



Activity Report of OLAF Supervisory Committee

June 2007 – May 2008

August 2008

Members of the OLAF Supervisory Committee

Luis LÓPEZ SANZ-ARANGUEZ

Chairman
Public Prosecutor at the Supreme Court, Spain

Kálmán GYÖRGYI

Chief Advisor to the Minister for Justice and Law Enforcement,
Attorney General of the Republic of Hungary (retired), Hungary

Peter STRÖMBERG

Director of the Supervisory Board of Public Accountants, Sweden

Diemut R. THEATO

Former Member of the European Parliament, Former Chairman of the Committee of
Budgetary Control, Germany

Rosalind WRIGHT

Chairman of the Fraud Advisory Panel, United Kingdom

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FOREWORD BY THE CHAIRMAN TO THE SUPERVISORY COMMITTEE'S ACTIVITY REPORT

I am pleased to submit the second Activity Report of the present Supervisory Committee of OLAF, covering the period between June 2007 and May 2008.

The Supervisory Committee is fully committed to assisting OLAF in its crucial fight against fraud, corruption and irregular activities to the prejudice of the European Community's financial interests and to reinforcing OLAF's independence through the regular monitoring of its investigations. We are now in a defining moment of our term of office to fulfil those tasks, having acquired both a good understanding and a broad knowledge of OLAF and the scope of its work.

With this practical experience in hand, we have stepped up our monitoring of OLAF's investigations through the examination of a considerable number of cases with the aim of safeguarding OLAF's independence in the conduct of investigations and the quality of its work. At the time of writing the Supervisory Committee is finalising a number of opinions: on cases of minor wrongdoings - "de minimis" cases; detailed analysis of the reasons for investigations lasting for more than nine months and assessment of a number of cases that remain unresolved four years after they were opened. The regular monitoring of investigations is a fundamentally important means of guaranteeing that independence in the opening and conduct of investigations and drafting of case reports is fully respected. As an independent Committee, we are in an unrivalled position to carry out this task and have and will continue to dedicate all our efforts and expertise to fulfil it.

We note that OLAF has been working on a new Manual for operations; we will review this carefully and provide constructive feedback. As we noted in our previous Activity Report, the Supervisory Committee found that a large proportion of the issues surrounding OLAF's investigations could be solved with clear procedural rules that all OLAF officials are required to adhere to. This is particularly true as regards the excessive amount of time taken up by some of these investigations. We would expect the new Manual to set out clear procedural rules for operations, including reasonable deadlines for each step in the investigative process.

The Committee is pleased to see those initiatives taken by OLAF with a view to making investigations more efficient; however there is still a long way to go. We expect OLAF to review its management and human resources policies and we would hope that resources in general are allocated in a more rational way to reinforce the investigative function of OLAF.

Over the period concerned we have continued to stay in close contact with OLAF management, including the Director General, Directors and Heads of Unit, as well as OLAF staff throughout the organisation. We have experienced good collaboration with OLAF which we are persuaded will be maintained and strengthened in the future. Furthermore we are confident that the close working relationship between the Committee and the EU institutions will also continue.

Our ultimate aim as an independent Committee is to help OLAF increase its effectiveness and strengthen its independence and we firmly intend to continue down this path.

I would like to thank in particular the Secretariat of the Supervisory Committee for their invaluable support.

INTRODUCTION

The Supervisory Committee (SC) of the European Anti Fraud Office (OLAF) was established to reinforce and guarantee OLAF's independence by regular monitoring of OLAF's investigative function. The Committee delivers opinions to the Director General of OLAF and is required to report to the institutions on its activities on a yearly basis. This is the second activity report of the current SC and refers to activities undertaken between 1st June 2007 and 31st May 2008.

In our first activity report, adopted in October 2007¹, the SC stressed the need for OLAF to implement strong and effective leadership, clear investigatory policy and management of procedures, internal control mechanisms to avoid potential conflict of interest in the course of investigations and a robust staff policy; all these matters having a direct impact on the independent conduct of investigations and their effectiveness. The SC also recommended changes to the way OLAF informs the SC of those investigations that have been in progress for more than nine months. The report was discussed with the Vice-President of the Commission, Mr. Siim Kallas, the Secretary General of the Commission, Mrs. Catherine Day; the Committee on Budgetary Control of the European Parliament (COCOBU) and the Council's working group on the Fight Against Fraud during the Slovenian Presidency. The SC is gratified by the positive feedback and support it received. Mr. Franz-Hermann Brüner, Director General of OLAF stated that he regarded the report as a positive means of achieving common goals.

Mrs. Rosalind Wright was Chairman of the SC until December 2007 when Mr. Luis López Sanz-Aránguez was elected for a term of one year.

I SUPERVISORY COMMITTEE WORKING METHODS

I – 1 Meetings

The SC maintained its schedule of monthly meetings and held eleven *in-camera* plenary meetings at which all members were present.² The SC meetings are not open to the public and all its related documents are confidential, although the minutes of its meetings are made available to OLAF and to the Secretariats General of the European Parliament, of the Council and of the Commission for the sake of transparency and in order to provide them with regular information on the SC's activities. The SC's opinions delivered to the Director General of OLAF were adopted unanimously by the SC members and the appointment of *rapporteurs*³ was maintained to increase the efficiency of the preparation and follow-up of specific items of interest to the SC.

As we did during the previous reporting period, the SC continued the practice of inviting the Director General of OLAF and a number of OLAF staff to its meetings in order to discuss and

¹ First Activity report covering the period December 2005 to May 2007 (OJ C 123, 20.5.2008).

² See Annex 1.

³ Article 8 of the Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 2.2.2007).

be informed of any pertinent matters relevant to the SC work and also to inform OLAF about the SC's activities.

I – 2 The Secretariat

The responsibilities of the Secretariat of the SC are outlined in the SC Rules of Procedure⁴, which stipulate that the Secretariat plays a key role in facilitating and contributing to the performance of all tasks undertaken by the SC and ensuring that the SC is able to fulfil its legal mandate in full independence.

Having observed the difficulties of recruiting and appointing Secretariat staff during its first two years in office,⁵ the SC recommended⁶ that eight appropriately qualified Secretariat staff be earmarked by means of a footnote to the OLAF establishment plan, in order to prevent the future work of the SC grinding to a halt, as well as to ensure the continuity of the SC's work and to strengthen the independence of the SC.

II OLAF'S INVESTIGATIVE FUNCTION

II – 1 Monitoring of OLAF'S investigative function: the reinforcement of OLAF's independence

The independent opening and conduct of investigations and the drafting of case reports following such investigations are the core duties of OLAF. Since the beginning of its mandate the present Supervisory Committee decided to make the fullest use of those legal mechanisms provided to it by the legislator with regard to the regular monitoring of OLAF's investigatory function.

Since its last report, the SC has increased its monitoring activity in the area of investigations lasting longer than nine months and, for the first time, those investigations still open after a period of more than four years, as well as those cases referred to the national judicial authorities. The SC has also examined monthly statistics on operational activities.

II – 1.1 Regular monitoring at the Supervisory Committee's initiative (article 11.1 of Regulation (EC) No 1073/1999)

The excessive length of certain of OLAF's investigations has been a matter of concern to the SC. OLAF also considers the reduction of the duration of older cases to be a priority.⁷

Taking into consideration the leading role that OLAF plays in certain areas of investigation where it also enjoys clear procedural competences, the SC decided to examine all cases of

⁴ The Rules were adopted by the SC in August 2006 and published in February 2007 (Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 2.2.2007)).

⁵ Two vacant secretariat posts were published internally by OLAF in June 2006. One member of the Secretariat was appointed in January 2007 and one in July 2007.

⁶ See Annex 5.

⁷ OLAF's seventh activity report 2006.

OLAF Directorate A “Investigations and Operations I” remaining open after more than four years of investigation or which were created in 2004. The *rapporteurs* have examined information relating to 26 OLAF investigation files covering all sectors of Directorate A as follows: 13 internal investigations: European institutions, 5 internal/external investigations: EU bodies, 6 direct expenditure and external aid and 2 external aid.

This analysis aimed to verify that potential undue delays were not related to any reason that would have compromised the independent conduct of investigations or could jeopardise their results.

When examining the cases, the SC gave due consideration to the following elements: compliance with the rules as set out in the OLAF Manual; categorisation of cases as criminal, disciplinary or financial offences; undue delays; periods of inactivity and time barring (prescription) limits; conflicts of interest in the course of investigations; respect for human rights and fundamental freedoms; potential risks for the independent conduct of investigations. In addition, an overall assessment of the quality of the files as well as the consistency between the Case Management System (CMS) and the paper copy was carried out.

While each case has individual features, it was apparent that there was a common thread of undue delays and unexplained periods of inactivity during the investigation phase. Some of those cases classified as “internal investigations” were in fact “criminal assistance” cases. These cases and others correctly categorised as internal investigations were kept open although no investigatory action is currently being taken.

Except for the evaluation and assessment periods there are no clear deadlines set out in the OLAF Manual for the duration of investigations. This lacuna creates legal uncertainty and a potential danger of a breach of the time-barring (prescription) limits and of other factors prejudicial to the interests of justice.

The SC is concerned by the lack of effective case scrutiny mechanisms to assist OLAF in avoiding such risks. The SC recognises and welcomes the appointment of two board advisors for the OLAF investigations and operational Directorates, but their terms of reference are not clearly defined and, in the absence of clear procedural rules, the SC fears that factors harmful to the successful outcome of an investigation are still present.

All OLAF’s investigations remaining open for more than four years are being currently examined by the *rapporteurs*. General and detailed conclusions will be reached in the coming months and will be the subject of an Opinion addressed to the Director General of OLAF.

In the process of the SC’s monitoring of OLAF cases, both paper and electronic files from OLAF’s Case Management System database (CMS) were examined. The SC experienced an overall lack of rigorous and systematic organisation in both the indexation and the filing of OLAF documents. The SC considers that such careful attention to detail is indispensable in order to avoid any possible confusion and potential loss of continuity in cases. Furthermore, the SC considers that in order to save time, file notes with a summary of the facts of a case in one of the Commission’s working languages be prepared by the investigator able to read the documents in their original language.

II – 1.2 Regular monitoring based on information sent to the Supervisory Committee by the Director General of OLAF (article 11.7 of Regulation (EC) No 1073/1999)

II – 1.2.1 Investigations in progress for more than nine months

The SC has continued the examination of those reports drawn up by OLAF investigators where investigations have been in progress for more than nine months. The SC examined all 141 reports of investigations of this type during the period January to December 2007 (78% of investigations opened by OLAF at that date had been in progress for more than nine months) on a month by month and sector by sector basis, paying particular attention to the reasons given for the cases not being completed within a nine month period. The SC noted that the reason cited by OLAF in half of these reports was: “significant resources were allocated but even so the volume of the investigative work means that more time is needed”.

In its annual activity report 2005-2007, the SC had recommended radical changes to the information contained in those OLAF reports designed to give detailed reasons for egregious delays in investigations and to draw attention to potential time barring (prescription) periods.⁸

More specifically, the SC recommended to the Director General of OLAF that “the format of the summary of the “nine months reports” should change so as to incorporate supplementary elements which would allow an efficient evaluation of the progress of investigations. These elements should include: the legal description of the irregularity, the date or period on which the acts under investigation were executed, the duration of the “assessment stage” prior to taking the decision to open the case, the potential sanctions or legal consequences of the acts under investigation and time-barring periods for the acts under investigation”.

The Director General of OLAF formally followed this recommendation of the SC. However, whereas investigations and operational units of Directorate B “Investigations and Operations II” adapted their reports to the information requested by the SC, the investigations and operational units of Directorate A “Investigations and Operations I” did not follow the recommendation.⁹ As a result, the SC encountered the same issues as those experienced in the previous reporting period. The use of “tactical hold in investigation” was frequently given as a reason for a pending investigation. The SC had previously recommended the omission of this as a reason to keep a case pending since it did not provide a clear picture of the reasons for delays. In addition, it was noted that the expected time for completion of the investigation was not mentioned in one third of the cases.

The SC drew the attention of the Director General of OLAF to the disparity in the approach of both Directorates. Only in January 2008 did the Directorate A units adapt their summaries to the requests of the SC. These reports are also under consideration by the SC (54 from January to May 2008) and, together with the above mentioned 141 reports, are the subject matter of an opinion to be addressed to the Director General of OLAF.

⁸ Recommendation III of the SC Annual Activity Report December 2005 – May 2007 and SC Opinion No 1/2007 (Annex 4).

⁹ Directorate B (4 units): Agriculture; Customs I.; Customs II; Structural Measures.
Directorate A (4 units): Internal Investigations; European Institutions; Internal/External Investigations: EU Bodies; Direct Expenditure and External Aid; External Aid.

II – 1.2.2 Recommendations to institutions

The Director General of OLAF is obliged to inform the SC of cases where an institution, body or agency concerned has failed to act on the recommendations of OLAF.¹⁰ In the reporting period only two such cases have been reported to the SC, which the SC has analysed and discussed. On the basis of such a small number of reported cases, the SC is not able to come to any general conclusions or make any recommendations. However, these cases raise concerns that OLAF did not carry out an effective follow-up and failed to take account of time barring periods despite which it undertook a great deal of unnecessary administrative work. The fact that there have only been two cases during the reporting period gives the SC concern that there appears to be no systematic reporting in place.

The SC recommends that OLAF set up a systematic reporting system for those cases where an institution, body or an agency has failed to act on OLAF's recommendations in accordance with the legal obligation.

II – 1.2.3 Cases requiring information to be forwarded to the national judicial authorities

The aim of the SC is to assess the quality and usefulness of OLAF's investigation reports for the national judicial authorities and that conclusions of investigations are solely based on elements which have evidential value in the judicial proceedings of the Member State in which their use proves necessary.¹¹

The Director General of OLAF regularly forwards to the SC copies of the files sent to Member States' judicial authorities. During the reporting period the SC examined 43 cases of this type. These cases have been presented to the SC meetings by those magistrates of OLAF's Judicial and Legal Advice Unit who forwarded the case files. Based on a preliminary analysis, open discussions on substantive and procedural aspects of investigations take place between the SC and the representatives of this Unit.

The SC has paid particular attention to the classification of the offences as well as to their limitation period (prescription). The SC also checks that the description of the facts is clear and comprehensible to the addressees. Lastly, the members endeavour to ensure that the reports will stand up as admissible evidence in the judicial procedure of the Member State in question. In the event of an offence comprising constituent elements committed in several Member States, the SC also seeks to determine what objective reasons prompted OLAF to choose the particular Member State to which it has submitted the case.

The SC has observed that in some cases the final reports have been sent to the national judicial authorities when cases are time barred; in others, the lack of relevance of the case has led these authorities not to open the case. The SC also noted that this could be avoided by involvement in the investigation at an earlier stage of the magistrate of the Judicial and Legal Advice Unit. In all cases where their advice appears essential, the degree and timing of involvement of OLAF magistrates is not systematic.

¹⁰ Article 11(7) of Regulation (EC) No 1073/1999.

¹¹ Recital 10 and art 9.2 of Regulation (EC) No 1073/1999.

It is worth pointing out that the judicial authorities of the Member State which receive OLAF's reports are not obliged to instigate legal proceedings.¹² It is up to these authorities to take a decision in line with the rules of law applicable in their territory and, where appropriate, with their criminal policy priorities.

With this in mind, and in order to improve the clarity of the reports forwarded, it would be advisable to ensure that all of these reports are always based on the same pre-established model to ensure that nothing is omitted and that all the relevant elements are included taking into consideration the legal requirements of the Member State and the national evaluation rules.

The SC also receives information regularly from OLAF on the cases in which the national authorities, including the prosecution services, did not instigate proceedings following the receipt of files from OLAF. This concerned two cases forwarded in 2007 and one in 2008, where the judicial authorities to whom the cases were referred decided not to take any further action.

II – 1.3 “Prima facie Non-Cases”: information received which clearly and unequivocally does not fall within the competence of OLAF

The SC examined a representative sample of 212 “prima facie non-cases” (24% of all cases between 2003 and 2007) where information received by OLAF did not fall within OLAF's competence and, therefore, did not require a full assessment or a formal investigation to be opened.¹³ The focus of the analysis was to verify the correct application by OLAF of the rules set out in the Manual, and to examine what procedures are currently in place to deal with these types of cases.

The SC concluded that OLAF applies the existing rules appropriately and that the procedures allow OLAF to close these types of cases quickly without excessive need of resources. The SC did not detect any case in the sample where a different procedure or full investigation of the information would have been more appropriate. However, the SC notes that there was a disparity between current practice, whereby investigators assess incoming information and the Manual, which indicates that processing incoming information is the responsibility of the Head of Unit. The SC recommends this to be taken into consideration by OLAF during revision of the OLAF Manual – Operational Procedures.

II – 1.4 “De minimis” policy of OLAF: minor wrongdoings than can be dealt with satisfactorily by other services

The SC is aware that the main factor in deciding whether or not to open a case is not always financial impact. OLAF is also obliged to consider other factors such as the political importance of the information and the Communities' reputation, as well as respecting the Commission's zero tolerance policy for fraud and corruption. This should, however, not mean that OLAF has to process all types of initial information and investigate all cases regardless of the magnitude of their financial impact.

¹² See also Judgment of 4/10/2006, case T-193/04, HMT v. Commission (point 69).

¹³ Part 3.3.3.1, P. 76. of OLAF Manual of 25 February 2005.

The SC has identified some very minor cases (e.g. false expense claims by officials involving small amounts of money) where they could have been immediately referred to the Investigation and Disciplinary Office of the Commission (IDOC), who are competent to investigate these types of internal cases, as well as cases of professional misconduct. The SC's experience also shows that OLAF would benefit from strengthened cooperation with IDOC. It is, therefore, important that OLAF implement the Memorandum of Understanding with IDOC as soon as possible, to clarify the rules on what should be investigated by OLAF and what should be referred to IDOC, as well as practical issues such as access to files.

The SC believes that it would be beneficial for OLAF to develop an in-house "de minimis" policy in accordance with OLAF's investigation policy and priorities. The SC considers that OLAF should aim at allocating resources wherever possible to investigate more serious cases pursuant to an investigation strategy, to be defined by OLAF, who would redistribute the workload and human resources away from those cases where the financial impact is low.

II – 1.5 OLAF's activities in the area of fraud prevention

During the period covered by this report OLAF gave regular presentations to the SC concerning new fraud and corruption prevention initiatives. While the SC, in principle, supports OLAF's efforts in the area of fraud and corruption prevention, it believes that work in this area should be closely linked with OLAF's investigations and operational work. The SC is particularly interested to learn how, based on concrete results from investigations, OLAF could use this experience and their resulting expertise to deal with strategic challenges in the area of fraud and corruption as stated in Regulation 1073/1999¹⁴.

Given their finite resources for both investigative and preventive activities, the SC recommends that OLAF give urgent consideration to clear prioritisation of fraud and corruption prevention in order that resources are not diverted from investigation work. The SC stresses the necessity to substantially increase the flow of information, collaboration and coordination between OLAF's directorates and units in charge of fraud prevention and those directorates and units in charge of investigations in order that the experience acquired through investigations can be of real use for OLAF's initiatives in this area. Such an alignment is essential for the useful contribution in this field which is anticipated from OLAF to the Commission services.

II – 2 Management of OLAF's investigative function

II – 2.1 OLAF's procedural investigation rules

In April 2007 OLAF forwarded to the SC the Draft OLAF Manual – Operational Procedures (short version). The SC considers that OLAF needs a clear and practical guide for OLAF investigators formulated so as to serve as a useful working tool for carrying out investigations: explaining the procedures, rules and deadlines applicable to different phases of an investigation. This version of the Draft OLAF Manual did not meet the SC's expectations.

¹⁴ Article 1(2) of Regulation (EC) No 1073/1999.

At the time of writing, OLAF was in the process of finalising the new Draft OLAF Manual - Operational Procedures and the SC will give its feedback bearing in mind the points mentioned above.

II – 2.2 Management of investigations

Since the beginning of its mandate, the SC has given consideration to the direct impact that OLAF's management, leadership and organisation have on the implementation of its investigative function.¹⁵ The SC is confident that improvements in these areas will increase the efficiency and effectiveness of OLAF's investigative function: namely control of delays and the quality and efficiency of investigations. In the SC's view, the current legal framework¹⁶ provides the decision-making powers on matters related to the organisation and management of OLAF's activities in general for the Director General of OLAF, as the Head of Service.

The SC notes that a number of improvements are already underway for the management of investigations. The SC welcomes the appointment of Directors of Directorate B "Investigations and Operations II" and of Directorate C "Operational and Policy support" and also Board advisors for Directorates A and B.

At the end of the reporting period, the SC met the Directors of Directorates A and B¹⁷ to discuss the latest developments regarding their respective areas of work and their ideas for the future. The SC would like to build a closer and more open relationship with OLAF management. The SC fully supports OLAF's Directors in their efforts to improve the control and supervision of investigations and is willing to help and advise OLAF as and when appropriate.

The SC recommends that OLAF's management better define a clear investigative policy and the strategic planning of investigations which, in the SC's view, would also improve transparency and facilitate the management of the high volume of investigations and corresponding available resources in the most efficient way.

The SC also encourages OLAF's management to adopt a clearer management focus and vision of OLAF's ultimate function. The SC believes that there is a danger that the lack of transparency may lead to delays in the processing of case files and, in turn, hinder follow-up by Member States of OLAF's recommendations. OLAF presentations of cases forwarded to national judicial authorities indicate that some case files were not processed by the national judicial authorities because the prescription period had expired before the case was forwarded to them. Moreover, the SC analysis of the nine months reports¹⁸ indicates that the many

¹⁵ See conclusions of the First Activity Report of 17 October 2007 (OJ C 123) and the SC Opinion No 1/2007 "OLAF's reports of investigations that have been in progress for more than nine months", contained in the Report.

¹⁶ Article 12 of Regulation (EC) No 1073/1999 and Article 5 of the Commission Decision No 352/1999.

¹⁷ Directorate A (4 units): Internal Investigations: European Institutions; Internal/External Investigations: EU Bodies; Direct Expenditure and External Aid; External Aid.

Directorate B (4 units): Agriculture; Customs I.; Customs II; Structural Measures.

¹⁸ SC Opinion No 1/2007 "OLAF's reports of investigations that have been in progress for more than nine months".

delays (due to low priority, lack of resources and tactical hold) in processing case files could be avoided by better management and planning.

Furthermore, the SC emphasises the importance of mechanisms for adequate quality control and the avoidance of delays as well as a fully functioning feedback system and evaluation of investigations. The existence of a sound control system and benchmarks would facilitate the follow-up by OLAF management of performance as well as identification of problem areas. On the other hand, the system should also allow corrective action to take place on the basis of lessons learnt, following recommendations made. Key tools to improve the control and feedback systems are internal transparency and communication.

The SC issued an opinion on OLAF's Annual Management Plan 2009 (AMP)¹⁹ in which the SC made a number of suggestions regarding management objectives and performance indicators.²⁰

II – 2.3 Administrative organisation and staff policy in relation to OLAF's investigative function

The SC takes the view that the Director General of OLAF should be responsible for putting in place an effective staff policy within the framework of the Communities Staff Regulations as stipulated in the Commission Decision of 1999²¹. Moreover, the Director General of OLAF should exploit the full flexibility he enjoys as appointing authority to ensure smooth staff recruitment, internal transfers and removals and to ensure that the posts and appropriations necessary to allow OLAF to function efficiently be made available.

The SC has examined OLAF's preliminary draft budget for 2009 and issued an opinion²², in which it particularly emphasised the importance of a close alignment of the staff policy with the needs of the investigations units.

In the SC's view this can be achieved by further development of human resources strategy enabling an efficient staff allocation based on real needs and agreed priorities, and by allocating new resources to core investigation work. There is currently an imbalance between allocated resources of operational and non-operational work and OLAF's priority should be to better use already acquired in-house resources rather than to increase total staff numbers.

The SC stresses the importance of setting up a specialised and continuous training programme for investigators to improve their knowledge and skills particularly in relation to the financial implementation of Community rules.

The independence of OLAF investigators is vital. To this end, the question of OLAF temporary staff is of critical importance from the point of view of stability, continuity and independence since a high proportion of investigatory staff is currently employed on temporary contracts. The SC welcomes positive developments in 2007 and 2008 with regard

¹⁹ See Annex 4.

²⁰ See Annex 4.

²¹ Article 6 of the Commission Decision of 28 April 1999 (OJ L 136/20, 31.5.1999).

²² See Annex 5.

to the extensions of temporary contracts for an unlimited period and the publication of open competitions. Furthermore, the SC encourages OLAF to undertake promotion of its temporary staff in accordance with the Staff Regulations and the Decision of the Director General of 2005²³ in order to improve their mobility, whilst carefully planning its recruitment policy following the completion of both the ongoing and planned competitions.

III RELATIONS WITH OLAF, THE EU INSTITUTIONS, OLAF PARTNERS AND STAKEHOLDERS

III – 1 Relations with OLAF

Since the beginning of its term of office the SC has issued eight opinions²⁴: three on OLAF's preliminary draft budgets, one on nine months reports, one on "prima facie non-cases", one on the proposed reform of OLAF (including one complementary opinion) and two on issues related to management of OLAF's investigative function. The SC is satisfied that, in most cases, OLAF has agreed to take the SC's views into consideration and is planning to implement them fully.

The SC encourages OLAF to respond with more detailed and regular information on how it intends to implement the SC's recommendations in order that the SC can assess the impact of its work. Overall, the SC is confident that its recommendations will help OLAF to improve the effectiveness of the activities of its office and, in particular, certain aspects which are central to the operational independence of the office and sound management of the investigative function.

During the period covered by the report, the SC met regularly with the Director General of OLAF, with all the individual Directors and regularly with magistrates of the Judicial and Legal Advice Unit, as well as with personnel from other Units who discussed their work with the SC. The SC concluded from these discussions that the ambiguities mentioned earlier in the report as to the nature of OLAF's investigations and particularly the management and human resources matters, are also of concern to OLAF management and staff. OLAF is aware of an urgent need to improve planning and strategic management of its investigations and to set up and implement operational priorities, rules and procedures for investigations.

The SC has stressed the importance of investigations criteria and priorities to enable an optimal use of existing resources. The SC supports the views of OLAF senior management that an increase in staff numbers is not currently a pressing need for OLAF, rather, that there should be a reallocation and proper training of existing in-house resources to correct the focus. All these measures and initiatives require, however, a stronger commitment and leadership on behalf of OLAF management.

²³ Article 1 of the Decision of the Director General of OLAF on a new policy for the engagement and use of OLAF's temporary agents stipulates that "Temporary staff may be regraded once to the next higher grade in the category/function group by decision of the Director General after consultation of a joint committee".

²⁴ See Annex 2, which includes a list of opinions adopted by the SC between 1 December 2006 and 31 May 2008.

During the reporting period, the Chairman of the SC and *rapporteurs* were invited by OLAF to participate in three OLAF conferences: the Fraud Prosecutors' Conference in Brussels, the Eurojust OLAF conference on corruption in Brussels and the joint ICSTE/ANU/OLAF conference to combat corruption held in Portugal.²⁵

III – 2 Relations with the Community institutions and with OLAF's partners and stakeholders

The SC maintained close contacts with the Community institutions and with OLAF's partners and stakeholders and it is committed to a regular exchange of views with bodies with a common interest in combating fraud, corruption and illegal activities affecting the Community financial interest.

In this spirit, during the reporting period, the SC met with the following: Vice-President of the Commission, Mr. Siim Kallas; the Secretary General of the Commission, Mrs. Catherine Day; the Committee on Budgetary Control of the European Parliament (COCOBU) and its Chairman, Mr. Herbert Bösch; the COCOBU Coordinators and the COCOBU *rapporteur* for OLAF and the SC, Mrs. Ingeborg Grässle; the Director for Justice and Home Affairs at the European Council Secretariat, Mr. Gilles de Kerchove; the Working Group for the Fight Against Fraud of the European Council during the Slovenian Presidency; the Assistant Supervisor of the European Data Protection Supervisor, Mr. Joaquín Bayo Delgado and with the European Ombudsman, Mr. Nikiforos Diamandouros.

From these discussions the SC concluded that a better understanding and closer working relationship had been established with OLAF across the Commission; that there was a common and overall concern with regard to the repercussions of delays in the handling and closing of internal investigations; that OLAF's operational capacity would be very much appreciated in the framework of Justice and Home Affairs and reflection should be made on the subject matter of OLAF within the framework of the Lisbon Treaty and the European Public Prosecutor Office. At the invitation of and in cooperation with the State General Prosecutor of Spain, the SC participated in the international seminar on this topic with the aim of uniting those bodies working in the field of justice in order to discuss the future framework in the fight against offences affecting the financial interests of the Union and to reflecting upon the role that OLAF could play in this new structure.

The SC also met the State General Prosecutor of Spain Mr. Candido Conde-Pumpido and the Federal Prosecutor of Belgium Mr. Johan Delmulle with the aim of assessing the quality and the usefulness of OLAF's investigations reports transmitted to the national judicial authorities and to encourage a good flow of information between OLAF and the Member States together with a proactive implementation by the national authorities of the provisions relating to the duty to inform OLAF²⁶. The SC's role is also to assist OLAF to improve the level of collaboration and cooperation between OLAF and Member States, this being essential for the successful outcome of OLAF's investigations. It was emphasised during the discussions that currently there is good cooperation and exchange of information between prosecution and judicial authorities and OLAF. The role of the magistrates of OLAF's Legal and Judicial

²⁵ Instituto Superior de Ciências do Trabalho e da Empresa /Australian National University/OLAF.

²⁶ Article 7 of Regulation (EC) No 1073/1999.

Advice Unit remains essential for regular contacts and work with the national judicial authorities.

A Cooperation Arrangement between the State General Prosecutor Office of Spain and OLAF was signed, following the international seminar mentioned above, in January 2008. The SC encourages OLAF to further reinforce its general relationships with national authorities, the tangible results of OLAF's work also depending on the contribution made by the Member States both during the investigation and in the follow-up stages.

In its discussions with the Assistant Supervisor of the European Data Protection Supervisor (EDPS), Mr. Joaquín Bayo Delgado, the SC stressed that permanent access to OLAF data was inherent to its work, to allow the SC to fulfil its legal mandate of monitoring whilst ensuring that personal data protection and confidentiality provisions are fully applied. In July 2007, the EDPS issued an opinion²⁷, in which he concluded that "There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that the considerations of the opinion are fully taken into account". The SC agreed with the recommendations made by the EDPS and is fully committed to implementing them.

²⁷ Opinion by the European Data Protection Supervisor on a notification for prior checking from the Data Protection Officer of the European Anti-fraud Office (OLAF) on Regular monitoring of the implementation of the investigative function. Case 2007-0073 of 19 July 2007.

CONCLUSIONS AND RECOMMENDATIONS

- I. The SC's core role is to carry out the regular monitoring of OLAF's investigations to secure independence in the opening and conduct of investigations and in the drafting of case reports. This mechanism is essential to reinforce the independence of OLAF's investigations from the outset and the SC remains committed to this goal.
- II. The SC is concerned with regard to the excessive length of certain investigations and has examined all those remaining open after more than four years pertaining to OLAF Directorate A "Investigations and Operations I". The SC has studied 26 investigations, without interfering in their conduct, and has observed unexplained periods of inactivity and incorrect categorisation of cases. The SC urges OLAF to implement rigorous control mechanisms to avoid potential conflict of interest in the course or investigations.
- III. The SC has analysed all those reports (195 in all) of investigations which remained open after nine months. Scrutiny is being made of the reasons for delays and the expected time for completion. The SC will follow up this item with OLAF.
- IV. The SC recommends that magistrates of OLAF's Judicial and Legal Advice Unit be fully involved at a much earlier stage of investigations in order to take full account of the time barring (prescription) periods and to ensure that those investigations forwarded to the national judicial authorities are likely to be admitted in evidence in each Member State.
- V. The SC is satisfied with the sample of 212 "prima facie non-cases" that it examined and concludes that the current procedure for dealing with information which does not fall within OLAF's competence, has allowed OLAF to close these cases quickly and efficiently. However, the SC recommends that the relevant reference in the OLAF Manual is consistent with the current practice of OLAF.
- VI. The SC believes that OLAF is not obliged to process all types of information and all cases regardless of their financial impact and strongly recommends it develop a "de minimis" policy for cases of minor wrongdoings with very low financial impact and critically assess when these cases could be referred to IDOC. Furthermore, the SC urges OLAF to implement the Memorandum of Understanding with IDOC to clarify the division of work concerning these cases.
- VII. The SC received and reviewed the two cases reported by OLAF in which an institution has failed to follow OLAF's recommendations. The SC strongly recommends that OLAF regularly monitor and systematically report to the SC all such cases thereby improving the effectiveness of OLAF's follow-up.
- VIII. The SC recommends OLAF review the content and format of the monthly statistical reports since the data is currently neither interpreted nor linked to any measurement of quality and cannot be verified by the SC.

- IX. The SC has considered the impact of OLAF's management on OLAF's investigative function and fully supports measures taken to improve the management of investigations and particularly their planning, control and supervision. The SC strongly recommends OLAF put more emphasis on management, strategic planning and control, and feedback systems for operational work. Above all, the SC recommends OLAF to better define their investigation policy and to adopt a clearer management focus and vision as to its purpose and overall success factors. Strong commitment on the part of OLAF leadership and managers is a prerequisite for a harmonious and productive working climate.
- X. The SC recommends that OLAF develop a human resources strategy and, as a priority, allocate more and the highest quality of human resources to operational work, which is the core activity of OLAF. It is not clear whether there is a sound legal basis for OLAF to deal with some of the non-core activities such as follow-up and management of the Community expenditure programmes. The SC recommends that OLAF management take steps to correct the current imbalance between allocated resources of operational and non-operational work and provide continuous training for its investigators.
- XI. The SC recommends that OLAF work with the Commission administration in order to optimise the implementation of its own staff policy. The SC welcomes positive developments with regard to the situation of OLAF's temporary staff and recommends OLAF undertake promotions of temporary staff in accordance with the Staff Regulations.
- XII. The SC recommends that OLAF's efforts in the area of fraud and corruption prevention be focused in such a way that expertise and knowledge gained from investigations can be of practical use for all Commission services. The SC recommends that OLAF improve internal coordination and ensure regular flow of information between its Directorates in this area.
- XIII. The SC considers that all the recommendations above must be adequately reflected in the new Manual of operations, this being an essential working tool for the conduct of investigations. The SC firmly believes that the adoption of a Manual with clear operational procedures and deadlines will provide a consistent framework for OLAF's investigations and would reinforce its independent conduct. The SC is committed to constructively contribute to its drafting.
- XIV. In order to avoid difficulties to acquire the necessary resources in the SC Secretariat, the SC recommends that SC Secretariat posts be earmarked in the OLAF establishment plan. Appointment of the SC Secretariat staff should be made with the express agreement of the SC thus ensuring the full independence of the SC in the performance of its duties.

Calendar of Supervisory Committee Meetings

2007

Month	Meeting date
JUNE	Tuesday, 19 June - Wednesday, 20
JULY	Monday, 9 July - Tuesday, 10
SEPTEMBER	Tuesday, 18 September – Wednesday, 19
OCTOBER	Tuesday, 16 October – Wednesday, 17
NOVEMBER	Monday, 26 November - Tuesday, 27
DECEMBER	Tuesday, 11 December – Wednesday, 12

2008

Month	Meeting date
JANUARY	Wednesday, 23 January
FEBRUARY	Tuesday, 26 February – Wednesday, 27
APRIL	Tuesday, 1 April – Wednesday, 2 Monday, 28 April – Tuesday, 29
MAY	Tuesday, 27 May – Wednesday, 28

**List of Opinions adopted by the SC between
1 December 2006 and 31 May 2008**

2006

Opinion No. 1/2006 OLAF's Preliminary Draft Budget for 2007

Opinion No. 2/2006 concerning the reform of the Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Supplementary opinion concerning the reform of the regulation (EC) N° 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Opinion No. 3/2006 of the Supervisory Committee Performance indicators for OLAF

2007

Opinion No. 1/2007 OLAF's Reports of Investigations that have been in progress for more than nine months

Opinion No. 2/2007 OLAF's Preliminary Draft Budget for 2008

2008

Opinion No. 1/2008 "Prima facie Non-Cases"

Opinion No. 2/2008 OLAF's Annual Management Plan for 2008

Opinion No 3/2008 OLAF's Preliminary Draft Budget for 2009

Opinion No. 1/2008

“Prima facie Non-Cases”

Brussels, 28 March 2008

1. At its meeting of 18/19 September 2007, the OLAF Supervisory Committee decided to analyse how OLAF treats so-called prima facie non-cases.
2. In order to focus greater attention and resources on the more important cases referred to it, in 2004, OLAF introduced a simplified procedure for “prima facie non-cases”, which are defined as “... information is received which clearly and unequivocally does not fall within the competence of OLAF”²⁸. This would apply, for example to a complaint from a citizen of a third country that he was being wrongfully taxed by his local taxation authority. The procedure, set out in the OLAF Manual, as above, avoids the need for OLAF to open a formal investigation and conduct an assessment, only to close the case a short time later.
3. Between 2003 and 2007, OLAF handled 894 prima facie non-cases. The Supervisory Committee selected a random but representative sample of 212 prima facie non-cases, taking care to ensure that the sample included cases involving all operational directorates and investigation departments of OLAF. The Supervisory Committee noted that very few of the prima facie non-cases related to customs matters, cigarette importation and VAT. After clarification of a number of data protection issues, OLAF gave the Supervisory Committee unrestricted access to all the cases sampled.

²⁸ OLAF, Operational Manual, S.76: "Prima Facie Non-Cases": Where information is received which clearly and unequivocally does not fall within the competence of OLAF, then the responsible Head of Unit may propose not to refer the information for assessment. The Head of Unit must complete a Prima Facie Non-Case form (Annex2, Form 19), which must be countersigned by Director B and returned to the Archives for registration, together with the initial information. A CMS record will be opened, but the case will appear on the CMS as closed."

4. The findings of the Supervisory Committee’s analysis can be summarised as follows–

4.1. In general, the Supervisory Committee found that OLAF applies the rules on prima facie non-cases correctly. In particular, the procedure is appropriately applied in the following cases:

- Information from anonymous sources;
- Information supplied by trouble-makers;
- Information relating to disputes between private individuals;
- Information regarding national programmes totally unrelated to European Union finances;
- Information regarding the implementation of a Community policy or programme; such cases frequently arise in connection with the common agricultural policy or structural policy.

In the last-mentioned cases, OLAF is obliged to identify the project concerned and investigate the case with the assistance of the competent national authority/ies and/or DG AGRI or DG REGIO. If the suspicions are not substantiated, the cases are also closed on the grounds that they are prima facie non-cases.

OLAF could equally file these cases as ‘non-cases’. However, the PFNC procedure has the advantage of requiring neither evaluation nor consultation of the OLAF Board thus enabling a simplified procedure leading to the same conclusion, i.e. closure of the case.

- Where OLAF has declined an invitation from the Commission’s disciplinary authority (IDOC) to take up a case of suspected misconduct.

The Supervisory Committee found that the prima facie non-case procedure allowed OLAF to close all these cases quickly without imposing an excessive drain on administrative and investigative resources.

4.2. The prima facie non-case procedure is sometimes applied in situations not covered by the definition set out in the OLAF Manual. Two examples:

- * An anonymous caller contacts OLAF on the freephone service alleging irregularities concerning the use of European funds and leaving a phone number. OLAF makes a number of attempts to obtain further information from the caller, but this proves impossible; either the number does not exist or the caller is not available. In such circumstances, the “sufficiently serious suspicions” necessary, under the ruling of the European Court of Justice relating to the launch of an investigation cannot be established. OLAF therefore closes the case, in the view of the Supervisory Committee, quite rightly. However, it is not certain that the case “clearly and unequivocally” falls outside the competence of OLAF.
- * In some cases, OLAF conducts an initial investigation which establishes in the light of the results of the investigation that it is a prima facie non-case.

The Supervisory Committee takes the view that OLAF is to be praised for not being overly hasty in closing investigations as prima facie non-cases and that the background facts are initially established prior to the case being closed.

- * The Supervisory Committee also found that in none of the cases examined did OLAF use the prima facie non-case procedure to “bury” cases which should have been fully investigated.

Conclusion

The representative random sample that the Supervisory Committee has examined has demonstrated that the prima facie non-case procedure enables OLAF to close prima facie non-cases quickly and without excessive bureaucracy. OLAF takes due care when applying this procedure. The Supervisory Committee found no case in its random sample where another procedure, in particular, a full investigation, would have been appropriate.

Opinion No. 2/2008

OLAF's Annual Management Plan for 2008

Brussels, 26 February 2008

The OLAF Annual Management Plan (AMP) 2008 was sent to the Secretariat of the Supervisory Committee (SC) in January and it was discussed by the SC at its meetings in January and February 2008 having particular regard to the parts concerning the Office's investigative function. The SC therefore welcomes the adoption of clear objectives and measurable performance indicators (result indicators and targets) and hopes they will contribute to achieving increased efficiency, transparency and accountability in all OLAF's operations.

The SC notes that in comparison with 2007, OLAF's overall strategic and operational target has been changed from "zero tolerance" to "to minimise fraud". Since this is a considerable strategic change the "minimum fraud rate" should be further specified in order to establish milestones and assess whether the activities undertaken contribute to achieving the general objective. On the other hand, given the fact that OLAF's resources are very limited, the SC considers that the general management objective should be to target more serious (i.e. higher financial impact) fraud cases which would enhance the Office's reputation whilst at the same time ensuring the most efficient use of Community funds. There is no specific reference to this in the AMP.

Having regard to the result indicators and targets for the four specific objectives, the SC is doubtful as to whether the number of cases closed with recommendations to be followed with disciplinary proceedings is a realistic target, given that it is difficult to predict the outcome of investigations at an early stage. Moreover, it is difficult to see how this target would apply to the increasing number of assistance, monitoring and coordination cases, where OLAF does not have a lead role.

The SC questions the value of the indicator "Increase the number of judicial and disciplinary proceedings based on OLAF's recommendations", as the achievement of this target is outside OLAF's powers. Moreover, the mid-term review of AMP 2006 indicates that OLAF does not currently receive consistent and reliable information from member states' (MS) national judicial authorities in relation to the judicial follow-up of its recommendations. The SC suggests that a more useful target might be to increase the information flow between OLAF and relevant MS authorities. Furthermore, in this context, the SC would like to see the legal basis, as well as the tasks and responsibilities of the various areas of follow-up, urgently

clarified and this should be reflected in the AMP. In the meeting with OLAF representatives in June 2007 the SC pointed out, inter alia, that OLAF does not have a legal basis to undertake financial follow-up activities on behalf of the Commission.

With regard to financial impact, a coherent policy or guidelines on how the financial impact of different types of cases is to be estimated should be determined before it is selected as a target in the AMP. The SC believes that different methods of calculation to estimate financial impact are currently being used by the two investigation Directorates and between the different units. Once such guidelines are established they should be linked to the strategy for implementing the “de minimis” policy and address the question of cost-efficiency within given resources.

The AMP states that OLAF’s investigations must be performed within a reasonable duration, which is, on average, 24 months (Result indicator 2.1). The SC notes that this target has, according to past OLAF annual activity reports, not been achieved for the past three years. Between 2005 and 2007, the average duration of investigations has been between 24 and 28 months. However, this target remains unchanged in the current AMP. The SC questions whether the target is indeed feasible and realistic or whether more effective management measures should be taken to achieve the target. Secondly, the case clearance rate (result indicator 2.2) should be close to one, which has been achieved in the past if it is calculated on the basis of new cases opened during a calendar year. However, the SC would like to know what measures OLAF management intends to undertake to tackle the existing caseload (around 400 cases in December 2007), since achieving this target will not contribute to a reduction of the caseload.

When it comes to the other supporting activities (Objectives 3 and 4), the SC is of the view that some of the objectives and targets are expressed in terms which are too general and therefore difficult to measure. This would be the case for example with the “Enhanced relations and cooperation with Europol and Eurojust”, “Network of contacts in place with all relevant partners”, “OLAF regarded as valued partner whose assistance and support is sought” and “Efficient use of OLAF operational experience and efficient use of OLAF’s investigations’ results to deter fraud and irregularities”.

Finally, the SC would like reference to be made in the AMP to the implementation of its own recommendations.

Opinion No 3/2008

OLAF's Preliminary Draft Budget for 2009

Brussels, 2 April 2008

At its meetings of 1st and 2nd April, the OLAF Supervisory Committee (SC) discussed OLAF's Preliminary Draft Budget for 2009 and adopted the following opinion.

I. Allocation and management of OLAF's human resources

With regard to the question of temporary staff, the SC welcomes a number of positive developments in 2007 and early 2008, particularly the granting of an extension for an unlimited period for temporary staff and the publication of open competitions in the area of anti-fraud prevention. These developments could not have taken place without OLAF's active and persistent involvement with the aim of improving the situation of its temporary staff.

The SC also notes that the number of vacant posts has been declining since early 2007. This is a positive trend and will enhance OLAF's capacity to carry out its activities effectively. In this context, the SC would like special attention to be given to a large number of management posts which have been occupied by 'acting' personnel for a considerable period. Of eight units in the two investigations Directorates, only one currently has a permanent head of unit. In the SC's view, this issue should be urgently resolved by the management to ensure continuity of work and provide some safety for managers.

Since 1999 the number of OLAF staff has considerably increased, and currently stands at close to 400. The SC is concerned that sufficient measures on human resources management have still not been taken to date. This weakness was pointed out in the SC's Opinion No 2/2007 on OLAF's 2008 budget and in a number of discussions with OLAF representatives in 2007. The SC can only reiterate the urgency of putting in place a human resources strategy, which aims to ensure that human resources are fully suited to the needs of the organisation and its priorities. The strategy could address, inter alia, the working relations with DG Admin, recruitment, training, in-house mobility, and career development of both permanent and temporary staff.

In the SC's view, a well-defined human resources strategy would enable OLAF to improve the efficiency and effectiveness of investigations, to maximise the use of existing resources in the investigation area and to better manage the workload in the investigation teams. As part of the human resources strategy the SC particularly wishes to emphasise the importance of finding a practical solution to improving the cooperation between OLAF and DG Admin in human resources management, development of temporary staff (promotions) and in putting in place adequate, continuous training for investigators.

For the 2009 Budget, OLAF is requesting an additional two AD posts, which would be allocated to operational Directorates A and B as stated by OLAF's Director General on 2nd April 2008 in the meeting of the SC. The SC fully supports strengthening OLAF's investigative function, enabling OLAF to shorten delays and increase the efficiency of investigations in priority areas, thus better responding to the needs of its stakeholders.

On the basis of the examination carried out by the Supervisory Committee of the 295 OLAF reports of investigations that have been in progress for more than nine months covering the years 2006 and 2007, about 55% of investigations have not been completed due to either "lack of resources" or "the volume of the investigative work meant that more time was needed". This analysis indicates that the investigation teams need to be reinforced in order to cope with their workload.

Furthermore, regarding the allocation of resources between different OLAF activities, the SC conducted a review which indicates that in the last few years more resources have been allocated to Office support activities rather than to core investigation work in Directorates A and B. The SC is concerned about this development since it weakens the Office's capacity to carry out investigations in an efficient, effective and timely manner and because it will draw OLAF away from its core mission. Based on numerous presentations given by OLAF to the SC in 2006 and 2007, it is not clear whether many tasks currently carried out by the Office, such as the follow-up activities (particularly the financial follow-up) and management of Community programmes, are part of OLAF's core mission and whether OLAF is indeed best placed to deal with them.

In the case of management of Programmes Hercule II and Pericles (€20 million) the SC is concerned with regard to the potential conflict of interest that could arise were there to be misuse of funds and an investigation opened. In the SC's view, OLAF should not manage any Community expenditure programmes.

In summary, the SC believes that OLAF's resources have been randomly distributed and there is an imbalance between allocated resources of operational and non-operational work. From now on OLAF's management should give a clear priority only to investigations which, in practice, require the allocation of further existing as well as future resources to core investigation work. The non-operational activities currently carried out by the Office should not be a priority in resource allocation and consideration should be given as to whether some of the activities are OLAF's responsibility in the first place.

Recommendations:

The SC supports OLAF's requests to allocate two AD posts for investigation Directorates A and B.

OLAF to draft a human resources strategy based on needs assessment to address short- and medium-term human resources matters.

OLAF to publish the vacant posts of Heads of Units of Directorates A and B as soon as possible.

The SC encourages OLAF management to allocate resources to areas of high priority investigation work and particularly to areas where workload is high. Furthermore, the needs for additional resources for non-operational activities should be critically evaluated.

II. The Secretariat of the SC

The SC has undertaken a needs assessment concerning its Secretariat staff. As a result the SC requests OLAF to make provision in the 2009 Budget for a complement of eight Secretariat staff using the “footnote” or other appropriate method to earmark these posts specifically for the Secretariat.

In the past, the post of the Head of SC Secretariat was graded at Director level. The SC requests that consideration should be given regarding the appointment of the Head of Secretariat post to Director, with the express agreement of the SC in order to ensure that the person who is chosen best fulfils the needs and requirements of the SC contributing to the performance of its duties and to its independence. As the SC stressed in its activity report, the independence of the Committee is a key factor in safeguarding OLAF’s own independence.

Recommendations:

OLAF to earmark eight staff members for the Secretariat.

The post of the Head of the Supervisory Committee Secretariat to be at Director level. Appointment should be made with the express agreement of the Supervisory Committee, thus ensuring the full independence of the SC in the performance of its duties.

III. Conclusion

The SC supports OLAF’s budget proposal for 2009 with the proviso that the above recommendations be taken into consideration.