

OPINION
FOR THE
EUROPEAN PARLIAMENT'S
COMMITTEE ON BUDGETARY CONTROL

ON

THE IMPLICATIONS OF THE POSSIBLE IMPLEMENTATION
OF THE *CORPUS JURIS*

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At a time when several European Union institutions have started to discuss the implementation of certain parts of the *Corpus Juris* the Supervisory Committee, at the request of the Committee on Budgetary Control, has analysed what the implications of such a step would be in practice. In this exercise it has particularly borne in mind the experience that it has gained in its first six months in office, as well as the thinking that has emerged in connection with 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 thoughts about three aspects:

- the implications for the balance between EU institutions,
- the implications for OLAF's internal organisation, and
- the implications for the organisation of the European Union's external relations in connection with the fight against fraud and other illegal activities and in connection with the protection of financial interests.

To start with, the committee noted that several problems which had emerged during the early months of its supervisory activities could or should be eased 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 desired 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 budgetary and staff 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 ease 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 protection of individual rights.

OLAF was conceived, in fact, as a temporary solution to resolve an urgent problem, pending a more comprehensive and definitive solution which calls for 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, in that the law applicable - both substantive and procedural - varies from one Member State to another, and in that there are inadequate safeguards to ensure respect for individual rights.

The committee rapidly drew up a list of the areas affected by implementation of the *Corpus Juris* and then proceeded 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 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 internal fraud.

The committee then analysed the extent to which the *Corpus Juris* might provide solutions, by comparison with the weaknesses and loopholes in the present system which have been pointed out by several observers, including the Committee of Independent Experts.

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

There are several question marks hanging over it, however; first, 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 still appears within the Commission's administrative structure, the practical arrangements concerning its independence still need to be clarified.

Although setting up a body of judicial officers within OLAF would be useful in terms of 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 jurisdiction.

The Supervisory Committee's scrutiny of OLAF's investigatory activities cannot bridge this gap, either, since it takes place *a posteriori* and respects the Director's autonomy.

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

Secondly, OLAF's effectiveness is restricted in several respects within the current framework, which also makes it necessary to set up 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 put an end to the inconsistencies that the committee has noted where action taken to follow up 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, particularly with 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 in connection with 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 consideration of the implications of implementing 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 setting up a European Public Prosecutor's Office responsible for internal fraud, as a first step, would provide a solution to several vital problems which have emerged during its first few months in office.