IV

*(Notices)*

# NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

# COMMISSION

# OLAF SUPERVISORY COMMITTEE

## Activity Report of OLAF Supervisory Committee

**June 2008 – May 2009**

(2009/C 000/01)

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

I am pleased to submit the third Activity Report of the present Supervisory Committee (SC) of OLAF covering the period between June 2008 and May 2009.

Now that the SC has completed its first mandate and, based on the experience gained over these three years, we hope to continue with our strong commitment to improve OLAF's effectiveness in carrying out the important task with which the SC has been entrusted and to work intensively to strengthen OLAF's independence.

The SC interprets its role of strengthening and guaranteeing the independence of OLAF and of assisting its Director General to discharge his responsibilities in a way that best provides OLAF with the support and advice necessary to enable it to function efficiently as an administrative investigator, entirely independent from undue external pressure and interference. The more rigorous and impartial in its operational role OLAF can be seen to be, the more it will be able to defend itself against unjustified criticism from any source and thereby ensure that it is able to carry out its functions in full independence.

The SC has based its core work on the regular monitoring of OLAF's investigations. An example of our work in this area is to be found in the SC's Opinion No 2/2009 on cases which last longer than nine months. Using a rigorous methodology studying individual case reports, this Opinion highlights a number of shortcomings in the conduct of investigations, some of which relate to operational factors and others which are the result of weaknesses in planning or internal organisation. The SC has recommended modifications to OLAF's operational methods, which the SC hopes will help to overcome these problems.

The SC has continually maintained that there is a need for clear procedural rules which can be used to guide OLAF investigators and with which the subjects of investigations should also be familiar to help to safeguard their rights. It is common ground that the 2005 OLAF Manual of Procedures currently in force does not fulfil these requirements. The SC has been privy to the work which OLAF has done during this period to update the Manual; the work is, as yet, incomplete, though improved and there is still a substantial way to go before a practical guide for use by investigators is ready.

The budget restrictions which affect all the European institutions also affect OLAF. The 2010 budget does not include additional posts for the Office and therefore greater effort is needed to improve planning, management and satisfactory use of existing resources. The SC has urged OLAF once again to assign the majority of its staff to its core activity, namely operational investigations.

The reform of the legal basis for OLAF, Regulation (EC) No 1073/1999, has been the subject of intense debate during the period covered by this report in the European Parliament Committee on Budgetary Control (COCOBU), which culminated in approval for the European Parliament resolution of 18 December 2008 on the Council's approach to revision of the OLAF Regulation (EC) No 1073/1999. Aware of the importance of this reform, the SC has sought to participate in the debate actively and constructively by appearing before the COCOBU to make proposals concerning the governance of the SC in the new Regulation.

The SC has insisted on the need to preserve the function of regular monitoring of investigations as the best method of guaranteeing OLAF's independence.

The SC is encouraged that OLAF has taken steps to implement many of the SC's recommendations. In particular, there has been progress in implementing a 'de minimis' policy. However, issues relating to management of the investigations, particularly with regard to the length of investigations and to control systems and supervision, have not yet been resolved.

This year is also the tenth anniversary of OLAF. This anniversary is a good opportunity to reflect on how OLAF has fulfilled its role: to fight against fraud, corruption and other illegal activities which damage the EU's financial interests, by conducting independent investigations and how it intends to go forward.

OLAF enjoys the exceptional experience of 10 years of conducting internal and external investigations which also have an international dimension. Its significance and reputation is continuously growing. Building on its achievements and experience OLAF has to remain a key actor in the European commitment to fight fraud and corruption. The SC believes that OLAF must play a significant role in the establishment of the European Public Prosecutor's Office which is envisaged in the Treaty of Lisbon.

The SC is ready to support OLAF in its efforts to improve the quality of its work and safeguard its independence.

I should like to thank the Secretariat of the SC warmly for the work it has done over this period.

**INTRODUCTION**

The OLAF SC was set up for the purpose of strengthening and guaranteeing OLAF's independence, as well as to assist the Director General in discharging his responsibilities. The SC delivers Opinions to the Director General of OLAF and is required to report to the institutions on its activities on a yearly basis. This third report refers to activities carried out by SC from June 2008 to May 2009.

In its second Activity Report, the SC stressed the need for OLAF to curb the excessive length of some investigations, to establish clear investigatory procedures, deadlines and internal control mechanisms to avoid potential conflicts of interest in the course of investigations. Additionally it was suggested that the magistrates in the Judicial and Legal Advice unit should be fully involved at an early stage in investigations to avoid cases running out of time and to ensure evidence is collected which will be useful to national judicial authorities.

The report was discussed with the Vice-President of the Commission, Mr. Siim Kallas, the Secretary General of the Commission, Mrs. Catherine Day; the Committee on Budgetary Control of the European Parliament (COCOBU) and the Council's working group on the Fight Against Fraud during the French Presidency. The SC is gratified by the positive feedback and support it received. Mr. Franz-Hermann Brüner, Director General of OLAF, appreciated the constructive approach pursued by the SC and stated that most of the recommendations given in the SC's Opinions had been implemented or were in process of implementation.

During this period, Mr. Luis López Sanz-Aranguez was the SC's Chairman.

## I. SUPERVISORY COMMITTEE WORKING METHODS

### I – 1. *Meetings*

The SC held ten plenary meetings in Brussels ([1]). The SC meetings are not open to the public and all its related documents are confidential, although the minutes of its meetings are made available to OLAF and to the Secretariats General of the European Parliament, of the Council and of the Commission for the sake of transparency and in order to provide them with regular information on the SC's activities.

As during the previous reporting period, the SC has continued the practice of inviting the Director General of OLAF and a number of OLAF staff to its meetings in order to discuss and be informed of any pertinent matters relevant to the SC work and also to inform OLAF about the SC's activities. SC stakeholders as well as OLAF's partners also participated from time to time in the SC meetings at the invitation of the SC.

### I – 2. *Rapporteurs*

The SC's Opinions delivered to the Director General of OLAF were adopted unanimously by the SC members and the appointment of *rapporteurs* ([2]) was maintained to increase the efficiency of the preparation and follow-up of specific items of interest to the SC. In this way, a member of the SC is assigned as rapporteur to a specific area of the SC's work, for example, analysis of case reports of investigations that have been in progress for more than nine months, operation of the 'de minimis' policy, OLAF budget, the OLAF Operational Manual etc … and works with the SC Secretariat to prepare a draft Opinion to be discussed with the SC for adoption.

### I – 3. *Secretariat*

The responsibilities of the Secretariat of the SC are outlined in the SC Rules of Procedure ([3]), which stipulate that it plays a key role in facilitating and contributing to the performance of all tasks undertaken by the SC and ensuring that the SC is able to fulfil its legal mandate in full independence.

During this period the SC requested publication of the post of the Head of the Secretariat, which was due to become vacant in July, at Director level, to ensure the independence of the selection procedure. Following discussions with Vice-President Mr. Siim Kallas, the post was advertised as head of unit but emphasising that the Head of the Secretariat reports to the Chairman of the SC and is responsible to him.

Appointments of members of the SC Secretariat staff should only be made in agreement with the SC, thus ensuring the full independence of the SC in the performance of its duties ([4]). The necessary involvement of the SC in the recruitment process for this important post has been accepted by OLAF and the Commission.

As a result of the ruling of the Court of First Instance ([5]), the SC's monitoring role will expand with the resulting implications for the staffing of the Secretariat in 2010. Since the new mechanism is not yet in place, the SC is not in a position to assess the specific additional staffing needs but will do so in early 2010.

The SC acknowledges that the European Commission staff rules and the appraisal and promotion system therein do not currently permit the members of the SC to evaluate the performance of the staff of the Secretariat. However, the SC considers it is unsatisfactory that the annual performance level of the Secretariat staff is ultimately decided by the Director General of OLAF and that there is no involvement of the SC in this exercise despite the fact that Secretariat works under its direct authority.

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([1]) See Annex 1: Calendar of Supervisory Committee Meetings.

([2]) Article 8 of the Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 7.2.2007).

([3]) The Rules were adopted by the SC in August 2006 and published in February 2007 (Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 7.2.2007)).

([4]) See Annex 6: Opinion No 3/2009 OLAF's Preliminary Draft Budget for 2010.

([5]) Case T-48/05 Yves Franchet and Daniel Byk v Commission of the European Communities.

## II. OLAF'S INVESTIGATIVE FUNCTION

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

The key function of the SC is to monitor OLAF's investigative function in order to ensure that its independence is not compromised.

The SC has examined the issue of independence in a wide context having regard to its role. The SC is alive to the risk of undue influence on the opening, pursuit or conclusion of an investigation which may come from any source. There are potential threats from governments, institutions, bodies or agencies but also from individuals or legal persons who are the subject of investigation, or from external sources. More subtle pressures exist which could affect OLAF's independence in carrying out its investigatory function. These might include:

— Efforts by the institutions, bodies or organisations to obstruct OLAF at the stage of launching an investigation or in the course of an investigation;

— Refraining from or delaying the transmission of evidence or documentation to OLAF to hinder OLAF in its investigatory activity;

— Undue restriction on OLAF's resources, whether financial or human, including placing restrictions on the number or seniority of posts.

Only by sustained efforts in examining a representative sample of a diverse range of case files and discussing them with OLAF investigators, managers and directors is it possible to identify any undue pressure on OLAF which could lead to its independence being compromised.

In this regard, therefore, discussions have been taking place with OLAF to define the outline of a Case Monitoring System (CMS) module to allow the SC and its Secretariat to have access to a long list of relevant case files. There are personal data protection implications which arise in relation to granting access to the SC and its Secretariat to the CMS on this basis and the related issues are currently the subject of discussions with the European Data Protection Supervisor (EDPS) and with the Commission's Legal Service.

Article 22a of the Staff Regulations creates an obligation for officials to inform their hierarchy, the Secretariat General or OLAF direct if they become aware of facts, which give rise to the presumption of the existence of a possible illegal activity, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities ([6]).

([6]) See Article 22a and Article 22b of the Staff Regulations.

In agreement with the SC, the Director General of OLAF has notified OLAF staff of the complementary possibility for OLAF staff members of reporting to the President of the Supervisory Committee of any factual information and evidence on possible illegal activities or serious professional misconduct within OLAF of which they become aware ([7]). During the reporting period no such reports have been received.

From monitoring exercises the SC has carried out which relate to the nine months case report, it has not identified any actual threats to OLAF's operational independence.

### II – 1.1. **Regular monitoring based on information sent to the Supervisory Committee by the Director General of OLAF (article 11.7 of Regulation (EC) No 1073/1999)**

#### II – 1.1.1. **Investigations in progress for more than nine months**

The Director General of OLAF provides a monthly report to the SC with a summary of every investigation that has been in progress for more than nine months (hereafter 'nine months reports'). The 'nine months reports' set out the reasons for non-completion of investigations and the expected time for closing each case.

The SC issued an Opinion ([8]) based on 275 'nine months reports' (out of 424 active cases) covering the period January 2007 to December 2008 and on 115 'assessments of initial information' drafted by OLAF's investigators before the decision to open an investigation is taken, covering the period from March to December 2008. These 'assessments of initial information' also contain 'initial work plan suggestions'.

The SC wanted to clarify whether the high percentage of investigations which were in progress over a nine month period (more that 78 % in December 2008) was due to objective and unavoidable causes. The SC can only monitor the length of OLAF's investigations to exclude external interferences or biased decisions if objective and verifiable reasons are given for delays. Particular attention was also paid to the expected time for completion of investigations and to whether investigations have been conducted continuously over a period proportionate to the circumstances and the complexity of the case ([9]).

An analysis was carried out and reports were broken down into the different types of work carried out by OLAF. A significant finding in a high number of cases across the board was that the reason stated in the report for the investigation being in progress

([7]) Note to OLAF staff members 10. November 2008.

([8]) See Annex 5: Opinion No 2/2009 OLAF's Reports of Investigations that have been in progress for more than nine months.

([9]) Article 6. 5 of Regulation (EC) No 1073/1999.

for more than nine months was frequently not borne out by the circumstances set out in the investigation file or even in the report itself. The stated reasons for delays in many cases are therefore unreliable and may lead OLAF to misleading conclusions. Mis-stated reasons for delays may impede OLAF's efforts to ensure appropriate staff and budgetary resources are assigned to cases, and in general, may hinder the efficient management of investigations and do not allow a proper assessment as to whether the high percentage of delays in investigations is justified.

It was also observed that heads of unit as well as directors frequently countersigned case reports which showed misleading reasons for non-completion of cases. This indicates inadequate supervision and control of the day to day management of investigations.

It was noted that there was a lack of specific objective and verifiable reasons for delays in the investigations and the SC recommended that the entire process of reporting at the nine month stage be revisited to enable the SC to ascertain the real reasons for delays. In this respect the SC gave specific advice as to how this should be done ([10]).

The SC identified a serious quality problem in the 'nine months reports' due to the frequent lack of reference to the expected time for completion of investigations. The indication of the 'expected time for completion' is not only a legal obligation from OLAF towards the SC but also an essential tool for managing investigations and avoiding the negative consequences of their excessive duration. The SC recommends, as it has done in previous Opinions, that the nine months reports must be used as a tool for effective management of investigations.

A key to successful and focused investigations is good investigation planning. The SC therefore recommends that OLAF should develop a system containing detailed investigation plans for every investigation opened. OLAF has reacted favourably to this suggestion but the SC awaits its written proposal for action.

II – 1.1.2. **Recommendations to Institutions**

The Director General of OLAF is obliged to inform the SC of cases where an institution, body or agency concerned has failed to act on the recommendations of OLAF ([11]). In the reporting period no such cases have been reported to the SC.

([10]) See Annex 5: Opinion No 2/2009 OLAF's Reports of Investigations that have been in progress for more than nine months, final Conclusions and Recommendations (pages from 60 to 63).

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

II – 1.1.3. **Cases requiring information to be forwarded to the national judicial authorities: the effect of the judgment of the Court of First instance in case T-48/05**

During the reporting period the SC has examined 36 reports of cases referred to it by OLAF necessitating transmission to the national judicial authorities. The reports are presented at the SC meetings by the magistrates of the Judicial and Legal Advice unit.

The SC makes a preliminary analysis enabling it to discuss matters with OLAF representatives and to understand the merits and procedural issues arising from each case. The SC pays particular regard to the quality of the report with a view to identifying cases which may not be taken up by national judicial authorities by reason of prescription (time-barring), obvious lack of evidence or other reasons. In the past the SC has identified several cases where prescription has been a problem. In this period there were significantly fewer cases where national judicial authorities would be prevented from taking action because of prescription. The SC also noted an improvement in the quality of information provided in the reports, in particular the analysis of the criminal offences allegedly committed and the applicable rules in the Member State to which the report is forwarded.

During the period of this report the SC has noted with concern the diminishing role of the magistrates in the Judicial and Legal Advice unit. These magistrates have a unique and valuable function within OLAF as the main point of contact with national judicial authorities and also to ensure that the evidence contained in the files which are transmitted to national judicial authorities conform to the legal requirements of the respective Member State.

The SC therefore urges OLAF to make full use of the services of the magistrates in these areas at an early stage in the investigation process. The magistrates should also have regard to possible infringement of fundamental rights of parties to the investigation and should be consulted by the investigators where a question with regard to fundamental rights may arise. These provisions should be clearly set out in the new operational Manual as they were previously.

***The effect of recent judgments and rulings***

In many cases, the case reports were examined by the SC after the cases had been forwarded to the national judicial authorities.

However, in a recent judgment of the Court of First Instance ([12]), the Court ruled that the lack of information to the SC prior to transmission of case reports to national judicial authorities was an infringement of article 11.7 of Regulation (EC) No 1073/1999. It also stated that the SC must be consulted prior to transmission for the sake of the protection of fundamental rights.

The consequences of this last consideration in the judgment appeared, in principle, to go beyond the SC's responsibilities under Regulation (EC) No 1073/1999. The SC had concerns as to the implication of this ruling. They included the legal obligation of the SC not to interfere in the conduct of current investigations, the non-binding nature of SC Opinions, the lack of power on the part of the SC to prevent transmission of case reports to national judicial authorities, which is the sole responsibility of OLAF, as well as the need for examination of the full documentation on each case which would place a greater burden on an already stretched SC Secretariat. For all these reasons, the SC recommended to the Commission that an appeal be lodged against the judgment of the Court of First Instance ([13]). The Commission, however, decided not to appeal this judgment.

In the circumstances, the SC decided to establish new working practices with OLAF to implement the Court's ruling. The safeguarding of fundamental rights within an investigation is a continuing obligation. By the stage that the case is reported to the SC, the SC's role in reviewing whether fundamental rights have been respected is a retrospective one only. Any Opinion that the SC can give at this stage would be of no practical value in a specific case.

OLAF intends to forward case reports to the SC five working days before transmission to national judicial authorities. The SC proposes to ask OLAF in each case to supply a report detailing its handling of fundamental rights and procedural guarantees. In cases where there appears to be concern about whether fundamental rights and procedural guarantees have been respected, the SC will call for access to the entire file.

In this regard, the SC wishes to be informed of all complaints that OLAF has received or has examined from parties to an investigation where fundamental rights and procedural guarantees appear to have been compromised. Indeed, the SC wishes OLAF to inform it of all cases, not only those cases transmitted to national judicial authorities, in which a complaint has been received of alleged abuse of fundamental rights and procedural guarantees.

([12]) Judgment issued on 8 July 2008 by the Third Chamber of the Court of First Instance of the European Communities in Case T-48/05 Yves Franchet and Daniel Byk v Commission of the European Communities.

([13]) Note reference D 53/02-09-08.

The latest findings of the European Union Civil Service Tribunal ([14]) and of the European Ombudsman ([15]) serve to underline the need for OLAF to be alive to the requirement to respect the procedural rights of individuals under investigation.

### II – 1.2. **'De minimis' policy of OLAF: minor wrongdoings that can be dealt with satisfactorily by other services**

The SC reviewed OLAF's 'de minimis' policy in the context of examining how OLAF manages the conflict between the need to address the issue of irregularities at the lower end of the scale of wrongdoing and the maximising of the limited resources available to OLAF. In particular, the SC sought to evaluate whether the 'de minimis' practice currently in place is efficient and effective and corresponds to the current needs of OLAF.

On the basis of an exercise in which 45 selected cases, with an estimated financial impact of less than EUR 50 000, were examined ([16]) the SC found that:

— the current Manual of Operational Procedures does not include precise 'de minimis' criteria to select and process 'de minimis' cases in any of the areas of OLAF's operations;

— the allocation of resources to 'de minimis' internal investigations does not reflect the best use of resources. There is a need to define OLAF's role in relation to the zero tolerance policy of internal investigations, to decide how to treat incoming information and to forward incoming information on minor wrongdoings and/or low impact cases to other Commission services, rather than to decide to open an OLAF investigation. OLAF is not in position to process all incoming information but should aim to share the workload with other Commission services where appropriate;

— a zero tolerance policy has been adopted by the Commission but this does not require OLAF to investigate small cases, particularly internal investigations, as long as there are other bodies which could take on these smaller investigations. In the future OLAF will not necessarily be in a position to investigate all incoming information even though it would fall under OLAF's legal competence;

— in some areas of external investigations (and assistance, monitoring and coordination), 'de minimis' policy has been agreed during the annual management plan exercise, but it remains largely theoretical and requires further development, reflection and effective implementation.

([14]) Case F-05/05 and F-07/05 Violetti and Others v the European Commission.

([15]) http://www.ombudsman.europa.eu/cases/decision.faces/en/3831/html.bookmark

([16]) See Annex 3: Opinion No 5/2008 OLAF *de minimis* policy.

In April 2009 the SC met with OLAF management to discuss the 'de minimis' policy and is encouraged by the fact that there is a general agreement on the urgent need to put in place a more efficient and effective 'de minimis' policy in all areas of investigations. The SC is pleased to note the closer cooperation between Directorate A of Investigations and Operations and the Investigation and Disciplinary Office of the Commission (IDOC), with the aim of clarifying the division of work between the two, and clear agreed 'de minimis' thresholds in the areas of external investigations (customs and agriculture sectors, SAPARD and structural funds).

Given the fact that OLAF has very limited resources to undertake investigations and is required to carry out investigations into serious cases of fraud and irregularity, the SC encourages OLAF to find a way to focus on more complex and serious cases so as to provide best value for money for the Community.

### II – 1.3. **Regular monitoring at the Supervisory Committee's initiative (article 11.1 of Regulation (EC) No 1073/1999)**

#### II – 1.3.1. **Planning and strategic direction of investigations**

During the reporting period the SC has started a review exercise looking at the way investigations and operations units evaluate and plan the 'assessments of initial information' prior to the opening of investigations and 'final case reports' and held a number of helpful discussions with OLAF staff and senior management of both Directorate A and B of Investigations and Operations. The SC has been impressed by the consistent efficiency and professionalism with which cases have been conducted in Directorate B and indeed in a number of cases in Directorate A as well. The SC is pleased that after a lengthy period of uncertainty, the appointment of a Director for Directorate A 'Investigations and Operations I' has finally been made. The SC anticipates this will lead to long term improvement in the management and direction of investigations in this Directorate.

In this reporting period the SC examined approximately 40 'assessments of initial information' forms and their respective 'final case' reports. Scrutiny is being made of the grounds on which the cases were opened, the financial impact and whether timeframes for the investigations were set. Examination of case planning and the strategic direction of the cases is an essential part of the SC's work in monitoring investigations to assess whether the principles of independence, impartiality and legality are respected.

The SC is encouraged that improvements are underway in order to better manage investigations.

The SC examined OLAF's Annual Management Plan. The operational priorities of this Plan continue to be theoretical and the monitoring exercises so far carried out indicate that, in practice, these priorities are not used to determine whether or not cases are opened. OLAF makes little or no distinction between investigations and other cases (such as criminal assistance and co-ordination cases) and treats all cases on an equal footing, although OLAF plays substantially different roles in these areas.

This being so and the fact that evaluations of incoming complaints and information are dealt with by the teams which subsequently carry out the investigations, makes it very difficult to manage the increasing volume of incoming information and allocation of tasks efficiently. In the SC's view the measures taken to date by OLAF management in relation to the opening of cases should be clearer.

Investigation objectives remain vague and this impacts on the progress of the investigation, its timeframe and its use of resources. The SC recommends that timeframes or deadlines should be agreed and set for all phases of the investigation cycle, including evaluations and follow-up activities and the system of assessing the results, based on key performance indicators, needs to be further strengthened.

A detailed investigation plan should be developed by the investigation team at the outset of each and every investigation thoroughly enough to allow for the forecast of a date for the final decision. This plan should cover every investigative step envisaged and be associated with a preliminary timetable for each step. The SC proposes to deliver a further and fuller Opinion on investigation planning ([17]).

The SC has issued an Opinion on OLAF's Annual Management Plan 2010 ([18]) in which a number of suggestions are made to improve investigation objectives and measurable performance indicators. The SC hopes that its views will help OLAF to improve the planning and strategic development of investigations.

### II – 2. **OLAF's procedural investigation rules: OLAF Manual – Operational Procedures**

Over the period in question, OLAF continued to work on updating the Manual of procedural investigation rules. The SC has followed the progress of the work with great interest. After nearly five years in force, it was clear to the SC that most of the

([17]) See Annex 5: Opinion No 2/2009 OLAF's Reports of Investigations that have been in progress for more than nine months, final Conclusions and Recommendations (pages from 60 to 63).

([18]) See Annex 4: Opinion No 1/2009 OLAF's Annual Management Plan for 2009.

provisions of the former Manual needed to be redrafted. The SC is particularly concerned that the investigation units continue to operate on the basis of a variety of instructions and practices and that clear rules and instructions are lacking. In August 2008, OLAF forwarded to the SC a draft long version of the new Manual of Operational Procedures, which includes the basic rules and principles concerning investigational procedures.

The SC sent a note to OLAF's Director General ([19]) stressing that in its view the draft Manual was still at a very early stage and was not ready to be adopted. The principal weakness of the document, as in the short version, is the lack of clear guidance and precise rules on investigation procedures. The SC's impression was that the document needed improvement as to its overall structure, lay-out, user-friendliness and clarity as well as radical revision to address inconsistencies, repetition and inaccuracies.

Overall, the SC was concerned that the draft Manual did not meet its expectations. In particular, there is an absence of clear guidance in relation to the criteria for opening cases and their subsequent management and clear deadlines for investigations and assessments. The SC notes particularly a lack of reference to the need for oversight by the magistrates of the Judicial and Legal Advice unit in relation to the safeguarding of fundamental rights and procedural guarantees in the course of investigations.

The SC has recommended that OLAF should continue drafting a practical guide which would increase the legality, efficiency, transparency and accountability of OLAF's operations. The drafting exercise is not yet complete and a further and improved draft of the Manual was sent to the SC after the conclusion of the period of this Report.

### II – 3. Administrative organisation, budget and staff policy in relation to OLAF's investigative function

The SC continues to take a close interest in OLAF's staff policy, as it is central to the success of investigations and has urged OLAF management to strengthen its investigation capacity and capabilities. The SC has examined OLAF's preliminary budget for 2010 and issued an Opinion ([20]).

The SC has observed that OLAF's reactive investigation policy makes it difficult to form an overview of the future workload and allocation of resources to areas where they would be needed most. The process of allocating resources between Directorates and between units within Directorates A and B of Investigations and Operations could, in the SC's view, be more transparent and the workload should be continuously monitored. A snapshot of staff statistics for December 2008 shows that 34 % of OLAF staff was assigned to investigation work in Directorates A and B.

The SC, in its Opinion on the budget for 2010, emphasises the importance of concentrating OLAF's resources on investigation activities (its core work) avoiding any further additional staffing in the areas of administrative support and coordination functions. In the SC's view, there is a pressing need to prioritise all activities with a view to making more efficient use of human and financial resources. In particular, the SC recommends that OLAF's expenditure on mission and travel expenses, which represents a considerable proportion of the overall budget, be clarified.

The SC has noted that success in investigations requires motivated and qualified staff who are experienced and who have specific skills as well as competences built by a sound human resources policy and strategy. The SC appreciates that considerable progress has been made, in particular towards resolving the situation of temporary staff. The SC urges OLAF not to diminish its efforts with regard to training specialist investigation staff and hopes that some other key personnel issues, such as development and mobility, will be urgently addressed.

With regard to administrative and budgetary issues, the SC has noted that there are practical difficulties in putting in place an effective staff policy. The Director General of OLAF does not have full independence in relation to budgetary and administrative arrangements but is required to follow the Commission's financial and staff regulations in the spirit of the decentralised exercise of functions. This being so, the SC considers that further efforts should be made to facilitate cooperation between OLAF and the Commission administration with a view to agreeing internal administrative arrangements that would allow OLAF to fully implement its own staff policy.

In relation to OLAF's temporary staff, the SC welcomes the completion of open competitions and publication of two internal competitions; this will, however, only partially address the problem. As a result, additional measures are required. The SC encourages OLAF to increase the mobility of its temporary staff while carefully planning its overall recruitment policy following the completion of both ongoing and planned competitions. The SC is encouraged that efforts have been started to enable OLAF temporary staff to achieve re-grading or promotion.

([19]) The SC sent a note on 25 February 2009, which included detailed comments regarding the overall structure of the Manual and also key suggestions as regards the specific parts of the document.

([20]) See Annex 6: Opinion No 3/2009 OLAF's Preliminary Draft Budget for 2010.

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

### III – 1. Relations with OLAF

Relations with OLAF have developed on constructive and mutually informative lines during the period of this Report. Members of the SC have met with OLAF officials and directors on numerous occasions, both within and outside formal meetings, to discuss matters of common concern. Meetings have been universally relaxed and cordial and matters have been discussed on an open and frank basis.

Members of OLAF staff, including, on many occasions, the Director General himself, have attended SC meetings in the period covered by this Report. At the majority of SC meetings during the year, presentations were made to the SC by magistrates of the Judicial and Legal Advice unit on cases transmitted to national judicial authorities and members of the SC were able to ask for further details of cases. In particular, the SC had an in-depth discussion with OLAF, on how the Court's ruling in the case T-48/05 ([21]) would be implemented, with particular regard to the principle of consultation with the SC prior to sending information to a national judicial authority.

In addition to these presentations, during the period covered by this Report, the SC met the Director General, Directors, Heads of unit as well as the OLAF Data Protection Officer to discuss issues, including the latest draft of the Operational Manual, the proposed revision of Regulation (EC) No 1073/1999, the rulings of the court mentioned above and the Commission's decision not to appeal the judgment. Other matters discussed included the SC's Opinion on OLAF's 'de minimis' cases, OLAF's Preliminary Draft Budget for 2010, the renewal of the mandate of the members of the SC and the question of a successor to the Head of the SC Secretariat.

At the invitation of OLAF, the SC observed the deliberations of the Executive Board chaired by Director A in order to gain a further understanding on their working methods concerning the opening and conduct of investigations.

As far as personal data protection issues are concerned, agreement on equal access to the CMS for the SC is still outstanding.

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

The SC has always valued the maintenance of good relations with the Community institutions and with OLAF's partners and stakeholders as OLAF relies upon them for the effective enforcement of its recommendations following investigations.

During the reporting period, the SC met with the following: the Vice-President of the Commission, Mr. Siim Kallas on a number of occasions, the Secretary General of the Commission Mrs. Catherine Day; twice with the Committee on Budgetary Control of the European Parliament (COCOBU) and with the Working Group for the Fight Against Fraud of the European Council during the French Presidency. The SC is encouraged to note the warm support for the work of OLAF and of the SC afforded by all these institutions.

The SC took the opportunity to raise with Vice-President Kallas and the Secretary General of the Commission the issue of the renewal of the mandate of members of the SC which expired at the end of November 2008. The Commission has indicated its support for the renewal of the mandate of the current members.

The Secretary General, Mrs. Catherine Day, agreed with the SC on the need for the reinforcement of the monitoring of the length of investigations and urged the SC to do what it could to eliminate any delays in the investigation process. She also made particular mention of her concern regarding the importance of early involvement of the magistrates of OLAF's Judicial and Legal Advice unit, particularly taking into account time barring issues. The SC fully shares the Secretary General's concerns.

The SC met with the Director of IDOC, Mr. Michel Magnier, to discuss relations between OLAF and IDOC. The SC shared Mr. Magnier's views on the importance of clarifying the respective competencies of the two services and of improving relations and day-to-day operational work; this will benefit both services. Better exchange of information is required, both when initiating an investigation and during the investigation itself, when follow-up activities are taking place. While the SC was pleased to note an improvement in the relationship between OLAF and IDOC, the SC considers that even better cooperation can be achieved in future if there is political will, and efforts are made by both OLAF and IDOC for better and closer coordination.

There were also several presentations by the SC to the COCOBU. In September 2008 the SC actively participated in the debate on the proposal to amend Regulation (EC) No 1073/1999, stressing the role of the SC in the regular monitoring of investigations as the appropriate mechanism to secure OLAF's independence. The SC's position was endorsed in the final proposal for the amendment of Regulation (EC) No 1073/1999 presented by the European Parliament in December 2008, which not only supported the SC's role in monitoring cases, but proposed that the SC should have access to the full file in cases where the investigation had exceeded 24 months ([22]).

([21]) Case T-48/05 Yves Franchet and Daniel Byk v Commission of the European Communities.

([22]) See article 11.3 and 14 of the Final draft proposal of EP amending Regulation (EC) No 1073/1999.

During the reporting period the SC met the General Prosecutor of Hungary, Mr. Tamás Kovács with the aim of assessing the quality and the usefulness of OLAF's investigations reports transmitted to national judicial authorities and to encourage a good and proactive flow of information between OLAF and Hungarian judicial authorities. Mr. Tamás Kovács emphasised the eagerness of Hungarian authorities to strengthen cooperation between Hungary and other Member States and made particular reference to the harmonious working relationship that his office enjoyed with OLAF, to the extent that it is envisaged that a separate unit within the Hungarian Public Prosecutors Office to deal specifically with OLAF's work might be created. The SC is encouraged by this approach which would better facilitate effective follow-up of OLAF's investigations in Hungary. The role of the Hungarian Antifraud Coordination Services (AFCOS) in relation to dealing with OLAF was explained. The SC considers it is of the utmost importance that Member States ensure that the point of contact for OLAF be the national judicial authorities where these exist.

**CONCLUSIONS AND RECOMMENDATIONS**

I. The SC has taken the opportunity to examine the implications of independence in the context of OLAF's operational work. It concludes that, as well as the obvious potential direct threats, there are more subtle dangers that might prejudice OLAF's independence in opening and conducting investigations. This has led the SC to redouble its efforts in examining a diverse range of case files and discussing them with OLAF's staff to identify any undue pressures which could compromise OLAF's independence in the operational field.

II. The SC has examined 275 reports of investigations that have been in progress for more than nine months ('nine months reports') covering the period January 2007 to December 2008 and 115 'assessments of initial information', covering the period from March to December 2008. The SC noted that a very high proportion (78 %) of OLAF investigations have exceeded nine months duration. The SC found that there was a lack of objective and verifiable reasons for delays. The SC was therefore unable to state whether the time taken to complete these cases was justified. The SC recommends that OLAF give more precise and accurate reasons for the undue delay in completing investigations and it has set out a framework of recommendations.

III. The SC identified a serious quality problem in the 'nine months reports', which was the frequent lack of reference to the expected time for completion of investigations. An indication of the 'expected time for completion' is not only a legal obligation from OLAF towards the SC but is also an essential tool for managing investigations and their excessive duration. The SC recommends, as it has done in previous Opinions that the 'nine months reports' must be used as a tool for effective management of investigations.

IV. The SC has noted an inadequate level of supervision and control of the day to day management of investigations which OLAF should address. Detailed investigation plans should be drawn up for every investigation opened with timeframes or deadlines agreed and set for all phases of the investigation cycle, including evaluations and follow-up activities and a system of assessing the results, based on key performance indicators.

V. The SC has examined 155 'assessments of initial information' prior to opening a case and is in the process of analysing them with a view to determining how the operational and investigations units evaluate and plan investigations as part of the SC's regular monitoring of the implementation of the investigative function work and in assessing whether the principles of independence, impartiality and legality are respected.

VI. The SC reviewed OLAF's 'de minimis' policy and examined 45 selected cases with an estimated financial impact of less than EUR 50 000 each. The SC concluded that the allocation of OLAF's resources to small internal investigations does not represent the best use of resources. The zero tolerance policy adopted by the Commission does not preclude other bodies (for example IDOC) investigating these cases, rather than OLAF. The SC recommends that the Manual of Operational procedures should contain criteria to select and process 'de minimis' cases.

VII. The SC considers that better exchange of information between OLAF and IDOC is required, both when initiating an investigation and during the investigation itself, when follow-up activities are taking place. While the SC was pleased to note an improvement in the relationship between OLAF and IDOC, the SC considers that even better cooperation can be achieved in future if there is political will, and efforts are made by both OLAF and IDOC for better and closer coordination.

VIII. The SC examined 36 reports of cases transmitted by OLAF to national judicial authorities. The SC is pleased to note that there were fewer cases in this reporting period than in the last one, where prescription was an issue.

IX. The Court of First Instance has ruled that the SC must be informed of cases necessitating transmission to national judicial authorities prior to transmission as a safeguard of fundamental rights of parties to the investigation. The SC is working with OLAF to devise a new working practice taking into account that the SC is not permitted to interfere in the conduct of ongoing investigations.

X. The SC wishes to be informed of all complaints that OLAF has received or has examined from parties to an investigation where fundamental rights and procedural guarantees appear to have been compromised. Indeed, the SC wishes OLAF to inform it of all cases, not only those cases transmitted to national judicial authorities, in which a complaint has been received of alleged abuse of fundamental rights and procedural guarantees.

XI. The SC urges OLAF to make full use of the services of the magistrates in the Judicial and Legal Advice unit at an early stage in the investigation process in cases necessitating transmission to the national judicial authorities. The magistrates should also have regard to issues of fundamental rights of parties to an investigation and should therefore be consulted by the investigators where a question with regard to fundamental rights may arise. These provisions should be clearly set out in the new OLAF Manual – Operational Procedures.

XII. The SC has followed the progress of OLAF's work of updating the Manual of Operational Procedures. The SC has expressed its misgivings to the Director General in relation to a number of weaknesses in the draft document. OLAF should continue to draft a practical guide which will increase the legality, efficiency, transparency and accountability of OLAF's operations.

XIII. The SC emphasises the importance of concentrating OLAF's resources on investigation activities (its core work) avoiding any further additional staffing in the areas of administrative support and coordination functions. In the SC's view, there is a pressing need to prioritise all activities with a view to making more efficient use of human and financial resources. In particular, the SC recommends that OLAF's expenditure on mission and travel expenses which represents a considerable proportion of the overall budget be clarified.

XIV. The SC has noted that success in investigations requires a motivated and qualified staff who are experienced and who have specific skills as well as competences built by a sound human resources policy and strategy. The SC appreciates that considerable progress has been made, in particular towards resolving the situation of temporary staff. The SC urges OLAF not to diminish its efforts with regard to training specialist investigation staff and hopes that some other key personnel issues, such as development and mobility, will be urgently addressed.

XV. The SC considers that further efforts should be made to facilitate cooperation between OLAF and the Commission administration with a view to agreeing internal administrative arrangements that would allow OLAF to fully develop and implement its own staff policy.

*ANNEX 1*

**CALENDAR OF SUPERVISORY COMMITTEE MEETINGS**

2008

| Month | Meeting date |
|---|---|
| JUNE | Tuesday, 24th – Wednesday, 25th |
| JULY | Tuesday, 8th – Wednesday, 9th |
| SEPTEMBER | Thursday, 18th |
| OCTOBER | Monday, 6th – Tuesday, 7th |
| NOVEMBER | Tuesday, 11th– Wednesday, 12th |
| DECEMBER | Tuesday, 16th – Wednesday 17th |

2009

| Month | Meeting date |
|---|---|
| JANUARY | Tuesday, 20th -Wednesday, 21st |
| FEBRUARY | Tuesday, 17th – Wednesday, 18th |
| MARCH | Tuesday, 24th – Wednesday 25th |
| APRIL | Tuesday, 21st – Wednesday, 22nd |

*ANNEX 2*

**LIST OF OPINIONS ADOPTED BY THE SC BETWEEN 1 JUNE 2008 AND 31 MAY 2009**

2008

Opinion No. 5/2008 OLAF de minimis policy

2009

Opinion No. 1/2009 OLAF's Annual Management Plan for 2009

Opinion No. 2/2009 OLAF's Reports of Investigations that have been in progress for more than nine months

Opinion No. 3/2009 OLAF's Preliminary Draft Budget for 2010

*ANNEX 3*

**OPINION No. 5/2008**

**OLAF de minimis policy**

2 December 2008

## INTRODUCTION

OLAF has limited investigative resources in relation to the number of investigations it is called upon to undertake. To carry out investigations into serious cases of fraud and irregularity to the prejudice of the financial interests of the EU with all due speed and efficiency, it is imperative that effective use is made of the resources available to OLAF. The Supervisory Committee (SC) has in the past expressed its concern ([1]) that OLAF has not yet developed a clear and consistent investigation policy and strategy.

The EC Regulations and the Commission Decision establishing OLAF ([2]) make no specific reference to prioritisation of incoming information or complaints involving small sums of money ('de minimis' cases). It therefore follows that information received and investigations carried out by OLAF, including de minimis cases will, in principle, be treated on an equal basis by OLAF. OLAF's investigation priorities are set out in the Manual ([3]) and in the current annual management plan. OLAF's note addressed to the SC in June 2007 ([4]) outlines OLAF's practice concerning 'zero tolerance' and the de minimis rule in the internal investigations.

The SC has therefore decided to examine the way in which OLAF deals with de minimis cases, for the purpose of evaluating the practice and effectiveness of OLAF's present de minimis policy.

## 1. THE SELECTION OF CASES

For the period of December 2005 to November 2008 (36 months) OLAF had around 2 000 closed cases in the CMS database. From this list, the SC selected 45 cases (See more details in Annex 1 ([5])) with an estimated financial impact of less than 50 000 EUR. The 50 000 EUR threshold was chosen on the basis of a cost-efficiency calculation of a minimum cost of an average investigation, taking into account the length of an average OLAF investigation (28 months) and resources involved (two investigators with an average of 15 cases per person). The financial impact of selected cases was divided as follows:

| *Financial impact EUR* | *Number of cases in the sample* |
|---|---|
| 0 - 500 | 6 |
| 501 – 25 000 | 20 |
| 25 001 – 50 000 | 19 |
| *Total* | 45 |

The sample represents all different types of OLAF cases from internal and external investigations to assistance, monitoring and coordination cases. The SC has monitored these cases by reviewing evaluation, interim, final, and follow-up reports to determine the following:

— Whether the opening of each case was in accordance with the rules set out in the OLAF Manual

([1]) See for example conclusions and recommendations of SC's annual activity reports December 2005 to May 2007 and June 2007 to May 2008.

([2]) Regulations (EC) No 1073/1999 and No 1074/1999; Commission Decision of 28 of April 1999 (OJ L 136/20, 31.5.1999).

([3]) OLAF Manual of 25 February 2005 point 3.2 Operational priorities: In the area of internal investigations the following criteria are taken into account: seriousness of criminal or disciplinary offence, involvement of a conspiracy or a single actor, or senior officials, involvement of an abuse of power, negative impact on the reputation/creditability of the EU or whether an investigation has been requested by a service/institution. In the area of external investigations there are fifteen criteria such as importance of the financial impact, public interest etc.

([4]) Internal note dated 18 June 2007 on OLAF's practice concerning zero tolerance and the de minimis rule in the field of internal investigations dated 18 June 2007. The note outlines the general principles of the zero tolerance policy of the Commission and the de minimis rule in the area of internal investigations when opening investigations and forwarding final reports to national authorities. The note concludes that OLAF has to remain within the limits of its own competencies when opening an investigation, and that minor wrongdoings with no connection to the financial interests of the Communities should be dealt with by services other than OLAF.

([5]) Annex 1: 12 page document analysing case related information, will not be made public.

— Whether OLAF was the only or the most appropriate body to investigate the case (particularly in relation to internal cases)

— Length of the investigation (in months) and the type of case

— Impact of the investigation and the follow-up actions taken by national authorities/EU-institutions and bodies following closure of an investigation

— Estimated resources used (number of people involved in investigation)

— Handover of incoming information or closed cases to appropriate Commission services

## 2. ANALYSIS AND CONCLUSIONS

### 2.1. General remarks

OLAF took an average of five months to evaluate the incoming information and 15 months to investigate the selected cases. The large majority of the cases involved two investigators and were classified as low priority by the initial evaluator. In six cases no follow-up was recommended at the end of the investigations.

The SC examined the rationale supporting the opening of an investigation in the light of the criteria laid out in the Manual and concluded that, for most of these cases, the justification for opening an investigation was poorly defined and lacked clear supporting reasons in the initial assessment forms. The initial assessment form describes the allegations, the OLAF legal basis and source reliability, but does not explain the reason for opening a case based on Manual criteria. The 'sufficiently serious suspicion' ([6]) is used as an opening criterion for cases but is not defined anywhere in the Manual. This criterion therefore appears to depend entirely on the evaluator to decide upon its method of interpretation and implementation. Many cases had been recommended for opening by the evaluator and subsequently approved by the Head of Unit, the Director and the Board, even though no clear opening criteria or reason was stated in the initial assessment form and no other written justification existed in the case files to support the opening.

The OLAF Manual currently in force, for use by investigators and evaluators, does not provide the clear guidance necessary to enable evaluators who are performing an initial assessment of incoming information to recommend whether or not to open an investigation. Better defined criteria for opening an investigation would improve transparency and would enable more consistent, appropriate and coherent treatment of incoming information.

Current practice is for the person conducting the initial assessment of incoming information to carry out the investigation itself. This practice, while it is not unique to OLAF, may prevent a neutral and unbiased assessment of the information if not balanced by clear and transparent criteria for opening cases as well as thorough management control.

While investigations are classified as being of high, medium or low priority, the SC was unable to identify any specific treatment for low or average priority cases. Clarification is needed with regard to the treatment of low priority cases if and when resources are released from other cases. It would appear that the sample investigations were treated in the same way as any other investigations, even though they were initially classified as being of low or average priority.

It appears that very little information is available in general on measures taken to plan an investigation after the decision to open it has been made. A clear and concise investigation plan (i.e. specific objectives, expected results, risk analysis, timelines, benchmarks and resource allocation) is essential for each investigation, to guide and structure the work and to be updated when necessary.

**Recommendations**

1. The section 'Operational priorities' of the Manual to be developed to include clear de minimis guidance and policy. Indicative de minimis thresholds for different types of investigations to be determined, together with criteria on whether to open a de minimis case or not.

2. The practical implication of low, medium and high priority definitions for investigations needs clarification.

3. Prior to launching an investigation, an investigation plan to be drafted, outlining the aim of the investigation.

4. OLAF to ensure separation of roles between the evaluator and the investigator when possible (language skills permitting).

([6]) EJC-11/00 EC /ECB - 10 July 2003 point 141 and C-15/00 EC / EIB - 10 July 2003 point 164.

2.2. Internal investigations

OLAF follows the Commission's zero tolerance policy (7) in this area and, in its capacity as the Community body entrusted with protecting and safeguarding the Community's financial interests, considers all internal cases to be of equal importance. As well as the potential financial impact on the Community budget, OLAF is also obliged to consider other factors, including the political importance of the information, the Community's reputation and/or seriousness of the case, particularly with reference to the professional conduct of the Community staff (8). As a consequence, OLAF has stated (9) that it has little room to decide whether or not to open an investigation; rather, it is required to investigate all cases which fall within its competence except so-called minor wrongdoings, which may be referred to other Commission services, such as the Commission's Security Office or IDOC (the Commission Investigation and Disciplinary Office).

OLAF's core mission is to protect the financial interests of the Community. In cases where allegations concerned the loss or the risk of loss of relatively small amounts of Community funds as a result of unjustified or falsified reimbursement claims, conflicts of interest, non-eligible expenditure or non-disclosed outside activities, the incoming information could, in the SC's view, have been immediately referred to IDOC. The exception is for cases where senior officials or serious and continuous irregularity or fraud allegations were involved, or where the case was related to another OLAF investigation or to a Community Agency where IDOC has no powers to act. The SC considers that further guidance is needed as to the type of information which could be classified as a 'minor wrongdoing' and when information could be sent to other services.

With regard to cooperation with IDOC, the SC emphasizes that it is important for OLAF to hand over information regarding minor wrongdoings and/or cases with very low financial impact to IDOC early, thereby allowing a disciplinary procedure to be opened without delay. This would ensure effective and prompt sanctioning of any infringement. In 99 % of the cases in the sample examined, OLAF investigations were followed by IDOC administrative inquiries and, thereafter, disciplinary actions.

Overall, the SC considers that disciplinary action should be undertaken without delay as stated by the European Court of Justice (10). This requires the prompt handing over of information from OLAF to IDOC or other appropriate Commission services and any duplication of investigation should be avoided. This is of particular importance when the persons concerned are not officials or there is a danger that they may soon leave the service, which was the case in some of the sample investigations. The SC's view is that there was no reason why in such cases the information should not have been forwarded to IDOC in the first place without opening an OLAF investigation.

The SC welcomes the recent efforts made by OLAF to strengthen its cooperation with both IDOC and other Commission services and encourages ever more activity in this area. Closer cooperation will improve the channelling of incoming information directly to the appropriate services without the need for OLAF's intervention. In particular, OLAF should attempt to improve the process of exchanging information and cooperation with these services. The cooperation arrangements, however, should neither limit OLAF's key competencies nor its independence to operate. The SC believes that by strengthening cooperation, OLAF would be able to release more resources to more serious fraud and irregularity cases, where it is clearly the only Community body which can investigate these cases. Since it is OLAF's aim to provide value for money for the Community, the SC considers it would be an advantage for OLAF, as well as for other services, to share expertise and knowledge of the internal cases by regular exchange of information and discussion of ongoing cases without setting up over-strict and detailed rules.

A final observation concerns the judicial follow-up of the internal investigations. In the majority of the sample cases, no judicial follow-up was recommended or undertaken for various reasons, such as time barring or lack of sufficient evidence to launch a criminal investigation. The SC's conclusion is that, in many of the sample cases, national judicial authorities were not able to process de minimis cases due to their workload and competing priorities. In the SC's view, a more careful reflection on the feasibility of a successful judicial follow-up of de minimis cases is required before cases are opened or forwarded to them; similarly, that constructive communication with the national judicial authorities is highly important in order to ensure an effective follow up upon closure of cases.

(7) Internal note dated 18 June 2007 on OLAF's practice concerning zero tolerance and the de minimis rule in the field of internal investigations dated 18 June 2007.

(8) Article 2(1) of the Commission Decision of 28 April 1999 (OJ L 136/20, 31.5.1999).

(9) Manual point 3.2.1.1. concerning operational priorities of the internal investigations.

(10) ECJ C-270/99 27 November 2001; CFI T-307/01 10 June 2004; Opinion of advocate general C-270/99 22 March 2001.

**Recommendations**

1. OLAF to better define its zero tolerance policy of internal investigations and, most importantly, decide on how to treat information with regard to low financial impact investigations. This should be clearly stated in the Manual.

2. OLAF to forward incoming information on minor wrongdoings and/or low financial impact cases when there are other means of investigation to other Commission services rather than to decide to open an OLAF investigation. There is a need to clarify when information should be forwarded to IDOC and other Commission services and to define the term 'minor wrongdoing'.

3. OLAF to improve the process of exchange of information between relevant Commission services on internal de minimis cases.

4. OLAF's overall operational priorities should be to focus on complex and serious cases to better use its scarce resources, thereby providing best value for money for the Community.

2.3 External investigations

For external investigations, the protection of the Communities' financial interests is a shared responsibility with the competent Member States authorities ([11]). In this area, OLAF has generally more freedom and flexibility to decide whether or not to open an investigation. In accordance with the Manual ([12]) certain criteria, such as the principles of subsidiarity and proportionality, should be taken into account when opening an investigation. On the other hand, where no responsible authority to initiate an investigation exists in a Member State, OLAF is the only organisation entrusted with powers of investigation.

The areas of the sample cases concerned minor irregularities in the implementation of Community programmes and, most typically, represented cases where there was a suspicion of a conflict of interest, unjustified payments or mismanagement of project funds. During the monitoring of these cases the SC looked particularly at the seriousness of the cases, their opening criteria and actions taken by the national authorities and follow-up.

As in the internal de minimis cases examined, the SC found that no clear criteria were used when deciding to open these cases. The SC therefore considers that the present strategy and prioritisation of external investigations is not clear. There is a need to further develop the criteria for the opening (including the indicative minimum thresholds) of an external case and thus avoid opening the de minimis cases. In the SC's view a strategy and clear priorities would ensure better use of scarce Community resources and would enable better allocation of resources wherever possible to investigate more serious cases. The SC is not convinced that optimal use is made of OLAF's resources if cases of very low financial impact, exceeding the costs of investigation, are regularly undertaken.

The SC observes, from the sample cases, that very often the financial follow-up or recovery of unduly paid monies and/or the disciplinary actions (e.g. putting the company's name in the early warning system) where appropriate, had been successfully undertaken or were well under way by the relevant Community service or an Agency during or before OLAF's investigation. It was not clear for the SC, from the reports, as to the added value brought to the process by the OLAF investigation into these minor irregularities, particularly concerning the financial follow-up, since a recovery order had already been issued by the service in charge of the implementation of the programme and this service was in a position to do that as soon as information about possible fraud or irregularity had become available. The SC also noted the practice where, once an OLAF investigation had been opened by the Board, it was processed until the end and no measures were taken to close a case, even though anticipated follow-up actions may have been closed during the investigation.

Concerning judicial follow-up, the SC observed that it is often cumbersome for OLAF, for reasons beyond OLAF's control, to gather information from non-member states regarding the status of follow-up. For this reason this information is mostly processed by the Commission Delegations in the countries concerned and OLAF's input is, therefore, limited.

**Recommendation**

1. There is a need to develop/define a de minimis strategy for external investigations and to define the minimum thresholds for such investigations.

([11]) EC Treaty Art. 280 (2).

([12]) Point 3.2.1.2 External investigations – principle of discretion p. 63

2.4 Assistance, monitoring and coordination cases

In the monitoring of the de minimis cases a number of assistance, monitoring and coordination cases were included in the sample. In general the legal basis for these activities is the EC treaty and relevant regulations ([13]), which oblige OLAF to assist the Member States in organising cooperation and coordinating their activities for the purpose of protecting Communities' financial interests against fraud.

As in the external and internal de minimis cases, the SC concluded that it would be extremely useful to provide guidance in the Manual on the way OLAF treats incoming information concerning these types of cases, particularly as to the prioritisation and selection of cases (criteria on whether or not to open a case). In the case sample, the SC concluded that ownership of the case files (conduct of investigation and follow-up activities) was always assumed by the national authorities and OLAF's role was, therefore, very limited in comparison to the external and internal cases where actual investigation activities such as inspections, checks and verification of information, were carried out by the Office. For this reason it was difficult for the SC to see the potential added value contributed by OLAF in this area and it would seem wise to reflect on the extent to which OLAF's resources should be used in these activities if there is a lack of resources in the areas of external and internal investigations.

**Recommendation**

1. OLAF Manual to include prioritisation and selection criteria for cases of assistance, monitoring and coordination.

([13]) Article 280 of the EC Treaty, Article 1(2) of the Regulation (EC) No 1073/99 and Article 9(1) of Regulation 2988/95.

*ANNEX 4*

**OPINION No. 1/2009**

**OLAF's Annual Management Plan for 2009**

Brussels, 19 March 2008

The SC has examined both the public part and internal annexes of the OLAF Annual Management Plan (AMP) 2009 paying particular attention to the objectives, indicators and expected results of the investigations and the linkage between them and the other activities of the Office. Overall, the SC would like to congratulate OLAF for a clear, well structured and precise AMP as well as for the inclusion of a reference of its own recommendations. The SC would like to provide a few thoughts and observations on the AMP 2009.

1. **Public part**

The SC notes that in comparison with 2008 the indicator and target of the general objective have been changed from '*minimising fraud*' to emphasise the importance of customer feedback. The SC agrees with this approach and notes that it is in line with its recommendation of the Opinion No 3 of 2006, where the SC stressed the need for involvement of OLAF's stakeholders in defining both qualitative and quantitative standards and benchmarks for OLAF's activities. With this in mind, the SC would like to reiterate the necessity for OLAF to set up a regular feedback system with its key stakeholders.

With regard to the indicator of the general objective '*effective use of the results of stakeholders surveys*', the SC has examined the results and analysis (as provided by your Office) of the 2007 and 2008 Eurobarometer and Commission surveys. It has concluded that the surveys neither address nor provide any information regarding the operational efficiency or effectiveness of OLAF's services. Hence, the SC is doubtful whether OLAF is able to use these results to evaluate the achievement of the AMP objectives from the operations viewpoint. Moreover, the SC has reservations concerning these surveys since they do not generally target individuals cooperating directly with OLAF. The SC, therefore, suggests OLAF carry out a more targeted and tailor-made OLAF survey to determine the views of those representatives, of the member states' authorities and EU institutions and agencies, which interact with OLAF on a daily basis. This information would be more useful for the purposes of the AMP 2009.

Another observation of the results of the surveys was that general awareness of OLAF was not very good, which should be thought provoking for OLAF when designing its future activities. For example the main findings of the 2008 Eurobarometer survey (25 000 randomly selected EU citizens) were that 59 % of respondents had never heard of OLAF and another 20 % who had heard of OLAF were unable, or unwilling, to say whether they trusted the organisation. The results were similar in the Commission survey where the staff did not have experience in dealing with OLAF and therefore could not form an opinion of its activities. On the basis of these results the SC would like to encourage OLAF to reflect these results in the 2010 AMP.

The SC warmly welcomes the 'specific objective no 1', which emphasises measuring both the efficiency and effectiveness of OLAF's operations. The objective of 2009 will be to target more serious fraud cases, which is in line with the comments made by the SC for the 2008 AMP and in the Opinion no 3 on *de minimis* cases. The SC welcomes the improved strategy with regard to the de minimis rule of the internal investigations, which was explained in the recent letter on de minimis policy.

The SC would like further information, particularly concerning the selection criteria of the '*serious*' external investigations and encourages OLAF to come up with a clearer and more consistent strategy and guidelines as to the types of cases which OLAF intends to investigate in 2009. The SC would also like to stress that the draft Manual of the operational procedures (point 2.3) should include an explanation of how operational priorities are formulated.

The SC shares OLAF's views that the effectiveness of OLAF's operations is an important factor in achieving the general objective and would like to have clarification as to how 'Compliance with guidelines on thresholds and criteria for opening follow-up paths (Indicator 1.1)' will contribute to achieving this in 2009.

In addition to the clearance rate and duration criteria, the SC considers that the efficiency of investigations could be measured in terms of setting up a system or mechanism of regular control (including quality control) of investigations, to decrease delays and tackle problems shortly after they occur. The SC would like more information about the '18 month warning system' which is mentioned in the AMP under specific objective no 1. As indicated in the AMP, approximately 25 % of investigations are still not processed within the management target period of 24 months. Since this is a continuing trend from previous years, the SC questions whether the efficiency indicators are sufficient to address and decrease these delays.

As in the AMP 2008, the SC finds it problematic that the case clearance rate (result indicator 2.2) should be close to one if it is calculated on the basis of new cases opened during a calendar year. Additional measures are required by OLAF management to tackle the existing caseload (around 440 cases in December 2008), since achieving this target will not contribute to a reduction of the caseload. This is also confirmed in the minutes of the Directors' meeting of October 2008 which state that, in the first half of 2008, the clearance rate deteriorated and new backlog was created.

Furthermore, the SC notes that effectiveness and efficiency of operations is measured exclusively from the viewpoint of investigations and does not include any other operational activities and support services. However, the SC considers that the OLAF support services (other operational activities and administrative services) should also be incorporated into this strategy to make OLAF into a 'world class administrative investigative body'. In the future, it would be worthwhile reflecting upon how other activities, apart from investigations, contribute to the benefit of OLAF's investigations and how this could be measured in the AMP.

The SC notes that the effective communication strategy of the specific objective No 2 'promoting a culture of cooperation to combat fraud and corruption' does not include any clear in-house communication policy. Reflecting on the SC's monitoring of OLAF cases, it is apparent that general coordination of activities between units and departments could be improved. Therefore, the SC would recommend incorporating an internal communications strategy into the AMP in order to improve knowledge sharing and to enhance general awareness amongst OLAF staff, concerning its own activities.

2. **Internal annexes**

The SC welcomes the specific financial impact indicator for investigations in the trade and customs area and increased focus on cases with an estimated financial impact exceeding 1 MEuro.

Regarding the efficiency of Dir A and B investigations and operations, the SC is particularly interested to know how the duration of investigations and their potential delays are currently monitored and welcomes the systematic review of cases every 18 months while also inviting OLAF to reflect upon whether this system is sufficient to control delays. The SC would like clarification on the 'new pending stage'. Overall, the SC underlines the necessity of a strict control system to decrease delay and maintain the quality of case work.

As in the AMP 2008, the SC questions the value and usefulness of an indicator '% of cases closed with financial/judicial/administrative follow-up' in relation to the total number of cases since, at the outset, the outcome of investigations is difficult to predict.

The SC would like to reiterate that, yet again, the result indicator of duration of cases of 24 months was not achieved in 2008 and has not been achieved for the past four years. The minutes of the Directors' meeting of October 2008 indicate that only 49 % of cases were closed in less than 24 months in the first half of 2008. The average duration of an active case in the first half of 2008 was 27 months. The SC questions whether the target will be achievable in 2009, in particular if OLAF is to target more complex cases, while there will be no additional resources available.

The AMP states (Point 1.2 efficiency) that evaluations (or assessments) represent approximately 50 % of the investigators' workload (48 % in Dir A, 54 % in Dir B). The SC notes that neither targets nor objectives have been formulated for the 'non-active stage' of investigations, and no information is available in the AMP about the average length of evaluations. The SC suggests that reflection should be given as to how to include the non-active phase of an investigation in the AMP, since it consumes scarce resources and is an important factor when determining, for example, the time barring of evidence and follow-up of OLAF's final case reports.

Finally, the SC would like to note that some of the result indicators of the supporting activities (e.g. 'the number of meetings organised', 'smooth cooperation' and 'feedback received') are too general, difficult to measure and/or lack precision as to how they are to be monitored in comparison with the set objectives and questions whether they in fact represent a good and efficient method of assessing performance.

*ANNEX 5*

**OPINION No. 2/2009**

**OLAF's Reports of Investigations that have been in progress for more than nine months**

Brussels, 28 May 2009

PART I

**INTRODUCTION**

The Director General of the European Antifraud Office (OLAF) provides a monthly report to the Supervisory Committee with a summary of every investigation that has been in progress for more than nine months (hereafter, 'nine months reports'). The 'nine months reports' set out the reasons for non-completion of investigations and a projected timeframe for closing each case.

The length of investigations is a matter of common concern for the institutions and for OLAF itself [1], taking into consideration the negative consequences that delays may have for the parties involved in the investigation and also for the administrative, judicial and financial follow up of those investigations conducted by OLAF.

The large backlog of cases, resulting from a large number of delayed cases, is also detrimental to the day to day work of OLAF, given that the mere administration of old cases takes significant resources away from the primary tasks of the office.

OLAF enjoys the exceptional and considerable experience of 10 years of conducting European and international investigations. Its significance and reputation is continuously growing. It is therefore essential that the time taken to investigate and complete cases is as short as possible.

***The task of the Supervisory Committee***

The general aim of this review carried out by the Supervisory Committee (SC) is to assess the duration of investigations and the reasons for potential undue delays in order to ensure that investigations are conducted continuously over a period proportionate to the circumstances and the complexity of the case [2].

Through this regular monitoring procedure, the SC first and foremost reinforces OLAF's independence by verifying that no external interferences in the impartial conduct of investigations take place and that delays do not prevent the intended result of an investigation, for example, by running up against time bar.

This is the second opinion delivered by the SC on 'nine months reports'.

In April 2007 the SC issued the Opinion 1/2007 after having examined all 150 'nine months reports' covering the period January-December 2006. The aim of that opinion was to assess two different aspects: whether those reports contained adequate information to enable the SC to perform its monitoring function and to evaluate the extent to which those reports could be used as a management tool by OLAF in order to bring the investigation to a successful conclusion within a proportionate period. The conclusions and recommendations of that Opinion were accepted and followed by OLAF [3].

The SC stated therein, as a future action, that the reasons for the non completion of investigations within the specified time period as indicated by OLAF would be scrutinized.

***OLAF's 'nine months reports'***

This Opinion is now based on the examination of 275 'nine months reports' (out of 424 active cases) covering the period January 2007 to December 2008 and of 115 'assessments of initial information' concerning each and every 'nine months report' that OLAF sent to the SC from March to December 2008 [4]. These 'assessments' are drafted by OLAF's investigators before the decision to open an investigation is taken and they also contain 'initial work plan suggestions'. A control in the Case Management System (CMS) in order to determine the status of the cases was also carried out.

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[1] See OLAF Annual Activity Report 2007.

[2] Article 6.5 of Regulation (EC) No 1073/1999.

[3] See SC Annual Activity Report, page 28 (OJ C 123, 20.5.2008, p. 22-23 and/or annex 1.

[4] See annex 2: model form number 40.

The reports received, by sector, were the following ([5]):

— 47 internal investigations: European institutions: where OLAF plays the leading role and enjoys clear procedural competences ([6]).

— 11 Internal/External Investigations: EU bodies: where OLAF plays the lead role ([7]).

— 51 Direct Expenditure and External Aid: where OLAF has the lead role and where the rules for the conduct of investigations are also based 'on the agreements with third countries' ([8]).

— 46 External Aid: where OLAF has the lead role and where the rules for the conduct of investigations are also based 'on the agreements with third countries' ([9]).

— 43 Agriculture: where OLAF has strong and well established legal powers. However, this sector also covers customs cases where agricultural products are involved and where OLAF plays primarily a co-ordination and assistance role ([10]).

— 51 Customs I and II: where OLAF plays a co-ordination and assistance role and where the duration of cases depends very much on action from the Member States (MS) or third countries involved ([11]).

— 26 Structural Measures: where OLAF enjoys a solid legal basis for conducting investigations ([12]).

OLAF has established a model form for the 'nine months reports'. The reasons for non completion of cases, as predefined in the model form of OLAF's 'nine month reports', were ticked by the investigators as follows ([13]):

— '**Significant resources were allocated, nevertheless, the volume of the operational/investigative work means that more time is needed**.' in 133 reports, (50 %);

— '**Tactical hold in investigation**' in 16 reports, (6 %);

— '**Lack of resources**' in 30 reports, (11 %);

— '**Low priority combined with limited resources**' in 12 reports, (5 %);

— '**Lack of co-operation: by MS; by Commission Services; by other institution; by individual/company**' in 43 reports, (15 %) and

— '**Other: see case**' in 77 reports, (27 %).

The content of these 'nine months reports' drafted by OLAF investigators is formally countersigned – 'visaed' – by the Head of Unit of the sector in question and by the Director of each of the Investigations and Operations Directorates respectively.

From January 2008 and following the modification of the nine months report model form ([14]), the reasons 'tactical hold in investigation' and 'low priority combined with limited resources' were removed from the list.

***The aim and methodology of the current review***

It is of fundamental importance for any investigation office to be able to give clear reasons for delays and obstacles in the investigation process. This allows accurate planning and strategy of investigations, allocation of appropriate staff, precise evaluation of external co-operation, case prioritisation and establishment of the investigation policy.

Furthermore, the SC can only monitor the length of OLAF's investigations to exclude external interferences or biased decisions if objective and verifiable reasons are given for delays.

([5]) See annex 3: model form number 20.
([6]) Unit A1 (88 active cases); Article 4 of Regulation (EC) No 1073/1999.
([7]) Unit A2 (27 active cases); Article 3 of Regulation (EC) No 1073/1999.
([8]) Unit A3 (79 active cases); Article 3 of Regulation (EC) No 1073/1999 and 'agreements with third countries'.
([9]) Unit A4 (54 active cases); Article 3 of Regulation (EC) No 1073/1999 and 'agreements with third countries'.
([10]) Unit B1 (68 active cases); Article 3 of Regulation (EC) No 1073/1999, Regulation (EC, Euratom) No 2988/95, Regulation (Euratom, EC) No 2185/96 and Regulation (EC) No 515/97 inter alia.
([11]) Unit B2 Customs I (38 active cases); Unit B3 Customs II (27 active cases).
([12]) Unit B 4 (43 active cases). Article 3 of Regulation (EC) No 1073/1999, Regulation (EC, Euratom) No 2988/95, Regulation (Euratom, EC) No 2185/96.
([13]) Some cases give several reasons for delay, e.g. lack of resources and lack of co-operation.
([14]) See annex 2B: previous version of model form 40.

In December 2008, 78 % of the OLAF investigations had been in progress for a period exceeding nine months and 40 % had been in progress for more than two years. In addition to performing an overall analysis of the information provided in the 'nine months report', the SC decided to check the consistency of the reasons ticked by OLAF investigators in the 'nine months reports' for non completion of cases, with the reasons as elaborated in detail in the main body of the report.

The SC also looked into the stated reasons for delays in order to analyse to what extent they contributed to an understanding of the real reason or the most important factors causing delay to ongoing investigations. To this end, the SC also analysed the 'assessments of initial information', particularly the initial work plan suggestions.

By carrying out this analysis, the SC additionally aimed to clarify whether the high percentage of investigations which were in progress over a 'nine month period' was due to objective and unavoidable causes.

Particular attention has been also paid to the expected time for completion of investigations that OLAF is obliged to communicate to the SC in the 'nine months reports' ([15]).

***Methodology***

Taking into consideration the specific nature of each sector and the different powers and procedural rules applicable to each, the analysis was carried out sector by sector ([16]). However, for the main purpose of this Opinion, we have also grouped OLAF's reports on the basis of the predefined reasons ticked in the 'nine months' model report for the non completion of cases within the specified period.

Specific conclusions and recommendations are to be made on a sectoral basis; however, global conclusions and recommendations will be provided.

PART 2

**ANALYSIS OF OLAF'S REASONS FOR NOT HAVING COMPLETED INVESTIGATIONS IN THE NINE MONTH PERIOD**

1. **'SIGNIFICANT RESOURCES WERE ALLOCATED NEVERTHELESS THE VOLUME OF OPERATIONAL/ INVESTIGATIVE WORK MEANS THAT MORE TIME IS NEEDED'**

Approximately 50 % of investigations transmitted to the SC were declared by OLAF to be delayed for this reason ([17]).

***Internal investigations: European institutions***

15 cases giving this reason were examined (31 % of cases in this sector transmitted to the SC).

Some of the cases were well explained and 'the volume of investigative work' easy to understand in the context of the report ([18]). Nevertheless, the underlying reasons for delay in many of the investigations were divergent: long periods of inactivity (up to 7 months) before initiating the investigation; case progress depending on potential information from outside sources where no investigative steps were actually taken by OLAF as well as unexplained reasons for delays ([19]). Lack of co-operation from individuals, appointments for interviews deferred to a later date and awaiting responses from individuals or institutions were also noted ([20]).

A significant factor which we identified was that of investigators working on other cases and on cases with higher priorities ([21]).

([15]) Article 11.4 of Regulation (EC) No 1073/99.

([16]) Directorate A Investigations & Operations covers four sectors: Unit A1 Internal investigations: European institutions; Unit A2 Internal/External investigations: EU bodies; Unit A3 Direct expenditure and External Aid; Unit A4 External aid. Directorate B Investigations & Operations also covers four sectors: Unit B1 Agriculture; Unit B2 Customs I; Unit B3 Customs II; Unit B4 Structural Measures.

([17]) 48,36 %.

([18]) See annex 4, cases number 31 and 44.

([19]) See annex 4, cases number 17, 14, 19 and 5.

([20]) See annex 4, cases number 3 and 19.

([21]) See annex 4, cases number 22, 14 and 1.

Finally, in some cases, despite a sizeable number of investigators being allotted to a case, the reasons given for delay included both 'significant resources' and 'lack of resources' ([22]). Although there might be underlying reasons for this contradiction related to different allocation of staff in the different phases of an investigation, nevertheless, on reading, it only serves to give a confusing impression.

***Internal/External investigations: EU bodies***

Eight cases giving this reason were examined (72 % of cases in this sector transmitted to the SC).

In a number of cases, the 'volume of investigative work' as the reason for delay is well presented and easily understandable in the context of the report ([23]).

In other cases the SC noted that long periods of inactivity elapsed from the date of opening the case to the appointment of investigators, or to the date when the investigation starts (up to 6 months) and that the unexplained and apparent change of the investigator in charge is the underlying reason for delay in some cases ([24]). Delayed co-operation from individuals has also been identified in a case with very low economic impact ([25]). Identical descriptions of the case and case results are reported in two different 'nine months reports' where different operational acts are undertaken ([26]).

***Direct expenditure and External aid***

21 cases giving this reason were examined (41 % of cases in this sector transmitted to the SC).

Although in most investigations the reason mentioned is well explained and corresponds to the case workload ([27]), it was also noted that one third of cases are of a criminal assistance nature and no operational actions were undertaken by OLAF ([28]) or that a response from other bodies is still pending ([29]).

***External aid***

20 cases giving this reason were examined (43 % of cases in this sector transmitted to the SC).

In some cases there is good planning, the aim of the investigation is clear and detailed, the investigations are well conducted and there is a clear and justified explanation for delays ([30]).

However, in other cases, 'the volume of investigative work' does not correspond to work carried out by OLAF but rather to OLAF's awaiting completion of audits carried out by external firms or experts, without any active participation or close follow up by OLAF ([31]). As pointed out in the first SC opinion on this matter, the added value of OLAF's work in this field is not demonstrated. The SC has noted a degree of lack of clarity in the investigation planning following missions to third countries and some months after investigatory steps were carried out ([32]).

The SC observed a lack of adequate planning in some missions to third countries ([33]). The compilation of appropriate documentation does not follow a common approach; sometimes missions are organised in order to obtain documentary evidence and sometimes the transfer of documents is arranged directly through the EC delegation ([34]) without prior contacts with the DG concerned, resulting in delays in the execution of the investigations ([35]). Furthermore, it indicates a lack of cost-effectiveness evaluation.

([22]) See annex 4, case number 26.
([23]) See annex 4, case number 50.
([24]) See annex 4, cases number 47, 40 and 48.
([25]) See annex 4, case number 49.
([26]) See annex 4, cases number 53 and 54.
([27]) See annex 4, cases number 77 and 68 inter alia.
([28]) See annex 4, cases number 59, 61, 60, 62, 75 and 70.
([29]) See annex 4, case number 64.
([30]) See annex 4, cases number 117, 15 and 135.
([31]) See annex 4, cases number 112 and 115.
([32]) See annex 4, cases number 120 and 123.
([33]) See annex 4, case number 128.
([34]) See annex 4, case number 130.
([35]) See annex 4, case number 147.

Delays are sometimes explained as being due to a lack of request from the national judicial authorities ([36]). It has also been noted that contradictory reasons have been quoted to justify the delay i.e. both 'significant resources' and 'low priority combined with limited resources allocation' are ticked in the model report ([37]).

***Conclusions and recommendations:***

***The reason 'significant resources were allocated, nevertheless, the volume of the operational/investigative work means that more time is needed' does not correspond with the real cause for delay in more than half of those investigations examined.***

***The fact that this reason is ticked in the model report by investigators when the actual reason is different is a matter of concern for the SC. The SC has noted that this reason has been used across the board (indiscriminately), and has been differently interpreted by investigators working within the same Unit.***

***The fact that reports with conflicting selected reasons for non-completion of cases are formally countersigned – 'visaed' – by management (Head of Unit and Director), reveals an unsatisfactory level of attention to the internal control of investigations.***

***The lack of a reliable use of this reason for delays may lead OLAF to misleading conclusions in terms of staff needs, budget demands and adoption of measures to reduce delays in investigations.***

***These reports should be used as a management tool for investigations. The SC recommends that OLAF carry out a revision of those investigations where this cause has been ticked in the model report in order to reassess the investigation strategy, taking into consideration the real reason for non-completion of cases.***

*Agriculture*

28 cases giving this reason were examined (65 % of cases in this sector transmitted to the SC).

The SC noted that cases are well explained and OLAF investigators have carried out continuous work ([38]). However, in most of the co-ordination cases that this sector deals with, the key reason for delays is not the volume of investigative work of OLAF's investigators but rather the lack of prompt (or any) reaction from the national authorities of the MS. In these cases OLAF is waiting for responses from these authorities ([39]).

In some external investigation cases, the same problem was identified ([40]) and, occasionally, it was noted that some of the information provided on the different steps in investigations was neither clear nor chronological, thus making it difficult to assess the exact reason for delay ([41]).

Additionally it was noted that sometimes long periods of inactivity in the 'assessment of initial information' resulted in little operational work during the nine months period ([42]).

It was also noted that some of these cases involved criminal elements which were the subject matter of judicial investigations in the MS concerned. In such cases, OLAF's investigations remained on hold in the absence of a straightforward exchange of information with MS' judicial authorities ([43]).

*Customs I and II*

28 cases giving this reason were examined (55 % of cases in this sector transmitted to the SC).

([36]) See annex 4, case number 145.
([37]) See annex 4, cases number 126, 122, 121 and 150.
([38]) See annex 4, cases number 181, 169, 178, 179, 176 and 194.
([39]) See annex 4, cases number 159, 161, 162, 167, 165, 166, 175, 191 and 193.
([40]) See annex 4, cases number 171 and 177.
([41]) See annex 4, case number 179.
([42]) See annex 4, case number 189.
([43]) See annex 4, cases number 186 and 183.

The greater number of these cases is dependent on co-operation with MS' authorities and, for the most part, OLAF acts in support of the MS' authorities in the conduct of their investigations. In other cases, OLAF is waiting for information to be provided by the MS or a third country ([44]).

The SC has sympathy with the explanation given by OLAF with regard to external investigations of antidumping cases namely, that due to their nature, scale, the involvement of several MS through mutual assistance and missions to third countries, it was not possible to conclude the investigation within a nine month period ([45]). Higher working priorities were also mentioned and it was noted that some old cases awaiting reaction from MS are still active ([46]).

It was also noted that in co-ordination cases, the reasons for exceeding the nine month period were well explained and justified. Moreover, detailed investigation working plans were developed at the outset ([47]).

Some criminal assistance cases were identified, the case progress depending on the national courts' work or on the execution of letters of request ([48]).

The SC was pleased to note that the 'nine months report' was explicitly used as a management tool for the case reassessment following a detailed analysis of unavoidable reasons for delays ([49]).

***Structural Measures***

13 cases giving this reason were examined (50 % of cases in this sector transmitted to the SC).

In some cases the 'volume of investigative work' corresponds to changes of the investigator in charge ([50]). In other cases the workload of the investigator in charge is the underlying reason for delay ([51]). The 'volume of investigative work' does not seem to be well justified by the list of operational acts ([52]).

The SC noted that both the periods of 'assessment of initial information' and the time spent on operational work were excessively lengthy, the former lasting for over one year and the latter for up to ten months per case with no clear justification identified in the report ([53]).

***Conclusions and recommendations:***

***There is a general lack of precision in the definition and the use of the reason 'volume of operational/investigative work' which does not distinguish between the volume of work that OLAF carries out and the volume of work that is the responsibility of national authorities in the majority of the assistance and co-ordination cases.***

***Such lack of precision does not allow for a clear vision or measure of the level of assistance and co-operation with external national authorities, thus making it difficult for OLAF to improve its performance.***

***Regarding external investigations, with the exception of the customs sectors, the real reasons for delay were other and various.***

***It would be advisable to revisit the definition 'volume of work' as it applies to each case in order to more properly identify where the responsibility lies for the measures to be taken.***

([44]) See annex 4, cases number 201, 207 and 215, inter alia.
([45]) See annex 4, cases number 202, 208, 211, 212, 234, 214, 229 and 237.
([46]) See annex 4, cases number 198 and 205.
([47]) See annex 4, cases number 240, 241, 242, 245 and 246.
([48]) See annex 4, cases number 244, 231 and 238.
([49]) See annex 4, case number 241.
([50]) See annex 4, e.g. case number 254.
([51]) See annex 4, e.g. case number 168.
([52]) See annex 4, e.g. case number 260.
([53]) See annex 4, e.g. case number 264.

2. **'TACTICAL HOLD IN INVESTIGATION'**

The SC has already expressed in its former Opinion on this matter that the term 'tactical hold in investigation', used in the 'nine months reports', should either be restricted or omitted. Moreover, the use of this reason for not having concluded an investigation should be prudent and precise.

We are pleased to note that in 2008 no case report has been transmitted to the SC making formal use of this reason for delays, although it has been observed that it was used in 'nine months reports' where the reason 'Other' was mentioned ([54]). Moreover, there are still a number of active cases where this reason has been indicated ([55]):

***Internal investigations: European institutions***

Four cases giving this reason were examined (8 % of cases in this sector transmitted to the SC).

It was noted that this reason was not clearly explained or justified. In some cases it has been used to put two related cases on stand-by ([56]) without attention being given to the procedural rights of the persons involved. Investigations with no economic impact and which appear to be based on vague allegations were also identified.

Case reports in which there were missions to third countries with no clear investigation strategy were also noted. The term 'tactical hold' is in some cases combined with other reasons: workload of the investigators in charge and 'lack of co-operation by other individual' ([57]), when the genuine reason for the case not being wound up is the lack of OLAF's powers to interview third parties in a non MS.

***Direct expenditure and External Aid***

Seven cases giving this reason were examined (13 % of cases in this sector transmitted to the SC).

In some cases the use of 'tactical hold' is well explained ([58]). However, it was noted that sometimes no further investigation activities were conducted by OLAF, information was transmitted to the judicial authorities of a MS and OLAF has kept the cases waiting should those authorities need OLAF's assistance ([59]).

Occasionally, the underlying reason for delay corresponds to co-operation with other Commission services ([60]).

***External Aid***

Five cases giving this reason were examined (11 % of cases in this sector transmitted to the SC).

It was noted that in all those cases, 'tactical hold in investigation' corresponded to OLAF waiting for the completion of audits carried out by external firms, or no further investigation activities were conducted by OLAF ([61]).

***Conclusions and recommendations:***

***Prudent use should be made of the reason 'tactical hold' to keep an investigation open and it should be explained in detail in order to have a clear view of the investigation strategy.***

***Those investigations which are still active where this reason is indicated should be revisited and particular attention given to those dating from the nine month reports received in 2007.***

([54]) See annex 4, cases number 79, 38 and 76.
([55]) See annex 4, cases number 18, 79, 76, 38 and 36.
([56]) See annex 4, cases number 6 and 21.
([57]) See annex 4, case number 21.
([58]) See annex 4, cases number 69 and 78.
([59]) See annex 4, case number 63.
([60]) See annex 4, case number 66.
([61]) See annex 4, cases number 110, 111, 114, 115 and 125.

3. **'LACK OF RESOURCES'**

***Internal Investigations***

Nine cases citing this reason were examined (19 % of cases in this sector transmitted to the SC).

The SC noted that reasons for delays are divergent and common to several cases: priority is given to other cases which were opened some time previously; long periods of inactivity (from four or five, up to 11 months) after collection of documents in missions to third countries or the copy of data, without further examination in cases where very small or non-estimated economic impact were observed ([62]).

In all of these cases the number of investigators in charge was aligned with or exceeded the proposal for staff allocation indicated by the evaluator in the 'assessment of initial information'.

In some cases the reason 'lack of resources' is explained as a lack of staff resources due to a temporary absence of the investigator in charge ([63]).

***Direct expenditure and External Aid***

Four cases giving this reason were examined (7 % of cases in this sector transmitted to the SC).

In those cases the reason 'lack of resources' is explained in detail and refers to the workload of investigators in charge together with the average priority of the case in question ([64]), or linked to the lack of investigators in OLAF with the required linguistic skills ([65]).

Occasionally it was noted that no explanation was given to justify the lack of resources in a high priority case with, in principle, adequate staff allocation ([66]).

***External aid***

Nine cases giving this reason were examined (19 % of cases in this sector transmitted to the SC).

The SC is concerned to observe that no investigation actions were taken for long periods from the date of opening the case (from nine up to 13 months) and the work plan was not initiated despite the fact that the number of investigators corresponds to the number suggested in the initial information assessment ([67]).

In some cases, contradictory reasons were ticked in the 'nine months reports': 'significant resources', 'complexity of the case' and 'lack of resources' ([68]). Moreover, the SC noted that in some cases, following the decision to open a case, OLAF would either await completion of external audits for several months without undertaking any investigation acts or, in other cases, refer to other case priorities ([69]).

In other cases, the real reason as mentioned in other sections of the model form, is the complexity of the case and the volume of investigation work ([70]), or 'lack of time' without further explanation ([71]).

([62]) See annex 4, cases number 7, 36, 9 and 8.
([63]) See annex 4, cases number 45 and 41.
([64]) See annex 4, case number 72.
([65]) See annex 4, case number 94.
([66]) See annex 4, case number 104.
([67]) See annex 4, cases number 140, 144 and 131.
([68]) See annex 4, case number 150.
([69]) See annex 4, cases number 154 and 119.
([70]) See annex 4, case number 126.
([71]) See annex 4, case number 129.

***Conclusions and recommendations:***

***The mention of the reason 'lack of resources' for not having concluded the investigation in a nine months period is not justified in most of the cases examined.***

***This is a matter of particular concern for the SC taking into consideration that OLAF's demands for increasing the number of staff in the annual budget would also be, in principle, based on an analysis of the 'lack of resources' in the investigations and operations field. Therefore, scrupulous attention should be paid to this matter.***

***This is also relevant for the SC given the fact that the SC is consulted on the annual draft budget for OLAF. Any inaccuracy in pointing out this reason could lead to misleading conclusions in terms of OLAF budget.***

***The indication of this reason should be explained in detail in the nine months report. Moreover, practical solutions to remedy this situation should be envisaged and explained in each and every report where this reason is mentioned.***

***Customs I and II***

Two cases giving this reason were examined (3 % of cases in this sector transmitted to the SC).

Higher operational priorities are mentioned in one of the cases ([72]) and reasons for not working full time on a case are clearly explained, including solutions to remedy the lack of resources situation ([73]).

***Structural Measures***

Six cases giving this reason were examined (23 % of cases in this sector transmitted to the SC).

All cases mention the same reason to justify their non completion: 'lack of resources and important volume of the investigative work' ([74]); however, apart from one of them ([75]), no explanations are given to allow an understanding of any of those two reasons.

***Conclusions and recommendations:***

***Apart from the customs sector where the nine months reports have been correctly used as a management tool to revisit the investigation needs, explanations are required in order to understand the reasons indicated for non-completion of cases.***

## 4. **'LOW PRIORITY COMBINED WITH LIMITED RESOURCE ALLOCATION'**

The SC has already expressed in its former Opinion on this matter that, in policy investigation terms, when a case is of 'low priority' coupled with 'limited resource allocation', an explanation is not expected for non-completion but rather for keeping it open nine months later.

We are pleased to note that in 2008, this reason for non case completion was removed from the nine month model report. However, there are still a number of active cases that have used that reason and need to be urgently revisited.

***Internal investigations: EU institutions***

Five reports were examined (10 % of cases in this sector transmitted to the SC).

([72]) See annex 4, case number 204.
([73]) See annex 4, case number 230.
([74]) See annex 4, cases number 252, 253, 256, 257, 258 and 259.
([75]) See annex 4, case number 253.

The SC noted that some cases remained open during prolonged periods (even following 10 months of 'assessment of initial information') and no investigation actions were undertaken, the pertinent reason being that the investigator was awaiting the results of an internal investigation ([76]).

In some cases these reasons are combined with 'volume of investigative work' or 'lack of co-operation from an individual' ([77]). Sometimes no economic impact is mentioned and no tangible results are achieved but only potential irregularities are referred to ([78]).

In all those cases, the number of investigators in charge is adequate (it varies from two to four) and some investigations are still active, whereas others took more than two years to complete them.

***External aid***

Four cases giving this reason were examined (8 % of cases in this sector transmitted to the SC).

The SC noted with concern that investigations with 'no financial detriment to the European Commission funds' as described in the report were opened and missions to third countries in cases with low economic impact have taken place ([79]).

It was also observed that contradictory reasons for some investigations not having been completed have been ticked in the model report: e.g. 'significant resources were allocated' and 'low priority combined with limited resource allocation', nevertheless in the latter, on the spot missions to third countries have taken place ([80]).

In all the above referred cases the number of investigators in charge seems to be adequate and is not in question.

***Conclusions and recommendations:***

***'Limited resource allocation' is not justified in any of the 'nine months reports' examined. As for the staff resources, the number of investigators seems to be adequate in relation to the volume of investigative work and to the work plan suggestions and it was not questioned in any of the cases. Some of these cases have a very low financial impact or even no financial impact on European Community funds.***

***The fact that these reports are formally countersigned – 'visaed' – by management (Head of Unit and Director), reveals that an unsatisfactory level of attention to the internal control of investigations.***

***When reference is made to 'limited resource allocation' it should be clearly explained in order to avoid misleading conclusions regarding staff allocation and OLAF financial resources.***

***The evaluation assessment which is presented to the Board should include a cost-efficiency evaluation and an overview of the staff resources of the Unit. The allocation of those investigators to other cases, the number of cases which are still pending and categorised as 'high priority' that could require the allocation of the investigators in question to other cases should also be mentioned.***

***Customs I and II***

Three cases giving this reason were examined (5 % of cases in this sector transmitted to the SC).

These cases are well described and well explained and the timeframe for the completion of cases has been respected. OLAF intervention is accurate ([81]). Both 'low priority and limited resource allocation' are well justified within the content of the reports.

([76]) See annex 4, case number 12.
([77]) See annex 4, cases number 13 and 15.
([78]) See annex 4, cases number 16 and 18.
([79]) See annex 4, cases number 116 and 118.
([80]) See annex 4, cases number 121 and 122.
([81]) See annex 4, cases number 206, 209 and 210.

***Structural Measures***

One case giving this reason was examined (3 % of cases in this sector transmitted to the SC).

No investigations have been initiated since they were seen not to be cost-effective. Only 'basic verification techniques have been applied and appear to indicate a risk of irregularities in the awarding of project funding'. If the case is of 'low priority' it is perhaps unnecessary to open an external investigation ([82]).

***Conclusions:***

***The reason for non completion of case was well justified and explained and the cost-efficiency evaluation was carried out.***

## 5. 'LACK OF CO-OPERATION'

**Lack of co-operation by the Member State (MS)**

Seven case reports were received by the SC in 2007 and six in 2008.

***Internal investigations: European institutions***

One case giving this reason was examined (2 % of cases in this sector transmitted to the SC).

It was observed that this is an external investigation in which two units are involved and a lack of co-operation of the Commission services is claimed. No actions appear to be planned with respect to this lack of co-operation ([83]).

***Internal/External investigations: EU bodies***

One case giving this reason was examined (9 % of cases in this sector transmitted to the SC).

The SC noted that the reason for this case not having been completed is not the lack of co-operation from a MS, but from a third country where a criminal investigation has been started. OLAF has not conducted any investigative action during the nine month period and is awaiting a report from an external body in order to take 'appropriate actions' ([84]).

***External aid***

Two cases giving this reason were examined (9 % of cases in this sector transmitted to the SC).

The SC observed some confusion in reference to dates of the evaluation period (up to one year and one month by four evaluators) and the drafting date of the 'assessment of initial information' (only drafted three days before the date of opening the investigation). No investigative acts have been implemented during the nine month period due to the lack of request for assistance from OLAF from the MS national judicial authorities ([85]).

The SC also noted that OLAF has not implemented the actions listed in the investigation plan in a case where lack of co-operation by the MS is quoted with reference made to Regulation 2185/96 ([86]).

([82]) See annex 4, case number 250.
([83]) See annex 4, case number 24.
([84]) See annex 4, case number 55.
([85]) See annex 4, case number 133.
([86]) See annex 4, case number 147.

***Conclusions and recommendations:***

***The lack of co-operation from the Member State has been inaccurately used in the cases examined. Sometimes this refers to the lack of co-operation from the Commission services, or the national authorities of third countries. On other occasions, it may refer to a lack of request for OLAF's assistance from the MS national authorities.***

***Moreover, no solutions are envisaged to solve the problem of a lack of co-operation.***

***The SC recommends that serious thought be given by investigators prior to the application of this reason for delay and advocates close scrutiny by managers.***

***Agriculture***

Seven cases giving this reason were examined (16 % of cases in this sector transmitted to the SC).

The cases examined are external investigations and co-ordination cases in agricultural matters where OLAF is awaiting responses from the MS' authorities some of which have shown evidence of poor co-operation with OLAF ([87]). According to the information provided in the nine months reports, OLAF does not seem to play a very proactive role in obtaining the information already requested ([88]).

***Customs I and II***

Two cases giving this reason were examined (4 % of cases in this sector transmitted to the SC).

The cases studied are 'co-ordination' and 'criminal assistance' cases where OLAF's assistance is requested by the national authorities ([89]).

***Structural Measures***

Two cases giving this reason were examined (7 % of cases in this sector transmitted to the SC).

The SC verified that prolonged periods elapsed (eight months and four months) without any response from the national authorities in external investigation cases ([90]).

***Conclusions and recommendations:***

***The lack of co-operation from the MS has been rightly identified in all the cases examined; there is a need for a more effective co-operation with and from the MS.***

***OLAF should take a more proactive approach.***

**Lack of co-operation by the Commission services**

Two case reports were received by the SC in 2007 and three in 2008.

***Internal investigations: European institutions***

Three cases giving this reason were examined (16 % of cases in this sector transmitted to the SC).

([87]) See annex 4, case number 188.
([88]) See annex 4, cases number 157, 163 and 180.
([89]) See annex 4, cases number 224 and 225.
([90]) See annex 4, cases number 262 and 255.

The 'lack of co-operation from the Commission services' is not the only reason indicated for delays in those three cases. This reason is combined with other explanations e.g. tactical hold, higher priorities of investigators in other cases, co-operation steps with national judicial authorities ([91]).

It was noted that the 'lack of co-operation from the Commission services' mentioned in the reports is not followed by pro-active action from OLAF to remedy the situation.

***Direct expenditure and External Aid***

Two cases giving this reason were examined.

It was noted that the notion of lack of co-operation from the Commission services was an element with no impact on the OLAF investigation as such and somewhat confusing ([92]).

***External aid***

Two cases giving this reason were examined (4 % of cases in this sector transmitted to the SC).

In these cases the 'lack of co-operation from the Commission services' is not clear. In one of them this type of 'lack of co-operation' is not explained, in the other the Commission services seemed to have justified the delay by outside reasons ([93]).

***Conclusions and recommendations:***

***In those cases examined where the lack of co-operation from the Commission services was identified, OLAF does not appear to have adopted concrete actions to remedy the situation.***

***OLAF should seek a way to speed up communication channels in this area.***

**Lack of co-operation by other institutions**

Three case reports were received by the SC in 2007 and six in 2008.

***Direct expenditure and External Aid***

One case giving this reason was examined (2 % of cases in this sector transmitted to the SC).

The reason is well explained and it is combined with several other reasons for not having completed the investigation ([94]).

***External aid***

Two cases giving this reason were examined (4 % of cases in this sector transmitted to the SC).

The underlying reason in both cases is related to national judicial authorities and not to other institutions: lack of request for OLAF's assistance from national judicial authorities ([95]) and lack of response from those national judicial authorities ([96]).

***Conclusions and recommendations:***

***Inaccurate use of this reason in some of the cases mentioned.***

***The SC recommends a re-examination of the use of this reason to avoid any confusion.***

([91]) See annex 4, cases number 2, 24 and 43.
([92]) See annex 4, cases number 96 and 100.
([93]) See annex 4, cases number 53 and 148.
([94]) See annex 4, case number 100.
([95]) See annex 4, case number 133.
([96]) See annex 4, case number 134.

***Agriculture***

One case giving this reason was examined (2 % of cases in this sector transmitted to the SC).

The case is well explained and OLAF played an active role in moving the case forward and getting a positive answer from the national authorities of a third country in an external investigation ([97]).

***Customs I and II***

Five cases giving this reason were examined (10 % of cases in this sector transmitted to the SC).

All cases are very well presented and thoroughly explained. However the investigators in charge tick systematically the box 'lack of co-operation by other institution' but they indicate in brackets that the lack of co-operation comes from national authorities of third countries; the reason for non completion of all those co-ordination cases being in fact this latter ([98]).

***Conclusions and recommendations:***

***All these cases are clearly explained. However, the reason for non completion is 'lack of co-operation from national authorities of third countries' which is different from 'lack of co-operation by other institutions'. No 'nine months report' of lack of co-operation by other institutions has been transmitted to the SC in these fields.***

***For the sake of clarity, the reason 'lack of co-operation by third countries' should be the subject matter of a separate box.***

**Lack of co-operation by individual/company**

13 case reports were received by the SC in 2007 and three in 2008.

***Internal investigations: European institutions***

Three cases giving this reason were examined (6 % of cases in this sector transmitted to the SC).

In two of these cases the reason is well explained and justified ([99]). However in the third case OLAF did not have powers to interview the individual concerned ([100]).

***Direct expenditure and External Aid***

One case giving this reason was examined (2 % of cases in this sector transmitted to the SC).

The reason is well justified in the case in question ([101]).

***External aid***

Five cases giving this reason were examined (10 % of cases in this sector transmitted to the SC).

In all these cases, this reason is always combined with other reasons which are in fact the key reasons for cases not being concluded. These reasons are divergent and common to several cases: awaiting external auditors' reports, complexity of cases and connexion with other OLAF investigations, low priority and intangible financial damage ([102]).

([97]) See annex 4, case number 195.
([98]) See annex 4, cases number 233, 235, 201, 203 and 207.
([99]) See annex 4, cases number 1 and 15.
([100]) See annex 4, case number 21.
([101]) See annex 4, case number 98.
([102]) See annex 4, cases number 116, 124 and 150.

***Conclusion and recommendations:***

***The underlying reasons for delays in some of these cases examined are of a different nature from that of 'lack of co-operation by individual/company'.***

***Attention should be paid in detail to the correct use of this reason.***

***Agriculture***

Three cases giving this reason were examined (7 % of cases in this sector transmitted to the SC).

All those cases are well explained and the reason for delay is rightly pointed out: lack of co-operation by third country.

***Customs I and II***

Four cases giving this reason were examined (7 % of cases in this sector transmitted to the SC).

The cases are well and thoroughly explained; nonetheless the real reason for delays is in fact lack of co-operation by a third country ([103]).

The other three cases are in fact criminal assistance cases without the participation of a magistrate of the legal and judicial advice unit ([104]).

***Conclusions and recommendations:***

***The reason for cases exceeding the nine month period is lack of co-operation by a third country and not by individual/company.***

***A new category should be established to reflect that different and real reason for delay, namely 'lack of co-operation by a third country'.***

6. **'OTHER: SEE CASE'**

73 cases mentioning 'other' as the cause for delays were examined (27 %) ([105]).

This reason has been cited in a large number of case reports: 16 in 2007 and 57 in 2008, thus making it the second most quoted reason for delay in the period examined.

The number of cases where this reason is quoted has also significantly risen in the latter half of 2008. An overall analysis shows that in a good number (nearly a half) of the cases the reason 'Other' seems appropriate when reading the report ([106]).

Thus, in many cases, the reason for delay is: complexity of the investigation, change of investigator, other case priorities, criminal assistance case (lack of request from the national judicial authorities), tactical hold in investigation, etc ([107]).

Moreover, OLAF is 'waiting for verifications in the MS', 'co-operation from a third country' or 'long term' investigations have also been identified ([108]).

([103]) See annex 4, case number 218.
([104]) See annex 4, cases number 200, 199 and 217.
([105]) In 17 of these reports, this 'other' reason was combined with another one.
([106]) See annex 4, cases number 153, 106, 89, 86, 94, 139, 151, 42 and 39.
([107]) See annex 4, cases number 147, 152, 102, 100, 109, 80 and 93 inter alia.
([108]) See annex 4, cases number 173, 174, 232, 243, inter alia.

However in many cases the true reason for delay seems to be otherwise, while still adhering to the predefined list of reasons provided in the model reporting format ([109]).

In other cases we found the stated reason for non-completion of the case difficult to understand and, in some cases, meaningless or even unacceptable. As examples of the latter, one may note two cases where the reason for delay is stated as 'the investigation is still ongoing' ([110]).

The SC also considers it a matter of particular concern that the 'other' reason for delay is defined as being the discussion pending on the final case report when the investigation is finished (long periods from five months to up to more than one year) ([111]).

***Conclusions and recommendations:***

***The choice of the reason 'other' in such a high percentage of investigations indicates the need to further extend and refine the list of reasons for non completion of cases.***

***The inappropriate indication of the reason 'other' when an already predefined reason should be employed, together with its non-justifiable use, indicates the need to thoroughly review the choice of this reason and to re-examine the cases in question.***

## NO EXPECTED TIME FOR COMPLETION: A QUALITY PROBLEM

The format for reporting nine months cases to the SC contains a section for OLAF to report on the approximate time for completion of the case.

Out of the 275 reports examined we found that in 64 of the 275 cases, no such approximation was made at all, i.e. no time for completion was set. 20 cases were closed at the expected time for completion; 105 cases were closed more than one month later than the expected time for completion. In the vast majority of these cases the delay was significantly longer than one month, in some cases exceeding 18 months and 72 cases will be closed one or several months later than expected.

***Conclusions and recommendations:***

***From this merely statistical and summary analysis it is hard not to draw the conclusion that this part of the 'nine month reports' is burdened with a serious quality problem. In order to make the nine months reporting procedure useful to OLAF and as a case-management tool, the forecasts of the expected time for completion of cases must be made much more precise and accurate.***

## CONCLUSIONS AND RECOMMENDATIONS

The SC very much appreciates the information provided by OLAF's investigators in the 'nine months reports'. We are also pleased to verify that the new model report form that was adopted following the SC Opinion 1/2007 supplies clearer information for the SC to fulfil its remit.

However, the current review identifies three levels of problems which have a negative impact on the adequate implementation of the SC's monitoring task to reinforce OLAF's independence:

I. **A lack of a consistent and meaningful approach in many cases raising doubts as to the justification for the selected reasons for delays.**

Given the fact that the reasons ticked in the 'nine months report' model form for the non completion of cases within that period do not correspond with the genuine causes in most of them, the SC is not in a position to state that the high percentage of OLAF investigations of longer duration than the specified period is justified.

([109]) See annex 4, cases number 95, 100, 94, 137, 138, 140, 144, 148 and 43 inter alia.

([110]) See annex 4, cases number 97, 82, 105, 25, 29 and 30 inter alia.

([111]) See annex 4, cases number 142, 146, 34 and 28.

It is clear from examination of the 'nine months reports' that there are major shortcomings with regard to the rules laid down currently by OLAF administration with respect to management and control of the investigation process.

OLAF management and investigators should use the 'nine months report' as a managerial tool to revisit the strategy and the planning of the investigation in progress.

II. **A lack of investigative methodology and rigour and a need for improvement in the internal levels of management and control of investigations.**

The key to successful and focussed investigations is good investigation planning.

A detailed investigation plan should be developed by the investigation team at the outset of each and every investigation, thoroughly enough to allow for the forecast of a date for the final decision. The indication of the 'expected time for completion' is not only a legal obligation from OLAF towards the SC but also an essential tool for managing investigations and avoiding the negative consequences of their excessive duration.

This plan should cover every investigative step envisaged and be associated with a preliminary timetable for each step. This planning should be in writing and systematically annexed to the case file, facilitating its review and consultation in the event that investigators are met with demands for postponements or other kinds of delays.

The management, at Unit level, should examine investigation plans regularly to follow and, where necessary, guide development of cases.

The SC proposes to deliver a further and fuller Opinion on investigation planning later in the year.

III. **A lack of specific objective and verifiable reasons for delays.**

For the SC to be in the best position to fulfil its monitoring remit, OLAF should be able to give more precise and accurate reasons for investigations not being completed within undue delays.

On close inspection of the process for assessment of reasons given for cases not completed within a nine month period, the SC recommends that this entire process be revisited.

This revision would also help OLAF to identify the real reasons for delays and enable it to take appropriate measures to reduce the length of investigations.

The SC makes the following recommendations for OLAF to refine the reasons for investigations not being completed in a nine month period.

1. ***Volume of operational/investigative work by OLAF/by other actors or partners.***

There must be a clear distinction between the volume of work completed by OLAF and the volume of work which is carried out by external agents or partners. The SC recommends that 'the volume of operational/investigative work' be split into these two categories. Based on the investigation plan, a detailed explanation should be provided as to the causes for delays or, where appropriate, an explanation of why extra steps were required which were not originally envisaged.

Every large case to be reviewed by the team on completion, in order to learn lessons from the handling procedure in that specific case.

2. ***Workload of investigators.***

Overall workload needs to be explained by providing details of what other investigations are being pursued and the extent to which they will negatively impact on the current investigation.

3. ***Change of the investigator in charge.***

The SC is aware that changes of the investigator in charge may lead sometimes to several months delay. This is why the reasons for such a change should be highlighted, in particular in cases of conflict of interest.

4. ***Other higher case priorities.***

The SC is aware that a case's priority may vary over its life cycle and explanation needs to be given as to why other investigations were given priority over the actual investigation and what investigation measures were taken. Investigation policy is a matter of continuous revision: common and regular discussions between both Directorates of operations/investigations on the investigations in progress are essential.

5. ***Inactivity for more than three months: the three months list.***

Every investigator should review his/her cases on a monthly basis by the first of every month; if nothing has happened in a case for three months, the investigator should report the case to the Head of Unit. This report should then state the reasons for such a long period of inactivity and give a detailed action plan for the resumption of the case. Precise dates are needed for every anticipated measure to be taken and the action plans from these 'three-months lists' must be very closely followed up.

6. ***Lack of resources.***

A clear distinction needs to be made between the lack of resources either within the Unit or within the specific investigation team. If the lack of resources occurs in the specific team, an explanation should be provided as to what measures should be sought to provide extra staffing for the investigation in question. The SC understands that cases may become more complicated than previously anticipated and that there can be either no resources or an overload of cases.

7. ***Missions to third countries and collection of documents: problems arising.***

The international nature of many of OLAF's investigations means that a thorough plan of action for a mission should be provided in writing before the mission takes place.

8. ***Lack of co-operation: from the Commission services; from EU institutions; from MS authorities; from national authorities of third countries; from individual/company.***

The nature of the lack of co-operation should be explicit (e.g. insufficiently prompt reaction from MS etc.) and a practical solution to remedy the specific obstacle needs to be explained in each and every case.

The SC has noted on several occasions a certain lack of pro-activity in cases where OLAF is met by lack of co-operation from MS authorities, institutions, Commission services, third countries or individuals. The SC therefore recommends OLAF review cases where these particular reasons are cited, in order to develop strategies for a more proactive attitude towards those who are proven to be non co-operative.

9. ***Lack of request for OLAF's assistance from the MS national authorities.***

Clear distinction needs to be made between the assistance cases at the request of the national authorities of the MS since this is a different area of OLAF's competences.

10. ***External audits: problems arising.***

Reference to OLAF's follow-up and input on audits carried out by external firms needs to appear in the 'nine months report'.

**FUTURE ACTION**

The SC will continue the examination of the 'nine months reports' received from OLAF's Director General for the period 2009 together with a study of the 'assessments of initial information' accompanying the reports.

Taking into consideration the serious quality problem identified in the 'nine months reports' due to the frequent lack of reference to the expected time for completion of investigations, close scrutiny will be made in the future of OLAF's legal obligation in this area.

*ANNEX 1*

**CONCLUSIONS AND RECOMMENDATIONS**

**of the Opinion No. 1/2007 of the Supervisory committee of OLAF**

**OLAF's Reports of Investigations that have been in progress for more than nine months**

Brussels, 25 April 2007

The information currently contained in the 'nine months reports' sent to the Supervisory Committee is pertinent and useful. Elements such as the description of the case, the steps taken, the financial impact and future steps proposed remain essential to the understanding of the investigation under evaluation. However, on examination of the 'nine months reports', it has become clear that crucial elements necessary for the Supervisory Committee to perform its monitoring task with regard to the duration of investigations are missing. Moreover, the Supervisory Committee believes that incorporation of these elements into the 'nine months reports' will be also helpful for improving the management of the investigation in progress at that stage of the case.

***The monitoring function of the Supervisory Committee***

— The current format of the 'nine months report' does not contain all relevant information necessary in order for the Supervisory Committee to determine whether investigations are conducted continuously over a period proportionate to the circumstances and the complexity of the case.

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

— The lack of reference to time-barring periods in the 'nine months reports' does not allow the Supervisory Committee to assess the proportionate duration of the steps taken and proposed for conducting investigations.

*Time barring periods should be specifically highlighted and analysed in the summaries of the 'nine months reports'.*

— The information contained in the 'nine months reports' in some sectors is not sufficient to have a clear picture of the aim of the investigations, the reasons for delays and their legal consequences. In particular, a reason such as 'tactical hold in investigation' where an investigation has not been concluded is neither well justified nor explained in most cases.

Furthermore, frequent use of a reason such as 'low priority combined with lack of resources' could suppose a lack of a clear investigation policy.

*The term 'tactical hold in investigation' used in the 'nine months reports' should either be strictly defined or omitted. The use of this reason for not having concluded an investigation should be prudent and precise.*

*Reflection on the implications of a reason such as 'low priority combined with lack of resources' is also recommended.*

— The expected time for completion of investigations is not accurately reflected in the 'nine months reports'. It is not mentioned in one third of the cases and when mentioned, it is never respected.

*An indication as well as a reasoned explanation with regard to the expected time of completion is necessary. Future investigative steps should be better outlined.*

***The management of OLAF's investigations***

— The 'nine months reports' transmitted to the Supervisory Committee is not longer a warning system with regard to the length of investigations but rather a reporting exercise carried out at this stage of the case. A vast majority of OLAF's investigations have been in progress for a longer period. In many cases long periods of inactivity are detected. The Supervisory Committee believes that the current 'nine months report' does not constitute a management tool for OLAF aiming to re-examine the strategy of the investigation and to clarify its targets. That 75 % of investigations have been open for over nine months is a strong indicator of the need of urgent managerial action to be taken.

*The implementation of a management control system which would efficiently prevent stagnation of investigations is recommended. Regular close scrutiny by the heads of Unit of the continuous progress of the investigation should then be appropriate.*

**FUTURE ACTION**

Continued examination of the 'nine months reports' received from the Director General for the period 2007 will be carried out by the Supervisory Committee. Further scrutiny will be made of the reasons for the non completion of investigations within the specified time period and particular attention will be given to the cooperation from the Member States. The development of a clear investigation policy and an improved case management system will also be followed closely by the Committee.

It should be noted that OLAF's quick reaction to improve the content of the 'nine months reports' following a meeting between themselves and the Supervisory Committee [1] leads the Committee to anticipate an equally swift response to the above mentioned recommendations. Incorporating the suggested changes as outlined would lay the ground for all future examinations of the 'nine months reports' by the Supervisory Committee.

[1] See Note I/01068 05.02.07

*ANNEX 2A*

EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Investigations & Operations

Brussels,
D (2009/ )
Form 40

*OLAF Operations*

## Information to the OLAF Supervisory Committee
## Case open for more than 9 months

Article 6(5) of Regulation 1073/99 requires investigations to be conducted continuously over a period which must be proportionate to the circumstances and the complexity of the case.
Article 11(7) of Regulation 1073/99 requires the Director of OLAF to inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation and of the expected time for completion.

**Case Identification**

| | |
|---|---|
| CMS No. | |
| CMS Title | |
| Legal Basis | |
| Type of case | |
| Investigator in charge | |
| Investigator associated | |
| Head of Unit in charge | |
| Date of opening decision | |
| Estimated Economic Impact (EURO) | |

**1. Description of the case**

— Date initial information received

— Allegations (and dates when acts under investigation took place)

— Duration of assessment

— Aim of the investigation

— Legislation allegedly breached

— Potential sanctions (indications to the extent the sanctions are identifiable) and any time barring considerations

**2. Operational acts undertaken to date and results**

**3. Operational acts still to be carried out**

**4. Reasons the case is not complete**

| | |
|---|---|
| | ☐ significant resources were allocated the volume of the operational work means that more time is needed<br>☐ lack of resources<br>☐ lack of co-operation<br>☐ by MS<br>☐ by Commission Services<br>☐ by other institution<br>☐ by individual/company<br>☐ other (please explain) |

**5. Approximate date of expected completion**

Investigator in charge

**Visas**

| | | |
|---|---|---|
| Investigator in charge [if not author] | name | |
| Head of Unit in charge | | |
| Director [A] [B] | | |

c.c.:

*ANNEX 2B*

EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Investigations & Operations

Brussels,
D (2009/ )
Form 40

*OLAF Operations*

## Information to the OLAF Supervisory Committee
## Case open for more than 9 months

**Case Identification**

| | |
|---|---|
| CMS No | [[szOFnumber]] |
| CMS Title | [[szShortLabel]] |
| Legal Basis | [From Initial Assessment] |
| Type of case | [[szInvCat]] |
| Investigator in charge | [[szInvInCharge]] |
| Investigator associated | [[szInvesAss]] |
| Head of Unit in charge | [[szAdv]] |

**Summary**

| | |
|---|---|
| Date of opening decision | [[szInvDt]] |
| Estimated Economic Impact (EURO) | [[szAmountEuroImpact]] |
| | ☐ significant resources were allocated but even so the volume of the investigative work means that more time is needed<br>☐ tactical hold in investigation<br>☐ lack of resources<br>☐ low priority combined with limited resource allocation<br>☐ lack of co-operation<br>☐ by MS<br>☐ by Commission Services<br>☐ by other institution<br>☐ by individual/company |

**1. Description of the case**

**2. Steps taken to date**

**3. Results**

**4. Reasons the case is not complete**

**5. Further steps to be taken and indication of timeframe**

[[szInvInCharge]]
Investigator in charge

**Visas**

| | | |
|---|---|---|
| Investigator in charge [if not author] | name | |
| Head of Unit in charge | | |
| Director B | | |

c.c.:

*ANNEX 3*

EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Investigations & Operations

Brussels,
[[szInitials]] I (2008/ )
Form 20

*OLAF Operations*

## Assessment of initial information

### Investigator Recommendation

**Case Identification**

| | |
|---|---|
| CMS No | [[szOFNumber]] |
| CMS Title | [[szShortLabel]] |
| Legal Basis | [[szLegBase]] |
| Evaluator in charge of assessment | [[szEvaluator]] |
| Head of Unit in charge | [[szAdv]] |

**Summary**

| | |
|---|---|
| Background | [[szMayorSource]] |
| Allegation | [[szAllegation]] |
| Impact on EC Financial interests | ☐ Yes<br>☐ No |
| Other impact | |
| Estimation of the financial impact | Estimation by the source: |
| | Estimation by OLAF: |
| Amounts already established or recovered by the Members State(s) or other competent authority | Realized damage: |
| | Prevented damage: |
| Judicial procedures | Case dismissed |
| | Investigation by national authorities |
| | Pre-trial |
| | Trial |
| | Ruling |
| | Appeal |

| | |
|---|---|
| Recommendation | ☐ internal investigation<br>☐ external investigation<br>☐ criminal assistance case<br>☐ coordination case<br>☐ monitoring case<br>☐ non-case |
| Priority Assessment | ☐ high priority<br>☐ average priority<br>☐ low priority |

**Initial Assessment** [OLAF Manual Section 3.3.3.3]

1. **Background**

2. **Legal basis**

3. **Sufficiently serious suspicion**

   a) Allegation

   b) Source reliability and probability of information being accurate

   c) Other

4. **Procedural recommendation**

5. **Financial impact and possible recovery**

6. **Priority assessment**

7. **Initial workplan suggestions**

8. **Resource allocation suggestions**

[[szEvaluator]]
Evaluator

**Initial Assessment supported by**

| | | |
|---|---|---|
| Head of Unit in charge | [[szAdv]] | |

**Annexes to Form 20**

| Number | Description | Number of Pages |
|---|---|---|
| | Data Protection Annex | |
| | | |

*ANNEX 6*

**OPINION No 3/2009**

**OLAF's Preliminary Draft Budget for 2010**

Brussels, 28th May 2009

In accordance with Article 11 of the Regulation (EC) No 1073/99 the mission of the OLAF Supervisory Committee (SC) is to reinforce the independence of OLAF in the exercise of OLAF's investigative function. To do this and to ensure that OLAF is able to function in an efficient and effective manner a specific budget article within the Commission budget was created for OLAF. In this context, and with a view to the powers conferred by the Commission on the SC [1] the SC has considered OLAF's Preliminary Draft Budget (PDB) and delivers the following Opinion.

## I. **Allocation of resources to priority activities**

The SC notes that the number of vacant posts (general rate of occupancy 94,5 % on 31st December 2008) has continued to be reduced since last year. The SC welcomes this trend, which will enhance OLAF's capacity to carry out its activities more efficiently. Furthermore, the SC is satisfied that some of the posts occupied up to now by 'acting' management personnel, have been published. The SC trusts that OLAF will finalise the recruitment of personnel to these posts as soon as possible and complete the selection of personnel from the reserve lists of the external competitions to fulfil the vacant permanent posts.

The PDB of 2010 does not include an increase in the number of posts and, as a result, the overall budget will decrease (– 1,22 %) in 2010. It appears, from the statistics submitted to the SC by OLAF, that personnel were allocated in the following way at the end of 2008:

| | | |
|---|---|---|
| Directorate A (investigations and operations): | 84 | (17 %) |
| Directorate B (investigations and operations): | 84 | (17 %) |
| Directorate C (operational support): | 125 | (25 %) |
| Directorate D (administration and general affairs): | 181 | (36 %) |
| General Director and SC: | 25 | (5 %) |
| Total staff | 499 | (100 %) |

This information shows that a minor part of total resources (34 %) is currently allocated to investigations, with two support and/or administrative staff for each investigator. OLAF has explained that while a smaller proportion of staff carries out investigations, nearly all staff should be considered as working within OLAF's 'operations' sector, albeit not necessarily directly attached to investigation units.

The distinction made by OLAF between investigations and operations raises some issues that should be considered in the context of resource allocation. The SC is not clear as to the reason for inclusion of certain activities within the 'operations' area of OLAF's work, either with regard to the nature of the work performed or regarding the added value of OLAF's input in these areas. Given the increasing diversity and complexity of OLAF's activities (either on OLAF's initiative or imposed on it by the Commission), a point has now been reached where it is pertinent to define and weight the importance of those activities carried out to date. In the SC's view OLAF could conduct a general evaluation of its activities with the aim of better allocation and prioritisation of its resources, followed by an eventual gradual suppression or reinforcement of activities.

As in preceding budgets, the note provided by OLAF for the SC on the PDB does not include an explanation on priorities for 2010, resource planning or policy regarding OLAF's personnel. Therefore, there is neither any evidence available to determine OLAF's future direction, nor any indication as to whether those activities carried out have made the most efficient use of OLAF's budget.

[1] Article 6 of the Commission Decision of 28th of April, 1999.

The SC recommends that OLAF's future activities should be built on its current strengths, core competencies and fields of expertise which will guarantee its future success. The SC questions the need for OLAF to reinforce the areas of administrative work, which require no specialised anti-fraud knowledge or proficiency, when its long term existence depends on the expertise and efficiency of its investigation teams.

The SC reiterates the importance of a human resources strategy built on the identified and real needs of the organisation and its priorities, with the aim of giving direction and maximising the use of existing resources. The SC is concerned of the capacity of Directorates A and B to deal with the increased workload foreseen for future years (and confirmed in the OLAF activity reports) when it is clear that resources will not increase. The SC has made reference to these points in its Opinions of 3/2008 and 2/2007 and in a number of discussions with OLAF management.

The SC also emphasises the importance of finding a practical solution to improving cooperation between OLAF and DG Admin and the provision of continuous training for investigators. Secondly, it would be worth reflecting how OLAF could benefit from internal mobility and rotation, with the aim of improved staff development. Investing in staff development is important since some investigators, particularly temporary staff, will remain in OLAF long-term.

Another point of concern for the SC is the difficulty in putting in place a system of promotion (or reclassification) of temporary staff. The SC finds it disappointing that no solution has yet been found to this problem despite a number of discussions between the SC and OLAF.

***Recommendations:***

— ***OLAF should provide justification of the current division of personnel between investigation and other operational work and define what 'operations' activities mean in practical terms.***

— ***A human resources strategy based on a needs assessment or evaluation of OLAF's current activities should be developed and focus given to cooperation with DG Admin and training, as well as the mobility of investigators.***

— ***Promotion of temporary agents to be put in motion at the earliest possible date.***

## II. **Individual items of expenditure**

Overall, the SC notes the decrease of 1,22 % in OLAF's 2010 budget, due to lower administrative expenditure related to various types of personnel costs. The SC also notes that despite the overall PDB decrease, some management expenditure items are expected to increase in 2010, particularly in the area of 'research and development IT systems' (an increase of 35 % over two years). Furthermore, based on above observations regarding the need to step up the training for investigators, the SC is concerned that there appears to be an estimated decrease (12 %) in the 'further training, retraining and information for staff'.

Thirdly, the SC considers that the overall mission and travel expenses and incidental expenditure(2,5 MEUR), albeit decreasing by 2 % in 2010, still represents a considerable proportion of the overall budget, especially since investigatory staff only represent a small proportion of the total personnel. This observation is obtained from evidence from the monitoring exercises which indicate that management control over mission expenditure leaves room for improvement.

***Recommendations:***

***OLAF to clarify***

— ***The increased expenditure in the area of 'research and development IT systems'.***

— ***The decreased expenditure in 'training, retraining and information for staff'.***

— ***The expenditure of the 'overall mission and travel expenses and incidental expenditure'.***

III. **The Secretariat of the SC**

The SC maintains its position on the minimum requirement of eight Secretariat staff, which is equivalent to the current needs of the SC and reiterates that the number of staff should be reserved in the OLAF establishment plan for the SC using the 'footnote' or other appropriate method to earmark these posts specifically for the Secretariat.

The SC has requested publication of the Post of the Head of the Secretariat and one post at AD level. Furthermore, the SC has expressed a desire to be closely involved in both selection processes.

As a result of the ruling of the Court of First Instance ([2]) the SC's monitoring role will expand with the resulting implications for the staffing of the Secretariat in 2010. Since the new mechanism is not yet in place, the SC is not in a position to assess the specific additional staffing needs but will do so in early 2010.

The SC acknowledges that the European Commission staff rules and the appraisal and promotion system therein do not currently permit the members of the SC to evaluate the performance of the staff of the Secretariat. However, the SC considers it is unsatisfactory that the annual performance level of the Secretariat staff is ultimately decided by the Director General of OLAF and that there is no involvement of the SC in this exercise despite the secretariat working under its direct authority.

***Recommendations/observations:***

— ***OLAF should earmark eight staff members for the Secretariat.***

— ***Appointments of the SC Secretariat staff should only be made following the approval of the SC, thus ensuring the full independence of the SC in the performance of its duties.***

— ***Current appraisal and promotion system for the staff of the SC secretariat is not appropriate.***

IV. **Conclusion**

The SC supports OLAF's budget proposal for 2010 with the proviso that the above recommendations be taken into consideration.

In accordance with Article 7 (paragraph 2) of the Commission Decision of 28 April 1999 the Opinion should be transmitted to the Budgetary Authority by OLAF. Furthermore, the SC would like to be updated regularly on measures taken by OLAF towards implementation of the recommendations of the Opinion.

([2]) T-48/05 Francet and Byk European Commission.