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OLAF Supervisory Committee

**Opinion No 1/05**

**on the Commission staff working document on  
complementary evaluation of the activities of OLAF**

Luxembourg, 22 March 2005

On 28 October 2004 Ms Schreyer sent the Supervisory Committee a Commission staff working document on the complementary evaluation of the activities of OLAF which had been requested by the Council and Parliament when examining a report the Commission sent to the institutions on 31 July pursuant to Article 15 of Regulation 1073/1999. Receipt of this working document gives the Supervisory Committee the opportunity to become involved in the procedure set out in Article 15 and to deliver an opinion as provided under this Article, in accordance with the request made by the Council and the Parliament.

The Committee shares the point of view put forward by Ms Schreyer in her letter, that the financial results of OLAF's work are difficult to quantify. It also stresses that a quantitative assessment alone would be insufficient since it does not take certain factors into account, such as the preventive or dissuasive effect of OLAF's activity.<sup>1</sup> However, it could be useful in supplementing and clarifying the qualitative assessment, and should not therefore be completely dissociated from it. The purpose of the Committee's opinion on the complementary assessment will therefore be to assess the extent to which it confirms, supplements or clarifies the qualitative assessment submitted on 31 July 2003. Firstly however, the Committee is of the view that it is worth commenting on the indicators chosen. This opinion must also be used in conjunction with opinion 2/03 on the Commission's first report, which the Committee gave on 18 June 2003.

#### **I. The choice of indicators**

It should first be noted that the working document gives a very broad definition of the "types of cases constituting OLAF's core operational activity", since practically all types of cases are listed: internal investigations and external investigations, coordination cases and assistance cases. This definition extends the scope of the procedure laid down by the Regulation for the closure of investigations (Article 9) to cover all these activities. It therefore only paints a general and indistinct picture of OLAF's activities.

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<sup>1</sup> This is also emphasised in point 1.3.3. of the working document.

Statistical data given in this working document is generally based on this generalised view of the Office's operational work and does not distinguish between the different types of activities. However, this distinction is made in point 1.2, where the distribution of the investigative activity for each type of investigation<sup>2</sup> is shown, and in point 3.1 (Table 9) for agriculture, customs and the Structural Funds.

However, the document tries to show evidence of an evolution in OLAF's operational activities by presenting results for the activities undertaken prior to 1 June 1999, before 30 April 2001, and after this date, which by their very nature are different, since Regulation (EC) No 1073/1999 created a new investigative function. Accordingly it would have been useful to also show the data broken down by type of activity, distinguishing between:

- OLAF's new activities (investigations and judicial assistance) and those taken over from UCLAF (coordination);
  - independent activities and those carried out under the Commission's authority
- and to clarify whether these two distinctions overlap.<sup>3</sup> Such indicators would have made it possible to carry out a more precise quantified assessment of the implementation of Regulation (EC) No 1073/1999.

This generalised presentation means it is not possible to report in any detail on the objectives of the different procedures. By amalgamating data on both investigations and coordinations in the number of openings and closures, the generalised presentation of results in point 1.3 rules out any reference to either the objectives set at the start or the recommendations made when the procedure is closed. It is therefore not possible to establish a link between on the one hand cases dismissed by either national judicial authorities (Table 7A) or disciplinary authorities (Table 7C), and on the other the recommendations to bring criminal or disciplinary proceedings and/or the objectives set when the case was opened.

Furthermore, the effect on the actual outcome of investigations (Table 7B) of continuing for a certain time to use UCLAF's methods is not shown. Similarly, the

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<sup>2</sup> According to the Manual (point 3.3.3.2), coordination, assistance and monitoring activities do not involve investigations and should therefore not be put in the same category as investigation activities.

<sup>3</sup> According to the Manual (point 3.4.1.3), judicial assistance has the same legal base as coordination, which is not an independent activity.

data on the financial impact (point 1.3.3) cannot be linked with any recommendations for recovery - which would be a useful indicator - because there is no indication of who these recommendations have been addressed to or even if they have been made.<sup>4</sup>

In addition, the indicators retained do not illustrate OLAF's work in supporting national judicial authorities, a role the Office has developed and which usefully supplements its investigations.<sup>5</sup>

The changes which have occurred compared with UCLAF's work and methods could also have been better highlighted<sup>6</sup> by indicating more clearly that the operations initiated by UCLAF (up to 1 June 1999) or carried out according to the methods and criteria UCLAF used (up to 30 April 2001) cannot be classed automatically among investigations, since UCLAF had neither the authority nor the means to carry out this kind of activity. Nor does the generalised presentation of the data give a detailed image of how things have developed.

Finally, the indicators used to assess the allocation of resources (point 2) do not allow the working of the structure to be evaluated precisely, since they refer to an organisation chart which does not take sufficient account of the type of operational activity, in particular whether this is independent or not.<sup>7</sup> In its report of 31 July 2003 the Commission referred only to the central administration<sup>8</sup> when it commented that a large number of officials are required to fulfil duties both within the Office's autonomous role and other functions "where the Office operates as a Commission department".<sup>9</sup> It would in fact be difficult and inefficient to manage the budget for funds earmarked for independent tasks separately from that for "Commission department" tasks. However, it is not possible to extend this logic to the independent and non-independent operational tasks, where synergy is only possible if they are

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<sup>4</sup> The data presented under point 1.3.3 and in Annex 2 also relate indistinctly to activities carried out under the responsibility of OLAF (investigations) or of the national authorities (coordination).

<sup>5</sup> Chapter II.B.2 of activity report 2003/2004.

<sup>6</sup> Table 9 shows the development of OLAF's activity by distinguishing between "cooperation cases" and "OLAF cases". This could correspond to a presentation of the changes which have taken place compared with UCLAF, if criminal assistance cases were disregarded.

<sup>7</sup> An attempt has been made within Directorate B to separate the "investigation" and "coordination" roles.

<sup>8</sup> Point 3.2.1 of the evaluation report of 31 July 2003.

performed separately and not merged. The desired mix of tasks performed by the central administrative staff ought not to have any impact on the Office's status, which is characterised by dual rather than mixed features, and should not cause any blurring between independent operational tasks (investigations) and non-independent ones (coordination).

From a technical angle, it is noted that in Tables 1, 2, 3 and 4 "monitoring" cases are presented as a potential stage for all OLAF cases, whereas Annex 1 (definitions from the manual of procedures) treats them as a type of case. There is therefore an unexplained change in methodology.

## **II. The working document confirms the qualitative assessment**

The Commission's evaluation report located the establishment of OLAF as part of a process starting with the creation of UCLAF and having the establishment of a European Public Prosecutor as an eventual objective. It highlighted not only the progress made, especially the creation of a new investigative function which is distinct from the activities carried out by the former body, UCLAF, but also all that remained to be achieved, in particular in terms of linking OLAF's activities with existing procedures. The working document sets out quantitative data confirming these developments.

### **A. The distribution of operational activities between investigations and coordination/assistance**

The Commission's report of 31 July 2003 highlighted the differences between OLAF's operational activities by classing investigative activities under the heading "operational tasks" (point 1.1) and cooperation/assistance activities under the heading "operational partnership" (point 1.2).

Table 5 of the working document presented by Ms Schreyer shows the factors which make it possible to show the distribution between the two categories of activities for the whole of OLAF's period of operation on the basis of the number of cases at the active stage: 269 investigations for 242 coordination/assistance cases. However, these aggregate figures reveal neither trends nor the specific features of certain sectors. On

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<sup>9</sup> Point 2 *in fine*, footnote 21 of the working document.

the other hand, Table 9 of the working document does give precise details on these two points.

The data featured in this table concern agriculture, customs and the Structural Funds, for which no internal investigation has ever been opened. The working document considers that these fields, which only involve external activities, lend themselves better to analyses of the relationship between investigative activities and cooperation/assistance activities. The table first shows a regular increase, in percentage terms, of cooperation/assistance activities at the opening stage: from 22% in 2000 to 79.6% in 2004, with a corresponding decrease in investigation activities: 78% in 2000 to 20.4% in 2004. This development appears to reflect the use of more objective criteria for classifying activities, something the Committee has already observed.

#### **B. Linking investigations with existing procedures**

The Commission's evaluation report noted that the issue of linking internal investigations with administrative and disciplinary procedures carried out by the institutions and Community bodies, and external investigations with domestic procedures has still not been completely resolved. It made recommendations that would enable this to be achieved. These include establishing a "corpus of administrative rules for the implementation of measures of internal and external investigation";<sup>10</sup> "undertaking a comparative analysis of rules applicable to obstructions";<sup>11</sup> "reinforcing Community antifraud investigation powers (Regulation (Euratom, EC) No 2165/96) as regards direct expenditure".<sup>12</sup>

The working document sets out certain quantitative data confirming this.

In terms of internal investigations, Table 10 shows a large number of cases classed either as non-cases (16) or closed without follow-up (74).

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<sup>10</sup> Recommendation No 2.

<sup>11</sup> Recommendation No 4.

<sup>12</sup> Recommendation No 3.

For external investigations, Table 7B sets out the reasons given by the national authorities in support of their negative decisions (55),<sup>13</sup> and Table 7A highlights the length of time taken for processing information submitted by OLAF.

These data confirm that there are limits to the investigative activities which, in the Commission's view, may be due to OLAF's remit (subsidiarity)<sup>14</sup> and the resources at its disposal,<sup>15</sup> as highlighted in the evaluation report.

### **III. The working document supplements and specifies the qualitative assessment**

The evaluation report was not very precise regarding developments in management quality. The working document provides quantitative data showing the improvement in the management of certain procedures.

In particular, Chart 1 compares the figures for closure decisions, highlighting the results of the efforts to clear old OLAF cases. Putting the figures for opening decisions alongside those for closure decisions is a sign of the introduction of new management methods. Lastly, Tables 12 and 13 reveal the improvements made in the evaluation process and in conducting investigations.

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<sup>13</sup> Equivalent to 318 cases sent to national authorities, including cases of investigations, cooperation and assistance and relating both to the submission of final files/dossiers and information.

<sup>14</sup> Point 1.1.2: "The protection of the Community's financial interests being a field of shared responsibility between the Community and the Member States, the relationship between the Community and national levels is a determining factor for effectiveness."

<sup>15</sup> Point 1.1.2: "The Commission considers it useful today to continue the debate on the scope of these regulations, as it has observed certain gaps based on the Office's work." "In the evaluation of Regulation (Euratom, EC) No 2185/96 in 2000, certain difficulties of implementation were noted, in particular the refusal of economic operators to cooperate in terms of access to buildings or documentation (obstruction)."

#### **IV. The working document must be supplemented by an audit**

In order to assess the efficiency of the operational activity, it would be useful to have certain figures relating to the objectives set by the legislator. These objectives are defined in Article 9 of Regulation (EC) No 1073/1999, which details the content of the final report and the follow-up to investigations.<sup>16</sup> Some of these figures do not appear in the working document and could therefore be provided by an audit.

##### **A. Number, type and addressees of recommendations made in final reports**

The working document does not contain data about the number and type of recommendations contained in final reports, nor who they are intended for. Quantitative and qualitative data of this kind would be useful for evaluating the nature and quality of OLAF's investigations.<sup>17</sup>

##### **B. Breakdown of the communications to the national authorities and to the institutions**

###### *- information (Article 10) or transmission of final dossiers (Article 9)*

The working document does not give any precise guidelines regarding the transmission of information to national authorities or to the institutions.

Article 9 of the Regulation gives only the final reports transmitted<sup>18</sup> evidential value as "admissible evidence in administrative or judicial proceedings of the Member State of which their use proves necessary". It is therefore important to be able to identify among the information sent exactly what constitutes final reports compiled in accordance with the procedure laid down in Article 9 and which benefit from the guarantees given by that procedure<sup>19</sup>, and what, in the case of internal investigations,

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<sup>16</sup> The Regulation remains very vague regarding the objectives of coordination operations (Article 1(2): "...in order to coordinate their activities for the purpose of protecting the European Community's financial interests against fraud". Assistance activities are not expressly dealt with by the Regulation.

<sup>17</sup> The OLAF Manual also provides for final reports for coordination and assistance cases but the recommendations contained in such reports necessarily have a different focus.

<sup>18</sup> With the exception of information or even interim reports transmitted which are not "drawn up on that basis" and therefore do not benefit from the same procedural guarantees as the final reports.

<sup>19</sup> Article 9(2): "Reports drawn up on that basis...under the same conditions as administrative reports drawn up by national administrative inspectors..."; Recitals 10, 14 and 16.



the institutions are obliged to follow up. The follow-up to other information transmitted pursuant to Article 10 is less useful in evaluating the effectiveness of operational activity. The data showing this distinction are not immediately available because OLAF uses Article 10 indiscriminately for transmitting information and final reports. Further analysis would therefore be required.

*- The recipients of the final reports submitted*

Regarding the recipients of the final reports, it would be useful to make the distinction between:

- reports drawn up following an external investigation and which must be sent “to the competent authorities of the Member States in question in accordance with the rules relating to external investigations”,<sup>20</sup>
  
- reports drawn up following an internal investigation which must be sent “to the institution, body or agency concerned”.<sup>21</sup>

Regarding the type of authority to which these reports are addressed, the working document provides some overall data on those sent to national authorities (Table 7B) or to the institutions (Tables 7C and 10). The authorities to whom these data are sent are under different obligations depending on whether they are the direct or final recipient: the institutions and bodies which are the direct recipients of a final internal investigation report are obliged to follow this up and inform OLAF, whereas national authorities may be direct (administrative authorities for external investigations) or indirect recipients (judicial authorities). This issue does not apply to information sent where there is no requirement to either follow-up or provide information on any follow up measures. A more detailed breakdown would make it possible to assess more precisely the effectiveness of the investigations.

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<sup>20</sup> It therefore appears that it is for the Community sectoral legislation on external investigations to identify the competent national authorities.

<sup>21</sup> It appears that OLAF also uses Article 10 of Regulation (EC) No 1073/1999 (forwarding to the judicial authorities of the Member State concerned the information obtained by OLAF during internal investigations into matters liable to result in criminal proceedings) to send the final reports to the judicial authorities of the Member State concerned.

- *“interim” reports*

One type of case submitted is not covered by the statistics provided, namely that of the interim reports which are occasionally drawn up by OLAF “in cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority”, but also to enable national judicial authorities to be rapidly informed.

As transmission of such a report to the national judicial authority automatically refers the case to them, it never goes back to OLAF, meaning that any report which has been sent to the national judicial authority is in fact therefore a final report with judicial follow-up, but one which falls outside the rules governing this type of report.

- *the need to fill the gaps in terms of data concerning the transmission of final reports*

There is an obvious need to fill the gaps, particularly because this is the only way it will be possible to carry out an adequate assessment of the effectiveness of OLAF’s operations, taking into account the follow-up measures recommended and actually taken.

Transmitting and following up OLAF’s final reports is important and sensitive work which affects relations within and between institutions as well as the relationship between the Community institutions and the administrative and judicial authorities in the Member States and the protection of the fundamental rights of the defence. These matters should be analysed by a body which receives regular information from the Director of OLAF on the Office’s investigations,<sup>22</sup> and also has access to all the documents, files and data recorded by OLAF, and which can have recourse to inspections, expert advice and studies.

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<sup>22</sup> The Director of OLAF must regularly inform the Committee about the Office’s investigations, the results and follow-up action taken, as well as cases where the institution, body or agency concerned has not followed up the recommendations made by the Office.

**C Points concerning administrative management and the allocation of human resources**

It would be useful to highlight the difference in the nature of the two factors which prevent a precise assessment of the way in which the structure functions, namely the fact that there is an inadequate divide between the operational tasks (independent and non-independent) within OLAF, and the lack of analytical instruments for evaluating the use of OLAF's resources for operational activity.

**D. Number and kind of follow-up actions**

Tables 7B, 7C and 10 contain important information on the final results of the operational activity.<sup>23</sup> Additional data would make it possible to specify the relationship between these data and the objectives and procedures to which they relate, for example to which procedures the number of closures without follow-up shown in Table 10 corresponds.

**Conclusion**

The Committee upholds the conclusions given in its Opinion 2/03 on the evaluation report.

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<sup>23</sup> However, without stating precisely whether this concerns investigations or coordination/assistance.