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## **COMMISSION REPORT**

### **Evaluation of the activities of the European Anti-fraud Office (OLAF)**

Parliament and Council Regulation (EC) No 1073/1999  
and Council Regulation (Euratom) No 1074/1999

(Article 15)

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## ***PROGRESS IN THE FIGHT AGAINST FRAUD: KEY ASPECTS OF THE REFORM***

The Treaties give the Community and the Member States the shared responsibility for protecting Europe's finances. The Commission has major powers for combating fraud, corruption and other illegal activities to the detriment of Community interests. To that end the Commission has gradually pooled its powers in an anti-fraud unit. This also met concerns expressed by Parliament and the Council. It generated a series of adaptations to consolidate the mechanism set up from 1988 on, when the Unit for the Coordination of Fraud Prevention (UCLAF) was set up in the Secretariat-General under the authority of the President of the Commission.<sup>1</sup> This consolidation gradually made it possible to adapt the scale of the antifraud department's activities, bringing in the reinforcement of the protection of other Community interests and the preparation of initiatives to combat certain other forms of transnational economic crime such as counterfeit and pirated goods and counterfeiting of the euro.

The establishment of the European Anti-fraud Office (OLAF), which, falls within the context of the crisis that prompted the Commission's resignation in March 1999, reflects this approach. The reform, launched at the Commission's initiative, proceeded at the pace set by the Heads of State or Government at the Vienna European Council in December 1998, and came to fruition before the Cologne European Council in June 1999. To facilitate interinstitutional cooperation, the German Presidency set up a high-level political group in January 1999, including representatives of the Presidency, Parliament and the Commission.<sup>2</sup> Completed in less than six months, the reform was also the fruit of a consensus to restore confidence in the sensitive matter of protecting Europe's public finances and preventing fraud.<sup>3</sup>

The Commission and the legislature agreed to give the new Office, now to be maintained in the Commission, functional independence to exercise the investigation powers conferred on the Community, without this affecting the balance of responsibilities between the Member States and the Community. At the same time, the Office was given an interinstitutional task of combating serious conduct undermining the credibility of the European public service and the institutions.

The European Anti-fraud Office is thus a fundamental stage which extends a dynamic process for the protection of financial interests that began in 1976 (draft Eurocrime Treaty).<sup>4</sup> The reform of 1999 reflects the various stages of the development of the anti-fraud service to improve the effectiveness and visibility of an investigation structure specialising in the fight against crime to the detriment of the Community's financial interests.

### ***MANDATE AND METHOD***

Article 15 of Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 on investigations carried out by the European Anti-fraud Office<sup>5</sup> provides: *"During the third year following the entry into force of this Regulation, the Commission shall transmit to the European Parliament and the Council a progress report on the Office's activities, accompanied by the Supervisory Committee's opinion, together, where appropriate, with proposals to modify or extend the Office's tasks"*. To carry out its statutory obligation, the Commission set up a high-level interdepartmental group by its Decision of 15 January 2002.<sup>6</sup> This group established its methodology and worked regularly on preparation of this report, focusing on a review of the legal framework governing the Office's activities.

Evaluation work proceeded from the full set of basic instruments governing the Office<sup>7</sup> and the relevant sectoral legislation<sup>8</sup> and from a broad documentary base including the Commission Reports on the protection of the Communities' financial interests and the fight against fraud,<sup>9</sup> and reports by the Supervisory Committee, the Court of Auditors, Parliament and the Council, in particular on the occasion of the discharge for the annual budget, and the Office itself. Certain of these reports, which more particularly concern the detailed examination of operational activities, are a vital source of evaluation material. The existence of these reports meant that the group was able to concentrate on the rules and regulations and the status and functions of the Office. This report does not set out to analyse figures or trends as this quantitative evaluation is already available in the Office's and the Commission's reports.

The object of the evaluation exercise is to come to an overall assessment of the Office's activities, supplementing the analyses conducted by the Office itself and the Supervisory Committee,<sup>10</sup> by examining its functions, the means available and the difficulties encountered. Account is taken of the impact of anti-fraud activities on the protection of the Communities' interests, sound implementation of the budget and healthy and rigorous financial management. The exercise takes account of the impact of the reform on prevention, cooperation and deterrence/enforcement. There is also reference to the subsidiarity and proportionality principles, respect for fundamental human rights, transparency, and the cost-effectiveness ratio (economies of scale). The interinstitutional dimension of the Office's activities (credibility of the institutions and of European integration) was also taken into account. This overall assessment should provide a means of weighing up the pros and cons of the structure that emerged from the 1999 reform.

This exercise covers the period from June 1999 to December 2002 and thus includes the transition from the old Commission anti-fraud unit to the Office and all the uncertainties that this entailed.<sup>11</sup> This does not preclude a meaningful initial assessment of ongoing activities for the attainment of the objectives set by the legislature, which the Commission plans to achieve in stages by means of the new operational strategy for the period from June 2000 to the end of 2005.<sup>12</sup>

### ***STRUCTURE OF THE EVALUATION REPORT***

The structure of the report is based on an analysis of the 1999 reform and the Office's activities, subdivided depending whether they are operational tasks or more general tasks connected with the development of political strategy and legislative initiatives.

The reform rests on innovative elements to boost the reliability and effectiveness of investigations. Conferring an interinstitutional investigation task on the Office and transferring the Commission's operational powers of investigation to it were accompanied by major institutional innovation: the granting of functional independence in operational activities intrinsically connected with the investigation function (*Part I*).

Another aspect of the new mechanism is the fact that the same service combines functionally independent investigation activities with activities for the preparation and implementation of Commission measures affecting its fundamental prerogatives, in particular in legislative matters (*Part II*).

The Office's independence in its investigation function and its attachment to the Commission express its functions based on innovation and continuity and are the guiding principles for the governance of the Office in the context of a hybrid status (*Part III*).

This overall evaluation exercise also concerns the longer-term trend towards stronger criminal-law protection of financial interests. That is why the future outlook, in particular through work on the European Prosecutor and the Convention on the future of the European Union, have been considered and analysed (*The Outlook*).

In the annexes, there is a stock-taking of the recommendations made in the report (*Annex I*). For ease of comprehension, they are classified on the basis of the level of the action required to give effect to them (*Annex II*).

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## **1. THE OFFICE'S OPERATIONAL TASK: A NEW APPROACH**

In its operational function the Office exercises the new powers conferred on it by the legislature and the interinstitutional agreement of 25 May 1999 (internal investigations) and the longer-standing powers conferred on the Commission (external investigations). In the performance of its investigation function the Office enjoys functional independence. It covers internal and external administrative investigations (*operational function*). It also covers to some extent the partnership with the Member States, judicial assistance and the relationship between the Office's functions and those of its counterparts in the Community and elsewhere (*operational partnership*).

### **1.1. Operational tasks**

The Office was entrusted with the exercise of the responsibilities given to the Commission as regards on-the-spot checks and inspections in the Member States or third countries (*external investigations*) and the power to conduct investigations in all European Community institutions and bodies (*internal investigations*).

The independence of the investigation function conferred on the Office is provided for in legal terms by Articles 3, 4 and 5 of Commission Decision 1999/352/EC, ECSC, Euratom establishing the Office and Articles 11 and 12 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 concerning investigations conducted by the Office.

The Office exists primarily to perform operational tasks, in particular the investigation function as defined by Article 2 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. The Office's investigation results, which can be used in criminal proceedings, will then serve in appropriate cases as the preparatory phase in prosecutions in national courts (see at 1.2.2 below).

Article 2(1) of the Commission Decision establishing the Office defines the scope of the investigation function. Article 2(4) provides that the Office can be entrusted with investigation missions in other fields by the Commission or the other institutions or bodies. This power has not yet been exercised.

#### **1.1.1. Internal investigations**

The European Anti-fraud Office has the power to conduct internal administrative investigations in all the European Community institutions and bodies. This interinstitutional function is the major innovation of the 1999 reform. It is the follow-up, in particular, to a Commission communication of 1997 and to special report No 8/98 of the Court of Auditors,<sup>13</sup> which pointed out that the fact that the old Unit for the Coordination of Fraud Prevention had

no power to carry out investigations in Community institutions other than the Commission “*has to be considered as a serious weakness in the legal and organisational framework of the fight against fraud*”.

- Scope of the internal investigations

The scope of internal investigations is defined by provisions enacted by the legislature or agreed by the European Parliament, the Council and the Commission in the interinstitutional Agreement of 25 May 1999.<sup>14</sup>

Under Article 1(3) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, the purpose of internal investigations is “*fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community*” and “*investigating to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members ... or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations ...*”.

The interinstitutional agreement of 25 May 1999 abolished the link with the protection of financial interests and thus extended the scope of internal investigations to all activities to protect Community interests against serious illegal conduct (see point 1.2.3, disciplinary bodies). To ensure homogeneous protection, Parliament, the Council and the Commission invited the other institutions and bodies to join the interinstitutional agreement and adopt the common system in accordance with the model Decision annexed to it.<sup>15</sup> Article 2(1) of the Commission Decision establishing the Office defines the material scope of internal investigations in a way corresponding to the interinstitutional agreement.

#### *A non-homogeneous mechanism*

The Commission notes that apart from the three signatories, no other institutions or bodies have actually joined the agreement.

Most of the institutions and bodies, on the other hand, have adapted their internal machinery. But an initial analysis shows that there does not seem to be a uniform interpretation of the new legal mechanism provided for by Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 (Article 4(6)) and by the interinstitutional agreement. Differences, not motivated by specific requirements as provided by paragraph 2 of the agreement, have been observed with regard to the mechanisms of certain institutions and bodies, such as the fact that officials cannot convey information direct to the Office but are obliged to pass through an internal authority or the fact that the Office’s internal investigations are confined to professional misconduct to the detriment of the Communities’ financial interests. The scope of these mechanisms is sometimes more restrictive than provided for by the model Decision (see R.1).

#### *Disputes*

There were several disputes about the establishment of the new interinstitutional internal investigation mechanism. Seventy-one Members of Parliament challenged the Decision concerning the internal investigations taken by their institution, on the grounds that it would undermine parliamentary immunity and independence. In this action there was first an interlocutory order and then a judgment of the Court of First Instance, given on 26 February 2002,<sup>16</sup> holding that the action was inadmissible since the authors of the actions had not

demonstrated that they were individually affected by the decision challenged. The grounds given for the judgment state that, although the rules governing internal investigations as such are equally applicable to members of the European Parliament, the risk cannot be excluded a priori that, in conducting an investigation, the Office might perform an act prejudicial to the immunity enjoyed by every Member of the Parliament. However, if that were to occur, any Member of the Parliament faced with such an act could, if he considered it damaging to him, avail himself of the judicial protection and the legal remedies provided for by the Treaty.<sup>17</sup> The European Central Bank (ECB) and the European Investment Bank (EIB) each adopted an internal Decision which the Commission, after analysis, considered incompatible with Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. Court actions so far, in the current state of proceedings pending in the Court of Justice (CJEC), have prompted an opinion of the Advocate-General, presented on 3 October 2002, recommending the annulment of the ECB and the EIB Decisions.<sup>18</sup>

These disputes are a useful source of evaluation, from which it can be seen that the consistency of the new interinstitutional mechanism does not allow any form of exclusion, as it is intended to cover all the institutions and all the bodies set up by or under the EC and Euratom Treaties without exception. The Cologne European Council asked all the institutions and bodies to join the interinstitutional agreement so that the investigations would be carried out under equivalent conditions in all of them.

**The Commission considers** that it is essential to attain the goal laid down by the legislature and the institutions of putting an interinstitutional dimension on internal investigations to ensure uniform protection of the integrity of the institutions.

*Recommendation No 1 (R.1)*

*The Commission invites all the institutions and bodies to accede quickly to the interinstitutional agreement of 25 May 1999, signed by the European Parliament, the Council and the Commission.*

*The Commission calls on the institutions and bodies to adopt an internal decision in line with the model decision annexed to the interinstitutional agreement.*

- Exercise of internal investigation powers

The Office's powers of internal investigation of the Office are exercised under Article 4 of the Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. These powers include:

- subject to Article 4(4),<sup>19</sup> “*immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises*”;
- the possibility to “*take a copy of and obtain extracts from any document or the contents of any data medium*”;
- the right to “*request oral information*” from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies;
- the right to carry out on-the-spot checks and inspections, under the conditions and according to the procedures provided for by Regulation (Euratom, EC) No 2185/96, on economic operators (see at 1.1.2 below) holding information concerning the facts under investigation;



- the right to “ask any person concerned to supply” information that the Office considers useful.

In accordance with the Regulations and the Decisions of the institutions and other bodies, the exercise of these powers of internal investigation must fully respect individual rights (presumption of innocence, respect for privacy and for defence rights, right to an impartial investigation). This aspect has been raised in the ongoing disputes, in successive reports by the Office’s Supervisory Committee and by the European Mediator.

That is why, with a view to ensuring greater control over internal investigation procedures and a high level of guarantee for all those concerned with such proceedings, **the Commission considers** that internal provisions should be adopted by the Office to produce a corpus of administrative rules governing the implementation of internal investigation measures (see at 3.4.1 and 1.1.2 below).

*Recommendation No 2 (R.2)*

*The Commission recommends that in its Manual of Internal Procedures the Office establish a corpus of administrative rules for the implementation of measures of internal and external investigation.*

- Internal investigation methods

Variations in the procedural guarantees which accompany internal investigation activities have been observed. This is the case in particular of procedures for information by the Office (see at 3.3 below, information and communication activities) and procedures whereby the Office receives information in connection with internal investigations.

*Procedures for provision of information to the Office*

The obligation to inform the Office, in accordance with Article 2 of the model Decision annexed to the interinstitutional agreement of 25 May 1999, must, according to the agreement,<sup>20</sup> be consolidated in the Staff Regulations. The Commission’s proposal for a Council Regulation laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities contains an Article incorporating this obligation to inform the Office so as to make it directly applicable to Community staff. The proposal is under examination;<sup>21</sup> the anticipated outcome is to be compatibility between the Staff Regulations and the model decision. It must also be made clear that the provisions governing the Office<sup>22</sup> do not restrict its powers in relation to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 and the Interinstitutional Agreement and model decision.

*Development of internal investigations*

The Commission notes, on the basis of the data available from the latest reports of the Office and the Supervisory Committee, that internal investigations are developing. This new situation reflects the priority given to internal investigations to protect the integrity and credibility of the European public service and the expansion of the Office’s powers beyond the Commission into the other institutions and bodies.

- Relationship between internal investigations and certain administrative procedures

In the context of reform of the Commission, provisions have been enacted to secure compliance with ethical obligations and the principles of sound financial management by Community officials and other staff. These provisions must be coordinated with those relating to the exercise of internal investigations by the Office (see at 1.2.3 below, disciplinary bodies and bodies specialising in dealing with financial irregularities).

- Specific question of immunities

Officials and other servants of the Communities cannot plead their immunity to resist the Office's planned administrative investigations, as this is part of the Communities' power of organisation, but the problems of waiver of immunity arise when criminal proceedings are brought against Community officials or servants by national law-enforcement authorities following internal investigations by the Office.

Some national authorities have argued that the procedures set up for waiving the immunity of an official/servant so that judicial authorities can commit him for trial in the context of investigations by the Office are cumbersome. The practice is that judicial authorities wishing to bring criminal proceedings on the basis of an investigation by the Office generally apply to the Office, which forwards the request to the institution or body concerned. According to the national judicial authorities, the response via the Office is always slow.

**The Commission considers** that it would be worth simplifying the current practice by stating clearly which authority would have the power to waive the duty of discretion (Article 19 of the Staff Regulations) or to waive immunity when the final investigation report is referred to the judicial authority.

#### 1.1.2. External investigations

*Until 1995*, the regulations governing Community on-the-spot checks and inspections were broadly seen as directed towards verifying proper accounts, the sound implementation of Community law, the effectiveness of Community funds management systems in the Member States and Commission's the role as guardian of the Treaties. Each Commission Directorate-General responsible for a specific field had to prepare its own policy guidelines and legislative framework. Each of them determined, and still determines, the checks and inspections to be undertaken on the basis of sectoral Regulations. The purpose of these checks and inspections, based on routine or on risk analysis, was and still is to detect any administrative malfunctioning or irregularities rather than to detect facts or irregular behaviour liable to give rise to administrative or criminal proceedings against individuals (anti-fraud investigation). The absence of a specifically anti-fraud purpose of sectoral regulations was not, however, likely to fully preclude the use of sectoral bases for detecting economic or financial offences.

*Since 1995*, Commission anti-fraud action has become more sophisticated and was consolidated by horizontal legislation (first and third pillars) incorporating means of administrative investigation making it possible to ascertain the reality and complexity of the facts and the criminal dimension of serious behaviour prejudicial to the financial interests of the Communities. This new mechanism, more specifically directed towards fraud prevention, rests on an enhanced partnership with the Member States in accordance with the subsidiarity principle and shared responsibility for the protection of the Community's financial interests.

*In 1999*, to boost the reliability and effectiveness of Community intervention in the Member States, the Commission and the legislature intended also applied the principle of the Office's functional independence to external investigation activities. But this major innovation does not affect the distribution and balance of responsibility between the national and Community levels. Nor does it affect the Commission's general responsibility for the protection of financial interests and anti-fraud policy (Article 280 of the EC Treaty), this responsibility being closely bound up with its function of implementing the budget under Article 274.

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The concept of external administrative investigation as defined in Articles 2 and 3 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 is a rather broad one. It covers two operational realities, namely investigations directed by the Community and investigations conducted at the national level at the Community's request or with its involvement. The Regulations not only define the concept of external administrative investigation but also emphasise the criminal-law purpose of such investigations. Reports drawn up by the Office can constitute a preparatory stage for prosecutions in the national courts.

Under Community law as it stands in the various sectors, the Commission considers it essential to maintain the possibility for the Office of using the various existing legal bases to carry out its operational activity in specific situations by conducting investigations itself or asking for a national investigation to be opened under sectoral regulations on the basis of relevant information in its possession, with which it can always be associated. The fact that these investigation tools (horizontal anti-fraud Regulation and sectoral Regulations for monitoring the application of Community legislation and auditing accounts) are available means that the Office can adapt the effectiveness of anti-fraud action in accordance with its priorities and the specific situation, but also in accordance with the powers available to the national authority that is its local partner.

**The Commission considers** that the Office must carefully adapt its operational activity and develop its intelligence resources (strategic and operational intelligence) so as to make the best use of the existing legal instruments in the absence of a specific cooperation instrument. It must also upgrade its capacity to act in full independence, without interfering with the other tasks conferred on it by the Commission in the field of cooperation with the Member States for the purposes of Article 280(3) of the EC Treaty and also in respect of the competencies of the various Commission departments concerning matters of administrative and financial follow-up to investigations, including penalties. It is clear that these functions are exercised in the context of the Commission's powers and not necessarily of the Office's independence in the performance of operational tasks, which focuses on the investigation function (see in particular at 1.2.1, 1.2.4 and 2.5 below).

- Scope of external investigations

Community legislation defines the scope of external investigations in the light of the aims and purposes of each instrument.

Under Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 (Article 1(1) and Article 3), the Office exercises the power conferred on the Commission to carry out on-the-spot inspections and checks in the Member States and, in accordance with the cooperation agreements in force, in third countries in accordance with cooperation agreements with them, to establish whether the activities being investigated are indeed irregular, without

encroaching on the Member States' powers in matters of criminal prosecutions under Article 2 of those Regulations.

When external investigations are launched at the instigation of the Office or at the request of a Member State, they are intended, according to Article 2 of Regulation (Euratom, EC) No 2185/96,<sup>23</sup> *“for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States”* and to detect irregularities, *“where ... the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community”*. Incidentally, the Office, in liaison with the national authorities, can initiate investigation missions in third countries, in accordance with agreements in force, on the basis of Regulation (EC) No 515/97,<sup>24</sup> to detect offences or operations contrary to the regulations referred to by that Regulation.

External investigations concern *“any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure”* (Article 1(2) of Regulation (EC, Euratom) No 2988/95), including irregular operations or offences within the meaning of the mutual assistance scheme (see Article 20 of Regulation (EC) No 515/97).

They may apply *“to the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity”* and *“to persons who have taken part in the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed”*. They can also apply to any other economic operators holding relevant information in connection with the facts covered by the on-the-spot checks and inspections (see Article 7 of Regulation (EC, Euratom) No 2988/95<sup>25</sup> and Article 5 of the Regulation (Euratom, EC) No 2185/96).

Article 9 of Regulation (EC, Euratom) No 2988/95 refers to the on-the-spot checks and inspections that the Commission may conduct under sectoral regulations. The legal bases provided by these regulations cover all areas of activity by the Office – the Communities' own resources, the Structural Funds, the common agricultural policy, the commercial policy and customs.<sup>26</sup>

The scope of these provisions was not affected by Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. Unlike internal investigations, the 1999 reform did not widen the scope of external investigations.

**The Commission considers** it useful today to continue the debate on the scope of these regulations, as it has observed certain gaps on the basis of the work of the Office. These concern cooperation with the national authorities, to be strengthened from the point of view of information exchanges (see below at 1.2.2) and administrative assistance (indirect taxation, money laundering and possibly other areas), and, with regard to investigations directed by the Office, the legal means available to the Community to strengthen the protection of financial interests as regards direct expenditure.<sup>27</sup>

**Recommendation No 3 (R.3)**

*The Commission will propose initiatives, in accordance with its overall anti-fraud strategy and its work programme<sup>28</sup> to:*

- expand the facilities for cooperation/assistance, particularly as regards transnational VAT, money-laundering and possibly other areas, including the possibility for the Community to ask the Member States' enforcement and investigation services to conduct antifraud investigations;*
- reinforce Community antifraud investigation powers (Regulation (Euratom, EC) No 2185/96) as regards direct expenditure.*

- Exercise of external investigation powers

In their respective areas of concern the sectoral Regulations confer the power on Commission staff to conduct on-the-spot checks and inspections in national control organisations responsible for adopting fund management systems or collecting own resources, to ensure the proper application of the regulations and an assistance function in investigations conducted by the national authorities.

Regulation (Euratom, EC) No 2185/96 gives Community investigators their own powers corresponding to those enjoyed by national investigators. The same applies to administrative investigation missions conducted by the Office in third countries under Regulation (EC) No 515/97. Article 7(1) of Regulation (Euratom, EC) No 2185/96 provides that *'Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents'*. An illustrative list of what can be done in on-the-spot checks and inspections then follows.<sup>29</sup>

In the evaluation of Regulation (Euratom, EC) No 2185/96 in 2000, certain difficulties of implementation were noted, in particular the refusal of economic operators to cooperate in terms of access to buildings or documentation (obstruction).<sup>30</sup>

**The Commission notes** that to remedy this type of difficulty, the Office considers that more effective Community machinery may have to be envisaged, on the basis of Community competition law and national provisions, to facilitate the success of checks and inspections involving economic operators who oppose the performance of administrative investigations in order to gain time.

**Recommendation No 4 (R.4)**

*The Commission recommends the Office to undertake a comparative analysis of rules applicable to obstructions so that the institution can prepare an initiative if appropriate.*

- External investigation methods

External investigation procedures, depending on the legal basis, are determined both by Community sectoral legislation, which provides for the conditions in which Commission staff may take part in or be associated with a national investigation, or by horizontal Community legislation (Regulation No 2185/96), or by national law.

Certain Community measures exist, such as Article 9 of Regulation (Euratom, EC) No 2185/96, which provides that “*the Member State concerned ... shall give Commission inspectors such assistance as they need to allow them to discharge their duty*” and “*take any necessary measures, in conformity with national law*”. In addition, Article 7(2) of that Regulation empowers the Commission to ask Member States to “*take the appropriate precautionary measures ... in particular in order to safeguard evidence*”.

- Relationship between Community action and national procedures

The Office exercises its external investigation powers in accordance with the subsidiarity and proportionality principles. To ensure complementarity and compatibility of its activity with those of the national authorities, it operates on the ground in close partnership with the Member States (see below at 1.2.1). The independence conferred on the Office in the investigation function does not always apply in this area. Action is subject to the dual requirement of legality and effectiveness.

#### *The legality requirement*

When on-the-spot checks and inspections are conducted, the Office must abide by the laws and regulations of the Member States,<sup>31</sup> including when it draws up its final report, which must be in accordance with national requirements (Article 8(1) of Regulation No 2185/96). Identification of the national rules of procedure, both administrative and judicial, is often a delicate exercise in view of the diversity and complexity of the rules in force; their application to an investigation case sometimes raises difficulties, in particular when a transnational investigation is involved. The judicial expertise available in the Office can go some way towards solving these difficulties.

**The Commission considers** that the Office needs to have the fullest possible knowledge of national rules of procedure at all times. To this end it must build up an internal memory so that it can constantly update its knowledge and share it easily with its staff. The Commission also recognises that it would be worthwhile to continue current thinking on improving the situation by a corpus of administrative rules for transnational external investigations, in connection with the corpus of administrative rules for internal investigations (see R.2).

#### *The effectiveness requirement*

The protection of the Community’s financial interests being a field of shared responsibility between the Community and the Member States, the relationship between the Community and national levels is a determining factor for effectiveness.<sup>32</sup> The establishment of a strategic and operational intelligence function in the Office is real progress. It is intended to improve the targeting of the use of the Community’s own investigation powers to ensure greater complementarity and compatibility with action undertaken by the national authorities (see below at 1.2.1) and greater effectiveness.

The new registry which the Office is setting up will contribute to greater transparency in the Office’s activities, which will make it possible to address the concerns expressed by the Supervisory Committee (see at 3.4.1 below). The follow-up to external investigations, which is part of the effectiveness requirement, obviously depends on an obligation to inform the Office (see below at 1.2.2).

## 1.2. Operational partnership

The Office conducts its operational activities in accordance with the subsidiarity and proportionality principles. It is mindful of the fact that the primary responsibility and the principal resources here belong to the Member States (external investigations). The Office's operational tasks are thus inevitably based on close partnership with all the players involved in protecting financial interests and combating financial crime; this partnership concerns information exchanges and exploitation of strategic and operational intelligence, and regular coopération with the various European Community and Union bodies and international organisations.

### 1.2.1. Partnership with the Member States

The partnership with the relevant national authorities is an essential element for the protection of financial interests and for fraud prevention. This includes cooperation in the broad sense, i.e. conducted by the Office of its own motion and in full independence when exercising its investigation powers (see above at 1.1.1 and 1.1.2) but also the cooperation between the Member States and the Commission which the Office initiates as a department of the institution (Article 280(3) of the EC Treaty).

Here the Office organises a specific form of partnership with the relevant national authorities to secure compliance with Community law and ensure an equivalent level of protection throughout the Community. This partnership is based on sectoral provisions referred to in Article 9(1) and (2) of Regulation No 2988/95 and on provisions for mutual assistance in the Community policies or regulations to which Regulation No 515/97 (agriculture, customs, commercial policy etc.).

Regulation (Euratom, EC) No 2185/96 places partnership with the Member States at the centre of the scheme of on-the-spot checks and inspections conducted by the Office. This minimises the risk of duplication (the second paragraph of Article 3 requires the Commission to *"take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation"*). It contributes to guaranteeing sincere cooperation at all the stages of an on-the-spot mission (under Article 4, *"On-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help. To that end, the officials of the Member State concerned may participate in the on-the-spot checks and inspections. In addition, if the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities"*).

Partnership with the Member States on the ground can sometimes be difficult to apply harmoniously, particularly as a result of the asymmetry in national administrative and judicial powers. But as the annual Commission reports on the fight against fraud and the office's activity reports regularly stress, the assessment is broadly positive and significant operational results have been obtained thanks to the effectiveness of this partnership. The practice of forming task groups acting as crisis units in certain sectors (cigarettes, alcohol, olive oil) is a model that deserves to be developed. The same applies to the conclusion and operation of protocols between the Office and certain specialised national services, such as the Direzione Nazionale Antimafia (see R.5), in particular to meet the need to boost the fight against economic crime. The treatment of certain complex transnational cases, such as illegal banana

imports in the Community under false import licences or the investigation conducted for forgery and fraud by a group of non-governmental organisations in the field of direct expenditure,<sup>33</sup> bears witness to the importance of the partnership with the Member States on the spot, as is also illustrated by the formation of Community investigation teams on mission in third countries, which include investigators from the Member States. The partnership also takes the form of treatment of cases having an impact not only on financial interests but also in other areas such as food safety (BSE for example) or counterfeiting (cigarettes). It is expressed in the form of cooperation projects based on first- and third-pillar instruments at the same time, as in the case of the Office's technical assistance to the Member States in joint maritime surveillance operations (MARINFO) conducted on the basis of Regulation (EC) No 515/97 and the Convention on the Customs Information System.

It should enable the Office to develop its strategic and operational intelligence function and to adapt, in liaison with the national authorities, to the mobility of transnational and organised crime while preserving the possibility of unannounced action on the ground. The national authorities will also be better placed to target their action on the ground.

**The Commission encourages** the Office to continue thinking about how to strengthen its cooperation with the national authorities. It considers that the Office should have the power to call on all prevention and investigation services in the Member States to undertake anti-fraud investigations (see R. 3). The practical usefulness of such a mechanism, centred on the detection of serious offences, should make it possible to strengthen synergies between the national and Community levels, in accordance with the subsidiarity principle.

From this point of view, **the Commission considers** that the Office should develop its intelligence function and finalise the project, recommended by the Commission's overall strategic approach, for an operating platform.<sup>34</sup> The aim of this project is to better present the range of activities undertaken in the Office and to propose an inventory of the expertise available in it so as to give concrete expression to the value added at Community level, in particular for all the national authorities having powers regarding administrative investigations or the prerogatives of a criminal investigation service. It aims to develop mutual exchanges of know-how, practice and experience that will help to optimise the protection of Community interests.

On the basis of the memoranda of understanding which the Office has concluded with certain authorities in the Member States, the same type of operation could be envisaged with other national authorities.

*Recommendation No 5 (R.5)*

*The Commission recommends the Office to continue the setting up and development of its strategic and operational intelligence function, in accordance with the overall anti-fraud strategy of 2000/2005.*

*It also recommends the Office to consider the case for extending the memoranda of understanding concluded with certain authorities in the Member States to other national authorities.*

1.2.2. Legal assistance and judicial expertise

The effectiveness of the Office's administrative investigations is heavily dependent on the use made of them not only in administrative and disciplinary proceedings but also in judicial proceedings, which depends primarily on close cooperation between the Office and the national police and judicial authorities (Article 2 of the Commission decision of 28 April



1999). This is why the guidelines adopted by the Commission in its overall strategy of June 2000 attach priority to strengthening of the criminal judicial dimension.

This concern is expressed in the Office through the legal follow-up and advice functions (institutional and Community law) and judicial follow-up and advice functions (national law). These functions take the form in daily life of assistance measures and multidisciplinary legal advice projects, of the Office's own motion or on request, and support in the form of the expertise of the Judicial Advice Unit attached to the Office's Director-General ("the Director"). The establishment of the operating platform should make it possible to develop the contribution of these functions in support of investigations, in cooperation with the national authorities. The partnership that the Office endeavours to build up with the national prosecution authorities should facilitate the preparation of a guide to good practice, already recommended by the Commission's overall strategy. The aim of this (non-mandatory) guide would be to provide national operational services with basis for organising and managing their cooperation and to encourage them to continue their efforts make best use of the Office's resources and expertise.

- Scope

The tasks entrusted to the Office here result in particular from the principle of close and regular cooperation set out in Article 280 of the EC Treaty. They are based:

- as regards assistance to judicial authorities, on Article 2(2) of the Commission Decision establishing the Office, which makes it "*responsible for providing the Commission's support in cooperating with the Member States in the area of the fight against fraud*", this provision being taken over in Article 1(2) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. In addition, the second subparagraph of Article 7(1) of the second protocol to the Convention on the protection of the financial interests of the Communities European,<sup>35</sup> currently in the process of being ratified, also substantially reproduced in a Commission proposal for a Directive,<sup>36</sup> underlies the Commission's action, providing that "*the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations*";
- as regards judicial follow-up, on Article 2(6) of the Decision establishing the Office, which provides "*The Office shall be in direct contact with the police and judicial authorities*". This power is strengthened by Articles 9 and 10 and by recital 16 to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

While it considers that the final solution to the problem of efficiency in criminal proceedings depends on establishing uniform definitions of offences and proper rules of criminal procedure (European Prosecutor), **the Commission considers** that for the time being it must continue using the resources available to strengthen cooperation between the Office and the Member States' judicial authorities, both for external investigations and for the judicial follow-up to internal investigations. Consolidating this approach, the Office develops its liaison and criminal expertise function in order to provide practical support for carrying out fraud prevention and anticorruption objectives and improves its role of advice, assistance and coordination to support national criminal prosecution of serious offences to the detriment of the Communities' financial interests.

- Procedures

The judicial assistance and follow-up function appears particularly essential to optimise use of the Office's investigations in judicial proceedings. But there are difficulties in judicial treatment. A first barrier to the action of the Office concerns the lack of judicial information in the reporting obligations under the sectoral Regulations (external investigations) and the difficulties of access to this type of information. These reports and this access are neither systematic nor complete. On the one hand, national provisions on confidentiality of judicial proceedings in Member States where they exist can be used as an argument for restricting reporting obligations, and files on criminal prosecutions are accessible only if civil proceedings are joined to the criminal action. In the latter hypothesis, it should be specified that the Member States are responsible for combating fraud where indirect Community financing is concerned, so the Commission does not therefore join civil proceedings as a matter of routine, and the possibility is not available in all the Member States.

Although sectoral regulations impose notification obligations on the Member States, their practical implementation seems to raise certain difficulties where procedures reach the prosecution stage. It has been observed here that, unlike the provisions relating to the institutions and other bodies as regards internal investigations (Article 9(4) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999),<sup>37</sup> the legislation does not impose on the Member States an obligation to inform the Office of the follow-up to external investigations.

**The Commission considers** that such a reporting obligation, which exists in certain sectoral Regulations, should be extended to all external investigations and to the judicial follow-up to internal investigations (see R. 6). This would greatly improve the quality of follow-up, which is substantially the responsibility of the Commission.

Recognition of the role of OLAF staff by national prosecution authorities would obviate an additional difficulty. Application of the second protocol to the financial interests Convention should facilitate the recognition of OLAF staff by national judicial authorities. This would help the Office to meet the needs of the relevant judicial authorities. The feasibility of recognition will have to be analysed in relation of the various existing national systems.

**The Commission considers** that in the absence of Community criminal prosecution powers, cooperation instruments such as the operating platform and the judicial advice, assistance and follow-up function should be developed, in particular by the constant development of operational exchanges between the judicial advisers in the Office and their national counterparts on the basis of a good practice guide. Given the present state of Community resources, this should help to improve the capacity of the criminal courts to respond to investigation reports from the Office.

The Commission also notes that the fact that not all the Member States have ratified the second protocol to the Convention on the protection of financial interests is a further barrier to action by the Office by way of operational assistance<sup>38</sup> to the national judicial authorities. This is one of the reasons why the Commission presented the proposal for a Directive referred to above. It broadly takes over the vertical cooperation scheme of Article 7 of the second protocol.

**The Commission points out**, therefore, that the Council is invited to adopt the proposal for a Directive referred to above which was presented to it in May 2001<sup>39</sup> and that, in parallel, Member States are invited to ratify the second protocol to the Convention on the protection of financial interests with a view to strengthening its implementation. **The Commission**

**considers**, in addition, that the obstacles encountered in the judicial treatment of cases referred by the Office to the criminal prosecution authorities are a major argument in favour of the establishment of a European Prosecutor (see R. 13).

*Recommendation No 6 (R.6)*

*To enhance the effectiveness of the judicial advice, assistance and follow-up functions, the Commission calls on:*

- the Member States to ratify the second protocol to the Convention on the protection of the Community’s financial interests;*
- the Council to adopt the proposal for a directive on the criminal-law protection of the Community’s financial interests.*

*The Commission will propose an initiative to provide that the Member States must inform the Community of action taken to follow up external investigations.*

*It recommends the Office to establish a guide to good practice as suggested in the Commission’s overall strategy.*

### 1.2.3. Coordination of Community action

The action taken by the Office and by other departments has been designed so that they offset each other in order to provide better protection for Community interests and meet the need for sound administration. This is the case of action by certain Commission departments, the disciplinary authorities, authorities specialising in dealing with financial irregularities and the Court of Auditors.

- Commission departments

Day-to-day relations between the Office and other Commission departments, in particular in terms of their responsibility as authorising or managing Community funds or as policy-making and legislating departments, are a component of complementary operations for the protection of financial interests and the fight against fraud. The complementarity appears to work satisfactorily, but it should be better coordinated, particularly as regards information exchanges. As regards information exchanges between certain services and the Office, divergent practices have emerged as regards communication flows on both sides. The Office considers that information intended for it should be better channelled upstream, at departmental level, so that the Office receives only information that corresponds to predetermined criteria or parameters. By the same token, some departments would like more information from the Office for the performance of their own tasks. Improving practice here would enable the Office to deploy its investigation resources more effectively and would encourage complementarity between anti-fraud action with on-the-spot checks and inspections that authorising and administrative services conduct on the basis of sectoral regulations, to ensure the sound implementation of Community policies, the regularity of the accounts and the smooth operation of national management and control systems.

In addition, in the field of direct expenditure, certain authorising officers tend to suspend payments as a precaution when they transmit information to the Office and/or the Office is launching an investigation. This approach should be re-appraised in accordance with concerted and better scheduled procedures so as to improve consistency.<sup>40</sup> In this context, according in particular to Article 106(4) of the implementing rules for the new Financial Regulation,<sup>41</sup> if an authorising officer receives information raising doubts as to the eligibility

of expenditure in a payment request, he can suspend the payment period for the purposes of further checks, including on-the-spot checks and inspections.

The Office must rationalise the use of available resources to focus operational activity on the most significant cases justifying Community intervention in accordance with the subsidiarity principle. The upstream selection of cases, on the basis of regular cooperation with departments responsible for checking the sound application and management of Community policies and financial instruments and of close cooperation with national authorities, will enable the Office to prepare its programme of operational activities in accordance with Article 11 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

**The Commission considers**, in the light of experience, that improvements are needed in the exchange of information, as is stronger mutual cooperation between the Office and its departments. It would be useful here to extend to other Commission departments the initiatives of action 93 of the Commission Reform White Paper for the improvement of coordination between the Office and certain services to enhance the fight against irregularities, fraud and corruption and improve the use of available resources. There is an arrangement with the Internal Audit Service and the Joint Research Centre; other arrangements are being prepared, notably with the Directorate-General for Employment and Social Affairs and the Cooperation Office (AIDCO). A practice has been established to set a general context for procedures for cooperation and information exchanges between the Office and other Directorates-General such as Taxation and the Customs Union. With this in mind, it is planned to develop interdepartmental memoranda of agreement, as set out in the 2001/2003 action plan, between the Office and the services responsible for verifying the effectiveness of national systems for the management of Community funds with a view to defining practical procedures for regular close interdepartmental coordination.

*Recommendation No 7 (R.7)*

*To enable the Office to better target its operational activities, the Commission recommends that interdepartmental memoranda of agreement, as set out in the 2001/2003 action plan, be developed and implemented to establish ground rules for cooperation between the Office and the other Commission departments, particularly those that manage Community funds.*

- The Commission's internal auditor

Investigations, both internal and external, can enable the Office, beyond its anti-fraud mission, to identify functional defects in the internal audit systems that can affect either the regulations or administrative organisation. This information must be transmitted in the first instance to the hierarchy so that it can take the requisite remedial measures. The Office can also share with the Commission's Internal Audit Service and the internal audit unit in the relevant Directorate-General or department all the information relating to systemic defects in internal audit arrangements that it identifies with a view to routine follow-up. Likewise the Internal Audit Service and the internal audit unit in the relevant Directorate-General or department, in accordance with the standard practice of internal auditors, can share with the Office all information arising in the course of their work that might ground a suspicion of fraud.

- Disciplinary authorities

Under Article 1(3) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 and the Interinstitutional Agreement of 25 May 1999, the Office carries out administrative investigations for the purpose of:

– “fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community”; and

– “investigating to that end serious matters ... such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members ... heads ... or members of the staff ... not subject to the Staff Regulations”.

The Commission notes that action by disciplinary authorities with investigation powers, when they exist, is confined to the institution or body to which they are attached, unlike the Office, which has broad internal powers to carry out investigations, even into members or personnel not subject to the Staff Regulations, which it can exercise without distinction in all the institutions and bodies. Since the institutions and bodies have general powers as regards disciplinary investigations and their own responsibility,<sup>42</sup> the scope of the Office’s activities must be demarcated to ensure that its powers are preserved in the event of an overlap.

No such authority exists in the other institutions or bodies, but the Commission has set up the Investigation and Disciplinary Office (IDOC)<sup>43</sup> with the function under Article 2 of the Commission Decision of 19 February 2002 of conducting administrative investigations and preparing disciplinary proceedings submitted to the appointing authority. The Commission has confirmed the priority status of OLAF within its powers (protection of financial interests or serious offences). If OLAF shows that it is already conducting an investigation or planning to do so, IDOC refrains from opening a parallel investigation. Article 5(2) of the Decision of 19 February 2002 provides that “*Before opening such an inquiry, the Director-General of Personnel and Administration shall first consult the European Anti-Fraud Office (OLAF) to check that OLAF is not itself undertaking an inquiry or does not intend to do so*”. It is clear from the Commission Decision and from administrative practice that IDOC exercises powers that are residual in relation to those of the Office, which avoids overlapping in administrative investigations. Incidentally, the effectiveness of the disciplinary follow-up to internal investigations demands that Office staff engaging in investigations bear in mind the specific features of disciplinary law.

To improve coordination and complementarity, the Office must be asked to enhance the transparency of the limits to its action on the basis of various intervention criteria. Certain parameters appear necessary on the basis of the principle of speciality, such as the criterion of criminal follow-up or expertise in the fight against behaviour involving serious forms of economic and financial crime.<sup>44</sup> With regard to the offences in relation to the office held by the offender, the Office should intervene wherever the conduct complained of is such that its expertise as regards economic and financial crime is needed.

**The Commission considers** that investigations by the Office and the disciplinary authorities could be demarcated by memoranda of understanding which would reserve intervention by the Office for the detection of serious facts liable to be treated as serious economic or financial offences. The establishment of a typology of conduct would also help to delimit powers more precisely. It would require major work on defining and classifying different types of violation of professional obligations in the exercise of functions.

***Recommendation No 8 (R.8)***

***The Commission recommends that memoranda of understanding be concluded to make the practical breakdown of tasks between the Office and disciplinary bodies more transparent.***

- Authorities specialising in financial irregularities

Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>45</sup> does not affect Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, in particular the responsibilities given to the Office.

But, to “*determine whether a financial irregularity has occurred and what the consequences, if any, should be*”, the Financial Regulation provides for each institution to “*set up a specialised financial irregularities panel which shall function independently*”. On the basis of the opinion of this authority, the institution is to decide whether to initiate proceedings entailing liability to disciplinary action or to payment of compensation.<sup>46</sup>

It is essential to preserve a sound relationship between action by these authorities and by the Office, while safeguarding the powers of the Office. The opinion of each of these authorities evaluates whether there is an irregularity, how serious it is and what its consequences might be. If the analysis suggests that the case requires action by the Office, it will be informed without delay.

**The Commission considers it useful** that the system be appreciated in the light of experience so that the need for improvements can be considered.

- Court of Auditors

The Court of Auditors, in accordance with Articles 246 and 248 of the EC Treaty, audits the accounts and examines to this end the accounts of all Community income and expenditure to assess its legality and regularity and ensure sound financial management. The Court of Auditors has an audit function, generally exercised without any pre-existing suspicions in order to check the reliability of systems. This institution’s primary purpose is not to detect punishable acts, and it has no power to identify individual liability, unlike the Office. To place cooperation with the Office on a sound footing, there is an arrangement between the Office and the Court whereby the Court sends the Office facts that might constitute fraud and the Office informs the Court of the action taken.

**The Commission considers** that this provides a solid foundation for cooperation between the Office and the Court of Auditors.

Since this type of mechanism would facilitate the exercise of the Office’s internal investigation function on equivalent terms in all the institutions and bodies, **the Commission considers** it useful to launch a debate on the advisability of specific memoranda of understanding between the Office and the other institutions and bodies.

*Recommendation No 9 (R.9)*

*The Commission recommends the Office to consider the case for extending the memoranda of understanding to other institutions and bodies.*

#### 1.2.4. Cooperation at the international and European Union level

Because economic and financial crime are transnational, and action by the European Community falls within the scope of its cooperation with third countries, it is necessary to improve cooperation with all organisations that are responsible for combating these forms of crime. The relationship between the powers of the Office and those of Europol and Eurojust,

and the procedures for cooperation between them, are essential. Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 contain no provisions on the matter. The Office is part of a Community institution which exercises responsibilities outside the area in which national powers are exercised. Europol and Eurojust, as third-pillar authorities, have functions focusing on coordination of national operations.

- Europol

According to Article 2(6) of the Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), it is in direct contact with the police and judicial authorities. The Council Decision of 6 December 2001<sup>47</sup> extended Europol's mandate to the fight against the serious forms of international crime listed in the annex to the Europol Convention. Fraud and corruption, in particular, are covered by Europol's mandate. A recital to the Decision states that the Commission's role is not affected. According to a declaration annexed to the Decision, the Council *'agrees that referring to fraud among the serious forms of crime referred to in the annex to the Europol Convention must take account of OLAF's powers ... as regards tax evasion and customs fraud and lead to the negotiation of an agreement between Europol and the Commission'*.

A cooperation agreement concluded between the Commission and Europol on 18 February 2003 makes provision for the direct conclusion of arrangements between Europol and OLAF in fields covered by the investigation function in which the Office enjoys full independence.

The Commission notes that the desire to improve cooperation is shared by the Office and Europol. To improve cooperation by allowing Europol to transmit information to the Office, the Council would have to adopt a unanimous decision. That much is clear from Article 10(4) and Article 18 of the Europol Convention. Because of these legal restrictions, operational exchanges between Europol and the Office remain limited. All ways of improving the situation should be explored, including more regular participation of the Office in Europol's Management Board, which would facilitate personal contacts and improve perceptions of the usefulness of exchanges between Europol and the Office.

- Eurojust

According to Article 2(6) of the Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), it is in direct contact with the judicial authorities. In areas within Community jurisdiction, such as the protection of financial interests, relationships as regards operational cooperation, in particular the judicial follow-up to investigations by the Office, are directly organised through the Office's judicial advice and follow-up function.

Eurojust is a permanent European Union body that coordinates judicial cooperation in criminal matters between the authorities of the Member States and sets its own priorities. Established by a Council Decision of 28 February 2002,<sup>48</sup> it replaced Pro-Eurojust, the provisional unit set up on 1 March 2001. Recital 8 to the Council Decision states that *"Eurojust's jurisdiction is without prejudice to the Community's competence to protect its own financial interests"*. To give priority to Community law and practice, the Commission made a statement, annexed to the Council Decision.<sup>49</sup> Eurojust does not have its own powers of investigation at European level. A judicial body, Eurojust aims to improve coordination and cooperation between national prosecution authorities and to support them so as to enhance the effectiveness of their investigations and prosecutions in cases involving serious forms of crime.

**The Commission notes** that the negotiation of a memorandum of understanding between the Office and Eurojust under Article 22 of the Eurojust rules of procedure is in progress. This memorandum should envisage practical procedures for mutual communication of information and cooperation in practical cases, as well as more general topics of interest to both the Office and Eurojust.

?

With regard to relations between the Office and Union authorities such as Europol or Eurojust, **the Commission considers** that account must be taken of the European institutions' specific responsibilities for the protection of Community interests, particularly its financial interests. The Commission and the two branches of the budgetary authority are basically responsible.<sup>50</sup> The 'acquis communautaire' should not back off.

- Third countries

In the Commission, the Office is responsible for negotiating agreements or protocols on mutual administrative assistance in customs matters with third countries. There are already 41 agreements. Negotiations are in hand with countries such as Syria and China. In this respect, **the Commission considers** that the Office must continue negotiating such agreements and protocols to cover more countries and reinforce in particular reciprocal exchanges of information and cooperation. The implementation of these instruments is monitored in the joint committees.

There is moreover, an agreement under negotiation with Switzerland aimed at combating fraud and any other illegal activity against the financial interests of the respective parties (administrative assistance and judicial cooperation).

In addition, work on protection of the euro against counterfeiting (see below at 2.3) has focused on the importance of cooperation with third countries. To this end, Article 9 of Regulation (EC) No 1338/2001 must become concrete by the inclusion of anti-counterfeiting measures in cooperation, association and pre-accession agreements.

Finally, on the basis of the memoranda of understanding which the Office has already concluded with certain authorities in third countries (e.g. Russian tax inspectorate), **the Commission considers** that the same type of operation could be envisaged with other national authorities.

***Recommendation No 10 (R.10)***

*The Commission recommends the continuing of the negotiation of international agreements on mutual administrative assistance in customs matters, with a view to reinforce in particular exchange of information and cooperation between the Community level and third countries authorities.*

*Equally, the Commission recommends to put in place anti-counterfeiting provisions relating to exchanges of information between the Community and the authorities of third countries in cooperation, association or pre-accession agreements with them.*

*The Commission further recommends the Office to consider the case for extending the memoranda of understanding concluded with certain authorities in third countries to other third countries.*



- International authorities

The Office maintains appropriate contacts with various actors on the international scene, such as Interpol, the World Customs Organisation (WCO) and the World Bank. Cooperation includes participation in international forums. Such is the case of the annual conference of international investigators which the Office is to organise in 2003. The Office has the option of envisaging procedures for closer cooperation with these partners. It is associated as an observer with several WCO committees and, at a more operational level, data exchanges are organised between the Office's computerised system and the WCO's database, in particular with regard to cigarette trafficking. Practice has also revealed the value of associating Interpol with work on the protection of the euro against counterfeiting done by the Commission's anti-fraud advisory committee chaired by the Office, with real value added in terms of the use of international instruments in the fight against counterfeiting and of their integration into the Community mechanism (national central offices or contact points).

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## **2. THE COMMISSION'S GENERAL TASKS: A SPECIFIC EXPERTISE OF THE OFFICE**

Like other Commission departments, the Office is responsible for preparing decisions, developing and implementing projects and implementing the Commission's decisions. The provisions applied in the matter provide that the Office's responsibilities range beyond the protection of the Community's financial interests to all activities connected with safeguarding Community interests against illegal conduct against which administrative or criminal proceedings may lie.<sup>51</sup> Its functions include *'the tasks carried out up to now by the Task Force for Coordination of Fraud Prevention, in particular those tasks concerning the preparation of legislative and regulatory provisions in the areas of activity of this Office, including instruments which fall under Title VI of the Treaty on European Union.'*<sup>52</sup>

Within the objectives laid down by the legislature for the protection of the Community's financial interests, the Commission, by creating the European Anti-fraud Office, has maintained a close relationship between policy-making activities and fieldwork.

The scope of these planning activities is determined by the objectives laid down by Article 280 of the EC Treaty, Article 1(2) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 and Article 2 of Decision 1999/352/EC, ECSC, Euratom establishing the Office. The main aim of these activities is to prepare work on anti-fraud policy (strategy) and legislation for prevention, cooperation and the fight against fraud.<sup>53</sup> It also concerns development of infrastructure and technical assistance, the collection and use of information, and the task of representing the Commission and cooperation with the appropriate national authorities.

This evaluation makes it possible to use a number of activities that have been undertaken to illustrate the effects of proximity between the general Commission tasks entrusted to the Office and tasks connected with the operational function.

### **2.1. Anti-fraud strategy**

The strategy for the protection of financial interests and the fight against the fraud adopted by the Commission in 1994, and the Commission work programmes on the fight against fraud, in

particular for 1998-99, testify to the Commission's desire to take advantage of the experience gained by the old anti-fraud unit.<sup>54</sup> It has also been possible to make use of this multidisciplinary expertise to develop specific know-how in other fields where there is a body of Community law that can be affected by illegal conduct for which administrative or criminal proceedings may lie. Consequently the anti-fraud unit, and then the Office, as a Commission department, were instructed to prepare and contribute to its anti-fraud strategy.

The broad lines of the anti-fraud strategy adopted in June 2000<sup>55</sup> and the programming of action to implement them give concrete expression to the principle of bringing the investigation, intelligence (strategic and operational) and analysis functions and the general functions of the institution together in the Office.

In the context of this strategy the Office, as a Commission department, contributes to initiatives to develop the means needed for an overall view of the phenomenon of transnational fraud. It encourages concrete practices for close and regular cooperation, while avoiding any partitioning and fragmentation of know-how. This is accompanied by the development of instruments, means and measures in the fields of prevention, cooperation and enforcement in relation to transnational crime. Such is the case of a matrix for the interpretation of the criteria for irregularity reporting allowing better coordination of intelligence and investigations, of the use of expertise of the Commission Anti-fraud Advisory Committee (see at 2.6 below) and the procedure for fraud-proofing (see at 2.2.1 below).

The programming of measures and annual evaluation (reports under Article 280 of the EC Treaty) provide the means of guiding Community action and monitoring the development of the Commission's anti-fraud policy.

Given its task of implementing the budget (Article 274 of the EC Treaty), which is closely linked to its responsibility for protecting financial interests (Article 280 CE), **the Commission considers** that it can determine the broad lines of anti-fraud policy and contribute to the development of guidelines for the Office's operational strategy without affecting the Office's operational independence. This could enable it to take account of recommendations from other institutions (Parliament Resolutions, reports of the Court of Auditors, Council conclusions). The Commission will establish work procedures with the Office (see at 3.5.1 below) to enable it to take into consideration contributions by the Commission and the other institutions in its work programme under Article 11 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

*Recommendation No 11 (R.11)*

*The Commission recommends that the Office draws up its work programme, taking account of the guidelines and contributions of the institutions in connection with the fight against fraud and relying on the strategic and operational intelligence function.*

## **2.2. Prevention**

Prevention is one of the challenges of the Commission's strategy of June 2000. In this connection, the Office is involved directly in the design and implementation of measures which come within the framework of the strategy and of the reform of the Commission (White Paper). The role entrusted to the Office in the White Paper also testifies to the political will of the Commission to fight effectively against fraud on the basis, in particular, of the expertise of the Office.

### 2.2.1. Fraud-proofing

The guidelines of action 94 of the White Paper on Reform of the Commission and of the strategic approach of June 2000 enabled the Commission to develop the prevention stage more consistently through measures to strengthen Community fraud-proofing (legislation, contract management).

This was the context in which, on 7 November 2001, the Commission adopted a communication<sup>56</sup> according to which the Office is to provide regular support to other departments in all areas of Community finance. The Office can rely on its operational experience since its investigations give it the opportunity to detect possible weaknesses in the legislation. This is why consultation procedures on new proposals for legislation with a major political or financial impact were introduced at an early stage in the legislative process. In this connection, the Office gives the relevant Commission departments its support in selecting risk sectors. The new consultation procedure also applies to contracts, public procurement and subsidies, in particular as regards expenditure managed direct by the Commission.

**The Commission observes** that Parliament recently stressed the advantages of this method as conducive to the development of a more effective prevention culture, in which the Office is involved by contributing the value added by its expertise.<sup>57</sup> The Commission will strive to implement action 94 of the White Paper.

### 2.2.2. Rules of professional ethics

The reform White Paper also envisages (action 92) that *‘To contribute to a proper business conduct of officials throughout the life cycle of programmes and projects, from the conceptual level to the evaluation of final results, guidelines will be put in place’* raising awareness *“on the part of officials and beneficiaries to forms of conduct which ... might lead to unintentional errors, conflicts of interest and irregularities”* (see at 1.2.3 above, disciplinary authorities).

On this basis, the Office has devised an operational tool to strengthen and develop the ethical quality of professional conduct in the institution. A number of professional ethical rules illustrated by practical examples are set out in the form of a user guide.

This draft must now be submitted for approval by the full Commission, and could then be sent on to the different institutions and bodies. The practical guide could be used as professional ethics training material.

### 2.2.3. Enlargement

To develop preventive measures even before the new Member States accede, the Commission noted that there were needs for action in certain of them. In the fight against fraud and corruption, the proper transposal of Community law requires not just a legislative effort but the operational capacity of the acceding countries to give the financial interests of the Communities an equivalent level of effective protection to that which in theory prevails in the Member States. The Office helps the competent authorities of these countries to lay down structural guidelines (institution-building) and to develop an efficient organisation before accession so as to strengthen prevention and devise a specific investigation policy for the protection of the Communities’ financial interests.

**The Commission considers** that the Office’s expertise here is particularly useful in enabling the acceding countries to extend the Community mechanism for preventing and combating fraud at the national level. The Commission intends to continue working with the Office on

fraud prevention activities and technical and operational support for the acceding countries. The emphasis here is on training schemes relating to the protection of financial interests, to which the Office must continue making its active contribution.

### 2.3. Anti-fraud legislation

On the basis of the general activities of the former anti-fraud unit and, since 1999, of the Office, the Commission has developed a series of initiatives to lay the ground for a body of secondary legislation inspired by an overall approach combining first- and third-pillar instruments. Experience on the ground and the gaps and needs for clarification perceived in the existing regulations were the starting point for legislative action to establish a more effective, dissuasive and proportional framework and accomplish the objectives of Article 280 of the EC Treaty.

It would be worth extending Community administrative penalties to supplement the machinery of Regulation (EC, Euratom) No 2988/95. The Commission also intends to stress the need for action as requested by the Court of Auditors, in particular as regards introduction of a more appropriate system of penalties in the field of research.

The expertise acquired in the protection of financial interests also enabled the Commission to present and support corresponding initiatives to protect the euro against counterfeiting, adopted within a tight schedule before the single currency came in.<sup>58</sup> **The Commission considers** that the Office's expertise brings added value to the preparation of legislative proposals to protect Community interests or to consolidate the legal framework for the Office's operational tasks (see R.3).

#### *Recommendation No 12 (R.12)*

*The Commission will examine the possibility of taking initiatives to introduce, if necessary, Community administrative penalties in other areas along the lines of what has been done in the common agricultural policy, and to harmonise penalties in the customs field.*

### 2.4. The strengthening of the legal dimension

In the course of its operations to ensure the enforcement of the criminal law and the judicial follow-up to its investigations, the Office has observed shortcomings relating in particular to the fragmentation of the European law-enforcement area (the maintenance of criminal law borders), conflicts in criminal policy and the principle of discretionary prosecution. This highlights the interest of the Commission's overall strategy of June 2000, which includes the idea of strengthening the judicial dimension.

The Office's expertise has developed gradually, in a continuous process following on from the old anti-fraud unit, in the field of operational cooperation with police authorities and other authorities responsible for protecting financial interests in the third-pillar context. This is the judicial assistance and follow-up function (see at 1.2.2 above).<sup>59</sup>

The Commission's long-term analysis with a high-level group of research workers on the protection of financial interests has provided input for discussions on the matter and made a special contribution to the Convention on the future of the European Union with regard to the question of the European Prosecutor.<sup>60</sup> The latest thinking is reflected in a Commission Report on follow-up to the Green Paper on the criminal protection of the Community's financial interests and establishment of a European Prosecutor (see below, the last paragraph of 3.4 and Outlook).

*Recommendation No 13 (R.13)*

*To improve the effectiveness of the enforcement of criminal law the Commission calls on the Convention on the future of the European Union to accept its proposal for the establishment of a European Prosecutor in the constitutional part of the Treaty, which would contribute to the respect for judicial guarantees while securing judicial review of the Office's operational activities.*

## **2.5. The instruments of technical assistance**

The Commission, in accordance with Article 280 of the EC Treaty and Article 1(2) of the Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, cooperates through the Office with the Member States to organise regular close cooperation and to coordinate their plans for more effective protection of Community interests. The same applies in the context of intergovernmental action under third-pillar instruments (see above at 1.2.1). The Commission asked the Office to develop the requisite anti-fraud infrastructures and to organise the gathering and exploitation of intelligence. This was the background to the Commission decision to give the Office specific responsibility for implementing action 96 of the reform White Paper on monitoring recovery.<sup>61</sup> High-performance administrative and financial follow-up is a major booster to the protection of financial interests, in particular regarding the recovery of debts. The instruments for centralisation and exploitation of information are part of the administrative and financial follow-up function falling within the Commission's responsibilities, to better perform the task of checking the reality and regularity of operations financed under the various Community policies and take part in measures to recover amounts lost as a result of irregularities. In the Office, a function of administrative and financial follow-up to investigations conducted by the Office in the field of direct expenditure has been created as a means of achieving close cooperation with the various services concerned.<sup>62</sup> The Office can also improve the information on the basis of which the Commission decides whether to book financial corrections to the Member State or to the Community. In addition, certain Commission initiatives to make the Community a direct actor on behalf of the Member States were developed on the basis of experience in operational partnership between the Office and national administrative and judicial authorities, an example being the civil action in the US federal courts against American tobacco producers.

The Office also provides the competent national authorities with technical cooperation, in particular on training. Its support for training takes the form of the organisation of seminars, meetings workshops and visits and active participation in events organised by the Office's partners. As regards prevention, cooperation and enforcement, by drawing conclusions from its operational activity, the Office can provide overall information (on technical and operational matters and on the judicial framework) that can help to make those present aware of the European dimension of their projects. The Office also manages the action programme on exchange of personnel, assistance and training, adopted by the Council at the end of 2001 for the protection of the euro against counterfeiting (Pericles programme).

Furthermore, the Office has also set up the OAFCN.<sup>63</sup> The network brings together those in charge of public relations in the Member States' investigation services with which the Office works together. The aims are to create the conditions for dialogue and, through the network, to inform and raise awareness among the national authorities and professional circles about the importance for the Community of working together to develop a prevention culture.

**The Commission considers** that apart from its operational tasks the Office, by developing the means available to it, provides technical assistance to make it possible for the authorising or administrative departments of the Commission or the national authorities, as the case may be, to improve their administrative and financial follow-up, and to make suggestions to the

Commission on the question of where the burden of financial corrections should fall. It makes a specific contribution to cooperation with the Member States, supports their national investigations and contributes to improving the training of their officials employed in the field of fraud prevention and protection of Community interests, and to publicising the matter.

## **2.6. The representation and cooperation function**

Under the Decision of 28 April 1999, the Office represents the Commission in its dealings with the national authorities and in the fields covered by it. As part of these duties, it must present and defend Commission proposals in Council and European Parliament negotiating bodies.

The Office is also responsible for cooperation and coordination, which involves it managing a number of advisory committees in sectoral areas such as agriculture or customs. It chairs the Anti-fraud Advisory Committee attached to the Commission, both for the protection of financial interests and for the protection of the euro.<sup>64</sup> To ensure that the Commission could consult on the broadest possible basis (finance, customs, agriculture, structural measures, police and justice), the Commission decided, when the committee was set up, that Member States should be represented on a multidisciplinary basis.<sup>65</sup>

**The Commission considers** that the other work in progress within the Anti-fraud Advisory Committee should enable it to assess the need to act in all areas of the fight against fraud, for example by extending the precautionary measures planned for potentially unreliable operators in the EAGGF Guarantee Section (“black list” regulation) to other fields.

**The Commission considers** that the Office, acting in liaison with other relevant Commission and national departments in the Anti-fraud Advisory Committee or various committees or working parties reporting to it,<sup>66</sup> must undertake a regular evaluation of the mechanisms provided for by the regulations so that it can better assess the need for adjustments<sup>67</sup> and improve the match between the workload for the Member States and the practical needs of the Commission, the institutions and Member States. In this context, the clarification of certain concepts, such as that of illegal activity (Article 280(1) of the EC Treaty) is necessary to improve information exchanges and cooperation, both for the Office’s own independent activity and for the implementation of the Regulations.

To increase strengthen cooperation with the national authorities, **the Commission considers** that it would be useful to update the Decision establishing the Anti-fraud Advisory Committee to reflect the consequences of the development of the Office’s tasks (protection, including criminal-law protection, of the Community’s financial interests and other interests such as the euro), and in particular to emphasise its role in strengthening the judicial dimension and its function as direct point of contact with police and judicial authorities.

### ***Recommendation No 14 (R.14)***

***The Commission, in accordance with its overall anti-fraud strategy and its work programme, recommends the development of cooperation with all national authorities involved in preventing and combating fraud and other illegal activities (platform of multidisciplinary services).***

***It will propose updating its decision on the Anti-fraud Advisory Committee to develop the judicial dimension and the function of channel of communication with the police and judicial authorities.***

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### 3. AN INDEPENDENT AND INTERNAL SERVICE: HYBRID STATUS

The establishment and adoption of a special status to secure compatibility between the vital functional independence in the Office's investigation function and the maintenance of its position as a Commission department can be explained by the circumstances surrounding its establishment, as set out above in the section on the development of the fight against fraud. The aim was to find a good way of increasing the effectiveness and credibility of the fight against fraud, corruption and other illegal activities as quickly as possible.

The Commission had initially proposed the establishment of an external body.<sup>68</sup> This idea was underpinned by the desire to confer a maximum degree of organisational independence on the Anti-Fraud Office. President Santer stated in the European Parliament on 2 December 1998:<sup>69</sup> “... a clear separation between inspectors and those they inspect is healthy. To remove any doubts, we must not stop half-way, and the discussion about externalising the service must be taken to its logical end. We have therefore come to the conclusion that creating a completely independent Anti-Fraud Office which is not in any way subordinate to the Commission or to any other institution is the most effective and most defensible way ...”.

This option was not adopted by the legislature. Beyond the political aspects of the reform, a number of legal and institutional considerations were to prevail, and the Commission accordingly revised its initial proposal. It now proposed the establishment of an office which would be part of its organisational structure for the purposes of performing its traditional functions and of administrative and budgetary management but would be independent in the exercise of its investigation function. This hybrid status was enshrined in a number of legislative measures designed to ensure OLAF's operational independence and its smooth operation within the Commission, in particular the independent decision-making powers of OLAF's Director, who is appointed by a specific procedure, and the existence of a Supervisory Committee to guarantee OLAF's operational independence and assist its Director in discharging his responsibilities.<sup>70</sup>

This specific status for the Office also needs to be evaluated to assess how suited it is to the Office's tasks as outlined above. It will be examined from the points of view of the Office's administrative organisation, budget, information and communication work, review of the investigation function, the Commission's political responsibility and relations with the Supervisory Committee.

#### 3.1. Organisation and staff

The fact that OLAF is independent for the purposes of its investigative work while remaining administratively part of the Commission is reflected in certain aspects of its internal work and staff set-up.

##### 3.1.1. Internal organisation of the Office

Article 6(4) of Decision 1999/352/EC, ECSC, Euratom establishing the Anti-fraud Office provides that “*Commission decisions concerning its internal organisation shall apply to the Office in so far as they are compatible*” with the legal framework relating to it.

The Commission has drawn the necessary conclusions from its Decision as regards OLAF's general administrative organisation. The procedures applicable to the various Directorates-General as part of the Commission reform which are designed to make them more autonomous are as a matter of principle applicable to OLAF. Decentralisation, delegation and

internal audit are concepts that can be applied to OLAF. OLAF can be audited by the Commission (Internal Audit Service – IAS), as is provided by the memorandum of understanding it has concluded with the IAS. Under this agreement, the scope of IAS audits may not cover the substance of OLAF's investigation work or the content of information received in the course of its investigations, but only its internal control and management of its operations.

The White Paper on the reform provides for a number of financial management, priority planning and administrative measures<sup>71</sup> to improve the way the Commission works and to ensure better collective management of its obligations, which are also beneficial to OLAF, but whose scope may, in OLAF's opinion, pose problems for its operational independence. **The Commission considers** that where problems arise it is ready to evaluate them in a dialogue with the Supervisory Committee.

### 3.1.2. Staff of the Office

In response to the concerns of the high-level group set up by the German Presidency of the Council to assist with the anti-fraud reform of 1999, the Commission took a number of measures to allow OLAF to recruit qualified staff and to obtain the specific expertise needed for its tasks, so as to boost the effectiveness of anti-fraud policy. The institutions did not have the appropriate training tools or resources with police or judicial expertise. By delegating to OLAF's Director the powers conferred by the Staff Regulations on the appointing authority (Article 6(1) of the Decision establishing OLAF), the Commission allowed him to set conditions and arrangements for recruitment, in particular as to the length or renewal of contracts, in accordance with a dual requirement: that of complying with the Staff Regulations and, subject to certain conditions, with the general rules governing the institution's staff, while ensuring that OLAF's needs for specific expertise are met.

This political decision, which takes account of the specific nature of OLAF's hybrid status, has none the less met with some difficulties in its implementation. There are two main reasons for this: one relating to the transfer en bloc of staff from OLAF's old structure, the other to the new provisions allowing OLAF's Director to depart from the rules devised by the Commission's administration.

OLAF's choice not to set up its own complete human resources department is justified by the fact that the posts provided for by the budgetary authority are for anti-fraud activity. It was vital for OLAF, for reasons of economies of scale, to use the resources and experience of the Commission's Directorate-General for Personnel and Administration, responsible for the organisation of its structure and staff management matters. This initially led to misunderstandings regarding the interpretation of OLAF's status and the powers of its Director.

The recruitment of temporary staff, as recommended by the above-mentioned high-level group, provides OLAF with the expertise it needs alongside the core of permanent staff. However, the question arises whether the current ratio of permanent to temporary posts is appropriate, in the light both of the findings by the Court of Auditors in its special report No 8/98 and the balance between categories, A and B in particular. With a view to economising on resources and avoiding duplication of certain tasks, a large number of officials and other staff perform tasks belonging both to a central administrative department and to the area of the Office's operationally independent functions.



Extensive recruitment of OLAF staff on the basis of the results of Commission competitions does not remove the Director's discretion, as delegated appointing authority, to decide to organise specialised competitions or selection procedures if necessary and to set the basic grade as appropriate.

Internal practices applicable to OLAF staff in compliance with the Staff Regulations must be based on the specific requirements of its investigation function and support of that function (anti-fraud policy, legislation, follow-up). Thus, OLAF's Director may in particular extend the contracts of its temporary staff, in order to ensure a solid core of expertise, which makes the most of the synergies offered in each post by the combination of knowledge. When renewing a contract, it should also be possible to re-grade the person concerned in order to guarantee fair career development prospects.

Moreover, to ensure the neutral selection of OLAF's management staff, guarantees exist in the form of the special composition of the Commission's Consultative Committee on Appointments, chaired by its Secretary-General with the participation of the Director-General for Personnel and Administration, but which also, to take account of OLAF's specific situation and interinstitutional mission, comprises representatives of the Court of Justice, Court of Auditors and Supervisory Committee and meets in the presence of an external consultant.

Lastly, the Commission would point out that the officials and other staff of the Anti-Fraud Office are not currently required to swear an oath. Such a requirement, which has been recommended by the European Parliament and the Supervisory Committee, should be introduced after an assessment of its added value in the Community legal context. Swearing an oath would not confer extra powers on OLAF staff but might help to strengthen the evidential value of its reports, drawn up by sworn officers. A comparative analysis of national systems would help to establish the value of such a measure.

The aim must be to preserve a set of rules and implementing arrangements which are in line with the Staff Regulations, so that OLAF can also recruit staff from Commission departments or other institutions, without undermining the exchanges linked to the mobility of permanent staff, a principle advocated by all the institutions.

Given that the officials and other staff working in OLAF continue to be Commission officials and staff eligible for interdepartmental mobility, **the Commission considers** that OLAF must always be in a position to give the reasons why it considers it necessary to adopt specific rules or arrangements regarding staff matters.

*Recommendation No 15 (R.15)*

*The Commission recommends that the Office, in full compliance with the Staff Regulations and the principle of transparency, should define its own staff management policy as required in both internal and external respects.*

### **3.2. Budget of the Office**

The hybrid status of the Office also gives rise to special budgetary arrangements.

Article 13 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 lays down that the "appropriations for the Office, the total amount of which shall be entered under a special budget heading within Part A of the section of the general budget of the European Union relating to the Commission, shall be set out in detail in an Annex to that Part" and also that

*“posts allocated to the Office shall be listed in an Annex to the Commission’s establishment plan”.*

Article 6(2) and (3) of the Decision establishing the Anti-Fraud Office requires the Director, *“after consulting the Surveillance Committee, ... [to] send the Director-General for Budgets a preliminary draft budget to be entered in the special heading for the Office in the annual general budget”* and provides that the Director, who *“shall act as authorising officer for implementation of the special budget heading for part A of the budget, concerning the Office, and the specific anti-fraud headings of part B ... [is] permitted to delegate his powers”*.

During the procedure for adopting the Financial Regulation, the Supervisory Committee had asked that OLAF be treated as an institution and enjoy greater budgetary autonomy, an idea which was also developed in its third report, with reference to the status of the European Ombudsman. On the other hand the new Financial Regulation, in Article 171 and following, confirms the budgetary regime of the Anti-Fraud Office attached to the Commission, with the latter remaining the point of contact for the budgetary authority. The legislature has thus decided not to grant OLAF greater budgetary autonomy for the time being.

From the point of view of the preliminary draft budget (PDB), even if OLAF and the Supervisory Committee consider that the Commission’s internal negotiations should not have a negative impact on OLAF’s requests, it has to be borne in mind that the Commission is under an obligation to consider all the policy priorities. The Commission attaches to its preliminary draft, out of a concern for transparency, the preliminary draft submitted by OLAF to the Director-General for Budgets and an explanation of why it has departed from it. This pragmatic solution makes the budgetary authority aware of any differences in the two assessments. For the first two budget years, the budget allocation was set by agreement between the Commission and the European Parliament, which planned to double OLAF’s staff. This objective was reached in 2001. When the PDB for 2003 was presented, while it gave a positive opinion on the preliminary draft presented by the Office, the Supervisory Committee felt that OLAF’s operational priorities for 2003 were not sufficiently defined and did not justify any additional requests.

**The Commission considers** that, while the budgetary framework for the Anti-Fraud Office has given rise to some misunderstandings in practice, it has none the less provided the Office with the resources it needed to perform its tasks. The new Financial Regulation, applicable from 1 January 2003, should clarify OLAF’s financial status. Pending initial practical experience of the new rules, it is premature to envisage amending either the Decision of 28 April 1999 or the Regulations of 25 May 1999. Moreover, the Commission’s commitment to transparency will help to ensure that the budgetary framework applicable to OLAF is appropriate.

### **3.3. Information and communication activities**

The flow of information and transparency are particularly important issues in the context of OLAF’s activities. Variable practices have been observed in the Office’s application of certain provisions relating to information, and in some cases this has engendered uncertainties as to possible follow-up action. Some of the investigations the Office conducts are likely to attract the attention both of the institutions and of the media and the general public.

Pursuant to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, OLAF supplies certain information directly. This includes passing on information on investigations in progress to the institutions concerned, the persons involved and the relevant authorities of the

Member States. A more sensitive and problematic question is the transmission of operational information to the public and to the institutions when the investigations do not concern them.

### 3.3.1. Information

The rules governing investigation activities provide for a number of procedural guarantees regarding information from the Office for the institutions and persons concerned and the relevant authorities of the Member States.

- Procedures governing information from the Office for the institutions and persons concerned

Staff of the Office are required to inform the institutions and other bodies when they carry out an investigation in their premises or consult a document or ask for information belonging to such institutions or bodies (Article 4(4) of Regulations (CE) No 1073/1999 and (Euratom) No 1074/1999). This obligation to provide information is accompanied by presentation of the written authorisation of investigators and their written instructions specifying the purpose of the investigation.

Under Article 10(3) of the Regulations, *“the Office may at any time forward to the institution, body, office or agency concerned the information obtained in the course of internal investigations”*.

In addition, *“Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed”*. But in *“cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority, the provision of such information may be deferred”* (Article 4(5) of the Regulations).

In addition, Article 4 of Commission Decision 1999/396/EC, ECSC, Euratom of 2 June 1999 provides that *“Where the possible implication [of a person] emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation”* and that *“conclusions referring by name ... may not be drawn ... without the interested party’s having been enabled to express his views on all the facts which concern him”*. This obligation is accompanied by a derogation based on *“the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority”*. Here the Decision requires the agreement of the President of the Commission (for a Member of the Commission) or the Secretary-General (for an official or servant) when the Office considers it necessary to defer the invitation to the interested party to express his views. Council Decision 1999/394/EC, Euratom of 25 May 1999 lays down a corresponding mechanism (required agreement of the President of the Council for a member of the Council or of its authorities or of the Secretary-General for an official or servant). The same applies to the Decision of Parliament (agreement of the President required for an MEP and the Secretary-General for an official or servant).

On completion of an investigation carried out by the Office, the latter must draw up a report specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken and send it to the institution, body, office or agency concerned (Article 9(1) and (4) of the Regulations).

- Procedures governing information from the Office for the relevant authorities of the Member States

Apart from the information it is required to send the relevant authorities of the Member State concerned following an on-the-spot investigation (see above at 1.1.2), the Office must transmit to the judicial authorities of the Member State concerned the information gathered in the course of internal investigations into conduct potentially classified as a criminal offence. Subject to the requirements of the investigation, it simultaneously informs the Member State concerned (Article 10(2) of the Regulations).

On completion of an external investigation carried out by the Office, the latter must draw up a report specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken and send it with any useful related documents to the institution, body, office or agency concerned (Article 9(1) and (3) of the Regulations).

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In practice, the implementation of these provisions by the Office has given rise to doubts as to how they should be applied. For instance:

- as regards information for the institutions concerned, the Commission, for example, might not be informed of the closure of an investigation carried out inside the institution while one of its operational services was informed at least informally. The same applies to a practice whereby the Office, when reporting on an investigation, announces that information for the institution will follow but fails to act on it;
- in the course of an investigation, the institution concerned sometimes did not have adequate information to take the necessary preventive measures;
- regarding information for persons concerned, a complaint has been filed with the European Ombudsman about failure to comply with the obligation to inform persons concerned by an internal investigation that there are suspicions regarding them; the Ombudsman highlighted the absolute need to give suspected persons the possibility of making their views known on facts concerning them before reaching conclusions;
- as regards delays in the provision of information to the person involved, the Secretary-General of the institution required to give his agreement on the relevance of the Office's proposal to defer the provision of information to the interested party does not generally have the information allowing him to give a detailed opinion, because the information is highly sensitive in operational terms.

**The Commission considers**, as regards delays in the provision of information to the person involved, that procedures should be laid down for informing the competent authorities so that they can agree to deferments on the basis of at least a modicum of information without hampering the Office's autonomous right to decide when reference should be made to the judicial authorities. Consistency in the protection of the integrity of the European public service would then be consolidated. Otherwise, the obligation to seek the agreement of the President or Secretariat-General of the institutions concerned as required by Article 4(2) of the model decision annexed to the interinstitutional agreement and by the specific decisions should be reviewed.

**The Commission welcomes** the Office's intention, in the performance of its investigation function, to develop the adoption of standardised practices with regard to the relevant national authorities, the institutions and bodies and persons involved to guarantee uniform application of information procedures. The Office will make more frequent use of Article 10(3) of Regulations Nos 1073/1999 and 1074/1999 and inform the institution or body concerned, or a relevant national authority, if necessary, in particular where interim protective measures need to be taken in the course of the investigation.

On the basis of recent experience involving the Office and the institutions and bodies, **the Commission considers** that it is necessary to improve information exchanges regarding internal and external investigations in full compliance with the rules and regulations applicable to the Office's activities.

*Recommendation No 16 (R.16)*

*The Commission recommends that the Office develop practices to secure compliance with and the standardised application of information procedures in relation to the relevant national authorities and the institutions and bodies concerned and information procedures in relation to persons involved.*

### 3.3.2. Communication activities

Communication mainly means giving a uniform and objective response to requests for information sent to the Office from the institutions and other people entitled to receive information. The framework agreement on relations between the European Parliament and the Commission, which entered into force on 1 January 2001, excludes the forwarding of certain information on OLAF investigations and refers to the legislation relating to OLAF, i.e. the specific and more stringent provisions of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

Taking into account the legal and regulatory framework for the communication of information it holds, in particular operational information, OLAF laid down internal guidelines in June 2002, which are designed to provide a lasting structure for communication activities, based on due respect for the tasks and responsibilities of each institution and Member State and the legitimate rights of persons concerned by the information.

OLAF's communication activities are based not only on the relevant provisions of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 – chiefly Articles 12(3) (regular report to the European Parliament, the Council, the Commission and the Court of Auditors on the findings of investigations carried out by the Office), 8 (confidentiality and data protection) and 10 (forwarding of information obtained in the course of ongoing external and internal investigations) – but also on other secondary legislation, in particular certain provisions of Regulation (Euratom, EC) No 2185/96 (Article 8(1)).

The guidelines seek not only to determine the nature of the information to be communicated, but also to define the parties entitled to information<sup>72</sup> and how the right to communication is exercised and to clarify the criteria to be taken on board where communication of information is not mandatory, the guarantees attached to transmission, the legal consequences of the act of communicating and the liability incurred, and the various methods of passing on information, including communication in private. The guidelines are strictly internal and reserved for the Office's use in its communication activities.

**The Commission believes** that these guidelines, which provide for a communication unit to be set up within the Office, should make the forwarding of information, especially to the institutions, more secure, thereby enabling them to carry out their respective tasks.

*Recommendation No 17 (R.17)*

*The Commission recommends that a communication unit be established in the Office to manage the Office's communication activities on a day-to-day basis and assist the Director on the basis of the guidelines established by the Office.*

### 3.3.3. Access to documents

The rules set out in Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 on access to information concerning OLAF investigations are aimed at a narrower target than the special horizontal provisions laid down by Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.<sup>73</sup> These Regulations serve different purposes but their practical application must be consistent in terms of results. The level of information to which the institutions have access on the basis of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 cannot be interpreted as lower than the level of access to documents enjoyed by the public under Regulation (EC) No 1049/2001. Certain Members of the European Parliament regularly ask for access to documents in OLAF investigations under Regulation (EC) No 1049/2001.

It should be borne in mind that Regulation (EC) No 1049/2001 applies in full to OLAF's activities, including those relating to investigations, in particular as regards the exceptions to the access rules. This Regulation was adopted on the basis of Article 255 EC, which recognises the principle (and the limits) of a "*right of access to European Parliament, Council and Commission documents*" enjoyed by "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State*". The exceptions allowed by Article 4 of the Regulation particularly concern the protection of privacy and individual integrity and the purpose of inspections, investigations and audits.

By Decision 2001/937/EC, ECSC, Euratom, of 5 December 2001, amending its rules of procedure,<sup>74</sup> the Commission adopted special provisions covering among other things the procedure to be followed for access to OLAF documents. The Decision lays down the treatment to be given to both initial applications and subsequent confirmatory applications.

Where the request for access concerns a document relating to OLAF's investigative function or its operational cooperation with the Member States, it must be handled by the Director or member of staff within the Office designated for that purpose, in the case of an initial application, or by the Director of OLAF in the case of a confirmatory application. Other OLAF documents are not covered by these special exemptions. The decision by OLAF's Director on a confirmatory request in accordance with the rules governing delegation of powers requires the prior approval of the Commission Legal Service. In the event of a disagreement between the Legal Service and the Director of the Office, the Commission decides.

**The Commission considers** that the system set up for OLAF takes account of the fact that the prior agreement of the Commission's Legal Service on a confirmatory request for access to a document cannot be interpreted as a barrier to the Office's functional independence as it is the Legal Service that will have to defend the Commission if there is a court action against it. It considers that the concerns expressed by the Anti-fraud Office, which feels that it alone

should be responsible for the factual appraisal of the grounds for granting an exemption from the principle of access to documents, require a pragmatic solution to be agreed with the Legal Service for the latter's access to the Office's operational documents.

### 3.4. Review of the investigation function

Review of the investigation function, as the corollary of the Office's hybrid status, is fundamental. It concerns both internal and external investigations conducted under the responsibility of the Office. These investigations can affect the individual rights of persons concerned, which is why the review of operations carried out in an investigation, which must strike a proper balance between several imperatives, in particular those of respect of law, transparency and effectiveness, is so important. The review of the Office's activities, which ensures effective legal and administrative protection, is currently exerted at different levels.

#### 3.4.1. Administrative review

Administrative review results both from hierarchical review and review by the Supervisory Committee. Another degree of level of review is available in the form of referral to the European Ombudsman or audits by the Court of Auditors.

- Hierarchical review

This review is performed by the Office's operational management and the Director is basically responsible in accordance with Article 5(1) of the Decision of 28 April 1999. Investigations are governed mainly by Articles 5, 6 and 9 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, which give the Director responsibility for each major phase of the investigation (opening, implementation, closing report and follow-up). These Regulations also confer specific responsibility on the Director who, according to Article 8(3) and (4), ensures that staff of the Office observe "*the Community and national provisions on the protection of personal data*" and Articles 286 and 287 of the EC Treaty and 194 of the Euratom Treaty. The Office responded to practical disadvantages connected with the extent of the tasks thus entrusted to the Director<sup>75</sup> as regards the opening of investigations<sup>76</sup> by setting up the Investigations & Operations Executive Board in the Office<sup>77</sup> to assist him, without affecting the Director's general responsibility or decision-making powers. The Director will be assisted by the same Board when implementing the Office's programme of investigation activities, provided for by Article 11(7) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

The Director is more particularly assisted in his ongoing internal review task by the staff responsible for the judicial assistance and advice function. This review particularly covers the Office's investigation work, which must itself be in conformity with the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and Fundamental Freedoms and the principles referred to in the tenth recital to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 and by Article 4(6) of the Regulations, which are reproduced in the individual decisions adopted by the institutions and other bodies. The Office organises itself in such a way as to optimise the review of the regularity of investigation measures and acts.

**The Commission recommends** the development of the detailed rules for the application of the rules on respect of fundamental rights in the form either of a Decision of the Director or of the recasting of its manual of internal procedures<sup>78</sup> (R.2). An initiative of this kind should meet the concerns of the Supervisory Committee.

- Review by the Supervisory Committee

This review mainly covers the independence of the Office and its investigation methods. A posteriori administrative review is primarily involved. Article 11 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 requires the Supervisory Committee to *‘reinforce the Office’s independence by regular monitoring of the implementation of the investigative function’* and, without interfering with investigations in progress, to *‘deliver opinions ... concerning the activities of the Office’*. It is informed of cases requiring the transmission of information to the judicial authorities of a Member State and receives the Office’s annual programme (Article 11(7)). The Supervisory Committee has a specific role in the review of compliance with deadlines,<sup>79</sup> in particular the nine-month deadline allowed by the Regulations for completion of an investigation. The Committee is attentive to proper confidentiality and data protection (in particular Articles 286 and 287 EC and 194 Euratom), in accordance with Article 8(4) of the Regulations.

With regard to the result of review by the Supervisory Committee and assessment of the action taken by the Office, the Commission considers that this is a matter for the Committee itself. For example, the Supervisory Committee (like the Office) has stated that the completion of investigations frequently took longer than allowed for by Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 (*‘investigation in progress for more than nine months’*). There is consequently a need to clarify the time or act from which an investigation is deemed to begin.

The Supervisory Committee has recommended that an authority be established to act as registry within the Office to generate rigorous management of cases and documents and greater transparency in operational activity (identification of the precise procedural context at a given moment). This transparency should help the Office’s management to better manage operational activity in accordance with priorities and this should both cut the number of cases being evaluated but not yet formally opened and strengthen the review of procedures. **The Commission supports** this initiative, which the Office is pursuing.<sup>80</sup>

- The European Ombudsman

Complaints relating to the activities of the Office, including investigation activities, can be referred to this Community authority, which has jurisdiction under Article 195 EC. By processing the complaints he receives, the Mediator is also involved in reviewing the Office’s operational action in terms of sound administration.<sup>81</sup>

- Court of Auditors

The Court of Auditors, apart from reviewing the management of the budget headings for which the Office is the authorising officer, performs an external financial audit on the Office’s performance of its investigation function. In particular it can produce special reports. The Court has made comments on the follow-up to special report No 8/98 relating to Commission departments responsible for combating fraud, notably in its annual report for 2000.<sup>82</sup>

### 3.4.2. Political review

The general review of fraud prevention activities is ensured by Parliament, the Council and the Commission. These are the three institutions which designate the Director of the Office and appoint the Supervisory Committee.



The European Parliament and the Council regularly receive Commission Reports on the protection of financial interests under Article 280 of the EC Treaty, the annual and special reports from the Court of Auditors, reports from the Office and reports from the Supervisory Committee. These documents are a valuable source of evaluation material to guide anti-fraud policies and activities.

Parliament, acting with the Council as budgetary authority, also performs its review in the procedure under Article 276 of the EC Treaty whereby, on a Council recommendation, it gives the Commission a discharge for the implementation of the budget.

Parliament, the Council, the Commission and the Court of Auditors are regularly informed of the Office's activities, in particular by the reports that the Director of the Office sends it under the third subparagraph of Article 12(3) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. Parliamentary review is exercised particularly under Article 197 of the EC Treaty (written or oral parliamentary questions to the Commission).<sup>83</sup>

Parliamentary review of the Office is carried out in the same way as its review of the Commission, to which the Office is attached administratively.

This situation is likely to generate expectations that will be tricky for the Office to solve as, particularly in the context of the discharge or parliamentary questions, it must both help the Commission to fulfil its obligations and satisfy Parliament's wish for facts allowing it to exert its financial management audit task, while complying with the legal framework for its investigations that place restrictions on its communication activities. For the Commission, the situation with regard to the current investigations can prove delicate, because of the Office's independence, as it must answer questions from Parliament even though the Office's independent status means that the Commission does not always have the requisite information, and at the same time it must abide by the principle of confidentiality of investigations.

**The Commission considers** that there are solutions to these difficulties. It is for the Office to assess the need for information and to determine the standards for its communication activities in relation to the institutions. It must be in a position to distinguish facts that can be exchanged and data subject to communication restrictions on grounds of functional independence provided for in the regulations governing operational activity. It will proceed on the basis of the guidelines that it has drawn up (see at 3.3.2 above).

### 3.4.3. Judicial review

Persons outside the Community institutions and bodies can bring actions against the Commission under Article 230 of the EC Treaty. And the possibility of appeals by officials and other servants as provided by Article 90 of the Staff Regulations and of an action in summary proceedings before the Court of First Instance provide facilities for reviewing the legality of measures adversely affecting them and, in particular, full respect for fundamental human rights. Article 14 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 provides that the mechanism is in place pending amendment of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities. The outcome of the current negotiation for new Staff Regulations should be to supplement the anti-fraud Regulations without affecting their scope. This would mainly involve incorporating in the new Staff Regulations the procedures provided for in the interinstitutional agreement of 25 May 1999 and the model Decision.

The current negotiations for new Staff Regulations and the decisions of the Community Courts should make it possible to remove ambiguities relating to the action of the Office by clarifying in particular the extent of the powers conferred on it. For example, an Order of the Court of First Instance of 17 October 2002<sup>84</sup> refers to the need for an applicant to provide evidence of a measure referring to him individually and likely to adversely affect him.

It must also be borne in mind that while the Office's activities are not subject to direct review by the national courts, the results of its field work must be accepted in national proceedings, in particular judicial proceedings. The national courts thus examine the conformity of the Office's investigation reports with the procedures and guarantees provided for by national and Community law.

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The legislature has admittedly set up protective measures matching the administrative nature of the Office's powers. Where individual rights are affected, these powers must be exercised in full respect for human rights and fundamental freedoms (tenth recital to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999). The development of the Office's operational functions call for reinforcement of the rules here, beyond the existing protection measures, with the establishment of judicial procedural guarantees permanently applicable to investigation activities. This is one of the reasons why the Commission is considering setting up a permanent Community judicial body to exercise powers to review acts and measures by the Office that impact on fundamental rights.

These problems are among the points offered by the Commission as input for discussion at the public hearing on the Green Paper and for consideration by the Convention on the future of the European Union as regards the establishment of the European Prosecutor in the constitutional part of the Treaty<sup>85</sup> (see R. 13 at 2.4 above and below at Outlook).

### **3.5. Political responsibility and relations with the Supervisory Committee**

#### **3.5.1. Political responsibility of the Commission**

The independence enjoyed by OLAF in its investigative role means that neither the Commission nor the Member responsible for fraud prevention has the power to give instructions as regards OLAF's operational activities or any omissions it may make. Nor do they have access to operational information regarding ongoing investigations.

The Commission assumes general responsibility for anti-fraud policy, to which OLAF's activities contribute. When it comes to defining policy strategies on the legislative front and preparing initiatives, OLAF operates as an integral part of the institution and the institution's overall responsibility poses no problem. In conducting its operational activities, the Office neither receives nor seeks instructions. But the Commission may have to answer requests from the institutions or Member States that cover ongoing OLAF investigations (parliamentary questions, questions relating to Parliament's discharge, questions raised when Members of the Commission visit Member States). Here it is up to OLAF to enable the Commission to reply to such requests for information as far as is possible, bearing in mind the Commission's need to assume its responsibilities in this respect. To avoid all risk of interference with ongoing investigations, it does so on the basis of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 and the guidelines governing its communication activities (see 3.3.2 above).

Moreover, in the exercise of its political responsibility, the Commission, and in particular the Member responsible for anti-fraud measures, may contribute to the definition of the broad lines of operational policy to enable the Office to determine its strategy and work programme in the light of the main issues at stake in the protection of the Community's financial interests. The Commission has a major role to play in determining antifraud policy. It can recommend the Office to consider a given sector as deserving priority for operational action. It can also ask the Office to conduct an investigation on the basis of information in its possession, just like any other institution or body. This power of the Commission to determine general anti-fraud policy guidelines does not affect the Office's operational independence, or influence its decisions as to whether an operation should be launched or not, for which it remains entirely responsible. This political responsibility is conferred in the context of the Commission's role under Article 280 of the EC Treaty (protection of the Community's financial interests), taken in conjunction with Article 274 (implementation of the budget), but also in its capacity as guardian of the general interest (see at 2.1 above).

The Commission, like the other institutions, is well placed to undertake general monitoring of the Office's activities on the basis of the opinions issued by the Supervisory Committee as specific documents or in its annual reports. This general review gives it the opportunity of assessing the general match or mismatch between the Office's activities and the objectives of protection of the Community's financial interests.

### 3.5.2. Relations with the Supervisory Committee

The Supervisory Committee guarantees the independence of OLAF's investigative function. The Committee, which for administrative purposes is attached to the Commission, is composed of entirely independent outside personalities. It exercises its responsibility for monitoring operational activities in accordance with rules laid down by the legislation (see 3.4.1 above). Its role also entails assisting OLAF's Director in his tasks. It may give opinions, particularly on the Office's budget. It helps draw up the list of candidates for the post of Director of the Office and may be consulted before the Commission orders disciplinary penalties against him.

The European Parliament, the Council and the Commission are the guarantors of the existence and smooth operation of the Supervisory Committee. Each of them takes part in the process of appointing Committee members.

As part of its responsibilities, the Supervisory Committee has expressed certain concerns and preferences, stressing the need to develop OLAF's organisational autonomy. The Commission appreciates this contribution, which is aimed at working out practical solutions for improving OLAF's hybrid status, and will remain open to dialogue with the Committee. But it may have to recommend different guidelines for attaining the shared objective of securing the full effectiveness of OLAF's activities and full respect for independence in the investigation function.

A number of problems have emerged on the organisational front, which can be put down to the fact that, although the Supervisory Committee is fully independent in carrying out its activities, it relies on OLAF for secretarial support (Article 11(6) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999). Apart from the administrative aspects, the problems also concern the implementation of administrative appropriations and the workplace of the Committee's secretariat. The Commission and the Supervisory Committee should take a constructive and pragmatic attitude in order to solve these problems in full compliance with the legislation.

## ***THE OUTLOOK***

The assessment of progress in attaining reform objectives through the tasks entrusted to the European Anti-fraud Office proceeds from the general assessment of the Office's activities. Although this evaluation covers only a relatively short period of time, bearing in mind the time taken for the transition, it has still been possible to pinpoint a number of advantages and also a number of difficulties, the impact of which has been duly assessed in the overall evaluation. The Commission will present a series of recommendations on the basis of this.

The recommendations contained in this report are proposals that have been put forward with a view to optimising the Office's work. Some of these proposals are for improvements to secondary legislation; others relate to OLAF's working practices and the arrangements for cooperation between it and its different partners, particularly at national level. In this connection, the project to set up a platform of services will help to boost the partnership among the national authorities responsible for measures to combat fraud and between those authorities and the Office.

The fact remains that, irrespective of the progress made in attaining the objectives of the reform, and of the benefits derived, the difficulties identified should not be underestimated. They centre mainly on the question of the Commission's political and legal responsibility vis-à-vis the Office and its operational activities, in conjunction with the Office's functional independence in the exercise of its activities, and the choices to be made regarding its budget and staffing policy. They also concern the view taken in some quarters that there is a risk of interference, based on possible suspicion of meddling by the Commission in the Office's internal investigation activities. This is more an imaginary than a real risk. It is significant to note that the Director of OLAF stressed, in his foreword to the third progress report on the activities of the Office during the year ending in June 2002 that "the Commission has scrupulously respected" his operational independence. Many of these difficulties also spring from the fact that the reform was set in motion immediately, from the duration of the transitional period and from the necessary re-assignment of the staff of the Office. The development of its operational activities, particularly with regard to internal investigations, may also have aggravated the difficulties.

These difficulties have been regularly reported, in particular as part of the dialogue between the institutions and the Office's Supervisory Committee. As the ongoing disagreements have shown, other institutions and bodies have expressed certain misgivings about the status of OLAF and its powers. Given the nature of its investigations, there is always the possibility of difficulties between the Office and the Community institutions and bodies. The Commission considers that the improvements to the Office's performance, particularly as a result of setting up the registry, the production of a corpus of administrative rules, the uniform application of information procedures provided for under Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, more rigorous working methods and the role of the Supervisory Committee, and the development of the intelligence function, will strengthen the Office's capacity to perform its operational tasks.

The difficulties may have led some to believe that the solution lies in hiving off the Office. The option was put forward by the Commission in 1998, but not embraced by the legislature. There are still factors of political, institutional and legal uncertainty about it. Already at the time, the reform of anti-fraud activities in 1999 reflected the limits set by the EC Treaty and the problems involved in establishing a European prosecution authority. There have been no

new developments since then, and the hiving-off option can be seen as substantially premature.

### ***CONSOLIDATING REFORM***

This exercise should generate something more than a piecemeal evaluation of each individual obstacle. These obstacles must be put into the context of the overall review of the mechanism chosen in 1999.

Several factors militate in favour of retaining the overall consistency of the system devised in 1999. Firstly, the establishment through the Office of a differentiated allocation of tasks within a single structure allows economies of scale to be made in contrast to a system with separate channels of operation, which would be the result of hiving off. The status conferred on the Office and the maintenance of the synergies between the investigation function and the Commission's traditional roles, in particular the developing of an anti-fraud policy and the drafting of legislation, were determined precisely in relation to that environment. The strategy adopted by the incoming Commission in June 2000 confirmed and extended that approach for the ensuing period (2001-05). In these circumstances, any change of strategy, including changes to the structure, would be premature and would be liable to weaken the system.

Furthermore, the overall assessment of the Office's activities, three years on, suggests that the difficulties encountered in this transition period are gradually diminishing. Pragmatic solutions are being found to problems as they appear. The legacy of the old anti-fraud unit now weighs much less heavily on the organisation. The management of the Office is putting in place new structures and new operational guidelines, developed in accordance with its new strategic and operational intelligence activities, equipping the organisation with the necessary means to ensure that it targets its operations on the ground more effectively, providing support as part of a platform of services.

So far the Commission, prompted by the European Parliament and backed by the Council, has consistently pursued a pragmatic approach based on the one hand on the active participation of its anti-fraud service working on the ground in close partnership with the national authorities responsible for combating economic and financial crime and, on the other, on the need to improve the compatibility of the legislative and operational instruments of the Member States in this area. This approach, which was consolidated in June 2000 with the adoption of the new comprehensive anti-fraud strategy, emphasises operational cooperation, the criminal law aspects and the Office's interinstitutional role.

Interestingly, none of the cases brought before the Court of First Instance or the Court of Justice has so far resulted in a judgment or opinion refuting the soundness of the reform. On the face of it seems quite clear that while the Office is a Commission department like any other as far as the performance of its standard administrative tasks is concerned, it enjoys functional independence within the Commission for the purpose of performing its specific operational tasks, while still remaining an integral part of the institution's administrative and budgetary structures. The opinions of the Advocate-General are a significant indication here.<sup>86</sup>

In view of the diversity of national, Community and international rules, dynamic cooperation to combat fraud can only be achieved by deploying the multidisciplinary expertise and legal instruments already available to the Commission. The combination of means makes it possible to respond appropriately to different situations on the ground (investigations by the Member States or the Office) and by using them to complement the enforcement work of other Commission departments. It is important to pursue the comprehensive approach

advocated by the Commission since 1994.<sup>87</sup> The profile and expertise developed by the Office's in the fight against all forms of economic and financial crime endorse this approach. The need to concentrate resources is even more essential at Community level than at national level, in order to enhance the impact and make better use of resources at this level. Keeping the Office within the Commission makes it possible to achieve the critical mass and scale in terms of resources needed to make the Community's efforts more effective and more visible at European and international level.

In the current situation, the consolidation of the Office is therefore a priority. Work on the Corpus Juris<sup>88</sup> and the follow-up to it, the preparation of the Green Paper of the protection of the Community's financial interests and the Commission's proposals for the establishment of a European Prosecutor are a good example of the synergy offered by the proximity of work on the ground and preparation and negotiation of Commission initiatives. Internal reform initiatives, in the legislative sphere and elsewhere, and the contributions to the Convention on the future of the European Union are all visible proof of the benefits to the Commission of capitalising on these synergies within it.

The Commission wants to be at the forefront of an effective strategy to combat all forms of crime directed against Community resources. As things stand, it believes it too early to call into question the current situation that emerged from the reform of 1999. Like the Court of Auditors and the Supervisory Committee, it recommends strengthening the current structure and judicial instruments. The Office must be consolidated over a period of time; a period of institutional is needed. This is the purpose and spirit of the recommendations linked to this evaluation exercise.

With fresh prospects, for example, with the establishment at Community level of a centralised authority for conducting investigations and prosecutions under the responsibility of a judicial body, in other words the creation of a European Prosecutor, the Office may enter a further phase of development.

### ***TOWARDS THE ESTABLISHMENT OF A EUROPEAN PUBLIC PROSECUTOR***

The Court of Auditors' Special Report No 8/98 pointed out that OLAF's predecessor UCLAF had "administrative tasks in relation to the protection of the financial interests of the Community which belong to the first pillar but also ... responsibilities related to judicial investigations, which belong to the third pillar, without support from an independent European judicial authority able to launch and direct investigations and bring prosecutions as appropriate." The powers of investigation devolved on the Community level are of an administrative nature, and the limits are plain to see when action has to be taken against serious transnational economic and financial crime, which is frequently very well organised. The same applies to gaps in law enforcement cooperation with Member States and loopholes caused by the lack of a standardised list of offences drawn up in order to combat crime against Europe.

New solutions are needed to strengthen the institutional framework for the criminal-law protection of Community interests, with a view to the revision of the Treaties (in the Convention and the Intergovernmental Conference). These are urgent matters in view of the outlook in the enlargement situation. Since the Intergovernmental Conference that ended in Nice, the Commission has been proposing that the EC Treaty be revised to allow the creation of a European Prosecutor responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Communities' financial interests, and exercising the functions of prosecutor in the national courts of the Member States in relation to such

offences.<sup>89</sup> It reiterated its proposal in its Communication on the institutional architecture published on 4 December 2002.<sup>90</sup> The Commission used its Green Paper of December 2001 to launch a broad public consultation on the issue of a European Prosecutor. On the basis of the answers it has received and the lively debate prompted by the Green Paper, on 19 March 2003 the Commission adopted a follow-up report that confirms the need to create a European Prosecutor.

To provide a solid foundation for his institutional and democratic legitimacy, the office of European Prosecutor should be provided for in the constitutional Treaty. The Treaty should also provide for the scope of the prosecutor's jurisdiction. The rules governing the prosecutor's status and work could be defined at a second stage by secondary legislation. This is an urgent and indispensable reform which cannot be postponed *sine die* as the principle will have to be ratified a second time in the enlarged Union. It will give the institutions the opportunity to examine the question of the relationship between the Office and the new European Prosecutor in more detail. It will also be an opportunity to set out the status of the Office and its relationship with other bodies and especially with Europol: this should allow all forms of cooperation with Europol. The complementarity and convergence between the tasks of Eurojust and the European Prosecutor also argue for an alliance between the two.

At this point the question will once again arise of hiving off an Office that might come to assume the role of a judicial officer in internal investigations as well as external investigations.

We have the opportunity today to design an overall approach that will avoid the creation of multiple organisations, which too often leads to overlapping powers, confusion and failures of operation. The Commission therefore believes that this evaluation exercise is a chance for it to stress the need to strengthen the Office and the legal instruments available to the Community and to remind its institutional partners and the Member States of the need to move forward together, without overturning the system, but with determination as to the objectives and the resources that Europe will need to combat the economic and financial crime directed against its interests more effectively.

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## **LIST OF RECOMMENDATIONS**

### **ANNEX I**

R.1 The Commission invites all the institutions and bodies to accede quickly to the interinstitutional agreement of 25 May 1999, signed by the European Parliament, the Council and the Commission. The Commission calls on the institutions and bodies to adopt an internal decision in line with the model decision annexed to the interinstitutional agreement.

R.2 The Commission recommends that in its Manual of Internal Procedures the Office establish a corpus of administrative rules for the implementation of measures of internal and external investigation.

R.3 The Commission will propose initiatives, in accordance with its overall anti-fraud strategy and its work programme to:

- expand the facilities for cooperation/assistance, particularly as regards transnational VAT, money-laundering and possibly other areas, including the possibility for the Community to ask the Member States' enforcement and investigation services to conduct antifraud investigations;
- reinforce Community antifraud investigation powers (Regulation (Euratom, EC) No 2185/96) as regards direct expenditure.

R.4 The Commission recommends the Office to undertake a comparative analysis of rules applicable to obstructions so that the institution can prepare an initiative if appropriate.

R.5 The Commission recommends the Office to continue the setting up and development of its strategic and operational intelligence function, in accordance with the overall anti-fraud strategy

It also recommends the Office to consider the case for extending the memoranda of understanding concluded with certain authorities in the Member States to other national authorities.

R.6 To enhance the effectiveness of the judicial advice, assistance and follow-up functions, the Commission calls on:

- the Member States to ratify the second protocol to the Convention on the protection of the Community's financial interests;
- the Council to adopt the proposal for a directive on the criminal-law protection of the Community's financial interests.

The Commission will propose an initiative to provide that the Member States must inform the Community of action taken to follow up external investigations.

It recommends the Office to establish a guide to good practice as suggested in the Commission's overall strategy.

R.7 To enable the Office to better target its operational activities, the Commission recommends that interdepartmental memoranda of agreement, as set out in the 2001/2003 action plan, be developed and implemented to establish ground rules for cooperation between the Office and the other Commission departments, particularly those that manage Community funds.

R.8 The Commission recommends that memoranda of understanding be concluded to make the practical breakdown of tasks between the Office and disciplinary bodies more transparent.



R.9 The Commission recommends the Office to consider the case for extending the memoranda of understanding to other institutions and bodies.

R.10 The Commission recommends the continuing of the negotiation of international agreements on mutual administrative assistance in customs matters, with a view to reinforce in particular exchange of information and cooperation between the Community level and third countries authorities.

Equally, the Commission recommends to put in place anti-counterfeiting provisions relating to exchanges of information between the Community and the authorities of third countries in cooperation, association or pre-accession agreements with them.

The Commission further recommends the Office to consider the case for extending the memoranda of understanding concluded with certain authorities in third countries to other third countries.

R.11 The Commission recommends that the Office draws up its work programme, taking account of the guidelines and contributions of the institutions in connection with the fight against fraud and relying on the strategic and operational intelligence function.

R.12 The Commission will examine the possibility of taking initiatives to introduce, if necessary, Community administrative penalties in other areas, along the lines of what has been done in the common agricultural policy, and to harmonise penalties in the customs field.

R.13 To improve the effectiveness of the enforcement of criminal law the Commission calls on the Convention on the future of the European Union to accept its proposal for the establishment of a European Prosecutor in the constitutional part of the Treaty, which would contribute to the respect for judicial guarantees while securing judicial review of the Office's operational activities.

R.14 The Commission, in accordance with its overall anti-fraud strategy and its work programme, recommends the development of cooperation with all national authorities involved in preventing and combating fraud and other illegal activities (platform of multidisciplinary services).

It will propose updating its decision on the Anti-fraud Advisory Committee to develop the judicial dimension and the function of channel of communication with the police and judicial authorities.

R.15 The Commission recommends that the Office, in full compliance with the Staff Regulations and the principle of transparency, should define its own staff management policy as required in both internal and external respects.

R.16 The Commission recommends that the Office develop practices to secure compliance with and the standardised application of information procedures in relation to the relevant national authorities and the institutions and bodies concerned and information procedures in relation to persons involved.

R. 17 The Commission recommends that a communication unit be established in the Office to manage the Office's communication activities on a day-to-day basis and assist the Director on the basis of the guidelines established by the Office.

## ANNEXE II

Recommendation	Implementation
<b>1. Internal rules and procedures</b>	
Continuation of the development of the strategic and operational function (R. 5)	OLAF
Good cooperation between the Office and Commission departments (R. 7)	Protocols of agreement: OLAF/Other depts
Specific rules concerning the Office's staff (R. 15)	Development if necessary (OLAF)
Communication unit within the Office (R.17)	OLAF
<b>2. Practical operation of the OLAF machinery (especially Regulation (EC) No 1073/1999 and Regulation (Euratom) No 1074/1999): improvements</b>	
Accessions to the interinstitutional agreement of 25 May 1999 and adoption of compatible internal decisions (R. 1)	Institutions and bodies concerned
Notification procedures relating to internal investigations (R. 16) and corpus of administrative rules (R. 2)	OLAF Manual of procedures
Policy on investigations and priorities (R. 11)	Office programme of activities (Article 11 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999; OLAF
Difficulties in relation to opposition to control (Reg. Euratom, EC) No 2185/96); comparative analysis (R.4)	OLAF
Intensification of judicial assistance and follow-up; adoption of the directive on the protection of the financial interests of the Community and ratification of the Second Protocol to the Convention on the Protection of the Communities' Financial Interests; good practice guide; recognition of members of the Office (R.6)	To be developed in day-to-day practice by OLAF; Council and Member States; OLAF
Obligation on Member States to notify the Office of follow-up to external investigations (R.6)	Amplify Article 9(3) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999; Commission initiative
<b>3. Other adjustments (legislation and agreements)</b>	
Legislative initiatives: checks and on-the-spot inspections in direct expenditure; cooperation/assistance on VAT and money-laundering, including asking Member States to conduct fraud investigations; administrative penalties; administrative penalties (R.3 and R.12)	Commission (work programme 2003)
Updating of Decision 94/140/EC (Anti-fraud Advisory Committee) (R.14)	Commission to act in its own right (work programme 2003)
Cooperation between the Office and institutions and other bodies, including demarcation of Office's powers and disciplinary bodies (R.9 and 8) and cooperation with national authorities (R.5 et 14)	Memoranda of understanding; OLAF/institutions and bodies and OLAF/national authorities
Possible exchange of information and cooperation with the responsible authorities of non-Community countries (R.10)	Agreements (Commission); memoranda of understanding OLAF/authorities of non-Community countries
<b>4. Reform of the Treaty</b>	
Establishment of the European Prosecutor (R.13)	Constitutional treaty (Convention/ICG)

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<sup>1</sup> It was in order to promote the development of a consistent antifraud policy that the Commission set up UCLAF (Commission report on tougher measures to fight against fraud affecting the Community budget: COM(87) 572 final), which was to focus on interdepartmental coordination to reinforce legal instruments, intensify cooperation with the Member States and improve the efficiency of an internal organisation scattered over several different Directorates-General. Since 1992 the Court of Auditors, in its special report No 2/92 on the control of the export refunds paid to major companies selected in the dairy sector (OJ C 101, 22.4.1992) had recommended “*the creation of an independent Community unit for ad hoc controls*”, a memorandum from the President of the Commission on fraud prevention (SEC(92) final 2045) specified the tasks of the anti-fraud unit, with certain operational tasks focusing on cases involving several financial instruments being added to existing coordination tasks. In 1995 overall responsibility for work in the fight against fraud was entrusted to the anti-fraud unit, “responsible for all operations relating to the fight against fraud”, and henceforth responsible for “all activities relating to the fight against fraud”, in particular “the protection of the financial interests of the Community, the conception of the fight against fraud in all domains, the development of the infrastructure necessary for the fight against fraud ..., the collection of information concerning cases of fraud and the processing of such information” (Commission Communication on The fight against fraud - Organisation in the Commission (SEC(95) 249 final). Since 1995, the legislature has produced a horizontal legislative base, including a definition of irregularities (1st pillar) and a concept of fraud (3rd pillar), the latter including a series of criminal offences (see in OJ C 316 of 27.11.1995, the preamble to the Convention on the protection of the financial interests of the European Communities, according to which “fraud affecting Community revenue and expenditure in many cases is not confined to a single country and is often committed by organised criminal networks” and, in OJ L 292 of 15.11.1996, recital 7 to Council Regulation (Euratom, EC) No 2185/96, which also includes the activities of criminal networks). The existence of a broad definition of fraud enabled the Commission to give a consistent definition of the powers of its anti-fraud unit in terms both of operations and of the preparation of policy documents and draft legislation, as it was converted on 1 May 1998 into a Task Force for the Coordination of Fraud Prevention, and to specify its role in internal investigations (Memoranda from the President, Mrs Gradin and of Mr Liikanen of July and December 1998: C(1998) 2049 et C(1998) 3232).

<sup>2</sup> Three institutions formed the High-level Group set up by the German Presidency of the European Council – the European Parliament (Officers of the Budgetary control Committee), the Presidency of the ECOFIN Council and the Commission (Mr Van Miert, Ms Gradin, Mr Monti).

<sup>3</sup> See first report of the Committee of Wise Men, which concluded there was a need to review the fraud prevention machinery (report of 15 March 1999 on fraud, mismanagement and favouritism in the European Commission, followed by a second report, dated 10 September 1999, on the reform of the Commission, analysis of practices in force and proposals to remedy mismanagement, irregularities and fraud).

<sup>4</sup> OJ C 222, 22.9.1976.

<sup>5</sup> See also recital 20.

<sup>6</sup> PV(2002) 1551. See also SEC(2002)33/2.

<sup>7</sup> Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the Office (OJ L 136, 31.5.1999, p. 20), Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 (OJ L 136, 31.5.1999, p. 1 and 8), Interinstitutional agreement concerning internal investigations carried out by the Office (OJ L 136, 31.5.1999, p. 15) and model Decision.

<sup>8</sup> Regarding the sectoral legislation, there can be no exhaustive identification of legal bases and means of intervention available to the Office in the context of this evaluation. The specific protection legislation accompanying each of the Community policies and instruments has evolved piecemeal and never been brought into a single compendium.

<sup>9</sup> Most recently COM(2000) 718 final, COM (2001) 255 final, COM (2002) 348 final.

<sup>10</sup> Supervisory Committee: reports published in OJ C 360 of 14.12.2000 for the period July 1999-July 2000, in OJ C 365 of 20.12.2001 for the period July 2000-September 2001 and in OJ C 234 of 30.9.2002 for the period September 2001-July 2002. Office: reports of 23.5.2000 (period from 1 June 1999 to 31 May 2000), 18.10.2001 (period from 1 June 2000 to 31 May 2001) and 17.10.2002 (year ending June 2002), amplified by this report.

<sup>11</sup> Legal and political constraints, time needed to appoint senior management and recruitment restrictions, management of cases of the current anti-fraud unit mobilising significant resources, delays in launching the new methodology.

<sup>12</sup> Commission overall strategy for the fight against fraud and the protection of the Communities' financial interests of June 2000. COM(2000) 358 final. See also the action plan for 2001-2003. COM (2001) 254 final.

<sup>13</sup> Commission Communication: Better action against professional incompetence, financial irregularities, fraud and corruption. SEC(97) 2198. Special Report by the Court of Auditors on the Commission's services specifically involved in the fight against fraud, notably UCLAF. OJ C 230, 22.7.1998.

<sup>14</sup> An interinstitutional agreement is a practice-based Community legal instrument which organises cooperation between two or several institutions by pragmatic methods within their respective powers. This practice is a contractual procedure which gives concrete expression to reciprocal duties of sincere cooperation and mutual trust between the institutions concerned. In the present case, it expresses the wish for there to be an instrument to monitor the reform and to support and regulate it pending appropriate provisions in the Staff Regulations. In practical terms it improves the application of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. Politically, it officialises the commitment of the three signatory institutions and sets an objective of extending it to the other institutions and bodies, via the invitation of the political level. Methodologically, it provides a model for the smooth operation of interinstitutional cooperation and coordination. And it makes for better legibility and transparency.

<sup>15</sup> For the Council: Decision 1999/394/EC, Euratom (OJ L 149, 16.6.1999, p. 36). For the Commission: Decision 1999/396/EC, Euratom (OJ L 149, 16.6.1999, p. 57). For Parliament, the Decision of 18 November 1999 was incorporated in the Rules of Procedure (Annex XI).

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- <sup>16</sup> Case T-17/00R and T-17/00. There is currently an appeal to the Court of Justice against the judgment of the Court of First Instance.
- <sup>17</sup> Paragraphs 72 and 73 of the judgment.
- <sup>18</sup> ECB Decision 1999/726/EC of 7 October 1999 on fraud prevention (OJ L 291, 13.11.1999, p. 36); Decision of 10 November 1999 of the Management Committee of the EIB concerning cooperation with the Office. Cases C-11/00 and C-15/00.
- <sup>19</sup> This paragraph provides for information to the institutions and bodies concerned “whenever employees of the Office conduct an investigation on their premises or consult a document or request information held by such institutions, bodies, offices and agencies”.
- <sup>20</sup> Information goes direct to the Office under Article 2 if any “*official or servant of [the institution or body] becomes aware of evidence which gives rise to a presumption of the existence of possible cases of fraud, corruption or any other illegal activity detrimental to the interests of the Communities, or of serious situations relating to the discharge of professional duties ...*”. See seventh recital to the Interinstitutional Agreement as regards amendment of the Staff Regulations.
- <sup>21</sup> COM(2002) 213 final. See in particular Article 22a of the proposal.
- <sup>22</sup> Article 86.
- <sup>23</sup> Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities. OJ L 292, 15.11.1996, p. 2. Vade-mecum on the application of the Regulation by Commission staff: October 1997.
- <sup>24</sup> See in particular Article 20 of the Regulation on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. OJ L 82, 22.3.1997, p. 1.
- <sup>25</sup> Council Regulation of 18 December 1995 on the protection of the European Communities financial interests. OJ L 312, 23.12.1995, p. 1.
- <sup>26</sup> Regulation (EC, Euratom) No 1150/2000. See Article 18. OJ L 130, 31.5.2000, p. 1. Regulation (EC) No 1260/1999. See Article 38. OJ L 161, 26.6.1999, p. 1 and Commission Regulations (EC) Nos 438/2001 (OJ L 63, 3.3.2001, p.21) and 448/2001 (OJ L 64, 6.3.2001, p. 13) laying down certain detailed rules for the application of Regulation (CE) No 1260/1999. Regulation (EEC) No 595/91. See Article 6. OJ L 67, 14.3.1991, p. 11. Regulation (EC) No 515/97, *supra*. See Article 18.
- <sup>27</sup> A proposal for a Regulation is in preparation to cover administrative assistance and the mutual exchange of information between the Commission and the Member States in the fields of VAT and of laundering. The advisability of preparing a Regulation to implement various administrative measures in the field of direct expenditure is being examined.
- <sup>28</sup> Commission legislative and work programme for 2003. COM (2002) 590 final/2.
- <sup>29</sup> On-the-spot checks and inspections can concern: professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators; computer data; production, packaging and dispatching systems and methods; physical checks as to the nature and quantity of goods or completed operations; the taking and checking of samples; the progress of works and investments for which financing has been provided, and the use made of completed investments; budgetary and accounting documents, and the financial and technical implementation of subsidised projects.
- <sup>30</sup> In particular the economic operators indirectly concerned. Commission staff working paper; SEC(2000) 844.
- <sup>31</sup> Compliance with the national law of the Member State concerned by an external investigation is mandatory under Article 9 of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999. It is also provided for by the third subparagraph of Article 6(1) of Regulation No 2185/96.
- <sup>32</sup> The Supervisory Committee stressed the need to determine in what situations and in what forms the Office's activity precedes or accompanies national investigations (concern for transparency with regard to national partners).
- <sup>33</sup> See the Commission's annual reports for 1999, 2000 and 2001, referred to above, and the report on the activities of the Office for the period from 1 June 2000 to 31 May 2001.
- <sup>34</sup> See, in particular, item 4.2 “Scope and means for Community action” of this strategy.
- <sup>35</sup> OJ C 221, 19.7.1997, p. 11.
- <sup>36</sup> Relating to the criminal protection of the financial interests of the Community. COM(2001) 272 final.
- <sup>37</sup> This provides that “The institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him”.
- <sup>38</sup> Only the Convention and its 1st protocol entered into force on 17 October 2002.
- <sup>39</sup> COM(2001) 272. The Commission presented an amended proposal on 16.10.2002. COM(2002) 577 final.
- <sup>40</sup> In this connection, action 59 of the reform of the Commission (COM (2000) 200 final) stipulates that management officials of the Commission are not released from the obligation to act themselves after passing a case to the Office.
- <sup>41</sup> Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002. OJ L 357, 31.12.2002, p. 1.
- <sup>42</sup> See the sixth recital to the model decision annexed to the interinstitutional agreement of 25 May 1999, which states “such investigations should be carried out under equivalent conditions in all the Community institutions...; assignment of this task to the Office should not affect the responsibilities of the institutions ... themselves”.
- <sup>43</sup> Commission Decision of 19 February 2002. C(2002) 540.
- <sup>44</sup> In addition, members of the institutions are not covered by the Staff Regulations and are consequently not answerable to the disciplinary authorities. It is to answer this situation that the legislature specified that the Office had the power.
- <sup>45</sup> Published in OJ L 248, 16.9.2002, p. 1.
- <sup>46</sup> Article 66(4) of the Financial Regulation.

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<sup>47</sup> OJ C 362, 18.12.2001, p. 1.

<sup>48</sup> OJ L 63, 6.3.2002, p. 1.

<sup>49</sup> According to which "The protection of the Community's financial interests is a responsibility shared between the Community and the Member States and it is important to stress in this connection that at Treaty level, Article 280 of the EC Treaty constitutes the specific legal basis for cooperation with the competent national authorities ... or taking the necessary measures for preventing and combating fraud and any other illegal activity affecting the Community's financial interests .... It is in this framework in particular that close and regular cooperation between the European Anti-Fraud Office (OLAF) and the national law-enforcement authorities, on the one hand, and between the Commission (OLAF) and Eurojust, on the other hand, should be guaranteed." »

<sup>50</sup> The protection of financial interests is connected with existing responsibilities for the institutions and, in particular, of the Commission under the proper implementation of the budget (Articles 274 to 276 EC), in close correlation with shared liability provided for in Article 280 EC.

<sup>51</sup> See, in particular, the sixth recital to Decision 1999/352/EC, ECSC, Euratom and fifth recital to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

<sup>52</sup> Article 2(1) to (7) and seventh recital to Decision 1999/352/EC, ECSC, Euratom.

<sup>53</sup> See also Article 1(2) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, requiring the Office to "contribute to the design and development of methods of fighting fraud and any other illegal activity affecting the financial interests" of the Communities.

<sup>54</sup> COM (94) 92 final and COM(1998) 278 final. This strategy was built around four priorities (stronger presence on the ground and support for operational activity, stronger partnership between the Commission and the Member States, including the improvement and use of information, improvement of the Community legislative framework and better compatibility of national legislation). See the annual Commission reports on the protection of financial interests and the fight against fraud adopted later, in particular for the years 1995 to 1997, COM (96) 173 final, COM (97) 200 final, COM (98) 276 final.

<sup>55</sup> General policy on anti-fraud legislation; the new operational cooperation culture; inter-institutional measures to prevent and combat corruption; strengthening the criminal-law dimension.

<sup>56</sup> Commission communication concerning the fraud-proofing of legislation and contract management. SEC (2001) 2029.

<sup>57</sup> Parliament Resolution of 10 October 2002 on the Commission communication referred to above relating to fraud-proofing. EP 323.627.

<sup>58</sup> See in particular the Council Regulations (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting and No 1339/2001 extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency (OJ L 181 of 4.7.2001) of 28 June 2001, and Council Decisions of 17 December 2001 2001/923/EC establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the "Pericles" programme) and 2001/924/EC extending the effects of the Decision establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting ("Pericles" programme) to the Member States which have not adopted the euro as the single currency (OJ L 339 of 21.12.2001).

<sup>59</sup> The Judicial Advice Unit, directly attached to the Office's Director, contributes to facilitating cooperation with national prosecution authorities.

<sup>60</sup> Mrs Schreyer's contribution, forwarded by Mr Barnier and Mr Vitorino, on "a European Prosecutor". WD 27, 25.11.2002.

<sup>61</sup> On the basis of the Commission communications of 13 December 2000 on the recovery of amounts wrongly paid (SEC(2000) 2204) and of 3 December 2002 on improving the recovery of Community entitlements arising from direct and shared management of Community expenditure (COM(2002) 671 final), the Commission has designated the Office as a service responsible for bringing civil actions (or equivalent measures, depending on the national law applicable) when, in the field of direct expenditure, the Office's investigations are followed up with judicial proceedings. The Commission is planning to give the Office the same task as the Legal Service of joining claims to criminal actions in other areas. At the request of other Commission departments, the Office can, within its abilities, help to locate debtors who appear to have disappeared.

<sup>62</sup> The authorising Directorate-General, the accountant of the Budgets Directorate-General and the Legal Service of the Commission.

<sup>63</sup> OLAF Anti-Fraud Communicators Network.

<sup>64</sup> Commission Decision 94/140/EC of 23 February 1994 setting up an advisory committee for the coordination of fraud prevention: OJ L 61, 4.3.1994, p. 27.

<sup>65</sup> Up to four representatives per Member State.

<sup>66</sup> See in particular Regulations (EC, Euratom) No 1150/2000 (own resources), (EC) No 515/97 (mutual assistance in customs and agricultural matters), (EEC) No 595/91 and (EC) No 1469/95 and No 745/96 (EAGGF Guarantee Section), (EC) Nos 1681/94 and 1831/94 (structural measures) and (EEC) No 218/92 (indirect taxes).

<sup>67</sup> Going beyond reporting thresholds. The threshold above which Member States must report irregularities to the Commission is €10 000 in the field of own resources and €4000 in expenditure under the EAGGF Guarantee Section and structural measures.

<sup>68</sup> See Commission proposal of 1 December 1998 for a Regulation establishing a European Anti-fraud Office. COM(1998) 717 final.

<sup>69</sup> After having stated in the European Parliament on 6 October 1998: "... if, due to the presence of UCLAF in our structure, the fraud prevention efforts of the Commission are being called into question ..., I would prefer the externalisation of the inquiry function".

<sup>70</sup> See Article 5(1) of decision 1999/352/CE, CECA, Euratom establishing the Office and recital 17 to Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999.

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<sup>71</sup> Regarding the more transparent matching of resources to the Commission's activities in accordance with the principles of ABM (activity based management) and ABB (activity based budgeting) and improved programming of the Commission's activities through the APS (annual policy strategy) and AMP (annual management plan) exercise, the Commission is aware that decisions on policy priorities and the use of resources taken in advance must not restrict OLAF's margin for manoeuvre. The improved management of financial resources including the obligation on Directors-General to make a statement in their annual activity reports also needs to be assessed from the point of view of OLAF's specific status. Regarding the management of human resources through the IRMS (Integrated Resource Management System), the Commission ensures that the Office's independence is respected.

<sup>72</sup> A distinction is drawn between information connected with the administrative side of OLAF's activities and information relating to criminal investigations, which are given special treatment. Institutions and other entitled parties, in particular economic operators affected by an external investigation and persons involved in an internal investigation.

<sup>73</sup> OJ L 145, 31.5.2001, p. 43.

<sup>74</sup> OJ L 345, 29.12.2001, p. 94.

<sup>75</sup> 2900 cases entered in the Case Management System (CMS) by 30 June 2002. See item 1.3 (statistics) of the most recent report of the Office referred to above.

<sup>76</sup> The Regulations explicitly provide that investigations must be opened by a Decision of the Office's Director, but they are less precise with regard to the closure of investigations. At the end of an investigation, the final report provided for in Article 9 of the Regulations is drawn up "*under the authority of the Director*". The initial version of the manual of internal procedures states that investigations are closed under the responsibility of the Director (formal parallelism).

<sup>77</sup> Consisting of representatives of the Judicial Advice and Assistance Unit as well as the investigation, intelligence and operational strategy functions.

<sup>78</sup> First edition, February 2001. The Commission takes due note of the Office's desire to have not only a general manual of procedure but also a handbook of internal operating procedures for investigations.

<sup>79</sup> The obligation to conduct investigations continuously over a period which must be proportionate to the circumstances and complexity of the case, imposed by Article 6(5) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, is connected with the obligation 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, where a case drags on for longer than nine months (Article 11(7)).

<sup>80</sup> The Office now has a database, the CMS, which remains to be refined, in particular to incorporate an intelligence/information aspect and a follow-up aspect.

<sup>81</sup> The Ombudsman, for example, has critically assessed media statements by representatives of the Office, in relation to respect for fundamental rights. See also at 1.1.1.

<sup>82</sup> OJ C 359, 15.12.2001.

<sup>83</sup> See also Article 194 of the EC Treaty, concerning the right of petition.

<sup>84</sup> Case T-215/02 R.

<sup>85</sup> Green Paper on the criminal protection of the Community financial interests and the establishment of a European Prosecutor. COM(2001) 715 final. See also the 3rd report of the Supervisory Committee referred to above and the opinion of the Supervisory Committee concerning the Green Paper, and the Theato report for the European Parliament of 27 March 2003. (A5.0048/2003).

<sup>86</sup> Particularly in Case C-11/00. The Advocate-General acknowledges that "OLAF is not an ordinary department of the Commission" and the "institutional and legal arrangements guarantee OLAF a substantial degree of operational independence although it is set up within the Commission's administrative and budgetary structures."

<sup>87</sup> The Commission's comprehensive approach seems to be gaining ground among the national authorities charged with improving the national systems for combating transnational crime. This can be seen in the internal debates and certain moves to restructure and focus the resources of the police forces and courts.

<sup>88</sup> Corpus juris on penal provisions for the protection of European finances. *Economica*, 1997.

<sup>89</sup> COM(2000) 608 final.

<sup>90</sup> COM(2002) 728 final.