

OLAF Supervisory Committee

2/2000

OPINION

on

**THE INITIATIVES OF THE INSTITUTIONS
CONCERNING
THE FUTURE OF OLAF**

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Even before OLAF has completed the restructuring required as a result of its having new functions assigned to it pursuant to Regulation No 1073/99 and of its having been allocated the requisite resources (essentially, management autonomy and an establishment plan consisting of 300 posts), several institutions have put forward various initiatives seeking changes in the short or medium term to its functions, its institutional environment or even its status. The Supervisory Committee appreciates that those initiatives have been drawn up on the basis of perfectly sound analyses, in particular those set out in the second report of the Committee of Independent Experts which highlighted the fact that the mechanism established by Regulation No 1073/99 was a temporary solution and that it was now time to consider what additions should be made to it.

In the light of the various initiatives referred to below (1), the Committee deems it appropriate to assess the ambiguities in the new OLAF structure (2), then to analyse, on the basis of the way in which OLAF currently operates, the priorities which must be established as part of its reorganisation (3) and, finally, to emphasise the need for the legal framework to be strengthened (4).

1. Reminder of the various initiatives put forward by the Institutions

1.1. Commission White Paper on reforming the Commission (5 April 2000)¹

Several of the proposals formulated by the Commission in its White Paper concern OLAF, essentially in two areas:

(a) Protecting the Community's financial interests

In this area, the White Paper does not propose changes to the current structure or rules but merely to the relationships between departments, advocating 'better' coordination and closer involvement of OLAF in the legislative process. It also recommends that OLAF's role in recovering unduly paid funds be strengthened.

As regards the way in which OLAF operates, suffice it to say that, if these additional tasks (especially the second) were assigned to OLAF, additional resources would also need to be allocated. Moreover, OLAF's operational management should not intervene in management other than in an advisory role, since that might otherwise lead to an overlapping of powers and responsibilities or even a conflict of interests.

(b) OLAF's role in disciplinary proceedings

The Commission proposes two new features, the impact of which on OLAF's status and powers needs to be studied: the setting-up of an Interinstitutional Disciplinary Board and the establishment of an 'Office', the job of which would be to bring administrative cases before the Disciplinary Board. The Commission also envisages proposing an amendment to the Staff Regulations of Officials in order to implement these measures.

¹ COM(2000) 200 final/2.

1.2. Commission opinion on the convening of an IGC (26 January 2000)²

In its opinion, the Commission proposes supplementing the provisions of Article 280 of the EC Treaty with a legal basis enabling a system of rules defining offences and the penalties they carry to be introduced, laying down the requisite procedures for the prosecution of such offences and creating a European Public Prosecutor. Such a system, which would introduce a judicial safeguard, would no doubt impinge on the way in which OLAF operates.

1.3. Council deliberations concerning the Eurojust project (note dated 28 March 2000)

Addressing the issue of action to combat organised crime in its entirety, the Council is considering mechanisms that could strengthen European police and judicial cooperation arrangements. It will thus be faced by problems of an interinstitutional nature, as the new entities, Europol, Eurojust and the European Judicial Network, have general powers and operate within the third pillar, whereas OLAF has specific powers relating to the protection of the European Union's financial interests and operates within both the first and third pillars. It will therefore be necessary to define the respective roles of the various entities and the relationships between them. It would seem to go without saying that this matter must be resolved through cooperation between these entities, based on the maintenance of the specific features of the protection of the Community's financial interests and the preservation of the efficiency of the current mechanism.

1.4. Parliament's resolutions

(a) Resolution in the Theato report on the protection under criminal law of the Union's financial interests (19 January 2000)

In that resolution, it is noted that the protocols on the protection of the Community's financial interests have still to be ratified by all the Member States, and a deadline for and a linkage between the various stages in the completion of the mechanism's development are proposed.

(b) Resolution in the Van Hulten report on the Second Report by the Committee of Independent Experts (19 January 2000)

That resolution takes into account some of the recommendations made by the Committee of Independent Experts with a view to making additions to the mechanism for establishing officials' liability.

² COM(2000) 34.

- (c) Resolution in the Stauner report on the postponement of the discharge in respect of the financial year 1998 (13 April 2000)

Inter alia, that resolution calls on the Commission to respond to the proposals for the establishment of an external chamber at the Court of Auditors or the Court of Justice to deal with disciplinary procedures in respect of budgetary irregularities.

- (d) Report drawn up by Mr Bösch, on behalf of the Committee on Budgetary Control, on the 1998 annual report on protecting the Communities' financial interests

First of all, this report recalls, and sets out in detail, the proposal to create a European Public Prosecutor's Office. It calls on the Commission to submit, on the basis of Article 280 of the EC Treaty, a proposal to amend Regulation No 1073/99 which would allow, initially, for the creation of a European Public Prosecutor's Office for the prosecution of irregularities committed by members and employees of the Institutions. It also calls for the establishment of a chamber for budgetary discipline under the authority of the Court of First Instance, the establishment of absolute priority for internal investigations, the reorganisation of OLAF so as to guarantee its operational independence and administrative and budgetary autonomy, and additional powers for the Supervisory Committee so that it may ensure that defence rights are guaranteed.

2. The ambiguities of the current legal framework which affect OLAF's independence

2.1. Ambiguities relating to OLAF's status

The legislative authority granted hybrid status to OLAF because of the urgent need for such a body to be established: the creation of an independent organ and the adoption of the acts entrusting to it the requisite powers would have entailed lengthy and cumbersome procedures. The hybrid status seeks to grant OLAF the operational independence sought by the political authorities while keeping the Office within the Commission structure as regards the budgetary and administrative aspects. Although the political authorities took various measures to ensure that OLAF enjoyed the maximum possible autonomy within that structure - such as the terms for the appointment of its Director-General, his role as appointing authority for its staff and as authorising officer for the implementation of its budget, and the specific budgetary structure - in practice OLAF has to cope with a large number of difficulties because not all of the implications of that autonomous status have as yet been properly thought through. Although, as regards the drawing up of budgetary estimates, it now appears accepted that the budgetary authority considers the preliminary draft estimates drawn up by the Office, OLAF does not yet possess the requisite instruments to cope with its autonomy in terms of budgetary and staff management, and the division of management powers and responsibilities between OLAF and the Commission will have to be reviewed with that in mind. In the current establishment phase, these ambiguities might give rise to situations where the Office's independence could be challenged.

It is clear that, if OLAF were to develop as Parliament wishes it to develop, these ambiguities would be eliminated. However, one problem would then have to be resolved, namely the exercise of the powers of the Commission, preparation of which is entrusted to OLAF, for example in the legislative field.

2.2. Ambiguities relating to OLAF's powers

The fundamental ambiguity relating to OLAF's powers arises from a change in the nature of the investigations conducted, a change which has become more marked during the transition from UCLAF to OLAF. Originally, the investigations were purely administrative in nature, being conducted by a Commission department. Now, however, they have become more like criminal law investigations (with particular regard to internal investigations) in order to respond to the wishes of the political authorities. That has given rise to problems concerning the powers allocated to the Office, the safeguards which must accompany its operations, the procedures used and the issues of immunity, inviolability of Members and inviolability of premises.

3. Reorganisation of OLAF: the priorities

The new Director-General took up his duties on 1 March 2000. His work revolves around the need to eliminate as rapidly as possible the difficulties referred to above. In the Stauner and Bösch reports, Parliament emphasised the need to identify the priorities for OLAF's reorganisation. It called for 'absolute priority' to be given to the establishment of a structure for investigations into cases of fraud or corruption within the EU institutions and for structures and procedures to be established for cases to be prosecuted under criminal law or in accordance with disciplinary procedures.

Parliament's concerns are completely in tune with the analyses made by the Supervisory Committee during the first ten months of its work.

4. Strengthening the legal framework

The ambiguities of the current legal framework are such that, whatever institutional changes may be envisaged, the legal environment in which OLAF operates must be clarified as a matter of urgency.

In its Opinion 5/99³, the Committee analysed the extent to which the *Corpus Juris* and the solutions advocated in the follow-up study might help to eliminate the weaknesses and the shortcomings of the current system. It emphasised in particular the desirability of the establishment of a body such as the European Public Prosecutor's Office and, with that in view, supported the Commission opinion dated 26 January 2000 referred to in point 1.2. above. A preliminary European Chamber might also be able to monitor the investigation procedure and determine whether there were grounds for committal for trial.

³ See Annex 1.

As regards the initiatives taken by Parliament with a view to the immediate strengthening of the legal framework, the Supervisory Committee would support:

- the establishment, on the basis of Article 280 of the EC Treaty, of a European Public Prosecutor's Office with powers restricted to cases of fraud and financial irregularities internal to the institutions;
- the establishment of a Disciplinary Chamber to deal with budgetary irregularities;
- the adoption of rules governing the conduct of OLAF's investigations.

Finally, the Committee takes the view that the provisions designed to clarify and supplement the current legal framework should clearly restate the principle that the protection of the Union's financial interests extends to assets held or managed by the Community institutions, organs and bodies and, in particular, to the fight against the counterfeiting of the euro and against fraud committed to the detriment of Community legislation, and that internal investigations concern illegal conduct and actions in the financial sector by officials and other servants of the Community in the exercise of their duties or, in the case of Members of the institutions, in the exercise of their mandate.

Conversely, it believes that the appointment of a hearings officer attached to the Supervisory Committee Secretariat would be in conformity neither with the powers nor with the nature of the Supervisory Committee.

Conclusion

This opinion is based on an analysis of the current situation, one where serious difficulties exist. Although it was possible to draw up the basic texts for the creation of OLAF in just four months, the putting in place of the new structures is far from being completed one year on. What is more, problems arise because of the ambiguous nature of the legal framework with regard to powers, safeguards, procedures and immunities. Whatever action is taken on the measures designed to bring about institutional changes, clarification of the legal framework is urgently required if those problems are to be resolved.

ANNEX I: Opinion 5/99 of the Supervisory Committee on the implications of the possible implementation of the *CORPUS JURIS* (17 December 1999)

At a time when several European Union institutions have started to discuss the implementation of certain parts of the *Corpus Juris*, the Supervisory Committee, in response to a request from the Committee on Budgetary Control, has analysed what the implications of such a step would be in practice. In so doing, it has taken particular account of the experience that it has acquired in its first six months in office as well as of the deliberations involved in its responsibility for supervising OLAF's budgetary and administrative management, where the future operational and administrative organisation of the Office is concerned.

The Committee has based its analysis of the implications of implementing the *Corpus Juris* on its members' initial deliberations about three aspects:

- the implications for the institutional balance of the EU,
- the implications for OLAF's internal organisation, and
- the implications for the organisation of the European Union's external relations as regards the fight against fraud and other illegal activities and as regards the protection of the Union's financial interests.

To begin with, the Committee noted that several problems which had emerged during the early months of its supervisory activities could or should be alleviated by the establishment of OLAF. An investigative policy based on the collection, processing and analysis of information, supported by a reorganisation of units and the recruitment of additional qualified staff, should bring about the first tangible improvement over the current situation.

Another improvement, which is also sought by the political authorities, should be to strengthen OLAF's independence regarding its operational activities (collection of information, investigative activity, follow-up) vis-à-vis the institutions, governments and other bodies, and especially vis-à-vis the Commission. Certain conditions for that improvement can now be said to be on the horizon. The Supervisory Committee is operational; budgetary and administrative autonomy should be assured with effect from 1 January 2000; the financial and human resources for this policy have been made available by the budgetary authority; and the new Director of OLAF should shortly take up his duties in circumstances conducive to his independence. On that basis, the establishment of OLAF should make it possible to alleviate these difficulties; first and foremost, these new resources should be deployed to maximum effect.

The Committee has nonetheless found that several difficulties cannot be resolved by the establishment of OLAF because the legislative authority has not settled certain issues relating essentially to the substantive law applicable and to the judicial control over investigations which is needed to ensure respect for and the safeguarding of individual rights.

OLAF was actually conceived as a temporary solution, one which would resolve an urgent problem pending a more comprehensive and definitive solution which requires the implementation of more cumbersome procedures. It was thus possible to create the investigatory body before the European legal area came into existence. In these circumstances, it is, therefore, not surprising that operational activities are taking place in a framework which restricts both their effectiveness and their legitimacy, since the law applicable - both substantive and procedural - varies from one Member State to another and since the safeguards to ensure respect for individual rights are inadequate.

The Committee rapidly drew up a list of the areas affected by implementation of the *Corpus Juris* and then went on to consider, on the basis of the various proposals put forward, which option would be most likely to resolve the difficulties encountered. It noted that, since the issue was one of strategic approach, the choice would be a political one, but it recognised that a two-stage approach offered the advantage of giving precedence to matters which were politically urgent and, at the same time, lent themselves to less cumbersome procedural solutions. It therefore focused on the proposed first phase, namely the consequences of setting up a European Public Prosecutor's Office responsible for dealing with instances of internal fraud.

The Committee then analysed the extent to which the *Corpus Juris* might provide solutions which would eliminate the weaknesses and loopholes in the present system noted by several observers, including the Committee of Independent Experts.

Firstly, OLAF's current fundamental ambiguity is attributable to its lack of total legitimacy. Its present degree of legitimacy was conferred on it by the Community legislative authority in an act adopted under the codecision procedure by Parliament and the Council, i.e. at a high level in the Community system.

However, there are several question marks hanging over it. Firstly, in several cases considered by the Supervisory Committee, it appears that some persons under investigation believe that their individual rights have not been protected. Secondly, some Community bodies claim that Regulation No 1073/99 does not apply to them. Finally, since OLAF remains part of the Commission's administrative structure, the practical arrangements concerning its independence still need to be clarified.

Although the setting-up of a body of law officers within OLAF would be useful with a view to improving the interface with national judicial authorities, it would not resolve this problem nor that of determining the national legal system applicable in cases of conflicting jurisdictions.

Nor can the Supervisory Committee's scrutiny of OLAF's investigatory activities bridge this gap, since it takes place *a posteriori* and respects the Director's autonomy.

By contrast, the establishment of a European Public Prosecutor's Office, which would exercise judicial scrutiny over OLAF's investigatory activities, would have the effect of enhancing its legitimacy to the highest possible level in the Community legal system, namely that of safeguarding fundamental rights and individual freedoms. The law officers' unit could, however, continue to provide criminal law expertise in connection with the conduct of investigations.

Secondly, OLAF's effectiveness is restricted in several respects within the current framework, and that also makes it necessary to establish a European Public Prosecutor's Office.

To begin with, the establishment of OLAF will not be sufficient to resolve the problems concerning international judicial cooperation. The Committee considers that the proposals put forward in the *Corpus Juris* concerning depositions (by witnesses) and interrogation reports (in respect of suspects), the European arrest warrant and recognition of the validity of evidence obtained by investigators constitute the only feasible solution. Transferring the responsibility for relations with national prosecuting authorities to the European Public Prosecutor's Office will make it possible to eliminate the inconsistencies that the Committee has noted where action taken on investigation reports is concerned.

Secondly, the legislative authority's main goal in setting up OLAF was to step up the fight against internal fraud. On the other hand, it introduced few improvements where external fraud is concerned, with particular regard to fraud involving third countries. By applying the principle of European territoriality defined in the *Corpus Juris*, the European Union should achieve greater consistency in its relations with third countries as regards the protection of financial interests. The definitions of offences in the European context would be valid in the same way as national definitions. In addition, it would be possible to forward European arrest warrants to Interpol.

Finally, OLAF's independence is difficult to ensure in the interinstitutional context, and it disrupts certain balances. The creation of a European Public Prosecutor's Office would certainly be likely to bring about greater clarity. In the long term, it might provide a solution to the problem of legitimacy not only for OLAF but also for Europol. Such a solution would promote the requisite degree of synergy between the two bodies, while enabling the responsibilities of each to be clearly delineated.

The Supervisory Committee is continuing its deliberations about the implications of the implementation of the *Corpus Juris*. It deems it premature to present conclusions about the impact of the *Corpus Juris* on the internal organisation of OLAF before discussing this with the new Director. The Committee also wishes to examine in greater depth the question of the new balance between the institutions that the establishment of a European Public Prosecutor's Office would entail.

As things stand, the Supervisory Committee considers that the setting-up of a European Public Prosecutor's Office responsible for internal fraud, as a first step, would provide a solution to several basic problems which have emerged during its first few months in office.

Conclusion

Even if institutional changes are envisaged, the legal framework must be set out in detail in order to eliminate the ambiguities and shortcomings indicated in this opinion.