



**EPP Group Public Hearing**

**OLAF and interferences with  
rights of persons concerned**

3 October 2013



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## PROGRAMME

### **EPP-Hearing**

Budgetary Control Committee

Committee for Civil Liberties, Justice and Home Affairs

### **« OLAF and interferences with rights of persons concerned »**

**3 October 2013**

**1. «The Performance of the Office 2012»**      Mme Ingeborg Gräßle *MEP and rapporteur of the European Parliament for the OLAF regulation*  
5min

**2. «Procedural guarantees: current situation and future challenges»**      Jan Inghelram,  
*European Court of Justice, Legal secretary*  
20min

**3. «The right on private life and the practices of OLAF»**      Maître Jean-Noël Louis,  
*Lawyer*  
20min

#### *Questions et Discussion*

**4. «European investigational structures in the area of conflict of efficiency and protection of civic rights»**      Prof. Dr. Dr. h.c. mult. Hans-Heiner Kühne,  
*Chair for German, European and International Criminal Law and Criminal Procedural Law, Criminology*  
*University of Trier*  
20min

**5. “The Court of Auditors reports, findings and conclusions related to the Commission’s anti-fraud services”**      Michael Bain,  
*Head of Unit at the European Court of Auditors*  
20min

**6. «Reinforcing procedural safeguards in OLAF – what needs to be done in view of monitoring experience of the Supervisory Committee »**      Marek Kaduczak,  
*Secretary of the OLAF Supervisory Committee*  
20min

#### *Questions et Discussion*

**7. Conclusion**      Mme Ingeborg Gräßle *MEP and rapporteur of the European Parliament for the OLAF regulation*  
5min



## THE PERFORMANCE OF THE OFFICE 2012

### **INGEBORG GRÄBLE MEP**

#### **Rapporteur of the European Parliament for the OLAF regulation**

Ladies and gentlemen,

The revised OLAF Regulation No 883/2013 has been in force since 1 October 2013. It has taken seven years to revise the legal basis, although we have only actually spent nine months negotiating the proposal with the Council and Commission. As rapporteur for the regulation, I am not entirely happy with the outcome of the negotiations.

The events surrounding the resignation of the Commissioner for Health in October 2012 have brought to light certain issues that need to be discussed urgently. The Dalli case is probably now the best-documented closed OLAF case. It therefore serves as an illustration of how OLAF works.

This case has made two things clear:

First, that the procedural guarantees and rights of individuals under investigation by OLAF were not respected.

Just a few examples of incidents brought to light are:

- phone calls being recorded on OLAF's premises with the support and under the supervision of the investigator responsible
- using false names to call witnesses to obtain information
- requesting telecommunication data in Member States without a court order
- searching property without sufficient grounds.

These incidents are clearly illegal, yet nothing is being done because OLAF is not prepared to abide by the law. OLAF is insisting that the matter be brought to court, so that the burden of proof is reversed.



When, in July 2013, the revised text of the OLAF Regulation was put to the vote, an attempt was made to remove its flaws. Unfortunately, it was unsuccessful, falling two votes short in plenary of the required three-fifths majority.

The second thing which has been made clear is that OLAF does not work efficiently or adequately protect the financial interests of the Union. More resources than usual were used in the Dalli case, and great efforts were made to prove that the Commissioner was guilty of misconduct. The investigation was therefore not conducted impartially by producing incriminating and exonerating evidence, but was prejudiced from the beginning with the sole aim of proving the allegations.

Figures show that of all the interviews conducted with persons concerned in 2012, 7.5 % were connected with the Dalli case. Statistically, only one in 20 cases involves any interview at all.



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It is also surprising that, in a highly digital world, only 10 digital forensic analyses were carried out that year, yet two of these were in connection with the Dalli case.

Although so many investigative efforts were made to collect evidence in the case against the Commissioner for Health, the only evidence produced was circumstantial. There is still no direct evidence.

The Dalli case is also illustrative of other OLAF investigations. Does investigative zeal lead to serious violations of fundamental rights?

The new organisational structure at OLAF, put in place in February 2012, does not seem to have helped it to work more efficiently. For a start, the number of staff leaving the organisation has increased since the reorganisation.

Furthermore, according to Commission sources, analyses reveal an error rate of 50 % in the newly created Unit 0.1 which is responsible for selecting cases. This is further evidence for the fact that OLAF is not sufficiently safeguarding the Union's financial interests.

At this hearing **Jan Inghelram**, Legal Secretary at the European Court of Justice, will speak about procedural guarantees in OLAF investigations.

Lawyer **Jean-Noël Louis** will talk about his experiences in connection with OLAF investigations whilst acting as defence counsel for numerous EU officials.

The European Court of Auditors has collected extensive information on the OLAF work in two special reports. **Michael Bain**, Head of Unit at the Court and person responsible for these reports, will speak about the Court's findings.

**Dr Hans Heiner Kühne**, a professor of criminal law and criminology, will speak on 'European investigational structures in the area of conflict of efficiency and protection of civic rights'.

The Secretary of the OLAF Supervisory Committee, **Marek Kaduczak**, will describe the work of the Supervisory Committee.

It is clear from the Dalli case that the truth has been deliberately obscured. It is symptomatic that the former Secretary of the OLAF Supervisory Committee, **Jean-Pierre Pétillon**, now working for the Staff Committee, has not been allowed to even take part in this hearing.



## PROCEDURAL GUARANTEES: CURRENT SITUATION AND FUTURE CHALLENGES

**JAN INGHELAM**

**European Court of Justice, Legal secretary**

Ladies and Gentlemen, distinguished guests,

I feel very honoured to have been asked to contribute to this hearing on OLAF and interferences with rights of persons concerned, by sharing with you some – strictly personal – reflections on procedural guarantees in the context of OLAF investigations. Looking at the programme, I see that I am not the only one to talk about procedural guarantees. This, however, confirms the obvious, namely that interferences with rights of persons and procedural guarantees are two sides of the same coin. The topic is, therefore, important enough to be discussed from different angles.

Procedural guarantees received little attention in 1999, at the time when OLAF was created. Due to the circumstances of its creation, political attention focused on the need to protect OLAF's independence rather than on procedural guarantees. Apart from a general reference to human rights, the issue of procedural guarantees was, therefore, not dealt with by the 1999 OLAF-Regulation. Only in relation to internal investigations, some procedural guarantees were, and still are, defined in the decisions adopted by each individual EU institution, body, office or agency by virtue of Article 4 of the OLAF-Regulation.

It did not take long, however, before the subject matter became topical, for instance in the case-law of the EU General Court. In all OLAF-related cases submitted to that Court, the first of which were introduced in 2002, procedural guarantees were an issue of debate, in their most various expressions: the rights of the defence, the right to be heard, the right of access to the file, the right to an impartial investigation, the presumption of innocence, the reasonable-time requirement, etc.



Also at the political level, awareness grew of the need to provide more on procedural guarantees than what the 1999 OLAF legal framework did. Already in 2004, the Commission launched its first proposal to amend the OLAF-Regulation and proposed, in that context, to add a provision on procedural guarantees. This provision became, with some changes, Article 9 in the new OLAF-Regulation, published two weeks ago and entered into force just two days ago. This Article 9 mentions and/or further clarifies, in the OLAF context, the already mentioned procedural guarantees and, in particular, the right to be heard.

What is now the exact role of this new provision?

This question cannot be answered without making reference to the Charter of Fundamental Rights of the EU. This legal instrument, which is binding since the entry into force of the Treaty of Lisbon, also contains provisions on the already mentioned

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procedural guarantees, which apply, by virtue of the Charter, under all circumstances in a EU context and, therefore, also in the OLAF context.

Moreover, those guarantees are not provided for by the Charter in an abstract way, still in need of implementing measures in order to be applied in concrete circumstances. The ruling of the European Court of Justice in the second *Kadi*-Case (ruling of July 18, 2013) – which deals with the listing by the EU of persons associated with the Al-Qaeda network – is an illustration of the extent to which fundamental rights can give rise to the existence of very concrete rules in practice, without any further implementation. Paragraphs 111-134 are, in fact, a long list of such concrete rules.

Therefore, with regard to persons concerned by an OLAF-investigation, the new provision on procedural guarantees does not “give” them procedural guarantees, but it makes explicit, clarifies procedural guarantees which, in any event, are already enshrined in the Charter. This does not mean that this clarification would not be important. Its merit clearly is that it enhances legal certainty since Article 9 defines the exact contents of the procedural guarantees applicable in the specific OLAF context.

Paradoxically, however, one could argue that the new provision on procedural guarantees is, from a pure legal point of view, more important to OLAF than it is to persons concerned by its investigations.

The reason again is the Charter. Indeed, limitations on the exercise of fundamental rights are subject to certain conditions set out in Article 52(1) of the Charter – the so-called horizontal exception clause. One of the conditions is that limitations must be [quote] provided for by law [unquote]. The role of Article 9 is, therefore, also to provide for valid limitations to the exercise of fundamental rights which are, in any event, applicable by virtue of the Charter.

The right to be heard allows us to illustrate this. According to Article 41(1)(a) of the Charter, the right to good administration includes [quote] the right of every person to be heard, before any individual measure which would affect him or her adversely is taken [unquote]. By defining the conditions under which this right can be deferred by OLAF, Article 9 of the new

OLAF-regulation, in fact, qualifies as a [quote] law [unquote] to which the horizontal exception clause of the Charter refers and which is necessary for limiting in a valid way the exercise of the right to be heard. In the absence of such a provision, or any similar provision not adopted by OLAF itself, it is indeed less certain that the exercise of the right to be heard can be limited in the same way.

Does this mean that the new OLAF-Regulation, which represents the current situation, has settled all questions in relation to procedural guarantees? Personally, I think some challenges remain and I would like to mention three, two of a specific nature and one of a more general and fundamental nature.

The first specific challenge relates to what we just discussed, the right to be heard and the conditions under which this right can be deferred. Article 9 of the new OLAF-Regulation does not set any limit to that deferral. However, Article 52(1) of the Charter specifically mentions that limitations on the exercise of a fundamental right must respect the essence of that right. Therefore, the right to be heard could not be deferred to the extent that its essence would be gone.

One can discuss what the essence of the right to be heard exactly is, but Article 41(1)(a) of the Charter in any event requires that the EU institutions, bodies, offices and agencies *themselves* respect that right. This seems to imply that the right to be heard cannot be postponed until the time when it is already up to a national authority, in a subsequent stage of the procedure, to hear the person concerned by an OLAF investigation under its own rules. Furthermore, the Charter requires, in principle, that a person is heard *before* the measure adversely affecting that person is taken.

A second specific challenge relates to the fundamental right of access to the file. The OLAF Manual which existed at the time explicitly excluded the existence of a right of access to the file in the OLAF context. Access to the file is not mentioned either in the new OLAF-Regulation.

However, according to Article 41(1)(b) of the Charter, the right to good administration includes [quote] the right of every person to have access to his or

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her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy [unquote]. There is no reason to consider that this very general provision is inapplicable to OLAF investigations, *unless* one can consider that giving access to the OLAF investigation file does not respect the legitimate interests of confidentiality and of professional and business secrecy.

In legal literature, it is however argued that the legitimate interests of confidentiality are those of third parties and not those of an EU institution or body itself which considers its activities to be confidential. Moreover, taking into account the very restrictive way in which Article 52(1) of the Charter allows for limitations of the exercise of fundamental rights in general, it seems somewhat surprising that a mere reference to the need for confidentiality would be enough to set aside completely and under all circumstances the fundamental right of access to the file, independent of what the contents of that file may be in practice.

Therefore, the question rises whether, from a legal point of view, a more prudent approach would not be to admit that, as a matter of principle, the fundamental right of access to the file indeed applies to OLAF investigations. The necessary exceptions to that right in order to allow OLAF to investigate efficiently could then be defined under Article 52(1) – the horizontal exception clause – of the Charter, taking into account the conditions set out by that provision. This solution might enhance legal certainty compared to the current situation.

The third and most important remaining challenge is that of the supervision of OLAF.

As already mentioned, due to the circumstances surrounding its creation, the independence of OLAF was high on the political agenda. Nevertheless, a totally independent OLAF was inconceivable for political as well as legal and institutional reasons. The compromise resulting from the OLAF negotiations was the creation of the OLAF Supervisory Committee.

It is true that the OLAF Supervisory Committee has an important role to play in supervising how OLAF investigators respect fundamental rights and procedural guarantees, which is now also confirmed

by Article 15(1) of the new OLAF-Regulation. Its analysis and recommendations are likely to give useful guidance to OLAF investigators on how to act in accordance with these rights and guarantees when carrying out investigations. However, the supervision exercised by the Supervisory Committee is essentially an ex-post control since it cannot intervene in on-going investigations.

By way of a parenthesis, the competences of the Supervisory Committee seem even to have been reduced by the new OLAF-Regulation. Indeed, Article 11(7) of the 1999 OLAF-Regulation, as interpreted by the EU General Court in its ruling of July 8, 2008 in *Case Franchet and Byk v. Commission*, required the Supervisory Committee to be informed before information was sent to national judicial authorities under that provision. This seems no longer to be the case if one attentively reads Article 17(5) of the new OLAF-Regulation. However, to look at it in a positive way, this change perhaps has the merit of preventing that information on on-going investigations is sent to the Supervisory Committee, with which this authority in any event cannot do much since it is not allowed to intervene in those investigations.

Therefore, as the Court of Auditors pointed out in its Special Reports 1/2005 and 2/2011, there is no independent control of the legality of OLAF investigative acts in progress. The new OLAF-Regulation did not bring any change in this respect.

This again is not unproblematic from the perspective of fundamental rights. Indeed, OLAF's investigative competences are quite far-reaching, particularly in relation to internal investigations carried out within the EU institutions, bodies, offices and agencies. OLAF has the right of immediate and unannounced access to any information held by any of these entities and to their premises, a right which includes access to the offices and computers of EU officials. These far-reaching powers may bring within OLAF's reach information which belongs to the private sphere, thus triggering the application of the fundamental right to privacy laid down in Article 7 of the Charter and Article 8 ECHR.

Interference with that fundamental right can be justified under the already mentioned horizontal

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exception clause of the Charter. In this respect, however, reference should be made to the case-law of the Court of Human Rights in Strasbourg, which is relevant when interpreting the provisions of the Charter, according to its Article 52(3).

For interference with the right to privacy to be justified, the European Court of Human Rights has underlined the need for adequate protection against arbitrary measures to be provided for by the applicable legislation. This protection implies that access to an independent authority must be guaranteed, which can control the interference of the fundamental right concerned. Moreover, it can be deduced from the ruling of 21<sup>st</sup> December 2010 of the Court of Human Rights in the Case *Société Canal Plus and Others v. France* that such a control must be readily available, not just hypothetical or exercised somewhere in a distant future.

Neither the Supervisory Committee nor any other authority has or claims to have such power of control. This situation is not without practical relevance. Indeed, in a worst case scenario, the mere absence of any possibility to adequately control the interference with the fundamental right to privacy could lead to the conclusion that this right has been violated, however justified the objectives of such interference may otherwise have been, since a sufficient guarantee against arbitrary measures is simply lacking.

This again demonstrates that not only persons concerned by an OLAF investigation benefit from a clear definition of procedural guarantees, but also OLAF itself.

The problem becomes even more apparent if one compares the procedural guarantees surrounding a search carried out by OLAF in the offices of EU institutions, with the guarantees surrounding a similar search carried out by a future European Public Prosecutor's Office. According to Article 26(4) of the Commission's proposal launched on July 17 of this year, the latter search would only be possible upon judicial authorisation.

It therefore does not seem to be a coincidence that, on the same day it launched its proposal on the European Public Prosecutor's Office, the Commission announced

that it will submit proposals to improve OLAF's governance and reinforce procedural safeguards. In practice, OLAF's search and seizure measures in the EU institutions and bodies would become subject to the prior opinion of the Controller of procedural safeguards (for EU staff) or to a prior quasi-judicial authorisation (for members of EU institutions). Even if the question remains whether a mere opinion by the Controller of procedural safeguards is sufficient as a procedural guarantee in comparison with a quasi-judicial or judicial prior authorisation procedure, the Commission's announcement in any event shows the willingness to tackle the problem of adequate supervision of OLAF.

By way of conclusion, even if by all hypothesis one wanted to, it would not be possible to run away from procedural guarantees, since they apply anyway through the Charter of Fundamental Rights of the EU. However, both persons concerned by an OLAF investigation *and* OLAF itself gain by well-defined and balanced rules on procedural guarantees, adapted to the context of OLAF investigations. An important step in defining such rules has been taken with the adoption of the new OLAF-Regulation but important challenges continue to exist. Today's hearing remains more than ever topical.

Thank you for your attention.



## THE RIGHT ON PRIVATE LIFE AND THE PRACTICES OF OLAF

**MAÎTRE JEAN-NOËL LOUIS**

**Lawyer**

### **OLAF: ITS INVESTIGATIONS AND FAILURE TO RESPECT THE RIGHT TO PRIVACY**

1. The European Anti-Fraud Office (OLAF) was established to protect the European Union against fraud, corruption and any other illegal activities which could harm the EU's financial interests, and against misconduct to which administrative or criminal sanctions could apply.

OLAF fulfils its investigative duties under the powers granted to the Commission by EU legislation and applicable agreements in force. Although it is part of the Commission, OLAF has its own budget and administrative structure, which guarantee its operational independence.

OLAF's remit is threefold<sup>1</sup>:

- to protect the EU's financial interests by investigating fraud and corruption cases and any other illegal activities;
- to uncover serious misconduct in the exercise of professional duties by members and staff of the EU institutions and bodies that could lead to disciplinary proceedings or criminal prosecution and to investigate the misconduct;
- to support the European institutions, in particular the Commission, in drafting and implementing antifraud regulations and policies.

2. In carrying out its investigations under this remit, OLAF must abide by Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF<sup>2</sup>, in which the 12<sup>th</sup> recital reads as follows:

*'Investigations should be conducted in accordance with the Treaties and in particular with Protocol No 7 on the privileges and immunities of the European*



*Union, while respecting the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (3) ('the Staff Regulations') and the Statute for Members of the European Parliament, and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value. To that end, the institutions, bodies, offices and agencies should lay down the terms and conditions under which internal investigations are to be conducted.'*<sup>3</sup>

Although this is only one of the recitals and not an actual provision of the regulation, the obligations arising from it must be strictly adhered to, since they originate in the legislation laying down the

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fundamental rights in force in all democratic societies. If OLAF fails to abide by these fundamental rights, any reports produced and evidence gathered during its administrative investigations are likely to be dismissed by the national courts, which are the only authorities with jurisdiction to impose criminal sanctions, as well as by the disciplinary bodies.

For example, France's Court of Cassation upheld a Court of Appeal ruling overturning a judgment on the grounds that the OLAF investigators had failed to follow due process when gathering the evidence on which the first judge had based his judgment<sup>4</sup>.

3. OLAF has its own guidelines, which its investigators must abide by<sup>5</sup>. Article 11 of the guidelines, entitled 'Investigation', stipulates the following:

*'11.1 The investigation unit gathers evidence using inter alia the following means:*

- a. Collecting documents and information in any format which can be used as evidence*
  - b. Gathering evidence in the framework of operational meetings*
  - c. Taking statements from any person able to provide relevant information*
  - d. Carrying out fact-finding missions in Member States*
  - e. Taking samples for scientific examination*
  - f. Conducting interviews with persons concerned or witnesses*
  - g. Carrying out inspections of premises*
  - h. Carrying out on-the-spot checks (Council Regulation (Euratom, EC) No 2185/96)*
  - i. Carrying out digital forensic operations*
  - j. Carrying out investigative missions in third countries*
- 11.2 Members of the investigation unit carry out the following investigative activities upon production of the Director-General's written act showing their identity and capacity, and the investigative activity they are authorised to carry out:*
- a. Interviews with persons concerned and witnesses*
  - b. Inspections of premises*
  - c. On-the-spot checks*
  - d. Digital forensic operations*
  - e. Carrying out investigative missions in third countries'.*

OLAF therefore grants its investigators wide-reaching powers, similar to those enjoyed by their national

counterparts. Complaints have been voiced publicly on many occasions about the wrongful assumption of identity of which OLAF investigators and other members of its personnel are regularly guilty. When attending meetings or in the course of their investigative duties, they publicly present themselves as national judges or members of a national antifraud or anticorruption body. In doing so, these OLAF staff members are acting unlawfully and the investigative duties they perform therefore carry no legal weight.

4. All OLAF investigators must spontaneously present to those concerned their signed mandate from OLAF's Director-General<sup>6</sup>. If the Director-General has delegated his or her authority, the investigator must present both the mandate and proof of the signatory's delegated authority. The mandate must also give details of the investigators' identities and positions, the nature and precise purpose of their investigation, its legal basis and the investigative powers arising therefrom. These mandates do not grant unlimited powers, therefore, but impose strict limits within which the investigators must perform their investigative duties.

5. As a rule, the person under investigation must be present or, if necessary represented by another public servant or member of their institution's security department. Article 13.4 of the 'Guidelines' allows an investigator to conduct the inquiry even if the party concerned is not present, if this is necessary in the circumstances. However, this concept of necessity is not clearly defined in the Guidelines and this has repercussions in terms of both legal certainty and the rights of the individuals concerned. The authority to conduct an investigation even in the official's absence and with no representative present expressly chosen by them raises serious questions over the validity of the evidence gathered.

This evidence is therefore liable to be ruled inadmissible in proceedings before the relevant national courts, and quite rightly so, since the investigators overstep their authority by disregarding the investigated party's right to privacy.

Public servants have the right to keep personal documents and other information in their offices and on their computers. Investigators should not be allowed to access these or even to take copies of them unless the person concerned has given their express consent.

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It is common practice for OLAF investigators to operate at night, entering the offices of public servants and officials without authorisation and taking copies of their computer hard drives, files and other documents, without even informing them after the event that they have done so. In doing this, the investigators are failing to make a distinction between the work-related and the private elements of the documents seized or copied.

As regards documents relating to a staff member's private life, the investigators should only read, copy and use them insofar as they are useful, or possibly even essential for the investigation.

Article 13.5 of the 'Guidelines' provides that investigators may even seize medical information if it is useful for the investigation. This power granted by OLAF's own rules of procedure blatantly disregards the individual's right to privacy, in particular their right to keep all information about their health confidential, as underlined by the European Court of Justice in its Appeal Judgment of 5 October 1994 in the case X v. European Commission.

OLAF's practice of entering the offices of EU public servants and officials without their knowledge and taking copies of their files, documents and hard drives without their consent and without treating work-related and private items separately therefore constitutes a clear violation of the person's privacy, added to which the means used to achieve the objectives are disproportionate by comparison with this violation of rights.

7. OLAF plays a vital role in protecting the financial interests of the European Union and its citizens. It is essential that in fulfilling this role it should abide strictly by all fundamental rights, including those laid down in the Charter of Fundamental Rights of the European Union, which protects all EU citizens. If it fails to do so, the evidence gathered by OLAF against an individual is liable to be ruled inadmissible by the national court before which a case may be brought.

Furthermore, OLAF's current practice of entering offices and taking copies of documents, files and computer hard drives without making any distinction between work-related and private items could be experienced as a severe violation by the person

concerned, given that they should be presumed innocent until proven guilty.

These practices illustrate that OLAF is not performing its duties correctly. It only gathers evidence against individuals, whereas it is obliged to gather evidence in their defence also. Furthermore, it is unacceptable that anyone who harms the financial interests of the EU and its citizens should escape punishment as a result of procedural errors, and in particular as a result of blatant violation of the fundamental rights enjoyed by all European citizens.

Lastly, it is regrettable that the supervisory committee does not exercise effective oversight over OLAF and does not have powers to sanction any unlawful actions it finds.

To conclude, the absence of clear, transparent rules governing both the internal and the external investigations conducted by OLAF and the absence of any guarantee that fundamental rights, a fair hearing and objective enquiries gathering evidence on both sides will be adhered to can all lead to violation of the principles which underpin all democracies, and at worst to a risk of totalitarian practices.

It is therefore a matter of urgency that clear rules be established, in order to provide a fully transparent framework for OLAF's investigations. It is unacceptable that OLAF's rules of procedure only exist in English<sup>5</sup>, even though it is obliged to conduct its investigations in any one of the official EU languages, at the choice of the person concerned.

<sup>1</sup> [http://ec.europa.eu/anti\\_fraud/about-us/mission/index\\_fr.htm](http://ec.europa.eu/anti_fraud/about-us/mission/index_fr.htm).

<sup>2</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

<sup>3</sup> Our underlining.

<sup>4</sup> France's Court of Cassation, Criminal Section, 16 January 2013, Ruling No 12-84221, available to view at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>5</sup> The 'Guidelines on Investigation Procedures for OLAF Staff' are available in English only.

<sup>6</sup> Article 7 of Regulation No 883/2013 of 11 September 2013 concerning investigations conducted by OLAF.



## EUROPEAN INVESTIGATIONAL STRUCTURES IN THE AREA OF CONFLICT OF EFFICIENCY AND PROTECTION OF CIVIC RIGHTS

**PROF. DR. DR. H.C. MULT. HANS-HEINER KÜHNE**  
**Chair for German, European and International Criminal Law and  
Criminal Procedural Law, Criminology, University of Trier**

**OLAF and the conflict between the protection of  
the rights of individuals and efficiency**

### **1. Introduction**

An investigative institution that acts to protect the financial interests of the EU is undoubtedly both essential and hugely important. Not only do national authorities generally have little interest in prosecuting offences that have an impact on the financial interests of the EU, since such actions tend to benefit their own economies, they also lack the requisite knowledge of the complex factual and legal conditions governing the award of EU funding.

On the other hand, it would be true to say that the diversity of interests among the individual Member States, in combination with chauvinistic attitudes which are particularly pronounced in the areas of criminal law and police law, do not exactly facilitate full or even merely adequate regulation of such an authority. It should come as no surprise, then, that OLAF's remit does not incorporate adequate provisions regulating its activities.

As I will demonstrate shortly, however, these shortcomings go to the very heart of OLAF's activities, an unacceptable situation.

These unregulated areas essentially concern the protection of individuals and institutions in the course of investigations. This reflects an imbalance, one which is clearly identifiable in the area of EU law in particular, namely that efficiency is generally given priority over the safeguarding of rights. For example, the Charter of



Fundamental Rights of the European Union was drawn up only at a very late stage in the development of EU law, although academics in particular had been calling for such a step for decades. In its case law at least, the Court of Justice of the European Union has repeatedly called for and enforced compliance with fundamental guarantees of the rights of individuals.

On the other hand, these shortcomings can also serve to reduce the efficiency of OLAF's work, if and in so far as the means of carrying out investigations lawfully are not defined sufficiently clearly.

### **2. Legal nature of the activities of OLAF**

OLAF's activities ultimately constitute police investigations, even if it is repeatedly claimed that they

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are in fact administrative in nature. In reality, its work is concerned with fraud committed at the expense of the EU, criminal offences in other words, the details of which need to be established and then forwarded to the public prosecutor's office of the country concerned with a view to prosecution. The aim is also to create the basis for corresponding claims for recovery, which can be asserted most easily with the aid of a legally binding court ruling handed down following a comprehensive investigation. This is stipulated clearly by both the Convention on the protection of the European Communities' financial interests of 26 July 1995, the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law of 11 July 2012, and the most recent OLAF Regulation (Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 18 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999).

The criminal law is a central point of reference in all these documents. Article 6 of the 'Guidelines on Investigation Procedures for OLAF Staff' that came into effect on 1 October 2013, which I will return to later, also makes reference to investigations under the criminal law.

OLAF is thus an authority that is competent to carry out criminal investigations and, in accordance with a conventional understanding of European law, has the status either of a judicial police force (*police judiciaire*) or an internal police authority acting on behalf of the public prosecutor's office. And this is where the problems begin.

### **3. Constitutional requirements to be met by an authority with powers to conduct criminal investigations**

#### **a. Standard legal conditions governing scrutiny**

Police investigations under the criminal law are only efficient if they also allow for some measure of encroachment on the individual rights of third parties, because suspects generally do not cooperate

voluntarily. This makes statutory arrangements essential, since these rights are the subject of legal safeguards, sometimes under constitutional law, the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. For this reason, the European legal tradition is to incorporate, usually into a country's code of criminal procedure, statutory provisions which precisely describe and define the investigative powers of the police.

This area of law is hugely sensitive, because it is the nexus of the conflict between civil liberties and the power of the state. It therefore comes as no surprise either that a multitude of rulings in this area, handed down by individual countries' constitutional courts, the European Court of Human Rights and even the European Court of Justice, deal with the conflict between power and freedom, or security and freedom, and thereby continually redefine the boundaries and scope of police investigations.

In addition, police entities are subject to supervision and scrutiny by the public prosecutor's office, which is meant to ensure that an *ex ante* review of investigative measures is carried out, in an effort to prevent the unnecessary curtailment of individuals' rights. In particularly severe cases of encroachment on the rights of an individual, the public prosecutor's office is even required to obtain judicial authorisation. After the event, all investigative measures are subjected by the relevant parties to regular *ex post* judicial review by at least two bodies, up to and including the European Court of Human Rights.

This concept of *ex ante* scrutiny by the public prosecutor's office and *ex post* scrutiny by the courts has proved effective as a way of protecting individuals' rights and maintaining the efficiency of investigative action, and it is not fundamentally being challenged.

It simply does not apply to OLAF, however.

#### **b. Supervisory mechanisms in OLAF**

First of all, there is no statutory provision describing OLAF's investigative powers. The 'Guidelines on Investigation Procedures for OLAF Staff' (the latest version effective from 1 October 2013) serve only as

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internal administrative rules that neither grant OLAF officials rights vis-à-vis third parties nor restrict the rights of third parties themselves in relation to investigative measures.

The case law of the European Court of Justice cited on OLAF's own homepage reveals two things. On the one hand, it is clear that, fortunately, OLAF's investigations are subject to *ex post* judicial review. On the other hand, it is equally clear that the European Court of Justice is teaching OLAF some fundamental lessons in the area of the protection of fundamental rights. Put another way, this means that OLAF's staff, including the Director-General, are happy to flout the rule of law in their actions.

The guarantee of a right to a hearing (*Kalliopi Nikolaou*), the upholding of parliamentary immunity (*Willi Rothley*) or the requirement that an investigator should be impartial (*Camós Grau*) are just some examples of this disregard for long-standing basic principles of law.

It is rather embarrassing that an EU authority that conducts police investigations should have to have the basic procedural rights of the individuals concerned explained to it by a hierarchically superior court, namely the European Court of Justice, on a case-by-case basis.

In this respect, the case law cited on the website is evidence of OLAF's obvious shortcomings as regards compliance with the rule of law. At the same time, this situation has resulted in numerous rights violations which, in modern states governed by the rule of law, should have been consigned to the past long ago - and have been in most cases. In the light of this case law, OLAF can be said to have taken on the role of backward pupil in this area - certainly not one that is becoming of such an important institution.

The wordings of Regulation (EU, Euratom) No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (under No 23) or of the Guidelines, which state that the 'fundamental rights of persons' must be taken into consideration, are not especially helpful; in fact they are an admission of helplessness. Of course, I could easily deal with the entire topic of the protection of individual

rights as referred to in the European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, looking at both individual countries and the EU as a whole, in a single paragraph, which could be entitled: 'In proceedings, the legitimate rights of the individuals concerned are taken into consideration in accordance with the ECHR and the EU Charter of Fundamental Rights.' However, that would quite obviously be a dramatic step backwards in view of the existence of a complex body of legal theory on the protection of the rights of individuals under the criminal law and its detailed interpretation by national specialist and constitutional courts, not to mention the case law of the European Court of Human Rights and the European Court of Justice. In this respect, it is imperative that OLAF's right to conduct police investigations must be established in full in the form of an autonomous legal instrument, with particular account being taken of the case law of the ECHR and the Court of Justice of the European Union.

An alternative approach would be to incorporate in such a legal instrument details of investigative methods that OLAF is currently either not entitled to use or which fall into a legal grey area. Some examples of this might be a limited authorisation to tap communications or the use of covert investigators. Such measures are part of the general repertoire of modern investigative bodies and there is, in principle, no reason why OLAF should not be allowed to avail itself of them. A reference to the existing possibility of requesting the competent national bodies to order such measures does not constitute a counterargument. National arrangements of this kind do not apply to EU institutions, which is why provisions need to be laid down in European law.

The monitoring of OLAF's activities by the Supervisory Committee is very limited in scope and the Committee's Rules of Procedure incorporate only a general reference to the legal protection which may be provided by the European Court of Justice (Article 14). What is more, the Supervisory Committee is not a judicial body, but rather an explicitly political one; as if that were not enough, it also consists of OLAF staff members, who for their part are subject to the administrative and legal supervision of the Director-General.

## Hearing on OLAF and interferences with rights of persons concerned

The review of procedural practice by the European Ombudsman is not a proper judicial review either, but merely a last resort, and one which is further devalued by the fact that the Ombudsman may neither intervene in court proceedings nor challenge the legality of judicial decisions. Even though the Ombudsman has no executive rights either, he has on occasion reprimanded OLAF in relation to its investigative activities.

The right to lodge a complaint with the Director-General of OLAF in accordance with Article 90(2) of the Staff Regulations does not constitute a legally meaningful form of scrutiny either. As the Director-General is himself involved in the investigations, at least in that he decides to instigate or close them, he can no longer be said to be impartial when it comes to assessing possible instances of misconduct in investigations. Even if he were in no way personally involved, he, as the head of the authority, could not be genuinely regarded as impartial and would at best be allowed to give his views on the allegations in the scope of a preliminary examination, remedy these or provide compensation, before a truly independent body makes a decision on the allegations and whether or not they are well-founded, as normally provided for under the law of criminal procedure.

The *immunity* of OLAF staff members limits the scope for exercising scrutiny even further, although in practice proceedings are very rarely brought against police officers in national courts. Nevertheless, OLAF is the only investigative police authority in Europe whose staff members are not accountable under either the civil or the criminal law. This is without parallel in modern criminal and police law, and indeed it is more reminiscent of the time when sovereign rights were exercised under long-forgotten feudal state structures. Even accountability under the Staff Regulations, which is purely administrative in nature, is no substitute for personal accountability under civil and criminal law.

The autonomy that OLAF staff members must enjoy vis-à-vis both the Member States and the EU authorities and institutions does not call for an exemption of this kind. Even at national level, the autonomy of the police is not restricted by the possibility open to anyone to instigate proceedings against officers and clerical staff.

It must be acknowledged, however, that the exercise of undesirable influence by both national and European political interests is a real problem in the case of OLAF. Judicial scrutiny by each of the Member States concerned would also be dysfunctional, because national courts would be acting in breach of all established rules if they were to judge the actions of EU authorities and their staff. However, if the legality of OLAF investigations can already be reviewed by the European Court of Justice, it is not clear why that European court should not also be able to rule on the accountability of OLAF staff members under the criminal and civil law.

While *ex post* judicial reviews of the legality of OLAF investigations by the European Court of Justice, as were mentioned earlier, may be very welcome in principle, they seem somewhat unsuccessful and ineffective in practice, for two reasons. On the one hand, the European Court of Justice does not have the requisite specialist knowledge of the problems associated with criminal investigations. On the other, it is certainly not efficient to entrust a body such as the European Court of Justice with tasks that in European judicial systems are performed by the public prosecutor's office or by individual investigating magistrates or *juge des libertés*.

A future European public prosecutor's office would effectively form the link between the police and the investigating magistrate and ensure that the problematic transition from self-regulation to formal judicial review goes off smoothly and above all in a manner consistent with the rule of law. That would also improve *ex ante* protection against unlawful investigations by OLAF.

### 4. Summary

In its capacity as a police authority responsible for conducting criminal investigations, OLAF does not have (1) an adequate range of investigative powers that are laid down in law, or (2) structural integration into the judicial system, which a police organisation requires in accordance with constitutional principles.

With regard to (1)

The existing regulations, including the most recent one of 11 September 2013, do not do enough to



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establish OLAF's investigative instruments in law. That undermines both the requisite protection of the rights of individuals in the context of investigations and the efficiency of OLAF's investigations. Suitable procedural rules of procedure enshrined in EU law are essential.

With regard to (2)

A police organisation that is not subject to scrutiny either by a public prosecutor's office or by an examining magistrate is not only incomplete, but also out of place in the system based on the separation of powers. The option of scrutinising the actions of OLAF directly and solely by judicial means before the European Court of Justice seems extremely impractical. An investigating magistrate at the European Court of Justice should be appointed in order to facilitate *ex ante* judicial review in severe cases of encroachment on fundamental rights.

In the present situation, in which there are, in principle, no effective *ex ante* monitoring mechanisms in place, and which is further exacerbated by the immunity enjoyed by OLAF staff members, OLAF does not in any way meet the fundamental requirements that apply in a state governed by the rule of law.

## THE COURT OF AUDITORS REPORTS, FINDINGS AND CONCLUSIONS RELATED TO THE COMMISSION'S ANTI-FRAUD SERVICES

**MICHAEL BAIN**

Head of Unit at the European Court of Auditors University of Trier

### Published reports and opinions (selected)



**Special report no 8/98 on:  
Commission's services  
specifically involved in the fight  
against fraud**

**Follow-up of SR 8/98 - published  
in the Court's Annual Report  
2000**

**Special Report 1/2005  
Concerning the management of  
OLAF**

**Special Report 2/2011 – following  
up the 2005 report**

**Opinion 6/2011– on the  
proposal concerning OLAF  
investigations**

- An examination of the operation of UCLAF



- A follow up of the main findings of the previous special report following the creation of OLAF



- An examination of the operation and management of OLAF.



- An in-depth follow-up of the findings of the 2005 report



- The latest in a series of opinions the Court has been asked to give in relation to proposed legislation relating to the operation of OLAF and the Commission's fight against fraud.



## Main findings

Common threads running through the reports resulting from work done between 1996 and the present day:

- The anti-fraud services (UCLAF and OLAF) have not prioritised the core function of investigation.
- Poor management of case files and lack of consistent procedures, leading to the risk that cases opened are not successfully brought to a conclusion and rights are not respected – (a complex multi-national framework but solutions adopted to date have not been successful)
- There remains a lack of a true independent guarantee of the legality of investigative procedures
- There is a need for a reinforcement of procedural guarantees; even the latest regulatory proposals do not fully clarify the rights of persons to be interviewed.
- The relationship between the office and supervisory Committee is unsatisfactory. The role and responsibilities of the Committee need to be clarified.
- The treatment of “internal cases” has been shown to be inadequate. A need for clear rules to be established.



## Findings from previous reports...

“In a comparison with the systematic way many national investigation services are forced to compile an investigation file for the prosecutor, it is difficult to see how the OLAF files can form the basis for a case respecting national laws.”

Special Report 8/1998

“All too frequently the preparation and follow-up of investigations is rudimentary”

Special Report 1/2005

“There is no independent check on the legality of actions investigative procedures that are underway or that the fundamental rights of persons under investigation are safeguarded.”

Special Report 1/2005

“The legal framework has not changed since the Court’s last report. There is still no independent control of investigative acts, nor is there a code guaranteeing that investigations follow a predictable course.

Special Report 2/2011

“OLAF should increase the number and speed of its investigations by increasing the proportion of time spent on its core investigative function”

Special Report 2/2011

“A procedure has been introduced to consult the SC before forwarding information to national judicial authorities but this does not yet adequately protect the rights of the individuals concerned.”

Special Report 2/2011

“The Court regrets however that the objective of independent control of investigative acts in progress will not be achieved under the Commission proposal.”

Opinion 6/2011

“The Court recommends taking into account the Court of First Instance’s judgment of July 2008 which held that it is an important function of the Supervisory Committee to protect the rights of persons who are the subject of OLAF investigations”

Opinion 6/2011

### **Practical outcomes from the weaknesses found: a double edged sword**

- The result of a failure to follow the proper procedures not only impacts on the rights of persons concerned by OLAF procedures but also directly on the protection of the financial interests of the EU budget.
- Where cases are time-barred, rejected prior to hearing, or lost before national judiciaries the recovery of the monies involved is almost impossible. This has a direct impact on the EU budget and is a waste of scarce EU and national resources.
- Where cases are founded and are then lost due to poor procedure the perpetrators of such frauds also escape punishment.



## **REINFORCING PROCEDURAL SAFEGUARDS IN OLAF – WHAT NEEDS TO BE DONE IN VIEW OF MONITORING EXPERIENCE OF THE SUPERVISORY COMMITTEE**

**MAREK KADUCZAK**

**Secretary of the OLAF Supervisory Committee**

### **Present supervision structure**

1. The European Antifraud Office (OLAF) and its Supervisory Committee (SC) have been established by Commission Decision of 28 April 1999<sup>1</sup>. The scope of supervision has been reinforced and specified by Regulation No 883/2013<sup>2</sup> of 11 September 2013. The SC is the guarantor of OLAF's independence and it supervises the investigatory function of OLAF through regular monitoring aimed at ensuring the proper conduct of investigations. The SC focuses in particular on examining whether fundamental rights and procedural guarantees are respected in OLAF investigations and whether the cases are dealt with efficiently, effectively, in due time and according to the relevant rules and legal provisions.

### **SC recommendations and Commission proposals**

2. In its Annual Activity Report 2012 (in particular in Section 2 of Annex III), the SC recommended, on the basis of its monitoring experience and in view of the identified shortcomings, a number of actions aiming at reinforcing procedural safeguards in OLAF investigations. The SC recommended in particular introduction of transparent and stable procedures for the internal legality check and for independent review of complaints. The SC recommended also clarification of OLAF powers in different types of administrative investigations and insisted on providing the SC with effective tools for monitoring the respect of procedural guarantees and fundamental rights by OLAF.



3. That need to strengthen the procedural safeguards and legality checks seems to be a common conclusion of the European Parliament, the Council, the Commission, the Court of Auditors and the SC as expressed in their exchanges of opinions on OLAF investigative activities.

4. Such strengthening should be considered in view of the Commission's proposal for the establishment of the European Public Prosecutor's Office (EPPO). Creation of the EPPO would be a change of paradigm by transferring cases of possible criminal fraud from administrative investigations in OLAF to criminal investigations conducted by

## Hearing on OLAF and interferences with rights of persons concerned

European prosecutors. Such change is to result in a substantial reinforcement of the procedural guarantees for persons concerned by investigations.

5. Even with the establishment of the EPPO, OLAF would still have a significant role to play in protection of the EU against offences and irregularities affecting its financial interests. There is a high degree of uncertainty when it comes to the geographical coverage of the EPPO which most probably will be established by enhanced cooperation of some Member States - their number remains unknown, but almost surely not all of them are going to participate. Therefore investigations of similar nature might be in future conducted in parallel by the EPPO and OLAF, depending on a Member State, which would require strengthening the procedural safeguards in OLAF investigations, so that they could match the foreseen EPPO standards.

6. Therefore, the SC welcomes with satisfaction the Commission's Communication on *Improving OLAF's governance and reinforcing procedural safeguards in investigations*. The SC is currently analysing possible consequences of particular solutions proposed there and is looking forward to discussing them with the Institutions and with OLAF. As the first reflection, the SC considers the substance of the proposals as positive, providing for instruments potentially enabling to improve the current level of safeguards. At the same time, some structural solutions, as proposed in the Communication, should be reconsidered with particular regard to the independence of OLAF and of the Supervisory Committee, to ensure avoiding conflicts of competences with respect to the supervision of OLAF as well as duplication of work and inefficient allocation of resources.

### New bodies and their competences

7. At this stage, the SC is considering specifically the issues of the institutional framework for two new offices proposed by the Commission and the scope of their competences.

8. The Communication advocates establishment of a new office of a "Controller of procedural safeguards" who would "monitor compliance with the procedural guarantees applicable to OLAF investigations and

of prompt handling of investigations to avoid undue delay". It is very hard to see how the Controller could avoid having his work overlapping with the work of the SC which would "monitor systemic developments regarding respect of procedural rights and reasonable deadlines for handling cases".

9. Even if the differentiation between the tasks of the Controller and of the SC could be possible argued on a theoretical level, the practical experience of the SC shows that review of individual cases is an indispensable element of systemic monitoring of OLAF. Therefore, the daily work – in the separate secretariats of both bodies - would be very similar and consist in examination of individual case files in view of respect of procedural rights and duration of investigation.

10. In its systemic analyses based on samples of individual cases, the SC could be examining, coincidentally and even unknowingly, the same case as would be examined by the Controller in the framework of his individual review. It could lead not only to redundant duplication of work, but also to issuing diverging or even conflicting recommendations to the Director General of OLAF.

11. Furthermore, the Commission proposes to establish an office of a judicial reviewer who would authorise OLAF's intrusive investigative measures concerning Members of EU Institutions. As a result, also his work (as the SC's and Controller's work) would concern examination of the respect of procedural/fundamental rights (although *ex ante* and not *ex post*).

12. The reviewer's competences, his punctual interventions and his placement within or next to the Commission could raise serious concerns as regards OLAF independence. In view of his placement, his competence to advise on investigative measures against Members of the Commission but also of other Institutions could affect the interinstitutional balance.

13. Also as regards the Controller, who would be similarly placed and separated from the Supervisory Committee, there could be concerns with regard to his independence and to the cost effectiveness of him having a separate secretariat doing the job currently done by the SC secretariat.

14. Creation of two additional offices controlling OLAF but separate from the Supervisory Committee of OLAF would lead to multiplication of independent supervising structures, probably resulting in confusion or conflict of competences and duplication of work. That could ultimately decrease the efficiency of the supervision of OLAF.

### Alternative solutions

15. The SC is considering other options which would retain the useful instruments proposed by the Commission, but which would at the same time incorporate them into a comprehensive and effective supervision structure.

16. To achieve the important aim of reinforcing the procedural safeguards in OLAF set forth by the Communication, the Controller should form a part of a wider supervisory committee. His independence would be strengthened and he could benefit from the expertise of the SC and its Secretariat having a long experience in examining the respect of procedural guarantees in OLAF. The whole joint structure would be stronger, more efficient and would produce an effect of synergy. A common secretariat would ensure consistency, economy of scale and allow avoiding duplication of work.

17. As regards the judicial reviewer, he could be, theoretically, also attached to a wider supervisory committee to benefit from the knowledge and independent resources of the already established structure. On the other hand, the judicial reviewer being attached to the SC (or to the Commission) would implicate the SC (or the Commission, respectively) in the decision-making process in OLAF which could jeopardise OLAF's independence.

18. Therefore, it seems more logical to place the judicial review back in a dedicated judicial unit within OLAF which would consist, as it used to be the case, of national magistrates. They could, without putting OLAF's independence in danger (as it could be the case with an external body), provide the Director General, rather expeditiously thanks to their presence within OLAF, with independent and formal legal advice, *ex ante*, on all intrusive investigative measures and other actions requiring compliance with specific national provisions. The SC would continue to monitor, *ex post*,

the judicial recommendations to the Director General and his ensuing decisions, with a view of ensuring OLAF's independence, on the one hand, and the procedural rights of persons concerned, on the other.

19. In the light of its monitoring experience, the SC supports the Commission's proposal to reinforce the procedural safeguards in OLAF investigations. It is particularly recommendable having regard to the abolition in the reformed OLAF of the SC's prior examination of the respect of fundamental right and procedural guarantees before an OLAF case is sent to national judicial authorities - which was considered by the Court of Justice as a crucial safeguard for persons concerned. The improved supervisory structure must be functional and efficient. The SC is looking forward to the forthcoming exchange of opinions between the Institutions under the new OLAF Regulation which could focus on working out optimal and broadly supported legislative solutions.

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<sup>1</sup> Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), 1999/352/EC, ECSC, Euratom (OJ L 136, 31.5.1999, p. 20) as recently amended by Commission Decision of 27 September 2013, 2013/478/EU (OJ L 257, 28.9.2013, p. 19).

<sup>2</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).



## CONCLUSION

### REMARKS TO THE SUBJECT – “OLAF AND THE RIGHTS OF PERSONS CONCERNED”

#### INGEBORG GRÄBLE MEP

##### Rapporteur of the European Parliament for the OLAF regulation

Frankly spoken, the contributions of our distinguished guests leave me worried. Taking into account all their views, I deem even more important to reinforce the mechanisms and provisions in the OLAF regulation to safeguard the rights of persons concerned. The respect of fundamental rights and procedural guarantees is key for the effective work of OLAF and there should be no room for legislative gaps – to the benefit of the persons concerned and to the benefit of OLAF.

In this context, I emphatically regret that the necessary majority in Parliament was missed by one vote in July 2013 to include my amendments into the suggested compromise between Parliament and the Commission. My amendments included provisions on legality checks during investigations and the establishment of a stronger and more independent Supervisory Committee.

Having heard Professor Kühne’s elaboration on the “Guidelines on Investigation Procedures for OLAF Staff”, I am convinced that the legal character of these guidelines as sole internal administrative instructions is simply insufficient for the key role they play for the work of the Office. They do not fix the main drawback, that the guidelines adopted by the Director General neither grant legal rights or privileges towards third parties, nor are they justification enough to interfere with the rights of third parties. My amendments foresaw the adoption of those guidelines as a delegated act, so that their legal status is enhanced.

Looking forward, the future holds some interesting debates ready for us. The latest proposal of the Commission for the change of the OLAF legal base,



accompanying its proposal for a European Public Prosecutors Office, foresees the installation of a so called ‘Controller of procedural safeguards’ as well as an ‘office of a judicial reviewer’. The competences of these two authorities are, as proposed by the Commission, overlapping with the competences of the OLAF Supervisory Committee. Furthermore, the set up would raise the issue of OLAF’s independence. Therefore, I can fully understand the Supervisory Committee’s point of view that the effectiveness and efficiency of supervision, especially as regards to procedural guarantees and fundamental rights were to decrease.

However, there remains one problem in the short run. Since 2011 when the current OLAF Director General took office, the first problems concerning his

notion of office bubbled up during the Dalli affair. The Supervisory Committee (its Rapporteur was a judge) reported in its opinion 2/2012 to the Institutions significant breaches of law (i.e., illegal recording of one telephone-call, illegal searches, illegal hearing of witnesses), breaches of internal rules and regulations, sloppy investigation steps, and intentional bypassing of the supervisory body. The Director General of OLAF was part of the team which acted in this way. Parliament also learned from a court hearing in Malta, that the Director General of OLAF also could have violated significant ethical rules and legal/administrative principles both during and after his interview with a female witness in Portugal. Closely looking at it, the entire Dalli-investigation seems to be tainted by obviously biased, flawed - and in parts, highly unethical behaviour directly conducted by the Director General.

These flaws have been uncovered by the Supervisory Committee, were mentioned in the Maltese courts, have been confirmed by leading Police officials in Malta, and can be found in the publically available OLAF report. It virtually appears to be of a grotesque nature that the OLAF Director General is still in office. The case did not shift “from a judicial forum into the political arena of the European Parliament”, as the Director General wrote in an Article for a newspaper. It is not the investigated case which is discussed in Parliament, but rather, OLAF’s failures.

The political scrutiny over OLAF’s failures is especially important in our respectable democracy particularly when OLAF’s own Supervisory Body raises the red flag! There is a law and the Director General has to respect it. That is what Parliament has been constantly telling him.

In short, the revelations surrounding OLAF’s investigations leading to Commissioner Dalli’s loss of office in October 2012 have shown that the OLAF Director General’s attitude and perception of Office is crucial for the work of the office. The attitude and perception of the current Director General is unacceptable and it is ruining the achievement of establishing OLAF and of its improving functioning until 2011. To release the Director General from his burdensome office is therefore, the first step to improve the respect of procedural and fundamental rights of persons concerned. The EPP maintains this vindication.



## ANNEXES

## I

*(Information)*

## COURT OF AUDITORS

### SPECIAL REPORT No 8/98

on the Commission's services specifically involved in the fight against fraud, notably the 'unité de coordination de la lutte anti-fraude' (UCLAF) together with the Commission's replies

*(pursuant to Article 188c(4), second subparagraph, of the EC Treaty)*

(98/C 230/01)

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## 1. INTRODUCTION

### Scope of the audit

1.1. At the beginning of 1997 the Court decided to carry out an audit of the services of the Commission responsible for the fight against fraud, especially the 'Unité de Coordination de la Lutte Antifraude' (UCLAF). To date the audit work has covered an evaluation of the measures taken to establish appropriate legal, organisational and administrative arrangements to ensure the success of UCLAF's mission, an assessment of the effectiveness of UCLAF based on an examination of all its units, enquiries in the United Kingdom and the Netherlands<sup>(1)</sup> and a global examination of the anti-fraud responsibilities of the Security Office, DG XIX and DG XX.

### Main observations

1.2. The Commission has, in particular since 1990, made a major effort in its fight against fraud. This has led to a better legal and administrative framework in this area (see paragraphs 2.4—2.6). However, Conventions and Protocols agreed under the third pillar have still not been ratified (see paragraph 2.11).

1.3. A structure within the Commission has been created for the fight against fraud (see paragraphs 2.20—2.23). However, the organisational arrangements, including those in relation to the Member States, are not always clear, and are often complicated and cumbersome (see paragraph 2.34, table 1, paragraphs 3.21—3.23 and 3.35—3.36). Furthermore, security measures and procedures are frequently not correctly implemented (see paragraphs 2.28—2.32).

1.4. UCLAF has been given more tasks, more powers and more staff. The number of temporary staff is about 50 % of total staff which creates a lack of continuity in the organisation (see paragraphs 3.2—3.4).

1.5. The databases of UCLAF were not fully operational or effective (see paragraphs 3.29—3.33). The databases were rarely used and the information kept by three of the four operational units within UCLAF did not reconcile with the database Pre-IRENE (see paragraphs 3.8—3.10).

1.6. Management information was insufficient for the effective management of the high number of cases held by UCLAF (see paragraphs 3.10—3.12). Furthermore the lack of standard methods of documentation and file management is considered a serious weakness (see paragraphs 3.13—3.18).

1.7. Cooperation between Member States and Commission is hampered by the manner in which the privileges and immunities of the European Union's staff are implemented (see paragraphs 3.24—3.26). In addition, UCLAF in its inspections on Member States'

<sup>(1)</sup> According to the legal and administrative framework action to combat fraud affecting the Community's financial interests is primarily the responsibility of the Member States (see chapter 2). For this reason it was decided to include in this audit controls at national level.

territory has had to cope with serious constraints related to national legislation (see paragraphs 3.20—3.23).

1.8. Recovery of amounts unduly paid is hindered by the fact that the information on the amounts recovered is incompletely recorded (see paragraphs 4.3—4.5). Furthermore Member States do not strictly respect their obligation to communicate all information to the Commission in this regard (see paragraphs 4.6, 4.7, 4.11, 4.19, 4.20).

1.9. It is to be noted that for EAGGF-Guarantee legislation has been adopted to create a so-called 'black list'. So far, the results are disappointing (see paragraphs 4.12—4.14).

1.10. A number of preventive actions have been taken in the fight against fraud (see paragraphs 2.13—2.15, 2.19). The risk analysis study, carried out by the Joint Research Centre (JRC), however, suffered serious delays and only part of the areas that were intended to be included in the study could be covered (see paragraphs 2.16—2.18).

1.11. Elements of the data about cases of fraud, published in the Commission's annual report on the fight against fraud are incomplete and therefore misleading (see paragraphs 5.4—5.11).

1.12. Procedures and responsibilities concerning the fight against internal corruption and breaches of discipline are unclear and incomplete (see paragraphs 6.3, 6.11—6.13). In particular there are no clear guidelines for investigations (see paragraphs 6.5—6.7) and there is no clear policy (such as a 'zero tolerance' policy) (see paragraphs 6.8—6.9). There is exaggerated hesitation to lift the immunity of European Union staff suspected of corruption (see paragraph 6.10).

## 2. THE COMMISSION'S ORGANISATION OF THE FIGHT AGAINST FRAUD

### The strategy of the Commission for the fight against fraud

2.1. The organisation of the fight against fraud within the Commission and the resources made available in this field developed in several phases.

2.2. The Commission firstly created within certain DGs (especially VI, XX and XXI) administrative units responsible for the fight against fraud. In a second phase the Commission decided in 1987<sup>(2)</sup> to establish a central coordination unit (Unité de Coordination de la Lutte Antifraude — UCLAF) in the General Secretariat and to

set up anti-fraud teams in the different DGs. At the beginning of the second phase UCLAF had at its disposal 10 officials (of which five at grade A) which were placed under the authority of a director. It was foreseen that additional staff should be allocated to the operational services and UCLAF.

2.3. The third phase, which started at the end of 1994 was characterised by a clear distinction between the task of developing and implementing a common policy and the collecting of information, carrying out enquiries and stimulating corrective action where the financial interests of the Community have been put at risk. The Commission decided to transfer the responsibilities of the different DGs in the fight against fraud to UCLAF in order to ensure a far reaching centralisation in this field<sup>(3)</sup> (see paragraph 2.5). Thus major staff resources and the largest part of the budgetary competence have been transferred to UCLAF (for financial details see Annex II).

2.4. Parallel to these developments there was the completion of the single market and the entry into force of the Treaty of the European Union (TEU). Accordingly the Commission devised in 1994 a new strategy to combat fraud based on four major axes:

- presence on the ground;
- closer cooperation with the Member States;
- improvement of Community legislation;
- convergence of Member States' criminal law enforcement systems<sup>(4)</sup>.

2.5. The Commission sets out an annual work programme to take forward its strategy against fraud<sup>(5)</sup> which is not only binding on UCLAF but on all services having responsibilities in this field (see paragraphs 2.20—2.23). In the work programme for 1997/1998 the Commission explains that it 'strengthens presence on the ground and continues the policy of partnership with national authorities'. The following main objectives are identified:

- detection of irregularities, where the Commission believes that it can add most value by concentrating on major transnational cases;
- recovery of the amounts involved, where the Commission intends to strengthen follow-up action;

<sup>(3)</sup> SEC(95) 249. It should be stressed that UCLAF has other responsibilities outside enquiry activities, see paragraph 2.20.

<sup>(4)</sup> COM(94) 92 final.

<sup>(5)</sup> The Commission's work programme 1997/1998 on the protection of the Communities' financial interests and the fight against fraud (COM(97) 199) also contains a brief evaluation of the results achieved since 1994.

<sup>(2)</sup> COM(87) 572 final.

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- preventive action through improvement of systems and legislation;
- emphasising the responsibility of Member States to manage the own resources system properly;
- the eventual creation of a European 'judicial area for the protection of the Union's financial interests', within which criminal penalties for offences against the Community's budget would be harmonised;
- preparation for enlargement, through development of relations with the countries which are candidates for accession.

The Court noted the Commission communication of the 18 November 1997 'Improving action against incompetence, financial irregularities, fraud and corruption' SEC(97) 2182/2. Part one of the communication describes the current situation in the Commission which confirms the Court's understanding as described in this report. Part two proposes lines of action to remedy the weaknesses in the current situation. Whilst the Court welcomes the content of the communication it cannot, at present, assess the impact of the proposals presented therein. An Action Plan adopted by the Council<sup>(6)</sup> includes detailed recommendations indicating the direction to be taken for further work in this domain.

2.6. Making UCLAF's presence more effective on the ground is clearly the responsibility of the Commission. Aspects of UCLAF's execution of its tasks are reviewed in Chapter 3 of this Report. The initiative for improving Community legislation rests with the Commission, although significant changes are likely to require action by the Council and Parliament. Progress on this aspect of the Commission's strategy is outside the scope of this Report. Closer cooperation on the investigation of frauds and irregularities and in the recovery of money wrongly paid involves both Commission and Member States; certain action is possible through legislation under the first pillar of the Treaty. Progress on financial follow-up and recovery action in cases involving UCLAF is reviewed in Chapter 4 of this Report. The convergence of Member States' criminal law enforcement systems presupposes action by all Member Governments under the third pillar of the Treaty.

2.7. Given the absence of any Community criminal law, fighting fraud against the Community finances (and corruption) is governed by the provisions of Treaty texts

concerning either the first or the third European Union pillars. In fact, Article 209(a) of the EC Treaty requires the Member States to take the same measures to combat Community fraud as they would take to combat fraud to the detriment of their own financial interests. This obligation derives without any doubt from subject matter covered by the first pillar.

2.8. In spite of this, since the detection and prosecution of fraud require criminal responsibilities and powers, it was considered that, if this obligation was to be complied with, use would have to be made of instruments deriving from traditional international law — in this case conventions — which, as such, come under the third pillar. Community legislative acts cannot provide for penal sanctions. They do, however, incorporate in the general notion of an irregularity both an intentional (and therefore fraudulent) infringement of Community law, and one that occurs through negligence. The legislation lays down administrative sanctions and extensive powers for the Commission to carry out checks and inspections so as to uncover such irregularities.

2.9. Although under the first pillar certain legislation exists relating to the combat against fraud, a definition of fraud is to be found under the third pillar: on 26 July 1995, the Council approved an act drawing up a Convention on the protection of the Communities' financial interests<sup>(7)</sup>. For the purposes of this Convention fraud affecting the European Communities' financial interests shall consist of:

- a) in respect of expenditure, any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation with the same effect and the misapplication of funds for purposes other than those for which they were originally granted;
- b) in respect of revenue, any intentional act or omission relating the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation or misapplication of a legally obtained benefit with the same effect.

<sup>(6)</sup> OJ C 251, 15.8.1997.

<sup>(7)</sup> OJ C 316, 27.11.1995.

2.10. It should be noted that the new Treaty of Amsterdam has strengthened the wording of Article 209a by requiring measures taken to combat fraud against the Community budget to be, in particular, '(...) deterrent and such as to afford effective protection in the Member States'. In addition, the new text of the article now states that the Council, 'after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud (...) with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.' This provision could open up the possibility of Community action in the harmonisation of national systems of criminal law, without prejudice to the exclusive prerogatives of the Member States in this area. Administrative sanctions would have to be developed subsequently.

2.11. Actions under the third pillar resulted in two Conventions and two Protocols agreed by the Council in the period 1995–97 (one of which the Convention mentioned under paragraph 2.9). However, these instruments become effective only when ratified by all 15 Member States; hitherto they have not yet been ratified by any Member State. As a result, present arrangements for judicial cooperation are still based on international legislation dating back to the 1950s, when Europe had no common institutions or policies covered by a single budget, when trade and financial flows were a fraction of what they are now and when financial crime was carried out by individuals or gangs, not organised international networks capable of maintaining an outward appearance of legality as is the case today<sup>(8)</sup>.

2.12. Moreover, even supposing that all the new instruments were ratified in the short term, a series of measures still have to be taken to enhance the legal basis of the anti-fraud policy. The discontinuity of legal procedures and the disparity between the different Member State systems of criminal justice, notably in terms of the severity and nature of punishment, hinder the effective repression of fraud<sup>(9)</sup>. There is a need for 'radical response to the absurdity, still tolerated though universally condemned, of opening wide our national frontiers to criminals while continuing to shut them

against those responsible for fighting crime, despite the risk of turning our countries into crime havens'<sup>(10)</sup>.

## Fraud prevention

### SEM 2000

2.13. Together with the Member States the Commission embarked on a wide-ranging three-stage exercise, named SEM 2000 (standing for Sound and Efficient Management 2000), to make the management of Community appropriations more efficient. The first two stages involved the Commission improving the standard of its own financial management. The third stage aims to bring about improvements in the management of Community resources by the Member States.

### 'Fraud-proofing' of legislation

2.14. In this context the Commission adopted in 1996 internal measures with the aim of fraud-proofing legislation and decisions that have direct or indirect financial implications<sup>(11)</sup>. The complexity and opaqueness of much existing Community legislation makes the EU budget particularly vulnerable to fraud. The necessary changes in the legislation will require a sustained effort over a long period.

### Early warning system in the field of direct expenditure

2.15. The Commission started, in July 1997, a project which has as its objective the introduction of an early warning system in case of administrative errors or fraud committed by organisations or enterprises receiving direct funding from the Commission<sup>(12)</sup>. It is too early for an evaluation of its effectiveness.

### Setting priorities

2.16. UCLAF needs a basis for deciding which cases should receive priority in the allocation of the limited

<sup>(8)</sup> See Fraud without frontiers, Study for the European Commission (Justice and Home Affairs Task Force, Judicial Cooperation Unit) of international fraud within the European Union prepared by Deloitte & Touche European and International Fraud Group, 1997.

<sup>(9)</sup> See Final Report 'Incompatibilités entre systèmes juridiques et mesures d'harmonisation', in: Seminar on the Legal Protection of the Financial Interests of the Community, Brussels, November 1993, Oak Tree Press, Dublin 1994.

<sup>(10)</sup> See 'Corpus Juris (hereinafter referred to as Corpus Juris) introducing penal provisions for the purpose of the financial interests of the European Union'. Study carried out at the request of the European Parliament, by researchers from the Associations of European Lawyers for the Protection of the Financial Interests of the Community, under the aegis of the Directorate General for Financial Control at the Commission, Paris 1997.

<sup>(11)</sup> SEC(96) 1802/4 (Implementation of recommendation No 7 of SEM 2000, Phase II).

<sup>(12)</sup> SEC(97) 1562.

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resources for inspections to sensitive areas and 'high-risk' operators and/or recipients. This in turn requires criteria for optimising the use of the diverse information at the disposal of the unit. UCLAF concluded, on 8 December 1995, an administrative arrangement with the Joint Research Centre (JRC) to carry out a study on:

- the development and application of pattern recognition methods for fraud cases stored in the Commission's databases IRENE and PRE-IRENE;
- the assessment of risk parameters concerning transactions financed or co-financed from the Community budget and;
- the description of trends over a given period of time and detection of heterogeneity in the amounts of subsidies in reference transactions and IRENE cases.

2.17. The project was initially intended to be carried out within a period of 12 months after the signature of the contract. Due to staff and technical problems, work on the project only started in April 1996. Therefore a first extension of the deadline of the last deliverable until the end of March 1997 was approved. As the JRC agreed to include in the work additional material and the results of an exchange on statistical sampling methods with the European Court of Auditors a second extension until the end of July 1997 was approved by UCLAF. The results of the study will only be of real practical value for UCLAF when its computer systems are further developed.

2.18. Due to the incompleteness of the information in the Pre-IRENE and the IRENE database the work on pattern recognition of frauds was limited to certain areas in the IRENE database (olive oil consumption aid, beef export refunds, own resources). DG XX refused its visa for the final payment. Meanwhile the situation remains that UCLAF has not yet developed any systematic basis for evaluating information contained in these databases in order to assist in the setting of priorities.

## Other actions

2.19. A number of actions was taken recently in the area of customs. Furthermore UCLAF has organised seminars for Member States' services to increase the awareness on fraud (see Annex IV).

## Division of responsibilities: UCLAF's mandate

2.20. By Commission decision of February 1995<sup>(13)</sup> UCLAF is responsible for all Commission activities in the

field of the fight against fraud. This includes in particular:

- the protection of the financial interests of the Community;
- the conception of the fight against fraud in all areas;
- the development of the necessary infrastructure for the fight against fraud (databases etc.);
- the collection of information concerning fraud cases and the treatment of this information;
- the operational measures (enquiries etc.).

2.21. The different Directorates General of the Commission are responsible for the conception and management of the common policies in their respective areas, including the control of the correct implementation of Community legislation. UCLAF and the departments concerned have to cooperate closely, coordinate their activities and exchange all the information necessary for their work<sup>(14)</sup> In February 1995 the Secretary General of the Commission requested the Directors General and the Heads of Services responsible for expenditure or own resources to ensure that all elements indicating a potential fraud are sent promptly and systematically to UCLAF.

2.22. In a further note of April 1997 the General Secretary asked the Directors General and Heads of Services to bring the guidelines, set out below, on 'Action to be taken in cases of suspected fraud, irregularities or breaches of discipline' to the attention of their services.

2.23. In accordance with the note from the Secretary General, if an incident comes to the knowledge of an official it is his duty normally to inform his Director General or Head of Service as soon as possible. The Director General without delay will inform the relevant service (no mention is made of DG XIX) according to the nature of the case:

- DG IX for possible breaches of discipline or professional misconduct;
- DG XX for irregularities relating to the commitment and authorisation of expenditure and the establishment and collection of Community revenue;
- UCLAF for all matters relating to cases of suspected fraud against the Community budget;

<sup>(14)</sup> Apart from these general guidelines, detailed rules for the repartition of responsibilities have been fixed in the area of agriculture, customs and indirect taxation.

<sup>(13)</sup> SEC(95) 249.



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— the Security Office for all matters relating to the security of persons, property or buildings of the Commission, including security of information, its transmission and use<sup>(15)</sup>.

2.24. The internal guidelines introduced a 'whistle-blowing mechanism' which allows an official to directly inform the services mentioned above. The Court found evidence where this proved to be very useful (see paragraph 6.8).

2.25. Direct contacts between the Commission and the national judicial or fraud authorities in relation to fraud cases must transit via UCLAF<sup>(16)</sup>. Therefore it is UCLAF that has to notify the judicial authorities of a Member State of evidence or suspicions in a specific case.

## Security measures

2.26. The Commission has by Decision of 30 November 1994, issued a set of rules 'on the security measures applicable to classified information produced or transmitted in connection with the activities of the European Union'<sup>(17)</sup>.

2.27. The Decision aims to ensure adequate protection of information on hard copy or in electronic form and to afford the same level of protection as the grading set by the owner, this being another institution or a Member State. It contains specific measures in respect of assignment of security grading, access and filing including the vetting of officials and other staff with access to sensitive information.

2.28. There are serious weaknesses in relation to the implementation of the security measures foreseen by the Decision. The Security Office of the Commission undertook a security inspection of the premises of UCLAF in 1996. This security inspection did not include an essential aspect, i.e. the appropriate character of any staff (by vetting or special enquiry). However, following the security inspection, UCLAF in May 1997 requested the vetting of 59 permanent officials and in July for a further three permanent officials. No request was made in respect of the temporary staff or detached national

experts who together make up more than half of UCLAF's staff.

2.29. By the end of October 1997 only two UCLAF officials have been vetted, in DG XIX and DG XX no member of staff directly involved in the fight against fraud has yet been vetted.

2.30. Furthermore no security inspections have been undertaken in respect of the other services having access to information related to the fight against fraud (databases, confidential documents). In relation to those staff having access to classified information no enquiries were made into their personal files, held by the Commission. Such a check could possibly provide essential security assurances.

2.31. The recruitment of a full time Security Officer is still to be decided upon and implemented by UCLAF (planned for 1998), and other basics such as classification principles, security grading of information, control of documents and the registration of documents classified higher than RESTRICTED. Thus for the time being it is up to the discretion of each individual staff member to ensure the security of information held by UCLAF.

2.32. It is a matter of concern that, with the growing responsibility of UCLAF and that more than two years after the reorganisation of the Commission services, the Commission Decision of 30 November 1994 has not been entirely implemented. It is a matter of very serious concern that there is no scrutiny of the suitability of all staff having access to sensitive information. The Court has become aware of a particular case where there is a *prima facie* unsuitability of a Commission official for a specific function where he has access to sensitive information.

## Internal administrative enquiries

2.33. In order to gain sufficient evidence to decide whether to take a case forward for criminal prosecution, UCLAF needs to carry out an administrative enquiry and to take a position on the results achieved. Well known cases exist (for example in the tourism sector) where dossiers have been withheld from UCLAF investigators and where incriminating documents have been systematically destroyed. Such events demonstrate the need for UCLAF to be granted powers enabling access to all files held by the authorising officers at the earliest possible stage, beyond the simple instruction to notify UCLAF of cases of suspected fraud. In an attempt to improve the situation, the Secretary General of the Commission approved in April 1996 a procedure to allow UCLAF to carry out searches with the prior

<sup>(15)</sup> The Inspectorate General is not regarded as an appropriate contact point in these cases as it is not implicated in ongoing management tasks. Its role is to monitor the effectiveness of the different services of the Commission in relation to their regulatory framework, use of resources and output obtained.

<sup>(16)</sup> Direct contacts with the security authorities in the Member States have to be channelled through the Security Office.

<sup>(17)</sup> COM(94) 3282 of 1 March 1995 replacing the decision of 7 July 1986 defining the security grading of documents and establishing the security measures applicable to classified documents.

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agreement of the Secretary General and the Director General for Personnel and Administration to individual proposals made by the Director of UCLAF.

## 3. ORGANISATION OF UCLAF

### Structure

2.34. *Table 1* gives an overview on the methods of accomplishment of certain operational tasks of UCLAF. It also shows that there are areas where serious deficiencies exist, for example in the definition of the powers of UCLAF when it comes to the questioning of Commission officials and the searching of files and offices in Commission buildings.

3.1. At present UCLAF consists of two units with horizontal support tasks and four operational units. The first unit (F1) is responsible for general policy matters, judicial questions and coordination, the second (F2) for intelligence, information and evaluation of the legislation, the third (F3) for the structural funds and other domains, the fourth (F4) for import/export of agricultural

TABLE 1

Basis for the accomplishment of certain operational tasks of UCLAF

Task	Legal base/ Reference document	Execution	Decision/ Signature	Remark
Notification of judicial authorities with a view to open a judicial enquiry	Art. 209a TEC	UCLAF exclusively	Director of UCLAF	In order to simplify the procedures the notification of judicial authorities and the transmission of documents can be combined
Transmission of documents to a judicial authority — on the request of the latter — on a Commission initiative	Actualisation of note SEC(95) 893 of 29.5.1995, SEC(97) 1293 of 25.6.1997 (particularly point 4.2.)	UCLAF in agreement with the DG competent in the policy area and the Legal Service	Director of UCLAF	Before the actualisation of 25 June 1997 the transmission was based on a decision of the Commission after a written procedure
Questioning of officials	—	UCLAF after approval by the Secretary General and information to the Director General concerned and the Director General of Personnel and Administration	Director of UCLAF	No specific legal basis or reference document
Search of files held by officials of the Commission (including those in electronic form)	Note of UCLAF No 530 of 2.2.1996 Note of Secretary General of 1.4.1996	UCLAF with the Security Office after approval of Secretary General and Director General of Personnel and Administration	—	Decision making powers unclear
Request of a judicial authority to lift the 'devoir de réserve' of an official of the Commission	Art. 19 of Staff Regulations	DG Personnel and Administration in dialogue with UCLAF	Appointing Authority (AIPN)	

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Task	Legal base/ Reference document	Execution	Decision/ Signature	Remark
Request of a judicial authority to lift the immunity from legal proceedings of an official of the Commission	Art. 18 of Protocol on Privileges and Immunities	DG Personnel and Administration in dialogue with UCLAF	Decision of the Commission/Signature of General Secretary	
Disciplinary Procedure	Art. 86 to 89 and Annex IX of Staff Regulations Art. 73 to 76 of the Financial Regulation	DG Personnel and Administration in dialogue with UCLAF	Appointing Authority (AIPN)	In some cases an 'administrative procedure' is introduced (during or after the enquiries of UCLAF) which is not covered by the Staff Regulations

products, the fifth (F5) for the common market organisations in agriculture and the sixth (F6) is responsible for own resources. Furthermore the director of UCLAF is supported by an adviser with specific competences for external training, seminars, relations with the media and coordination of studies.

## Staff resources to date

3.2. In order to fill the available posts as quickly as possible and to strengthen the experience available in the fight against fraud UCLAF selected and recruited in 1994/1995 a large number of national civil servants with requisite experience and qualifications combining financial, police, customs, judicial and tax expertise on temporary contracts. The number of staff of UCLAF and their administrative status as at 15 September 1997 is shown in *Table 2*. Of the total staff of 126 only 60 (48 %) are permanent staff. 66 (52 %) are temporary

staff with 33 contracts finishing in 1997 (50 %) and 33 in 1998 (50 %). In addition to these staff there remain 20 staff in DG XIX and XX with some responsibility in the fight against fraud.

3.3. While the quick recruitment of temporary staff helped UCLAF to become operational in a minimum of time, the departure of a lot of these staff at the same time at the end of their standard temporary contract could cause severe problems. Therefore, UCLAF has instigated the procedures required for an open competition to recruit specialist investigators. UCLAF considers however that a balance has to be struck between recruitment of permanent staff and a regular rotation of temporary staff on secondment from the relevant national authorities.

3.4. A more recent development has been the recruitment of experienced national legal experts or magistrates. The continuation of this policy to establish,

TABLE 2

Staff of UCLAF and their administrative status as at 15 September 1997

Grade	Permanent staff	Temporary staff	Contract finishing in 1997	Contract finishing in 1998 and beyond
A2 (Director)	1	0	0	0
A3-A5 (Head of Unit/Adviser)	7	0	0	0
A4/5 (Principal Administrator)	12	15	8	7
A6/7 (Administrator)	6	10	5	5
National Expert	0	13	1	12
Category B	18	17	8	9
Category C	16	1	1	0
Category D	0	0	0	0
Others	0	10	10	0
<b>Total</b>	<b>60</b>	<b>66</b>	<b>33</b>	<b>33</b>

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within UCLAF, a prosecution interface consisting of experts in criminal law who afford assistance and advice and coordinate files in liaison with the national judicial authorities, would be a valuable addition to the fight against fraud. The situation could be further improved by the further recruitment of experienced 'magistrates' or legal experts to ensure that UCLAF can draw on the experience of at least one magistrate or other national equivalent per Member State.

## Financial resources

3.5. The Court, using the Commission's estimating methods<sup>(18)</sup> for staff and accommodation costs, adjusted to reflect UCLAF's missions costs estimates the cost of UCLAF to be some 12,4 Mio ECU for the budget year 1996.

3.6. In addition to the staff and accommodation costs of UCLAF, the Commission's expenditure on the fight against fraud amounted to 11,1 Mio ECU in 1996 and (an estimated) 11,9 Mio ECU in 1997 (see Annex II).

3.7. The anti-fraud appropriations allocated exclusively to the Commission include appropriations relating to specific activities of UCLAF such as specialist computer programmes, access to databases, certain computers, etc. These are, in practice, charged to budget line A-3 5 3 0 and in some specific cases to A-3 5 3 1. The anti-fraud appropriations allocated for the direct benefit of the Member States are used by UCLAF to finance national control structures, to cover the use of experts in national investigations or joint investigations with the Commission, training expenditure, and to co-

finance certain programmes for setting up new control methods.

## Working methods

3.8. The operational work of UCLAF is governed primarily by the information that is received from the various sources available (see paragraph 3.28). It is assessed by the staff of UCLAF and a decision is taken whether or not to open a case in relation to the information received. The Court sought to document the system by which the cases are opened, monitored, reported and concluded. However, no common system exists and moves toward standardisation, notably through the internal management system Pre-IRENE (see Annex III), have had only limited success.

3.9. There was a clear difference between the units as regards utilisation of the Pre-IRENE computer system. This ranged from almost complete utilisation of the system to the minimal use of the computer tool to keep a simple, if incomplete, list of the cases related to the unit. A significant number of cases introduced were never updated using the system. The units that did not make full use of the Pre-IRENE internal management tool used a variety of methods to keep track of cases, including spreadsheets developed within the unit and meetings between investigators of the unit. These various listings and management tools could not be reconciled with each other as regards the number of cases.

3.10. Table 3 shows the number of cases held on the UCLAF Pre-IRENE database and those held on other forms of listings in the various operational units.

TABLE 3

Summary of the count of files/cases in the operational units of UCLAF as of April 1997

Operational Unit	Number Staff	Files/cases as per PRE IRENE listing	Files/cases as per lists from heads of unit	Number of files/cases that are identified on both lists
F3 Structural Funds + Other domains	20	356	356	356
F4 Import/Export Agricultural products	22	260	311	243
F5 Agricultural CMOs	13	39	64	35
F6 Own resources	29	101	596	8
<b>Total</b>	<b>84</b>	<b>756</b>	<b>1 327</b>	<b>642</b>

<sup>(18)</sup> Document DG IX, ref. IX.01/PT D(97)1552.

3.11. Within the units cases are normally assigned to a case officer who is responsible to a coordinator and ultimately to the head of unit. Given the number of cases held by most of the units the ability of the management hierarchy to effectively monitor and manage live cases without an adequate management information system must be called into question.

3.12. Given the fact that in three of the four units the number of cases runs into the hundreds it is evident that the head of unit cannot have all the necessary information at his disposal at all times. The coordinator has to ensure that the cases under his control meet standards required and that the hierarchy is informed of progress/problems with current cases. A properly defined role for the coordinator, common across all units, with a structured management reporting system would be of benefit. At present the coordinators are too often taken up with a great number of cases for which they have personal responsibility as well as retaining responsibility for coordinating cases being handled by the individual investigators.

## *Management of case files*

3.13. The confidential nature of the majority of the cases means that, quite rightly, details of the case are only held by those with a need to know. This is often the investigator, his coordinator and the head of unit. This type of arrangement however needs to have safeguards built in that will protect the work done and ensure its subsequent usefulness.

3.14. Given the current structure of UCLAF with some 50 % of investigators on temporary contracts with a remaining duration of less than one year it is probable that a significant number of cases will see a change in case officer between the initial opening of the case and the final closure. The files relating to the cases should therefore be properly structured in order that another member of the UCLAF staff can take over the case when the need arises. The cases examined by the auditors showed that for most of them there was a lack of a standard structure to the case files, and that there were no instructions to the investigators as to how files should be structured. Furthermore there were no guidelines on the standard to which documentation and notes should be kept in order to satisfy the minimum requirements for criminal evidence laid down in the Member States legislation.

3.15. The files examined ranged from those that were well structured, indexed and annotated (in the minority), to those that were little more than a collection of documents placed in no particular order onto ring binders. The most common shortcomings noted were absences of clear identification of case documents on the

files (no listing, frequently no date(s), no indication of the source and finally often no case summary). Where progress/mission reports were held on the file they were not of a uniform content and did not appear to have been drawn up within any particular time frame, i.e. a six monthly progress report, mission report completed within a certain time following the mission etc. Furthermore the case files rarely contained any evidence that reviews by the coordinators and/or the heads of units had been carried out. No record of resources employed and time spent on each case exists. In addition there is no referencing system to link related cases. One officer had inherited and/or opened six files on one and the same suspect.

3.16. In a comparison with the systematic way many national investigation services are forced to compile an investigation file for the prosecutor it is difficult to see how the UCLAF files can form the basis for a case respecting national laws. Disclosure of evidence, used and unused material etc. are only some of the requirements of national law the Commission will have to respect when making use of the new on-the-spot control Regulation (Euratom EC) No 2185/96 (see paragraphs 20–22 of Annex I).

3.17. The lack of overall guidelines as to the form and content of case files (or at the very least a set of minimum requirements) needs to be addressed. The increase in size of UCLAF from 10 staff in 1987 to 126 today, when combined with the increased caseload means that more effective ways of managing staff and monitoring cases are required.

3.18. A consequence of the absence of file discipline is that it allows the possibility of the manipulation of the files by adding or removing documents at any time. This could reduce UCLAF's credibility and the value of the evidence produced if the defendant has good legal advisors.

## **Cooperation with the Member States**

### *Constraints imposed on the Commission services*

3.19. Whether it be in the field of the fight against fraud itself or subsequently on the administrative and judicial level, full-scale, sincere and confident cooperation between the competent bodies in the Member States and the Commission's anti-fraud structure is necessary. A climate of trust is vital if policies which demand full cooperation are to be carried out and produce results, especially where jointly conducted investigations are

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concerned. The success of the fight against fraud depends also on the extent to which a sharing of responsibilities and information with the corresponding departments in the Member States is achieved.

3.20. The Regulation (EC) No 2185/96 contains provisions aimed at bolstering the legal force of the inspectors' findings, by providing that the reports prepared by UCLAF agents constitute admissible evidence in judicial proceedings<sup>(19)</sup>. The on-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections.

3.21. The new Regulation (Euratom, EC) No 2185/96 stipulates that the 'Commission inspectors ... shall be required to comply with the rules of procedure laid down by the law of the Member State concerned' and that they 'shall ensure in drawing up their reports that account is taken of the procedural requirements laid down in the national law of the Member State concerned'. This implies that UCLAF has to cope with a huge variety of different systems and procedures. Thus UCLAF is faced with 15 legislations of the Member States and furthermore within each Member State different enforcement and investigative bodies exist (judicial authorities specialised in combating financial crime and traditional enforcement authorities such as police forces of various kinds, customs investigators, revenue authorities, business supervisory authorities, courts etc.). Each of these can have different sets of rules which must be respected. Any future enlargement of the EU can only complicate this situation.

3.22. UCLAF is addressing this problem by the preparation of instructions for the carrying out of enquiries under the new Regulation. However, UCLAF is not yet in possession of a complete set of national laws, rules and procedures requested from the Member States. Even when this is received, there will inevitably be a considerable delay before complete instructions can be compiled. Furthermore, support needs to be given to this measure by experienced staff (investigative and other) on secondment from the Member States.

3.23. Given the wide-ranging power under the new Regulation coupled with the fact that the missions under the Regulation are now 'labelled' as anti-fraud enquiries, first experiences have shown that the actions of UCLAF officials were under close scrutiny of legal representatives

of the organisations visited. The problems described above and in paragraph 3.22 explain why UCLAF to date has only carried out five missions under the new Regulation.

## *Treatment of requests presented*

3.24. In relation to the cooperation between the Commission and Member States it is of particular importance that the European and the national authorities deal in a constructive way with the requests presented by their partners. It is up to the Member States to decide whether a procedure has to be launched when the Commission has seized the competent national authorities after gathering sufficient evidence. However where Member States seek the help of the Commission in the course of an investigation the Commission has, *inter alia*, to apply the Protocol on the privileges and immunities of the European Communities in a way that allows the Member States to carry out the necessary actions.

3.25. Indeed, the privileges and immunities which the Protocol grants to the Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities<sup>(20)</sup>. Therefore, if no danger of interference exists, the Commission is obliged to waive the immunity of the inviolability of its premises in order to allow a search by competent national authorities (Article 1). Furthermore, although Article 12 of the Protocol provides that officials are immune from legal proceedings in respect of acts performed by them in their official capacity, the Commission is required to waive the immunity when the interests of the Communities are not at stake (Article 18). Permission has to be given by the appointing authority according to Article 19 of the Staff Regulations if an official is requested to testify on some aspect of a criminal case and thus also on documentation seized during a search. This permission can be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned.

3.26. The Court identified several problems in relation to actual cases. In three of the cases examined by the Court the Member States did not start the procedures requested by UCLAF although evidence was produced.

<sup>(19)</sup> See recommendation 20 of the final report of the European Parliament's temporary committee of enquiry on the Community transit procedures (PE 220.895/def).

<sup>(20)</sup> See the Order of the Court of Justice of 13 July 1990, Case C-2/88 Imm. Zwartfeld, [1990] ECR I-3372, point 19.



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Furthermore where Member States need to cooperate with each other in relation to cases brought by UCLAF this cooperation was, in one of the cases examined, lacking. As UCLAF is not always fully informed of the reasons why cooperation is not given it is difficult to pursue action. In two cases examined by the Court the Commission did not request or delayed a request to the Member States to start a procedure although the evidence available gave grounds to presume the existence of serious irregularities. In another case the Commission only lifted the immunity of three officials some twenty months after a request from the competent national authority (see also paragraph 6.10).

3.27. A criticism levelled at UCLAF by the two Member States visited was that the start up of a case was handled well but that subsequent work and follow up could be improved. Lack of consultation and feedback were cited. In a specific case a Member State contacted UCLAF in preparation of an action but UCLAF did not disclose all information it held. The Member State then effected a search and found information related to a presumed fraud that was already on file in UCLAF. A further problem mentioned was the fact that investigations started by UCLAF seemed to stop without reason. In a specific case there was concern on the part of a Member State as to whether a suspicion of fraud reported over one year ago should be allowed to lie with UCLAF for such a long time with no concrete action being taken. Finally criticism was made of the fact that in some cases work carried out in the Member States was completed but no mission report or letter was forthcoming from UCLAF. In one case the Commission services involved could not agree after a period of two years on a common position as to whether a fraud had taken place or not.

## Information and intelligence systems

### Databases

3.28. Seeking and gathering hitherto unavailable information relating to the fight against fraud, exploiting information that is available but in other contexts and combining information from different sources into coherent sets is an important instrument to protect the Community's financial interests. The methodical processing of such a form of 'intelligence' will provide a better understanding of various types of fraud and fraudster and should help to ensure that the Community finances are protected [on the optimum cost-efficiency basis]. The fight against fraud involves such a vast amount of information that detailed knowledge of the result of the work effected in this field is needed right from the initial investigation stage to recovery and the ordering of penalties.

3.29. Based on its strategy programme published in March 1994 the Commission invested a lot of resources to expand its databases and information networks and develop a rational and integrated approach. As can be seen in *Table 4*, the results in terms of use of the IRENE database which records the communications of fraud and irregularity from the Member States is still very limited.

3.30. As regards the UCLAF internal case management database Pre-IRENE, paragraph 3.10 shows that its implementation has not been completely successful. UCLAF is currently working on IRENE 95 which should integrate IRENE and Pre-IRENE and link them to other

TABLE 4

Use of the database IRENE as at 31 of August 1997

Service	Total Users	Active Users	Inactive Users <sup>(1)</sup>	Excluded Users <sup>(2)</sup>
UCLAF	63	7	10	46
DG VI (EAGGF Guarantee)	5	1	0	4
DGs responsible for the Structural Funds (DG V, VI, XIV, XVI)	11	0	6	5
DG XIX	4	1	2	1
DG XX	3	1	0	2
Others (including European Court of Auditors)	9	2	2	5
<b>Total</b>	<b>95</b>	<b>12</b>	<b>20</b>	<b>63</b>

<sup>(1)</sup> No interrogation in 1997.

<sup>(2)</sup> Excluded in February 1997 because no interrogation was made during the preceding six months.

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sources of information. The project 'UCLAF Integrated Information Management System (UIMS)' which should associate and interpret all information that is available for intelligence and investigation purposes in every area of Community activity has been abandoned. Instead the IIMS project (Integrated Information Intelligence Management System) has been launched. In the framework of the DAF project (documentation antifraude) four electronic registers for Member States were set up (United Kingdom, Spain, Portugal and Greece) to display the fraud prevention and detection systems set up there. This project has been abandoned because Member States were not willing to assure the permanent provision of the necessary data. The APSO (Anti-fraud Policy Support Office) which should help to meet the considerable need for information still awaits the approval of a formal agreement with the Joint Research Centre (JRC). At the moment only a 'support cell' exists within UCLAF consisting of a B official who prepares information at the specific request of investigators.

3.31. The development of the databases holding intelligence and case information has been beset by delays and problems of implementation. The low usage of the databases and the partial unreliability of information held therein casts serious doubt as to whether any of the computer tools could be said to be fully operational. Too often it appears that databases are replaced with new models promising more features before a basic database with, for example, a list of open cases, is established.

3.32. At the moment national investigation services do not have direct access to IRENE/Pre-IRENE. This gives rise to the risk that UCLAF and national authorities carry out enquiries on the same case without being aware of this duplication.

3.33. During the missions to the two Member States the officials met suggested that UCLAF should invest more resources on transnational intelligence work instead of increasing the number of its own inspections because, in the intelligence field, it could add the most value to a successful fight against fraud. (In the light of this the informal contacts between UCLAF and Europol could be intensified in order to establish an intelligence system on the European level<sup>(21)</sup>).

3.34. In the field of direct expenditure UCLAF does not possess a single database linking information on

amounts established and/or recovered to cases of fraud or irregularity. As UCLAF has to deal with an increasing number of cases in this field consideration should be given to the introduction of this type of database.

3.35. The SCENT system and the customs information system were developed for the customs services of the Member States (see Annex III). In 1994 a number of measures were taken to improve the Customs transit arrangements:

- a list was drawn up of sensitive products for which there is a high risk of fraud<sup>(22)</sup>;
- an early warning system (EWS) was introduced for the exchange of information relating to consignments of sensitive goods between the office of departure and the office of destination so that the office of departure can be notified when goods have not been presented.

3.36. According to the Member States visited, the EWS is cumbersome. It ought to be fully computerised and should work on a more selective basis. A similar criticism was made in relation to requests under the mutual assistance arrangements. As they often generate a lot of work, an explanation of the reasons for generating a request or ad hoc meetings to exchange views would help to motivate the national services.

## *Other sources of information*

3.37. In November 1994 the Commission set up a permanent system for direct notification of information relating to Community fraud by creating a freephone number in each Member State. During 1995 and 1996 the Commission received more than 8 000 calls. A very reduced number of them led to further investigations being carried out. Around 50 of the calls prompted a formal enquiry. The Commission also makes use of the technique of informers, for the payment of whom there exists a budgetary heading supplied with the sum of 200 000 ECU. The result of the use of this instrument was confined to the payment of three cases during the 1995–1997 period.

<sup>(21)</sup> See also Action Plan to combat organised crime (OJ C 251, 15.8.1997), in particular page 9.

<sup>(22)</sup> Decision No 2/94 of the EEC-EFTA Joint Committee on Common Transit (94/948/EC) of 8 December 1994 (OJ L 371, 31.12.1994). Sensitive products are products which are highly taxed on import into the Community or attract particularly high refunds on export to a non-member country.

## 4. FINANCIAL FOLLOW-UP AND RECOVERY

### General overview

4.1. Recovery is a fundamental obligation, and is the logical result of investigative work as it merely restores an equitable situation in relation to the taxpayer by withdrawing the financial advantage illegally obtained from the person or organisation at fault. Thus it is also one of the parameters of the success of the fight against fraud.

4.2. In principle, the sums involved in frauds and irregularities in the area of own resources and indirect expenditure can be recovered only by the Member States acting under Community and national law. Therefore, the Commission must ensure that Member States make regular reports to the Commission under the obligatory procedures so that appropriate action can be taken at Community level on the basis of the legal means available<sup>(23)</sup>. However, the Commission is largely autonomous in respect of direct expenditure<sup>(24)</sup>.

4.3. In its report accompanying the Statement of Assurance concerning the execution of the 1995 budget<sup>(25)</sup>, the Court observed that the Commission must indicate the declared or known amounts pertaining to cases of fraud and irregularity and the chances of their recovery. Although the Commission announced in its 1993 Annual Report on Fight against Fraud that thanks to the refinement and the quantitative and qualitative improvement of input procedures, IRENE will be used for the financial monitoring of recoveries concerning cases of fraud and irregularities, in cooperation with the operational DGs concerned and to the full extent of their capacities<sup>(26)</sup>, a series of problems still exist.

4.4. UCLAF has to play the role of a catalyst in systematically inviting the authorising DGs to establish a forward estimate of debt or recovery orders based on the question whether the debt is or is not identified as a

tangible and valid obligation to pay. UCLAF sends information, communicated by the Member States under Regulations (EEC) No 595/91 (EAGGF Guarantee Section), (EC) No 1681/94 (Structural Funds) and (EC) No 1831/94<sup>(27)</sup> (Cohesion Fund), (which is registered in the IRENE database) to DG XIX in order to include it in the 'off balance sheet commitments' of the Commission. For historical reasons the communications under Regulation (EEC, Euratom) No 1552/89 (traditional own resources) are sent by the Member States to DG XIX. As the information was paper-based DG XIX then had to input it manually to the IRENE database. It was foreseen that from the beginning of 1997 the Member States themselves should introduce the information, via an electronic system, directly to the database. However, due to several problems not all of the Member States use the system.

4.5. IRENE can still not provide an accurate picture of the situation regarding recovery in reported cases of fraud and irregularities. The effectiveness of the recovery procedure suffers from the fact that the different DGs concerned are not cooperating to a sufficient extent. Instead they tend to develop singular solutions for their own specific problems. Further significant problems are the slowness of internal administrative procedures in the Commission and in the Member States and the high percentage of cases in which the economic operators concerned contest recovery decisions before national courts. Moreover the figures indicated in previous Annual Reports on the fight against fraud were not reliable (see paragraph 5.4).

### Traditional own resources

4.6. The own resources Decision and its implementation Council Regulation (EEC, Euratom) No 1552/89 require Member States to establish, enter in the accounts and recover any amounts due in cases where fraud or irregularity has been established<sup>(28)</sup>. The Commission's role is to ensure that recovery procedures are indeed initiated and completed by national authorities so that Member States can be given a discharge when their management can be considered as satisfactory. If sums are not recoverable because of bankruptcy or lapse of time, the Member State has to show that it has done everything possible to recover them if it is to be exempted from making them available to the Community.

<sup>(23)</sup> Regulation (EEC) No 595/91 as regards EAGGF Guarantee Section, Regulation (EEC) No 4253/88 as regards Structural Funds and Regulation (EEC, Euratom) No 1552/89 as regards own resources.

<sup>(24)</sup> The Commission, however, has no power as regards the enforcement of the recovery of established debts.

<sup>(25)</sup> OJ C 395, 31.12.1996.

<sup>(26)</sup> See Annual Report 1993 of the Commission 'Protecting the Community's financial interests. The fight against fraud', COM(94) 94 final, page 49.

<sup>(27)</sup> Under Regulation (EC) No 1831/94 no communication has been received to date.

<sup>(28)</sup> See Annual Report of the Court of Auditors concerning the financial year 1996.

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the Regulation (EEC) No 595/91 a much longer list of operators should have been put on the black list<sup>(34)</sup>. In fact, every communication has to be made 'as rapidly as possible' (Article 1 of Regulation (EC) No 1469/95) on the basis of 'the first written assessment, even if only internal, by a competent administrative or judicial authority, concluding on the basis of concrete facts that an irregularity has been committed, deliberately or through gross negligence, without prejudice to the possibility of this conclusion being revised or withdrawn subsequently on the basis of developments in the judicial procedure' (Article 1, paragraph 2 of Regulation (EC) No 745/96). The Commission (UCLAF) intends to examine, together with the Member States, the reasons for the non-communication and how cases under inspection by UCLAF have to be treated<sup>(35)</sup>.

## Structural funds

4.15. Article 23 of Council Regulation (EEC) No 4253/88 defines the role of the Member States and the Commission as follows: the Member States bear prime responsibility and are required to 'prevent and take actions against irregularities', 'recover any amounts lost' and 'inform the Commission of the measures taken for those purposes and, in particular, of the progress of administrative and judicial proceedings' (Article 23(1)). The Commission has powers at its disposal to check that these responsibilities are carried out (Article 23(2)).

4.16. However, the Code of Conduct drawn up by the Commission to lay down the detailed rules for notification of irregularities by the Member States was declared void by the Court of Justice because it considered that its provisions went beyond those of Article 23(1) of Regulation (EEC) No 4253/88<sup>(36)</sup>. Although the Court of Justice's judgment did not question the legal basis of the Member States' obligation to communicate cases of fraud or irregularities, its effect was to curb the flow of information<sup>(37)</sup>.

4.17. Article 23(1) of Regulation (EEC) No 4253/88 was modified in 1993. It now states that the Commission

will draw up detailed arrangements for implementing that paragraph. On this basis the Commission Regulation (EC) No 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field was adopted<sup>(38)</sup>.

4.18. While it is possible in the area of EAGGF Guarantee to hold a Member State responsible for any negligence in the recovery of amounts concerned by irregularities and to charge the amounts that ought to be recovered to the Member State involved on the basis of the clearance of accounts procedure, this possibility is not explicitly provided for at this stage in the regulations that govern the Structural Funds. The Madrid European Council in December 1995 advocated the extension of the clearance of accounts to the other budgetary areas. The Commission presented, on 15 October 1997, a document on the terms on which it will apply net and possible flat-rate corrections in the Structural Funds in line with Article 24 of Council Regulation (EEC) No 4253/88<sup>(39)</sup>.

4.19. At present, in the case of the Structural Funds any irregular behaviour or negligence resulting in the misappropriation or illegal use of payments is examined by the Commission in cooperation with the Member States under the partnership arrangements<sup>(40)</sup>. In practice, repayments are a rare occurrence and the amounts recovered may be redeployed or reprogrammed for the benefit of operations or final beneficiaries other than those involved in the irregularity under specific conditions, i.e. that the Member State has notified the irregularity in accordance with the Regulation (EEC) No 1681/94 and that the re-programming was transparent. The Commission included in the 'Off balance sheet commitments' as at 1996 the total amount of 81,8 Mio ECU communicated under Regulation (EC) No 1681/94 although the expected reimbursements to the Communities budget are rather low. The Explanatory Notes give no explanation. Furthermore it was not mentioned that some Member States fail to fulfil their obligations as they do not systematically communicate all cases or results of recovery procedures.

4.20. Where funds are redeployed (i.e. switched to another project in place of the irregular one) the implementation of a set of relevant rules concerning the redeployment requires, in particular, the development of a typology of cases to be communicated and the

<sup>(34)</sup> In COM(97) 417 the Commission points out that only in the area of export refunds the Member States communicated 72 irregularities which go over the limit of 100 000 ECU (Article 2, paragraph 1 of Regulation (EC) No 745/96 foresees the cumulation of all irregularities committed by the same operator during one year).

<sup>(35)</sup> See COM(97) 417 final, pages 2 and 3.

<sup>(36)</sup> Case 303/90 France versus Commission, judgment given on 13 November 1991.

<sup>(37)</sup> See Annual Report 1994 of the Commission 'Protecting the Community's financial interests. The fight against fraud', COM(95) 98 final, page 10.

<sup>(38)</sup> OJ L 178, 12.7.1994.

<sup>(39)</sup> See also Regulation No 2064/97 (EC) C(97)3151 final — II of 15 October 1997 (OJ L 290, 23.10.1997).

<sup>(40)</sup> Article 24 of Regulation (EEC) No 4253/88 as amended by Council Regulation (EEC) No 2082/93.

establishing of procedures in the Commission's departments for administering the reports. In general it can be said, that the situation at present is not satisfactory. To date no 'vademecum' has been established which describes which irregularities have to be communicated. No regular follow-up of irregularities communicated by the Member States is made. Although practical guidelines for the closure of programmes have been agreed in an inter-service meeting in April 1995, at which representatives of the authorising DGs for the Structural Funds, DG XIX and XX, the Legal Service and UCLAF took place, their implementation has not been satisfactory. The authorising DGs for the Structural Funds do not make any use of their access to the IRENE database. UCLAF sent a note in February 1997 informing them of cases where Article 24 of Regulation (EEC) No 4253/88 should be applied and which communications under Regulation (EC) No 1681/94 had been received so far. But the feed-back received has been very limited.

4.21. The communications of the Member States sometimes contain wrong information or are incomplete. In some cases it is difficult to identify which specific project of a particular programme is concerned. Thus it is difficult for the Commission to monitor an eventual reprogramming. A specific problem concerns the region of Campania in Italy. The region at the end of 1996 directly communicated more than 1 000 cases of irregularities to UCLAF. However, given the number of cases presented and the errors and omissions in the communications, even to examine the contents of the files would have tied up the resources of the whole unit of UCLAF for a considerable period of time. Therefore these cases were not introduced into IRENE and were returned to the Italian Permanent Representation in Brussels for further examination and classification. Given that the communications were received it will be extremely difficult to close the programmes in this region in a legal and regular way.

## 5. RELIABILITY OF INFORMATION IN THE ANNUAL REPORT ON THE FIGHT AGAINST FRAUD

### Data presented

5.1. The figures presented by the Commission in the annual reports on Fight against Fraud related to the impact of irregularities on the Community Budget show the financial importance of 'Irregularities formally communicated by the Member States' alongside figures relating to 'Irregularities detected by the Commission in cooperation with Member States'.

5.2. In recent publications these figures have been presented as a type of performance indicator comparing average cases size and total of the irregularities in the two categories<sup>(41)</sup>. The Commission itself presented, in its 1996 Annual Report on Fight against Fraud, similar reflections. According to the text, approved by the Commission, the average budgetary impact of cases under investigation by the Commission (i.e. those not formally communicated by Member States) is 1,6 Mio ECU. Cases of fraud or irregularity notified by Member States under the various regulations reach an average amount of 130 000 ECU.

5.3. According to the Commission, less than 5 % of all the cases detected are dealt with by the Commission in close collaboration with the investigation authorities in the Member States. On an aggregate basis, these cases account for more than half of the amounts involved<sup>(42)</sup>. This reflects a deliberate choice by the Commission to concentrate its efforts on combatting organised or sophisticated fraud. Such fraud, the origin of which is often characterised by the participation of persons or firms operating from one or many countries is difficult for the Member States to identify without the active support which can only be given at the Community level<sup>(43)</sup>.

### Reliability of data

5.4. The Court sought to break down the figures indicated in the 1996 Annual Report on Fight against Fraud and establish whether or not they provide a true picture of the actual situation: in theory the figures presented as Member State formal communications are the total of the amounts transmitted by Member States under the various regulations governing the fields of Community revenue and expenditure and, with the exception of own resources, registered in the IRENE database (see paragraph 4.4 and Annex I, table 1).

5.5. For 1996 IRENE contains 645 cases in the field of traditional own resources transmitted by the Member States with a total value of 123,1 Mio ECU. In the 1996 Annual Report on Fight against Fraud 1 950 cases are indicated with a total amount of 320 Mio ECU. A footnote explains that this includes an estimate for the

<sup>(41)</sup> See the Bösch Report (PE 222.169), page 8 or the UK Parliament Select Committee on European Legislation, Fight against Fraud Programme, London 1997, page xxiii.

<sup>(42)</sup> See Annual Report 1996 on Fight against Fraud (COM(97) 200 final, 6.5.1997, page 20. In the meantime the 1997 Annual Report has been published; that report has not been subject of the Court's audit.

<sup>(43)</sup> See 1995 Annual Report on the Fight against Fraud, page 80 (COM(96) 173 final).

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second half year. The practice in past years was to multiply the number/amount of the first six months by two. Thus there is a significant difference between the published figure and the figures available in IRENE.

5.6. The problem as it relates to own resources should not occur in the future, as Member States are required, according to Council Regulation (EC) No 1355/96<sup>(44)</sup>, to report more frequently, i.e. every three months on irregularity cases detected (see paragraph 4.9).

5.7. The figures in *Table 5* presented as 'Irregularities detected by the Commission in cooperation with Member States' are composed of the estimates of the financial importance of cases held by UCLAF. These cases come from a variety of sources and should in theory be the total of the cases held in the UCLAF Pre-IRENE database. As the Pre-IRENE database is not yet fully operational the figures for only one of the four units were produced from this source. For the other three units a note was prepared for the unit in charge of drafting the Annual Report giving a total amount of the estimated financial value of the cases held. Examination of these figures showed that some 88 % of the amounts given were attributable to only 12 % of the cases. The amount recorded for the estimated VAT, lost to the Communities own resources, in relation to work done by the cigarettes and alcohol task forces in 1996 amounted to some 36 % of the total financial impact of the category. This amount should not be directly compared to the figures formally communicated by the Member States.

5.8. The total value of cases in *Table 5* is higher than the actual value of the cases held in Pre-IRENE (2 460 Mio ECU) as 49 of them have more than one source and are therefore counted more than once in the table above. More than 142 cases are held in Pre-IRENE where no source is registered.

5.9. The fact that these figures, presented as detected irregularities, are estimates is not clearly indicated in the reports. Sources outside the Commission or the Member States are not indicated. In addition the figures are not updated each year to reflect changes in the impact of cases, amounts recovered, changes in estimated value, cases dropped etc. Many cases initially reported as irregularities detected by the Commission in cooperation with Member States will become the subject of a formal communication and therefore be reported at a later date as such. The fact that the previous years cases are not updated gives rise to the risk that some cases are reported in both categories and are therefore 'double counted'.

5.10. Two 'UCLAF cases', resulting from audits carried out by the Court, were registered in the Pre-IRENE database for a total amount of 30 Mio ECU and without a source indicated. In the Annual Reports 1995/1996 these two cases were reported with a value of 58,5 Mio ECU. In IRENE nine communications from four Member States relating to the same cases are registered with a total amount of 58,8 Mio ECU. The grouping of what the Member States notify to IRENE as a number of irregularities (by entity or incidents) into one

TABLE 5

List of PRE IRENE cases with source and case values

	Cases	Amounts Mio ECU
Other	81	455
Informer	88	53
Communication Member States	84	1 530
Freephone	31	8
Information Financial Controller	17	6
Court of Auditors	14	18
Information Member States	149	577
Information authorising officer	96	187
Press	54	169
<b>Total with source</b>	<b>614</b>	<b>3 003</b>

Source: PRE IRENE as of April 1997.

<sup>(44)</sup> OJ L 175, 13.7.1996.



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UCLAF case leaves the reader of the annual reports with the incorrect impression that the average value of a UCLAF case is greater than the average value of the cases dealt with by the Member States. In the example above the average UCLAF value is 29 Mio ECU against the Member States average value of only 7 Mio ECU.

5.11. The results of the work of the specialised task groups (on e.g. cigarettes, textiles) as reflected in the annual reports have been amongst the most important in terms of value. However this must be viewed with caution as the figures are estimates and no precise figures exist as to the actual recoveries/savings to the Community budget.

## 6. CORRUPTION AND BREACHES OF DISCIPLINE

### Fight against corruption

6.1. Corruption (see Annex I point 26) relates to any abuse of power or impropriety in the decision-making process brought about by some undue inducement or benefit and is often used by organised crime. Corruption affects the interests of the Union in several ways: it not only damages the financial interests of the European Communities but it also undermines sound decision making, distorts competition and challenges principles of open markets, in particular the functioning of the internal market.

6.2. The need to combat corruption at EU level has already been recognised and a number of initiatives have been taken which are relevant to the fight against corruption<sup>(45)</sup>. However, as these are not part of an integrated approach, the Commission adopted on 21 May 1997 a Communication to the Council and the European Parliament<sup>(46)</sup> in order to set out the main elements of a comprehensive Union Policy against Corruption. The document represents a good basis for proposals and actions of the Commission fighting

corruption in specific policy areas but does not cover internal corruption in Community institutions. Also the Commission's Work Programmes for the Fight against Fraud does not contain a strategy to tackle corruption<sup>(47)</sup>.

### Allocation of responsibilities

6.3. The responsibility for the fight against internal corruption is not clear. The note of 14 April 1997 from the Secretary-General entitled 'Action to be taken in cases of suspected fraud, irregularities and breaches of discipline' recalled the responsibility of UCLAF for 'all matters relating to cases of suspected fraud against the Community budget'. Although the Director of UCLAF stressed in May 1996 that a clear written reference to corruption would be necessary to avoid confusion about responsibilities of UCLAF, there is still no clear formal written instruction as to which service has to deal with this task.

6.4. At present UCLAF has to treat around 40 cases which involve a 'volet interne'. This expression was chosen by UCLAF because the limits between corruption, conflict of interests, favouritism or bad management are often difficult to identify and cases potentially involve one or more of the elements described. Most of these cases concern direct expenditure but there are also cases related to EAGGF Guarantee and the Structural Funds.

### Lack of clear guidelines for administrative investigations

6.5. Although a number of such cases could be expected in an organisation of the size of the Commission, no standard procedure for handling such cases has been adopted. Despite the fact that some cases were several years old, procedures for investigating such cases were improvised on a case by case basis. No clear guidelines exist as to how the administrative investigations have to be carried out. Questions remain as to what the powers of the officials of UCLAF and the Security Office are in terms of searching of premises, sequestration of property and documents and questioning officials and what the rights and obligations of the persons suspected are. Furthermore, and perhaps more seriously, it is not clear at which stage national prosecuting authorities have to be notified and thus when the important change from the sphere of an

<sup>(45)</sup> Convention on the Fight against Corruption (see point 2.4), Resolution of the European Parliament on corruption of 15 December 1995 (Rapporteur Mrs. Salisch), Action Plan of the High Level Group on Organised Crime (OJ C 251, 15.8.1997) stress the importance of enhancing the fight against corruption. Furthermore a common opinion has been adopted on 6 October 1997 on the negotiations in the Council of Europe and the OECD on the fight against corruption (OJ L 279, 13.10.97).

<sup>(46)</sup> COM(97) 192 final. This document was prepared by the Justice and Home Affairs Task Force.

<sup>(47)</sup> For the 1997 Work Programme this has been explicitly criticised by the European Parliament (see PE 222.169).

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administrative enquiry to a judicial investigation takes place<sup>(48)</sup>.

6.6. The current situation gives rise to the serious and unacceptable risk that any investigation carried out will fail because the laws relating to investigation of such cases are not respected and any subsequent prosecution will therefore be rejected.

6.7. The rules related to collection of evidence and its subsequent use are markedly different in the various Member States. This is true, in particular, for the documents that a person, later accused during criminal proceedings, has been required to produce in a preliminary administrative investigation. The rules on the exclusion of evidence illegally obtained and as to the point at which a suspect becomes an accused person, and therefore starts to enjoy special rights (particularly the right to have charges communicated, the right to silence, the right to assistance by a defence lawyer of the accused's choice etc.) also vary from one Member State to another<sup>(49)</sup>.

## Implementation of a 'zero tolerance' policy

6.8. Many of the cases investigated by OLAF have been initiated by members of staff of the Commission reporting their suspicions relating to other officials. In all types of organisation this has proved to be one of the main sources of information when the uncovering of corrupt practices is made<sup>(50)</sup>. In order to foster the climate in which this type of information is forwarded and where fraudulent or corrupt practices are not tolerated the policy of the Commission must be clear and unambiguous.

6.9. The culture of the organisation must be 'anti-fraud' and the management must be prepared to demonstrate the fact that any cases of suspected internal fraud, corruption, breach of discipline or mismanagement will be investigated in a professional manner and, if proved, that the appropriate disciplinary measures will be instigated with rigour and transparency. If this so called 'zero tolerance'<sup>(51)</sup> policy is implemented in the Community institutions it must be done on the basis of a strict application of the rules of the staff regulation and the financial regulation. However, in this context there is

a lack of a definition and guidelines relating to the disciplinary and pecuniary responsibilities of those involved in the financial procedure 'ordonnateurs', financial controllers, accountants and imprest account holders as already criticised by the Court<sup>(52)</sup>.

6.10. Furthermore an obligation should exist to notify the responsible prosecuting authorities of all suspicions of fraud and corruption. In this context it has to be very clear that the 'Protocol on immunities and privileges' cannot, and will not, be used to protect a member of the management or staff. Moreover it should not be the case that the Commission requires the responsible judicial authority of a Member State to justify its request to lift the immunity by sending relevant documents. It should be sufficient that on the basis of the specific national rules and procedures a motivated demand is presented. If the Commission is persuaded that its official fulfilled his obligations it can grant him legal protection under Article 24 of the Staff Regulation. In this context it should be kept in mind that only a formal judicial investigation and eventually a trial can establish whether a person accused is or is not guilty according to the penal law<sup>(53)</sup>.

## Problems identified

6.11. At present the Commission's policy is anything but clear; cases are left to drag on for years with members of staff being transferred away from their post but remaining within the organisation<sup>(54)</sup>. In many cases examined, OLAF was not able to produce sufficient evidence for corruption. This could be due to the fact that the initial suspicion was not justified or that OLAF was not able to uncover malpractice. In any case it is difficult for OLAF to uncover sufficient evidence where payments were, for example, passed to third persons because no European institution has the power to search a house, analyse bank accounts etc. These actions can only be carried out with the agreement of the persons concerned or after authorisation by the competent judicial authorities. Nevertheless in all presumed corruption cases examined OLAF was able to find clear

<sup>(48)</sup> Also the Bösch report (PE 222.169, page 4) criticises 'the inadequacy of provisions for dealing with'... [cases of] 'corruption occurring in the Commission's own ranks'.

<sup>(49)</sup> See 'Corpus Juris', pages 134 to 140.

<sup>(50)</sup> Zero tolerance, S. Burns, Accountancy August 1997.

<sup>(51)</sup> See Fraud without Frontiers, An Executive Summary of the Study for the EC on International Fraud within the European Union, Deloitte & Touche European Fraud and International Disputes Group, page 1.

<sup>(52)</sup> Opinion No 4/97 of the Court of Auditors on the proposal for a Council Regulation (Euratom, ECSC, EC) amending the financial regulation of 21 December 1977 applicable to the General Budget of the European Communities (OJ C 57, 23.2.1998). Hereinafter Opinion 4/97.

<sup>(53)</sup> See the Order of the Court of Justice of 13 July 1990, Case C-2/88 Imm. Zwartfeld, [1990] ECR I-3372, point 19.

<sup>(54)</sup> Also the Bösch report (PE 222.169, page 15) criticises the absence of a zero-tolerance policy: 'A series of recent cases have focused attention on how relatively lax financial culture within the Commission has allowed cases of corruption to occur within its ranks, and, perhaps even more worryingly, go uninvestigated for considerable length of time.'

evidence of breach of discipline (serious mismanagement, favouritism, conflict of interests etc.). However only in exceptional cases have disciplinary procedures been launched<sup>(55)</sup>.

6.12. Cases occurred where an administrative enquiry took place (during the investigation or after the presentation of a final report by UCLAF) which was not covered by the staff regulation or any other legal text. In such cases the official charged with the ad hoc investigation (normally a director independent of the DG concerned) is likely to encounter problems (transcription of minutes of the hearings/interviews/auditions; presence of lawyers; search for/requisition of documents). Again there are no guidelines covering the conduct of such investigations.

6.13. Experience so far raises questions whether UCLAF as presently structured should be responsible for dealing with cases of corruption involving staff of the Commission. This responsibility could be incompatible with the partnership between the operational DGs and UCLAF which is necessary to make UCLAF's investigations successful. Consideration should be given to the establishment of a separate unit to which any suspicion of corruption would automatically be communicated, and which would have the authority and resources to undertake any necessary investigation.

## 7. CONCLUSION

7.1. As this enquiry did not include the Member States and the Commission's operational DGs in great depth the findings concentrate on UCLAF. The Commission has, in particular since 1990, made a major effort in its fight against fraud relating to European funds which has resulted in a better legal and administrative framework for the fight against fraud. At the end of 1994 the Commission began setting up UCLAF as a central service with requisite financial, police, customs, judicial and tax expertise. However, improvements to security measures, the internal management procedures, intelligence and information systems and the cooperation with the responsible authorities of the Member States are of vital importance.

7.2. An overall evaluation of the results achieved by UCLAF up to now is difficult. However, the information

on recoveries communicated by the Member States and included in the Annual Reports on Fight against Fraud is not reliable and does not differentiate between recoveries due to work of UCLAF and that of the national authorities. Furthermore in the area of direct expenditure no easily accessible information exists on the total amount to be recovered as a result of investigations effected by UCLAF. Finally the instruments 'black list' and 'fraud proofing' of legislation have only been introduced recently and have had a limited impact so far.

7.3. UCLAF needs a management system that holds information on the status of actual or former cases from the moment of receiving or obtaining the initial suspicion, to the administrative enquiry, seise of national authorities, penal investigation, prosecution, trial, decision and recovery. Without such a system an overall evaluation of its performance is virtually impossible.

7.4. The first steps have been taken in an ambitious programme to fight fraud simultaneously from all sides (prevention, enforcement and administrative and judicial cooperation). Important efforts still have to be made to put these initiatives fully into effect. None of the Conventions and Protocols agreed in the context of the third pillar has yet been ratified.

7.5. Fraud against the Community budget is often transnational. The enforcement agencies, however, operate according to a huge number of different procedures and in dispersed order in a very time-consuming way. In contrast the fraudsters themselves can operate in real time using their international networks of contacts. The procedures in place can simply not cope with the new criminal networks. Assistance from the Commission and the information exchange between UCLAF and the judicial authorities of Member States constitute the beginning of a solution. However, a major obstacle still is the lack of common standards of evidence, which prevents Member States from accepting evidence gathered in other Member States. Therefore a 'European Law Enforcement Area'<sup>(56)</sup> with clear, limited objectives reflecting the specific responsibilities of the institutions regarding the protection of the Community's financial interests is necessary.

<sup>(55)</sup> See also Court Opinion No 4/97, in particular paragraphs 5.20—5.23.

<sup>(56)</sup> Speech of Mr. Klaus Hänsch, President of the European Parliament, addressed to the interparliamentary conference on fraud, organised on the initiative of its Committee on budgetary control, on 23 and 24 April 1996.

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7.6. UCLAF has to play a difficult role. It has administrative tasks in relation to the protection of the financial interests of the Community which belong to the first pillar but also it has responsibilities related to judicial investigations, which belong to the third pillar, without support from an independent European judicial authority able, to launch and direct investigations and bring prosecutions as appropriate. The liaison and criminal law expertise interface described in paragraph 3.4 only represents a preliminary solution to the existing problems<sup>(57)</sup>. On 25 November 1997 the Commission presented a communication to the Parliament Committee on Budgetary Control (DOC(SEC97) 2182/2) entitled 'Improving Action against

Incompetence, Financial Irregularities, Fraud and Corruption'.

7.7. UCLAF has no competence to carry out enquiries related to the other Community institutions. In the Community context this has to be considered as a serious weakness in the legal and organisational framework of the fight against fraud. Priority should be given to finding a solution to this problem and any proposal for the reorganisation of the fight against fraud at European level should address this. In this context it is also necessary to define the responsibilities of Europol and UCLAF in such a way that synergy effects can be ensured.

This report was adopted by the Court of Auditors in Luxembourg at its meeting of 10 and 11 June 1998.

*For the Court of Auditors*

Bernhard FRIEDMANN

*President*

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<sup>(57)</sup> But it is no solution to the problem that UCLAF does not have the right to tackle the fraud in other European institutions. Furthermore in the field of the fight against corruption it is questionable whether UCLAF should be responsible.

## ANNEX I

### BASIC LEGISLATION CONCERNING THE FIGHT AGAINST FRAUD

#### Introduction

1. Virtually all own resources of the Community are collected by the Member States and about 80 % of Community funds (essentially EAGGF Guarantee Section and Structural Funds) are paid out to the final beneficiaries by the Member States (indirect expenditure). Agricultural expenditure is managed by the national payment agencies. The Structural Funds are administered by the national authorities responsible for implementing the Community programmes, in particular at regional and local level. The Commission plays an important coordinating and monitoring role. Recent legislative changes have enhanced the role of the Commission as regards control.

2. Direct expenditure is managed by the Commission itself under contract without any formal obligations being incumbent on the Member States. This is the case for administration, energy, research, environment, internal market, industry, tourism, culture and audiovisual media, European Development Fund (EDF) and cooperation with the countries of Central and Eastern Europe (PHARE), the independent States of the former Soviet Union (TACIS), the Mediterranean countries (MED) and the countries of Latin America and Asia.

#### The two pillars and the fight against fraud

3. The entry into force of the Treaty on European Union (TEU) established a new institutional framework for the fight against fraud which is based on the first and third pillar.

#### The first pillar

##### *Provisions in the three Community Treaties*

4. The objective of combating fraud was formally enshrined in specific provisions in the three Community Treaties; the Treaty establishing the European Community (TEC), the Treaty establishing the European Atomic Energy Community (TEuratom) and the Treaty establishing the European Coal and Steel Community (TECSC) within the so-called first pillar of the institutional structure of the Union (Articles 209a TEC, 183a TEuratom and 78i TECSC). They clearly state the Member States' obligation<sup>(1)</sup> to 'take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests'. The Member States have to 'coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, with the help of the Commission, close and regular cooperation between the competent departments of their administrations'.

5. As guardian of the Treaties the Commission has to ensure that this obligation is complied with. The cooperation between the Member States and the Commission is governed by the principle of subsidiarity to ensure that the financial interests of the Community are protected in the most adequate way.

6. The Amsterdam European Council on 16 and 17 June 1997 considered some proposals for Treaty amendments to protect the financial interests of the Community. A Danish proposal to include a specific legal base for measures to combat fraud was adopted. The draft Treaty provides for a new paragraph to be added to Article 209A enabling such measures to be adopted, after consulting the Court of Auditors, under the co-decision procedure by qualified majority voting<sup>(2)</sup>. The paragraph provides, however, that the measures shall not concern the application of national criminal law and the national administration of justice<sup>(3)</sup>.

<sup>(1)</sup> See Case 68/88 Commission v. Hellenic Republic [1989] ECR 2965, at paragraph 24.

<sup>(2)</sup> So far Regulations on the protection of the Community's financial interests have to be adopted under Article 235 TEC, where unanimity applies.

<sup>(3)</sup> See The Select Committee of the UK Parliament on European Legislation, Fight against Fraud Programme, London 1997, page xxiv.

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## *Advisory committee and fraud prevention*

7. On 23 February 1994 the Commission adopted a decision<sup>(4)</sup> setting up the Advisory Committee for Coordination of Fraud Prevention (CoCoLaf)<sup>(5)</sup>. It has to advise the Commission on all horizontal matters relating to the prevention and prosecution of fraud as well as the legal protection of the Community's financial interests. The Committee is made up of representatives from the Member States and is chaired by the Commission (UCLAF). It set up its own working parties to look into specific questions.

## *Horizontal regulation*

### *Reporting and controls*

8. According to the actual legal framework under the first pillar actions against fraud affecting the Community's financial interests are primarily the responsibility of the Member States who have the means at their disposal, through their authorities, for detecting, monitoring, countering and penalising fraud against the Union budget. The flow and the quality of information supplied by the Member States is a crucial factor guiding the work of the Commission. Therefore, a whole range of policy areas are now covered by Regulations defining the obligations of the Commission and the Member States regarding fraud and irregularity reporting.

9. In respect of the regulations governing controls on Community revenue and expenditure it can be said in general terms that Community revenue has better instruments of protection than Community expenditure and that on the expenditure side agricultural expenditure appears to be scrutinised more closely than expenditure under the Structural Funds. Customs authorities, who are responsible for own resources and a part of agricultural expenditure (essentially in liaison with exports or imports of agricultural products) have at their disposal special investigation units which have a long tradition in the fight against fraud.

10. In contrast, the controls on the other areas of agricultural expenditure and on the Structural Funds are the responsibility of the management agencies or authorities responsible for implementing the Community programmes, in particular at regional or local level, which are in the majority unfamiliar with techniques for combating large scale or sophisticated fraud. Therefore they tend to be traditional audit and account checking and are not necessarily the most effective way of detecting large scale and organised crime<sup>(6)</sup>.

11. Given that, in recent years, the proportion of the Community budget allocated to agricultural guarantee expenditure has been decreasing whilst the expenditure on structural actions has increased, then the focus of the Commission's fight against fraud effort should be reviewed and if necessary re-targeted to reflect this change.

12. Council Regulation (EC) No 2988/95<sup>(7)</sup> fixes horizontal rules on Community controls, measures and administrative penalties concerning nearly all areas of the first pillar<sup>(8)</sup>. It includes, for the first time, a definition of irregularity covering fraud, abuse of law and any other failure to discharge obligations under Community legislation<sup>(9)</sup> which jeopardises the finances of the institutions, whether on the expenditure or on the revenue side. Apart from the recovery of any benefits granted, the Regulation stipulates the conditions in which measures may be taken and Community administrative or financial penalties may be imposed on the legal and natural persons who commit the offence.

<sup>(4)</sup> Decision 94/140/EC (OJ L 61, 23.2.1994).

<sup>(5)</sup> The nature and tasks of the various sectoral committees (Committee for Mutual Assistance, Advisory Committee on Own Resources, Standing Committee on Administrative Cooperation in the Field of Indirect Taxes) or subcommittees (Sub-group on Irregularities in the Agricultural Sector, Sub-group on Recovery in the Advisory Committee on Own Resources, Anti-fraud Sub-group of the Standing Committee on Administrative Cooperation in the Field of Indirect Taxes) dealing with fraud prevention were maintained.

<sup>(6)</sup> It is to be noted that the Commission decided on 15 October 1997 detailed guidelines on the financial controls to be executed by Member States on operations co-financed by the Structural Funds; see Regulation (EC) No 2064/97 of 15 October 1997 (OJ L 290 23.10.1997).

<sup>(7)</sup> OJ L 312, 23.12.1995.

<sup>(8)</sup> The Regulation applies to all expenditure and all traditional own resources. VAT is not covered by the Regulation.

<sup>(9)</sup> This concept of irregularity covers both simple omission due to error or negligence which is likely to have a harmful effect on the Communities' budget and intentional and deliberate acts which correspond for their part to the more restrictive concept of fraud as defined in the penal convention.



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13. It follows from the notion of the liability of defrauders acting on behalf or under cover of a body corporate, which corresponds to the decision-making powers, that the business in question bears responsibility and should clearly be held liable under criminal law. Provision is also made for economic operators to be held liable for offences committed by staff of an undertaking on its behalf.

14. Furthermore, the Regulation provides for a control mechanism, setting out the general framework for inspections, with detailed arrangements being spelled out in a specific regulation concerning on-the-spot checks and inspections carried out by the Commission<sup>(10)</sup> or in regulations governing individual sectors.

## *Regulations on reporting*

Table I.1: Basic Regulations on the reporting of fraud and irregularity.

Own Resources (customs duties and agricultural levies)	Article 6(3) of Council Regulation (EEC, Euratom) No 1552/89 <sup>(1)</sup>
EAGGF Guarantee Section	Articles 3 and 5 of Council Regulation (EEC) No 595/91 <sup>(2)</sup>
Structural Funds	Article 24 of Council Regulation (EEC) No 4253/88 <sup>(3)</sup> Articles 3 and 5 of Commission Regulation (EC) No 1681/94 <sup>(4)</sup>
Cohesion Fund	Article 12 of Council Regulation (EC) No 1164/94 <sup>(5)</sup> Articles 3 and 5 of Commission Regulation (EC) No 1831/94 <sup>(6)</sup>
Mutual assistance in customs and agriculture	Council Regulation (EEC) No 1468/81 <sup>(7)</sup>

<sup>(1)</sup> OJ L 155, 7.6.1989; this Council Regulation was amended by Regulation (Euratom, EC) No 1355/96 (OJ L 175, 13.7.1966).

<sup>(2)</sup> OJ L 67, 14.3.1991.

<sup>(3)</sup> OJ L 374, 31.12.1988.

<sup>(4)</sup> OJ L 178, 12.7.1994.

<sup>(5)</sup> OJ L 130, 25.5.1994.

<sup>(6)</sup> OJ L 191, 27.7.1994.

<sup>(7)</sup> OJ L 144, 2.6.1981.

15. The wide range of information received under this legislation should provide the appropriate transparency needed by the Commission for financial, administrative and judicial monitoring of cases and for operational inspections.

## *Regulations on administrative cooperation*

16. Council Regulation (EEC) No 1468/81<sup>(11)</sup> established the procedures for mutual assistance between the authorities responsible in the Member States in agricultural and customs matters and the conditions for cooperation between them and the Commission. It also provides for the exchange of information on cases where no material facts have yet been established but are already, or will be, under investigation. In 1997 the Council adopted a new Regulation (EC) to replace Council Regulation (EEC) No 1468/81 in order to improve the organisation of measures to combat fraud and to guarantee consistent protection of the Community's external borders by stepping up mutual assistance and administrative cooperation<sup>(12)</sup>. Council Regulation (EEC) No 218/92 lays down arrangements for administrative cooperation in the field of indirect taxation.

<sup>(10)</sup> Council Regulation (EC, Euratom) No 2185/96 (OJ L 292, 15.11.1996).

<sup>(11)</sup> OJ L 144, 2.6.1981.

<sup>(12)</sup> Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997).

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17. As regards the Structural Funds the administrative cooperation is governed by the partnership principle. It implies a close dialogue between the Commission and all competent national authorities at central, regional and local level during all stages of programming. Article 4 of Council Regulation (EEC) No 2052/88<sup>(13)</sup> requires that the partnership shall be exercised in full respect of the institutional, legal and financial competences of all of the partners.

## *Regulations for controls*

18. Council Regulation (EC, Euratom) No 2988/95 on the protection of the Community's financial interests adopted a twin-track approach to the question of on-the-spot controls. On one side some general obligations are set out in Article 8 of the Regulation concerning the traditional checks which are carried out by the Member States. The task of harmonising checks to ensure a comparable level of stringency across the Community was left to sectoral Community legislation. On the other side Article 9 of the Regulation lays down certain rules for checks carried out by the Commission, though some more detailed provisions appear in Council Regulation (EC, Euratom) No 2185/96<sup>(14)</sup> and in the sectoral legislation.

19. Thus the Member States are responsible for ensuring the legality and regularity both of operations to recover revenue and of expenditure operations financed by the EAGGF Guarantee and the Structural Funds. It is up to them to take action for preventing and prosecuting fraud and irregularity offences and for recovering amounts evaded or wrongly paid out. The Commission has the task of monitoring the smooth working of the relevant procedures. Specific regulations give it the power to conduct direct on-the-spot inspections on its own initiative or to ask the national authorities to conduct special inspections, in which Commission officials may take part (see table).

*Table I.2: Basic Regulations concerning controls*

Own Resources	Article 18(2) and (3) of Regulation (EEC) No 1552/89 <sup>(1)</sup>
EAGGF Guarantee	Article 9 of Council Regulation (EEC) No 729/70 <sup>(2)</sup> Article 6 of Regulation (EEC) No 595/91 <sup>(3)</sup>
Structural Funds	Article 23(2) of Council Regulation (EEC) No 4253/88, as amended by Regulation (EEC) No 2082/93 <sup>(4)</sup>

<sup>(1)</sup> This Regulation has been amended by Council Regulation (Euratom, EC) No 1355/96 (OJ L 175, 13.7.1996).

<sup>(2)</sup> OJ L 94, 28.4.1970.

<sup>(3)</sup> Apart from these horizontal regulations exist also regulations covering specific Common Market Organisations (e.g. Council Regulation (EEC) No 2048/89 on controls in the wine sector; OJ L 202, 14.7.1989; and Council Regulation (EEC) No 1319/85 on controls in the fruit and vegetables sector; OJ L 137, 27.5.1985).

<sup>(4)</sup> OJ L 193, 31.7.1993.

## *Anti-fraud checks and inspections*

20. Regulation (Euratom, EC) No 2185/96, which entered into force 1 January 1997, provides the Commission with a new horizontal legal basis for conducting specific anti-fraud checks and inspections through direct inquiries at operators<sup>(15)</sup>. Thus it complements the current checks carried out by the various Commission services to ensure that Community regulations are being properly implemented by the Member States.

21. The new regulation has strengthened the powers of the Commission to carry out on-the-spot controls in the Member States. That said, the legal framework within which the Commission is empowered to

<sup>(13)</sup> OJ L 185, 15.7.1988; the Regulation has been amended by Council Regulation (EEC) No 2081/93 (OJ L 193, 31.7.1993).

<sup>(14)</sup> OJ L 292, 15.11.1996.

<sup>(15)</sup> Except VAT and areas without impact on the Union budget.

operate has been clearly defined, and the Member States' fundamental responsibilities in the matter remain unchanged. It follows from the subsidiarity principle that the Commission can conduct anti-fraud checks and inspections only where it can add a certain value. Therefore the Regulation defines the area in which on-the-spot checks and inspections may be carried out:

- for the detection of serious or transnational irregularities or irregularities that may involve economic operators in several Member States,
- where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community,
- at the request of the Member State concerned.

22. The Regulation indicates, that in addition to economic operators receiving money from the Community budget or owing money to it, on-the-spot-checks and inspections may also be carried out on other operators (suppliers, carriers, insurers, etc.). The Commission's agents are entitled to have access to all information and documentation, to take samples and to enter business premises, in the same way as national inspectors. If necessary they may seek assistance from the authorities of the Member State.

## The Third Pillar

23. Title VI TEU makes provision for various forms of intergovernmental cooperation in the fields of justice and home affairs (third pillar). This Title deals with several matters of common interest, notably combating fraud on an international scale, judicial cooperation in civil and criminal matters and customs cooperation. Furthermore it covers police cooperation in specific areas, notably serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)<sup>(16)</sup> (Article K.1(5) to (9)).

24. The Member States are to inform and consult one another within the Council with a view to coordinating their action. To that end they have to establish cooperation between the competent departments of their administrations. The Council may adopt joint positions, approve joint action and draw up conventions or protocols on the initiative of any Member State or the Commission (Article K.3).

25. In order to reduce the inconsistencies between laws on fraud in several Member States, which provide a breeding ground for international fraud<sup>(17)</sup>, the Commission presented on the basis of Article K.3.2. a proposal for a Council instrument establishing a Convention for the protection of the Community's financial interests under criminal law<sup>(18)</sup>. On 26 July 1995 the Council approved an act drawing up a Convention on the protection of the European Communities' financial interest<sup>(19)</sup>. Its purpose is to establish a common definition of fraud and of other serious offences which damage the Community budget, enshrine the principle of a specific offence in the criminal law of the Member States and introduce provisions as regards appropriate penalties, jurisdiction, extradition and mutual cooperation. Serious fraud involving more than ECU 50 000 has to be made an extraditable offence, punishable by imprisonment. Persons with the power to take decisions within a business should be made criminally liable, albeit in accordance with the principles defined in national law. Furthermore the Convention includes rules on centralisation of the prosecution and on the extradite or prosecute principle.

<sup>(16)</sup> See Convention of 26.7.1995 setting up a European police office (OJ C 316, 27.11.1995).

<sup>(17)</sup> The features which make the various national systems incompatible were highlighted in a number of studies (see Corpus Juris or the study carried out under the direction of Professor Delmas Marty described in the 1993 Annual Report on the Fight against Fraud COM(94) 94 final).

<sup>(18)</sup> OJ C 216, 6.8.1994. Already in March 1994 the United Kingdom presented a proposal for joint action on criminal penalties.

<sup>(19)</sup> OJ C 316, 27.11.1995.

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26. On 27 September 1996 the Ministers of Justice signed the first Protocol<sup>(20)</sup> to the Convention relating to corruption to the detriment of the Communities' financial interests. The main purpose of the protocol is to fill in the gaps in existing criminal law on corruption having a link with protection of the Community's financial interests which involve Community and/or national officials. The Commission had already accompanied its proposal for a draft treaty from 1976 with a second instrument concerning the responsibilities under criminal law of officials and other servants of the European Communities, but discussions have never got off the ground. In a resolution passed on 11 March 1994 the European Parliament asked the Commission, under Article 138b of the Treaty, to draw up a legal instrument dealing with the liability of officials in charge of expenditure from the Community budget<sup>(21)</sup>.

27. On 26 May 1997 the Council adopted on the basis of Article K.3.2. a further act which drew up a convention on the fight against corruption<sup>(22)</sup>. This further act was needed as 'for the purpose of improving judicial cooperation in criminal matters between Member States, it is necessary to go further than the said Protocol and to draw up a Convention directed at acts of corruption involving officials of the European Communities or officials of the Member States in general' because corruption may also be committed outside the context of fraud against the Community budget. It provides for an offence covering both acts and omissions. European officials are assimilated to national officials under criminal law, while taking account of the immunity conferred by the Protocol on the Privileges and Immunities of the Communities. Members of Community institutions are assimilated to their political counterparts at national level rather than officials. The authorities in a Member State may claim jurisdiction for criminal cases involving European officials employed by a Community institution established on its territory.

28. As the Convention on the protection of the European Communities' financial interests in certain specific areas merely sets out a few basic principles it was complemented by a second instrument, the Protocol on judicial cooperation<sup>(23)</sup>. This Protocol provides apart from the provisions relating to the responsibility of legal persons, for the criminalisation of money laundering and the confiscation of the proceeds of fraud and for cooperation between the Commission and the national prosecuting authorities in the Member States in relation to fraud, corruption and money laundering. It also contains rules on the exchange of information between the judicial authorities and the Commission and provides that the latter shall render technical and operational assistance.

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<sup>(20)</sup> OJ C 313, 23.10.1996. The Protocol has the same status and binding force as the Convention since it has to be adopted by the same procedures, i.e. those provided for by Title VI of the Treaty on European Union and notably ratification by national parliaments.

<sup>(21)</sup> OJ C 91, 28.3.1994.

<sup>(22)</sup> OJ C 195, 25.6.1997. For the purposes of this convention passive and active corruption were defined in a similar way to the Protocol.

<sup>(23)</sup> OJ C 221, 19.7.1997.

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## ANNEX II

### FINANCIAL RESOURCES FOR THE FIGHT AGAINST FRAUD

Table II.1: Financial resources for the fight against fraud

Budgetary item	Heading	1995	1996	To 31.8.1997
		Appropriations available after transfer		
A-3 5 3 0	Unit to coordinate action against fraud	200 000	200 000	190 000
A-3 5 3 1 <sup>(1)</sup>	Controls, studies, analysis in connection with the fight against fraud	3 308 000	4 000 000	3 980 000
A-3 5 3 2 <sup>(2)</sup>	Combating fraud in the textile sector (TAFI)	800 000	800 000	800 000
A-3 5 5	European documentation, coordination and study network to control cross-border crime and fraud	400 000	p.m.	p.m.
B2-1 0 1	Actions to combat fraud in the area of the European Agricultural Guidance and Guarantee Fund, 'Guidance' section	200 000		
B2-1 1 1	Actions to combat fraud in the area of the financial instrument for fisheries guidance	50 000		
B2-1 2 1	Actions to combat fraud in the area of the European Regional Development Fund	300 000		
B2-1 3 1	Actions to combat fraud in the area of the European Social Fund	200 000		
B2-1 5 0	Actions to combat fraud in the area of structural measures		750 000	750 000
B2-3 0 1	Actions to combat fraud in the area of the Cohesion Fund	300 000	300 000	300 000
B2-5 1 9	Actions to combat fraud in agriculture	1 650 000		
B5-9 1 0	General anti-fraud measures		4 175 000	5 000 000
B6-7 9 2	Activities to provide scientific and technical support to Community policies on a competitive basis	993 452	800 000	916 200
B6-9 1 0	Actions to combat fraud in the area of research (shared-cost)	50 000	50 000	
B7-5 3 0	Measures to combat fraud in the cooperation sector	100 000		
B7-6 5 0	Measures to combat fraud in the cooperation sector		50 000	
<b>Total</b>		<b>8 551 452</b>	<b>11 075 000</b>	<b>11 936 200</b>

<sup>(1)</sup> Budget line co-managed by UCLAF with DGs VI, XIX, XX and XXI.

<sup>(2)</sup> Budget line co-managed by UCLAF with DG I.

Source: UCLAF.

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## ANNEX III

### DATABASES

#### IRENE Database

1. The IRENE (IRregularities, ENquiries, Exploitation) database has been in operation since 1 December 1992. As at the 6 October 1997 it contained details of 25 619 cases of fraud or irregularity (14 332 under the EAGGF Guarantee Section, 9 509 under own resources, 821 under the Structural Funds and 957 under the mutual assistance) based on the obligatory communications presented by the Member States. It contains, in particular, information on the practices adopted in committing the irregularity, the manner in which the irregularity was discovered, the national authorities which recorded the irregularity, the financial consequences and possibilities of recovery and the judicial and administrative procedures instituted.

Table III.1: Count of records in IRENE as of 6 October 1997

Mutual Assistance			957
Structural funds:			
	ERDF	97	
	EAGGF Guidance	363	
	FIOF	11	
	ESF	350	
	Total Structural Funds		821
EAGGF Guarantee			14 332
Own Resources:			
	Old system	8 900	
	Own resources	609	
	Total Own Resources		9 509
Total number of records:			25 619

2. Often it is not possible, at the stage of communication, to distinguish between irregularities, for example resulting from clerical errors, and those which represent fraud or acts of negligence. In fact in the majority of cases the intentional nature and the seriousness of the irregularity only becomes apparent during the administrative and judicial procedures, which are often particularly lengthy.

3. The IRENE database was designed partly to allow a systematic follow-up of all the cases of fraud and irregularities which have to be communicated by the Member States and partly to serve as a source of intelligence. However, the database suffers from long delays in reporting, incompleteness of some records, absence of credibility checks of the information furnished and lack of user-friendliness. Furthermore individual cases are systematically reported without essential details (location of the incidents, names of individuals or entities involved, etc.). Thus it is of limited value for concrete investigative work.

#### Pre IRENE Database

4. In principle the Pre-IRENE database (UCLAF internal, case management database) contains information concerning cases of (presumed) fraud on which UCLAF carries out enquiries and which were not yet the subject of a specific communication by the Member States. In theory the information supplied should not only relate to identification of the case (category, type of programme, country or region, type of irregularity, amount involved) but also to particulars of the fraud technique or the irregularity and the proceedings in motion. The objective is, that the base should evolve as a valuable management tool enabling investigators to manage their cases autonomously and those in charge to manage the generality of



investigation business and produce summary tables. It is foreseen, by facilitating the correlation of information, to improve programming of UCLAF's operations in this field and to frame an intelligence strategy with a view to obtaining a better picture of fraud prevention and of economic and financial crime. Pre-IRENE should then be at the core of an intelligence based strategy with centralised information management. Furthermore it should be, following the analysis of the cases introduced, the starting point for targeted operational measures.

5. According to the Commission, Pre-IRENE was operational in 1994 on an experimental basis<sup>(1)</sup>, and further changes were to be made to it in 1995. Beginning of April 1997 in total 756 cases were under management in this database — 356 relating to the Structural Funds and direct expenditure, 39 on the Common Market Organisations on Agriculture, 260 cases on export or import of agricultural products and 101 to non-agricultural own resources (customs duties).

#### *IRENE 95 Database*

6. In 1995 the Commission started to develop an integrated information system which would take account of different information sources. It is foreseen to base this new integrated information system on a new version of the IRENE database, which merges the two previously separate databases IRENE and Pre-IRENE. Furthermore, this new database will set up a direct link with 'mutual administrative assistance' messages having an impact on the Community budget. This new database (IRENE 95) will not be a mere database recording information on fraud cases but a management tool<sup>(2)</sup>. Due to technical problems IRENE 95 is not yet operational.

#### *SCENT*

7. The SCENT (System Customs Enforcement NeTwork) system, which has been operational since 1987, was to have been complemented since 1996 by the SCENT taxation system which has been in the development stage since 1993. The system allows the exchange of information on indirect taxation via the SCENT-network. The CIS (Customs Information System)<sup>(3)</sup>, which has been operational since 1993, is a database which contains information (data on persons, vehicles, goods, patterns of fraud, etc.) exchanged by the Member States through the SCENT network. More than 300 Terminals have been installed to link up offices at points of entry and exit of the Union and allow them to communicate 24 hours a day, seven days a week with their own central authorities and with Commission departments. CIS is also used for specific operations (surveillance of consignments of sensitive goods in the transit procedure, maritime surveillance, etc). The Commission provides user support in technical matters and looks after training for users in the Member States.

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<sup>(1)</sup> Annual report 1994 (COM(95) 98 final), 29.3.1995), page 24.

<sup>(2)</sup> See 1995 Annual Report on Fight against Fraud, page 78.

<sup>(3)</sup> The Member States have adopted, in the Title VI context, the convention on the use of information systems in the field of customs. Furthermore a Convention was drawn up on the use of information policy for customs purposes. The Conventions still have to be ratified.

## ANNEX IV

### PREVENTIVE ACTIONS

#### Action in the area of customs

1. Further to its communication of 29 March 1995<sup>(1)</sup> the Commission adopted on 3 April 1996 a communication on the emergency measures taken and those still to be taken, put in place a transit task force and presented a communication on the future of transit systems<sup>(2)</sup>. Furthermore the Commission cooperated closely with the European Parliament's temporary committee of inquiry (Article 138(c) of the EC Treaty) on the Community transit procedures<sup>(3)</sup>. Finally on 19 December 1996 the European Parliament and the Council adopted an action programme for Customs in the Community (Customs 2000)<sup>(4)</sup>. The objective of this programme is to improve the overall effectiveness of customs action and the uniformity of controls at the external community borders.

#### Seminars

2. As part of the general training policy of the Commission, OLAF organises seminars to acquaint national anti-fraud services and administrations managing Community funds with the European dimension of fraud. General basic courses have been run in all the Member States. Lately the Commission has been concentrating more on targeted schemes for specialists departments managing Community funds and for judicial authorities. These training schemes are appreciated by the Member States.

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<sup>(1)</sup> See Commission Communication of 29 March 1995 on fraud in the transit procedure, solutions foreseen and perspectives for the future, COM(95) 108 final.

<sup>(2)</sup> See SEC(96) 290 final 'Commission action to counter transit fraud' and COM(96) 477 final. For further information see 1996 Annual Report, pages 38 and 39.

<sup>(3)</sup> See PE 220.895/def.

<sup>(4)</sup> Decision No 210/97/EC, OJ L 33, 4.2.1997.

## COMMISSION'S REPLIES

### 1. INTRODUCTION

#### Scope of the audit

1.1. The Commission welcomes the opportunity to take stock of progress made in the fight against fraud as provided by the Court's draft report. The effectiveness of UCLAF depends to a large extent on the quality of cooperation and on the Member States' structures.

#### Main observations

1.2. The Commission welcomes the endorsement by the Court of the Commission's commitment to the fight against fraud and the improvements in the legal and administrative framework that have resulted. The Commission is extremely concerned that the Conventions on the legal protection of the financial interests of the Community, together with its two protocols and the Convention on the fight against corruption have not yet been ratified by the Member States. It would point out that the Member States have undertaken at the European Council of Amsterdam in June 1997 to ratify these instruments by mid-1998 and it will follow closely progress towards meeting this commitment.

1.3. A wider ranging examination of the link between UCLAF and other control and police services would provide a useful basis for an appreciation of the overall arrangements that have been put in place. In relation to cases of suspected fraud or corruption within the Institution the Commission has established a clear policy and committed itself to a series of actions including the establishment of a formal decision on UCLAF's role and powers in its Communication of 18 November 1997 on Sound Financial Management and Administration: Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption (SEC(97) 2198 (see point 1.7 below). As to security measures the Commission has undertaken a number of initiatives which have provided for a progressive increase in security in UCLAF (see also comments on points 2.26 to 2.28 below).

1.4. The Commission agrees that the number of temporary staff in UCLAF as a proportion of the total staff is too high. The majority of temporary agents are coming to the end of their contracts in the period autumn 1998 to summer 1999 and a plan has been established for the conversion of a substantial number of these posts into permanent posts when the temporary posts become vacant. This should help to provide an appropriate

balance between permanent officials and temporary staff and to ensure a proper continuity. However it would point out that the current situation is in large part due to a decision by the budgetary authority in 1994 to increase the staffing of UCLAF by 50 persons of which 35 were temporary agents. The advantage of having been able to recruit a substantial number of temporary agents in the period 1994/95 was that it allowed UCLAF to recruit specialist expertise at different levels and thus constitute a multi-disciplinary team that was quickly operational.

1.5–1.6. The general statements on the effectiveness and use of the UCLAF databases should be seen in the specific context. The rapid evolution of UCLAF over the last few years has given rise to a continuous re-evaluation of UCLAF needs in relation to information systems. At present UCLAF still depends to a large extent on old systems which are running on outdated software and which are not appropriate for UCLAF's role. However the present systems represent a transitional arrangement which should be phased out during 1998 with the entry into operation of the new integrated IRENE database.

1.7. The Commission would refer to its communication of 18 November 1997 in which it has clearly explained its commitment to ensuring that cases where there are grounds for prosecution under the criminal law are dealt with quickly and effectively. A formal Commission decision is in preparation which will establish UCLAF's role and powers in relation to contacts with national judicial authorities. It is true that national legislative requirements are important in the conduct of investigations particularly under Regulation (EC) No 2185/96.

This point is dealt with in more detail in the comments on point 3.

1.8. The Commission agrees that further actions are needed to improve the procedures designed to track and stimulate recovery actions in the Member States. However it would also underline the progress that has been achieved to date. This includes the introduction of a reporting system for the structural funds, the amendment of Regulation (EEC) No 1552/89 to improve the system for own resources reporting and the ongoing work in the context of SEM 2000 on the putting in place of financial correction mechanisms, such as exist in the agricultural domain, in the areas of own resources and the structural funds. In addition computerised systems have been established in all areas to facilitate recording and follow-up actions.

1.9. The Commission agrees that to date the results of the so-called 'black-list' procedure are not satisfactory

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and is examining means of encouraging the Member States to become more active in this area. It would point out that under the relevant legislation it is only the Member States that can insert names on the so-called 'black-list'.

1.10. The Commission would emphasise the fundamental reforms provided for in SEM 2000 together with specific actions arising from the implementation of SEM 2000 referred to in relation to point 1.8 above. The study carried out by the Joint Research Centre (JRC) did suffer delays; the coverage was altered as a result of agreement reached during the carrying out of the study.

1.11. The Commission is concerned at the Court's affirmation that the figures published in the Commission's annual report on the fight against fraud are misleading. The Commission will examine closely the presentation of its next annual report to ensure that the origin and calculation of the numbers of cases and amounts involved are clearly explained. Nevertheless the Commission would point out that there is a fundamental problem in relation to the estimation of the impact of fraud on the Community budget. This is because using only those figures formally communicated by the Member States in the framework provided by the Regulations applicable in the different domains tends to lead to a systematic underestimation of the problem as is evidenced by the growing importance of those cases of fraud identified by the Commission itself in collaboration with the specialist anti-fraud services of the Member States. The Commission needs to monitor the reported cases and their evolution and recovery in parallel with the recording of the cases not or not yet formally communicated by the Member States. This is a complex and difficult exercise and careful verification is needed. The new IRENE database contains special features to ensure a proper correlation of cases.

1.12. The Commission would again refer to its communication of 18 November 1997 (SEC(97) 2198) which has established clear policy lines and set in motion the creation of new procedures as well as the formalisation of certain existing procedures.

## 2. THE COMMISSION'S ORGANISATION OF THE FIGHT AGAINST FRAUD

### The strategy of the Commission for the fight against fraud

2.3. The Commission decided in February 1995 (ref. SEC(95)249) not only to centralise operational anti-fraud activity in UCLAF (this affected mainly DGs VI and XXI) but it also clearly set out UCLAF's mandate in relation to anti-fraud policy. Thus UCLAF was charged

*inter alia* with 'the protection of the financial interests of the Community' and 'the conception of the fight against fraud in all domains' as indeed the Court mentions in point 2.20 of the report. This has led, in particular, to a series of legislative initiatives concerning control powers, administrative sanctions and criminal law which are mentioned in other parts of the draft report. This activity, already important at present, will become even more so in the future in the context of the legislative possibilities provided for under the new Article 280 of the Treaty of Amsterdam and in the development of the framework already established to counter fraud. The continuing work on the CORPUS JURIS project in the context of the notion of a 'single judicial space' also represents an area of considerable importance.

The transfers of human resources to UCLAF involved only DG VI and XXI and the operational budget transfers were very limited. Indeed both DGs VI and XXI maintained appropriations on the shared budget lines in the A part of the budget. In the B part due to action by the European Parliament a number of new budget lines were created to support UCLAF activity and subsequently a number of these were merged to give the current situation. These are shown in Annex II to the Court's report. It is to be noted that Annex II contains only those budget lines where UCLAF is authorising officer or joint authorising officer.

2.5. The Council's Action Plan is independent of the Commission's anti-fraud work programme and indeed covers a wide range of subjects which fall outside the competence of UCLAF in its specific tasks even if a number of the issues raised in the Action Plan are also reproduced in the Commission's work programme. In the negotiations that led to the adoption of the Action Plan UCLAF was represented and a number of points were inserted on the initiative of the Commission to broaden the scope to cover certain areas of Community interest.

### Fraud prevention

#### SEM 2000

2.14–2.15. The Commission agrees that the exercise of 'fraud-proofing' legislation which it has proposed will require a sustained effort which however will have to be applied continuously and in particular to new legislative initiatives.

#### Setting priorities

2.18. The study was hampered by incompleteness in pre-IRENE and IRENE databases. The domains in question were chosen because they represented sensitive

areas. The administrative arrangement with the JRC made it clear that part of the specific study would be concentrated on areas chosen by UCLAF.

The refusal of DG XX's visa was related to a formal problem in the presentation of the dossier which arose because of a problem in the identification of the sub-heading within the budget nomenclature which was appropriate to the type of expenditure. The problem was encountered by a number of other services which use appropriations on budget line B6-7 9 2. After discussion with DG XX the problem was resolved and the final payment was approved. The Commission would point out that the detailed examination of the results of the study is still ongoing and that the next stage of development of information evaluation will be accomplished only when the new IRENE database becomes operational during 1998.

The establishment of UCLAF inspection priorities is guided not only by the historical development of reported fraud cases but also by ongoing intelligence work and evaluation of new policies and risks as well as by the evaluation of control reports supplied by other Commission services. The nature of UCLAF's activities in relation to targeted anti-fraud investigation and intelligence operations does not lend itself easily to the setting up of an audit programme approach designed to provide a wide coverage of the different areas where Community finance is at risk. Nevertheless work is continuing on developing instruments for establishing priorities.

## Security measures

2.26—2.28. The Commission accepts that the detailed rules of its Decision on security have yet to be fully implemented in UCLAF. However it points out that an essential feature of the implementation of the Decision will mean that only those persons who have been vetted can have regular access to documents classified confidential and above. As a result UCLAF launched the vetting procedure for all of its full time officials in May 1997. The procedure involves an enquiry in the Member State of origin of the official in question by the competent national authorities and can take the better part of a year to finalise. It was decided to concentrate on the permanent official population because the UCLAF temporary agents and national experts are as a general rule selected from services already dealing with sensitive information and subject to vetting procedures and because of the fact that temporary agent and national expert contracts were of limited duration (most of the temporary agent contracts will expire in the period September 1998 to April 1999). It is nevertheless the intention to apply the vetting procedure to future recruitment to such posts. In the interim advice on

document classification was circulated to the units of UCLAF and measures were taken to ensure that adequate protected storage facilities existed together with a general protection of UCLAF premises. Special attention has also been given to computer security because of the importance of establishing the new integrated database IRENE. As a result the work undertaken by the security office was supplemented by a further detailed study by the JRC in the context of UCLAF's overall security concept for computers. The results are in the process of implementation in the ongoing work on the finalisation of IRENE.

It should be noted that the security of information to be transmitted electronically is covered more pertinently by Commission Decision C(95)1510.

The inspection of UCLAF by the Security Office was a wide-ranging review that included document, physical, information technology and personnel security: recommendations on vetting are to be found in paragraphs 4.1 and 5.2 of the Security Office report.

2.30. It is not the practice for the Security Office to carry out routine checks of the personal files of Commission staff for the purpose of security clearances. Such clearances are governed by national procedures, including citizen's rights: legal evidence of criminal activity should be thrown up in the course of those procedures.

2.32. The Commission intends to place ever greater emphasis on ensuring the implementation of all aspects related to security during 1998. It would point out that a post has been assigned for the purpose of the recruitment of a full-time security officer in UCLAF in 1998. The official who did not work in UCLAF has since been transferred to other duties within his service. It should be noted that services outside UCLAF have access only to the database containing formal communications of the Member States and not to that containing cases under investigation by UCLAF. In addition access is allowed only to certain officials in those services and to certain categories of cases. In the case of nominative data access is further restricted to cases of direct relevance to those services.

## Internal administrative enquiries

2.33. The Commission agrees that there is a need to formalise and reinforce the existing procedures under which UCLAF acts in internal cases. It was for this reason that the Commission issued its Communication of 18 November 1997 (SEC(97) 2198). Moreover a formal Commission decision on UCLAF's powers to include the elements set out in the Communication is currently in

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preparation. It should be pointed out in relation to the reference to the Tourism sector that the destruction of documents referred to as well as the start of the case predated the creation in UCLAF of an operational unit responsible for such matters.

2.34. The specific points in relation to the questioning of Commission officials and the searching of files and offices in Commission buildings is being taken up in the draft decision on the powers of UCLAF referred to in the previous paragraph. It should be noted however that the Court of First Instance in its judgment of 19 March 1998 in the case *Tzoanos v. Commission* has confirmed the right of the Commission to take documents from officials' offices and computers prior to the initiation of any disciplinary proceedings in the context of an internal administrative investigation. This and other aspects of the judgment are being examined carefully in the preparation of the draft decision on the powers of UCLAF.

## 3. ORGANISATION OF UCLAF

### Staff resources to date

3.4. The Commission welcomes the Court's endorsement of its policy in relation to the establishment of an interface and liaison function with national judicial authorities which is entirely in line with the new role that the Commission will be called on to play once the Convention on the legal protection of the Financial Interests of the Community and its protocols are ratified (in particular Article 7 of the second protocol). In line with the commitment in its 1997/98 anti-fraud work programme the Commission is creating an interface and liaison cell within the unit of UCLAF responsible for general affairs and legal matters. It is clear that extra human resources would be necessary if the Court's recommendation of at least one magistrate or other national equivalent per Member State were to be implemented.

### Working methods

3.8—3.9. The difference in use of the pre-IRENE computer system reflects to some extent the differences between the type of work carried out in the investigative units. As is explained in the comments in points 3.14 to 3.16 below the work of some units is more intelligence

based than others. This type of work is less suited to the case by case follow-up for which pre-IRENE was designed. The Commission would point out that the current IRENE project is designed to provide a common basis for managing cases in UCLAF. This system is currently becoming operational unit by unit in parallel with the migration to WINDOWS NT. It should greatly improve the transparency of the system for authorised managers while at the same time improving security.

3.12. In the context of the current reorganisation of UCLAF attention will be given to ensuring a more clearly defined role for coordinators. The new IRENE provides for a structured management reporting system. It should be emphasised however that the high number of cases inevitably puts pressure on coordinators in view of the limited resources available to UCLAF.

### Management of case files

3.14—3.16. The Commission accepts the need for investigation dossiers to be properly structured. However given the wide variety of subjects treated in UCLAF and the different legal and procedural frameworks that apply the imposition of a single structure is difficult. As a first step in developing standardised procedures UCLAF has established a vade-mecum on the operation of on-the-spot checks under Council Regulation (EC) No 2185/96 in view of the importance of UCLAF reports as input to possible prosecutions in the Member States due to the standing accorded to them by virtue of the regulation. The other area where presentation of reports is of importance is in missions led by UCLAF to third countries where mission reports may be subsequently used in judicial proceedings. Thus it is this aspect of UCLAF dossiers where most care is and will be taken (see point 3.20 and 21 below). It should be stressed that in relation to the preparation of investigation mission reports UCLAF has established a standard layout which includes resource use, and which is countersigned by the investigator responsible, the relevant Head of Unit and the Director of UCLAF.

The issue of possible guidelines on the standard of documentation and notes to satisfy the minimum requirements for criminal evidence laid down in the Member States legislation also presents particular problems in relation to the wide variety of situations encountered. The Commission underlines the nature of the role of UCLAF in relation to investigative and intelligence work. The overwhelming bulk of investigative casework is carried out by the specialist services of the Member States. This derives from the division of roles between UCLAF and such services and the limited



resources available to UCLAF. Thus the preparation of a file for a prosecuting service in many cases is carried out by national services with input from UCLAF but not by UCLAF alone. In addition within UCLAF there is a marked difference between the type of activity carried out by the different enquiry units. Certain units operate on a case by case basis, others are more intelligence oriented.

UCLAF has been obliged to take a pragmatic approach to the development of its work particularly in a context where its role has been rapidly developing. In addition its multi-disciplinary nature and the fact that it has been created by amalgamation of various previously separate sectors needs to be taken into account. A full examination of this aspect of UCLAF's work will be launched in the context of the ongoing work on the application of Regulation (EC) No 2185/96. A further point that needs to be stressed is that in a number of cases, and most notably in the cases of the different Task Forces a significant amount of work is intelligence rather than case based. Thus the files that are created are intelligence files even though they may include details of cases where the Member States are operating with the assistance of UCLAF.

3.18. In relation to the specific point of file manipulation it should be pointed out that this presupposes an action on the part of an official that could warrant a disciplinary measure and it is of course linked to the issue of security procedures. Moreover UCLAF's central archives have been redesigned to enable files to be reconstituted on the basis of registered incoming and outgoing documents as a backup to investigations enquiry files. Nevertheless UCLAF is examining its internal security procedures on this point.

## Cooperation with the Member States

### *Constraints imposed on the Commission services*

3.20—3.21. It is true that Regulation (EC) No 2185/96 requires UCLAF inspectors to comply with national rules of procedure in each Member State in which it carries out controls and the Commission agrees with the Court that this does present difficulties for UCLAF inspectors.

Nevertheless it should be emphasised that the regulation requires that the Commission only take account of national procedures for the establishment of control reports. In practice this should mean that depending on the nature of the procedural requirement the Commission may apply it (as in obligatory circumstances (such as respect of a contradictory procedure) or not (such as in the case of minor procedures which do not undermine the validity of the report)). This wording was insisted on

by the Commission during negotiations on this text precisely for the reasons put forward by the Court.

In any case where a joint control is carried out the Commission inspectors can benefit from the expertise of the agents of the Member State who are accompanying them. Indeed the latter are obliged to provide the necessary assistance to the proper carrying out of the control.

3.22. The vade-mecum provides investigators with a guide to the application of the Regulation in conformity with the commitment made by the Commission in Council when the Regulation was adopted.

3.23. The Court notes that the Regulation had only been applied on five occasions at the time of the audit. The Commission would emphasise a number of important elements arising from the need to put in place certain practical provisions in the first year of operation namely:

- the creation of the vade-mecum
- putting in place the Commission procedures for authorising UCLAF investigations,
- internal training for UCLAF investigators,
- a series of contacts with certain national administrations to launch the first control missions under the best conditions possible.

This work was necessary to allow actions under the provisions of the Regulation to be started within a clear and solid framework. It should be noted that since the visit of the Court's audit team the number of cases of application of the Regulation has doubled. It is clear that in view of the newness of the Regulation its legal effects and its operational context UCLAF is only at the beginning of a process of establishing its use. It should be noted that the Commission will be reporting to the Council on its experience with the Regulation at the end of 1998. The vade-mecum will be subject to continuous review.

### *Treatment of requests presented*

3.26—3.27. In general the Commission would point out that difficulties arising from the organisation of individual Member States services and particularly the lack in certain cases of a service with an overview of what is happening within a given Member State have posed practical problems in cooperation on casework. One Member State has decentralised its anti-fraud activities so that UCLAF has no central point of reference

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at all. Others however have established central services in parallel with UCLAF. In addition where a specific legal problem in casework arises this cannot be justifiably linked to problems in the overall structure of UCLAF's operational role and relations with Member States.

The Commission would point out that one of the three cases mentioned by the Court under point 3.26 where Member States did not start procedures requested by UCLAF led to a substantial recovery action by the Member State in question in May 1997. The two other cases are still in the hands of the appropriate judicial authorities. In the two cases cited by the Court where a request was not made or was delayed both cases were followed up and are in the hands of the appropriate judicial authorities. In the case involving the lifting of immunity of three officials there were difficulties with the initial requests which resulted in a prolonged exchange of correspondence before the matter was eventually resolved.

In relation to point 3.27 the Commission would make the following comments.

The Commission understands that the case which prompted the comment on lack of consultation and feedback is a case where, because a judicial enquiry was launched in a Member State, it was not possible for reasons related to the protection of the secrecy of the judicial procedure to provide detailed feedback to other Member States. Once this factor no longer applied the appropriate administrations were informed. In the specific case involving the claimed non-disclosure of information UCLAF received information which did not directly implicate operators in the Member State where the search took place. UCLAF was not able to establish a link between the information and the Member State operation in time for it to be provided to the relevant authorities prior to that operation.

The Commission would point out that the three cases, on which the Court's statement about investigations seeming to stop without reason is based, were all continued. In one case, which is also the case referred to by the Court as having been with UCLAF for a long time without concrete action being taken, substantial difficulties in the organisation of an enquiry mission to a third country prevented a rapid conclusion. In this particular case the collection of the documentation which was needed to carry out the enquiry took the Member States concerned some nine months. However the case has since advanced following a joint UCLAF/Member State mission to a third country and a substantial fraud has been identified. The other two cases involved are again referred to by the Court in its statement in paragraph 3.27 about lack of feedback (letters, mission reports). In one the results were formally communicated to the administrations in question in November 1997. In the other, which is also the case referred to by the Court in relation to the issue

of whether a fraud had or had not taken place, the issue concerned interpretation of complex legal provisions requiring exhaustive analysis by different Commission services.

## Information and intelligence systems

### Databases

3.28—3.29. It is true, as the Court points out, that the number of users of the IRENE database is very limited. However it should be borne in mind that the current version of IRENE (to be replaced this year) is a system that was developed in the 1970s which requires knowledge of a specific (and now outdated) computer language to operate it. As a result its use in UCLAF has been restricted to a relatively small number of trained operators. However, in spite of this the number of users is not a sufficiently accurate indication of the use of the system. Other criteria that have to be taken into account are the frequency of use and the length of consultation. According to the statistics of the Calculation Centre at Luxembourg where IRENE is held it is one of the most important databases there in terms of size and use. This is on the basis that although there are a relatively small number of users they account for a regular and substantial activity.

3.30. As mentioned above the Commission is in the process of replacing the outdated computer structure which was designed with the original UCLAF role in mind. Improvements in the pre-IRENE database which has already considerably evolved since its inception when it ran on the same basis as IRENE and suffered from using the same specific computer language are part of the process of modernisation and adaption to the new situation. It expects the situation to improve shortly with the integration of IRENE and pre-IRENE in the version of IRENE to be implemented in 1998. The project 'UCLAF Integrated Information System (UIIS)' was a project financed by the JRC in the context of its institutional support. The project as such was not abandoned. Its results were used as a basis for two further projects SURCOM and IIMS (Integrated Intelligence and Management System) which are still ongoing.

The APSO (Antifraud Policy Support Office) was a proposal of the JRC about the internal organisation of its support work for UCLAF. In practice the JRC opted for an interservice agreement supported by agreed annual work programmes between UCLAF and the JRC. In this context the JRC has given valuable support to UCLAF in the development of tools and systems. Once the new IRENE database has been successfully implemented, and in the context of the current reorganisation of UCLAF, it is planned to devote more resources to intelligence work based on data analysis from the Commission's own

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databanks. It should be noted that an important part of UCLAF's intelligence work is carried out in the operational units and particularly as part of the operation of the different task forces.

3.31. The Commission accepts that there have been very considerable problems in the development of communication systems and databases. However it would point out that it is not unique in its experience of such problems. In the context of the replacement of outdated and inappropriate systems by the type of complex information and management system that the Court itself is calling for the potential for problems to occur cannot be underestimated. It believes that the new IRENE system should provide a solid foundation for a reliable and effective management of cases both communicated by the Member States and under investigation by UCLAF.

3.32. The risk that UCLAF and the Member States could be running enquiries on the same case unknown to each other exists but is small. Member States are of course obliged to advise the Commission when cases of fraud or irregularity come to light. UCLAF concentrates on important transnational cases and Member States are informed of this work through the work of the different Task Forces and by *ad hoc* communication for information. Moreover the vast majority of UCLAF enquiries (other than in the area of direct expenditure) are carried out in partnership with the authorities of the Member States. The new IRENE includes a feature which will correlate possible overlapping cases.

3.33. It is certainly true that UCLAF can and does provide a substantial value-added in intelligence work and this is an area which will be receiving more attention. However the Commission must also fulfil its formal control and inspection functions under Community legislation. In addition much of its intelligence comes from links established as a result of its own operational activity. In relation to EUROPOL contacts have been established. However this is a complex issue taking in as it does such a wide variety of areas (from customs to agricultural expenditure, etc.) and questions of principle relating to legal bases. At present UCLAF is discussing the establishment of a protocol with EUROPOL as provided for in the Council's Action Plan to combat organised crime as a first step to increasing cooperation (as provided for in the Commission's annual anti-fraud work programme (COM(97) 199, point 1.9). The institution of an information system would, it is understood, require certain changes in the current legal framework.

3.34. The amounts that are to be or have been recovered in direct expenditure cases are listed in the pre-IRENE database as well as in the CORE database of

the Commission's accountant which is accessible to UCLAF. All direct expenditure cases are listed in pre-IRENE and the new IRENE application will specifically cover the area in question.

3.36. The Early Warning System (EWS) was put together very quickly in order to respond to a crisis situation. As a result some compromises had to be made. In terms of becoming fully computerised it should be noted that the EWS does not replace the existing transit procedures and that the basic weakness in the transit system requires a full computerisation which is the subject of a Commission led project with the Member States under the responsibility of DG XXI.

To the extent possible improvements are being gradually introduced to the EWS and in particular the introduction of a reply function. In relation to requests for information UCLAF always asks Member States for information with a specific objective in view and has as a policy to inform national services of the results of its work.

Nevertheless it will consider taking up this point with the national authorities in the context of the mutual assistance committee provided for in Council Regulation (EEC) No 1468/81.

## 4. FINANCIAL FOLLOW-UP AND RECOVERY

### General overview

4.1—4.4. The Commission shares the Court's view about the importance of having at its disposal accurate information regarding recovery action taken by Member States. The new integrated IRENE database expected to be available by mid-1998 will assist the Commission in monitoring the overall recovery situation as well as monitoring a number of very important traditional own resources cases. Moreover, with regard to the traditional own resources cases of fraud or irregularities, this database will receive the most recent information from Member States, including updates, via an electronic network. In relation to footnote number 24 it should be noted that the Commission envisages in its anti-fraud work programme for 1997/98 the introduction of administrative sanctions in the area of direct expenditure. In addition consideration is being given to providing that

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certain contracts of a public service nature should be based on public Community law and in conformity with Article 192 of the Treaty it would be then possible to provide that the recovery decisions would be directly enforceable by the Commission.

4.5. The absence of an accurate picture of the situation regarding recovery of traditional own resources arising from reported cases of fraud or irregularity arose because until mid-1996 Member States were not obliged to follow a particular format when submitting reports. Since Regulation (EC) No 1355/96 amending Regulation (EEC) No 1552/89 came into force on 14 July 1996, Member States' reporting obligations are clearly defined. The introduction of the new integrated IRENE database should enable the Commission to obtain an overall view of the recovery situation based on the data supplied by the Member States.

## Traditional own resources

4.7—4.9. Up to July 1996, Member States were not formally obliged to communicate to the Commission the state of recovery in the cases reported under Regulation (EEC) No 1552/89. Since Regulation (EC) No 1355/96 came into force and on the basis of the new computerised system for the communications (OWNRES), the Commission is in a much better position to monitor the recovery. First results of the improved transparency will be presented in the annual report 1997. However, it will take considerable time to collect also the necessary information on cases communicated before July 1996.

4.8. The Commission's monitoring activities cannot entail a constant examination of all the recovery cases. Instead, it reviews the overall situation regarding recovery. In addition, the Commission monitors individually, until their ultimate discharge, a number of significant cases identified by a risk analysis. The Budgetary Authority is regularly informed of the outcome of these monitoring actions. The Commission considers that most Member States are now regularly updating their fraud reports although some are still experiencing technical problems. The Commission continues to follow the situation carefully.

## EAGGF guarantee section

4.10—4.11. The Commission is continuing its efforts to clarify the recovery situation especially in the older cases, i.e. cases reported before 1994. While it is true that at the end of 1997 65 % of the amounts involved in cases communicated before 1994 were still to be recovered, for some 30 % the recovery orders were challenged and

pending in court or the Member State requested that the Commission accept that the amounts were no longer recoverable.

The Commission will systematically include in the forthcoming decisions in the 'clearance of account procedure' all amounts for which recovery is not imminent. Where the Member State does not provide sufficient elements which exclude any irregularity or negligence attributable to it, the Commission will not fail to charge the amounts to the Member State in accordance with Article 8 of Regulation (EEC) No 729/70 without necessarily waiting for the final outcome of proceedings pending in court.

## Improvements to legislation in the agricultural area

4.14. The Commission is concerned by the lack of communications by Member States and intends to review the operation of the procedure during 1998.

## Structural Funds

4.19. The Commission undertakes to provide more information on potential claims arising from the establishment of frauds and irregularities in the structural funds, in the Explanatory Notes to the off balance sheet commitments.

4.20. Member States are obliged to communicate all cases of irregularity in the structural funds. UCLAF monitors the communications and examines in particular cases that come to its attention in other ways to ensure that they have been included in the formal communications. Typologies have been established by UCLAF and communicated to the appropriate national authorities both directly on a bilateral basis and at the meetings of the Advisory Committee (COCOLAF) and at seminars supported by UCLAF.

4.21. It should be pointed out that the 1 000 cases received from the Region of Campania at the end of 1996 were returned to the Italian Permanent representation as the formal communication of cases is the responsibility of the Member States and not the regions under the terms of the relevant legislation.

## 5. RELIABILITY OF INFORMATION IN THE ANNUAL REPORT ON THE FIGHT AGAINST FRAUD

### Reliability of data

5.4—5.6. As far as the practice of including an estimate for the second half year is concerned, this was

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necessary because the provisions of Regulation (EEC) No 1552/89 did not allow the Commission to obtain the second half year figures in time for incorporation in the annual report. As the Court rightly points out the need to make estimates should not occur in the future following the amendment in 1996 of the provisions relating to the communication of cases. It should be noted that it was precisely for this purpose that the Commission proposed the amendment to Regulation (EEC) No 1552/89.

5.7. The Commission believes that the figures for losses to Community resources deriving from the VAT element of certain frauds relating to cigarettes needs to be underlined. Indeed the Commission attaches great importance to the idea of obtaining as accurate a picture as possible on the understanding that in the past the estimates solely based on the formal communications by the Member States have been underestimates of the real situation. It accepts that the amounts in question here cannot be directly compared to the traditional own resources communications by Member States given the different nature of the revenues involved. It will take measures for future reports to indicate clearly in footnotes to the tables to the report the origin and nature of these figures, which in previous years have been explained within the text of the report.

5.9. The Commission will clearly indicate the fact that the figures for irregularities in cases detected by the Commission are estimates in future reports even if this should of course be understood from the nature of investigative work. The Commission is alert to the possible double counting of certain cases and expects that the next IRENE system will give the necessary assurances that cases are being counted only once. The system should also facilitate the updating of cases. It has not been the practice to detail the source of cases under investigation by the Commission.

5.10. In the 1996 annual report the Commission has explained that it concentrates on complex transnational cases and on major criminal networks which operate in many different Member States. It tends therefore to treat as one case those cases which it considers have a common link in the Member States. Thus the Commission takes an overview that individual Member States cannot necessarily have. In relation to the cases reported by the Court the cases currently shown without a source will be the subject of an internal review.

5.11. The Commission takes the point that precise figures or savings and recoveries arising from the intelligence and investigative work of the different Task Forces is difficult to quantify and it is examining ways of making it clearer what are the benefits of this work without compromising ongoing operational activity.

## 6. CORRUPTION AND BREACHES OF DISCIPLINE

### Fight against corruption

6.2. The Commission would again refer to its communication of 18 November 1997 where it has clearly set out its policy in relation to anti-corruption work within the institution.

### Allocation of responsibilities

6.3. The Commission communication of 18 November 1997 also clarifies the responsibilities of UCLAF in relation to corruption cases.

### Lack of clear guidelines for administrative investigations

6.5. The Commission communication of 18 November 1997 provides the basis for a standardisation of procedures. The questions raised by the Court in relation to the powers of UCLAF will be treated in the formal decision to be taken by the Commission on UCLAF's powers. In relation to the notification of judicial authorities it has been the practice in UCLAF to notify the authorities as soon as it is established that there are grounds to do so. However it must be borne in mind that the purpose of UCLAF investigations is to establish the facts on which, subsequently, judgements can be made by the appropriate authorities.

6.6—6.7. The Commission is conscious of the need to ensure the protection of the rights of individuals and the respect of laws relating to investigation. It would point out however that UCLAF does not have police or judicial powers and that its enquiries into cases of suspected corruption or fraud within the institution are necessarily administrative enquiries which are designed to establish the facts.

If the results give reason to believe that criminal actions have taken place the file is passed to the appropriate national judicial authorities which then have to decide if a criminal action has taken place. In these and other cases the results of the investigation may give rise to a decision with the Commission to open disciplinary procedures. In its reflection on the formal decision on the powers of UCLAF however serious attention is being paid to this issue.



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## Implementation of a 'zero tolerance' policy

6.8—6.9. The Commission's position is clearly set out in its communication of 18 November 1997 as well as its commitment to take a clear line on cases of suspected internal fraud and corruption. In addition the Commission has recently made a proposal (OJ C 359 of 25.11.1997 page 9) to provide for disciplinary measures and the payment of compensation by authorising officers.

6.10. The Commission's communication of 18 November 1997 is clear on the issue of informing the prosecuting authorities. The Commission agrees that relevant documents should not necessarily have to be communicated to it provided a request for lifting immunity is clearly motivated, however it underlines the fact that in order to lift immunity the Commission must receive a properly motivated request in order to be able to take a decision.

## Problems identified

6.11. The Commission's communication of 18 November 1997 clarifies the Commission's policy. It should be noted that in practice it is usually extremely difficult to obtain proof of corruption and that therefore it is normally the police or judicial authorities who have the powers necessary to do so who obtain such proof once they have been alerted to the existence of a case.

6.12. The Commission would refer again to the recent judgment by the Court of First Instance in the case of Tzoanos v. Commission (see comments above in relation to point 2.34) where the Court has given a clear view on the rights of the Commission in carrying out administrative enquiries prior to disciplinary proceedings.

6.13. The Commission intends within the limits of resources available to UCLAF to reinforce the team dealing with anti-corruption matters there through the creation of a specific sector responsible for such cases in an existing unit. At this stage the resources for a separate unit are not available.

## 7. CONCLUSION

7.1. The Commission appreciates the recognition of the efforts that it has made in the fight against fraud. Many aspects of its' overall strategy are still being

implemented given the fact that UCLAF in its' current structure has really only existed in a fully operational form since the end of 1995. Moreover it takes time to fully implement new actions and to see the results of those actions.

7.2. The Commission accepts that work needs to continue on the improvement of recovery which is a complex and difficult task involving many different players. The non-differentiation between recoveries due to the work of UCLAF as against that due to the national authorities is, as a general rule, justified by the nature of cooperation between the Commission and the Member States. Thus the majority of cases treated by UCLAF are the result of cooperative work with the national authorities. The end results in terms of recovery should not therefore be solely attributed to the Commission (UCLAF).

In the area of direct expenditure however the situation is somewhat different and here information on recoveries is contained in the pre-IRENE database, held by UCLAF.

7.3. The Commission is implementing an integrated management system as a high priority. It expects that the implementation of this new version of IRENE in 1998 will provide the appropriate means for ensuring a rigorous control and cross referencing of cases formally communicated by the Member States and those on which UCLAF is working itself.

7.4. The Commission considers it of the highest priority that the Member States ratify the Conventions and protocols as quickly as possible.

7.5. The Commission shares the view expressed by the Court of the problems that can arise from the existence of so many different agencies and organisations in the Member States responsible for action in the fight against fraud. It is pleased to note the general trend to create central bodies with wide responsibilities and a proper overview of activities in each Member State in relation to European Union interests such as is the case in France, Italy, Denmark, Portugal and Sweden. Furthermore UCLAF is establishing specific cooperation agreements with a variety of different agencies to ensure that as wide a cooperation as possible takes place. The Commission is continuing further work on the CORPUS JURIS study in order to examine further the options for legislative initiatives in the area of enforcement.

7.7. As provided for in its anti-fraud work programme for 1998/99 (COM(98) 278 final), the Commission is reflecting on the establishment of appropriate agreements



with the other institutions and authorising UCLAF to provide technical advice on anti-fraud investigations.

Annex I — Point 6 — The Commission in its report to the Reflection Group on the Intergovernmental Conference also proposed a modification to the Treaty in relation to the inclusion of a specific legal basis for measures to combat fraud. The new text of Article 280 of the Treaty is also the result of this Commission initiative. The Commission also noted the paradox that

the Council which can, as budgetary authority, decide on the budget on the basis of a qualified majority can only adopt measures to control expenditure and fight against fraud by absolute majority.

Annex I — Point 18 — It should be noted that Regulation (EC) No 2185/96 provides that the powers of control specifically provided to the Commission are in addition to those sectoral powers of control that already existed prior to the adoption of the Regulation.

## I

(Information)

## COURT OF AUDITORS

### **SPECIAL REPORT No 1/2005**

**concerning the management of the European Anti-Fraud Office (OLAF),  
together with the Commission's replies**

*(pursuant to the second subparagraph of Article 248(4) of the EC Treaty)*

*(2005/C 202/01)*

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## LIST OF ABBREVIATIONS

AFIS	Anti-fraud information system
CMS	Case management system
DG	Directorate-General
ECR	Electronic case register
EIB	European Investment Bank
END	Seconded national experts
EU	European Union
IDOC	Investigation and Discipline Office of the Commission
OLAF	European Anti-Fraud Office
UCLAF	Unit for the Coordination of Fraud Prevention

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## SUMMARY

I. The European Anti-Fraud Office (OLAF) succeeded the Unit for the Coordination of Fraud Prevention (UCLAF) in April 1999 with enhanced status and a mandate extended to cover all the institutions and bodies of the European Union. Setting up the Office was a laborious process, in particular because of the disorganised nature of the files that it inherited. It was only towards the end of 2003 that the effects of its restructuring began to make themselves felt. As at mid-2004, however, improvements were still necessary in many areas of the management of investigations.

II. The hybrid status of the Office, which has investigative autonomy but reports to the Commission for its other duties, has not adversely affected the independence of its investigative function. Being part of the Commission, the Office has been able not only to benefit from substantial administrative and logistical support, but also to take advantage of the anti-fraud legislation that is available to Commission departments. Consequently, it does not appear appropriate to consider amending the Office's status <sup>(1)</sup>.

III. The Office has sufficient resources to deal with all justified denunciations that it receives. This being so, the priorities that it establishes as part of its investigation policy continue to be theoretical ones.

IV. OLAF makes too little distinction between investigations (internal or external) on the one hand, and assistance and coordination operations on the other. As the nature of the work in each case is markedly different, lumping them together hinders the management of resources.

V. While the introduction of a registry and a computerised system for managing investigation files have improved record keeping for operations and clarified responsibilities, managerial supervision has remained inadequate and results in serious delays in the processing of files, the lodging of inconclusive reports and results that are difficult to identify. In order to eliminate unnecessary delays, imperative deadlines should be set when investigations are opened.

VI. All too frequently, the preparation and follow-up of investigations is rudimentary. The objectives pursued by investigators have remained vague in terms of the evidence that is to be supplied and the use of resources. The customs sector apart, there is a need for more effective cooperation with the Member States, both in areas of direct management and in areas where management is shared with Member States.

VII. Although the procedures for reporting on the Office's work have recently been improved, the information relates to the volume of operations undertaken rather than to the results actually achieved, either in terms of the actual recovery of misappropriated funds or in terms of the disciplinary or criminal sanctions imposed on persons convicted of fraud. The system for assessing results, which is based on relevant indicators, needs to be further strengthened.

VIII. The measures adopted in 2001 to provide the Office with staff competent to perform the duties of investigators have achieved all they can. The large number of staff on contracts that cannot be renewed beyond a certain duration (between six and eight years) is now hindering any further consolidation of expertise. In these circumstances, the training measures introduced by the Office remain insufficient.

IX. There is no independent guarantee of the legality of investigative procedures in progress or that the fundamental rights of persons under investigation are safeguarded. For want of a clear codification of investigative procedures, the situation is prone to litigation. The relevant regulatory provisions have proved unsatisfactory.

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<sup>(1)</sup> See the evaluation report on OLAF's activities (Article 15), COM(2003) 154 final of 2 April 2003.

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X. Relations between the Office and its Supervisory Committee are difficult. There is a need for a serious re-examination of the regulatory provisions concerning the governance of the Office.

XI. To avoid dissipating the Office's work on activities which, although related to fraud prevention, are not directly concerned with investigations, and in order to guarantee that all resources are directed towards effectively combating fraud detrimental to the European Union's financial interests, the tasks assigned to the Office ought to be re-examined in detail. Refocusing its activities on its investigative function would make it possible to mobilise its resources more effectively, particularly as regards the launching of targeted investigations in areas where the risks of fraud are considered the most serious.

## INTRODUCTION

### *The mission of the Anti-Fraud Office (OLAF)*

1. By setting up the European Anti-Fraud Office (OLAF) <sup>(1)</sup>, the European institutions aimed to increase the effectiveness of the fight against illegal activities detrimental to the Union's financial interests. The Office was thus given new powers as compared with those of its predecessors <sup>(2)</sup>. In particular, it was given the task of carrying out administrative investigations within all the institutions and bodies of the European Union. The investigative function was strengthened by a guarantee of independence in the performance of this activity. That independence was, in turn, to be strengthened by the establishment of a Supervisory Committee made up of important figures from outside the Community institutions. The Director of the Office, who took up his post in March 2000, was invested with the power to appoint OLAF staff, which should enable him to respond more effectively to the Office's specific investigative needs.

2. While emphasising the importance of OLAF's investigative function (see paragraph 12), the Commission also entrusted the Office with a wide range of activities related to the protection of the European Union's financial interests <sup>(3)</sup>. These activities, which are partly grouped into what the Office calls a 'service platform', cover:

- (a) the assistance that the Commission gives the Member States in the fight against fraud;
- (b) the development of a strategy for fighting fraud within the framework of its policy on the protection of financial interests (Article 280 of the Treaty);

<sup>(1)</sup> Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 (OJ L 136, 31.5.1999, p. 20); Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 (OJ L 136, 31.5.1999, p. 1).

<sup>(2)</sup> Task force for the Coordination of Fraud Prevention (until 1987), Unit for the Coordination of Fraud Prevention (UCLAF — 1987-1999). In this connection, see the Court's Special Report No 8/98 (OJ C 230, 22.7.1998) the conclusions of which contributed to the debate that led to the creation of OLAF.

<sup>(3)</sup> Decision 1999/352/EC, ECSC, Euratom, Article 2(3) to (7). In the context of activities related to the protection of the financial interests of the European Union, the Commission has appointed OLAF to the position of lead manager for 31 of the 37 actions set out in its 2004-2005 action plan.

- (c) the preparation of the Commission's legislative and regulatory anti-fraud initiatives;

- (d) the development of the necessary means to tackle fraud;

- (e) the collection and analysis of information;

- (f) technical assistance, especially in the field of training, to the other Community bodies and institutions and to the national authorities concerned with the protection of the Community's financial interests.

The legislation does not prioritise these tasks.

3. The Office operates within a complex institutional framework and is at the centre of a group of bodies concerned either directly or indirectly with fraud prevention. It is not always clear how responsibilities are divided among these bodies, which results in risks of both duplication of effort and omissions. These bodies fall into three subgroups:

- (a) those located in the Member States or third countries, such as police forces, judicial authorities and administrative anti-fraud authorities;
- (b) Community bodies, such as the Investigation and Discipline Office of the Commission (IDOC) <sup>(4)</sup>, each institution's internal audit service, the European Ombudsman, the audit capabilities of the Commission's operational departments and OLAF's own Supervisory Committee;
- (c) other intergovernmental crime prevention bodies, such as Eurojust and Europol.

<sup>(4)</sup> Set up in February 2002 to conduct investigations and organise the Commission's disciplinary proceedings. Relations between the Office and IDOC were to be the subject of an agreement that has still not been finalised.

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4. As the Member States are responsible for managing around 80 % of European Union expenditure, it is necessary, for obvious reasons of effectiveness, for the Office to work closely with national authorities (police, customs, the courts, etc.). This requirement adds to the complexity of its task. Furthermore, it is the Member States that are responsible for bringing criminal proceedings where appropriate, and the diversity of their judicial systems renders the Office's task still more complex.

5. Although OLAF is a new body, it has been obliged to continue the operations begun by its predecessor, UCLAF. It thus took on around 1 400 active files <sup>(1)</sup>, a very burdensome legacy owing to the disorganised way in which many of these investigations had been managed <sup>(2)</sup>. At the same time, UCLAF's staff were reassigned *en bloc* to the Office, which, until the 2001 overhaul of the establishment plan, limited the new Director's room for manoeuvre <sup>(3)</sup>.

## Organisation of OLAF

6. The Office enjoys an ambivalent status, according to which it has investigative autonomy but is answerable to the Commission as regards its other duties. This hybrid structure has not adversely affected the independence of its investigative function and brings certain advantages. From the legal point of view, for example, as a part of the Commission the Office has been able to make use of powers conferred on that institution, in particular the power to carry out on-the-spot checks in the Member States pursuant to a variety of general and sectoral regulations <sup>(4)</sup>. The Commission connection has also been useful for OLAF's day-to-day operations, enabling it to draw on the administrative support of the Commission's general services.

7. The Office's organisation chart as at May 2004 is presented in *Annex I*. Since 2001, the Office's establishment plan has been made up of around 300 posts, twice as many as were available to UCLAF <sup>(5)</sup>. In 2004, the Investigations Directorate (Directorate B) comprised 126 investigators <sup>(6)</sup> and 13 administrative staff. The remaining 193 posts were divided among the Office's other departments (Directorate A 'Policy, legislation and legal affairs' and Directorate C 'Intelligence, operational strategy and information services').

<sup>(1)</sup> See Table 3 in the Complementary Evaluation Report on the Activities of OLAF, SEC(2004) 1370 of 26 October 2004. Nine cases were still open on 30 June 2004 and 280 cases were in the follow-up phase.

<sup>(2)</sup> See Special Report No 8/98, paragraph 1.6 (OJ C 230, 22.7.1998).

<sup>(3)</sup> See paragraph 7.42 of the Court's Annual Report concerning the financial year 2000 (OJ C 359, 15.12.2001).

<sup>(4)</sup> For example, Council Regulation (EC, Euratom) No 2988/95 concerning administrative penalties in the case of irregularities (OJ L 312, 23.12.1995, p. 1), Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections (OJ L 292, 15.11.1996, p. 2), or specific regulations on own resources, the Structural Funds, the European Development Fund, etc.

<sup>(5)</sup> At the beginning of 1999, the UCLAF establishment plan contained 149 posts.

<sup>(6)</sup> Including 13 seconded national experts (END).

## The Court's audit

8. The aim of the audit was to appraise the quality of OLAF's investigations management. This was done by assessing:

- (a) how the Office had discharged its investigative duties;
- (b) the contribution made by each OLAF department to the investigative function.

The final effectiveness of the Office's work could not be evaluated due to the insufficient reliability of the data on the follow-up of investigations.

9. The Court's report complements the evaluation produced by the Commission in April 2003, which essentially focused on the legal framework of the Office's activities <sup>(7)</sup>, as well as a second more quantitative evaluation submitted by the Commission in October 2004 <sup>(8)</sup>.

10. As far as investigations are concerned, the audit carried out between April and October 2004 had as its starting point previous observations made by the Court <sup>(9)</sup>. It focused on systems, structures and staff measures. There was also a review of the activity of the OLAF departments that are not directly responsible for investigations. Although the Office's recent organisation was analysed, along with a sample of 117 operations conducted or closed towards the end of 2003, it became clear that, at that time, the Office was still engaged on clearing numerous operations begun by its predecessor, and that the reorganisation measures introduced during the 2002-2003 period were just starting to have an effect. The deficiencies found in the audit are summarised in *Annex II*.

11. This report was produced at the same time as the Commission proposed an amendment to the Regulation concerning investigations conducted by OLAF <sup>(10)</sup>. The Court has submitted an opinion on this proposal in which it takes account of the conclusions and recommendations of the audit.

<sup>(7)</sup> Evaluation submitted pursuant to the provisions of Article 15 of Regulation (EC) No 1073/1999 of 25 May 1999.

<sup>(8)</sup> Complementary Evaluation Report of the Activities of OLAF, SEC(2004) 1370 of 26 October 2004.

<sup>(9)</sup> In particular Special Report No 8/98 (OJ C 230, 22.7.1998) and observations in Chapter 7 of the Court's Annual Report concerning the financial year 2000 (OJ C 359, 15.12.2001).

<sup>(10)</sup> COM(2004) 103 final of 10 February 2004.



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## OLAF INVESTIGATIONS

### *Investigative procedures*

12. Apart from coordination operations, Regulation (EC) No 1073/1999 distinguishes between external investigations (Article 3) and internal investigations (Article 4). The Office itself divides its cases into five categories:

- (a) internal investigations (investigations of corruption within the institutions and assimilated bodies);
- (b) external investigations (direct investigations of third parties involved in activities related to Community budget transactions);
- (c) judicial support (support for national authorities in the context of criminal proceedings);
- (d) coordination (support for the Member States in the context of investigations concerning more than one country);
- (e) monitoring cases (the aim is to allow the Office, where important cases are concerned, to check whether the Member States are fulfilling their obligations under Article 280 of the Treaty).

13. Cases at the active investigation stage (475 as at 30 September 2004) include actual investigations (252) and coordination and assistance operations (223). Coordination operations are particularly common in the field of revenue and shared-management expenditure. Consequently, out of the 23 cases examined during the audit of the customs and trade sectors, four were investigations led by the Office.

14. This lumping-together of investigations with coordination and assistance operations within the same units of the Investigations Directorate hinders the management of resources. In fact, the Office plays a substantially different role in each of these two fields. For investigations, each step must be formally recorded, filed and justified so that the dossier can be used by a prosecutor. For coordination and assistance cases, OLAF needs to be able to provide the national authorities with quick and effective support without being subject to severe procedural constraints. In these cases the use of investigation procedures is not always appropriate. It uses up resources which could have been assigned to investigations and leads to the risk of overlap with some of the responsibilities of the follow-up units.

15. The Office is only authorised to conduct administrative investigations. It cannot therefore undertake all of the tasks for which police powers are required. Although it can, for example, make copies of documents it finds on the premises of economic operators, it is not authorised to search the homes of their

owners or staff, even if important evidence may be found there. Neither is it authorised to demand access to the bank accounts of economic operators or private citizens, even where the latter are employed by a Community institution. There are therefore clear limits to the investigative acts that the Office can perform, and these affect the scope of its conclusions. Moreover, the practical effectiveness of the investigation stage may be reduced if the Member States do not respond to the Office's requests for support.

16. The Office generally launches its investigations in response to information received from third parties. This takes the form of denunciations forwarded by the Commission services, other EU institutions, authorities in the Member States as well as private citizens or commercial undertakings. When information of this kind is received, a new file is opened in the Office records <sup>(1)</sup>. The work of investigation then falls into three main stages:

- (a) an assessment stage leading to a summary report <sup>(2)</sup> by the Investigations Directorate proposing, if there is sufficient substance to the allegations received <sup>(3)</sup>, that an investigation be launched. The assessment report is submitted for the opinion of an Executive Board composed of representatives of the units that are associated with the Office's investigations. The Director of the Office then decides whether to open an investigation. As at 30 September 2004, 194 cases were in assessment (see Table 1);
- (b) an investigative stage during which the case is prepared. In principle, as required by the procedures laid down in the OLAF manual, evidence is gathered both for and against the allegations. The investigators conclude their work by submitting a draft report to the Executive Board, which assesses whether the file should be forwarded to the courts or disciplinary authorities, whether follow-up should be initiated with a view to recovery or whether the case should be shelved. The Director rules on the basis of the Executive Board's opinion. As at 30 September 2004, 475 cases were in active investigation;
- (c) a third stage, conducted outside the Investigation Directorate, is dedicated to the follow-up of cases transmitted to the judicial authorities and those requiring recovery of funds. Many cases are closed without follow-up. As at 30 September 2004, 649 cases were at the follow-up stage.

<sup>(1)</sup> Case management system (CMS).

<sup>(2)</sup> The model headings for assessment reports are as follows: 1. Background; 2. Allegations; 3. Reliability, source and credibility of the information; 4. Competence of OLAF; 5. Approach to be considered; 6. Financial impact and prospects of recovery; 7. Degree of priority; 8. Proposed work plan; 9. Allocation of resources.

<sup>(3)</sup> When an allegation is so poorly substantiated that it is not worth even going on to the assessment stage, the case is immediately dropped and no further action is taken (*prima facie* non-case).

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Table 1

Number of cases at each stage at the end of September 2004

Sector \ Stages of processing	Number of cases being assessed	Number of cases being investigated	Number of cases being followed up
Anti-corruption	28	57	48
Direct expenditure	33	42	78
External aid	53	81	84
Agriculture	21	86	59
Structural Funds	41	48	202
Customs	18	161	178
<b>Total</b>	<b>194</b>	<b>475</b>	<b>649</b>

Source: OLAF case management system, data as at 30.9.2004.

17. The introduction of the case management system (CMS) by the Office in 2002 made it easier for it to log investigations <sup>(1)</sup>. Although improvements were made in 2003, information from this system must be approached very cautiously, as the audit revealed that there are often delays in the processing or updating of files and that the financial data in the system are neither consistent nor always verified. There have in fact been cases categorised as ongoing investigations although, in the absence of further investigative acts, the cases concerned should have been closed either with or without follow-up. Other cases have been closed, without calculation of the sums involved. In other cases the investigators had deferred closure so that they themselves could follow the cases up, although in principle this is not their responsibility.

Table 2

Denunciations received by the Office between August 2003 and September 2004

Sector	Average number of denunciations per month	Proportion of denunciations per month
Anti-corruption	5	9 %
Direct expenditure	8	15 %
External aid	12	23 %
Agriculture	12	23 %
Structural Funds	7	13 %
Customs	9	17 %
<b>Total</b>	<b>53</b>	<b>100 %</b>

Source: OLAF case management system, data as at 30.9.2004.

## Setting of priorities for OLAF's investigative function

18. The policy announced by OLAF is to give priority to internal investigations and direct expenditure investigations, especially in the context of enlargement.

19. In reality, OLAF has sufficient resources to deal with all the reliable denunciations that it receives so the question of making choices between possible investigations does not arise. The frequency of denunciations for each sector is indicated in Table 2.

## The assessment stage

20. Broadly speaking, the Office has substantially reduced the time spent on assessment by applying a standard deadline of 15 days counting from the assessor's appointment. Although between October 2002 and September 2004 the proportion of assessments already in progress for more than four months fell significantly, from 62 % to 35 %, they still numbered 68. Where the documentation necessary for the assessment report has to be obtained outside the Community institutions, the standard 15-day deadline is clearly too short <sup>(2)</sup>. For most of the assessments examined, the decision to open an investigation appeared

<sup>(1)</sup> See paragraphs 1.5 and 1.6 of the Court of Auditors' Special Report No 8/98 (OJ C 230, 22.7.1998).

<sup>(2)</sup> The Structural Funds are particularly problematic because documentation and detailed financial data are only available regionally, and not at Community or national level.

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to be justified in the light of the criteria adopted by the Office. Nonetheless, the audit revealed certain practices (see *Annex II*) that could be improved. For example:

- (a) in one third of the assessments examined, the objectives selected for the investigation remained vague;
- (b) in one third of the assessments examined, supervision by the management proved to have been deficient;
- (c) half of the assessments examined had experienced significant unexplained delays.

21. Although the Office is supposed to focus primarily on financial fraud, preference has in practice often been given to the criminal aspect. The likely financial impact, that would have made it possible to establish the direction in which the investigation should go, such as the calculation of the sums misappropriated, has been given secondary status.

22. While it is true that, by their very nature, OLAF investigations make it impossible to foresee all aspects of every stage, it is nonetheless instructive to attempt to outline how investigations are organised and planned so as to eliminate the risk of waste of resources. In this regard, assessment reports often contained nothing more than the rudiments of planning, and this was not compensated for by more detailed work plans at a later stage of the investigation. It also became clear that certain assessments could have benefited from consultation with follow-up units and the Magistrates Unit from the outset about the objectives, the options to be chosen and the resources that would be needed for the investigation. In some cases, consultation with Directorate C (Analysis and intelligence) would also have enabled the assessors to make better use of the available information tools (see *Annex II*).

## The investigation stage

23. In October 2002 some 51 % of investigations had been ongoing for more than 12 months. By September 2004, however, this figure had risen to 62 %, even though the average duration of investigations had been reduced following the clearance of old cases from the time of OLAF. As with assessments, the time needed by the Member States to respond to the Office's requests for documentation often led to delays <sup>(1)</sup> (see *Annex II*). Other delays were caused by the fact that, in common with other Commission services, OLAF has adopted an approach to communication that is often bureaucratic, with the result that there are extensive lulls in activity which would have been avoided by visits to the authorities concerned. The audit showed that some delays could be attributed to a certain dilatoriness on the part of the investigators, despite the fact that Regulation (EC) No 1073/1999 requires, in Article 6(5), that the Office's investigations be conducted 'continuously'.

<sup>(1)</sup> The forwarding of information by the Member States is an explicit provision of Article 7 of Regulation (EC) No 1073/1999.

24. The Office's management exercised little control over the duration of investigations. One would have expected the various investigation files to explain and justify delays, but this was not the case. Although the reports that the Office is obliged to send to the Supervisory Committee on investigations open for more than nine months contain some information, there is no further obligation after that time to explain delays, of whatever duration, or even to report regularly to the Executive Board. In many cases the delays cannot be explained.

25. In principle, the assessment reports classify the investigations by degree of priority. It is not clear whether this classification has an impact on subsequent work. There are in fact no criteria concerning the resources to be assigned to an investigation or the deadlines for concluding work of a given degree of priority.

26. The keeping of records of investigators' time is an essential management tool for monitoring the progress of investigations. Although the Court has already recommended such a system <sup>(2)</sup>, the Office has still not set one up. Furthermore, there is no general tool for analysing the workload of investigators at the level of Directorate B.

27. The Office's investigations have suffered from the absence of a system for codifying investigative procedures, although such a system is essential both for the investigators and for those being investigated <sup>(3)</sup>, especially in the case of internal investigations. The lack of codification brings a twofold risk: that procedural conflicts will arise in the course of an investigation with the subjects of the investigation, and that court proceedings brought after an investigation will collapse owing to non-compliance with the formalities introduced to guarantee the application of the principles of transparency and the adversarial procedure <sup>(4)</sup>.

28. More generally, as with the assessments, the sample of investigations examined showed that OLAF's actual investigative activity was often rather limited. The use by the Office of its powers to carry out on-the-spot investigations, examine witnesses and question suspects is the exception rather than the rule. These specific investigative acts were most common in the customs sector. On the other hand, the Office often requests information from the investigative agencies of certain Member States, notably Italy. For example, when investigating shared-management expenditure the Office usually asks for the documentation it needs

<sup>(2)</sup> Annual Report concerning the financial year 2000, paragraph 7.49 (OJ C 359, 15.12.2001).

<sup>(3)</sup> The provisions governing investigative procedure are scattered among a number of texts and could usefully be consolidated (Regulation (EC) No 1073/1999, Regulation (Euratom, EC) No 2185/96, Regulation (EC, Euratom) No 2988/95, interinstitutional agreements, the IDOC Memorandum and the Staff Regulations).

<sup>(4)</sup> The second recommendation in the Commission's October 2003 evaluation report concerns the establishment of a corpus of administrative rules for the implementation of investigative measures.

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to be submitted for it to study and analyse before, if appropriate, carrying out an on-the-spot visit <sup>(1)</sup>. Even when investigating direct-management expenditure, a field in which the Office has the lead role, it often limits itself to examining documents obtained from the managing departments at the Commission, and in particular the reports of the independent auditors appointed in the context of financing agreements. In such cases the Office assembles and comments on the evidence to be submitted to the judicial authorities in the Member States, but it does not provide any evidence beyond that which was already available to the managing departments. The work of preparing files is most usually carried out with the help of the Magistrates Unit.

29. While the Office must be able to produce its final reports on investigations in the context of judicial proceedings, in the case of shared-management operations these are addressed to the managing authorities in the Member States (customs services, paying agencies, etc.). For that reason they need to be clearly argued and must contain relevant, precise and balanced conclusions. The final reports on many of the cases examined as part of the sample were clearly of insufficient quality. The most common inadequacy was failure to quantify the fraud, even though investigations usually related to the misappropriation of funds.

## *The follow-up stage*

30. OLAF distinguishes between five kinds of follow-up:

- (a) financial follow-up, which is intended to ensure the recovery of funds misappropriated from the Community budget;
- (b) administrative follow-up, which aims to improve the procedures for the management of budgetary revenue and expenditure;
- (c) judicial follow-up, which aims to provide information on the progress of criminal proceedings and the presentation, where appropriate, of claims for damages by the institutions concerned;

(d) disciplinary follow-up, which takes the form of determining what action the institutions intend to take in response to the Office's recommendations <sup>(2)</sup>;

(e) legislative follow-up, the purpose of which is to amend Community legislation in order to render it less susceptible to fraud.

31. It was difficult to determine how much time is really spent on follow-up. However, the information obtained shows that it is not the main activity of the units concerned. In general, the Office's follow-up activity has provided little added value, especially where coordination and assistance were concerned (see *Annex II*). The Office's role in financial follow-up should be limited to calculating the amounts of the sums to be recovered. Once they are known, it is for the authorising officers in the operational Directorates-General and the authorities in the Member States to issue recovery orders and to ensure that payment is received on the due date. For its part, DG Budget must ensure that recovery orders are registered as soon as they are issued and that the authorising officers observe the timetable for recoveries. Cases of negligence on the part of the authorising officers are to be referred to IDOC by DG Budget. Mobilising OLAF staff after the stage of calculating the amounts of the sums to be recovered is thus a duplication of effort already undertaken by the authorising officers.

32. In the special case of the mutual assistance procedure in the customs and agriculture sectors there is no systematic follow-up by the Office <sup>(3)</sup>. The Office has established no rules for the continuous and consistent monitoring of progress within the framework of the procedures for requesting mutual assistance from the Member States, and the results of such requests are not clearly recorded.

## *Quality control procedures*

33. The weaknesses identified in the preceding paragraphs raise the question of the effectiveness of the Office's quality control systems.

## *The OLAF manual*

34. The OLAF manual describes the work of every OLAF department and most of the current administrative procedures. Investigative activities are only dealt with in a small section giving details of existing practices, by reference in particular to the stages of the CMS. There is a disproportionate emphasis on the purely legal aspects of operations, to the detriment of the practical aspects of organising and conducting investigations and the

<sup>(1)</sup> Article 7 of Regulation (EC) No 1073/1999 explicitly provides for the communication of the information necessary for OLAF investigations.

<sup>(2)</sup> Article 9(4) of Regulation No (EC) 1073/1999 on the Office's investigations requires the Community institutions and bodies to inform the Office of disciplinary action taken in response to the Office's recommendations.

<sup>(3)</sup> Council Regulation (EC) No 515/97 of 13 March 1997 (OJ L 82, 22.3.1997, p. 1).

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contribution expected from the different parties concerned, in particular the authorities in the Member States and especially the Office's management. The role of the Executive Board, which is a crucial element in the management of investigations, should be explained in greater detail.

## Supervision of the management of investigations

35. OLAF inherited the organisational culture of UCLAF, under which the investigators conducted most of their investigations in isolation and without real supervision. While it is true that investigative confidentiality is necessary to avoid pressures that may impede the process of investigation, it is nonetheless essential that the management of an investigation office should check not only that the investigators do not stray from their objectives, but also that they carry out their duties with due diligence. This was not always the case. Management supervision of this sort is also indispensable for guaranteeing the sound use of resources.

36. While the CMS and the establishment of a registry have now brought the necessary order to the record-keeping, physical location and structure of investigation files, this system has yet to be transformed into a real management tool to enable the responsible officers in the Investigations Directorate to be better informed of the progress of the operations for which they are responsible, to prepare the necessary actions and to ensure that they are carried out within the stipulated deadlines. In this connection, the practice of monthly progress reports that certain units have set up on an experimental basis to monitor not only the investigators' workload but also the real financial impact of closed investigations should be extended to all the units of the Investigations Directorate.

37. Investigation results are still poorly interpreted. Just because follow-up is initiated, it does not follow that there will be a concrete result <sup>(1)</sup> (recovery or criminal/disciplinary penalty). In other words, initiating follow-up is not a relevant indicator of success. Nor is the fact that files have been forwarded to the judicial authorities significant. This is because the evidence presented by the Office may not be deemed sufficient by the national authorities, while the acts constituting an offence may be time-barred. As regards internal investigations, when the Office has managed to assemble evidence concerning offences committed by staff of the Community institutions, it has often been very difficult to get cases taken up by the judicial authorities in the countries where the institutions concerned by the offences are located <sup>(2)</sup>, either because those authorities lack clear procedures for transferring

these cases to their own courts or because they do not assign to them the priority desired by the Office <sup>(3)</sup>. In Brussels and Luxembourg, the principal workplaces of the institutions, the Office should clarify once again with the judicial authorities concerned the practical steps to be taken so that cases transferred to them no longer disappear from view. Moreover, the Office's recommendations regarding disciplinary action are not always taken up by the institutions or bodies concerned.

## Internal audit

38. The Internal Audit Unit, which comprises two temporary members of staff, reports directly to the Director of the Office. Its main task is to keep the Director informed of the effectiveness of the internal control procedures. Since it was set up in 2001, its work has essentially concerned the Office's administrative management and non-investigative activities. It has also been required to perform a variety of tasks in support of the management and to back up the task force that was created in July 2003 to handle the Eurostat case files.

39. The Internal Audit Unit has submitted no reports on the work of investigation. In particular, it has not assessed the correct functioning of the CMS or the reliability and relevance of the results indicators. As at the end of 2004, despite its own risk analyses, the Internal Audit Unit had still not contributed in any significant way to improving the systems for managing investigations.

## The OLAF Executive Board

40. An Executive Board comprising most of the heads of units directly or indirectly responsible for investigations was set up in 2002 under the chairmanship of the Director of Investigations. It meets once a week to examine the reports that are filed at each stage of an investigation (evaluation, closure, and post-follow-up). It was established to meet two major objectives:

- (a) to improve the quality of reports by drawing on the experience of the various services;
- (b) to ensure the consistency of the decisions proposed to the Director of the Office by the various investigation teams.

<sup>(1)</sup> See the Judgment of the Court of Justice of the European Communities of 10 July 2003, *Commission v EIB*, paragraph 164.

<sup>(2)</sup> Specifically, Belgium and Luxembourg.

<sup>(3)</sup> In this connection, see the Office's analysis in Section 1.3.2 of its Complementary Evaluation Report, SEC(2004) 1370 of 26 October 2004.



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41. While this new feature undeniably constitutes an advance in the way cases are handled, its success as a means of controlling the management of investigations is still limited, in particular because of the limited time the Board Members have to examine all the files. Thus, despite the intervention of the Board, investigations have been started on the basis of inadequate assessment, delays in carrying them out have not been monitored beyond the stage of informing the Supervisory Committee, and investigations may be passed on to follow-up units before the work of finding evidence has been completed.

## Activity reports

42. Anti-fraud operations are the subject of various reports, all of which are part of OLAF's external supervision since they are addressed to the Council and the European Parliament. The Office submits an annual activity report, the Commission presents an annual report on the implementation of its policy for the protection of its financial interests, OLAF's Supervisory Committee draws up an annual report and Article 15 of Regulation (EC) No 1073/1999 requires an evaluation of the Office's activities after three years of existence.

43. The presentation of the Office's activity reports has improved over the years. Reporting has gained in clarity now that it is supported by CMS statistical data and the analyses are less focused on questions of law and investigation policy and more on case studies. The reliability of the statistical data must be enhanced still further by recording operations in greater detail and updating files more quickly. Similarly, the most recent reports could be improved upon, in the sense that activity is analysed in terms of its volume rather than by results obtained. In this connection, the second paragraph of Article 12(3) of Regulation (EC) No 1073/1999 asks the Director to 'report ... on the findings of investigations carried out by the Office'. With regard to amounts recovered, the information is not very reliable because the data coming from the Member States lack consistency and are not corroborated<sup>(1)</sup>. With regard to judicial consequences, the time available is not enough to allow any assessment of the effectiveness of the Office's work, while the number of disciplinary proceedings relating to internal investigations is still very small. In order to account for its activities in a way that is both transparent and relevant, the Office should identify and regularly update indicators which focus not just on the volume of its activity but also on the results (success or failure) of its investigations<sup>(2)</sup> (see paragraph 39), including those conducted in collaboration with

the competent authorities in the Member States. It is still difficult to determine what the effective results of investigations have been.

## THE CONTRIBUTION MADE BY OLAF DEPARTMENTS TO ITS INVESTIGATIVE FUNCTION

### Introduction

44. The aim of this second section is to assess the effectiveness of the contribution made by the Office's services to its investigative function. In this connection, it is worth remembering that in November 2003 the President of the Commission spoke of refocusing OLAF's activities on its investigative role<sup>(3)</sup>.

### Intelligence, operational strategy and information services

45. Directorate C is made up of three units (see *Annex I*). The first deals with anti-fraud strategy issues, analysis of trends and long-term risks and the databases of irregularities reported by Member States. The second is responsible for information and case-recording technology. In particular, this unit has set up and kept the case management system (CMS) running (see paragraph 17). The third unit supplies software and technical tools to support investigations carried out by Investigations Directorate staff. It can also provide operational assistance<sup>(4)</sup> to enquiry services in the Member States.

46. The unit responsible for strategic analysis ought to enable the Office not just to follow up denunciations, but to initiate enquiries based on targeted risk analyses carried out by the Office itself, in collaboration, where appropriate, with its counterparts in the Member States. Although this unit has been in existence for two years, its interventions to date have had no direct impact on investigation activity<sup>(5)</sup>.

47. Areas examined by the unit which could have resulted in new investigations included information given by Member States pursuant to Regulations (EEC) No 595/91<sup>(6)</sup> and (EC) No 1681/94 on irregularities found in the fields of agriculture and the Structural Funds. The unit concluded that the quality of the data was generally inadequate for them to be used.

<sup>(1)</sup> In its Annual Report concerning the financial year 2000, the Court indicated (paragraph 7.49) that there was no system for the overall recording of the results of the various enquiries and amounts recovered.

<sup>(2)</sup> In this respect, a distinction should be drawn between the recommendations in investigation reports and the disciplinary or legal consequences which are actually attributable to them. Similarly a distinction should be made between recoveries requested and funds eventually recovered.

<sup>(3)</sup> President Prodi's speech to the European Parliament's Committee on Budgetary Control on 18 November 2003.

<sup>(4)</sup> Assistance delivered through managing the systems for recording and communicating instances of fraud detected by the Member States (AFIS, ECR, etc.).

<sup>(5)</sup> Fifth report of the Anti-Fraud Office (July 2003-June 2004) paragraph 3.1.1.

<sup>(6)</sup> See Special Report No 3/2004 of 10 June 2004 (OJ C 269, 4.11.2004).



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48. As regards strategic analyses, the unit faces problems of access to various databases belonging to Community institutions. The fact is that their departments say they are concerned about the use which the Office might make of general access to databases to which provisions relating to the security of personal data apply (Regulation (EC) No 45/2001). There has been no in-depth discussion of this sensitive issue with the Supervisory Committee, whereas discussion is crucial if the Office is to adopt a more systematic and proactive approach to opening internal investigations.

49. Though this is a recent development, there has been a regular increase in requests for assistance from the investigative services with regard to operational intelligence, consisting in particular of interrogation of databases. In mid-2004 the Operational Intelligence Unit was chiefly working on investigations concerning agriculture and customs, which are not among OLAF's investigative priorities as established by the Director.

50. Within what the Office calls its service platform, the Operational Intelligence Unit devotes a significant share of its resources to supporting Member States in the fields of customs and agriculture. The following two activities would be better placed in other Commission services:

- (a) operation of the anti-fraud information system (AFIS), which allows Member States as well as OLAF to receive and disseminate information about fraud <sup>(1)</sup>;
- (b) management of programmes financed by the general budget of the European Union and aimed at reinforcing the infrastructure of customs services in the Member States.

## Policy, legislation and legal affairs

51. Directorate A comprises six units (see *Annex I*). Three of these units deal with follow-up operations (see paragraphs 30-32) and support to the investigators on issues concerning sectoral legislation. Although the precise role of these three units varies according to the sectors for which they are responsible, they have two functions, one linked to investigations and the other supporting the Commission's operational Directorates-General in the context of the policy on the protection of financial interests.

52. As regards investigations, these three units provide analyses relating to sectoral rules and regulations. They also follow up irregularities notified to the Commission by the Member States. The opinions given by these units on legal or financial matters, in particular those given on cases at the assessment stage, have contributed to an improvement in the quality of the investigations, particularly in the areas of direct expenditure and external activity.

<sup>(1)</sup> Unit C.2 is involved in the technical management of the AFIS system, to which the Office would need access even if it was managed by another Commission service.

53. As regards supporting the Commission's operational Directorates-General, they participate in the scrutiny of legislation from a 'fraud-proofing' perspective. Their role consists of proposing preventive measures, making use of the experience that the Office has accumulated during its investigations.

54. In paragraph 53 of its Special Report on the recovery of irregular payments under the common agricultural policy <sup>(2)</sup>, the Court concluded that there was still confusion over OLAF's role in following up irregularities notified by Member States, because the division of responsibilities between the Office and DG Agriculture is not very clear. This has diminished the effectiveness of the mechanisms for recovering amounts wrongly charged to the Community budget. Although the Court's audit only briefly looked at the follow-up of irregularities notified in respect of customs and the Structural Funds, the same questions about the division of responsibilities also arise in those areas. In general, follow-up operations tend to divert the Office's resources, to the detriment of its investigative role, and to the benefit of the Commission's operational Directorates-General.

55. Of the three other units in Directorate A, about one third of the resources in the Legal Affairs Unit (12 staff) are employed in providing general (non-sectoral) legal opinions to the Investigations Directorate. This is a useful function since it complements the sectoral opinions which the follow-up units provide. Nevertheless, it is less clear whether the other tasks carried out by this unit, particularly those devoted to the strategy for the protection of financial interests, are part of the Office's core mission and indeed whether OLAF is best placed to deal with them. The same applies to the two other units (Protection of the euro and Support for consultative committees on the protection of financial interests).

## Units reporting directly to the Director of OLAF

56. In addition to the internal audit service, four units report directly to the Director of the Office (see *Annex I*).

### Magistrates Unit

57. Although reporting to the Director of the Office, this unit is supposed to play two roles closely linked to the investigative function:

- (a) to support investigations in matters relating to specific features of the judicial systems in Member States;
- (b) to ensure, when cases are transferred to national judicial authorities, a smooth transfer of the Office's files to public prosecutors in the countries concerned.

<sup>(2)</sup> See Special Report No 3/2004.

58. The Magistrates Unit has had little involvement in evaluation and investigation work. The unit's action has often been late, which has not always allowed full advantage to be taken of the powers available to it, and this has affected the quality of some investigation reports. In the field of direct expenditure, magistrates have been involved from the start with the investigators' work on investigations from the second half of 2003 onwards. If this practice were extended to all the areas in which the Office is involved, it would be easier to determine whether the evidence available is adequate or what additional evidence is needed to allow an investigation to be concluded by the transfer of the file to the appropriate disciplinary or judicial authorities with good prospects of success.

## Training and support for candidate countries unit

59. As part of the enlargement of the Union, a special unit was given responsibility for implementing a 15 million euro programme financed by the PHARE programme. This activity is scheduled to continue in principle until 2006. In 2004, it was given responsibility for a further support programme for new Member States (the Hercules programme, with funding of 11,7 million euro). As with anti-counterfeiting initiatives, it is not the Office's role to become a manager of expenditure programmes.

60. The unit also has in principle responsibility for lifelong training within the Office. It seems however that this activity has been neglected. The mission of this unit should therefore be reassessed.

## Human Resources and Budget Unit

61. The size of this unit, and OLAF's administrative expenditure in general, is less than it would be if the Office were not attached administratively to the Commission. As a result, OLAF derives significant economies by using the services of a large number of departments in the Administration Directorate-General of the Commission, without prejudicing the independence of its investigative function.

## Human resources

62. The sharp increase in the number of posts since 1999 reflects the budgetary authority's determination to strengthen the Office's investigative function. Nevertheless, the number of new posts is not based on any targeted study to determine the Office's staffing needs in relation to its adopted strategy and its workload.

63. A large proportion of the increase in staff numbers has been by way of temporary posts. As a result, the number of temporary posts in categories A and B rose from 12 in 1999 to 127 in 2001. In the list of posts for 2004, these posts accounted for 55 % of the total for categories A and B. The large number of temporary posts was a consequence of the budgetary procedure for the financial year 2001, when the aim at the time was to replace senior investigations staff coming from UCLAF <sup>(1)</sup>. Now that this objective has been achieved, the present situation poses more problems than it offers advantages:

- (a) as many investigators had been recruited from surveillance services in the Member States, a large proportion of them had to familiarise themselves with the judicial and institutional framework, as well as the implementation procedures, applicable to the Community budget. This exercise was all the more difficult as, unlike the practice at DG Competition and DG Trade <sup>(2)</sup>, the Office provides only limited initial training to the investigators it recruits;
- (b) most of the temporary contracts now in progress will come to the end of their second and final three-year term between 2007 and 2009 <sup>(3)</sup>. Since the staff members concerned will then have to leave the Office, there is a high risk that all this accumulated knowledge and experience will disappear within a short period.

64. Because of the complexity of the Community context, investigators are required to show versatility and adaptability. Since it is not easy to find this combination of qualities, this is a serious reason for giving greater priority to stability in recruitment and training programmes. This being so, it would be appropriate to look again at the list of posts so as to provide investigators with less precarious employment situations and real career possibilities. That can be achieved gradually by converting some posts as future budgetary procedures permit.

65. At the same time, the administrations most exposed to the problems of fraud and the protection of the European Union's financial interests should be encouraged to make available to the Office's analytical (intelligence) services a greater number of seconded national experts. A particular effort in this direction may be made as regards the services of Member States called on to collaborate with the Office.

<sup>(1)</sup> The number of permanent posts in categories A and B moreover increased from 107 in 1999 to 143 in 2000 and then was cut back to 109 in 2001.

<sup>(2)</sup> These Commission Directorates-General make considerable use of high-level investigative teams.

<sup>(3)</sup> In Special Report No 8/98 the Court had already indicated that the high proportion of temporary staff was leading to a lack of continuity in the organisation.

## THE SUPERVISORY COMMITTEE

66. The Supervisory Committee was established by OLAF's founding acts <sup>(1)</sup>. Through its regular control of the implementation of investigations it strengthens the Office's independence <sup>(2)</sup>. It was also supposed, in response to requests from the Director or on its own initiative, 'to deliver opinions to the Director concerning the activities of the Office without, however, interfering with the conduct of investigations in progress' <sup>(3)</sup>. In practice, using recital 10 of Regulation (EC) No 1073/1999 as a basis, the Committee has concentrated its attention on one of its own rules of procedure, under which it states that it will ensure that the Office respects the principles of individual rights and fundamental freedoms, particularly with regard to internal investigations <sup>(3)</sup>.

67. The discharge of the mandate of the Supervisory Committee is delicate on several counts. The Committee is required to be the guarantor of both the Office's independence and the rights of persons under investigation. The legislation gives it no decision-taking power to do this. By restricting its pronouncements to issues of principle, it is laying down a doctrine which has no real effects on investigations. Finally, as the Committee cannot intervene during the course of investigations, it in no way constitutes a mechanism to monitor the legality of investigations while they are in progress.

68. With regard to monitoring the procedure followed in investigations, several recent cases demonstrate the existence of overlaps between the roles of the Supervisory Committee and the European Ombudsman. For example, between September 2003 and May 2004, the Committee debated the Ombudsman's interventions in connection with individual investigations by the Office during seven of its meetings. Moreover, the Committee does not deal with complaints which persons under investigation address to the Director of the Office, who remains free to deal with them as he sees fit.

69. Whilst the Committee may not interfere in the management of the Office, that is, it may intervene neither in the Office's non-investigative activities nor in the conduct of investigations:

- (a) it must be informed of any investigations not completed within nine months of their start; in practice, when such information is communicated to the Committee it usually has no practical consequences;

- (b) each year it has to examine the Office's draft budget in detail <sup>(4)</sup>, although this budget also covers activities other than investigations. In practice this examination is largely a formality since the Committee, which is not an arm of the budgetary authority, has no responsibility in this regard;

- (c) it has asked to be informed in advance of cases for referral to national judicial authorities <sup>(5)</sup>. Nevertheless, since informing the judicial authorities is often a stage in an investigation which continues with these authorities' support, and since informing them is a sovereign act by the Director of the Office, prior communication to the Committee may be a source of interference;

- (d) in its Rules of Procedure the Committee asks the Director to grant it rights which go beyond those provided for in its legal constitution (communication of complaints received by the Director <sup>(6)</sup>, communication of the Office's legislative initiatives concerning the fight against fraud and the protection of financial interests <sup>(7)</sup>, access to all OLAF's documents and files <sup>(8)</sup>, its own budgetary resources <sup>(9)</sup>, appointment of secretariat staff <sup>(10)</sup>, determining the secretariat's place of work <sup>(11)</sup>, etc.).

70. Since the Director of the Office was appointed, his independence has never been under any real threat <sup>(12)</sup>. In practice, the Committee has largely focused its attention on questions relating to the Office's observance of individual rights in internal investigations and has deplored the absence of a code of procedure to give a firm framework for investigative actions. The Committee's focus of attention on internal investigations and individual rights has affected the relationship between the Director of the Office and the Committee.

71. Following the policy adopted by the Office, the Supervisory Committee has given priority to the criminal destination of internal investigations, to the detriment of external investigations, in spite of the fact that fighting fraud against the Communities' financial interests goes well beyond the confines of the institutions, and that numerous frauds are committed without any

<sup>(1)</sup> Decision 1999/352/EC, ECSC, Euratom, Article 4.

<sup>(2)</sup> Regulation (EC) No 1073/1999, Article 11(1).

<sup>(3)</sup> Rules of Procedure of 17 November 1999, Article 2 (OJ L 41, 15.2.2000).

<sup>(4)</sup> Consultation of the Committee by the Director under Article 6(2) of Decision 1999/352/EC, ECSC, Euratom, which does not require a formal opinion.

<sup>(5)</sup> Whilst Regulation (EC) No 1073/1999 says that the Committee must be informed of cases which the Director of the Office transfers to the judicial authorities but does not specify when this information is to be given, the Committee's Rules of Procedure (Article 22(5)) establish the principle of information in advance.

<sup>(6)</sup> Article 22(6).

<sup>(7)</sup> Article 22(7).

<sup>(8)</sup> Article 3(b).

<sup>(9)</sup> Articles 4(5), 19(7) and 25.

<sup>(10)</sup> Articles 19(1) and 19(2).

<sup>(11)</sup> Article 19(4).

<sup>(12)</sup> Even at the height of the Eurostat crisis in 2003, the Commission was careful not to interfere in the conduct of investigations.

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collusion with staff from the institutions or its related bodies. Though Articles 7(1) and 7(3) of Regulation (EC) No 1073/1999 require that 'the institutions, bodies, offices and agencies shall forward to the Office without delay any information relating to possible cases of fraud or corruption' and that 'Member States shall also send ... any other document or information considered pertinent ... relating to the fight against fraud ... and any other illegal activity affecting the Communities' financial interests', the Supervisory Committee has never studied the conditions in which the agencies or Member States have discharged this duty, although it is essential to the Office's investigative activities <sup>(1)</sup>.

72. To allow it to discuss questions relating to the conduct of enquiries in full knowledge of the facts, the Committee secretariat examines closed investigation files which it selects on the basis of criteria determined in consultation with the Chairman. The number of files examined recently was 17 <sup>(2)</sup> in 2003 and seven in the first six months of 2004. These examinations are the subject of detailed evaluation records which often include pertinent recommendations or important matters of principle. These records are not communicated to the Office. An attitude of greater openness would not only benefit relations between services but would also allow all parties to benefit from best practice, which would thus contribute to strengthening the investigative function.

## CONCLUSIONS AND RECOMMENDATIONS

73. The Office undertook substantial reorganisation measures in November 2003. At the time of the audit, it was evident that at the beginning of 2004 it was still engaged in clearing the burden of the past inherited from UCLAF, its predecessor, and that the new measures were just beginning to have an effect (see paragraph 10).

### Efficiency and effectiveness of investigations

74. The Office's investigations policy is still uncertain, whether with regard to the question of acting on its own initiative, the management of priorities, procedures for collaboration with the authorities of Member States or checking deadlines. Similarly, guidelines on the results to be achieved are still vague because the disciplinary or financial aspects may be overlooked in favour of judicial processes, the outcome of which is often remote and uncertain (see paragraphs 19, 20 and 25).

<sup>(1)</sup> See also the provisions of Article 9 of Council Regulation (EC, Euratom) No 2988/95 which obliges Member States to give the Commission every assistance necessary, as part of the protection of financial interests.

<sup>(2)</sup> Including 14 internal investigations.

*Once the guiding principles of its investigations have been specified in terms of results to be achieved instead of simply the areas on which it wishes to concentrate its activities, the introduction of performance indicators (rather than mere activity indicators) should make it possible to assess the extent to which the Office's choices are justified.*

75. The decision-making system governing the various stages of the investigations has become more transparent (see paragraph 16). This is largely due to the intervention of the Executive Board and the introduction of standardised reports (see paragraph 41).

76. The fact that coordination and assistance operations are treated as equivalent to investigations makes control of resources difficult and results in time-consuming use of the CMS system, even though the Office has no obligation, in coordination and assistance cases, to collect and produce evidence itself (see paragraphs 13 and 14).

*It would be worth reconsidering the organisation of the Office with regard to coordination and assistance operations and investigating the possibility of creating a special unit dedicated to these operations, as part of the service platform.*

77. With regard to preliminary work (assessments), analyses are still rudimentary. The support units (magistrates, follow-up and operational analysis) have taken little part in defining objectives and planning the strategy to be adopted in each investigation. The Executive Board has not insisted strongly enough on the need for clear formulation of the objectives and expected results of investigations (see paragraphs 20 and 22).

*Some investigation acts still need to be justified more convincingly, the objectives set for the investigators in each case need to be clarified and there must be more insistence on work programmes to support proposed decisions. Regarding the Executive Board, it would be worth considering smaller groupings each of which would bring together managers working on files that have common features <sup>(3)</sup>. This kind of approach would reduce the participants' burden of work on examining files and would encourage more rational and more thorough analysis of draft decisions. It would also allow coordinated follow-up of the portfolio of current cases and the introduction of a system of prioritisation. Nothing would prevent all the subgroups of the Executive Board from coming together, if the need arose, to deal with matters of principle in which all the services have an interest.*

<sup>(3)</sup> For example revenue and shared-management expenditure, direct-management expenditure, internal investigations, etc.

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78. Supervision of investigations by the Office's management has generally proved inadequate (see paragraphs 28, 35 and 36). The duration of investigations has not been brought under control (see paragraph 24).

*Heads of unit must ensure that priorities are as far as possible respected and must both be aware of and control investigators' actual workload. In the course of an investigation, the search for evidence must take precedence over mere collation of information already available. From this point of view, the Office must make better use of the means it has available (witness hearings, on-the-spot visits to collect documents, operational analyses, etc.).*

79. There is no system in place to measure investigators' actual workload or the time they spend on investigations (see paragraph 26).

*A time-recording system, linked to work plans which include estimates of time to be spent on investigations, would supply a basis for better alignment of the workload with the resources available in the various units of the Investigations Directorate, and would allow delays to be avoided.*

80. The obligation to report investigations that are more than nine months old to the Supervisory Committee has had no notable effect (see paragraph 24).

*Taking into account the time-barring periods laid down in national (criminal) and Community legislation (e.g. Article 3 of Regulation (EC, Euratom) No 2988/95), establishing a maximum duration for enquiries would be likely to increase their effectiveness.*

81. It is still difficult to determine the actual results of investigations. In the area of internal investigations, little progress has been achieved since 1988 with regard to sanctions imposed. Judicial and legal routes have in the main proved ineffective (see paragraph 37).

82. The Office's financial follow-up operations use up a lot of its resources (see paragraphs 31 and 54). Judicial follow-up adds little value to the conclusions submitted (see paragraph 43).

*Financial follow-up should not be part of the Office's remit. It is up to authorising departments in the Commission and Member States to organise the recovery of amounts identified as a result of investigations. Authorising officers and Member States should notify OLAF promptly of any sums recovered or amounts written off. Judicial follow-up should be limited solely to cases where, after criminal proceedings, the officer who authorised the original expenditure is required to start civil proceedings for recovery. Legislative follow-up ought to remain the responsibility of the operational Directorates-General on the basis of summaries addressed to them by the Office.*

83. There is no independent control of the legality of investigative actions <sup>(1)</sup>. The procedural measures concerning investigations are still imperfectly codified (see paragraph 27).

*Codifying the procedures should guarantee that investigative acts follow a predictable course, that there is certainty about the timing of hearings and that, at each key stage of the enquiry, the rights to a fair hearing of the person under investigation are protected along with his right of access to the file. The code should also reinforce the principle of investigative secrecy and provide controls on the legality of investigative acts still in progress. Such a code should have legal force, be published and allow the fundamental principles governing OLAF's investigations, in particular transparency and the adversarial principle, to be applied transparently.*

84. In the field of direct expenditure, OLAF is dependent on cooperation with national departments. Some Member States give their support to the Office more willingly than others, even though the Office does not have all the means at its disposal to identify certain facts (see paragraphs 15 and 37).

85. In the areas of own resources and shared-management expenditure, cooperation with Member States under ad hoc rules and mutual assistance procedures (Regulation (Euratom, EC) No 2185/96) is often mediocre (see paragraphs 15 and 32).

*In order to clarify arrangements for cooperation with the authorities of Member States, it would be useful to consider either the adoption of a specific Council Regulation setting out detailed arrangements for such cooperation (see proposed amendments to Regulation (EC) No 1073/1999), or the conclusion of agreements with national investigation services best placed to assist the Office <sup>(2)</sup>.*

86. The case management system (CMS and registry) established by the Office represents distinct progress in the control of documentation and investigation files (see paragraph 17).

87. The CMS databases are not used to their best advantage to create a genuine system of investigation management and a decision-making aid, although such an instrument is needed to manage and direct investigations (see paragraphs 34 and 36).

<sup>(1)</sup> See Article 14 of Regulation (EC) No 1073/1999. Article 90a of the new Staff Regulations does not resolve the matter of the independence of pre-litigation appeals concerning the Office's investigative acts.

<sup>(2)</sup> An agreement of this nature has already been concluded with the Italian Guardia di finanza.



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*The CMS databases should be used to convert the documentation system into a true system of investigation management and a decision-making aid. If combined with a clarification of the role of management responsibility for investigators, this would reinforce the effectiveness of investigations and prevent delays. These points should be added to the OLAF manual and details of management responsibilities included. To make the manual more operationally useful, all instructions relating to the organisation, conduct and supervision of investigations should be collated in a single volume. A special effort must also be made with regard to the training of investigators (in investigation techniques; sectoral, national and Community legislation, report-writing skills, etc.).*

88. Considerable resources are invested in producing reports which do not always result in sufficiently clear information to judge the Office's effectiveness in the absence of relevant performance indicators (see paragraphs 37, 39 and 43).

*The number of reports should be cut and greater attention should be paid to their information value. Statistical data should be made more reliable and relevant so that comparisons can be established over time. In this regard, the introduction of performance indicators based on real rather than potential results should bring greater clarity.*

## Deployment of resources in support of investigations

89. The Office's reactive investigation policy does not allow it to form an overview of its future workload and to organise its investigative teams accordingly (see paragraphs 26 and 62). The process of allocating staff between units in the Investigations Directorate is not transparent. Staff management is complicated by the disproportionate number of temporary posts, which results in instability (see paragraphs 63 and 64).

*The workload of the various services should be monitored and a genuine master plan for personnel management implemented so as to resolve structural problems in staff management. Sound management of the investigation teams would moreover militate in favour of more balanced units in terms of staff numbers, allowing heads of unit to supervise investigations more closely.*

90. The impact of the strategic analysis services on the Investigations Directorate is still insignificant. With regard to risk analyses, their contributions have remained limited (see paragraph 46).

*The mission of the strategic analysis services must be redefined so that they can contribute effectively to the identification of situations which would lead to external investigations being initiated in sectors at greatest risk. In this regard, they should seek improvement in the presentation, the nature and the accuracy of data forwarded by the Member States allowing the creation of databases which could be used to look for anomalies and launch investigations.*

91. Judicial support is useful in view of the difficulties posed by some Community legislation. In this sector, support to the investigation services is regular. It is legitimate on the other hand to question the contribution which work related to the strategy for the protection of financial interests makes to the Office's investigations (see paragraphs 53 and 55).

*Since work in relation to the strategy for the protection of financial interests has had no direct impact on the conduct of investigations, other Commission services could be better placed to undertake such work.*

92. Assistance activities are useful when concrete support to Member States with coordination or analysis in the field of cross-border investigations is required. The Office's peripheral activities, particularly those associated with the policy on the protection of financial interests in the broad sense, distract management from its role of surveillance and support for the investigative function. When such activities involve taking on responsibilities which are normally carried out by the operational services of the Commission (programme management, for example) mobilisation of the Office's resources does not constitute the best solution (see paragraphs 55 and 59).

*Programme management work should be the responsibility of the operational services of the Commission, which are better equipped than the Office to deal with them.*

## Relations between OLAF and the Supervisory Committee

93. A body like the Office needs clear lines of management responsibility and clear arrangements for supervision. The terms of reference of the Supervisory Committee have become unclear. Moreover, the Supervisory Committee does not provide the Office's Director with all necessary support (see paragraph 70).

*The role of the Supervisory Committee should be re-examined in order to avoid all risks of interference in ongoing investigations.*



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## ***Refocusing the Office on its investigative function***

94. The fact that OLAF is attached to the Commission has not endangered the independence of the Office's investigative function, even if some difficulties in communication were noted. It does not appear, therefore, that the status of the Office should be called into question. On the other hand, executive management of the investigative function should have received more sustained attention, in order to guarantee the quality of its results and avoid duplicating the work of other Commission services. The experience of the first five years of the Office's existence thus tends to show that more reflection is needed, to ensure with

greater certainty that investigations are effective in achieving concrete results, whether these be the recovery of misappropriated amounts or the effective application of disciplinary or criminal sanctions.

*From the foregoing, it is clear that a refocusing of the Office's activities on its investigative function, as the President of the Commission indicated in November 2003, would tend to reinforce the effectiveness of investigations while leaving other organisations with the responsibility for preventive or legislative acts. Such refocusing should, for its part, be accompanied by modifications to the governance of the Office, necessitating changes in the regulations <sup>(1)</sup>.*

This Report was adopted by the Court of Auditors in Luxembourg at its meeting of 9 June 2005.

*For the Court of Auditors*  
Hubert WEBER  
*President*

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<sup>(1)</sup> Regulation (EC) No 1073/1999 concerning investigations by the Office; Decision 1999/352/EC, ECSC, Euratom establishing the Office; Decision 1999/396/EC, ECSC, Euratom (OJ L 149, 16.6.1999, p. 57) concerning the terms and conditions for internal investigations.

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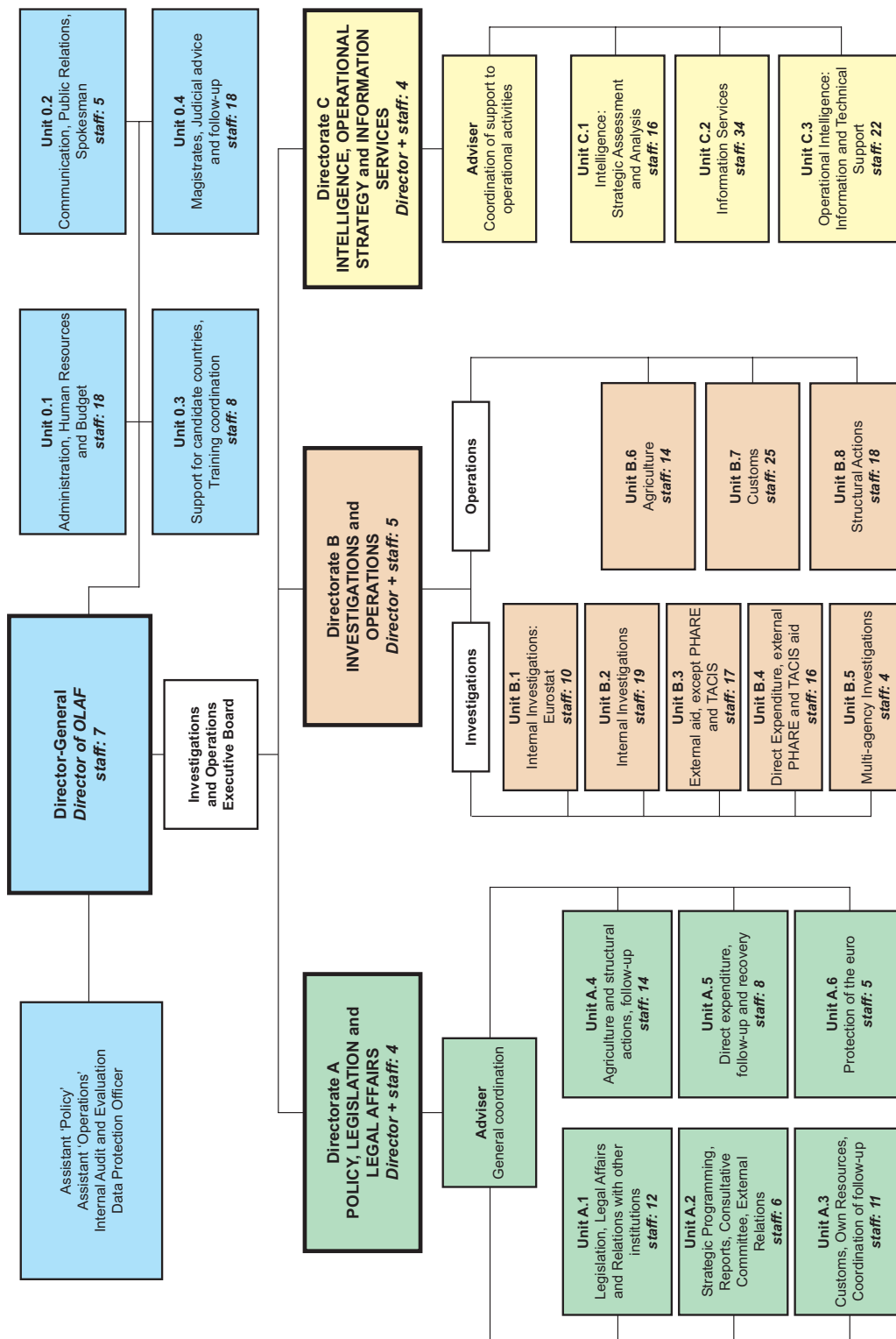
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ANNEX I

## OLAF ORGANISATION CHART



Source: OLAF

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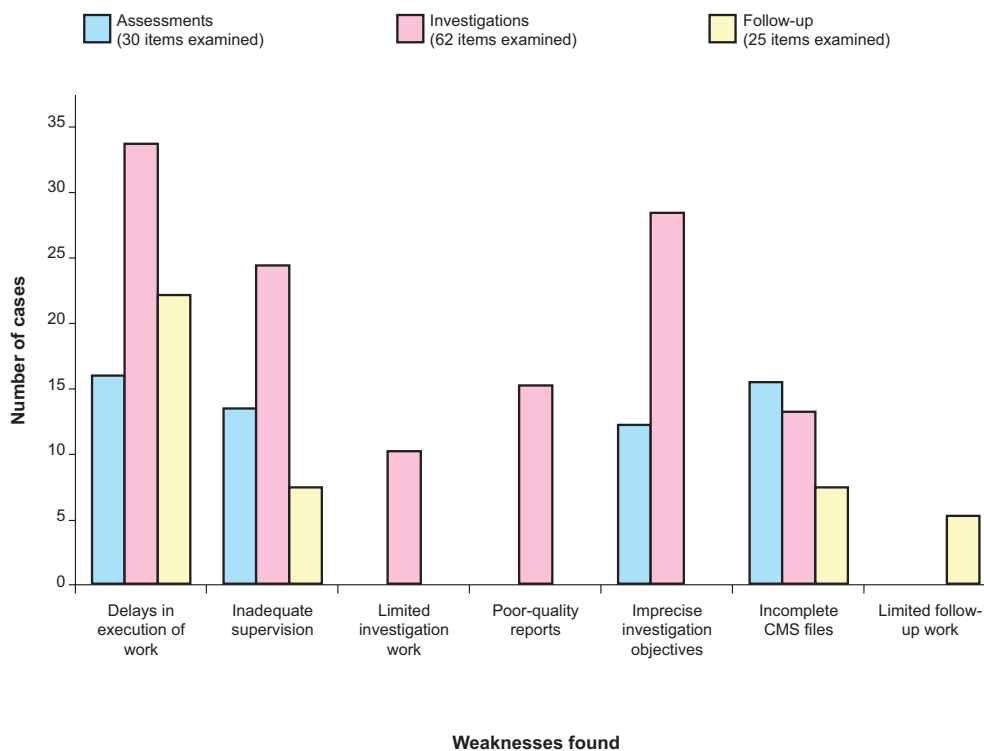
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## ANNEX II

### MAIN WEAKNESSES NOTED IN THE INVESTIGATIONS SAMPLE EXAMINED

<b>Assessments (30 items examined)</b>	
Delays in execution of work	16 cases
Inadequate supervision	13 cases
Imprecise investigation objectives	12 cases
Incomplete CMS files	15 cases
<b>Investigations (62 items examined)</b>	
Delays in execution of work	34 cases
Inadequate supervision	24 cases
Limited investigation work	10 cases
Poor-quality reports	15 cases
Imprecise investigation objectives	28 cases
Incomplete CMS files	13 cases
<b>Follow-up (25 items examined)</b>	
Delays in execution of work	22 cases
Limited usefulness of the follow-up work	8 cases
Inadequate supervision	7 cases
Incomplete CMS files	6 cases
Limited follow-up work	5 cases

### MAIN WEAKNESSES NOTED



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## THE COMMISSION'S REPLIES

*In Annex to its replies, the Commission transmits the replies from the Supervisory Committee of OLAF to paragraphs 66 to 72 and 93. The Commission and OLAF point out that they do not share certain of the views expressed by the Committee.*

### SUMMARY

III. At present, by sifting its information <sup>(1)</sup>, OLAF has the capacity to follow up any serious report it receives. In future the Office intends to increase its effectiveness and the following-up of investigations by developing a more sophisticated strategic analysis that could adapt to take account of new priorities.

IV. Investigations and assistance and coordination operations share the same objective: the protection of financial interests. The distinction between the two is clear, based as it is on Regulation (EC) No 1073/1999. It is reflected in the Office's role (which is a function of its possibilities, its powers and its independence). Should decisions taken by the Institutions lead to a structural reform of the Office <sup>(2)</sup>, thought could be given to clarifying the distinction between these different categories at organisational level.

V. The findings regarding managerial supervision relate to the sample of cases examined by the Court, the management of which does not take account of the progress made since 2003. Consequently, the Court's observation regarding the inadequacy of the supervision should be qualified (between July 2000 and June 2003 957 cases inherited from UCLAF were closed and in three years the average length of investigations dropped from 33 months to 22 months in 2004). It should also be borne in mind that the Commission's proposal would set imperative deadlines for investigations. (See the proposed amendments to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 <sup>(3)</sup>).

VI. After the first stage, which is carried out by the Greffe, OLAF is now able to ensure that the quality and legality of its operations are controlled by its line managers, its Executive Board and its Magistrates and Follow-up Units. Furthermore, the Office now devotes greater attention to planning its investigative activities using work plans.

Cooperation with Member States requires continuous and sustained efforts on both sides. OLAF has defined this issue as a priority area for improvement. This cooperation is also a concern for the Commission and has been described as a platform of multidisciplinary services in recommendation 14 of the Commission report on the evaluation of the activities of OLAF <sup>(4)</sup>.

VII. Activities following-up investigations, such as recovery or prosecutions, provide only a partial picture of OLAF's effectiveness. It is usually up to national authorities and, in some cases, to Community institutions, to take decisions on further steps that are beyond OLAF's control.

As developing and introducing performance indicators is a complex process, OLAF has set about studying the question in depth, looking to draw on the experience of national investigation agencies. OLAF is exploring the possibility of seeking feedback from Member States authorities on the usefulness of its reports.

<sup>(1)</sup> On the basis of criteria that reflect the priorities set out in OLAF's Programme of Activities.

<sup>(2)</sup> Proposal to amend Regulation (EC) No 1073/1999 — COM(2004) 103 final, 10 February 2004.

<sup>(3)</sup> Article 6(7) of the proposed amendment of Regulation (EC) No 1073/1999, which concerns the length of investigations; COM(2004) 103 final, 10 February 2004.

<sup>(4)</sup> OLAF activities evaluation report, COM(2003) 154 final.

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VIII. The fact that OLAF's establishment plan contains a large number of temporary staff enabled the Office to take on experienced investigators fairly quickly when it was setting up its organisation. While aware of the risk flagged up by the Court, the Office intends, with the agreement of the budgetary authorities, to gradually make a significant percentage of its temporary posts permanent, which should consolidate expertise. The Office also intends to focus on staff training, especially for investigators and new arrivals.

IX. OLAF's current legal framework already contains substantial provisions to protect human rights. The proposed amendments to Regulation (EC) No 1073/1999 codify defence rights <sup>(1)</sup>. Internal monitoring of quality and legality is currently a matter for line managers and the Executive Board; however, the question of internal controls is to be examined.

Moreover, to further ensure the legality of investigations in practice and make the Office's procedures more transparent, the new version of the OLAF manual of procedures includes a body of administrative rules (which could be developed further separately from the current manual).

X. The Commission shares the Court's view on the need to review the governance of the Office and has set out possible solutions in its proposal to amend Regulation (EC) No 1073/1999.

XI. OLAF's activities concentrate on the overall protection of financial interests. With this objective in mind, the mobilisation of resources for operations is the top priority. The Court itself points out in paragraph III that the Office currently has the resources it needs to meet the operational challenges it faces.

The Commission welcomes the Court's observations, although this is without prejudice to any future re-assessment the Commission may make concerning the division of responsibilities between its services, particularly in the framework of the evaluation of the tasks/competencies of OLAF.

## INTRODUCTION

4. The Office has taken account of the fact that it needs to work together with the various authorities in the Member States if it is to accomplish its mission. To this end it has attached suitable importance to coordination and support and set about recruiting specialists from the national administrations.

7. OLAF refers to the Complementary Assessment of the European Anti-Fraud Office (2004) <sup>(2)</sup>, which points out that operational tasks account for some 60 % of its resources. This can be explained by the fact that a significant proportion of resources allocated to units outside the Investigations and Operations Directorate (B) is closely linked to investigative activities.

8. The Commission accepts that it may be difficult at present to assess the effectiveness of OLAF's work. Initially the Office lacked the tools needed to make such an assessment, but the introduction of the case management system (CMS) has made it possible to make an inventory of OLAF's actions. This in turn has made it possible to undertake an initial description of results in terms of financial impact and cooperation with the judicial authorities

(see the Complementary Assessment of the European Anti-Fraud Office <sup>(3)</sup>). However, the time taken by national procedures makes it impossible to establish quickly what concrete follow-up measures have been taken in response to OLAF investigations. This is why OLAF is looking to identify the most appropriate performance indicators, drawing on the experience of national bodies, to refine the evaluation of its work. It is difficult, however, to assess preventive measures and deterrence, both of which are significant outcomes of OLAF's work.

10. The Commission has already set out the impact of the need to clear operations launched previously and the delays in setting up the Office, for which there were a variety of reasons (see paragraph 7.41 in the Court's annual report for 2000). It is therefore unsurprising that the consequences were still being felt in 2004 (see paragraph 73). The deficiencies summarised in Annex II must therefore be relativised, as they primarily concern investigations opened prior to the reorganisation of the Office in November 2003.

The Office has also taken account of the Court's previous observations, and the introduction of the case management system is an example of the progress made by OLAF in response to the Court's Special Report No 8/98.

<sup>(1)</sup> COM(2004) 103, 10 February 2004.

<sup>(2)</sup> Complementary Assessment of the activities of the European Anti-Fraud Office (OLAF), SEC(2004) 1370, 26 October 2004.

<sup>(3)</sup> Complementary Assessment of the activities of the European Anti-Fraud Office (OLAF), paragraph 1.3.2, SEC(2004) 1370, 26 October 2004.

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## OLAF INVESTIGATIONS

13. The difference between investigations and operations is reflected in the role OLAF has to play (depending on its possibilities/powers). Within the legal framework for OLAF's activities, direct intervention in the form of an investigation conducted by the Office may be less common in the fields of customs and trade (see reply to paragraphs IV, 4 and 12).

14. Coordination and assistance are provided with a view to achieving the objective of protecting financial interests, as laid down by the legislator. The Office aims to identify the appropriate procedure for each specific case. There is no preferred form of intervention and there should be no question of mobilising resources to the detriment of the investigations. Furthermore, as these operations are often complex and involve several Member States, it is imperative to follow strict procedures. Subjecting all OLAF's operational activities to the same internal reporting procedures also ensures greater transparency (see the reply to paragraph 76). A simplified procedure could, however, be envisaged for cases of mutual assistance.

15. Collaboration with national authorities requires mutual trust that is based on and develops through the support (coordination and assistance) that the Office can give the Member States. The Office is pursuing a policy of improving its operational contacts and has made this one of its priorities for 2005.

16. (a) When the information is evaluated the Office makes sure that the suspicions raised (i) concern offences within OLAF field of activities; (ii) are sufficiently serious <sup>(1)</sup>, (iii) concern events covered by pre-established operational priorities <sup>(2)</sup>. Priorities for investigations are set following a detailed study by the Office and consultation with the Supervisory Committee.

(c) A decision by the Office to close a case without follow-up is in itself a significant conclusion for both the persons and the Institution concerned, as it means that the initial allegations may be dismissed.

17. OLAF introduced a number of important modifications in the CMS in early 2003, which have resulted in a considerable improvement in its functioning and in the reliability of the information. The *ex ante* estimation of financial impact is difficult, therefore OLAF plans to establish a working group with experts to review guidelines for the estimation of the 'prejudice to the

financial interest of the European Union' at the beginning of an investigation. The amounts shown in the CMS represent the best estimate at the end of the investigation; it is up to the relevant authorising officer to determine the exact amount and issue the recovery note.

19. The proportion of cases that the Office closed without follow-up has increased significantly since 2002, following the introduction of a prioritisation system applying from the moment the reports are received (see replies to paragraphs 16(a) and III).

The true challenge is to feed OLAF quality information from the outset (concerning facts of substance that are likely to generate investigations that produce real results).

OLAF plans the development of more proactive, intelligence led investigations and operations, in accordance with the new Regulation (EC) No 1073/1999 (see reply to paragraph 74).

20. The new OLAF manual, which was adopted on 25 February 2005, has taken account of the fact that it may be impossible to produce an effective initial assessment of information in 15 days in areas where cooperation is needed with Member States. This is why the time allowed for the assessment has been set at two months <sup>(3)</sup>, with the possibility of obtaining an extension with the approval of the Head of Unit.

(b) The Court's observations regarding management supervision must be considered in the light of the conditions in which the OLAF management has had to operate. Only after the workload from the past had been dealt with was it possible for the Office to embark on a phase of management training.

(c) Similarly, with regard to the delays cited, it must be borne in mind that significant resources were absorbed in the process of clearing up past cases (between July 2000 and June 2003 957 'UCLAF cases' were closed).

21. From the moment a case is assessed, the Office takes account of its financial impact, which is one of the criteria mentioned in the reply to paragraph 16(a). OLAF's objectives are entirely complementary, involving an approach that is both financial (geared to recovery) and concerns administrative, disciplinary or criminal penalties (geared to enforcing the law). Furthermore, on the basis of the mechanism for cooperation between the Commission and OLAF implemented in 2003 the Office supplies the information necessary for precautionary measures to be taken in the course of investigations with a view to protecting the Union's financial interests <sup>(4)</sup>.

22. The aim of extending the deadline for evaluation, as laid down in the new version of the manual (see reply to paragraph 20) is to improve planning of the work.

<sup>(1)</sup> See paragraph 164 of Case C-15/00 *Commission v EIB* [2003] ECR I-7281.

<sup>(2)</sup> See paragraph 3.2 of the OLAF manual.

<sup>(3)</sup> See paragraph 3.3.3 of the OLAF manual, 25.2.2005.

<sup>(4)</sup> EWS (Early Warning System) (SEC(2005) 310).



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Since 2005 it has been the rule from the evaluation stage to consult the Magistrates and Follow-up Units, and the Analysis and Intelligence Units have increasingly been called on for assistance.

23. As stated in the Complementary Evaluation, the average duration of OLAF investigations has decreased from 33 months in 2002 to 22 months in 2004 (see reply to paragraph 78) <sup>(1)</sup>.

24. In Article 6(7) of the proposal for an amendment to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 the Commission suggests consolidating the management of investigations by imposing maximum time limits for conducting investigations. Moreover, in its plan of activities for 2005, OLAF plans to introduce a system for monitoring the use of its investigators' time that will reduce the time spent on investigations (see replies to paragraphs 26 and 80).

25. This monitoring of the use of staff time will also help to focus more on the urgency of the investigations.

26. To introduce a suitable system for an investigative service for monitoring the use of staff time, OLAF is studying the experience of national bodies in this area. At the same time follow-up units are testing a system for registering time spent working. It should, however, be pointed out that the CMS makes it possible to establish the number of cases being dealt with by an investigator.

27. The proposed amendments to Regulation (EC) No 1073/1999 codify defence rights. Furthermore, the new OLAF manual includes the existing internal rules in its administrative rules governing the exercise of its faculties/powers and taking account of fundamental rights in the course of its investigations. In January 2005 the Office also commissioned a comparative study involving eight Member States to determine an adequate level of guarantees to be applied to investigations.

28. With regard to the Office's powers, it is important to distinguish between powers relating to internal investigations and those relating to external investigations. In cases involving agriculture and customs, Regulation (Euratom, EC) No 2185/96 does not allow OLAF to report discussions with economic operators. For this reason, OLAF tries to draw on support from the Member States and other services that have the appropriate instruments at their disposal.

Finally, OLAF's role in arranging files prior to forwarding them to the national judicial authorities is very important as it ensures optimal handling by the authorities concerned.

29. For 2005, OLAF has organised specialised training for investigators to improve the quality of investigation reports. The new format of the final report set out in the manual adopted in February 2005 includes a quantification of the financial impact (even if it is difficult to produce an accurate evaluation, as was pointed out in the reply to paragraph 17) and the classification of unlawful conduct in terms of its criminal, administrative or disciplinary consequences.

31. With regard to the financial follow-up, the Commission believes that the division of responsibilities between OLAF and the other Commission services concerned (authorising officers, Budget Directorate-General and Legal Service) is clear and there is no overlap (see rules on recovery <sup>(2)</sup>). This is without prejudice to any future re-assessment the Commission may make concerning the division of responsibilities between its services, particularly in the framework of the evaluation of the tasks/competencies of OLAF.

As far as agricultural spending is concerned, a mechanism already exists according to which the follow-up of recovery of funds found to have been paid illegally is undertaken by the Directorate-General for Agriculture through the clearance of accounts process.

The follow-up units of OLAF have had other specific anti-fraud tasks assigned to them (these are related to Customs Information System, Mutual Administrative Assistance, protocols with third countries; Task Force Recovery in the agricultural sector; closure of programmes in the structural actions sector which have links to certain operational OLAF cases; debtor searches on behalf of the authorising officers).

32. Concerning Mutual Assistance, OLAF is currently developing an electronic message module which is expected to greatly improve processing and follow-up.

33. OLAF made quality control one of its priorities for 2005 and has organised training on the subject (see reply to paragraph 29). The Executive Board is increasingly controlling quality and in the future the Internal Audit Unit will be more involved in monitoring its application (see reply to paragraph 39).

34. Legal aspects of investigations are voluntarily highlighted in the manual, as failure to comply with OLAF's legal obligations would undermine any subsequent result.

<sup>(1)</sup> Complementary Evaluation of the activities of OLAF report — SEC(2004) 1370, 26 October 2004.

<sup>(2)</sup> For direct expenditure sector, see documents COM(2002) 671 final, SEC(2000) 2204/3 and the internal rules of the Commission on recovery related to direct expenditure C(2002)5048/4. — See paragraph 54 of this report on the agricultural, structural measures and customs sectors.

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The OLAF manual is continually being updated and improved. The new OLAF manual of 25 February 2005 provides further clarification on most of the issues mentioned by the Court, including the role of the Board. A new CMS manual is currently under way, which will provide an in-depth description of the CMS separate from the OLAF manual. In the same way, OLAF will also consider putting all material related to the conduct of investigations in a separate manual.

35. Line managers are responsible for continuous case management. In 2004 the documentation of this supervision had not been standardised, but mechanisms have been developed, most notably in connection with the case management system (CMS), to homogenise and facilitate supervision using scoreboards.

36. The Office recognises that in the past, the CMS focused on proper filing and recording of information. This was OLAF's first priority due to the weaknesses identified by the Court in this respect (see Report No 8/98). Meanwhile considerable progress has been achieved. The description of the CMS in the new OLAF manual shows that many of the concerns of the Court have already been addressed. Line managers receive monthly reports which indicate cases that might require their intervention. New modules have also been developed which allow the management of requests for intelligence support. A system has been put in place for the AM Communications, and a similar module is currently under test for all requests for legal and judicial advice. The CMS system is therefore evolving from a simple file management system (as described by the Court) to a real case management system.

37. The decision that the investigation warrants further follow-up by the appropriate authorities should be taken into account when evaluating OLAF activities as the Office considers a fraud/irregularity has taken place. However, the success of follow-up depends on variables beyond OLAF's control. OLAF has already established a regular and close contact with the Belgian and Luxembourg judicial authorities, while fully respecting their decision-making autonomy. Further initiatives have been implemented with the Belgian authorities (designation of the Belgian Federal Prosecutor as contact point for OLAF cases, and adoption of a circular with the Belgian College of General Prosecutors on 22 May 2003) and training has been organised in 2005 for prosecutors specialising in economic crime who work with OLAF.

In terms of criminal investigations and penalties, the Institutions have at their disposal a wide range of decision-making options based on the new Annex IX to the Staff Regulations.

The zero tolerance policy must be applied in the light of the principle of proportionality and defence rights, with a response from the appointing authority and penalties fitting for each individual case.

39. The Internal Audit Capability of OLAF will in future audit the implementation of procedures and controls for investigations and will perform a quality review of cases (procedural aspects) on a sample basis.

41. To enable the Executive Board to monitor the quality of reports more effectively and make operational decision-taking more transparent, an electronic CMS form was introduced in January 2005. However, OLAF does exclude the possibility of reorganising the Board to make the consultation procedure more effective (see replies to paragraphs 77 and 58).

42. The Commission believes that account needs to be taken of the differing aims of the Office's activity reports as defined by their respective legal bases. The system could be rationalised, and a first step has already been taken, with the proposed alignment of dates and times of some of these reports. The Commission and the Office are willing to continue discussions on these matters with the Institutions concerned.

43. To improve its activity reports OLAF is conducting a detailed study to establish which performance indicators would be most appropriate, taking account of the experience of national investigation agencies. In the case of internal investigations, for example, one indicator of success could be based on the measures taken by the Institutions to follow up OLAF's activities (precautionary measures or measures to improve control). This would complete the indications provided by the number of disciplinary measures and their outcomes.

To provide a clearer picture of the judicial follow-up to OLAF recommendations, relevant information regarding judicial and disciplinary follow-up and their results have been reported in a coherent way at the end of the follow-up procedure in the CMS since 2004 (see also the reply to paragraph 37 regarding OLAF's absence of control on national procedures or disciplinary procedures).

The Complementary Evaluation of OLAF's activities provides an initial indication of OLAF's results in terms of operations, financial impact and cooperation with the judicial authorities <sup>(1)</sup> (see reply to paragraph 8).

<sup>(1)</sup> See paragraph 1.3. Complementary Evaluation of the activities of OLAF report - SEC(2004) 1370, 26 October 2004.

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## THE CONTRIBUTION MADE BY OLAF DEPARTMENTS TO ITS INVESTIGATIVE FUNCTION

46. The main purpose of the Strategic Intelligence Unit is to increase the level of understanding of the phenomenon of fraud, particularly through risk analysis. This improves OLAF's contribution to policy-making and the legislative process. Some identification of possible new investigations is a by-product of this process. The proposal for modification of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, would clarify OLAF's scope to prioritise investigations based on such analysis (see reply to paragraph 90).

47. As a result of an improvement in the quality of the communication system, data related to irregularities communicated by Member States, have been exploited since 2004 for risk analysis purposes. It is to be stressed that, where Member States have identified the possibility of fraud (as opposed to the majority of irregularities which involve mistakes rather than fraud) their national services should take the necessary action.

50. (a) OLAF uses the AFIS system as a secure means of communicating with its external partners (customs or other enforcement agencies) when coordinating investigation missions in third countries under Regulation (EC) No 515/97.

(b) OLAF believes it needs to be involved in reinforcing the infrastructure of Member States customs services, as it has the necessary specialised technical expertise technique and secure environment.

54. The Commission considers the breakdown of responsibilities between Directorates-General and OLAF regarding recovery and following-up irregularities is sufficiently clear.

This is without prejudice to any future re-assessment the Commission may make concerning the division of responsibilities between its services, particularly in the framework of the evaluation of the tasks/competencies of OLAF.

In the agricultural sector (regarding CAP), responsibilities between OLAF and the Directorate-General for Agriculture are defined according to Annex 2 to the Communication of the Commission SEC(1995)249 of 10 February 1995 (see also the reply of the Commission to the Court of Auditors' Special Report No 3/2004). OLAF is presently responsible for matters of recovery related to all agricultural irregularities notified by the Member States in application of Regulation (EEC) No 595/91. Any decision to write off irrecoverable amounts has to be taken by the Commission via the EAGGF clearance of accounts procedure that is conducted by the Directorate-General for Agriculture, with assistance of OLAF throughout the various stages.

Responsibilities are also distributed clearly between departments in the fields of structural measures and customs matters. For the structural measures sector, OLAF is also responsible for the management of all irregularity notifications by the Member States in application of Regulations (EC) Nos 1681/94 and 1831/94 and OLAF works in cooperation with the authorising Directorates-General (Agriculture and Rural Development; Regional Policy; Employment, Social Affairs and Equal Opportunities; and Fisheries and Maritime Affairs). In the customs sector, Commission Decisions in 1995 and 1999 have clearly defined the responsibilities of OLAF and Taxation and Customs Union Directorate-General.

The functions performed by the follow-up units enable the investigators to concentrate solely on their tasks without having to deal with the administrative tasks necessary for financial, administrative or legislative follow-up (see reply to paragraph 82).

55. The Commission has entrusted OLAF with the task of developing its anti-fraud strategy. Its investigative function, which is its principal mission, makes a clear contribution to the preparation of the anti-fraud strategy. It is useful to maintain close links on the ground with the authorities responsible for combating the various forms of crime, as OLAF's activities benefits from a sound understanding of national practices. Two examples illustrate the synergy benefits of the development/investigation functions: (i) the design of Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections was followed by the development of a strategy; (ii) the reflection on the European Public Prosecutor was informed by OLAF's current practice and the need to take account of the principles underlying criminal investigations (e.g. the safeguarding of defence rights) (see reply to paragraph 91).

58. The Magistrates Unit is now involved upstream in the process of evaluating cases in all sectors where there is a likelihood of criminal proceedings ensuing (see reply to paragraph 77).

59. OLAF assists the Directorate-General for Enlargement, the administrator of the PHARE programme, by setting up anti-fraud structures and developing training programmes to assist them.

OLAF's experience is useful in assisting candidate countries to adopt in an effective way the *acquis communautaire* in the field of the protection of the Communities' financial interests, which arises from Article 280 of the EC Treaty. The Hercule and Pericles programmes, for which OLAF is responsible, do not require vast financial and human resources. Transferring them to other departments could do the Office more harm than good. While reflecting on OLAF's activities, however, the Commission could devote some thought to this matter.

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60. In 2005, particular attention has been given to the training of new staff (see reply to paragraph 63(a)), but OLAF intends to place greater priority on internal training and is planning to give training a higher profile in its structure.

63. The Commission is aware of the significance of the number of temporary staff working for OLAF and has proposed making significant changes to the Office's establishment plan in its preparations of the 2006 PDB along the lines recommended by the Court.

(a) In 2005 OLAF provided initial training for new investigators and continuous training. It consisted mainly of training on public procurement, specialised language and legal training, workshops on investigative techniques and continuous training to improve the drafting of reports. In 2005 the Heads of Unit also attended management courses organised by the Commission.

(b) OLAF is aware of the potential damage that could be caused by temporary staff leaving at the end of their contracts and has therefore envisaged contracts with an overall maximum duration of eight years for its staff, which will give it time to organise specific competitions and alter its establishment plan (see replies to paragraphs 63 and 64).

The Commission is open to dialogue aimed at finding a balance between OLAF's specific needs and the Staff Regulations.

64. The Office is expecting to organise special internal anti-fraud competitions that will give the most highly qualified staff the chance to become officials and thereby to preserve their accumulated knowledge and experience.

65. The Office currently employs 25 national experts on secondment. While the idea of increasing this number has not been discounted, it should be pointed out that, owing to their status, there are certain sensitive functions national experts on secondment may not perform.

Moreover, OLAF's experience is that it is more appropriate to employ specialist temporary agents for intelligence purposes, as Member States are not sufficiently prepared to make staff available as seconded national experts, and the necessary expertise on direct expenditure programmes cannot be found within those Member States authorities which customarily agree to second experts. There would also be a problem of geographical balance.

## THE SUPERVISORY COMMITTEE

66. Regarding the Supervisory Committee, the Commission has stated in its report on evaluation of the activities of OLAF, that 'a number of problems have emerged on the organisational front', including the implementation of administrative appropriations and the workplace of the Committee's secretariat <sup>(1)</sup>. The Commission will take a constructive and pragmatic attitude when discussing solutions to these problems that fully comply with the legislation with the [new] Supervisory Committee.

## CONCLUSIONS AND RECOMMENDATIONS

74. The legal framework of OLAF's work and the nature of the work itself make it difficult to manage priorities and produce guidelines on results. Nevertheless, the Commission has called on the bodies concerned to consider the Office's strategic priorities (see recommendation 11 of the report on the evaluation of the activities of the European Anti-fraud Office) <sup>(2)</sup>. This question will also be tackled by the Commission during the discussions on the reform of the Office's workings. With regard to guidelines on results, OLAF aims to encourage existing synergies between the various procedures (judicial, recovery and disciplinary procedures), while taking all the precautionary measures necessary and endeavouring to pursue the most effective policies to protect financial interests.

*The Commission stresses that the subject of performance indicators to measure the Office's results is a complex question that needs detailed study, particularly as the Office does not have control over all the factors influencing success where following-up cases is a matter for the national authorities or Community Institutions concerned. OLAF has conducted an initial analysis of its results in the Complementary Evaluation of the activities of OLAF (2004). The Office intends to develop this study and consider which performance indicators would be most suitable in the light of best practice in national agencies (see replies to paragraphs VII and 8).*

76. The Office believes it is necessary to subject the management of all OLAF's operational activities to the same internal procedures to ensure transparent reporting and to establish a common culture and shared practices. This will make it flexibility when it comes to switching resources from one sector to another and will avoid the compartmentalisation of the various operational sectors. Moreover, assistance and coordination operations, which are often complex, need rigorous internal procedures (see replies to paragraphs 13 and 14).

*As part of the work being undertaken with a view to reforming OLAF's workings and organisation, OLAF could examine methods of developing an administrative structure that better reflects the distinction between assistance and coordination operations, on the one hand, and investigations, on the other.*

<sup>(1)</sup> COM(2003) 154 final.

<sup>(2)</sup> Report on the evaluation of the activities of the European Anti-fraud Office (OLAF), COM(2003) 154 final.



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77. Since the end of 2003 OLAF has been encouraging the involvement of the Follow-up and Magistrates Units in the opening, execution and finalisation of investigations, as this has a positive impact on the effectiveness of the investigations and their subsequent follow-up. The CMS Board module implemented in 2005 facilitates this involvement.

*OLAF has already taken account of Court's observations concerning the justification of investigation activities, and since 2005 each case assessment report has set out a work plan. With regard to the reorganisation of the Executive Board, OLAF is willing to consider smaller groupings that could target their activities more effectively (see replies to paragraphs 41 and 58).*

78. Since 2004 the case management information system has made it easier for management to supervise and manage cases. The average duration of investigations has fallen steadily, to 22 months in 2004 (see replies to paragraphs V, 20(b), 23, 33, 35, 36 and 87).

*To enable Heads of Unit to manage investigation priorities more effectively OLAF is studying the possibility of setting up a system for monitoring of the use of investigators' time (see replies to paragraphs 25 and 79). The Office has also launched initial training programmes for new arrivals and specialised continuous training to help investigators further improve the quality of their work by raising their awareness of tools available to them that can increase the effectiveness of their work (see replies to paragraphs 29 and 63(a)).*

79. In 2004 the CMS already made it possible to establish the number of cases being dealt with by an investigator (see replies to paragraphs 26 and 14).

*In 2005 OLAF will examine the experiences of national investigative services in connection with monitoring the use of investigators' time before instituting a system that will take account of the expected duration of investigations as laid down in the work plan. Moreover, a system for monitoring the use of time staff in the follow-up units is currently being tested (see replies to paragraphs 24 to 26).*

80. The Commission has addressed the question of a maximum period for investigations in its proposal to amend Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 which calls for a duration of 12 months with the possibility of extending investigations by up to six months at a time on the basis of a decision taken by the Director after consulting the Supervisory Committee <sup>(1)</sup>.

81. See replies to paragraphs 37 and 43.

The Office cannot be held responsible for follow-up by judicial and disciplinary authorities but OLAF is striving to improve cooperation (the creation of IDOC in 2002, with which OLAF has concluded a Memorandum of Understanding). The Commission and OLAF consider cooperation with IDOC to be satisfactory.

<sup>(1)</sup> See Article 6(7) of the proposal. COM(2004) 103 final, 10 February 2004.

See also the reply to paragraph 29.

82. The value added by judicial follow-up is not confined to the contribution made by the magistrates when forwarding the files to the judicial authorities; it arises in connection with all complementary matters related to the various disciplinary or judicial procedures (such as requests for waivers of immunities or the duty to exercise discretion of officials and requests for legal aid).

*With regard to recovery, the Commission has chosen to add OLAF's expertise to that of the authorising officers (see replies to paragraphs 31 and 54).*

*This is without prejudice to any future re-assessment the Commission may make concerning the division of responsibilities between its services, particularly in the framework of the evaluation of the tasks/competencies of OLAF.*

*As far as agricultural spending is concerned, a mechanism already exists according to which the follow-up of recovery of funds found to have been paid illegally is undertaken by the Directorate-General for Agriculture through the clearance of accounts process.*

*Judicial follow-up cannot be limited solely to cases where, after criminal proceedings, the officer who authorised the original expenditure is required to start civil proceedings for recovery. The various authorities to whom the cases are forwarded ask the Office to help them communicate with the Institutions. It is also true that to evaluate and improve its work the Office needs to monitor cases forwarded to the various authorities to discover the outcome.*

*In the case of legislative follow-up, it is definitely up to the operational Directorates-General to take the necessary measures in their fields in response to recommendations made following OLAF investigations. The Office points out that it is involved in fraud-proofing upstream of the legislative process (see reply to paragraph 91).*

83. The Office points out that it is standard practice for a complaint regarding an administrative decision to be referred to the department in question before judicial redress is sought.

*The proposed amendment of Regulation (EC) No 1073/1999 codifies defence rights, including the right to a hearing and other important clarifications regarding the procedures governing OLAF's investigations <sup>(2)</sup>.*

84. The OLAF believes that it would be possible to consolidate operational relations with the Member States and third countries. Recommendation No 6 of the Commission's Article 15 report suggests guidelines on cooperation to increase the effectiveness of the advisory function and of judicial follow-up. The Office has made the improvement of operational contacts one of its priorities for 2005 (see replies to paragraphs 15 and 37).

<sup>(2)</sup> COM(2004) 103, 10.2.2004.

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85. The proposal presented by the Commission in July 2004 on mutual administrative assistance for the protection of the Community's financial interests against fraud and any other illegal activities aims to standardise relations between the Commission (OLAF) and national authorities. Regulation (Euratom, EC) No 2185/96 is of vital importance for the conduct of investigations and enables significant sums to be recovered. However, the powers granted to the Commission are not automatically the same as those conferred on comparable bodies under national law, which complicates the question of implementation.

*It is OLAF's intention to improve cooperation with Member States; this requires continuous and sustained efforts on both sides. Article 3 of the proposal to amend Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, which were presented in February 2004, and recommendation No 5 of the Commission's Article 15 report (extending memoranda of understanding concluded between OLAF and the national authorities) are steps in this direction.*

87. The CMS allows ongoing management of investigations and the CMS scoreboards have been operational since 2003. Although in the past the main thrust of the CMS was to record and classify information relating to cases, the system is evolving all the time and it is now becoming a valuable case management tool (see reply to paragraph 36).

*The CMS has the attributes necessary to become a valuable instrument for continuous case management but improvements need to be made in the way it is used (see reply to paragraph 17).*

*The version of the OLAF manual adopted in February 2005 already contains some improvements. OLAF will also consider putting all material related to the conduct of investigations in a separate document (see reply to paragraph 34).*

*Finally, a special effort has been made with regard to training (see reply to paragraph 63(a)).*

88. To improve the quality of its activity reports and the evaluation of its effectiveness, OLAF has embarked on a study of performance indicators, drawing on the experience of national investigation agencies (see replies to paragraphs 8 and 37).

*As mentioned in the reply to paragraph 42, the Office and the Commission are willing to continue discussions with the Institutions concerned on the content and a degree of rationalisation of OLAF's various reports.*

89. The Office's operations are largely reactive in that, like most national investigative services, they basically respond to requests from outside they cannot always be foreseen.

To stabilise its staffing levels the Office intends to organise special internal competitions in an attempt to preserve the know-how and expertise of its most highly qualified staff and to alter the Office's establishment plan along the lines set out by the Court (see replies to paragraphs 63 and 64).

*The Office has established its work plan for 2005, allocating resources to units on the basis of their expected workload. Depending on the size of their units, Heads of Unit are assisted by Head of Operations to ensure that investigations are monitored closely.*

90. Today, the Intelligence Unit enables OLAF to identify areas at risk and make it easier in the long term to allocate resources to the various sectors (see reply to paragraph 19). The unit could contribute more directly to investigations in the future by supporting the management of the Office's priorities (see reply to paragraph 46).

*The Commission's proposed amendment of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, which clarifies questions regarding whether the Office should launch investigations, will enable OLAF to give priority to areas considered high-risk by the strategic analysis departments. The Court's recommendation on this subject is in line with recommendation No 5 of the report on the evaluation of the activities of the European Anti-fraud Office <sup>(1)</sup>.*

*Regarding irregularities communicated by Member States, following a clear improvement in the quality of their communication and evaluation, this data is now being exploited for risk analysis purposes (see reply to paragraph 47).*

91. On the subject of fraud-proofing the Community legislator has recognised synergies between OLAF's operational activities and its role in devising methods to combat fraud (see Regulation (EC) No 1073/1999).

*The Commission Communication on fraud-proofing (SEC(2001) 2029) assigns OLAF a specific coordinating and consultative role (see reply to paragraph 55). The question of the duality of OLAF's functions will be addressed at the European Parliament public hearing on the reform of OLAF.*

92. *The human resources deployed to manage programmes run by OLAF are minimal and the financial resources involved are insignificant. OLAF gives the programmes real advantages and the Office derives real benefit from them, particularly in terms of cooperation. However, the Commission could undertake a general reflection on the definition of OLAF's responsibilities with regard to these programmes.*

93. With regard to the Supervisory Committee, the Commission shares the Court's view that there is a need to review the governance of the Office.

<sup>(1)</sup> COM(2003) 154 final.



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*In the Commission's proposal for the amendment of Regulation (EC) No 1073/1999, which it has submitted to the Institutions for discussion, it has set out possible ways of defining the Supervisory Committee's role more clearly and it will devote sustained attention to this matter.*

94. The implementation of the Court's recommendations will require detailed study and may result in OLAF being organised in a way that identifies its various functions more clearly and safeguards synergies between them, thereby ensuring that its principal activity, investigation, is conducted with the necessary effectiveness.

*Anti-fraud strategy must be global in concept, embracing analysis and policy formulation, legislative proposals, and the development of inter-agency and international cooperation around the central core of the investigative and operational function. This is without prejudice to any future re-assessment the Commission may make concerning the division of responsibilities between its services, particularly in the framework of the evaluation of the tasks/competencies of OLAF.*

## ANNEX

### REPLIES BY THE OLAF SUPERVISORY COMMITTEE

#### ***The role of the Supervisory Committee (paragraph 66)***

The Supervisory Committee controls the method of conducting investigations 'with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value' (see recital 10 of the basic Regulation). These clear guidelines reveal some principles underlying the rules on investigation procedures. It should also be pointed out that the Committee has the task of monitoring the application of rules on confidentiality and data protection.

#### ***A. The Supervisory Committee and the independence of the Office (paragraphs 67 and 70)***

The independence enjoyed by the Office, and its Director, when performing its investigative duties is one of the most significant new developments brought in by Regulation (EC) No 1073/1999. To strengthen this independence, which can be undermined far more by informal pressure and influences than by direct instructions from an institutional body, the Committee must remain vigilant, which is incidentally also the only way to prevent any attempt to undermine this independence.

#### ***B. The Supervisory Committee and the rights of persons under investigation (paragraphs 67, 68 and 70)***

It is not the Committee's role to monitor the legality of the investigations.

The Ombudsman's work, although extremely important, is not enough on its own and is not a control on legality in the legal sense of the term. The Committee believes that this activity, which is intended to bring to light any 'dysfunctions', should be complemented by action on the part of the legislator. With this in mind and after exchanging views with CoCoBu, in its annual reports the Supervisory Committee has never failed to set out its proposals on the subject with a view to the creation of a European Public Prosecutor. In its 2004 report the Supervisory Committee also proposed the appointment of an individual rights lawyer (*avocat des libertés*).

The Supervisory Committee is aware that respect for fundamental rights is both a guarantee for persons under investigation and a condition for the effectiveness of OLAF's investigations.

To avoid interfering in OLAF's investigations, ever since it began its work the Supervisory Committee has refused to become involved in individual cases, and has never accepted any of the requests submitted to the Committee from persons under investigation, some of whom asked to be heard by the Committee in the presence of a lawyer. This approach has made it possible from the outset to avoid any overlaps with the work of the Ombudsman.

Nevertheless, the Supervisory Committee has made use of the individual requests to identify some general problems. The Committee has examined these problems in detail at its meetings (when it also examined the Ombudsman's decisions) and in exchanges of views with OLAF.

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Numerous meetings have been held with the Director of the Office and the Director responsible for investigations on the subject of rules of procedure. Positive results were quickly achieved in certain areas, such as the introduction of records of hearings of witnesses. The question of developing a code of internal procedures for the Office remains open; the Supervisory Committee has underscored the need for such a code on several occasions. To date the Director of the Office has not expressed any desire to adopt such a code, even on a purely internal basis.

## C. The Supervisory Committee and the regular monitoring of investigations (paragraph 69)

Initially — and there can be no doubt that this took too long — the Committee had to devote an inordinate amount of its time to developing new structures and working methods for OLAF. Only then was it able to look at operational questions and exercise its powers to monitor the investigative function (see Chapter 1 of the latest annual report).

### 1. The setting up of new structures (paragraph 69(b))

In response to a recommendation made by the Court of Auditors, a comprehensive file registration system, a 'case management system', which is constantly being improved, and a registry (*greffe*) have been in place since the first half of 2001.

### 2. Information on investigation not completed within nine months (paragraph 69(a))

Information from the Director of OLAF concerning investigations not completed within nine months, as required by Article 11(7) of the Regulation, has proved an extremely useful source of information for the Committee and a valuable monitoring tool. In practice, the provision of the information has given rise to exchanges of views regarding investigative activity and general matters with the Director responsible for investigations of the situation.

### 3. Prior notification of cases to be referred to a Member State's judicial authorities (paragraph 69(c) and (d))

The final sentence of Article 11(7) of the Regulation states that '[t]he Director shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State'. In Article 22(5) of its Rules of Procedure (published in OJ L 41 on 15 February 2000 and adopted on the basis of a text drafted by Mr Da Cunha Rodrigues, who was a member of the Committee at the time and was subsequently appointed as judge at the European Court of Justice) the Supervisory Committee interpreted the word 'requiring' as implying prior notification.

This interpretation has been consistently employed and has never given rise to disputes or problems.

In one sensitive case, without referring to the dossier concerned, the Director responsible for investigations asked the Supervisory Committee if OLAF could notify the Committee after the information had been forwarded to the national judicial authorities. The Committee gave its consent.

### 4. Internal and external investigations (paragraph 71)

At the time of the events that led to the resignation of the Santer Commission the Institutions focused particularly on internal investigations. Recitals 1 and 7 and Article 1(3) of the basic Regulation reflect this concern. It should also be pointed out that external investigations are in the hands of the Member States, as they actually conduct the investigations while the Office confines itself to providing material support and organising coordination meetings.

However, having examined all the files and the CMS, it is certainly not the case that in practice the Office or the Supervisory Committee, which bases its work on the investigations conducted by the Office, have given priority to the criminal aspect of internal investigations, to the detriment of external investigations. The fact that the Office, the Supervisory Committee (as can be seen from the minutes of its meetings) and even the press have often focused on internal investigations, which are by their very nature sensitive, in no way means that external investigations have been put on the backburner. It should indeed be noted that, apart from the external investigations, the Office has provided important assistance to the Member States, support much appreciated by the Committee (see Chapter II of the annual report).

### 5. The examination of closed files and evaluation records (paragraph 72)

The Supervisory Committee devoted particular attention to the question of closed files, instructing its secretariat to examine as many files as possible and, in significant cases, to prepare evaluation records. The decision to deal solely with closed cases avoided any risk of interfering with ongoing investigations. As the records drawn up by the Committee secretariat are purely for internal use, it was possible to use them to point up any problems encountered and they were studied at length by the Committee. The Supervisory Committee and the Director of the Office or the director responsible for investigations held very fruitful discussions on any underlying problems detected, such as procedural problems and problems relating to the examination of the outcomes of criminal proceedings in the Member States. The Supervisory Committee minutes do not always reflect the full range of observations made during the Committee's meetings, as some cases closed by OLAF were under investigation in the Member States.

## D. **Conclusions (paragraph 93)**

It can be concluded the Supervisory Committee has adopted a totally supportive attitude towards the Office, encouraging where necessary the introduction of new structures or methods. This approach has produced real results with regard to the *greffe*, the file registration system and the CMS, although so far the Director of the Office has not followed up the urgent and repeated recommendation made by the Supervisory Committee regarding the adoption of a proper code of procedure.

There are no cases where the Supervisory Committee might have interfered with an ongoing investigation. The monthly meetings with the Director of the Office and the Directors of the various Directorates have provided the perfect occasion for examining underlying general matters that could be brought to the attention of the Supervisory Committee.

## I

(Resolutions, recommendations, guidelines and opinions)

## OPINIONS

## COURT OF AUDITORS

### OPINION No 7/2006

**on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)**

(pursuant to Article 280(4), EC)

(2007/C 8/01)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THE FOLLOWING OPINION:

Having regard to the Treaty establishing the European Communities, and in particular Article 280(4) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 160c thereof,

Having regard to the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) <sup>(1)</sup>,

Having regard to the requests for an opinion submitted to the Court of Auditors by the European Parliament on 14 July 2006 and by the Council on 21 September 2006,

Having regard to the previous opinions issued by the Court of Auditors <sup>(2)</sup>,

1. The proposal replaces an earlier proposal <sup>(3)</sup> made by the Commission in February 2004. The initial proposal aimed at amending Regulation (EC) No 1073/1999 in order to boost the procedural rights of individuals, to ensure better control over the duration of investigations and to improve the exchange of information between the Office and the institutions or bodies concerned and the efficiency of operational activities. In the explanatory memorandum, the revised proposal states that it aims to further improving OLAF's operation while taking into consideration recommendations made by the Court and the conclusions of the public hearing on the reinforcement of OLAF organised at the European Parliament in July 2005.

2. The revised proposal has largely taken into consideration the observations made in the Court's previous opinion of 9 June 2005, the main exception being the view expressed in paragraph 7 thereof. This concerns the need to ensure that the requirement that the institution, body, office or agency concerned should be notified of the opening of an investigation is not set aside without justification on the pretext that secrecy is necessary to guarantee the efficiency of the investigation.

<sup>(1)</sup> COM(2006) 244 of 24 May 2006.

<sup>(2)</sup> Opinions No 2/1999 of 14 and 15 April 1999 (OJ C 154, 1.6.1999, p. 1), No 6/2005 of 9 June 2005 (OJ C 202, 18.8.2005, p. 33) and No 8/2005 of 27 October 2005 (OJ C 313, 9.12.2005, p. 1).

<sup>(3)</sup> COM(2004) 103 final of 10 February 2004.

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3. Article 14 of the proposal provides for the introduction of a Review Adviser to monitor compliance with procedures. The Court welcomes this introduction. However, the role and responsibilities of the Review Adviser should be explicitly set out in the Regulation, as should the review of the legality of investigative measures envisaged for this function. Furthermore, the qualifications and experience required to occupy this function should be reflected in the Regulation. The Court also stresses the need for complete independence in the post, as stated in Article 14(2) in the Commission's proposal, but considers that the independence may be compromised by the Director-General's authority to instigate disciplinary measures concerning the Review Adviser after consultation with the Supervisory Committee. It should also be considered, in order to avoid conflicts of interest, that the Review Adviser, who is to monitor ongoing investigations, should no longer intervene once the results of an investigation have been transmitted to the authorities concerned.
4. A new provision <sup>(1)</sup> grants the Director-General discretionary powers in deciding whether or not to submit a final report to the Member States' judicial authorities where the Director-General considers that internal measures are available which would ensure more appropriate follow-up. However, the circumstances under which this discretionary power may be exercised need to be more clearly established. Moreover, if such a decision necessitates an assessment of national legislation and case-law it should be left to the judicial authorities in the Member States.
5. In its Opinion No 8/2005 the Court recommended that the Commission should simplify and consolidate the Community's anti-fraud legislation. However, the new proposal makes even more extensive reference to Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities <sup>(2)</sup> (the purpose of which have been considerably extended <sup>(3)</sup>). As no amendment of Regulation (Euratom, EC) No 2185/96 is proposed it will not be clear to a reader of this Regulation that it also applies for other purposes. This is contrary to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation <sup>(4)</sup>. Finally the Court notes that although the new proposal includes procedures and guarantees to be observed by the Office's employees when conducting internal investigations the Commission does not propose to delete the current Article 4(6)(b). This could be a source of confusion and give room for deviations.

This opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 6 December 2006.

*For the Court of Auditors*  
Hubert WEBER  
*President*

<sup>(1)</sup> Article 9(3a).

<sup>(2)</sup> OJ L 292, 15.11.1996, p. 2.

<sup>(3)</sup> According to recital 4 and the amendments to Articles 3 and 4 in the new proposal.

<sup>(4)</sup> The Agreement stipulates that legal text should keep references to other legal acts to a minimum. Where the impact on other legal acts is substantial the Agreement requires a separate amending act (OJ C 73, 17.3.1999, p. 1).

## III

(Preparatory acts)

## COURT OF AUDITORS

### OPINION No 6/2011

(pursuant to Article 325 TFEU)

**on the amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999**

(2011/C 254/01)

THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 325(4) thereof,

Having regard to the Commission's amended proposal <sup>(1)</sup>,

Having regard to the European Parliament's request for an opinion on the abovementioned proposal, received at the Court on 13 May 2011,

HAS ADOPTED THE FOLLOWING OPINION:

#### Introduction

1. The European Anti-Fraud Office (OLAF) was created in 1999 <sup>(2)</sup>. OLAF is a Directorate-General of the Commission but is functionally independent with respect to its investigative work. Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999 assigns OLAF the general objective of contributing to the protection of the Union's financial interests, and confers on it two principal tasks: conducting administrative investigations and providing the Member States with assistance in

order to protect the Union budget against fraud, including contributions to the design and development of methods of fighting fraud and any other illegal activity affecting the financial interests of the Union.

2. Furthermore, the Commission has entrusted OLAF with the preparation of Commission legislative and regulatory initiatives with the objective of fraud prevention, and any other Commission operational activity in relation to the fight against fraud, including the management of funding programmes.

3. For its investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union, the Office cannot rely on the OLAF Regulation alone. The use of an additional legal basis is always necessary to empower the Office to perform investigative measures in specific cases, both for external investigations in the Member States and for internal investigations within the EU institutions, bodies, offices and agencies <sup>(4)</sup>.

4. In addition, OLAF is also empowered by the Commission to investigate any other act or activity in breach of EU provisions, including serious breaches of obligations linked to the performance of their professional activities by staff and members of the institutions and bodies of the Union <sup>(5)</sup>. The OLAF Regulation is not applicable to such cases which do not have an impact on the financial interests of the Union. OLAF has to rely instead on Article 86 of the Staff Regulations, and/or on internal decisions adopted by the institutions, that envisage such investigations.

<sup>(1)</sup> COM(2011) 135 final of 17 March 2011 – Amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999.

<sup>(2)</sup> Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20).

<sup>(3)</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1). The provisions of Regulation (Euratom) No 1074/1999 are identical to those of Regulation (EC) No 1073/1999 but have been adopted on a different legal basis (Article 203 of the Treaty establishing the European Atomic Energy Community).

<sup>(4)</sup> For the most important legal instruments see the Annex to this opinion.

<sup>(5)</sup> See Article 2 of Commission Decision 1999/352/EC, ECSC, Euratom.



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5. The revision of the OLAF Regulation has been under constant discussion since 2003 <sup>(1)</sup>. This amended proposal is the third attempt to modify the OLAF Regulation. The two earlier proposals failed to obtain a consensus <sup>(2)</sup>. To prepare the ground for the third amended proposal, a reflection paper on the reform of OLAF was issued in July 2010 <sup>(3)</sup>.

6. A draft for an amended Commission decision <sup>(4)</sup> has also been presented with a view to maintaining OLAF's current status as a Commission Directorate-General.

7. The political guidelines formulated by the Commission's President <sup>(5)</sup> to the effect that OLAF should be given full independence outside the Commission have not been addressed <sup>(6)</sup>. On the contrary, the draft Commission decision reinforces the Commission's role in the process of selecting OLAF's Director-General and restricts the Director-General's appointing-authority powers with regard to the Office's staff <sup>(7)</sup>.

8. The observations which follow take into account the recommendations made in previous opinions <sup>(8)</sup> of the Court as well as the findings of the audit of the Office, as set out in Special Report No 2/2011 <sup>(9)</sup>.

<sup>(1)</sup> See the Commission report on the evaluation of OLAF's activities, COM(2003) 154 final of 2 April 2003.

<sup>(2)</sup> The first proposal was issued in February 2004 (see COM(2004) 103 final of 10 February 2004) and withdrawn in March 2007. The second proposal was issued in May 2006 (see COM(2006) 244 final of 24 May 2006) and is now superseded by the amended proposal under examination in this opinion.

<sup>(3)</sup> SEC(2010) 859 of 6 July 2010.

<sup>(4)</sup> Preliminary Draft Commission Decision amending its Decision (1999/352/EC, ECSC, Euratom) of 28 April 1999 establishing the European Anti-Fraud Office, SEC(2011) 343 final of 17 March 2011.

<sup>(5)</sup> '(...) I would like to see further steps, for instance in the area of financial management: now that it is well-established, OLAF should be given full independence outside the Commission.' See p. 37 of the Political Guidelines for the next Commission by President Barroso, 28 October 2009: [http://ec.europa.eu/commission\\_2010-2014/president/pdf/press\\_20090903\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf)

<sup>(6)</sup> In his mission letter of 27 November 2009 the President tasked the Commissioner with responsibility for Taxation, Customs Union, Audit and Anti-Fraud to prepare the establishment of OLAF as a fully independent service outside the Commission. See: [http://ec.europa.eu/commission\\_2010-2014/mission\\_letters/pdf/semeta\\_taxation\\_en.pdf](http://ec.europa.eu/commission_2010-2014/mission_letters/pdf/semeta_taxation_en.pdf)

<sup>(7)</sup> To the 'extent necessary to preserve the Office's independence' (proposed new Article 6(1) of the Decision).

<sup>(8)</sup> Opinion No 8/2005 on a proposal for a Regulation of the European Parliament and of the Council on mutual administrative assistance for the protection of the financial interests of the Community against fraud and any other illegal activities (OJ C 313, 9.12.2005, p. 1) and Opinion No 7/2006 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ C 8, 12.1.2007, p. 1).

<sup>(9)</sup> Follow-up of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office: <http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions>

## General observations

9. The Court agrees with the Commission that there is a need to improve the efficiency, effectiveness and accountability of OLAF, while safeguarding its investigative independence <sup>(10)</sup>.

## A need to simplify and consolidate anti-fraud legislation

10. The Court regrets that the Commission has not followed up the Court's repeated recommendation <sup>(11)</sup> to simplify and consolidate the anti-fraud legislation currently in force and to address weaknesses in OLAF's powers and procedures in this context <sup>(12)</sup>. Any such recasting should include the OLAF Regulation, Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities' financial interests <sup>(13)</sup> and Council Regulation (Euratom, EC) No 2185/96 concerning the on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities <sup>(14)</sup>.

11. Without such a recasting, legal certainty is undermined due to the coexistence of overlapping, incoherent or even incompatible provisions which are difficult to understand and apply (see also paragraphs 22 to 24 and 35).

## A need to clearly define the notion of 'financial interests of the Union'

12. The Court reiterates its recommendation <sup>(15)</sup> that the notion of 'the financial interests of the Union' which is central to all anti-fraud legislation should be clearly defined.

<sup>(10)</sup> See in particular recitals 2, 5, 7, 9, 11 and 19 of the amended proposal and the Commission note IP/11/321 of 17 March 2011 which provides a summary of the amended proposal.

<sup>(11)</sup> See paragraph 36 of Opinion No 8/2005, paragraph 5 of Opinion No 7/2006, paragraph 112 of Special Report No 8/2007 (OJ C 20, 25.1.2008, p. 1) and paragraph 71 (follow-up recommendation 3) of Special Report No 2/2011: <http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions>

<sup>(12)</sup> The European Parliament took up the Court's recommendation as early as 2006 (see paragraphs 28 to 32 of the European Parliament Resolution on protection of the financial interests of the Communities and the fight against fraud – 2004 annual report of 15 June 2006 (P6\_TA(2006)0277) (OJ C 300 E, 9.12.2006, p. 508)). The Council also advocated that the legal instruments to combat fraud should be consolidated into a single regulatory framework (see paragraph 6 of the Council conclusions on the reform of the European Anti-fraud Office, as adopted by the Council on 6 December 2010: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/genaff/118236.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/118236.pdf)).

<sup>(13)</sup> OJ L 312, 23.12.1995, p. 1.

<sup>(14)</sup> OJ L 292, 15.11.1996, p. 2.

<sup>(15)</sup> See paragraph 38 of Opinion No 8/2005.

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13. Furthermore, the Court draws attention to the case-law of the Court of Justice <sup>(1)</sup>, which rejected in 2003 a restrictive interpretation of the notion 'financial interests' based on the definition of 'irregularity' in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95. However, the Commission never proposed to amend the Regulation in the light of this jurisprudence.

14. Amending <sup>(2)</sup> Council Regulation (EC, Euratom) No 2988/95 is particularly important in connection with the fight against VAT fraud <sup>(3)</sup>. Such fraud is a major threat not only to the Member States' budgets but also to the collection of the Union's own resources <sup>(4)</sup>.

## A need for independent control of the legality of investigations in progress

15. The Court appreciates the proposal to introduce provisions for procedural guarantees and takes note of the proposal for an internal review procedure (see also paragraphs 37 to 40). The Court regrets, however, that the objective of independent control of the legality of investigative acts in progress will not be achieved under the Commission proposal. For such a control to be effective it must be carried out by a body or a person independent of OLAF which has the power to issue binding opinions. This control of investigative acts in progress is particularly necessary for cases where the persons concerned are not informed that they are subject to an investigation in order to preserve its confidentiality.

## A need for effective and equivalent protection of financial interests

16. The Court points out that the former Article 280(4) EC has been reworded to Article 325(4) TFEU, which now explicitly requires the European Parliament and the Council to adopt the necessary measures with a view to affording effective and equivalent protection of the financial interests of the Union in all the Union's institutions, bodies, offices and agencies. Currently OLAF's investigations are subject to differing conditions laid down in individual internal decisions by the Union's institutions, bodies, offices and agencies <sup>(5)</sup>. While the Court understands that the inherent nature of certain insti-

tutions, bodies, offices or agencies of the Union may require to be taken into account, it also believes that such internal decisions may not necessarily be justifiable in all cases and may result in limiting the scope of OLAF's investigative activities and so jeopardising the effective and equivalent protection of the financial interests of the Union.

## A need for clear rules to investigate serious misconduct in non-financial matters

17. As it is based on Article 325 TFEU, the scope of the OLAF Regulation is limited to investigations concerned with irregularities affecting the financial interests of the Union. There is a need for clear rules to investigate internal cases of serious misconduct which do not concern the financial interests of the Union but are liable to result in disciplinary and/or criminal proceedings, or in proceedings before the European Court of Justice. Existing legislation in this respect is very succinct and applies only to staff concerned by the Staff Regulations and the Conditions of Employment of Other Servants of the European Union <sup>(6)</sup>. The Court believes that the legislator ought to consider what options are available under the Treaty in order to ensure that all cases of serious misconduct are properly investigated.

## A need to keep the text concise, clear and consistent

18. The Court considers that, taken as a whole, the amendments fail to ensure that the provisions of the OLAF Regulation are as concise, clear and consistent as possible. An example in this respect is the use of the terms 'the Office' and 'the Director-General of the Office' which does not seem to follow any particular logic <sup>(7)</sup> and is further complicated by the introduction of specific provisions for delegating the Director-General's powers to other staff of the Office. Another example is the vague wording of the proposed new Article 4(6) which stipulates that 'the Office shall use appropriate alternative channels of information' to provide notification to an institution of cases where its highest management or political level is concerned by an investigation.

## Specific observations

### Priority of the core investigative function

19. The Court recommends that a new wording of Article 1 of the OLAF Regulation should clearly stress the priority of

<sup>(1)</sup> Paragraphs 82 to 95 of the Judgment of the Court of 10 July 2003 in Case C-11/00 *Commission of the European Communities v European Central Bank* (OJ C 213, 6.9.2003, p. 1).

<sup>(2)</sup> Unless the issue is addressed by a recast of anti-fraud legislation.

<sup>(3)</sup> VAT-based revenue is part of the EU's own resources. However, the definition of the notion of 'irregularity' by Council Regulation (EC, Euratom) No 2988/95 does not cover VAT fraud as it only applies to infringements affecting own resources collected directly on behalf of the Communities.

<sup>(4)</sup> See Special Report No 8/2007 concerning administrative cooperation in the field of value added tax (OJ C 20, 25.1.2008, p. 1).

<sup>(5)</sup> See Article 4(1) of Regulation (EC) No 1073/1999.

<sup>(6)</sup> See Article 86(2) of the Staff Regulations.

<sup>(7)</sup> The current Regulation, starting from the assumption that the Director-General holds all decision-making powers conferred upon the Office, seeks to distinguish between situations where the Director-General is allowed to delegate his powers to other staff of the Office and situations where the Director-General is not allowed to delegate his powers. See also in this connection the draft recommendation by the European Ombudsman of 9 December 2010 in his enquiry into complaint 856/2008/BEH against OLAF, paragraphs 92 to 104.

OLAF's core investigative function over other tasks. OLAF's effectiveness critically depends on devoting a greater share of its resources to investigative activities.

## Clarification of key notions needed

20. The Court welcomes the intention to define a number of key notions in the proposed new text of Article 2. However, the proposal is incomplete as it only covers the terms 'administrative investigations', 'person concerned' and 'Staff Regulations'. Definitions, or references to the relevant legal texts where such definitions already exist <sup>(1)</sup>, of other basic terms such as 'fraud', 'corruption', 'serious crime', 'irregularity', 'competent authority of the Member State', 'directly concerned', 'indirectly concerned', 'witness', 'informant', 'interview' and 'statement' should also be included. Furthermore, the Regulation should define what is to be understood by 'administrative investigations of the Member States' and should use distinctive terminology to cover situations where the initial allegations against a person concerned could not be substantiated <sup>(2)</sup>.

21. The Court draws attention to the fact that the definition of the notion of 'administrative investigation' given in the proposed Article 2 is inconsistent with the proposed wording of Article 3(2). Article 2 limits OLAF's task to establishing the irregular nature of the activities under investigation <sup>(3)</sup>. The Office is not required to establish whether an irregularity has occurred as a consequence of an intentional act or omission. Article 3(2) provides that OLAF should aim at establishing that there has been fraud, corruption or any other illegal activity. As a consequence, OLAF would thus need to investigate individual responsibilities of natural persons not belonging to the EU institutions, bodies, offices or agencies for acts which are likely to result in penal sanctions.

## Amendments to Regulation (EC) No 2185/96 are required

22. The current Article 3 of the OLAF Regulation provides that, for the purpose of its external investigations, OLAF exercises the power conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot checks and inspections on economic operators. The proposed new Article 3(2) and the proposed amendment to Article 4(3) extend the use that can be made of the procedures laid down in Regulation (Euratom, EC) No 2185/96 to a number of situations which are not envisaged in the Regulation <sup>(4)</sup>.

<sup>(1)</sup> Unless the anti-fraud legislation is recast.

<sup>(2)</sup> See paragraph 35 of Special Report No 2/2011.

<sup>(3)</sup> Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 provides that 'Irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

<sup>(4)</sup> For example, to obtain evidence relevant for the purpose of internal investigations.

23. At the same time, the proposed new Article 3(2) limits the conducting of on-the-spot checks and inspections to cases related to unjustified expenditure, whilst Regulation (Euratom, EC) No 2185/96 also applies in cases of irregularities prejudicing revenue accruing from own resources collected directly on behalf of the Union.

24. As neither a recasting of the anti-fraud legislation (see paragraph 11 above) nor any amendment of Regulation (Euratom, EC) No 2185/96 is proposed, it will not be clear to the reader of this regulation that it also applies for other purposes and under different conditions from those set out therein. As the Court pointed out in its Opinion No 7/2006 <sup>(5)</sup>, this is contrary to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation which requires the drafter of acts to take account of the persons to whom they are intended to apply with a view to enabling them to identify their rights and obligations in an unambiguous manner <sup>(6)</sup>. If a recasting cannot be agreed, the Commission should propose the consequential amendments to Regulation (Euratom, EC) No 2185/96 in accordance with paragraph 19 of the Agreement.

## Stepping up cooperation with the Member States' competent authorities

25. The Court stresses that Article 4(3) TEU requires the Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from the acts of the institutions of the Union. The Court takes note of the proposed new Article 3(3) which aims to ensure that OLAF's staff are allowed access, under the same terms and conditions as the Member States' competent authorities and in compliance with national law, to all information and documents relating to the matter under investigation which prove necessary for the on-the-spot checks and inspections to be carried out effectively and efficiently. The Court understands that this requirement relates not only to information and documents held by economic operators <sup>(7)</sup> but also to any such information held by the authorities and bodies involved in the shared management of Union funds.

26. A new Article 3(4) is proposed, obliging Member States to designate an anti-fraud coordination service which shall ensure effective cooperation and information exchange with the Office. While better coordination is welcome, such a coordination service alone will not be sufficient to address the difficulties OLAF encounters when carrying out on-the-spot

<sup>(5)</sup> See paragraph 5.

<sup>(6)</sup> See paragraph 3 of the Agreement. Paragraph 16 goes on to stipulate that a legal text should keep references to other legal acts to a minimum (OJ C 73, 17.3.1999, p. 1).

<sup>(7)</sup> For economic operators, a similar provision already exists in Article 7 of Regulation (Euratom, EC) No 2185/96.

checks and inspections in the area of direct expenditure. The problem in this specific area is that not all Member States have set up or designated authorities with the necessary powers to support OLAF's investigative measures effectively <sup>(1)</sup>. The Court suggests that the proposed new Article 3(3) should be amended in such a way that OLAF may be assisted by an appropriate enforcement authority, to enable it to conduct its checks and inspections <sup>(2)</sup>.

## Clarifying the importance of the Staff Regulations for internal investigations

27. The Court recommends that an amended Article 4 on internal investigations should contain a clear reference to the Staff Regulations given their importance for OLAF's internal investigations. Article 22a of the Staff Regulations requires transmission to OLAF of any evidence which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, and Annex IX to the Staff Regulations provides rules for the conduct of administrative investigations with a view to disciplinary proceedings.

## Avoiding confusion with regard to the opening of investigations

28. The proposed Article 5 on the opening of investigations contains complicated provisions that are vaguely worded. Article 5(1) could be interpreted in the sense that the Office has liberty not to investigate suspected fraud or corruption or other illegal acts affecting the financial interests within the EU institutions, bodies, offices and agencies, even when sufficient suspicions exist.

29. Furthermore, amendments are introduced in Article 5(4) and (5) which complement the procedures laid down in Articles 22a and 22b of the Staff Regulations for cases where a staff member provides information to the Office relating to a suspected fraud or irregularity. For reasons of clarity, it would be more appropriate to propose such amendments to the Staff Regulations instead, also taking into account that their scope is broader than that of the OLAF Regulation (see paragraph 4).

## Speeding up the initial assessment and subsequent investigation of cases

30. The Court welcomes the proposed new wording for Article 5(4) which requires the Director-General of the Office to take a decision whether or not to open an investigation within 2 months of receipt by the Office of a request from one of the institutions, bodies, offices or agencies of the Union or from a Member State concerned. The Court

recommends that a maximum duration for assessments should also be set for cases where the Office is provided with initial information from other sources.

31. The new wording of Article 6(6) stipulates that, where it is found that an investigation cannot be closed within 12 months after it has been opened, the Office shall inform the Supervisory Committee of the reasons at intervals of 6 months; such information currently has to be given only once after 9 months. The wording of the new provision is not clear and might be interpreted in the sense that the Supervisory Committee is to be informed for the first time after 18 months.

32. To address the issue of the long duration of OLAF's investigations more effectively <sup>(3)</sup>, it would be appropriate to introduce a standard duration of 12 months, extendable by up to 6 months at a time only on the basis of a decision taken by the Director-General of the Office after informing the Supervisory Committee <sup>(4)</sup>.

## Reinforcing procedural guarantees

33. The proposed Article 7a(2) on procedural guarantees sets out rules for interviewing witnesses and persons concerned. It should be clarified that the interviewee has the right to refuse approval of the record of the interview prepared by the Office. Furthermore, it should be made explicit whether there is an obligation for persons not belonging to the EU institutions, bodies, offices or agencies to accept OLAF's invitation to an interview or to sign the record of such an interview. Finally, prior to the taking of statements in the context of on-the-spot checks, the persons to be interviewed should be informed about their rights; and they should be given access to the record of their statements as drawn up by the Office.

34. In the view of the Court, the proposed Article 7a(4) should not allow exceptions to the rule that the person concerned is entitled to use the official Union language of his or her choice in an interview with the investigators of the Office.

35. The Court notes that the proposed wording of Article 7a(4) allows for a more extensive use of the option of deferring the fulfilment of the obligation to ask the person concerned to make their views known. The proposed text stipulates that the Director-General may take such a decision when two conditions are met: that a case entails the use of investigative proceedings falling within the remit of a national

<sup>(1)</sup> See paragraphs 40 to 42 of Special Report No 2/2011.

<sup>(2)</sup> A similar provision exists in Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(3)</sup> Article 41 of the Charter of Fundamental Rights of the European Union provides that every person has the right to have his or her affairs handled within a reasonable time by the institutions, bodies, offices and agencies of the Union.

<sup>(4)</sup> The Commission proposed such a procedure in its reply to paragraph 80 of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF) (OJ C 202, 18.8.2005, p. 1). See also paragraph 27 of Special Report No 2/2011.



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judicial authority and that it is 'necessary to preserve the confidentiality of the investigation'. This wording is not in line with Article 1(2) of Annex IX to the Staff Regulations which is more restrictive in this respect as it limits the use of this option to 'cases that demand absolute secrecy'.

36. Once OLAF has opted to defer a hearing, its investigators are often precluded from asking the persons concerned to make their views known as long as proceedings of a national judicial authority continue. As a consequence, OLAF cannot close the case, even in situations where no further investigative activities are to be carried out by the Office. As such situations are not in line with the requirement set out in Article 6(5) of the OLAF Regulation that investigations have to be conducted continuously, appropriate provisions should be introduced to deal with them.

## Internal review procedure

37. The new Article 7b provides for an internal review procedure at the request of any natural person concerned by an OLAF investigation regarding the respect of procedural guarantees by the investigators of the Office. It is envisaged that the OLAF staff member(s) entrusted with the review procedure shall not take instructions from anyone and that they may inform the Supervisory Committee if they consider that a measure taken by the Director-General calls their independence into question.

38. Nevertheless, the Court considers that the required complete independence in the post is not guaranteed as those entrusted with the review procedure remain under the authority of the Director-General. Furthermore, it is not clear whether, and when, the Supervisory Committee will receive copies of the opinion which the person in charge of a review of a case has submitted to the Director-General and of the reasoned reply which has been sent to the person concerned.

39. The proposed review procedure would be launched only at the request of a person concerned. It would not cover cases where the persons concerned do not know that they are subject to an OLAF investigation as their information has been deferred in order to preserve the confidentiality of the investigation.

40. Instead, the Court suggests creating the function of a review officer. He should neither be appointed by the Director-General nor be subject to his authority. The review officer should not only be required to issue binding opinions at the request of the persons concerned but should also be empowered to issue such opinions in all cases where the transmission of information to the national judicial authorities is envisaged by the Director-General or where investigations last for more than 2 years. To that end, the review officer should

have full access to OLAF's relevant case files. He should address his opinions to both the Director-General and the Supervisory Committee.

## Cooperation with Eurojust, Europol and international organisations

41. The proposed Article 10a introduces provisions for the Office to cooperate with Eurojust, Europol and international organisations. OLAF's obligations to inform Eurojust of suspected serious crime in the form of fraud, corruption or other illegal activities are described in a vague manner. The Court recommends that objective criteria should be introduced to identify appropriate cases for collaboration, similar to those contained in the 'Practical Agreement on arrangements of cooperation between Eurojust and OLAF' <sup>(1)</sup>.

## Clarifying the role of the Supervisory Committee

42. With regard to the proposed amendments to Article 11 on the Supervisory Committee, the Court welcomes the proposal that the Committee shall, in future, monitor the functioning of information exchange between the Office and the institutions, bodies, offices and agencies. The Court recommends that the Committee's monitoring should also extend to exchanges of information between the Office and the authorities of the Member States, including the exchange of information through Eurojust.

43. According to the proposed new Article 11(1), the extent of the Supervisory Committee's access to information on investigations and to OLAF case files would be almost entirely left to the discretion of the Director-General of the Office. The Court recommends clarification that the Committee needs access to OLAF's case files in order to be able to detect instances of interference with the Office's independence.

44. In order to reinforce the independent role of the Supervisory Committee, the Court recommends that the proposed Article 11(6) should provide that the Committee's secretariat must act solely in accordance with the Committee's instructions and independently of OLAF, and may not be appointed by or subject to the authority of the Director-General <sup>(2)</sup>.

<sup>(1)</sup> Point 5 of the Agreement stipulates that, with a view to identifying appropriate cases for collaboration, OLAF will inform Eurojust as soon as possible of the existence of any case where it appears that it directly involves judicial cooperation between the competent authorities of two or more Member States, or where the case concerns a Member State and the Community (OJ C 314, 9.12.2008, p. 3).

<sup>(2)</sup> Various options exist, see for example the provisions laid down in Decision No 235/2008/EC of the European Parliament and of the Council of 11 March 2008 establishing the European Statistical Governance Advisory Board (OJ L 73, 15.3.2008, p. 17). Article 4(4) of the Decision stipulates that this high-level advisory body set up with a view to enhancing the independence, integrity and accountability of Eurostat shall be assisted by a secretariat which shall be provided by the Commission but which must act independently thereof.

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45. The Court recommends taking into account the Court of First Instance's judgment of July 2008 <sup>(1)</sup>, which held that an important function of the Supervisory Committee is to protect the rights of persons who are the subject of OLAF investigations. The Court notes that the Committee's role in this respect is likely to be diminished as, pursuant to the proposed new Article 11(7), the Director-General of OLAF will no longer <sup>(2)</sup> be obliged to inform the Committee of cases requiring information to be forwarded to the judicial authorities of a Member State before they are transmitted. In the Court's view, this could be compensated for by introducing the function of a review officer reporting to the Committee (see paragraph 40).

## The 'exchange of views procedure' may undermine investigative independence

46. The proposed new Article 11a introduces a regular exchange of views at political level to discuss the Office's policy of investigations obliging the Office in Article 11a(4) 'to take appropriate action taking into account the opinions expressed in the exchange of views'. Such a procedure could be perceived as undermining the independence of the Director-General in identifying and defining the investigative priorities of the Office <sup>(3)</sup>. Furthermore, such a procedure could evolve into a kind of de facto governing board of the Office without the responsibilities of those participating in it being clearly defined and without any indication of the procedural framework for such an exercise.

47. If the proposed new Article 11a intends to achieve a greater involvement by all the Institutions in the operating of

the Office, transforming OLAF into an interinstitutional office <sup>(4)</sup> would be a better option. Such a solution would also reflect the changes brought about by Article 325 TFEU with regard to an effective and equivalent protection of the financial interests of the Union in all the Union's institutions, bodies, offices and agencies.

## Clarifying the role of the Director-General

48. The Court sees no valid reasons for the Commission's proposal to delete from the current Article 12(3) the obligation to report to the Court of Auditors on the findings of investigations carried out by the Office.

49. The Court notes the proposed new Article 12(5) empowering the Director-General to delegate the exercise of certain of his functions to other members of the Office's staff, in particular concerning decisions to open investigations or powers to direct the conduct of investigations. The Court draws attention to the risk that the proposal might result in diluting key responsibilities of the Director-General.

50. The proposed new Article 12(6) stipulates that the Director-General shall be assisted by an 'internal body' which he shall consult on the opening of an investigation, before the closing of an investigation and whenever he deems appropriate. The Court draws attention to the risk that such a consultation procedure might prevent the Director-General from acting swiftly in situations of urgency.

This Opinion was adopted by Chamber IV, headed by Mr Igors LUDBORŽS, Member of the Court of Auditors, in Luxembourg at its meeting of 12 July 2011.

For the Court of Auditors

Vítor Manuel da SILVA CALDEIRA

President

<sup>(1)</sup> Case T-48/05 *Franchet and Byk v Commission* of 8 July 2008 (OJ C 209, 15.8.2008, p. 44).

<sup>(2)</sup> Currently Article 11(7) of the OLAF Regulation provides that the Director of the Office shall inform the Supervisory Committee of 'cases requiring information to be forwarded to the judicial authorities of a Member State'. The Court of First Instance stipulated in paragraph 168 of its judgment in Case T-48/05 that '... it cannot be disputed that the requirement to consult that Committee before forwarding information to the national authorities is intended to confer rights on the persons concerned.'

<sup>(3)</sup> See guiding principle No 3 set out in Resolution (97)/24 on the twenty guiding principles for the fight against corruption adopted by the Committee of Ministers of the Council of Europe on 6 November 1997, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=593789&>

<sup>(4)</sup> See as an example for such an interinstitutional office the decision establishing the European Communities Personnel Selection Office EPSO (Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 (OJ L 197, 26.7.2002, p. 53)).



## ANNEX

## MAIN LEGISLATION CONCERNING OLAF'S INVESTIGATIVE ACTIVITIES

**Decision setting up OLAF**

Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20).

**General legislation on the protection of the financial interests <sup>(1)</sup>**

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (also known as the 'PIF Regulation') (OJ L 312, 23.12.1995, p. 1).

**General rules for investigative activities <sup>(1)</sup>**

Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1).

Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 8).

**On-the-spot checks and inspections on the premises of economic operators <sup>(1)</sup>**

Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

**Rules on data protection**

Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

**Cooperation with Eurojust**

Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1), as most recently amended by Council Decision 2009/426/JHA of 16 December 2008 (OJ L 138, 4.6.2009, p. 14).

**Internal investigations within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties**

Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1), as most recently amended by Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 (OJ L 311, 26.11.2010, p. 1) ('the Staff Regulations').

About 50 different internal decisions adopted by the institutions, bodies, offices and agencies pursuant to Article 4 of Regulation (EC) No 1073/1999.

Where these internal decisions follow the 'Model Decision' annexed to the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 15), they go beyond the protection of the financial interests of the Union and provide the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Union's interests.

Further information can be found on OLAF's website <sup>(2)</sup>.

<sup>(1)</sup> Only applicable in the case of investigations concerning the protection of the financial interests.

<sup>(2)</sup> [http://ec.europa.eu/dgs/olaf/legal/index\\_en.html](http://ec.europa.eu/dgs/olaf/legal/index_en.html)

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FOLLOW-UP OF SPECIAL REPORT No 1/2005  
CONCERNING THE MANAGEMENT OF THE  
EUROPEAN ANTI-FRAUD OFFICE



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# FOLLOW-UP OF SPECIAL REPORT No 1/2005 CONCERNING THE MANAGEMENT OF THE EUROPEAN ANTI-FRAUD OFFICE

(pursuant to Article 287(4), second subparagraph, TFEU)

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## EXECUTIVE SUMMARY

**I.** The European Anti-Fraud Office (OLAF) is charged with fighting fraud and other illegal activities detrimental to the EU budget. The Office, which belongs to the Commission but has investigative autonomy, employs in the order of 500 staff, and annual expenditure amounts to some 50 million euro. In 2005 the Court of Auditors' Special Report No 1/2005 concerning the management of OLAF identified weaknesses in the management of investigations and made 17 recommendations to refocus activities on the investigative function, improve efficiency and demonstrate effectiveness (see paragraphs 1 to 5).

**II.** OLAF now makes more use of its powers to carry out on-the-spot checks, examine witnesses and question suspects. In order to refocus on the investigative function OLAF created two investigation directorates to replace the one existing previously. However, the Commission considers that OLAF is most effective as an all-round anti-fraud authority rather than a service concentrated on investigations and so did not divest OLAF of its non-investigative activities such as anti-fraud strategy and funding programmes. Consequently, the rate of increase in staff in the investigation directorates (32 %) has not kept pace with growth in the rest of the Office (43 %). In 2009 investigative casework accounted for 37 % of the time of the Office as a whole (see paragraphs 7 to 18).

**III.** OLAF has taken a number of steps to improve the efficiency of investigations. It has made fuller use of its electronic case management system (CMS), carried out more focused training, introduced targets to focus on more serious and complex cases, reduced the proportion of temporary staff and introduced a Time Management System (TMS). However, the TMS is not used for planning purposes and workplans do not include estimates of the time required and deadlines for investigations. There is a need to improve the management of cases in progress in order to resolve problems faster and avoid long periods of inactivity: the average case duration remains over two years. In addition, OLAF now receives 50 % more initial information on possible frauds and irregularities than in 2004 and the average duration of the initial assessment of this information has doubled from 3,5 months to 7 months. Although there are 32 % more investigators than in 2004, the number of cases under investigation has not increased. This reflects the focus on more serious cases, the increasing proportion of OLAF's own investigations and the redirection of investigative resources to carrying out initial assessments (see paragraphs 19 to 37).

## EXECUTIVE SUMMARY

### IV.

The legal framework<sup>1</sup> has not changed since the Court's last report. There is still no independent control of investigative acts in progress, nor is there a code guaranteeing that investigative acts follow a predictable course. A Practical Agreement for cooperation with Eurojust has so far had limited impact (see paragraphs 38 to 44).

### V.

OLAF sets clear objectives for the Office in its Annual Management Plan. Investigations have resulted in the identification of significant sums for recovery, judicial and disciplinary action, and closure of investigations where initial allegations were shown to be unfounded. Information on OLAF's performance is available in CMS concerning activity, potential results and real results. However, OLAF does not report this information in a single document which would enable reliable comparisons to be made of its performance over time and across sectors (see paragraphs 45 to 57).

### VI.

The Supervisory Committee has revised its rules of procedure and has produced a number of reports and opinions concerning the management of OLAF. A procedure has been introduced to consult the Supervisory Committee before forwarding information to national judicial authorities although this does not yet adequately protect the rights of individuals concerned (see paragraphs 58 to 65).

### VII.

On the basis of these observations the Court's main recommendations are that OLAF should (see paragraphs 66 to 76):

- (a) Increase the number and speed of investigations by increasing the proportion of time spent on them and revising the legal framework.
- (b) Improve efficiency by including estimates of resources required and deadlines in plans for investigations. Plans should be monitored and updated. The Executive Board should play a role in ensuring that the overall duration of assessments and investigations is reduced.
- (c) Provide reliable information on effectiveness by publishing in a single document performance statistics on activity, potential and real results.
- (d) Better define a procedure for consulting the Supervisory Committee before transmitting information to national judicial authorities.

<sup>1</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1).

## INTRODUCTION

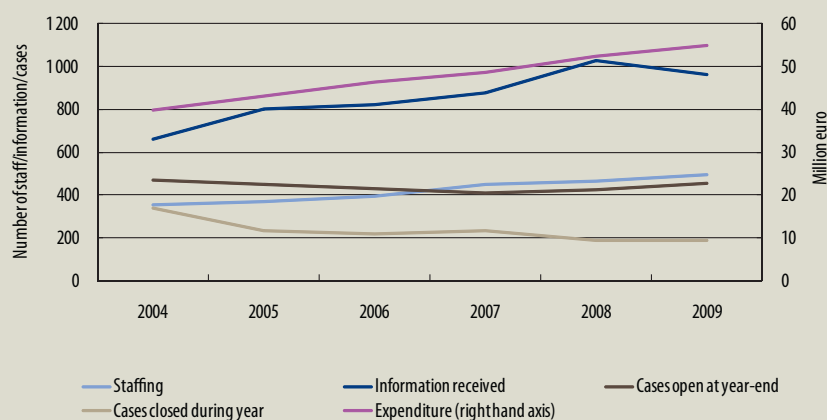
1. In 2005 the Court of Auditors published Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF)<sup>2</sup>. The audit identified weaknesses in OLAF's management of investigations and made 17 recommendations to refocus activities on the investigative function, improve efficiency and demonstrate effectiveness. OLAF produced an action plan for the implementation of the accepted recommendations and in 2007 reported on progress to the Audit Progress Committee of the Commission<sup>3</sup>. An outline of OLAF's role and tasks is set out in **Box 1**.
2. **Figure 1** illustrates the evolution of activity in OLAF since 2004 in terms of expenditure, staffing, information received and cases handled. The number of cases under investigation at any one time has remained at some 400, each lasting on average two years, and in the order of 200 cases are closed each year. The amount of initial information received has increased considerably and OLAF now receives approximately 1 000 different communications from various sources each year.

<sup>2</sup> OJ C 202, 18.8.2005, p. 1.

<sup>3</sup> Audit Progress Committee meeting on 5 July 2007 - Progress report by OLAF on the implementation of the recommendations of the Court of Auditors' Special Report No 1/2005.

FIGURE 1

### OLAF EXPENDITURE, STAFFING AND CASELOAD 2004 TO 2009



Source: OLAF.

**BOX 1****OLAF'S ROLE AND TASKS****Key objectives and activities**

OLAF was set-up in 1999<sup>4</sup> with the aim of increasing the effectiveness of the fight against illegal activities detrimental to the Union's financial interests. OLAF is responsible for a range of activities including carrying out administrative investigations for fighting fraud, assisting Member States in fraud prevention and collecting and analysing information.

OLAF has investigative independence, which is reinforced by a Supervisory Committee made up of five independent persons from outside the EU institutions.

**Types of case**

The Office divides its cases into the following categories:

- (a) Investigations
  - internal investigations (investigations within the EU institutions and bodies);
  - external investigations (investigations into economic operators involving EU funds).
- (b) Coordination and assistance operations
  - coordination of Member States in investigations concerning more than one country;
  - support for national judicial authorities in the context of criminal proceedings.

**The key stages of investigations**

- (a) OLAF receives denunciations from within or outside the EU institutions;
- (b) OLAF assesses the initial information and the Director decides whether or not to open a case;
- (c) OLAF investigators gather evidence e.g. through interviews and on-the-spot checks;
- (d) The investigators report to the Board the results of the investigative activities. The Director decides what follow-up action to initiate, if any. Follow-up action may include transmission of case information to the competent national or EU authorities with a view to launching judicial or disciplinary proceedings or recovering funds;
- (e) OLAF verifies whether the responsible authorities have taken the recommended follow-up action.

The outcome of OLAF's work can take the form of four types of follow-up: financial, administrative, judicial and disciplinary.

<sup>4</sup> Commission Decision 1999/352/EC, ECSC, Euratom (OJ L 136, 31.5.1999, p. 20); Regulation (EC) No 1073/1999.

## STATUS OF RECOMMENDATIONS

3. **Table 1** lists the original 17 recommendations made in Special Report No 1/2005. The Court notes that 13 of its recommendations were followed up by OLAF, three others (recommendations 2, 14, 15) were not accepted by the Commission, while recommendation 16 on the role of the Supervisory Committee needs to be seen in the light of a judgment of the Court of First Instance in July 2008<sup>5</sup>.

<sup>5</sup> Case T-48/05 of 8 July 2008 (OJ C 209, 15.8.2008, p. 44).

TABLE 1

STATUS OF ECA RECOMMENDATIONS MADE IN SPECIAL REPORT NO 1/2005 ON OLAF

Recommendation	Status
1. Specify results to be achieved by investigations and introduce performance indicators to assess success	Accepted
2. Consider creating a separate unit dedicated to coordination and assistance operations to improve management of resources	Not accepted
3. Establish smaller groupings on the Executive Board with the aim of setting clear plans and objectives for investigations	Accepted
4. Supervise the investigation process to focus on priorities and on the search for evidence by making better use of the investigation means available	Accepted
5. Introduce a time recording system linked to work plans with estimates of time to be spent on investigations to align workload with resources and to avoid delays	Accepted
6. Establish a maximum duration for investigations	Partially accepted
7. Remove follow-up activities (involvement in judicial proceedings and recovery of funds) that can be performed by authorising officers	Partially accepted
8. Codify and publish procedures to protect the rights of individuals at all stages of the investigation and to provide controls on the legality of the investigative acts in progress	Accepted
9. Formalise arrangements for cooperation between OLAF and the Member States through legislation or the conclusion of agreements with national investigation services	Accepted
10. Convert CMS into a system of investigation management and increase training of investigators in investigation techniques, legislation and report-writing skills	Accepted
11. Produce reliable and relevant reports on performance, based on real rather than potential results	Accepted
12. Implement a masterplan for personnel management to resolve structural problems	Accepted
13. Strategic analysis services should seek improvement in the data forwarded by Member States and create databases which can be used to identify anomalies and launch investigations	Accepted
14. Transfer responsibility for anti-fraud strategy to other Commission services	Not accepted
15. Give responsibility for managing funding programmes (e.g. Pericles and Hercules) to other Commission services	Not accepted
16. Clarify the role of the Supervisory Committee to ensure that there is no interference in ongoing investigations	Accepted
17. Refocus activities on the investigative function, accompanied by changes in governance and regulations	Partially accepted

Note: The recommendations made in Special Report No 1/2005 were not numbered. They are presented here, in summary form, in the order in which they appeared in the report.

## AUDIT SCOPE AND APPROACH

**4.** The follow-up audit set out to establish the action taken to implement the recommendations of Special Report No 1/2005. The audit aimed to answer the following four questions which group together the different recommendations (see **Annex I**):

- (a) Have the activities of OLAF been refocused on its investigative function? (recommendations 2, 7, 13, 14, 15, 17)
- (b) Has OLAF improved the efficiency of its investigations? (recommendations 3, 4, 5, 6, 8, 9, 10, 12)
- (c) Can OLAF demonstrate the effectiveness of its investigations? (recommendations 1 and 11)
- (d) Has the role of the Supervisory Committee been clarified? (recommendation 16).

**5.** The audit comprised:

- (a) an analysis of policy, planning, procedural, staffing and financial documentation and statistics obtained from OLAF including its action plan to address the recommendations of Special Report No 1/2005;
- (b) interviews with OLAF Directors, Heads of Unit and investigators; meetings with the OLAF Supervisory Committee and its Secretariat to discuss their reports and opinions; interviews with other relevant bodies (Investigation and Disciplinary Office of the Commission (IDOC), Eurojust);
- (c) an assessment of a random selection of 30 investigations out of the 332 internal and external investigations open on 1 July 2008<sup>6</sup>. The assessment was based on an analysis of the case-related documentation held on the computerised Case Management System (CMS) and interviews with the investigators concerned.

<sup>6</sup> The audit selected cases which were open on 1 July 2008 in order to review all stages of the procedure up to April 2010 (initial assessment, active investigation, final decision and follow-up where applicable).



## OBSERVATIONS

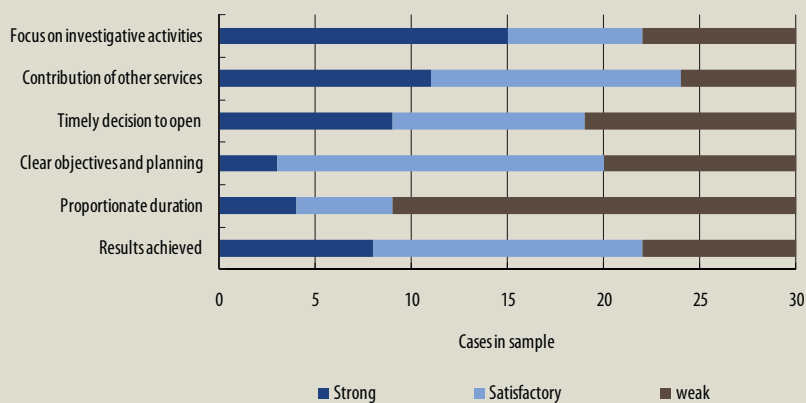
6. Findings emerging from the examination of the sample of 30 cases are summarised in **Figure 2**. Each investigation was assessed as strong, satisfactory or weak against the following criteria: the focus on investigative activity, contribution of other OLAF services to the case, timeliness of decisions to open the case, clarity of objectives and planning, proportionate duration, and results achieved. The findings are examined further in the relevant sections of the report.

### REFOCUSING ON THE INVESTIGATIVE FUNCTION

7. The Court followed up the recommendations of Special Report No 1/2005 that OLAF should divest or separate certain non-investigative activities and improve the contribution of strategic services to the investigative function. OLAF reorganised its directorates in 2006 and the new organisation structure (see **Annex II**) was intended to put more focus on OLAF's investigative function.

FIGURE 2

### ASSESSMENT OF CRITERIA IN 30 CASES EXAMINED



Source: Examination of 30 cases.

## NON-INVESTIGATIVE ACTIVITIES HAVE NOT BEEN DIVESTED

8. The Court made four recommendations to divest or separate activities. The recommendation to transfer follow-up activities (recommendation 7) was partially accepted. As the Commission continued to insist on maintaining OLAF as an all-round anti-fraud authority rather than a service concentrated on investigations, the other three recommendations were not accepted: the transfer of responsibility for anti-fraud strategy to other Commission services (recommendation 14); the transfer of responsibility for managing funding programmes to other Commission services (recommendation 15); and the separation of coordination and assistance operations from investigations (recommendation 2).
9. Concerning recommendation 7 to transfer follow-up activities, action has been taken to give primary responsibility to Commission services for follow-up activities<sup>7</sup>. OLAF remains involved in judicial and disciplinary follow-up (Unit C1, see organisation chart in *Annex II*) and financial follow-up (Units C2 and C3). OLAF's role is to optimise conditions for follow-up and to verify whether Commission services and national authorities have taken the necessary measures.

<sup>7</sup> Commission Decision – Communication C(2007) 5709 of 27.11.2007 clarifying the respective responsibilities of OLAF and the Commission's authorising officers for financial follow-up of irregular expenditure.

TABLE 2

### STAFF DISTRIBUTION 2004–09<sup>1</sup>

Date	Investigations and operations (directorates A and B)			Other (directorates C and D, Director-General and Supervisory Committee)			Total OLAF	% Investigations and operations
	Officials and temporary	Contract staff	Total	Officials and temporary	Contract staff	Total		
end 2004	100	25	125	165	65	230	355	35,2 %
end 2005	107	22	129	174	67	241	370	34,9 %
end 2006	110	25	135	180	77	257	392	34,4 %
end 2007	126	21	147	205	100	305	452	32,5 %
end 2008	140	20	160	212	93	305	465	34,4 %
end 2009	143	22	165	217	111	328	493	33,5 %

<sup>1</sup> The table shows the actual number of staff employed.

Source: OLAF.

10. The proportion of staff working in investigations and operations directorates is on average 34 % (2004–09) as shown in **Table 2**.
11. Some of the staff in Directorates C (Operational and Policy Support) and D (General Affairs) are also involved in the investigative process. OLAF introduced a Time Management System (TMS) in 2007 which records time spent by all OLAF staff on casework and on other activities<sup>8</sup>. The TMS shows that not all of the time of the staff in investigation directorates is spent on casework. In 2009 they allocated 63 % of their time to casework, 27 % to management and administration and 10 % to policy and resources. Conversely, staff working in other directorates spent 25 % of their time directly supporting casework. The resulting total amount of time spent on casework by staff in all directorates amounts to 37 % as shown in **Figure 3**<sup>9</sup>. Only just over half of this was allocated to specific cases<sup>10</sup>.

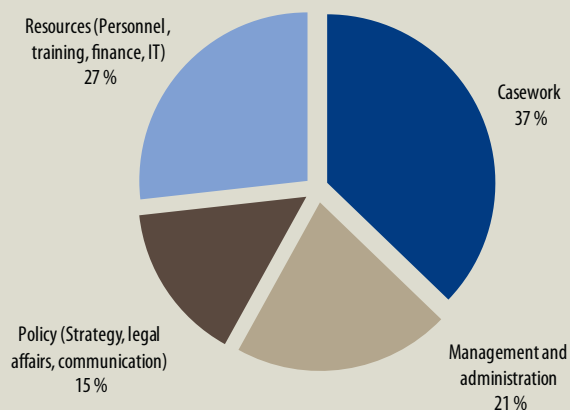
<sup>8</sup> In 2009 over 98 % of all hours available were recorded in the time management system.

<sup>9</sup> The workload of staff in the investigation directorates also covers assessments and co-ordination and assistance cases.

<sup>10</sup> An investigator or Head of Unit working on a large number of cases would allocate time to casework without indicating specific cases.

FIGURE 3

## USE OF STAFF TIME RECORDED IN TMS IN 2009



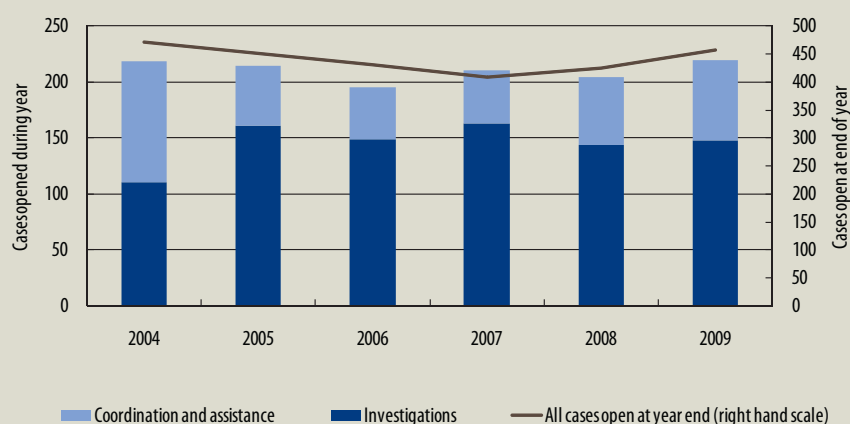
Source: OLAF Time Management System.

## GREATER FOCUS ON INVESTIGATIVE ACTIVITIES

12. The Court recommended that OLAF should refocus on the investigative function accompanied by changes in the regulations while leaving other services with the responsibility for preventive or legislative acts (recommendation 17).
13. In September 2006 two investigations and operations directorates (Directorates A and B) were created to replace the one existing previously (Directorate B). The new organisation (see **Annex II**) was intended to put more focus on OLAF's investigative function. The Court's recommendation to accompany the refocusing on the investigative function with modifications to the governance of the Office through changes in the regulations has not been implemented (see paragraph 38).
14. The examination of a sample of 30 cases indicated an increased focus on investigative activities such as interviews or on-the-spot checks. It also showed the contribution of OLAF services, other than Directorates A and B, which are integrated in the investigative process and provide support when necessary such as the provision of judicial advice and forensic data analysis (**Figure 2**).
15. Another indicator of refocusing is the increase in the proportion of OLAF's own investigations compared with coordination and assistance cases. The proportion of OLAF's casework represented by investigations has increased from 50 % in 2004 to 67 % in 2009 (**Figure 4**).

**FIGURE 4**

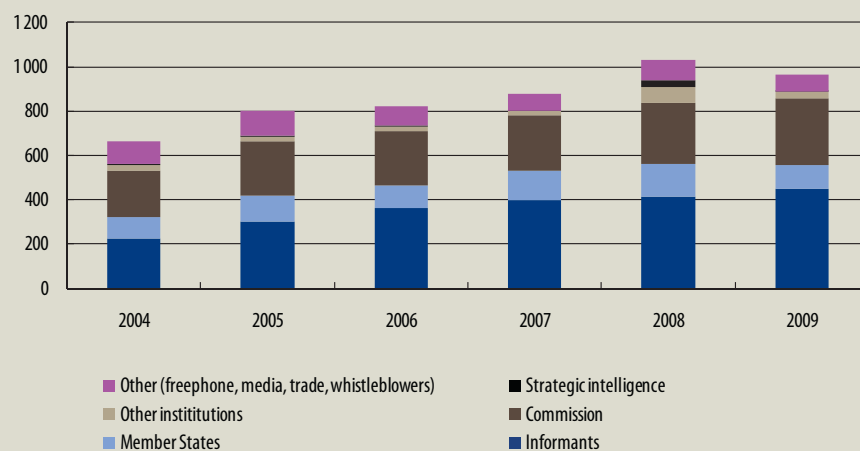
## ANALYSIS OF CASES OPENED



Source: OLAF.

**FIGURE 5**

## SOURCE OF INITIAL INFORMATION RECEIVED 2004-09



Source: OLAF.

## CONTRIBUTION OF STRATEGIC SERVICES TO THE INVESTIGATIVE FUNCTION REMAINS LIMITED

16. The Court recommended that strategic analysis services should aim to identify anomalies which can be used to launch investigations (recommendation 13).
17. OLAF's strategic intelligence (Units C2 and C3) has improved systems to manage the reliability of data obtained from Member States, concerning, in particular, irregularities in the agricultural and structural funds areas. It now delivers products which are used by the investigation directorates and also by the relevant services in the Commission and in Member States.
18. Strategic intelligence provides general guidance relevant to policy development and operational strategy by identifying risk areas and patterns of fraud. It may also lead to the opening of specific cases<sup>11</sup>, either directly or indirectly. Of the 332 investigations open on 1 July 2008, six (i.e. 2 %) were the direct result of strategic intelligence. **Figure 5** shows the source of all initial information received from 2004 to 2009, of which 0,7 % came from strategic intelligence.

<sup>11</sup> OLAF Manual of Operational Procedures, 1 December 2009 section 3.1.9.

## IMPROVING THE EFFICIENCY OF INVESTIGATIONS

19. The Court followed-up the recommendations of Special Report No 1/2005 which aimed to improve the planning and supervision of investigations and to ensure they were implemented in a timely manner in compliance with a clear legal and procedural framework.



## PLANNING DOES NOT INCLUDE MANPOWER AND DEADLINES

20. Concerning planning, the Court recommended that smaller groupings should be established on the Executive Board, consisting of directors and heads of unit, in order to set clear plans and objectives for individual investigations (recommendation 3) and that a time recording system should be introduced linked to work plans with estimates of time to be spent on investigations (recommendation 5).
21. Concerning the recommendation for smaller board groupings, the Board now meets on alternate weeks as Board A and Board B, composed according to the respective competencies of the two new Directorates A and B. This split should have allowed a more thorough analysis of case proposals. However, the Court's examination of a sample of investigations showed that for one third of cases plans and objectives were still not clear (**Figure 2**).
22. Concerning recommendation 5, a time management system (TMS) was introduced from October 2007. All OLAF staff, with the exception of Supervisory Committee staff, are required to record the use of their time by tasks. In 2009 over 98 % of all hours available were recorded in the time management system. It is currently a system for recording time. The data in the system is not used to manage casework.
23. The initial assessment of information received (see paragraph 32) includes a workplan which indicates the first steps of the investigation and is reviewed in the nine month report to the Supervisory Committee. Although the workplan indicates the number of investigators and specific skills required there is no estimation of the time required and deadlines. TMS is not used for planning purposes. Outside TMS, Unit B2 (which deals with customs cases) does produce time charts in order to plan the work of investigators. Plans may need to be reassessed once investigative activities are underway because recommendations to open a case are based on the information available at the time and no investigative activities can be carried out during the initial assessment phase<sup>12</sup>.

<sup>12</sup> OLAF Manual 1 December 2009 section 3.2.1. However, in two cases from the Court's sample, investigative activities started following a board recommendation but before a formal decision to open a case had been taken by the Director. In one of these cases all investigative steps had been completed before the decision to open an investigation was taken.

## MEASURES TAKEN TO FOCUS ON PRIORITIES

24. The Court recommended that investigations should focus on priorities in order to make the most of the means available (recommendation 4).
25. A *de minimis*<sup>13</sup> approach has been introduced for external investigations based on indicative financial thresholds<sup>14</sup> and other criteria such as reputational risk, indications of systematic fraud and whether there are other competent investigative bodies.
26. Since 2004 OLAF has grown by 39 % from 355 to 493 staff, whilst the number of staff in the investigations and operations directorates has increased by 32 % from 125 to 165 staff (see **Table 2**). The increase in the number of staff in the investigations and operations directorates has not been accompanied by an equivalent increase in the number of cases (see **Figures 1 and 4**). In 2009 OLAF carried out fewer cases per person in investigations and operations than in 2004 (2,8 open cases instead of 3,7). This development reflects:
- the focus on more serious complex cases resulting from the *de minimis* policy;
  - the increasing proportion of OLAF's own investigations (see **Figure 4**);
  - the deployment of more investigative resources to assessing the increasing amount of information received (see **Figure 5**). The quantity of initial information analysed which did not lead to the opening of a case doubled from 364 such 'non-cases' in 2004 (including 108 *prima facie* non-cases<sup>15</sup>) to 755 in 2009 (including 267 *prima facie* non-cases).

<sup>13</sup> An abbreviated form of the Latin *maxim de minimis non curat lex*, 'the law cares not for small things'. The Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49) stipulates that, for the purpose of criminal prosecution, fraud involving an amount exceeding 50 000 euro shall be considered in any event as serious fraud.

<sup>14</sup> 1 million euro in the customs, cigarettes and trade sectors; 100 000 euro in the agriculture and structural funds sectors; 50 000 euro in direct expenditure and external aid cases. (See page 5 of the Annual Activity Report of OLAF for 2009 — [http://ec.europa.eu/atwork/synthesis/aar/doc/olaf\\_aar.pdf](http://ec.europa.eu/atwork/synthesis/aar/doc/olaf_aar.pdf))

<sup>15</sup> *Prima facie* non-cases relate to information received which clearly does not fall within the competence of OLAF or clearly does not justify the use of OLAF resources.

## **DURATION OF INVESTIGATIONS HAS NOT IMPROVED**

- 27.** The Court recommended that a maximum duration for investigations be established (recommendation 6). The Commission accepted the idea of imposing maximum time limits for conducting investigations and made a legislative proposal<sup>16</sup> to introduce a standard duration of 12 months which was extendable by up to six months at a time on the basis of a decision taken by the Director of the Office after consulting the Supervisory Committee. However, no changes to the legal framework have yet been adopted.
- 28.** OLAF's Annual Management Plan for 2010 has a minimum target of closing 75 % of cases within 24 months, 10 % of which in less than nine months. Regulation (EC) No 1073/1999 states that where an investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to complete it. The duration of investigations is an important issue not only because of the risk of time-barring, but also for the efficiency of OLAF and for persons concerned by such investigations.
- 29.** Duration is monitored through day-to-day supervision by Heads of Units, monthly operational reports and, in Directorate B, case reports drawn up every three months. The Board is only involved at the opening and closing stages of cases. For cases which last longer than nine months the investigator prepares a report for the Supervisory Committee summarising the status of the case, the reasons for the delay and the estimated time for completion. The new manual also requires 18 month reports to be prepared for internal purposes only<sup>17</sup>. No further reporting of this nature is required although most investigations last longer than 18 months. There is a need to improve the management of cases in progress in order to resolve problems faster and avoid long periods of inactivity.

<sup>16</sup> See COM(2004) 103 final, proposed new Article 6(7) p. 10.

<sup>17</sup> OLAF Manual of Operational Procedures 1 December 2009 Section 1.4.7 states: 'If the case is still ongoing nine months after being opened, the investigator prepares a report for the Supervisory Committee summarising the allegations, the status of the case and the reasons for the delay and the estimated time for completion. Another report following a similar internal procedure must be prepared for the management 18 months after the opening of the investigation.'

30. **Table 3** shows the actual number of cases closed in nine months from 2004 to 2009 is generally just over 10 %, in line with the target in the Annual Management Plan.
31. Although between 2004 and 2009 the number of cases per person in investigations and operations has decreased (see paragraph 26), this has not had an impact on the duration of cases. The average duration of all cases (external and internal investigations, criminal assistance and coordination cases) from 2004 to 2009 has varied little and remains at over two years (25 months) as shown in **Figure 6**. Many investigations take considerably longer to complete than the average of two years. At the end of 2009, 125 of 457 cases in progress (27 %) had been open for more than two years. Of these, 33 had been open for more than three years and a further 21 for more than four years. The examination of the 30 cases showed that long duration is sometimes due to outside factors, but more often due to internal factors such as lack of resources assigned to cases or shifts in priorities.

TABLE 3

## CASES CLOSED IN NINE MONTHS

Year of closure	Total cases closed	Total closed in 9 months	%
2004	339	60	18 %
2005	233	27	12 %
2006	217	24	11 %
2007	232	21	9 %
2008	187	21	11 %
2009	188	20	11 %

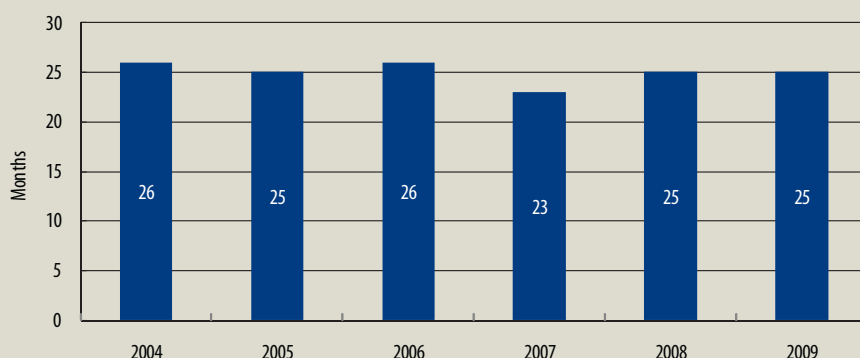
Source: OLAF.

32. The issue of long duration applies not only to investigations but also to initial assessments. When OLAF first receives or generates information concerning a possible fraud, it carries out an evaluation of this initial information to decide whether or not to open a case. The volume of this incoming information has increased considerably from 662 items in 2004 to 965 in 2009 (see **Figure 5**). The duration of assessments is affected by the need to gather information from outside organisations, the workload of investigators and also the policy to focus on more serious and complex cases (see paragraph 25). Consequently, many evaluations take considerably longer to complete than the two months envisaged in the OLAF manual<sup>18</sup>. The average duration of evaluations has doubled from 3,5 months in 2004 to 7,1 months in 2009. At the end of 2009, 72 cases had been in assessment for more than 12 months, representing 16 % of the total of 459.
33. The results of the Court's examination of 30 cases (summarised in **Figure 2**) showed that the decision to open an investigation was not made in a timely manner in 11 cases. The average duration of the evaluations for the 30 cases examined was six months.

<sup>18</sup> Section 3.2.2 of the OLAF manual states that the initial assessment of a case should be completed within two months of receiving the initial information. If this is not possible, the investigator must request an extension to the deadline from the responsible Head of Unit. The initial assessment must then be completed within a period authorised by the responsible Head of Unit, which shall not be more than six months after receipt of the initial information. If the information required for completing the assessment is still not available after six months a prolongation has to be authorised by the line Director.

FIGURE 6

## AVERAGE DURATION OF CASES 2004 TO 2009<sup>1</sup>



<sup>1</sup> Based on the ratio of cases open at the end of the year to cases opened during the year.

Source: OLAF.

## INCREASED SUPPORT FROM CASE MANAGEMENT SYSTEM (CMS) AND PERSONNEL FUNCTION

34. The Court made recommendations to develop the case management system (CMS) as a management tool, to increase training of investigators in investigation techniques, legislation and report-writing skills (recommendation 10) and to implement a masterplan for personnel management in order to resolve structural problems (recommendation 12).
35. CMS is now better used and all key documents are recorded in the system. However, data protection information is not systematically completed. In accordance with Regulation (EC) No 45/2001<sup>19</sup>, a decision should be taken either to inform natural persons that their personal data are stored and treated by OLAF (recorded as 'provided' on CMS) or else to defer informing them (recorded as 'deferred' on CMS), because, for example, to do so could jeopardise the investigation. However, in five of the 30 investigations examined, a decision whether or not to inform the suspect had not been taken. Furthermore, the Court recalls that the data protection regulation requires personal data to be accurate and, where necessary, kept up to date<sup>20</sup>. In this respect, the Court notes that when an investigation is closed without follow-up and the initial allegations could not be substantiated, the CMS does not reflect such a development in the categorisation of the person concerned. The advice of the European Data Protection Supervisor (EDPS) is needed on the matter.
36. Concerning training, **Figure 7** illustrates the number of OLAF staff attending training events on investigation techniques, legislation and report-writing skills since 2004 and shows an increase in the number of participants at training events in 2009. The January 2009 report on training by OLAF's Internal Audit Capability reinforced the messages of Special Report No 1/2005 and stressed the need to improve the analysis of training needs.
37. Structural problems in staffing have been addressed by obtaining additional permanent posts and thus reducing the number and proportion of temporary staff (see **Table 4**).

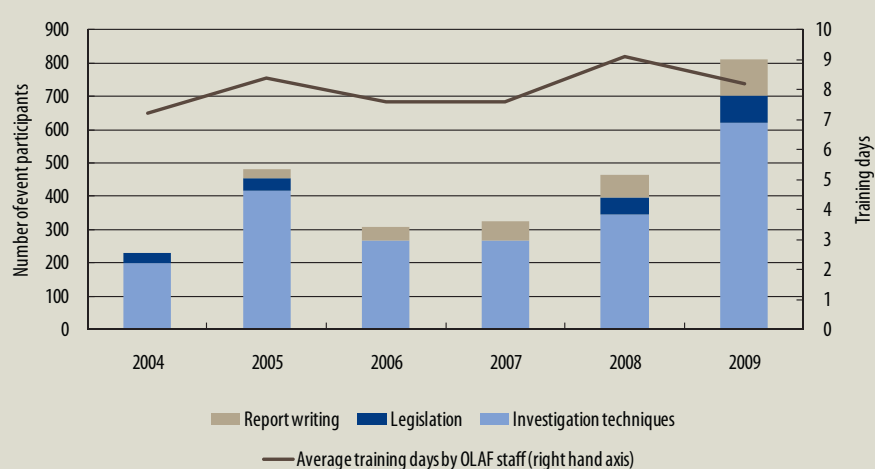
<sup>19</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>20</sup> Article 4(1) of Regulation (EC) No 45/2001.



**FIGURE 7**

## TRAINING EVENTS ATTENDED BY OLAF STAFF



Source: OLAF.

**TABLE 4**

## REDUCTION IN PROPORTION OF TEMPORARY POSTS<sup>1</sup>

Year	Permanent posts	Temporary posts	Total posts	% temporary posts
2004	183	146	329	44 %
2005	201	146	347	42 %
2006	238	119	357	33 %
2007	252	116	368	32 %
2008	261	116	377	31 %
2009	270	114	384	30 %
2010	282	102	384	27 %

<sup>1</sup> In addition to the establishment of 384 posts there were also 131 contract staff in March 2010, including 65 working in Information Services in Directorate D.

Source: OLAF.

## REVISION OF THE LEGAL AND PROCEDURAL FRAMEWORK STILL PENDING

- 38.** Regarding the legal and procedural framework, the Court made a recommendation to codify and publish procedures to protect the rights of individuals at all stages of the investigation and to provide controls on the legality of investigative acts in progress (recommendation 8).
- 39.** In December 2009, the Director of OLAF adopted a new Manual of Operational Procedures which was published in May 2010. The legal framework, however, has not changed since the Court's last report, as the instructions contained in the Manual are not intended to have any legal force<sup>21</sup> and as Regulation (EC) No 1073/1999 concerning investigations conducted by OLAF has not been amended<sup>22</sup>. There is still no independent control of the legality of investigative acts in progress<sup>23</sup> nor is there a code guaranteeing that investigative acts follow a predictable course, that there is certainty about the timing of hearings and that, at each key stage of the enquiry, the rights to a fair hearing of the person under investigation are protected along with the right of access to the file<sup>24</sup>.

## DIFFICULTIES IN COOPERATION WITH EUROJUST AND MEMBER STATES

- 40.** The Court made a recommendation to clarify arrangements for cooperation with Member States' authorities by adopting a specific regulation or through agreements with national investigation services (recommendation 9).

<sup>21</sup> See the foreword to the Manual which is available on OLAF's website.

<sup>22</sup> The Commission proposal (COM(2006) 244 final of 24.5.2006) for amending Regulation (EC) No 1073/1999 has not yet been adopted. On this proposal, the Court issued Opinion No 7/2006 (OJ C 8, 12.1.2007, p. 1).

<sup>23</sup> See paragraph 83 of SR No 1/2005.

<sup>24</sup> Opinion No 5/2010 of the OLAF Supervisory Committee on the respect for fundamental rights and procedural guarantees in investigations.

41. In 2006, the Commission made a revised proposal for a regulation on mutual administrative assistance<sup>25</sup> which has not yet been adopted by Parliament and Council. OLAF has signed administrative cooperation arrangements with authorities in 10 Member States and negotiations are currently underway with four others<sup>26</sup>. However, several Member States have not communicated to OLAF which national authority or investigation service is in charge of cooperation with OLAF in the field of direct expenditure or have not set up the necessary national and judiciary authorities with competences for the field of direct expenditure. Therefore, OLAF continues to encounter difficulties and lack of support when carrying out on-the-spot checks and inspections in certain Member States, notably where national inspectors do not have the control competences referred to in Regulation (Euratom, EC) No 2185/96<sup>27</sup>.
42. The audit confirmed the observations of the Court in its Opinion No 8/2005 that the existing legal framework for combating fraud and irregularities is complicated and difficult to implement and that weaknesses persist in cooperation between the Commission and Member States<sup>28</sup>. The audit also confirmed that given the limitations of OLAF's powers to investigate, the response of Member States to the Office's requests remain weak<sup>29</sup>.
43. Difficulties may also arise when allegations under investigation by OLAF involve economic operators from several Member States. In such cases, cooperation with Eurojust becomes important, as Eurojust is responsible for coordinating national criminal investigations and prosecution procedures. To make cooperation as efficient as possible, a Practical Agreement on arrangements of cooperation between Eurojust and OLAF was signed on 24 September 2008<sup>30</sup>. The Practical Agreement requires OLAF to inform Eurojust as soon as possible of the existence of any case where it appears that it directly involves judicial cooperation between the competent national authorities of two or more Member States, or where the case concerns a Member State and the Community. On the basis of the Court's sample, some 20 % of investigations fall into these categories. Although quarterly meetings take place between OLAF and Eurojust as required by the agreement, practical cooperation in the form of transmission of information on cases has been limited. In 2008 information on five cases was transmitted from OLAF to Eurojust and in 2009 on just one case.

<sup>25</sup> COM(2006) 473 final of 14.9.2006.

<sup>26</sup> Arrangements are in place with authorities in the following Member States: Belgium, Bulgaria, Czech Republic, Estonia, Spain, Italy, Lithuania, Malta, Romania, Slovak Republic. Negotiations are ongoing with authorities in Denmark, Latvia, Germany and the United Kingdom.

<sup>27</sup> Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

<sup>28</sup> See paragraphs 34–36 of Opinion No 8/2005 (OJ C 313, 9.12.2005, p. 1)

<sup>29</sup> See paragraph 15 of SR No 1/2005.

<sup>30</sup> OJ C 314, 9.12.2008, p. 3.

- 44.** Article 85 of the TFEU provides for an extension of the role of Eurojust to initiating investigations. In this regard, the Court notes the recommendations adopted by the European Council in December 2009 on the possibility of furthering the powers of Eurojust national members, reinforcing of the powers of the Eurojust College or the setting-up of a European Public Prosecutor<sup>31</sup>. More effective cooperation between OLAF and Eurojust is necessary in view of developments in this direction.

## REPORTING ON THE EFFECTIVENESS OF INVESTIGATIONS

- 45.** The audit assessed whether the action taken by OLAF had resulted in clear objectives for investigations and relevant and reliable reports on performance.

## TARGETS ARE SET AND MONITORED BUT DO NOT FOCUS ON RESULTS

- 46.** The Court made a recommendation to specify results to be achieved by investigations and to introduce performance indicators (recommendation 1).
- 47.** For the Office as a whole, certain sectors and geographical areas, OLAF now sets objectives in the Annual Management Plan with clearly quantified targets. These targets are monitored in monthly updates of the Annual Management Plan<sup>32</sup> and further information is provided in monthly management reports<sup>33</sup>.
- 48.** Concerning individual investigations, the initial assessment did not systematically identify clear financial objectives for investigations. Although the amounts affected are not always the key concern, the initial assessment of information received should identify the possible financial impact and recovery.

<sup>31</sup> See Stockholm Programme adopted by the European Council in December 2009 Council document 17024/09, p. 24.

<sup>32</sup> The monthly updates of the annual management plan show the percentage of cases opened in certain sectors and geographical areas, follow-up cases with an impact over certain amounts, percentage of cases closed with follow-up, clearance rate (cases opened/ cases closed), percentage of cases closed in a certain time and number of cases per investigator.

<sup>33</sup> Monthly management reports show results for the current year to date and four previous years in terms of prison sentences and amounts recovered and also show the duration of assessments, investigations and follow-up.

## REPORTS ON PERFORMANCE DO NOT FULLY EXPLOIT THE INFORMATION AVAILABLE

49. The Court made a recommendation that reports on OLAF's performance should be based on relevant and reliable data. They should enable comparisons over time and include indicators based on real results (recommendation 11).
50. OLAF produces the following reports and follow-up documents on performance: annual management plan monthly update, monthly management reports, annual activity report, annual operational report, and ad hoc reports (such as the 2008 report concerning on-the-spot checks).
51. At the end of an investigation, a final case report is submitted to the Board. The Board recommends whether the case should be closed with or without follow-up. Follow-up action includes recovering funds and opening criminal proceedings<sup>34</sup>. The responsibility for follow-up action does not lie with OLAF, but rather with Commission DGs and national authorities. OLAF's role is to optimise conditions for follow-up and to verify whether action has been taken.
52. **Table 5** shows how information is reported in different documents which are produced at different times (monthly, annually or ad hoc) and for different readers (internal or external).

<sup>34</sup> The OLAF Manual identifies four kinds of follow-up: administrative, financial, judicial and disciplinary.

53. It is difficult to form an overview of OLAF's performance. The information provided is to be found in different documents, which are prepared for different purposes and addressed to different audiences. Additional, more comprehensive information available in CMS is not presented. The Annual Activity Report does not enable the reader to make comparisons of OLAF's performance over time because there is no summary of key statistics for previous years. The Annual Operational Report provides comparisons with previous years for a number of indicators relating to activity (information received, initial evaluations carried out, opening decisions and average duration of cases), potential results (% of cases closed with follow-up) and real results (funds actually recovered). However, it does not make the important link between OLAF's activity (number of cases closed in a year) and the ensuing results, both potential (e.g. amounts identified for recovery) and real (e.g. amounts actually recovered).

TABLE 5

AVAILABILITY OF PERFORMANCE INDICATORS

	Internal		Public		
	Monthly reports		Annual reports		One-off reports
	Annual management plan monthly update	Monthly management reports	Annual activity report	Annual operational report	2008 report concerning on-the-spot checks
Activity					
Number of investigations closed	√	√	√	√	
Potential results					
% of investigations closed with follow-up	√		√	√	
Amounts identified for recovery from investigations					√
Stakeholder satisfaction <sup>1</sup>					
Views of Commission DGs					
Real results					
Actual recovery resulting from investigations					√
Actual recovery resulting from all cases		√		√	

<sup>1</sup> In 2007 OLAF launched a user satisfaction survey which was unsuccessful due to the low response rate (only six replies were received to the 45 questionnaires sent). OLAF has introduced operational conferences with Commission DGs.

Source: OLAF reports.

54. Relevant indicators are those which measure the link between OLAF's investigations, its potential results (for example, funds identified for recovery, recommendations to open criminal proceedings) and its real results (for example, funds actually recovered, cases resulting in a penalty or sentence). Although these are largely outside OLAF's control, they do also depend on the quality and timeliness of OLAF's investigations.
55. In order to be reliable, indicators should be based on accurate data and presented consistently in order to enable comparisons between years and across sectors (e.g. agriculture, customs, external aid) or types of investigation (internal, external, coordination and assistance).
56. CMS contains information on financial, judicial and disciplinary results. It also records cases closed without follow-up where OLAF has disproved, or been unable to prove, the initial allegations. The type of information which is available in the CMS and which could be reported annually is shown in **Annex III**. The indicators relate to three dimensions of OLAF outcomes: financial, judicial and outcomes by area or sector. For the financial and judicial outcomes, the tables outline the following:
- (a) activity (number of investigations closed);
  - (b) potential results (investigations closed with follow-up, recommendations to recover funds or open criminal or disciplinary proceedings);
  - (c) real results (actual amounts recovered or sentences passed).
57. The tables in **Annex III** complement information available in current reports. They link the real results to the year in which the cases were closed. The information is presented to demonstrate ways in which indicators available in CMS may be reported, enabling reliable comparisons over time and between sectors and types of investigation. With additional analysis and explanation by OLAF, this information may provide a more complete picture of the activity trends and performance in its reports.



## CLARIFYING THE ROLE OF THE SUPERVISORY COMMITTEE

- 58.** The Court followed up the recommendation of Special Report No 1/2005 to clarify the role of the Supervisory Committee.

## UPDATING PROCEDURES NOT YET COMPLETED

- 59.** The recommendation of the Court, was to clarify the role of the Supervisory Committee to ensure that there was no interference in investigations (recommendation 16).
- 60.** The Supervisory Committee revised its rules of procedure<sup>35</sup> in 2006 and produced a number of reports and opinions concerning the management of OLAF with the aim of reinforcing the independence of the Office.
- 61.** However, a judgment of the Court of First Instance in July 2008<sup>36</sup> held that an important function of the Supervisory Committee was to protect the rights of persons who are the subject of OLAF investigations<sup>37</sup>. After the judgment was pronounced, a practical working arrangement had to be found to consult the Supervisory Committee before forwarding information to the national judicial authorities.
- 62.** The new manual requires the information to be provided at least five working days before transmission<sup>38</sup>. In June 2010 a new procedure has been agreed between OLAF and the Supervisory Committee to ensure that the letter transmitting cases to national judicial authorities is signed at least five working days after the note informing the Supervisory Committee about the envisaged transmission<sup>39</sup>. OLAF committed itself to take any advice of the Supervisory Committee into account and react on a case-by-case basis.

<sup>35</sup> Rules of Procedure of the OLAF Supervisory Committee, 24 August 2006 (OJ L 33, 7.2.2007, p. 7).

<sup>36</sup> Case T-48/05 of 8 July 2008.

<sup>37</sup> The judgment of the Court further stipulates that 'it cannot be disputed that the requirement to consult that committee before forwarding information to the national judicial authorities is intended to confer rights on the persons concerned' (para 168).

<sup>38</sup> OLAF Manual of Operational Procedures, 1 December 2009, Sections 3.3.6.1.1 and 3.4.3.2.1.

<sup>39</sup> OLAF also provides the Committee with a summary note indicating whether the person concerned has been informed and been given the right to reply and whether the case is within the time limits set by the national authorities.

- 63.** However, in consideration of the decision of the Court of First Instance, this procedure puts at risk the rights of individuals concerned since it does not describe the steps to be taken in the event that the Supervisory Committee decides to issue an opinion. The absence of binding procedures in this regard makes it more difficult to ascertain that the Supervisory Committee has not interfered with the conduct of investigations in progress.
- 64.** Furthermore, OLAF applies a policy of transmitting information to the national authorities without informing the Supervisory Committee where OLAF is aware that a case is already being dealt with by the national judicial authorities. In 2009 OLAF recorded nine such cases where information was transmitted to national authorities without informing the Supervisory Committee in contrast to the position of the Court of First Instance, whereby the obligation to inform the Supervisory Committee is 'unconditional and leaves no margin of discretion'<sup>40</sup>.
- 65.** The members of the Supervisory Committee are appointed by common accord of the European Parliament, the Council and the Commission (see Article 11 of OLAF regulation). The term of office of the members of the Supervisory Committee is three years and is renewable once. On expiry of their term of office, members shall remain in office until their appointments are renewed or until they are replaced. The members of the current Supervisory Committee took office on 30 November 2005. Their term of office expired on 29 November 2008. The Court notes that more than two years later, a decision to renew their term of office or to replace them is still pending. Such a situation is unsatisfactory.

<sup>40</sup> The decision stipulates 'that the Committee must be informed before the information is forwarded to the national judicial authorities' (paragraph 164) and 'that the obligation to inform the Supervisory Committee is unconditional and leaves no margin of discretion' (paragraph 170).

## CONCLUSIONS AND RECOMMENDATIONS

### REFOCUSING ON THE INVESTIGATIVE FUNCTION

66. The Court's previous report made six recommendations to refocus activities on OLAF's investigative function. Three of these recommendations, concerning the divestment or separation of activities (recommendations 2, 14 and 15), were not accepted, and the other three have been partially implemented (recommendations 7, 17 and 13). Consequently, all six recommendations for OLAF to refocus on its investigative function are still valid.
67. In terms of the allocation of its resources, OLAF has not refocused on its investigative function. The Commission considers OLAF as an all-round anti-fraud authority rather than a service concentrated on investigations. Consequently it did not accept the recommendations of the Court's previous report to divest activities such as anti-fraud strategy and funding programmes. The number of staff in investigation directorates as a proportion of all staff amounted to 34 % in January 2010. The Time Management System showed that the Office as a whole allocated 37 % of its time to casework in 2009 (see paragraphs 8 to 11).
68. When carrying out investigations, OLAF now makes more use of its investigative powers, for example to carry out on-the-spot checks and interviews. OLAF support services contribute to investigations where appropriate and in 2009 spent 25 % of their time in this way. In this context, the strategic intelligence units identify areas of risk, but their work rarely triggers investigations (see paragraphs 12 to 18).

#### FOLLOW-UP RECOMMENDATION 1

OLAF should increase the number and speed of investigations by increasing the proportion of time spent on its core investigative function.

#### FOLLOW-UP RECOMMENDATION 2

The contribution the intelligence units make to investigative work should be enhanced.

## IMPROVING THE EFFICIENCY OF INVESTIGATIONS

- 69.** The Court's previous report made eight recommendations to improve the efficiency of investigations (recommendations 3, 4, 5, 6, 8, 9, 10 and 12). Except for recommendations 3 and 12, the other recommendations are not yet fully implemented and therefore still valid.
- 70.** The Court's previous report made recommendations to ensure a clear procedural framework for investigations and to improve planning and supervision so that investigations were implemented in a timely and efficient manner. OLAF has taken measures to clarify the procedural framework through the introduction of a new manual in December 2009 and a Practical Agreement for cooperation with Eurojust in 2008. Other measures taken by OLAF to improve efficiency were the introduction of a time management system, the development of a de minimis policy to focus on serious and complex cases, better use of CMS (though it is still not fully used), more focused training, a reduction in temporary staff, and splitting the Board into smaller groupings.
- 71.** Despite the steps taken by OLAF to improve efficiency, progress has been slow and remains incomplete. The new manual was not introduced until December 2009 and the legal framework has not changed since the Court's last report. Although OLAF entered into an agreement for cooperation with Eurojust, information on only one case was transmitted from OLAF to Eurojust in 2009. Although TMS is used to record time spent, the information it contains is not used to plan and supervise investigations. The volume of initial information to be assessed has increased considerably and the duration of these assessments has doubled. The duration of investigations remains long, sometimes due to outside factors, but more generally due to internal factors such as other priorities or lack of resources (see paragraphs 19 to 44).

## FOLLOW-UP RECOMMENDATION 3

The legal framework for combating fraud and irregularities should be revised to simplify and consolidate the anti-fraud legislation. Such an overhaul should address weaknesses in OLAF's current powers and procedures, in particular concerning cooperation between OLAF and the competent services in Member States.

## FOLLOW-UP RECOMMENDATION 4

OLAF should strengthen its cooperation and partnership with Eurojust, which, under Article 85 of the TFEU, is tasked with coordinating criminal investigations and prosecutions relating to offences against the financial interests of the Union. To this end, OLAF should put in place procedures to identify all relevant cases, communicate information on them to Eurojust on a timely basis, and report on the results of its cooperation with Eurojust on a regular basis.

## FOLLOW-UP RECOMMENDATION 5

The provisional plans for investigations should include estimates of resources required and deadlines. These plans should be monitored and updated once investigative activities are underway. Information from the Time Management System (TMS) should be used to provide more effective support to investigators and managers.

## FOLLOW-UP RECOMMENDATION 6

The overall duration of assessments and investigations should be better controlled to improve the impact of investigations and make better use of resources available. To this end, the Board should play a role in monitoring long and complex investigations, to ensure appropriate action is taken.

## REPORTING ON THE EFFECTIVENESS OF INVESTIGATIONS

- 72.** The Court's previous report made two recommendations concerning the demonstration of the effectiveness of investigations (recommendations 1 and 11). Although these have been partially implemented, the recommendations are still valid.
- 73.** The Annual Management Plan establishes clearly quantified targets for the Office which are regularly monitored. However, clear financial objectives are not systematically identified for individual investigations (see paragraphs 45 to 48).
- 74.** There is considerable information available in CMS which enables OLAF's performance to be compared over time and across different sectors. These statistics concern activity (investigations closed), potential results (investigations closed with follow-up; recoverable amount) and real results (actual amount recovered). However, the information is not currently reported in a single document which would enable the reader to assess OLAF's performance. The 696 external investigations closed in the period 2004 to 2009 identified 656 million euros for recovery, of which 180 million euros had actually been recovered at the time of the audit in April 2010 (see paragraphs 49 to 57).

### FOLLOW-UP RECOMMENDATION 7

Clear objectives for individual investigations should be systematically set and updated, and results should be reported in terms of objectives achieved.

### FOLLOW-UP RECOMMENDATION 8

CMS should be used more extensively in management decision-making and to produce better reports. Performance statistics on OLAF's activity, potential and real results should be made available in a single report, including comparisons over time.

## CLARIFYING THE ROLE OF THE SUPERVISORY COMMITTEE

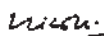
75. The Court's previous report made one recommendation to clarify the role of the Supervisory Committee (recommendation 16). Some action has been taken, but implementation remains incomplete.
76. Following the July 2008 judgment of the Court of First Instance, OLAF applies a new procedure to consult the Supervisory Committee before transmitting information to national judicial authorities. However, this procedure does not define the steps to be taken if the Supervisory Committee decides to issue an opinion. Apart from case law, the legal framework to protect the rights of persons being investigated has not changed since the Court's last report (see paragraphs 58 to 65).

### FOLLOW-UP RECOMMENDATION 9

In agreement with OLAF, the Supervisory Committee should define a formal procedure to outline the steps to be taken if it decides to issue an opinion on a case on which it is consulted. The legal framework should be revised in order better to protect the rights of persons being investigated.

This Report was adopted by Chamber IV, headed by Mr Igors LUDBORŽS, Member of the Court of Auditors, in Luxembourg at its meeting of 8 February 2011.

*For the Court of Auditors*



Vítor Manuel da SILVA CALDEIRA  
*President*



# Hearing on OLAF and interferences with rights of persons concerned

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## ANNEX I

### STATUS OF IMPLEMENTATION OF RECOMMENDATIONS (SPECIAL REPORT No 1/2005)<sup>1</sup>

Recommendations	Accepted	Implemented <sup>2</sup>
<b>Recommendations to refocus activities on OLAF's investigative function</b>		
<b>Divest or separate non-core activities</b>		
7. Remove follow-up activities (involvement in judicial proceedings and recovery of funds) that can be performed by authorising officers	Partially	Partially
14. Transfer responsibility for anti-fraud strategy to other Commission services	Not accepted	No
15. Give responsibility for managing funding programmes (e.g. Pericles and Hercules) to other Commission services	Not accepted	No
2. Consider creating a separate unit dedicated to coordination and assistance operations to improve management of resources	Not accepted	No
<b>Improve contribution of strategic services to the investigative function</b>		
17. Refocus activities on the investigative function, accompanied by changes in governance and regulations	Partially	Partially
13. Strategic analysis services should seek improvement in the data forwarded by Member States and create databases which can be used to identify anomalies and launch investigations	Accepted	Partially
<b>Recommendations to improve the efficiency of investigations</b>		
<b>Legal and procedural framework</b>		
8. Codify and publish procedures to protect the rights of individuals at all stages of the investigation and to provide controls on the legality of the investigative acts in progress	Accepted	Partially
<b>Cooperation with Member States</b>		
9. Formalise arrangements for cooperation between OLAF and the Member States through legislation or the conclusion of agreements with national investigation services	Accepted	Partially
<b>Planning</b>		
3. Establish smaller groupings on the Executive Board with the aim of setting clear plans and objectives for investigations	Accepted	Yes
5. Introduce a time recording system linked to work plans with estimates of time to be spent on investigations to align workload with resources and to avoid delays	Accepted	Partially
<b>Focus on priorities</b>		
4. Supervise the investigation process to focus on priorities and on the search for evidence by making better use of the investigation means available	Accepted	Partially
<b>Timely completion</b>		
6. Establish a maximum duration for investigations	Partially <sup>3</sup>	Partially <sup>4</sup>
<b>Support from IT systems and personnel function</b>		
10. Convert CMS into a true system of investigation management and increase training of investigators in investigation techniques, legislation and report-writing skills	Accepted	Partially
12. Implement a masterplan for personnel management to resolve structural problems	Accepted	Yes
<b>Recommendations to demonstrate the effectiveness of investigations</b>		
1. Specify results to be achieved by investigations and introduce performance indicators to assess success	Accepted	Partially
11. Produce reliable and relevant reports on performance, based on real rather than potential results	Accepted	Partially
<b>Recommendation for the Supervisory Committee to reinforce OLAF's independence</b>		
16. Clarify the role of the Supervisory Committee to ensure that there is no interference in ongoing investigations	Accepted	Partially

<sup>1</sup> The recommendations made in Special Report No 1/2005 were not numbered. They are numbered here according to the order they appeared in the report.

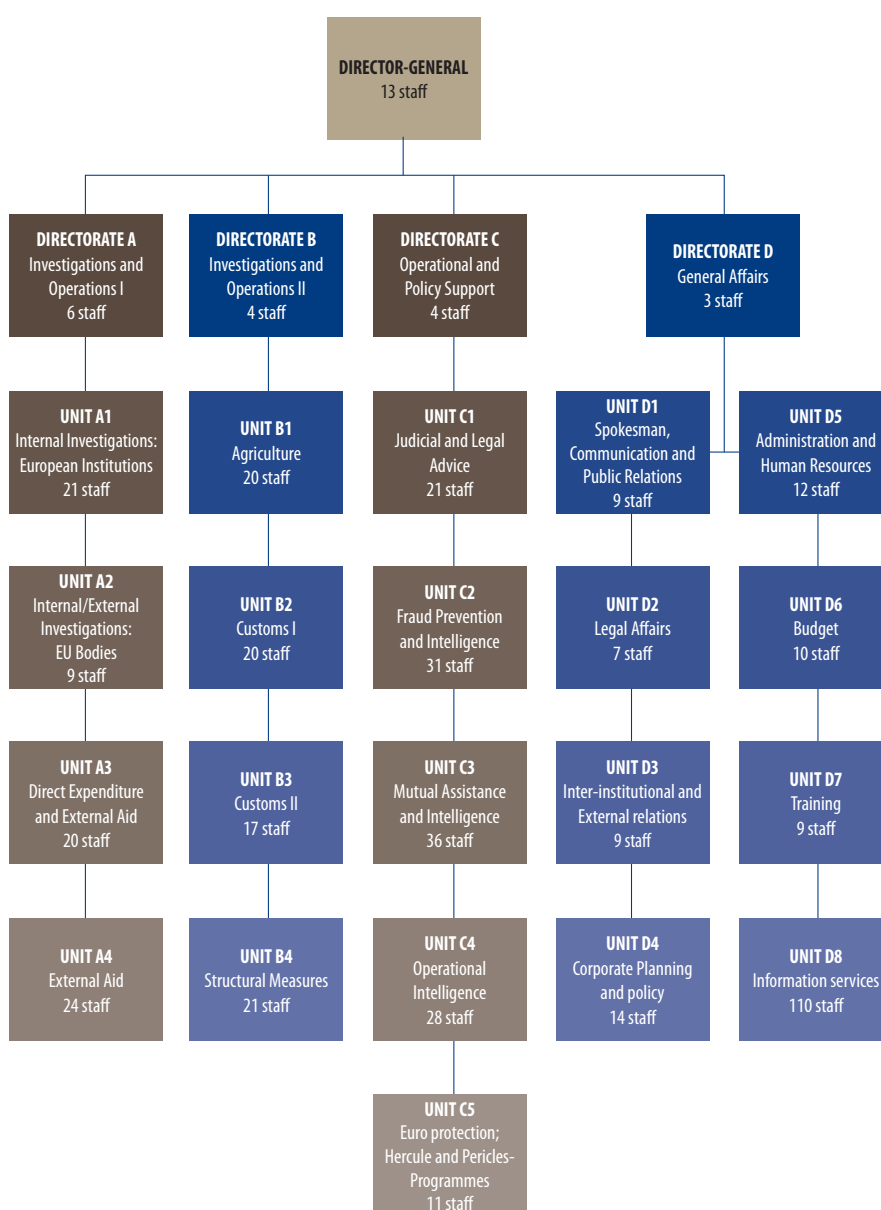
<sup>2</sup> Yes – recommendation implemented; No – recommendation not implemented and still valid; Partially – varying degrees of implementation and further action recommended.

<sup>3</sup> The Commission replied that it proposed to amend Regulation (EC) No 1073/1999 and introduce a duration of 12 months with the possibility of extending investigations by up to six months at a time.

<sup>4</sup> The legal framework has not yet been amended.

## ANNEX II

### OLAF ORGANISATION CHART<sup>1</sup>



<sup>1</sup> The chart shows the actual number of staff employed in March 2010.

## ANNEX III

### POTENTIAL INDICATORS

**TABLE A — Indicators of activity, potential and real financial results<sup>1</sup>**

	2004	2005	2006	2007	2008	2009	Total
External investigations	<b>Activity</b>						
	External investigations closed	151	104	100	117	121	696
	<b>Potential results</b>						
	With financial follow-up	59	52	60	66	67	356
	Recoverable amount (million euro)	183,7	43,8	54,7	122,6	121,0	656,4
	<b>Real results</b>						
	Amount recovered (million euro)	73,0	8,8	9,2	43,8	28,3	179,7
	Amount written off (million euro)	5,7	0,3	1,9	1,8	0,0	25,1
	Amount outstanding (million euro)	105,0	34,7	43,6	77,0	92,7	451,6

<sup>1</sup> The financial amounts in the table are attributed to the year in which follow-up commenced regardless of the year in which the money was actually received. The table therefore does not show amounts recovered relating to cases closed in 2003.

Source: OLAF as at April 2010.

**Table A** shows CMS data on external investigations concerning activity (number of investigations closed), potential results (closed with follow-up and amounts identified for recovery) and real results (actual recovery).

Over the six year period between 2004 and 2009, of the 696 external investigations closed, 356 (51 %) cases involved potential financial follow-up.

Over the same six year period the total amount identified for recovery was 656,4 million euro. The total actual amount recovered (over the same six years) up to the time of the audit in April 2010 was 179,7 million euro (27 %).

## ANNEX III

**TABLE B — Indicators of activity, potential and real judicial results**

		Year of follow-up recommendation						Total
		2004	2005	2006	2007	2008	2009	
External investigations	<b>Activity</b>							
	Investigations closed	151	104	100	117	121	103	696
	<b>Potential results</b>							
	With judicial follow-up	33	46	32	42	55	32	240
	Related actions	112	91	48	67	66	22	406
	<b>Real results</b>							
	Cases dismissed	63	24	17	11	9	0	124
	Cases outstanding	26	55	28	51	57	16	233
Internal investigations	Penalty or sentence	23	12	3	5	0	6	49
	Investigations closed	39	30	31	34	25	37	196
Coordination and assistance	Penalty or sentence	1	2	2	0	0	0	5
	Cases closed	149	99	86	81	41	48	504
Total all cases	Penalty or sentence	182	63	17	39	19	2	322
	Cases closed	339	233	217	232	187	188	1 396
Internal investigations	Penalty or sentence	206	77	22	44	19	8	376
	Disciplinary actions triggered	8	12	13	19	12	1	65

Source: OLAF as at April 2010 (One case may lead to a number of actions and subsequent penalties and sentences).

**Table B** shows CMS data on activity, potential and real results in the judicial sphere. Over the six year period between 2004 and 2009, the following observations can be made:

- External Investigations: out of the 696 external investigations closed, 240 (34 %) have been with judicial follow-up, leading to 406 related actions. Of these, 49 (12 %) have resulted in judicial decisions (including four acquittals and 11 rulings under appeal), 124 actions (30 %) have been dismissed while the results of 233 actions remain outstanding. Of the 124 cases dismissed, 76 (61 %) were due to lack of evidence whilst nine (7 %) were due to prescription.
- Internal investigations: the number of final rulings by judicial authorities in respect of internal investigations is extremely limited, amounting to five rulings for a total of 196 cases closed with 45 judicial paths opened and 62 related actions, 16 of which were dismissed. Internal investigations closed during the period also triggered disciplinary proceedings against 65 persons.

ANNEX III

- Coordination and assistance cases: these are considerably more successful than internal and external investigations in terms of achieving final rulings by judicial authorities for cases closed with follow-up during the period 2004 to 2009<sup>1</sup>.

The table shows how judicial results vary between the different categories of cases. Judicial follow-up takes on average 3,5 years to complete, which explains in part why the number of penalties or sentences are lower in recent years.

<sup>1</sup> In coordination and assistance cases national judicial authorities have already taken a decision to deal with a case which explains the higher success rate of these cases.

## ANNEX III

**TABLE C — Financial results in different areas**

		Cases closed 2004–09	Closed with financial follow-up	Recover- able (million euro)	Recovered to date		Recovery per case closed with financial follow-up (million euro)
					(million euro)	%	
External In- vestigations	Agriculture	92	49	136,8	5,5	1,7 %	0,11
	Customs	102	69	306,6	112,9	35,4 %	1,64
	External Aid	225	101	74,9	10,9	3,4 %	0,11
	Structural Funds	124	76	124,2	46,6	14,6 %	0,61
	Other <sup>1</sup>	153	61	13,9	3,8	1,2 %	0,06
	Sub total	696	356	656,4	179,7	56,4 %	0,50
Internal investigations		196	33	3,0	0,5	0,2 %	0,02
Coordination and assistance		504	201	877,0	138,3	43,4 %	0,69
Total		1 396	590	1 536,4	318,5	100,0 %	0,54

<sup>1</sup> Other consists of direct expenditure, EU bodies and agencies and trade.

Source: OLAF as at April 2010.

**Table C** compares financial results in different sectors. For external investigations, the customs area represented the highest proportion of recoverable amounts (20 %) and of actual recoveries (35 %). The financial results from other areas were lower.

Over the six year period (2004 to 2009), coordination and assistance cases account for 57 % (877 million euro out of 1 536 million euro) of potentially recoverable amounts for the Office as a whole, and 43 % (138 million euro out of 319 million euro) of actual recoveries.

The recovery per investigation shows the average amount recovered per case closed with financial follow-up in each sector (for example in the case of agriculture, 5,5 million euro was recovered, from a total of 49 cases, resulting in an average recovery per case of 0,11 million euro).

Whilst the different sectors are not directly comparable because they manage different types of cases, the table shows the variation in average amounts recovered per case, across sectors.

## REPLY OF THE COMMISSION

### IV.

The Commission is currently preparing a revised proposal to amend Regulation 1073/1999. It is envisaged that the proposal will strengthen the rights of the persons concerned and also comprise provisions on a review procedure and on cooperation with Eurojust and Europol.

The Commission considers that, even under the existing legal framework, the rights of individuals concerned are protected and that an independent control of investigative acts exists, to which the case law of the Court of Justice has been increasingly contributing since the Court made its statement in 2005.

### V.

OLAF's reports are under constant development in order to improve their practical use as a management tool. OLAF will examine whether a statistical annex can be appended to the annual operational report in the future which would ensure a better comparison of performance indicators.

### VI.

The proposal for the reform of Regulation 1073/1999 will consolidate the rights of individuals concerned and make them more visible.

The rights of individuals concerned are already protected in the existing legal framework, as well as by national courts and by the rapidly developing case law of the Court of Justice.

### VII.

(a) The Commission agrees that the speed of investigations is an area that could be further improved.

OLAF will make every effort to increase the efficiency and effectiveness of its investigative work, which remains its core task. Furthermore, OLAF will look into the possibility of increasing the proportion of its time spent on its investigative function.

In order to use its resources efficiently, OLAF is primarily committed to dealing with serious cases and is progressively applying minimum financial thresholds.

(b) OLAF already has initial workplans in place, which it is committed to develop further so as to improve overall planning.

The Commission agrees that OLAF should endeavour to reduce the overall duration of assessments and investigations. Duration is a key performance indicator for OLAF, which OLAF is committed to reducing wherever possible, particularly through improved monitoring of complex investigations.

Under the existing governance framework, the Board delivers recommendations on fundamental decisions relating to the treatment of cases. But it is the role of line management to examine investigation plans regularly, guide their development and take decisions in order to respect timeframes and speed up investigations wherever possible. OLAF considers that the Board involvement in the monitoring process would dilute responsibility of OLAF's line management.



## REPLY OF THE COMMISSION

### OBSERVATIONS

- (c) OLAF's various reports are intended for different audiences, including internal management and external stakeholders. OLAF will try to improve these reports further.
- (d) An adequate procedure has been defined and implemented by OLAF and the Supervisory Committee that takes account of the requirement for OLAF to inform the Supervisory Committee before transmitting cases to national judicial authorities as well as of the investigative independence of the OLAF Director. OLAF will take any advice of the Supervisory Committee into account and react on a case-by-case basis. Any formal procedure for the Supervisory Committee to intervene in ongoing cases could be seen as an interference with the investigative independence of the OLAF Director.

### INTRODUCTION

#### **Box 1 — OLAF's role and tasks** **Key objectives and activities**

It is envisaged that the draft revised proposal to amend Regulation 1073/1999 will further underline OLAF's role to promote and coordinate a more intensive sharing of operational experience and best procedural practices, as well as to support joint anti-fraud actions.

**6.**  
The Commission notes that OLAF has expressed different views regarding the gradings of a number of cases.

**9.**  
OLAF has focussed its financial follow-up activities on important cases where the financial impact meets specific thresholds defined for the respective sectors and types of procedures.

**10.**  
The 34 % figure in isolation does not reflect the proportion of OLAF resources devoted to investigation. In terms of staff allocation to investigative activities, nearly 75 % are involved in operational casework, i.e. including providing support to investigations. The split by directorates does not thus reflect the proportion of staff involved in investigations.

**11.**  
Even though the figure of 37 % is generated from the Time Management System (TMS), it does not entirely reflect the real situation. In particular, investigators in Directorates A & B regularly use the 'Management and administration' category when they are dealing with administrative tasks e.g. reports which are purely case-related. Also middle and senior management and secretaries in the investigative units often use this category for case-related paperwork. OLAF will examine how to improve the use of the TMS to better reflect the division of work.

## REPLY OF THE COMMISSION

**13.**

In order to improve the governance framework, the revised proposal for amending Regulation 1073/1999 will inter alia comprise a provision on the 'exchange of views' between the EU institutions (European Commission, European Parliament and Council) and OLAF on relevant questions concerning its strategic working priorities.

**17.**

OLAF has issued specific recommendations to several Commission services to improve fraud prevention following analysis of its operational cases.

**18.**

According to the jurisprudence of the Court of Justice<sup>1</sup>, 'sufficiently serious suspicion' is required for opening a case. This means that OLAF is not allowed to conduct investigative activities based solely on risk assessments without serious levels of suspicion being attained. Since 2007, OLAF has produced more than 10 strategic intelligence analyses for Commission services and Member States, which contain specific recommendations to substantially reduce the risks and impact of irregularities and fraud.

**21.**

It is primarily the role of line management to ensure that clear case plans and objectives are set and regularly monitored.

The Board delivers recommendations on fundamental decisions relating to the treatment of cases.

OLAF considers that involvement of the Board in the monitoring process would be likely to result in a dilution of responsibility of OLAF's line management.

**22.**

The TMS was designed to provide management with a global view of how much time is spent on a set of 20 pre-defined activities, such as investigation, follow-up, intelligence, administration, etc. This information is compiled in a monthly TMS report for each organisational entity, which allows managers to review resource allocation within their area of responsibility and senior management to initiate resource allocation across the Office. The existing case management features of CMS will be reviewed with a view to strengthening its case planning capabilities.

**23.**

The Commission agrees that workplans contribute to the efficiency of investigations. OLAF's Manual already outlines the basic elements of initial workplans which should describe the scope and investigative steps insofar as they can be anticipated at that stage. However, when an investigation starts, it is difficult to know where it will lead. Circumstances can change for reasons outside OLAF's control, so investigators and their managers are in constant touch, and revise the workplans when needed.

The initial workplan and subsequent updates are all registered in the CMS.

<sup>1</sup> C-11/00 Commission v. ECB; C-15/00 Commission v. EIB, 10 July 2003

## REPLY OF THE COMMISSION

In the light of the Court's comments:

- OLAF will ensure that initial workplans always include the objectives and scope of the investigation, and estimated financial impact. If it is possible at such an early stage, the plans will also include an initial estimate of resources required, possible missions and a likely timeframe.
- OLAF is committed to improving the monitoring and updating of workplans on a regular basis.
- As regards the TMS, see reply to paragraph 22<sup>2</sup>.

### 26.

It should be emphasised that OLAF's overall objective is the protection of the financial interests of the EU. The number of cases is not an adequate parameter by which to judge OLAF's performance. Given that OLAF's policy is to focus on the more serious and complex cases where its involvement clearly adds value, the fact that the number and duration of investigations has remained largely stable should be considered as an achievement.

<sup>2</sup> As regards the two cases mentioned in footnote 10, these were exceptional cases and OLAF will review its procedures in this regard.

### 27.

The Commission does not consider that a maximum duration for investigations, in the sense of an absolute limit, would be appropriate. Because of the very nature of an investigation and its uncertainties, a fixed maximum duration cannot be set. Taking into account its operational experience and the various factors influencing the course of an investigation, OLAF set a realistic target in its 2010 Annual Management Plan (AMP) of closing 75 % of cases within 24 months. This is not a maximum duration, but a target allowing for a necessary amount of flexibility.

It is envisaged that the proposal for the reform of Regulation 1073/1999 will contain provisions for improving the monitoring of the duration of investigations.

### 28.

The Commission shares the Court's view that the duration of investigations is a key performance indicator in terms of OLAF's operational procedures. It is recognised as such in OLAF's AMP. On the other hand, targets need to be realistic and have to reflect actual operational circumstances.

The Commission recalls that the provision on 9-month reports in Regulation 1073/1999 is not a target deadline for the completion of an investigation<sup>3</sup>.

<sup>3</sup> The obligation to report to the Supervisory Committee on cases that are still open after nine months should be considered in the context of the Supervisory Committee's role of reinforcing the independence of the Office. Historically, the purpose of this reporting was to prevent an interference by the Institutions in OLAF's independent case work.

## REPLY OF THE COMMISSION

The 24 months target set in OLAF's AMP is realistic taking into consideration OLAF's operational experience and the various factors influencing the course of investigations (such as OLAF's dependence on cooperation from Member States or third countries). However, one size does not fit all, and in recognition of these factors, OLAF is assessing the possibility of making a clear distinction between the duration targets for different types of case, whilst still retaining the average duration target of 24 months.

### **29–30.**

In addition to the 9- and 18-month reports, there is continuous supervision of duration by line management.

On a monthly basis, statistics are produced for management drawing attention to longer cases. These are regularly discussed at Directors' meetings.

Regarding the role of the Board, see reply to paragraph 21.

The revised proposal to amend Regulation 1073/1999 will foresee reinforced controls of the duration of investigations, including informing the Supervisory Committee in a timely manner.

### **31.**

Even though the number of cases per investigator in Investigations and Operations Directorates may have decreased, the amount of incoming information needing to be evaluated has considerably increased, which has a significant impact on the overall workload of investigators.

Due to OLAF's policy to focus on the more serious cases, their duration tends to be in line with their increased complexity.

OLAF is fully committed to controlling the duration of cases through their efficient management. See also reply to paragraphs 29–30.

### **32.**

As already mentioned, the volume of incoming information has increased considerably and OLAF intends to put in place a procedure for a more efficient and accurate processing of the information during the evaluation period. This will include an upstream filtering and where necessary an analysis of information.

### **33.**

In many cases where initial information needs to be verified with external bodies, Member States and third country authorities, OLAF depends on its external partners to respond in a timely manner and relies upon their goodwill and cooperation. Although OLAF is investing heavily in improving these relationships in order to reduce delays in communication of information, this remains a factor largely outside its control.

The two- and six-month guidelines for assessments have been set by OLAF itself for work monitoring purposes. They are not regulatory deadlines as such. Moreover, the progressive application of the de minimis guidelines (as laid down in an annex to the OLAF Manual) should facilitate progress in reducing assessment duration in the medium to longer term.

## REPLY OF THE COMMISSION

### 35.

OLAF has made considerable progress in ensuring that data subjects are informed of its investigations, in accordance with Regulation (EC) No 45/2001. This was achieved in a transparent way following a plan agreed with the European Data Protection Supervisor (EDPS). OLAF has completed a data protection backlog exercise covering specified groups of investigations that were opened prior to the existence of the data protection module, therefore the five outstanding cases have been dealt with accordingly.

Although the EDPS was consulted on all the aspects referred to by the Court in the context of the prior checks on OLAF investigations and follow-up, OLAF is willing to consult the EDPS again on the specific issue raised.

### 37.

As of 1 January 2011, OLAF has achieved its goal and reduced the number of its temporary agents to 21 %.

### 39.

It is envisaged that the proposal for the reform of Regulation 1073/1999 will consolidate the rights of the individual concerned and make them more visible. Additionally, it will introduce an independent review mechanism/procedure for dealing with complaints by persons concerned by investigations, who consider that their procedural rights have not been respected by OLAF.

The Commission considers that, even under the existing legal framework, the rights of individuals concerned are protected and that an independent control of investigative acts exists, to which the case law of the Court of Justice has been increasingly contributing since the Court made its statement in 2005. Even though it considers that OLAF's investigative actions (including the Final Case Reports) cannot be challenged for annulment<sup>4</sup>, the Court of Justice contributes to an independent control notably of these by means of possible actions for damages<sup>5</sup>. Evidence must be collected in a lawful manner in order to ensure that national administrative and judicial authorities can make use of it in their respective procedures. The same is valid for administrative and recovery procedures to be initiated by the authorising officers. In addition to this, the OLAF Manual provides clear internal guidelines for investigators concerning the conducting of an investigation.

### 41.

OLAF has no powers to force its partners to react in a timely manner and relies upon their goodwill and cooperation. Although OLAF is investing heavily in improving these relationships, this remains a factor largely outside its control.

<sup>4</sup> Refer to cases T-193/04 Tillack v. Commission dated 4 October 2006 and T-261/09P Violetti et Schmit dated 20 May 2010.

<sup>5</sup> Refer to cases T-48/05 Franchet et Byk v. Commission dated 8 July 2008 and F-5/07 and 7/05 Violetti v. Commission dated 28 April 2009 and F-72/06 Verheyden v. Commission dated 28 April 2009.

## REPLY OF THE COMMISSION

With regard to cooperation with Member States in the field of direct expenditure, steps towards solving this problem have already been taken by the Commission. In 2009, as part of the questionnaire for the 2008 Annual Commission Report on the protection of the EU's financial interests - fight against fraud, most Member States communicated to OLAF the complete contact details of national authorities for all expenditure fields, including direct expenditure, thus enabling OLAF investigators to identify and contact the competent authority in good time of the check. OLAF will remain in close contact with Member States for the continuous updating of this information. In the 2009 report, the Commission strongly recommends all Member States to set up national and judicial authorities with competences for the field of direct expenditure, as the same level of protection of financial interests must be ensured for all areas of the EU budget. It is envisaged that the reformed Regulation 1073/1999 addresses this issue by proposing an Anti-fraud Coordination Service (AFCOS) for each Member State.

### 43.

The Practical Agreement provides for a framework for the respective cooperation. There is a common understanding between OLAF and Eurojust that, in order to ensure sound management, the text is not in practice interpreted in a literal way but cooperation is focused on complex and sensitive criminal cases, and where it brings added value. This cooperation is handled by the OLAF-Eurojust liaison team which meets regularly. Additionally, OLAF and Eurojust organise regular exchange visits to further improve understanding of their respective tasks.

### 44.

The Commission is paying close attention to the possibilities offered by the Lisbon Treaty in terms of the further development of Eurojust and the setting up of a European Public Prosecutor's Office (EPPO). The Commission is planning to issue a Communication on the establishment of an EPPO from Eurojust and to further reflect on the cooperation with all actors involved, including OLAF. OLAF is fully aware of this perspective and will further improve cooperation. It is envisaged that the reformed Regulation 1073/1999 will lay down rules for closer cooperation between Eurojust and OLAF. It will provide a legal basis for OLAF to conclude cooperation arrangements with both Europol and Eurojust. An information exchange between OLAF and Eurojust will be reinforced in the new proposal.

See also reply to paragraph 43.

### 48.

OLAF makes every possible effort to evaluate and quantify the financial impact of fraudulent activity. Nevertheless, the amounts to be recovered are not always possible to quantify at the outset and therefore the potential financial impact cannot always be considered as a clear 'objective' for an investigation.

## REPLY OF THE COMMISSION

The effectiveness of OLAF investigations cannot be assessed simply in financial terms. OLAF gathers evidence both against and in favour of persons concerned, so a conclusion that a person concerned does not have a case to answer is also to be considered a positive result. Also, a case which has limited immediate financial impact may have substantial longer term financial implications once lessons learnt have been reflected in improved procedures.

**51.** Indeed, OLAF fulfils its role to optimise conditions for follow-up. In many instances, without OLAF's assistance, follow-up would not have been successful.

**52.** Table 5 in the ECA report compares internal information available for management purposes and annual reports. Management information is necessarily more detailed to enable managers to carry out their function. OLAF agrees that the public should have access to comparable information over time, in order to give results greater visibility, but reserves the right to produce more detailed information for management purposes only.

**53.** OLAF will examine how to further improve its annual operational report, where it has a certain leeway as opposed to its other reports.

**56.–57.**

The Commission appreciates the idea of further improving OLAF's reporting, allowing for reliable comparisons over time.

The proposal will be carefully examined. However, difficult technical issues have to be taken into account and resolved, in particular with respect to time lags and quality of data.

**60.**

The Commission agrees with the findings of the Court. It should also be noted that the relations between OLAF and the Supervisory Committee have become much more fruitful since the previous audit.

**63.**

The rights of individuals concerned are already protected in the existing legal framework. Any formal procedure on the part of OLAF or the Supervisory Committee for an intervention of the Supervisory Committee on this issue in ongoing individual cases could be seen as an interference with the investigative independence of the OLAF Director.



## REPLY OF THE COMMISSION

### CONCLUSIONS AND RECOMMENDATIONS

**64.**

As regards the question whether the Supervisory Committee has to be informed when OLAF transmits information to national judicial authorities in cases which are already dealt with by the national judicial authorities, no definitive answer to this question is to be found in Art. 11(7) of Regulation 1073/1999. The provision could be interpreted strictly, limited only to internal cases, or in a broader sense. OLAF is willing to apply an extensive interpretation, i.e. including external cases, as this would facilitate the monitoring work of the Supervisory Committee. Concerning already ongoing criminal cases at national level, OLAF considers it appropriate to inform the Committee of these cases if an external or internal investigation has been opened and investigative action taken by OLAF.

OLAF has already adapted its practice according to this interpretation.

**65.**

With the Decision of the European Parliament, the Council and the Commission of 15 February 2011, the mandate of the present Supervisory Committee Members will be extended until 30 November 2011.

**67.**

The Commission reiterates its opinion that OLAF should continue to contribute to the establishment of its anti-fraud policy and strategy. OLAF's policy work benefits from its investigative experience and vice versa.

The 34 % figure in isolation does not reflect the proportion of OLAF resources devoted to investigation. In terms of staff allocation to investigative activities, nearly 75 % are involved in operational casework, i.e. including providing support to investigations. The split by directorates does not thus reflect the proportion of staff involved in investigations.

Even though the figure of 37 % is generated from the TMS, it does not entirely reflect the real situation. See also reply to paragraph 11.

**68.**

The Commission appreciates the Court's findings that OLAF is making more use of its investigative powers.

Concerning strategic intelligence, its main concern is to understand the patterns of fraud and to identify (sectoral and other) risks which support operational activities and fraud prevention.

## REPLY OF THE COMMISSION

In addition to the assistance OLAF's strategic intelligence offers to Member States, OLAF contributes significantly to the anti-fraud policy of the Commission. For example, OLAF has issued specific recommendations to several Commission services to improve fraud prevention following an analysis of its operational cases.

### Follow-up recommendation 1

This recommendation is partially accepted. The speed of investigations is an area that could be further improved (see also replies to paragraphs 27–29). However, as OLAF is committed to dealing with the more serious cases and is progressively applying financial thresholds when deciding whether or not to open a case, increased time spent on investigations may not necessarily imply an increase in the number of investigations. Moreover, the number of cases is not the only indicator by which to judge OLAF's performance.

OLAF will make every effort to increase the efficiency and effectiveness of its investigative work, which remains its core task. Furthermore, OLAF will look into the possibility of increasing the proportion of its time spent on its investigative function.

### Follow-up recommendation 2

This recommendation is accepted.

### 71.

The Commission is of the view that OLAF has made considerable progress since the audit of 2005, in particular:

- From 2005 until the introduction of the 4th edition of the Manual in December 2009, the previous version of the Manual served as a valuable tool for investigators;
- Cooperation with Eurojust has improved based on the agreement which entered into force in 2008 (see reply to paragraph 43);
- The CMS, (and not the TMS,) was designed as a tool for case management and further developed;
- The duration of investigations has remained stable in recent years even though cases have become more serious and complex. However, further efforts will be made to improve investigation planning and therefore contribute to reducing the duration of cases (see reply to paragraph 23).

Changes to improve the legal framework are underway and expected by the end of 2011. These will consolidate the rights of persons concerned by an investigation and make them more visible. They will also comprise provisions on a review procedure and on cooperation with Eurojust and Europol.

## REPLY OF THE COMMISSION

### Follow-up recommendation 3

This recommendation is partially accepted.

The reform of Regulation 1073/1999, which is currently underway, already addresses the issue of OLAF's competences and procedures. It will also consolidate relations between OLAF and the Member States' competent authorities. Furthermore, the reform foresees that Member States will designate an authority to ensure good cooperation with OLAF.

The Commission is generally in favour of an overall consolidation of the anti-fraud legislation. However, given that this is a very complex issue involving different pieces of legislation, it is not envisaged in the framework of the ongoing reform of Regulation 1073/1999, but is considered as a longer term objective.

### Follow-up recommendation 4

This recommendation is partially accepted. The cooperation between OLAF and Eurojust has developed considerably in recent years, based on the new Eurojust Decision and the Practical Agreement on the Arrangement of Cooperation with Eurojust of September 2008. The exchange of case-related information and the follow-up of ongoing cases have been facilitated and now occur on a more regular basis.

OLAF has already put in place procedures regarding the transmission of information regarding relevant cases to Eurojust<sup>6</sup>. Furthermore, in 2011 a new secure information exchange system will be installed in order to further facilitate information exchange.

<sup>6</sup> The transmission of information on cases to Eurojust has increased compared to 2008 and 2009. In 2010 OLAF has already transmitted four cases to Eurojust; Eurojust has transmitted one case to OLAF.

It is envisaged that the revised proposal to amend Regulation 1073/1999 will comprise provisions on cooperation with Eurojust, taking into consideration the respective scopes of competence of OLAF and Eurojust.

### Follow-up recommendation 5

This recommendation is accepted.

OLAF already uses initial workplans and is committed to develop these further in order to improve its planning system.

These workplans are revised when necessary in the course of the continuous dialogue between investigators and management.

Depending on the different types of investigation, monitoring may take different forms. However, in all cases, both the initial workplan and its updates are already registered in the CMS in the form of reports or notes.

OLAF will work on further improvements in terms of investigation planning:

- OLAF will ensure that initial workplans always include the objectives and scope of the investigation, and the estimated financial impact. If it is possible at such an early stage, the plans will also include estimates of resources required, possible missions and a likely time-frame.
- OLAF is committed to improving the monitoring and updating of workplans on a regular basis.

### REPLY OF THE COMMISSION

#### **Follow-up recommendation 6**

This recommendation is partially accepted. Monitoring long and complex investigations should be further improved.

Within the existing governance framework, the Board delivers recommendations on fundamental decisions relating to the treatment of cases. But it is the role of line management to examine investigation plans regularly, guide their development and take decisions in order to respect timeframes and speed up investigations wherever possible.

OLAF is of the opinion that an involvement of the Board in the monitoring process would be likely to result in a dilution of responsibility of OLAF's line management.

The duration of investigations is indeed a key performance indicator in terms of OLAF's operational procedures. It is recognised as such in OLAF's AMP. On the other hand, targets need to be realistic and have to reflect actual operational circumstances.

OLAF is alert as regards the duration of cases and is committed to continue monitoring developments in this field and to reduce duration wherever possible. See also replies to paragraphs 27–29.

#### **73.**

OLAF makes every possible effort to evaluate and quantify the financial impact of fraudulent activity, but the amounts to be recovered are not always possible to quantify at the outset. Financial implications are taken into account for reasons of prioritisation, rather than serving as 'objectives' as such. See also reply to paragraph 48.

#### **74.**

The spending Commission Directorates-General (DGs) (as authorising DGs) and Member States' services are responsible for financial recovery on the basis of OLAF's findings. Therefore, the amounts recovered are only an indicator in a broader context, i.e. with regard to stakeholders and, in particular, the spending Commission DGs and Member States.

#### **Follow-up recommendation 7**

This recommendation is partially accepted.

OLAF already sets objectives for investigations and updates them regularly via workplans. OLAF agrees that some improvements could be made to the current arrangements. However, substantial changes are not required.

OLAF's objective is to gather evidence both for and against and to identify amounts for recovery as accurately as possible.

## REPLY OF THE COMMISSION

### **Follow-up recommendation 8**

This recommendation is partially accepted.

The CMS should be further developed for these purposes. However, there will always be factors outside the CMS to be taken into account. OLAF will examine the possibilities for further improvement in its reporting, including in relation to comparisons over time.

### **75.**

The role of the Supervisory Committee will be further clarified by the reform of Regulation 1073/1999.

### **76.**

The new procedure of informing the Supervisory Committee before transmitting a case to national judicial authorities entered into force with the 4th edition of the OLAF Manual in December 2009. The Supervisory Committee is informed five working days before the transmission of information to national judicial authorities. OLAF will take any advice of the Supervisory Committee into account and react on a case-by-case basis. Any formal procedure on the part of OLAF or the Supervisory Committee could be seen as an interference with the investigative independence of the OLAF Director concerning ongoing investigations, as an element of his independence includes deciding whether and when a case shall be transmitted to national judicial authorities. Concerning the protection of the rights of persons being investigated, see reply to paragraph 39.

### **Follow-up recommendation 9**

The first sentence regarding the Supervisory Committee is rejected. Any formal procedure on the part of OLAF or the Supervisory Committee could be seen as an interference with the investigative independence of the OLAF Director. The second sentence is partially accepted. The proposal for the reform of Regulation 1073/1999 will consolidate the rights of individuals concerned and make them more visible.

The rights of individuals concerned are already protected in the existing legal framework. Even though it does not consider OLAF's investigative actions (including the Final Case Reports) as acts adversely affecting the persons concerned<sup>7</sup>, the Court of Justice contributes to an independent control of these. See also reply to paragraph 39.

Additionally, the OLAF Manual provides clear internal guidelines for investigators concerning the conduct of investigations.

<sup>7</sup> Refer to cases T-193/04 Tillack v. Commission dated 4 October 2006 and T-261/09P Violetti et Schmit dated 20 May 2010.

## REPLY OF THE OLAF SUPERVISORY COMMITTEE

The Supervisory Committee takes note of the observations of the Court of Auditors in the follow-up of the Special Report 1/2005 concerning the management of the European Anti-fraud Office and would make the following responses:

### **1. The role of the Supervisory Committee following the *Franchet and Byk* ruling (paragraphs 58–63 and 75–76 of the Court of Auditors observations)**

*(a) Action to be taken by the SC where fundamental rights and procedural guarantees are at stake (paragraphs 58–63, 75–76 and first part of the follow-up recommendation 9)*

#### **Current situation**

Currently, OLAF forwards the case reports to the SC five working days before transmission to national judicial authorities (NJA). These case reports are accompanied by a special report detailing its handling of fundamental rights.

Following examination of these reports the SC may request, where appropriate, access to the entire file. The SC then arranges for a discussion on substantive and procedural aspects of cases with OLAF staff who regularly participate in the SC's plenary meetings. This discussion is focused, in particular, on respect for fundamental rights and procedural guarantees of the persons concerned in the investigation. The SC pays particular attention to the duration of the investigation and to the question of time barring.

#### **Position of the SC**

The SC considers that respect for fundamental rights is both a safeguard for persons under investigation and a criterion for assessing the effectiveness of OLAF's investigations. The SC is aware and confirms that it shall not interfere in the conduct of ongoing investigations, as stipulated by Regulation No 1073/99. That is why, in order to fulfil its role of assisting the Director General of OLAF in discharging his responsibilities<sup>1</sup>, the SC can, and does, draw general observations from the analysis of an individual case with a view to improving OLAF's practices in future investigations. However, the SC shall not give directions or recommendations to the Director-General of OLAF on the subsequent course of the individual investigation.

The SC can also be consulted by the Director-General of OLAF on a specific case.

The SC is currently working to adapt its rules of procedure to formally take into account the ruling of the Court of First Instance in the *Franchet and Byk* case.

The SC considers in particular, that before the information is sent to NJAs, it should be entitled to request access to relevant case files to ascertain whether fundamental rights and procedural guarantees are being complied with. The SC secretariat shall be afforded access to the documents within a time limit sufficient to guarantee compliance with this function. Corresponding working arrangements shall be agreed with OLAF.

<sup>1</sup> The ECA's Special Report No 1/2005 concluded that 'the Supervisory Committee does not provide the Office's Director with all necessary support' (see paragraph 93).

## REPLY OF THE OLAF SUPERVISORY COMMITTEE

In conformity with the current practice, the SC may also appoint a rapporteur to examine the cases and participate in their presentation at the Committee's plenary session. The management of OLAF shall be invited to this session.

If necessary, the SC can issue an opinion.

*(b) Legal framework protecting the persons being investigated (paragraph 76 and second part of the follow-up recommendation 9)*

The reform of Regulation No 1073/1999 is ongoing and the SC contributed to the debate by submitting two opinions: Opinion No 3/2010 on the Reflection Paper on the reform of the European Anti-fraud Office and Opinion No 5/2010 on fundamental rights and procedural guarantees within OLAF's investigations. The SC would welcome any improvement in the legislation designed to clarify and strengthen OLAF's powers of investigation and the procedural guarantees applicable to OLAF's investigations.

### **2. Scope of OLAF's obligation to communicate cases to the Supervisory Committee prior to their transmission to NJAs (paragraph 64)**

The European Court of Auditors notes that in 2009, the SC was not informed about nine cases which had been transmitted to NJAs. The reason for not informing the SC was that these cases were already being dealt with by the NJAs at the time of transmission of the information by OLAF.

The SC agrees with the ECA that the obligation to inform the SC of cases transmitted to the NJAs is unconditional and leaves no margin for discretion<sup>2</sup>.

<sup>2</sup> See Franchet and Byk judgement, § 170.

The SC considers that it must be informed of transmission of information to NJAs both in internal and external investigations. In addition to cases where OLAF transmits information to NJAs in order to initiate judicial proceedings, OLAF shall inform the SC when transmission occurs in cases already pending before the NJAs when cases are opened and investigative action is taken by OLAF. This obligation does not apply if OLAF transmits information to national administrative authorities.

### **3. The term of office of the Supervisory Committee's Members (paragraph 65)**

The Members of the current SC took office on 30 November 2005, on a three year mandate, renewable once. On expiry of their term of office on 29 November 2008, they remained in office, according to Article 11 (4) of Regulation No 1073/1999, since they were not renewed or replaced. The procedure for the renewal of their appointment by common accord of the European Parliament, the Council and the Commission was at its final stage at the time this response was drafted.

The SC agrees with the ECA that the SC must have a formal mandate from all three institutions. The SC regrets the lack of alacrity on the part of the institutions in concluding this matter, since the end of the SC's first term of office. Despite a long period of uncertainty, the SC has continued to fully perform its task of reinforcing OLAF's independence by regular monitoring of the implementation of the investigative function.



# Hearing on **OLAF** and interferences with rights of persons concerned

European Court of Auditors

**Special Report No 2/2011**

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THE EUROPEAN ANTI-FRAUD OFFICE (OLAF) PROVIDES AN INDEPENDENT INVESTIGATION SERVICE IN THE FIGHT AGAINST FRAUD AND OTHER ILLEGAL ACTIVITIES DETRIMENTAL TO THE EU BUDGET. IN 2005 OLAF WAS THE SUBJECT OF A SPECIAL REPORT BY THE EUROPEAN COURT OF AUDITORS WHICH MADE A NUMBER OF RECOMMENDATIONS TO MAKE ITS INVESTIGATIVE FUNCTION MORE EFFICIENT AND EFFECTIVE. THIS FOLLOW-UP REPORT EXAMINES WHETHER THE ORIGINAL RECOMMENDATIONS HAVE BEEN IMPLEMENTED AND RECOMMENDS FURTHER MEASURES WHICH COULD HELP OLAF IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF ITS INVESTIGATIONS.



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