



Supervisory Committee

PROGRESS REPORT July 1999 – July 2000

25 August 2000

DV\420021EN.doc

EN

EN

Members of the OLAF Supervisory Committee

Mireille DELMAS-MARTY

Chairman.

Professor, Université Panthéon-Sorbonne (Paris I)

Edmondo BRUTI-LIBERATI

Deputy Public Prosecutor,

Court of Appeal, Milan

José Narciso DA CUNHA RODRIGUES

Prosecutor-General of the Portuguese Republic

Raymond KENDALL

Secretary General of INTERPOL

Harald NOACK

State Secretary,

Government of North-Rhine-Westphalia

Contents

	<i>Page</i>
<u>Chapter I - Establishment of new structures</u>	7
A - Establishment of the Supervisory Committee	7
1- Rules of procedure	7
2- Secretariat	8
B - Transition from UCLAF to OLAF	9
1- Operational structure	10
2- Appointment of the Director	
C - Organisation of relations between the Supervisory Committee and OLAF	11
1 – Procedures for obtaining information	12
2 - Assessment	14
<u>Chapter II - An initial assessment</u>	17
A – OLAF’s independence in budgetary and administrative matters	17
B- Functional independence (investigative activity)	19
C-Organisational independence (interinstitutional relations)	20
1- The context	21
2 - OLAF's interinstitutional status	24
3 - Difficulties encountered in interinstitutional relations	25
4 – Involvement of OLAF in interinstitutional discussions on the protection of the financial interests of the EC	28
D- Confidentiality and data protection	29
1. The relevant texts	29
2. Application of relevant texts	30
Chapter III: Limitations imposed by the new structures and possible improvements	32
A – Limitations imposed by OLAF’s status	32
1 - Administrative organisation (P1)	33

2 - OLAF's dual role (P2)	34
3 - OLAF's interinstitutional remit (P3)	34
B - Limitations imposed by OLAF's activities	35
1 - Limitations associated with the internal organisation of investigations (P4)	36
2 - Limitations associated with the institutional environment (P5)	37
Conclusion	40
Annexes:	41
- Calendar of Supervisory Committee meetings	42
- List of opinions and reports by the Supervisory Committee	43
- Opinion 5/99 of 17 December 1999 on <i>the implications of the possible implementation of the Corpus Juris</i>	44
- Opinion 2/2000 of 16 May 2000 on <i>the initiatives of the Institutions concerning the future of OLAF</i>	48
- Report 1/99 of 7 October 1999 on <i>the implementation of Regulation No 1073/1999 of the European Parliament and of the Council by EU institutions, bodies, offices and agencies</i>	54

Introduction

The European Anti-Fraud Office's (OLAF's) establishment phase is not yet complete. Some operations, such as the recruitment of new staff, take time, and the budgetary authority decided that they should be spread over two years. Other operations have not yet been completed owing to the cumbersome nature of the procedures used. In particular, owing to the fact that the Director did not take up his duties until 1 March 2000, consideration of the reform of OLAF's operational structures has not yet been concluded, and the managerial staff are not yet in place. The decentralised management procedures intended to reinforce OLAF's independence have not yet been formally laid down, and this is also helping to delay the introduction of new structures.

From the very start, the Supervisory Committee finds itself obliged to draw the political authorities' attention to the fact that the system which they devised in four months, i.e. from January to May 1999, has not yet been definitively introduced, more than one year after Regulation No 1073/99¹ (hereinafter 'the Regulation') was adopted by Parliament and the Council under the codecision procedure, following the adoption of the Decision of 28 April ('the Decision').

This state of affairs, which is due to the political context that led to the establishment of OLAF, has determined the way the Supervisory Committee's activities, which are the subject of this report, have been organised and conducted.

On the one hand, the establishment of OLAF reflected the political authorities' wish to change not only the mission, but above all, the nature of the entity responsible for combating fraud and all other illegal activities detrimental to the Community's financial interests, the aim being to guarantee the Office's operational independence. The approach initially taken by the Commission was to propose a new, totally independent interinstitutional body. This approach was not accepted by Parliament or the Council, basically because it would have deprived the new body of the Commission's powers of supervision and investigation throughout the time required for the transfer of those powers to the body.

The approach finally adopted made it possible to avoid this kind of break in operations. OLAF is formally part of the Commission and, as such, may exercise the Commission's powers while being endowed with the budgetary and administrative autonomy that is essential for it to be operationally independent.

For the same purpose of avoiding any interruption, the Commission decided to provide OLAF with the entire UCLAF staff as soon as the Regulation entered into force and instructed the UCLAF Director to act as Director of OLAF until the new incumbent, appointed under the procedure laid down in the regulation, took up his post. In actual practice, however, it was not just UCLAF's staff, but also its structures and methods that were transferred to OLAF. It was only in the area of budgetary forecasts, where the Supervisory Committee's opinions clarified the situation, that relations between the Commission and OLAF could be established from the outset

¹ In actual fact Regulation (EC) No 1073/99 and Regulation (EC) No 1074/99. For practical reasons, reference will be made only to Regulation No 1073/99 in the rest of this report.

in a way that was in line with the principles laid down by the legislator. However, during this period, relations between OLAF and the Commission were not well suited to the new autonomy and the principles governing such interdepartmental relations in the Commission remained unchanged, in particular as regards personnel and budget management, something which caused a number of misunderstandings, difficulties and delays.

On the other hand, the Supervisory Committee was established pursuant to the same Regulation precisely in order to strengthen and guarantee OLAF's independence: 'Whereas the Office should enjoy independence in the discharge of its function; whereas, to reinforce that independence, the Office should be subject to regular monitoring of its investigative function by a Supervisory Committee, made up of outside independent persons highly qualified in the Office's fields of activity; whereas the Committee's duties should also include assisting the Office's Director in discharging his responsibilities (recital 17). Following on from this recital, the Regulation stipulates that 'The Supervisory Committee shall reinforce the Office's independence by regular monitoring of the implementation of the investigative function. At the request of the Director or on its own initiative, the committee shall deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress'. (Article 11(1)).

Moreover, Article 11(8) lays down that 'the Supervisory Committee shall adopt at least one report on its activities per year which it shall send to the institutions. Drafted so as to provide an account of the performance of its tasks, this initial progress report of the Supervisory Committee also serves the purpose of drawing attention to the difficulties encountered.

This report outlines the work done by the Committee in accordance with the Regulation, at eleven meetings (the Regulation stipulates that there must be at least ten meetings a year). It has been drawn up on the basis of the minutes of each of those meetings. Apart from the time spent, together with the Secretariat, on preparing and following up the meetings, members of the Committee basically concentrated their activities during their monthly meetings. It should be recalled that the Committee is composed of 'five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the Office's areas of activity' (Article 11(2)) and that these five persons have in no way been relieved of the duties incumbent upon them in their respective Member States.

During this first year, which has been one of transition from UCLAF to OLAF, the Supervisory Committee's activities have been focused largely on the establishment of new structures (Chapter I). This report therefore provides an account of the Committee's deliberations regarding the Office's organisation and functioning. As regards the monitoring of operational activities, however, the committee has had to take into account the constraints and obstacles resulting from the mismatch between the old UCLAF structures and the new tasks that have been entrusted to OLAF. Taking such difficulties into consideration, an initial assessment has been made by reference to the objectives laid down in the Regulation (Chapter II). Lastly, going beyond the difficulties typical of a transition period, the report seeks to identify where the limitations associated with the new structures lie and makes proposals as to how improvements might be made (Chapter III).

Chapter I Establishment of new structures

This chapter will first consider the establishment of the Supervisory Committee (A), then the transition from UCLAF to OLAF (B), and lastly the organisation of relations between the Supervisory Committee and OLAF (C).

A: ESTABLISHMENT OF THE SUPERVISORY COMMITTEE

Even before they officially took up office on 1 August 1999, the Committee members, appointed by common accord of Parliament, the Council and the Commission, met in Brussels on 12 and 13 July 1999 for an initial exchange of views (in the presence of the representatives of the three institutions) on the committee's task and priorities, its working methods and the material conditions for its independence. At this meeting, it was emphasised that the committee's task would not be to act as a governing body intervening in the management of the Office, but, in accordance with Article 11 of the Regulation, to strengthen the Office's independence through regular and, in practice, *a posteriori* monitoring of its investigative function. After carrying out an initial assessment of OLAF's activities and methods at its first meetings, the committee laid down its own working methods, deciding to hold monthly meetings, opting for a system of rapporteurs responsible for preparing the different items of business, and drawing up its Rules of Procedure (as provided for in the Regulation). At the same time, it had to recruit staff for its Secretariat.

1 - Rules of Procedure

The Committee's Rules of Procedure, drawn up on the basis of an analysis of the current functioning of OLAF and of the changes to be made to structures and methods, were adopted on 17 November 1999 and published in the Official Journal of 15 February 2000¹. They organise, group together and specify the provisions of European Parliament and Council Regulation No 1073/99 in order to render operational the rather general legal framework they lay down.

- Tasks of the Supervisory Committee

In performing its task of strengthening the office's independence through regular monitoring of the implementation of the investigative function, as set out in the Regulation, the Committee felt it important to specify in its Rules of Procedure the criteria on the basis of which it is to carry out these monitoring tasks, in particular compliance with the law. These monitoring tasks are not the same thing as the judicial review provided for in Article 14 of the Regulation, which is the responsibility of the Director of OLAF, and, in the final instance, of the Court of Justice, and therefore do not take its place.

- Procedures and means of action

¹ A note of 21 June 2000 drawn up by the Commission's Legal Service on the Rules of Procedure appears to depart from the status and functions of the Supervisory Committee as laid down by the Community legislator.

The Rules of Procedure set out the various procedures under which the Committee is to carry out its investigative role within the terms of the Regulation, lay down the relevant rules and specify the material conditions under which this work is to be done: access to information held by OLAF; use of inspections, expert reports and studies; the hearing of representatives of institutions in the event of a refusal to inform OLAF. The Rules point out, in this connection, that the Committee must refrain from interfering with the conduct of investigations in progress.

- Independent status

The Committee felt it appropriate to reiterate in its Rules of Procedure the importance of its legitimacy and independence. Its members are appointed by common accord of the European Parliament, the Council and the Commission, i.e. by the Union's highest political authorities, and must perform their role in complete independence. The Committee has therefore organised the conduct of its business in such a way as to guarantee this independence, in particular with regard to members' status, the committee's budget and its secretariat.

- Functioning

The Rules of Procedure expand on the brief provisions of Article 11(6) of the Regulation with a view to guaranteeing the effective operation of the Committee, making full use of the skills of its members and seeking to ensure transparency. Its procedures and working methods are intended to prepare and facilitate decision-making on a consensual basis, given that it meets, on average, two days per month. The Rules of Procedure are aimed at encouraging decision-making on a collegiate basis so as to enhance their authority. This collegiate approach is backed up and given a framework by the definition of the chairman's powers, under which he is responsible for the proper conduct of meetings, the implementation of decisions and external contacts.

- Relations with the Director of OLAF

The nature of these relations is defined in Recital 17 of the Parliament and Council Regulation: the Committee is responsible for regular monitoring of the Office's investigative function and assists the Office's Director in discharging his responsibilities in this respect. The Rules of Procedure contain detailed provisions on the monitoring dimension of these relations. It was also necessary to draw up a procedure for preparing the opinion which the Committee is required to deliver under Article 12(2) of the Regulation on the list of candidates for the post of Director. This procedure was in fact implemented before the formal adoption of the Rules of Procedure.

2. - Secretariat

As soon as the members of the Committee were appointed, Parliament's Secretary-General placed two officials at OLAF's disposal, on a provisional basis, to be responsible for the Supervisory Committee's secretariat. This made it possible to make the necessary organisational arrangements and start work rapidly, as the High-Level Group¹ had requested. At its first

¹ Established by the European Council in January 1999 on the initiative of Chancellor Schröder, Mr Gil Robles, President of the European Parliament, and Mr Santer, President of the Commission.

meeting, the Committee firstly defined the secretariat's tasks, as subsequently set out in the Rules of Procedure. It immediately established the principle that the secretariat placed at its disposal should be under its sole authority and took the necessary measures to ensure that it could perform its tasks effectively, exclusively serving the missions entrusted to the Supervisory Committee. In its first opinion (No 1/99) adopted at the meeting of 31 August 1999, on OLAF's budgetary situation, it proposed to the Director an establishment plan for its secretariat and this proposal was adopted by the budgetary authority in Supplementary Budgets Nos 4 and 5/99 and Letter of Amendment No 4 relating to the preliminary draft budget for 2000.

The recruitment procedures were opened as soon as the posts created by the budgetary authority actually became available, on 1 January 2000. They were conducted in accordance with the principles established by the Committee in its Rules of Procedure (Article 19(1)), which had been published in the Official Journal on 15 February 1999, and the guidelines laid down by common accord with the Director of OLAF and set out in Committee Opinion No 1/2000. However, the procedure for filling the secretariat posts was delayed for several months owing to a disagreement between OLAF and the Commission on the nature of these posts. OLAF, referring to Article 6 of the Decision, which conferred on the Director the power of appointment and, in particular, the power to establish recruitment conditions and procedures, wished to take the recruitment decisions on a completely independent basis. The Commission, on the other hand, considered that such decisions should be subject to the institution's internal procedures.

Finally, in a spirit of conciliation and in order to prevent the system grinding to a standstill because it was not possible to recruit a secretariat, the Supervisory Committee agreed to an arrangement which, it feels, preserves its independence, is sufficiently flexible and guarantees the permanent nature of the secretariat's functions, namely the open-ended temporary contract arrangement under Article 2(c) of CEOS¹. This also has the advantage of not undermining the Director's independence as the appointing authority and of meeting the recruitment needs of OLAF, in particular as regards the possibility of recruiting people from outside the Commission for the purpose of appointing specialists or guaranteeing the Office's independence.

The Committee also asked for the secretariat to be organised in such a way as to preserve its independence.

B - TRANSITION FROM UCLAF TO OLAF

From its very first meeting, the Supervisory Committee was fully aware of its responsibilities with regard to the transition from UCLAF to OLAF. For the purposes of this transition, the Commission had, as mentioned above, decided to transfer the entire UCLAF structure to the new Office and to confer on the UCLAF Director responsibility for exercising the OLAF Director's functions on a provisional basis. As part of its task of assisting the Director, the Committee therefore began, during this particularly important and delicate phase, to examine OLAF's tasks and the resources required for it to carry out those tasks, in particular its operational structure. It also contributed to the procedure for appointing the Office's new Director.

¹ Conditions of Employment of Other Servants of the European Communities

1.- Operational structure

The establishment of OLAF and the definition of its tasks and powers under the Regulation were based on the legislator's desire to amend and improve procedures for the protection of the Community's financial interests and action to combat fraud. This desire for change was based on the analyses and assessments of the Court of Auditors as well as Parliament and the Council, which had drawn attention to shortcomings and weaknesses with regard to the independence of investigations, the transparency of procedures and the resources available.

On taking up its duties, the Supervisory Committee had the task of taking these analyses a stage further in order to draw operational conclusions and prepare the work of the future Director in considering what structures and procedures would be adequate.

As early as its meeting of 31 August 1999, the Committee carried out an initial assessment of OLAF's operation with a view to drawing up its guidelines for the Offices' budget, the main points of which were as follows:

- *the move from UCLAF to OLAF has not yet resulted in the changes in tasks and structures called for by the political authority;*
- *there are no structured links between investigative activities and the management services, whether in the Commission's Directorates-General or in the Member States;*
- *the aims of OLAF's investigation policy have not been clearly defined and the decision to open an investigation is reactive, whereas it should be proactive; such aims should be reflected in the budgetary forecasts;*
- *the range of tasks covered by OLAF is far too extensive and highlights the absence of priorities;*
- *there should be a clearer distinction, in the nature of OLAF's tasks, between information, coordination, legislation and investigative activities;*
- *the compartmentalisation of inquiry units into specialised sectors is counter-productive;*
- *security aspects in relation to staff as well as information, are only tackled superficially and the resources to be allocated to these aspects should be increased;*
- *collection and analysis of information should have a central role in the organisation and a better balance should be sought between information and investigation. OLAF should carry out a systematic analysis of audit reports;*
- *instruments should be developed to enable information technologies to be used for collecting and processing information;*
- *the lack of budgetary independence has serious repercussions on the purchase of equipment and recruitment of personnel.¹*

The Committee concluded that OLAF should be provided with a complete overview of the Office's organisation, working methods and procedures. It was thus possible to initiate a dialogue with the new Directorate as soon as he took up his duties on the aims and procedures of a new structure for OLAF, which in turn made it possible for clear guidelines to be drawn up on

¹ Based on the minutes of the meeting of 31 August 1999.

the 2001 budgetary estimates and with regard to the procedures for filling the new posts created by the budgetary authority.

A study of OLAF's operational tasks and working methods which external experts were commissioned to carry out was submitted on 29 March 2000 (see below). It contains a detailed assessment of OLAF's operations at the time when the new Director took up his duties. In addition to its assessments which concur with and supplement the conclusions previously reached by the Court of Auditors, the Committee of Independent Experts and the Supervisory Committee itself, the study provides a significant contribution to the OLAF Director's analysis of restructuring requirements. The Committee therefore carefully considered the study and took up its main recommendations: separate organisation and operation as regards internal and external investigations; establishment of a magistrate's unit to supervise investigations and guarantee their internal and external legality; ensuring that OLAF's operational activities are part of a strategy defined by the Director with the assistance of an '*intelligence*' structure.

2.- Appointment of the Director

The three institutions meeting within the High-Level Group - Parliament, the Council and the Commission - were in favour of establishing OLAF's new bodies, and in particular its Director, as swiftly as possible. At its first official meeting, the Supervisory Committee had to establish a procedure for the adoption of the opinion which it was required to draw up, pursuant to Article 12(2) of the Regulation, on the list of candidates with the necessary qualifications (Article 20 of the Rules of Procedure). Similarly, it expressed the wish that internal and external recruitment procedures be initiated simultaneously and, by urgent procedure, delivered a favourable opinion on the draft call for applications.

At its meeting of 6-7 October 1999, the Supervisory Committee therefore began its consideration of the applications which the Commission had submitted to it. Having then considered the applications on the basis of a grid for the assessment of applicants' qualifications, the Committee then felt that it could give a favourable opinion on a list of 11 applicants, which it forwarded to the Commission (Supervisory Committee Opinion 3/99). In accordance with the Rules of Procedure, the Director was chosen by the institutions from amongst the candidates on the list forwarded by the Supervisory Committee.

C - ORGANISATION OF RELATIONS BETWEEN THE SUPERVISORY COMMITTEE AND OLAF

At its preliminary meeting of 12 and 13 July 1999, the Supervisory Committee observed that its terms of reference and the conditions of its appointment required it to carry out regular checks on OLAF's operations, holding approximately 10 two-day meetings each year. This being so, and on the basis that the preparatory work could not reasonably exceed one day's preparation per meeting day, the Supervisory Committee could only perform its task properly if permanent contact could be maintained with the secretariat (which, as will be recalled, is still provisional).

The Committee's work has accordingly focused on the meetings, which have been devoted not only to adopting positions on the supervision of operations, but also, during this first year, to the

restructuring and administrative and budgetary management of OLAF. The opinions, letters and reports communicating these positions formally to the Institutions more particularly concerned institutional or administrative issues, whereas the positions adopted by the Committee on the subject of the investigative operations have generally been communicated by letter or orally to the Director at meetings and are reflected in the minutes.

In order to be able to check on OLAF's operations regularly, the Supervisory Committee has sought from the outset to institute procedures for obtaining the information required in order to exercise such supervision, to which end it has had to overcome the difficulties arising from the inadequacy or non-existence of procedures for registering information or files and the lack of harmonised rules for processing them.

Its assessment of OLAF's work reflects the situation with regard to the information available: the Committee does not yet have sufficient data to enable it to assess comprehensively to what extent the expectations formulated by the High-Level Group (representing Parliament, the Council and the Commission), Parliament, the Court of Auditors and the Committee of Independent Experts have been met during this first year of OLAF's operation; however, the Committee has expressed views on particular aspects of OLAF's operations in opinions, reports, letters or exchanges of views, and the positions it has adopted in this way have been recorded in its minutes.

1.- Procedures for obtaining information

In order to supplement what is still very incomplete direct information, the Supervisory Committee has taken into account various sources of indirect information.

(a) Direct information

In view of the need to condense the Committee's deliberations into the two days of the monthly meeting, the Committee found it expedient to configure its information system in such a way that summaries could be produced rapidly for operational purposes. The Regulation expressly provides for certain sources of information which are useful but not sufficient for the exercise of regular supervision. The Director's report to the Institutions pursuant to Article 12(3), second paragraph, or the programme of activities referred to in Article 11(7) contain valuable information, but it is too general. Conversely, the information which is to be provided to the Supervisory Committee pursuant to the same Article 11(7) in certain cases (where an investigation has been in progress for more than nine months, where information needs to be forwarded to the judicial authorities of a Member State, and cases where the Director's recommendations have not been acted upon) is too fragmented.

The Committee has therefore made use of the more general provision in the same article which stipulates that 'the Director shall keep the committee regularly informed of the Office's activities, its investigations, the results thereof and the action taken on them' with the aim of trying to establish a chart of OLAF's operations which would enable it to exercise constant supervision. On-site inspections of OLAF by several of its members provided it, inter alia, with indications of the nature and structure of the information available: as neither the conditions under which the information received was recorded nor the procedures for dealing with cases

were centralised or harmonised, the information which the Committee required had to be gathered and presented in advance, which, incidentally, presupposed a reorganisation of OLAF's working methods. The Committee consequently asked the Director, for each meeting, to provide it with a periodic overview of the cases under investigation and a press file. Since May 2000, the Committee has thus had summaries and data sheets concerning the cases which had been under investigation for more than nine months and the internal inquiries. In addition, the Director was asked to inform the Committee systematically of cases which he thought concerned an issue of principle.

The Committee also requested that external experts draft an overview of OLAF's operations and working methods. This was done, describing the situation as at the end of February 2000, and provided important indirect information to assist the Committee in assessing the work of OLAF.

(b) Indirect information

In addition to being approached on several occasions with requests from Member of Parliament or persons under investigation, the Supervisory Committee has also been able to make use of various documents.

- Firstly, the experts' study of OLAF's operational tasks and working methods¹, which was forwarded to OLAF on 29 March 2000, reviews the structure and functioning of the Office as regards its operations. It considers the various functions of OLAF and their organisation, the methods used to draw up an anti-fraud policy and strategy, and the various aspects of the Office's operations: information, investigations, coordination and follow-up. Before presenting a summary of some interesting recommendations for restructuring, the study analyses the way in which the Office now functions, particularly its operational activity. However, this analysis, covering the period ending on 29 February 2000, does not permit an overall assessment of OLAF's activities to be made. Its only contribution can be as a source of information for use in evaluating the restructuring currently in progress.

- Secondly, OLAF's first report on its operations, dated 6 June 2000, begins by describing the procedures governing the Office's functioning and then presents an overview of operations, particularly those performed between 1 June 1999 and 29 February 2000. Like the experts' study it is therefore primarily of value as source material for an assessment to be made once restructuring is completed. The data it presents concerning investigations performed and their follow-up provides some interesting information about the division of the Office's work between investigations and coordination, the number and proportion of cases, investigations initiated, investigations closed and reports drawn up and forwarded to the competent authorities. But OLAF's report recalls that, particularly on account of the recent date of entry into force (1 June 1999) of the Regulation, and hence the recent nature of the requirement to draw up an investigation report (Article 9), these figures do not give a clear picture of the facts.

The report raises the following issues without, however, offering any solution:

- the large number of investigations closed without a report
- the duration of the validation procedures

¹ Anne Heitzer, Jean de Maillard, Simone White

- the small number of judgments given after cases were forwarded.

Lastly, the Commission communication on an overall strategic approach, drawn up at the request of the Helsinki European Council on the basis of proposals drafted by OLAF, has the advantage that it incorporates the Office's proposed strategy into the policy envisaged by the Commission. For an overall assessment of OLAF, this document indicates the context in which the Office must operate and in which its restructuring must take place.

However, the Committee noted that the challenges referred to in this communication often fell within the remit of the Commission rather than that of OLAF. It therefore wished to have the opportunity to examine OLAF's own strategy on the basis of the programme of activities which the Director is required to submit to it annually pursuant to Article 11(7) of the Regulation.

2. - Assessment

Owing to the mismatch between OLAF's structures and working methods, which are still subject to restructuring, the conditions needed for making an overall assessment do not exist: the on-site inspections by its members made it clear to the Committee what difficulties it would encounter in its attempt to assess OLAF's operations. Besides the lack of clear management, the lack of harmonisation of procedures and practices, and the imperfections of the system for recording information and filing, the fact that OLAF has for more than a year been undergoing a period of transition and restructuring made this exercise very difficult, as it was impossible to distinguish between intentions and plans already being implemented and to evaluate structures which are still in the process of being set up. However, during this first year of operations the Committee was able to assess various selected questions either when considering particular cases that had been referred to it or by analysing the collections of summaries submitted by the Director. Its principal observations relate to investigation procedures and procedures for the referral of cases to the judicial authorities and to the protection of those subject to proceedings.

(a) Investigation procedures

The cases examined by the Committee concerned investigations, some of which had been started by UCLAF with the legal bases applicable at the time, while others had been based on the provisions of the Regulation and the 1999 Commission Decision. The period under consideration is therefore characterised in the first place by a change not only in the legal framework for the investigations but also in their nature. Although formally they were at all times administrative, in terms of subject-matter and effect, the investigations – taking further a trend which began with the adoption of Regulation No 2185/96 – encroached upon the field of the criminal law, although they lacked the necessary guarantees with regard to the rights of individuals¹.

In particular, the general guidelines in the Regulation and in the Decision of 2 June 1999 concerning the conduct of investigations have not been translated into centralised and codified

¹ Any such development must fit in with the Community legal order and in particular take account of the case-law of the ECJ, which takes the view that the criminal nature of a case is linked to the nature of the offences in question and to the nature and severity of the associated penalties (ECR, 8 July 1999, C-235/92, point 176). In its view, the criminal nature of a case entails the application of general principles of criminal law, and in the case in question, the principle of presumption of innocence.

instructions to the investigators, to which those subject to legal proceedings could have been given access. A manual of this kind, which is currently being drafted, ought therefore to take account of the objectives of the current restructuring: to provide a framework for operations in accordance with a strategy laid down by the Director and to introduce a unit comprising legally qualified magistrates to ensure the internal and external regularity of investigations.

The lack of such instructions in effect arose from a certain confusion among the various categories of action by OLAF, particularly between actual investigations, the coordination of national investigations and support for administrative or criminal inquiries.

The future instruction manual ought therefore to reflect the need to organise OLAF in such a way as to stress the special character of internal investigations.

On the other hand, the Committee observed that the provisions of Article 4(2), first indent, of the Regulation concerning access to the premises of the Institutions were being applied without those subject to investigation being informed of their rights, and that the records of hearings carried out on the basis of the second indent of the same article were not systematically submitted to the people who had been heard for approval. The new instruction manual should of course also remedy these shortcomings.

Finally, the Committee notes with interest the reforms in progress with a view to giving the Director sole responsibility for decisions to open and close investigations and concerning the length of the periods of validation of the information received.

(b) Referral to the judicial authorities

Article 11(7) of Regulation 1073/99 requires the Committee to be informed of cases requiring information to be forwarded to the judicial authorities of a Member State. In principle, therefore, it is able to monitor this particularly important stage in OLAF's operations. However, it was only at the end of the period under consideration that satisfactory arrangements were established in relation to this information.

The Committee deliberated on the question of referral to judicial authorities when considering particular cases. It noted the lack of clear and exact criteria for determining the nature of the referral. The Regulation refers to two different situations: forwarding of the report drawn up after an investigation (Article 9) and forwarding by the Office of information obtained in the course of an investigation (Article 10), without indicating the relationship between these two situations. In practice, the two possibilities seem to have been used indiscriminately, and the reasons why OLAF sometimes forwards the whole file and sometimes only part of it, and why it refers a case to the enforcement or to the administrative authorities of one country or another, are not apparent, which gives an impression of arbitrariness and improvisation.

The Committee therefore wishes this legal ambiguity to be clarified at the appropriate level (see the improvements proposed in Chapter III).

(c) Protection of those subject to proceedings

The Supervisory Committee considered this issue from the practical point of view, primarily on the basis of information which it received from people whom OLAF had investigated and statements made by the Office at the Committee's request. At the outset the Supervisory Committee made it clear that its checks did not constitute any avenue of redress designed to ascertain individual responsibilities. From the strict point of view of consideration of the application of the provisions in force, it noted the effectiveness of a certain monitoring of the regularity of OLAF's investigations¹. On the basis of Article 14 of the Regulation, a complaint was submitted to the Director of the Office concerning the examination of acts adversely affecting the complainant committed as part of an internal investigation. This complaint, which was lodged in accordance with Article 90(2) of the Staff Regulations, subsequently led to proceedings before the Court of First Instance². Similarly, the Disciplinary Board may perform certain checks on the regularity of the Office's investigations³.

As regards the nature of the rights concerned, it should be noted that the demands of the interested parties relate essentially to their right to be informed and to have the opportunity to state their case, and the right to an impartial investigation.

The assessment of this protection remains an unresolved issue, as cases are still pending. However, it should be noted that this protection is effective to the extent that it is subject to review by the Court of First Instance and the Court of Justice, but that comes late in the day, namely *a posteriori*, rather than during the investigation.

¹ UCLAF's investigations were likewise subject to the control of the Court of Justice of the European Communities. See Tzoanas judgment – case C 191/98 P.

² Case pending

³ Case pending

Chapter II An initial assessment

In addition to the specific assessments referred to above, it is necessary to assess the Committee's role as guarantor of OLAF's independence within the meaning of the Regulation in the budgetary and administrative spheres (A) and as regards organisational independence (B) and functional independence (C), and as the body coresponsible for confidentiality and data protection. within the meaning of Article 8(4) (D).

A. OLAF's INDEPENDENCE IN BUDGETARY AND ADMINISTRATIVE MATTERS

At its very first meeting and regularly in all subsequent meetings the supervisory committee considered the supplementary budget for 1999, the budget for 2000 and the budget for 2001.

In its consultations and decision-making the supervisory committee was particularly conscious that one of its tasks consists in guaranteeing the independence of OLAF.

As regards the draft budgets, this meant ensuring that the posts and appropriations necessary to allow OLAF to function properly were safeguarded in each budget.

In doing so, the committee had to bear in mind that the decisions of Parliament, the Council and the Commission on the establishment of OLAF call for a gradual approach in setting up and implementing OLAF, notably by spreading the creation of 300 posts and the recruitment of staff for these posts over a relatively long period of time and various different budgets.

Taking the structure of the former UCLAF as its starting point, the supervisory committee discussed the budgetary issues raised by each draft budget, taking particular pains to establish which forms of structure and organisation might be appropriate to enable OLAF to undertake the tasks allotted to it efficiently as intended by the decisions of the European institutions. One question in particular that needed to be addressed in order to ensure that OLAF could operate properly concerned the relationship between A and B posts. The committee also discussed to what extent posts should be allocated as temporary posts, despite OLAF's changed remit which meant that it no longer operated merely as a taskforce.

Discussions on the structure and tasks facing OLAF in connection with the human and other resources required by OLAF also considered to what extent the use of modern technologies by OLAF called for particular funding.

Basically, the supervisory committee took care in its budgetary decisions and opinions to ensure that the demands made on OLAF in the decisions by the Parliament, the Council and the Commission were actually met.

The 1999 supplementary budget showed clearly that the recruitment of staff and the construction of the future organisation of OLAF should be left to subsequent budgets. Nevertheless, the supervisory committee attached great importance to the fact that the 300 posts provided for and the appropriations required for this purpose should be made available by the budgetary authorities and Parliament in good time. The supervisory committee therefore welcomed the fact

that the 2001 draft budget met all the budgetary preconditions to ensure that OLAF would finally be set up by this budget as intended by the decisions of Parliament, the Council and the Commission.

The constitutional guarantees provided by the institutions for this agency are intended, by guaranteeing its independence, to give it the maximum room for manoeuvre both internally and externally to protect the financial interests of the EU.

Important first steps in this direction were taken during the period under review.

The supervisory committee took up its work in the knowledge that it was the direct and primary guarantor of the independence of OLAF.

At almost all meetings since the constitution of the supervisory committee there were detailed discussions concerning the budgetary, organisational and administrative independence of this agency. One area of particular concern for the committee was to what extent the structure of UCLAF which had been taken over might hinder the work of the new agency. Bearing in mind that the change from UCLAF to OLAF would have to have been effected at the latest by the end of the construction phase, i.e., at the end of 2001, the supervisory committee reviewed its structure and held related discussions, most recently with the new director-general who took office on 1 March 2000.

It should however be borne in mind that the independence which is essential if the agency is to function optimally has only been partly achieved and guaranteed. This is due primarily to the fact that OLAF is still being set up. As stated above, the director-general of the agency who was selected by a Europe-wide competition was only able to take office on 1 March 2000.

Only since that date have there been institutional guarantees that the structure and staff complement will be implemented and operate as envisaged by the institutions and bearing in mind also the consensual discussions held between the Secretary-General and the supervisory committee. However, the supervisory committee and the director-general have completed neither their discussions on the structure nor on the guidelines for OLAF. For example, it still needs to be decided whether the agency will or should operate according to the principle of legality or the discretionary principle. Another question that has not been discussed is to what extent the administrative reform which has begun in the EU institutions will be taken up by OLAF and if so, in what direction.

Since the recruitment of staff and the financial endowment of the agency have only just begun, and the structural priorities of OLAF's activities and working methods have not yet been sufficiently discussed, OLAF is still a long way from the organisation envisaged by Parliament, the Council and the Commission in their decisions.

In the period under review it has also become clear that the guarantees of independence given to the agency are still not sufficient. The lack of independence in recruiting and transferring or dismissing staff owing to the close ties with the Commission's administration has almost led to gridlock. This is shown by the duration of the recruitment procedure for posts and the difficulties

in dismissing staff where necessary. Since the Director-General of OLAF has not been given maximum freedom to act independently, the agency's room for manoeuvre and independence have been impaired.

The supervisory committee takes the view that budgetary independence means that the agency should be able to take structural decisions independently of the institutions: it includes freedom to take decisions on staff and freedom of manoeuvre. In the period under review, none of these preconditions were fully met, as they must be if OLAF is to work properly. The supervisory committee will take pains during the next review period to ensure that the independence which OLAF has been guaranteed is achieved even more fully, even in its daily work.

B. FUNCTIONAL INDEPENDENCE (INVESTIGATIVE ACTIVITY)

The role and responsibilities of the Supervisory Committee in relation to investigative activity are essentially described in Article 3 of the Rules of Procedure, which clearly indicates that investigative activity is to be monitored by the Committee. It was never the intention that the Committee should enter into detailed examination of ongoing investigations, but rather ensure that certain basic procedures and principles are respected.

At an early meeting, the Committee appointed two of its members to evaluate the way in which OLAF functioned in relation to investigations following the period in which UCLAF had been in operation. This evaluation was based on meetings with the interim Director of OLAF as well as with members of the staff.

Progress was not particularly satisfactory due to the fact, and this is understandable, that the interim Director and most of the staff were carried over from UCLAF.

The tasks of OLAF, insofar as investigations are concerned, are defined in Article 2 of the Commission Decision establishing OLAF.

It is clear that the internal structures of OLAF should correspond to an organisational plan which would enable it to carry out its newly defined role.

It has to be said that, without a Director being appointed on a permanent basis, it is difficult to imagine how serious long-term reform could be undertaken. An examination of the manner in which investigations had been conducted during the UCLAF period disclosed a certain number of anomalies and weaknesses which arose essentially from the fact that there were no internal rules of procedure for dealing with investigations and that they were often dealt with according to the individual investigating officer's interpretation of what was required, thus preventing uniformity of action. The role of investigation insofar as internal and external cases was concerned was not clearly defined.

The Committee decided at the outset that its role was not to examine the past action of UCLAF, except insofar as it could be used as a basis of experience in the establishment of the working methods and structures of OLAF.

The Committee's task was considerably complicated by the fact that a new Director was not appointed permanently until 1 March 2000, so that the Office's new establishment plan is still on the drawing board.

In the light of the above remarks, it is clear that the Committee has not been in a position to carry out, other than partially, its responsibility for monitoring in accordance with the procedures outlined in Article 3 relating to its role and responsibilities.

It was difficult to 'examine the information on investigative activity supplied on a regular basis by the Director of OLAF', essentially because the internal mechanism did not exist within OLAF to supply information in a uniform manner, notably in relation to cases which had been under investigation for some time.

The fact that the Committee, in the context of its task of regularly monitoring implementation of the investigative function (Article 11(1) of the Regulation), had access to all documents and files held by and data stored by OLAF was not, during the interim period pending the appointment of the new Director, of real assistance, given the lack of uniformity in dealing with case files in general and in particular the lack of procedures and structures to deal with intelligence information.

Monitoring by the Committee has therefore been based on case files selected pragmatically on the basis of their topicality or of specific communications received from members of the Institutions or from individuals. The Committee has used the information obtained to assist it in its task of 'reinforcing the independence of the Office', which it performs by issuing opinions to the Director, but it reserves the right to deliver more formal opinions on certain cases if need be.

The lack of clearly defined objectives following the creation of OLAF also made it difficult to consider whether any real strategy had been developed.

The Committee is aware that OLAF is a new organisation, as indeed is the Supervisory Committee, and that it will inevitably take a certain amount of time to introduce permanent measures concerning rules and procedures for investigations. Not until this has been achieved will the Committee be able effectively and efficiently to carry out its monitoring function. The Committee will, however, continue to supervise, in close cooperation with the Director, the implementation of measures which will ensure the independence of OLAF insofar as investigative activity is concerned. This will also apply to a certain number of cases where investigations were started by UCLAF and where continued action by OLAF appears necessary.

C. ORGANISATIONAL INDEPENDENCE (INTERINSTITUTIONAL RELATIONS)

The Supervisory Committee reinforces the Office's independence by ensuring that its interinstitutional position, as laid down by the legislative authorities, is protected. It is necessary to bear in mind the circumstances that surrounded the adoption of the Regulation by Parliament and the Council on 25 May 1999 in order to fully understand why, despite their wish to confer genuine independence on OLAF, the legislative authorities have not resolved all the difficulties

that stem from OLAF's interinstitutional status, nor those which stem from OLAF's involvement in interinstitutional discussions of the protection of the financial interests of the EC.

1. The context

The institutions have long been concerned about the need to strengthen the means of combating fraud affecting the Community budget. It is a concern that dates from a time when it was estimated that fraud affecting the Community budget, the extent of which it was difficult to measure, amounted to 10% of the budget, while at the same time the Community Institutions had virtually no powers in this area. The response of the institutions at that time was to establish a Commission service, UCLAF, responsible for coordinating the exercise of the various powers conferred on the Commission in the area of administrative controls, as part of its role in the implementation of Community policies and the budget. In the early 1990s, a number of high-profile cases of fraud clearly demonstrated the need for the Community's anti-fraud mechanisms to be made tougher. As a result, UCLAF was given responsibility not only for exercising the Commission's powers relating to anti-fraud controls but also new powers to conduct on-the-spot administrative investigations. New texts laid down the definition of and sanctions for administrative and criminal offences affecting the Community budget.

Despite these changes, when Parliament and the Council came across instances of irregularities and fraud in the institutions in the course of the discharge procedure for 1996, it became apparent that the new arrangements did not guarantee investigative independence and that this would have serious consequences for the transparency and effectiveness of legal proceedings. In particular, the political authorities took the view that the objectivity of investigations and their follow-up in terms of criminal or disciplinary proceedings could not be relied on. The purpose of adopting Regulation 1073/99 was therefore to establish a new body responsible for administrative investigations based on three principles: independence, transparency and effectiveness. The legislative authorities also ensured that the establishment of the new body, OLAF, formed part of a broader political project aimed at protecting the financial interests of the Union against fraud and corruption and, more generally, at dealing with the growing problem of organised crime in the context of globalisation and the enlargement of the Union. Faced with this situation, the main aim of the political authorities was to set up a system that was effective, taking into account the fact that, as the UCLAF experience had shown, the effectiveness of the system depended to a large extent on its legitimacy. In particular, in order for an investigation to lead to disciplinary or criminal proceedings, it must be subject to the safeguards necessary to protect the rights of the persons concerned, thereby allowing greater transparency. Investigations must also be conducted in accordance with the highest standards of objectivity, in other words, on the basis of total independence and impartiality.

In dealing with the issue of safeguarding individual rights, the political authorities took account of the autonomous status of the institutions and allowed each institution to take internal measures relating to the rights and obligations of their members and officials on the basis of an interinstitutional agreement and in the framework of an internal decision.

With regard to the aim of independence, the legislative authorities have provided for a solution in Regulation 1073/99. Although agreement between the institutions was reached quickly on the

need to allow UCLAF/OLAF to conduct investigations in all the Community institutions and bodies, which required it to be neutral, the degree of independence which it should be granted was a matter of lively debate. Initially, the Commission had proposed the setting up of a European anti-fraud Office that was totally independent of all the institutions¹. In order not to deprive the new Office of the material and legal means required for it to operate during the period which otherwise would have been required for the replacement of the Commission's resources, Parliament, the Council and the Commission, within the high-level group, finally came to an agreement on a formula granting the greatest possible independence to an Office that nevertheless continued to be integrated into the structure of the Commission.

Safeguarding the independence of the Office nevertheless posed a thorny problem for the legislative authorities which they have attempted to solve by setting up a Supervisory Committee and giving the Director a special status. Even before they became operational, the ability of these two solutions to safeguard the organisational independence of OLAF was questioned by the Court of Auditors and the Committee of Independent Experts.

The Court of Auditors in its Opinion 2/99² points out that because OLAF is part of the Commission's administrative structure the Commission is responsible for it. In particular, challenges to acts of the Office brought before the Court of Justice refer to the Commission as defendant and not to OLAF itself. This remark made by the Court of Auditors was to a large extent taken into account by the legislative authorities who introduced provisions for appeals by officials before the Director of OLAF. Disciplinary powers with regard to the Director, however, remain the prerogative of the Commission, after consulting the Supervisory Committee.

The Committee of Independent Experts stressed the need and the urgency of preventing any possible political interference by the Commission hierarchy in order to safeguard confidence in the objectivity of investigations. Its report therefore recommends that OLAF's independence of the Commission in particular must be and remain a fundamental principle. Clearly, OLAF must also be protected from interference on the part of the other institutions. The Committee of Independent Experts considered that the Supervisory Committee, set up to reinforce the independence of OLAF, was not a satisfactory solution since it will be asked to act as a judicial authority, and in particular to review the legality of individual decisions and the conduct of specific investigations. The report therefore comes out in favour of the establishment of an independent prosecutor working in close collaboration with OLAF which would be subject to review of legality carried out by a special chamber of the Court of First Instance.

Given the legal and political context in which the legislative authorities decided to adopt these solutions, in other words at a time when a formula had to be agreed as a matter of urgency in order to make it possible for independent investigations to be conducted using the existing legal bases, they represented a set of pragmatic arrangements which could be implemented in a matter of months. The ideal solution, which was also a great deal more radical, to the problem of the effectiveness and legitimacy of investigations not only in the institutions but also into fraud generally affecting the Community Budget had already been proposed in the *Corpus Juris*.

¹ COM(98) 717

² OJ C 154, 1.6.1999, p. 1

The recommendations of the Committee of Independent Experts explicitly refer to the *Corpus Juris* and call for it to be phased in over time. In addition, the study dealing with the need for, the legitimacy and feasibility of the *Corpus Juris*¹, which stressed that the issue was a matter of political rather than legal choices, also envisaged the implementation of *Corpus Juris* in several phases. But as far as those who drafted the study were concerned, it was clear that only the implementation of all the proposals would ensure the effective and legitimate protection of the financial interests of the EU.

The tasks assigned to OLAF by the Decision of 28 April 1999 (Article 2) and the Regulation in the area of the protection of the financial interests of the EC are part of a network of responsibilities conferred by the Treaties on the various participants in the management of the Budget. The fact that the legislative authorities have laid down the principle of the independence of the Office in Article 12(3) of the Regulation and that they have made the Supervisory Committee responsible for reinforcing it (Article 11(1) of the Regulation) is not sufficient to resolve all the problems that arise from the addition of these tasks. Further provisions govern the relationship of the Office with the national authorities competent in the field of criminal proceedings (Article 2) and with the Commission, with regard to which the Director's independence is safeguarded by the possibility of bringing an action before the Court of Justice (Article 12(3)).

These various provisions only lay down a number of principles and the independence of OLAF can only take on concrete significance when these principles are applied in practice. The Supervisory Committee has thus had the opportunity, through its reports, opinion and other expressions of its positions, to clarify the scope of the principle of the organisational independence of OLAF, in the first instance with regard to the national prosecuting authorities.

The issue of OLAF's organisational independence of the national authorities is not regulated in a specific manner. Article 12(3) of the Regulation merely indicates that 'the Director shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying out of external and internal investigations or to the drafting of reports following such investigations.'

The regulation's recitals provide, however, for cooperation between the Office and the Member States, in particular with regard to the reciprocal exchange of information (recital 15), the admissibility of OLAF reports as evidence in administrative and judicial proceedings (recital 16), and in addition, the principle underlying such cooperation, namely subsidiarity (recital 21).

On 11 January 2000 Mr Knudsen submitted a request for an opinion to the Committee concerning the inaction of the Luxembourg judicial authorities in the ECHO affair. The Committee reiterated that it was competent in the area of the independence of the Office in cases of alleged obstruction on the part of the Member States.

¹ General Report of 30 September 1999, Mrs Delmas-Marty

In its opinion addressed to the acting Director of OLAF on 14 February 2000, the Committee recommended that the Director should first seek an explanation from the Luxembourg judicial authorities in order to establish whether it could be shown that there had been a failure to act, before, if appropriate, making use of the procedures for initiating legal proceedings set out in the Treaty.

In such a context, the Supervisory Committee noted with interest the ideas for a global strategic approach aimed at organising the functions of the Office to represent a 'platform' of services in order to implement a partnership ('new culture of cooperation') with the Member States. It looks forward to receiving the Director of OLAF' proposals on how this is to be put into practice.

2. OLAF's interinstitutional status

The provisions of the Treaty laying down the competence of the Community in combating fraud affecting the financial interests of the Community (Article 280) are imprecise with regard to the administrative or criminal-law nature of that competence. They simply indicate that the competence does not concern the application of national criminal law nor the administration of justice in the Member States. They do not seem therefore to preclude action on the part of the Community where such action does not affect the application of national criminal law but instead relates only to the principles thereof. As far as the nature of investigations is concerned, the ambiguity lies more in the provisions of the regulations that lay down the powers of the Commission, and in particular Regulations Nos 2988/95 and 2185/96. This is because Regulation No 2988/95, which defines the irregularities and the administrative measures relating to breaches of Community law in the financial field, lays down genuine sanctions, which are, moreover, consistent with the case law of the Court of Justice, although it distinguishes them from criminal law sanctions. Regulation No 2185/96 lays down arrangements relating to the power to conduct on-the-spot investigations, stipulates that investigations may lead to either administrative or judicial proceedings in the Member States.

The competences conferred on OLAF by the 1999 Decision and the Regulation are in addition to those previously conferred on the Commission and consist of competence in the field of internal administrative investigations and in the areas of corruption and professional misconduct, which may lead to disciplinary or criminal proceedings. This new competence lies behind the modification to the statute introduced by the Decision of 28 April 1999 establishing OLAF and laying down its interinstitutional position and the need for its independence. The legislative authorities attempted in this way to provide a structured response to the need to strengthen the fight against corruption and fraud in all the institutions. In order to do this it was necessary to go beyond the existing framework: the nature of the statute and the role of the Court of Auditors prevents it from carrying out such investigations; and OLAF did not have the requisite institutional status or independence.

All these measures and provisions reflect an exceptionally clear political will to strengthen the protection of the financial interests of the Union using all the available legal means. In the same way that the notion of an administrative sanction was interpreted as extensively as possible, the provisions of the Treaties, the protocols annexed thereto and the staff regulations were fleshed

out and made more precise, in the framework of an interinstitutional agreement, so as to define the arrangements under which members, officials and other staff of the institutions were to collaborate with the internal investigations conducted by OLAF. The use of this type of non-binding and provisional legislation reflects the desire of Parliament, Council and the Commission to introduce an effective mechanism very quickly to combat corruption and illegal conduct within the Community institutions and bodies. But this formula, while meeting the need for speedy action and flexibility, has weaknesses which the Supervisory Committee has had occasion to draw attention to in the performance of its duties, since they are such as to undermine the organisational independence of OLAF. In particular, the institutions and bodies which are not signatories to the interinstitutional agreement may be reluctant to adhere to it out of a desire to protect themselves against interference in their internal affairs by an Office whose status may appear ambiguous and whose independence of the Commission does not seem to them to be entirely guaranteed. In addition, by merely referring to the Protocol on the immunities of officials and to the Staff Regulations the interinstitutional agreement has not resolved all the questions which may arise with regard to the protection of individual rights and safeguards in internal investigations which may lead to criminal proceedings.

3. Difficulties encountered in interinstitutional relations

In practice, since it was formally established following the entry into force of the Regulation, OLAF must resolve a number of problems relating, among other things, to its terms of reference as regards the recruitment of staff, the procedures and safeguards to which investigations are subject and the immunities which may be invoked against it. In the course of the establishment of the Office, the Supervisory Committee spent a great deal of its time considering the solutions adopted and identifying the aspects that were key to the Office's independence of the institutions.

(a) OLAF's terms of reference as regards the recruitment of staff

As it is defined in the texts, which stipulate that OLAF is to take over the tasks conferred on the Commission in the area of combating fraud in the various sector-based policies, the competence of the Office is very diverse and its investigations may be of an administrative, disciplinary, financial, tax or customs nature and can even enter the field of criminal law. This wide range of functions makes the problem of recruitment (inevitably, of a limited number of staff) particularly difficult, especially as the structure of the organisation chart must strike a difficult balance between the different categories of investigators and duties that are upstream and downstream of investigations: intelligence, follow-up and administration. Thus, in the case of investigations within the institutions, where the knowledge required is of an administrative or budgetary nature, but where anti-corruption expertise may also be necessary as well as a knowledge of public procurement and financial management, it can prove difficult to meet all of the Office's needs.

(b) Investigative procedures

The investigative powers of OLAF are defined in Articles 3 and 4 of the Regulation and Article 7 of Regulation No 2185/96, which emphasise the administrative nature of its powers. Nevertheless, both in terms of outcome and procedure, the investigations stray into criminal law. They may contribute to the investigation of criminal offences and involve acts affecting the rights and freedoms of persons, such as searches and interrogations. OLAF is working on the

introduction of procedural rules that are specific to its role and which reflect its aims. This task is however proving difficult since the 'administrative' nature of its investigations could constitute a restriction in relation to crimes of a complex nature, not only from the point of view of admissibility before criminal jurisdictions but also from the point of view of effectiveness. In cases of corruption or financial crime administrative procedures may be inadequate for protecting the institutions against attempts to conceal evidence.

(c) Safeguards surrounding investigations

According to the regulations in force, investigations conducted by OLAF are subject to safeguards protecting the rights of persons. Article 8 of the Regulation requires confidentiality and the protection of personal data and Article 4(6)(b) thereof stipulates that each institution must issue rules safeguarding these rights. The outline decision set out in this provision provides for two such safeguards: the right of persons concerned to express themselves prior to being accused of an offence following an investigation (Article 4) and the right to be informed of the closure of an investigation (Article 5). Clearly, the safeguards built into criminal procedures are much more precise and extensive. In order for evidence gathered in the course of OLAF investigations to be admissible before a criminal court these safeguards must be respected. Article 6 of Regulation No 2185/96 provides that the investigations must comply with the procedural rules applicable to national administrative auditors. Nevertheless, OLAF must adapt its procedures for gathering evidence and, in particular, the safeguards surrounding the investigations, so as to reflect the outcome of the investigation, be it criminal, disciplinary or administrative. If it fails to do this, it is likely that the validity of the measures OLAF takes and even their legitimacy may be challenged when it conducts investigations in the institutions.

(d) Immunities, restraints on OLAF's action within the institutions

The question of immunity, which the Supervisory Committee has examined at length because of its implications for the organisational and operational independence of OLAF, is very complex since the notion in fact covers three different situations: immunity proper, absence of responsibility and inviolability.

- Immunity proper is immunity from jurisdiction and by virtue of one's office. Such immunity is granted to officials and other servants of the Community under Article 12 of the Protocol on Privileges and Immunities of 8 April 1965. This immunity exempts them, in respect of acts carried out in the exercise of their duties, from legal proceedings taken by national authorities, in particular judicial authorities. This immunity is not an obstacle to OLAF's action in the institutions and is only mentioned in the internal decisions of the institutions relating to OLAF investigations with reference to the fact that applications by national authorities for the waiver of the immunity of officials or a servant of the institution must be notified to OLAF. In practice, all the applications made by the national authorities for immunity to be waived since the entry into force of the Regulation have been in respect of cases referred to the national authorities by OLAF.

Closely related to the question of immunity, or at least to issue of the obstacles to OLAF's internal investigations, is the fact that several Community bodies have felt entitled to restrict the action of the Office within their own administrations.

The decision taken, not without some delay, by the Committee of the Regions aimed at implementing the Regulation, and in particular Article 4(6) thereof, constitutes an obstacle to the obligation of members, officials and other servants of the Committee to provide OLAF with information since it requires them to communicate with the Office through their hierarchy.

In addition, in exchanges with the Supervisory Committee, the European Central Bank and the European Investment Bank have maintained that they are not subject to the obligation to allow investigations by OLAF in their administrations on the grounds that Regulation 1073/99 is not applicable to them. They maintain that the intervention of OLAF in their internal affairs would undermine their independence and that, furthermore, since they do not manage Community funds they are not concerned by the regulation. The Supervisory Committee, which took the view that the adoption of such positions was an attack on the organisational independence of OLAF, sent a report on the matter to the institutions in which it stressed that in its opinion since Regulation 1073/99 had been adopted on the basis of Article 280 of the EC Treaty it had general application and applied to all the institutions. Since the banks had adopted internal decisions putting in place structures of their own shielding their administrations from OLAF investigations and their staff from the obligation to supply information to OLAF, the Supervisory Committee lent its support to the application by the Commission to the Court of Justice for the annulment of the decisions.

- The parliamentary immunity provided for in Article 10 of the Protocol is in fact an absence of responsibility: on the territory of any Member State other than their own, merely by virtue of the fact that Parliament is in session, Members of Parliament are exempt from all detention measures and legal proceedings. On their national territory, they enjoy the immunities enjoyed by the members of the parliament of their own country. The question of whether parliamentary immunity protects Members of the European Parliament against OLAF measures is currently the subject of a case before the Court of First Instance. The case clearly underlines one of the fundamental ambiguities of OLAF, i.e. that surrounding the nature of its investigations. The applicants, 71 Members of Parliament, consider that the internal decision taken by Parliament which lays down the arrangements for OLAF investigations does not protect them against OLAF measures, such as searches, which are usually carried out in the context of criminal proceedings. At all events, the Court's judgment should clarify the nature of OLAF investigations. The Supervisory Committee has stressed, however, that there are two drawbacks to a solution based on case law: firstly, it will take a relatively long time for the Court to deliver its judgment and in the meantime the legal situation will remain uncertain; secondly, the scope of the judgment may be limited and may only partially resolve the problem. It is therefore to be hoped that a regulatory solution can be found.

- The inviolability of premises could be another obstacle OLAF investigations have to overcome. The principle was referred to by the 71 Members of Parliament who requested, among other things, in the framework of the summary procedure, a commitment on the part of Parliament to authorise the Office to enter their offices only with their express permission. In its order of 2 May 2000, the President of the Court granted the request made by the 71 Members of Parliament pending the delivery of the judgment in respect of the main action.

Conversely, the inviolability of the premises of OLAF itself was lifted by the Commission at the request of an investigating magistrate in Brussels (decision of 15 February 2000).

4. Involvement of OLAF in interinstitutional discussions on the protection of the financial interests of the EC

Owing to its institutional status, OLAF often adopts positions or does groundwork relating to discussions involving the Community institutions about the protection of the financial interests of the EC. The Supervisory Committee has also become involved in such discussions to the extent that they relate to its area of responsibility. The Regulation has enabled a structure to be established which now has the task of defining a policy, completing and specifying the legal framework for its actions and of initiating discussion on its institutional development. The Supervisory Committee, in order to reinforce the independence of the Office, has been involved in the discussions led by the Director and has given its support to this process, whether it concerns the overall strategic approach, the legal framework or institutional reform.

(a) Overall strategic approach

The challenge which the European Union is facing in the shape of crime affecting its finances can only be met by means of a coherent, comprehensive and planned response. The broad outlines of such a response proposed by OLAF to the Commission reflect the analyses and observations of the Supervisory Committee.

Firstly, the fight against fraud must be based on an in-depth understanding of its economic and criminal context, and on a policy of investigations defined on the basis of the analysis of as wide a range of information as possible. OLAF could perform these tasks by establishing an adequate 'intelligence' service, which would involve recruiting the necessary qualified staff.

Secondly, the cross-border nature of the fraud in question means that it must be combated through greater cooperation with the Member States.

Thirdly, at the Community level, there is a need to boost the effectiveness, transparency and independence of internal investigations in the institutions and furthermore to introduce an anti-fraud policy based on legislation dealing with the issues of detection, follow-up and prevention.

Lastly, the strategy must deal with the judicial dimension of the investigations and, by creating the platform of services proposed by the Office (see above), clear the way for the establishment of a body such as the European prosecutor. It will be necessary for the various phases of this development to be carefully coordinated.

(b) Legal framework

The legal difficulties encountered by OLAF and reported by the Supervisory Committee in the areas of procedural rules, immunities, etc., can and must be resolved quickly, without the need for institutional changes. The Supervisory Committee has had the opportunity to stress the urgency of such measures in its Opinions 5/1999 and 2/2000.

(c) Institutional reform

The Supervisory Committee has pointed out on several occasions, and in particular in its Opinion 5/1999, that OLAF is faced with a problem of legitimacy. Although its role has been defined by the Community legislative authorities at the highest level, by means of a regulation adopted by codecision, the body's legitimacy has been challenged on the grounds that there are shortcomings in the system of safeguards surrounding the investigations and in the institutional status of the Office. Moreover, OLAF, even by strengthening its partnership with the national authorities, is not in a position to resolve all the problems of international judicial cooperation. The introduction of a European prosecutor would be, in the view of the Supervisory Committee, a coherent solution to these problems. That is why it has lent its support to the proposal for the establishment of a European prosecutor which the Commission has submitted to the IGC.

D. CONFIDENTIALITY AND DATA PROTECTION

Community law confers specific responsibilities on the OLAF Supervisory Committee in the area of confidentiality and data protection. It is necessary to analyse the scope of such responsibilities before considering application of the relevant texts.

1. The relevant texts

The legislation in question consists of two complementary sets of provisions:

- Firstly, Article 8 of the Regulation protects all information obtained in the course of investigations.

The aim of these provisions is to protect all information obtained by the service in the course of external investigations and all types of information obtained or supplied in the course of internal investigations which is covered by the principle of professional secrecy.

The legislation provides, however, for the possibility of communicating information obtained in the course of internal investigations, **with names**, to persons who need to be made aware of such information because of the nature of their professional duties in combating fraud, corruption and all other illegal activities.

The staff of the Office and all persons acting under its authority must adhere strictly to the Community and national rules governing personal data protection.

It is the Supervisory Committee's role to ensure that this obligation, which is aimed at protecting both the service and anyone placed under investigation, is met, on the basis of Article 8(4) of the Regulation.

Secondly, European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides for the protection of the fundamental freedoms and rights of individuals, and of privacy in particular, with regard to the processing of

personal data. Under the provisions of the directive personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes, relevant in relation to the purposes for which they are collected, and steps must be taken to update the data within a reasonable period which must be usable for a period no longer than is necessary for the purposes for which they were collected.

Pursuant to Article 8 of the Regulation, the Supervisory Committee is required to ensure that the provisions of the directive are complied with in so far as they apply to the information collected and processed by the Office in the course of its work in the area of preventing and combating fraud affecting the financial interests of the Communities.

With regard to the first aspect of the issue of data protection, the Supervisory Committee, immediately after its establishment, launched several initiatives aimed at ensuring that the provisions relating to confidentiality and data protection were applied.

2. Application of the relevant texts

- Firstly, in order to check the nature of all the information relating to the activities of the Office published in the press, the Supervisory Committee asked the Director of the Office to compile, for each of its meetings, a press review covering all the articles and information published in the press in which the Office was mentioned.

Subsequently, at each meeting, the Supervisory Committee examined and sifted through the information in order to identify any material capable of compromising the secrecy of investigations or the principle of professional secrecy protecting third parties.

Clearly, the quality and in particular the independence and effectiveness of investigations and the legitimacy of the status of the service can only be improved by strict adherence to the provisions governing confidentiality and data protection.

- A second initiative by the Supervisory Committee consisted in giving an oral reply to an urgent request for an opinion expressed orally to the acting Director of the Office. The request for an opinion raised a question of principle. Shortly before the issuing of a press release following the closure of an internal investigation, the acting Director of the Office asked the Supervisory Committee whether it approved, in principle, of the issuing of the press release and its contents. After discussing the matter the Committee noted that the press release contained information and remarks which specified names and that the judicial authorities in a Member State were to be forwarded the Office's file on the investigation.

In view of these considerations, the Supervisory Committee decided, taking into account the provisions concerning confidentiality and data protection, that it was not advisable for the press release to be issued. In the course of the subsequent discussion which took place with the acting Director of the Office, the Supervisory Committee expressed its reservations with regard to the issuing of press releases which reveal investigative methods, breach the principles of confidentiality and the protection of the identity of

individuals, or which are issued without the agreement of the judicial authorities to which the case has been referred for prosecution.

The Supervisory Committee stated that in the event of cases being referred to the judicial authorities it was preferable for the judicial authorities themselves to issue a press release rather than the Office. The Supervisory Committee welcomes the fact that it is apparent from the Office's most recent press releases that the Committee's recommendations have been put into effect.

Moreover, the Committee has taken note of the complaint lodged by an official against the acting Director of OLAF relating to an alleged breach of the confidentiality obligation. The complaint is currently being considered by the Commission and the Court of First Instance.

Lastly, with regard to the aspect of data protection which concerns the automated processing of information gathered by the Office, the Supervisory Committee has appointed one of its members rapporteur responsible for carrying out an assessment of the IT systems that will be introduced in the Office.

Chapter III Limitations imposed by the new structures and proposed improvements

As has been emphasised throughout this report, OLAF's establishment phase is not yet complete, and the very length of the transition period poses problems which have been outlined above. However, not all the difficulties are of the same nature. Although, in practice, the distinction between the two categories is not always perfectly clear, it would appear that, in addition to cyclical problems, there are also structural problems which stem from the limitations associated with the new structures, the hybrid nature of which was pointed out at the outset. Where such limitations are likely to undermine the functioning of OLAF at various levels, the Supervisory Committee considers it has a duty to identify and propose improvements that it considers necessary in order to ensure in full the required independence and transparency, as regards both the Office's efficiency and its legitimacy (See P1-P5 below).

It does not, of course, fall to the Supervisory Committee to choose the legal basis and appropriate procedure for each of the solutions advocated, for such matters do not fall within its remit, that is to say they are *neither* internal OLAF decisions, *nor* provisions clarifying general Community rules and regulations, e.g. the Staff Regulations, *nor* modifications to Regulation No 1073/99, *nor* provisions to be added to the Treaty at the IGC.

However, the Committee will in this final chapter consider the limitations it perceives in the system that has been introduced for implementing the political project adopted on 25 May 1999 as regards both OLAF's *status* (A) and its *activities* (B).

A. Limitations imposed by OLAF's status

When it was adopted (in the 1999 Decision and Regulation), the status conferred on OLAF no doubt constituted the most sensible way of addressing the problems which the political authority had to resolve as a matter of urgency. The alternative of creating a completely new interinstitutional body and transferring to it the powers it needed would have required a considerable amount of time, and this would not have been compatible with the political situation. On the other hand, the establishment of an office within the administrative and budgetary structure of the Commission was practicable, provided that such an office had the investigative powers hitherto exercised by the Commission and maximum operational independence. And so it was that work on defining OLAF's status was completed in four months. Moreover, the chosen formula offered the advantage of a gradual transition from UCLAF (a Commission department) structures to those of OLAF (an independent interinstitutional office) and thus ensured continuity.

The task of establishing OLAF has, however, proved to be a tricky and difficult business. It has been entrusted to the Director and overseen by the Supervisory Committee, but it cannot be completed without the active support of all those involved, namely the budgetary authority, in creating the structure and allocating the appropriations and posts needed, the Institutions, in adopting the decisions to enable OLAF to carry out internal investigations, and the Commission, in adapting its management rules to give OLAF the autonomy it needs to operate.

Limitations which are undermining OLAF's operational independence have become apparent. They stem from the various ambiguities in OLAF's status, e.g. the administrative organisation of OLAF, its dual role, and its interinstitutional remit. Since they could jeopardise the objectivity of its investigations and the credibility of its role, the necessary administrative and regulatory remedies in each case are set out below.

1. Administrative organisation

The Decision (Articles 5 and 6) and the Regulation (Article 13) emphasise the intention of the political authorities to give OLAF administrative and budgetary autonomy by laying down a special budgetary structure and establishment plan for the Office and conferring upon its Director the powers of an appointing authority and authorising officer.

As far as procedures for adopting budget forecasts are concerned, the Commission and the budgetary authority have implemented the following arrangements: OLAF's budget and establishment plan are adopted by Parliament and the Council on the basis of a preliminary draft drawn up by the Director after consulting the Supervisory Committee and forwarded to the budgetary authority by the Commission, if necessary accompanied by comments.

Not all the conclusions have yet been drawn from these arrangements as far as management is concerned, and the effect of this has been to create de facto limits on the Office's autonomy. In particular, OLAF has so far made very few changes to the expenditure implementation and staff management procedures used by UCLAF, a department which was subject to the general Commission regime. However, Article 6(4) of the Decision laid down that 'Commission decisions concerning its internal organisation shall apply to the Office' but only 'in so far as they are compatible with the provisions concerning the Office adopted by the Community legislator, with this Decision and with the detailed rules implementing it'. It should be noted that Article 6(1) confers the power to 'lay down the conditions and detailed arrangements for recruitment'. And pursuant to Article 6(2), the Director, as authorising officer, has the powers needed to ensure OLAF's administrative and budgetary autonomy. It would therefore suffice in principle to implement such powers. To date, however, all that has been done is to compile a more or less formal inventory of expenditure managed directly by OLAF and to assign management tasks on a pragmatic basis, the aim being to continue to benefit from economies of scale.

If this situation were to continue, it could adversely affect the Director's freedom of action, limit his powers in matters pertaining to staff management and create de facto obstacles to the restructuring of the Office by limiting his scope for recruiting staff with the necessary qualifications and specialisations (e.g. in the fields of criminal investigation, criminal procedure or 'intelligence'). As regards the management of appropriations, scope for obtaining equipment or premises could also be limited.

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 200 (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).

2. OLAF's dual role

In addition to its operational task of fighting fraud, the Decision and the Regulation conferred on OLAF all of UCLAF's powers and responsibilities, including the task of preparing and drawing up legislative and regulatory initiatives for the Commission pertaining to action against fraud. It is precisely in this dual role that the ambiguity lies. OLAF has total independence in respect of its operational activities, but in respect of the drawing-up of legislative initiatives or certain preparatory work, it is merely involved in a process for which the Commission retains full responsibility.

OLAF's involvement in the preparation and drawing-up of legislative initiatives is very important, partly for ensuring the quality of such legislation, which must be able to benefit from the Office's practical experience in the field, and partly for OLAF, whose enforcement activities must be improved and supplemented by preventive measures, by means of better adapted and more effective legislation. In practice, the relationship between the Commission and OLAF in such cases tends to be very similar to that between the Commission and any directorate-general to which it issues, and on which it imposes, political guidelines: OLAF is thus regarded as a department which must cooperate and negotiate with other departments in the drafting of common positions, i.e. those of the Commission.

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.

3. OLAF's interinstitutional remit

As is evident from the foregoing, regards operational activities, the most important aspect of the reform brought about by the creation of OLAF concerns its task of carrying out investigations within Community institutions, bodies, offices and agencies in order to enhance the action taken to fight fraud, corruption and any other illegal activities to the detriment of the Community's financial interests. Owing to certain weaknesses in the legal framework, difficulties have nevertheless become apparent in implementing the Regulation in the institutions.

- On the one hand, the general scope of the Regulation, which covers the whole of the Community's legal order and all the bodies, institutions, offices and agencies established by, or on the basis of, the Treaties, has been called into question because of the decisions that are to be taken pursuant to Article 4. The political authorities had chosen to ensure the Regulation's general scope not only by basing it on Article 280 of the EC Treaty and using the codecision procedure set out in Article 251, but also by concluding an interinstitutional agreement which the various institutions and bodies were called on to sign and which provided for a model decision which they were to adopt.

- It should be recalled that the European Central Bank and the European Investment Bank did not consider themselves to be bound by these provisions and used the scope the interinstitutional agreement gave them to adopt internal decisions that were not consistent with the Regulation. As requested by the Supervisory Committee in its letter of 17 December 1999 to President Prodi, the Commission instituted legal proceedings, currently pending before the European Court of Justice, in respect of those internal decisions. At the same time, several Members of Parliament brought action against the European Parliament on account of its decision to apply the Regulation, and an interim decision was given on 2 May 2000 which suspended application of the decision for the plaintiffs.

- On the other hand, once the institutions and other bodies envisaged the specific possibility of OLAF conducting internal investigations, ambiguities and uncertainties emerged as regards the relationship between such investigations and existing procedures for invoking the disciplinary, financial or criminal liabilities of their members, officials or agents:

- how could the administrative inquiries hitherto conducted by the institutions into irregularities be reconciled with OLAF's power to conduct internal administrative investigations?
- what role do OLAF's internal investigations have with regard to disciplinary procedures?
- what action could be taken to follow up OLAF investigation reports which conclude that it is advisable to invoke financial liability since the corresponding procedures work only in very exceptional cases?
- what could the scope of an OLAF investigation into a Member of the European Parliament be?

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;**
- **inter-relationship 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.

B. LIMITATIONS IMPOSED BY OLAF'S ACTIVITIES

If we look first at the situation that existed previously, we see that OLAF had a structure that corresponded to, and evolved with, the tasks entrusted to it. That structure was initially geared to coordinating the anti-fraud activities of various Commission Directorates-General and gradually came to encompass administrative control activities, the aim being to draw up administrative measures, adopted more often than not by national authorities on the basis of Community rules, on the prosecution of irregularities. In the case of intentional irregularities

constituting administrative or criminal offences, such measures could take the form of sanctions. Increasingly, UCLAF became involved in coordinating criminal proceedings relating to one and the same case in several Member States or in providing technical back-up for such proceedings. Its activities thus evolved towards coordinating and providing back-up for investigations and proceedings conducted by national (administrative or criminal) authorities. Lastly, there were its own investigative activities within the European institutions, either in internal Commission cases, or in relation to the aspects of complex external cases which involved the Commission.

The dividing line between such activities has remained blurred and, despite their extreme diversity, they have continued to be dealt with according to analogous, and very informal, rules of procedure. However, at the request of the political authority, these changes in UCLAF's activities were accompanied by increases in resources, in terms both of personnel and of legal instruments. Regulation No 2185/96 conferred upon the Commission, i.e. its anti-fraud unit, powers of investigation involving relatively major restrictions on individual freedoms, and it has, for instance, the same material resources as national administrative control officers: it can make copies of documents or computerised data, take samples, make physical checks, analyse budget documents and accounts, and, if need be, call on the public authorities for assistance. Where necessary, the information thus obtained can be used in criminal proceedings. However, neither UCLAF's methods nor its structures were really adapted to reflect these changes until the Commission Decision of 14 July 1999.

But the Regulation, which established OLAF, did not provide specific solutions to the difficulties caused by the structural mismatch in respect of the legitimacy and effectiveness of investigations, either. This calls into question OLAF's ability to fulfil its tasks and means that the system must be improved so that the provisions of the Regulation become fully effective and that consideration must be given to developing the legal framework so as to ensure the necessary overall cohesion. This is illustrated below as regards both internal organisation and the institutional environment.

1. Limitations associated with the internal organisation of investigations

The introduction of the new OLAF structure, tailored to the tasks laid down by the legislator, is still at a very early stage, and several major reforms are still being considered or are in the process of being implemented. As for the changes that have already been made, they have had very little impact to date and it has to be pointed out in this report that shortcomings exist in the current organisation in terms of the requirements for transparency, legitimacy and efficiency:

- as regards transparency, it is not possible to determine the objective criteria on the basis of which decisions to launch investigations or forward files to the legal authorities are taken, and the same is true of the practices and procedures for registering cases and associated documents;
- as regards legitimacy, guarantees for the objectivity of investigations and for respect for individual rights are inadequate; persons under investigation by OLAF receive little

information about the procedural rules being applied or their guaranteed rights (in the case of internal investigations, the procedures applied by UCLAF have also been the subject of formal complaints (see above);

- as regards efficiency, the operational scope of the reports drawn up following investigations is still inadequate. Although a relatively large number of prosecutions have been launched in cases which UCLAF/OLAF have dealt with, very few of them have resulted in a judgment. As far as disciplinary action is concerned, it should be noted that investigation reports are merely considered to be one of several factors.

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.**

2. Limitations associated with the institutional environment

The purpose of the various Community texts on the protection of the Community's financial interests (Article 280 of the EC Treaty and the Cannes agreement of 26 July 1995 on the protection under criminal law of the financial interests of the European Communities, Regulations Nos 2988/95, 2185/96 and 1073/99), is, with due regard for subsidiarity, to remedy the shortcomings of a system in which responsibility for investigating and prosecuting fraud against the financial interests of the European Union rests primarily with national authorities. It may be observed that those perpetrating acts of fraud are increasingly profiting from the existence of separate national prosecution systems and that it is therefore necessary to coordinate, organise and, indeed, centralise at Community level a number of tasks so as to deal with the increasingly Community-wide dimension of such crime. However, the institutional limits of the last measure adopted for this purpose, the establishment of OLAF by the Regulation, are already becoming apparent as regards cooperation between OLAF and the national authorities, which is meant to ensure the system's efficiency, and as regards judicial scrutiny of OLAF's operations, which is intended to ensure its legitimacy.

(a) Limits on the operational efficiency of OLAF: inadequacy of cooperation with national authorities

The bases for cooperation between OLAF and the national administrative authorities are rules providing for mutual administrative assistance and well-established bilateral contacts, which may be based on *ad hoc* arrangements or on formal agreements. However, only exceptionally does

such cooperation go beyond the scope of specific cases and scarcely does it extend to a global approach to the phenomenon of fraud. In particular, cooperation on the collection and analysis of information and intelligence is still embryonic.

As far as cooperation with national criminal authorities is concerned, OLAF's role is still poorly defined and is not the same for external operations as it is for internal investigations. In the case of external operations, OLAF endeavours, by adopting a pragmatic approach and cultivating personal contacts, to mitigate the drawbacks of international judicial cooperation, i.e. slow and unreliable procedures. But the results are hardly encouraging, and very few cases are successful. In the case of internal investigations, OLAF is more proactive when it comes to gathering evidence, but its relationship with the judicial authority is unclear: OLAF may only issue guidance, depending on the particulars of each case, to the competent national authority, and it is excluded from the judicial handling of cases, especially as the national authorities tend to consider OLAF as an ordinary Commission department.

(b) Limits on the legitimacy of OLAF investigations: inadequate judicial scrutiny

The Regulation does not formally provide for scrutiny of the legality of OLAF investigations, except in the case of internal investigations and solely where officials or agents are concerned. The latter may file a complaint with the Director of OLAF in accordance with the procedure laid down in Article 90 of the Staff Regulations, pursuant to which appeals may be filed retrospectively with the Court of First Instance.

Obviously, this is completely inadequate, and a judicial body should permanently supervise all OLAF activities and, in particular, authorise or order measures restricting individual rights to be adopted during investigations, monitor their implementation and verify whether an investigation conforms to the evidence rules so that the evidence adduced is admissible in the court with jurisdiction for the case.

The Regulation did not entrust such a task to the Supervisory Committee, which is not a judicial body. It was clearly stipulated that the Office is not to interfere in the conduct of investigations in progress. Moreover, the fact that it is composed of 'independent persons' occupying senior posts in their respective countries prevents it from taking on such a role.

This is a fundamental issue which, together with the ambiguities concerning the Office's independence, forms the basis for the complaints made in respect of the legitimacy of OLAF's investigations that have been filed with the Court of Justice (see above). It must be resolved as soon as possible.

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 5/99 and 2/00, which are annexed to this report.

Conclusion

The Committee was established and its powers laid down by the Community legislator in order to ensure the independence, transparency and efficiency that are essential for the protection of the Community's financial interests and for action to combat fraud. It is for that reason that it stands outside the Institutions and that the Regulation states clearly as regards its members that: 'in carrying out their duties, they shall neither seek nor take instructions from any government or any institution, body, office or agency' (Article 11(5)).

One year on, the organisation of the protection of the European Union's financial interests has not yet improved appreciably, in spite of the innovative system introduced by the Regulation of 25 May 1999.

From the cyclical point of view, the transition from UCLAF to OLAF is far from complete, and the long-drawn-out staff recruitment procedures (even the Secretariat of the Supervisory Committee has not yet been appointed, more than a year after its members took up their duties!) makes us fear that the transition will last for many more months to come, at the risk of compromising the effectiveness of investigations both within the European institutions and in the Member States. This risk is particularly worrying at this specific time, when the introduction of the euro in currency form, on the one hand, and the enlargement of the European Union, on the other, will provide criminals with new opportunities to commit fraud.

The structural problems that the Supervisory Committee has noted are equally worrying. It is obvious that neither *a posteriori* scrutiny exercised by the Court of First Instance and the Court of Justice of the European Communities nor coordination by Eurojust investigating magistrates, however vital these may be, will be enough to ensure the continuous management of investigations, which presupposes the adoption of common rules on procedure and substance and the establishment of a European public prosecutor's office with jurisdiction throughout the European area. In this connection, there must be no confusion about the Supervisory Committee: it has not been given a mandate to fulfil the role of judicial safeguard which is called for by the development of the powers of investigation entrusted to OLAF; it neither can nor should replace such a public prosecutor's office, the establishment of which it regards as inevitable, after the year it has spent observing OLAF's activities. However, the Committee proposes in Chapter III a set of improvements (P1-P5) which could be implemented quickly.

When all is said and done, it is obvious -and this first year illustrates this point beyond any doubt- that in the absence of a European public prosecutor's department, OLAF's independence must be guaranteed by a body which is itself independent and not part of the Institutions, and this confirms, if any confirmation were necessary, the legitimacy of the system introduced by the Community legislator.

ANNEXES

Summary

- Annex 1: Calendar of Supervisory Committee meetings
- Annex 2: List of opinions and reports by the Supervisory Committee
- Annex 3: Opinion 5/99 of 17 December 1999 on *the implications of the possible implementation of the Corpus Juris*
- Annex 4: Opinion 2/2000 of 16 May 2000 on *the initiatives of the institutions concerning the future of OLAF*
- Annex 5: Report 1/99 of 7 October 1999 on *the application of Regulation (EC) No 1073/1999 of the European Parliament and of the Council by EU institutions, bodies, offices and agencies*

Calendar of meetings - 1999

Month	Meeting date
JULY	Thursday, 12 July 1999 Friday, 13 July 1999
AUGUST SEPTEMBER	Tuesday, 31 August 1999 Wednesday, 1 September 1999
OCTOBER	Wednesday, 6 October 1999 Thursday, 7 October 1999
NOVEMBER	Tuesday, 16 November 1999 Wednesday, 17 November 1999
DECEMBER	Tuesday, 14 December 1999 Wednesday, 15 December 1999

Calendar of meetings - 2000

Month	Meeting date
JANUARY	Tuesday, 11 January 2000 Wednesday, 12 January 2000
FEBRUARY	Tuesday, 8 February 2000 Wednesday, 9 February 2000
MARCH	Wednesday, 7 March 2000 Thursday, 8 March 2000
APRIL	Tuesday, 4 April 2000 Wednesday, 5 April 2000
MAY	Tuesday, 9 May 2000 Wednesday, 10 May 2000
JUNE	Tuesday, 20 June 2000 Wednesday, 21 June 2000
JULY	No meeting planned
AUGUST	Thursday, 24 August 2000 Friday, 25 August 2000

List of opinions and reports by the Supervisory Committee

Opinion 1/99 of 7 September 1999 on OLAF's budget proposals for 1999 and 2000

Opinion 2/99 of 28 September 1999 on preliminary draft supplementary and amending budget 5/99

Opinion 3/99 of 7 October 1999 on applications for the post of Director of OLAF

Report 1/99 of 7 October 1999 on the application of Regulation (EC) No 1073/1999 of the European Parliament and of the Council by the institutions, agencies and bodies of the European Union

Opinion 4/99 of 14 October 1999 on the draft rectifying letter relating to the budget for 2000

Opinion 5/99 of 17 December 1999 on the implications of the possible implementation of the *Corpus Juris*

Opinion 1/2000 of 8 February 2000 on the filling of posts in the Secretariat

Opinion 2/2000 of 16 May 2000 on the initiatives of the institutions concerning the future of OLAF

OPINION 5/99
by the Supervisory Committee

FOR THE
EUROPEAN PARLIAMENT'S
COMMITTEE ON BUDGETARY CONTROL

ON

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

Rapporteurs: José Narciso da Cunha Rodrigues
Raymond Kendall
Edmondo Bruti-Liberati

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, 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 the Regulation 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.

OPINION 2/2000

ON

THE INITIATIVES OF THE INSTITUTIONS
CONCERNING
THE FUTURE OF OLAF

Draftsman: Mr Edmondo BRUTI-LIBERATI

16 May 2000

Even before OLAF has completed the restructuring required as a result of its having new functions assigned to it pursuant to the Regulation 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 the Regulation 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

¹ COM(2000) 200 final/2.

also envisages proposing an amendment to the Staff Regulations of Officials in order to implement these measures.

1.2. Commission opinion on the convening of an IGC (26 January 2000)¹

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 Hulst 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.

¹ 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 the Regulation 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 5/99¹, 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.

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.

¹ See Annex 1.

**REPORT 1/99
by the Supervisory Committee**

**to Parliament
to the Council
to the Commission**

on the implementation of Regulation No 1073/1999 of the European Parliament
and of the Council by EU institutions, bodies, offices and agencies

1. On 25 May 1999 the European Parliament and the Council, in agreement with the Commission, adopted the Regulation concerning investigations conducted by the European Anti-Fraud Office (OLAF). This regulation confers on OLAF independent status and extensive powers to conduct administrative investigations in all the Community institutions, bodies, offices and agencies. It also makes it compulsory for each Community institution, body, office or agency to take a decision aimed at two objectives: establishing a duty on the part of their members, officials and other servants to cooperate with and supply information to OLAF; specifying the guarantees of the rights of persons concerned by an internal investigation.

On the same date, the European Parliament, the Council and the Commission signed an interinstitutional agreement extending OLAF's powers of investigation within institutions, bodies, offices and agencies beyond protection of the Community's financial interests and providing a model for the decision required by the Regulation. All institutions, bodies, offices and agencies were invited to accede to this agreement and to take a decision in compliance with the model.

2. An assessment of the implementation of these provisions shows that, to date, only the Committee of the Regions, the European Central Bank and the European Investment Bank have failed both to take the decision made compulsory by Article 4 of Regulation 1073/1999 and to accede to the interinstitutional agreement.

3. The Committee wishes to point out that the Regulation is based on Article 280 of the Treaty establishing the European Community, under which the Council, acting in codecision with Parliament, has the power to *'adopt the necessary measures in the fields of the prevention of and the fight against fraud affecting the financial interests of the Community'*. The Committee notes that the only restrictions set by Article 280 on Community measures are the application of national criminal law and the national administration of justice, and that it does not provide for any Community institution, body, office or agency being exempt from measures taken on the basis of this article. Besides, Regulation No 1073/1999 stipulates that OLAF *'shall conduct administrative investigations 'within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties'*, without exception. The Committee of the Regions, the European Central Bank and the European Investment Bank are bodies established by the Community Treaties.

4. The Committee notes that Article 280 of the Treaty and Regulation No 1073/1999 do not mention the budget administered by the Commission but seek to protect the Community's financial interests as a whole. As Regulation No 1073/1999 points out, the Community is composed of all the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties. Their financial interests include not only the funds which these Community institutions, bodies, offices and agencies have in their possession or administer, but also all the resources available to them. They also cover any funds or assets entrusted to the Community institutions, bodies, offices and agencies, e.g. by the Member States (currency reserves deposited with the ECB), given that, under Article 288 of the Treaty, the Community *'shall, in accordance with the general principles common to the laws of the Member States, make good any damage*

caused by its institutions or by its servants in the performance of their duties', e.g. as a result of fraud.

5. The Committee also attaches the greatest importance to the interinstitutional agreement. It is the only means of protecting citizens and economic operators against a number of risks which may not affect the finances of Community institutions, bodies, offices or agencies, but might be costly to the general public. These risks include corruption with the aim of influencing Community legislation or the choice of projects to be funded or supported by the Community, e.g. via the European Investment Bank, the disclosure of confidential information, e.g. with regard to decisions on reference or intervention rates on the European Central Bank's exchange market. Moreover, under the terms of Regulation No 1073/1999, OLAF already has the power to conduct administrative investigations within institutions and other bodies, including, where necessary, the Committee of the Regions, the European Central Bank and the European Investment Bank. The fact that these Community bodies have not taken the statutory decision specifying the guarantees of rights of persons concerned by an internal investigation is potentially prejudicial to their members and staff. The result of the abstention of the Committee of the Regions, the European Central Bank and the European Investment Bank is therefore that neither ordinary citizens nor economic operators, nor the staff of these bodies are guaranteed adequate protection.

6. In view of the sums of money managed by the Committee of the Regions, the European Central Bank, and the European Investment Bank, the Supervisory Committee therefore considers it essential that these Community bodies accede as soon as possible to the interinstitutional agreement on OLAF and take the decision made compulsory by Regulation 1073/1999, in accordance with the proposed model. It calls on the European Parliament, the Council and the Commission, in exercising their responsibilities, to take due account of the attitude of these bodies to OLAF, in accordance with the principle that the Community should not make public funds available if they cannot be protected by OLAF.