers a wider field and also comprises direct expenditure and, pursuant to the principle of connectedness, cases of fraud and other unlawful activities harmful to financial interests, in particular those relating to the operational budget, implicating Members, officials or other employees of the Institution.

It should also be pointed out that the Committee made its analysis as OLAF was about to introduce a new structure, and new working methods had still not had any significant impact on the conduct of investigations. The analysis thus reveals the deficiencies in the old structure³ whilst the solutions it proposes should in part be implemented through the new structure, which must obviously be taken into account.

It should be noted that, as a result of the introduction of transparency into the management of OLAF several months ago, the Supervisory Committee now has tools enabling it to make an initial assessment of the impact of possible intervention by a prosecutor for internal investigations: scoreboards, information sheets on internal investigations, on investigations open for longer than the nine months specified in the Regulation and on files forwarded to judicial authorities; work carried out on the spot by its rapporteurs; its exchanges of views with the

¹ See Opinion 5/99, Opinion 2/2000 and first Progress Report

² It should be recalled that the term 'financial interests' means more than just Community revenue and expenditure and that Regulation 1073/99 explicitly refers to measures affecting the Communities' assets (2nd recital)

³ Where reference is made to management of OLAF, the analysis thus concerns both UCLAF and OLAF.

Director of OLAF and his staff. From the information thus obtained, it has concluded that OLAF activity in the field of internal investigations still accounts, in terms of the number of cases, for a small percentage of the total (about 80 out of 1700), but also that such activity has been increasing rapidly since the entry into force of Regulation 1073/99 (by 70% as compared with 20% for its activity as a whole). Moreover, the internal investigations dealt with by OLAF relate to cases of fraudulent personal enrichment of individual officials and employees acting alone and taking advantage of weaknesses in the administrative set-up, but even more to concerted action by several people, or even networks, and may involve substantial amounts of money.

Internal investigations more often than not entail more detailed investigations by OLAF, as it has sole responsibility for them.

Already, the observations made by the Committee in the context of monitoring internal investigations have revealed closely intertwined problems of *legitimacy* and *effectiveness*, which could to a large extent be remedied by establishing a public prosecutor.

1. Contribution of a public prosecutor for internal investigations as regards the legitimacy of investigations

The reservations concerning the legitimacy of OLAF investigations noted by the Supervisory Committee in its first Progress Report have been borne out subsequently; its examination of case files and objections raised by persons under investigation and its analysis of disciplinary and legal follow-up have shown the question marks regarding respect for the rights of defence to be warranted.

The establishment of a prosecutor for internal investigations should therefore result in a strengthening of the validity of procedures and of the objectivity of investigations.

1.1 Increasing the stringency of procedures

Procedures which have hitherto remained almost exclusively within the administrative domain have been affected by a number of weaknesses:

- absence of judicial scrutiny of OLAF investigations, which has been used as an argument by some Institutions and bodies for contesting the legitimacy of such investigations within their ranks;
- absence of a legal framework for OLAF's investigation methods (examination of witnesses; drawing-up of witness statements; seizure of documents), which has given rise to objections from some people who have been under investigation;
- difficulties of maintaining an information communication policy which respects the rights of those under investigation (in particular to confidentiality in respect of their personal data and the presumption of innocence), given the pressure from the media in some cases;
- the enormous difficulty of taking fifteen very different systems of criminal law and criminal procedure into account when organising investigations.

The reorganisation of OLAF currently in progress (in particular the taking up of duties by magistrates, the introduction of a registration system, the drafting of a manual for investigators and the drawing up of an information policy) should help remedy these problems.

In the long run, however, the establishment of a public prosecutor exercising scrutiny over OLAF's internal investigations in all Institutions and bodies of the European Union would be the best guarantee for the proper conduct of such investigations, as the prosecutor's statute would be laid down as such and a unified set of clear rules would ensure that the evidence thus gathered was valid.

1.2 Strengthening the objectivity of investigations

The conduct of OLAF investigations seems hitherto to have taken place partly on a discretionary basis:

- despite a marked improvement in particular as regards the timing of the decision to open an investigation and of the registration of the case file, the Committee notes that it is still difficult to identify the criteria on the basis of which decisions to open, or not to open, investigations are taken by OLAF;
- in the objections of which the Committee has been aware (as it indicated in its first report), those under investigation argue that OLAF's investigations consist essentially in gathering incriminating evidence against them and that evidence in their favour is not taken into consideration.

Probably the most appropriate response is to establish a public prosecutor who would be specifically obliged to open an investigation when the required objective conditions were met (mandatory prosecution) and duty-bound to investigate both incriminating and exonerating evidence.

2. The contribution of a public prosecutor for internal investigations as regards the effectiveness of investigations

On various occasions, the Committee has recommended that all OLAF investigations be conducted from the outset in accordance with methods and procedures which take account of the possibility of criminal proceedings and which do not compromise the outcome thereof as a result of procedural irregularities. It also acknowledged the fact that the new Director of OLAF, from the moment he took up his duties, stressed the importance he attached to this requirement.

Consideration of internal cases which OLAF has hitherto dealt with reveals inadequacies as regards judicial and, sometimes, disciplinary follow-up.

In the case of judicial follow-up, such inadequacies primarily stem from the fact that criminal proceedings fall within the jurisdiction of national courts and are covered by strongly divergent sets of national rules, although difficulties may also stem from inadequacies in the way investigations are conducted.

In the case of disciplinary follow-up, the Committee noted that the status of OLAF employees in disciplinary proceedings was characterised by ambiguities which weakened the effectiveness of such proceedings.

The intervention of a public prosecutor responsible for internal investigations would doubtless prevent such ambiguities and, more generally, be likely to improve the effectiveness both of the investigations themselves and of the interface between OLAF and the authorities responsible for the proceedings.

2.1 Effectiveness of investigations - the situation within OLAF

There is a twofold weakness in this area.

Firstly, OLAF employees do not have available to them all instruments used in the field of criminal law and, when they do have such instruments, they are not guided by precise rules ensuring proper use thereof; moreover, because there are no unified rules, it is not possible to guarantee the validity of the evidence gathered during investigations. If we take the basic regulations, i.e. 2185/1996 and 1073/1999, whose provisions on OLAF employees' powers of investigation are very vague, the means for conducting investigations are not very effective, as they are more limited than in the criminal law sphere. If a wider definition of such powers is sought, then there must be judicial scrutiny of how they are used.

Secondly, and perhaps as a result of the above, it is possible in certain cases to detect a tendency to confine investigations to inquiries into purely administrative irregularities.

Improved use of criminal law methods and criminal procedure should be achieved by applying the manual drawn up by the Director of OLAF and by recruiting specialised magistrates to OLAF. However, genuine improvements will be made only by establishing an independent public prosecutor and laying down a statute which clearly sets out the prosecutor's prerogatives (in particular as regards decisions to open investigations, to make inquiries in the course of an investigation, to close investigations and, if necessary, to refer matters to the relevant disciplinary or criminal law authorities) and responsibilities (disciplinary arrangements), and stating precisely the rules to be applied (advisability or mandatory nature of prosecution, investigations to secure both incriminating and exonerating evidence, common conditions for the examination of witnesses and questioning of suspects, searches and seizures, or even the monitoring of telephone calls, etc.), so that the search for proof is more effective, and any evidence thus obtained is admissible in all Member States' legal systems.

This is the point at which the effectiveness of investigations is bound up with the effectiveness of follow-up (judicial or disciplinary), i.e. the interface with the responsible authorities.

2.2 An effective interface between OLAF and the authorities responsible for follow-up

Cases that have been the subject of internal investigations by OLAF and forwarded to judicial and/or disciplinary authorities have been few in number and often reveal difficulties that have adversely affected their outcome. In some cases, OLAF was unable to organise the allocation of powers and responsibilities between the various national authorities. In others, the specific features of the proceedings or of national criminal law were not adequately taken into account. In the case of disciplinary proceedings, intervention by OLAF is generally confined to forwarding files to the superior authority within the Institution concerned.

For the reasons set out above, the establishment of a public prosecutor for internal investigations would make it possible to markedly improve the interface with the authorities responsible for judicial and/or disciplinary proceedings.

To conclude, the Committee would firstly like to stress that the assignment of magistrates to OLAF, the distribution of a manual to investigators and the clarification of OLAF's information policy will make appreciable improvements possible in the short term.

However, the Committee also considers that it is necessary to fill the gaps of the existing legal framework which prevent an efficient action of OLAF. In a first step, only the establishment of an independent public prosecutor for internal investigations, governed by a statute which sets out the prosecutor's prerogatives and responsibilities and responsible for applying common European rules, which could be based on the work done since 1996 by the experts in charge of the 'Corpus Juris' project (1997 version and 2000), can provide a response to this problem.

The OLAF Supervisory Committee is of the opinion that, whether the aim is to remove the reservations on the part of certain European institutions with regard to OLAF, to provide a lasting solution to the current problems or to ensure both the effectiveness and the legitimacy of investigations, the establishment of a European public prosecutor responsible for internal investigations would meet a real need.