Committee of Independent Experts

SECOND REPORT

on

Reform of the Commission

Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud

VOLUME I

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The Committee of Independent Experts

Membership

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Chapter 2

Le développement d'une véritable doctrine contractuelle, la rénovation du cadre législatif, réglementaire et budgétaire, et le renforcement de la responsabilité des ordonnateurs devraient contribuer à assainir la gestion de la Commission, dont les plus inquiétantes dérives se sont manifestées à travers le phénomène des BAT.

Recommendation 1

Le domaine contractuel doit dans son ensemble constituer une préoccupation à part entière de la Commission, dans le souci de la plus grande transparence. Les instructions doivent être édictées, et la formation adéquate dispensée. Le droit des marchés publics, au niveau communautaire, pêche par l'enchevêtrement des textes, de nature variée, qui en sont la source : sa codification doit être mise à l'étude, en vue, non pas de sur-réglementer, mais de rationaliser pour faciliter le travail des praticiens (cf. 2.1.17).

Recommendation 2

L'inadaptation du Règlement Financier aux exigences d'une gestion moderne et d'un contrôle efficace justifie qu'il soit fondamentalement revu. En tout état de cause, il doit s'inscrire dans une hiérarchie claire des normes communautaires et s'en tenir aux principes essentiels que toutes les institutions doivent respecter. Pour les détails, il doit renvoyer à des règlements propres à chaque institution (cf. l'ensemble du chapitre 2).

Recommendation 3

La conclusion d'un contrat - par procédure d'appel d'offres ou par procédure négociée -, le financement d'un projet dans le cadre de l'aide extérieure, ou l'octroi d'une subvention, constituent différentes modalités de dépense des deniers communautaires. A cet égard, le Règlement Financier doit énoncer les règles de base qui s'imposent à toutes les institutions - transparence de la prise de décision, non-discrimination, contrôle ex post de l'usage effectué- et mettre fin au désordre conceptuel qui règne en matière de contrats : la notion de contrat, les différents types de contrats, doivent être précisés (cf. 2.1.21 et s.).

Recommendation 4

La nomenclature budgétaire actuelle fondée sur la distinction imposée par le Règlement Financier entre une partie A pour les dépenses administratives et une partie B pour les dépenses opérationnelles est inapplicable en pratique. Elle subit de nombreux contournements au stade de l'imputation des crédits. Une nomenclature par politiques faisant apparaître le coût global de celles-ci, et dans laquelle les différentes dépenses seraient identifiées selon leur nature à l'intérieur d'une même destination doit être mise en place afin de faciliter l'évaluation et de permettre à l'autorité budgétaire d'exercer tout son contrôle (cf. 2.1.15 à 2.1.19).

Recommendation 5

Les dépenses effectuées au titre de la coopération avec les pays tiers constituent à l'heure actuelle un domaine autonome et anarchique, si l'on considère la multiplicité des régimes juridiques le régissant. Les principes qui se dégagent des directives communautaires doivent s'appliquer non seulement aux marchés publics passés par la Commission elle-même, mais aussi à ceux qu'elle passe en tant que mandataire de bénéficiaires extérieurs des fonds communautaires (cf. 2.1.33 à 2.1.35).

Recommendation 6

Des règles applicables aux subventions doivent être élaborées. Dans la mesure où elles comportent une contrepartie, cause de leur octroi, elles doivent être assimilées à des contrats, tant pour la procédure d'octroi (mise en concurrence) que son contrôle (passage en CCAM) et la gestion (suivi dans les bases de données) (cf. 2.1.40).

Recommendation 7

Une lacune importante quant à la composition du comité d'évaluation subsiste : il doit y être remédié (cf. 2.1.28).

Recommendation 8

La programmation des contrats de prestations intellectuelles doit être systématisée. Il convient de proscrire la dispersion des moyens - humains et financiers - en une myriade de trop petits contrats impropres au contrôle, d'assurer la bonne compréhension des différentes procédures, de mettre l'accent sur le caractère crucial de la bonne définition de l'objet du contrat, et de garantir que l'Institution dispose des moyens de contrôler la bonne exécution du contrat (cf. 2.2.17 à 2.2.48).

Recommendation 9

La Commission doit demander à ses contractants et aux groupes d'intérêt d'indiquer, s'il y a lieu, la composition de leur conseil d'administration et l'identité des détenteurs de leur capital. A la fois dans un souci de pédagogie à leur égard et en vue d'assurer leur égalité rigoureuse, elle doit permettre aux soumissionnaires non retenus d'accéder aux dossiers de procédure de mise en concurrence (cf. 2.2.36 à 2.2.38 et 2.2.60 à 2.2.63).

Recommendation 10

Les ordonnateurs doivent être responsables, se sentir responsables, et être tenus responsables. Leur rôle doit être valorisé, notamment en veillant à qu'ils disposent des garanties nécessaires d'indépendance, voire de certains avantages en termes de carrière, ainsi que de toute la formation et l'information nécessaires. La mise en cause de leur responsabilité disciplinaire et pécuniaire ne doit pas rester une éventualité purement théorique. La dissociation de la décision d'engager la dépense et de la signature de la proposition d'engagement est préjudiciable à un esprit de responsabilité. Il devrait donc toujours y avoir sinon identité, du moins proximité entre l'ordonnateur et le signataire d'un contrat (seul acte engageant juridiquement la Commission à l'égard des tiers, alors que l'engagement n'est qu'une décision interne) (cf. 2.2.49 à 2.2.59).

Recommendation 11

Il doit être exclu que la Commission, ou un commissaire habilité par le collège, puissent être ordonnateurs (cf. 2.2.58).

Recommendation 12

Le conseil aux ordonnateurs en matière de contrats doit être développé. Pour cela, la cellule centrale des contrats, récemment constituée par la Commission, doit être dotée de moyens accrus, en ressources humaines et informatiques, de façon à fournir ex ante l'assistance nécessaire aux ordonnateurs pour monter leurs dossiers, à suivre ex post l'exécution des contrats les plus significatifs, et à en tirer les conclusions nécessaires, en vue d'assumer l'adaptation permanente de la réglementation. A cet effet, la cellule centrale des contrats a besoin d'être mise en contact, à travers la commission consultative des achats et marchés (CCAM), avec les projets de contrats les plus importants ou les plus typiques. Ses représentants doivent donc y siéger et y constituer l'élément techniquement prépondérant (cf. 2.2.75 à 2.2.77).

Recommendation 13

La CCAM, cantonnée à l'heure actuelle à un contrôle quasi-mécanique de l'application des textes, et qui ralentit un processus déjà trop lourd, doit être réformée. Le nombre de dossiers traités doit être extrêmement limité. Leur sélection doit se faire sous la responsabilité personnelle du président de la CCAM, assisté du secrétariat de celle-ci et de la cellule centrale des contrats, travaillant en synergie. Les dossiers non sélectionnés doivent être immédiatement relâchés, en contrepartie d'un examen approfondi des quelques dossiers retenus pour leur exemplarité. Les réunions de la CCAM doivent se tenir à un niveau hiérarchique suffisamment élevé, mais tel cependant que les membres titulaires assistent effectivement à la majorité des séances. Sa composition doit être paritaire, de façon à en faire une enceinte de dialogue entre DG fonctionnelles et DG opérationnelles. Les seuils de saisine doivent être substantiellement relevés, plus ou moins selon les types de contrats (cf. 2.2.78 à 2.2.98).

Recommendation 14

La Commission doit enfin se doter d'un fichier central des contrats et des contractants : à défaut d'y parvenir dans le cadre du système SINCOM, les services centraux doivent examiner les alternatives (développement de la base de la CCAM) en concertation avec les ordonnateurs (cf. 2.2.64 à 2.2.73).

Recommendation 15

La multiplication et la diversification des tâches de gestion de la Commission, jointes à l'impossibilité d'y répondre par une expansion indéfinie du nombre de fonctionnaires, justifient une politique d'externalisation. A cet égard, il est nécessaire de maîtriser le recours aux ressources du secteur privé, de façon à respecter les exigences du service public. En outre, le Comité suggère que soit explorée de manière approfondie la solution d'agences d'exécution placées sous la tutelle exclusive de la Commission (cf. l'ensemble de la section 2.3).

Chapter 3

The extreme complexity of the legislation renders the EAGGF Guarantee section vulnerable to fraud and makes its control very difficult. The control of EAGGF Guarantee expenditure remains an important current issue despite the gradual reduction in the EAGGF Guarantee section's percentage share of the total Community budget. Sensitive sectors such as export refunds and direct income support are also key sectors which merit the Commission's particular attention. The recent clarification of the respective responsibilities of the Commission and the Member States for payments and control may have a positive impact if given the correct follow-up. The clearance of the accounts with the Member States is the final, overall management act by the Commission in its exercise of control over expenditure by the Member States under the Commission's responsibility. The findings of the Court of Auditors annual Statements of Assurance suggest that there should be an increase in the amounts recovered through the Clearance of Accounts.

Recommendation 16

All decisions taken by the Commission in the EAGGF Guarantee area, either as an administration or as a college, must be taken in conditions of complete independence. The Commission must ensure that the Clearance of Accounts unit can work independently and without being subject to any inappropriate external or internal pressure or influence (3.12.3.-4).

Recommendation 17

The Commission should ensure a more stringent application of the provisions of Regulations 1287/95 and 1663/95 which deal with the accreditation of paying agencies and the certification of their accounts (3.9.8.-3.9.10).

Recommendation 18

The Commission should make full use of its right of on-the-spot controls in the Member States for accounting and compliance clearance and exclude from the certified accounts those amounts relating to accounting errors and underlying transactions which are irregular (3.10.6.).

Recommendation 19

Where systematic weaknesses are found higher rates of flat rate correction for the amounts to be recovered should be applied (3.8.6., 3.12.2.)

Recommendation 20

There remains scope to recover greater amounts through a reinforced clearance effort. To this end the Clearance of Accounts unit needs a further increase in staff to allow a wider coverage each year and checks through to the level of the final beneficiary. It should set a target for amounts recovered linked to the error rates found by the Court of Auditors in its annual Statements of Assurance ((3.12.2.).

Recommendation 21

Interest should be charged by the Commission from the date of payment by the paying agency on those amounts recovered which have been subject to the conciliation procedure (3.11.1-3.11.5-6).

Recommendation 22

The threshold for amounts in dispute which can be presented to the Conciliation body should be increased if need be by expressing it as a fraction of the value of the average transaction in each Member State (3.11.3.).

Recommendation 23

The Commission should seek to reduce the length of time taken in the clearance procedure by reducing the number of steps and in particular the number of distinct occasions which Member States have to comment on proposed recoveries and the Commission's observations leading to them (3.10.9.).

Recommendation 24

The Commission should ensure that the cycle of Clearance of Accounts' inspection of market and direct payment regimes is short enough to guarantee that all major areas are covered in a 24 month period in view of article 1 of Regulation 1663/95 (3.10.7.).

Recommendation 25

In the new system the compliance clearance decisions can refer to transactions in different years. The Commission should therefore ensure that in the interests of transparency its records and reporting show how much is recovered through compliance clearance for payments made for each accounting year (3.10.5.-8).

Recommendation 26

The Commission should pay particular attention to the area of export refunds differentiated by destination and ensure that guarantees are recovered in full when frauds are uncovered (3.13.2-5).

Recommendation 27

The Commission should give priority to ensuring the proper implementation and correct application of the Integrated administrative and control system (IACS) (3.13.6-7).

The size of the Structural Funds means that day-to-day control of expenditure must be exercised by the Member States. The fact that the division of responsibilities between the Commission and the Member States has recently been clarified in legislation does not mean that the right balance in the division of responsibilities has been struck. A certain number of factors tend to divest the Member States of responsibility. The Commission must ensure that the Member States have put in place effective control systems.

Recommendation 28

There has to be a strengthening of control within the Commission through reinforced internal control units in the Directorates General. This is necessary to avoid the Commission being almost entirely dependent on the Member States for information on implementation and irregularities and the subsequent possibilities of pursuing these. This recommendation accords with proposals made in Chapter 4 of this report concerning decentralised financial control and modern internal and professional auditing (3.17.2-9).

Recommendation 29

Checks by the Commission in the Member States must be reinforced both in number and in quality, that is to say they should go beyond checks which lead simply to the provision of advice by the Commission and an exchange of views. Checks should be designed to result in the detection of irregularities and consequently in financial corrections. They should be most frequent in countries and regions with relatively weak administrative structures. This implies more Commission resources devoted to control in the Member States This implies stronger and more effective control by the Commission of such structures in all the Member States (3.17.2-9).

Recommendation 30

The number of administrative units involved in the management of the Structural Funds should be decreased and not increased. To this end the EAGGF Guarantee Directorates in DG 6 should have no role in rural development measures which should be left to the Guidance Directorates. The Committee's view is that only one Directorate General should have responsibility for the new objectives 1 and 2 (3.21.1.-2).

Recommendation 31

The use of diverse national rules to determine project eligibility if compatible with the provisions of the Treaties, should be carefully monitored by the Commission to ensure equality of treatment in respect of Structural Fund assistance for all citizens of the Union. Where the national rules cannot ensure this then the Commission should come forward with one or more additional eligibility datasheets to function as guidance notes (3.18.5.).

Recommendation 32

The Commission should refuse to accept over-declarations for reimbursement from Member States and return them for proper presentation (over-declaration occurs where Member States in claiming submit more expenditure than their entitlement leaving to the Commission the task of selecting eligible expenditure from within this larger sum). It is the Member State's responsibility to present its claims for payment in a transparent and detailed way so that all parties can be satisfied that the expenditure concerned was eligible and its effects can be evaluated (3.18.1.-4).

Recommendation 33

Member States should inform the Commission of all project substitutions and their value. The Commission should systematically retain this information to form an overview of the integrity and coherence of the programmes. Member States should prepare for comparison the initial proposal without substitutions with the final outcome with substitutions. This would allow the Commission to intervene to assess certain instances of re-use and to ensure it may recover sums unduly paid from the Community budget(3.18.1-4).

Recommendation 34

If the reforms refered above at paragraphs 3.24.1. and 3.24.6. were not to be implemented, the Commission should take the initiative by preparing a distinct legislative proposal.

Chapter 4

The existence of a procedure whereby all transactions must receive the explicit prior approval of a separate financial control service has been a major factor in relieving Commission managers of a sense of personal responsibility for the operations they authorise while at the same time doing little or nothing to prevent serious irregularities of the sort analysed in the Committee's First Report. Moreover, the combination of this function with a (weak) internal audit function in a single directorate-general gives rise to potential conflicts of interest on the part of the Financial Controller. Thus a serious rethink of both internal control and internal audit is necessary.

Recommendation 35

A professional and independent Internal Audit Service, the competences and activities of which should be based upon the relevant international standards (Institute of Internal Auditors), should be established, reporting directly to the President of the Commission. The centralised pre-audit function in DG XX should be dispensed with and internal control - as an integrated part of line responsibility - decentralised to the directorates-general. One of the principal tasks of the proposed Internal Audit Service should be to audit the efficiency and effectiveness of these decentralised control systems. (c.f. Recommendation 49 below) (4.7.1-2, 4.9.8, 4.13.3, 7)

Recommendation 36

Chains of delegation should be made clear and explicit: every subordinate manager is responsible and accountable for internal control in his/her field of responsibility. It is for the director-general (and heads of independent services) to assume (overall) responsibility for all operational matters in her/his directorate-general or service, including for internal control. The chain of delegation begins at the level of the Commission through the commissioner. She or he thus holds ultimate managerial responsibility for all financial matters, including for financial control, and political responsibility as a member of the College. (4.9.5-9)

Recommendation 37

Each directorate-general should have at its disposal two basic prerequisites for effective financial management : (i) a specialised internal control function, exercised under the responsibility of a senior official reporting directly to the director-general; (ii) an accounting function, exercised under the responsibility of a delegated accounting officer. The latter would work under the functional supervision of the Commission's accounting officer, but be responsible for keeping the accounts and processing the financial operations exclusively of the directorate-general in which it is located.

Recommendation 38

Each directorate-general should produce its own annual financial report and accounts, audited by the Commission's internal auditor, including both financial information and a wider review of the directorate-general's activities. These reports should be examined first by the Commission, which should then submit them to the competent institutions as part of the discharge procedure. (4.9.13-17)

Recommendation 39

The Internal Audit Service should act under the responsibility and authority of the President of the Commission, independently of any other Commission service. It should above all be a diagnostic tool in the hands of the President, enabling him/her to identify structural and organisational weaknesses in the Commission. The competences, objectives, powers and status of this Service should be set out in a basic founding document (a "charter") The work programme of the Internal Audit Service should ensure periodic coverage of all Commission activities. It should however leave headroom for additional *ad hoc* audit tasks to be carried out at the request of the President and/or on the basis of needs arising. (4.13.3, 7, 9)

Recommendation 40

The Head of the Internal Audit Service should be a highly qualified and experienced member of the auditing profession, recruited specifically for this task. S/he should hold and administrative grade equivalent to that of a director general. The Head of the Internal Audit Service, though reporting to the President, should enjoy full independence as to the conduct of audits, the maintenance of professional standards, the contents of reports, etc. (4.13.8)

Recommendation 41

The internal contradictory procedure between the Internal Audit Service and its auditees should last at most one month, whereafter publication of the audit report should take place at the discretion of the Head of the Internal Audit Service. (4.13.11-12)

Recommendation 42

The President of the Commission should present to the Commission each year an annual report of the Internal Audit Service, outlining its activities, principal findings and the action taken, or to be taken, by the President as a result. This report should be made public. (4.13.13-14)

Recommendation 43

All audit reports of the Internal Audit Service should be sent to the Court of Auditors. Additionally, all data collected by the Service, all preparatory work and audit findings should be available to the Court and be of sufficient professional quality to be used by it. (4.13.15)

Recommendation 44

The present General Inspectorate of Services (IGS) should be integrated into the new Internal Audit Service.

Recommendation 45

A central specialised unit, responsible for the formulation and oversight of financial procedures and internal control mechanisms should be constituted within DG XIX. This body should have no role in individual transactions (though it could, in difficult cases, offer advice), but should establish Commission-wide procedures and ground rules for financial management and monitor their application. (4.9.1-3)

Recommendation 46

All officials involved in financial procedures should undergo compulsory and regular training in the rules and techniques applying to financial management as a precondition of being allocated such work. (4.9.1-2, 4, 11)

Recommendation 47

The formal aspects of financial transactions should be verified by the delegated accounting officer. Any objections should be referred back to the authorising officer, who should decide, on his/her own responsibility, whether to overrule the objections and proceed with the operation. (4.9.12)

Recommendation 48

A new and specific administrative procedure should be established, governed by (an amended) Title V of the Financial Regulation, designed formally to establish the individual responsibilities and/or liabilities of authorising officers in respect of financial errors and irregularities. To this end, a new Financial Irregularities Committee would deliberate on the basis of reports from the Commission's internal auditor. Disciplinary or other action could follow if necessary. (4.9.18-28)

Recommendation 49

In the light of the foregoing recommendations, the existing DG XX no longer has any reason to exist. DG XX staff qualified for audit work should be redeployed to the new Internal Audit Service, while other staff should be redeployed, as needed, to other Commission services, notably those requiring expertise in financial procedures. (4.15.1-2)

Recommendation 50

The Court of Auditors could seek to obtain a more constructive reaction on the part of the Commission to its audit observations through greater recourse to department-based auditing, presenting its observations in a more analytical style, giving an overview of the situation it encountered and placing greater emphasis on the management needs of the Commission. (4.16.4)

Recommendation 51

It would be helpful if the Court were able in its Statement of Assurance ("DAS") to indicate with greater precision which sectors, systems and procedures, and, in the case of shared management, which Member States, are mainly affected by errors, and the nature of the errors concerned. (4.16.5)

Recommendation 52

The duration of the contradictory procedure between the Court of Auditors and the Commission (and other auditees) should be considerably shortened. The process should not assume the nature of a negotiation on the severity or otherwise of the Court's observations but seek only to establish the facts. The underlying purpose of the Court's audits should be to identify the remedial management action required in the Commission to address the issues identified by the Court (4.16.7).

Chapter 5

The Committee found that the current legal framework for combating fraud against the financial interests of the European Communities is as yet incoherent and incomplete, largely because the Commission (i.e. UCLAF/OLAF) possesses only administrative law powers and competences, which however have important implications in the area of criminal law. Thus the existing framework (i) fails to recognise and accommodate the true nature of UCLAF/OLAF, (ii) leaves the legal instruments for the investigation, prosecution and punishment of fraud ineffective and (iii) fails to provide sufficient guarantees of individual liberties.

Recommendation 53

The independence of OLAF vis-à-vis the Commission in particular must be and remain a fundamental point of principle if the organisation is to play its role, which is substantially of criminal investigation, fairly and effectively. (5.11.4-8)

Recommendation 54

OLAF must earn the respect, and thus wholehearted cooperation, both of EU institutions and personnel and of Member States' investigative and judicial authorities through ensuring that its inquiries are – and are seen to be – independent, rigorous, objective, procedurally correct, reasonably rapid and ultimately productive of results. (5.9.4-7)

Recommendation 55

OLAF's activities must be subject to the supervision of a judicial authority in order to guarantee due legal process in the course of investigations and the protection of the civil rights of persons affected, directly or indirectly, by inquiries. In this context, the existing Supervisory Committee of OLAF, though fulfilling a useful transitional role, cannot be considered adequate and should be replaced by a special chamber of the Court of First Instance created for this purpose (and, on appeal, also by a chamber of the Court of Justice). (5.12.5-5.12.9)

Recommendation 56

With a view to its role as a central data and criminal intelligence collation point, OLAF must take action to overcome the failings of UCLAF (identified by the Court of Auditors in particular) in the exploitation of information technology. While respecting the data protection requirements of Community and Member State legislation, it should also do the utmost to maximise the potential synergies with national authorities and with Europol in this area (5.9.5, 5.11.10)

Recommendation 57

OLAF must possess adequate human resources to deal with its case-load at least as effectively as an equivalent Member State service. It should also ensure that certain lacunae in the staffing of UCLAF are remedied, notably through the recruitment of adequate specialist expertise, beyond its core investigative personnel, in the fields of (a) auditing, especially "forensic accountancy", (b) information technology, (c) prosecution and (d) judicial procedures in Member States. All OLAF staff should moreover be selected strictly on the basis of their suitability for OLAF's purposes, which should preclude any "automatic" transfer of UCLAF staff to the new organisation. (5.11.9-13)

Recommendation 58

In preparation for the introduction of the new legal framework described hereafter, the Member States should (i) ratify the Convention on the protection of the financial interests of the European Communities (ii) further develop common definitions of relevant criminal offences and procedures, and (iii) formally agree common standards of criminal investigation within the context of the European Convention on Human Rights (5.13.2)

Recommendation 59

With the foregoing principles in mind, the Committee recommends a three-stage introduction of a new legal framework for the prosecution and punishment of criminal offences affecting the financial interests of the European Communities in accordance with the proposal set out in this report (section 5.13), summarised as follows:

- *Stage 1*: Appointment of an independent *European Public Prosecutor* (EPP). The EPP would hold unrestricted jurisdiction (i.e. without the obstacle of official immunity or confidentiality) for offences committed by members and officials of EU institutions and bodies. S/he would work closely with the Director of OLAF and prepare prosecutions as appropriate. Prosecutions would be referred to the appropriate national court. The legality of OLAF investigations and of EPP decisions would be supervised by a special chamber of the Court of First Instance (5.13.4)

- *Stage 2*: Creation in each Member State of a national *Prosecution Office for European Offences* (POEO) which would be competent for its entire territory. A POEO would be established within each national prosecution service specifically to deal with cases wholly or partially affecting the financial interests of the European Communities. POEOs would act through national police forces and before national criminal courts in conformity with national criminal procedure. The legality of the POEO's activities would be supervised in each Member State by a single court, the same court at which it is located. (5.13.5, 7) The EPP would receive from OLAF all information liable to give rise to criminal proceedings and be responsible for referring it, with appropriate advice, to the appropriate POEO. The EPP would moreover act as liaison between the POEOs of different Member States, notably advising them on possible conflicts of jurisdiction on cases involving more than one Member State and making recommendations for their resolution. The EPP would report annually to the EU institutions on its activities and on the action taken by the POEOs as a result of its recommendations. (5.13.6)

- *Stage 3*: Creation, on the basis of the EPP and POEOs, of a single, indivisible European Prosecution Office (EPO) with delegated public prosecutors in the Member States holding jurisdiction for all offences affecting the financial interests of the European Communities. The EPO would operate through OLAF and national investigation units. In terms of EU fraud, this stage of the reform would create the single "area of freedom, security and justice" foreseen by the Treaty (TEU Art. 29) (5.13.7)

Recommendation 60

Preparation of the three-stage introduction of a new legal framework should begin immediately and implementation achieved within the following timescale:

First stage: within one year
Second stage: as soon as possible thereafter,
Third stage: to be agreed at the next Intergovernmental Conference (IGC), or at an *ad hoc* IGC shortly thereafter. (5.13.9-10)

Chapter 6

La politique du personnel appelle d'importantes réformes. Le changement des pratiques et des procédures est la condition indispensable pour assurer l'efficacité de l'action de la Commission et préserver son rôle traditionnel de moteur de la construction européenne. La véritable question n'est pas de modifier profondément le système statutaire actuel, mais d'en appliquer correctement les règles et les principes.

La Commission devrait appliquer vigoureusement le principe de la valorisation des mérites. Ainsi la qualité de l'organisation toute entière s'améliore, une atmosphère positive se répand à tous les niveaux de la hiérarchie et produit un effet d'exemplarité.

Dans cet esprit, la Commission devrait se doter d'une forte politique de carrière, pour stimuler l'engagement et les ambitions du personnel et éviter les risques de sclérose.

Recommendation 61

Des relations sociales et syndicales correctes à l'intérieur de la Commission sont essentielles. L'administration doit reconnaître le rôle des syndicats, mais de leur côté ceux-ci doivent éviter toute tentation de vouloir constituer une sorte de hiérarchie alternative et se concentrer sur les responsabilités essentielles qu'ils exercent pour le succès du processus de changement et de modernisation de la fonction publique européenne (62.34-38).

Recommendation 62

Le poids des équilibres nationaux à l'intérieur de la Commission devrait être réduit. A cette fin, il faudrait: favoriser une formation professionnelle visant à renforcer le caractère "européen" de la fonction publique dans les Institutions; encourager une véritable "multinationalisation" des cabinets; revoir le nombre et la répartition des tâches entre les Directions générales, en fonction des exigences réelles de l'Institution et non pas des équilibres nationaux ; développer la flexibilité des "quotas nationaux"; assurer une rotation plus fréquente du personnel (6.2.18-33).

Recommendation 63

La politique de formation et de reconversion professionnelle devrait être conçue comme un processus qui débute dès la période de stage et se développe de façon permanente et obligatoire, tout au long de la carrière du fonctionnaire. La Commission devrait consacrer davantage de moyens financiers aux actions de formation (6.3.6.-14).

Recommendation 64

La mobilité devrait être encouragée sans exceptions et au-delà d'un certain temps le changement de fonctions devrait être rendu impératif. Ceci implique que la polyvalence constitue un mérite apprécié et primé au moment des promotions. Par ailleurs, la mobilité devrait être une *condition sine qua non* pour accéder à des fonctions de direction ou de gestion du personnel (6.3.15-18).

Recommendation 65

La responsabilisation du personnel exige que les tâches de chacun soient clairement définies et que les efforts déployés et les résultats obtenus par chaque fonctionnaire pour accomplir les tâches qui lui sont confiées soient reconnus, encouragés et récompensés (6.3.19-22)

Recommendation 66

La décentralisation joue un rôle important pour renforcer le sens de la responsabilité. Mais elle implique que les tâches qui en constituent l'objet soient bien définies et effectives. Ainsi, la pratique de créer ou maintenir des postes auxquels ne correspondent pas de véritables responsabilités (et une charge de travail adéquate) doit être regardée comme contraire non seulement à la rationalité et à l'efficacité, mais aussi au principe de responsabilisation. La décentralisation ne peut pas devenir synonyme de confusion. Il faut que le processus de décentralisation soit accompagné d'un renforcement de la programmation et de la coordination interne et qu'une véritable autorité de direction soit exercée (6.3.23-25).

Recommendation 67

Pour les "autres agents" de la Commission, et en particulier les agents temporaires, la pratique de la "temporalité ad infinitum" devrait être éliminée. Les agents temporaires devraient être nommés sur des emplois permanents, ce qui les obligerait statutairement à partir dans un délai de trois ans maximum. Parallèlement, le tableau des effectifs concernant les postes temporaires devrait être progressivement réduit (6.4.22-27).

Recommendation 68

Le recours aux apports extérieurs devrait être réduit, de manière que la dépendance de l'Institution vis-à-vis du personnel externe devient toujours moins importante que le recours à ce personnel redevienne exceptionnel et que ses conditions et modalités soient mieux réglementées (6.428-41).

Recommendation 69

Le système des concours externes pour le recrutement du personnel de la Commission devrait être profondément revu, car au fil du temps le nombre des candidats s'est considérablement accru et les procédures suivies se sont révélées inadéquates. On pourrait envisager de décentraliser les épreuves de présélection dans chaque Etat membre, d'accroître la pratique des concours par spécialité avec description plus précise des postes, et d'organiser des concours par langue.

Afin d'éviter les pratiques non transparentes qui se produisent entre l'établissement de la liste de réserve et l'embauche, les candidats ayant réussi à un concours devraient figurer sur des listes de mérite reflétant les résultats du concours. Tout écart, lors du recrutement effectif, de l'ordre de la liste, devrait être dûment motivé et rendu public.

Les concours internes pour la titularisation du personnel temporaire devraient être supprimés. Il faudrait en revanche maintenir le concours interne pour le passage des fonctionnaires d'une catégorie à une autre (6.5.4.-25).

Recommendation 70

Une réforme du système des rapports et promotions est nécessaire pour réaffirmer la capacité de sélection et rétablir la crédibilité du régime des carrières. A cette fin, il faudrait renforcer la culture d'évaluation, réviser la forme des rapports et en simplifier les rubriques, établir des critères d'évaluation plus ponctuels et homogènes, recommander des notes plus différenciées et des commentaires plus circonstanciés et mieux motivés, encourager une participation plus active et responsable des fonctionnaires intéressés.

On pourrait même songer à un système de concours internes pour un nombre limité des postes disponibles, notamment pour les postes dits d'encadrement, pour lesquels les nominations sont décidées selon une procédure souple et donc exposées à des risques de favoritisme. Ce concours sur titres et examens confié à des jurys externes ou présidé par une personnalité extérieure - permettrait aux fonctionnaires les plus ambitieux et motivés de tenter leurs chances par une voie autre que celle de la promotion statutaire (6.5.28-42).

Recommendation 71

Au fil des années, les nominations des hauts fonctionnaires (A1 et A2) ont révélées des carences assez graves. L'établissement de règles ou pour le moins d'un code de conduite pour leur recrutement est une nécessité. Quant aux équilibres nationaux, on pourrait notamment penser à une progression la flexibilité des "quotas", à une limitation temporelle du mandat, à l'interdiction de nommer un successeur de la même nationalité. Quant aux modalités de recrutement, à l'intérieur même de ces quotas il faudrait introduire des critères de sélection plus rigoureux et des procédures plus transparentes.

Bien que des améliorations ultérieures s'imposent, quant à la procédure à suivre, aux critères et aux modalités de sélection, le Comité considère que les réformes envisagées par la

Commission nouvelle vont dans la bonne direction (6.5.43-58).

Recommendation 72

L'insuffisance professionnelle devrait faire l'objet d'une règlementation statutaire plus claire et précise. Une procédure distincte de celle concernant les fautes disciplinaires devrait être instituée (6.5.61-66).

Recommendation 73

La pratique en matière de responsabilité disciplinaire devrait être corrigée. En effet, elle a révélé des limites graves d'efficacité et de rapidité, avec des conséquences négatives pour la fonction publique européenne et pour son image.

En particulier:

- les règles concernant les conditions formelles et les modalités de la procédure, ainsi que la protection des droits individuelles devraient être précisées;

- la composition du conseil de discipline devrait être beaucoup plus stable et moins interne à la Commission, notamment en ce qui concerne le président. Un conseil de discipline interinstitutionnel pourrait aussi être envisagé. L'idée d'externaliser entièrement la partie de la procédure qui se déroule actuellement devant le conseil de discipline mérite également d'être exploitée, surtout en ce qui concerne les grades élevés;

- la participation aux travaux du conseil de discipline d'un représentant de l'Autorité investie du pouvoir de nomination, pour le moins à toutes les phases de la procédure dans lesquelles le fonctionnaire et/ou son conseil sont présents, devrait être assurée;

- des barèmes disciplinaires établissant un cadre relativement fixe de correspondance entre fautes et sanctions, devraient être fixés pour éviter que des sanctions très différentes ne soient appliquées à des manquements identiques (6.6.11-34).

Chapter 7

The Committee considered that the codes of conduct elaborated by the Commission remain insufficient and are not yet backed up by the necessary legal framework. The attribution of responsibilities and chain of delegation between the Commission, single commissioners and the departments are ill-defined and ill-understood by those concerned. Finally, the concepts of political responsibility and accountability remain unclear and the mechanisms for their practical application inadequate.

Recommendation 74

The code of conduct for commissioners should redefine the concept of collective responsibility to encompass not only a prohibition on calling into question decisions adopted by the college, but also the right and the obligation of each commissioner to keep him/herself fully appraised of the activities of every other commissioner and to take action in this respect as necessary, for example by having frank and open discussions with other commissioners both inside and outside the college. (7.5.1-4, 7.10.1-2)

Recommendation 75

Commissioners' *cabinets* should be limited to a maximum of six category-A officials. The commissioner must ensure that the *cabinet* is multi-national in character and rules must be introduced to exclude any unduly favourable treatment of *cabinet* members at the end of their service. (7.5.7-8)

Recommendation 76

Clear rules should be established as to the applicable criteria to the appointment of individuals to commissioners' *cabinets*, with a particular view to eliminating the possibility of favouritism based on personal relationships. Full transparency as to any personal relationship between a commissioner and a member of his/her *cabinet* must be ensured. (7.5.9-10)

Recommendation 77

Commissioners who use undue influence to favour fellow nationals or wider national interests in any sector for which they are competent are in serious breach of their obligation of independence, and should be subject to an appropriate sanction. (7.5.9-10)

Recommendation 78

Commissioners must carry out their duties with complete political neutrality. They should not be permitted to hold office in any political organisation during their term of office. (7.5.11-12)

Recommendation 79

The Commission must establish clear internal guidelines – to be made public – designed to ensure maximum openness and transparency as to acts and decisions of the Commission once taken and the processes by which they were arrived at. (7.6.3-7)

Recommendation 80

The rights and obligations of officials to report instances of suspected criminal acts and other reprehensible behaviour to the appropriate authorities outside the Commission should be established in the Staff Regulations and the necessary mechanisms put in place. The Staff Regulations should also protect whistleblowers who respect their obligations in this regard from undue adverse consequences of their action. (7.6.8-11)

Recommendation 81

An independent standing "Committee on Standards in Public Life" should be created by interinstutional agreement to formulate, supervise and, where necessary, provide advice on ethics and standards of conduct in the European institutions. This Committee on Standards should approve the specific codes of conduct established by each institution. (7.7.1-5)

Recommendation 82

All Commission staff should undergo professional training aimed at raising awareness of ethical issues and providing guidance, from both a personal and management perspective, on how to deal with practical situations as they arise. (7.7.6-9)Recommendation 82(7
The code of conduct on commissioners and their departments should establish that each commissioner is responsible both for policy formulation and the implementation of policy by his/her department(s). The commissioner shall therefore be answerable to the Commission as a whole for the actions of the department(s), and accountable to the European Parliament. Officials in departments shall answer to their director-generals, which shall in turn be accountable to the competent commissioner. (7.9.1-9)

Recommendation 83

The Secretary General should be considered as the prime interface between the political and administrative levels of the Commission. He/she should above all ensure that decisions of the Commission are effectively followed up by the administration. (7.11.1)

Recommendation 84

Members of *cabinets* should not be permitted to speak on behalf of their commissioners. The primary function of *cabinets* is to provide information and to facilitate communication vertically (between the commissioner and the services) and horizontally (between commissioners). In neither case should the *cabinet* prevent direct communication with the commissioner, but rather stimulate such communication. (7.12.1-6)

Recommendation 85

The Commission is accountable to the European Parliament. To this end, it is under a constitutional duty to be fully open with Parliament, providing it with the complete, accurate and truthful information and documentation necessary for Parliament to carry out its institutional role, notably in the context of the discharge procedure and in connection with committees of inquiry. Access to information and documentation should only be refused in exceptional, duly motivated circumstances and in accordance with procedures agreed between the institutions. (7.14.1-13)

Recommendation 86

The enforcement of the individual political responsibility of commissioners should be a matter for the President of the Commission. The President should be empowered to dismiss individual commissioners, modify the attribution of responsibilities between them or take any other measure in respect of the composition or organisation of the Commission he/she deems necessary to enforce political responsibility. The President of the Commission shall be accountable to the European Parliament for any action (or inaction) in this context. These powers of the President should be made explicit in the Treaties, but, until this is possible, all commissioners should agree to abide by these principles. (7.14.16-22)

Recommendation 87

Any commissioner who knowingly misleads Parliament, or omits to correct at the earliest opportunity inadvertently erroneous information provided to Parliament should be expected to offer his/her resignation from the Commission. In the absence of an offer of resignation, the president of the Commission should take appropriate action. (7.14.14)

Recommendation 88

The Council should give greater political priority to the preparation of its annual recommendation to the European Parliament on discharge, as this would reinforce the political status of the prime institutional mechanism whereby the Commission is held accountable for financial management. (7.15.8-9)

Recommendation 89

Council and Parliament should be bound by the principle of budgetary discipline to take into account the resource requirements attached to any policy initiative they request from the Commission. The Commission should be able to refuse to assume any new tasks for which administrative resources are not available and cannot be provided through redeployment. (7.15.10)

Recommendation 90

The management of Community programmes, and in particular all questions of financial management are the sole responsibility of the Commission. Committees composed of Member State representatives should not therefore be empowered to take any decision relating to the ongoing financial management of programmes. Any risk that national considerations might affect financial management at the expense of sound financial management criteria should be excluded. (7.15.11-14)

1. INTRODUCTION

1.1. The Mandate

1.1.1. In its First Report, and in accordance with the mandate it was given for the first phase of its work[1], the Committee of Independent Experts (henceforth 'the Committee'), addressed the issue of individual responsibilities of members of the Commission relating to certain allegations of fraud, mismangement and nepotism.

1.1.2. Following publication of the First Report of the Committee on 15 March 1999 and successive events, at its meeting of 22 March 1999 the Conference of Presidents of the European Parliament considered and approved a note on the terms of reference for the Committee's second report. Specifically, it mandated the Committee as follows:

"In the light of the findings of the first report (...), it is proposed to mandate the Committee to produce its second report, concentrating on formulating recommendations for improving:

- *procedures for the awarding of financial contracts, and of contracts for interim or temporary staff, to implement programmes;*
- *the coordination of Commission services responsible for detecting, and dealing with fraud, irregularities and financial mismanagement (and, particularly, internal auditing departments, and financial control);*
- *the application and, possible, the adaptation of the Staff Regulations, to facilitate the holding of officials to account in cases of fraud and mismanagement."*

1.1.3. The following day the European Parliament adopted a resolution confirming the mandate of the Committee in the following terms:

> *"Looks forward to the second report by the Committee of Independent Experts containing a more wide-ranging review of the Commission's culture, practices and procedures and in particular its concrete recommendations for strengthening these procedures and any other appropriate reforms to be considered by Commission and Parliament; this report should deal amongst other issues with procedures in existence for the awarding of financial contracts and of contracts for interim or temporary staff to implement programmes, with procedures for following up allegations of fraud, mismanagement and nepotism (detection and treatment), and with the treatment by the Commission of cases of fraud, mismanagement and nepotism, involving staff; this report must be finished by the beginning of September 1999;"* [2]

[1] See First Report, section 1.1

[2] Resolution B4-0327, 0328, 0329, 0330, 0331, 0332 and 0333/99 of 23.3.99, paragraph 4

1.1.4. In preparing its Second Report the Committee has adhered to the terms of this mandate. The report therefore deals the "culture, practices and procedures" of the Commission, with an eye to formulating recommendations for reforms in the areas encompassed by its mandate, namely financial procedures, control mechanisms, personnel management, measures aimed at combating fraud, etc. By the same token, the Second Report does not seek - by contrast with its First Report - to attribute individual responsibilities. Cases cited in the present report serve simply as illustrations of the wider points the Committee wishes to make.

1.1.5. The approach taken by the Committee was formally communicated to the President of the European Parliament by its Chair by letter on 3 August 1999:

> *"Tout ce qui concerne les responsabilités individuelles ou collectives des Commissaires, a été dit dans le premier rapport, déposé le 15 mars 1999. En aucune manière, le deuxième rapport ne reviendra sur ce genre de questions …Aucun des éléments qu'il contiendra ne saurait être de nature à mettre en jeu des responsbilités passées. Il sera consacré à l'analyse des procédures et des systèmes mis en place par l'ensemble des acteurs de l'Union européenne - Institutions et Etats-Membres – pour lutter contre la fraude, et s'efforcera simplement de présenter des analyses et des recommandations en vue d'accroître leur efficacité"*

1.1.6. In keeping with this approach, the Committee does not in the present report pursue, re-examine or update any of the cases analysed in its First Report.

1.2. Structure of Second Report

1.2.1. The subjects covered by the Second Report are determined by the mandate outlined above. The Report comprises a brief introduction, six substantive chapters, each containing specific recommendations, and some brief concluding remarks. For ease of reference, the Committee's recommendations are also presented together at the beginning of the report. It should be stated at the outset, however, that the recommendations can only fully be understood in the light of the substantive arguments contained within the body of the text. For this reason the reader is invited to refer, for explanation and elucidation of the recommendations, to the paragraphs cited after each of them.

1.2.2. The chapters of the Second Report are as follows:

1.3. Working methods and language

1.3.1. As in the first phase of its work, the Committee worked independently of both the European Parliament and of the Commission. It therefore adopted its own working methods and procedures. It has continued to operate on the basis of the agreements already in place concerning the availability of Commission officials to appear before the Committee and the provision of documentary information on request. The Committee thanks all those who have contributed through the statements they gave and the information they provided to the formulation of the ideas set out in this report.

1.3.2. The constituent parts of this report were drafted and adopted in one or the other of the Committee's two working languages: English and French. The Committee declines any responsibility for language versions other than the originals, translation of the text being a matter for the European Parliament. The reader is therefore informed that the original languages of the chapters are as follows:

English:	Chapters 1, 3, 4, 5, 7
French:	Chapters 2, 6, 8

2. LA GESTION DIRECTE

TABLE DES MATIERES

2. LA GESTION DIRECTE

2.0. INTRODUCTION

2.0.1. Le présent chapitre traite de certaines dépenses effectuées en gestion directe par la Commission, qui, au cours des dernières années ont provoqué un grand nombre de critiques. En effet, pour faire face à des tâches de gestion sans cesse plus nombreuses et spécifiques sans disposer toujours du personnel approprié, la Commission a dû externaliser certaines activités. Les contrats passés dans ce but avec des entités communément appelés BAT se sont trouvés au cœur des difficultés rencontrées. Nombre de subventions, d'autre part, ont fait l'objet de critiques. Les contrats visés sont essentiellement ceux qui concernent les prestations de services complexes : maîtrise d'œuvre, assistance technique, consultants, études, dont l'importance s'est accrue depuis dix ans).

2.0.2. Les dépenses (Feoga-garantie, fonds structurels notamment) dont la gestion est partagée entre la Commission et les Etats membres sont traitées au chapitre 3.

2.0.3. Le Comité pensait, au départ, effectuer, de façon classique, un audit des contrats et des subventions faisant l'objet d'une gestion directe par la Commission. Pour cela il aurait fallu, à partir d'une analyse des risques aboutissant à identifier les types de contrats et de subventions les plus sensibles, établir d'une façon représentative des échantillons de dossiers, les examiner, et en tirer des conclusions de portée générale. Cela n'a pas été possible faute de données classées par rubriques appropriées et permettant d'effectuer des sélections.

2.0.4. Cette constatation illustre la médiocrité des outils de gestion de la Commission, en ce qui concerne les contrats et les subventions

2.0.5. D'une manière générale, il est permis de penser que ce n'est pas seulement le manque de ressources humaines qui a conduit la Commission aux difficultés actuelles, mais aussi le défaut d'outils de gestion, le système contractuel insuffisant qui ont provoqué la difficulté d'externaliser vers des structures fiables. S'agissant des contrats, le maximum de cas concrets a cependant été étudié, à titre d'exemple. Par ailleurs le Comité s'est fondé sur la connaissance des textes réglementaires et des pratiques existantes, obtenue à travers un certain nombre d'interviews et de la documentation disponible, pour se livrer néanmoins à une étude du système, et formuler sur celui-ci des conclusions à caractère général.

2.0.6. Contrats et subventions sont, pour la Commission, des notions mal définies, et qui se recouvrent dans la pratique. La plupart des subventions font l'objet de documents à caractère quasi-contractuel, signés par les deux parties intéressées, dénommés conventions, ou parfois même contrats. Qu'est-ce qu'une subvention ? En quoi diffère-t-elle d'un contrat ? La réponse n'est pas claire. En tout état de cause, les règles régissant l'octroi d'une subvention sont quasi-inexistantes : le Règlement Financier ignore cette catégorie de dépenses.

2.0.7. Les règles régissant la passation des contrats forment un ensemble enchevêtré dans lequel les dispositions de droit commun figurant au Règlement Financier, ne tiennent qu'une place mineure, au regard notamment des directives Marchés publics. De plus, indépendamment des deux grands domaines d'exception reconnus par le Règlement Financier que sont la recherche et les programmes destinés à des actions extérieures, chaque programme communautaire comporte ses propres procédures.

2.0.8. L'aide accordée à certains Etats tiers (ou à d'autres acteurs dans le cadre des accords passés avec les Etats) engendre elle-même des contrats, passés par ces entités bénéficiaires et non par la Commission. Néanmoins, le plus souvent, celle-ci conserve une responsabilité de mandataire, chargé de la préparation des appels d'offres et de la sélection des candidats. En outre, le devoir lui incombe, vis-à-vis de l'autorité budgétaire de la Communauté, de vérifier la bonne utilisation de cette aide.

2.0.9. Le Règlement Financier s'applique à toutes les institutions de l'Union européenne. Pour cette seule raison, il ne peut qu'être un instrument inadapté à l'ampleur et à la diversité des tâches que doit maintenant gérer la Commission, qui n'ont aucune mesure avec celles des autres institutions. De plus, ce règlement a peu évolué depuis l'origine. La procédure pour le modifier est longue et compliquée.

2.0.10. La Commission a tendance à recourir à des instructions internes, mélangeant les conseils, les vœux énoncés au conditionnel, et les interdictions plus ou moins strictes. Ces textes variés - instructions, manuels de procédures, vade-mecum - s'appliquent, au fur et à mesure des besoins et des circonstances, à des domaines tels que la CCAM, les procédures extérieures, les subventions, les BAT, et ne font pas toujours preuve de cohérence.

2.0.11. Pour ce qui est des procédures de gestion, l'indigence est également extrême. Les procédures de décision présentent souvent un caractère artificiel. L'extrême centralisation de beaucoup d'entre elles dilue les responsabilités. Lorsque la Commission elle-même prend la décision - le cas n'est pas exceptionnel - le dossier fourni à chaque membre du collège comporte toute une série d'avis favorables, émis à différents stades par des services qui n'ont jamais été que marginalement engagés dans l'affaire. Ces avis sont considérés comme suffisamment rassurants pour emporter une décision finale positive. Le suivi des contrats déjà passés, ou des subventions déjà accordées, n'est pratiquement pas assuré.

2.0.12. Les observations qui suivent traiteront tout d'abord du cadre juridique et budgétaire dans lequel se déroulent les opérations afférentes aux contrats de prestations de services complexes et aux subventions et de la gestion de ces contrats et subventions. Elles évoqueront ensuite, globalement, la problématique de l'externalisation.

2.1. Le cadre

2.1.1. Les crédits[3] annuellement consacrés à des opérations réalisées en gestion directe sont de l'ordre de 14 milliards d'euros[4], soit 1/6ème du budget de la Communauté.

2.1.2. Le nombre annuel de contrats passés en CCAM[5] est approximativement de 1.200 pour un montant de 2 milliards d'euros auxquels s'ajoutent environ 10.000 contrats représentant un montant de 2 milliards d'euros passés dans le contexte des aides extérieures (dont 8.000 sont des avenants à des contrats en cours et 2.000 contrats sont conclus suite à des appels d'offres). Ces données incluent les contrats d'assistance technique.

2.1.3. Parmi les subventions, celles qui sont octroyées au titre d'une base légale (programme découlant d'une directive, d'un règlement ou d'une décision) concernent un montant de 7 milliards d'euros alors que celles qui ne sont pas régies par une base légale autre que le budget (encore appelées subventions non réglementées)[6] sont au nombre de 7.000 environ et concernent un montant approximatif de 1 milliard d'euros.

2.1.4. La distinction entre contrats et subventions est extrêmement discutable en théorie comme en pratique.

La structure budgétaire : crédits administratifs et crédits opérationnels

2.1.5. C'est seulement dans son avant-projet de budget pour 1982 que la Commission a proposé de distinguer, pour des raisons de "transparence politique" semble-t-il, deux parties : les crédits administratifs - regroupant les dépenses de personnel, d'immeubles et autres dépenses de fonctionnement (partie A) et les crédits opérationnels (partie B). Dès le départ cependant, certains crédits de la partie B, classés par destination, ont été affectés à du personnel, pour les actions de recherche notamment (budget fonctionnel).

2.1.6. Pour que la distinction améliore la transparence, il aurait fallu disposer de critères précis permettant de tracer exactement la frontière entre le fonctionnement administratif et l'activité opérationnelle, ce qui s'est révélé impossible. Tout au plus le manuel des procédures budgétaires indique-t-il que : "Les crédits administratifs sont les crédits destinés à assurer le fonctionnement de l'ensemble de la "machine administrative" représentée par les Institutions afin qu'elles puissent remplir les tâches qui leur incombent" ; "les crédits opérationnels sont destinés directement à la réalisation des différentes actions ou politiques communautaires : ce sont des crédits d'intervention".

2.1.7. Il est souvent avancé que la nomenclature partie A / partie B présente pour le

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3 Après passage en CCAM. Les données figurant aux paragraphes 2.1.1 à 2.1.3 proviennent d'estimations établies par la DG XIX

4 12 milliards si l'on exclut les dépenses administratives, notamment les dépenses de personnel.

5 Commission consultative des achats et marchés. Voir 2.2.81 et suivants.

6 Le chiffre de 1 milliard se base sur l'enquête de l'IGS sur l'exercice 1996, mais il ne tient pas compte de l'évolution subie dans ce domaine qui a permis de doter d'une base légale plusieurs lignes budgétaires, ce qui a une implication évidente sur le rapport réglementées/non-réglementées, voir annexes I et II.

Parlement l'avantage d'isoler en partie B les crédits opérationnels, ce qui lui permet d'exercer une influence politique visible, tout en facilitant son contrôle sur les dépenses classées en partie A, dépenses administratives. Le Parlement, comme autorité budgétaire, a le dernier mot sur toutes les dépenses non obligatoires, qu'elles soient en partie A ou en partie B. Cette distinction n'a donc pas d'incidence sur la question de la classification des dépenses. La distinction entre DO (dépenses obligatoires) et DNO (dépenses non obligatoires) pourrait parfaitement s'exprimer à travers une structure budgétaire dans laquelle la nomenclature partie A / partie B n'existerait pas.

2.1.8. En matière de subventions, la nomenclature partie A / partie B, loin d'apporter la clarté, accroît la confusion. Comme on le verra plus loin, une grande partie des subventions sont en fait des contrats déguisés que la Commission se refuse à traiter comme tels, pour toute une série de raisons, dont la principale est le fait que la transparence est encore moins bien assurée pour les subventions, que pour les contrats.

2.1.9. Beaucoup de subventions, en effet, contribuent directement à la réalisation de tel ou tel objectif de l'Union européenne. Elles ne sont attribuées à des "bénéficiaires" qui sont en fait des contractants, que parce que, ce faisant, la Commission leur demande en contrepartie de contribuer à la réalisation de ces objectifs. Si l'on suivait la nomenclature partie A / partie B, elles devraient toutes êtres financées sur la partie B (crédits opérationnels), ce qui est loin d'être le cas. Ce devrait être aussi le cas de tous les subsides alloués à des organismes extérieurs auxquels une mission spécifique est assignée, comme par exemple l'Institut Européen de Florence. Inversement, les subventions qui ne contribuent pas, ou ne contribuent qu'indirectement à la réalisation d'un objectif déterminé de l'Union européenne, devraient toutes être classées en partie A (crédits de fonctionnement), ce qui n'est pas le cas. A titre d'exemple, on citera un crédit de 325.000 Euros destiné à financer la Fondation Yehudi Menuhin, classé en B3 - 2005, et un crédit de 100.000 Euros destiné à subventionner le Forum Européen pour les arts et le patrimoine, classé en A - 3021.

2.1.10. Cette confusion s'est encore aggravée depuis l'arrêt de la Cour de justice du 12 mai 1998[7] qui a condamné la Commission pour avoir exécuté des crédits sur des lignes ne disposant pas de bases légales (directive, règlement, décision). La Commission et plus encore le Parlement ont depuis lors cherché à "protéger" les subventions non régies par une base légale, en les inscrivant dans la partie A du budget. Etant donné qu'aucune base légale n'est considérée comme nécessaire pour justifier l'inscription des crédits en partie A, *destinés à assurer le fonctionnement des Institutions*, cette partie est devenue un refuge pour le financement de subventions sans base légale, quel que soit leur objet.

Mini-budgets et BAT

2.1.11. Il y a une dizaine d'années, la notion de crédits opérationnels (partie B) a favorisé la création de "mini-budgets", première tentative de la Commission pour répondre aux besoins en personnel, spécifiques et temporaires, découlant du lancement de nouvelles actions communautaires, en gestion directe.

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[7] CJCE 12.05.98 aff. 106/96 Royaume Uni de Grande-Bretagne et d'Irlande du Nord contre Commission des Communautés européennes, R. I-2729

2.1.12. Les mini-budgets étaient des dotations en crédits de fonctionnement, néanmoins inscrits en partie B, parce qu'étroitement liés à la réalisation d'une action, elle-même financée par des crédits opérationnels. En 1991, l'ensemble des mini-budgets était évalué à 153 millions d'Ecus A partir de 1993 et jusqu'en 1998, ces crédits ont été rapatriés dans la partie A. Il fut procédé à leur transformation en 1.830 emplois budgétaires nouveaux, s'étalant sur cinq ans. Ainsi, un nombre équivalent de recrutements fut effectué (temporaires, auxiliaires, agents locaux, prestataires de services), en utilisant des procédures de concours internes peu transparentes.

2.1.13. Parallèlement, au début de la présente décennie se sont développés les contrats passés avec ce qu'il a été convenu d'appeler des "bureaux d'assistance technique" (BAT) auxquels est consacrée la troisième partie du présent chapitre. En novembre 1998, ces contrats assuraient, semble-t-il, l'emploi de 800 personnes effectuant des tâches administratives, répartis en une centaine de BAT[8]. Loin d'être imputés à la partie A du budget, comme l'exigeait le Règlement Financier, ils furent financés par la partie B, la notion de "dépenses opérationnelles" permettant de les camoufler, alors que les plafonds imposés par les perspectives financières pluriannuelles ne permettaient pas de les mettre à la charge des dépenses de fonctionnement (partie A).

2.1.14. Pour tenter de normaliser ce désordre, est apparue ultérieurement une bizarre distinction entre les différentes activités confiées aux BAT, considérant que celles qui sont « au bénéfice de la Commission » devraient être financées en partie A, alors que celles « au bénéfice exclusif des Etats partenaires » pouvaient être financées en partie B, de même que celles se situant dans une sphère « d'intérêt mutuel » (destinées à remédier aux déficiences des Etats bénéficiaires tout en accroissant la charge de travail de la Commission). Ces acrobaties ont encore aggravé le désordre.

Une nouvelle structure budgétaire

2.1.15. Il est donc nécessaire de mettre en place une structure budgétaire propice à une gestion transparente et à un contrôle efficace. La distinction entre dépenses administratives et dépenses opérationnelles devrait être abandonnée. Elle pourrait être remplacée par une double nomenclature budgétaire, dont les rubriques se croiseraient de façon matricielle.

2.1.16. La première nomenclature, en colonnes, distinguerait les activités auxquelles se consacre chaque Direction Générale, de façon à en évaluer le coût et le rendement et à répartir de façon optimale les dépenses de personnel et les achats de biens ou services extérieurs, y compris les contrats d'assistance technique. Le coût réel de chaque action pourrait être connu, et rapproché des résultats obtenus. A l'avenir, cette présentation budgétaire devrait se faire par politique, le nombre de Directions Générales étant ajusté à celui des politiques.

2.1.17. La deuxième nomenclature, en lignes, présenterait par nature de dépenses, pour chacune des Directions Générales ou activités identifiées en colonnes, les autorisations accordées par l'autorité budgétaire. Ces dépenses de différentes natures seraient ventilées de telle sorte qu'apparaissent notamment les crédits de personnel, les achats de biens et services

[8] Les services de la Commission n'ont pas été en mesure de confirmer ces données avec exactitude.

courants, les achats de prestations de services complexes, et les subventions.

2.1.18. L'autorité budgétaire disposerait ainsi de toutes les informations nécessaires pour exercer son pouvoir de décision et de contrôle sur le coût global des politiques.

2.1.19. La gestion des programmes communautaires trouverait cohérence et transparence dans cette présentation budgétaire donnant pour chaque action à la fois son coût administratif et son coût opérationnel. La Commission serait ainsi incitée à mieux redéployer ses ressources humaines et administratives en fonction des programmes prioritaires. L'autorité budgétaire conserverait la garantie d'exercer son pouvoir de décision sur l'allocation des moyens destinés à telle ou telle action. La possibilité de réduire ou d'augmenter les postes administratifs resterait de sa responsabilité.

Les règles applicables aux contrats

2.1.20. Le Règlement Financier, sans fournir d'autre principe général que celui de non-discrimination entre les ressortissants des Etats membres en raison de leur nationalité (article 62) :

- ignore purement et simplement les actes relatifs à l'octroi de subventions[9] ;

- établit un ensemble de dispositions relatives à la passation des marchés : marchés de fournitures, de travaux et de services, d'achats et de location passés par les Communautés (titre IV), en distinguant de façon sommaire quelques grandes catégories (fournitures, travaux, services, locations …) dont aucune ne correspond aux marchés particulièrement sensibles qui ont donné lieu depuis quelques années à de grandes difficultés à savoir les prestations de services complexes, les contrats d'assistance technique, les contrats de maîtrise d'œuvre ;

- prévoit un certain nombre de dispositions spécifiques pour les contrats passés dans le domaine de la recherche (titre VII) et les contrats financés dans le domaine des aides extérieures (titre IX) .

2.1.21. Le Règlement Financier a été modifié à maintes reprises. Il ne répond toujours pas à l'énorme évolution des tâches de la Commission (cf. 2.0.9). Cependant, il a perdu beaucoup de sa cohérence. Il devrait aujourd'hui être complètement refondu, de manière à le concentrer sur les principes essentiels, et à renvoyer à des règlements propres à chaque institution pour les modalités d'application. L'obligation de passer par une décision unanime du Conseil, aussi mineure soit-elle, constitue pour la Commission un frein considérable à l'amélioration de sa gestion. Le recours abusif à la "soft legislation" en est l'une des conséquences.

[9] sinon pour prévoir que tout bénéficiaire de subvention doit accepter par écrit la vérification par la Cour des Comptes de l'utilisation des subventions octroyées (article 88)

Le droit commun

S'il en constitue le point de départ, le Règlement Financier est loin de déterminer à lui seul le régime de passation des marchés dans son ensemble. Il ne dispose directement que pour les marchés inférieurs au seuil d'applicabilité (article 56) des directives Marchés publics[10]. Aussi le Règlement 3418/93 portant modalités d'exécution[11] apporte-t-il les précisions indispensables à l'application des directives (titre XIX) aux procédures d'appel à la concurrence (titre XV), à la détermination des différents seuils dans le domaine des marchés (titre XVI), et aux conditions de fonctionnement des commissions consultatives des achats et des marchés (titre XVII), ainsi qu'en ce qui concerne la constitution de cautionnements préalables (titre XVIII).

2.1.22. Bien plus que le Règlement Financier et les modalités d'exécution, ce sont les directives Marchés Publics[12] qui constituent finalement le véritable corpus normatif en matière de passation des marchés. Elles sont en effet beaucoup plus détaillées, tant du point de vue du choix des procédures de passation, des règles de publicité, des règles de participation des candidats admis à soumissionner, des critères de sélection que des critères d'attribution du marché. Leur nature même de directives a supposé, pour qu'elles soient rendues applicables aux institutions, le biais de dispositions de renvoi qui ont pour vocation la coordination des dispositions de procédures nationales : articles 126 et suivants des modalités d'exécution.

2.1.23. Or, c'est à l'usage des Etats membres, plus qu'à celui des institutions propres de la Communauté, que celles-ci ont été conçues, dans le but d'assurer l'égalité de traitement entre candidats et le respect des règles de la concurrence. Les directives ne se sont pas souciées de prévoir toutes les dispositions techniques susceptibles d'assurer le bon emploi des deniers de la Communauté ce que, cependant, chaque Etat membre, pour son compte, n'a pas négligé de faire.

2.1.24. Indépendamment des directives Marchés et des modalités d'exécution du Règlement auxquelles celui-ci renvoie, les ordonnateurs sont appelés à tenir compte :

– de l'accord international sur les marchés publics de 1994[13], auquel la Communauté a souscrit dans le cadre de l'OMC ;

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10 Directive 92/50/CEE du 18 juin 1992, portant coordination des procédures de passation des marchés publics de service (JO L 209 du 24.7.1992, p.1), Directive 93/36/CEE du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199 du 9.8.1993, p. 1), Directive 93/37/CEE du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199 du 9.8.1993, p. 54)

11 Règlement de la Commission portant modalités d'exécution de certaines dispositions du Règlement Financier du 9 décembre 1993 (JO L 315 du 16 décembre 1993, p. 1)

12 Directive 92/50/CEE du 18 juin 1992, portant coordination des procédures de passation des marchés publics de service (JO L 209 du 24.7.1992, p.1), Directive 93/36/CEE du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199 du 9.8.1993, p. 1), Directive 93/37/CEE du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199 du 9.8.1993, p. 54)

13 Décision 94/800/CE du Conseil du 22 décembre 1994 (JO L 336 du 23.12.94, p. 1, 2, 10 et 273 à 289), entrée en vigueur le 1 janvier 1996 : Accord OMC du 15 avril 1994 sur les Marchés Publics (AMP), Uruguay Round

- de divers textes, qui sans avoir directement pour objet les marchés publics, prévoit des dispositions qui doivent être prises en compte lors de leur passation, ainsi par exemple, du "Code de bonne conduite" d'octobre 1994 "dispositions d'ensemble régissant les relations entre les services de la Commission et certaines catégories de personnel" ;

- de la jurisprudence de la Cour ;

- de la pratique de la CCAM, reprise dans son "vade-mecum" ainsi que, le cas échéant de celle du contrôle financier ;

- des dispositions spécifiques éventuellement fixées dans le cadre d'un programme donné.

2.1.25. Cette prolifération est à l'évidence excessive, les ordonnateurs étant requis de connaître le détail des textes, leur évolution, leur articulation, et la pratique suivie par les autres services.

2.1.26. Il n'est donc pas étonnant qu'au niveau de l'application, se posent des problèmes de cohérence. Ainsi en est-il de la procédure d'évaluation des offres : certaines DG évaluent en priorité les aspects techniques d'une soumission, et "n'ouvrent l'enveloppe" relatives aux éléments financiers qu'une fois les premiers évalués. La majorité des DG procède à l'évaluation des uns et des autres simultanément. Ainsi en est-il encore de la méthode de sélection : critère du moins disant, critère de l'offre économiquement la plus avantageuse, différentes conceptions sont acceptables, pour autant que le candidat sache à l'avance sur quoi il sera jugé, ce qui n'est pas toujours le cas. A vrai dire, le meilleur des actes réglementaires ne peut tout régler d'avance : à ce niveau de détail, pourtant essentiel, c'est au coup par coup que les observations de la CCAM auraient dû contribuer à définir progressivement une doctrine commune à tous les services de la Commission.

2.1.27. Dans l'ensemble des textes, actuellement très disparates, le Comité a relevé une lacune qui concerne l'évaluation des offres, point tout à fait crucial. Aucune disposition à cet égard n'est prévue par les modalités d'exécution du Règlement Financier[14]. La CCAM, dans ses avis, exprime simplement le vœu qu'au moins un membre du comité d'évaluation soit extérieur au service ordonnateur. Cette disposition imprécise et non contraignante n'est pas suffisante.

Les contrats de recherche

2.1.28. Les contributions financières versées dans le domaine de la recherche constituent des contrats, régis par un dispositif législatif autonome et clair (programme-cadre de recherche, annexe IV). Le programme-cadre est mis en œuvre par le biais de trois types de modalités : en premier lieu, les contributions financières, donnent lieu à la publication "d'appels à propositions", qui font l'objet d'une évaluation par un panel d'experts, avant la négociation contractuelle. Les achats de fournitures et de services courants sont soumis au régime de droit commun, sous réserve de seuils différents. Enfin, une procédure spécifique d'appel à candidatures s'applique au recrutement d'experts indépendants en vue de l'évaluation des projets.

[14] Alors que des dispositions assez précises sont prévues en ce qui concerne les modalités *d'ouverture* des offres : article 104 des modalités d'exécution du Règlement Financier

Les contrats au titre de la coopération avec les pays tiers

2.1.29. Sont conclus au titre de la coopération avec les pays tiers de la Communauté - passés par la Communauté, ou par une autorité publique de l'état bénéficiaire de l'aide, mais financés par la Communauté - quelque 10.000 contrats par an, dont environ 2.000 font l'objet de la publication d'un appel d'offres.

2.1.30. Le Règlement Financier prévoit, en son titre IX, un ensemble de "dispositions particulières applicables aux aides extérieures", couvrant (articles 112 à 119) la passation des marchés. La situation est cependant encore plus complexe, car certains des programmes communautaires concernés prévoient eux-mêmes des règles spécifiques - applicables dans le seul cadre du programme en cause -, elles-mêmes relayées le cas échéant par des dispositions prévues dans le cadre des conventions de financement négociées avec les Etats ou les entités publiques bénéficiaires de l'aide.

2.1.31. Ces aides, qui pour la plupart donnent lieu à des marchés passés pour des bénéficiaires extérieurs, mais sous contrôle de la Commission, constituent néanmoins des dépenses communautaires, pour l'exécution desquelles la Commission est soumise à une double responsabilité. D'une part elle doit pouvoir justifier devant les autorités de l'Union de la bonne gestion financière et de l'efficacité de ces dépenses. D'autre part, en son nom propre ou comme mandataire, dans son rôle de mise en œuvre des marchés découlant des aides accordées, elle ne saurait se départir du respect des principes de base que l'Union affiche dans le domaine des marchés publics, notamment pour les directives adoptées dans ce domaine.

2.1.32. Le fait qu'il existe, pour les contrats externes, autant de régimes particuliers que de bases légales en fonction desquelles chaque activité extérieure (F.E.D., divers accords de coopération, PHARE, TACIS, MEDA, etc.) est lancée, doit être souligné. Quel que soit le caractère particulier de telle ou telle activité par rapport aux activités de gestion directe qu'assure la Commission à l'intérieur du territoire de l'Union, une telle diversité, pour ne pas dire un tel désordre, ne se justifie pas. La Commission en a pris conscience récemment et a confié à la nouvelle structure de gestion de la coopération avec les pays tiers (Service Commun Relex) la tâche de dresser l'inventaire de ces particularismes et de proposer une codification des règles de procédure applicables à tous les marchés de services, fournitures et travaux conclus par la Commission dans le cadre de ses activités dans les pays tiers, ainsi que des contrats conclus par les Etats bénéficiaires eux-mêmes dans le cadre des accords de coopération.

2.1.33. Le travail de codification se heurte néanmoins au caractère limité des pouvoirs réglementaires autonomes de la Commission. L'acte de base lui-même, dans certains programmes, étant allé jusqu'à réglementer les procédures applicables aux contrats, le « manuel codifié[15] » que propose la Commission ne peut prétendre s'y substituer qu'à condition de prendre lui-même la forme d'un acte législatif, jusque dans ses moindres détails : on aboutit à une sorte de mise sous tutelle du pouvoir de gestion de la Commission qui va à l'encontre du renforcement de sa responsabilité. Il vaudrait mieux partir d'une réflexion institutionnelle sur les contours des pouvoirs de gestion des uns et des autres, pour que la

[15] Service Commun Relex – Règles des procédures (version finale – 25.05.99)

Commission soit apte à disposer d'un pouvoir de réglementation en la matière.

2.1.34. Entre-temps et en attendant un règlement du Conseil, afin d'assurer cohérence et transparence à l'action communautaire, la Commission pourrait, s'imposer à elle-même, les disposition du manuel précité. En outre, chaque fois que cela serait possible, ces dispositions seraient rendues contractuelles avec les soumissionnaires concernés. Mais cette manière de procéder ne dispenserait nullement les institutions de la réflexion évoquée plus haut.

Le cas des subventions

2.1.35. En 1998, plus de 7.000 opérations d'engagement ont concerné des subventions. Néanmoins, la réglementation concernant celles-ci est faible. Les textes contraignants sont seulement des dispositions à portée générale, telles que l'article 2, 24 ou 87 du Règlement Financier et les modalités d'exécution (règlement 3418/93) de la Commission du 9 novembre 1993. Les dispositions spécifiques aux subventions n'ont aucun caractère contraignant. De plus, elles sont éparses. On les retrouve, non seulement dans le vade-mecum sur les subventions publié en 1988, mais encore dans le manuel des procédures budgétaires ou dans l'annexe 17/2 du vade-mecum de la CCAM.

2.1.36. Le vade-mecum sur les subventions, publié en novembre 1998, n'a repris qu'une partie des recommandations du rapport présenté par l'IGS en 1997[16]. Encore ne l'a-t-il fait qu'en termes parfois vagues ou succincts. En tout état de cause, il n'a aucune force juridique contraignante. Les Directions Générales V - VI - VIII - X et XIII, ainsi que le Secrétariat Général, lui donnent une interprétation restrictive, au prétexte qu'elles ont leurs propres vade-mecum.

2.1.37. Le fait que le vade-mecum contienne deux types de dispositions, les unes prétendant être impératives et les autres facultatives, conduit trop souvent à un vocabulaire équivoque qui suscite le recours aux exceptions : *«devrait de préférence»*, «*doit avoir»*, «*les services devraient veiller à», «il est conseillé de demander», «n'est pas exclu a priori», « il peut être utile », « il peut lui être demandé de fournir », « la règle normale est que »*, etc.… Il faut cependant s'interroger sur les moyens dont disposait la Commission : soit elle choisissait la voie autoritaire de la réglementation contraignante en introduisant une modification du Règlement Financier requérant l'unanimité des Etats membres (procédure lourde et longue), soit elle choisissait la voie persuasive de la « soft legislation » sous la forme d'un texte standard et commun, à vocation pédagogique à la fois vis-à-vis des services ordonnateurs et vis-à-vis de l'extérieur, mettant de ce fait en valeur même l'aspect contractuel de l'octroi (le vade-mecum est d'ailleurs destiné "aux demandeurs et bénéficiaires"). Les principales faiblesses de ce texte concernent les risques de cumul en faveur d'un même bénéficiaire (non obligation pour les DG ordonnatrices de consulter le fichier tiers de SINCOM avant la sélection de leurs projets afin de vérifier la présence d'engagements/paiements existants en faveur du bénéficiaire potentiel) ; la non obligation de fixer à l'avance et par écrit des règles d'évaluation ex ante afin de limiter la marge discrétionnaire de l'ordonnateur, et l'insuffisance de rigueur dans la composition des comités d'évaluation.

[16] Rapport de l'IGS : Inspection sur "l'attribution des subventions par les services de la Commission", IGS, 16 mai 1997

2.1.38. Mais la plus grave lacune du dispositif actuel concerne l'absence de définition de la notion de subvention. De ce fait, les ordonnateurs jouissent d'une liberté excessive pour choisir, selon leurs souhaits, soit la procédure d'attribution des contrats, soit celle des subventions. A cet égard, le vade-mecum sur les subventions ne fournit aucune indication précise. Le vade-mecum de la CCAM s'efforce, quant à lui, d'orienter le choix de la procédure à suivre à partir de critères trop complexes : objet du contrat, existence ou non d'une contrepartie facilement identifiable, détenteur de l'initiative et de la maîtrise de l'action, propriétaire du résultat final de l'action, importance de la participation financière, et modalités de choix du contractant. Enfin, le manuel des procédures internes propose une définition principalement fondée sur le critère de la propriété. Lorsque la Commission acquiert la propriété d'un bien ou d'un service, il s'agit d'un contrat. Lorsque ce n'est pas le cas, même si l'intérêt de la Communauté est en jeu, il s'agit d'une subvention. Cette définition, apparemment logique, est en fait beaucoup trop réductrice.

2.1.39. En effet, la notion de contrepartie qui, dans la grande majorité des cas, constitue l'essence même de celle de contrat, se retrouve dans la plupart des subventions, dont elle justifie l'octroi. Elle est même souvent, explicitement formalisée dans l'acte juridique (convention) qui lie la Commission au bénéficiaire. L'engagement et la participation active du bénéficiaire sont indispensables, pour mettre en œuvre les objectifs fixés, en utilisant les moyens fournis. Une relation contractuelle existe, même lorsqu'elle n'est pas complètement formalisée. Dès lors, en principe, il convient de traiter les subventions comme des contrats.

2.1.40. Dans le cas où il n'existe pas d'élément de réciprocité - et dans ce cas seulement - il s'agit d'une subvention. Doivent donc, par exemple, être considérées comme telles, les contributions financières visant à apporter un soutien matériel ou moral. Dans ce cas, en effet, aucune contrepartie n'est immédiatement et directement attendue du bénéficiaire du financement communautaire.

2.1.41. Des situations surviendront, pour lesquelles l'hésitation quant au classement contrats/subventions sera permise. Ce sera à l'ordonnateur de décider (cf. 2.2.60 et suivants) à quel système de gestion la dépense en cause doit être soumise. Pour cela, il sera guidé par les décisions de l'autorité budgétaire s'exprimant dans le cadre d'une nomenclature (cf. 2.1.15) prévoyant séparément, dans les moyens alloués à une DG donnée, les crédits autorisés pour attribuer des subventions et ceux consacrés au financement des contrats.

2.2. La gestion

2.2.1. Les conventions de subvention et les contrats de prestations de services complexes (consultance, études, assistance technique, maîtrise d'œuvre), constituent des actes juridiques créateurs d'obligations financières à travers lesquels sont mises en œuvre les politiques communautaires. Leur responsabilité incombe aux ordonnateurs. Contrats et subventions sont parfois accordés de manière trop récurrente à des organismes gravitant autour de la Commission qu'ils contribuent à faire vivre artificiellement.

2.2.2. Pour identifier les causes et les mécanismes de cette situation, les observations qui suivent s'attachent à décrire la vie d'un contrat en présentant tout d'abord deux exemples

concrets avant d'analyser le processus d'attribution des marchés et subventions.

La vie d'un contrat : exemples concrets

2.2.3. Lorsque l'autorité budgétaire inscrit dans le budget de la Commission les crédits nécessaires à la réalisation d'un projet communautaire, l'ordonnateur et les services gestionnaires engagent les procédures qui aboutiront à la conclusion d'un marché ou à l'attribution d'une subvention en contrepartie desquels l'institution bénéficiera de la prestation attendue.

Les principales étapes sont les suivantes :

- la décision de contracter
- le choix de la procédure : l'appel à la concurrence et/ou la négociation
- le choix du contractant
- le financement et le suivi des contrats

A chacune de ces étapes correspondent des risques d'irrégularités voire de fraude que le Comité a constatés en examinant un nombre limité de dossiers dont il ne prétend pas qu'ils constituent un échantillon vraiment représentatif mais dont il pense cependant tirer un certain nombre de conclusions et de mises en garde.

Un contrat de prestations de services complexes traité sur mesure

2.2.4. Un contrat portant sur des actions de publicité dans le domaine agricole a été passé par la Commission, il y a une dizaine d'années, pour un montant quelque peu supérieur à 4 millions d'Ecus. Formellement, la décision a été prise au plus haut niveau, celui de la Commission réunie en collège, et accompagnée de toutes les garanties imaginables : appel d'offres, nombre élevé de candidats, avis favorable de la CCAM, du service juridique, du contrôleur financier, proposition présentée par le Commissaire compétent sous forme d'un dossier épais de plusieurs centimètres. La décision, au niveau du collège, ne pouvait être que positive, ce qui est advenu.

2.2.5. Et pourtant, toute cette procédure formellement régulière était en fait biaisée, ce que l'absence de contrepartie effective de la part de son partenaire a conduit progressivement la Commission a constater.

2.2.6. En premier lieu, les termes de l'appel d'offres publié au Journal officiel (JO) étaient extrêmement vagues. L'objet du contrat, c'est à dire les prestations à fournir en échange de la somme d'argent versée par la Communauté, était mal défini. Plus grave encore, les critères d'évaluation auxquels devaient être confrontées les différentes offres n'étaient pas fournis dans l'appel d'offres. Il est permis de penser qu'ils ont été établis seulement après la réception des offres. Ils ont été pondérés de telle sorte qu'ils donnaient un avantage déterminant à un seul des concurrents, ce que rien ne laissait prévoir dans les termes de l'appel d'offres publié. Le Comité a interrogé les fonctionnaires concernés à l'époque, qui ont confirmé qu'il n'y avait pas eu de comité d'évaluation à proprement parler. Il n'en existe pas de

procès-verbaux.

2.2.7. La CCAM a été requise d'examiner le projet par la procédure écrite, l'urgence ayant été invoquée. Il n'existe au dossier aucune trace d'une motivation de cet état d'urgence. La CCAM a donc rendu par écrit un avis favorable, sans commentaire. Il en a été de même du service juridique. La Commission a pris une décision positive, dans les circonstances rappelées plus haut, sans délibération, le dossier étant inscrit en point A.

2.2.8. Le contrat lui-même comportait des anomalies graves. En premier lieu, 40 % de son montant total était à verser immédiatement après la signature alors que la garantie fournie par la firme était minime. En second lieu, comme on l'a déjà dit, l'objet du contrat était mal défini. Aucun engagement financier contraignant n'était souscrit par le contractant. En troisième lieu, rien ne permettait de contrôler les sous-traitances. Cela a permis au contractant de céder, dans les plus brefs délais, 90 % du montant du marché à une société immatriculée dans un État membre, mais située loin du siège bruxellois des institutions de la Communauté, ce qui contredisait le critère très fortement pondéré qui avait abouti à donner les préférences à ce contractant par rapport à ses concurrents. Qui plus est, cette société sous-traitante a disparu après quelques temps. Un audit effectué par la Commission, dont les conclusions étaient très négatives, a finalement abouti à limiter à environ 75 % du montant initialement prévu la somme effectivement versée au contractant. Il était précisé qu'un comité d'orientation composé d'experts nommés par la Commission surveillerait la mise en œuvre des actions prévues au contrat. Le Comité n'a pu recueillir aucune trace, ni de la nomination des membres de ce comité ni d'aucune de leurs réunions.

Un contrat d'assistance technique pour la réalisation de projets-pilotes

2.2.9. Le dossier dont il vient d'être question est ancien. Les directives Marchés publics n'étaient pas encore publiées. Bien que maintenant elles soient applicables, les progrès réalisés dans la pratique ne sont pas évidents. L'histoire d'un contrat d'assistance technique passé récemment, pour la réalisation de projets pilotes, en témoigne.

2.2.10. L'ordonnateur a lancé un appel d'offres, publié au JOCE. Sept offres ont été enregistrées, toutes recevables, dont cinq remplissaient les critères de sélection publiés dans l'appel d'offres. Les prix proposés par les concurrents se situaient, grosso-modo, entre 1,1 et 2,0 millions d'Ecu. L'offre la plus basse a été cotée en deuxième position par l'ordonnateur pour ce qui est de la qualité des prestations, immédiatement après l'une des offres les plus chères, coûtant 700.000 Ecu de plus, classée n° 1. Cette offre classée n° 1 pour la qualité émanait d'une ASBL dont faisait partie, en position dominante, une autre ASBL bénéficiant déjà d'un contrat avec la Commission et se trouvant à l'époque en cours de liquidation, après des litiges avec celle-ci.

2.2.11. Au lieu d'attribuer le marché à l'offre la moins chère, l'ordonnateur a souhaité déclarer l'appel d'offres infructueux se fondant pour cela sur l'article 11 de la directive Marchés publics et a consulté dans ce but la CCAM, arguant de ce que la configuration des offres ne lui permettait pas d'établir un rapport qualité/prix. La CCAM a rendu un avis favorable. L'ordonnateur s'est alors adressé aux cinq soumissionnaires en leur demandant de lui faire parvenir une offre de prix modifiée, tous les autres éléments de l'appel d'offres

restant inchangés. Les nouvelles offres de prix ont abouti à ce que le soumissionnaire précédemment le moins cher augmente son offre de 400.000 Ecu et à ce que le soumissionnaire, derrière lequel se trouvait l'ASBL ayant déjà travaillé avec la Commission, baisse la sienne de 80.000 Ecu. L'écart entre les deux offres n'était plus que de 200.000 Ecu environ.

2.2.12. L'ordonnateur a alors adressé à la CCAM un projet de contrat portant sur l'offre dont il avait, dès le début, coté les prestations au plus haut. La CCAM suspectant un conflit d'intérêts possible du fait de la composition du conseil d'administration du contractant (cf. 2.2.10), l'ordonnateur a répondu par écrit en fournissant des informations rassurantes mais erronées, notamment sur les relations contractuelles de l'ASBL en question avec la Commission et sur la possibilité de conflits d'intérêts. Les réponses étaient reprises telles quelles d'un document rédigé la veille par le président de l'ASBL soumissionnaire, également président de l'ASBL déjà contractante.

2.2.13. Un montant représentant la moitié du contrat a été versé immédiatement après sa signature, alors que la garantie déposée par le contractant ne correspondait qu'à 1,25 % de celui-ci. Quelques mois plus tard, le groupement contractant sous-traitait des prestations de services à l'un de ses membres. Moins d'un an après, son président était obligé de démissionner en raison des difficultés de l'ASBL précitée (cf. 2.2.11), dont il était également président.

2.2.14. Deux mois avant l'échéance du contrat, le contrôle financier a émis un rapport très critique sur son exécution portant notamment sur l'exécution partielle du contrat, les sous-traitances accordées aux membres du groupement sources de conflits d'intérêt, les procédures de gestion et de contrôle insuffisantes, les opérations comptables peu transparentes, les frais de voyage et de séjour acceptés sans vérification, etc.….concluant que le contrat ne devrait pas être renouvelé.

Le renouvellement a cependant été décidé, pour un an, en 1998.

2.2.15. A la lumière des constatations faites lors de l'élaboration de son premier rapport ainsi que des dossiers examinés ultérieurement et notamment des deux exemples qui précèdent, le Comité croit devoir appeler l'attention sur la nécessité de revoir complètement le système de passation des contrats et d'attribution des subventions. Dans un souci de transparence accrue, cette révision profonde concerne tout particulièrement les stades suivants :

- le processus de passation des contrats et d'attribution des subventions
- la hiérarchie des ordonnateurs et ses relations avec les fonctionnaires chargés de négocier les contrats
- les relations avec les groupes d'intérêt
- les outils de gestion
- le conseil aux ordonnateurs: cellule centrale des contrats et CCAM.

Ces différents points vont être examinés successivement.

Processus de passation des contrats et d'attribution des subventions

2.2.16. La procédure à suivre dépend de la qualification de la dépense comme marché ou comme subvention. Cette qualification est importante car dans le premier cas, la procédure sera régie par les règles des marchés publics alors que l'attribution des subventions dépend de dispositions plus souples lorsque leur octroi est réglementé par les textes qui les autorisent ou même échappe à toute règle, lorsqu'il ne l'est pas.

2.2.17. Comme exposé au paragraphe 2.1.40, la plus grande partie des dépenses qui sont actuellement considérées comme des subventions devraient à l'avenir être considérées comme des contrats. En effet non seulement elles comportent un élément "donnant/donnant" qui détermine leur nature contractuelle, mais surtout elles seraient ainsi soumises à des procédures plus transparentes.

La nomenclature budgétaire (cf. 2.1.15 et suivants.) devrait être utilisée de telle sorte que des crédits afférents à des contrats ne puissent pas être dépensés pour des subventions et vice-versa.

2.2.18. S'agissant des seuls contrats, le premier stade à franchir est celui de la définition et de la justification du besoin à satisfaire. C'est un stade qu'en matière d'assistance technique notamment, les services de la Commission ont tendance à oublier. La qualité des appels d'offres et la clarté de la définition de l'objet du contrat s'en ressentent nécessairement. Cependant, certains secteurs de la Commission ont compris qu'un besoin s'inscrivait le plus souvent dans une programmation. C'est une tendance qu'il faut encourager. Un contrat de prestations de services complexes devrait toujours s'inscrire dans une programmation. Celle-ci constitue le cadre « politique » qui doit faire l'objet d'une décision au niveau du commissaire responsable. Le programme exprime le besoin et inscrit la satisfaction de celui-ci dans le temps. Programmer est un métier. Contracter en est un autre. Mais il ne devrait pas être possible de susciter des contrats qui ne puissent s'inscrire dans une programmation.

2.2.19. De plus, la Commission doit veiller à ne pas multiplier les petits contrats d'assistance technique, d'études, de consultants, etc., même s'ils s'insèrent dans un programme. Trop de contrats, souvent bien inférieurs à 1 million d'Euros, pèsent lourdement sur le temps des fonctionnaires. Il serait intéressant d'examiner si ce phénomène n'est pas l'une des causes de l'insuffisance en personnel de la Commission. En outre, l'ordonnateur qui pense ne pas prendre de risques vu l'insignifiance de la somme en jeu, les signe, trop souvent sans leur accorder une attention suffisante. Ou bien, hypothèse encore moins favorable, il signe en sachant qu'il attribue à une personne ou à une firme un avantage indu, mais qui passera inaperçu.

2.2.20. Le Comité pense que la Commission devrait fixer des seuils en dessous desquels les petits contrats seraient autant que possible à écarter sauf s'ils étaient honorés dans le cadre d'un programme. Autrement, le besoin d'assistance technique devrait être satisfait par le recrutement d'agents auxiliaires en vertu du régime applicable aux autres agents (cf. chapitre 6).

Attribution d'un marché – Choix de la procédure

2.2.21. Lorsque les règles des contrats s'appliquent et lorsque le besoin est reconnu, l'ordonnateur décide de la procédure à suivre pour la passation du marché. La mise en

concurrence ouverte ou restreinte constitue la règle, l'entente directe et la procédure négociée sont les exceptions autorisées limitativement par les règles applicables.

2.2.22. Le marché sans mise en concurrence est possible 1) lorsque le montant est inférieur à 12.000 euro, 2) en raison d'une urgence impérieuse, 3) lorsque l'appel d'offres est infructueux ou a abouti à des prix inacceptables, 4) lorsqu'en raison de nécessités techniques ou de situations de fait ou de droit, l'exécution de la prestation ne peut être assurée que par un fournisseur ou un entrepreneur ou 5) pour les marchés qui techniquement ne peuvent être séparés du marché principal.

2.2.23. L'appel à la concurrence est en principe préférable, mais seulement lorsque les conditions concrètes nécessaires sont réunies et lorsque une transparence absolue est respectée. Les ordonnateurs ont tendance à recourrir dans tous les cas à l'appel d'offres qui est la procédure préconisée par toutes les instances de contrôle interne. Ils pensent ainsi se prémunir d'avance contre les critiques. Cette attitude est regrettable car chaque type de procédure a son domaine d'élection, en dehors duquel les risques de fraude sont élevés. Rien n'est pire que le faux appel d'offres (cf. 2.2.4 et suivants), si ce n'est la fausse négociation (cf. 2.2.9 et suivants). Dans l'hypothèse d'une négociation, il est important que l'administration dispose de moyens d'analyse suffisants (cf. 2.2.33) et de la volonté de les utiliser.

2.2.24. La rédaction d'un appel d'offres demande un effort de conception et de rédaction: l'ordonnateur doit expliciter ses besoins et définir avec précision et exhaustivité l'objet du marché comme les critères de sélection et d'attribution qui, par la suite, ne pourront être modifiés. Le texte de mise en concurrence est l'instrument d'information des entreprises, l'outil de la sélection entre les candidats et le premier élément du contrat que les soumissionnaires en remettant leur offre s'engagent à exécuter. Le Comité a constaté que les services de la Commission éprouvaient des difficultés à rédiger des appels d'offres suffisamment élaborés en ce qui concerne l'objet du contrat.

2.2.25. Dans certains dossiers d'appel d'offres, il apparaît qu'un bénéficiaire est souhaité voire préchoisi et que la mise en concurrence a été organisée sans avoir la volonté d'en accepter les résultats. La procédure en est biaisée. Ce biais intervient, pour autant qu'on puisse le constater à partir des cas examinés, à deux moments, pas nécessairement de manière cumulative: rédaction de l'appel d'offres et décision sur les conclusions à tirer de l'évaluation des offres (cf. infra).

2.2.26. Si l'intérêt de la Commission est en jeu ou si la situation monopolistique ou quasi monopolistique du marché rend la mise en concurrence illusoire, l'ordonnateur doit ne pas hésiter à le reconnaître formellement (cf. 2.2.23) et conclure le marché après négociation avec la firme comme le permettent l'article 59 du Règlement Financier et l'article 11 de la directive sur les marchés publics. En fait, dans des situations monopolistiques, la mise en concurrence suscite des ententes entre firmes et aboutit à des prix plus élevés que ceux qui pourraient être obtenus au terme d'une négociation.

2.2.27. Il est indispensable que les instances chargées de conseiller les ordonnateurs puissent leur fournir une expertise en matière de négociation. En effet, face aux monopoles et quasi-monopoles, la puissance publique, qu'il s'agisse d'un État ou de la Commission, est relativement désarmée. La durée cependant lui appartient. Elle doit jouer de cet atout et

pratiquer la méthode qui consiste à demander au candidat contractant un devis présenté suivant ses propres rubriques comptables certifiées par un expert comptable agréé par les deux parties. Les négociations se font sur base du devis et le contrat comporte une clause de vérification qui permet de s'assurer, à son terme, qu'il n'y a pas eu tromperie. L'efficacité de la méthode suppose que le contractant ait conscience de jouer sa réputation ainsi que la possibilité d'obtenir de nouveaux contrats de la part de la puissance publique.

Information préalable

2.2.28. Les règles de publicité sont précises, détaillées et contraignantes tant sur les informations à communiquer que sur les délais à respecter pour le dépôt des candidatures ou la remise des offres. Les ordonnateurs les suivent scrupuleusement à l'exception, jusqu'en 1998, de l'obligation de préinformation pourtant obligatoire lorsque le montant des marchés de services envisagés pour les 12 mois à venir est égal ou supérieur à 750.000 Euros. Cette disposition, destinée à favoriser l'accès des petites et moyennes entreprises aux marchés publics et à améliorer la transparence de la politique contractuelle exige une programmation des marchés que les ordonnateurs ont quelques difficultés à mettre en œuvre. Jusqu'en 1998, son non-respect n'a pas été sanctionné.

Ouverture des offres

2.2.29. Les offres sont ouvertes par un comité d'ouverture qui examine si les soumissions respectent les modalités formelles prévues dans l'appel d'offres. Toutes les offres sont ouvertes et l'ouverture est consignée dans un procès verbal. Cette phase, bien rodée, n'appelle pas de critiques de la part du Comité.

Examen des candidatures

2.2.30. Les soumissionnaires sont tenus de produire des déclarations et des justificatifs de leur capacité juridique, économique et financière.

2.2.31. Actuellement, la première opération dans l'examen des offres consiste à vérifier si le soumissionnaire ne doit pas être exclu de la mise en concurrence parce qu'il est en faillite, liquidation, règlement judiciaire, ou parce qu'il a été condamné pour faute professionnelle grave ou pour délit affectant sa moralité professionnelle, qu'il est en situation régulière pour le paiement de ses impôts et taxes, qu'il est inscrit sur les registres professionnels, etc. La seconde opération consiste à vérifier sa capacité économique et financière par examen des déclarations bancaires, des bilans et des références qu'il est tenu de produire. Le Comité recommande que ces précautions soient prises avec la plus grande rigueur.

2.2.32. Mais la connaissance de ces éléments ne suffit pas à l'ordonnateur pour s'assurer de la capacité effective du soumissionnaire car ils ne donnent pas d'informations suffisantes sur son identité réelle. Certes, la Commission dispose du système d'alerte précoce (cf. 2.2.73). Il conviendrait également qu'elle s'assure de l'identité réelle de ses éventuels partenaires en

demandant la composition de leur conseil d'administration ainsi que des informations sur les détenteurs de leur capital. De plus, elle devrait disposer d'un fichier des contractants (cf. infra 2.2.69 et suivants).

Comparaison des offres

2.2.33. Les offres sont comparées sur base des critères d'attribution annoncés dans l'appel d'offres. Il est interdit d'en ajouter de nouveaux, d'en modifier ou d'en retrancher. Chaque offre doit être analysée de manière non discriminatoire par un comité d'évaluation dont les modalités de constitution ne sont pas définies par un texte contraignant. Des dérives se sont produites au stade de l'évaluation et des conclusions à en tirer. Les critères prévus sont appliqués pour établir un ordre de mérite généralement chiffré mais, soit ils sont trop flous et autorisent une discrimination en faveur du bénéficiaire souhaité, soit les résultats de l'évaluation ne sont pas en cohérence avec les résultats obtenus par critères.

2.2.34. Déclarer l'appel d'offres infructueux peut être nécessaire si l'analyse des offres a montré que la concurrence n'a pas joué ou seulement de façon imparfaite. Dans cette situation, il n'est pas souhaitable d'accepter sans discussion le prix proposé par la firme la mieux placée. Il faut essayer de la négocier, soit avec cette seule firme s'il se révèle qu'elle est en position de monopole, soit avec toutes les firmes qui se sont manifestées dans le cadre de l'appel d'offres. Pour cela, il ne faut pas hésiter à déclarer l'appel d'offres infructueux afin d'ouvrir la procédure négociée (article 59 du Règlement Financier). Mais, comme on l'a vu plus haut (cf. 2.2.27), cette démarche n'est productive que si la Commission dispose des outils d'analyse nécessaires de façon à fournir au service négociateur l'expertise dont il a besoin.

2.2.35. Cette procédure peut être utilisée de manière contraire aux intérêts financiers de la Commission - que l'intention soit ou non frauduleuse - lorsqu'avant même le début de la procédure d'appel d'offres, l'ordonnateur entend conclure un contrat avec un partenaire déterminé (cf. 2.2.9 et suivants, supra). En effet, si la firme souhaitée a remis une offre trop chère, la procédure négociée, dans l'hypothèse d'une telle collusion, autorise à lui donner une seconde chance, ce qui ouvre des possibilités de fraude. En effet, cette firme est ainsi mise en situation de présenter une offre financièrement plus acceptable alors qu'elle est déjà qualitativement la meilleure et, le cas échéant, informée des niveaux des offres concurrentes.

Conclusion du contrat et information des soumissionnaires

2.2.36. Le service gestionnaire conclut le contrat avec l'adjudicataire et informe du rejet de leurs offres les autres soumissionnaires. Lorsque le marché tombe sous le coup des directives Marchés publics, les résultats de la procédure font l'objet d'un avis d'attribution du marché publié au plus tard 48 jours après sa passation. Cet avis fait état de la procédure de passation retenue en cas de procédure négociée sans publication préalable d'un avis de marché, la justification du recours à cette procédure, la date d'attribution du marché, les critères d'attribution, le nombre d'offres reçues, le nom et l'adresse de l'adjudicataire, le prix payé ou la fourchette de prix avec indication du minimum et du maximum et la valeur et la part du contrat susceptibles d'être, le cas échéant, sous-traitées à des tiers.

En outre, l’ordonnateur est tenu de communiquer, dans un délai de quinze jours à compter de la réception de sa demande, à tout candidat ou soumissionnaire écarté, les motifs du rejet de sa candidature ou de son offre et le nom de l’adjudicataire. Si l’ordonnateur renonce à passer un marché pour lequel il y a eu mise en concurrence ou s’il recommence la procédure, il est également tenu de communiquer les motifs de sa décision au soumissionnaire qui souhaite les connaître.

Pour les marchés n’atteignant pas le seuil d’application des directives, les soumissionnaires sont informés que leur offre n’a pas été retenue. S’ils demandent des informations complémentaires, elles leur sont communiquées par écrit.

2.2.37. Il est indispensable que toute entreprise reçoive une explication claire et complète des raisons du rejet de son offre, ce qui en pratique est loin d’être toujours le cas. Pourtant, si le rejet est justifié, l'ordonnateur ne devrait pas rencontrer de difficultés pour en communiquer les raisons. Il faudrait que le soumissionnaire soit informé de ses propres scores et de ceux de l'adjudicataire pour chacun des critères de sélection annoncés. Une explication "pédagogique" devrait être considérée comme une obligation car l’intérêt de la Commission n'est pas de décourager les soumissionnaires mais de leur faire prendre la mesure de leurs faiblesses pour, à terme, obtenir un plus grand nombre d'offres dignes d'intérêt.

2.2.38. En vertu de l’obligation de transparence, les dossiers de la procédure doivent être mis à la disposition des candidats qui en font la demande, y compris les dossiers d’appel d’offres remis par les concurrents, sous réserve de la protection légitime du secret des affaires.

Exécution et suivi du contrat

2.2.39. La Commission verse, généralement dès la conclusion du contrat, un pourcentage important de son montant, qui est assimilable à un véritable préfinancement. Les deux exemples présentés aux paragraphes 2.2.4. et suivants montrent combien cette pratique peut être dangereuse. La garantie versée par le contractant devient illusoire et la résiliation du contrat pratiquement impossible : on imagine mal un ordonnateur se lancer dans une telle procédure alors qu’au départ, sans contrepartie, 40 ou 50 % du marché en cause sont déjà payés. Tout appel d’offres, et d’une manière générale tout contrat devrait donc prévoir dans l’appel d’offres lui-même, un plan réaliste de versement des acomptes qui serait lié aux prestations effectives, pour garantir l’égalité des soumissionnaires devant la concurrence. Un soumissionnaire qui dépend totalement de la Commission pour exécuter son contrat et qui ne garantit de surcroît que 1,25 % du montant du marché constitue un risque réel pour l'utilisation des deniers publics si l’institution doit se retourner contre lui.

2.2.40. Un contrôle effectif est un impératif pour garantir la bonne exécution d’un contrat ou d’une convention de subvention et pour, éventuellement, y mettre fin par anticipation en prenant à temps les dispositions nécessaires pour assurer la continuité du service. Or, le suivi et le contrôle des contrats ou subventions par la Commission sont insuffisants. L’absence de contrôle par les ordonnateurs est facteur direct d'inexécution et de mauvaise exécution, notamment dans le cas des BAT: diminution des obligations du contractant sans contrepartie pour l'institution, conclusion de contrats de sous-traitance sans autorisation avec les membres du groupement soumissionnaire qui ne peuvent à la fois s'acquitter de leurs attributions et

contrôler la manière dont ils s'en sont acquittés, déficit de gestion, etc.

Renouvellement et fin du contrat

2.2.41. Lorsqu'un contractant ne donne pas satisfaction, son contrat ne devrait pas être renouvelé. La complexité des affaires ne le permet pas toujours. Toutefois, renouveler un contrat sans impérieuse nécessité ou contracter à nouveau, pour d'autres marchés, avec une firme qui n'a pas donné satisfaction devrait être justifié de manière très circonstanciée, ce qui est loin d'être toujours le cas dans la pratique. Une telle décision, non justifiée, doit être considérée comme faute professionnelle passible de sanctions disciplinaires.

2.2.42. Les dossiers examinés par le Comité lors de la préparation de son premier rapport, ainsi que les exemples précités, montrent plusieurs cas de défaillances coupables. Ces défaillances se produisent dans toutes les étapes où existe un pouvoir d'appréciation et ne sont pas toujours détectées par ceux qui sont chargés de contrôler. Le manque ou l'inadéquation de l'information ne permet pas aux acteurs du système de décider en pleine connaissance de cause ni aux soumissionnaires lésés de demander des explications et de faire valoir leurs droits.

Attribution d'une subvention

2.2.43. Jusqu'à l'entrée en vigueur du vade-mecum sur les subventions le 1er janvier 1999, il n'existait pas pour l'ensemble de l'institution de directives définissant les règles à suivre pour l'attribution des subventions. Pourtant, les montants versés à ce titre sont extrêmement élevés. Ainsi pour l'année 1996, les montants des subventions dont la procédure d'octroi n'est pas réglementée étaient, selon le rapport de l'IGS du 16.05.1997, du même ordre de grandeur que le montant des marchés présentés à la CCAM (1 milliard et 1,4 milliard d'Ecu respectivement).

2.2.44. Au sein des subventions, il convient de distinguer celles dont la base légale fixe les conditions d'octroi. Elles sont distribuées en fonction de critères définis par l'autorité législative et budgétaire, le plus souvent à l'occasion du lancement d'un programme et accordées, en règle générale, après intervention de comités au sein desquels les Etats membres sont représentés. Les autres subventions sont attribuées sur base de critères et selon des modalités propres à la direction générale gestionnaire du chapitre budgétaire dont elles relèvent. Ce sont les modalités d'attribution de ces subventions qui sont présentées ci-dessous.

2.2.45. L'information préalable passe par l'appel à propositions, publié au JO ou adressé à une liste mise à jour de bénéficiaires potentiels, voire par contact avec des bénéficiaires et organismes connus des services ou qui ont pris l'initiative de solliciter une subvention. La publicité au JO impose une discipline qui conduit les gestionnaires à donner des informations plus complètes. Les deux autres modes d'information, s'ils ne sont pas couplés à une publication dans la presse, ouvrent la porte à toutes les dérives.

Ex post, la publication de listes des bénéficiaires est sporadique et les media utilisés souvent

inadéquats.

2.2.46. Il n'existe pas de pratique bien établie concernant les modalités de dépôt des candidatures, les critères d'évaluation ou le contenu des conventions. L'unique contrôle exercé sur les subventions avant leur attribution est celui du contrôleur financier. Leur suivi et le contrôle de l'évaluation de leur objectif dépendent de la direction générale ordonnatrice.

2.2.47. Le système SINCOM (cf. 2.2.70 et suivants, infra) enregistre sous le code SUB les données concernant les subventions. Cependant, du fait de l'imprécision des définitions sur lesquelles reposent les codes informatiques utilisés dans SINCOM, certaines subventions échappent à l'inventaire. La fiabilité des données n'est donc pas assurée. A l'exception peut-être de la DG XIX, aucun service ou comité ne dispose d'une vue d'ensemble des subventions attribuées. En raison d'une publicité insuffisante, ce sont les mêmes organismes et associations qui reçoivent les subventions, le cas échéant de plusieurs DG en parallèle. Certaines subventions sont gérées dans la transparence et l'égalité de traitement des bénéficiaires, mais ce n'est pas le cas général. Certains ordonnateurs décident seuls, sans même qu'un dossier soit préparé par leurs services.

2.2.48. Compte tenu de la proposition mentionnée sous 2.1.40 il serait souhaitable que les véritables subventions à savoir celles pour lesquelles aucune prestation n'est immédiatement et directement attendue de la part du bénéficiaire ne soient pas laissées à l'appréciation des directions générales mais gérées de manière centralisée, par exemple par le secrétariat général, dans la transparence et après élaboration d'une directive interne à la Commission. Les prescriptions du récent vade-mecum sont tout à fait insuffisantes.

Les ordonnateurs

2.2.49. Ce sont les ordonnateurs qui ont le pouvoir d'engager contractuellement la Commission à l'égard des tiers. Selon l'article 73 du Règlement Financier, tout ordonnateur met en jeu, dans ce cas, sa responsabilité disciplinaire et éventuellement pécuniaire, dans les conditions prévues aux articles 22 et 86 à 89 du statut des fonctionnaires.

En vertu de l'article 22 du Statut, notamment, le fonctionnaire peut être tenu de réparer en totalité ou en partie le préjudice subi par la Communauté en raison de fautes personnelles graves qu'il aurait commises dans l'exercice de ses fonctions. Dans les faits, comme on le verra au chapitre 4 du présent rapport, cette disposition n'est pratiquement pas mise en œuvre.

Il est permis de se demander si cette absence de recours à l'article 22 du Statut ainsi d'ailleurs que la rareté extrême des sanctions disciplinaires concernant des ordonnateurs, ne trouvent pas leur origine dans le jeu complexe des délégations et subdélégations qui, mêlant pouvoirs d'ordonnateurs, responsabilités politiques et pouvoir hiérarchique, annulent le concept d'ordonnateur responsable et dispersent les responsabilités.

Le système en vigueur

2.2.50. Le système en vigueur est extrêmement compliqué. La Commission est autorisée à déléguer ses pouvoirs d'exécution du budget (article 22, paragraphe 4 du Règlement Financier) dans des conditions déterminées par ses règles internes adoptées le 20 décembre 1974[17]. En vertu de ces dispositions, sont habilités à engager l'institution :

- la Commission ;
- les ordonnateurs délégués ;
- les ordonnateurs subdélégués à condition qu'ils aient reçu le pouvoir d'engager des dépenses ;
- pour les crédits fonctionnels administratifs, le fonctionnaire autorisé formellement par un ordonnateur délégué ou subdélégué à signer des contrats ou des bons de commande. Dans ce cas, l'ordonnateur engage les crédits et le fonctionnaire signe le contrat sous la responsabilité de l'ordonnateur, tout en engageant sa propre responsabilité quant aux dispositions contractuelles.

2.2.51. L'acte de délégation précise les limites à l'intérieur desquelles les délégataires sont autorisés à agir.

La liste des ordonnateurs (650 en 1999) est établie et mise à jour par la DG XIX.

2.2.52. Lorsqu'elle conserve les pouvoirs dévolus à l'ordonnateur pour certaines lignes budgétaires considérées comme politiquement sensibles (cf. exemple supra, 2.2.4 et suivants), la Commission prend sa décision en séance, par procédure écrite ou par habilitation à l'un de ses membres. La proposition soumise à sa décision selon l'une de ces trois procédures fait l'objet d'un avis des directions générales ou services intéressés, puis est soumise pour visa au contrôleur financier et enfin pour décision à la Commission ou au commissaire habilité (dans le cas d'une habilitation, le commissaire décide et la Commission, informée de la décision, prend acte mais la décision lui est imputée ce qui différencie cette procédure de la délégation à un commissaire). Une fois la décision prise, la proposition d'engagement de dépense est signée par le chef de l'unité administrative gestionnaire qui peut déléguer ce pouvoir. Ainsi, lorsqu'elle conserve l'exercice des pouvoirs d'ordonnateur, la Commission décide mais ne signe ni l'engagement de dépense, ni le contrat qui constitue pourtant le seul acte créateur de droits et d'obligations.

La Commission peut également déléguer ses pouvoirs à un commissaire et dans ce cas, les règles relatives aux délégations s'appliquent (cf. infra 2.2.53).

Ainsi, l'engagement juridique relève, dans les cas précités, à la fois de la responsabilité du niveau politique et de celle du niveau administratif. Les fonctionnaires engagent les procédures, instruisent les dossiers, signent les engagements de dépense et les contrats. La décision de principe est prise par la Commission.

2.2.53. Lorsque la Commission délègue l'ensemble des opérations relatives aux dépenses et

[17] Règles internes sur l'exécution du budget général des Communautés européennes (Section Commission)

aux recettes, cette délégation ne peut être donnée qu'à un commissaire, à un directeur général ou à un chef de service, c'est à dire à un haut fonctionnaire placé à la tête de l'unité administrative la plus importante (la Direction Générale) ou d'une unité administrative autonome. La délégation investit son titulaire du pouvoir d'exécution des crédits pour les lignes budgétaires correspondantes.

2.2.54. Les délégataires peuvent ensuite accorder des subdélégations à des fonctionnaires de catégorie A ou de grade B1, placés sous leur autorité ou à un autre ordonnateur délégué qui peut à son tour les subdéléguer à des fonctionnaires A et B1 placés sous son autorité. Indépendamment de cette hypothèse qui ne concerne que des directeurs généraux et des chefs de service, le titulaire d'une subdélégation ne peut à son tour déléguer ce pouvoir.

2.2.55. Dans tous les cas, l'ordonnateur délégué qui subdélègue ses pouvoirs peut, à tout moment, sans que l'acte de délégation ne soit modifié, continuer à exercer lui-même le pouvoir subdélégué, soit à son initiative, soit à la demande du titulaire de la subdélégation. La subdélégation ne fait donc pas perdre à son auteur l'exercice de sa compétence.

Cette disposition permet de concilier les pouvoirs de l'ordonnateur et le devoir d'obéissance hiérarchique qui découle de l'article 21 du Statut. Le titulaire d'une subdélégation qui n'est pas en mesure d'engager sa responsabilité disciplinaire et pécuniaire sur une opération ordonnée par sa hiérarchie, peut demander à l'ordonnateur délégué d'engager les crédits et de conclure le contrat à sa place. En pratique, dans ce cas, l'ordonnateur délégué ne s'engage pas et le dossier est retiré.

2.2.56. Lorsqu'il choisit de subdéléguer, l'ordonnateur est libre, à l'intérieur de son service, de choisir tel ou telle, en fonction de la confiance qu'il lui fait. Néanmoins l'exercice du pouvoir hiérarchique en parallèle aux pouvoirs d'ordonnateur fait qu'en pratique les subdélégations suivent la ligne hiérarchique, afin d'éviter des conflits entre responsables hiérarchiques et ordonnateurs subdélégués. Beaucoup de directeurs généraux déplorent une situation qui les conduit ainsi, en fait, à subdéléguer les pouvoirs d'ordonnateur à des personnes qu'ils n'ont pas eux-mêmes choisies. De leur côté, les ordonnateurs subdélégués regrettent souvent que leur carrière puisse dépendre d'un refus de signer contredisant les vœux de leur hiérarchie.

2.2.57. Il conviendrait de réorganiser et de simplifier le système des délégations.

Dégager la Commission en tant que collège et les commissaires des responsabilités d'ordonnateur

2.2.58. Lorsque la Commission exerce le pouvoir d'ordonnateur, elle dégage la hiérarchie administrative de tout ou partie de sa responsabilité, ce qui est malsain. Il serait préférable qu'à l'avenir non seulement la Commission mais chaque commissaire n'exerce directement aucun pouvoir d'ordonnateur. La généralisation des délégations leur éviterait de déresponsabiliser les fonctionnaires. Ceux ci, tenus d'agir dans le cadre de la légalité conformément à leurs obligations statutaires, porteraient ainsi seuls la responsabilité de leurs dossiers. Bien entendu, chaque commissaire et la Commission collégialement conserveront le pouvoir hiérarchique de donner des ordres aux ordonnateurs sans préjudice des droits et

responsabilités de l'AIPN. Naturellement, ils demeurent politiquement responsables.

2.2.59. Au cas où un ordonnateur considérerait qu'un ordre est entaché d'irrégularités ou qu'il contrevient aux principes de la bonne gestion financière, il devrait l'exposer par écrit. Si le commissaire concerné ou, le cas échéant, la Commission, confirme l'ordre par écrit, leur responsabilité politique serait clairement engagée. La responsabilité du fonctionnaire serait, du même coup, dégagée.

Responsabiliser les fonctionnaires

2.2.60. Le système des subdélégations devrait être organisé dans un esprit de déconcentration beaucoup plus poussé de manière à ce que l'ordonnateur soit celui qui négocie le contrat ou un fonctionnaire qui lui est hiérarchiquement proche pour avoir avec lui un rapport direct dès que c'est nécessaire.

2.2.61. Devrait également cesser la situation où l'ordonnateur, en signant un engagement de dépense, engage sa responsabilité sur un montant et sur l'identité du bénéficiaire, alors qu'un fonctionnaire de rang inférieur signe le contrat et porte, à ce titre, la responsabilité de l'acte faisant grief.

2.2.62. Chaque délégataire, dès lors qu'il accepte formellement la délégation, devrait être soumis à un statut spécifique engageant sa responsabilité pécuniaire, en cas d'erreur ou de négligence, à l'égard de la Communauté (cf. chapitre 4), sans préjudice de la mise en œuvre des procédures disciplinaires. De plus, la liste des ordonnateurs devrait être tenue à jour en temps réel, ce qui n'est pas le cas, et diffusée largement dans toute l'institution.

2.2.63. Des dispositions destinées à mieux protéger leur indépendance, voire à compenser, en termes de déroulement de carrière, les responsabilités exercées et les risques encourus notamment par rapport aux fonctionnaires de même grade qui ne sont pas ordonnateurs, pourraient être envisagées pour les ordonnateurs des grades inférieurs (A6, A7, A8, B1).

Groupes d'intérêt

2.2.64. Les ordonnateurs et gestionnaires, s'ils décident et portent la responsabilité des opérations, ne sont pas les seuls protagonistes de la gestion directe car ils sont confrontés aux interventions des groupes de pression. En effet, la présence à Bruxelles de groupes d'intérêts est très importante. S'y ajoutent, parfois, les interventions des représentations nationales. De leur côté, les membres du Parlement européen, peuvent intervenir directement auprès des services, notamment à la demande des groupes de pression nationaux, pour que des aides soient accordées. Ils introduisent éventuellement des commentaires dans le budget afin de préciser le bénéficiaire d'une subvention voire le montant à lui allouer.

Le principe des groupes d'intérêt n'est pas mis en cause. Ils ont pour mission d'influencer l'activité législative des institutions et d'obtenir des subsides. La Commission a besoin d'eux pour connaître l'ensemble des éléments d'un dossier.

2.2.65. L’approche suivie jusqu’à présent a été de préserver le caractère ouvert des relations de la Commission avec les groupes d'intérêt, sans différenciation de traitement. On n'a voulu imposer ni système d'accréditation ni enregistrement obligatoire ni code de conduite. Les secteurs concernés ont été supposés capables d’élaborer et de faire respecter leurs propres codes de conduite, sur base de critères minimaux fixés dans une communication du 5 mars 1993[18].

La Commission a également choisi de diffuser sans restriction l'information. Ainsi, un site informatique est consacré à ses relations avec les groupes d'intérêt. Il comprend l'ensemble des outils de travail permettant aux fonctionnaires de faire participer les milieux socio-économiques et les représentants de la société civile au processus législatif. L’objectif recherché est d’inciter les fonctionnaires à consulter systématiquement les milieux intéressés. Le site comprend également les codes de conduite des organisations syndicales et professionnelles portés à la connaissance de la Commission.

2.2.66. L’expérience montre que ces dispositions ne suffisent pas. La Commission ne doit pas réglementer les groupes d’intérêts en tant que tels, mais elle devrait prendre des mesures plus contraignantes pour assurer la transparence. Une déclaration des groupes d'intérêt précisant leur situation juridique et financière devrait être requise pour leur permettre d'être invités à participer aux réunions lorsque la Commission souhaite les consulter sur un problème déterminé. Bien entendu, cette consultation devrait toujours se faire sans exclusion, entre tous les groupes d’intérêts ayant rempli les formalités de déclaration. Mais les groupes d’intérêts non déclarés ne devraient pas être invités. La Commission doit être transparente lorsqu'elle consulte les lobbies, et les groupes d’intérêt doivent l'être aussi à son égard, ce qui implique qu'ils se présentent juridiquement et financièrement à visage ouvert. Les réunions devraient être annoncées publiquement et leurs débats actés dans un procès-verbal.

2.2.67. Les groupes d’intérêts non déclarés ne devraient être reçus dans les services de la Commission qu’avec certaines précautions. Les fonctionnaires devraient être tenus par une directive interne, dans leurs contacts avec eux, de fournir dans les 24 heures à leur supérieur hiérarchique un compte-rendu écrit de leurs entretiens avec les groupes d’intérêts non déclarés. Ils le font systématiquement, dans la plupart des services, lorsqu’ils rencontrent des hommes politiques ou des hauts fonctionnaires des Etats membres. Il serait paradoxal qu’ils échappent à cette obligation lorsqu’il s’agit de groupes de pression peu transparents.

Les outils de gestion

2.2.68. Une gestion efficace des crédits exige que l’ordonnateur puisse, avant d’attribuer un marché ou une subvention, s’informer des éventuels antécédents du soumissionnaire au sein de l’institution : contrats conclus directement avec lui ou par sociétés ou associations interposées, subventions attribuées, difficultés rencontrées, éventuels litiges.

2.2.69. Un fichier central des contrats et des contractants est nécessaire, d’abord pour les ordonnateurs mais aussi pour les organes de contrôle, d’audit et de conseil qui doivent disposer d’une vision globale. Or, un tel fichier n’existe pas. Qu’il s’agisse de marchés ou de

[18] JO C 63 du 5 mars 1993

subventions, ceux qui décident n'ont pas une vision d'ensemble de l'activité de l'institution à tel point que "la main droite ignore ce que fait la main gauche".

La Commission en a pris conscience, au milieu des années 90, sous la double pression de la multiplication de procédures contentieuses et précontentieuses relatives à la passation ou à l'exécution des contrats, et de sa mise en cause grandissante à ce propos par le Parlement, la Cour des comptes, voire le Médiateur (50 % des plaintes adressées au Médiateur portent sur des problèmes liés à l'activité contractuelle de la Commission).

2.2.70. Le système officiel financier et comptable SINCOM n'allant pas au-delà des exigences liées au respect du Règlement Financier, ne permettait qu'une connaissance statistique très approximative (cf. pour les subventions par exemple 2.2.45).

SINCOM comprend bien un "fichier tiers" (i.e. des bénéficiaires de paiements de la part de la Commission). Mais celui-ci, conçu comme un outil d'exécution des paiements, est organisé autour du compte bancaire et ne permet pas d'identifier le nombre de contrats qui lient à la Commission un bénéficiaire de paiements, ni de savoir si une société doit de l'argent à la Commission.

Les informations relatives à la gestion des contrats, quand elles sont disponibles, ne le sont que via les systèmes locaux des directions générales, interfacés avec SINCOM. Par interrogations successives, il est possible de remonter à ces informations, qui dépendent de la qualité de renseignement du système local mais ne peuvent être assimilées à celles qui seraient disponibles à partir d'un fichier central des contrats et des contractants.

2.2.71. La CCAM gère sa propre base de données, ADAM, qui recense tous les dossiers de marchés publics examinés depuis 1993. Cette base permet une analyse poussée: tous les tris sont possibles. Cependant, une fois son avis rendu, la CCAM ne suit plus le dossier (il était prévu que l'ordonnateur ait à saisir le numéro de l'avis CCAM pour tout engagement : cela n'a jamais été fait, pour des raisons de coût).Elle recense les informations relatives à la passation du contrat, mais elle est déconnectée de la procédure financière et comptable afférente à son exécution. En conséquence, l'usage de la base ADAM en dehors de la CCAM est de peu de profit.

2.2.72. L'absence d'un fichier central s'est révélée progressivement, pour la Commission, une source de difficultés multiples. Tout d'abord, elle complique considérablement le traitement des procédures juridictionnelles dans lesquelles la Commission est impliquée. De plus, elle entrave sa réaction en cas de problèmes liés à un contrat comme en témoignent, dans divers examens par le Comité dans le premier rapport, les difficultés rencontrées pour identifier la totalité des contrats passés avec une société par les différents services. Enfin, l'absence de fichier central hypothèque la mise sur pied de solutions systémiques aux problèmes récurrents liés à la passation et à l'exécution des contrats, dans la mesure où elle rend difficile leur évaluation globale et donc la diffusion de "bonnes pratiques".

2.2.73. Consciente de cet état de choses, la Commission a, en 1997[19], mis en place un système informatisé d'alerte précoce (Early Warning Systems (EWS) reposant sur le fichier tiers de

19 Communication SEC(97)1562 du 30 juillet 1997

SINCOM, destiné à être consulté le plus en amont possible de la procédure pré-contractuelle (appels à manifestation d'intérêt ou appels d'offre). Ce système vise à signaler les bénéficiaires réels ou potentiels de deniers communautaires qui peuvent être légalement exclus en vertu des directives sur les marchés publics : soit qu'ils aient fait l'objet de constatations en la matière par l'UCLAF, le contrôle financier ou la Cour des comptes, soit qu'ils soient concernés par une action en justice ou des ordres de recouvrement émis par la Commission.

Le signalement d'un bénéficiaire par l'EWS (du moins dans les trois dernières hypothèses) ne lui interdit pas nécessairement de passer des marchés avec la Commission, mais incite le service qui envisage de contracter avec lui à prendre des précautions, notamment en s'informant auprès de la direction générale à l'origine du signalement. L'EWS est une initiative utile qui ne remplace cependant pas l'indispensable outil d'appui à la politique contractuelle que serait un fichier contrats/contractants.

2.2.74. La Commission a pris la décision de principe, dans le prolongement de "SEM 2000" et en liaison avec la mise en place de la "cellule centrale des contrats" dont il sera question plus loin (cf. 2.2.78), de créer un registre des contrats (à partir de la constitution, au préalable, d'un registre des contrats type), et de veiller tout particulièrement à la gestion des contractants (suivi des fusions de sociétés, des créations de filiales, des changements de dénomination etc.) grâce à la mise en place d'un registre des contractants, toujours à partir du fichier tiers, mais dont l'orientation, actuellement dirigée vers les paiements, serait également tournée vers les engagements.

Toutefois, les multiples difficultés techniques et les coûts - exorbitants - liés au développement du système SINCOM II n'ont pas permis, plus de trois ans après la décision, la réalisation effective du fichier intégré tiers/contrats/contractants envisagé.

2.2.75. Dès lors, il convient de s'interroger sur l'alternative que pourrait constituer un développement de la base ADAM de la CCAM, qui a déjà été entrepris, sous le nom de ADAM module 2, dans le but exclusif, au départ, de vérifier le bien fondée du recours par la Commission à des études extérieures[20]. Rien ne s'oppose à ce que la même méthode soit appliquée au traitement des informations relatives à d'autres formes de contrats (consultants et subventions), si ce n'est la difficulté "d'interfacer" cette base avec le système SINCOM II[21]. Pour aboutir positivement, la réflexion doit être menée en collaboration avec les ordonnateurs - seuls en mesure d'alimenter le système central.

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[20] ADAM2 s'est substitué à CERES, base centralisée, gérée à DG XIX, et qui n'a jamais bien fonctionné dans la mesure où son renseignement dépendait du bon vouloir des services ordonnateurs Il s'agit d'un deuxième module greffé en 1997 sur la base ADAM, qui recense désormais tous les marchés d'études même inférieurs au seuil de saisine de la CCAM, et dans lequel sont à la fois coordonnées toutes les références utiles (référence "locale", dans ADAM2, n° CCAM, n° de la décision de la CCAM) et rassemblées les informations qualitatives essentielles.

[21] Interface indispensable, tant il est vrai qu'il n'y a pratiquement aucune chance que l'alimentation d'une telle base soit systématique et fiable si elle est indépendante de la génération des flux financiers liés à l'exécution du contrat. Malheureusement la mise en place d'une telle interface est hypothéquée par le problème technique de la définition des références des engagements budgétaires dans SINCOM II.

Le conseil aux ordonnateurs

2.2.76. Le conseil aux ordonnateurs constitue à l'évidence une pièce maîtresse du système de gestion directe en matière de contrats, étant rappelé une fois de plus que le Comité englobe dans cette notion toutes les subventions qui comportent une contrepartie de la part du bénéficiaire des prestations intéressant directement la Commission dans le cadre de l'exercice de ses missions.

2.2.77. Cette affirmation revêt d'autant plus d'importance, pour le Comité, que le présent rapport s'efforce avant tout de mettre l'accent sur les notions de transparence et de responsabilité. En compensation de cette obligation de transparence et de cette responsabilité, les ordonnateurs ont droit à une assistance technique toujours disponible et de bonne qualité.

La cellule centrale des contrats

2.2.78. Pour maîtriser et harmoniser son activité contractuelle et parallèlement à sa décision de principe de se doter d'un fichier central des contrats et des contractants, la Commission a créé une unité nouvelle au sein de la DG XIX, la cellule centrale des contrats.

2.2.79. Cette cellule qui se met en place fait fonction de groupe de contact entre le service juridique, le contrôle financier et la CCAM. Elle a pour mission d'identifier des catégories homogènes de contrats afin d'en établir une typologie plus fine, de standardiser les pratiques contractuelles et d'amener les services ordonnateurs à utiliser des contrats-type aussi systématiquement que possible. La cellule centrale des contrats devrait également fournir aux ordonnateurs, particulièrement lorsqu'ils veulent rédiger un contrat plus spécifique, une assistance ponctuelle et créer un registre des contrats-type en vue de développer le fichier contrats/contractants.

2.2.80. La cellule centrale des contrats n'est dotée ni d'un pouvoir de contrôle, ni d'un pouvoir de décision et ne siège pas en CCAM. Pour jouer son rôle de mise en cohérence de l'activité contractuelle, elle dépend des services et doit attendre qu'ils la consultent : les dossiers de marchés publics ne lui sont pas automatiquement soumis et elle n'a pas le pouvoir de s'en saisir. Pour compenser ce relatif éloignement de la matière qu'elle est censée traiter, elle devrait soit aller au devant des besoins des services, ce qui supposerait un renforcement de son organigramme, soit mettre en place pour la rédaction des contrats un cadre informatisé qui s'imposerait aux ordonnateurs et les obligerait à la consulter dès qu'ils veulent s'en écarter. Encore faudrait-il que les outils existants de gestion le lui permettent. On verra plus loin (cf. 2.2.97 et 98) comment le Comité propose de répondre à ce souci.

La Commission Consultative des Achats et Marchés (CCAM)

2.2.81. La CCAM joue un double rôle de contrôle et de conseil. Dans le cadre de sa mission de contrôle, lui sont présentés pour avis, avant décision de l'ordonnateur, tous les projets de marché de travaux, de fournitures ou de prestations de services, y compris les études, d'un montant supérieur à 46.000 Euros. Ce seuil, extrêmement bas, est cependant plus élevé pour

les marchés conclus par le Centre Commun de Recherche.

2.2.82. Echappent actuellement à sa compétence, par définition, toutes les subventions, ainsi que les marchés inférieurs au seuil de saisine et ceux qui relèvent du Titre IX du Règlement Financier fixant les dispositions applicables aux aides extérieures, à l'exception des marchés de prestation de services « passés dans l'intérêt de la Commission » (article 119 du Règlement Financier). A vrai dire, on se demande quels contrats pourraient ne pas être passés dans l'intérêt de la Commission, puisque, par nature, tout contrat suppose une contrepartie, favorable à la Commission, en échange de la somme d'argent payée par celle-ci. On mesure ici l'inanité de certaines définitions qui ont acquis droit de cité dans la Communauté, récemment.

La distinction entre les marchés de prestation de services passés dans l'intérêt de la Commission et ceux passés dans l'intérêt du bénéficiaire étant en pratique impossible à opérer, la Commission a cependant décidé, en 1998, que tous les marchés concernant des bureaux d'assistance technique[22] seraient soumis à la CCAM.

2.2.83. L'avis de la CCAM porte sur la régularité de la procédure suivie au regard des dispositions applicables, sur le choix de l'adjudicataire proposé et, en général, sur les conditions retenues pour la passation des marchés.

La CCAM est appelée à s'assurer que les dépenses envisagées ne sont pas hors de proportion avec les objectifs visés et que ces objectifs ne peuvent être atteints à moindres frais. Elle a donc compétence, sinon pour se prononcer sur l'opportunité de la passation d'un marché, tout au moins pour examiner que les mesures proposées sont économiquement les meilleures pour atteindre l'objectif fixé. D'une manière générale, elle veille à ce que l'application des règles de mise en concurrence assure la transparence des opérations et l'égalité des soumissionnaires.

2.2.84. L'avis de la CCAM est purement consultatif : il ne comporte en lui-même aucun élément de « veto ». Même si dans les faits l'ordonnateur retire son dossier, lorsqu'il continue la procédure et le soumet au contrôleur financier, celui-ci s'appuie assez souvent sur la position prise par la CCAM pour refuser son visa. De plus, il existe des cas, assez nombreux, où le contrôleur financier refuse son visa, alors que l'avis de la CCAM est favorable.

Le Règlement Financier et les modalités d'exécution attribuent en outre à la CCAM une mission de conseil. Ainsi, elle peut être appelée à donner son avis, à la demande de l'ordonnateur compétent ou de l'un de ses membres sur les projets d'appel à la concurrence qui présentent une importance ou un caractère particulier, sur les questions soulevées lors de la passation ou de l'exécution des marchés (annulation de commandes, demande de remise de pénalités de retard, dérogations aux dispositions du cahier des charges) ou sur les marchés inférieurs au seuil de saisine qui posent des questions de principe (article 68 des modalités d'exécution). Ce rôle de conseil est en pratique peu développé. Il se limite surtout à des questions de procédure.

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[22] On se trouve ainsi confronté à la nécessité de définir le bureau d'assistance technique (cf. infra section 2.3). Il aurait été préférable de faire passer devant la CCAM les marchés d'assistance technique, ou même seulement les marchés de maîtrise d'œuvre (notion malheureusement ignorée à la Commission).

2.2.85. En effet, bien que l'article 112 des modalités d'exécution lui accorde de larges compétences dans ses fonctions de conseil y compris la possibilité de procéder ou de faire procéder à des enquêtes, la CCAM tend à limiter ses activités à ce titre. Elle adresse, avec ses avis, des recommandations sur des dossiers ponctuels et diffuse des circulaires aux ordonnateurs sur certains aspects relevés dans les contrats, notamment pour les rendre attentifs aux problèmes de conflits d'intérêts et à la délégation des tâches de puissance publique et des contractants. Elle ne formule plus, depuis plusieurs années, de recommandations à l'institution et son rapport annuel d'activité destiné à la Commission n'appelle pas directement l'attention de celle-ci sur la politique contractuelle de l'institution.

Composition et fonctionnement de la CCAM

2.2.86. L'article 64 du Règlement Financier prévoit que la CCAM doit comprendre au moins un représentant du service chargé de l'administration générale, un représentant du service chargé des finances et un représentant du service chargé des questions juridiques et qu'un représentant du contrôleur financier assiste à ses réunions à titre d'observateur. Pour le reste, c'est à la Commission de fixer sa composition. Actuellement, la CCAM est théoriquement composée de dix membres, le plus souvent de grade A2, qui représentent la direction générale du personnel et de l'administration (DG IX), le service juridique, la direction générale des budgets (DG XIX), la direction générale du marché intérieur et des services financiers (DG XV), la direction générale de la concurrence (DG IV), la direction générale de l'industrie (DG III), le service commun de gestion de l'aide communautaire aux pays tiers (SCR), l'Office des publications et l'Office statistique. Sa présidence incombe à la direction générale des budgets, représentée par un directeur général adjoint.

En fait, chaque DG ou unité représentée en CCAM désigne également un suppléant. A l'exception du Président, ce sont en fait les suppléants qui siègent en CCAM. D'un niveau hiérarchique extrêmement inférieur à celui des titulaires et parfois sous contrat d'agent temporaire, leur désignation varie en cours d'année et d'une séance à l'autre. Cette pratique regrettable n'est pas de nature à donner à la commission des marchés un sentiment de cohésion et de responsabilité, ni à donner à ses avis la qualité et le prestige qui conviendraient.

2.2.87. L'explication que donnent les services de la Commission d'une telle situation est significative d'une dégradation du rôle de la CCAM : ce serait, selon eux, l'adoption des directives marchés publics qui justifierait le recours aux suppléants, sinon même aux suppléants de suppléants, dont la présence suffirait à contrôler l'application en quelque sorte «mécanique» d'une réglementation désormais parfaite, d'autant que le nombre croissant des dossiers soumis rendrait la charge de membre de la CCAM trop lourde pour de hauts fonctionnaires.

2.2.88. Chaque représentant en CCAM est désigné pour une année donnée comme rapporteur des dossiers émanant d'une DG déterminée qui ne peut être la sienne. Une rotation est effectuée chaque année.

2.2.89. La CCAM est assistée d'un secrétariat de 6 fonctionnaires, dont 2 de catégorie A. Le Directeur général adjoint, chargé de la présider, y consacre, quant à lui, une bonne partie de

son activité. En dehors de ses fonctions d'assistance, le secrétariat conseille les services ordonnateurs, notamment au moment de la rédaction du cahier des charges, et assure leur formation.

2.2.90. Un groupe préparatoire est chargé d'examiner, avant la réunion plénière, tous les rapports déposés et de proposer leur adoption en point A, sans débat ou leur examen en séance (point B). Ce groupe est composé de membres et de suppléants provenant des mêmes directions générales que celles représentées en CCAM.

2.2.91. La CCAM se réunit environ une fois par mois (13 fois en 1997). Les réunions se déroulent sur une journée très chargée (de 9 heures à 20 heures, voire 22 heures et plus). Les avis sont rendus à la majorité simple, le vote du Président déterminant, en cas d'égalité des votes, le résultat du scrutin. Les votes individuels ne sont pas consignés dans le procès verbal et les travaux de la CCAM sont secrets.

2.2.92. Il ressort de ses rapports d'activité qu'en 1996, 914 dossiers ont été inscrits à l'ordre du jour, soit 100 dossiers par séance et 1014 dossiers en 1997, soit 78 par séance. Ont été inscrits en point A, 560 dossiers en 1996 et 533 en 1997 ce qui porte à 354 dossiers en 1996 et à 481 en 1997 les marchés qui ont dû être examinés, théoriquement, de manière approfondie. La moyenne des dossiers examinés en une séance est de 39 en 1996 et de 37 en 1997 mais cette moyenne n'est pas pertinente car en raison de l'annualité budgétaire, la plupart des dossiers sont examinés à la fin de l'année. Ainsi, en 1997, la CCAM a traité en point B jusqu'à 72 dossiers en une seule séance ce qui représente donc 5 à 10 dossiers à l'heure. Dans ces conditions, aucun examen approfondi, aucun dialogue avec le service responsable du marché, aucune pédagogie ne sont possibles.

2.2.93. Chaque dossier fait l'objet d'un avis, qui peut être favorable, favorable mais comportant une recommandation pour les prochains marchés, favorable avec réserves, le service étant appelé à modifier certains éléments du projet de marché souvent en concertation avec le service juridique, de mise en suspens en attendant un complément d'information à fournir par l'ordonnateur ou défavorable. La motivation des avis, parfois absente, est souvent succincte ou rédigée de façon imprécise.

En 1997, la CCAM a rendu 912 avis favorables et 27 avis défavorables. 42 dossiers ont été retirés par l'ordonnateur en cours de procédure, dans la plupart des cas pour éviter un avis défavorable.

Sur les 912 avis favorables, 24 % concernaient des études, ou des marchés de consultations. Ainsi, 23,5 % seulement des dossiers constituaient dossiers sensibles (études, consultants) générateurs de difficultés. 643 marchés étaient conclus après une mise en concurrence et 274 par procédure négociée.

2.2.94. Pour obtenir un avis favorable, un service doit attendre environ trois semaines à un mois, lorsque le dossier ne pose aucun problème, et deux mois s'il suscite des difficultés. Les mêmes délais s'imposent à tous les dossiers quel que soit leur classement par le groupe préparatoire, alors que les dossiers classés en point A, n'ont pratiquement aucune chance d'être examinés par la CCAM, qui n'arrive même pas à examiner sérieusement tous les dossiers classés en point B. De plus, comme on l'a vu plus haut, un avis favorable ne garantit

pas le visa du contrôleur financier, qui obéit à des critères autres que ceux de la CCAM.

Doit-on supprimer la CCAM ?

2.2.95. La CCAM s'est progressivement enfermée dans un rôle de vérification subalterne, (vérification de la date et du contenu des publications, respect des délais, application correcte des critères de sélection des soumissionnaires et d'attribution des marchés, etc.). La plupart des marchés de services récemment mis en cause ont reçu son aval. A cet égard il convient de s'interroger sur la possibilité pour les rapporteurs (temps, compétence, indépendance notamment à l'égard de leur hiérarchie) de vérifier avec pertinence les dossiers dont ils ont la responsabilité.

2.2.96. Parce qu'elle constitue une étape dilatoire dans le processus de conclusion des marchés et que la valeur ajoutée qu'elle produit n'est pas toujours évidente, la suppression de la CCAM pourrait être envisagée.

2.2.97. Pourtant, cette suppression retirerait à l'ordonnateur et à la Commission la possibilité de recueillir le conseil éclairé d'un collège disposant d'une vision globale de la politique des marchés que la cellule contrats dans sa formule actuelle n'est pas en mesure de remplacer.

En fait, c'est la cellule centrale des contrats elle-même qui a besoin de ce collège et qui devrait utiliser la CCAM pour résoudre son propre problème (cf. 2.2.71).

2.2.98. La CCAM doit donc être réorganisée. Ses membres effectifs devraient être des directeurs ou des directeurs généraux, suppléés par des fonctionnaires titulaires de grade A3 à A6 au minimum choisis pour leur autorité et leurs compétences personnelles, et indépendants de leur hiérarchie dans l'exercice de leur mandat. Leur nombre devrait être réduit : un représentant du service juridique, un ou deux membres de la cellule contrats (DG XIX), un représentant du secrétariat général, dont les compétences fonctionnelles soient équilibrées par un nombre égal d'ordonnateurs choisis en fonction de leur expérience et de leur position administrative au sein de DG très actives en matière de marchés publics.

2.2.99. Il serait fait recours à des rapporteurs indépendants, le cas échéant d'anciens fonctionnaires qui figureraient sur une liste établie par le Président de la CCAM. Ce point est important car la formule actuelle ne garantit pas l'indépendance des rapporteurs les uns vis-à-vis des autres.

2.2.100. La nécessité d'une présence effective de ses membres implique que l'organisation des travaux de la CCAM soit modifiée. Au lieu d'examiner une cinquantaine de marchés par séance, à la vitesse moyenne de 10 marchés à l'heure (!) la CCAM devrait en étudier trois ou quatre, sélectionnés tant à titre d'exemple pour servir de matière à des études de cas qu'en fonction d'une politique de conseil au cas par cas. Les seuils de saisine devraient être fortement relevés et différenciés selon les types de marché. Ce sont les marchés de prestations intellectuelles et spécialement les marchés de maîtrise d'œuvre qu'il importe d'examiner attentivement. Ainsi, le seuil d'examen des marchés de fournitures et de services courants pourrait être relevé à 3 millions d'euros alors que celui des marchés de prestations intellectuelles - hormis les marchés de maîtrise d'œuvre - pourrait ne passer qu'à 100.000 euros. Tous les marchés de maîtrise d'œuvre (BAT) devraient continuer, comme à l'heure

actuelle, à être présentés à la CCAM.

2.2.101. Le relèvement des seuils ne supprimerait pas la nécessité d'une sélection, le nombre de marchés soumis à la CCAM demeurant encore très élevé. Cette sélection devrait être assurée, non plus par le groupe préparatoire qui devrait être supprimé, mais par le Président de la CCAM, sous sa propre responsabilité, assisté d'un secrétariat dont les effectifs pourraient être quelque peu augmentés. Les projets de marchés non retenus par le président pour le passage en CCAM seraient immédiatement « libérés » de façon à éviter des délais inutiles. Si nécessaire, il faudra de surcroît scinder la CCAM en sections spécialisées en fonction des types de marchés. Au total, l'examen par la CCAM concernerait seulement une centaine de cas par an pour avis.

2.2.102. Tout ordonnateur qui le souhaite devrait pouvoir obtenir l'examen rapide d'un dossier par la CCAM, en cas de non-sélection de celui-ci. Il devrait cependant être clair que solliciter trop souvent cet examen ne constitue pas un bon point pour un ordonnateur responsable.

2.2.103. Pour préserver l'indépendance de ses membres, la confidentialité des travaux de la CCAM devrait être particulièrement protégée. Ses avis, en revanche, devraient être soigneusement motivés et leur diffusion, systématiquement élargie à tous les ordonnateurs.

2.2.104. Les réformes préconisées redonneraient à la CCAM, l'esprit même du rôle qui lui a été assigné par le législateur et permettrait de constituer avec la cellule centrale des contrats, en raison des synergies ainsi créées, un pôle de conseil disposant de l'expérience concrète, de la vision globale et, en conséquence, de l'autorité nécessaire pour aider les ordonnateurs et encadrer la politique contractuelle de la Commission, notamment en affinant la typologie des contrats pour les adapter aux besoins nouveaux.

2.3. L'externalisation des tâches de la Commission

2.3.1. La Commission assume désormais un très grand nombre de tâches dont le caractère temporaire et spécialisé nécessite qu'elles soient externalisées : la sous-traitance se justifie pour des raisons d'efficacité, d'opportunité et de coût. Jamais le recours par la Commission à l'assistance technique n'a d'ailleurs été mis en cause ni par le Conseil ni par le Parlement.

2.3.2. Concrètement, la notion d'assistance technique - ou plutôt, d'assistance technique et administrative - recouvre une gamme très variée de tâches, liées à la gestion d'un programme ou d'une action communautaire, susceptibles de faire l'objet de contrats de sous-traitance à l'extérieur : par exemple, dissémination d'informations concernant le programme, recueil et traitement de données, vérification du paiement des travaux, préparation des paiements (tâches d'assistance administrative) ; évaluation de la validité technique des offres soumises, interface opérationnel entre les autorités des pays tiers et la Communauté, organisation de conférences et de séminaires, vérification et évaluation de la démarche du programme (tâches

d'assistance technique). Cette énumération n'a aucun caractère limitatif[23].

2.3.3. La très grande proximité de ces tâches avec les missions de puissance publique de la Commission, l'importance des risques de conflit d'intérêts, auraient justifié la mise en place de contrôles très rigoureux de ces contrats de sous-traitance. Bien au contraire, leur développement a mis en lumière les aspects les plus pathologiques de la pratique contractuelle de la Commission. Arbitraire des imputations budgétaires, mauvaise compréhension des règles régissant la passation des contrats, dilution dans la chaîne hiérarchique de la responsabilité des ordonnateurs, indigence du conseil et du contrôle assurés par les services centraux : toutes les faiblesses évoquées précédemment, quant au système de gestion directe de la Commission, ont reçu une illustration concrète dans la décennie 90, à travers le phénomène dit des "BAT" (bureaux d'assistance technique) dont certains ont récemment défrayé la chronique communautaire[24].

Que sont les "BAT"?

2.3.4. Aussi le premier rapport soulignait-il : "Comme il ressort de plusieurs des dossiers traités [à l'occasion du présent rapport], l'idée de faire mettre en œuvre des programmes publics européens par des contractants privés doit être sérieusement étudiée et appréhendée."[25] Le BAT n'est rien d'autre en effet qu'un contractant de la Commission. Ce n'est ni son statut vis-à-vis de celle-ci, ni sa forme juridique (qui peut varier : ASBL, université, société privée etc.) qui fait le BAT, mais l'objet du contrat qui le lie à la Commission : contrat de sous-traitance à l'extérieur, par la Commission, de tout ou partie des tâches liées à l'exécution d'un programme dont elle a la responsabilité.

2.3.5. La recherche d'une définition générique du BAT en tant que structure se révèle dès lors artificielle. L'IGS le souligne dans l'introduction à son rapport de 1998[26]: "il n'existe pas, [à la Commission] de définition unique des termes "Bureaux d'Assistance technique". De multiples définitions sont possibles, selon les conventions que l'on adopte pour délimiter le champ de réflexion. Ainsi l'IGS, dans son rapport, ne retient que les "BAT" constitués sous la forme de personnes morales apportant une assistance technique à la Commission elle-même (et non aux bénéficiaires des programmes), sur plus d'un an, au moyen de ressources humaines extra muros. Cependant, le vade-mecum relatif aux bureaux d'assistance technique en préparation sous la houlette de la DG XIX (cf. infra), s'il conserve la notion de prestation "extra-muros" comme critère d'identification du BAT, considère que l'appellation couvre non seulement l'assistance fournie dans le seul intérêt de la Commission, mais aussi l'assistance fournie dans l'intérêt mutuel de la Commission et des bénéficiaires des programmes communautaires (l'assistance fournie dans l'intérêt exclusif des bénéficiaires des programmes communautaires étant considérée comme ne relevant pas dudit vade-mecum).

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23 Selon la typologie établie par le rapport de l'IGS : Inspection sur "le recours des services de la Commission aux bureaux d'assistance technique", IGS, 4/02/1998, voir annexe III

24 Premier rapport du CEI : ARTM (programmes MED) - paragraphes 3.1.1 à 3.8.4, AGENOR (programme LEONARDO) - paragraphes 5.1.1 à 5.8.7 -, notamment.

25 Premier rapport du CEI, paragraphe 5.8.1

26 Rapport de l'IGS, précité

2.3.6. La présentation de l'assistance technique sous l'angle des "BAT", en fait, ne s'avère pas seulement artificielle: elle est aussi trompeuse. En effet l'estampille administrative qui leur est ainsi conférée tend à détourner l'attention de l'essentiel, à savoir l'acte juridique, souvent mal contrôlé, qu'est la passation d'un marché public de prestation de services. De plus, cette présentation empêche d'appréhender de manière globale le phénomène de l'assistance technique et administrative, qui peut revêtir différentes formes.

2.3.7. A la lumière de ce qui précède, il n'est pas surprenant que la mesure du phénomène soit sujette à caution. L'IGS, pour l'année 1996, dénombrait 51 BAT, intervenant dans 45 programmes ou actions communautaires, occupant 653 personnes extérieures à la Commission, pour un coût avoisinant 80 millions d'Ecus et pour gérer un montant global de crédits de 270 millions d'Ecus. Mais une évaluation postérieure[27], fondée sur une méthode différente, estime que les BAT représentent l'équivalent d'environ 1000 hommes/an, pour un coût total d'environ 190 millions d'euros (tout en précisant que l'assistance technique et administrative "en dehors des BAT" représente par ailleurs l'équivalent de 710 hommes/an pour un coût total de 64 millions d'Euros).

2.3.8. Quoi qu'il en soit le phénomène n'est pas mineur. Le développement du recours à l'assistance technique et administrative au cours de la décennie 1990 a résulté en effet de la conjonction de différents facteurs :

- application dans le contexte du processus de convergence en vue de l'instauration de la monnaie unique, au budget de l'Union européenne, d'un degré de rigueur semblable à celui appliqué aux budgets nationaux. Cette rigueur a plus sévèrement touché les dépenses administratives, de sorte que la tendance des services a été de compenser en augmentant le recours à de l'assistance technique, et en la finançant sur les lignes opérationnelles ;

- augmentation importante des tâches de gestion de la Commission, découlant de la mise en œuvre de nombreux programmes multiannuels tant au niveau des politiques internes (Leonardo, Socrates, Media, Raphaël, Kaléidoscope, Ariane) qu'à celui des actions externes (PHARE, TACIS, MEDA), augmentation à laquelle la Commission n'a pas suffisamment su faire face par des mesures de redéploiement des ressources disponibles ;

- insistance sur l'objectif d'exécution des différents programmes, de la part du Parlement notamment, qui a cherché à lier l'allocation de nouveaux crédits à la bonne exécution (au sens quantitatif) des crédits des années précédentes.

2.3.9. Indépendamment de l'ampleur du phénomène, l'analyse révèle surtout de considérables différences entre un BAT et un autre : quant aux DG qui y recourent, quant à leur imputation budgétaire (parfois en partie A, parfois en partie B), quant au coût moyen d'un emploi dans un BAT (de 14.420 à 214.000 Ecus), quant à la nature des prestations fournies (voir ci-dessous), quant aux contrôles effectués par la Commission selon les services de l'activité de ses cocontractants, quant à la proportion de crédits affectés à un programme communautaire passant entre les mains du BAT (de 6 à 90 %) etc.

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27 "Enquête sur l'utilisation de l'assistance technique et administrative extérieure par les services de la Commission" -note de synthèse, 30.11.1998. Ce document fournit en outre un détail des BAT par DG, voir annexe IV.

Difficultés liées au recours aux BAT

2.3.10. Le recours aux BAT pose tout d'abord la question de la détermination de la frontière entre celles des tâches de la Commission qui peuvent sans risque pour le service public, voire avec certains avantages en termes d'efficacité, être sous-traitées, et celles dont la délégation à des entreprises privées constitue un abandon de ses responsabilités par la Commission. On s'est habitué, au sein de la Commission, à désigner les secondes sous le terme de "tâches de puissance publique"[28], et l'on s'accorde à considérer qu'elles ne doivent pas être confiées à du personnel externe. C'est du moins ce que "recommandait" aux services une note du Secrétaire Général de 1997[29], qui, sous couvert de diffuser des règles minimales, au demeurant floues et non contraignantes, légitimait en fait subrepticement les BAT. En l'absence de toute autre directive[30], de mécanismes d'assistance et de conseil aux services, ainsi que de tout système de diffusion des bonnes pratiques (lacunes très clairement dénoncées par le rapport de l'IGS), on a pu ainsi voir confier à des BAT des tâches telles que la vérification et le paiement de travaux, la gestion de contrats avec les bénéficiaires finaux de l'action communautaire, ou l'évaluation des offres.

2.3.11. Le développement des BAT a illustré les fréquentes déficiences et la grande hétérogénéité de la pratique contractuelle de la Commission, qu'il s'agisse du soin apporté à la rédaction du cahier des charges, de l'instauration de mécanismes de contrôle des moyens mis en œuvre par les BAT pour exécuter leur contrat, du souci d'éviter l'apparition de situations de "récurrence" dans lesquelles des BAT se retrouvent de fait partenaires privilégiés de la Commission, du choix de la procédure de passation du marché de services, des critères d'attribution de celui-ci, ou du rôle de la CCAM - instance témoin des dérives mais sans véritable capacité d'intervention.

2.3.12. De plus, le recours aux BAT a mis en lumière l'inadaptation du cadre budgétaire (cf. 2.1.5 et suivants). La limitation des crédits affectés aux dépenses administratives avait très tôt conduit au financement de dépenses administratives sur les lignes opérationnelles sous forme de "mini-budgets", en violation flagrante des règles d'imputation budgétaire prévues par le Règlement Financier. Suite aux critiques de l'autorité budgétaire, les mini-budgets ont été résorbés progressivement à partir du budget pour 1993, les crédits correspondants "rapatriés" dans la partie A en même temps que "transformés en emplois" (1830 emplois créés) et de nouvelles règles relatives à l'imputation budgétaire diffusées. Mais ces règles, reposant sur des définitions floues et assorties de nombreuses exceptions, loin d'assurer la transparence, contenaient dès le départ le risque de leur contournement : en particulier, elles admettaient que l'imputation budgétaire de l'assistance technique diffère selon les "bénéficiaires" de celle-

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28 En fait, c'est de service public qu'il s'agit c'est à dire de tâches qui ne peuvent pas être conférées à des fournisseurs d'assistance technique.

29 SEC (97)1542 du 30.07.1997

30 En dehors d'une seule et vague définition dans le Code de bonne conduite relatif au recours à du personnel externe de 1994 : "relèvent notamment de ces tâches les fonctions liées à la représentation, à la négociation, au contrôle et au respect du droit communautaire"

ci, - Commission ou Etats tiers -. Aussi cet effort n'a-t-il nullement empêché la résurgence de nouveaux crédits de fonctionnement en partie B : dès 1996, la Commission faisait état d'un besoin en personnel supplémentaire, dû aux programmes Phare et Tacis, et dispersé à nouveau, du point de vue de l'imputation budgétaire, en partie A et en partie B (« facilité Liikanen »). Ni le Conseil, ni le Parlement, ni la Commission n'ont à aucun moment de cette histoire pris sérieusement la mesure du problème.

La réponse de la Commission

2.3.13. Alors que dès 1993 un rapport de l'IGS dénonçait les risques inhérents à la sous-traitance de la gestion de programmes communautaires à des organismes de droit privé[31], qu'au-delà de la suppression des mini-budgets le Règlement Financier continuait d'être sans cesse transgressé, que des réformes spectaculaires concernant les structures (SEM 2000) et le personnel (MAP 2000) étaient annoncées, les BAT ont continué de se développer impunément sans que la Commission n'ait à leur égard de réactions autres que tardives et partielles.

2.3.14. Un vade-mecum est actuellement en cours de préparation, dont les principes ont été adoptés par la Commission démissionnaire au cours de sa réunion du 22 juin 1999. Ces orientations constituent un progrès par rapport au vide préexistant. Au regard des problèmes décrits ci-dessus, elles sont pourtant incomplètes et insuffisantes. Tout d'abord l'idée même de diffuser un vade-mecum sur les BAT procède d'une erreur d'analyse. Les BAT, on l'a déjà dit, ne constituent pas une catégorie juridique susceptible d'être définie autrement que par la relation contractuelle qui les lie à la Commission. C'est donc cette relation contractuelle qu'il faut analyser et réglementer de façon ferme, ainsi qu'indiqué plus haut. A l'origine de tout BAT, il y a un contrat. Pourquoi la Commission a-t-elle si longtemps méconnu cette réalité et perdu ainsi le contrôle de l'assistance technique ? Parce que jamais le Règlement Financier n'a élaboré suffisamment le droit des contrats, et notamment pris en compte la spécificité des contrats de prestations intellectuelles, et en particulier, à l'intérieur de ceux-ci, les notions d'assistance technique et de maîtrise d'œuvre.

2.3.15. En outre, les orientations proposées ne sont pas assez fermes sur la question essentielle des tâches interdites aux BAT en tant qu'éléments constitutifs du "noyau dur" de la mission de service public, qu'aucun contrat ne doit pouvoir déléguer. Si, par exemple, le contrat délègue à un BAT l'instruction des dossiers, l'approbation des demandes de financement par la Commission est un pouvoir vidé de toute substance.

2.3.16. Il est permis de douter de l'opportunité de la création, prévue par le vade-mecum, d'un "Observatoire des BAT" au sein de la DG XIX. Certes, un suivi central est indispensable. Mais pourquoi ne pas en charger la cellule centrale des contrats, étroitement associée au secrétariat de la CCAM ? (cf. 2.2.78 et suivants) La tendance de la Commission est de

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31 Rapport de l'IGS "organismes de droit privé", IGS, 11 mars 1993 : risques pour l'image de la Commission ; risques financiers ; risques de conflits d'intérêts pour les fonctionnaires (cas de prestations de services non conformes aux exigences des contrats) ; risques de détournement des procédures financières ; risques tenant à l'établissement de liens privilégiés et permanents avec certains prestataires de services ; risques de concurrence déloyale.

multiplier des cellules pour des effets d'annonce, au risque de les rendre redondantes et rivales.

2.3.17. Le vade-mecum perpétue la contestable distinction entre les BAT selon leurs bénéficiaires, pour justifier l'inscription des crédits afférents à certains d'entre eux en partie B du budget, soit, en fait, une infraction à un Règlement Financier qui démontre par là, encore une fois, son obsolescence (cf. section 2.1). Du moins le vade-mecum prend-il acte de la triple condition posée par l'autorité budgétaire pour que le financement des BAT qui « prêtent une assistance dans l'intérêt mutuel de la Commission et des bénéficiaires des programmes ou actions communautaires » soit imputé en partie B : autorisation en ce sens de la base légale, mention dans le commentaire budgétaire afférent au programme concerné et indication d'un plafond annuel des dépenses liées au BAT.

Mieux externaliser

2.3.18. Tout projet d'action ou programme nouveau, décidé par l'autorité législative et budgétaire, devrait faire l'objet d'une évaluation a priori en termes de moyens nécessaires à sa mise en œuvre.

Des contrats plus rigoureux

2.3.19. En tout premier lieu, l'amélioration du contrôle de la passation et de l'exécution du contrat doit être recherchée, en se conformant aux principes suivants : les responsabilités du service public ne doivent jamais être attribuées à des BAT ; le recours à ceux-ci doit être le moyen le plus économique d'effectuer des tâches précises ; un système approprié reposant notamment sur le service d'audit interne dont la mise en place est recommandée au chapitre 5 du présent rapport doit être aménagé pour surveiller et contrôler toutes leurs activités ; les conflits d'intérêts doivent être évités ; leur coût ne peut être financé qu'à partir de la partie B du budget avec l'accord de l'autorité budgétaire. Toute la difficulté réside dans la détermination des responsabilités du service public : il y a loin, à cet égard, du principe à la réalité.

2.3.20. Un premier cas de figure est celui-ci où un contractant assure pour la Commission en vertu d'un certain nombre de contrats distincts les uns des autres avec différentes Directions générales des tâches précises et multiples qui peuvent clairement être spécifiées : dans un tel cas de figure, il n'existe pas d'inconvénient à ce que chacune des DG concernées traite avec le BAT, qui apparaît comme un fournisseur de services multiples.

2.3.21. Tout autre est le cas où il s'agit d'externaliser un ensemble intégré de tâches indissociables les unes des autres au point de constituer en permanence la mise en œuvre d'un programme, ou tout au moins d'un ensemble de mesures. La solution contractuelle se heurte alors à une triple limite :

- elle présume que l'objet du contrat peut être parfaitement défini dans le cahier des charges: or, si un effort d'analyse poussée y suffit dans nombre de cas, il en restera d'autres où ni le

résultat précis à attendre de l'assistance technique, ni les moyens effectifs à mettre en œuvre pour la fournir ne peuvent être prédéfinis ;

- elle suppose que la distinction entre les tâches dites de puissance publique et les autres - "tâches de non-puissance publique"- puisse toujours se traduire en termes organisationnels, de manière à conserver les premières à la Commission et à renvoyer les secondes à l'assistance technique. Or des tâches de simple exécution comme par exemple, de dissémination d'informations ou de traitement de données peuvent relever de la puissance publique, si elles ne peuvent être séparées de l'exercice d'un pouvoir d'appréciation ; à l'inverse des tâches de haut niveau peuvent relever de compétences spécifiques qui se trouveront bien plus dans le secteur privé qu'au sein de la Commission (mise en œuvre d'un programme de promotion du tourisme, par exemple) ;

- enfin, l'encadrement des BAT par des contrats plus contraignants ne peut équivaloir au contrôle quotidien qui peut dans certains cas être nécessaire, surtout lorsqu'il s'agit de maîtrises d'œuvre importantes, portant sur l'exécution de tout un grand programme communautaire.

2.3.22. Pour le cas de figure qui précède, il se peut que le renforcement du contrôle des contrats ne suffise pas à garantir à la Commission une maîtrise satisfaisante des tâches externalisées. Il convient dès lors d'examiner les différentes voies envisageables pour qu'elle soit mise en mesure, sous sa propre responsabilité, de les confier à des structures externes, existantes ou à créer, sur lesquelles elle puisse exercer un contrôle effectif.

Le recours à des organismes de droit privé

2.3.23. Le recours à des ASBL ne constitue pas une solution généralement envisageable. Dès lors en effet que celles-ci seraient constituées par des fonctionnaires de la Commission agissant à titre individuel ou de personnes proches de ceux-ci, les conflits d'intérêt sont inévitables. En outre, ces fonctionnaires pourraient se voir reprocher d'utiliser l'ASBL pour se soustraire aux dispositions du Règlement Financier et aux exigences du principe de transparence.

2.3.24. Tel n'est pas le cas certes lorsque l'ASBL, au lieu d'être une construction factice, est une association crédible, capable de vivre de façon autonome : nombre élevé d'adhérents, organes sociaux fonctionnant réellement, objet social de nature humanitaire ou tout du moins désintéressée, etc. Dans une telle situation, ou bien l'on se trouve devant une association entretenant avec la Commission des liens contractuels multiples, parfaitement admissibles (cf ci-dessus 2.3.20), ou bien la prestation est unique et non contractualisable (cf ci-dessus 2.3.21) et la formule de l'ASBL ne convient pas.

2.3.25. La participation de la Commission dans des sociétés de droit privé dont elle s'assurerait le contrôle en qualité d'actionnaire majoritaire voire unique est une alternative à examiner. Certains éléments plaident en sa faveur : cadre légal certain, organes de gestion bien structurés, et néanmoins souplesse caractéristique du droit privé, notamment en ce qui

concerne le recrutement du personnel.

2.3.26. Mais la création de telles sociétés ne pourrait résulter que d'un processus lourd, la Commission ne pouvant trouver les fonds nécessaires à la constitution du capital sans passer par le consentement de l'autorité budgétaire. En outre, son pouvoir de décision et de contrôle dans la société serait subordonné aux dispositions du droit national des sociétés (en ce qui concerne le détachement de fonctionnaires, la compétence du service d'audit interne envisagé au chapitre 5 du présent rapport, la révocation du PDG etc.). Surtout, la voie est étroite pour que l'externalisation par ce biais de certaines tâches de la Commission soit viable. D'un côté si la société concernée dépend de la Commission pour sa survie, cela risque de fausser la concurrence dans le secteur et de générer des conflits d'intérêts. D'un autre côté, si cette société a une clientèle diversifiée, la Commission se retrouve en tant qu'actionnaire conduite à assumer, à l'encontre du but recherché (à savoir lui permettre de se concentrer sur ses tâches de service public) des responsabilités commerciales auxquelles elle n'a pas vocation.

Des agences d'exécution

2.3.27. Il convient dès lors de réfléchir au recours à l'assistance technique - réflexion déjà entreprise dans certains cercles de la Commission[32] - à travers le développement de nouvelles structures de droit communautaire, qui pourraient être qualifiées "d'agences exécutives de la Commission". En avançant cette piste, le Comité souligne d'emblée la nécessité d'éviter différents écueils déjà rencontrés lors d'expériences passées :

- il ne s'agit pas de flanquer la Commission d'agences du type de celles que l'on connaît à l'heure actuelle : celles-ci, loin de constituer dans ses mains un instrument pour une gestion plus souple, lui permettant de recourir à des compétences présentes dans le privé qui lui manquent en interne, constituent au contraire autant de structures permanentes, dans lesquelles la Commission voit ses pouvoirs de gestion rognés par les Etats membres (présents au Conseil d'administration) ; en outre leur mode de création est très lourd du fait de l'exigence d'une décision unanime du Conseil et elles sont parfois soumises à un contrôle allégé pour ce qui concerne la détermination et l'exécution de leur budget ;

- il convient d'écarter tout risque de pérennisation en subordonnant strictement la mise en place de ces agences exécutives de la Commission à l'identification de besoins spécifiques (liés à la mise en œuvre d'un programme) et temporaires.

2.3.28. La solution adéquate pourrait être donc de recourir à une formule d'agences d'exécution, ayant une personnalité juridique distincte et dotées de l'autonomie financière. Un règlement-cadre fondé sur l'article 308 du Traité (ex article 235) adopté par l'autorité législative définirait les conditions et les modalités de création de ces structures à laquelle la Commission déciderait au cas par cas de recourir.

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32 Réponse contradictoire de la DG IX au rapport d'inspection de l'IGS sur les BAT, note 0367 du Directeur Général IX en date du 3.02.1998 ; note 0200 du Directeur Général IX en date du 25.01.1999 "offices européens d'exécution du programme", entre autres. Une allusion à cette réflexion se retrouve dans le rapport DECODE, § 7.2.3.2

2.3.29. Les agences exécutives permettraient de marier, de façon pragmatique, du personnel fonctionnaire détaché pour remplir quelques fonctions stratégiques (direction générale, comptabilité, service juridique) au sein de l'agence, et du personnel de droit privé, assurant les tâches d'exécution ou les tâches spécialisées liées directement à la nature de l'agence et du programme. En aucun cas, des agents temporaires ou des auxiliaires recrutés en vertu du statut des agents des Communautés ne devraient faire partie du personnel d'une agence. Le risque de pérennisation serait évité dans la mesure où l'agence ne serait instaurée, et le personnel privé ne serait engagé, que pour la durée du programme la justifiant.

2.3.30. La mise en place des agences ne devrait pas conduire à augmenter le personnel permanent de la Commission, c'est à dire le nombre de fonctionnaires. La permanence des missions de la Commission demande qu'elle dispose de fonctionnaires de formation généraliste (juridique, économique, financier), alors qu'elle peut avoir, pour répondre à des besoins spécifiques et temporaires, à recourir aux compétences de collaborateurs spécialisés, dont l'intégration définitive dans les services de la Commission n'est pas souhaitable. Bien entendu certains employés des BAT qui seraient remplacés par des agences pourraient au cas par cas, obtenir un contrat de travail avec celles-ci.

2.3.31. Sur la base des commentaires qui précèdent, le Comité encourage donc la Commission à approfondir la réflexion quant à la création d'une nouvelle catégorie d'organismes de droit communautaire. Ce faisant, il estime devoir insister sur la mise en garde suivante : l'éventuel recours à une formule d'agence exécutive, si elle permettrait sans doute d'assurer une plus grande flexibilité dans la gestion de la Commission, et de s'épargner des discussions oiseuses quant à ce qui relève de la puissance publique et à ce qui n'en relève pas, ne permettra pas de faire l'économie de la réflexion quant à la distinction entre mission politique et tâches de gestion : il ne doit être en aucune façon question de décentraliser les aspects **politiques** de l'action communautaire dans des agences.

2.4. Recommandations

Le développement d'une véritable doctrine contractuelle, la rénovation du cadre législatif, réglementaire et budgétaire, et le renforcement de la responsabilité des ordonnateurs devraient contribuer à assainir la gestion de la Commission, dont les plus inquiétantes dérives se sont manifestées à travers le phénomène des BAT.

2.4.1. Le domaine contractuel doit dans son ensemble constituer une préoccupation à part entière de la Commission, dans le souci de la plus grande transparence. Les instructions doivent être édictées, et la formation adéquate dispensée. Le droit des marchés publics, au niveau communautaire, pêche par l'enchevêtrement des textes, de nature variée, qui en sont la source : sa codification doit être mise à l'étude, en vue, non pas de sur-réglementer, mais de rationaliser pour faciliter le travail des praticiens (cf. 2.1.17).

2.4.2. L'inadaptation du Règlement Financier aux exigences d'une gestion moderne et d'un contrôle efficace justifie qu'il soit fondamentalement revu. En tout état de cause, il doit s'inscrire dans une hiérarchie claire des normes communautaires et s'en tenir aux principes essentiels que toutes les institutions doivent respecter. Pour les détails, il doit renvoyer à des règlements propres à chaque institution (cf. l'ensemble du chapitre 2).

2.4.3. La conclusion d'un contrat - par procédure d'appel d'offres ou par procédure négociée -, le financement d'un projet dans le cadre de l'aide extérieure, ou l'octroi d'une subvention, constituent différentes modalités de dépense des deniers communautaires. A cet égard, le Règlement Financier doit énoncer les règles de base qui s'imposent à toutes les institutions - transparence de la prise de décision, non-discrimination, contrôle ex post de l'usage effectué- et mettre fin au désordre conceptuel qui règne en matière de contrats : la notion de contrat, les différents types de contrats, doivent être précisés (cf. 2.1.21 et s.).

2.4.4. La nomenclature budgétaire actuelle fondée sur la distinction imposée par le Règlement Financier entre une partie A pour les dépenses administratives et une partie B pour les dépenses opérationnelles est inapplicable en pratique. Elle subit de nombreux contournements au stade de l'imputation des crédits. Une nomenclature par politiques faisant apparaître le coût global de celles-ci, et dans laquelle les différentes dépenses seraient identifiées selon leur nature à l'intérieur d'une même destination doit être mise en place afin de faciliter l'évaluation et de permettre à l'autorité budgétaire d'exercer tout son contrôle (cf. 2.1.15 à 2.1.19).

2.4.5. Les dépenses effectuées au titre de la coopération avec les pays tiers constituent à l'heure actuelle un domaine autonome et anarchique, si l'on considère la multiplicité des régimes juridiques le régissant. Les principes qui se dégagent des directives communautaires doivent s'appliquer non seulement aux marchés publics passés par la Commission elle-même, mais aussi à ceux qu'elle passe en tant que mandataire de bénéficiaires extérieurs des fonds communautaires (cf. 2.1.33 à 2.1.35).

2.4.6. Des règles applicables aux subventions doivent être élaborées. Dans la mesure où elles comportent une contrepartie, cause de leur octroi, elles doivent être assimilées à des contrats, tant pour la procédure d'octroi (mise en concurrence) que son contrôle (passage en CCAM) et la gestion (suivi dans les bases de données) (cf. 2.1.40).

2.4.7. Une lacune importante quant à la composition du comité d'évaluation subsiste : il doit y être remédié (cf. 2.1.28).

2.4.8. La programmation des contrats de prestations intellectuelles doit être systématisée. Il convient de proscrire la dispersion des moyens - humains et financiers - en une myriade de trop petits contrats impropres au contrôle, d'assurer la bonne compréhension des différentes procédures, de mettre l'accent sur le caractère crucial de la bonne définition de l'objet du contrat, et de garantir que l'Institution dispose des moyens de contrôler la bonne exécution du contrat (cf. 2.2.17 à 2.2.48).

2.4.9. La Commission doit demander à ses contractants et aux groupes d'intérêt d'indiquer, s'il y a lieu, la composition de leur conseil d'administration et l'identité des détenteurs de leur capital. A la fois dans un souci de pédagogie à leur égard et en vue d'assurer leur égalité rigoureuse, elle doit permettre aux soumissionnaires non retenus d'accéder aux dossiers de procédure de mise en concurrence (cf. 2.2.36 à 2.2.38 et 2.2.60 à 2.2.63).

2.4.10. Les ordonnateurs doivent être responsables, se sentir responsables, et être tenus responsables. Leur rôle doit être valorisé, notamment en veillant à qu'ils disposent des garanties nécessaires d'indépendance, voire de certains avantages en termes de carrière, ainsi

que de toute la formation et l'information nécessaires. La mise en cause de leur responsabilité disciplinaire et pécuniaire ne doit pas rester une éventualité purement théorique. La dissociation de la décision d'engager la dépense et de la signature de la proposition d'engagement est préjudiciable à un esprit de responsabilité. Il devrait donc toujours y avoir sinon identité, du moins proximité entre l'ordonnateur et le signataire d'un contrat (seul acte engageant juridiquement la Commission à l'égard des tiers, alors que l'engagement n'est qu'une décision interne) (cf. 2.2.49 à 2.2.59).

2.4.11. Il doit être exclu que la Commission, ou un commissaire habilité par le collège, puissent être ordonnateurs (cf. 2.2.58).

2.4.12. Le conseil aux ordonnateurs en matière de contrats doit être développé. Pour cela, la cellule centrale des contrats, récemment constituée par la Commission, doit être dotée de moyens accrus, en ressources humaines et informatiques, de façon à fournir ex ante l'assistance nécessaire aux ordonnateurs pour monter leurs dossiers, à suivre ex post l'exécution des contrats les plus significatifs, et à en tirer les conclusions nécessaires, en vue d'assumer l'adaptation permanente de la réglementation. A cet effet, la cellule centrale des contrats a besoin d'être mise en contact, à travers la commission consultative des achats et marchés (CCAM), avec les projets de contrats les plus importants ou les plus typiques. Ses représentants doivent donc y siéger et y constituer l'élément techniquement prépondérant (cf. 2.2.75 à 2.2.77).

2.4.13. La CCAM, cantonnée à l'heure actuelle à un contrôle quasi-mécanique de l'application des textes, et qui ralentit un processus déjà trop lourd, doit être réformée. Le nombre de dossiers traités doit être extrêmement limité. Leur sélection doit se faire sous la responsabilité personnelle du président de la CCAM, assisté du secrétariat de celle-ci et de la cellule centrale des contrats, travaillant en synergie. Les dossiers non sélectionnés doivent être immédiatement relâchés, en contrepartie d'un examen approfondi des quelques dossiers retenus pour leur exemplarité. Les réunions de la CCAM doivent se tenir à un niveau hiérarchique suffisamment élevé, mais tel cependant que les membres titulaires assistent effectivement à la majorité des séances. Sa composition doit être paritaire, de façon à en faire une enceinte de dialogue entre DG fonctionnelles et DG opérationnelles. Les seuils de saisine doivent être substantiellement relevés, plus ou moins selon les types de contrats (cf. 2.2.78 à 2.2.98).

2.4.14. La Commission doit enfin se doter d'un fichier central des contrats et des contractants : à défaut d'y parvenir dans le cadre du système SINCOM, les services centraux doivent examiner les alternatives (développement de la base de la CCAM) en concertation avec les ordonnateurs (cf. 2.2.64 à 2.2.73).

2.4.15. La multiplication et la diversification des tâches de gestion de la Commission, jointes à l'impossibilité d'y répondre par une expansion indéfinie du nombre de fonctionnaires, justifient une politique d'externalisation. A cet égard, il est nécessaire de maîtriser le recours aux ressources du secteur privé, de façon à respecter les exigences du service public. En outre, le Comité suggère que soit explorée de manière approfondie la solution d'agences d'exécution placées sous la tutelle exclusive de la Commission (cf. l'ensemble de la section 2.3).

Annexes

I. Subventions : nombre d'engagements et montant des engagements par an et par DG

II. Subventions : répartition des montants octroyés ; coût de la gestion des subventions en ressources humaines

III. BAT : typologie des tâches demandées aux BAT

IV. BAT : répartition par DG

ANNEXE I

SUBVENTIONS

Nombre d'engagements et montant des engagements par an et par DG

DG	Nombre d'engagements	Montant des engagements
V	2.074	125.121.959,38
VIII	867	321.267.932,00
X	833	38.565.327,59
XXIII	739	31.576.579,30
XXII	395	16.792.928,26
XI	366	25.526.499,93
I.B.	255	119.247.115,00
I.A.	222	57.088.036,46
XXIV	205	17.378.498,00
S.G.	121	31.003.406,00
VII	120	18.326.444,00
III	109	14.517.171,59
XVII	106	16.494.207,87
XII	104	3.405.455,19
XIII	66	4.414.064,49
I	60	5.588.711,00
XVI	60	168.886.202,00
XIV	57	40.149.074,00
VI	50	5.550.434,00
OSCE	30	4.668.844,87
XX	18	136.200,00
II	13	387.000,00
XXI	11	1.074.248,00
XV	6	69.069,38
IX	2	40.000,00
SCIC	1	155.550,00
TOTAL	**6.890**	**1.067.430.958,31**

Source : Rapport IGS (mai 1997)

ANNEXE II

SUBVENTIONS

Répartition des montants octroyés

Tranches (en Euros)	Montants	Nombre engagements
0-10 000	5.153.223	964
10 000-20 000	13.132.395	947
20 000-30 000	25.921.598	1.167
30 000-40 000	16.402.266	486
40 000-50 000	18.227.930	420
50 000-60 000	20.322.270	383
60 000-70 000	16.945.653	266
70 000-80 000	17.183.048	230
80 000-90 000	14.789.794	176
90 000-100 000	15.129.427	160
100 000-110 000	19.107.976	187
110 000-120 000	10.937.540	96
120 000-130 000	11.902.068	96
130 000-140 000	7.942.146	59
140 000-150 000	8.410.694	58
+ de 150 000	745.922.925	1.194
Montant total eng.	**967.430.952**	**6.889**

Coût de la gestion des subventions en ressources humaines

Tâches	Total	%
- opérationnelles	366,37	72,8
- d'évaluation	36,38	7,2
- financières	100,75	20,0
Total	**503,5**	**100,0**

On peut estimer à 503,4 hommes/année le personnel employé à des tâches de gestion des subventions.

Source : Rapport de l'IGS sur « Le recours des services de la Commission aux BAT (4.02.1998)

BAT

Typologie des tâches demandées aux BAT

		Nombre de BAT exerçant cette tâche
A. - TACHES D'ASSISTANCE ADMINISTRATIVE:		
A1.	Gestion de contrats administratifs avec les bénéficiaires de l'action communautaire	15
A2.	Dissémination d'information concernant le programme	21
A3.	Travaux de secrétariat pour le programme	14
A4.	Recueil et traitement de données, création et/ou gestion de bases de données	19
A5.	Vérification des paiements des travaux	14
A6.	Préparation des paiements	9
A7.	Autres	5
T. - TACHES D'ASSISTANCE TECHNIQUE:		
T1.	Recrutement d'experts pour l'assistance aux projets	3
T2.	Analyse de la validité des offres soumises	9
T3.	Evaluation de la validité technique des offres	12
T4.	Vérification et évaluation de la démarche du programme	9
T5.	Participation à des réunions techniques et d'information sur le programme	18
T6.	Participation à l'évaluation des offres	8
T7.	Participation à la discussion sur le financement de projets, rédaction de rapports annuels d'activité	14
T8.	Rédaction de plan d'action pour le programme	7
T9.	Interface opérationnel entre les autorités des pays tiers et la CEE	6
T10.	Organisation de conférences et/ou de séminaires	13
T11.	Etablissement des termes de référence pour un projet/définition des tâches à accomplir	2
T12.	Autres	16

Rapport de l'IGS sur "Le recours des services de la Commission aux BAT" (4.02.1998).

ANNEXE IV

BAT

Répartition par DG

(Euros)

DG	Parties A et B	
	H/a*	Crédits
1	0	0
1A	191	40.608.010
1B	324	44.379.000
2	0	0
2SOF	19	2.968.350
3	0	300.000
4	0	0
5	83	20.010.499
6	21	5.574.248
7	0	0
8	67	19.328.891
9	0	0
10	56	5.273.230
11	0	0
12	0	0
13	0	964.165
14	0	0
15	0	476.224
16	0	12.432.695
17	0	0
19	0	0
20	0	0
21	0	171.000
22	86	8.604.000
23	51	6.789.759
24	0	0
AAE	0	0
BdS	0	0
CCR	0	0
CdP	0	0
DI	0	0
ECHO	0	0
IGS	0	0
OPOCE	0	0
OSCE	52	4.693.000
SCIC	0	0
SCR	24	14.597.082
SdT	0	0
SG	0	0
SJ	0	0
SPP	0	0
TFNA	0	0
TOTAL	**974**	**187.170.153**

***** *Homme/an (données indicatives pour 1998)*

Source : Enquête sur l'assistance technique et administrative extérieure utilisée par les services de la Commission dans la mise en œuvre de programmes ou actions communautaires. (Note du 30.11.1998).

3. SHARED MANAGEMENT

TABLE OF CONTENTS

3. SHARED MANAGEMENT IN GENERAL

3.1. Introduction

3.1.1. The first report of the Committee dealt with subjects related to direct management by the Commission. The preceding chapter of this report also deals with such matters. Although during the last ten years problems have become manifest in that field this should not divert attention from longer established difficulties in other sectors such as agriculture and the Structural Funds[33] where management is shared between the Commission and the Member States.

3.1.2. In both sectors management of policy has been inadequate for many years. The European Court of Auditors in its annual reports, special reports and opinions repeatedly criticised weaknesses, in particular those leading to a high incidence of irregularity ranging from simple errors to serious frauds and a lack of effectiveness. The problem of a high level of irregularities was recognised at the time of the adoption of the Maastricht Treaty. The Treaty required the Court of Auditors to publish an annual Statement of Assurance as to the reliability of the Community's accounts and the legality and regularity of the underlying transactions[34].

3.1.3. The insertion of a new article 280 (formerly 209a) in the same Treaty (effective from 1993) which states that "*Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests"* was a breakthrough in approach. Member States themselves had by this time become aware of the need to take a more committed approach to protecting Community funds even when they had no immediate financial interest in so doing . The new article in the Maastricht Treaty reflected this change in attitude which lead, although with too long a delay for the Structural Funds, to amendments to the Regulations in these fields (agriculture from 1995, Structural Funds from 1999).

3.1.4. It is important to bear in mind that although Member States are the principal disbursers of Community monies in their own territories, where a fraud or irregularity goes undetected or unreported it is the Community budget, and not the Member State, which pays (see below at 3.7.3. and ff.).

3.1.5. The history of shared management demonstrates the difficulties the Commission has had as a manager of money, policy and programmes vis a vis the Member States. Strengthening financial management, tighter controls, reducing the number of irregularities and better fraud detection were long overdue. Recognition of this also gave rise to the creation of UCLAF (see chapter 5 of this report).

3.1.6. The Treaties have given wide –ranging powers, and a considerable area of discretion in their deployment to the Commission. The everyday relationship between the Commission and the Member States is sometimes delicately balanced and this can lead to the Commission

[33] The Structural Funds are the European Regional Development Fund, the European Social Fund, the European Agricultural Guidance and Guarantee Fund, Guidance Section, and the Financial Instrument for Fisheries Guidance.

[34] Article 248 (ex article 188c)

showing a lack of courage and exhibiting laxity in order supposedly to preserve this balance. The Commission has even been prepared to negotiate when faced with improper pressure from Member States. But a compliant Commission is not in the interests of sound management nor in the longer-term interests of the Member States as a whole. It is the Commission which implements the budget on its own responsibility, a responsibility not shared with the other Institutions or the Member States (see paragraph 3.3.4 below). Community legislation in the fields of agriculture and the Structural Funds must respect this Treaty provision by giving the Commission the powers to exercise this responsibility and to fulfil its obligation of accountability to the discharge authority.

3.1.7. The question is whether the right balance has been found between the Commission's responsibilities and the legal and material means of which it disposes to exercise its responsibilities. This point also merits careful attention not least because of the enlargement of the Union now being prepared. The realisation of the 'acquis communautaire' in this field should not be limited to legal texts. It should also be understood to include the requirements of control in executing Community policies.

3.1.8. This chapter will examine shared management as it is applied in practice to the implementation of Community policies and not as an abstract concept. In budgetary terms shared management characterises most of the Commission's and the Member States' activity to implement Community policies. Some of the issues raised will be discussed from different perspectives in other chapters of this report. Shared management and the areas to which it applies are considered separately and distinctly here because of its prevalence, history and financial importance. The field of its application is so wide that it will not be possible to consider every area to which it does apply nor to examine its application in all its diverse ways and circumstances. The focus of this chapter will be on certain aspects of the shared management of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee section and the Structural Funds.

3.2. Definitions

3.2.1. Shared management is nowhere specifically defined in Community legislation. The key regulations governing the EAGGF and the Structural Funds simply set down the respective roles and tasks of the Commission and the administrative authorities of the Member States in such a way as to make it clear that the legislator's intention is that the management of the EAGGF and the Structural Funds should be shared. These Regulations will be considered in greater detail below where the operation of shared management in these areas is discussed.

3.2.2. For the purposes of this chapter shared management will be understood to refer to the management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully. Direct management in contrast is where the Commission directly manages programmes without the necessary involvement of Member State administrations, for example the PHARE programme.

3.2.3. Shared management is a long established practice and is a feature of the Common Agricultural Policy, the biggest common policy in terms of budgetary expenditure. The Guarantee section of the EAGGF accounts for 48 % of the European Union's 1998 annual budget and comprises direct income support, price support payments, export refunds, set aside premiums and other financial aid to agricultural production. Shared management is also used to

implement the Communities' Regional and Social Funds as well as the structural element of the EAGGF, the Guidance section. In total these Structural Funds and the Cohesion Fund[35] account for 36 % of the European Union's annual budget. Only a very limited part of the Structural Funds, for example pilot studies to help direct policy development and research contracts within the EAGGF Guarantee section are directly managed by the Commission. **For ease of understanding the reader will find at annexe 1 a table showing the distribution of Community expenditure by broad category.**

3.2.4. Shared management varies in its operation from one area to another but its defining financial characteristic is that payments to beneficiaries made in respect of Community policies are made by national authorities designated by the Member States within the framework of the Regulations governing those policies. Although there are different legal arrangements specific to each policy area, the disbursement of funds by Member States and their subsequent reimbursement subject to financial corrections by the Commission is a constant.

3.3. Shared Management and the Commission's Responsibilities

3.3.1. Shared management implies shared responsibility between the Commission and national administrations for the efficient administration of Community policies and for the ensuring that the law as expressed in the Regulations as well as in the Treaties is respected. Nevertheless the Commission has a particular and over-arching responsibility for Community policies which cannot be shared even where day to day management is. Article 211 (ex-155) of the Treaty establishing the European Community states that the Commission shall "*ensure that the provisions of this treaty and the measures taken by the institutions pursuant thereto are applied*. The Commission shall also *exercise the power conferred on it by the Council for the implementation of the rules laid down by the latter*."

3.3.2. The Commission's ultimate responsibility for ensuring the application of Community policies is clear. Shared management although a long standing and clearly necessary arrangement is a contingency whose legal basis is in secondary legislation, mainly the various Regulations concerning the EAGGF Guarantee section and the Structural Funds. Ultimate responsibility for implementation rests with the Commission by virtue of the Treaty itself. This responsibility cannot be delegated even to a national administration and shared management is therefore not a form of a delegated responsibility.

3.3.3. This point is eloquently expressed in the European Parliament's resolution postponing the 1997 Discharge decision[36] which says: *"la Commission est la responsable ultime au niveau communautaire de l'action des administrations nationales coresponsables de l'exécution des politiques nationales gérées en partenariat."*

3.3.4. On the financial side the matter is if anything clearer. Article 274 (ex-205) of the Treaty states that "*the Commission shall implement the budget …on its own responsibility ... having regard to the principles of sound financial management."* The key phrase in the context of this chapter is "on its own responsibility". The distinction between responsibility which is established in the Treaties and management which is shared by virtue of secondary legislation is crucial to what follows. Management may be shared but financial responsibility is not.

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[35] The Cohesion Fund contributes to the strengthening of economic and social cohesion in the Community in Member States where GNP per capital is less than 90 % of the Community average.

[36] PE 230650, page 7, point 0

3.4. Shared Management and the Member States' Responsibilities

3.4.1. Notwithstanding the above the Member States do have Treaty derived responsibilities which are relevant in this area. In particular, and this is important for parts of the discussion which follow, Article 280 (ex-209a) of the Treaty as amended by the "Amsterdam Treaty" reads:

> *"1. The Community and the Member States shall counter fraud and other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article which shall act as a deterrent and be such as to afford effective protection in the Member States.*
>
> *2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests."* (The full text of article is quoted at paragraph 5.5.1).

The Amsterdam Treaty also amended article 274 (ex 205) cited at paragraph 3.3.4 above by further adding the words *"Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management."*

3.4.2. In addition Council Regulation 2988/95[37]. of the 18 December 1995 requires Member States to take measures to ensure the regularity and reality of transactions involving the Community's financial interests including by carrying out checks and inspections Other specific requirements are set down in sectoral legislation.

3.4.3. Given the foregoing, two questions arise. Do the Council regulations which establish the various shared management arrangements take sufficient account of the Commission's indivisible responsibility for implementing the budget and ultimate executive responsibility? In the areas of shared management do the practices of the Commission and the Member States reflect the respective Treaty articles? These and other questions are best answered through an examination of aspects of the EAGGF and the Structural Funds' implementation.

3.5. Other Considerations Relevant to Shared Management in General

3.5.1. The Statements of Assurance published by the Court of Auditors to the accounts from 1994 onwards have confirmed the high level of errors in underlying transactions, especially in relation to payments made by the Member States in the fields of shared management. On the basis of information, both quantitative and qualitative, in the successive statements, it is believed that the rate of substantive errors for payment for the budget as a whole is a good 5 % (substantive errors are those legality and regularity errors which have direct, measurable effects on the amount of the underlying transactions financed by the Community budget). This has prevented the Court giving a positive Statement of Assurance on the payments made. For EAGGF, Guarantee the percentage seems to be somewhat lower and for the Structural Funds much higher.

3.5.2. The partial or complete separation of the financing of a Community policy from its implementation, as is the case in the area of shared management, is a point which merits particular attention. In general in the Member States such structures are avoided. In the Community they cover 85 % of its budget.

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[37] OJ L 312 of 23 December 1995

3.5.3. The Member States have a conflict of interest. On the one hand as members of the Council it is their duty in adopting regulations to create conditions for their implementation that are readily implemented and controlled by the Commission. On the other hand as nation states they favour their own systems of management and control. This hybrid arrangement leads to a lack of clarity on mutual responsibilities and obligations and fails to give any guarantee that the right balance has been struck in the interests of good management of Community monies.

3.5.4. The occurrence of irregularities and frauds is an extremely important element in the consideration of the advantages and disadvantages of partnership with Member States and decisions on the modalities of shared management. In any case, the Commission must be always in the position to exercise its own responsibilities via monitoring, control and evaluation of the effectiveness of its partners and make financial corrections when necessary.

SHARED MANAGEMENT OF THE EAGGF GUARANTEE SECTION

3.6. The Agricultural System and its Evolution

3.6.1. In European Community terms the Guarantee section of the EAGGF has a very long history. The original six Member States set up a single agricultural fund as far back as 1962 (Reg. 25/62-OJ 30/1962). In 1964 two distinct sections were established (Reg.17/64-OJ 34/1964). The Guidance section covered Community expenditure incurred under the policy relating to agricultural structures while the Guarantee section covered Community expenditure incurred under the policy relating to agricultural markets. In the period to 1970 expenditure under the Common Agricultural Policy was gradually taken over by the Community budget. The key regulation governing the EAGGF adopted in 1970, although amended since, is Council Regulation 729/70 of 21 April 1970.[38]

3.6.2. This Regulation confirmed the existence of two sections of the Fund: the Guidance section to finance the structural adaptations necessary for the proper working of the market and the Guarantee section which is discussed here. The Guarantee section was to finance refunds on exports to third countries and intervention intended to stabilise the agricultural markets. Broadly put the Guarantee section operated through a system of price support to ensure a fair income for producers and price and supply stability for consumers. Export restitution payments compensated producers when world market prices, estimated for each product and for all destinations on the basis of mercurial factors such as the price of wheat on the Chicago Exchange, were below Community reference prices. Furthermore, a system of storage at the same level of support was implemented in order to regulate the internal markets.

3.6.3. Community prices have been constantly maintained at a level very much higher than market prices and storage has become a quasi-permanent phenomenon. The system led, especially from the end of the seventies, to massive agricultural surpluses and costs which placed an enormous burden on the Community budget. From the eighties onwards the mechanisms for supporting producers' incomes have been progressively modified. Community prices have been somewhat lower, especially for cereals. Nevertheless, overall they have remained clearly above world prices and considerable surpluses are still in place. The system of subventions for export has been diversified to take account of destinations. It has thus become, not only a technical arrangement for the management of agricultural markets, but also a tool of commercial and humanitarian policy. At the same time a complex system of direct aid for agricultural production has been developed.

[38] OJ L 94 of 28 April 1970

3.6.4. For the period 1988-1992 and then for the period 1993-1999 an "agricultural guideline" within the context of an overall financial perspective agreed by the Parliament and the Council succeeded in slowing growth in agricultural expenditure and reducing its share of the Community's budget. The "MacSharry" reforms introduced from 1992 onwards began a move away from price support to direct support to producers usually on an acreage or stock basis. In the Agenda 2000 document[39] the Commission proposed deepening and extending the 1992 reforms through further shifts from price support to direct payments from the Community budget. Forms of direct payment now account for 70 % of Guarantee section expenditure and will increase to 80 %.

3.7. The Basic Control Regulation

3.7.1. Regulation 729/70 established that from 1970 onwards management of the EAGGF Guarantee section should be shared. Article 4 reads :

"Member States shall designate the authorities and bodies which they shall empower to effect, from the date of application of this Regulation the expenditure referred to in articles 2 and 3. They shall communicate to the Commission, as soon as possible after the entry into force of this regulation, the following particulars concerning those authorities and bodies: - their name and, where appropriate, their statutes;
. .. the Commission shall make available to the Member States the necessary credits so that the designated authorities and bodies may, in accordance with Community rules and national legislation, make the payments referred to in paragraph 1."

These payments by the Commission to the Member States were on a monthly basis originally by way of an advance followed by a declaration after the month end and are now by way of reimbursement on the basis of a monthly declaration by the Member State. In fact those agencies which had made payments under the previous national agricultural regimes by and large became the paying agencies for the Guarantee fund.

3.7.2. Article 5 of Regulation 729/70 required Member States to pass to the Commission the annual accounts and documents for making up the balance sheets of these bodies and to *"Satisfy themselves that transactions financed by the Fund are actually carried out and executed correctly; to prevent irregularities; recover sums lost as a result of irregularities or negligence."* This article provided the basis for a clearance of the annual accounts by the Commission resting on information supplied by the Member States. Initially and in implementing legislation the term "making up of accounts" was used.

3.7.3. The same Regulation made Member States responsible for preventing and detecting irregularities and recovering sums lost because of them. At Article 8 it states

"In the absence of total recovery the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States."

3.7.4. It is this article which gives rise to the situation referred to at paragraph 3.1.4. If a fraud or irregularity is undetected the cost is borne by the Community. Only in the event of detection can the consequences of irregularities or negligence be attributed to the administrative authorities of a Member State. At this point it is worthwhile recalling the sometimes extreme

[39] Bulletin of the European Union, Supplement 5/97

complexity of the market regulations and that it is the Member States themselves in Council who have adopted a corpus of complex legislation with all the "loophole" possibilities this entails.

3.7.5. It is difficult to believe that the administrative authorities or other bodies in the Member States are always inclined to highlight for the Commission instances of irregularity or negligence on their part which would result in them bearing the resulting financial consequences. It is also difficult to believe that they are never negligent. In other words the arrangements which this basic Regulation established and which still pertain do not provide the immediate disbursers of 48 % (at one time this figure was as high as 70 %) of the Community's budget, the EAGGF paying agencies in the Member States, with any immediate incentive for rigour and tight control of what is in effect someone else's, that is the Community's, money.

3.7.6. This observation will be revisited below but it does strongly suggest that the Commission must at all times be able legally and in terms of its resources to act decisively and independently to protect the Community's financial interests in accordance with Article 274 of the Treaty.

3.8. The History of the Clearance of Accounts

3.8.1. Since 1970 the Clearance of Accounts procedure has been crucial to the protection of the Community's financial interests and while not the Community budget's first operational line of defence in the EAGGF Guarantee section it is its most important. The Clearance of the accounts by the Commission leads directly to closing the accounts. In doing that the Commission accepts what may be charged definitively to the Community budget. It should therefore have full responsibility for checking and evaluating the systems in operation and the documents it receives both in Brussels and on the spot in order to clear and then close the accounts. All other acts including audit by Member States are no more than technical preparations for this final management act which the Commission undertakes on its own responsibility.

3.8.2. The complexity of the various systems has always made Clearance difficult. The recurring temptation is to stray from the strict application of the legislation to something more akin to bargaining between the Commission and each Member State. These difficulties led, at the end of the seventies and beginning of the eighties, to delays in clearance often of more than five years. Finally, the Clearance of Accounts procedure underwent a major change in 1995 after the adoption of two new regulations, Council Regulation 1287/95 of 22 May 1995[40] and Commission Regulation 1663/95 of 7 July 1995[41] both applicable from the 15 October 1995 and considered below (at 3.9.1 ff.). To examine the significance of that change and to place it in its context it is necessary briefly to describe the previous procedure, the difficulties it gave rise to and the reasons for its reform. It is important to recall that both before and after the adoption of the new regulations the Commission made and makes monthly payments to the paying agencies in the Member States and thereafter seeks to make recoveries where it believes undue payments have been made.

3.8.3. Under the pre-1995 arrangement the Commission was required to clear the EAGGF Guarantee accounts by the 31 December of the year following the financial year concerned, that is by the 31 December of year n+1. Member States submitted the accounts of paying agencies

[40] OJ L 125 of 8 June 1995
[41] OJ L 158 of 8 July 1995

by the 31 March of year n+1. Thereafter the Commission opened an enquiry phase based on the information submitted and its own checks. There followed a contradictory procedure during which the Member States had an opportunity to contest the Commission's proposed corrections and which brought in informal but substantial elements of political pressure and negotiation which invariably reduced the amounts recovered through clearance. The accounts were rarely closed on time. More usual was for the accounts to be closed at the 31 December of year n+ 2. The delay began with the Member States who very largely failed to respect the deadline for the submission of the paying agencies' accounts. The delays meant that the accounts were not closed by the time the Court of Auditors drafted its Annual Report and its Statement of Assurance and even on occasion had not been closed before the Parliament had begun the discharge procedure for the year concerned. After the Commission's formal decision Member States also enjoyed the right to take a case to the Court of Justice.

3.8.4. In addition the whole procedure was seen in some quarters as too conflictual. When interviewed in connection with this report one senior Commission official expressed the view that the Member States had lacked confidence in the Commission's judgement when it came to determining corrections. This led to an initial reform to the procedure that took place in 1994 when a Conciliation body of five "wise" persons was set up by the Commission to consider disputed corrections. A further observation on conciliation will be made below (paragraph 3.11.1 and ff.). Notwithstanding any effect this may have had on Member States' perceptions of the outcomes, it had the effect of adding a further six months to the clearance procedure.

1.1.1. The amounts involved in the annual clearance decisions were substantial. The total disallowed in respect of 1992 was 788 million ECU. The amount for 1993 was 755 million ECU. These sums represent respectively 2.6 % and 2.3 % of the yearly total of Guarantee expenditure but are above average because of exceptional corrections related to the implementation of milk quotas. The amounts so far for 1994 and 1995 are 307.6 million and 430 million ECU or about 1% of yearly Guarantee expenditure.

3.8.5. There were and are two types of correction dealt with in the context of clearance. The first type of correction is made when a particular irregularity or mistaken payment is uncovered. The second type is more important. Flat rate corrections are made where the Commission on inspection has identified a systematic weakness in a paying agency's procedures which it is reasonable to suppose has led to a series of irregular payments over time. The underlying principle is that the rate of correction must be clearly related to the probable loss. From 1990 the Commission applied flat rates of 2 %, 5 % and 10 % depending on the extent of the systematic weakness and the estimated loss to the Community. At the Parliament's insistence a 25 % rate was added from 1998. The Court of Justice has upheld the Commission's prerogative to apply flat rate corrections of up to 100 %[42].

3.8.6. For the period from 1989 to 1993, some 3200 million ECU were recovered from Italy and Spain after those Member States' failure properly to implement the milk quota regime. The Commission had originally favoured allowing all of this expenditure but had been obliged to reconsider following observations from the Court of Auditors supported by the Parliament. The Council subsequently decided that the states involved could repay in four separate tranches. This case clearly showed the Commission's weakness in the face of the political pressure that was brought to bear, although it was clear that the amounts should be recovered. Political pressure eventually obtained the "compromise" of staggered repayment. The case also illustrated the

[42] Case C-50/94, Greece v. Commission - 4/7/96 - European Court Reports 1996, page 1 -3331

weakness of the then clearance procedure the outcome of which the Commission was prepared to disregard on this occasion despite, or perhaps even because of, the very large sums involved.

3.8.7. The 1993 clearance procedure was particularly contentious. In fact for that year two distinct clearance decisions had to be made in April and July 1997 because at the time of the earlier decision an amount was still eligible for or subject to the conciliation procedure. Even so, and despite the amount of 755 million ECU disallowed, of which 27% concerned milk products in Italy, 1566 million ECU or 4.8 % of the total expenditure declared was excluded from the clearance decision and carried forward to future clearance years[43].

3.9. The New Clearance of Accounts: Accreditation and Certification

3.9.1. The impetus for reform, set in the context of a more general concern about frauds and irregularities, was now well established. As mentioned above it led to the 1995 reforms laid down in Council Regulation 1287/95 which amended the provisions of the basic Regulation 729/70 dealing with the Clearance of Accounts.

3.9.2. This Regulation refers in its preamble to the difficulties created by a single annual decision and the need to shorten the time limit for the clearance decision. Crucially it established two distinct types of clearance decision, one accounting and the other relating to compliance. Commission Regulation 1663/95 of 7 July 1995 lays down the detailed rules which reform the clearance procedure.

3.9.3. In summary these two regulations introduced three new substantial features

- paying agencies must now be formally **accredited** by the Member State. Only these agencies may make payments. The annex to Regulation 1663/95 gives the criteria which paying agencies must meet. These include the existence of an internal audit service and a structure which separates the authorisation, execution, and the accounting for payment[44]

- **certification** of the annual accounts of the paying agency before their transmission to the Commission by "*a department or body which is operationally independent of the paying agency*[45]*"* (only the correctness of the accounts from an accounting point of view and not as regards the legality and regularity of the underlying transaction is concerned here)

- a distinct **accounting** clearance decision based on the annual accounts submitted with a definite decisional timetable; and a distinct **compliance** clearance decision based on the Commission's checks[46] on the legality and regularity of the underlying transaction. Each of these new features is discussed below: accreditation and certification at 3.9.4 ff., and the separation of accounting and compliance clearance at 3.10.1 ff.

3.9.4. The accreditation of paying agencies and the certification of accounts really concern the operation of shared management at Member State level. The Court of Auditors Special Report

43 Court of Auditors Special Report 2/98 - OJ C 121/1988
44 Article 1 of Regulation 1287/95 and article 1 of Regulation 1663/95
45 Article 3 of Regulation 1663/95
46 Article 1 of Regulation 1287/95

21/98 examined in detail the accreditation of paying agencies and the certification of accounts by the Member States as well as the accounting clearance of accounts for the first year of the new system. Although it found shortcomings and delays leading ultimately to two accounting clearance decisions for 1996 (5 May and 30 July 1997, both after the deadline date of 30 April given in Regulation 1663/95) it concluded that *"both the Member States and the Commission made significant efforts to comply with the new Regulation"* (paragraph 5.1, page 10)[47]. The Court did point out however that no decision had been made at the time of writing of its report in regard to compliance either for transactions in 1996 or 1997.

3.9.5. Accreditation is new. It is a central feature of the new regulations. Council Regulation 1287/95 requires the Member States to "*limit the number of accredited paying agencies to the minimum necessary in order to effect the expenditure ..... under satisfactory administrative and accounting conditions."*

3.9.6. Before 1996 there were hundreds of unnotified, small de facto agencies making EAGGF Guarantee payments in the Member States without any structured procedures for checking on their activities or accounts in terms of EC Regulations. This was clearly illegal but tolerated by the Commission and practised by the Member States. Given that officially they did not exist for the purposes of making payments any payments they were making must have been legally questionable. The original Regulation 729/70 was quite clear. There were no exceptions. It required the Member States to communicate to the Commission the names and statutes of all authorities and bodies making payments as well as their annual reports and accounts (article 4.2). This certainly did not happen. Shared management here amounted to not much more than shared acceptance that the Regulation could be flouted. The Commission is most at fault. In this situation it is difficult to see how it could be sure that bodies about which it officially knew nothing (although of course it was fully aware of their existence) were properly disbursing funds for decades for which the Commission was ultimately responsible.

3.9.7. The number of de facto paying agencies has decreased since 1996 largely because of Commission pressure. In consequence the number of properly notified agencies which keep accounts of EAGGF Guarantee expenditure has increased from 55 in 1995 to 90 now as Member States have been finally obliged, after 26 years, to respect the law which they adopted.

3.9.8. Criteria for accreditation are laid down in the Annex to Regulation 1663/95. Nevertheless the Commission has in practice decided that these need not apply to smaller paying agencies for which it has allowed the Member States to use less stringent criteria. In view of this and in the event of irregularities or a future legal challenge will the Commission be able to insist that accreditation be withdrawn or withheld in respect of a particular agency?

3.9.9. Certification of the accounts is new. It too is a central feature of the new Regulations. Certifying bodies must be operationally independent of the paying agency (Regulation 1663/95, article 3).Notwithstanding this in Denmark and more often than not in Germany they are the internal audit departments of the paying agency as the Court of Auditors confirms in its Special Report 21/98. In effect the paying agencies certify their own accounts in these Member States which is in direct contradiction to the requirements of the Regulation and negates the idea of an external audit.

3.9.10. In fact the overall situation is neither transparent nor reassuring. The leeway which the Commission has allowed the Member States on accreditation and certification amounts to a lax

[47] OJ C 389 of 14 December 1998

implementation of the Regulation. In these circumstances there is a real risk that the number of paying agencies will again increase. The Committee is of the opinion that the Commission should ensure conformity with the letter and spirit of the Regulation in the interests of transparency and efficiency.

3.10. The New Clearance of Accounts : Accounting and Compliance separated

3.10.1. The third strand of reform was the separation of the accounting (based largely on accreditation and certification) from the compliance clearance of accounts. The objective here was to speed up the clearance procedure. The Community's overriding interest remains the recovery through clearance of amounts unduly paid within a reasonable period of time

3.10.2. It is difficult to see how the separation of the clearance into accounting clearance and compliance clearance has in practice contributed to attaining this objective.

3.10.3. The timetable set down in Regulations 1287/95 and 1663/95 for **accounting** clearance is straightforward. Member States must provide the certified accounts to the Commission by 31 January of year n+1.The Commission must clear these accounts by 30 April of year n+1.This accounting clearance decision covers the integrity, exactitude and veracity of the accounts submitted (Article 1 of Reg.1287/95). In other words this decision is limited to an examination of the accounting documents but does not require an examination of the acceptability of the underlying transactions.

3.10.4. Nevertheless the Commission has not made one single accounting clearance decision by the date fixed in the Regulation for any of the years 1996,1997 or 1998. It continues to 'disjoin' expenditure (in effect postpone consideration of it) and make two accounting clearance decisions for each year. This is largely because not all Member States respect the timetable for presentation of the certified accounts of paying agencies to the Commission.

3.10.5. The timetable for the **compliance** clearance decision is not straightforward. There is no overall deadline given in the Regulations for the completion of this exercise. It is true that the Commission may only refuse to finance expenditure incurred in the 24 month period preceding its formal communication to a Member State on a given matter. For example formal letters sent by the Commission on 1 June 1999 cannot result in the recovery of expenditure effected by paying agencies before 1 June 1997 (although this does not apply to specific instances where an irregularity has been uncovered). When, as is usually the case, the amount to be recovered is disputed the Commission and the Member State are enjoined to resolve the matter bilaterally. Thereafter the Member State can call for mediation by the Conciliation body which gives an opinion. The matter could go to the Court of Justice if the Member State is still not satisfied with the definitive decision of the Commission which is taken in cognisance of the Conciliation body's opinion.

3.10.6. Compliance clearance is based on the Commission's checks on transactions themselves and on systems of transaction and not on a reading of the accounts, as with accounting clearance. The Commission's clearance of accounts unit carries out about 120 on-the-spot compliance check missions in an average year. Given that the certificate for the accounts obtained by the Member States does not concern the validity of the underlying transactions there is no reason to weaken compliance, in fact it will be argued below that this should be strengthened.

3.10.7. There are two problems here. Obviously the Commission must be quick off its mark in sending out formal communications to Member States given the 24 month limit. In view of this the Commission is urged to adopt a conscious policy of making these formal communications within as short a period as possible after the transaction to which they refer. The second problem is the absence of a deadline date for compliance clearance. Unless the Commission is energetic and the Member States co-operative corrections identified through checks could be in abeyance for very long periods of time. It is hard to see how from the Community's perspective this represents an improvement on the previous situation.

3.10.8. In fact there are good grounds for concern. The first compliance clearance decision for the first year to which the reformed procedure was applied, 1996, was taken in March 1999. To date under compliance clearance 111.2 million ECU has been recovered for 1996 and 1997 together; nothing for 1998. In total 276 formal communications have been sent for a total estimated recoverable expenditure of 1214 million ECU. The overall situation as at the 25 June 1999 looks like this:

	No. of letters in the year	Est. Sum to be recovered for year	Sum recovered For year	Amount in abeyance
		Mio ECU		
1996	20	415	77.3	337.7
1997	66	406	33.9	372.1
1998	139	393	0	393.0
1999 (to date)	51	?	?	?
Totals	276	1214	111.2	1102.8

(source: Commission's services)

3.10.9. Interest cannot be charged on these sums owed to the Community. It is believed that the total amount in abeyance for 1996 will not be completely recovered until 2000. As far as the Committee can determine this is because of the slowness of the procedures in general including within the Commission. Time scales of this duration are not an improvement on the previous clearance arrangements that were in place before 1996. In this regard it is important to point out that the Member States have five distinct opportunities in the procedure, before the Commission's collegiate decision, to influence or contest the amount the Commission seeks to recover.[48]

3.10.10. Seen from this optic the reform represents no improvement. The total amounts so far recovered through accounting clearance are small (77.33 million ECU for 1996; 33.9 million ECU for 1997). This, it has been argued, is because of the introduction of accreditation, effective internal control and certification. These three new requirements have resulted, so the argument goes, in better control of payments in the Member States with as a consequence less to be recovered. But equally the small amounts being recovered through accounting clearance could be because large sums are being held over for compliance clearance. Moreover the time taken to close the dossiers and recover the amounts involved is still being measured in years rather than months after the market year concerned.

3.10.11. It is important to recall that corrections need not await the final compliance clearance decision. The monthly reimbursement payment system referred to at paragraph 3.7.1. above allows for a minimum of monitoring during the year. Individual cases can be examined urgently

[48] Reply to formal letter (article 8), bilateral meeting; reply following bilateral meeting; conciliation; Fund Committee.

where there is a suspicion of serious irregularity or fraud and settled after examination one way or another. Sound management depends on everyday actions in the implementation of the EAGGF Guarantee Fund.

3.11. The Conciliation Procedure

3.11.1. Conciliation is a win-win procedure for the Member States as things stand. From the Community's standpoint conciliation at best leads to a delayed recovery of undue payments in cases won by the Commission or at worst to a delay and reduction in repayment in cases won by the Member State. Nor do Member States have to accept the Conciliation body's opinion. They retain the right to appeal to the Court of Justice after the Commission's final decision. Since 1995 115 conciliation recommendations have been made and the Commission has accepted reductions totalling of 275 million ECU in recovery payments or 17 % of the total value of all cases submitted to the Conciliation body. Of course no decision has resulted in an increase in recovery. 54 Commission decisions following conciliation have nevertheless been subject to further appeal to the Court of Justice. So far the Commission has won 14 of these and 40 are still before the Court.

3.11.2. A number of senior officials and the Commissioner responsible when interviewed by the Committee suggested that conciliation helps to deflect improper pressure from the Member States who are simply referred to the Conciliation body. The overall adjustment proposed by the Conciliation body over the years of its operation does not seem enormous. If however it is used to provide additional assurance to Member States there can be no case, in normal circumstances, for the Commission's final collegiate decision on clearance being anything other than as proposed by its services after conciliation. It seems however that notwithstanding conciliation the Commission does not always adhere to the proposal put before it by its services and sometimes makes a further adjustment in favour of a Member State or States.

3.11.3. Conciliation takes time and, although the examination by the body is rigorous and professional, the procedure is open to abuse. Almost half of the cases submitted to the Conciliation body by the Member States have subsequently been brought before the Court of Justice by the same Member States. One Member State, Italy, seems to send cases to conciliation as a matter of course (it accounts for 30 % of all cases). Some Member States use conciliation to retain for as long as possible sums they know in all probability will eventually have to be returned to the Community. The Conciliation body itself reports that *"the risk is clearly apparent that certain member States (and more particularly Italy) refer systematically any correction notified by the Commission to the Conciliation Body, and not only those likely to be genuinely debatable"*.[49]

3.11.4. Member States also introduce new evidence and arguments to the Conciliation body which could just as well have been presented to the Commission during the preceding bilateral phase. The Evaluation Report states that "*it is not rare that an important obstacle to the smooth operation of the conciliation procedure (and the clearance in general) is created by the Member States when they produce at the conciliation stage new explanations and/or evidence, not*

[49] Evaluation Report concerning the Conciliation Proceedings opened by Commission Decision (94/442/EC of 1/7/94) paragraph 23.

provided to the Commission departments at the time of the audit or at the time of the earlier bilateral discussions".[50]

3.11.5. One option is for a provision that interest be paid to the Community on sums held for months and years by the Member States and subject to conciliation, calculated from the date of the expenditure concerned by the paying agency until the formal clearance decision for Commission proposed corrections brought before the Conciliation body. This would discourage the over-ready appeal by Member States to the conciliation procedure. The legislation in force is on this point weighted in the Member States favour. When corrections are contested the onus of proof and recovery lies with the Commission even though paying agencies are ultimately acting on the Commission's behalf in a common policy area.

3.11.6. An alternative to charging interest on the Community's behalf on sums eventually recovered after the formal clearance decision as suggested above would be to grant the Commission the right to recover immediately and fully pending resolution of the dossiers with the Commission paying interest on any reduction in recovery. An immediate incentive for Member States to expedite files would be created. The option described at paragraph 3.11.5 above is preferred by the Committee.

3.12. The Resources of, and Pressures on, the Clearance of Accounts Unit

3.12.1. Given the amounts involved and the complexity of the market regulations, the personnel resources devoted to Clearance of Accounts in the Commission are still not adequate. Although the unit has doubled in size since 1990 the total number of professional staff is 55. Set against the average annual amount cleared in recent years, 40 billion ECU, and the average amount recovered or expected to be recovered of 400 million ECU, this does not represent an enormous staff input. It is 6 % of the total Agriculture Directorate General staff of 1100. The Commission should consider to what degree an increase in expert staff working on clearance could result in increased recoveries and strengthen this unit accordingly by reallocating resources to it. This would also help authorising officers the better to discharge their duties.

3.12.2. In this context the Committee observes that the amount recovered through clearance is lower than the error rate for agriculture in the Court of Auditor's Statement of Assurance would suggest. The Statement of Assurance's error rate is between 3 % and 4 % implying an additional amount over clearance corrections of about 1000 million Euros. In the Committee's view the reasons for this difference should be examined in detail by the two Institutions concerned. The Committee has found a number of factors which may largely (or even wholly) explain the situation.

*The Court uses the whole of the Guarantee section as its sampling frame to draw a sample from which it extrapolates to an overall error rate. Clearance checks focus on particular sectors in particular years.

*The Court systematically examines transactions to the level of the final beneficiary. The Commission does not.

*It may well be that the flat rate corrections applied by the Commission are too low to ensure adequate recovery.

*The number of occasions where Member States can state their case and enjoy "the benefit of the doubt" tends to a lower than desirable recovery rate.

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[50] op. cit. - paragraph 22

These considerations confirm the Committee in its view that there is significant scope for an increase in the amounts recovered through clearance if the clearance unit is reinforced.

3.12.3. In preparing this report the Committee heard from sources within the Commission and elsewhere but not connected to the Clearance of Accounts unit, of frequent pressure brought to bear in the past on the unit from national governments, sometimes in conjunction with trade lobbies, from Commissioners' cabinets and senior officials to adjust corrected amounts in Member States' favour for reasons which had no legal basis or technical justification.

3.12.4. It is important to emphasise however that since structural and other changes were made in the Directorate General for Agriculture which roughly coincided with the arrival of the new procedures such practices have become less common. Officials who resist these kinds of pressures are to be encouraged in their endeavours and although some of the criticisms above are trenchant they should not be read as damning. Nevertheless it has been confirmed to the Committee that the Commission as a college still adjusts recoveries when its final position is established in the light of factors which are subjective and sometimes connected to national considerations. The Commission must not reduce the amounts recovered after a long and detailed process in conformity with the Regulations has established how much should be recovered for the Community taxpayer for reasons such as these.

3.13. Other Observations on the Control of Expenditure

3.13.1. The Clearance of the accounts as described in the previous paragraphs is the final management act by the Commission in that field. The Committee would not want to leave this subject however without emphasising that the volume of work in this field very much depends on control in general over policy and the systems implemented. In the past systems of export refund in particular gave rise to irregularities and fraud. The scale of export refunds has diminished (see paras. 3.6.3. and 3.6.4.) because of the gradual change from market assistance to direct support to farmers. Nevertheless the export refund policy still exists and will exist in the near future as long as EU prices are higher than world market prices. The "new" policy of direct support also poses its own problems from a control viewpoint. Direct support to farmers raises a number of issues which need attention. Both export refunds and direct support are dealt with hereafter at paragraphs 3.12.2 to 3.12.5. and 3.12.6 to 3.12.7 respectively.

Export Refunds

3.13.2. Export refund payments are intended to bridge the gap between Community prices for agricultural produce and world market prices. The Community's practice has been to differentiate these payments as a function of the produce type, sometimes very finely defined, and the export destination. Experience has shown that this system of differentiation is vulnerable to fraud. It necessitates careful verification that the product really is of the type which attracts the export refund claimed and that the final destination is the country stated and not another where prices are higher, and for which a lower refund would have been paid. Experience has also shown that it is very difficult to police this export refund policy, even when traders are obliged to lodge guarantees to be forfeited in the event of fraud by , for example, changing the destination of the produce. A system without differentiation would have been more readily controlled. The problem is even more serious and control more difficult in cases of export to countries in the context of special food aid when lower prices and higher refunds are in play.

3.13.3. The following example may serve as an illustration of how the system of differentiation described above is very much open to fraud, especially when the Commission's services fail to apply sound management and to treat fraud adequately. This example which occurred in the early nineties is certainly not a unique case, but is an obvious one for two reasons. Firstly because it constitutes a case of poor management on the part of the Commission under the pressure of commercial interests which was transmitted by a Member State, as well as a fraud by an exporter and secondly it shows how a system of export restitution payments differentiated by destination encourages trade distortions prejudicial to the Community budget when they result from frauds as in the example below. Actually such distortions may also arise when export refunds are undertaken, completely legally, since there is nothing to prevent an exporter, after clearing customs at the point of arrival and while remaining within the law, organising re-export in conjunction with a local partner.

3.13.4. It appears from information in the file to which the Committee had access, but which it could not check, that the trader concerned imported the goods to a country other than the country of destination and presented forged proof of import to the intended destination in order to liberate his guarantee. When this became known to the Commission's services, they asked the national authorities of the country from where the goods in storage were exported to block the release of the trader's security. From then on matters went wrong. After the authorities of the trader's Member State (which was another than the one from which the goods were exported) had intervened on the trader's behalf, the national authorities of the exporting country were informed, to their surprise, that the Commission would not press for recovery of the guarantee. In fact, the Commission's services produced a draft amendment to the Regulation which would have the effect of retroactively reducing the amount of the guarantee the trader would lose . In addition there is no indication that the Commission's services asked the national authorities to pursue the fraudulent aspects of the case indicated by the forgery of import documents.

The aforementioned draft Regulation was strongly opposed by the Legal Service and the Financial Controller of the Commission. As a result a new amendment to the Regulation was prepared but was finally adopted on the basis of no retroactive effect thanks to the resistance of the national authorities of the Member State of export and the Commission's Financial Controller.

That was not the end of the story. The Commission's services now drafted a decision with the effect of applying the adopted amendment regulation nonetheless with retroactive effect. Notwithstanding objections from the Financial Controller and initially also from the Legal Service (which later on changed its attitude) and after a new intervention of the authorities of the trader's Member State with the Commission's senior hierarchy a letter was finally sent to the national authorities of the exporting Member State informing them of the Commission's decision to apply the amended Regulation retroactively anyway. In the end, it was decided that the trader should forfeit less then 20% of the guarantee.

3.13.5. As indicated (at 3.12.2.) the example shows how the systems of export refunds differentiated as a function of the destination of export is extremely difficult to police. Even more importantly, and most regrettably, it also shows how the senior hierarchy of the Commission has been influenced by national authorities of the Member State of the beneficiary of the refund and has chosen, notwithstanding opposition from its own administration and from the national administration of the exporting Member State, to take a decision of doubtful legality at the expense of the Community's finances which it has a duty to preserve. On a more general level the example shows that a possibility of an a posteriori reduction of a guarantee ,which aims to be dissuasive and proportionate to the risk involved to assure a proper execution of

export transactions, undermines the purpose of the guarantee as well as legal continuity and equality of treatment.

Direct support

3.13.6. The move from price support to direct support to farmers, and thus to income aids entailed the establishment of an Integrated administrative and control system (IACS) which has been operational in most Member States since January 1997. For plant products the system reposes on aid applications by farmers indicating all their agricultural parcels; a computerised data base recording this information; an alphanumeric identification system for agricultural parcels and an integrated control system for administrative control and field inspections. For animals the IACS necessitated the establishment of an alphanumeric system for their identification and registration. The system is governed by Council Regulation 3508/92 of 27/11/92[51]

3.13.7. It is probably to early to say with confidence that the new system has been successfully established but it is clearly vital to the future control of EAGGF Guarantee expenditure and depends to a large extent for its implementation and execution on the Member States. A two - year delay in its full implementation was largely due to tardy preparation of the relevant systems in the Member States. As for the partial implementation which did take place, the Court of Auditors in its Annual Report for 1996 found for plant products that "*the result of on-the-spot checks was that on average 20% of the applications checked on the spot were found to be incorrect"* [52]. The successful establishment and use of the IACS system is probably one of the most important tasks for shared management in the EAGGF Guarantee section in the immediate future.

3.14. Conclusions

3.14.1. The error rate in EAGGF transactions is still too high. An error rate of about 3.5% as reported by the Court of Auditors (error not fraud rate) amounts to about 1400 million Euros. Recovery through clearance is running at 400 millions Euros per annum.

3.14.2. Member States complain that when their own controls, Commission controls, and Court of Auditors controls are taken into account there are too many on-the-spot controls. The Commission's Clearance of Accounts Unit makes 150 control visits (compliance and accounting) in a year to cover 40 000 million Euros of annual expenditure. Can this really be too many or even enough in order for the Commission to exercise its responsibilities as authorising officer?

3.14.3. One of the questions posed at 3.4.3 was whether the Council Regulations which establish the various shared management arrangements take sufficient account of the Commission's financial and executive responsibilities. Regulation 729/70 generally, and the more recent Regulations on Clearance of Accounts in clearly spelling out the Member States obligations in respect of the provisions concerning the accreditation of paying agencies and certification of accounts certainly do. The second question was whether practices on the ground respect the Commission's responsibilities. Not as far as the long term acceptance of undeclared paying

[51] OJ L 355 5/12/92, para. 3.6.8.

[52] OJ C 348 18/11/97.

agencies is concerned. In the same way there is a clear danger that with the passage of time the Commission's responsibility to ensure that agencies are properly accredited and accounts certified will be eroded, especially if, as is the case, the Commission itself fails rigorously to implement the provisions of the new regulations from the start.

3.14.4. There existed up to 1995 a climate in the EAGGF area whereby Member States were allowed unduly to influence Commission clearance decisions against a background of a set of complex market regulations. This has prevented a proper equilibrium being established in the shared management of the EAGGF Guarantee section by the Commission and the Member States. Responsibility for this is shared between Member States who fail to respect the Commission's role and the Commission which is too ready to accommodate the Member States. The ultimate loser here is the Community taxpayer.

3.14.5. A more promising regulatory framework has been established since 1995 for the Clearance of Accounts with some improvements in practice in the Member States under Commission pressure.

3.14.6. However a failure to take the broad view means that this activity is still under-resourced. A target for amounts recovered linked to the error rates found by the Court of Auditors, together with an unbending application of the regulation and real efforts to reduce the timescales, would result in more and speedier recoveries.

3.14.7. In general for clearance it can be said that the overall situation has been improved when compared to the laxity which reigned before 1995 but that further improvements are clearly still required.

3.14.8. The work in connection with clearance would be lightened if Member States were obliged to exercise more stringent controls in implementing the different market regulations. Equally the error rate would be lower.

3.14.9. Generally beyond clearance the key is an independent Commission with the capacity to act, even when opposed by the Member States, to protect the Community's financial interests.

SHARED MANAGEMENT IN THE STRUCTURAL FUNDS

3.15. History and Background

3.15.1. The Structural Funds, which include the EAGGF Guidance section, is the other main area of joint management between the Commission and the Member States. They differ from the EAGGF Guarantee in that expenditure to meet their objectives always comes from both the Community and the Member States' national budgets, although to varying degrees. Whereas the Guarantee section of the EAGGF is a common policy area in which the Community has exclusive competence, the Structural Funds concern a Community policy where political and funding responsibility is shared between the Community and the Member States. The historical development of the Structural Funds is also different from that of EAGGF Guarantee section. It will be briefly outlined below to allow a better understanding of the current situation.

3.15.2. The EAGGF Guidance section is contemporaneous with the Guarantee section and the legislation which established it is discussed above at paragraph 3.6.1. The Guidance section is

concerned with agricultural structures and measures to assist producers in the processing and marketing of agricultural produce and it also provides a system of aid for investments in agricultural holdings. The European Social Fund was established by Regulation 9/1960[53] and has been substantially adjusted and modified since that date. The European Regional Development Fund was established by Regulation 724/75 in March 1975[54] and has also been adjusted and amended since its inception. There has been a pattern of change and development in the area of the Structural Funds, which in summary has had three inter-related features. Firstly the share of the Community budget devoted to the Structural Funds has increased in absolute and in percentage terms over time. Secondly greater efforts have been made to co-ordinate the activities of the different funds to meet a set of common objectives. Thirdly there has been an accelerating devolution of decision making on project selection and management to the Member States. This part of the report will focus in the main on problems connected to the shared management of the Social and Regional Funds which together account for almost two-thirds of all structural measures.

3.15.3. Council Regulation 2396/71 of 8 November 1971[55] allowed the Social Fund already foreseen in the Treaty of Rome to assist operations aimed at solving problems arising in areas suffering *"a serious and prolonged imbalance in employment."* 60 % of appropriations were reserved for tackling long term structural unemployment. The Council on a Commission proposal drew up a list of qualifying aid measures and Member States submitted particular projects. The Commission would assess their eligibility on the basis of the Council's decision. Reimbursement was on the basis of project costs actually incurred. The operation of the Social Fund was refined by Council Regulation 2950/83[56] which implemented the Council decision 83/516/EEC of 17/10/83[57]. Fund assistance was directed to vocational training and recruitment and wage subsidies for young workers, the long term unemployed, women and others deemed particularly vulnerable on the employment market. Fund assistance was granted at the rate of 50 % of eligible expenditure. For the first time some detailed control provisions and a clear delineation of the Member States' and the Commission's respective tasks was established. Member States were to certify the accuracy of the facts and accounts in payment claims. The Commission was to carry out on the spot checks on the basis of representative sampling.

3.15.4. Following adoption of the Single Act in 1986 the European Regional Development Fund became the main Community instrument for the correction of regional imbalances. Its history goes back further. The Council Regulation 724/75 of 18 March 1975 which established the Regional Fund set as its principal objective the correction of regional imbalances particularly those resulting from the preponderance of agriculture and industrial change and structural unemployment. Assistance was not however to lead to Member States reducing their own regional development effort. Up to 50 % of public authority aid could be met from the Fund. The decision to support lay with the Commission except in instances where a Fund Committee decided effectively to refer the matter to Council. Individual investment proposals were considered by the Commission with a view to the regional development programmes also prepared and submitted by the Member States. Project and programme submissions had to include detailed information on, inter alia, their anticipated effect on economic activity and employment. Payment was made on the provision of statements certifying expenditure and detailed supporting documentation. The Commission having consulted the Fund Committee could reduce or cancel payments. Sums paid in error were to be repaid. Member States were to

53 OJ O 12 of 31st August 1960
54 OJ L 149 of 10 July 1975
55 OJ L 249 of 10 November 1971
56 OJ L 289 of 22 October 1983
57 OJ L 289 of 22 October 1983

provide the Commission with all information necessary for the effective operation of the Fund and the Commission could conduct on-the-spot checks.

3.15.5. The clear intention of the legislator at this point for both the Social and Regional Funds was that individual projects should have clear objectives which accorded with the provisions of the Regulations and that payment should be conditional on progress to those objectives, for the Regional Fund within the framework of a wider programme. The Commission under these arrangements had a much more "hands on " role in project selection, monitoring and control in the Structural Funds. Later, as will become clear, there was a shift in the management balance between the Commission and the Member States.

3.15.6. The first major reform of these arrangements was in 1988 with Council Regulation 2052/88 of 24 June 1988[58]. This was aimed at concentrating expenditure and moving to co-ordinated programmes rather than individual projects. Five common objectives for all of the then Structural Funds were set down. These were the promotion of development and structural adjustment in regions "lagging behind"; the redevelopment of regions suffering industrial decline; combating long term unemployment and facilitating young people's entry to the labour market; facilitating workers' adaptation to industrial change; facilitating agricultural structural adjustment and promoting rural development (objectives 3 and 4 were the exclusive domain of the Social Fund and 5a of the EAGGF Guidance section). Regulation 2052/88 also established arrangements to set overall Structural Fund expenditure over a number of years and distribute it by Member State. This is a recurring and important feature in the Structural Funds. Levels of Community expenditure by Member State are set down in the Regulations or by the Commission on the basis of the provisions of the Regulations using "transparent procedures". Member States thereby negotiate target levels of expenditure before any scientific information on needs or absorption capacities is brought to bear on resource decisions. In short for the Structural Funds the ceiling of expenditure in each Member State is also a target and this is bound to have a knock-on effect in the areas of project selection, evaluation and control. There is pressure on the national administrations to find and on the Commission to accept sufficient projects to attain the predetermined levels of expenditure in each Member State. An inter-institutional accord of 29 June 1988 provided that the total amount available under the Structural Funds should be doubled in the period 1987 to 1993. Fund specific regulations were also adopted to dovetail each fund with the new horizontal regulations discussed here and below.

3.15.7. The implementing Council Regulation 4253/88 provided for co-ordination between the Funds based on a system of multi-annual planning. Member States were to submit integrated plans for specified regions upon which Community Support Frameworks detailing the forms of intervention and its financial volume over a three to five year period would be prepared by the Commission in conjunction with the Member State and followed up by operational programmes. Projects would be proposed within these frameworks by Member States and the Commission's decision would cover an operational programme "package".

3.15.8. Member States were supposed to prevent and pursue irregularities, recover amounts lost or themselves meet the cost except if they could show they had not been negligent and inform the Commission accordingly (article 23 of Regulation 4253/88). As well as conducting on the spot checks the Commission could reduce or suspend financial assistance from the Funds post facto (article 24 of Regulation 4253/88) if it was not satisfied with project implementation. Monitoring Committees of Member State and Commission representatives were established to verify progress towards programmes' stated objectives.

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[58] OJ L 185 of 15 July 1988

3.15.9. Changes were introduced in revised regulations in 1993 that had the effect of maintaining or consolidating the main principles adopted in 1988. New regions were incorporated, planning procedures were adjusted and provision made for Community funding of new types of measures. Five new regulations modified those of 1988, in addition to the adjustment of a Regulation on the financial instrument for fisheries guidance. Once again the financial volume of the Funds was almost doubled over a six year period and a new fund, the Cohesion Fund, set up to further economic and social cohesion by providing additional support in Spain, Italy, Ireland, Portugal and Greece.

3.16. The New Regulations and their Implications

3.16.1. The Structural Funds again stand on the threshold of a major reform. The Council has recently adopted a series of proposals encapsulated in five new regulations[59] based on the Commission proposal, COM(1998) 131 final, of which the key Regulation is again the "horizontal" one, Regulation 1260/99 of 21 June 1999. On the policy side these bring the number of common objectives down to three. These are to promote the development and structural adjustment of less developed regions; support economic and social development in regions with structural difficulties and support the adaptation and modernisation of education and training systems and employment. The first objective is assisted by four Funds (Regional, Social, EAGGF Guidance and the Financial Instrument for Fisheries Guidance), the second by the Regional and Social Funds as well as EAGGF Guarantee for rural development and the third by the Social Fund alone. A second major intention is to concentrate resources on a smaller overall population. By 2006 the percentage of the 15 Member States' population eligible under objectives 1 and 2 will be reduced from 51 % to between 35 % and 40 %. Funding will be maintained at 1999 levels (286.4 billion for the period 2000 to 2006). One important aim of the reform is to clarify the respective roles of the Commission and the Member States.

3.16.2. On the management and administration side significant changes discussed in greater detail below are envisaged which impact on the roles of both the Commission and the Member States and which again pose questions about ultimate responsibility and the distribution of tasks. These will be considered from four standpoints, financial control and irregularity; project eligibility; additionality; and evaluation, ex ante, current and ex post. They will be examined in turn below and the new Regulations will be considered in the light of current and previous arrangements where this is appropriate. General remarks on organisation will also be made.

3.17. Financial Control and Irregularity

3.17.1. There has been a history of legislative change and development in this area. Articles 23 and 24 of Regulation 4253/88 dealt with financial control and the reduction, suspension or cancellation of assistance respectively. Article 23 required Member States to verify that Community financed operations had been carried out properly, prevent irregularities and recover any amounts lost. The Commission was to be informed of the measures taken and in particular of the progress of administrative and judicial proceedings. It was also permitted to carry out its own on the spot checks. Article 24 empowered the Commission to reduce, suspend or cancel the Community's financial assistance, if the operation did not appear to justify the assistance, having asked the Member State for its comments. On paper control was further reinforced by the adoption of Commission Regulation 2064/97[60] which came into force in November 1997.This

[59] OJ L 161 of 26 June 1999 and OJ L 160 of 26 June 1999

[60] OJ L 290 of 23 October 1997

laid down in some detail what was required of Member States' control systems. The certification of payment claims was introduced. A sufficient audit trail was to be provided. Sampling controls of systems and expenditure declarations were to be introduced on the basis of risk analysis. The requirement already established in existing legislation to report irregularities to the Commission was reiterated and not later than final payment Member States were to submit to the Commission a statement summarising the conclusions of their control examinations in previous years. This provision has in effect not been implemented because for the current programme period no final declarations of expenditure have been submitted.

3.17.2. Under the new Regulation 1260/99 Member States are again to be the Community's first line of defence against irregularity and fraud in the Structural Funds. They are to ensure that management and control systems are in place, vouch for the expenditure declarations presented to the Commission (this time prepared by someone independent of project management) and recover sums lost through irregularity. Many of its provisions restate in other terms the requirements established in Regulations 4253/88 and 2064/97. For example the requirement to verify management and control arrangements (article 38 (1)(a) of Regulation 1260/99 and article 4 of Regulation 2064/97). What is new in article 38 of Regulation 1260/99 is a clear statement that the Commission "*shall ensure that Member States have smoothly functioning management and control systems so that Community funds are efficiently and correctly used.*" To this end the Commission's on the spot checks to be conducted with a minimum of one day's notice are to cover not just transactions but Member States' management and control systems. Thereafter the Commission may make observations including on the management shortcomings found and after observations from the Member State suspend all or part of any interim payment made. Article 39 of the same Regulation deals with recoveries and allows the Commission to effect recoveries after verifications where there are serious failures in management and control systems. Corrections are to be proportional and are to follow a structured attempt to come to an agreement with the Member State. This provision could be read as an embryonic clearance of accounts arrangement or the basis for developing such an arrangement.

3.17.3. The Committee's view is that the new Regulation does clarify responsibilities but whether or not in practice it leads to better control will be determined by how it is implemented. Experience to date of the implementation of current control provisions does not permit an optimistic forecast of this. It is also evident that resources devoted to control in the operational Directorates General with responsibilities for the Structural Funds are woefully inadequate to ensure proper implementation of the current legislation, never mind ensure implementation of the new Regulation. The Commission must also find the will and courage to implement the Regulation even if this means a Member State does not attain its expenditure target. It is also the Committee's view that although Regulation 1260/99 brings clarity in certain areas it also strikes the wrong balance between Member State and Commission responsibilities and powers in others. For example, if national rules are to be the primary criteria for determining eligibility (article 30 of Regulation 1260/99), then the Commission must at least be in position to monitor their application and be able to assess if the differences between national rules are giving rise to serious distortions between Member States in the pursuit of Community policy objectives.

3.17.4. It is important to recall the observation made at paragraph 3.1.4 above. For the Structural Funds as for the EAGGF Guarantee section it is the Member States who are almost always the disbursers of Community monies on their territories. However where an irregularity or fraud involving Community resources goes undetected or unreported it is the Community budget and not the Member State that pays. It is sometimes argued that because programmes and projects in the Structural Fund's sector are co-financed with Member States that there is an identity of interest in recovering undue payments and that Member States have an immediate incentive so

to do. The Committee is surprised, if this is the case, that for 1997 during which about 500,000 projects were current and total Regional Fund expenditure was 13 billion ECU only 79 irregularities for a total value of 27.5 million ECU were communicated to the Commission by national authorities under the terms of Council Regulation 1681/94[61] which requires them to inform the Commission of judicial and administrative action taken in the event of irregularities.

3.17.5. The new and former regulations allow the Commission to conduct on-the-spot checks which may be followed by a suitable reduction in the amounts paid from the Community budget in accordance with article 24 of Regulation 4253/88 or article 39 of Regulation 1260/99 when it enters into force. In 1998 the Commission undertook 37 on the spot missions for the Regional Fund. Since July 1996 to date the Commission has made formal recovery decisions for 8 Regional fund cases covering 14 million ECU for the programme period 1989 to 1993.This is not credible as an indication of the sums lost to the Community to Regional Fund irregularities. During 1998 the Commission cancelled two interventions worth 2.8 million ECU on evidence of irregularity. However when asked the Commission was unable to provide information on the number of instances, and the value of these, where it had refused to pay the full amount requested by Member States at the closure of an intervention during the period 1989 to 1993. This was because the Commission's routine record keeping did not allow it to distinguish these instances from those where Member States requested a final payment which was less than the sum initially committed**.** In these circumstances the Commission can have no overview of the effect, financial and other, of its checking of final payment requests from Member States.

3.17.6. When asked by the Committee for information on the number of instances of formal application of article 24 of Regulation 4253/88 and their outcomes the Commission's services were unable initially to provide an elementary breakdown of the number of cases or their financial consequences. It emerged that information in this form was not routinely maintained by the Directorate General for Regional Affairs although assurances were given that it would be henceforth. This failure by the Commission to monitor the application of an important article on financial control in a basic Regulation confirms the Committee in its view that the article has been a dead letter and that it is the implementation of Regulations' provisions which is lacking rather than inadequate legislation per se. In part this situation arises because of Member States' aversion to the application of the Regulation.

3.17.7. For the Social Fund in 1997 123 irregularities were reported by the Member States and 21.2 million ECU were recovered. In 1998 86 control missions were undertaken by the Commission to cover a budget of 7,600 million ECU. If anything the Social Fund is more exposed to irregularities and even frauds because it deals in intangibles such as training courses and the like. Recent reports in one Member State indicate widespread Social Fund irregularity and fraud in two regions and there are indications from a larger Member State of irregularity rates in the Social Fund of up to 50 %. Notwithstanding this and subsequent investigations by the national authorities in the smaller Member State, as at 15 June 1999, these same authorities had not communicated to the Commission in respect of 1998 one single Social Fund irregularity which had been the subject of initial administrative or judicial investigations, as they are required to do by article 3 of Commission Regulation 1681/94 of 11 July 1994.

3.17.8. The new Regulation 1260/99 does provide for more co-ordination between the Commission and the Member States in the area of on the spot checks but its basic provisions as set down at its article 38 are not very different from the analogous provisions in the preceding

[61] OJ L 178 of 12 July 1994

Regulation 4253/88[62] at its article 23. The same is true for these articles' provisions on Member States reporting of irregularities to the Commission. If the Member States failed to respect the provisions of the old Regulation in these areas and the Commission was lax in enforcing the Regulation why should the adoption of a new regulation, of itself, necessarily change these practices? In the Committee's view the problem is more one of attitudes and a lack of respect for the rules rather than the rules themselves. Nevertheless the clarifications included in the new Regulation 1260/99 give the Commission more opportunity to insist on their application.

3.17.9. The Court of Auditors' annual Statements of Assurance indicate a material payment error rate in Structural Fund transactions present in the accounts of perhaps as much as 10 %, representing between 2 to 3 billion Euros. This must not be read as an indication of levels of fraud. The point is that there is an enormous gap between what the Commission is appraised of as irregularities as described at paragraphs 3.17.4 and 3.17.7 above and error levels determined by neutral and scientific auditing. There are two possibilities. The Commission and Member States have no idea of what is going on or the Member States know but the Commission does not. In either case the extent of the Commission's ignorance is culpable. This situation is at least in part the result of widespread project substitution and over-declaration (see paragraph 3.18 and ff.). More will be said on material error rates and the attitude of the Commission and Member States representatives on this question at 3.22.5.

3.18. Eligibility

3.18.1. The original arrangements for both the Regional Fund and the Social Fund allowed project eligibility to be considered by the Commission on a case by case basis within the framework of agreed programmes. By 1988 the volume of projects and the imminent expansion of Structural Fund activity made separate Commission decisions on individual projects an impracticable option. Regulations 2052/88 and 4253/88[63] in instituting a system of programming based on Community support frameworks and operational programmes allowed Member States to determine the projects that made up these programmes and moved the key decision about eligibility to that level. The Commission was to make one single decision for each operational programme as an entity (Article 14 of Reg. 4253/88). The real opportunity the Commission enjoyed to assess project eligibility was in effect transferred to the point where Member States submit expenditure declarations on programme completion. It became clear over time that the lack of clear definitions in the area of project eligibility was causing difficulties for both the Commission and the Member States. The practice of project substitution was used from the outset and became ever more frequent. If a project is declared ineligible by the Commission Member States simply submit a replacement project introduced to the operational programme post facto for just this purpose and often at a point where the new project is underway or even completed. The new Regulation 1260/99 now specifically permits this. Its article 39.2 reads " *the corrections made by the Member State shall consist in cancelling all or part of the Community contribution. The Community funds released in this way may be reused by the Member State for the assistance concerned."*

3.18.2. The basic objective is that come what may, Member States be permitted to spend up to their financial targets. The real concern is to identify enough on- going projects to achieve that. In this respect and to provide a kind of "cover" against the possibility of a decision that a project is ineligible certain Member States routinely over-declare expenditure. This is clear from the

62 OJ L 374 of 31st December 1988

63 OJ L 144 of 27 May 1989

report prepared under the auspices of the Commission entitled SEM 2000-etape III: 5eme rapport d'avancement.[64]"

Dans le cas des fonds structurels, une irrégularité en matière d'éligibilité ne s'est pas nécessairement soldée par une perte de ressources, du fait que les demandes de paiement des Etats membres comportent fréquemment plus de dépenses éligibles que nécessaire pour justifier le paiement de la Commission." (paragraph 2.2.3)

In essence the Member State has a programme and submits a total of, for example, 80 million ECU's worth of expenditure and expects the Commission to identify say 50 million ECU of expenditure from that total, being the sum already earmarked for the Member State from the Structural Fund budget. If a project within the 50 million is found to be ineligible it will be replaced by another project identified by the Commission from within the additional 30 million.

3.18.3. The Commission has in any case always accepted project substitution and from 1988 onwards came to accept over-declaration. In a recent letter to the President of the European Council (19/5 /99) the Court of Auditors concludes that "*in many cases the over-declaration of eligible expenditure is insufficient to ensure that those errors do not have a definitive impact on the total of the Commission's payments in respect of the programs concerned*." The errors to which the Court of Auditors makes reference here are those uncovered in the preparation of its annual Statement of Assurance on the accounts. The substantial point is that over-declaration does not of itself remove the risk that errors are present in expenditure accepted by the Commission. A further comment on error rates, the Court of Auditors concerns and the reaction of the Commission and senior civil servants from the Member States will follow at paragraph 3.22.5.

3.18.4. A related difficulty which arises here is that equal treatment between Member States and between programmes within a Member State cannot be assured. If a Member State includes the whole field of action in the operational programme then there will be no possibility for it to substitute one project for another or to over-declare.

3.18.5. Following a process of consultation in the context of phase 3 of the SEM 2000 exercise the Commission prepared a package of 20 fact sheets or guidance notes dealing in detail with aspects of eligibility judgements to guide Member states and its own services in this area. The consultation was with the Group of Personal Representatives composed of senior civil servants in the main from Finance ministries in the Member States. The legislation now adopted, so the Commission argues, incorporates elements of these fact sheets that are consequently being revised. However the same legislation states in Article 30 of new Regulation 1260/99 dealing with eligibility that the "*relevant national rules shall apply to eligible expenditure except where, as necessary, the Commission lays down common rules on the eligibility of expenditure"*. Moreover in proposing the new Regulation the Commission stated that "*le contenu plus détaillé de la programmation, ainsi que la gestion des interventions, seront par contre de la responsabilité pleine et entière des Etats membres"*.[65] Revised fact sheets will continue to be available as points of reference but the basic eligibility decision will move substantially into the domain of the Member States. The Commission argues that because of co-financing the interests of the Member States and the Community run in parallel as far as project eligibility is concerned. However in many instances the Community's share of a programme cost is much greater than the Member State's.

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64 O/99/142-7/5/99

65 COM(1988) 131 final, page 20

3.19. Additionality

3.19.1. Clearly if Community expenditure merely substitutes for national expenditure then it has no added value. The preamble to the Regional Fund's initial regulation (Reg. 724/75) insists that *"the fund's assistance should not lead Member States to reduce their own development efforts but should complement these."* Article 4 of Regulation 2052/88 covering all of the funds says that "*the Commission shall take the steps and measures necessary to ensure that Community operations …impart to national initiatives an added value"*.

3.19.2. Additionality has never been easy to verify. It is difficult to determine its presence either in the context of specific projects or programmes or more globally. The move from individual project approval by the Commission to programme approval which occurred with the introduction of the 1988 reform effectively removed the possibility for the Commission of verifying additionality at this level at least ex ante. The 1993 regulations began to consider additionality at a global level only. Article 9 of Reg. 2082/93[66] states that "*the Commission and the Member State concerned shall ensure that the Member State maintains, in the whole of the territory concerned, its public structural or comparable expenditure at least at the same level as in the previous programming period, taking into account however the macroeconomic circumstances in which the funding takes place ……and business cycles in the national economy."* This is already a very generalised and highly qualified interpretation of additionality. The new Regulation 1260/99 attempts to work with this broad interpretation and proposes a verification by the Commission of its application at the ex- ante, mid-point and ex-post stages of the programming period. For new objectives 2 and 3 the Commission and the Member State will establish the reference level of national expenditure for the programme period. It is clear however that this new definition of additionality merely reflect the fact that the Commission has no longer any effective means to ensure additionality below the macro-economic level. It is also difficult to believe that it disposes of any effective means to ensure additionality at the macro-economic level. What could the Commission do at the mid point or ex post stage if after its verifications it concluded that a Member State had reduced its level of public spending because of the availability of Structural Fund monies? The Regulation does not provide for a sanction of any kind. At no level, macro-economic or other can the Commission act independently of the Member States to observe, confirm or ensure additionality.

3.20. Evaluation

3.20.1. Evaluating and monitoring are different activities. Evaluation involves assessing the impact of the assistance while monitoring entails having an overview of implementation. The two activities have been linked in this field by the role established in successive regulations for the Monitoring Committees composed of Member State Representatives and chaired by the Commission. A key component in the matter of evaluation was the monitoring Committees set up in accordance with article 17 of Regulation 2052/88 which also provided for ex ante and ex post evaluation against the five objectives set at that time for the Funds. Their role was significantly reinforced in this area by the provisions of Regulation 2082/93 and the new Regulation further formalises this by providing for ex ante, mid point and ex post evaluation. In the case of ex ante evaluation especially a more systematic approach is introduced to allow a reference point for subsequent mid point and ex post evaluation. Monitoring is to be against both physical and financial indicators and is to be used to measure the impact of measures

[66] OJ L 193 of 31st July 1993

overall, at Community Support Framework level and at programme level. This being the case the monitoring Committees might better have been styled monitoring and evaluation Committees. While acknowledging the Commission's role in persuading Member States of the importance of evaluation the Court of Auditors made remarks in its Special Report 15/98 that the Committee finds disquieting. Despite the Commission's best endeavours on evaluation the Court reports that *"according to information gleaned orally during the (Court's) audits, only some of the results and recommendations are of any real use in terms of assisting decision-making, managing projects, re-programming or preparing the next generation of interventions" (*paragraph 6.7)[67]. Other reports of the Court of Auditors have been critical of the relative passivity of the Monitoring Committees for whom progress has been measured almost exclusively in terms of the amount of expenditure effected.

3.20.2. Notwithstanding this the new Regulation will limit the Commission's role in the monitoring Committees to a purely advisory one. Article 40 of Regulation 1260/99 speaks of evaluation being a joint responsibility. The structure of these arrangements however leaves the Commission with little opportunity to conduct an independent evaluation the results of which may not accord with an evaluation entirely dependent on information from the Member State.

3.20.3. A further consideration is the overall impact on the objectives set out. Evaluation at this level is difficult not least because a major increase in levels of expenditure in a given limited area resulting from fund activity would have a "keynesian" effect whether or not the resources used were deployed in the interests of long-term structural development.

3.21. Organisational Aspects

3.21.1. At an administrative level the Committee noted a recent development in parallel with the introduction of the new Regulation. As the Community moves from 6 to 3 objectives the number of instruments involved increases yet again with the introduction of the "contribution" of the EAGGF Guarantee (as opposed to Guidance) section to objective 2. The argument advanced, that objective 2 sometimes entails rural development is hardly convincing. Does objective 1 not also entail rural development? A consequence of the new arrangement is that there will be different programme methods for rural development between objective 1 and objective 2. If the rural development element for objective 1 can safely be left to the Guidance section which has years of Structural Fund experience then why is the intervention of the Guarantee section necessary in respect of objective 2. The argument that the expenditure would be subject to clearance of the accounts has some merit. However if a clearance procedure is to be recommended for some objective 2 expenditure then why not all, indeed why not all Structural Fund expenditure. The Committee's view is that this hybrid administrative arrangement now reflected in the Regulation results from pressure from the agricultural lobby and internal bureaucratic considerations within the Commission related to the probable continuing decrease in agricultural price support expenditure.

3.21.2. The first objective (promoting the development and structural adjustment of regions lagging behind) and the second objective (supporting the economic and social conversion of areas facing structural difficulties) could be better attained, in the Committee's view, if both were covered by one unified fund managed by one Directorate General. This would allow easier co-ordination and control and achieve economies of effort and personnel resources for the Commission. It has been suggested to the Committee that such an arrangement would be

[67] OJ C 347 of 16 April 1998

opposed by the Member States because they prefer the structure of the Commission's services to mirror that of national administrations with a "corresponding" Directorate General for each national ministry. The Committee also believes that bureaucratic opposition within the Commission has so far precluded a rationalisation of this kind.

3.22. Conclusions

3.22.1. The legislative and administrative development of the Structural Funds tends to the conclusion that the balance of decision-making power and effective control of direction and expenditure has passed decisively to the Member States. The Commission has not acted energetically to protect the resources involved from irregularity and the gap between the irregularities uncovered and the rate of material errors revealed by audit is startling. As ultimately responsible for the implementation of the budget the Commission has no right to complacently suppose that irregularities are routinely uncovered and corrected in sufficient numbers in the structural fund area by the Member States. This point is linked in particular to the question of eligibility. The loss of the possibility of systematically verifying the eligibility of individual projects and substitution of projects has not been compensated on the Commission's side by a mechanism which would allow it to take an independent, informed decision to exclude expenditure and protect the integrity of operational programmes. Experience has shown that the Commission has great difficulty in ensuring the application of the key control articles of Regulation 4253/88, 23 and 24. Despite their greater clarity there is no reason to believe that the key control articles of the new Regulation 1260/99, 38 and 39, will of themselves be any easier to apply. Effective control in and of the Member States requires more staff resources.

3.22.2. Additionality is now almost impossible to verify and verification at the level of Member States national expenditure by region and policy is so problematic as to be pointless. The Commission has made serious attempts to promote evaluation but it is difficult to see why its role here should not be reinforced while that of the monitoring Committees is. In general it is difficult not to conclude that there has been a gradual erosion of the Commission's position in shared management of the Structural Funds. In this the Commission, if it has not lost sight of its primary Treaty derived responsibility to implement the budget, has at least allowed its vision of it to be obscured. This erosion of the Commission's position should not be confused with a clearer delineation of responsibilities. A clearer delineation of responsibilities is worthwhile in itself but it does not guarantee that the right balance has been struck between the powers and responsibilities of the Commission on the one hand and those of the Member States on the other.

3.22.3. Although control has passed to the Member States, six factors tend to divest them of responsibility.

- the separation of responsibility for financing and executing, where the Commission co-finances a policy for which the day to day management is the responsibility of the Member States.
- expenditure ceilings are also targets.
- Community support can be as high as 70 %
- project substitution which undermines project selection from the outset
- over-declaration which undermines project selection and control in general.
- the procedures for control and recovery by the Commission are difficult to apply under the old and probably under the new Regulations (4253/88 and 1260/99)

3.22.4. Other provisions of the new horizontal Council Regulation 1260/99 do have the benefit of making some matters clearer, for example how, by whom and when evaluation should be conducted. However its provisions on the reporting of irregularities and Commission on-the – spot missions are not very different from the previous provisions which have had very little practical impact. They have been more or less dead letters, in part because of project substitution and over-declaration by Member States, both tending to undermine their responsibility from the outset to take due care in selecting projects. What really matters is whether the Commission is energetic in implementing the new Regulation and in pushing for further reform while adjusting its administrative structures. It is the Committee's view that if this does not happen there will be no further reform of the Structural Funds but that under the strain of enlargement and the administrative difficulties faced by new Member States from central and eastern Europe the Community policy approach will give way to a simple redistribution mechanism, for which for the moment there is insufficient political support.

3.22.5. Part of this Committee's remit is to consider the Commission's administrative culture. The Personal Representative's Group of senior finance Ministry officials was constituted on the Commission's initiative to consider the whole area of shared management in the context of the SEM 2000 initiative. In this group's most recent document cited at paragraph 3.16.2 and prepared in conjunction with the Commission discussion turned to the Court of Auditor's Statements of Assurance. Remarks made here are illustrative of a joint reluctance on the part of the Commission and the national administrations to accept the existence of problems when their resolution might be difficult for Member States. On the Court's decision not to give a positive Statement of Assurance on payments in successive years following its scientific audit the document reads "*la situation n'est guère encourageante pour la Commission: pour la quatrième année consécutive, la Cour des Comptes n'a pas été en mesure d'établir une DAS positive sur les paiements.*" The context of this remark, wherein the Court's methods are compared with a national Court of Auditors and its definition of error tendentiously questioned, would lead the reader to believe that the problem is the Court's unwillingness to give a positive Statement of Assurance rather than the underlying error rate which gives rise to that unwillingness. This is the world on its head. The Court is supposed to produce a positive statement, irrespective of the facts, to aid the Commission's morale at the behest of national civil servants. This is illustrative of an administrative culture that has difficulty with objectivity. The Court's reply in its letter of 19 May 1999 to the Council advises "*caution before any decision is taken which would involve a commitment to the achievements of a positive DAS on the transactions underlying the Commission's payments within a given timetable. Of course, where expenditure directly managed by the Commissioners concerned, it should be within the Commission's powers to make the necessary improvements within such a time scale. But the Member States will also have to ensure that their own monitoring and control procedures are strengthened – for example, implementing correctly the new higher structural fund's regulations and that their financial reporting to the Commission is improved, if the Commission is to be able to deliver reliable financial statements whose underlying transactions are legal and regular*." The Committee shares this view.

RECOMMENDATIONS

3.23. Shared Management in the EAGGF

The extreme complexity of the legislation renders the EAGGF Guarantee section vulnerable to fraud and makes its control very difficult. The control of EAGGF Guarantee expenditure remains an important current issue despite the gradual reduction in the EAGGF Guarantee section's percentage share of the total Community budget. Sensitive sectors such as export

refunds and direct income support are also key sectors which merit the Commission's particular attention. The recent clarification of the respective responsibilities of the Commission and the Member States for payments and control may have a positive impact if given the correct follow-up. The clearance of the accounts with the Member States is the final, overall management act by the Commission in its exercise of control over expenditure by the Member States under the Commission's responsibility. The findings of the Court of Auditors annual Statements of Assurance suggest that there should be an increase in the amounts recovered through the Clearance of Accounts.

3.23.1. All decisions taken by the Commission in the EAGGF Guarantee area, either as an administration or as a college, must be taken in conditions of complete independence. The Commission must ensure that the Clearance of Accounts unit can work independently and without being subject to any inappropriate external or internal pressure or influence (3.12.3.-4).

3.23.2. The Commission should ensure a more stringent application of the provisions of Regulations 1287/95 and 1663/95 which deal with the accreditation of paying agencies and the certification of their accounts (3.9.8.-3.9.10).

3.23.3. The Commission should make full use of its right of on-the-spot controls in the Member States for accounting and compliance clearance and exclude from the certified accounts those amounts relating to accounting errors and underlying transactions which are irregular (3.10.6.).

3.23.4. Where systematic weaknesses are found higher rates of flat rate correction for the amounts to be recovered should be applied (3.8.6., 3.12.2.)

3.23.5. There remains scope to recover greater amounts through a reinforced clearance effort. To this end the Clearance of Accounts unit needs a further increase in staff to allow a wider coverage each year and checks through to the level of the final beneficiary. It should set a target for amounts recovered linked to the error rates found by the Court of Auditors in its annual Statements of Assurance ((3.12.2.).

3.23.6. Interest should be charged by the Commission from the date of payment by the paying agency on those amounts recovered which have been subject to the conciliation procedure (3.11.1-3.11.5-6).

3.23.7. The threshold for amounts in dispute which can be presented to the Conciliation body should be increased if need be by expressing it as a fraction of the value of the average transaction in each Member State (3.11.3.).

3.23.8. The Commission should seek to reduce the length of time taken in the clearance procedure by reducing the number of steps and in particular the number of distinct occasions which Member States have to comment on proposed recoveries and the Commission's observations leading to them (3.10.9.).

3.23.9. The Commission should ensure that the cycle of Clearance of Accounts' inspection of market and direct payment regimes is short enough to guarantee that all major areas are covered in a 24 month period in view of article 1 of Regulation 1663/95 (3.10.7.).

3.23.10. In the new system the compliance clearance decisions can refer to transactions in different years. The Commission should therefore ensure that in the interests of transparency its

records and reporting show how much is recovered through compliance clearance for payments made for each accounting year (3.10.5.-8).

3.23.11. The Commission should pay particular attention to the area of export refunds differentiated by destination and ensure that guarantees are recovered in full when frauds are uncovered (3.13.2-5).

3.23.12. The Commission should give priority to ensuring the proper implementation and correct application of the Integrated administrative and control system (IACS) (3.13.6-7).

3.24. Shared Management of the Structural Funds

The size of the Structural Funds means that day-to-day control of expenditure must be exercised by the Member States. The fact that the division of responsibilities between the Commission and the Member States has recently been clarified in legislation does not mean that the right balance in the division of responsibilities has been struck. A certain number of factors tend to divest the Member States of responsibility. The Commission must ensure that the Member States have put in place effective control systems.

3.24.1. There has to be a strengthening of control within the Commission through reinforced internal control units in the Directorates General. This is necessary to avoid the Commission being almost entirely dependent on the Member States for information on implementation and irregularities and the subsequent possibilities of pursuing these. This recommendation accords with proposals made in Chapter 4 of this report concerning decentralised financial control and modern internal and professional auditing (3.17.2-9).

3.24.2. Checks by the Commission in the Member States must be reinforced both in number and in quality, that is to say they should go beyond checks which lead simply to the provision of advice by the Commission and an exchange of views. Checks should be designed to result in the detection of irregularities and consequently in financial corrections. They should be most frequent in countries and regions with relatively weak administrative structures. This implies more Commission resources devoted to control in the Member States This implies stronger and more effective control by the Commission of such structures in all the Member States (3.17.2-9).

3.24.3. The number of administrative units involved in the management of the Structural Funds should be decreased and not increased. To this end the EAGGF Guarantee Directorates in DG 6 should have no role in rural development measures which should be left to the Guidance Directorates. The Committee's view is that only one Directorate General should have responsibility for the new objectives 1 and 2 (3.21.1.-2).

3.24.4. The use of diverse national rules to determine project eligibility if compatible with the provisions of the Treaties**,** should be carefully monitored by the Commission to ensure equality of treatment in respect of Structural Fund assistance for all citizens of the Union. Where the national rules cannot ensure this then the Commission should come forward with one or more additional eligibility datasheets to function as guidance notes (3.18.5.).

3.24.5. The Commission should refuse to accept over-declarations for reimbursement from Member States and return them for proper presentation (over-declaration occurs where Member States in claiming submit more expenditure than their entitlement leaving to the Commission the task of selecting eligible expenditure from within this larger sum). It is the Member State's

responsibility to present its claims for payment in a transparent and detailed way so that all parties can be satisfied that the expenditure concerned was eligible and its effects can be evaluated (3.18.1.-4).

3.24.6. Member States should inform the Commission of all project substitutions and their value. The Commission should systematically retain this information to form an overview of the integrity and coherence of the programmes. Member States should prepare for comparison the initial proposal without substitutions with the final outcome with substitutions. This would allow the Commission to intervene to assess certain instances of re-use and to ensure it may recover sums unduly paid from the Community budget(3.18.1-4).

3.24.7. If the reforms refered above at paragraphs 3.24.1. and 3.24.6. were not to be implemented, the Commission should take the initiative by preparing a distinct legislative proposal.

CHAPTER 3 : SHARED MANAGEMENT

European Union Budget 1999
Expenditure by broad category (1999 payment appropriations)

	mio EUROS	**in % of total budget**
EAGGF - Guarantee	40735	**48.5**
EAGGF – Guidance	3774	4.5
Regional Fund	12702	15.1
Social Fund	7246	8.5
Other Structural Funds	3846	4.7
TOTAL Structural Funds	27568	**32.8**
Cohesion Fund	2887	3.4
TOTAL Structural & Cohesion Fund	30455	**36.2**
Other expenditure	12798	15.3
TOTAL budget	83978	**100.0**

Source: OJ L 39 - Final Adoption of the General Budget of the European Union for the Financial Year 1999.

4. THE CONTROL ENVIRONMENT

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INTRODUCTION

4.1. The basics

4.1.1. The present chapter will examine the mechanisms in place within the Commission for the control of revenue and expenditure[68]. Such mechanisms include the measures taken to verify the legality and regularity of expenditure *before* it is made - *ex ante* control - and those which occur *after* or *during* expenditure - *ex post* control.

4.1.2. These functions, currently grouped under the responsibility of the Directorate-General for Financial Control (DG XX), are in fact substantially different in nature. The former category is essentially an administrative process whereby proposals for expenditure (both commitments and payments) are checked for conformity with the appropriate rules and procedures and validated by the Financial Control service. Approval for an operation must explicitly be given before it can take place. This procedure is known in Community jargon as the granting of a *"visa"*. The second category of control takes the form of *audits*, which may be of specific services, programmes, projects, etc., carried out by a specialised service within DG XX, the conclusions of which ultimately take the form of reports by the Commission's Financial Controller. For the purposes of this chapter, the two functions will be referred to as **internal control** and **internal audit**.

4.1.3. Both functions, though different in nature, include verification of conformity with the financial rule-book of the European Union, the *Financial Regulation.*[69] This document, the application of which is further elucidated in *Implementing Rules* adopted by each institution, is the basic text of financial control. It lays down the ground rules for the basic budgetary procedures: the establishment, structure and presentation of the budget, the implementation and management of the budget, the presentation of the accounts, the external audit of the accounts and the discharge to be granted to the Commission for its implementation of the budget. It also contains a number of special provisions for specific areas of expenditure. For present purposes, the key provisions are those concerning implementation of the budget by the Commission and the oversight exercised over them by DG XX.

4.1.4. One key provision of the Financial Regulation is that each institution shall appoint a *Financial Controller* with two principal tasks: monitoring (i) the commitment and authorization of all expenditure, and (ii) the establishment and collection of all revenue.[70] The Financial Regulation is also concerned with the status of the Financial Controller. Each institution shall make its own provisions in its implementing rules, but in all cases these *"shall be such as to*

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68 For those familiar with audit terminology, the title of this chapter, "control environment", is used here with this restricted meaning. It will not concern itself with the wider connotations of the term (e.g. corporate ethos, disciplinary regime, etc.) as these are covered abundantly elsewhere in the report.

69 The "Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities" (OJ L356 of 32.12.77), amended on eleven occasions.

70 Article 24, first and third indents

guarantee that they are independent in the performance of their duties".[71] In the case of the Commission, the Financial Controller is the Director-General of DG XX.

4.1.5. Another fundamental of the financial control system, also contained in the Financial Regulation, is the *separation of functions* between the person authorising expenditure and the person actually carrying out the financial operation concerned, or, as the text has it, *the authorizing officers and accounting officers are different individuals"*[72]. Consequently, any commitment or payment order requires the agreement of three individuals: the authorizing officer, who enters into financial commitments and issues payment orders, the Financial Controller, who gives his/her visa for the operation, and the accounting officer, who carries out the operation in question. These duties, in the words of the Financial Regulation, are *"mutually incompatible"*.[73]

4.2. Ongoing reforms

4.2.1. In some respects, the Committee is dealing with a moving target in this field, notably because of the processes underway as part of the "SEM 2000"[74] initiative. The purpose of this initiative is to address failings in the Commission's financial management identified by the Santer Commission at the beginning of its mandate. SEM 2000 was billed as a wide-ranging reform not only of formal structures and procedures, but also of the entire financial management "culture" of the Commission. (The eleven "recommendations" of SEM 2000 are reproduced in Annex 1 to this chapter.)

4.2.2. Latterly linked with the SEM 2000 process, several batches of amendments to the Financial Regulation (picturesquely known as "trains") have been put forward by the Commission in response to the changing circumstances of financial management. While each "train" has been proposed for good reason, the overall result, inevitably, has been to complicate the Financial Regulation to the point that it is becoming unworkable. Under pressure not least from the Court of Auditors, the Commission has therefore stopped the process of partial revision and launched a complete review of the Financial Regulation under the banner "the Recasting of the Financial Regulation"[75]. Its reflections have not yet, nor will for some time, taken concrete form. However in its introductory document, the Commission, after acknowledging that the repeated amendments of recent years have *"robbed the 1977 text of some of its coherence and readability"*[76], outlines the nature of the modifications it intends to propose. These relate both to

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71 *Idem.* eighth indent

72 Financial Regulation, Article 21 (first indent)

73 *Idem.* (fourth indent)

74 "Sound and Efficient Management 2000"

75 Title of Commission Working Document - SEC(1998)1228 of 22.7.1998

76 *Idem.* Introduction, paragraph 2 (see also the Court of Auditors: *"As a result of the successive proposals for revising the Financial Regulation, a good many "facilities" have been arranged, or allowed to emerge; these discretionary arrangements are regarded as useful for managers ... but tend to run counter to a disciplined approach and hugely complicate the accounting and financial management"* - Court of Auditors opinion 4/97 (10.7.97) para. 14 - Quoted by Commission in introduction)

form (clarity of text and consistency with other legislation) and to the substance of the provisions laid down in the Regulation. The task is a vast one, which will potentially take considerable time to complete. It is also subject to complex legislative procedures and involves a substantial input notably from the European Parliament, the Council and the Court of Auditors. As such, it would be inappropriate (not to say impractical) for the Committee to attempt to "second guess" these procedures by indulging in its own systematic review of the Financial Regulation. It will therefore restrict itself to indicating its ideas on specific reforms, as they arise in its analysis, and assumes that, insofar as the Committee's recommendations are considered useful, they will be "built-in" to the new Financial Regulation as necessary.

4.3. Other control mechanisms

4.3.1. Though this chapter is predominantly concerned with the internal control functions currently carried out by DG XX, it will also deal more briefly with other aspects of control.

4.3.2. It will thus comment briefly on the *external audit* function, carried out by the Court of Auditors, and in this context at the *political budgetary control* exercised by Parliament (though this subject is more correctly the subject of Chapter 7 and is covered more deeply there). It must also make mention of the *internal inspection* carried out by a specialised service of the Commission[77].

4.4. Approach taken

4.4.1. The recommendations to be made in this chapter will concern the key matters of principle according to which the Committee believes the Commission's audit and control environment should be designed and do not to enter into the small print of the reforms it identifies as desirable. It is for those directly concerned to build a system which will work on the foundations of these principles.

4.4.2. Furthermore, although SEM 2000 in many respects addresses a similar range of problems to those arising in this chapter, the Committee has preferred, for the purposes of this report, to base its analysis on the situation currently prevailing in the Commission, rather than take its lead from the Commission's own project for the reform of financial management. Although conscious of SEM 2000 plans, and though mention will be made on the occasions where there is a clear coincidence of thinking between SEM 2000 and the Committee's own reflections, on the whole the Committee prefers to follow its own path in reaching its recommendations.

[77] Referred to in this chapter by the commonly used French acronym, IGS - "Inspectorat Général des Services"

4.5. The First Report: Identifying problem areas

4.5.1. In its first report, the Committee made a range of criticisms relating to the role of the directorate-general for Financial Control. Two observations in particular point to problems which the Committee would identify as fundamental.

4.5.2. The first, in paragraph 9.4.14, is a simple but telling statement of fact:

> "*Most of the irregularities highlighted by the Committee stemmed from decisions to which Financial Control gave its approval"*

4.5.3. Behind this fact lies a substantial question mark as to the effectiveness, indeed usefulness, of *ex ante* financial control as currently organised in the Commission.[78] It is a question posed not only by this Committee, but one exercising the collective mind of the Financial Control service of the Commission itself. This is hardly surprising: according to DG XX's figures, in 1998 it processed over half-a-million financial transactions. (This could be one factor in the unfortunate reputation the Commission has required for late payment of creditors) The bulk of DG XX's staff is dedicated, directly or indirectly, to *ex-ante* control.[79] In spite of this, the volume of operations has already led to a system whereby proposals are only studied on a sample basis (30% in 1998, descending to 10% in 1999), with the great majority of operations therefore receiving approval automatically. On this basis, and notwithstanding the application of some effort to target controls on the basis of risk analysis, the supposed "quality guarantee" provided by the *visa* is a myth, and the sense in which authorising officers feel correspondingly relieved of responsibility for the financial regularity of the operation unjustified in either fact or principle.

4.5.4. The second observation relates to the other function of DG XX, internal audit. In this case, the problem arises as a common thread throughout the report. It frequently occurred that irregularities were identified in the course of audits by DG XX, and that these irregularities were such as to indicate at least the necessity for swift remedial action. The prime example of this phenomenon was the Leonardo case, where observations (subsequently proven to be accurate) in early drafts disappeared in final texts.[80] Moreover, the finalisation of texts can take an inordinately long time, as the arguments under the so-called "contradictory procedure" between auditor and auditee, especially on difficult cases, become protracted.

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78 Notably in the context of SEM 2000 (see especially "recommendation 11" - Annex 1)

79 For detailed figures see from "Financial Controller's 1998 Annual Report" - SEC(1999) 446/2A/4,6,8 (summarised in Annex 2). It should be said that these figures are presented for reference purposes only, as the classification of work and staff (particularly in the category "ex-post" audit) is questionable.

80 See First Report, Chapter 5

4.5.5. The Committee supports the basic principle of the right of reply: there is no question that the auditee should have the possibility to reply to audit findings *before* the report is finalised. The problem identified by the Committee is not that the contradictory procedure exists, but in the way it operates in practice - which is in turn the result of the relative position occupied by DG XX within the Commission. What, in the final analysis, is in question is the very conception of internal audit within a large organisation such as the Commission.

4.5.6. The focus of this chapter will therefore be on two subjects: the redesign of internal control and the transformation of internal audit.

4.5.7. The recommendations made will be based on the premise - also the subject of an observation in the first report[81] - that the two functions, *ex ante* control of regularity of financial operations and *a posteriori* audit, are entirely separate (even conflicting) activities which do not belong in the same department.

INTERNAL CONTROL

4.6. The need for change

4.6.1. There are different possible responses to the observation that the *visa* system of financial control in the Commission does not work. The first (an "ideal world" solution) is to try to make the existing system work in practice as it should in theory, in such a way that all financial proposals are genuinely and thoroughly checked. This would involve posting a *vastly* increased number of officials to the financial control service - a move which is impossible for a variety of reasons. A second response is to accept the impossibility of universal testing, by moving to a sampling system, whereby only relatively few, hopefully "targeted", transactions are thoroughly checked with the rest receiving an "automatic" *visa* (this being the current, SEM 2000-sanctioned situation).

4.6.2. Whatever the (im)practicalities of these options, the Committee continues to have strong reservations about them on two points of principle. First, *ex ante* checking, whether it be universal or on the basis of sampling, is unlikely to be a cost-effective process: the effort put in to checking all transactions is clearly disproportionate, while sampling is unlikely to have sufficient dissuasive effect. The second, and fundamental, principle is that any retention of *ex ante* control runs up against the crucial objection that, *de facto* if not *de jure*, it displaces responsibility for financial regularity from the person actually managing expenditure onto the person approving it. This displacement of responsibility, meaning in effect that *no-one* is ultimately responsible.

4.6.3. Thus we arrive at the third kind of response, namely a complete re-examination of the very concept of *ex ante* control.

4.6.4. In the world of international financial management, the *ex ante* financial control system of the Community institutions has something of an antediluvian feel about it. It corresponds to

[81] Paragraph 9.4.16

an outmoded "belt and braces" vision of control which places little value on the sense of personal responsibility of the "manager", focuses on the formal aspects of operations[82] and which can in any case only work effectively in an environment where a relatively restricted number of financial proposals pass through the system. Both these points have been identified by the Committee as major problem areas for the Commission, which, as the first report of the Committee pointed out, does not structurally encourage a sense of personal responsibility in its staff and carries out a number and range of financial activities beyond its capacity to manage them. In terms specifically of the European civil service, the problem is further exacerbated by the near-impossibility of applying administrative sanctions of a pecuniary nature against officials who commit irregularities.[83]

4.6.5. Most modern practice indicates a shift away from rigid *ex ante* control systems, to ones which rely on a combination of high quality financial management at source together with a firm regime of *ex post* audit. DG XX itself in part reflects this development, having created an internal audit service alongside the traditional *visa* departments. In doing so, it has arguably provided itself with the worst of both worlds, in the shape of two services, neither of which stands a serious chance of operating effectively. To make matters worse, the functions of the two services are potentially in conflict, as the audit service will inevitably throw up cases where financial control has granted a visa for an irregular operation (cases abound...). The position of the Financial Controller in such cases is not a satisfactory one.

4.6.6. The conclusion to be drawn is clear. First, financial control (i.e. the *ex ante* guarantee of the regularity of financial operations) must be completely rethought with a view to making the managers of expenditure genuinely and concretely responsible for it. Second, this function must be completely separate from the internal audit function.

4.7. The principles of responsibility in financial management

4.7.1. The considerations outlined above point to a series of principles which must be respected in any redesign of financial management:

- the manager of expenditure ("authorising officer") must be and feel responsible for all aspects[84] of the financial operations she/he carries out;

- the responsibility of authorising officers must be concrete and enforceable: formal and practicable mechanisms must exist to sanction contraventions;

- attribution of competences and the delegation of authority in any financial management structure must consequently be clear and unambiguous, in such a

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82 Notwithstanding the fact that Art. 38(1)e of the Financial Regulation does allow respect for the "principles of sound financial management" to be taken into account.

83 This statement is made not least on the basis of empirical evidence: no Community official has ever been sanctioned under Article 22 of the Staff Regulations (see Chapter 6)

84 Broadly, the "legality, regularity and sound financial management" of expenditure. (c.f. TEC Art. 248(2) - *paraphrase*)

way as to allow responsibility to devolve through the hierarchy in an identifiable fashion;

- authorising officers must be adequately trained and equipped to exercise their financial responsibilities;

- a demanding system of accounting, reporting and audit should reinforce the principle of accountability.

4.7.2. With such a system for authorising officers in place, central financial control as currently conceived essentially becomes redundant. Certainly, the submission by authorising officers of financial proposals for approval to a separate directorate-general of the Commission no longer has a place in the system. The "quality control", which is the ultimate purpose of financial control, should be ensured at the level of the directorate-general responsible for the expenditure. A form of "decentralisation" is thus envisaged, whereby responsibility is repatriated in the operational services. Reasons of efficiency moreover preclude any notion that a *visa* system be reproduced in the directorates-general.[85]

4.8. What is internal control?

4.8.1. Before proceeding, it is worthwhile pausing to consider what exactly is meant by "internal control", if the old-fashioned notion of it as an *ex ante* check on regularity is to be replaced. The convenient shorthand term "quality control" has already been used. To be more specific, internal control consists of all activities, instructions and routines in each directorate-general that ensure proper and secure handling of the DG's assets and financial resources. These can be outlined as follows:

- the provision to all parties to financial processes of adequate, complete and accurate information relative to their tasks;

- measures to monitor and guarantee compliance with all relevant procedures, instructions, regulations and laws;

- measures to protect public property and safeguard the value of public assets;

- measures to ensure the economic, efficient and effective use of resources according to the principles of sound financial management;

- measures to monitor and, as far as possible, guarantee the achievement of policy aims, priorities, targets and objectives.[86]

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85 Though SEM 2000 does not commit itself to this idea, it visibly moves in the same direction - Recommendation no. 11 (Annex 1)

86 The criteria applying to *a priori* internal control neatly match those to be reviewed and assessed by internal audit (c.f.14.12.4)

4.9. A new framework for internal control

Oversight and support

4.9.1. Within its vision of a decentralised internal control system falling under the responsibility of each director-general, the Committee would emphasise that it is not proposing anarchy. SEM 2000 already offers a context within which a harmonised financial culture is taking shape, complete with a system of financial "cells" within each directorate-general. This "spread" of financial competence is a vital component in the future development of the Commission. Moreover, for obvious technical/management reasons, it is important that accounting methods and basic financial management procedures should be the same throughout the Commission.

4.9.2. The preoccupation of the Committee that individual director-generals and their delegates should be personally responsible for the functioning of internal control systems and the regularity of individual financial transactions thus does not imply that they should simply be left to sink or swim. On the contrary, it becomes increasingly important that the appropriate structures be in place and that adequate guidance and support be available to authorising officers. This observation points to two needs which must be met.

4.9.3. First, a central specialised financial unit will continue to be necessary to oversee internal control arrangements, to propose and coordinate amendments to the Financial Regulation and other financial rules and procedures, to provide (when necessary) interpretations of the regulations and other advice to authorising officers, etc. Such a unit, which in the view of the Committee should be based in DG XIX (Budgets), should play no formal role in the processing of individual transactions (though, at the request of a director-general, it could offer advice on specific cases), but should establish the basic procedures and ground rules for financial management and monitor their application.

4.9.4. Second, obligatory and regular training must be available to all participants in financial processes. Current practice, whereby individual officials are simply allocated financial responsibilities and left "to get on with it", has no place in the management of a modern organisation. An essential *quid pro quo* of the personal responsibility to be given to authorising officers is that they, in their own interests as well as those of the Institution, be adequately equipped to exercise financial functions.

Delegation of authority

4.9.5. A further *sine qua non* of making internal control work is that the system of delegation in the Commission, and thus the responsibilities attached to each level of the hierarchy, must be absolutely clear. The font of all authority in the Commission is the college of commissioners itself. Ultimately therefore, responsibility for all actions of the administration must find its way back to individual commissioners and through them to the college. The relationship between the commissioners and the upper level of the Commission's permanent hierarchy is discussed in Chapter 7 and need not detain us here. It suffices to say that the administrative authority vested in director-generals is delegated from the Commission itself through single commissioners, with the actions of each director-general being carried out under the supervision of the commissioner (as part of the latter's duty to supervise the overall functioning of his/her directorate(s)-general)

and under his/her political responsibility (cf. 7.9.6). The global operation of internal financial control falls within the concept of the collective responsibility of the Commission as a whole.

4.9.6. For present purposes, the chain of delegation begins at the level of the Commission through the commissioner. She or he thus holds the ultimate responsibility for all financial matters, including for internal control, and as a member of the College.

4.9.7. It is for the director-general to assume (overall) responsibility for all operational matters in her/his directorate-general, including for internal control. Any subsequent delegation to subordinate managers directly under the director-general should be established by the latter in a specific document covering the order of delegation and the precise competences delegated. In this order of delegation the manager directly under the director-general is answerable to the latter for the management of his/her directorate/unit. This delegation of responsibility and accountability also covers internal control. Every subordinate manager is responsible and accountable for the internal control within his/her field of responsibility.

4.9.8. Accordingly, whatever the delegation of authority, the director-general bears primary managerial responsibility, as delegated to her/him by the relevant commissioner, for setting up and ensuring the smooth functioning of efficient and effective control systems that guarantee that regulations are adhered to and that established strategies, policies and plans are followed.

4.9.9. Notwithstanding the chain of responsibilities outlined here, it is important that consistency in financial rules and procedures be maintained across directorates-general. It would be the overarching role of the central financial unit in DG XIX (see 4.9.2-3) to ensure this.

Financial operations - procedures

4.9.10. Within the system of delegation set up in any given directorate-general, specific individuals will, as at present, have the task of authorising financial operations. Under Title V of the Financial Regulation, these persons, the authorising officers, are already (in theory) personally responsible for the regularity of the operation in question. For this responsibility to operate in practice, there should, as this chapter has already argued, be no formal procedure whereby the financial proposal is "vetted" or approved by a third party as a precondition of it taking place.

4.9.11. None of this is to say that there should not be safeguards in the system. In terms of the quality of the preparation of financial transactions, each authorising officer will have the resources of the directorate-general's specialised financial cell at his/her disposal in accordance with the internal procedures put in place by the director-general. In particularly difficult and/or complex cases, the authorising officer should also be able to call on the expertise of the central financial unit in DG XIX for advice.[87]

4.9.12. Furthermore, the intervention of the accounting officer should remain in place, through the presence of a delegated accounting officer in each directorate-general. The need for all operations to be booked in the Commission's accounts will continue to exist, implying the

[87] This unit would incorporate the "advisory unit on contracts" referred to in chapter 2.

existence of an individual carrying out this role. Moreover, the formal aspects of a transaction (presentation, presence of requisite signatures, authority of authorising officer to sign for the amount concerned, etc.), together with the availability of appropriations, should be verified by the accounting officer. A refusal on the part of the delegated accounting officer to implement a transaction should be referred back immediately to the authorising officer who should then decide, on his own responsibility, whether to overrule the objection and proceed with the operation. The provision of the Financial Regulation whereby the functions of authorising and accounting officer are separate (see para. 4.1.5) should therefore be maintained. (It should be noted that further proposals made below will affect the exact role of accounting officers - these do not however affect his/her participation in the implementation process)

Accounting and reporting

4.9.13. A further vital component of any system based on the "responsibilisation" of authorising officers is an adequate system of monitoring, accounting and reporting. At present, the accounts of the Commission are maintained for official purposes solely by DG XIX. In the view of the Committee, though it is necessary that consolidated accounts be maintained for the Commission as a whole, a system whereby responsibility for financial management is decentralised to the directorates-general implies that official accounts should also be drawn up at that level.

4.9.14. The Committee therefore recommends that each directorate-general be obliged to prepare an annual report and accounts covering all its activities. In accordance with general public and private sector practice, this document should not only contain information of a financial nature, but should also review the activities of the directorate-general more widely, indicating its activities in pursuit of policy objectives and assessing its success in achieving those objectives. This report should bear the certificate of the internal auditor as to the reliability of the accounts and be submitted, first, to the Commission as a whole by the competent commissioner and, second, by the Commission as a whole to the competent institutions as part of the annual discharge procedure.

4.9.15. This proposal is intended to be more radical in its effects than in the new workload it imposes on the Commission. Most, if not all, the information to be included within the annual report is already published (and thus prepared) by Commission services in an array of separate reports, brochures, accounts, etc. So far however, this has never been done in such a way as to make the clear link between the management structures through which policy and expenditure are implemented and the outcome of policies and expenditure. Under the Committee's proposals, this link, which is one of responsibility, is made explicit in order to reinforce the chain of accountability.

4.9.16. If accounts are to be formalised at the level of directorates-general, there are implications for the function of accounting officer. For this reason too, each directorate-general will require its own delegated accounting officer.

4.9.17. The system proposed is one which, if the accounts are to be meaningful, relies upon a greater degree of logic and homogeneity in the division of financial responsibility between directorates-general than currently exists. (See especially chapter 2)

Enforcement of authorising officers' responsibility

4.9.18. From the outset, this chapter has recognised that responsibility must be more than an abstract concept. If the principle is to be workable in the long run, specific administrative sanctions, possibly including of a monetary nature, *must* be available to back up the notion of responsibility in cases where authorising officers grievously fail in their obligations to the institution.

4.9.19. Theoretically, a general possibility already exists under the Staff Regulations to oblige an official "to make good, in whole or in part, any damage suffered by the Communities as a result of serious misconduct on his part in he course of or in connection with the performance of his duties"[88] This possibility, which in any case is not limited to financial matters, has, to the best of the Committee's knowledge, never been used to exact monetary compensation from an official. (Chapter 6 further examines the possible disciplinary procedures.)

4.9.20. However, the starting point for fixing the individual *financial* responsibilities of authorising officers lies in the specifically *financial* provisions of the European Union, namely the Financial Regulation.

4.9.21. Title V of the Financial Regulation, entitled "Responsibilities of authorising officers, financial controllers, accounting officers and administrators of advance funds", establishes the principle that individuals bear a personal responsibility for their actions:

> *"Authorising officers who, when establishing entitlements to be recovered or issuing recovery orders, entering into a commitment of expenditure or signing a payment order do so without complying with this Financial Regulation and the rules for its implementation, shall render themselves liable to disciplinary action and, where appropriate, to payment of compensation."*[89]

4.9.22. Later in Title V, an indication is given of how this liability might be applied:

> *"The liability to payment of compensation and disciplinary action of authorising officers ...* ***may*** *be determined in accordance with the provisions of Articles 22 and 86 to 89 of the Staff Regulations"*[90] (emphasis added)

4.9.23. The Financial Regulation foresees the possibility therefore (note: *not* the obligation) of "operationalising" the liability of authorising officers through the disciplinary procedures under the terms of the Staff Regulations. The difficulties associated with disciplinary procedures were mentioned in the Committee's First Report, and are discussed in detail in Chapter 6 of the present report, where recommendations are made for improvements. In the case of the highly specific subject of *financial* misconduct, the difficulties are particularly serious as nature of the supposed misconduct in question adds extra complications to the process of establishing the responsibility of an official, insofar as specific accounting/financial methods are necessary.

4.9.24. With these problems in mind, the Committee considers that the formal establishment of the responsibility of authorising officers, and any subsequent liability, should be through a new, separate and specific procedure, limited to strictly financial affairs and governed by the

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88 Staff Regulations, Article 22

89 Financial Regulation, Article 73 (extract)

90 Financial Regulation, Article 76 (extract)

Financial Regulation. In this respect, however, Title V of the Financial Regulation, as currently worded, is insufficiently specific concerning the mechanisms by which individual responsibilities (and possible liabilities) can be established.

4.9.25. First, it is necessary that the financial irregularity and the persons concerned be identified. As indicated above, this is a job which requires specific financial/accounting know-how and respect for correct procedure. Moreover, the body performing this function must be independent of the service to which the authorising officer belongs. The Committee therefore believes that the Internal Audit Service (whose creation is proposed later in this chapter) should report, according to its usual procedures, on individual cases of financial irregularity and identify the authorising officers concerned. It should do this either on its own initiative, under the responsibility of its Head, on the basis of facts emerging in the course of its normal work, or on the basis of a (duly justified) request from the President, the competent commissioner or a director-general.

4.9.26. Second, the personal responsibility of the individual must be fixed. This should be the task of a specialised financial irregularities committee, composed of persons with relevant experience and attached directly to the Secretary-general. This committee would deliberate on the basis of the reports described above.

4.9.27. The task of the committee described above would simply be to establish and identify the responsibility of an authorising officer. It could do so in a variety of ways, depending on the seriousness of the case. This process, which is purely administrative in nature, could then be followed up, if necessary, by disciplinary procedures.

4.9.28. To conclude, the Committee recommends that the Title V of the Financial Regulation be amended to provide for the procedure outlined above.

INTERNAL AUDIT

4.10. Internal v. External Audit

4.10.1. Audit in the public sector has - or should have - a dual function, reflected in the existence of two forms of audit, external and internal. The purpose of *external* audit is to provide the taxpayer with assurance that public money is being spent in a manner which respects the principles of legality, regularity and sound financial management[91]. It can therefore be seen as "public interest" audit. Such audit is external because it must be completely separate from, and thus independent of, the auditee. Such audit seeks objectively to analyse revenue and expenditure and to identify the problems and issues which should be made public.

4.10.2. By contrast, the *internal* auditor provides a powerful tool by which the "management" of the organisation can achieve its objectives with maximum efficiency and at the same time help instill the sense of responsibility in its line managers necessary for effective internal control. In this respect, internal audit in the public sector is more closely related to the conventional internal audit function in the private sector, whose function is not necessarily to make public the weaknesses and irregularities it detects, but to report them to the management in order that remedial action may be taken. It follows that the internal audit service answers only to "top management" and occupies a position of independence within the structure of the organisation.

[91] Cf. TEC Article 248 *(ex 188c)* Para. 2.: "The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases of irregularity." In the Community context, this activity falls within a duty to assist the discharge authority (Art. 276 *(ex 206)* TEC)

4.11. The weakness of the present internal audit function

4.11.1. Two related issues lie at the heart of DG XX's audit problems. First, as already stated, the independence of the Financial Controller vis-à-vis the auditee is compromised by the mere fact that, at present, both the *visa* and audit functions fall under her/his responsibility as director-general of DG XX. One branch of the directorate-general therefore potentially audits the actions of the other. Second, and in the light of experience more importantly, the Financial Controller does not enjoy the position of authority with respect to other Commission services which is needed to make her/his independence truly operational. In practice, the position of DG XX as just one directorate-general among others, and the corresponding position of the Financial Controller as just one high-level nominee among others, compromises her/his ability to translate audit findings into management action.

4.11.2. The most telling confirmation of this problem comes in the observation that numerous "sensitive" reports drafted by DG XX auditors have been the subject of lengthy contradictory procedures, often with the effect, and, one suspects, the intention, of delaying the report - and any consequent action - by periods of several months. Leaving aside for the present the need to introduce concrete measures to reduce the time taken for contradictory procedures to a reasonable level, these discussions tend to take on the nature of a negotiation between fellow director-generals. In this process, the purpose of audit - the detection and rectification of irregularities, the identification of systemic weaknesses and proposal of corrective action - does not necessarily take first place, being potentially overshadowed by the wish of both parties to come out of the process looking as good as possible.

4.11.3. Nor is the situation helped by the fact that the commissioner responsible for financial control/audit matters has a relative position, vis-à-vis fellow commissioners, each with their own interests, which is exactly analogous to that of the Financial Controller with respect to fellow director-generals. Once again internal audit is, as it were, unable to impose itself.

4.11.4. The underlying problem is that the internal audit service is not perceived as a central department at the service of the entire Commission, both as a guarantor of financial regularity and as a mechanism through which the financial management of the Commission can be improved, but as an antagonist and a competing service with its own interests to play for.[92]

4.11.5. It is a noteworthy irony that, whatever the Commission's weaknesses in the field of internal audit, it demands high standards of others. For example, one of the criteria for the accreditation of national EAGGF paying agencies is that they "normally dispose of … [an] internal audit service: the objective [of which] … shall be to ensure that the agency's system of internal control operates effectively; the internal audit service shall be independent of the agency's other departments and shall report directly to the agency's top management".[93]

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92 Though the Commission itself has recognised the need to extend and reinforce the internal audit function (SEM 2000, recommendation 6), it has not satisfactorily addressed the issue of its relative position vis-à-vis the rest of the Commission.

93 Commission Regulation (EC) 1663/95 of 7.7.95 (OJ L158 of 8.7.95) – c.f. above, at para. 3.8.3

4.12. What is internal audit?[94]

Definition

4.12.1. "The Institute of Internal Auditors (IIA)", an international professional organisation for internal auditors, publishes definitions, professional standards, ethical rules, etc. for the exercise of the internal auditing profession. It has recently issued a new draft definition of internal audit:

> *"Internal auditing is an independent and objective assurance and consulting activity that is guided by a philosophy of adding value to improve the operations of the organisation. It assists an organisation in accomplishing its objectives by bringing a systematic and disciplined approach to evaluate and improve the effectiveness of the organisation's risk management, control and governance processes. Professionalism and a commitment to excellence are facilitated by operating within a framework of professional practice established by The Institute of Internal Auditors."*[95]

4.12.2. In the context of the Commission, there are a number of salient points in this definition:

- internal audit is an instrument which "adds value" to the activities of an organisation, it is thus a *tool for management*,
- internal audit is within the organisation, but is independent and objective
- internal audit is a profession

Objective and scope

4.12.3. Again according to the IIA, Internal Audit exists "to assist members of the organization in the effective discharge of their responsibilities". To this end, it "furnishes them with analyses, appraisals, recommendations, counsel, and information concerning the activities reviewed. ... The members of the organization assisted by internal auditing include those in management and the board of directors."

4.12.4. The tasks of the internal auditor range from traditional financial audit to value-for-money or "performance audit" and are summed up by the IIA as follows:

- *[To] review the reliability and integrity of financial and operating information and the means used to identify, measure, classify, and report such information.*
- *[To] review the systems established to ensure compliance with those policies, plans, procedures, laws, regulations, and contracts which could have a significant impact on operations and reports, and should determine whether the organization is in compliance.*
- *[To] review the means of safeguarding assets and, as appropriate, verify the existence of such assets.*
- *[To] appraise the economy and efficiency with which resources are employed.*

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94 This section relies on the definitions on internal audit prepared by the Institute of Internal Auditors (IIA). All quotations are from the IIA's website at www.theiia.org

95 Draft "definition of Internal audit" - 11 January 1999 (www.theiia.org/GTF/Iadef.htm)

- *[To] review operations or programs to ascertain whether results are consistent with established objectives and goals and whether the operations or programs are being carried out as planned.* [96]

Responsibility, authority and independence

4.12.5. The IIA describes the position of the internal audit department within an organisation as follows:

> *"The internal auditing department is an integral part of the organization and functions under the policies established by senior management and the board. The purpose, authority and responsibility of the internal auditing department should be defined in a formal written document (charter). The director of internal auditing should seek approval of the charter by senior management as well as acceptance by the board. The charter should make clear the purposes of the internal auditing department, specify the unrestricted scope of its work, and declare that auditors are to have no authority or responsibility for the activities they audit."*

4.12.6. Though part of the organisation, it is a fundamental principle that the internal audit service should be independent of the *activities it audits*:

> *"Internal auditors should be independent of the activities they audit. Internal auditors are independent when they can carry out their work freely and objectively. Independence permits internal auditors to render the impartial and unbiased judgments essential to the proper conduct of audits. It is achieved through organizational status and objectivity."*

4.12.7. Finally, the IIA addresses the question of the *internal status* of the audit service:

> *"The organizational status of the internal auditing department should be sufficient to permit the accomplishment of its audit responsibilities. The director of the internal auditing department should be responsible to an individual in the organization with sufficient authority to promote independence and to ensure a broad audit coverage, adequate consideration of audit reports, and appropriate action on audit recommendations."* [97]

4.12.8. The Committee makes no apology for quoting at length from the IIA, firstly because its status as the relevant international professional organisation gives it unique authority, but secondly, and perhaps more importantly for present purposes, because its preoccupations concerning the scope, objectives, status and independence of internal auditors reflect so accurately the problems encountered in the Commission's present audit arrangements.

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96 Cf. para 4.8.1. giving criteria for internal control

97 Series of quotations from the "Statement of Responsibilities of Internal Auditing" (originally issued by the IIA in 1947, most recently revised in 1997).

4.13. A framework for internal audit in the Commission

4.13.1. The likely shape of any proposal for the future of audit in the Commission emerges naturally from a combination of the analysis of its present defects (both in this and the Committee's first report) and the *desiderata* for internal audit outlined by the IIA.

Status and position within the organisation

4.13.2. It is by now quite clear that the Internal Audit Service can no longer remain part of one of many directorates-general. This organisational position gives its auditors (up to and including the Financial Controller) neither the authority vis-à-vis their colleagues in the Commission nor the "direct line" to top management required by an effective internal audit service.

4.13.3. The Committee therefore proposes that there be a specialised Internal Audit Service, outside the regular structure of directorates-general, reporting directly to the President of the Commission.[98] The President of the Commission is the only figure in the Commission who is free of sectoral interests (insofar as he is institutionally competent for *all* the activities of the Commission) and who has the authority to draw the necessary conclusions from the results of audits. In line with the vision of internal audit outlined above, the Committee would envisage the Audit Service working as a diagnostic tool in the hands of the President, enabling him to identify structural and organisational weaknesses in the Commission and the specific, even isolated, problems which may arise from them. Clearly therefore, the president should be able to instruct the Audit Service to carry out specific tasks on an ad hoc basis and take the management action indicated by the results.

4.13.4. Though this definition of internal audit is one which applies throughout the world of major public and private sector organisations, one objection - drawn perhaps from experience - is predictable. Whereas in the private sector the head of an organisation has a direct incentive, in the shape of the "bottom line" by which he/she is judged, to maximise its efficiency and to root out all forms of waste, does the head of the Commission share such an incentive? Indeed, might his interest, as a political appointee, be to conceal inefficiencies, waste or even fraud?

4.13.5. The very fact that this question can (reasonably) be asked reveals the extent to which democratic accountability has been undermined in the Commission. The key to the previous paragraph's comparison between the head of a major private corporation and the President of the Commission lies in the word "judged". While it is true that the basis of the judgement exercised may be different, it nevertheless remains a basic point of principle that both are accountable, the former to the shareholders, the latter to the public at large, through the European Parliament. The problem is that the accountability of the latter is a more complicated matter.

4.13.6. Indeed, the availability to the president of an effective internal audit function is part of the broader picture by which the Committee hopes to reinforce accountability and in itself reinforces the sense of responsibility felt by officials.

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98 The President may wish, for internal organisational reasons, to delegate his competences vis-à-vis the Internal Audit Service to a vice-president of the Commission (though no lower than that), but should in any case retain responsibility for the action taken in respect of its findings.

4.13.7. Nor should the nature of the Internal Audit service itself be forgotten. As this chapter has been at pains to emphasise, internal audit is a *profession*. As such, it has professional standards, practices and ethics. These must be written into a basic document - a "charter"[99] - which sets out the competences, objectives, powers, status, etc. of the service. The officials of the Internal Audit service must be correspondingly qualified professional auditors, up to and including the Head of the service.

4.13.8. The Head of the Internal Audit Service is clearly an important figure, akin to, though with important distinctions, today's Financial Controller. First, the administrative grade of the individual concerned should be equivalent to that of a director-general: anything less would immediately compromise the status of the service[100]. Second, the individual concerned must be a highly qualified and experienced member of the auditing profession, to which end it would probably be necessary, or at least desirable, on most occasions to appoint the person concerned from outside the institution on the basis of a specific recruitment notice.[101] Third, notwithstanding the fact that the Internal Audit Service responds to the President, the Head of the service must maintain full independence as to the conduct of the audits, the maintenance of professional standards, the contents of reports, etc. On paper, this independence is less complete than that currently enjoyed by the Financial Controller, but in practice the new status of the Audit Service should provide a more favourable "balance of power" and thus greater independence vis-à-vis operational services of the Commission.

Selection of audits*Error! Bookmark not defined.*

4.13.9. The "charter" of the audit service should include provisions designed to ensure periodic full coverage of the Commission's activities. To this end, the work programme of the Audit Service should be approved by the President on the basis of a proposal by the Head of the Audit Service which takes into account the need to ensure that the Audit Service meets the objectives set out in its charter. At the same time, the Internal Audit Service must remain responsive to management requirements. Some elasticity or "headroom" should therefore be built into the work programme in order to allow for extra audit work arising at short notice. In particular, the President must have the possibility to order special audits in accordance with needs arising.

Conduct of audits

4.13.10. The basic principles governing the conduct of audits, be they within the Commission or "on-the-spot in Member States, need not be significantly different from those currently applying to DG XX officials, which provide for full and unrestricted access to all relevant documentation. Problems have arisen in the past more in connection with the formulation of audit reports.

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99 See para. 4.12.5

100 As UCLAF has learnt to its cost...

101 Though not exactly analogous, one could compare this requirement with the formal stipulations about the qualifications of members of the Court of Auditors (EC Treaty Article 247 *(ex 188b)*) or the requirements for the Director of OLAF and the members of its Supervisory Committee (Regulation (EC)1073/1999). By contrast to these cases however, the Head of the Internal Audit Service should be nominated by the Commission on the proposal of the President.

4.13.11. The internal "contradictory procedure" (i.e. the right of reply of the auditee) has been the source of substantial difficulties in the past (see first report). Though there must be a right of reply, and the replies of the auditee should, where necessary, be published together with the audit report, the auditee should not be able to either "negotiate" the contents of an audit report or delay its finalisation. This is not to say that the auditee should not have the opportunity to correct material errors of fact in the audit report before it is finalised, but that its intervention should not go beyond this factual level. Where divergences of opinion or interpretation subsist between auditor and auditee, these can be dealt with by way of a parallel publication of observation and reply.

4.13.12. In any case, the contradictory procedure (beginning when the draft report is first forwarded to the auditee and concluding with the finalisation of the report) should not last longer than one month. As a point of principle, after the month has lapsed, the decision on when, and under what conditions, to finalise an audit report must lie exclusively with the Head of the Internal Audit Service.

Follow-up of audits

4.13.13. Under the scheme proposed by the Committee, the action to be taken as the result of audit findings necessarily falls to the President of the Commission within the context of his management competences. No prescriptive approach is therefore possible in terms of follow-up to audit reports.

4.13.14. In a spirit of transparency however, the measures taken by the President, and, as a consequence, by other Commission managers, should be a matter of record. This can be achieved in two ways. Firstly, the Internal Audit Service must publish an annual report outlining its activities, summarising its most important findings and describing the action taken in response by the Commission's services. This annual report should be presented by the President to the Commission and should be made public. Secondly, all reports finalised by the Internal Audit Service should be made available to the Court of Auditors. This will permit the Court to monitor the concrete action taken by the Commission in response to audit observations.

Relations with the Court of Auditors

4.13.15. The professional quality of the work of the Internal Audit Service must be sufficient for the external auditor of the Commission to be able to rely on it. In order to maximise the potential benefits, there should be regular contacts between the Court of Auditors and the Internal Audit Service at both the programming and implementation stages of their work. Full access to the audit data of the Internal Audit Service for the Court must be assured, meaning in practice that, beyond the simple communication of audit reports, all the underlying audit files of the Internal Audit Service (i.e. "raw" audit data, observations, etc.) must be accessible to the Court for use in the course of its audit work.

Resources

4.13.16. It is not for the Committee to decide on staffing levels in the Commission. However, it is legitimate to point out, as it did in its first report, that the number of staff currently dedicated to internal/systems audit in the Commission is derisory (13). To be effective the Internal Audit

Service which will replace the DG XX internal audit unit must enjoy an adequate level of resources.

4.14. General Inspectorate of Services (IGS

4.14.1. The IGS was set up in 1991 to fill a perceived need in the management of the Commission for an internal inspection service. Between 1991 and 1999, it has grown from a staff strength of 20 to 35. The IGS is of guaranteed independence and is attached directly to the President of the Commission, who specifically mandates its inspections. Its tasks are briefly as follows:

- to check and assess the respect by Commission services for regulations and procedures and their consequences,
- to check and assess the use of human and financial resources within the Commission in relation to the tasks of the departments concerned,
- to check and assess the cost-effectiveness of Commission services.

4.14.2. To carry out this job, IGS inspectors have unrestricted access to Commission services. Their reports are subject to a contradictory procedure with the heads of the services concerned, and are communicated on a confidential basis, together with an opinion of the Legal Service and with the agreement of the Secretary-General, to the President of the Commission. Any follow-up action is decided upon by the President as is the question of whether or not to publish the report.

4.14.3. It is the experience of the Committee that IGS reports are frequently of high quality, with perceptive analysis of the operation of Commission services and useful recommendations. The follow-up which is given to them is, by and large, far less impressive. The Committee would therefore be in favour of strengthening the position of the IGS.

4.14.4. The means for doing so is implicit in the preceding paragraphs which show that the underlying rationale of the IGS is extremely close, if not identical, to that of the proposed Internal Audit Service, in that both are essentially analytical tools at the disposal of management for the attainment of maximum value for money. In the light of the competences to be given to the Internal Audit Service, the IGS has no need to continue as a *separate service*. It is thus a short step to envisage a rationalisation whereby the staff and activities of the current IGS be subsumed within the Internal Audit Service. The Committee would recommend this course of action.

4.15. Organisational consequences

4.15.1. The recommendations of this report concerning internal control and internal audit affect all directorates-general carrying out financial operations. Given the structural changes in course under SEM 2000, with its introduction of specific financial services in all directorates-general, the organisational consequences for the administrative structure as a whole are not radical. Two services however are more fundamentally affected. First, DG XX. Staff involved in internal audit should normally find a place in the new Internal Audit Service, subject to verification of their qualifications. On the other hand, the vast majority of the staff - currently occupied, directly or indirectly, with *ex ante* control of financial operations - would have to be redeployed, where

needed. It should again be stressed that the two present functions of DG XX are completely separate activities. Staff involved in *ex-ante* control are not auditors and would have no automatic claim on positions in the Audit Service. On the other hand, their technical knowledge of financial procedures and the Financial Regulation, should make them valuable to operational directorates-general throughout the Commission. Second, the IGS. As we have seen above, the IGS would find its place as a department within the new Internal Audit Service.

4.15.2. As far as the Financial Controller is concerned, it is evident that this role, as delineated in the Financial Regulation, ceases to exist.

4.16. The use made by the Commission of the audit findings of the Court of Auditors

4.16.1. The main source of audit information for the Commission will (and should) be its own Internal Audit Service. However, a second important source of useful audit results and valuable comment is provided by the Court of Auditors, both directly, in the form of reports and opinions, and indirectly, in the form of the "political" recommendations and observations formulated by the European Parliament and the Council on the basis of the Court's findings. The present section looks briefly at how the work of the external auditor is transformed into management action by the Commission and at possible means by which the Commission might be encouraged to draw more fruitfully on the audit work of the Court.

4.16.2. In looking at how the Commission makes use of the Court of Auditors' work, it is necessary to look at two separate processes: first, the translation of the Court's own observations into management action and, second, the action taken on the recommendations of the institutions to whom the Court reports, notably in the context of the discharge procedure.

Audit coverage

4.16.3. The Court's work programme is aimed at, on the one hand, carrying out the compulsory tasks set out for it in the Treaty (e.g. a "Statement of Assurance", an annual report) and, on the other, covering, firstly, an adequate range of themes, firstly in any given year, and, secondly, the near entirety of budgetary activity over a longer cyclical timespan. Audits of the Commission are usually theme-based rather than organisation-based, i.e. they focus on specific activities or policy areas rather than on defined departments or services.[102]

Nature of audit observations

4.16.4. A close reading of the Commission's replies to Court's reports, and the testimony of those involved in the process of auditing the Commission, point towards a defensively antagonistic reaction from the Commission to the Court's observations. The Commission could be persuaded into a more constructive reaction if the Court, working with exactly the same audit techniques and findings, were to present its observations in a more analytical style, giving an overview of the situation encountered by the Court more tailored to the management needs of the Commission. This would probably involve a greater emphasis on department-based auditing

[102] An exception to this rule is UCLAF, which was subject to a departmental audit (Special report 8/97 - see chapter 5)

(which would incidentally allow management responsibilities to be identified (and felt) more keenly), but would have little substantive effect on the way the Court does its job.

DAS

4.16.5. A similar problem of enabling the Commission to make use of audit results arises in connection with the Statement of Assurance (universally known by its French acronym "DAS"[103]). The findings of the DAS, which by necessity come down to a statistical analysis of "error rates" in financial management, are extremely difficult to relate to the systems and services of the Commission. It would be helpful to the Commission, Member States and other readers of the DAS if the Court could indicate with greater precision which sector, systems and procedures, and, in the case of shared management, which Member States, are mainly affected by errors, and indeed the nature of the errors.

Timing of reports

4.16.6. If the impact on the Commission of external audit findings are to be maximised, there is some scope for the Court to accelerate the production of its reports. The possible measures, in terms of the scope of audits, programming, internal procedures, etc. are an internal matter for the Court. Suffice it to say here that the fewer the pretexts given to the Commission not to take Court audits seriously the better.

The Contradictory Procedure

4.16.7. Draft reports of the Court of Auditors are submitted to the auditee in order for the latter to formulate replies. Within a deadline of two months, representatives of the two institutions meet in order, as far as possible, to agree each other's text with a view to publication of the report. In its initial draft replies, the Commission in particular tends to "bid high" with excessively categorical statements, in the knowledge that language and content will be moderated in the course of the contradictory procedure, which it sees as a procedure to "tone down" the Court's report as much as possible. In other words, the process strongly resembles a negotiation and obscures the real purpose of the exercise, which is ultimately to identify the remedial action required.

4.16.8. Thus, not only is this procedure time-consuming - even when respected deadlines are excessive - but it also reveals the unconstructive attitude of the Commission to the audit process.

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103 "Déclaration d'Assurance" - see EC Treaty article 248(1) *(ex 188c)*

4.17. Parliamentary budgetary control

4.17.1. The second source of external audit "findings" for the Commission comes by way of the European Parliament, acting in its capacity as discharge authority (with the Council in a subsidiary role). Chapter 7 of this report discusses the principle and operation of democratic accountability to Parliament in depth, and the reader is thus referred to that part of report for comment on the relationship between Parliament and Commission.

4.17.2. Parliament, upon whose observations the Commission is bound to act, thus translates external audit findings into political recommendations for action.

4.17.3. The changes to the Treaty introduced in Maastricht and Amsterdam have considerably strengthened Parliament's hand in the audit-based exercise of budgetary control over the Commission, both in terms of the ammunition provided by the Court and in the use it can make of it. If the Court and the Parliament work effectively as a team, with the Court's reports being timely and relevant and the Parliament's use of them thorough and incisive, external audit in the European Union takes on a new and fruitful dynamic.

4.17.4. Formal powers are not the whole story, however, and the Commission still has to be obliged in practical terms to react positively to the political recommendations based on external audit findings. At the moment, it is not clear whether the institutions are achieving the desired result. The Committee has already criticised Council for its lack of interest in following up Court reports[104] and though Parliament has been more active, its lack of the necessary institutional powers have until recently hampered serious efforts to "operationalise" Court reports[105]. The underlying difficulty however remains the one already identified, that the Commission does not treat the discharge as a constructive process, but as an annual ordeal to be gone through. The remedy is similar to that outlined in respect of the Court of Auditors and largely lies with the Commission itself. This has been the subject of this chapter: internal reform in the Commission.

4.18. Recommendations

4.18.1. The existence of a procedure whereby all transactions must receive the explicit prior approval of a separate financial control service has been a major factor in relieving Commission managers of a sense of personal responsibility for the operations they authorise while at the same time doing little or nothing to prevent serious irregularities of the sort analysed in the Committee's First Report. Moreover, the combination of this function with a (weak) internal audit function in a single directorate-general gives rise to potential conflicts of interest on the part of the Financial Controller. Thus a serious rethink of both internal control and internal audit is necessary.

4.18.2. A professional and independent Internal Audit Service, the competences and activities of which should be based upon the relevant international standards (Institute of Internal Auditors),

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104 First report: paragraph 9.4.12

105 See chapter 7

should be established, reporting directly to the President of the Commission. The centralised pre-audit function in DG XX should be dispensed with and internal control - as an integrated part of line responsibility - decentralised to the directorates-general. One of the principal tasks of the proposed Internal Audit Service should be to audit the efficiency and effectiveness of these decentralised control systems. (c.f. 4.18.16 below) (4.7.1-2, 4.9.8, 4.13.3, 7)

4.18.3. Chains of delegation should be made clear and explicit: every subordinate manager is responsible and accountable for internal control in his/her field of responsibility. It is for the director-general (and heads of independent services) to assume (overall) responsibility for all operational matters in her/his directorate-general or service, including for internal control. The chain of delegation begins at the level of the Commission through the commissioner. She or he thus holds ultimate managerial responsibility for all financial matters, including for financial control, and political responsibility as a member of the College. (4.9.5-9)

4.18.4. Each directorate-general should have at its disposal two basic prerequisites for effective financial management : (i) a specialised internal control function, exercised under the responsibility of a senior official reporting directly to the director-general; (ii) an accounting function, exercised under the responsibility of a delegated accounting officer. The latter would work under the functional supervision of the Commission's accounting officer, but be responsible for keeping the accounts and processing the financial operations exclusively of the directorate-general in which it is located.

4.18.5. Each directorate-general should produce its own annual financial report and accounts, audited by the Commission's internal auditor, including both financial information and a wider review of the directorate-general's activities. These reports should be examined first by the Commission, which should then submit them to the competent institutions as part of the discharge procedure. (4.9.13-17)

4.18.6. The Internal Audit Service should act under the responsibility and authority of the President of the Commission, independently of any other Commission service. It should above all be a diagnostic tool in the hands of the President, enabling him/her to identify structural and organisational weaknesses in the Commission. The competences, objectives, powers and status of this Service should be set out in a basic founding document (a "charter") The work programme of the Internal Audit Service should ensure periodic coverage of all Commission activities. It should however leave headroom for additional *ad hoc* audit tasks to be carried out at the request of the President and/or on the basis of needs arising. (4.13.3, 7, 9)

4.18.7. The Head of the Internal Audit Service should be a highly qualified and experienced member of the auditing profession, recruited specifically for this task. S/he should hold and administrative grade equivalent to that of a director general. The Head of the Internal Audit Service, though reporting to the President, should enjoy full independence as to the conduct of audits, the maintenance of professional standards, the contents of reports, etc. (4.13.8)

4.18.8. The internal contradictory procedure between the Internal Audit Service and its auditees should last at most one month, whereafter publication of the audit report should take place at the discretion of the Head of the Internal Audit Service. (4.13.11-12)

4.18.9. The President of the Commission should present to the Commission each year an annual report of the Internal Audit Service, outlining its activities, principal findings and the action

taken, or to be taken, by the President as a result. This report should be made public. (4.13.13-14)

4.18.10. All audit reports of the Internal Audit Service should be sent to the Court of Auditors. Additionally, all data collected by the Service, all preparatory work and audit findings should be available to the Court and be of sufficient professional quality to be used by it. (4.13.15)

4.18.11. The present General Inspectorate of Services (IGS) should be integrated into the new Internal Audit Service.

4.18.12. A central specialised unit, responsible for the formulation and oversight of financial procedures and internal control mechanisms should be constituted within DG XIX. This body should have no role in individual transactions (though it could, in difficult cases, offer advice), but should establish Commission-wide procedures and ground rules for financial management and monitor their application. (4.9.1-3)

4.18.13. All officials involved in financial procedures should undergo compulsory and regular training in the rules and techniques applying to financial management as a precondition of being allocated such work. (4.9.1-2, 4, 11)

4.18.14. The formal aspects of financial transactions should be verified by the delegated accounting officer. Any objections should be referred back to the authorising officer, who should decide, on his/her own responsibility, whether to overrule the objections and proceed with the operation. (4.9.12)

4.18.15. A new and specific administrative procedure should be established, governed by (an amended) Title V of the Financial Regulation, designed formally to establish the individual responsibilities and/or liabilities of authorising officers in respect of financial errors and irregularities. To this end, a new Financial Irregularities Committee would deliberate on the basis of reports from the Commission's internal auditor. Disciplinary or other action could follow if necessary. (4.9.18-28)

4.18.16. In the light of the foregoing recommendations, the existing DG XX no longer has any reason to exist. DG XX staff qualified for audit work should be redeployed to the new Internal Audit Service, while other staff should be redeployed, as needed, to other Commission services, notably those requiring expertise in financial procedures. (4.15.1-2)

4.18.17. The Court of Auditors could seek to obtain a more constructive reaction on the part of the Commission to its audit observations through greater recourse to department-based auditing, presenting its observations in a more analytical style, giving an overview of the situation it encountered and placing greater emphasis on the management needs of the Commission. (4.16.4)

4.18.18. It would be helpful if the Court were able in its Statement of Assurance ("DAS") to indicate with greater precision which sectors, systems and procedures, and, in the case of shared management, which Member States, are mainly affected by errors, and the nature of the errors concerned. (4.16.5)

4.18.19. The duration of the contradictory procedure between the Court of Auditors and the Commission (and other auditees) should be considerably shortened. The process should not assume the nature of a negotiation on the severity or otherwise of the Court's observations but seek only to establish the facts. The underlying purpose of the Court's audits should be to identify the remedial management action required in the Commission to address the issues identified by the Court (4.16.7).

Chapter 4 - ANNEX 1

SEM 2000: Recommendations

Recommandation no 1: débat d'orientation politique, en janvier, pour déterminer les priorités budgétaires de l'année suivante et leur caractère limitatif;

Recommandation no 2: connaître le coût global en ressources financières, humaines et autres de toute proposition au moment de toute prise de décision politique (lien entre crédits de fonctionnement et crédits opérationnels);

Recommandation no 3: instauration d'un système d'enveloppes globales aux DG qui comportent le plus grand nombre possible de catégories de dépenses administratives;

Recommandation no 4: évaluation systématique pour tout programme ou toute action communautaire; les DGXIX et XX renforcent leurs travaux respectifs en matière d'amélioration coût-efficacité et de techniques d'évalutation;

Recommandation no 5: rationalisation des contrôles ex ante en ayant recours à des techniques de contrôle basées sur les méthodes et outils tels que l'échantillonnage statistique et les audits de systèmes et de la qualité de gestion financière des services;

Recommandation no 6: la DGXX approfondira et élargira la fonction d'audit interne (audits de systèmes, gestion, performances des services et comptabilité) selon un programme annuel arrêté par la Commission;

Recommandation no 7: dès la conception d'une réglementation et jusqu'à la phase finale de son adoption, les services veillent à ce qu'elle soit claire, contrôlable et protégée contre les tentatives de fraude;

Recommandation no 8: séparation entre, d'une part, le volet conception/gestion/relations et, d'autre part, le volet finances/ressources dans les services et la transformation de ce dernier volet en "contrepoids" au sein de la DG;

Recommandation no 9: gestion intégrée des ressources et création d'un système de gestion des ressources humaines similaire et synchrone à celui qui existe déjà pour les ressources financières;

Recommandation no 10: prise en compte de l'expérience acquise en matière de gestion des ressources comme élément de plus en plus important pour les nominations et promotions. Chaque agent paraphant ou signant un engagement financier fera une déclaration sur l'honneur portant sur la non-existence de conflits d'intérêts avec la partie contractante;

Recommandation no 11: changements réglementaires éventuels (suppression du visa préalable, extension de la notion de "dépenses courantes", ancrage d système d'audit interne dans les textes juridiques, clarification de la responsabilité des ordonnateurs).
N.B. La Commission a différé sa décision sur ce point.

DG XX (FINANCIAL CONTROL): FACTS AND FIGURES

(The following information is drawn from the Financial Controller's Annual Report for 1998 and Orientations for 1999)

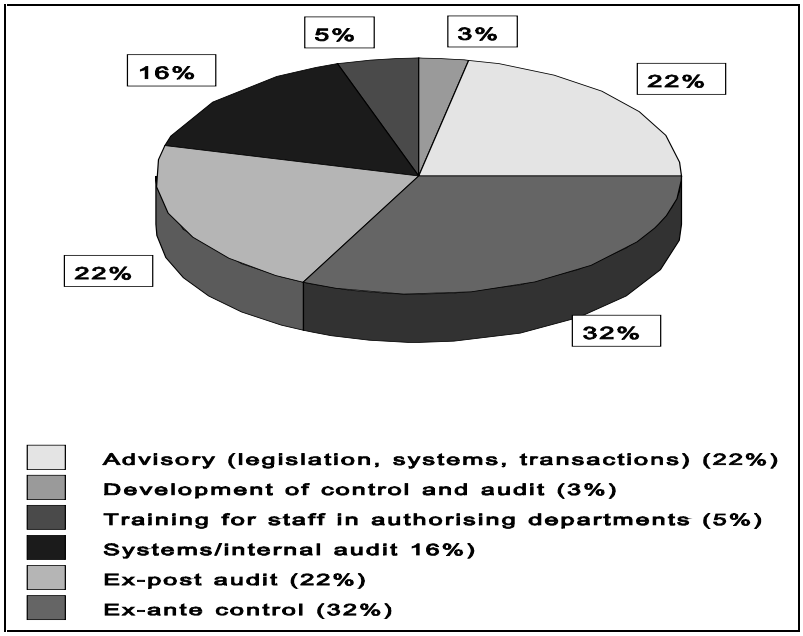
Transactions

The following numbers of financial transactions were processed by the *ex ante* control department of DG XX.

	1994	1995	1996	1997	1998	1999 (est.)
Transactions	275.000	302.000	360.000	461.000	550.000	600.000
Av.days/transaction	6.9	5.9	5.1	4.8	4.4	4.0
Sampling (%)	60%	55%	48%	40%	30%	10%

Use of resources

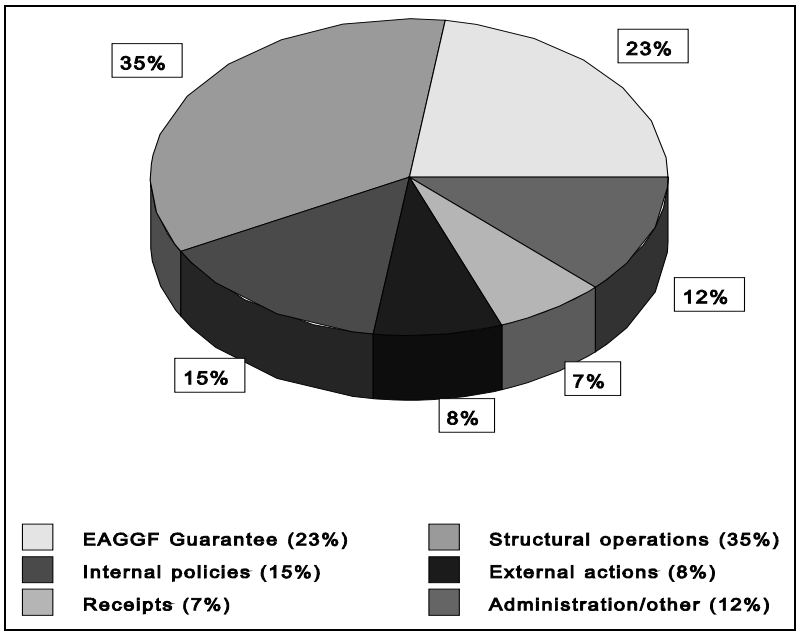
The chart below shows the proportions of DG XX resources (staff time) dedicated to specific activities in 1998.



Audit activity

DG XX carried out 201 ex-post audits in 1998 (against 152 in 1997), plus three special investigations (tourism, Security Office and Leonardo). It plans 284 audits in 1999.

The chart below indicates the coverage of major policy areas (according to the categories of the Financial Perspectives) by ex-post audits:



Staff

DG XX has 230 staff. This figure has been stable since 1995. They are currently deployed as follows:

Advice on proposed legislation, financial systems and proposed transactions	39 staff
Ex ante control	57 staff
Audit	69 staff
Training and technical assistance	9 staff
Development of control and audit instruments	7 staff
Administration and other horizontal activities	49 staff

5. FIGHTING FRAUD AND CORRUPTION

TABLE OF CONTENTS

INTRODUCTION

5.1. Defining fraud and measuring its extent

Definitions

5.1.1. This chapter is concerned with the manner in which the Commission (and others) address the problem of fraud and corruption. Its scope is thus restricted to action taken in relation to criminal or potentially criminal activities. This is in contrast to the previous chapter, which dealt with the processes of financial control (issues of sound and efficient management, financial regularity, etc.), and the following chapter, which (in part) deals with action taken in respect of individuals following personal and professional misconduct by way of disciplinary measures. Clearly there is overlap between the three, but it is important that the conceptual distinctions be drawn because the appropriate response of the institution varies depending on the nature of the problem.

5.1.2. This chapter therefore cannot but start with the distinction to be made between *fraud* and *irregularity*. Confusion between the two is the perennial source of alarmist (and inaccurate) headlines which declare anything between five and ten percent of the European Union's budget to be "lost in fraud". *Fraud* is not an equivalent concept in the legal systems of Member States - in some the term has no legal meaning at all - but the European Union does possess a workable definition, to be applied in the context of criminal law:[106]

> "*... Fraud affecting the European Communities' financial interest shall consist of :*
>
> *a) in respect of expenditure, an intentional act or omission relating to:*
>
> - *the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities*
> - *non-disclosure of information in violation of a specific obligation, with the same effect,*
> - *the misapplication of such funds for purposes other than those for which they were originally granted*
>
> *b) In respect of revenue, an intentional act or omission relating to:*
>
> - *the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities*
> - *non-disclosure of information in violation of a specific obligation, with the same effect,*
> - *misapplication of a legally obtained benefit, with the same effect."*

[106] Definition quoted from the "Convention on the protection of the European Communities' financial interests" Article 1(1)a - OJ C316 of 27.11.95. (See also 5.7.1 and Annex 2)

5.1.3. An *irregularity*, on the other hand, is a contravention of rules and/or procedures which does not necessarily involve either illicit gain or intention, defined as follows:[107]

> *"'Irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure"*

5.1.4. By this definition, quoted from a Community regulation, an irregularity is not a criminal matter but an administrative one. It is thus exposed to the possibility of an administrative sanction rather than a criminal one. Thus a distinction is immediately drawn between the sphere of criminal law and the sphere of administrative law. It is to be a vital distinction in this chapter, but one that is not unambiguous, for though an irregularity is not a criminal offence in a judicial sense, it is possible that a fraud, which is a criminal matter, lies behind an irregularity.

5.1.5. It is in consideration of the above that discussion of irregularities is central to the discussion of fraud. They represent the soil in which fraud can grow. Consequently, taking one step further back, tolerance of the slack administrative practices, poor regulations, over-complicated payment mechanisms, excessive exceptions and derogations, lack of transparency, etc., which tend to lead to abundant irregularities and errors[108], amounts to a tolerance of a relatively high level of fraud.

5.1.6. *Corruption*, which can be viewed as a "special case" of fraud, is also defined in a European Union text (in a manner limited, spuriously perhaps, to EU interests), the first protocol to the Convention on the protection of the European Communities' financial interests[109]. A distinction is drawn between *passive* and *active* corruption, i.e. being corrupted and corrupting another:

> *"...the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute* ***passive corruption****"*
>
> (...)
>
> *"...the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or a third party, for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute* ***active corruption****"*

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107 Quoted from Council Regulation 2988/95 Article 1 (2) (See also 5.6.2 ff and Annex 2)

108 It is sufficient to consider the annual conclusions of the Court of Auditors' "Statement of Assurance" to appreciate the extent of the irregularity problem.

109 Articles 2 and 3 of the first Protocol (OJ C313 of 23.10.96). (See also 5.7.5) This Protocol's scope has been completed and broadened by a "Convention relating to active and passive corruption on the part of both Community and Members States' officials" drawn up by Council act of 26 May 1997 (OJ C195 of 25.6.1997).

Incidence of fraud

5.1.7. Fraud is by definition a hidden activity. It is only possible to assess its impact and extent by indirect means, for example by counting convictions for fraud, by extrapolating from confirmed occurrences, by citing reports of suspected fraud or irregularities likely to conceal fraud, by examining investigations in course and so on. To complicate matters further, an important variable is detection rates, whereby relative success in the detection and prosecution of fraud can give the appearance of a greater overall problem than where detection and prosecution are less effective and hence reveal fewer cases of fraud.

5.1.8. The approach taken by the Commission to measuring the extent of fraud is to rely on the official communication of irregularities by the Member States[110] and the resulting enquires (in the field of shared management) or on inquiries carried out (in case of direct management). Though highly imperfect, no better method exists.

5.1.9. The first remark to be made is that the relationship between the number of cases and the amounts concerned is far from a simple one. UCLAF's figures show that a mere 5% of the cases under examination account for well over half the total amounts in question. Put differently, a few big frauds are disproportionately important vis-à-vis a mass of smaller frauds. The importance of this point will become apparent when it comes to the investigation of fraud. Any serious attempt to deal with the bulk of the losses in value terms will involve the investigation of large-scale fraud operations. Experience shows these to be usually highly sophisticated, transfrontier operations, frequently the work of organised crime. The response has to be up to the scale of the task.

5.1.10. Secondly, one unambiguous conclusion which can be drawn from the Commission's statistics is that the vast bulk of irregularities, both in terms of cases and the amounts involved, occur in the fields of traditional own resources (essentially revenue from customs duties), agricultural expenditure and structural fund expenditure. In other words, in those parts of the budget which are jointly managed by the Commission and the Member States (see Chapter 3). Given that these areas account for about 80% of total expenditure and the bulk of revenue collection directly from third parties, this observation is in itself not surprising. It does serve however to make two important points. First, the Commission's own efforts to combat fraud can only be seen as part of the solution to the fraud problem - the Member States, which are in the front line as far as most fraud or potential fraud is concerned, are the primary line of defence. The Commission's role is thus above all one of guidance, coordination, legislation, etc. Second, the problem of fraud affecting directly managed expenditure is put into perspective - in the overall total, and notwithstanding the recent attention cases in this area have attracted, the amounts concerned are comparatively small.

5.1.11. This second point is not made to minimise the importance of the Commission effectively tackling the problems associated with direct expenditure. On the contrary, it is precisely in this

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[110] Under regulations nos. 1552/89 (Own Resources), 595/91 (EAGGF), 1681/94 & 1831/94 (Structural Funds). The figures communicated under these regulations are reported in UCLAF's Annual Report on the Fight Against Fraud(Last published 6 May 1998 for 1997 – COM(98)276

area where the Commission can and must most of all demonstrate its commitment to the fight against fraud. In the light of the role the Commission plays, and hopes to play in the future, in the political life of Europe, nothing less than total commitment to the fight against fraud, and maximum effectiveness in this commitment, is acceptable.

5.1.12. Exactly the same point applies to the fight against internal fraud and corruption. Though, according to the latest information, the number of UCLAF investigations involving Commission officials is a relatively low 30, the political impact of such cases and the importance of the manner in which the Commission deals with them far exceed their monetary impact. The issue here, more so than in the myriad cases of fraud elsewhere, is one of trust. The Commission's ambitions, which depend on the ambitions of ordinary Europeans for the European Union as a whole, can only be realised if the institution earns and retains the confidence of those it serves.

5.2. Aspects of the fight against fraud

5.2.1. The fight against fraud is a multifaceted one, covering prevention, detection and sanction. There are thus a range of activities and a wide range of responsibilities involved, not all of which fall exclusively within the sphere of competence of the Commission. To summarise:

Prevention

a) Quality of legal documentation:
   - well-drafted, "fraud-proofed" legislation
   - simple and transparent rules and procedures;
   - well-drafted contracts
b) Transparent and efficiently-managed tender procedures
c) Effective control and monitoring procedures on the ground
d) Effective internal audit in the Commission and in partner organisations
e) A tight administrative "culture" (both formal and informal)

Detection and investigation

f) Effective, competent and qualified law-enforcement in Member States
g) An effective investigative capacity at the European level
h) Good coordination and information exchange between anti-fraud services
i) Good internal cooperation between Commission services
j) Adequate legal basis for investigations
k) An anti-fraud culture - guarantees for whistle-blowers

Prosecution and sanction

l) Willingness and ability of national judicial authorities to prosecute EU fraud cases
m) Good cooperation between Member States' judicial authorities
n) Adequate legal framework for the prosecution of EU fraud, including of EU officials
o) Effective coordination of administrative, disciplinary and judicial procedures
p) Speedy resolution of fraud litigation in Member States' criminal courts

5.2.2. Many of these subject areas are covered elsewhere in this report, especially those relating to the prevention of fraud. The present chapter will thus concentrate on the mechanisms for the detection and investigation of fraud, and the possibilities for prosecutions and resolution of fraud litigation and the subsequent application of sanctions.

5.3. Political impetus

5.3.1. In many, if not all, parts of the European Union, fraud is big news. Stories about the loss of taxpayers' money through fraud and corruption have been a constant feature of media coverage of "Europe" for many years. Although distortion and scaremongering have been an equally constant aspect of such coverage, it has served the useful purpose of ensuring that the issue of dealing with fraud has never been forgotten, even though it was perhaps submerged beneath perhaps more inspiring political projects in the expansionist Delors era in the minds of the European political classes.

5.3.2. Probably because of the popular and media interest in "fraud", it has been the European Union's sole directly-elected institution, the European Parliament, which has consistently made the running on anti-fraud policy, above all in the form of its Committee on Budgetary Control. The latter body has pursued its often thankless task with a great deal of persistence, with the result that all the principal anti-fraud and control mechanisms currently in existence one way or another had their genesis in this Committee.

5.3.3. The purpose of this observation is not to heap praise upon any particular grouping of politicians (it is - or should be - normal that the responsible committee of parliament lies behind many policy initiatives), but to make the point that the prime anti-fraud impetus must begin at the political level, not only in the European Parliament but throughout the institutions. It is no coincidence that most of the criticisms made by this Committee in its first and second reports arise in the context of structures, practices, procedures and a culture which developed in a period when concern about fraud and mismanagement had slipped off the mainstream political agenda.

5.3.4. The role of the democratic political structures of the European Union are examined later in this report (chapter 7). The present chapter, having noted the importance of political impetus, will deal with its more concrete manifestations, mainly UCLAF, but now also OLAF.

5.4. History

UCLAF

5.4.1. A brief "potted history" of UCLAF, providing a chronology of its key developments, is provided in Annex 1 at the end of this chapter. The following is thus the briefest of summaries.

5.4.2. UCLAF originally emerged as a result of sustained parliamentary pressure for a direct anti-fraud capacity within the Commission. Though what Parliament envisaged was a "flying

squad" able to carry out inquiries in the Member States, UCLAF was initially constituted solely as a body for the *coordination* of the Commission's anti-fraud activities, which were hitherto dispersed in the principal expenditure/revenue directorates-general. The name it still bears reflects this early role[111]. UCLAF became operational in July 1988.

5.4.3. From that point on, and under constant pressure from the European Parliament, UCLAF's role and competences have been steadily upgraded. The biggest single change occurred in late 1994-early 1995, when three developments coincided. First, the Parliament voted 50 extra staff specifically for UCLAF. Second, in doing so, it specified that the new staff should fulfil an *investigative* role. Third, in the light of these developments, the Commission concentrated all its anti-fraud activities within UCLAF, transferring the relevant staff from the operational directorates-general for agriculture (DG VI) and for customs and indirect taxation (DG XXI). Its enhanced role was subsequently reinforced by three significant pieces of legislation[112] and by the new Treaty of Amsterdam. (These are discussed in the next section.)

5.4.4. A further important step in UCLAF's development has been its increasing *de facto* involvement in judicial procedures. Tentative steps in the direction of attempting to ensure better cooperation between national judicial authorities, especially in the preparation of prosecutions, were given a boost by the findings of the European Parliament's Committee of Inquiry into the Community Transit System, which recommended UCLAF taking a more active role in this field.[113] (Again, this subject is developed in section 5.10 below.)

5.4.5. Finally, UCLAF is currently in the process of a further significant transformation, again as the result of direct pressure from the European Parliament and again with a view to increasing its operational effectiveness and independence. The change from UCLAF to OLAF, a fraud office operationally completely independent of the Commission, is reviewed in section 5.11 below.

OLAF[114]

5.4.6. The rules applying to the conduct of UCLAF's inquiries are in the process of being superseded by the new provisions relating to OLAF, which officially (though for the time being

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111 UCLAF (French acronym) = **U**nité de **C**oordination de la **L**utte **A**nti-**F**raude

112
1) Convention on the protection of the European Communities' financial interests (26.7.95 - OJ C316 of 27.11.95)
2) Council Regulation (EC, Euratom) 2988/95 on the protection of the European Communities' financial interests (18.12.95 - OJ L312 of 23.12.95)
3) Council Regulation (EC, Euratom) 2185/96 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 (11.11.96 - OJ L292 of 15.11.96)

113 Final Report and Recommendations of the Committee of Inquiry into the Community Transit System (A4-0053/97 of 19.2.97): see especially sections 8.2.5 and 15.2.2 and recommendation 18.

114 OLAF (French acronym): **O**ffice pour la **L**utte **A**nti-**F**raude

only virtually) came into being on 1 June 1999[115]. They remain however of more than historical interest as the same, or similar, principles will have to apply to OLAF inquiries. Moreover, their effectiveness (or otherwise) in regulating the relations of UCLAF with other services can provide an indication of where potential difficulties will lie in the new institutional setup.

5.4.7. Except insofar as this chapter will specifically review the changes brought about as a result of the move from UCLAF to OLAF, it will, in its descriptive and analytical sections, by and large refer to UCLAF. This is not only because all past and present experience necessarily relates to UCLAF, but also because UCLAF will continue, for an indeterminate transitional period, to be the Commission's operational anti-fraud body. Generally speaking, it is safe to assume, unless otherwise indicated, that observations on the legal and operational attributes of UCLAF will apply equally to OLAF.

LEGAL FRAMEWORK[116]

5.5. Treaty provisions

Treaty establishing the European Community

5.5.1. Article 280 of the Treaty establishing the European Community (TEC), as modified by the Amsterdam Treaty, contains the following explicit provisions on the fight against fraud specifically affecting the EU budget:

> *Article 280 (ex Article 209a)*
>
> *1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.*
>
> *2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.*
>
> *3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.*
>
> *4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.*
>
> *5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.*

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115 OLAF is discussed in detail below (Section 5.11)

116 This part of the chapter provides a brief discursive overview of the legal framework in place. A table showing the legislation in force, including more detailed summaries of its provisions, can be found in Annex 2

5.5.2. This treaty article in paragraph three gives the Commission - and thus UCLAF (now OLAF) - together with the Member States a role in all "action aimed at protecting the financial interests of the Community against fraud". Specifically, the Commission and the Member States are called upon to participate in "close and regular cooperation between the competent authorities". Thus UCLAF acquires a formal responsibility not only in the coordination of investigations and the collation of intelligence, but also in prosecutions of anti-EC fraud.

5.5.3. The preparation and adoption of anti-fraud measures connected with the financial interests of the Community (in practice not always easy to distinguish from other anti-fraud measures), are brought in paragraph 4 firmly within the Community framework, under the co-decision procedure between the Council and Parliament[117], this being the principal novelty of this article in comparison with the previous version (TEC Article 209a)[118]. In this case, however, measures affecting the "application of national criminal law or the national administration of justice" are specifically excluded. It is within the jurisdiction of the Court of Justice to interpret these provisions.

Treaty on European Union

5.5.4. Fighting crime in a broader sense, including through the application of criminal law, is nevertheless addressed in the Treaty on European Union (TEU), in Title VI as amended by the Amsterdam Treaty: "Provisions on Police and Judicial Cooperation in Criminal Matters". This part of the Treaty, which is outside the Community framework, introduces provisions aimed at tackling cross-border crime generally, covering areas such as police and customs cooperation - including through Europol - (Article 30), judicial cooperation and the prevention of conflicts of jurisdiction between Member States (Article 31), operations outside the Member State of origin (Article 32) and the possible approximation or harmonisation of national criminal laws through the adoption of framework decisions or the establishment of conventions (Article 34). The Court of Justice may be given jurisdiction, under certain conditions, to give preliminary rulings regarding such framework decisions or conventions and their implementing measures (Article 35 *(ex K.7)* TEU. The general aim of the Union is set out in Article 29 *(ex K.1)*:

> *Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia*
>
> *That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:*
>
> — *closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;*
>
> — *closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;*

[117] TEC Article 251 *(ex 189b)*

[118] Also reproduced in Annex 2

— *approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).*

5.5.5. In practice, it is clear that these general provisions on combating crime will also concern the fight against fraud affecting the Community budget. Frequently frauds to the detriment of the EU are only part of a wider fraud affecting national or private interests - an obvious example being VAT fraud, where a loss of revenue is suffered both by the EU budget and by national exchequers. From the point of view of the fight against EU fraud, and the mechanisms employed in this fight, notably UCLAF/OLAF, there is therefore a major interest in the broader measures provided for in Articles 29-34 of the TEU.

5.5.6. At the same time, the distinction between measures relating to anti-EC fraud (TEC, thus the Community framework, i.e. "First Pillar") and measures to combat EU crime in general (TEU, thus outside the Community framework, i.e. "Third Pillar") draws the key conceptual lines in the sand. On the one hand, there exists the possibility for the Community, using the co-decision procedure set out in Article 251 *(ex-189b)* TEC, to adopt *administrative* legislation specifically aimed at tackling anti-EC fraud, without explicitly touching on criminal matters, and for the Commission to assist and coordinate *all action* aimed at dealing with such fraud. On the other hand, any "legislative" measures touching on *criminal* law are exclusively the competence of the Member States, who may, in the context of the TEU choose to coordinate their action, using the procedure set out in Article 34 *(ex K.6)* TEU (requiring unanimity), notably through the establishment of framework decisions or conventions.[119]

5.5.7. It is obvious that the distinction made (EU-fraud = Community = administrative measures *versus* crime in general = Member States = criminal law measures) is an artificial one and one which inevitably places UCLAF/OLAF in an ambiguous position. The ramifications of this ambiguity will be apparent in the course of this chapter.

5.6. "First pillar" provisions: administrative powers

External inquiries

5.6.1. The administrative measures in place and the powers given to the Commission (thus UCLAF[120]) to deal with fraud affecting the European Communities' financial interests fall into two categories, external and internal. The former category, which concerns the fight against fraud generally, and thus involves Commission (UCLAF, now OLAF) intervention on the ground in the Member States, is governed by formal Community legislation. This section is a brief review of this legislation.

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119 It is to be noted however that such measures may (and do) reserve a role for the Community institutions, including the Commission (hence UCLAF/OLAF) and, optionally, the Court of Justice.

120 UCLAF, in its present form, exists only by virtue of internal Commission decisions. Its powers and obligations are delegated to it by the Commission, whose own position is defined in legislation.

***Council Regulation 2988/95 - The protection of the financial interests of the European Communities*[121]**

5.6.2. This regulation, contemporary with the Convention of the same name (see below), was intended to provide a framework for, though not supersede, the anti-fraud activities of the European Community already carried out under a disparate range of pre-existing sectoral regulations. It therefore establishes a number of general principles.

5.6.3. The regulation studiously avoids the term "fraud" with its criminal law connotations, by employing the word "irregularity", intentional or otherwise.[122] In the same spirit, the regulation consistently uses the adjective *administrative* to qualify the measures and sanctions for which it provides.

5.6.4. The importance of the regulation lies firstly in its mere existence, namely that it introduces a framework for the Commission's action against fraud in all sectors of the budget. Concretely, it provides the Commission with the authority to carry out administrative checks, introduce specific measures and apply administrative sanctions (including fines) in the protection of the European Communities' financial interests. In accordance with the Treaty principle that Community financial interests shall receive the same priority as national interests[123], it also places Member States and their services under an obligation to take measures to protect the European Communities' financial interests and to cooperate with the Commission for this purpose. (For details see Annex 2)

***Council Regulation 2185/96 - On-the-spot checks and inspections carried out by the Commission in order to protect the financial interests of the European Communities*[124]**

5.6.5. This regulation lays down provisions for the administrative on-the-spot checks and inspections foreseen in Regulation 2988/95 (Article 10). It is a similar attempt to pull together a range of disparate rules (contained in sectoral regulations) into a common framework.

5.6.6. The effect of the regulation is to empower the Commission (in practice UCLAF) to carry out inspections of an administrative nature in the Member States *on its own authority and under its own responsibility* (Article 6(1)). These shall be carried out: (i) to detect serious irregularities or irregularities with a transnational dimension, (ii) in response to a weak control environment or (iii) at the request of the Member State (Article 2). The inspectors are given parity in terms of powers, access to persons, premises and documents with an equivalent national administrative service (Article 7(1)) and their inspection report has the same legal value

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121 Council Regulation (EC, Euratom) 2988/95 of 18.12.95 - OJ L312 of 23.12.95

122 The definition of "irregularity" employed in this regulation has already been cited at paragraph 5.1.3

123 Article 280(2) (quoted above at 5.5.1). NB This does not of course necessarily mean that the *same* degree of protection will be provided throughout the Union.

124 Council Regulation (EC, Euratom) 2185/96 of 11.11.96 - OJ L292 of 15.11.96

as its national equivalent (Article 8(3)). The Commission is placed under an obligation to notify in advance and cooperate with the relevant national authorities (Article 4) and must, after an inspection, communicate its results to them(Article 8(2)). National inspectors may, but need not necessarily, participate in the inspection. (For details see Annex 2)

5.6.7. As a point of information, this regulation was applied 17 times in 1997 and 24 times in 1998. (It should be noted that it may still be more convenient for UCLAF/OLAF to operate under older, sectoral regulations, depending on the circumstances of the case.)

Other regulations

5.6.8. As has been mentioned, a number of sector specific regulations also provide the Commission with powers to act in the fight against fraud. Their is little point enumerating these here, but examples include: Regulations nos. 1552/89 (Own Resources), 595/91 (EAGGF), 1681/94 & 1831/94 (Structural Funds).

Internal inquiries

5.6.9. As far as inquiries *within* the Commission are concerned, there is clearly a great deal of scope for UCLAF/OLAF's powers to be extended by way of internal Commission decisions, while remaining within the scope of formally administrative action. Until July 1998, a surprisingly informal and *ad hoc* approach prevailed. Thereafter, following the internal ructions over the ECHO inquiry already referred to and a critical report from the Court of Auditors (see below) UCLAF's internal powers were formalised.

5.6.10. It should be noted that it is in the context of internal inquiries that the position of OLAF has evolved most vis-à-vis UCLAF. The following is a resumé of UCLAF's position, OLAF will be discussed in Section 5.11.

Conduct of UCLAF internal inquiries: early provisions

5.6.11. The explicit instructions or procedures which existed prior to the Commission Decision of 14 July 1998 covered only restricted fields, as follows:

- Notes from the Secretary-General concerning the obligations of officials vis-à-vis UCLAF and the latter's access to information. The first of these notes[125] incidentally confirmed the right of the Director of UCLAF to "initiate any investigation" as he saw fit.

- "Demarcation" agreements, specifying the competences of different services:
  - . Division of responsibilities between UCLAF and DGs VI and XXI on fraud-related matters (SEC(95)249 of 10.2.95)

[125] Note SG(95)D/141.038 dated 1 February 1995

. Cooperation and complementarity between Financial Control and UCLAF. (Note SG(94)D/141.662 and annex of 6.7.94)

- Agreement with the Court of Auditors on the exchange of information relating to possible fraud. (Exchange of letters between Mr Weber, responsible member of the Court (25.7.95) and Mrs Gradin, responsible commissioner (4.10.95))

Conduct of UCLAF internal inquiries: the Commission Decision of 14 July 1998

5.6.12. Following a Communication entitled "Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption"[126], which, albeit in rather vague terms, promised to tighten up internal provisions on the fight against fraud, the Commission adopted on 14 July 1998 a Decision on the conduct of UCLAF's inquiries. Although formally concerned with *all* UCLAF inquiries, be they external or internal, the Commission decision notes (Article 2) that its activities outside the Commission are regulated by Council regulations 2988/95 and 2185/96, together with the various sectoral regulations covering revenue and expenditure. The Decision is thus essentially concerned with regulating the conduct of inquiries *within* the Commission and/or the mutual obligations of UCLAF and other Commission services in relation to investigations. As the covering communication from the Commission President, and Commissioners Gradin and Liikanen points out, the Decision "consolidates already existing practices".

126 SEC(97)2198 of 18.11.97

5.6.13. Most importantly, this Decision:

- obliges directors-general and heads of service to *report to UCLAF* all suspicion of fraud in their services affecting the European Communities' financial interests (other officials may inform either their hierarchical superiors or UCLAF directly);

- authorises the director of UCLAF to *undertake internal investigations* on his own initiative (he shall inform the secretary-general at the same time);

- obliges all officials fully to cooperate with UCLAF inspectors and to provide *unrestricted access* to all information and documentation;

- imposes a requirement on UCLAF to *inform the senior officials* responsible in advance of inspections and of any indication that Commission officials may be involved, except in exceptional circumstances;

- empowers the Director of UCLAF on his own authority to *notify the relevant national judicial authorities* of cases where criminal proceedings may be appropriate and to report to the AIPN where disciplinary action is indicated;

5.6.14. The above provisions were subsequently clarified by "Detailed Rules of Application" (Dec. 1998), which specify the internal procedures and responsibilities required for the application of these principles.

5.6.15. It is worth remembering that both the main Commission decision and the rules of application on UCLAF were adopted at a time when the Commission was under severe pressure on fraud issues from the European Parliament and the OLAF idea was already in the air. As with many recent developments concerning UCLAF, it is impossible not to see them as an attempt both to head off external pressure for a more convincing effort to deal with fraud and corruption within the Commission and, as a fall-back position, to write the ground rules for whatever finally emerged as the result of such pressure.

5.7. "Third pillar" provisions: activities in the field of criminal law

Convention on the Protection of the European Communities' Financial Interests[127]

5.7.1. As the Convention and its protocols remain outside the European Community legal framework and were adopted under the intergovernmental provisions of the "third pillar" to come into force they require ratification by all the Member States in accordance with national constitutional arrangements. At the time of writing, only four Member States had ratified the

[127] Drawn up by Council Act of 26 July 1995 - OJ C316 of 27.11.95

Convention.[128] In the meantime, the Convention and its protocols are being used "informally" by UCLAF/OLAF.

5.7.2. In contrast to the regulations outlined above, the Convention deals with the criminal aspects of fraud affecting the EU budget under the general umbrella of the TEU provisions on tackling crime in general. Though it correspondingly reflects the habitual trepidation with which this subject is addressed, it nevertheless represents a step forward.

5.7.3. The Convention establishes a shared definition of fraud affecting the Communities' financial interests[129] and that offences meeting this definition will be treated as criminal offences punishable by criminal penalties, including custodial sentences for serious cases (Articles 1 and 2). It further includes provisions to ensure that rules on jurisdiction and/or extradition between Member States cannot provide loopholes to avoid prosecution for fraud (Articles 4 and 5) while placing Member States under an obligation to cooperate in the fields of criminal investigation, prosecution and sanction of fraud (Article 6).

***The two principal Protocols to the Convention*[130]**

5.7.4. The first two protocols to the Convention, the most important ones for present purposes[131], put flesh on these relatively bare bones in their respective subject areas.

5.7.5. In the first, dealing with corruption of public servants, a shared definition of such "corruption" of Community and national officials damaging to the European Communities' financial interests is established[132] and agreement is reached on it being treated as a criminal offence.

5.7.6. The second is more of a patchwork, including a range of disparate subjects. It is agreed: first, that money laundering is to be made a criminal offence in all Member States (Article 2); second, that legal persons are to be made criminally liable for offences of fraud, corruption and money laundering (Articles 3 and 4); third, that the proceeds of fraud against the financial interests of the European Communities are to be subject to confiscation (Article 5); and fourth, that the Commission is explicitly required to cooperate with Member States, both by providing

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128 Austria, Germany, Finland and Sweden

129 Article 1 (Already cited in paragraph 5.1.2)

130 First Protocol on corruption drawn up by Council Act of 27 September 1996 - OJ C313 of 23.10.96
Second Protocol on the liability of legal persons, confiscation, money laundering and cooperation between Member States drawn up by Council Act of 19 June 1997 - OJ C221 of 19.7.97

131 A third protocol exists on the "interpretation, by way of preliminary rulings, by the Court of Justice ... of the Convention on the protection of the financial interests of the European Communities" (Council Act of 29.11.1996 - OJ C151 of 20.5.1997)

132 The definition of corruption employed in this Protocol is cited at 5.1.6, along with reference to the related Convention of 26.5.97.

technical and operational assistance (Article 7(1)) and by participating in the exchange of information, "so as to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering" (Article 7(2)).

Europol

5.7.7. Under the general heading of third pillar measures aimed at combating fraud, mention should be made of the creation of Europol, which is given an explicit role in promoting cooperation between national police forces, customs services and other authorities in Articles 29 and 30 of the Treaty on European Union, for example by coordinating individual operations, providing specific expertise, promoting liaison arrangements and centralising information on cross-border crime.

5.8. Remarks on the legal framework

5.8.1. The legal framework described briefly above is characterised by a number of recurring themes.

- Both the European Community legislation and the EU Convention are driven by a need to establish a general framework, above and beyond the provisions of separate sectoral legislation, for the investigation and sanction of fraud.

- All texts touch on matters relating to the criminal jurisdiction of Member States while cautiously avoiding any apparent infringement of national sovereignty. This is at the same time a recognition of the political sensitivity of the subject and a *de facto* acknowledgement that the fraud problem cannot seriously be addressed without criminal legislation taking on a European dimension.

- A strong emphasis is placed on effective cooperation between and coordination of the actions of Member States in the investigation, prosecution and punishment of fraud. In the administrative area, the Commission (i.e. UCLAF/OLAF) is given an increasingly prominent and explicit role in achieving these. In the criminal area, operational cooperation between police and other enforcement services of the Member States is reinforced, the collection and storage of intelligence data organised and judicial cooperation strengthened.

- The independent powers of the Commission in the administrative sphere (internally and externally), including its capacity to carry out investigations on a par with national authorities in the Member States, have increased significantly. In the criminal sphere, the Commission has become increasingly involved in the promotion of cooperation (e.g. by way of its duty to provide technical assistance, its involvement in the exchange of information, etc.)

5.8.2. The result of the various legislative and non-legislative processes described in this section, is a rather incoherent and ineffective legal framework. This is apparent at the outset

from the simple observation that, although the Council clearly perceives the need for concerted action in the field of criminal law, the fruit of its labours, the Convention and its protocols, have not, in the absence of the necessary ratification by national parliaments, yet come into force and will not do so for some time to come. On the other hand, the legislation which is in force, the Treaty and the regulations, has provided the Commission with significant powers in the administrative area.

5.8.3. The distinction which has thus arisen between administrative and criminal jurisdiction is however not as clear as this contrast might suggest. UCLAF/OLAF possesses sweeping powers to investigate and gather intelligence on irregularities affecting the European Communities' financial interests and to carry out, on its own responsibility, on-the-spot "administrative" inspections. This work will, by its very nature, involve UCLAF/OLAF in criminal investigations and criminal intelligence, albeit without itself possessing the police powers needed to gather some of it.

5.8.4. This factor will come into play most obviously in the context of external investigations. UCLAF/OLAF's assistance to Member States relates to both criminal and administrative matters. Thus it is implicit in the legislation that UCLAF/OLAF has a role in the sphere of criminal investigations and prosecutions, even though this role is never openly acknowledged by the same legislation in force. Moreover, there is a mismatch between the scope of UCLAF/OLAF's investigations and information-gathering, which is Europe-wide, and the competence of the judicial authorities it in effect serves, which have strictly national jurisdictions.

5.8.5. This issue has a special dimension when the potentially criminal acts under investigation are within the Commission, where UCLAF/OLAF is in reality the sole investigative body able to initiate fraud inquiries. In such cases, no judicial authority holds jurisdiction until such time as, in effect, the Commission grants such jurisdiction by waiving the immunities of officials and/or the inviolability of Commission premises.

5.8.6. These questions are more than purely theoretical ones. Coordination between national judicial authorities when dealing with "European" fraud cases and the relationship between the Commission and national judicial authorities have been a constant source of difficulty, with the result, that prosecution for frauds to the detriment of the European Communities' financial interests remain extremely rare and even more rarely successful.

5.8.7. This chapter will henceforth seek to look beyond the legal rules, firstly to the practice - namely how UCLAF, now OLAF, and the European Union's prosecution of fraud work in reality - and secondly to attempt a "blueprint" for the future of the fight against fraud.

5.9. The functioning of UCLAF

The rationale behind UCLAF

5.9.1. The formal evolution of UCLAF described in the preceding sections has almost always been the result of an attempt to respond to perceived failings in the European Union's response to fraud. It has thus been designed piecemeal in order to plug the gaps in the system as they became impossible to ignore. Examples of such "gaps" include (in roughly chronological order):

- poor coordination between Commission services in the fight against fraud,
- poor information exchange with and between Member States,
- poor cooperation (even rivalry) between DGXX and UCLAF,
- poor coordination of enquiries into EU fraud carried out by different Member States' authorities,
- the need for the Commission to be able to participate in/carry out on-the-spot inquiries,
- a need for a central intelligence-gathering body concerned with EU fraud,
- ineffective prosecutions of EU fraud through low national priority for such action, poor communication and cooperation between judicial authorities (consequently a low conviction rate),
- the need for an independent body able to carry out inquiries within the Commission and able to deal directly with the judicial authorities.

5.9.2. These needs are real ones, interconnected ones and ones which could not collectively be met by any other body. However, the process by which UCLAF has taken shape has left a variety of open questions, which apply as much to OLAF in the future as to UCLAF in the past. Three in particular suggest themselves:

- Is UCLAF/OLAF necessarily the only or the best body to meet the needs identified?
- How well did UCLAF carry out its tasks?
- Does UCLAF/OLAF fully meet the needs of the EU in the fight against fraud?

5.9.3. The simplest response to these questions is that plainly UCLAF is not the Union's definitive response to fraud. The mere fact that OLAF has just come into being makes this point clear. The evolution continues and, one suspects, is bound to do so for some time yet. The next section will consider the deeper, abstract reasons for which UCLAF, henceforth OLAF, is not - *cannot be* - the end of the story. The present section, by contrast, will look at the reality on the ground.

Court of Auditors' report 8/98

5.9.4. So bound up were all concerned with the Commission's need to equip itself with a body dedicated to the fight against fraud and to provide that body with the necessary powers, that the Court of Auditors' special report 8/98[133], which examines UCLAF in the same critical way as it would any other Commission service, came as something of a shock.

5.9.5. The main weaknesses of UCLAF identified by the Court may be summarised as follows:

a) Policy on and organisational arrangements for inquiries, both within the Commission and in relation to Member States' judicial authorities, were poorly defined or over-complicated. *(Here, the Commission decision of 14 July 1998, which the Court's report pre-dates, represents a partial response to the Court's criticism.)*

b) Security measures and procedures were frequently not correctly implemented. Staff were not properly vetted and rules on confidential information were inconsistently applied.

c) An excessive proportion of UCLAF's staff were temporary agents, leading to a lack of continuity.

d) Electronic databases (the basis of much intelligence gathering work) were neither fully operational nor effective. The use made of the databases was in practice very limited.

e) Management information on UCLAF's caseload of 1,327 open files (as at April 1997) was inadequate to ensure their correct handling. No standard procedures for documentation or for the pursuit of inquiries were in existence, nor were measures in place to ensure that case files were maintained to the standards of criminal evidence required in Member States.

f) UCLAF's cooperation with Member States was hampered by the manner in which the privileges and immunities of EU staff are handled by the Commission, while national legislation in turn imposed serious practical constraints on UCLAF's inspections in Member States.

5.9.6. The criticisms of the Court are worrying, and indeed were one of the factors which encouraged the European Parliament to press for the creation of a new, reinforced (and more independent) anti-fraud unit, OLAF.[134] The criticisms fall into two main categories: those concerning UCLAF's efficiency, internal organisation and general functioning, and those which

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133 "Special Report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the 'unité de coordination de la lutte anti-fraude' (UCLAF) together with the Commission's replies" - OJ C230 of 22 July 1998

134 See Bösch report A4-0297/98, adopted by European Parliament on 7 October 1998

concern its position within the Commission and its relationship with national judicial authorities.

5.9.7. In terms of the first category, it is of course vital that UCLAF function as efficiently and effectively as possible. If it is to earn the respect - and thus full wholehearted cooperation - of both th Member States' investigative and judicial authorities and the staff and services of the Commission, UCLAF must show that its investigations are rigorous, objective, procedurally correct, reasonably rapid and, above all, produce results. It is the quality of the management and staff of UCLAF which, in the first instance, will determine whether it is able to achieve this. The Court's findings indicate that UCLAF (now OLAF) has some way to go in this area.

5.9.8. As to the second category, UCLAF can also point to "structural" failings elsewhere. The Court of Auditors is clear that the legal framework within which UCLAF works is undeveloped and that procedural rules and the constraints of national legislation place serious hindrances in the way of successful inquiries. Moreover, it challenges the Commission's good faith (at least on occasions): suggesting that it does not possess a "zero tolerance" policy towards corruption on the part of its officials, applies the privileges and immunities of Community officials too restrictively and hesitates to refer cases to the competent judicial authorities. It mentions occasions when "dossiers have been withheld from UCLAF investigators" and "incriminating documents have been systematically destroyed"[135], finding that this indicates that UCLAF is insufficiently empowered within the Commission.

5.9.9. In other words, the Court finds a two-way problem: structurally UCLAF does not have sufficient status, but at the same time operationally it does not make the most of the status it has. The two are, needless to say, connected.

The standing of UCLAF, conduct of inquiries

5.9.10. The findings of the Court chime with those of the Committee. Although the Committee has not examined the internal workings of UCLAF in the detail of the audit carried out by the Court, it has perceived in the course of its work a counterproductive tension between UCLAF and other Commission services. Several of the operational services with whom the Committee have had contacts have expressed some reserves about the functioning of UCLAF, while some have seen its involvement as a positive obstacle to the resolution of an affair. To be fair, much reticence can be traced to the particularly strict requirements of confidentiality under which UCLAF, by the very nature of its job, must work. Investigators can thus be seen as intrusive and arrogant. Moreover, as is well known, no-one loves a cop...

5.9.11. Notwithstanding such unavoidable professional handicaps, it remains the case that UCLAF has encountered problems in its relations with Commission services to which it would do well to pay serious attention. Bitter recriminations have surrounded its handling of some internal cases, with UCLAF having been perceived, rightly or wrongly, as excessively secretive or not wholly objective. On the other hand, UCLAF may be right in pointing to a strong defensive reflex on the part of services within which internal inquiries are carried out. It is

[135] Special report 8/98 para. 2.33

undeniable that far from treating UCLAF as an ally in the fight against fraud, services often perceive it as an antagonist with whom cooperation is to be kept to an indispensable minimum.

5.9.12. As far as the outside world is concerned, UCLAF continues to experience - though for different reasons - difficulties with its counterparts and interlocutors in Member States. Partly through sensitivities over sovereignty, partly through ignorance of UCLAF's role, partly through reserves over providing detailed criminal intelligence to a body which is part of the Commission and allegedly too because of doubts about UCLAF's functional competence, some of the national investigative authorities are less than fully enthusiastic about cooperating with UCLAF. Nevertheless, progress is being made, thanks in part to a policy of recruiting from the ranks of national bodies, in improving the situation. Where relations are good and the reciprocal roles well understood, UCLAF has proved itself able to provide genuine added-value, leading to a number of highly-successful operations (for example in the fight against large-scale organised cigarette smuggling).

5.9.13. One result of a better understanding with national authorities has been a move to formal bilateral cooperation agreements. To date, one such agreement exists, with the Italian *Guardia di Finanza*, while three more are close to finalisation and another nine "on the table". More such agreements can be expected if and when UCLAF (now OLAF) succeeds in convincing national counterparts not only of its formal powers and status but also of its professionalism, reliability and usefulness.

Relations with Commission audit and control services

5.9.14. If operational services of the Commission show some reticence in their dealings with UCLAF, those in a similar line of work tend also to be critical. The most notable example is DG XX (Financial Control), the audit division of which has played a crucial role in uncovering many of the cases of fraud detected by the Commission. As indicated at the beginning of this chapter, the detection of administrative and/or financial irregularities is the basis of the detection of most fraud, certainly in the Community context. The skills of the auditor are often highly relevant in the constitution of a fraud file. In practice, as the Committee itself has seen, UCLAF leans heavily on the findings of DG XX auditors in the preparation of its cases. There is thus a large overlap between the work of the internal audit service and that of the anti-fraud unit, especially as UCLAF is itself only an administrative body by statute and thus does not always possess in its own right the police-style powers which are needed to go significantly beyond auditors can do.

5.9.15. This fact accounts for the dissatisfaction expressed to the Committee by several auditors as to UCLAF's conduct of investigations. The commonest complaint is that when files are handed over to UCLAF because they contain indications of fraud, they "disappear" with no visible follow-up.

5.9.16. The internal agreement defining the respective tasks of UCLAF and DG XX (Financial Control) referred to in paragraph 5.6.11 is of surprisingly little help in this context. Essentially, this document defines the respective tasks of the two departments, outlines areas where their activities potentially overlap and indicates which information should be exchanged. In practical

terms, the document amounts to little more than a general undertaking to exchange relevant information and does not really resolve the day-to-day overlaps in competence which are bound to arise. Because of the interrelation between irregularities and fraud, they do so constantly.

5.9.17. The issue is not so much that overlaps of competence occur, but that of how an investigation should then proceed. In the context of its first report[136], the Committee found that once a suspicion of fraud arose in any given case, UCLAF took over the investigation. The subsequent *de facto* exclusion of DG XX from the dossier was often counterproductive in that the skills of the auditor remained necessary in the context of the inquiry, rather than those possessed by UCLAF, whose staff typically have a different professional profile[137]. It is in the nature of UCLAF's role that a great deal of its work will be in the field of what in the vogue term is known as "forensic accountancy".[138]

Is UCLAF (OLAF) necessary?

5.9.18. Indeed, if, as this report elsewhere proposes (chapter 4), the internal audit function is to be significantly reinforced, the considerations above pose a question as to the nature of the added-value provided by a separate fraud unit. Some would go as far as to challenge its very existence: to put it more provocatively, is UCLAF/OLAF necessary?

5.9.19. The Committee would answer in the affirmative, whilst pointing out that it is salutary to ask the question, in that it concentrates the mind on the fact that, in spite of the functional overlaps, UCLAF (henceforth OLAF) is in law and in fact something very different from an audit service.

5.9.20. Function: It is worth recalling the essential functions of internal audit and the fraud unit. The former is primarily a diagnostic management tool, the purpose of which is to verify the regularity and efficiency of financial management and identify systemic weaknesses; the latter is a body set up to investigate specific cases of fraud and corruption within the scope of criminal law and, in accordance with the requirements of "due process", to prepare the file for whatever follow-up it is to receive. Although his findings may be relevant to a fraud inquiry, the auditor is not primarily concerned with the detection of criminal offences, nor necessarily possesses the skills to identify and investigate it, especially if the legal requirements of a criminal investigation (attention to the rights of defence, etc) are to be respected..

5.9.21. Independence: First and foremost, an investigative body must be - and be seen to be - independent of any influences which might compromise the objectivity, even impartiality, of its

136 Especially paragraphs 9.4.15-18

137 By specialisation/background, the investigative staff of UCLAF (80 persons) is currently composed as follows: 25 customs investigators, 15 agricultural inspectors, 7 police, 8 tax inspectors, 8 accountants/financial inspectors, 2 magistrates, 2 lawyers, 2 computer specialists, 3 administration and 8 others.

138 i.e. accountancy aimed at detecting and/or investigating crime

inquiries and other activities. The vision of internal audit favoured by this Committee - as a tool of management at the disposal of the President - will arguably have the side-effect of diminishing the independence of the audit service with respect to the Commission hierarchy. At the same time, the move to OLAF is specifically designed to reinforce the fraud unit's independence by distancing it from the Commission.

5.9.22. Relations with Member States: Independence is also one of the virtues which can reinforce cooperation with Member States' investigative and judicial services, some of which have hesitated to deal on an equal footing with a body which remained organisationally part of the large (and thus probably leaky) administration of the Commission. (Such hesitation particularly relates to the provision of information, which, for reasons of due process, must remain confidential.) Moreover, UCLAF's "criminal" competences depend on effective cooperation with those Member State authorities in possession of the necessary investigative powers. Understanding of and competence in criminal investigation techniques, powers and due process are thus vital to UCLAF and do not form part of a professional training in audit.

5.9.23. Competences in the judicial sphere: A key part of UCLAF's task is to ensure appropriate judicial action is taken on the basis of fraud investigations. It has thus received not only the right to initiate inquiries, but also the right to decide, in cases where it has been responsible for the investigation, when files should be submitted to the judicial authorities for (i) further investigation with police powers, and (ii) possible prosecution. In cases where it acts primarily as a coordinator between Member State investigators, it assumes an important role in the preparation of prosecutions and should be able to assist with the preparation of cases and the provision of evidence in a form usable in criminal courts thus becoming a party to the secrecy which characterises criminal proceedings for the sake of the suspect's rights of defence.

5.9.24. Intelligence and information-gathering: one of the foremost "gaps" which UCLAF has to plug is the gathering of criminal intelligence on a Europe-wide basis. Experience has repeatedly shown that the fragmentation of criminal investigation and jurisdiction - and hence of intelligence - between 15 Member States (and beyond) is a substantial weakness in the fight against crime organised across borders, thus showing the need for a central collation point.[139] At least as far as the European Communities' financial interests are concerned, only a specialised and secure anti-fraud unit can fulfil this sensitive role.

5.9.25. So the need for UCLAF/OLAF does exist. This does not however prevent the reality of functional overlaps with other services, notably the audit service, within the Commission. The problem is thus essentially one of ensuring that UCLAF/OLAF possesses the professional competence it needs to accomplish its task as effectively as possible.

Results

5.9.26. It is the right and responsibility of any public service organisation to be judged by its results. So much of the discussion of UCLAF revolves around points of legal and other principle

[139] The European Parliament's Committee of Inquiry into the Community Transit System makes this point powerfully and at length. (Final report A4-0053/97)

that its results are neglected. This is in part because "results" are extraordinarily difficult to measure in this context. UCLAF's central role, of coordination and facilitation of fraud investigations and prosecutions in the Member States, is not one which allows for the easy identification of a success rate", as the ultimate outcome of UCLAF activities is affected by numerous variables beyond its direct control. Even in the case of internal investigations, where UCLAF is - at least in the first instance - the sole investigating authority, a "result" in terms of administrative, disciplinary or judicial sanctions depends on other authorities.

5.9.27. Figures provided by UCLAF (May 1999) illustrate the difficulties of measuring results. Since 1996, 298 criminal prosecutions have been opened in respect of cases where UCLAF was involved. 51 of these involved more than one national jurisdiction. Only 13 of the 298 prosecutions have so far produced any judgement. In internal cases, of the thirty inquiries carried out by UCLAF, twelve have so far led to criminal prosecutions, but none to a conviction.

5.9.28. Another possibility is to look at the number of inquiries opened and closed by UCLAF. The following table shows the situation as at 10 May 1999 for cases opened since 1996:

Year Opened	Own resources		EAGGF G'tee		Structural actions		Direct exp.		Totals	
	Opened	Still open	Opened	Still open	Opened	Still open	Opened	Still open	Opened	Still open
1996	110	84	72	48	90	76	47	39	319	247
1997	83	72	48	28	60	54	41	34	232	188
1998	97	97	73	54	41	40	24	22	235	213
5-1999	28	28	18	18	6	5	11	10	63	61
Totals	**318**	**281**	**211**	**148**	**197**	**175**	**123**	**105**	**849**	**709**

5.9.29. These figures, which display a tendency for UCLAF enquiries to remain open for prolonged periods should obviously be treated with caution. A "case", for example, could be anything from a relatively minor one-off irregularity involving a small amount, to a multi-million Euro fraud committed by organised criminals. It is reasonable for UCLAF to prioritise its "big" cases. Clearly too, cases opened more recently can hardly be expected to have been closed. Moreover, the ability or otherwise of UCLAF to close a file may depend on others rather than itself. Nevertheless, read in conjunction with the findings of the Court of Auditors (5.9.4-9), the very high ratio of cases remaining open (84%), and especially those for a protracted period (79% from 1996/7) must be a cause for concern.

5.10. Intervention of national judicial authorities

Basic principles

5.10.1. In keeping with the principle that criminal law and the administration of justice remain outside the Community framework, criminal investigation, prosecution and punishment of fraud in the Member States against EU financial interests fall under the exclusive competence of national jurisdictions. Any criminal offence involving the European Communities' financial interests is thus investigated, prosecuted and sanctioned according to national rules.

5.10.2. Where acts of officials or members of the Commission itself are concerned, no Member State automatically holds criminal jurisdiction. Nor does any national authority automatically have the right of access to Commission premises. In practice, the competent Court is decided on a case-by-case basis, depending where the facts in question took place. For obvious reasons, Belgium is the jurisdiction most often called upon to act in connection with Commission officials. To proceed with a criminal investigation, a national jurisdiction must request waivers of official immunity (for suspects), of professional secrecy (for witnesses) and of the inviolability of Commission premises (for searches and access to documents).[140]

External cases

5.10.3. The development of the European Union, and above all the creation of a single market, is one (though far from the only one) of the factors which has served to make borders between Member States largely irrelevant in economic terms. This is a statement of fact rather than ideology. Customs formalities no longer exist between Member States of the Union, the introduction of the Euro removes exchange costs from cross-border transactions, financial markets already largely disregarded borders and the technology of money transfer means that vast sums can move around the world at a moment's notice. Economic activity, licit and illicit, is a Europe-wide affair, not to say a world-wide affair.

5.10.4. This Europe of free movement and exchange doubtless brings enormous benefits to its people, but has proceeded in an asymmetrical fashion. The protections that are provided to the citizen against economic crime (other forms of crime lie outside the mandate of this Committee), which includes fraudulent misappropriation of EU funds, have not kept pace. Where economic activities, money and private individuals move freely across borders, criminal jurisdiction stops. This is far from a theoretical difficulty, but gives rise to a series of legal and practical difficulties the extent of which is well known in professional circles but remains in practical terms largely unacknowledged by the political world in general.

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140 In this context, it should be noted that the obligations of cooperation between the Commission and the Member States work both ways. According to the Court of Justice, the Commission must cooperate in criminal investigations with the Member States' authorities, in acceding as much as possible to requests for waivers of immunity or of professional secrecy ("Zwartveld" ruling of 13.7.90 - Case C-2/88. Imm. Rec. 1990, I-3365).

5.10.5. By way of example, one might refer to the *Appel de Genève* (Geneva Appeal) launched by seven investigating magistrates from a variety of EU countries, plus Switzerland, in which the signatories denounced the extreme difficulty, not to say near impossibility, of pursuing international economic crime and called for the *"[abolition] of outmoded protectionism in the police and judicial fields"*. From the statistics submitted by one of signatories, it would appear that only a limited percentage of the requests made for international assistance is granted and that the percentage is no higher in the case of requests between Member States than those involving third countries (34%).[141]

5.10.6. All attempts so far to respond to what is an acknowledged problem revolve around the political mantra of "better cooperation". Of course, it is impossible not to agree with calls for better cooperation between police, customs and other investigative services, and indeed between judiciaries. Such calls are easy to make, but the difficulties in achieving the desired level of cooperation are formidable, for two principal sets of reasons.

5.10.7. Firstly, the mechanisms of cooperation are frequently slow, formalistic and inefficient, and are likely to remain so as long as national systems remain significantly different. The structures, resources, priorities, skills, techniques, rules and procedures of national equivalents are often very different. It is often difficult for an investigator or a prosecutor even to identify the appropriate contact in another Member State, let alone obtain a swift and effective response to a call for assistance. Even in a supposedly integrated system such as customs, where a single customs area is being administered, it has been found that investigative cooperation is more form than substance:

> *"...cooperation between customs is ineffective. This ineffectiveness begins with the reluctance to share basic operational intelligence (...) and ends with practical investigative cooperation which is, notwithstanding the best but necessarily limited efforts of UCLAF, successful only on an occasional basis"*[142]

5.10.8. If and when it comes to prosecutions, the same source is even more bleak:

> "*Even where cases of transit fraud are successfully investigated by the authorities, the deterrent effect this may have is severely undermined by the legal difficulties in bringing effective prosecutions in cases involving more than one country. Prosecutors point in the first place to the practical obstacles to legal cooperation, which can be as simple as not knowing whom to contact in another Member State, and to the formalistic and burdensome procedures required to request assistance in a prosecution.*

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141 Drawn from speech at public hearing of the European Parliament on the "Geneva Appeal" - 15-16 April 1996 (see EP working document DG IV/LIBE 101 FR p.40)

142 European Parliament's Committee of Inquiry into the Community Transit System - Final Report, paragraph 7.6.2

When cooperation is obtained, prosecutions can flounder on the differences between national legal systems. Standards of evidence vary, creating potential problems with the admissibility in court of documents and evidence from other Member States. At present there is no agreement between Member States on definitions of fraud [pending ratification of the Convention - ed.], the sanctions to be applied or the procedures by which cross-border prosecutions can be brought. The result is that similar offences receive substantially different treatment depending on the place of prosecution."[143]

5.10.9. Secondly, cooperation, however effective, can only take place when the need for it has been identified. The mere realisation that a fraud has taken place, particularly if the fraud is a sophisticated international one and/or an EU-related one, is very often impossible from the perspective of a single Member State.

5.10.10. The notion of cooperation is thus to be taken with a pinch of salt, a fact which has not entirely escaped the European Union's legislator, which has attempted to make the concept more operational in a variety of ways. One example, responding in part to the second of the two observations quoted above and operationalising Articles 29-31 of the EU Treaty, is the European Convention on the protection of the European Communities' financial interests. This though, five years after adoption, is not yet in force. Another example is UCLAF.

5.10.11. UCLAF, for all the limitations outlined in this chapter, is a genuine attempt to overcome some of the problems of making cooperation work in practice, although its small size means that its impact remains limited. Moreover, its activities are concentrated in the field of investigation, rather than prosecution, though, with some prompting from the European Parliament, it has recently started to build up its legal competences with a view to assisting national prosecutors. At present, this latter field of activity remains embryonic, and without any formal status whatsoever. Moreover, as soon as UCLAF becomes involved in the process of prosecution, the question of its precise relations with judicial authorities arises. In complicated EU-centred cases, UCLAF could find itself principally responsible for the preparation of a case, though it would have to rely on the "police powers" of national authorities to obtain certain kinds of evidence. However, it works *in cooperation* with national authorities, not under the direction of any judicial authority. For work which is in nature, if not in name, a criminal investigation, UCLAF has hitherto been worryingly free of any judicial control beyond the legal review of a general kind exercised *a posteriori* by the Court of Justice over the Commission as a whole.[144]

Internal cases

5.10.12. This lack of an overseeing judicial authority is much more obvious and potentially damaging in cases involving Commission officials. Here, UCLAF more overtly plays a *de facto* role of criminal investigation, but answerable to whom and with the authority of whom? As noted above, jurisdiction over the Commission, its officials and buildings, is acquired on a case-

143 *Idem*. Paragraphs 8.5.1 and 8.5.2

144 TEC Articles 230-234 *(ex 173-177)*

by-case basis by whatever national authority or authorities are competent. But no judicial authority holds permanent authority over UCLAF, authorises its investigations, verifies the conduct and quality of its inquiries or ensures (until after the event, when it may be too late) that its results meet admissible standards of evidence. Bizarrely perhaps, UCLAF is equipping itself with internal "judicial" expertise (i.e. a team of magistrates) in a partial response to this void.

5.10.13. The protection of EU officials may admittedly not be at the top of their list of priorities, but a situation of this sort should be of some concern to civil libertarians. The provisions covering OLAF go some way to meet this objection, but are as yet insufficient.

5.10.14. Conversely, the absence of a judicial authority with any control over UCLAF or OLAF, or any general competence for criminal offences committed by EU officials, adversely affects the effectiveness with which judicial sanctions are applied. The first obstacle to expeditiousness in the judicial field is the requirement for national investigators and/or prosecutors to obtain waivers of immunity. Such waivers are granted by the Commission, which is supposed to assess the request on the basis of the "interests of the Communities"[145]. In the cases examined by the Committee, the Commission has almost always acceded to a direct request for waivers of immunity relatively quickly (though exceptions have occurred). More often, the reluctance, official or unofficial, to permit a national judiciary to exercise jurisdiction over Commission officials is manifest at an earlier stage, when evidence is (i) being gathered or (ii) is to be sent to judicial authorities.[146] In spite of recent moves to reinforce UCLAF's independence in these fields, the mere fact that the immunity waiver system exists is the first obstacle to effective judicial action.

5.10.15. It should be noted at this point that UCLAF investigations may also lead to disciplinary measures, including - in theory - monetary sanctions against authorising officers under Article 22 of the staff regulations. In practice, the existence of this potential sanction has done nothing to compensate for the inability of national prosecutors so far to bring successful criminal prosecutions. No monetary sanction under Article 22 has ever yet been applied. (The problem of disciplinary sanctions is examined in chapter 6 of this report.)

5.10.16. The second problem is more closely related to the national judicial authorities themselves. Since 1994, criminal prosecutions have been opened for alleged financial offences in the case of twelve EU officials. Not one has so far led to a conviction. The Committee has neither the intention nor the authority to comment on the merits of any case in particular, but nevertheless finds it surprising that convictions in national criminal courts are so hard to obtain. Reasons are likely to reflect those encountered outside the Commission: evidence is required from different Member States, fraud mechanisms are complex and require a detailed understanding of EU regulations and procedures, priority accorded to such cases is relatively

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145 Staff Regulations, Art. 23: "The privileges and immunities enjoyed by officials are accorded solely in the interests of the Communities..."

146 Following the Commission decision of 14 July 1998, the communication of a case file to judicial authorities has been at the sole discretion of the Director of UCLAF. Previously, the final decision fell to the Secretary-General.

low, resources are limited etc. Some of these problems are intrinsic to the nature of the offence (complexity, etc.) but others are attributable to a lack of expertise on the part of prosecutors and the dispersal of jurisdiction between different countries.

5.10.17. In one case, examined by the Committee, different parties to the same internal fraud were under investigation by different national judiciaries, and at one stage were simultaneously in custody. Even so, and even though UCLAF did its best to bring the authorities together, no effective coordination between them was possible. Neither of the suspects has yet been brought to trial. In other actions, UCLAF has submitted the same dossier at the same time to different national authorities with the result that some have acted, others have not. Such inconsistent follow-up, which may be down to a banal question of resources, substantially reduces the likelihood that a corrupt official and his/her accomplices will ever pay a judicial price for their actions.

REMEDIES

5.11. OLAF - an assessment

5.11.1. On 28 April 1999, the Commission decided to establish OLAF - "Office pour la lutte anti-fraude"[147]. The new Office came into being on 1 June 1999. At the same time, a new regulation of the Council and the European Parliament was adopted to regulate the activities of the Office[148]. The decision and the regulation are the culmination of a process driven by the European Parliament, and notably the rapporteur of the Committee on Budgetary Control, Herbert Bösch, to increase the independence of the anti-fraud unit vis-à-vis the Commission while at the same time bringing it under some kind of quasi-judicial supervision. In effect, OLAF responds to some of the objections to the status of UCLAF outlined above.

Powers, structures and competences

5.11.2. Much of the regulation delineating OLAF's powers and competences for internal investigations is based on the Commission decision of 14 July 1998 on UCLAF. There are however some significant changes, the principal novelties of OLAF in relation to UCLAF being as follows:

- OLAF is empowered to carry out administrative inquiries, without notice, within all the institutions and other bodies of the European Union. Inquiries may involve members and staff of the institutions (Article 4). (A separate interinstitutional agreement puts this provision into effect[149]).

147 Commission decision of 28 April 1999 (SEC(99)802) - OJ L136 of 31.5.99

148 Regulation (EC) 1073/1999 of 25 May 1999 - OJ L136 of 31.5.99

149 Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) - 1999/352/EC, ECSC, EURATOM - OJ L136 of 31.5.1999

- All institutions and other bodies are placed under a corresponding obligation fully to cooperate in OLAF inquiries and to communicate to OLAF any information concerning possible fraud. (Articles 4 and 7)[150]

- In accordance with the Staff Regulations (explicitly cited in the Regulation)[151], an official is entitled to submit a complaint to the Director of OLAF in respect of any act committed by the Office as part of an investigation adversely affecting his/her interests. It follows that the Court of Justice hereby assumes a right of judicial review over OLAF investigations. (Article 14)

- Inquiry reports are formally required to meet the standards of evidence required in the jurisdiction where they are liable to be used in a subsequent prosecution (Article 9). OLAF reports also become sufficient in themselves to "establish ... the irregular nature of the activities under investigation" (Article 2)

- OLAF's activities will be monitored by a Supervisory Committee, composed of five suitably qualified independent persons, nominated by common accord of the Commission, the Council and the European Parliament (Article 11). Its task will be to give a general opinion on the activities of the Office, either on its own initiative or at the request of the Director of OLAF. It may not however interfere "with the conduct of investigations in progress" (para.1). It shall report, annually at least, to the institutions.

- The Director of OLAF shall similarly be appointed by common accord of the institutions, for a fixed five-year term (renewable once), on the basis of a shortlist submitted by the Commission. He/she shall report to the institutions on the activities of OLAF, without compromising the confidentiality of investigations. (Article 12)

- The Director of OLAF shall be the appointing authority (AIPN) for the staff of OLAF.

- OLAF will be funded by way of a separate budget section in Part A (administrative appropriations) of the Commission budget. (Article 13)

- It is foreseen that the total staff strength of OLAF will be in the region of 300, about twice the numbers available to UCLAF.

5.11.3. In reality, there are two fundamental aspects to the OLAF project: <u>independence</u> and <u>supervision</u>.

5.11.4. It is to be noted that OLAF remains administratively part of the Commission, in light of the fact that its formal powers in respect of the outside world (still, it should not be forgotten,

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150 Modifications to the Staff Regulations are probably necessary to provide a reliable legal basis for this provision.

151 Articles 90(2) and 91 of the Staff Regulations

the lion's share of its work) are attributed formally to the Commission. Moreover, it is useful for OLAF to be "inside" the Commission, both for the purposes of inquiries and in order to contribute to the shaping of legislation where there is a fraud interest. At the same time however, the legislator has ensured that OLAF is functionally and administratively independent, notably in the appointment procedure for the director, the separate staff structure and the separate budget. By these mechanisms, the degree of independence already given to the director of UCLAF, in particular to initiate inquiries and to forward conclusions to the judicial authorities, are guaranteed and reinforced.

5.11.5. In the light of its experience of the first report, and subsequent inquiries, the Committee supports this reinforcement of UCLAF's independence. Occasions have arisen in the past where the question of possible "political" interference from the Commission hierarchy has so insistently been posed that the issue must be resolved beyond any doubt, if for no other reason than to ensure confidence in the objectivity of anti-fraud inquiries.

5.11.6. It need hardly be repeated that such independence carries a risk, a risk which the legislator has attempted to allay (i) by giving all the institutions a voice in the nomination of the Director, (ii) by limiting the possibility of successive renewals of his/her term of office, (iii) by setting up a formal reporting requirement to the EU institutions and (iv) by creating a supervisory committee.

5.11.7. This final element is both the most interesting and unsatisfactory aspect of the OLAF reform. On the one hand, it is vital that there be some guarantor of the proper and effective conduct of OLAF's inquiries. The qualifications specified for the members of the Committee[152] clearly reflect a concern that the supervision exercised be akin to that of a judicial authority (e.g. a *juge de l'instruction*), able to assess the conduct of investigations with a professional eye. But precisely here lies the problem, quasi-judicial authority is placed in the hands of a group whose authority and status, with all respect for the future nominees, will be open to question.

5.11.8. The use of an *ad hoc* committee, or to use the popular parlance, the recourse to "wise persons", is a useful occasional mechanism (the present report could hardly suggest otherwise), but should never be more than an exceptional one. The members of the OLAF Supervisory Committee, whose names "emerge" in the somewhat mysterious processes which characterise such appointments[153], will, through no fault of their own, have a legitimacy problem which sooner or later will have to be addressed. This would be particularly the case if the Supervisory Committee were to pass comment, though without breaking its obligation not to interfere in current investigations, on the regularity of individual decisions taken and conduct of specific inquiries carried out.

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152 "...five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the Office's areas of activity" (Regulation 1073/1999, Art. 11 (2)).

153 The decision of the Parliament, Council and Commission appointing the Supervisory Committee of OLAF was made on 19 July 1999 (OJ C220 of 31.7.99)

Functioning of OLAF

5.11.9. At the same time as it addresses the important structural problems of UCLAF, OLAF must provide a convincing response to the operational criticisms levelled at it, chiefly by the Court of Auditors. OLAF will be a new organisation with significantly increased resources and institutional status, and must therefore represent something of a new start, avoiding an uncritical "importation" of UCLAF's organisation and structures. It is not for the present report to go into detail on the internal management of OLAF, this being a matter for its director, but two or three specific themes do merit comment.

5.11.10. Information technology. The role of UCLAF as a central data and intelligence-gathering point has been repeatedly stressed as an area in which its contribution can be crucial. It has a perspective on the problem of EU fraud which cannot by definition be shared by any other body, and potentially possesses a tool whereby its Treaty obligation to enable cooperation between Member States can take very concrete form. However, the Court of Auditors is extremely critical of UCLAF's activities in this area, which depend essentially on the use of electronic data, a conclusion which has been confirmed by the Committee's own observations. It is therefore up to OLAF to remedy this failing through equipping itself with adequately qualified staff and with a concerted effort in the exploitation of information technology. As far as possible, the potential synergies and exchange of information with Europol should be maximised.

5.11.11. Competence in the field of audit. The operational dependence of UCLAF on audit findings has already been noted, as has its own lack of competence in this area. All the considerations concerning the position of OLAF, plus the recommendations of this report on the future of audit in the Commission persuade the Committee that it would be inappropriate to integrate the internal audit service and OLAF. However, in recognition of the likelihood that a substantial proportion of OLAF's cases will initially arise through the findings of the internal audit service, and that further investigation will continue to rely in many respects on the skills of the auditor, OLAF should equip itself with sufficient numbers of specialists in the field of "forensic" accountancy. It should moreover reach an operational working agreement with the new Internal Audit Service (and until then with DG XX - see chapter 4) on cooperation and information exchange as a matter of urgency.

5.11.12. Legal experts. UCLAF has begun, though as yet left uncompleted, the process of constituting a team of legal experts from each Member State[154]. At present, four such experts have been recruited. OLAF should pursue this initiative, the underlying objective of which is to respect the stipulation in the new regulation that OLAF files should be presented in a form acceptable to and admissible in Member States' courts. The role of the legal experts/prosecutors within what remains an administrative body should be to provide assistance and advice to the

[154] Based on the recommendation of the Committee of Inquiry into the Community Transit system that the Commission "*establish a legal "clearing house", composed of national legal experts, whose task would be to ensure that evidence for use in courts outside its Member State of origin corresponds to the requirements of those courts*." (Recommendation 18)

Director of OLAF, to investigative staff in the context of specific inquiries and, as necessary to national prosecutors dealing with EU cases.

5.11.13. Staff and resources. The case-load of UCLAF is out of proportion with its resources. While it is impossible to say what the "right" balance between workload and resources is, it is essential that OLAF be adequately equipped to accomplish its task. If a body established with such relative fanfare, and as the subject of such expectations, proves unable to cope with the task it has been given, it will be dead in the water from the outset. However, while staff numbers must be adequate to the task, the key question is one of quality. Given the criticisms levelled at UCLAF, the transfer of personnel from UCLAF to OLAF should also be the subject of critical evaluation.

Conclusions on OLAF

5.11.14. OLAF is a step forward as compared with UCLAF. It is an attempt to address the problems which have insistently arisen, not just as questions of theory, but in connection with specific inquiries, notably in the cases which indirectly set in train the series of events which led to the resignation of the Commission. It should become fully operational without delay. However, OLAF also represents unfinished business. It is hard not to see the Supervisory Committee and the presence of prosecution experts within OLAF as a provisional and ultimately unsatisfactory solution to a question which insistently arises.

5.11.15. We thus return to the issue which has lurked constantly in the background of this chapter. How can quasi-criminal investigations in UCLAF, the need for some judicial control over such investigations and more effective criminal prosecutions of EU fraud be reconciled with the principle that criminal jurisdiction is and for the foreseeable future will remain a prerogative of national legal and judicial systems?

5.12. The legal framework - a blueprint

Introduction

5.12.1. It is a basic tenet of the Committee that it comes to its subject matter from "outside", without any kind of preconceptions. It has thus tried to base itself as rigorously as possible on the evidence available to it and argue its case from first principles.

5.12.2. This point is worth repeating here because the subject of this section is one which evokes strong political and ideological reactions. As has been made clear throughout this chapter, the administration of criminal justice touches national sensitivities in a way that many other subjects do not, this being a factor which has exercised a strong influence over the formulation of legislation affecting the protection of the European Communities' financial interests. For present purposes, it is therefore to be emphasised the Committee is, as it were, "neutral" on the subject. It will put its case purely on the basis of the problem presented to it, though clearly it would fail in its task if it were to ignore the current political circumstances

Premise

5.12.3. The Committee believes that this chapter has demonstrated that the distinction between administrative measures and measures in the criminal field which formally conditions UCLAF/OLAF's work in the fight against fraud is not a reliable one. The convenient fiction that OLAF is a *purely* administrative service also exposes the European Union to a dual risk: firstly that OLAF will enjoy *de facto* criminal investigation powers without proper supervision; secondly, and conversely, that prosecutions for EU-related fraud will continue to be handicapped by the inability of national prosecutors to come to grips with internal EU and/or transnational cases.

5.12.4. These two "missing" aspects of the legal framework are thus taken in turn.

Supervision of OLAF

5.12.5. As discussed in the previous section, the EU legislator has attempted to address the problem of the supervision of the activities of an independent OLAF though the mechanism of a Supervisory Committee. This is a half-way-house about which the Committee has already expressed its reservations. In order to arrive at a more satisfactory system, it is worth briefly considering what precisely OLAF's supervisor should do. The important functions can be outlined as follows:

- Protection of individual rights: OLAF has considerable powers of direct intervention in the course of its inquiries and its findings can be highly prejudicial to the individuals concerned, including in terms of possible criminal charges. Under the rule of law, the investigative authority (OLAF) must be subject to a form of supervision designed to ensure that inquiries are conducted objectively, civil rights are protected and correct procedures are observed.

- Guarantor of "judicial standards": In a task which is complementary to the above (in fact is in many respects identical), the supervisor should also ensure that the inquiries conducted by OLAF are of sufficient quality to be usable in court: i.e. that procedures are respected, individual rights duly protected, evidence adequately presented, etc.

- Quality control: Beyond such "passive" supervision of the standards observed in inquiries, but for essentially the same reasons of presenting the best possible cases, the supervisor should also ensure that investigations are adequately thoroughgoing, pursue all avenues of inquiry, maximise cooperation between and sufficiently involve national authorities, etc.

5.12.6. The functions outlined above, particularly the first two, which are of a judicial nature, require not only expertise, but also total legitimacy. The current Supervisory Committee fails on both counts. On expertise, not because of any doubts about the personal qualifications of the five individuals chosen, but because five individuals, working moreover on a part-time basis, cannot know the judicial systems and procedures of fifteen Member States, examine all, or even a representative sample of, inquiries in sufficient depth or adequately knowledgeable about the investigative/law enforcement agencies of Member States, still less maintain contacts with them.

On legitimacy, for the reasons outlined above: the members of the Supervisory Committee are nominated, according to criteria and processes which are vague, by a political authority and thus enjoy neither the backing or status of any recognised judicial body.

5.12.7. The EU legislator has in fact recognised these limitations, with the result that the tasks of the supervisor have been restricted (for example to the *ex post* review of the handling of cases only - see 5.11.2 ff), with the effect that it cannot in any case meet the *desiderata* for the supervisory body outlined above.

5.12.8. The qualities an OLAF supervisor must have are therefore apparent. For the purpose of the first two functions, it must be a judicial body. Moreover, it must have expertise in the judicial procedures in all Member States and have contacts with and access to the courts and the investigative services of all Member States.

5.12.9. The Committee can at present see no practical alternative to incorporating a judicial supervision function of the type envisaged within the existing apparatus of the European Union. Given that the function in question is substantially of a judicial nature - being akin to the control of legality of investigations carried out by a supervising magistrate (e.g. the "*juge de l'instruction*" - the judicial guarantor of the civil rights of suspects in inquiries) in several European legal systems - the Committee would propose the creation of a special chamber of the Court of First Instance (and, if necessary, also within the Court of Justice itself), with the purpose of exercising judicial supervision over the inquiries of OLAF.

An EU Prosecutor's Office

5.12.10. In contrast to the necessary neutrality of the judicial supervisor, the European Union also stands in need of a judicial body which has the express purpose of defending its interests (and thus the interests of the European public as a whole) through the judicial system, just as, in national systems, public prosecutor's offices represent the interests of the general public.

5.12.11. An EU public prosecutor's office should be designed to provide the necessary competence to present criminal cases relating to EU fraud throughout the Union, while leaving the jurisdiction of national courts untouched and without implying any fundamental effects on national legal systems. It could also solve the thorny issue of jurisdiction over the Commission (and other EU institutions), its officials and premises, by making the very concepts of immunity and inviolability redundant. As far as legitimacy is concerned, this would be drawn from the judicial structure decided upon. The following are the essential principles which should characterise the prosecution office:

- Its competence should be restricted to investigations and prosecutions concerning the protection of the European Communities' financial interests.

- Its investigation and prosecuting acts should have the same legal effect throughout the EU in all Member States, in line with "the Union's objective", laid down in TEU Article

29 *(ex K.1)*, "... to provide citizens with a high level of safety within an area of freedom, security and justice".

- It should be integrated with the national prosecution services of Member States, in order to be able to bring prosecutions in national courts, while retaining autonomy insofar as the prioritisation of cases and the conduct of inquiries are concerned.

- It should have the authority to direct investigations both by OLAF and, through national prosecution services according to national mechanisms, by the relevant national authorities.

- It should be responsible for ensuring optimum cooperation and coordination between national prosecution services and/or prosecutions taking place before different national courts.

- It should exercise direct, unrestricted jurisdiction over the members, staff and premises of EU institutions and bodies (i.e. no requirement for waivers of immunity, etc.)

- It should itself be subject to the jurisdiction of the European Court of Justice.

5.12.12. These *desiderata* point to a central EU public prosecutor, supported by a network of prosecutors within national systems (and subject to national rules) operating under his/her instructions and taking decisions with effect throughout the whole territory of the EU. It is important to emphasise the hybrid nature of model which emerges, which will in effect be as national as possible, with its Community structure kept to a bare minimum. However, it is essential that the ultimate authority on EU-fraud cases be the EU public prosecutor, who must be able to have a bearing on how prosecutions are selected, prioritised and conducted independently of instructions emanating from within national services. Unless the prosecutors in Member States are able to proceed in accordance with European priorities, prosecutions will quickly fall foul of the lack of coordination between Member States that characterise them now.

Corpus Juris[155]

5.12.13. An effort to describe a system of the sort outlined in the preceding subsections, and notably an EU Public Prosecutor's Office, is contained within *Corpus Juris* (the exception being the arrangements for the supervision of OLAF, which it does not cover). The *Corpus Juris* is the result of a project for a "European Legal Area" launched following considerable preparatory consultations and reports and indeed interparliamentary conferences.

5.12.14. The departure point for the *Corpus Juris* provisions relating to criminal procedure (Articles 18-35) is the establishment of a single legal area for the purposes of investigation, prosecution, trial and execution of sentences for the offences described in the Criminal Law part

155 *"Corpus Juris: introducing penal provisions for the purpose of the financial interests of the European Union*" edited by Mireille Delmas-Marty. (Paris, 1997)

of the *Corpus*, this legal area comprising the territory of all the Member States of the European Union. For this purpose, it proposes the creation of a European Public Prosecutor (EPP), made up of a European Director of Public Prosecutions and European delegated Public Prosecutors residing in the capital of every Member State. This EPP is indivisible, implying that any act of any of its members in any Member State is taken as an act of the EPP itself (Article 18). It further implies that members of the EPP have competence across the EU and that warrants for arrest , transfers of persons under arrest and judgements have full effect across the EU (Article 24).

5.12.15. Other key features of the *Corpus Juris* are that:

(i) the decision to prosecute is taken by the EPP (Article 19);

(ii) it is up to the EPP to investigate cases and to do so neutrally, i.e. seeking evidence of innocence as well as of guilt (Article 20, which also details the powers of investigation) and, when the investigation is complete, either to bring or decide not to bring the prosecution (Article 21);

(iii) it is for the EPP to present the prosecution before the court of trial, which shall be one of the 15 single national courts designated for this purpose by each Member State (in order to avoid conflicts of jurisdiction, the case shall be heard in the Member State (a) where most of the evidence is found, (b) where the effects of the offence are greatest or (c) where the accused is resident - with any disputes as to jurisdiction to be settled by the European Court of Justice) (Articles 22, 26 and 28);

(iv) it is for the EPP, alongside the competent national authority, to oversee the implementation of sentences in the Member State designated as the place of execution of the decision (Article 23);

(v) judicial control, throughout the preparatory proceedings (i.e. from the initial investigation until the decision to prosecute) is exercised by a "judge of freedoms" appointed by each Member State from the court where the EPP is based (Article 25)

5.12.16. The *Corpus Juris* solution contains a coherent solution for the problems posed by the prosecution of offences affecting the financial interests of the European Communities and other EU related criminal offences. However, its wish to effect far-reaching amendments in one step makes it subject to a range of potential legal, political and even constitutional difficulties, already apparent in the context of the follow-up studies.

5.12.17. Rather than rehearse again here the arguments which surround *Corpus Juris*, the Committee prefers to address the question of a new legal framework in terms of the practical - and practicable - steps which could be taken towards the creation of a genuine European legal area for EU-related financial offences. It should not be excluded that the end destination of this process would resemble the system proposed in *Corpus Juris* as it would be based on the same underlying principle of a single “area of freedom, security and justice” (Article 29 *(ex K.1)* TEU).

5.13. The new legal framework - gradual implementation

5.13.1. The following schema for the gradual creation of a new legal framework would apply to the prosecution and sentencing in the criminal courts of the Member States of fraud and other criminal offences as defined in European Acts and Conventions. The first two stages could, in the view of the Committee, be implemented within the framework of the existing treaties, notably the so-called "third pillar" (Title VI of the TEU "Provisions on Police and Judicial Cooperation in Criminal Matters"). The third and final stage should be the subject of further progress in the context of the next Intergovernmental Conference (IGC), before the accession of new Member States.

The starting point: desiderata

The Member States should ratify the existing Convention on the protection of the financial interests of the European Communities and the associated protocols. This would provide a first stage in arriving at common definitions of the relevant criminal offences and in ensuring an equivalence of treatment through the Member States. Further definitions of the same, or other, EU criminal offences (basically those referred to in Article 29 *(ex K.1)* TEU) would in time have subsequently to be developed, by using first pillar regulations or directives (Article 280 *(ex 209a)* TEC) or third pillar legal instruments (conventions or framework decisions under Article 34 *(ex K.6)* TEU). In a similar fashion, common standards of criminal investigation should be agreed (though in the light of the fact that all Member States are signatories to the European Convention on Human Rights, this should be largely a technical process). In respect of such common definitions and standards, jurisdiction should be given to the Court of Justice.

5.13.2. Budgetary support could be made available from the European Union to the Member States to assist them in putting in place the structures proposed below, at 5.13.5, and in providing the necessary human resources.

First Stage

5.13.3. In order to improve the investigation and prosecution of EU fraud by members, officials and other agents of European institutions and bodies, the following steps are proposed:

- the EU would appoint a high-level official responsible for the coordination of prosecutions of EU fraud - *European Public Prosecutor*. S/he should possess the qualifications required for appointment to the highest judicial office and have extensive experience in the administration of criminal justice in one of the Member States.

- The *European Public Prosecutor* would have guaranteed independence from all European institutions. S/he would work in close cooperation with the Director of OLAF, who would report directly to him/her in connection with criminal cases.

- During the first stage, the *European Public Prosecutor* would only hold jurisdiction regarding internal criminal offences, i.e. those committed by members and staff of

Community institutions and bodies. S/he would refer cases for further prosecution and judgement to the appropriate judicial authorities.

- The *European Public Prosecutor* would have direct, unrestricted jurisdiction over the members, staff and premises of EU institutions and bodies, without any requirement for waivers of immunity, etc.

- The legality and proper control of OLAF investigations and of decisions of the *European Public Prosecutor* would be supervised by the new chamber referred to in 5.12.9.

Second stage

5.13.4. During the second stage, all criminal prosecutions in matters referred to in Article 29 *(ex K.1)* TEU and including fraud and corruption affecting the financial interests of the European Communities, would take place, as now, according to national procedures. At this level the Committee proposes:

- On the basis of a framework decision of the Council or, if necessary, a convention[156] between Member States, each would establish, according to national law and procedures, a *Prosecution Office for European Offences* within its national prosecution services.

- These national *Prosecution Offices for European Offences* would each be concerned with the investigation and prosecution of criminal offences referred to in Article 29 TEU, including fraud and corruption affecting the financial interests of the European Communities. They would also be concerned with the investigation and prosecution of wider criminal offences which are intertwined with these.

- The *Prosecution Offices for European Offences* would be competent for the entire territory of their Member States. In Member States where different systems of criminal justice exist, different offices may be created.

- The *Prosecution Offices for European Offences* would act through national police forces and before national criminal courts, on the basis of the powers accorded by national law and in conformity with national criminal procedure.

- The *Prosecution Offices for European Offences* would be integrated within the relevant national structure, subject to exactly the same hierarchical authority, constitutional constraints, rules of professional conduct, etc. as all other national prosecutors.

- Each *Prosecution Office for European Offences* would be under an obligation to achieve maximum cooperation, where appropriate, with its counterparts in other Member States and with OLAF, particularly in view of the need to avoid conflicts of jurisdiction. Each should possess a specialised judicial police unit, competent for its entire territory concerning EU

[156] TEU Article 34 *(ex-K.7)* paragraph 2(b)

cases and operating under the responsibility and upon the instructions of the national *Prosecutions Office for European Offences*.

5.13.5. In order to facilitate and make effective cooperation between Member States and with OLAF within the framework of (particularly) Article 6 of the Convention on the Protection of the financial interests of the European Communities, the *European Public Prosecutor* referred to under 5.13.4 would at this stage:

- be given all information liable to give rise to criminal prosecutions in the possession of OLAF and would be responsible for referring it, with appropriate advice, to the competent national authorities, generally the national *Prosecution Offices for European Offences*.

- offer advice to national *Prosecution Offices for European Offences* and act as a liaison between them. In cases involving either more than one Member State or any Member State(s) plus any European Institution(s), OLAF would be bound to follow his/her advice while the Prosecution Offices for European Offences would be expected to do so, unless there are clearly motivated grounds for derogating therefrom.

- offer advice - in order to prevent conflicts of jurisdiction between Member States - to the *Prosecution Offices for European Offences* involved as to which jurisdiction should take precedence for the investigation and prosecution of a specific offence, making use of criteria like those set out in Article 26, para. 2 of the *Corpus Juris* (see above, 5.12.15 (iii)) would be used. The *Prosecution Offices for European Offences* involved would be expected to follow such advice, unless, again, they have clearly motivated grounds for derogating therefrom.

- hold jurisdiction to request the urgent authentication by the competent national authorities of judicial investigation and prosecution acts taken by the competent authorities in one Member State for use in another. If such authentication has not occurred within a period of three months following the request, the national authorities must give reasons, duly motivated, for not following it up.

- be required each year, on the basis particularly of the advice given to national authorities pursuant to the preceeding paragraphs, to publish an *Annual Report* to be submitted to all EU institutions summarising the cases handled during the year, highlighting the action taken by national *Prosecution Offices for European Offences* and the results achieved. This report should be as detailed as possible without compromising due legal process. The *Prosecution Offices for European Offences* should provide the *European Public Prosecutor* with all information necessary for the preparation of this report.

5.13.6. At the latest during the second stage, Member States would designate the national court(s) where the national *Prosecution Offices for European Offences* is located and to be responsible for the supervision of the legality and proper conduct of the proceedings of its national *Prosecution Offices for European Offences* during the preparatory stages, i.e. from the initial investigation until the decision to commit the case to trial. Acts carried out during these preparatory stages by OLAF and by the *European Public Prosecutor* would be supervised as provided for in paragraph 5.13.4, last indent by the new chamber referred to in 5.12.11.

Third Stage

5.13.7. Arrangements set up in the first and second stages should be transformed during the third stage into a system similar to that proposed in the *Corpus Juris*, allowing the *European Public Prosecutor* and the *Prosecution Offices for European Offences* to develop into an indivisible and independent European Prosecutions Office with delegated public prosecutors in the Member States in possession of jurisdiction for both internal and external criminal offences and of which OLAF and the national investigation units would be part. This last stage in the reform should establish the European Union as a single legal area for the purposes of investigation, prosecution, trial and execution of sentence concerning EU offences. Acts of the European and national branches of the European Prosecutions Office should be subjected to judicial review during the investigation stage by independent judges at the Community and/or national level.

Time schedule

5.13.8. The gradual implementation of the legal framework described above should occur in accordance with a well-established time schedule. Of the three stages, the last should be decided by the next IGC or at an *ad hoc* IGC shortly thereafter, whilst the first should be implemented in the near future, with the second to follow as soon as possible thereafter.

5.13.9. In order to prepare the reforms and to implement them within the desired time-schedule, a working group should be established forthwith by the Council, Commission and Parliament to formulate detailed proposals as to the legal instruments needed and their content.

5.14. Recommendations

5.14.1. The Committee found that the current legal framework for combating fraud against the financial interests of the European Communities is as yet incoherent and incomplete, largely because the Commission (i.e. UCLAF/OLAF) possesses only administrative law powers and competences, which however have important implications in the area of criminal law. Thus the existing framework (i) fails to recognise and accommodate the true nature of UCLAF/OLAF, (ii) leaves the legal instruments for the investigation, prosecution and punishment of fraud ineffective and (iii) fails to provide sufficient guarantees of individual liberties.

5.14.2. The independence of OLAF vis-à-vis the Commission in particular must be and remain a fundamental point of principle if the organisation is to play its role, which is substantially of criminal investigation, fairly and effectively. (5.11.4-8)

5.14.3. OLAF must earn the respect, and thus wholehearted cooperation, both of EU institutions and personnel and of Member States' investigative and judicial authorities through ensuring that its inquiries are – and are seen to be – independent, rigorous, objective, procedurally correct, reasonably rapid and ultimately productive of results. (5.9.4-7)

5.14.4. OLAF's activities must be subject to the supervision of a judicial authority in order to guarantee due legal process in the course of investigations and the protection of the civil rights of persons affected, directly or indirectly, by inquiries. In this context, the existing Supervisory Committee of OLAF, though fulfilling a useful transitional role, cannot be considered adequate and should be replaced by a special chamber of the Court of First Instance created for this purpose (and, on appeal, also by a chamber of the Court of Justice). (5.12.5-5.12.9)

5.14.5. With a view to its role as a central data and criminal intelligence collation point, OLAF must take action to overcome the failings of UCLAF (identified by the Court of Auditors in particular) in the exploitation of information technology. While respecting the data protection requirements of Community and Member State legislation, it should also do the utmost to maximise the potential synergies with national authorities and with Europol in this area (5.9.5, 5.11.10)

5.14.6. OLAF must possess adequate human resources to deal with its case-load at least as effectively as an equivalent Member State service. It should also ensure that certain lacunae in the staffing of UCLAF are remedied, notably through the recruitment of adequate specialist expertise, beyond its core investigative personnel, in the fields of (a) auditing, especially "forensic accountancy", (b) information technology, (c) prosecution and (d) judicial procedures in Member States. All OLAF staff should moreover be selected strictly on the basis of their suitability for OLAF's purposes, which should preclude any "automatic" transfer of UCLAF staff to the new organisation. (5.11.9-13)

5.14.7. In preparation for the introduction of the new legal framework described hereafter, the Member States should (i) ratify the Convention on the protection of the financial interests of the European Communities (ii) further develop common definitions of relevant criminal offences and procedures, and (iii) formally agree common standards of criminal investigation within the context of the European Convention on Human Rights (5.13.2)

5.14.8. With the foregoing principles in mind, the Committee recommends a three-stage introduction of a new legal framework for the prosecution and punishment of criminal offences affecting the financial interests of the European Communities in accordance with the proposal set out in this report (section 5.13), summarised as follows:

- *Stage 1*: Appointment of an independent *European Public Prosecutor* (EPP). The EPP would hold unrestricted jurisdiction (i.e. without the obstacle of official immunity or confidentiality) for offences committed by members and officials of EU institutions and bodies. S/he would work closely with the Director of OLAF and prepare prosecutions as appropriate. Prosecutions would be referred to the appropriate national court. The legality of OLAF investigations and of EPP decisions would be supervised by a special chamber of the Court of First Instance (5.13.4)

- *Stage 2*: Creation in each Member State of a national *Prosecution Office for European Offences* (POEO) which would be competent for its entire territory. A POEO would be established within each national prosecution service specifically to deal with cases wholly or partially affecting the financial interests of the European Communities. POEOs would act

through national police forces and before national criminal courts in conformity with national criminal procedure. The legality of the POEO's activities would be supervised in each Member State by a single court, the same court at which it is located. (5.13.5, 7)

The EPP would receive from OLAF all information liable to give rise to criminal proceedings and be responsible for referring it, with appropriate advice, to the appropriate POEO. The EPP would moreover act as liaison between the POEOs of different Member States, notably advising them on possible conflicts of jurisdiction on cases involving more than one Member State and making recommendations for their resolution. The EPP would report annually to the EU institutions on its activities and on the action taken by the POEOs as a result of its recommendations. (5.13.6)

- *Stage 3*: Creation, on the basis of the EPP and POEOs, of a single, indivisible European Prosecution Office (EPO) with delegated public prosecutors in the Member States holding jurisdiction for all offences affecting the financial interests of the European Communities. The EPO would operate through OLAF and national investigation units. In terms of EU fraud, this stage of the reform would create the single "area of freedom, security and justice" foreseen by the Treaty (TEU Art. 29) (5.13.7)

5.14.9. Preparation of the three-stage introduction of a new legal framework should begin immediately and implementation achieved within the following timescale:

- First stage: within one year
- Second stage: as soon as possible thereafter,
- Third stage: to be agreed at the next Intergovernmental Conference (IGC), or at an *ad hoc* IGC shortly thereafter. (5.13.9-10)

ANNEX 1 - HISTORY OF UCLAF - CHRONOLOGY

Date	Reference	Development
1984-89		Repeated requests from the Committee on Budgetary Control of the European Parliament for the constitution of a "flying squad" able to carry out on-the-spot checks in Member States in cases of suspected fraud affecting the financial interests of the Community. Backing from Council and the Court of Auditors.
20.11.87	COM(87)572 & COM(87)PV891	On the basis of an internal report on its anti-fraud activities, the Commission decides to establish a central anti-fraud coordination unit, UCLAF (**U**nité de **C**oordination de la **L**utte **A**nti-**F**raude) and to generalise anti-fraud cells in the main spending/revenue services.
July 1988		UCLAF becomes operational
May 1989		45-point work programme for fraud prevention, cooperation with Member States, etc. presented to te Member States. Annual report published from 1989 onwards.
Nov.1992	SEC(92)2045 of 4.11.92	On the basis of Parliament recommendations in the 1990 discharge, UCLAF's role is strengthened, though still on the basis of shared responsibility with anti-fraud cells in DGs VI (Agriculture), XIX (Budget), XX (Financial Control) and XXI (Customs and Indirect Taxation). UCLAF staff totals 32, anti-fraud staff in DGs 89.
Early 1993		Political responsibility for UCLAF transferred to the Commissioner responsible for the Budget, Mr Schmidhuber.
Dec. 1993		European Parliament adopts 1994 budget, including 50 new posts (35 temporary - 15 permanent) specifically for UCLAF. Prior to this decision, total staff = 50
July 1994	Note SG(94)D/141.662	Division of competences and terms of reference agreed between UCLAF and DG XX (Financial Control)
Up to early 1995		Under pressure from European Parliament (postponement of 1992 discharge), Commission recruits the additional UCLAF staff foreseen, though 8 seconded national experts withdrawn. (Net gain 42 staff)

Jan. 1995		UCLAF placed under the responsibility of the Commissioner specifically responsible for the fight against fraud (and for financial control), Mrs Gradin. (Budgetary matters, financial control and the fight against fraud previously all under the responsibility of a single commissioner)
1.2.1995	Note SG(95)D/141.038	The Secretary-General informs all services of UCLAF's right to initiate inquiries on its own initiative on the basis of information from any source. Obligation on services to inform UCLAF of any suspicion of fraud in their areas of competence.
Feb – June 1995	SEC(95)249 of 10.2.95	All operational anti-fraud activities centralised in UCLAF. 40 staff (of 72 working in relevant units) transferred from DGs VI and XXI to UCLAF. Division of responsibilities between UCLAF and line DGs defined. Constitution of specialised units dealing with non-agricultural expenditure.
26.7.95	95/C 316/03	Council act drawing up the Convention on the protection of the European Communities' financial interests. Common definition of fraud, criminalisation of anti-EU fraud in all Member States *(not yet ratified - not yet in force)*
18.12.95	Reg. 2988/95	Adoption of Council regulation on the protection of the European Communities' financial interests, providing general framework for Commission's activities in the fight against fraud.
26.2.1996	SEC(96)345	First reminder to services of obligation to communicate suspected irregularities/fraud to UCLAF
1.4.1996	Note from secretary-general	Following experience of documents having been withheld by officials, the Secretary-general authorises UCLAF directly to access documents held by authorising officers in Commission departments, with the prior approval of the secretary-general and the director-general for staff on a case-by-case basis.
25.7.96	Letter from Mr Weber, member of the Court	Agreement between the Commission and the Court of Auditors on the exchange of information relating to fraud or suspected fraud detected by the Court in the course of its work.
27.9.96	96C 313/01	First Protocol to Convention on protection of European Communities' financial interests: corruption of Community and national officials. *(Not yet ratified or in force)*

11.11.96	Reg. 2185/96	Adoption of Council regulation providing overall framework for on-the-spot checks in Member States by UCLAF in the context of its inquiries.
14.4.97	SEC(96) 345/2 (replaces version of 26.2.96)	The Secretary-general issues second reminder of the obligation of services to inform UCLAF of suspected cases of fraud. Individual officials given the option of informing their superiors or going directly to UCLAF.
19.6.97	97/C 221/02	Second protocol to the Convention on the protection of the European Communities' financial interests: liability of legal persons, confiscation, money laundering and cooperation between Commission and Member States. *(Not yet ratified or in force)*
June 1997	SEC(97)1293 of 25.6.93	Secretary-general and the director general of the legal service confirm the rules on dealing with national judicial authorities and UCLAF's responsibility for contacts on fraud matters.
18.11.1997	SEC(97)2198	Commission communication on "Sound Financial Management - Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption" proposes strengthening of UCLAF, the formalisation of its powers and the reinforcement of its independence within the Commission
1.5.98		UCLAF becomes a "task force". Total staff now 141 (118 statutory, of which 21 temporary, 13 seconded national experts and 10 auxiliary/interim/consultant)
14.7.1998		On the basis of an internal communication, Commission decision formalising the powers, competences and responsibilities of UCLAF and regulating the conduct of its inquiries.
7.10.1998	A4-0297/98	European Parliament calls for creation of "OLAF" (Bösch report)
4.12.1998	COM(98)717	First Commission proposal for creation of OLAF
9.12.1998		Implementing decision for decision of 14.7.98 with "detailed rules of application"
17.3.1999	COM(99)140	Amended Commission proposal for creation of OLAF
28.4.1999	SEC(1999)802	Commission decision to create OLAF
6.5.1999	A4-0240/99	European Parliament adopts Bösch report on creation of OLAF and related legislation (co-decision procedure)

25.5.1999	Reg. 1073/1999 IIA 1999/352	Adoption of regulation concerning the investigations of OLAF and of the interinstitutional agreement concerning its internal investigations.
19.7.1999	1999/C220/01	Decision appointing the supervisory board of OLAF

ANNEX 2 - SUMMARIES OF LEGAL AND REGULATORY TEXTS

Administrative provisions (First pillar)		Criminal provisions (Third pillar)
External	**Internal**	
TREATIES		
EC Treaty Article 280 *(ex 209a)* *Article 280* (ex Article 209a) 1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States. 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. 3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities. 4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice. 5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.		**EU Treaty Article 29** (ex Article K.1) Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: — closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32; — closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32; — approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

For information **EC Treaty (Maastricht) Article 209a – Previous Version** (i.e. before Amsterdam amendments) Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.		**EU Treaty Article 30** (ex Article K.2) 1. Common action in the field of police cooperation shall include: (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences; (b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data; (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research; (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime. 2. The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam: (a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; (b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime; (c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol; (d) establish a research, documentation and statistical network on cross-border crime.
		EU Treaty Article 31 (ex Article K.3) Common action on judicial cooperation in criminal matters shall include: (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions; (b) facilitating extradition between Member States; (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation; (d) preventing conflicts of jurisdiction between Member States; (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

		EU Treaty Article 32 (ex Article K.4) The Council shall lay down the conditions and limitations under which the competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State.
		EU Treaty Article 33 (ex Article K.5) This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.
		EU Treaty Article 34 (ex Article K.6) 1. In the areas referred to in this Title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations. 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: (a) adopt common positions defining the approach of the Union to a particular matter; (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; (c) adopt decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two-thirds of the Contracting Parties. 3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 62 votes in favour, cast by at least 10 members. 4. For procedural questions, the Council shall act by a majority of its members.

OTHER RULES AND REGULATIONS

Regulation 2988/95

Main Provisions:

General rules are introduced concerning the checks to be carried out and the administrative measures and sanctions to be applied by the Commission relating to irregularities affecting the financial interests of the European Communities. *(Art. 1)*

Administrative checks, measures and penalties are introduced. These shall be determined by Community law. Their application shall be governed by national law. *(Art. 2)*

A limitation period for such checks, measures and penalties is introduced. (4 years, with numerous provisos) *(Art. 3)*

"Wrongfully obtained advantages" shall be either recovered (monetary amounts) or otherwise withdrawn (e.g. entitlements). Additionally, administrative fines and/or other sanctions (e.g. temporary or permanent exclusion from Community schemes) may be applied by the Commission. *(Arts. 4-5)*

The administrative measures provided for in this regulation shall be suspended in the event of criminal proceedings related to the same facts. *(Art. 6)*

Member States shall take measures to ensure the regularity and reality of transactions involving the Communities' financial interests, including by carrying out checks and inspections. The Commission shall also have the right to carry out checks and inspections within the scope of the existing sectoral regulations. A general regulation enabling such checks and inspections by the Commission will be introduced later. *(Arts. 8-10)*

Early "ad hoc" rules and decisions:

Examples:

Notes from the Secretary-General concerning the obligations of officials vis-à-vis UCLAF and the latter's access to information. The first of these notes incidentally confirmed the right of the Director of UCLAF to "initiate any investigation" as he saw fit.

"Demarcation" agreements, specifying the competences of different services:

. Division of responsibilities between UCLAF and DGs VI and XXI on fraud-related matters (SEC(95)249 of 10.2.95)
. Cooperation and complementarity between Financial Control and UCLAF. (Note SG(94)D/141.662 and annex of 6.7.94)

Agreement with the Court of Auditors on the exchange of information relating to possible fraud. (Exchange of letters between Mr Weber, responsible member of the Court (25.7.95) and Mrs Gradin, responsible commissioner (4.10.95))

Convention on the Protection of the European Communities' financial interests

Main Provisions

Establishes a shared definition of fraud affecting the Communities' financial interests *(Art. 1)*

Establishes that offences meeting this definition will be treated as criminal offences punishable by criminal penalties, including custodial sentences for serious cases. *(Art. 2)*

Establishes the criminal liability of heads of businesses in respect of decisions they take fraudulently affecting the financial interests of the European Communities *(Art. 3)*

Provisions are included to ensure that rules on jurisdiction and/or extradition between Member States cannot provide loopholes to avoid prosecution for fraud. *(Arts 5-6)*

Member States are placed under an obligation to cooperate in the fields of investigation, prosecution and sanction of fraud affecting the financial interests of the European Communities *(Art. 6)*.

Principle of *ne bis in idem (Art 7)*

Jurisdiction of the Court of Justice in resolving disputes between Member States as to the interpretation of the Convention *(Art. 8)*

Regulation 2185/96

Main provisions:

Without prejudice to either the existing sectoral rules or to Member States' administration of justice, this regulation shall apply to all areas of Community activity. *(Art. 1)*

On-the-spot checks may be carried out: (i) to detect serious irregularities or irregularities with a transnational dimension, (ii) in response to a weak control environment or (iii) at the request of the Member State. Overlaps with checks carried out by the Member State shall be avoided.*(Arts 2-3)*

The Commission shall prepare and conduct on-the-spot checks in cooperation with the relevant national authorities, which shall receive adequate advance notification. Officials of the Member State may participate in the inspection, or joint inspections may be organised if the Member State so wishes. *(Art. 4)*

All economic operators covered by regulation 2988/95 may be the subject of on-the-spot checks and must grant Commission inspectors access to premises, land, means of transport or other areas used for business purposes. *(Art. 5)*

On-the-spot checks shall be carried out on the Commission's authority and responsibility by duly empowered officials or other servants, including national experts on secondment. They shall be required to provide written authorisation for inspections carried out. They may seek the assistance of national officials. *(Art. 6)*

In the course of inspections, Commission inspectors shall have the same access to documentation and other information under the same conditions as national administrative inspectors. *(Art. 7)*

Information gathered during inspections shall be covered by professional secrecy and protected in accordance with the laws of the Member State concerned. The Commission shall report any indication of irregularity to the authorities of the Member States concerned. Inspection reports shall be drawn up in conformity with the legal requirements of the Member State in question and shall have exactly the same status and value as a report drawn up by equivalent national inspectors (including as admissible evidence in Court). *(Art. 8)*

Commission Decision of 14 July 1999

Main provisions:

UCLAF's investigations are of an administrative nature. *(Art. 1)*

UCLAF shall cooperate with and assist Member States' authorities. *(Art. 3)*

The Director of UCLAF informs the competent Member State authorities of facts and suspicions indicating fraud. UCLAF shall remain the direct interlocutor of such authorities. *(Art. 4)*

Information gathered in the context of investigations is confidential and is only communicated on a need/right-to-know basis. *(Art. 5)*

Directors-general and heads of service are required to report to UCLAF all information giving rise to the presumption of fraud. Officials may inform either their director-general/head of service or UCLAF directly of such information. No official may suffer any inequitable or discriminatory treatment as a result of acting under these provisions. *(Arts. 6-8)*

Investigations shall respect the principle of equity, the right of reply of individuals and proper standards of evidence. *(Art. 9)*

Internal investigations shall be initiated at the initiative of the director of UCLAF. He shall inform the secretary-general at the same time. *(Art. 10)*

UCLAF inspectors, who shall properly identify themselves and state their purpose, shall enjoy the full cooperation of all Commission officials and unrestricted access to all information and documentation, including the power to copy or remove it. *(Arts. 11-14)*

The Director-General or the Head of Service concerned shall be informed in advance of a requirement for access to premises or documents. Exceptionally, if this is not desirable in the context of the inquiry, the Secretary-General and the Director-General for staff and administration shall be informed. *(Art 15)*

Investigations shall be proportionate to the circumstances and complexity of the case. They shall not normally exceed one year. *(Art. 17)*

If indications arise of the personal involvement of a Commission official arises, the Secretary-General and the Director-General for staff and administration as well as the Director-General or Head of Service shall be informed before the investigation continues. Unless the investigation would be thus compromised, the individual concerned shall be informed, and shall in any case have the right to give his views before conclusions are
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□$□□F□$□□$□□□□$□□$□ial authorities and in agreement with the Secretary-General. *(Arts. 18-19).*

Where disciplinary action is indicated, a report shall be sent by the Director of UCLAF to the Secretary-General and the Director-General for staff and administration. *(Art 21)*

Where criminal charges within the Commission are indicated, the Director of UCLAF shall inform the President of the Commission, the Commissioners responsible for staff and administration and the area concerned as well as the Secretary-General. He shall notify the relevant national judicial authorities as soon as possible. *(Art. 22)*

The Director of UCLAF shall advise the Commission on any request from national judicial authorities for the waiver of official immunity. *(Art. 23)*

The Director of UCLAF shall inform the Committee on Budgetary Control of the European Parliament of the course of investigations while respecting the requirements of confidentiality and the rights of individuals. *(Art. 24)*

The provisions of this Decision shall apply also to persons who, though not officials of the Commission, act directly or indirectly on behalf of the Commission. *(Art. 25)*

The above provisions subsequently clarified by "Detailed Rules of Application" (Dec. 1998)

First Protocol to the Convention on the protection of the European Communities' financial interests (Corruption)

Main features:

Shared definitions of active and passive corruption of Community and national officials damaging to the European Communities' financial interests are established. *(Arts 2-3)*

Member States undertake to ensure that their criminal provisions relating to corruption by holders of public office or public officials apply equally to holders of national and European office and to national and EU officials *Art. 4)*

Member States undertake to apply appropriate and proportionate criminal penalties for acts of corruption as defined in the protocol *(Art. 5)*

Provision relating to jurisdiction *(Art. 6)*

Comptence of Court of Justice to resolve disputes between Member States concerning interpretation of the protocol *(Art. 8)*

Regulation 1073/1999 (OLAF investigations)

Main characteristics:

In the context of the fight against fraud, OLAF is empowered to exercise the powers of investigation conferred on the Commission by the various relevant sectoral and horizontal regulations. It shall assist Member States' authorities and facilitate coordination between them. It shall also carry out investigations within the institutions, bodies, offices and agencies of the Community in order to fight fraud and other serious matters liable to lead to disciplinary or criminal proceedings. *(Art. 1)*

OLAF shall carry out administrative investigations. These shall be sufficient to establish the irregular character of the activities under investigation. *(Art. 2)*

Externally, OLAF shall exercise the powers of the Commission under regulations 2185/95 and 2988/96 (*Art. 3)*

Internally shall be empowered to carry out investigations within and relating to European institutions and bodies. Its powers shall include the right to carry out unannounced visits and unrestricted access to persons, documentation and premises. Members and staff of institutions and other bodies shall be under an obligation to cooperate with OLAF. The civil rights of individuals shall be protected. *(Art. 4)*

Inquiries shall be opened at the initiative of the director of OLAF *(Art. 5)*

The director of OLAF shall direct the conduct of investigations. Office agents shall adopt an attitude in line with the rules governing equivalent national officials. Member States shall ensure the cooperation of their competent authorities. *(Art. 6)*

European institutions and bodies are placed under an obligation to supply all relevant information to its agents and to communicate to OLAF any information concerning possible fraud. Member States, insofar as their laws allow, shall communicate all pertinent information to OLAF. *(Art. 7)*

Data protection and confidentiality shall be ensured *(Art. 8)*

OLAF reports shall be drawn up in such a way as to respect the procedural requirements of the Member States concerned. Copies of reports of external investigations shall be given to the competent authorities of the Member State concerned, those resulting from internal inquiries to the institution in question. *(Art. 9)*

OLAF may at any time provide the competent authorities of Member States with information obtained in investigations, and shall provide information liable to result in criminal proceedings. *(Art. 10)*

OLAF's activities will be monitored by a Supervisory Committee, composed of five suitably qualified independent persons, nominated by common accord of the Commission, the Council and the European Parliament. Its task will be to give a general opinion on the activities of the Office, either on its own initiative or at the request of the Director of OLAF. It shall not interfere in investigations in progress. It shall report, annually at least, to the institutions. *(Art. 11)*

The Director of OLAF shall similarly be appointed by common accord of the institutions, for a fixed five-year term (renewable once), on the basis of a shortlist submitted by the Commission. He/she shall report to the institutions on the activities of OLAF, without compromising the confidentiality of investigations. *(Art. 12)*

OLAF will be funded by way of a separate budget section in Part A (administrative appropriations) of the Commission budget. *(Art. 13)*

Any official whose interests adversely affected in the course of an OLAF investigation may complain to the Director and thereby cause OLAF's actions to be submitted to judicial review by the Court of Justice, pursuant to articles 90-91 of the Staff Regulations (Art. 14)

In the third year of effect of the regulation, the Commission shall report on OLAF's progress and make appropriate proposals for the future development of the Office. *(Art. 15)*

Second Protocol to the Convention on the protection of the European Communities' financial interests (various)

Main features:

Money laundering" to be made a criminal offence in all Member States. *(Art. 2)*

Legal persons to be made criminally liable for offences of fraud against the financial interests of the European Communities and shall be subject to effective, proportionate and dissuasive sanctions. *(Arts. 3-4)*

The proceeds of fraud against the financial interests of the European Communities to be subject to confiscation. *(Art. 5)*

The Commission and Member States are explicitly required fully to cooperate, both by exchange of technical and operational assistance and by participating in the exchange of information, "so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering" *(Arts 6-7)*

Data protection provisions *(Arts. 8-11)*

Jurisdiction of the Court of Justice for resolution of disputes of interpretation of the protocol *(Art. 13)*

	Interinstitutional agreement on internal OLAF inquiries Main features of the IIA: The European Parliament, Council and Commission agree the following in relation to internal inquiries of OLAF: - to adopt common rules on the conduct of internal investigations of OLAF. Investigations shall be aimed at (i) fighting fraud, corruption and any other illegal activity detrimental to the financial interests of the European Communities or (ii) bringing to light any other serious situation relating to professional misconduct susceptible to lead to criminal or disciplinary proceedings. *(Para. 1)* - to apply such rules by adopting an internal decision conforming to a model decision annexed to the IIA *(para. 2)* - to refer all requests for waivers of immunity to OLAF for opinion *(para. 3)*	

6. QUESTIONS DE PERSONNEL

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6. QUESTIONS DE PERSONNEL

6.1. Introduction

Le cadre de ce chapitre

6.1.1. Au point 9.4.8. du premier rapport il est observé que « *le Comité n'a pas eu le temps de réfléchir à la gestion du personnel, ni à d'éventuelles modifications du Statut. Cependant, il a noté que plusieurs commissaires lui ont spontanément fait part de leur conviction qu'aucune amélioration sérieuse du fonctionnement du service ne serait possible, sans une réflexion approfondie sur ces points* ».

6.1.2. Dans ce deuxième rapport le Comité considère nécessaire de développer cette réflexion afin de compléter son analyse et de proposer des recommandations pour le futur.

6.1.3. Ce chapitre du rapport se penche donc sur les aspects de la fonction publique européenne qui présentent, à l'heure actuelle, à l'intérieur de la Commission, les problèmes les plus importants dans la mesure où ils reflètent - pour reprendre les termes du Parlement européen lui-même[157] - les *"allégations de fraude, de mauvaise gestion et de népotisme (détection et traitement) et le traitement par la Commission des cas de fraude, de mauvaise gestion et de népotisme impliquant le personnel"*.

Les défis de la fonction publique européenne

6.1.4. Sur un plan général, les problèmes de la fonction publique européenne sont assez proches de ceux que rencontrent depuis quelques années les administrations publiques nationales.

6.1.5. Dans une société globale de plus en plus marquée par un esprit d'ouverture, de dynamisme et de compétitivité, l'administration publique communautaire doit aussi faire face aux problèmes de modernisation et rationalisation de ses structures, justifier sa raison d'être et l'exercice de ses compétences en faisant preuve de l'efficacité et de la qualité des services qu'elle est tenue de rendre aux citoyens et aux contribuables.

6.1.6. Dans le cas de l'administration communautaire ces problèmes sont accrus par des difficultés liées au caractère multinational de la fonction publique européenne, ainsi que par certains développements spécifiques que le processus d'intégration a connu au fil du temps.

6.1.7. Il suffit de rappeler à ce stade l'augmentation constante du nombre des Etats membres, mais surtout la spectaculaire multiplication des compétences de l'Union, qui a affecté

[157] Résolution du Parlement européen du 23 mars 1999, point 4.

profondément la nature et l'étendue des activités institutionnelles. La perspective de l'adhésion de nouveaux Etats ne pourra qu'accentuer cette tendance.

6.1.8. Mais on peut aussi évoquer, sur un autre plan, la plus grande attention que l'opinion publique porte à la bonne administration des institutions européennes et à sa responsabilité, en exigeant que non seulement un service de haute qualité exclusivement fondé sur la reconnaissance des mérites individuels soit fourni aux citoyens, mais également que les principes d'intégrité et de légalité soient respectés, dans un contexte qui puisse assurer le plus haut degré de transparence.

La portée générale des problèmes

6.1.9. Il convient de préciser tout de suite que les problèmes que l'on vient d'évoquer sont largement communs à toutes les institutions de l'Union européenne.

6.1.10. On remarque par ailleurs, dans la pratique, une sorte de particularisme institutionnel, dans le sens où chaque institution s'efforce de rechercher des solutions en développant ses propres procédures et pratiques, sa propre "philosophie". Il reste pourtant opportun, tout en tenant compte des exigences plus spécifiques de chacune d'entre elles, de définir des solutions unitaires ou pour le moins coordonnées, pour toutes les institutions, afin d'assurer la parité de traitement du personnel, mais aussi de pouvoir déployer des efforts communs pour parvenir à de véritables réformes.

Les exigences spécifiques de la Commission

6.1.11. Il est vrai par ailleurs que, en ce qui concerne la Commission européenne, la nécessité de changements importants dans l'organisation et la politique du personnel s'impose de manière encore plus urgente.

6.1.12. Aucune autre institution en effet n'a subi de manière si directe les conséquences des développements qui ont marqué l'Union dans les dernières années. En particulier, aucune autre institution s'est vue confier et a accepté toute une série de tâches nouvelles et de finalités à poursuivre, non seulement plus nombreuses que par le passé, mais aussi qualitativement différentes par rapport aux fonctions traditionnelles de l'Institution, telles que les activités de gestion. Non seulement l'étendue, mais la nature même des tâches de la Commission, ont profondément changé, au point que d'organe de réflexion et de contrôle qu'elle était, l'Institution est désormais devenue essentiellement un organe de gestion.

6.1.13. Malgré ces développements, ni la structure dans son ensemble, ni les critères et les modalités d'organisation, ni les pratiques et les procédures, n'ont été adaptés à la nouvelle situation. Bref, tout a changé autour de la Commission, mais elle est largement restée à côté du changement.

6.1.14. Certes, les problèmes évoqués sont analysés depuis des années à l'intérieur de la Commission et un nombre important d'enquêtes et de rapports a été rédigé par diverses

instances internes ou même externes à la Commission[158]. Modernisation, décentralisation, rationalisation, sont devenues comme des mots d'ordre, que l'on retrouve un peu partout dans ces analyses. Malheureusement, celles-ci n'ont pas donné lieu à une réflexion d'ensenble cohérente et acceptée, et souvent même pas à des mesures (ou au moins à un début de mesures) opérationnelles.

6.1.15. Et pourtant, à l'heure actuelle la mise en place des réformes ne constitue plus une option pour l'Institution. Elles sont devenues une nécessité impérieuse et urgente, voire la condition indispensable pour assurer l'efficacité de l'action de la Commission et préserver son rôle traditionnel de moteur de la construction européenne.

6.2. Les problèmes généraux de la politique du personnel

6.2.1. Il est incontestable que la politique du personnel de la Commission n'a pas été à la hauteur des meilleurs modèles offerts par les administrations nationales et qu'elle comporte de grandes insuffisances.

6.2.2. Dans les pages suivantes on évoquera brièvement quelques unes de ces insuffisances, d'abord de nature générale et horizontale, pour développer par la suite l'examen de questions plus spécifiques.

Le problème de la révision du régime statutaire

6.2.3. Le Statut du personnel a été rédigé il y a plus de trente ans, avec l'adoption d'un texte unique pour toutes les catégories du personnel communautaire[159].

6.2.4. En dépit d'adaptations ponctuelles du Statut et de l'élaboration de principes généraux par la jurisprudence de la Cour de Justice et du Tribunal de première instance, le régime a souffert, dans son application, d'un détournement certain de ses objectifs initiaux. Ceci n'empêche pas que les lignes fondamentales de ce régime (protection et renforcement de l'indépendance du personnel, conditions de travail attrayantes et compétitives, valorisation des mérites, régime spécifique des garanties individuelles) restent valables.

6.2.5. Il en résulte que la véritable question qui se pose n'est pas de modifier profondément le système statutaire actuel, mais d'en appliquer correctement les règles et les principes.

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[158] Ainsi par exemple, le rapport Spierenburg de 1979 ou, plus récemment, les rapports de l'Inspection Générale des Services (IGS) sur les BAT (février 1998) et la décentralisation (février 1998), le programme MAP 2000 (30 avril 1997), le rapport Caston (début 1998), le rapport Williamson (6 novembre 1998), les codes de conduite (avril 1999) ou encore et, en dernier lieu, le document de l'IGS « *Dessiner la Commission de demain-DECODE* » (7 juillet 1999).

[159] Règlement 259/68 (JO n° L 56 du 4 mars 1968) portant sur le "Statut des fonctionnaires des C.E." et le "Régime applicable aux autres agents des C.E." (RAA), adopté le 29 février 1968, après l'entrée en vigueur du Traité de Bruxelles du 8 avril 1965, instituant un Conseil unique et une Commission unique des C.E.

L'absence d'une analyse des besoins et des priorités

6.2.6. Parmi les raisons de caractère général qui ont empêché une application correcte des principes statutaires, une place de premier rang doit être réservée au fait qu'une véritable analyse des besoins et des priorités de l'Institution n'a pas été développée.

6.2.7. En effet, l'attribution de nouvelles tâches à la Commission (ainsi que leur acceptation) n'a pas été précédée ou tout au moins accompagnée par un recensement rigoureux des ressources humaines, financières et organisationnelles existantes ainsi que par une évaluation approfondie des priorités et des exigences liées aux tâches que l'Institution exerçait déjà ou prévoyait d'exercer à l'avenir.

6.2.8. Or, seul un tel exercice peut fournir des instruments fiables et la base pour une planification prospective des réformes structurelles à entreprendre et, à la limite, d'une demande de renforcement adéquat de ses ressources. Comme l'a remarqué tout dernièrement la Commission elle-même dans son document DECODE déjà cité, cet exercice aurait aidé l'Institution "*à s'acquitter de ses fonctions d'une manière efficiente, dans un contexte qui reste caractérisé par une très faible croissance de ses ressources*".

6.2.9. Par contre, un *screening* de l'organisation et du fonctionnement de cette Institution n'a été mis en place - et de plus pour des fins limitées - qu'en novembre 1997 pour aboutir tout récemment au document mentionné.

6.2.10. Or, ce document fait clairement apparaître de graves inadéquations dans l'organisation et dans les pratiques de l'Institution, notamment : services inadaptés aux compétences actuelles, morcellement des responsabilités, mauvaise utilisation des ressources humaines ou méthodes de travail obsolètes et inefficaces.

Les réflexes pour l'organisation et le redéploiement du personnel

6.2.11. Concernant spécifiquement la politique du personnel, l'absence d'une évaluation des ressources et des besoins réels de l'Institution a exercé une influence négative à la fois sur l'organisation du personnel et sur les conditions propres à développer une véritable politique de qualité.

6.2.12. En ce qui concerne le premier aspect, faute d'une telle évaluation, l'Institution n'a pas su entamer les réformes nécessaires pour conférer efficacité et rationalité au système. En particulier, elle n'a pas su mettre en place un redéploiement de son personnel en vue d'aboutir à une allocation optimale des ressources existantes et accroître le rendement et l'efficacité de ce personnel.

6.2.13. A cette fin, la Commission aurait dû définir - en fonction de la priorité des besoins et sur la base d'un examen critique de la structure de l'organigramme et des éventuels dysfonctionnements organisationnels - les tâches de chaque service, le nombre et le profil des postes nécessaires pour accomplir ces tâches, les ressources disponibles et les excédents ou déficits qui en résultaient. Etalée dans le temps, une telle politique aurait permis et permettrait

de faire face à une extension des activités de l'Institution même dans une situation de gel de l'organigramme, et donc avec un effectif constant.

6.2.14. Certes, un tel exercice n’est pas facile. Et, de fait, les quelques tentatives de redéploiement se sont confrontées à des sérieux problèmes, à commencer par une certaine résistance des Directions générales à laisser partir des fonctionnaires de leurs services (parfois les meilleurs) ou même par la résistance de ceux-ci à changer de poste. Cette résistance est d’autant plus compréhensible lorsque, comme on le verra ci-après, le déplacement n’est souvent pas encouragé de manière adéquate.

6.2.15. Mais l'expérience a surtout démontré, comme le confirme le rapport DECODE déjà mentionné, que "*la notion de fixation de priorités, et en particulier de priorités négatives, ne fait pas partie des mécanismes de la Commission et n'est pas entrée dans les mentalités*" (p. IX).

6.2.16. Il en résulte qu'à l'intérieur de la Commission un véritable redéploiement n’a pas été réalisé. En effet, la Commission n'a décidé qu'en 1997 de redéployer chaque année 1% des emplois du tableau des effectifs (à savoir environ 150 par an), tandis que le rapport DECODE considère qu'elle aurait pu doubler ce pourcentage.

6.2.17. Et pourtant, seule une organisation qui distribue son propre personnel de manière rationnelle et efficace, peut réunir les conditions préalables pour que chaque fonctionnaire puisse se sentir motivé et responsabilisé dans son travail, en ce qu’il est encouragé à rechercher ou accepter les tâches qu'il considère les plus adaptées à ses propres capacités.

Les “équilibres nationaux”

6.2.18. Il faut à cet égard rappeler que d'importantes difficultés de la fonction publique européenne trouvent leur origine dans les contraintes imposées par le respect de ce qu'on appelle les "équilibres nationaux".

6.2.19. Il est incontestable qu'une fonction publique européenne provenant d’une base géographique la plus large possible, est nécessaire pour faire fonctionner le processus décisionnel de l’Union européenne. C’est uniquement avec un personnel de différentes nationalités travaillant ensemble et sur une longue période de temps, que l’on peut minimiser les problèmes d’identité culturelle, linguistique et nationale en général.

6.2.20. Par ailleurs, le besoin croissant et impérieux de disposer d’un nombre suffisant d’agents ayant une connaissance de différentes langues et une compréhension de la structure politique et sociale de plusieurs pays, doit être pondéré par la prise en considération que les institutions européennes ne sont pas des organisations ou les quotas de nationalité, de culture ou de langue sont primordiaux, puisque tous les fonctionnaires et autres agents sont *européens*.

6.2.21. Comme le souligne le Rapport Herman[160], "*... il est essentiel avant tout que les considérations étroitement nationales et partisanes jouent un rôle moins important à l'avenir au sein de la Commission, en particulier en ce qui concerne les nominations à tous les niveaux. Dans une certaine mesure, la présence de ces facteurs est inévitable… Cependant, l'équilibre actuel ne semble pas satisfaisant. En particulier, la nécessité d'instaurer un équilibre géographique entre les nationalités des différents responsables au sein de la Commission semble de nature à compromettre l'indépendance de la fonction publique européenne, et la compétence et l'expérience des intéressés devraient jouer un rôle accru dans le processus de nomination. En outre, il est probable que s'il n'est pas affronté maintenant, ce problème ira en s'aggravant à l'avenir à l'occasion de l'élargissement à grande échelle de l'Union européenne…*".

6.2.22. En effet, malgré les presque 50 ans du processus d'intégration et d'une pratique de travail en commun dans des structures multinationales, les exigences des équilibres nationaux, loin de se réduire, ont accentué leur poids. Les manifestations de leur influence sont même devenues au fil du temps plus éclatantes et se trouvent souvent à l'origine de cas de népotisme et de mauvaise administration.

6.2.23. Sur le plan formel, le poids des équilibres nationaux dans le choix ou dans la progression de la carrière des fonctionnaires apparaît en contradiction avec le principe qui interdit toute discrimination fondée sur la nationalité, c'est-à-dire avec un principe général et fondamental du droit communautaire (art.12, ex art.6, traité C.E.). On peut déroger à ce principe au nom des spécificités nationales et de l'exigence d'assurer la présence de toutes les cultures des Etats membres. Mais il s'agit toujours d'une dérogation, devant s'appuyer sur une base légale et être, selon la jurisprudence constante de la Cour de Justice, exceptionnelle et soumise aux tests de nécessité et de proportionnalité.

6.2.24. Cette conclusion est par ailleurs confirmée par le Statut du personnel lui-même, car l'exigence de garder un certain équilibre géographique y est accompagnée de fortes réserves.

6.2.25. Ainsi, son article 7 dispose que "*l'autorité investie du pouvoir de nomination affecte, par voie de nomination ou de mutation, dans le seul intérêt du service et sans considération de nationalité, chaque fonctionnaire à un emploi de sa catégorie ou de son cadre correspondant à son grade*".

6.2.26. A son tour, l'article 27 du Statut dispose que « *le recrutement doit viser à assurer à l'institution le concours de fonctionnaires possédant les plus hautes qualités de compétence, de rendement et d'intégrité, recrutés sur une base géographique aussi large que possible parmi les ressortissants des Etats membres… Aucun emploi ne doit être réservé aux ressortissants d'un Etat membre déterminé* ».

6.2.27. Pour sa part, la jurisprudence communautaire a confirmé d'une manière encore plus nette les conclusions mentionnées. Ainsi, dans l'arrêt *Lassalle* la Cour de justice a affirmé que "*l'intérêt du service et le respect de la vocation à la carrière seraient compromis si*

[160] Rapport du 26 mars 1999 de la Commission institutionnelle du Parlement européen *"sur l'amélioration du fonctionnement des institutions sans modification du traité*", point 25 de la partie B – Exposé des motifs (PE 229.072, A4-0158/99)**.** Voir également le point 7.3.4. de ce rapport.

l'administration, aux fins d'assurer l'équilibre géographique, pouvait réserver un poste à une nationalité déterminée, sans que cela soit justifié par des raisons ayant trait au fonctionnement de ses services… par contre, il n'est pas incompatible avec ces exigences que l'administration, au cas où les titres des différents candidats seraient sensiblement équivalents, fasse jouer à la nationalité le rôle de critère préférentiel lorsque cela est nécessaire pour maintenir ou rétablir l'équilibre géographique au sein de son personnel"[161]. Et dans l'arrêt *Marenco* elle a encore précisé que "*la nécessité pour l'administration communautaire de remédier, lors des recrutements, à un déséquilibre géographique des emplois au sein de ses services, doit céder le pas devant les impératifs d'intérêt du service et de prise en considération des mérites personnels des candidats*"[162].

6.2.28. Il est donc grand temps de revenir à l'esprit de la construction européenne et pour le moins essayer de réduire le poids des équilibres nationaux.

6.2.29. A cette fin, on pourrait imaginer quelques remèdes à la fois concrets et réalistes. Par exemple et en termes très généraux, on pourrait encourager une formation professionnelle visant à renforcer le caractère "européen" de la fonction publique dans les Institutions et donc à réduire le poids des origines nationales (voir la rubrique « formation »).

6.2.30. Plus spécifiquement et sur la même ligne que celle déjà annoncée par le Président désigné de la Commission, on devrait encourager une véritable "multinationalisation" des cabinets, ainsi qu'un retour de ceux-ci à leur rôle originaire (voir à cet égard, la partie 7.12 de ce rapport).

6.2.31. On peut également songer à une révision du nombre des Directions générales et de la répartition des tâches entre elles, en fonction des exigences réelles de l'Institution et non pas des équilibres nationaux.

6.2.32. On peut encore penser à un développement de la flexibilité dans le système actuel des "quotas nationaux", ce qui permettrait aux compétences et à l'expérience professionnelles de jouer un rôle plus déterminant dans le contexte de la procédure de nomination (à cet égard v. encore infra, la rubrique « la nomination des hauts fonctionnaires »). Dans tous les cas, ce critère devrait être appliqué pour le poste - en quelque sorte "atypique" - du Secrétaire général de la Commission.

6.2.33. Enfin, une rotation plus fréquente du personnel depuis les directeurs généraux jusqu'aux chefs d'unité, et cela notamment dans les services ordonnateurs, serait utile afin d'éviter toute sorte de "nationalisation" des postes.

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[161] Arrêt du 4 mars 1964, affaire 15/63, *Lassalle/Parlement, Rec.* p. 57.

[162] Arrêt du 29 octobre 1975, affaires jointes 81 à 88/74, *Marenco/Commission, Rec*. p. 1247. V. aussi l'arrêt du 29 septembre 1976 dans l'affaire 105/75, *Giuffrida/Conseil, Rec*., p. 1402, point 6, qui rappelle que *"l'article 29 du statut établit les procédures de recrutement nécessaires afin qu'il soit pourvu aux emplois vacants par des fonctionnaires choisis sur la base de critères objectifs de sélection et dans le seul intérêt de service"* . Egalement v. l'arrêt du 30 juin 1983, affaire 85/82, *Schloh/Conseil, Rec*. p. 2105.

Le risque de déception

6.2.34. On ne peut pas cacher que les problèmes engendrés par la politique actuelle du personnel ont suscité un certain désenchantement**,** voire un mécontentement, parmi le personnel lui-même. La lenteur de réformes de plus en plus nécessaires et urgentes, les retombées de certains scandales et leurs effets négatifs pour l'image et la réputation de la fonction publique européenne dans l'opinion, ont alimenté au sein du personnel une situation d'insatisfaction, voire de frustration. Il s'agit là évidemment d'un problème majeur, car toute réforme destinée à améliorer et à renforcer la Commission repose principalement sur l'engagement affirmé de l'ensemble du personnel.

6.2.35. Et, pourtant, ce personnel (dans sa presque totalité) ne demande qu'à pouvoir travailler dans une Institution où le dialogue social soit effectif et productif et où la qualité du travail et le dévouement soient reconnus et ouvertement appréciés. A cet égard, de plus larges et fréquentes consultations du personnel ne pourraient que contribuer à mieux saisir la nature des problèmes et en définir les solutions.

6.2.36. Il appartient aux instances responsables de faire face à ces exigences de façon efficace et rapide.

Le rôle des syndicats

6.2.37. Il est évident que des relations sociales et syndicales correctes sont essentielles. Certes, l'administration doit reconnaître le rôle des syndicats, mais de leur côté ceux-ci doivent éviter toute tentation de vouloir constituer une sorte de hiérarchie alternative destinée à empiéter sur les compétences des instances formellement responsables.

6.2.38. A ce propos, le Comité tient à souligner combien les syndicats exercent une responsabilité essentielle pour le succès du processus de changement et de modernisation de la fonction publique européenne. Pour sa rénovation, celle-ci a besoin que soient rigoureusement promues toutes les valeurs qui conditionnent sa qualité et son efficacité. Ces valeurs doivent être acceptées, non seulement dans leurs principes, mais dans chacune de leurs conséquences pratiques. Pour les syndicats européens, encourager cette tendance est une condition de leur propre réussite.

6.3. Les objectifs et les instruments de la politique du personnel

6.3.1. Une politique du personnel efficace et prévoyante implique que tous les efforts soient déployés pour recruter, former et maintenir un corps de fonctionnaires de la plus haute qualité.

6.3.2. En effet, le Statut du personnel des institutions communautaires se préoccupe d'établir les conditions nécessaires pour poursuivre ces objectifs. Cependant, des dispositions statutaires ne suffisent pas en elles-mêmes ; elles doivent être suivies de pratiques cohérentes et appropriées, aptes à cerner les évolutions récentes.

La valorisation des mérites

6.3.3. Un instrument fondamental pour une véritable politique du personnel est la création d'un système de valorisation des mérites. Dans la fonction publique européenne, aucun système d'incitation financière n'est prévu, ce qui répond à un choix d'opportunité tout à fait compréhensible. Cela exige d'autant plus que d'autres formes de motivation soient prévues, que l'on examinera ci-après.

6.3.4. La valorisation des mérites ne peut être un simple mot d'ordre destiné à rester sans conséquences. Il s'agit par contre d'un principe qui doit affecter tous les aspects de la politique du personnel. Grâce à une politique des mérites, la qualité de l'organisation toute entière s'améliore ; appliquée à tous les niveaux de la hiérarchie, elle produira un effet d'exemplarité, qui encourage la motivation et améliore le rendement. De plus, une culture de la qualité renforce le sentiment de participation et de loyauté envers l'Institution et peut aider à affaiblir les particularités nationales et par cela à renforcer la confiance des citoyens dans l'Union.

6.3.5. Une politique de valorisation des mérites implique des mécanismes de recrutement qui assurent des standards élevés d'efficacité et de rigueur, des efforts d'amélioration des capacités personnelles et professionnelles, un système d'évaluation correcte et sélectif dans les promotions, de même qu'un système efficace et crédible de sanction des fautes.

La formation

6.3.6. Il est de l'intérêt de l'administration de pouvoir compter sur du personnel motivé et qualifié autant que de celui du fonctionnaire d'améliorer sa formation et ses propres capacités professionnelles et par ce biais d'améliorer la qualité de son travail et les possibilités de progression dans la carrière. Pour atteindre ces objectifs, un rôle essentiel revient à la formation et à la mobilité, deux aspects qui sont strictement liés.

6.3.7. Concernant d'abord la politique de formation et de reconversion professionnelle, elle doit donc être conçue comme un processus qui débute dès la période du stage et se développe de façon permanente et obligatoire, tout au long de la carrière du fonctionnaire. Ceci implique que la Commission doit s'engager dans les actions de formation, même au-delà des prévisions statutaires actuelles[163].

6.3.8. Déjà pendant la période de stage[164], la formation des nouveaux fonctionnaires doit être adaptée aux fonctions futures mettant l'accent particulièrement sur la necéssité de travailler dans une équipe multinationale et développant un esprit et une culture véritablement "européens".

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[163] L'art. 24, alinéa 3 du Statut prévoit en effet que les Communautés *"facilitent le perfectionnement professionnel du fonctionnaire dans la mesure ou celui-ci est compatible avec les exigences du bon fonctionnement des services et conforme à leurs propres intérêts"*.

[164] Rappelons que l'article 34 du Statut prévoit que *"tout fonctionnaire, à l'exception des fonctionnaires des grades A1 et A2, est tenu d'effectuer un stage avant de pouvoir être titularisé. Ce stage est d'une durée de neuf mois pour les fonctionnaires de catégorie A, du cadre linguistique et de la catégorie B, et de six mois pour les autres fonctionnaires"*.

6.3.9. Tout effort devra être déployé par la suite pour devélopper les capacités du fonctionnaire et ses moyens d'adaptation. Ainsi, la possibilité devait être donnée d'accomplir de courtes périodes dans des services autres que celui dans lequel les fonctionnaires exercent leurs activités, ou même à l'extérieur de l'Institution.

6.3.10. Il faudrait également prévoir un programme permanent de séminaires taillés sur mesure pour répondre aux besoins des différentes catégories de personnel. Dans ce contexte, l'on pourrait même songer à la création d'une école de l'Union (ou en tout cas d'un centre de formation) ou à la mise en place, toujours sous l'impulsion de l'Union, d'un réseau d'écoles externes pour la formation des fonctionnaires de toutes les institutions.

6.3.11. Pour tous les fonctionnaires la participation aux cours de formation devrait être un facteur à prendre en compte dans les rapports de notation en vue des promotions[165]. En d'autres termes, la formation devrait favoriser l'évolution de la carrière, en préparant les fonctionnaires à assumer des responsabilités plus exigeantes. A part cela, une formation plus spécifique devrait être prévue pour l'exercice de certaines fonctions. Cela vaut en particulier pour les fonctions qui concernent la gestion des ressources humaines et financières, car le *management* ou la gestion des ressources humaines constitue un élément essentiel de la stratégie de modernisation administrative[166]. De plus, cette aptitude doit être cultivée au début de la carrière et non pas lors de l'attribution de fonctions dirigeantes. Elle devrait être spécifiquement évaluée dans les rapports de notation. On pourrait même imaginer qu'une formation spécifique soit donnée aux personnes appelées à évaluer des subordonnés (par exemple aux notateurs et aux membres de jurys).

6.3.12. A l'heure actuelle, la Commission développe quelques programmes de formation, mais ses efforts sont concentrés - pour à peu près la moitié des crédits de formation[167] - sur les cours de langues (qui devraient par contre être limités aux cas d'intérêt réel pour le service et, dans ce contexte, organisés de manière plus efficace et fonctionnelle). En revanche, les crédits pour la formation non linguistique ont subi une diminution considérable en 1996 et 1997. Cette tendance est heureusement renversée par une augmentation des crédits en 1998 et une autre pour l'année 1999, qui tient compte aussi de la première phase du programme de formation pour le *management* et, de manière plus générale, de la croissance des instruments de formation prévus dans le cadre du programme MAP 2000.

6.3.13. Même si on prend en considération ces dernières augmentations, les crédits alloués aux activités de formation paraissent insuffisants puisqu'ils ne représentent, par rapport à la masse salariale globale, que 0.57% des crédits, alors que la moyenne dans les administrations nationales semble être de l'ordre du 2% et que celle du secteur privé est encore plus importante, notamment en période de restructuration (comme ce devrait être le cas aujourd'hui à la Commission)**.**

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[165] Selon l'alinéa 4 de l'art. 24 du Statut *"il est tenu compte également (du) perfectionnement (professionnel) pour le déroulement de la carrière"*.

[166] Apparemment la Commission va réorienter ses programmes dans ce sens.

[167] V. annexe n° 1. La politique de formation à la Commission est prévue sur deux lignes budgétaires : A4030 pour la formation linguistique, et A7060 pour la formation professionnelle (non linguistique). Voir en annexe n° 2 les principales branches des programmes de formation non linguistique.

6.3.14. Il va de soi que tous ces efforts devraient être chapeautés par la mise en place - éventuellement en coopération avec les autres institutions – d'un système d'évaluation permettant d'analyser l'efficacité des actions de formation.

La mobilité

6.3.15. Les problèmes de mobilité sont étroitement liés à ceux de la formation du personnel car l'une est d'autant plus faisable que l'autre est organisée de façon adéquate. Comme la formation, la mobilité profite à la fois aux fonctionnaires et à l'Institution, le premier intérêt de celle-ci en la matière étant d'encourager la souplesse et la capacité d'adaptation du fonctionnaire à exécuter différents types de tâches.

6.3.16. En effet, pour le personnel, changer périodiquement de fonctions ou de tâches constitue une garantie du maintien de la polyvalence, de la motivation et de la productivité du personnel. Comme le souligne la communication au personnel du 26 septembre 1997 de M. Priestley, Secrétaire Général du Parlement européen**,** la stabilité qui découle du maintien des mêmes fonctionnaires aux mêmes postes est positive à court et à moyen terme parce qu'elle facilite l'acquisition des compétences, mais elle est néfaste à long terme parce qu'elle peut déboucher sur la stagnation. La mobilité doit donc être recherchée par le fonctionnaire et encouragée par l'Institution avant que la sclérose ne s'installe.

6.3.17. Le Statut du personnel prévoit dans plusieurs dispositions la possibilité et même les moyens pour assurer la mobilité (transfert, mutation, détachement, etc.). Dans la pratique toutefois cette mobilité n'est pas réalisée de manière adéquate. D'un côté, elle n'est pas suffisamment encouragée par l'Institution, de l'autre, elle ne rentre pas dans les ambitions de beaucoup de fonctionnaires, qui ont souvent tendance à rester dans le service d'origine ou, tout au moins, dans des services qui n'impliquent pas une remise en question des connaissances et des façons de travailler. Il en résulte que des expériences diversifiées ne sont jamais acquises pendant la carrière de beaucoup de fonctionnaires.

6.3.18. La mobilité devrait être encouragée sans exceptions et au-delà d'un certain temps, le changement de fonctions devrait être rendu impératif. Il pourrait même être souhaitable d'établir des durées maximales de service pour tous les grades et fonctions. De toute façon, la polyvalence du fonctionnaire doit être reconnue comme un facteur pris en compte à l'occasion des promotions. Pour les fonctionnaires de catégorie A, en particulier, elle devrait être une condition *sine qua non* pour accéder à des fonctions de direction ou de gestion du personnel.

Responsabilisation et décentralisation

6.3.19. La responsabilisation constitue elle aussi un élément important de la politique du personnel et, de manière plus générale, de l'organisation de la fonction publique européenne. Responsabiliser signifie renforcer chez le personnel la conscience professionnelle, l'attachement à l'Institution et le sentiment de participation à la vie et aux problèmes de sa propre administration. Ce qui veut dire impliquer davantage le personnel dans son propre travail. Mais responsabiliser signifie aussi rendre le fonctionnaire clairement et directement responsable de ses propres activités et de l'accomplissement des tâches qu'on lui a confiées.

6.3.20. Pour ce qui est de la Commission, les conditions d'une véritable responsabilisation ne semblent pas réunies. Comme l'a fait remarquer ce Comité lors de son premier rapport (par. 9.4.25.), à « *travers les études menées par le Comité, il a été trop souvent constaté que le sens de la responsabilité est dilué dans la chaîne hiérarchique* ».

6.3.21. La responsabilisation exige tout d'abord que les tâches de chacun soient clairement définies; ce qui implique que soient éliminées les ambiguïtés qui subsistent à cet égard à tous les niveaux de l'Institution (v. à ce propos le Chapitre 7 de ce rapport). Elle exige ensuite que les efforts déployés pour accomplir les tâches confiées à un fonctionnaire, ainsi que les résultats obtenus, soient encouragés et récompensés. Ce qui implique que le travail de chacun soit "visible", c'est à dire identifiable à travers le chef du fonctionnaire et non pas confondu dans l'anonymat d'un groupe où personne ne sait (ou n'est en mesure de savoir) qui fait quoi.

6.3.22. En d'autres termes, il faut que les anneaux de la chaîne hiérarchique puissent être identifiés dans leur individualité et dans leur fonction spécifique. Ceci est d'ailleurs d'autant plus nécessaire que, plus les tâches du fonctionnaire sont élargies et importantes, plus les responsabilités qui lui incombent sont lourdes.

6.3.23. Dans ce contexte de responsabilisation, la décentralisation (mieux vaudrait-il parler de « déconcentration ») joue un rôle important. Comme le signale le projet de troisième code de conduite de la Commission pour les fonctionnaires, la décentralisation et l'attribution de pouvoirs plus étendus aux fonctionnaires les encouragent à être plus responsables dans les deux sens du terme : dans le sens d'assumer une responsabilité personnelle "pour" les missions qui leur sont confiées, et dans le sens d'engager leur implication personnelle "envers" l'Institution et, en dernier lieu, envers les citoyens. Dans cette optique, il n'est pas souhaitable de créer ou de maintenir des postes auxquels ne correspondent pas de véritables responsabilités (et une charge de travail adéquate). A cet égard, il convient d'évoquer en particulier la situation des directeurs généraux adjoints et des conseillers, qui suscite à juste titre de nombreuses critiques. En effet, non seulement la distinction à l'intérieur des fonctionnaires de grade A/1 apparaît justifié davantage par des raisons d'équilibres nationaux que par des exigences réelles, mais elle ne s'accompagne pas toujours d'une véritable attribution de fonctions.

6.3.24. Depuis quelques années, des initiatives en vue d'une plus grande décentralisation ont été prises à l'intérieur de la Commission, bien que sur base de pratiques assez hétérogènes entre les différentes Directions générales. Pour réussir, la décentralisation doit pourtant se dérouler dans l'ordre - comme l'envisage de façon assez ponctuelle la nouvelle Commission- "*afin de garantir la cohérence et l'efficacité de l'action de la Commission ainsi que la qualité de ses initiatives*"[168]. Mais il faut également assurer qu'une véritable autorité de direction subsiste. Comme le remarque la communication de M. Priestley déjà citée, "*une direction de qualité satisfaisante n'est pas incompatible avec la fonction publique. Au contraire, elle est la clé de son succès. Si des pratiques administratives saines sont essentielles, une gestion efficace l'est également, et les deux ne se recouvrent pas. Le personnel de direction… doit se voir confier de véritables responsabilités, par la décentralisation, et il doit donner l'exemple aux subordonnés en ce qui concerne l'engagement, la compétence, la ponctualité, la conscience professionnelle, le respect des dispositions, etc... D'une manière générale, tout le personnel doit être conscient*

[168] V. le document distribué par la Commission nouvelle le 12 juillet 1999 sous le titre « Fonctionnement de la Commission », annexe 3: "Le renforcement de la coordination interne".

que, à côté de droits, il a aussi des devoirs envers l'institution".

6.3.25. La responsabilité du personnel chargé de fonctions dirigeantes s'étend donc à l'exécution des tâches qu'il a confiées à ses subordonnés et qu'il est censé diriger et contrôler, ce qui exige que soient fixés des objectifs clairs, réalistes et mis périodiquement à jour et que soit assuré un contrôle efficace et régulier, avec un système de suivi pour vérifier les résultats.

Les incitations de carrière

6.3.26. Il faut regretter à l'intérieur de la Commisssion l'absence d'une véritable politique de carrière. Or, les incitations de carrière sont essentielles pour une politique visant à assurer la motivation, l'efficacité et la qualité du personnel.

6.3.27. Du point de vue de l'organisation de la carrière, il faut signaler que l'articulation de celle-ci est rigide, dans le sens que le Statut se caractérise par une division du personnel en quatre catégories distinctes (A-B-C-D) et relativement étanches (le seul moyen de passer de l'une à l'autre catégorie étant le concours interne), mais aussi et surtout dans le sens qu'en pratique la progression à l'intérieur des grades se fonde plutôt sur des automatismes liés à l'ancienneté que sur une véritable évaluation et valorisation des mérites.

6.3.28. Il s'agit, en outre, à l'intérieur de chaque catégorie, de carrières brèves. Si l'on exclue le pourcentage très limité de fonctionnaires qui atteignent le sommet de la carrière (A/1 et A/2), on constate que cette carrière se développe normalement sur 5 à 6 grades (de A/8-A/7 à A/4-A/3), ce qui veut dire que pour la grande majorité du personnel elle se déroule sur une période de 20 à 25 ans. En moyenne donc, un fonctionnaire atteint la fin de sa carrière à l'âge d'environ 50-55 ans, avec la perspective d'y rester plus d'une dizaine d'années. La carrière est encore plus brève pour le personnel des grades "B" et "C", car elle se développe sur un total de 5 grades.

6.3.29. Une telle situation peut entraîner de sérieux dangers de stagnation et de sclérose. D'un côté, les incitations de carrière visant à stimuler l'engagement et les ambitions du personnel apparaissent très limitées. D'un autre côté, il n'y a pas de mécanisme efficace pour encourager une redistribution de fonctionnaires ou le départ de ceux qui, n'ayant plus de perspectives de carrière, sont moins motivés. On pourrait même dire que le régime actuel encourage ces fonctionnaires à rester en place par l'existence de dispositions telles que les majorations des droits à pension pour chaque année de service entre 60 et 65 ans.

6.3.30. Il faudrait envisager des solutions pour pallier les risques de sclérose du système que cette situation entraîne.

6.3.31. On peut relier à cette problématique (ainsi qu'à des motivations de caractère budgétaire) l'introduction en 1988 du système dit d'encadrement ("middle management"), qui consiste à séparer pour les tâches de direction le grade et les fonctions. En d'autres termes, à chaque grade ne correspondent pas nécessairement les mêmes fonctions; au contraire, celles-ci peuvent être exercées par des grades différents, de sorte que des tâches de direction sont conférées à un éventail plus large de grade (A 5/4/3). Ceci a l'avantage de ne pas bloquer certains fonctionnaires dans leur progression en grade, tout en permettant à d'autres fonctionnaires moins gradés d'exercer des fonctions pour lesquelles ils sont déjà manifestement compétents

ou préparés.

6.3.32. Cette pratique, qui est de nature à encourager la motivation des fonctionnaires moins gradés, pourrait être considérablement développée, tout en éliminant par ailleurs certains problèmes que soulèvent, comme on le verra, les modalités de promotion suivies à cet égard (v. infra, sous la rubrique « évaluation et promotion ».

6.3.33. On pourrait également songer à de véritables mesures de dégagement, comme dans le cas d'adhésion de nouveaux Etats membres. En particulier, une telle solution pourrait être envisagée en fonction des réformes structurelles annoncées par la nouvelle Commission. Ce régime de dégagement devrait être mis en place pour une durée de 3-5 ans pour permettre à l'Institution de déployer une stratégie d'envergure.

6.4. L'organisation du personnel

Les différentes catégories de personnel

6.4.1. Le personnel de la Commission peut être classé sous différentes catégories: statutaire et non statutaire, interne et externe (*intra muros* ou *extra muros*), permanent ou temporaire, contractuel ou non contractuel, de droit privé ou de droit public, etc.

6.4.2. Dans un but purement utilitaire, on utilisera dans ce chapitre deux notions distinctes mais qui englobent une partie du personnel qui est commune (auxiliaires et agents locaux). On distinguera donc entre:

- personnel statutaire, qui inclut les fonctionnaires et les autres agents (agents temporaires, auxiliaires, locaux et conseillers spéciaux); et

- personnel externe, qui inclut le reste du personnel contractuel (intérimaires, prestataires de service, experts nationaux détachés, etc.) mais aussi, pour certains aspects, les auxiliaires et agents locaux susvisés[169].

Le personnel statutaire

6.4.3. Le personnel statutaire fait l'objet d'un régime défini dans le Statut et dans le RAA: le premier concerne les "fonctionnaires" et le deuxième les "autres agents".

6.4.4. Le budget (1999) de fonctionnement de la Commission contient 16.511 emplois

[169] Il convient de rappeler l'arrêt du 6 décembre 1989, aff. 249/87, *Mulfinger e.a./Commission, Rec*. p. 4127, dans le sens que *"le statut des fonctionnaires et le RAA ne constituent pas une réglementation exhaustive de nature à interdire l'engagement de personnes en dehors du cadre réglementaire ainsi établi. Au contraire, la capacité que possède la Communauté de nouer des relations contractuelles soumises au droit d'un Etat membre s'étend à la conclusion de contrats de travail ou de prestations de services".*

permanents (postes de fonctionnaires) et 690 emplois temporaires[170]. Les uns et les autres constituent ensemble presque 60% du total des emplois budgétaires des institutions communautaires.

Les fonctionnaires

6.4.5. Les fonctionnaires sont à plein titre intégrés dans la fonction publique européenne. Ils occupent des emplois permanents dans une des catégories (A, B, C, D) et dans un des grades prévus par le Statut.

6.4.6. En principe, est réservé aux fonctionnaires l'exercice des tâches de fonction publique. Celles-ci sont liées aux fonctions de l'Institution découlant des compétences qui lui ont été confiées par les traités ou par les actes arrêtés en application de ceux-ci[171].

Les autres agents

6.4.7. A part les fonctionnaires, qui ont un rapport de travail permanent, l'exigence s'est imposée dès le début de recourir à du personnel temporaire pour satisfaire avec une certaine flexibilité les exigences contingentes et matérielles de l'institution que les fonctionnaires ne pouvaient satisfaire de manière immédiate et adéquate.

6.4.8. Ce personnel constitue notamment la catégorie des "autres agents", pour lesquels un acte spécifique (le RAA) a été adopté simultanément au Statut des fonctionnaires afin d'en établir le régime en termes généraux.

6.4.9. Etant donné les multiples exigences auxquelles ces "agents" sont appelés à faire face, une différentiation a dû être établie parmi eux. Le RAA prévoit en effet plusieurs catégories d'agents: les «temporaires » les «auxiliaires», les "locaux" et les "conseillers spéciaux". Les deux premières catégories se divisant à leur tour en plusieurs sous-catégories[172].

6.4.10. Les agents temporaires constituent la principale catégorie les "autres agents". Dans cette catégorie on regroupe: l'agent engagé en vue d'occuper un emploi compris dans le tableau des effectifs et auquel les autorités budgétaires ont conféré un caractère temporaire, l'agent engagé en vue d'occuper, à titre temporaire, un emploi permanent dans ce tableau, l'agent engagé en vue d'exercer des fonctions auprès d'une personne remplissant un mandat prévu par les traités ou auprès d'un président élu d'une institution ou d'un organe ou d'un groupe politique du Parlement européen et, enfin, l'agent engagé en vue d'occuper, à titre temporaire, un emploi permanent dans le domaine de la recherche et de l'investissement (art. 2

[170] Voir les tableaux en annexe n° 3 et 4.

[171] La Cour de Justice considère en effet que l'exercice des tâches de fonction publique de l'institution ne peut être confié au personnel externe de manière exceptionnelle, tandis que pour les "autres agents" il est tout à fait normal (v. arrêt 28.2.1989, aff. Joints 341/85 et suiv., Van der Stijl et a., Rec., p. 557). Selon la Cour "*il y a lieu d'observer que, s'agissant d'emplois qui comportent l'exercice d'un pouvoir de décision, celles-ci (les institutions) sont tenues de se conformer à l'un des régimes juridiques qui sont limitativement prévus par le statut ou par le régime applicable aux autres agents*" (par.11).

[172] Voir en annexe n°5 les statistiques globales concernant le personnel effectivement en service par catégorie et par lien statutaire ou contractuel au 31.12.98.

RAA). La première de ces quatre sous catégories est la plus fréquente en ce qui concerne les crédits de fonctionnement.

6.4.11. Conformément à la nature du rapport de travail qui les régit, les autres agents sont engagés par contrat[173]. Néanmoins, la première sous-catégorie d'agents temporaires (emploi à caractère temporaire) doit d'abord passer devant un comité de sélection. De la même façon, les auxiliaires des catégories C et D doivent suivre un test d'aptitude. Le reste du personnel "autres agents" n'est soumis à aucune sélection préalable de ce type.

6.4.12. A présent, malgré la persistance d'un régime spécifique (le RAA), c'est la temporalité qui continue à différencier pour l'essentiel les agents temporaires des fonctionnaires.

6.4.13. Par ailleurs, il convient de remarquer que les agents temporaires se sont vu reconnaître le droit de participer aux concours internes de l'institution en question, afin d'acquérir la condition de "fonctionnaire"[174].

Le cas des agents de la recherche

6.4.14. Dans la catégorie des "autres agents" de la Commission, le personnel dit de la recherche mérite une mention particulière. Il correspond à la dernière des rubriques de la catégorie des agents temporaires mentionnée plus haut [175].

6.4.15. Ce personnel est rémunéré sur le budget de la recherche. Le tableau des effectifs de la recherche et les dépenses administratives sont inscrits à la partie B du budget. Pour chaque programme spécifique, un plafond est fixé par l'autorité législative, et les dépenses annuelles sont fixées et soumises au contrôle de l'autorité budgétaire. Ainsi, il ressort de l'annexe n°3 que la recherche et le développement technologique comprennent pour l'année 1999, 3.638 emplois permanents et 74 emplois temporaires. A leur tour, ces effectifs se répartissent en 2.080 emplois pour le Centre Commun de Recherche et 1.632 emplois pour les actions indirectes[176].

6.4.16. Parmi les agents de la recherche, qui sont recrutés sur base contractuelle, il convient de distinguer les intérimaires et agents auxiliaires, les experts nationaux détachés et les visiteurs scientifiques, les agents temporaires sous contrat de trois ans non renouvelable et les agents temporaires sous contrat de cinq ans renouvelable.

6.4.17. Quant au régime qui lui est réservé, ce personnel constitue une sorte d'enclave à l'intérieur du système général des agents de la Commission, avec des règles et des procédures tout à fait spécifiques, bien qu'orientées progressivement en direction d'une harmonisation avec le système général.

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[173] Articles 1 et 6 du RAA.
[174] Ainsi, l'arrêt du 8 novembre 1990, affaire T-56/89, *Bataille/Parlement, Rec.* II-597.
[175] Article 2 d) du RAA: "*l'agent engagé en vue d'occuper, à titre temporaire, un emploi permanent, rémunéré sur les crédits de recherches et d'investissement et compris dans le tableau des effectifs annexé au budget de l'institution intéressée*".
[176] Voir les statistiques budgétaires correspondantes, en annexe n° 6.

6.4.18. En effet, d'importantes innovations ont été introduites dernièrement afin de faire face aux problèmes que la pratique a révélés, en particulier quant à un certain manque de transparence dans le recrutement et à l'excès de "temporalité" dans les fonctions. Ces innovations visent à réaliser un parallélisme avec la politique relative au personnel relevant du budget de fonctionnement, tout en préservant la spécificité du personnel de recherche, en particulier dans le domaine des actions directes.

6.4.19. Concernant en particulier le recrutement des agents sous contrat de cinq ans - qui est à présent effectué par l'intermédiaire de procédures de sélection assez souples et rapides - un nouveau système a été introduit en 1999, pour rendre ces procédures plus transparentes et plus proches de celles organisées pour le recrutement des fonctionnaires.

6.4.20. Quant à l'excès de "temporalité", partant de la nécessité d'une plus grande permanence du personnel de la recherche, la nouvelle politique adoptée en 1996 prévoit un rééquilibrage entre personnel permanent et personnel temporaire.

6.4.21. Le Comité recommande que ces changements dont il vient d'être question soient réalisés d'une façon effective et rapide et surtout que la transparence du système soit adéquatement assurée.

Le problème de la cessation des contrats des agents

6.4.22. Concernant le problème de la cessation des contrats des agents temporaires, il convient de rappeler tout d'abord que l'article 8 du RAA prévoit que "*l'engagement d'un agent temporaire visé à l'article 2 point a)*[177] *peut être conclu pour une durée déterminée ou indéterminée*", tandis que "*l'engagement d'un agent visé à l'article 2 point b) ne peut excéder deux ans et ne peut être renouvelé qu'une fois pour une durée d'un an au plus ; à l'issue de cette période, il est obligatoirement mis fin aux fonctions de l'agent en qualité d'agent temporaire*"[178].

6.4.23. Dans la réalité, l'assimilation des autres agents et, en particulier, des agents temporaires aux fonctionnaires, ainsi que la tendance de la Commission à faire appel à du personnel sous contrat de courte durée, ont posé de sérieux problèmes. Les services utilisateurs essaient en effet d'obtenir des dérogations aux règles régissant la durée des contrats afin de maintenir le personnel contractuel en place le plus longtemps possible. En d'autres termes, ils se sont montrés plus soucieux de maintenir le nombre d'effectifs qu'ils considéraient indispensables pour le service, que d'assurer le respect des délais des contrats**.** Il en est résulté la pratique de renouveler plusieurs fois les contrats de ces agents qui étaient de durée déterminée ou de ne pas résilier les contrats de durée indéterminée. Ainsi, le sentiment s'était répandu que la temporalité n'était dans ce cas qu'une simple formalité.

6.4.24. De sérieuses difficultés sont donc apparues, suite à la décision de la Commission en 1996 de revenir au respect du caractère temporaire des contrats des agents. La période transitoire prévue à cette fin venant à expiration, la mise en œuvre de la décision a conduit au

[177] Première des sous catégories susvisées.
[178] Voir l'arrêt du 1er février 1979, aff. 17/78, *Deshormes/Commission, Rec*. p. 189.

départ d'un nombre important d'agents temporaires et a soulevé des problèmes dans les Directions générales où ces agents étaient employés.

6.4.25. Cela dit, il est évident que le principe de la temporalité des contrats doit s'appliquer aux agents temporaires. Or, l'une des solutions pour éliminer les inconvénients mentionnés pourrait être la nomination des agents temporaires sur des emplois permanents (lettre b) de l'article 2 du RAA), au lieu de les nommer sur des emplois à caractère temporaire (lettre a) de l'article 2 du RAA) compris dans le tableau des effectifs annexé à la section du budget afférente à l'Institution. Il en résulterait une obligation de partir comme le prévoient ces dispositions et les pressions des intéressés n'auraient plus de raison d'être.

6.4.26. Parallèlement, il serait bon de réduire progressivement le tableau des effectifs pour postes temporaires et de revenir à la pratique d'attribuer des contrats sur ces postes au cas par cas, en fonction de la spécificité technique de la tâche et de la durée pour la remplir.

6.4.27. La pratique du passé est à la source de plusieurs difficultés. Elle a conduit d'abord à des renouvellements injustifiés de contrats et ensuite à une cessation de ceux-ci dans des conditions qui ont eu pour résultat que plusieurs personnes concernées ont entamé des recours en justice. Des procès étant donc en cours à cet égard, le Comité ne considère pas opportun de se prononcer plus en avant sur cette question.

Le recours au personnel externe

6.4.28. Au-delà du personnel statutaire, la Commission a développé la pratique consistant à faire appel à l'assistance de personnes externes pour l'accomplissement de tâches qui exigent des compétences qui sont censées ne pas être disponibles à l'intérieur de l'Institution. Expression des pouvoirs discrétionnaires reconnus à la Commission pour l'organisation de son propre fonctionnement, cette pratique s'insère dans le cadre d'une gestion souple des ressources humaines.

6.4.29. Tout en reconnaissant sa légitimité, la Cour de justice a en même temps défini les limites de cette pratique, en excluant qu'elle puisse être utilisée, sauf cas d'urgence et de façon tout à fait exceptionnelle, pour l'exercice des tâches de puissance publique[179]. Le recours au personnel externe n'est donc admis que pour des tâches ponctuelles ou spécialisées, accessoires à celles de fonction publique et non permanentes: tâches administratives, d'assistance technique, de prestation de services matériels ou intellectuels, etc.

6.4.30. Dans la pratique, cela s'est traduit par une panoplie étendue de catégories de personnel externe, dont le régime est très diversifié quant à la base juridique (réglementation spécifique, contrats de droit privé, etc.), aux conditions et même au lieu de travail (contrat de travail ou de service; activités intra muros et non), etc. Parmi ce personnel, outre les auxiliaires et les agents locaux, déjà mentionnés, on trouve des consultants, des chargés d'études, des experts nationaux détachés, des visiteurs scientifiques, des interprètes free-lance, des intérimaires (ayant un lien contractuel avec une agence d'intérim qui bénéficie d'un contrat cadre avec l'institution), du personnel de sociétés prestataires de services, des hôtesses, des médecins, des

[179] Voir arrêt *Van der Stijl* cité retro.

assistants sociaux, des professeurs de langues, etc.[180].

6.4.31. Au fil du temps le recours aux apports extérieurs s'est développé de façon excessive et désordonnée. Et cela suite surtout à l'attribution de nouvelles tâches à l'Institution à partir des années ´80. D'un autre côté, l'Autorité budgétaire a imposé à la Commission l'obligation de respecter une sorte de croissance zéro en ce qui concerne le personnel statutaire.

6.4.32. On rencontre ici une des conséquences les plus éclatantes de l'absence d'une véritable analyse des besoins et des priorités de la part de la Commission et d'un manque de rationalisation menant à des mesures appropriées de redéploiement. Cette inadéquation entre tâches et ressources humaines se manifeste aussi dans le fait que l'Institution n'a même pas exploité toutes les ressources qui lui étaient offertes par le tableau des effectifs, comme le prouve le nombre anormal d'emplois vacants. Or, il est vrai qu'un taux incompressible d'emplois vacants est inévitable, correspondant notamment aux délais statutaires de pourvoi. Mais il demeure particulièrement embarrassant - et bien difficile à justifier - qu'au moment où l'Institution doit expliquer le recours aux ressources externes en invoquant une insuffisance de ressources statutaires, elle doive en même temps afficher des emplois vacants. Il est vrai que les modalités pour pourvoir à ces vacances sont particulièrement longues et lourdes et qu'elles devraient être fortement accélérées. Néanmoins, le nombre d'emplois vacants affiché reste bien plus élevé que les exigences et les mécanismes du renouvellement ne l'imposent.

6.4.33. Par ailleurs, les quelques opérations de rééquilibrage interne des ressources au profit du personnel statutaire, qui se sont produites par la suite, ont été très partielles et sans rapport avec les exigences liées aux nouvelles tâches de gestion confiées à l'Institution.

6.4.34. Cela dit, il faut rappeler que le recours au personnel externe n'est pas aussi favorable qu'on pourrait le croire. Il comporte beaucoup d'inconvénients, entre autres, il ne permet pas de garantir que les tâches de puissance publique soient exclusivement effectuées par du personnel statutaire ; il favorise l'absence de transparence, ainsi que les abus et des pratiques de népotisme du point de vue du recrutement ; il induit un coût salarial du personnel temporaire proche du coût d'un fonctionnaire et parfois plus élevé et entraîne des pratiques peu orthodoxes (l'Institution en arrive à accorder à une même personne plusieurs contrats successifs). Mais, surtout, le recours au personnel externe tend de plus en plus à répondre à des besoins structurels, si bien que le taux de dépendance de l'Institution vis-à-vis de ce personnel devient excessif.

Le cas des BAT

6.4.35. La possibilité d'avoir recours à du personnel externe, de plus par le biais d'un recrutement beaucoup plus rapide et facile, a donné lieu dans le temps au développement de pratiques peu orthodoxes, telles que l'utilisation de crédits opérationnels (destinés à la mise en œuvre des grandes politiques communautaires) pour effectuer des dépenses de nature administrative, y compris la mise à disposition de personnel contractuel sous des régimes juridiques divers (les "mini-budgets", condamnés par la Cour des comptes).

[180] Un Code de bonne conduite du personnel externe a même été adopté par la Commission le 5 octobre 1994. Voir les statistiques en annexe n° 7 (pages 48 et 51 de l'avant-projet de budget pour l'année 2000).

6.4.36. Dans ce contexte s'insèrent également certaines dérives qui ont pu être constatées telles que, en particulier, la passation de contrats de prestations de services, portant sur de la maîtrise d'œuvre et de l'assistance technique, avec des entités de droit privé, de formes variées (ASBL, sociétés commerciales), dénommées "bureaux d'assistance technique" (BAT) pour assister la Commission dans ses tâches d'exécution de grandes politiques communautaires. Cette pratique a été analysée au chapitre 2.

Observations finales

6.4.37. L'analyse que l'on vient de développer confirme qu'une organisation complexe et difficilement contrôlable du personnel s'est instaurée à l'intérieur de la Commission, qui risque de provoquer de graves défaillances dans l'exercice de la fonction publique européenne.

6.4.38. Après tant d'années d'application du Statut, une réflexion fondamentale menant finalement à une révision du système et de la façon dont il est appliqué, s'avère urgente.

6.4.39. Cela implique, sur la base d'une analyse rigoureuse des besoins de l'Institution:

- qu'il faut définir clairement les tâches de fonction publique, dérivant des compétences attribuées par les traités, qui doivent être exécutées par des fonctionnaires ou agents temporaires et les autres tâches qui peuvent être exécutées par d'autres catégories de personnel contractuel, voire celles qui pourraient être externalisées (et non privatisées);

- qu'un jugement soit porté par conséquent sur la part que doit représenter le personnel externe d'appui dans le volume global des ressources humaines de l'Institution ;

- que si à cette fin le redéploiement ne suffit pas et si le taux de dépendance du personnel contractuel est jugé trop élevé, alors que le besoin de telles ressources est néanmoins considéré comme structurel, l'Institution doit demander à l'autorité budgétaire une nouvelle opération de transformation de crédits en emplois;

- que si en dernière analyse le recours au personnel temporaire s'impose, il faudrait recourir au système de pourvoi régi par le RAA, en limitant strictement le recours aux autres ressources humaines.

6.4.40. En d'autres termes, il faudrait revenir au Statut et au RAA et de cette manière simplifier et rationaliser la structure actuelle des ressources humaines dont dispose l'Institution.

6.4.41. Le Comité se rend bien compte qu'un renversement de la situation actuelle ne peut être que progressif, étant donné la portée et les difficultés des réformes nécessaires. Il n'en reste pas moins que la nouvelle Commission devrait énoncer clairement et ouvertement ses orientations à cet égard et adopter dès le début de son entrée en fonction des comportements cohérents.

6.5. La carrière

Le recrutement

6.5.1. L'art. 27 du Statut déclare que le recrutement "*doit viser à assurer à l'institution le concours de fonctionnaires possédant les plus hautes qualités de compétence, de rendement et d'intégrité, recrutés sur une base géographique aussi large que possible parmi les ressortissants des Etats membres des Communautés*".

6.5.2. Pour assurer le respect de ces principes, les institutions recourent normalement à la technique du concours. Il s'agit plus spécifiquement de concours externes auxquels tous les candidats qui présentent les conditions requises peuvent participer, la sélection étant effectuée sur la base de titres et/ou épreuves communs, et simultanément dans tous les pays membres, par un jury *ad hoc* indépendant, bien que nommé par l'administration elle-même et souvent composé en tout ou en partie par des membres de celle-ci[181].

6.5.3. L'art. 29 du Statut mentionne aussi d'autres modalités pour pourvoir aux vacances d'emploi, dont la plus intéressante aux fins de ce chapitre est celle des concours internes. Des procédures particulières sont par contre prévues pour des emplois nécessitant des qualifications spéciales et pour le recrutement des hauts fonctionnaires (en particulier des grades A/1 et A/2). On y reviendra lors de l'examen des mécanismes de promotion.

Le concours

6.5.4. Malgré ses mérites évidents, le système des concours a donné lieu dans la pratique à de sérieuses difficultés, surtout dues au fait qu'au fil du temps le nombre des candidats s'est considérablement accru. Il suffit de rappeler que les deux derniers concours généraux organisés par la Commission en 1994 et 1998, ont compté 56.000 et 31.000 candidats respectivement**.**

6.5.5. Avec un tel nombre de candidats, une gestion correcte et efficace d'un concours général n'est pas sérieusement praticable: les problèmes organisationnels sont énormes, la durée du concours trop longue pour les exigences de l'Institution, le coût financier excessif, le contrôle de la régularité des opérations, presque impossible. Du reste, l'annulation du dernier concours général susvisé, suite à la découverte de certaines irrégularités, n'est que la confirmation des problèmes soulevés.

6.5.6. On peut aussi ajouter qu'un nombre aussi élevé de candidats rend impossible une sélection attentive et efficace. Opérée par des jurys assez variables et hétérogènes, assistés par un nombre considérable d'assesseurs, et d'un niveau parfois insuffisant, cette sélection assure un recrutement relativement efficace. L'objectif principal de la procédure semble être devenu plutôt la réduction massive des concurrents qu'une véritable sélection des compétences nécessaires pour l'Institution.

[181] Voir art. 29, par. 1 et l'Annexe III du Statut relatifs à la "procédure de concours".

6.5.7. Cependant, le système n'assure pas une représentativité adéquate des différentes nationalités, étant donné que le nombre des candidats de certains Etats membres est plus réduit que d'autres (même proportionnellement), notamment parce que la vocation et la formation multinationale sont plus poussées ou développées dans certains pays que dans d'autres, ce qui se reflète dans les résultats.

6.5.8. Malgré les grands efforts de l'administration, la procédure s'est révélée tout à fait insatisfaisante et l'image externe du concours en a été négativement influencée.

Quelques correctifs à introduire

6.5.9. Tout en étant conscient des problèmes organisationnels qui se posent en la matière et des difficultés de concilier des exigences diversifiées et parfois même opposées, le Comité considère qu'il ne serait pas impossible d'introduire des corrections pour remédier aux inconvénients du système actuel, ou tout au moins les réduire.

6.5.10. On pourrait par exemple décentraliser les épreuves de pré-sélection dans chaque Etat membre. Ces épreuves seraient suivies par le concours au niveau communautaire pour les candidats ayant réussi les pré-sélections.

6.5.11. On pourrait également améliorer la pratique des concours par spécialité avec description plus précise des postes. En plus, ces concours pourraient être utilisés pour faciliter le recrutement de candidats plus âgés qui présentent une expérience professionnelle plus poussée. Ils pourraient également être organisés au niveau interinstitutionnel.

6.5.12. Egalement encore - et en ayant à l’esprit que les hypothèses mentionnées ne sont pas exclusives l'une de l'autre - on pourrait songer à des concours par langue. De tels concours, qui ont déjà été organisés par le Conseil et le Parlement européen, permettraient d'assurer la neutralité et une articulation des épreuves par rapport aux différences culturelles et professionnelles qui existent entre les Etats membres, et auraient en plus l‘avantage indéniable de permettre de combler des déficits existants ou possibles dans l’organigramme en ce qui concerne certaines langues. Bien entendu, cette proposition ne saurait être réalisée aux dépens de la qualité du recrutement.

Les listes de lauréats

6.5.13. Des correctifs devraient aussi être introduits afin de surmonter une autre pratique douteuse suivie par la Commission en matière de recrutement.

6.5.14. En effet, à l'heure actuelle, la Commission ne suit pas le système visant à mettre au concours un nombre déterminé de postes et à établir une liste de lauréats selon l'ordre purement méritocratique sortant des résultats spécifiques du concours.

6.5.15. La pratique de la Commission consiste par contre à établir et publier[182] tout simplement

[182] Par ailleurs, cette publication n'est faite que depuis quelques mois et sous la pression du Médiateur européen (v., tout dernièrement, les listes publiées dans le JO C 187 du 3 juillet 1999, p. 21 et suivantes).

une "liste de réserve", à savoir une liste des lauréats selon un ordre purement alphabétique dans laquelle on peut rechercher cas par cas - avec beaucoup de discrétion et sans motivation spécifique - le lauréat destiné à occuper l'un ou l'autre poste (art. 30 du Statut).

6.5.16. L'incertitude totale sur le moment et le critère du choix, ainsi que l'absence de publicité et de motivation de la décision, rendent ce système tout à fait insoutenable. Il se prête en effet à des pratiques douteuses, non transparentes et non nécessairement respectueuses des droits des candidats, qui - tout en ayant réussi un concours difficile - sont encore obligés pendant des mois, voire des années, de parcourir les couloirs de la Commission dans l'espoir de recueillir quelques nouvelles utiles ou (encore mieux pour eux) de trouver... le bon chemin.

6.5.17. Les arguments qui ont été avancés à l'appui de ce système se fondent d'une part sur la nécessité de pouvoir choisir le lauréat qui présente un profil correspondant aux exigences de l'une ou l'autre Direction générale, et d'autre part sur le risque que - à la lumière de la pratique actuelle - un critère purement méritocratique mènerait à un excès de présence de certaines nationalités au détriment d'autres.

6.5.18. Ce dernier argument exprime une préoccupation qui devient de plus en plus exagérée et qui pourrait être davantage surmontée si le système actuel de concours était modifié dans le sens indiqué plus haut, c'est-à-dire, par exemple, via des concours par langue.

6.5.19. Quant à l'autre argument, il faudrait tout d'abord rétablir le principe (de bonne administration) selon lequel le lauréat est nommé fonctionnaire de la Commission et non pas d'une Direction générale, et que donc celle-ci en choisissant elle-même sur la liste ne devienne pas « propriétaire » de ce fonctionnaire. Cela permettrait de réduire l'arbitraire et de respecter le critère des mérites sans lier le choix aux exigences (parfois discutables ou artificielles) d'une Direction générale particulière.

6.5.20. On pourrait, en plus, songer à la possibilité d'établir des listes de mérite par spécialité. Et l'on pourrait même à la limite prévoir des dérogations à l'ordre de mérite, pourvu qu'elles soient décidées sur la base d'une motivation précise et objective, et justifiée par l'intérêt du service, comme d'ailleurs la jurisprudence de la Cour de justice le permet[183].

6.5.21. En tout cas, même si dans l'immédiat on était obligé de maintenir le système actuel, celui-ci devrait être révisé, éventuellement par une modification de l'art. 30 du Statut, dans le sens d'une véritable transparence. En particulier, la liste d'aptitude devrait être rendue publique, de même que les choix opérés dans chaque cas et les motivations y afférentes.

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[183] Ainsi par exemple, l'arrêt du 15 décembre 1966, affaire 62/65, *Serio/Commission*, *Rec*. p. 813, prévoit que *"l'autorité investie du pouvoir de nomination, si elle a le droit de ne pas respecter dans ses choix l'ordre précis résultant du concours pour des raisons qu'il lui appartient d'apprécier et de motiver devant la Cour, elle n'en a pas pour autant la possibilité d'annihiler la notion même de concours en s'écartant substantiellement du résultat de celui-ci sans de sérieuses raisons"*. Dans le même ordre d'idées, l'arrêt du 18 décembre 1986, affaire 246/84, *Kotsonis/Conseil*, *Rec*. p. 3989, prévoit que *"aux termes de l'article 30 du statut, l'autorité investie du pouvoir de nomination choisit sur la liste d'aptitude résultant du concours les candidats qu'elle nomme aux postes vacants … cette autorité a le droit de ne pas respecter dans ses choix l'ordre précis résultant du concours, pour des raisons qu'il lui appartient d'apprécier et de motiver devant la Cour … Il s'ensuit que l'administration n'est pas en toute circonstance tenue de nommer le lauréat classé premier, mais peut donner la préférence à un autre candidat figurant sur la liste d'aptitude, si elle a des raisons tenant à l'intérêt du service de procéder ainsi"*.

Les concours internes

6.5.22. Le concours externe n'est pas le seul moyen de recrutement des fonctionnaires de la Commission. Il faut en particulier mentionner les concours internes (article 29, paragraphe 1, lettre b) du Statut) organisés notamment pour la "titularisation" du personnel temporaire ainsi que pour le passage d'un fonctionnaire d'une catégorie à une autre (article 45, paragraphe 2 du Statut).

6.5.23. En termes généraux il convient de souligner que ces concours présentent toujours des risques d' "endogamie", compte tenu de la connaissance personnelle des candidats. Il faudrait donc envisager la possibilité de les supprimer ou de pallier tout au moins cet effet pervers, par des mécanismes qui assurent une transparence et une sélectivité véritables.

6.5.24. Cela dit, concernant spécifiquement les concours internes pour la "titularisation" du personnel temporaire, la Commission semble décidée à ne plus les organiser, à partir de l'année 2000[184].

6.5.25. En ce qui concerne le passage des fonctionnaires d'une catégorie à une autre, on pourrait maintenir le concours interne. Dans le cas où la Commission déciderait d'abandonner le système actuel également pour cette hypothèse, elle devrait tout de même accorder aux fonctionnaires candidats souhaitant changer de catégorie certains droits d'accès aux concours généraux, par exemple via des dérogations en matière d'âge, mais surtout par un système de quotas de postes réservés. Il faudrait, par ailleurs, que les candidats à ces postes atteignent un minimum de points afin de pouvoir figurer dans la liste des lauréats.

Le déroulement de la carrière

6.5.26. Dans la fonction publique européenne la carrière se déroule normalement par des promotions aux grades supérieurs et, à l'intérieur de ceux-ci, par des avancements d'échelon, avec également la possibilité de passer d'une catégorie à l'autre.

6.5.27. Des mécanismes particuliers, comme on le verra, sont prévus pour certains grades et fonctions.

Evaluation et promotion

6.5.28. Selon les règles statutaires, la progression et le développement de la carrière sont liés à un système d'évaluation/notation et de promotion.

6.5.29. En fait, les promotions sont attribuées par l'Autorité investie du pouvoir de nomination (AIPN) parmi les fonctionnaires justifiant d'un minimum d'ancienneté dans leur grade, sur la

[184] Voir à ce propos le rapport Williamson, qui préconise l'abolition de ces concours. La question se pose par ailleurs de savoir comment parvenir à ce but, étant donné que la jurisprudence *Bataille* citée ci-dessus permet justement aux agents temporaires de se présenter aux concours internes au même titre que les autres candidats ; une modification statutaire est à envisager.

base d'un examen comparatif des mérites des fonctionnaires ainsi que des rapports de notation périodiques dont ils ont fait l'objet (art. 45 du Statut). Ces rapports sont établis au moins tous les deux ans et au regard des compétences, du rendement et de la conduite dans le service de chaque fonctionnaire (art. 43)[185].

6.5.30. L'avis du comité de promotion doit se fonder, dans son choix, sur les mérites et sur les rapports de notation.

6.5.31. Le poids des mérites est décisif. Le pouvoir d'appréciation de l'AIPN ne peut pas mettre en cause ce poids, mais s'exercer seulement par rapport à la détermination des différents mérites (par exemple, recommandations des directeurs généraux, acceptation de tâches plus complexes ou comportant plus de responsabilités, pratique de la mobilité, etc.). Ainsi, cette autorité a le pouvoir statutaire, en décidant des promotions, de faire un choix sur la base d'un examen comparatif des mérites des candidats promouvables établi par la méthode qu'elle juge la plus appropriée[186].

6.5.32. Le rapport de notation constitue un élément indispensable d'appréciation chaque fois que la carrière du fonctionnaire est prise en considération par l'AIPN en cas de promotion[187]. Mais, comme on vient de le voir, celle-ci n'est pas tenue de se baser uniquement sur ce rapport, car elle peut également fonder son appréciation sur d'autres aspects des mérites des candidats, comme des informations concernant leurs situations administrative et personnelle, informations de nature à relativiser l'appréciation portée uniquement sur la base des rapports de notation[188].

6.5.33. Dans ce contexte de valorisation des mérites, l'ancienneté dans le service et l'âge ne constituent que des critères subsidiaires pour départager des candidats à mérite égal[189].

6.5.34. L'application juridique de ce système appelle quelques remarques. En effet, la clarté des principes est parfois sacrifiée notamment par les marges d'appréciation des mérites et par les carences des rapports de notation.

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[185] La procédure de promotion est entamée par chaque Directeur général, qui est responsable de l'examen des mérites de tous les promouvables de son service, en vue de préparer les propositions de promotion. Les propositions des Directeurs, par ordre de priorité, font l'objet d'un affichage dans tous les services. Elles sont transmises au Comité des promotions (présidé par le Secrétaire Général et composé par les Directeurs généraux et vingt représentants du personnel), lequel établit les projets des listes des plus méritants à travers une méthode d'évaluation par points comprenant: priorités exprimées par les Directions générales (ces points de priorités sont discrétionnaires et ils sont normalement vraiment décisifs), rapport de notation, ancienneté de grade et de catégorie, âge. D'autres critères ne sont pas chiffrés: mobilité, égalité de chances et toute autre situation. L'AIPN fait son choix parmi les fonctionnaires jugés les plus méritants, en tenant notamment en compte un certain équilibre entre les Directions générales et les priorités exprimées par celles-ci. La décision de promotion fait l'objet d'un acte individuel signé par le Directeur général du personnel et transmis à l'intéressé, qui peut y joindre toutes observations qu'il juge utile (art. 43 du Statut).

[186] Voir, à ce propos, l'arrêt du 1er juillet 1976, affaire 62/75, *De Wind/Commission*, *Rec*. p. 1167.

[187] Voir les arrêts du 5 juin 1980, affaire 24/79, *Oberthür/Commission*, *Rec*. p. 1743 et du 17 décembre 1981, affaire 151/80, *de Hoe/Commission*, *Rec*. p. 3161.

[188] Arrêt du Tribunal de première instance du 25 novembre 1993, T-89/91 et T-89/92, *X/Commission*, *Rec***.** II-1235.

[189] Voir l'arrêt du 14 juillet 1983, affaire 9/82, *Ohrgaard et Delvaux/Commission*, *Rec.* p. 2379: *"en matière de promotion, l'ancienneté ne constitue qu'un critère d'appréciation parmi d'autres et ne saurait en aucun cas primer le mérite des candidats"*.

6.5.35. Il est notoire, par exemple, que les rapports de notation - compte tenu notamment de l'absence d'une véritable culture d'évaluation - présentent un certain nombre d'imperfections et sont parfois mal élaborés ou imprécis.

6.5.36. Il faut également rapeller que les Directions générales ont des approches différentes en la matière. Il semblerait, en outre, que les entretiens précédant l'élaboration des rapports ne sont pas sérieusement préparés.

6.5.37. De plus, la notation des résultats de tout fonctionnaire a tendance à être généralement exagérée, si bien qu'au moment des promotions, il devient difficile d'établir une véritable distinction. Ainsi, en l'absence d'éléments fiables de différenciation, le critère déterminant risque d'être l'âge et la durée de service, ce qui, comme on l'a vu, est de plus contraire au Statut.

6.5.38. On peut encore remarquer que la comparaison initiale des mérites se fait par Direction et même pas par Direction générale, ce qui implique le risque d'une altération des échelles des valeurs si le choix est opéré sur la base d'un certain nombre de promouvables pour chaque Direction.

6.5.39. Le résultat de ces défauts en est que le système de promotion n'est pas - ou en tout cas n'est pas ressenti - comme fiable et équitable.

6.5.40. Une révision du système des rapports et promotions serait donc nécessaire pour réaffirmer la capacité de sélection et rétablir la crédibilité du régime des carrières au sein de la Commission (sans oublier que ces mêmes problèmes existent aussi dans les autres institutions). Il y a lieu notamment de réviser la forme des rapports en simplifiant leurs rubriques, en établissant des critères d'évaluation plus ponctuels et homogènes, en recommandant des notes plus différenciées et des commentaires plus circonstanciés et mieux motivés, en encourageant une participation plus active et responsable des fonctionnaires intéressés.

6.5.41. On pourrait même songer à des solutions plus radicales, comme par exemple prévoir un système de concours internes pour un pourcentage limité de postes disponibles. Et cela notamment pour les postes dits d'encadrement (« middle management »), pour lesquels les nominations sont décidées selon une procédure souple et donc exposées à quelques risques de favoritisme**.** En effet, ces nominations sont gérées essentiellement par le directeur général compétent, qui a seul le droit de formuler la proposition et de l'exposer au Comité consultatif de nomination (dont on parlera plus bas). Le Commissaire compétent confirme la nomination (à laquelle il ne pourrait s'opposer que sur la base de motivations précises), tandis que le directeur auxquel le poste sera rattaché n'est même pas consulté formellement. Par contre, pour les autres nominations des cadres dirigeants, une gestion plus collégiale de la nomination est toujours assurée.

6.5.42. Le concours envisagé - qui devrait être sur titres et épreuves et confié à des jurys externes ou tout au moins présidés par une personnalité externe - permettrait aux fonctionnaires qui veulent accélérer leur carrière ou qui se considèrent appréciés de manière inadéquate par la hiérarchie, de tenter leurs chances. En plus, ce système pourrait pousser la hiérarchie à formuler avec plus d'attention les rapports de notation pour éviter le risque de

comparaisons gênantes.

La nomination des hauts fonctionnaires

6.5.43. La nomination des hauts fonctionnaires (A1 et A2) constitue un cas particulier, pour lequel il faut différencier les deux cas de figure prévus à l'article 29 du Statut. Le premier paragraphe de cette disposition concerne la filière normale de promotion applicable à tous les fonctionnaires : d'abord promotion et mutation, ensuite concours interne, par transfert en provenance d'autres institutions et enfin, concours externes ; tandis que le deuxième paragraphe s'applique uniquement à ces hauts fonctionnaires, dans le sens que *"une procédure de recrutement autre que celle du concours peut être adoptée"*. Dans la pratique, c'est le premier paragraphe, à savoir la "filière" interne et interinstitutionnelle, qui est d'abord utilisé. L'autre filière qui peut conduire à nommer des candidats externes, n'est utilisée qu'à titre tout à fait subsidiaire.

6.5.44. Dans le cas étudié, l'autorité investie du pouvoir de nomination est toujours le Collège des Commissaires. Pour les grades A1, la procédure est simplement orale, la décision étant adoptée en séance sur proposition du Commissaire responsable pour le personnel. Pour les grades A2, il est aussi prévu un avis du Comité consultatif des nominations (CCN), qui est présidé par le Secrétaire général et composé du Chef de cabinet du Commissaire responsable pour le personnel, du directeur général du personnel et de trois autres directeurs généraux (et trois suppléants)[190].

6.5.45. De telles nominations, comme tout le monde le sait, sont plus que toutes les autres strictement liées aux exigences du respect des "équilibres géographiques", auxquelles on a déjà fait plusieurs fois référence.

6.5.46. Sans vouloir méconnaître de telles exigences, il faut toutefois signaler qu'au fil des années le système a révélé ses limites et des risques importants: des critères de choix discutables et non nécessairement liés aux compétences et aux expériences requises pour le poste, une sorte de "nationalisation" du poste (et même des services via des postes "à drapeau") suite à de longues permanences dans celui-ci de la même personnalité ou de personnalités de la même nationalité.

6.5.47. Il faudrait donc établir des règles ou pour le moins un code de conduite pour le recrutement de ces fonctionnaires avec un certain nombre de critères objectifs et transparents, en vue de limiter les risques de dérapages et marquer le début d'une inversion de tendance. Ainsi, concernant le poids des équilibres nationaux, on pourrait penser à une accentuation progressive de la flexibilité dans le système actuel des "quotas", à une limitation temporelle du mandat, à l'interdiction de nommer un successeur de la même nationalité, etc. Quant aux modalités de recrutement, il faudrait introduire - même à l'intérieur de ces quotas - des critères de sélection plus rigoureux et des procédures plus transparentes.

[190] On pourrait se demander si la présence d'un représentant du personnel dans le Comité ne serait pas opportune, notamment pour assurer davantage de transparence à ses travaux et compte tenu de la présence du chef de cabinet du Commissaire responsable pour le personnel.

Les projets de la nouvelle Commission

6.5.48. La Commission désignée vient de reprendre certaines de ces idées dans ses premières prises de position[191]. En effet, elle a énoncé l'intention de soumettre les procédures de nomination pour les fonctions de grade A1 et A2 "*à des règles strictes et transparentes qui garantissent... le plus haut degré d'expertise et de compétence"*, en s'inspirant *"des bonnes pratiques en vigueur dans certains Etats membres*".

6.5.49. A cette fin, la procédure suivante est envisagée: publication des avis de vacances d'emploi; appréciation des candidatures lors d'une première phase de sélection; établissement d'une grille d'évaluation claire et transparente pour l'audition des candidats (se référant aux capacités de *management*, à la connaissance de la gestion de ressources humaines et financières, à la connaissance du domaine, etc.); entretien approfondi du CCN avec les candidats retenus; évaluation de chaque candidat; avis du CCN et rédaction d'une *short-list* motivée; audition par les Commissaires des candidats retenus par le CCN sur la *short-list*; nomination en Commission.

6.5.50. Concernant en particulier les nominations internes et interinstitutionnelles, il est prévu que dans les entretiens avec les candidats le CCN soit composé des membres habituels susvisés, élargi pour les grades A/1 à un ou deux Directeurs généraux compétents dans le domaine concerné par le poste à pourvoir; et pour les A/2 au Directeur général concerné. Dans les deux cas le CCN fait appel à une expertise externe, ce qui semble signifier qu'on sollicitera un avis technique d'une personnalité extérieure.

6.5.51. L'avis du CCN donne lieu à une *short-list* motivée, qui est transmise avec les fiches d'évaluation et le CV de chaque candidat retenu par les Commissaires. Il faut par ailleurs noter que cette pré-sélection, du fait de son caractère entièrement interne, évoque plutôt l'idée d'une cooptation de la part de la corporation. Il serait par contre préférable qu'au moins le Commissaire responsable y participe. Cette participation serait également opportune lors de la définition du profil du poste et des tâches à exercer.

6.5.52. Avant toute proposition de nomination, comme on l'a déjà souligné, une audition des candidats retenus doit avoir lieu. Elle est menée, pour les postes de grade A/2, par le seul Commissaire responsable du secteur concerné; pour les A/1, par ce Commissaire et par le Commissaire chargé du personnel et de l'administration.

6.5.53. La décision de la Commission est prise, pour les A/1, sur la base de l'avis motivé du CCN et de la proposition motivée du Commissaire chargé du personnel et de l'administration, en accord avec le Président et le Commissaire responsable du secteur concerné; pour les A/2 la proposition est formulée d'un commun accord par ce Commissaire et par le Directeur général concerné. Il serait par ailleurs opportun que les propositions de nomination soient aussi accompagnées par des renseignements adéquats au collège sur les autres candidats insérés dans la *short-list*.

[191] Voir le point 4 (portant les "Règles de conduite pour les nominations pour les fonctions de grade A1 et A2") du document distribué par la Commission nouvelle le 12 juillet 1999 sous le titre: "Fonctionnement de la Commission".

6.5.54. Concernant le recrutement externe, on remarquera d'abord que ce document ne prévoit pas la possibilité de procéder au recrutement sur la base d'un contrat de durée déterminée, ce qui pourrait être parfois préférable.

6.5.55. Cela dit, la procédure qu'on vient de décrire reste intégralement d'application, sauf qu'une publicité plus large est prévue pour les appels à candidatures.

6.5.56. Quant aux profils des candidats, le projet exige 15 années minimum d'expérience professionnelle de niveau équivalent à la catégorie A, après l'obtention du diplôme donnant accès à cette catégorie. Parmi ces 15 années, une expérience appropriée de 5 années minimum dans le domaine concerné doit être prouvée. De plus, une expérience concrète dans des fonctions de *management* doit être démontrée.

6.5.57. Il convient de souligner à cet égard que la période de 15 années d'expérience professionnelle est plus courte que celle qui doit s'écouler normalement pour les fonctionnaires qui aspirent à une promotion aux grades en question. Sans vouloir faire de procès d'intention, on ne peut pas cacher les risques de « parachutage » qu'un tel système représente, surtout si on considère que les 5 années d'expérience dans le domaine spécifique correspondent exactement au mandat d'un Commissaire et donc, des membres de son cabinet. Il serait opportun pour le moins d'allonger la période de 5 années.

6.5.58. Enfin, la prévision éventuelle d'une période de stage probatoire suscite également quelques perplexités. En effet, dans le cas des nominations internes, le fait de soumettre à une telle épreuve un fonctionnaire qui est dans l'administration depuis de nombreuses années serait tout à fait étonnant. Pour les candidats externes, ce stage serait non seulement inexplicable, compte tenu de la procédure de nomination décrite ci-dessus, mais aussi franchement dissuasif, compte tenu des risques de carrière que les intéressés seraient tenus de prendre.

La cessation de la carrière.

6.5.59. La carrière des fonctionnaires se termine par démission volontaire ou d'office, retrait d'emploi dans l'intérêt du service, licenciement pour insuffisance professionnelle, révocation, mise à la retraite, décès[192].

6.5.60. Aux fins de ce chapitre, c'est le licenciement pour insuffisance professionnelle qui présente le plus d'intérêt (pour la révocation, v. les procédures disciplinaires plus loin).

L'insuffisance professionnelle

6.5.61. A cet égard, la première remarque est que les insuffisances ou les fautes professionnelles constatées dans la pratique, ne semblent que très rarement traduites par la hiérarchie en mesures appropriées, comme le prouve la quasi absence de précédents ainsi que la très rare jurisprudence. Il faut reconnaître par ailleurs que la discipline statutaire de la matière ne constitue pas un modèle de clarté. La seule disposition pertinente du statut (l'article 51) se borne à prévoir les mesures qui peuvent être prises dans le cas où un fonctionnaire fait

[192] Voir l'article 47 du Statut .

preuve d'insuffisance professionnelle (licenciement ou même classement à un grade inférieur).

6.5.62. Certains éléments d'ambiguïté sont en outre introduits par la tendance assez répandue à confondre insuffisance professionnelle et faute disciplinaire. En réalité, bien qu'à l'une et à l'autre le Statut applique la même procédure (Annexe IX), l'insuffisance professionnelle est un cas distinct de la faute disciplinaire. Alors que la première se rapporte à des exigences de qualité du travail, de rendement et d'engagement, les questions disciplinaires concernent les violations des obligations du fonctionnaire. Celles-ci se traduisent normalement dans un acte ponctuel répréhensible sur le plan disciplinaire, l'autre se présente plutôt comme la conjugaison de comportements, à apprécier de façon globale[193].

6.5.63. Dans un premier stade, l'insuffisance professionnelle à proprement parler demande une approche constructive, visant plutôt à résoudre les difficultés qu'à poursuivre des finalités punitives. Cela signifie par exemple que l'administration devrait tout d'abord vérifier si l'insuffisance est "structurelle" ou si elle ne dépend pas de la nature des tâches confiées au fonctionnaire (par exemple, tâches de direction). Il faudrait également vérifier si l'insuffisance ne cache pas des formes de démotivation survenue dans le temps, suite à un intérêt limité pour les tâches qui ont été confiées au fonctionnaire (et dans ce cas on pourrait y remédier par le transfert dans une autre fonction) ou à d'autres difficultés fonctionnelles ou personnelles.

6.5.64. Si malgré ces efforts et éventuellement après transfert à un autre poste ou dans d'autres services, l'insuffisance persiste, il ne faudrait pas hésiter à faire application de l'art. 51. A ce propos, il convient de rappeler que, bien que cela ait été oublié parfois dans la pratique, l'art. 50 ne peut être utilisé dans l'intérêt de l'administration que lorsque le profil d'un directeur général ou d'un directeur ne correspond pas à l'intérêt du service.

6.5.65. La difficulté de prouver l'insuffisance professionnelle ne saurait être évoquée pour éviter de prendre une telle décision, compte tenu des garanties et des procédures existantes. Il faut rappeler en effet que tout le personnel statutaire est soumis au rapport de stage, aux rapports de notation successifs ou à une autre forme d'évaluation. Une mauvaise qualification dans certaines rubriques de ces rapports constitue un début de preuve d'insuffisance professionnelle. Les mauvaises qualifications qui se succèdent dans le temps et sur différents postes, devraient conduire à l'application de l'article 51[194].

6.5.66. Pour finir, il convient de souligner que les difficultés d'application de l'art. 51 dérivent aussi du fait que l'insuffisance professionnelle n'est pas associée à des mesures proportionnées. En effet, le licenciement et même la rétrogradation constituent (ou peuvent

[193] V. Rapport Williamson, page 66 litt. Comme le déclare l'arrêt de la Cour de justice du 21 octobre 1980 (Affaire 101/79, *Vecchioli/Commission*, *Rec.* p. 3069), *"la spécificité de l'article 51… résulte en effet non seulement des motifs qui la justifient, mais également des mesures auxquelles elle conduit et dont la nature et les effets, différents de ceux de l'action disciplinaire, sont plus exactement adaptés à la situation qu'il y a lieu, dans l'intérêt du service, de corriger"*.

[194] Dans l'arrêt du 21 octobre 1980 (affaire 101/79, *Vecchioli/Commission*, cit. p. 3069) la Cour de justice a précisé que *"l'insuffisance professionnelle d'un fonctionnaire, au sens de l'article 51 du statut, doit être appréciée notamment au regard de sa compétence, de son rendement et de sa conduite dans le service, c'est-à-dire des éléments visés à l'article 43 du statut relatif aux rapports de notation périodiques, étant entendu que l'autorité compétente doit pouvoir prendre en considération l'ensemble de la carrière du fonctionnaire concerné"*.

constituer) des réactions excessives par rapport à la nature et à la gravité des défauts constatés.

6.6. Le statut juridique du personnel

6.6.1. L'intérêt de tous les Etats membres, ainsi que des Institutions elles-mêmes est de garder un corps de fonctionnaires indépendant et de la plus haute qualité. Le statut juridique du personnel a ainsi été établi en vue d'assurer des conditions et des incitations appropriées, pour rendre attrayante et compétitive la fonction publique européenne et en même temps imposer une série d'obligations cohérentes avec les fonctions que ce personnel est appelé à exercer dans une organisation de caractère indépendant et multinational.

Droits et avantages

6.6.2. Les droits dont jouit le personnel des Institutions communautaires correspondent dans une large mesure à ceux reconnus dans la presque totalité des Etats membres au personnel de la fonction publique.

6.6.3. Des conditions particulières sont prévues afin d'encourager l'entrée dans la fonction publique européenne et de tenir compte des difficultés que ce choix comporte, notamment en termes de déplacements à l'étranger.

6.6.4. Parfois des critiques s'élèvent à l'égard du régime accordé au personnel des Institutions communautaires. Mais, en réalité, elles découlent moins d'un excès présumé d'avantages, que du fait que ces avantages ne sont pas toujours justifiés en termes de quantité et de qualité du travail. Pour répondre à ces critiques, il y a lieu de procéder à une rationalisation des structures et à une distribution claire, transparente et efficace des tâches de chaque fonctionnaire.

Les immunités

6.6.5. Les "privilèges et immunités" dont bénéficient les fonctionnaires visent à protéger le caractère d'indépendance et d'autonomie de la fonction publique européenne. Il ne s'agit donc pas de "droits" des fonctionnaires, étant donné que les privilèges et immunités sont conférés exclusivement dans l'intérêt des Communautés et sont destinés uniquement à éviter qu'une entrave soit apportée au fonctionnement et à l'indépendance des Communautés. Chaque institution des Communautés est donc tenue de lever l'immunité accordée à un fonctionnaire ou autre agent dans tous les cas où elle estime que la levée de cette immunité n'est pas contraire aux intérêts des Communautés[195].

Devoirs et obligations

6.6.6. Le Statut se préoccupe d'énoncer les devoirs que le personnel des Institutions communautaires est tenu de respecter dans l'exercice de ses fonctions et aussi après la cessation de ces fonctions[196].

[195] Article 18, alinéa 2, du Protocole sur les privilèges et les immunités des Communautés européennes.
[196] Voir notamment les articles 11 à 23.

6.6.7. A cet égard, un code de conduite du personnel a été préparé par la Commission visant à éviter ou tout au moins à réduire les dérapages de la pratique. Il faut cependant constater que ses prescriptions sont essentiellement une répétition des dispositions statutaires et des principes déjà implicites qu'elles contiennent. En outre, ces textes ressemblent plus à des orientations morales qu'à des règles capables de se traduire dans une application pratique et efficace.

6.6.8. De plus, elles gardent le silence par rapport à certaines situations d'incompatibilités (au sens très large) que la pratique a révélées dans le temps. Cela est le cas, par exemple, des incompatibilités des acteurs de la procédure budgétaire, des personnes habilitées à préparer et à signer les contrats et de tout agent pouvant influer sur ces deux catégories de fonctionnaires. Pour ces cas, hormis l'application de l'article 14 du Statut des fonctionnaires[197], il n'existe pas de réglementation détaillée sur d'éventuels conflits d'intérêts (rapports de parenté ou d'affaires) qui peuvent surgir entre les fonctionnaires qui gèrent les dépenses et les tiers (personnes physiques ou morales, ainsi qu'associés, actionnaires ou administrateurs de société et autres sujets contractuels, comme par exemple les BAT).

6.6.9. Un autre exemple concerne les fonctionnaires communautaires en provenance de certains Etats membres où ils occupaient (avant leur prise de fonctions dans les institutions européennes) des postes de fonctionnaires nationaux. Ces fonctionnaires jouissent de certaines situations administratives assimilables à des congés spéciaux, ce qui leur permet de ne pas perdre leur condition de fonctionnaire national, de rentrer dans leur pays d'origine en regagnant leur ancienne place et même, parfois, de continuer à recevoir certaines primes associées à la condition de fonctionnaire national. De telles situations sont évidemment de nature à créer des problèmes d'inégalité et d'incompatibilité avec la condition de fonctionnaire communautaire.

6.6.10. Concernant finalement les incompatibilités après la cessation des fonctions, on doit rappeler que l'article 16 du Statut prévoit, dans son premier alinéa, que "*le fonctionnaire est tenu, après la cessation de ses fonctions, de respecter les devoirs d'honnêteté et de délicatesse, quant à l'acceptation de certaines fonctions ou de certains avantages*". Et le deuxième alinéa prévoit en effet que « *chaque institution détermine, après avis de la commission paritaire, les emplois dont les titulaires ne pourront, pendant une période de trois ans à partir de la cessation de leurs fonctions, exercer une activité professionnelle, rémunérée ou non, sans se soumettre aux dispositions ci-après* » (déclaration à l'institution et acceptation éventuelle par celle-ci). Jusqu'à présent la Commission (pas plus que d'autres institutions, du reste) n'a établi une telle liste d'emplois. En son absence les institutions sont aménées à traiter chaque cas de façon *ad hoc*.

La responsabilité des fonctionnaires

6.6.11. Les obligations imposées au fonctionnaire (ou à l'ancien fonctionnaire) ayant une nature et une portée très diversifiées, leur violation entraîne des conséquences également

[197] La disposition fait obligation au fonctionnaire, par ailleurs dans des termes assez laconiques, de déclarer d'éventuels intérêts de nature à compromettre son indépendance *("Tout fonctionnaire qui, dans l'exercice de ses fonctions, est amené à se prononcer sur une affaire ou traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance, doit en informer l'autorité investie du pouvoir de nomination").*

diversifiées.

6.6.12. S'agissant de manquements qui n'impliquent pas une faute du fonctionnaire, ces conséquences pourront se manifester, le cas échéant, lors du rapport de notation et des promotions.

6.6.13. Si, par contre, la violation est commise "volontairement ou par négligence" (art. 86 du Statut), une procédure disciplinaire sera ouverte, qui pourrait déboucher sur l'imposition de sanctions à la charge du fonctionnaire. Les articles 86-89 et l'Annexe IX du Statut établissent pour ces cas une discipline assez précise, énumèrent les sanctions disciplinaires et définissent les conditions matérielles et les modalités procédurales de leur application.

6.6.14. Une responsabilité pécuniaire est aussi prévue pour le préjudice éventuellement subi par les Communautés en raison de fautes personnelles graves commises par le fonctionnaire dans l'exercice de ses fonctions (art. 22 Statut). Ce principe est confirmé par le Règlement Financier (Titre V, art. 73-77) à propos des ordonnateurs, contrôleurs financiers, comptables et régisseurs d'avances, du fait qu'ils ont des responsabilités spécifiques dans la gestion des finances communautaires. Par ailleurs, ledit règlement se limite à énoncer le principe de la responsabilité car, quant aux conditions nécessaires pour l'engager, il se borne à renvoyer à l'art. 22 du Statut (voir Chapitre 4).

6.6.15. Enfin, il convient de rappeler que la violation des obligations imposées aux fonctionnaires peut entraîner une responsabilité pénale selon le droit des Etats membres où le comportement a eu lieu**.**

Les difficultés du système

6.6.16. Cela dit, on peut noter que le régime statutaire prévu pour les fautes du personnel apparaît assez clair et précis. De ce point de vue, on pourrait bien dire que la “route est balisée” pour réagir de manière adéquate à ces fautes. Par contre, le fonctionnement du système est loin d'être satisfaisant, comme le prouve la pratique de ces années.

6.6.17. Concernant le principe de la responsabilité patrimoniale, on peut remarquer que ce principe, au moins en ce qui concerne les gestionnaires des finances communautaires, n'a trouvé qu’une rare application.

6.6.18. La responsabilité pénale, à son tour, s'affirme avec beaucoup de difficultés en raison des limites imposées par les législations nationales (dans l'attente de l'entrée en vigueur des Conventions conclues entre Etats membres[198]) au caractère punissable des infractions portant atteinte aux intérêts communautaires (voir chapitre 5).

[198] On fait référence ici en particulier à l'Acte du Conseil du 26 mai 1997 établissant la Convention établie sur la base de l’article K.3 paragraphe 2 point c) du traité sur l’Union européenne, relative à la lutte contre la corruption impliquant des fonctionnaires des Communautés européennes ou des fonctionnaires des Etats membres de l’Union européenne (Journal Officiel n° C 195 du 25 juin 1997). Cette Convention, qui par ailleurs n'est pas encore en vigueur, oblige les Etats membres à considérer comme des infractions pénales au titre de la législation desdits Etats, certains comportements (corruption active et passive) portant atteinte aux intérêts communautaires et définis par la Convention elle-même.

6.6.19. Enfin, quant à la responsabilité disciplinaire, la mise en œuvre du système a révélé dans la pratique ses limites d'efficacité et de rapidité

6.6.20. Se limitant ici aux questions disciplinaires, on peut remarquer que la Commission elle-même – à partir de l'expérience acquise notamment au cours des dernières années, qui ont connu un nombre croissant de cas - envisage de proposer d'importantes modifications au régime actuel, afin de permettre une plus grande efficacité ainsi qu'une accélération des procédures, tout en respectant les droits de la défense.

6.6.21. Dans certains cas, une telle réforme nécessiterait une modification des textes statutaires. Dans d'autres, par contre, une meilleure application suffirait. Nous allons en mentionner brièvement les principaux aspects.

La procédure disciplinaire et ses carences

6.6.22. Il faut rappeler tout d'abord que - exception faite des sanctions tout à fait mineures - les sanctions sont infligées par l'Autorité investie du pouvoir de nomination (AIPN) après l'accomplissement de la procédure *ad hoc* décrite à l'Annexe IX du Statut.

6.6.23. En particulier, il est prévu que le conseil de discipline (dont on parlera d'ici peu) est saisi d'un rapport émanant de l'AIPN, laquelle doit indiquer clairement les faits reprochés et, s'il y a lieu, les circonstances dans lesquelles ils ont été commis. Le rapport (préparé par un fonctionnaire au moins du même niveau que le fonctionnaire incriminé) est transmis au président du conseil de discipline, qui le porte à la connaissance des membres de ce conseil et du fonctionnaire intéressé. A la fin de son examen, le conseil émet un avis sur la sanction que, selon lui, correspond aux faits. Cet avis est transmis au fonctionnaire intéressé et à l'AIPN. Celle-ci, après avoir entendu le fonctionnaire, décide de la sanction à appliquer. Tout au long de la procédure, l'Institution doit respecter les droits individuels du fonctionnaire et notamment les droits de la défense[199]. Le fonctionnaire doit donc être préalablement entendu et peut se faire assister, à tous les stades de la procédure, par un avocat[200], ce qui n'est pas possible pour l'administration[201].

6.6.24. Dans la pratique, cette procédure a révélé des sérieuses difficultés sous plusieurs aspects. Les règles concernant les conditions formelles et les modalités de la procédure, ainsi

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[199] Comme la Cour l'a précisé, *"les droits de la défense et le caractère contradictoire de la procédure disciplinaire doivent être respectés, non seulement devant le conseil de discipline, dans le cadre de la procédure prévue à l'alinéa 2 de l'article 87 et à l'annexe IX du statut, mais également devant l'autorité investie du pouvoir de nomination, dans le cadre de la procédure prévue à l'alinéa 1 du même article "* (arrêt du 19 avril 1988, affaire 319/85, *Misset/Conseil*, *Rec.* p. 1861). Voir aussi les arrêts de la Cour du 4 juillet 1963, aff. 32/62, *Alvis/Conseil*, *Rec.* p. 99; 8 juillet 1965, aff. jointes 27 et 30/64, *Fonzi/Commission* , id. p. 615; 7 mai 1969, aff. 12/68, *X./Commission*, id. p. 109; 17 décembre 1981, affaire 115/80, *Demont/Commission, id. p. 3147* .

[200] Ceci d'autant plus que l'article 4 de l'Annexe IX du Statut prévoit que « *devant le conseil de discipline, le fonctionnaire peut présenter des observations écrites ou verbales, citer des témoins et se faire assister d'un défenseur de son choix* ».

[201] Comme la Cour de justice l'a remarqué: *"l'article 4 de l'annexe IX autorise le fonctionnaire incriminé à être assisté devant le conseil de discipline par le défenseur de son choix, mais aucun droit semblable n'est reconnu pour l'audition par l'autorité investie du pouvoir de nomination"* (arrêt du 16 décembre 1976, dans l'affaire 124/75, *Perinciolo/Conseil*, *Rec*. p. 1953).

que la protection des droits individuels sont assez vagues et sommaires, ce qui ouvre la voie à des recours juridictionnels. Cela vaut dès l'ouverture de la procédure et de la phase d'instruction, à propos de laquelle on peut constater l'absence de base juridique statutaire et de réglementation adéquate.

Le conseil de discipline

6.6.25. Des problèmes se posent également quant à la composition et au fonctionnement du conseil de discipline. Dans le système actuel[202], ce conseil est composé d'un président et de quatre membres ayant au moins le même grade que le fonctionnaire incriminé. Ils sont tirés au sort annuellement sur deux listes établies respectivement par l'administration et le Comité local du personnel. La composition varie donc pour chaque cas, ce qui peut nuire à la continuité de son action ainsi qu'à la formation d'une " jurisprudence " administrative et d'une pratique commune.

6.6.26. Or, pour pallier ce problème, on pourrait songer à ce qu'au moins quelques membres du conseil soient nommés pour une durée minimale de trois ans, bénéficiant ainsi d'une certaine stabilité. En outre, pour assurer l'impartialité et la crédibilité des procédures, on devrait envisager une composition moins "interne" du conseil. A cet égard, l'annexe II du Statut exige en effet que les membres du conseil de discipline soient des fonctionnaires, mais la même exigence n'existe pas pour le Président. Celui-ci peut donc être une personne externe à l'institution, par exemple un ancien directeur général ou un ancien membre de la Cour de justice ou du Tribunal de première instance. Un conseil de discipline interinstitutionnel pourrait aussi être envisagé, ce qui constituerait un premier pas permettant de dépasser un certain phénomène d'endogamie.

6.6.27. La Commission envisage elle même de telles solutions et irait semble-t-il jusqu'à proposer de confier à un comité composé de personnalités extérieures la partie de la procédure qui se déroule actuellement devant le conseil de discipline. Le Comité pense que cette idée mérite d'être explorée, surtout en ce qui concerne les grades élevés.

6.6.28. Quant au fonctionnement du conseil de discipline, il faut remarquer qu'aucun représentant de l'AIPN ne participe aux travaux du conseil, ce qui constitue une anomalie. On devrait donc autoriser sa présence à toutes les phases de la procédure dans lesquelles le fonctionnaire et/ou son conseil sont présents.

La correspondance entre fautes et sanctions

6.6.29. De ce point de vue, on rappellera que l'actuel article 86 du Statut mentionne toute une série de sanctions disciplinaires, mais n'établit aucune correspondance entre faute et sanction.

6.6.30. Comme le Tribunal de première instance l'a déclaré, "*dès lors que la réalité des faits retenus à la charge d'un fonctionnaire est établie, le choix de la sanction adéquate appartient à l'autorité investie du pouvoir de nomination. Les articles 86 à 89 du Statut ne prévoyant pas de rapports fixes entre les sanctions disciplinaires y indiquées et les différentes sortes de*

[202] Voir articles 4 à 6 de l'Annexe II du Statut.

manquements commis par les fonctionnaires, la détermination de la sanction à infliger doit être fondée sur une évaluation globale, par l'autorité investie du pouvoir de nomination, de tous les faits concrets et circonstances aggravantes ou atténuantes propres à chaque cas individuel"[203].

6.6.31. Mais, en l'absence de tout "barème disciplinaire", c'est-à-dire d'une échelle des fautes et des sanctions correspondantes, le résultat pratique est que des sanctions très différentes peuvent être appliquées à des manquements identiques. Un cadre relativement fixe établissant une certaine correspondance aurait l'avantage de la cohérence et de la sécurité juridique.

La durée des procédures

6.6.32. La durée moyenne des procédures disciplinaires s'est révélée excessive. En effet, elle est d'à peu près 4 mois s'il n'y a pas de saisine du conseil de discipline et d'un peu plus de 12 mois en cas de saisine (1 mois pour l'audition de l'intéressé, 4 mois pour l'enquête disciplinaire et le rapport à l'autorité investie du pouvoir de nomination, 6 mois de travaux au sein du conseil de discipline et 1 mois pour la prise de décision par cette autorité). Sans oublier les recours juridictionnels qui s'ouvrent aux fonctionnaires et qui peuvent même avoir des effets suspensifs. Ces recours éloignent encore de quelques années la véritable conclusion des procédures disciplinaires.

6.6.33. Or, ces délais sont excessivement longs pour qu'on puisse considérer la procédure véritablement efficace et exemplaire, ce qui est encore plus évident pour les cas de fraude, lesquels nécessitent d'une rapidité toute particulière.

6.6.34. Il faut signaler en outre que la suspension que l'AIPN peut décider en cas de faute grave alléguée à l'encontre d'un fonctionnaire ne peut dépasser quatre mois; au delà de ce délai le fonctionnaire doit être réintégré. Ce qui implique - comme la Commission elle-même l'envisage – ou bien que ce délai soit allongé, ou bien que la disposition soit abrogée. Il faut rappeler par ailleurs qu'au titre de l'article 88 du Statut, en cas de poursuites de nature pénale, la procédure disciplinaire est suspendue jusqu'à ce que la décision rendue par la juridiction saisie devienne définitive.

6.7. Recommandations

La politique du personnel appelle d'importantes réformes. Le changement des pratiques et des procédures est la condition indispensable pour assurer l'efficacité de l'action de la Commission et préserver son rôle traditionnel de moteur de la construction européenne. La véritable question n'est pas de modifier profondément le système statutaire actuel, mais d'en appliquer correctement les règles et les principes.

La Commission devrait appliquer vigoureusement le principe de la valorisation des mérites. Ainsi la qualité de l'organisation toute entière s'améliore, une atmosphère positive se répand

[203] Arrêt du 17 octobre 1991, dans l'affaire T-26/89, *De Compte/Parlement.* Voir aussi, entre autres, l'arrêt du 5 février 1987, aff. 403/85, *F./Commission*, Rec. p. 645 ainsi que l'arrêt du Tribunal de première instance, du 26 novembre 1991, aff. T-146/89, *Williams/Cour des comptes***,** id. p. II - 1293.

à tous les niveaux de la hiérarchie et produit un effet d'exemplarité.

Dans cet esprit, la Commission devrait se doter d'une forte politique de carrière, pour stimuler l'engagement et les ambitions du personnel et éviter les risques de sclérose.

6.7.1. Des relations sociales et syndicales correctes à l'intérieur de la Commission sont essentielles. L'administration doit reconnaître le rôle des syndicats, mais de leur côté ceux-ci doivent éviter toute tentation de vouloir constituer une sorte de hiérarchie alternative et se concentrer sur les responsabilités essentielles qu'ils exercent pour le succès du processus de changement et de modernisation de la fonction publique européenne (62.34-38).

6.7.2. Le poids des équilibres nationaux à l'intérieur de la Commission devrait être réduit. A cette fin, il faudrait: favoriser une formation professionnelle visant à renforcer le caractère "européen" de la fonction publique dans les Institutions; encourager une véritable "multinationalisation" des cabinets; revoir le nombre et la répartition des tâches entre les Directions générales, en fonction des exigences réelles de l'Institution et non pas des équilibres nationaux ; développer la flexibilité des "quotas nationaux"; assurer une rotation plus fréquente du personnel (6.2.18-33).

6.7.3. La politique de formation et de reconversion professionnelle devrait être conçue comme un processus qui débute dès la période de stage et se développe de façon permanente et obligatoire, tout au long de la carrière du fonctionnaire. La Commission devrait consacrer davantage de moyens financiers aux actions de formation (6.3.6.-14).

6.7.4. La mobilité devrait être encouragée sans exceptions et au-delà d'un certain temps le changement de fonctions devrait être rendu impératif. Ceci implique que la polyvalence constitue un mérite apprécié et primé au moment des promotions. Par ailleurs, la mobilité devrait être une *condition sine qua non* pour accéder à des fonctions de direction ou de gestion du personnel (6.3.15-18).

6.7.5. La responsabilisation du personnel exige que les tâches de chacun soient clairement définies et que les efforts déployés et les résultats obtenus par chaque fonctionnaire pour accomplir les tâches qui lui sont confiées soient reconnus, encouragés et récompensés (6.3.19-22)

6.7.6. La décentralisation joue un rôle important pour renforcer le sens de la responsabilité. Mais elle implique que les tâches qui en constituent l'objet soient bien définies et effectives. Ainsi, la pratique de créer ou maintenir des postes auxquels ne correspondent pas de véritables responsabilités (et une charge de travail adéquate) doit être regardée comme contraire non seulement à la rationalité et à l'efficacité, mais aussi au principe de responsabilisation.

La décentralisation ne peut pas devenir synonyme de confusion. Il faut que le processus de décentralisation soit accompagné d'un renforcement de la programmation et de la coordination interne et qu'une véritable autorité de direction soit exercée (6.3.23-25).

6.7.7. Pour les "autres agents" de la Commission, et en particulier les agents temporaires, la pratique de la "temporalité ad infinitum" devrait être éliminée. Les agents temporaires

devraient être nommés sur des emplois permanents, ce qui les obligerait statutairement à partir dans un délai de trois ans maximum. Parallèlement, le tableau des effectifs concernant les postes temporaires devrait être progressivement réduit (6.4.22-27).

6.7.8. Le recours aux apports extérieurs devrait être réduit, de manière que la dépendance de l'Institution vis-à-vis du personnel externe devient toujours moins importante que le recours à ce personnel redevienne exceptionnel et que ses conditions et modalités soient mieux réglementées (6.428-41).

6.7.9. Le système des concours externes pour le recrutement du personnel de la Commission devrait être profondément revu, car au fil du temps le nombre des candidats s'est considérablement accru et les procédures suivies se sont révélées inadéquates. On pourrait envisager de décentraliser les épreuves de présélection dans chaque Etat membre, d'accroître la pratique des concours par spécialité avec description plus précise des postes, et d'organiser des concours par langue.

Afin d'éviter les pratiques non transparentes qui se produisent entre l'établissement de la liste de réserve et l'embauche, les candidats ayant réussi à un concours devraient figurer sur des listes de mérite reflétant les résultats du concours. Tout écart, lors du recrutement effectif, de l'ordre de la liste, devrait être dûment motivé et rendu public.

Les concours internes pour la titularisation du personnel temporaire devraient être supprimés. Il faudrait en revanche maintenir le concours interne pour le passage des fonctionnaires d'une catégorie à une autre (6.5.4.-25).

6.7.10. Une réforme du système des rapports et promotions est nécessaire pour réaffirmer la capacité de sélection et rétablir la crédibilité du régime des carrières. A cette fin, il faudrait renforcer la culture d'évaluation, réviser la forme des rapports et en simplifier les rubriques, établir des critères d'évaluation plus ponctuels et homogènes, recommander des notes plus différenciées et des commentaires plus circonstanciés et mieux motivés, encourager une participation plus active et responsable des fonctionnaires intéressés.

On pourrait même songer à un système de concours internes pour un nombre limité des postes disponibles, notamment pour les postes dits d'encadrement, pour lesquels les nominations sont décidées selon une procédure souple et donc exposées à des risques de favoritisme. Ce concours sur titres et examens confié à des jurys externes ou présidé par une personnalité extérieure - permettrait aux fonctionnaires les plus ambitieux et motivés de tenter leurs chances par une voie autre que celle de la promotion statutaire (6.5.28-42).

6.7.11. Au fil des années, les nominations des hauts fonctionnaires (A1 et A2) ont révélées des carences assez graves. L'établissement de règles ou pour le moins d'un code de conduite pour leur recrutement est une nécessité. Quant aux équilibres nationaux, on pourrait notamment penser à une progression la flexibilité des "quotas", à une limitation temporelle du mandat, à l'interdiction de nommer un successeur de la même nationalité. Quant aux modalités de recrutement, à l'intérieur même de ces quotas il faudrait introduire des critères de sélection plus rigoureux et des procédures plus transparentes.

Bien que des améliorations ultérieures s'imposent, quant à la procédure à suivre, aux critères et aux modalités de sélection, le Comité considère que les réformes envisagées par la Commission nouvelle vont dans la bonne direction (6.5.43-58).

6.7.12. L'insuffisance professionnelle devrait faire l'objet d'une règlementation statutaire plus claire et précise. Une procédure distincte de celle concernant les fautes disciplinaires devrait être instituée (6.5.61-66).

6.7.13. La pratique en matière de responsabilité disciplinaire devrait être corrigée. En effet, elle a révélé des limites graves d'efficacité et de rapidité, avec des conséquences négatives pour la fonction publique européenne et pour son image.

En particulier:

- les règles concernant les conditions formelles et les modalités de la procédure, ainsi que la protection des droits individuelles devraient être précisées;

- la composition du conseil de discipline devrait être beaucoup plus stable et moins interne à la Commission, notamment en ce qui concerne le président. Un conseil de discipline interinstitutionnel pourrait aussi être envisagé. L'idée d'externaliser entièrement la partie de la procédure qui se déroule actuellement devant le conseil de discipline mérite également d'être exploitée, surtout en ce qui concerne les grades élevés;

- la participation aux travaux du conseil de discipline d'un représentant de l'Autorité investie du pouvoir de nomination, pour le moins à toutes les phases de la procédure dans lesquelles le fonctionnaire et/ou son conseil sont présents, devrait être assurée;

- des barèmes disciplinaires établissant un cadre relativement fixe de correspondance entre fautes et sanctions, devraient être fixés pour éviter que des sanctions très différentes ne soient appliquées à des manquements identiques (6.6.11-34).

6.8. Annexes

I. Tableau sur le " budget formation " de la Commission
II. Tableaux concernant les programmes de formation non linguistique
III. Tableau budgétaire comprenant les effectifs des institutions communautaires
IV. Tableau budgétaire comprenant les effectifs de la Commission/fonctionnement
V. Tableau comprenant le personnel au service de la Commission au 31.12.1998
VI. Tableaux budgétaires comprenant les effectifs de la Commission/recherche et développement technologique
VII. Tableau comprenant le personnel externe de la Commission

Annexe I

6.9.

6.10. Budget Formation

	A07060 Formation non-linguistique	**A04030** Formation linguistique Interinstitutionnelle	**TOTAL**
1994	3.357.000	3.650.000	7.007.000
1995	3.662.000	4.061.000	7.723.000
1996	3.471.000	4.000.000	7.471.000
1997	3.035.000	3.725.000	6.760.000
1998	3.175.000*	3.730.000	7.539.000
1999	4.500.000	3.960.000	8.460.000
2000 (demandé)	5.500.000	4.150.000	9.650.000

* (non inclus deux actions particulières : formation SINCOM de la DG XIX et « analyse économique et financière » du SCR)

NB Les actions de formation dans le domaine de l'informatique sont financées à partir du Titre A5 du budget.

Annexe II (1)

	1998 (□)	1999 (□)	2000 (□)
Formation liée aux priorités de l'institution et au développement de la carrière	**944.000**	**1.045.000**	**1.200.000**
° Entrée en service	218.000	300.000	
° Développement de carrière et recyclage	251.000	250.000	
° Métiers spécifiques (jurys de sélection, sécurité au travail, formateurs internes, etc.)	262.000	250.000	
° Mainstreaming, égalité des chances	53.000	75.000	
°SEM et MAP 2000, finances, audit*	142.000	150.000	
° Actualités européennes	18.000	20.000	
Formation au management**	**375.000**	**1.250.000**	**1.600.000**
° Top management		250.000	
° Middle management		750.000	
° Autres managers		200.000	
° Approfondissement de certaines techniques		50.000	

* Plusieurs formations sont organisées en interne

** Les cours étant structurés différemment en 1998 il n'est pas possible de ventiler les cours de la même manière qu'en 1999 et 2000

Annexe II (2)

	1998 (□)	1999 (□)	2000 (□)***
Formation liée aux besoins spécifiques des services par rapport aux fonctions exercées	**981.000**	**1.225.000**	**1.500.000**
°Négociation	44.000	50.000	
°Conduite de réunions	26.000	50.000	
°Parler en public	62.000	60.000	
Lecture rapide/Mémorisation	43.000	40.000	
°Prise de notes	32.000	30.000	
°Techniques devant les médias	50.000	75.000	
° Information et Communication	52.000	50.000	
Gestion du temps	74.000	60.000	
°Gestion des projets	106.000	150.000	
°Economie - principes de base	84.000	90.000	
°Bibliothèque / Archives / Documentation	17.000	20.000	
°Actions individuelles spécialisées	301.000	350.000	
Analyse et rédaction	15.000	50.000	
° Service du client	0	100.000	
Divers	75.000	50.000	
Actions thématiques ciblées organisées par les DGs	**505.000**	**600.000**	**800.000**
Support	**370.000**	**380.000**	
Logistique	120.000	100.000	
Matériel technique et pédagogique	170.000	180.000	
Médiathèque	80.000	100.000	
TOTAL	**3.175.000**	**4.500.000**	**5.500.000**

*** Les chiffres pour 2000 sont purement indicatifs à ce stade

Annexe III

C. EFFECTIFS

Effectifs autorisés

Institutions	1998		1999	
	Emplois permanents	Emplois temporaires	Emplois permanents	Emplois temporaires
Parlement et Médiateur	3 490	620	3 491	611
Conseil	2 514	20	2 584	37
Commission :				
- fonctionnement	16 344	750	16 511	690
- recherche et développement technologique	3 598	114	3 638	74
- Office des publications	525	-	525	-
- Centre européen pour le développement de la formation professionnelle	52	29	52	29
- Fondation européenne pour l'amélioration des conditions de vie et de travail	83	-	84	-
Cour de justice	727	226	727	234
Cour des comptes	460	93	458	94
Comité économique et social et Comité des régions (et structure organisationnelle commune)	711	28	709	28

(Source : JO L 039 du 12 février 1999, p. 129)

Annexe IV

Section III - Commission

Fonctionnement

Catégories et grades	1999		
	Emplois permanents	Dont emplois permanents relevant de l'Agence d'approvisionnement	Emplois temporaires
A 1	28	-	-
A 2	194	-	22
A 3	554	2	32
A 4	1 323	3	154
A 5	1 240	1	133
A 6	898	2	41
A 7	998	-	-
A 8	100	-	-
Total	5 335	8	382
LA 3	54	-	-
LA 4	527	-	1
LA 5	486	-	2
LA 6	352	-	2
LA 7	448	-	8
LA 8	36	-	-
Total	1 903	-	13
B 1	786	1	46
B 2	668	2	52
B 3	852	1	58
B 4	526	3	31
B 5	467	-	-
Total	3 299	7	187
C 1	1 351	6	24
C 2	1 274	1	42
C 3	1 362	-	20
C 4	710	2	9
C 5	514	-	13
Total	5 211	9	108
D 1	463	-	-
D 2	230	-	-
D 3	70	-	-
D 4	-	-	-
Total	763	-	-
Total général	**16 511**	**24**	**690**

(Source : JO L 039 du 12 février 1999, p. 138)

Annexe V

Personnel au service de la Commission européenne au 31/12/1998										
Catégorie	**Lien statutaire ou contractuel**									
	FP	**FS**	**TC**	**TP**	**TT**	**TR**	**AUX**	**END**	**PriM**	**Totaux**
A	5.144	278	79	71	223	1.060	196	730		7.781
B	3.450	125	21	70	121	470	212			4.475
C	5.552	126	88	81	1	688	817			7.353
D	815	21	6	0	0	28	91			961
LA	1.764	69	0	73	3	0				1.909
PriM									568	568
Totaux	16.725	619	194	295	348	2.252	1.316	730	568	23.047

FP Fonctionnaire permanent
FS Fonctionnaire stagiaire
TC Agent temporaire Cabinet
TP Agent temporaire sur emploi permanent
TT Agent temporaire sur emploi temporaire
TR Agent temporaire sur emploi permanent (recherche)
AUX Auxiliaire
END Expert National Détaché
PriM Prestataire de services extra-muros

Annexe VI (1)

Recherche et développement technologique

Centre commun de recherche

Catégories et grades	1999		
	Cadres scientifique et technique	Cadre administratif	Total
A 1	1	-	1
A 2	10	1	11
A 3	38	8	46
A 4	177	13	190
A 5	150	8	158
A 6	167	3	170
A 7	137	2	139
A 8	13	1	14
Total	693	36	729
B 1	178	36	214
B 2	146	20	166
B 3	90	12	102
B 4	103	8	111
B 5	64	5	69
Total	581	81	662
C 1	233	147	380
C 2	56	31	87
C 3	47	24	71
C 4	29	22	51
C 5	29	32	61
Total	394	256	650
D 1	12	13	25
D 2	5	3	8
D 3	5	1	6
D 4	-	-	-
Total	22	17	39
Total général	**1690**	**390**	**2 080**

(Source : JO L 039 du 12 février 1999, p. 141)

Annexe VI (2)

Actions indirectes

Catégories et grades	1999					
	Emplois permanents			Emplois temporaires *Jet*		
	scientifiques et techniques	administratifs	Total	Scientifiques et techniques	administratifs	Total
A 1	1	-	1	-	-	-
A 2	17	2	19	-	-	-
A 3	71	8	79	2	-	2
A 4	278	27	305	5	4	9
A 5	245	24	269	11	3	14
A 6	129	17	146	3	-	3
A 7	76	4	80	-	-	-
A 8	9	2	11	-	-	-
Total	829	84	910	21	7	28
B 1	44	35	79	8	1	9
B 2	22	37	59	5	-	5
B 3	4	56	60	2	-	2
B 4	7	35	42	-	-	-
B 5	1	19	20	-	-	-
Total	78	182	260	15	1	16
C 1	-	90	90	-	-	-
C 2	-	90	90	-	-	-
C 3	-	106	106	-	-	-
C 4	-	87	87	-	-	-
C 5	-	45	45	-	-	-
Total	-	418	418	-	-	-
D 1	-	-	-	-	-	-
D 2	-	-	-	-	-	-
D 3	-	-	-	-	-	-
D 4	-	-	-	-	-	-
Total	-	-	-	-	-	-
Total général	**904**	**684**	**1 588**	**36**	**8**	**44**

(Source : JO L 039 du 12 février 1999, p. 143)

Annexe VII (1)

Le bilan 1998 par rapport à l'allocation initiale et à l'exécution 1997

Recours au personnel extérieur		Allocation 1998 Avant Déduction TCE	Différence	Exécution 1997	Différence 98/97
Ressources	Crédits 98 (1)	(2)	(3) = (1)-(2)	(4)	(5) = (1)-(4)
Auxiliaires	692	734	-42	775	-83
Intérimaires	296	244	52	360	-64
END	576	579	-3	564	12
Prestataires	407	286	121	398	9
TOTAL	**1.971**	**1.843**	**128**	**2.097**	**-126**

Annexe VII (2)

RESS.EXT. FINANCEES SUR LE TIT. A.7 (EX A-1) DU BUDGET 1998 ET SUR LES RESTES A LIQ.1997

(en homme/année) DOMAINE D'ACTIVITE	BILAN 1992	BILAN 1993	BILAN 1994	BILAN 1995	BILAN 1996	BILAN 1997	BILAN 1998
Marché intérieur	782	637	496	475	497	458	443
Espace social	512	729	549	521	369	301	258
Politique d'accomp.	405	376	314	273	239	201	193
Dévelop.économique et	164	135	130	111	103	121	125
Actions structurelles	0		0				
Politiques communes	78	95	70	50	35	56	37
Relations extérieures	407	434	414	410	463	466	407
Coordination	390	378	289	292	307	267	246
Finance et contrôle	56	35	36	35	38	36	35
Administration et	199	206	200	161	147	140	127
Informatique	0		0				
Linguistique	41	42	43	41	39	51	100
	0		0				
TOTAL	**3.034**	**3.067**	**2.541**	**2.369**	**2.237**	**2.097**	**1.971**

7. INTEGRITY, RESPONSIBILITY AND ACCOUNTABILITY IN EUROPEAN POLITICAL AND ADMINISTRATIVE LIFE

TABLE OF CONTENTS

ACCOUNTABILITY AND POLITICAL RESPONSIBILITY

INTRODUCTION – THE CULTURAL FRAMEWORK

7.1. Opening remarks

7.1.1. In accordance with the Committee's mandate, the bulk of this report examines concrete aspects of the Commission's systems, practices and procedures. It is therefore able to arrive at recommendations aimed at resolving particular weaknesses. However, as the mandate also reflects, such weaknesses cannot be dealt with in isolation, but must be set against the backdrop of a particular administrative "culture" prevailing in the Commission.

7.1.2. It is impossible to discuss the Commission's culture in the same way as one can discuss, say, financial control arrangements or contracting procedures, as a culture is, by its very nature, intangible and lies beyond the scope of explicit rules, procedures and legislation. Nevertheless, it is equally impossible – and utopian to boot - to ignore the influence that a given collective culture may have over the manner in which rules, procedures and legislation operate in practice.

7.1.3. This chapter attempts no systematic analysis of the prevailing culture in the Commission. Though perhaps entertaining, it would serve little purpose to do so. For present purposes, it suffices that the central "cultural" area of concern has already been identified: integrity, responsibility and accountability, going hand-in-hand with transparency and openness.

7.1.4. The concept of responsibility, as discussed in the Committee's first report, is an amalgam of a range of related ideas, ranging from personal integrity and good conduct to the operation of formal processes of institutional accountability. The objective of this chapter is to look at these related ideas with a view to finding ways of reinforcing them and making them work. The exercise is based on the premise that it is not possible to legislate for a culture of integrity, responsibility and accountability, but that it is possible to take action to nudge a organisational culture in a positive direction by identifying its core values. It should be remembered that the tools for doing so – the classic mixture of "carrot and stick", in the form of rules, codes, training, career incentives, sanctions, etc. – are not ends in themselves, but means to an end. Too often in bureaucracies and organisations everywhere, respect for form (e.g. the existence of codes of conduct, of sanctions for misconduct, training schemes, etc.) is confused with respect for substance. The Committee is fully aware, in making the proposals included in this chapter, that their value can only ultimately be judged by their long term effects.

7.1.5. This chapter falls into three main subject areas:

- Standards of personal conduct applying to commissioners, their cabinets, director-generals and the officials working under them.

- The chain of responsibility from the President of the Commission, through the Commission itself to individual commissioners and their *cabinets*, thence to the senior levels of the hierarchy and the officials and other agents below them.

- Institutional accountability of the Commission, commissioners and officials vis-à-vis

the democratic institutions of the European Union, notably the European Parliament, both positively (giving account) and negatively (being held to account).

7.2. The fundamentals

7.2.1. "Corporate culture" is made up of both the tangible (rules, structures, working habits) and the intangible (attitudes, perceptions, mentalities). The cultural foundation of the EU institutions and their administrations is provided by shared ethical and political values and priorities flowing primarily from the concept of human dignity. These have been given formal expression in various international and European acts, particularly the European Convention on Human Rights and in national constitutional rules and traditions. They are based on the principles of democracy and respect for the citizen and on the rule of law, now confirmed by Articles 1 *(ex A)* and 6 *(ex F)* of the TEU, which read:

> "This Treaty marks a new stage in the process of creating an even closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen"
>
> and
>
> *"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States".*

7.2.2. Building on this basis, fundamental concepts of ethics and standards of behaviour are increasingly being formalised in written rules and codes of conduct, drawn up for example by international organisations, such as the OECD, as well as the institutions of the Community and of the Member States. From the outset, these concepts should be reflected in sound, therefore simple, administrative procedures, structures and working methods and in a clearly defined set of competences and responsibilities.

7.2.3. Within the institutional structure of the European Union, the European Commission is uniquely vested with a mix of legislative, executive and administrative tasks. These have grown in complexity due to the Community's geographic enlargement and the diversification of its activities. In contrast to the Council, where national interests are transformed, for better or for worse, into Community interests, the Commission is the prime actor in the preservation of the Community spirit and in strengthening the "*acquis communautaire*". Thanks to its right of legislative initiative, and the substantial direct and delegated legislative powers assigned to it, and to its function as the Community's executive, it remains the engine behind the development of Community policy and Community law.

7.2.4. The growing role of the European Parliament has made significant changes to the Commission's constitutional position. The Commission must now come to terms with both Council and Parliament where these share legislative competence, but more importantly, it must

familiarise itself with a more stringent notion of the accountability inherent in parliamentary control. Recent events have highlighted that the Commission can no longer consider itself immune either from intense parliamentary scrutiny or its consequences. The end result should not only be a stronger European Parliament, but also a stronger European Commission, provided that the new Commission draws the right lessons from past experience. It must opt unreservedly for openness and transparency, for responsibility and accountability in its relations towards the other institutions and towards those over whom it exercises power. These fundamentals must permeate its culture in all areas and at all levels; they are the basic essentials for creating credibility in the exercise of power.

7.2.5. In conclusion, the remarks in this chapter are made in the light of the fact that the Commission is situated at the heart of a modern European democratic structure built upon deep-rooted political and ethical values. In this framework the Commission plays the part of the executive branch and holds sole power of legislative initiative. It thus bears especially well-developed duties of responsibility and accountability towards the other participants in the political structure: Parliament and Council, and, above all, the citizens of Europe.

7.3. A multi-cultural environment

7.3.1. In contrast with national administrations, any attempt to reform the Commission must take account of its multi-national and multi-lingual environment. This makes it difficult simply to "transplant" national management practices and regulatory frameworks, however successful they may be "at home". European problems need European solutions.

7.3.2. Arguably, the multinational character of the Commission itself lies at the heart of some of its problems. Firstly, it can lead to differences in the interpretation of procedures, practices, rules and laws within the Commission which potentially give rise to a culture of moral flexibility and permissiveness.

7.3.3. Secondly, unhealthy national allegiances can cut across the formal structures of the Commission. During the first phase of its work, the Committee, in examining files, in interviews with officials and in correspondence received from outside sources, not infrequently encountered the existence of national reflexes, and even of national networks, within the Commission. It found that some commissioners, and/or their private offices, are not immune from such reflexes.

7.3.4. This problem is linked to the policy of appointing Directors-General and civil servants immediately beneath them, albeit for understandable reasons of proportionality, on the basis of national "shares". This practice can (and does) result in the creation of national "fiefdoms" unless special measures are taken to avoid such an outcome. If allowed to develop, it will ultimately undermine Europe as a concept.[204]

[204] See also the EP "Report on improvements in the functioning of the Institutions without modification of the Treaties" - A4-0158/99 adopted 15.4.99 (Herman report)

7.4. Codes of conduct in public life

7.4.1. One means to attain uniformity in the interpretation of legal rules and, more importantly, to shape a culture reflecting high standards of behaviour notwithstanding national differences, is the elaboration of codes of conduct. This has become common throughout the public sector as one technique "to restore respect for the ethical values inherent in the idea of public service," while recognising that though "formal procedures have a role to play, (…) in the end it is individuals' consciences that matter"[205]. Codes of conduct are not "formal procedures", but are designed to provide an ethical reference point for officials and holders of a public mandate. They aim to assist them in living up to the principles of conduct which provide the foundations for public life and which have been defined as: selflessness, integrity, objectivity, accountability, openness, honesty and leadership[206].

7.4.2. The growing need for high standards of conduct in public service is widely recognised at all levels and in different sectors. Leaving aside its intrinsic value, this trend is in part driven by a phenomenon which, in a restrained form, is visible in the Commission, namely towards privatisation, outsourcing and delegation of administrative tasks to an array of agencies and quasi-governmental organisations, thereby provoking the widespread use of "new" financial management techniques such as contracting out and competitive tendering.

7.4.3. To find an example of a major international organisation adopting a code of conduct, one recent illustration is provided by the adoption by the Council of the OECD on 23 April 1998 of a set of "Principles for Managing Ethics in the Public Service"[207]. Its twelve principles deserve to be restated in full. They are:

1. Ethical standards for public service should be clear;
2. Ethical standards should be reflected in the legal framework;
3. Ethical guidance should be available to public servants;
4. Public servants should know their rights and obligations when exposing wrongdoing;
5. Political commitment to ethics should reinforce the ethical conduct of public servants;
6. The decision-making process should be transparent and open to scrutiny;
7. There should be clear guidelines for interaction between the public and private sectors;
8. Managers should demonstrate and promote ethical conduct;
9. Management policies, procedure and practices should promote ethical conduct;
10. Public service conditions and management of human resources should promote ethical conduct;
11. Adequate accountability mechanisms should be in place within the public

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205 Standards in Public Life, First Report of the (Nolan) Committee, vol.1 May 95, p.16.

206 See the Committee's first report, para. 1.5.4, referring to Nolan Committee.

207 See website www.oecd.org. (This website also contains summary reports of ethical provisions in various Member States including the Netherlands, Finland, Portugal and the United Kingdom.)

service;

12. Appropriate procedures and sanctions should exist to deal with misconduct.

7.4.4. The principles intend to prevent misconduct "by a range of integrated mechanisms, including sound ethics management systems". They address different points of concern, some of which have a direct bearing on subjects dealt with in the Committee's present and/or first report.

7.4.5. Principles 1 and 2 indicate that, although standards for public service may be of an ethical nature, and therefore do not constitute legal (i.e. judicially enforceable) rules, they must nonetheless be reflected in the formal legal framework. In other words "the legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant... (Therefore) laws and regulations ... should provide the framework for guidance, investigation, disciplinary action and prosecution"[208]. The point is that a code of conduct cannot exist in isolation, but must, though not law itself, be underpinned by and consistent with a coherent legal framework based upon the same underlying values and principles.

7.4.6. Shortly before its resignation, the EU Commission proposed two codes of conduct[209]. The first lays down rules of conduct for Members of the Commission, who are not covered by the Community's Staff Regulations. The code contains non-binding rules of a self-regulatory type. That is not necessarily inconsistent with the principles above, which are only formally applicable to officials. Moreover the code is based on Treaty provisions (see 7.5.1). If, as it should, the new Commission pursues the intention of laying down codes of conduct, it must ensure that the formal legal framework, in the form of binding laws and regulations is adequate. (This would include, for example, the clarification of the legal protection to be given to whistleblowers, as required by Principle 4 of the OECD code).

7.4.7. In the following sections we will first deal with the (proposed) code of conduct for members of the Commission and thereafter with the code of conduct for officials.

7.4.8. In this connection, it should be stressed that though the Committee's mandate only concerns the Commission, it believes that members and officials of other EU institutions fall under similar obligations of good conduct and that similar provisions should equally be applied to them.

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208 Explanatory comment under Principle 2.

209 *For a European political and administrative culture.* See www.europa.eu.int. A third code, on officials, is still under preparation, while the incoming Commission has already amended and supplemented the first two codes with proposals of its own (to be adopted formally when it takes up office). These too have been posted on the Commission's website.

7.5. Code of conduct for members of the Commission

Principles

7.5.1. The code of conduct prepared by the outgoing Commission rightly takes the Treaty articles concerning the Commission (see TEC Article 213 *(ex 157)*) as a starting point, making particular reference to the independence enjoyed by the members of the Commission, who are required to discharge their duties in the general interest of the Community. It continues to state: "In the performance of their duties they must neither seek nor take instructions from any government or from any other body. The general interest also requires that in their official and private lives Commissioners should behave in a manner that is in keeping with the dignity of their office".

7.5.2. The remainder of the code is devoted to setting limits to commissioners' outside activities (including the delivery of speeches or taking part in conferences against payment, the holding of posts or being an active member of political parties or trade unions) as well as to interests which could jeopardise their independence (declaration of financial interests and assets, and of activities of spouses). It lays down rules for missions, receptions and professional representation and acceptance of gifts, decorations or honours. More important matters concern the principle of collective responsibility and the composition of Members' private offices, dealt with below.

7.5.3. The proposed codes of conduct are a first, albeit modest, step in the right direction. The prohibition - or at least declaration - of situations giving rise to a possible conflict of interest is essential for good governance, just as it is to lay down the principle of collective responsibility. However, the codes define the latter notion as implying only a prohibition on Commissioners "[making] any comment which would call into question a decision taken by the Commission," or "disclosing what is said at meetings of the Commission". The principle of collective responsibility should also involve the definition of how the Commission as a whole bears a responsibility for decisions taken collectively and how, in practical terms, individual commissioners must assume responsibility for decisions taken collectively. The Committee recommends the Commission to re-define collective responsibility in that direction in light of the Committee's findings in its first report (see further in 7.10.1-2).

7.5.4. The question of collective responsibility is part of a much broader issue in that it concerns not only the relations between commissioners, but also relations with (and between) their departments. It also concerns the accountability of commissioners vis-à-vis Parliament and their relations with the Council. These broader issues are not dealt with in the outgoing Commission's code of conduct which limits itself mainly to issues of personal integrity. These broader issues will be discussed in later sections where further recommendations will be formulated.

Appointments to cabinets

7.5.5. The Commission's proposed code of conduct for commissioners puts forward specific rules on the composition of *cabinets*, for which the President of the Commission named appointing authority. The rules are intended to "secure an appropriate balance between officials

and temporary staff as well as in terms of nationalities and equal opportunities". Further, "at the end of their period of secondment to Member's Offices, officials shall be reinstated in Commission departments in accordance with standard procedures laid down in Staff Regulations. No commitment shall be given to temporary members of staff in respect of continued employment in the Commission after the Commissioner's term of office expires".

7.5.6. The importance of these rules cannot be overstated. The role of commissioners' *cabinets* is highly significant, and is further discussed below. In the present context of standards of conduct for Commissioners, it suffices to recall that the inclusion of externals as members of a private office, or as special advisers, has been the occasion of appointments based not on merit but on friendship, even family links, sometimes in violation of standing rules. The Committee recommends that objective rules be established concerning the appointment of personal relations to their *cabinets* or elsewhere, be they directly proposed or induced by commissioners, to ensure that they are clearly based on merit. Obviously, this should not lead to discrimination *against* such persons where merit can objectively be ascertained. However, in such instances, rules of transparency declaring the nature of the relationship must be laid down.

Size of cabinets

7.5.7. There are vast differences between the Member States as to the use of private offices or *cabinets* by members of the government. In some, private offices are unknown and ministers fully rely on their administration. In others, ministers have sometimes very large *cabinets* composed of personal collaborators of the Minister, handpicked by him/her from within, but often also from outside, the administration. The Member States in between allow for a number of "advisors" who serve as political or policy experts to the Minister, help them to prepare long-term policies and short-term decisions and to function as a first sounding board for ideas.

7.5.8. Here is not the place for a general discussion of the pros and cons of private offices. It suffices to say that the Committee subscribes to the view that large *cabinets* are damaging in that they become a "counter-administration", demotivate regular officials, lead to "*parachutages*" of outsiders within the administration and contribute, generally, to an administrative culture based on party, ideological and/or regional/national divisions. The Committee therefore recommends that the size of *cabinets* be kept to, at most, six category A members. It approves both the outgoing Commission's proposals in this respect and the president-designate's determination to promote multi-national private offices, to limit (even exclude) the appointment of outsiders and to exclude unduly favourable treatment of members of *cabinets* at the end of their term of office.

Nationality considerations

7.5.9. The issue of nationality arises in the codes in the requirement that commissioners ensure balance in terms of nationalities (and gender) in their *cabinets*. Nationality as a general criterion for appointment, though aimed at securing Member States a proportionate share in Community decision-making processes, inevitably gives rise to informal quota provisions[210]. Such "quotas"

[210] Whether this system is consistent with Community law is doubtful, given that the ECJ has held that job allocation should not be predetermined and should be decided on merit: "sur la base de critères objectifs de

do not in principle apply to appointments in *cabinets*, where commissioners have wide discretion to select persons who have their full confidence. However, even there, that wide discretion may not be unrestricted, as the proposed code correctly suggests. It is unacceptable that *cabinets* - which are involved in policy making in the Commission (but see 7.12.1ff.) - should be composed exclusively or predominantly of persons of the same nationality as the commissioner. That would put the Community character of the commissioner's work too much at risk.

7.5.10. Nationality may only be a criterion insofar as it is permitted by law[211]. Outside the realm of such (Community) law, the use of nationality amounts to impermissible discrimination. This principle applies not only to appointments but also to all other areas of decision making, most particularly where financial incentives or subsidies are involved. Commissioners who, in the exercise of their office, use undue influence to favour their national interests should be deemed in serious breach of their obligation of independence.

Political affiliation

7.5.11. In this connection, the Committee emphasises that the use of other discriminatory criteria such as political affiliation of the person to be recruited, or selected or to receive any other advantage, is also to be considered a serious breach of the obligation of independence. Commissioners themselves, though appointed by common accord of the governments of the Member States (essentially on the basis of political considerations), must subsequently carry out their duties in full independence - meaning that they must act, and be seen to act, with political neutrality. The proposed code of conduct should not allow commissioners to "be *active* [i.e., in the Committee's understanding, office-holding] members of political parties or trade unions, provided that this does not compromise their *availability* for service in the Commission" (emphasis added). It is not availability, but political neutrality, which should be the decisive criterion[212], at least under present Community law where the Commission, unlike a national government, is not the emanation of an elected political majority.

7.5.12. The events surrounding the resignation of the outgoing Commission illustrate how the political affiliation of commissioners contributed to a distortion of the European Parliament's power of censure, in that political groups were influenced by the actual or perceived political affiliation of the commissioners involved. Although it is normal for a directly-elected Parliament to react on the basis of political considerations, it is inconsistent, under present Community law, for the same to apply to the commissioners, who should not be perceived as being part of a political grouping of any kind.

Concluding remark

7.5.13. It emerges from the above that a code of conduct for commissioners must cover a broader range of issues than those dealt with in the draft prepared by the outgoing Commission.

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sélection et dans le seul intérêt de service" (Cf Art 29 Staff regulations): Case 105/75, *Giuffrida v. Council* [1976] ECR 1395, par 6.

211 See Chapter 6

212 The proposed code rightly prohibits commissioners from holding any outside public office.

Because they relate to the public image of the Community as a whole, moreover, the issues in question are of direct concern not only to the Commission, but also to the other institutional players in the European Union. It is therefore recommended that when the new Commission prepares a new and, it is hoped, more comprehensive code, it will take the prior advice of Council and Parliament as well as the Court of Justice and the Court of Auditors.

7.6. Rules of conduct for officials of the Commission

Principles

7.6.1. It falls to the new Commission to adopt a code of conduct for its officials. This should be done following the principles laid down in other international or supranational documents, for example those adopted by the OECD Council (see 7.4.3), and in similar codes used in EU Member States. It is for the Commission to "create legislative and institutional arrangements that reinforce ethical behaviour and create sanctions against wrongdoing"[213]. Again, the other Institutions should be consulted, also with a view to achieving a degree of uniformity with similar codes of conduct for officials of those Institutions.

7.6.2. A code of conduct for officials, together with the rules and legislation underpinning it, should comprise a comprehensive set of standards regulating their conduct, not only indicating "official actions which will not be tolerated", but also "articulating public service values that employees should aspire to"[214]. It should also emphasise the use of "basic principles, such as merit, consistently in the daily process of recruitment and promotion (which) helps (to) operationalise integrity in the public service"[215]. Mechanisms must exist to promote the accountability of officials for their actions to their superiors and, more broadly, to the public. These should focus not only on compliance with rules and ethical principles, but also on the achievement of results"[216]. Effective "mechanisms for the detection and independent investigation of wrongdoing such as corruption and provide reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative disciplinary sanctions to discourage misconduct"[217] must also be in place. Many of these points have been discussed elsewhere in this report and recommendations made.

Openness v. Secretiveness

7.6.3. Three points relating to the conduct of the Commission, both college and services, are of major concern to the Committee. The first is "the whole tradition of secretiveness" which characterises both the Commission and the other EU institutions, above all the Council[218]. Secretiveness must not be confused with the need for confidentiality in certain instances. Secretiveness means a lack of openness in matters where no real justification for confidentiality exists. Confidentiality must be the exception, not the rule. Openness is not in the first place a

213 Explanatory comment to Principle 5 of the OECD set of principles.
214 Explanatory comment to Principle 9.
215 Explanatory comment to Principle 10.
216 Explanatory comment to Principle 11.
217 Explanatory comment to Principle 12.
218 Thus EU Ombudsman, Mr. Söderman in an interview with European Voice, (22.4.99)

question of legal texts[219] or codes of conduct, but a question of mentalities and attitudes, arising from the basic principle that the public has a right to know how public institutions use the power and resources entrusted to them. Accordingly, "public scrutiny should be facilitated by transparent and democratic processes, oversight by the legislature and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media"[220].

7.6.4. There exists a "Code of Practice on access to Council and Commission documents"[221] which is a step in the right direction. Public scrutiny has also been strengthened by the creation of the office of Ombudsman appointed by the Parliament who is "empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies"[222] as well as by the right, contained in Article 194 *(ex 138 d)* of the Treaty, for such natural or legal persons to "address (...) a petition to the European Parliament on a matter which comes within the Community's fields of activity and which affects him, her or it directly". It should be noted moreover that the Ombudsman is himself in the process of preparing a "Code of Good Administrative Behaviour", much of which deals with the need for openness and transparency on the part of officials vis-à-vis the public.

7.6.5. These mechanisms cannot in themselves bring about a change in mentality. In the first instance, it falls to the new Commission, and above all its President, to give an example by their own behaviour of a move away from the present mentality of secretiveness into one of openness.

7.6.6. It is important to appreciate that the thoughtful preparation of decision-making within the Commission should not however be hindered. Like all political institutions, the Commission needs the "space to think" to formulate policy before it enters the public domain, on the grounds that policy made in the glare of publicity and therefore "on the hoof" is often poor policy. Openness and transparency do not therefore imply routine and invasive public access to the inner counsels of the Commission in the course of its work, but complete openness as to all political and administrative acts of the Commission, the justification for these once they have been taken and as to the formulation of policy once it is sufficiently definitive to be laid before the public. It is for the Commission to establish internal guidelines – which should themselves be public – establishing when deliberations on policy are sufficiently advanced to be shared with the public.

7.6.7. The press, and media in general, clearly have a key role in this process. By and large, the contribution of the press in respect of the Commission, including in the course of recent events, has been a positive one: constantly pushing for greater transparency and openness in the implementation and examination of Community legislation and policy by the Commission and

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219 Legal texts are not infrequently interpreted, by virtue of an "old-fashioned view of privacy" (thus the interview with the Ombudsman) to curtail transparency.

220 Explanatory comment to Principle 6 of the OECD set of principles.

221 OJ L340 of 31.12.93. The validity of this code is confirmed by inter-institutional agreement (Judgement of Court of Justice of 19.3.96: case C-25/94, Commission v. Council (1996) ECR I – 1496 and judgement of 30 April 1996 in case C-58/94, *Netherlands v. Council* (1996) ECR I-2169.)

222 TEC Article 195 *(ex 138e)*, para. 1

participating in the exposure of problems which would otherwise never have been addressed. However, recent events have also underscored the wider public interest in the Commission developing a more effective press and information policy, whereby, through establishing a balanced relationship with the press, it would better handle some of the intense media pressure to which it is subject.

Whistleblowing

7.6.8. The second point of concern to the Committee is the need to delineate the obligation for officials to "expose actual or suspected wrongdoing within the public service ... [to] include clear rules and procedures for officials to follow... Public servants also need to know what protection will be available to them in cases of exposing wrongdoing"[223].

7.6.9. The events leading up to the resignation of the former Commission demonstrated the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also showed how the reaction of superiors failed to live up to legitimate expectations. Instead of offering ethical guidance, the hierarchy put additional pressure upon one such official. This clearly flouts the principle referred to above, as well as with the third of the OECD principles, according to which "(i)mpartial advice can help create an environment in which public servants are more willing to confront and resolve ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace".

7.6.10. This does not mean that officials must be encouraged to come forward in all instances where they believe that superiors or colleagues have not acted correctly. The duty of loyalty and discretion should not become an empty concept. But neither must it be used to install a conspiracy of silence. In this regard, a distinction has to be drawn between criminal behaviour, where there is an unambiguous duty of any civil servant to report to the appropriate authorities (particularly OLAF)[224], and other breaches, which have to be reported in accordance with departmental procedures. Nonetheless, when these procedures have not made it possible to resolve concerns within a reasonable period of time, a mechanism should exist to allow the civil servant to address an external authority (for example, the Ombudsman, the parliamentary Committee on Petitions or the Court of Auditors.)

7.6.11. The Committee recommends that the Commission examine its rules, including the Staff Regulations, accordingly. (See Chapter 6)

Outsourcing

7.6.12. As its third and final point of concern, the Committee draws attention to principle 7 of the OECD set of principles, touching upon a subject which, as the First Report showed, creates numerous problems. Principle 7 demands "clear rules defining ethical standards [which] should guide the behaviour of public servants in dealing with the private sector, for example public procurement, outsourcing or public employment conditions... More attention should be placed

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223 Explanatory comment to Principle 4 of the OECD set of principles.

224 But see Article 19 of the Staff Regulations

on public service values and *requiring external partners to respect those same values*"[225] (emphasis added). The latter requirement must be reflected in contractual or public procurement provisions. Observations on this subject have been made in Chapter 2.

Final remark

7.6.13. Here, the Committee would emphasise the role of the Commission‘s Legal Service. Contrary to a legal department in the private sector, which has the role of facilitating its principal’s requirements, the Commission’s Legal Service should always recall that its function is to provide an independent check on the legality of the Commission’s intended action (or inaction). In other words, the Commission’s Legal Service is of crucial importance in making the concept of the rule of law an essential part of the corporate climate of the Commission at all levels, including above all the commissioners and the directors-general.

7.7. How to give effect to codes of conduct?

Committee on Standards in Public Life

7.7.1. An advantage of codes of conduct is that they give guidance by way of flexible rules, which are however as concrete as possible. Without imposing legally binding obligations, they may exert a high degree of moral persuasion because of their widely accepted ethical content. Such codes must have a legal basis, however, in that they should emanate from an authority having the competence to issue them.

7.7.2. The question arises as to who should prepare codes of conduct, and how they should be made as effective as possible. The answer to these questions, in the Committee's view, is that there should be a general code of conduct in which basic standards are laid down, applicable to all officials and servants of the Community institutions and bodies, but which leaves sufficient leeway to allow more specific codes in the light of the individual characteristics of the institution or body or persons for whom they are designed.

7.7.3. It is to be recommended that, in order to supervise the *general* standards, a Committee of Standards in Public Life be set up, under an interinstitutional agreement, and that *specific* codes of conduct would be drawn up by each institution concerned, in complement to the general standards.

7.7.4. The question remains as to whether such a committee should be "*ad hoc*" or take a more permanent form. The answer depends on whether it would be asked to come up not only with a set of standards, but also to update them regularly, monitor their application and implementation in more specific codes of conduct, and to give advice on specific particular issues or questions which are brought to its attention. If the latter were the case, as this Committee recommends, such a committee would develop over the years a body of practical rules, reflected in its annual reports, and acquire the moral authority that would help to establish and restore the credibility of the Community Institutions, both internally and externally. Recent events, involving a member of the outgoing Commission, have again emphasised the importance of this point.

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[225] Explanatory comment to Principle 7.

7.7.5. It should further be noted in passing that such credibility is now seriously affected not only by allegations of abuses in the Commission, but also in the other institutions.

Training and consciousness-raising

7.7.6. Notwithstanding the fact that codes of conduct are, in the opinion of this Committee, a necessary basis for the transformation of the Commission's culture, and that both a legal framework and a Committee on Standards are vital to underpin such a transformation, they do not in themselves suffice. Hearts and minds are not, as it were, won with either rules or good intentions, and hearts and minds are the crux of any discussion of organisational culture. The problem is thus to ensure that the codes of conduct discussed above become a pervasive part of the Commission's culture rather than an external imposition.

7.7.7. No simple answers exist to this problem. However, just as it is possible to bring about "cultural" change in other fields by public education programmes, a clear example set from above, well-directed management action, training, information and consciousness-raising all have the potential to help the principles set out in a code of conduct take root in the Commission's administration.

7.7.8. Examples may help illustrate this point. Staff might be obliged to participate in (a limited number of) seminars or workshops at which the practical implications of codes of conduct could be examined ("What would you do if...?") and the ethical implications of particular working situations discussed. Such seminars might also serve to inform staff about "danger areas", how things can go wrong, the warning signs to watch out for and what to do when a case of suspected fraud/corruption arises. By the same token, more senior grades should receive professional training in the management techniques involved in inculcating a certain professional culture, identifying weaknesses/individuals "at risk" and so on.

7.7.9. For all that such training exercises risk being perceived amongst Commission staff as tiresome impositions which can achieve little more than state the obvious, they are common, accepted and fruitful practice throughout modern private-sector organisations. Such organisations have a clear incentive - in the form of the so-called "bottom line" - to make maximum use of such techniques. It is for the Commission, in this case together with staff organisations, to undertake an *active* role in finding an equivalent incentive in shaping its corporate culture, rather than trusting to undefined notions of public service.

RELATIONS BETWEEN COMMISSIONERS, DEPARTMENTS AND *CABINETS*

7.8. The issue of responsibility revisited

7.8.1. In its first report, the Committee stated (at 1.6.2), regarding the responsibility of the Commission as a body or of commissioners individually, that:

"The responsibility ... this Committee is dealing with concerns ethical responsibility, that is responsibility for not behaving in accordance with proper standards in public life, as discussed above (para 1.5.1). Such responsibility must be distinguished from the political responsibility of the

> Commission dealt with in Article [201,ex-]144 of the EC Treaty which is to be determined by the European Parliament, and from the disciplinary responsibility of individual Commissioners dealt with in Article [216,ex-]160 of the EC treaty, which is to be determined by the Court of Justice, on application of the Council or the Commission [footnote omitted]. That does not however, prevent the institution concerned, when determining political or disciplinary responsibility, from basing its assessment in part on the findings of the Committee concerning the collective or individual behaviour of the Commission or of Commissioners."

7.8.2. Here again the Committee wishes to turn to this issue, and more particularly to the distinction between ethical and political responsibility as applied to commissioners.[226]

7.8.3. *Ethical* responsibility is about (non-)compliance, intentional or negligent, with ethical, professional, legal rules of conduct on the part of an individual to whom blame can be attributed, individually or collectively. *Political* responsibility, on the other hand, is about (i) the political consequences arising from ethically, professionally, or legally reprehensible conduct, (ii) the nature of those consequences and (iii) the authority by which the consequences are decided.

7.8.4. An important question regarding the notion of political responsibility of commissioners is whether it can be applied only in respect of the (personal or professional) conduct of a commissioner him/herself, or whether it can also apply in respect of conduct of persons (mainly officials, but possibly also third parties to whom tasks have been 'outsourced') for whom Commissioners are held to be politically responsible. As a rule, only persons carrying out tasks which fall within the legal competence of a commissioner are able to engage the latter's political responsibility.

7.8.5. This section will deal with the relations between commissioners and their departments, mainly their directors-general, and with the relations between commissioners. The role of the secretary-general and *cabinets* will be examined in connection with both of these relationships.

7.8.6. The distribution of tasks amongst commissioners and directorates-general determines the competences, and therefore (legal and ethical) responsibilities of both. Issues of political responsibility will be discussed later, mainly in connection with the European Parliament (7.14).

7.8.7. As a general remark on commissioners' and director-generals' responsibility, the Committee wishes to emphasise that no responsibility can be imposed, or assessed correctly, if it does not go hand in hand with a clear definition of competences, means, hierarchical structure, control systems and sanctions.

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[226] As indicated in the first report, ethical liability must also be distinguished from legal non-contractual liability (based on Article 288 (ex 215), par. 2) which is part of the provision in the EC Treaty on judicial review of administrative and legislative action of the Community institutions before the Community Courts.

7.9. Commissioners, their director-generals and departments

Formulation of policy v. implementation of policy

7.9.1. The Committee's first report observed that commissioners sometimes evade responsibility for acts or omissions of their services on the pretext that commissioners are responsible only for laying down policy, while director-generals implement policy. This distinction, if strictly interpreted, is tenable neither in law nor in fact. It is not tenable in law, because it would mean that the whole area of implementation of policy would escape scrutiny by Parliament. It could be argued that, since the commissioner concerned lacks legal competence, he/she cannot be held accountable to Parliament for the implementation of policy, whereas, at the same time, the director-general and his services only owe (executive or management) responsibility to their commissioner and have no direct (political or constitutional) responsibility towards Parliament. Nor is the distinction tenable in fact, as, as is generally agreed, the distinction between formulating and implementing policy, i.e. between policy and operational matters, is a falsely rigid one, difficult to define in principle and even more difficult to apply in practice.

7.9.2. The (second) code of conduct of the outgoing Commission, relating to commissioners and departments, after recalling that, "Relations between Commissioners (their Offices) and departments shall be based first and foremost on loyalty and trust", states that "Commissioners shall assume full political responsibility. Directors-general shall be answerable to their Commissioner for the sound implementation of the policy guidelines laid down by the Commission and the Commissioner".

7.9.3. The Committee accepts this principle if it is taken to mean that, in the *internal* relationship between commissioner and director-general, the latter assumes *prime* responsibility for the implementation of policy, and the former lays down policy. Such an internal division of labour does not however preclude the commissioner being operationally responsible too for the sound implementation of "his/her" policy, just as it does (or should) not preclude the director-general, and his services, being involved in policy formulation. The "full political responsibility" assumed by the commissioner should then be understood as an obligation to be fully accountable firstly to the Commission as a body, and then to Parliament for his/her own actions and for those of the director-general and other officials of his/her department. These are *in turn* answerable to the commissioner, and through him/her to the Commission and the Parliament.

7.9.4. It is recommended that the above principles be better elucidated in the code of conduct, which in its present version could be interpreted as subscribing to a strict separation of work *and* competence for policy and operational matters between the commissioner and the director-general respectively.

7.9.5. The *internal* relationship between commissioner and director-general is further described in the Commission's code of conduct. In line with what is indicated above, it is for the departments to "implement the priorities and policy guidelines set at political level" but also to help to prepare those policy guidelines "by proposing strategy options advising the commissioner on individual political decisions and providing all the necessary background

information". Furthermore, "(T)hey shall provide the commissioner with information, reporting on any important event in departments, in the Member States or in international bodies which might have an impact on the management of his or her portfolio or his or her position within the Commission."

7.9.6. The reverse situation, namely that the commissioner must be able to give instructions, or at least supervise, how policy guidelines are *implemented* by departments - this being the practical basis for his/her political accountability - is not given substance in the proposed code of conduct. Indeed, the principles mentioned at the outset state that commissioners "shall be responsible for the efficient operation of their Directorate-General in compliance with the distribution of powers and responsibilities laid down in the Staff Regulations, the Financial Regulation, the Commission's Rules of Procedure as well as SEM 2000 and MAP 2000". The Committee recommends that it be made clear that such rules or regulations may not be interpreted so as to curtail the commissioner's managerial (not only political) responsibility for the overall organisation of his/her department, and that they should not be allowed to confer "immunity" upon commissioners in respect of the sound implementation of policy and the efficient organisation of their services. This is particularly important as the Commission's work progressively shifts "from drafting new legislation and developing new policy initiatives (towards) tackling the less glamorous, but increasingly important, task of managing existing programmes"[227]

7.9.7. In the aftermath of the outgoing Commission's resignation, one commissioner was heard to complain that commissioners cannot in practice supervise the actions of their directorates-general. That complaint must be taken seriously. It is not normal that commissioners must assume political responsibility for acts of their departments if they have no competence whatsoever to give instructions or at least to supervise managerial or important operational matters. However, the Committee does not know of any legal, or other, provision which prohibits a commissioner from instructing or supervising their departments, provided that the competence to do so is clearly defined.

Status of director-generals

7.9.8. This point raises the question of the status of directors-general. Since they are appointed for an indefinite period of time, whereas commissioners are appointed for a renewable five-year term, there is a serious risk that directors-general become excessively dominant in their spheres of activity. That is why, in some Member States, a "public mandate" is envisaged for heads of departments, implying that they are appointed for a limited but renewable term.

7.9.9. The Committee appreciates the delicacy of intervening in the balance of power between commissioners and directors-general, whereby it remains for the director-general to manage the financial and human resources in his/her department. Nonetheless, the matter has to be re-considered in the light of an increasing need for commissioners to be more involved in supervising the organisation and management of their services (including tasks which have been outsourced) and for the Commission, primarily its President, to regroup departments to make directorates-general more homogeneous (in order to prevent rivalry between departments

[227] Herman Report, B. 34

having parallel competences). The matter must also be re-considered because of a wider recognition of commissioners' accountability towards Parliament. As stated above, such accountability towards Parliament implies broader competences on the part of the commissioners vis-à-vis their departments.

7.10. Relations between commissioners – collective responsibility

Collective responsibility in practice

7.10.1. In the Committee's first report, responsibility was attributed to a few individual commissioners on the basis of their own personal or managerial conduct. Obviously to the surprise of the outgoing Commission, the Committee also established instances of collective responsibility. Collective responsibility may arise, in the Committee's view, in connection with decisions taken by the Commission as a body, e.g. where the Commission decides to relieve a director-general of his function, refuses to lift immunity of civil servants at the request of a national criminal court, or, even more importantly, where the Commission as a whole decides policy questions or fails to react to mismanagement on the part of a colleague of which it is aware or should have been aware. [228]

7.10.2. The outgoing Commission's proposed code on commissioners defines collective responsibility only as an obligation for each commissioner not to call into question a decision taken by the whole Commission, and to refrain from disclosing what is said at meetings of the Commission. In the Committee's view collective responsibility should also be defined to mean that each member of the Commission has the right and duty to keep him/herself informed as to the activities of every other commissioner. Thus one commissioner should not be able to evade responsibility for decisions which have been taken by the Commission as a college - whether nominally or in reality - by passing it to another commissioner. Once a policy has been announced, and once a decision has been reached, all commissioners are responsible for it. They are also collectively responsible, in the Committee's view, for failings and problems about which they know, or should know, for example where questions have been raised in Parliament or, in a credible way, in the media. All this presupposes that mechanisms are provided whereby commissioners receive information on matters falling within colleagues' portfolios, are able to put such matters on the agenda of the Commission.

Organisation of the Commission

7.10.3. The issue of collective responsibility is closely related to the way in which the Commission as a college is organised, and to the position of the President, the Vice-Presidents and the Secretary-General in allocating or overseeing tasks carried out by the commissioners. In this context, it is frequently heard that there are too many commissioners. This may lead to an

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[228] The principle of "collegiality" is a well established principle of Community law: it "is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted": Judgement of Court of Justice of 29.9.98, Case C-191/95, *Commission v Germany*, ECR(1998)I-5449, para. 39

excessive separation of tasks and responsibilities which, especially if combined with a feeling of responsibility only for the accomplishment of one's own tasks, undermines any sense of responsibility for the Commission's work as a whole.

7.10.4. Since the Amsterdam Treaty, it is the clear responsibility of the President of the Commission to deal with the problem of the reduction and rationalisation of Commission portfolios, possibly through the establishment of teams of commissioners for each subject area, especially as commissioners have been nominated with his agreement (Article 214, *(ex 158)*, paragraph 2 TEC). Moreover, it is also the President's responsibility to give "political guidance" to the Commission (Article 219 *(ex 163)*) and accordingly to organise the work and the proceedings of the Commission in a way that reinforces, instead of weakens collective responsibility. Collective responsibility requires that commissioners should be able to argue freely in private and at Commission meetings on what they hear, or perceive, to be a colleague's approach in his/her sphere of competence, "and can argue freely in private while maintaining a united front when decisions have been reached".

7.10.5. In modern government, different techniques of self-administration or management by contract have been developed whereby the execution of public tasks and the management of the relevant financial envelopes are delegated to civil servants grouped in executive agencies or working under covenants with the Minister. In the Community context, shared management with Member States, as discussed in Chapter 3, is a well established feature of Community policy and more recently it has become commonplace to outsource public tasks to private entities, as discussed in Chapter 2. Recourse to such forms of delegated and shared management may in no way impede commissioners and their director-generals from being held responsible for the organisation and supervision of policies implemented within their areas of competence.

7.11. The role of the Secretary-general

7.11.1. The growing importance of the management tasks of the Commission and the need for commissioners to take joint responsibility with directors-general for the correct functioning of the their departments, as well as the increased role of political guidance of the President of the Commission and the necessity to reduce the role of the Commissioners' *cabinets* in dealing with management issues, are all factors which tend to emphasise the importance of the role of the secretary-general of the Commission. He/she should, under the political guidance of the President, act as the interface between the political and the administrative levels of the Commission and promote transparency and accountability of the administration in its relations with the citizen. He/she should stimulate horizontal cooperation between the directorates-general and above all ensure that decisions of the Commission are effectively followed up.

7.11.2. More specifically, it is the secretary-general's task to encourage dialogue between horizontal and operational directorates-general on administrative issues. If, because of wider obligations, director-generals cannot participate in such a dialogue on a systematic basis, weekly meetings should be held "of assistants or Heads of Resources Units or the two together (to) clear up issues of interpretation but also offer a forum for raising new issues in implementation.

This will provide horizontal services with early warning of questions which will otherwise be dealt with under the pressure of the procedures for individual financial decisions…"[229]

7.12. The role of commissioners' cabinets

7.12.1. The task of a commissioner's *cabinet* should be no other than to be the emanation ("alter ego") of the commissioner. It should, in other words, have no competences beyond those of the commissioner him/herself and should act under the explicit personal instructions of the commissioner. Its members must therefore limit themselves to preparing the personal work of the commissioner and facilitating his/her political guidance, both vertically, i.e. towards the departments and officials, and horizontally, i.e. towards the other commissioners and their *cabinets*.

7.12.2. As to the first, vertical, aspect, members of the *cabinet* should beware of interposing themselves between their commissioner and his/her department, director-general, directors, etc. Obviously, the commissioner cannot be bothered by anyone for everything. However, *cabinets* often act as screens and fences, impeding direct communication between commissioner and departments.

7.12.3. The code of conduct proposed by the outgoing Commission on commissioners and departments reflects this distant, needlessly hierarchical and bureaucratic approach. It provides, for example, that it is for the *cabinet* to "inform the departments [thus also the director-general!?] about the Commission's proceedings especially when they have a direct impact on the departments' own activities" (sic) just as it shall "inform the departments about decisions taken by the Commissioner" and "keep the director-general fully informed about its contacts with the outside on matters falling within the portfolio". Meanwhile, "departments' contacts with the outside shall be co-ordinated with the Commissioner and his or her Office". "Working methods and information channels shall be laid down at the start of the term of office by the Director-General and the *Chef de cabinet*, who will ensure that they are endorsed by the Commissioner".

7.12.4. Of course, much will depend on the commissioner's personal authority and talent for communication, and therefore his/her ability to work with these rules. That does not alter the fact, however, that on paper they encourage the departments, including the directors-general to keep at a "respectful" distance from their Commissioner. That is not how the Committee envisages relations between commissioners and their departments.

7.12.5. As to the second, horizontal aspect, it is the main task of members of the commissioner's *cabinet* to keep "the commissioner informed about matters outside his or her own area of competence" in order "to ensure that the principle of collective responsibility operates correctly" and, in the same vein, "to make the preparations for securing political agreement by the Commission at the final decision making stage". In other words, it depends largely on the *cabinet* how well a commissioner is informed about the work of his/her colleagues. Such information must obviously not be obtained through "espionage", but in all openness through

[229] In the words of a Director General in a report for an administrative inquiry

free and frank discussion between *cabinets*. If difficulties within the area of competence of other commissioners arise, the *cabinet* must be in a position to enable their commissioner to act.

7.12.6. Obviously, the *cabinet* of the President occupies a special position, as it is through this office that issues arising within the areas of competence of other commissioners are, if not detected, then dealt with and/or submitted to further dialogue and possible discussion in the Commission.

7.13. Enforcement of ethical responsibility

7.13.1. As stated at the outset the individual and collective responsibility of commissioners is substantially an ethical professional/legal responsibility (to be distinguished from political responsibility which will be dealt with in the next section). This holds true for both non-compliance with rules and standards on proper personal behaviour in public life (duty of integrity) and non-compliance with rules and standards on proper managerial conduct in high office (duty of sound management). Civil servants also bear ethical responsibility for non-compliance with both sets of rules and standards.

7.13.2. There is, however, a considerable difference between the two cases, in that commissioners, unlike officials, are not subjected to Staff Regulations or conditions of employment and that the only way to hold commissioners responsible, leaving aside political responsibility[230], is to bring suit against them before the Court of Justice under Article 216 *(ex 160)* in cases of serious misconduct or, under Article 213 *(ex-157)*, para. 2, in cases of infringement of their duty to "behave with integrity and discretion". Such action tends to compulsory retirement or deprivation of pension or other benefits, and is brought on application by the Council or the Commission.

7.13.3. It has been suggested that the possibility to bring proceedings of this sort should also be given to Parliament. The Committee does not agree, as such proceedings relate to *personal* misconduct, and may thus be seen as a form of disciplinary procedure, whereas Parliament's role, as a democratically elected institution, relates to the enforcement of *political* responsibility as described below.

ACCOUNTABILITY AND POLITICAL RESPONSIBILITY

7.14. The Commission in relation to the European Parliament

Accountability and political responsibility

7.14.1. The events preceding the resignation of the outgoing Commission showed the importance of the European Parliament - acting on the basis of reports of the Court of Auditors, of its own information or of articles in the press - in detecting and dealing fraud, favouritism and mismanagement within the Community. It is therefore of the utmost importance to examine the

230 Also leaving aside penal responsibility for criminal offences committed which is a matter for the court of the State where the offence is committed.

role of the European Parliament in its relation with the Commission. As in all parliamentary democracies, the relationship between Parliament and the executive branch (leaving aside for now the Commission's legislative competence) is of a dual nature: first, Parliament has a right to be informed by the Executive, which gives account of its action (hereafter **accountability)**; second, it also judges the ultimate political responsibility of the Executive and draws the political consequences (hereafter **political responsibility**).

7.14.2. There are important differences in the constitutional systems of the EU Member States as to the precise form of ministerial accountability and responsibility. Moreover, the position of the European Parliament cannot yet be entirely assimilated with the position of a national parliament. This does not prevent, however, national parliaments from serving as a model, insofar as they reveal constitutional characteristics which may increasingly also shape the role of the European Parliament.

Accountability and transparency

7.14.3. Accountability of ministers or commissioners towards Parliament is only one aspect of transparency in general. The more transparency a constitutional and administrative system displays towards the public at large the better citizens and the media, as a reflection of a pluralistic public opinion, will be in a position to allow and encourage Parliament to control the action of the executive branch. The stronger the control by public opinion, the more forcefully ministerial accountability towards Parliament is able to operate in a democratic society. Giving full account to Parliament, at their own initiative, is also a form of self-defence for ministers and commissioners against the unhappy predicament of being submitted to unfocused and uninformed criticism by press and public opinion.

7.14.4. Pressure from public opinion plays a limited role in influencing the Commission at the European level, as it is still primarily shaped by national viewpoints and interests, and according to accepted standards of conduct which may vary. Moreover, criticism of individual commissioners is easily perceived by the public opinion in the home country of the commissioner as a criticism of the country itself.

7.14.5. It is of the essence of accountability towards Parliament that commissioners are open regarding policies, decisions and actions of their departments, and refuse information only, and exceptionally, when disclosure is definitely not in the public interest. They should give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Accountability however goes beyond the mere provision of information. It also implies that the policies, decisions or actions are explained, motivated and argued before Parliament. Officials should be expected to give information or evidence before parliamentary committees upon request, and under the direction and political responsibility of, their commissioner. However, it is for the minister, and only for him/her, to explain and defend his/her action before the Parliament.

Mechanisms for accountability

7.14.6. Accountability to Parliament manifests itself through answers to oral and written questioning and through the work of parliamentary committees. In some legal systems, it is

incumbent upon a special Constitutional Committee to examine Ministers' performance of their duties and the handling of government business.

7.14.7. According to EC Treaty Article 197 *(ex 140)*, members of the Commission may attend all meetings of the European Parliament and shall, at their request, be heard on behalf of the Commission. Furthermore, the Commission shall reply orally or in writing to questions put to it by the European Parliament or by its members. It must also submit an annual general report which the European Parliament shall discuss in open session (Article 200 *(ex 143)*, EC). The information collected should permit the European Parliament to exercise political control over the Commission, which may, in extreme circumstances, culminate in a motion of censure as provided in Article 201 *(ex 144)* TEC, forcing the Commission to resign as a body.

7.14.8. One of the most significant procedures available to the European Parliament to force the Commission (or other institutions) to submit information is laid down in Article 193 *(ex 138c)*. According to this article the Parliament may, in the course of its duties and at the request of a quarter of its members, set up a temporary committee of inquiry to investigate alleged contraventions or maladministration in the implementation of Community law[231]. Information to decide on the introduction of such a procedure may reach Parliament by a petition addressed to it, directly or indirectly through the ombudsman (Articles 194 and 195 *(ex 138d and 138e)*, TEC), by "any natural or legal person... on a matter which comes within the Community's field of activity and which affects him, her or it directly".

The discharge procedure

7.14.9. The European Parliament's prerogative to require the Commission to give account can be enforced most effectively in the framework of Parliament's competence to give discharge to the Commission in respect of the implementation of the budget. Article 276 *(ex 206)*

7.14.10. With a view to its decision on discharge, Parliament, like Council, will examine, among other documents, the annual report and any relevant special reports by the Court of Auditors as well as, since the Amsterdam Treaty, its "Statement of Assurance" (known as the "DAS" – see Chapter 4). Article 276, *ex 206*, para. 2 further provides: "Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request".

7.14.11. If Parliament is not satisfied with the measures the Commission takes in light of Parliament's (or Council's) observation and comments, it can and may, refuse discharge. This may lead Parliament to adopt a motion of censure on the basis of Article 201 *(ex 144)*.[232]

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231 Decision 95/167/EC, Euratom, ECSC of the European Parliament, Council and Commission of 19 April 1995 (OJ L/113 of 19.5.95, p.2) and Article 136 of EP Rules of Procedure.

232 In the context of recent events, recourse to a formal motion of censure was rendered superfluous by the resignation of the Commission

Confidentiality and accountability

7.14.12. In the course of application of Article 276 *(ex 206)* to the 1996 budget, a lack of understanding arose between the European Parliament and the European Commission concerning the communication of information (in particular regarding the ECHO file) to Parliament. Notwithstanding an agreement of 30 September 1998 between the Presidents of the two institutions concerning the communication of confidential documents in order to preserve the rights of individuals, no workable solution could be found. The discussion bears in such cases essentially on how to reconcile the right of Parliament under Article 276 TEC to determine itself (as follows from the text of the article) which documents it requires from the Commission and the need to respect confidentiality, most often to protect the rights of persons who are under investigation for reprehensible acts, including criminal offences..

7.14.13. In also refusing to give discharge for the 1997 budget, the European Parliament's rapporteur re-examined the question and came to the conclusion that the existing instruments, primarily Annex VII to Parliament's Rules of Procedure, are insufficient to prevent the unauthorised dissemination of confidential information[233]. It is recommended that an inter-institutional instrument be concluded, similar to the one existing within the framework of investigations carried out by committees of inquiry under Article 193 TEC, to ensure Parliament's unfettered right to information, subject only to the respect for basic rights and fundamental freedoms of individuals. The conclusion and implementation of such an inter-institutional agreement as early as possible would be a clear signal of the Commission's readiness to fulfil its constitutional duty to give account to Parliament.

7.14.14. In its first report the Committee has met at least one instance, outside the field of application of Article 276, where it noted the reluctance of Commissioners to inform Parliament to the best of their knowledge at a point in time when Parliament needed all information available to perform its own duties[234]. The Committee recommends that the new Commission make it clear that it will give the widest interpretation possible to its duty of accountability towards Parliament and that any member of the Commission who knowingly misleads Parliament, or omits to correct at the earliest opportunity any inadvertent error in information given to Parliament, will be expected to offer his/her resignation.

Political responsibility

7.14.15. Political responsibility concerns the political consequences attached to conduct of holders of public office, or to conduct of civil servants working under them within their sphere of competence, by the institution or person who can hold such holders of public office to account. Although political responsibility exists in all democratic legal systems, it exists in different forms and at different levels depending on the constitutional structure of the legal system concerned. Differences also exist:

- as to the extent of political responsibility: only for individual (personal or functional) misconduct or also for misconduct of subordinate civil servants?;

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233 See report A4-0201/99 – adopted 4 May 1999

234 First Report, Chapter 5

- as to the nature of the political consequence: dismissal, or other consequences of a lesser nature?; imposed collectively, or also individually?

- as to the institution or person called upon to impose the political consequence: parliament, president or prime minister?

7.14.16. The first distinction to be made is between the enforcement of *individual* political responsibility and the enforcement of *collective* political responsibility.

7.14.17. The principle of collective political responsibility of the Commission towards Parliament follows from the right granted to Parliament, from the beginning, to adopt a motion of censure in accordance with Article 201 *(ex 144)*, in which case the Commission must resign as a body. On the occasion of the Maastricht Treaty revision, this power was reinforced by the opportunity for Parliament to set up committees of inquiry (Article 193 *(ex 138c)*). The political responsibility of the Commission is also implied in its duty to give account to Parliament in hearings or replies to questions as laid down in Article 197 *(ex 140*). It should be noted in passing that, in order for Parliament to exercise this role credibly, it should apply the same high standards to itself that it expects of those over whom it exercises supervision.

7.14.18. As for the political responsibility of individual commissioners, no changes have been introduced by the Amsterdam Treaty, except that it has been made clear that the Commission(ers) "shall work under the political guidance of its President" (Art. 219 EC) and that the President, once his/her nomination by common accord between the Member States has been approved by Parliament, will now be in a position to refuse his/her accord with the designation of a commissioner by the Member States (Article 214, para. 2). Note should be taken, moreover, of Declaration 32 adopted by the IGC where the Conference "considers that the President of the Commission must enjoy broad discretion in the allocation of tasks with the college, as well as in any reshuffling of those tasks during a Commission's term of office". These enhancements in the role of the president point the way towards, though do not make explicit, greater authority for the president vis-à-vis the members of "his/her" Commission. At the same time, Parliament's veto over the president points to its overarching role.

7.14.19. It is inconsistent with the need to strengthen the sense of responsibility of all persons working in the Commission, starting at the top, that no more specific provisions regarding the political responsibility of the Commission as a body, and no provisions at all regarding the political responsibility of individual commissioners, are to be found in the treaties. Such political responsibility of commissioners, whether collective or individual, must cover the whole range of competences for which they are responsible, namely their own personal, managerial and operational shortcomings in the exercise of their high office as well as important shortcomings in the functioning of their departments, even when the blame for these cannot be laid upon them personally.

7.14.20. With these needs and lacunae in mind, the Committee would stress that political responsibility should be enforced at two distinct levels. First, the collective responsibility of the Commission, under its president, is a matter for the Parliament in accordance with the current

treaty provisions. This concept presents few difficulties and has moreover recently been illustrated in dramatic fashion.

7.14.21. Second, the individual political responsibility of commissioners should be enforced through a significant strengthening of the hand of the Commission President. Just as in most Member States the head of the government has a constitutionally free hand to dismiss or reshuffle the members of his/her government, the President of the Commission should be in a similar position with regard to commissioners. The President should be able to act, at his own initiative and on his own responsibility, to give concrete form to the political responsibility of commissioners. The exact nature of the action would be for him/her to decide. It cannot be excluded that the Parliament may itself express views on the suitability or otherwise of certain individuals to exercise a political mandate in the Commission, but it must remain for the President alone to establish what, if any, action should be taken in respect of that individual taken. He/she will be answerable to the Parliament for any such action (or inaction).

7.14.22. Treaty amendments are needed to set the principle of the President's authority with respect to commissioners on a firm legal footing. However, until the necessary amendments are possible the Committee takes note of and endorses the view expressed by the current president-designate of the Commission that any breach of the new codes of conduct on the part of a commissioner would indicate that the individual concerned would forfeit his/her place in the Commission.

7.15. The Commission in relation to the Council

7.15.1. The role of the Council in holding the Commission to account is institutionally far less developed than that of the European Parliament. This, obviously, is the result of the evolution, over the years in the role of the Council, the Commission and the Parliament in their relations with each other and of the fact the Parliament is a directly-elected body, thus enjoying the highest possible form of democratic legitimisation: the will of the people.

7.15.2. The continuously growing role of the European Parliament in relation to the Commission has been mentioned already (7.14.1). This section will briefly examine the relationship between the three institutions, including the Council, summarising to the extreme. The Commission has a vast array of legislative, administrative, executive and even judicial powers. As far as the legislative field is concerned, the most important powers of the Commission are the right of initiative and the exercise of delegated powers. The Council plays, from the outset, a considerable role in the legislative process, foremost in that it has to vote its approval of Commission initiatives before they become law, and now also in that it may be pro-active in the process by virtue of TEC Article 208 *(ex-152)*. The Parliament has seen its initially purely consultative role transformed into a substantial one in the legislative process, while its original powers to censure the Commission and to decide on the granting of discharge for the implementation of the budget have been strengthened, firstly, by its new right to approve a newly-appointed Commission and, secondly, by its extended rights to monitor the activities of the other institutions by asking questions and establishing committees of inquiry.

7.15.3. Beyond the changes contained within the treaties, it is even more important to understand the evolution in the political culture of the institutions. Whilst the Commission has

always been, and will remain, the single most important force for political integration in Europe, it must now learn to keep pace with Parliament and Council in a continuously evolving inter-institutional context. Within this context, the pro-integration perspective of the Commission tends to create tensions with the inter-governmental perspective of Council. These have led Council to strengthen its own position through the growing importance of COREPER and through the creation of an array of committees allowing it to participate directly in the management and implementation of Community action by virtue of TEC Article 202 *(ex-145)* ("comitology" – see below). It is not for the Committee to express a view as to how the institutional balance will evolve with respect to the two extreme models: the Commission as a dynamic technocracy, with Council as the body required to ratify Commission action, or the Commission as a kind of federal government, with a bicameral parliament, the Council filling the role of second chamber representing the interests of Member States. Within this institutional relationship, the Parliament may even have to act as an arbitrator and intermediary between Community and national interests, using its budgetary, supervisory and censuring powers in a drive for openness, accountability and responsibility against not only the Commission but also the Council.

7.15.4. In this dynamic context of evolving inter-institutional relations, the Committee would like to address three specific areas.

Power to take disciplinary action

7.15.5. Mention has already been made of the Council's power under Treaty articles 213 *(ex-152(2))* and 216 *(ex-160)* to apply to the Court of Justice in respect (i) of a failure to "behave with integrity and discretion"[235], (ii) of "serious misconduct"[236] by individual commissioners or (iii) when the commissioner no longer fulfils the conditions required for the performance of his duties"[237]. This is the sole concrete provision in the Treaties enabling sanctions to be applied by an outside body against *individual* commissioners.

7.15.6. This power does not however correspond to the notion of political accountability in discussion in this section. First, it is not exercised directly: it is for the Court of Justice to decide the merits of each application. Second, it applies in cases of *personal* misconduct rather than the exercise of a political mandate as such, and should therefore be regarded as a disciplinary sanction (c.f. First Report 1.6.2 and 7.13.2 above).

7.15.7. The Committee offers no further comment on this mechanism other than to suggest that the treaty definitions of "misconduct" and behaviour with "integrity and discretion" might usefully be tightened up. It remains to be seen – in the context of a case currently pending at the Court of Justice - whether the present definitions of these terms, and procedures, are sufficiently apt for an early determination of the matter.

The discharge procedure

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235 TEC Article 213 *(ex-157)*

236 TEC Article 216 *(ex-160)*

237 TEC Article 216 *(ex-160)*

7.15.8. On the other hand, Council is a participant in a procedure, already described above, aimed explicitly at the enforcement of political, though not purely budgetary, responsibility: the discharge procedure. The power to give or withhold discharge is exclusively in the hands of the Parliament, but Council is nevertheless required to give a recommendation before it does so. Though its power in the decision itself is purely advisory, successive Treaty amendments have tended to upgrade the Council's recommendation. The last two paragraphs of Treaty Article 276 *(ex-206),* which deals with the discharge, reads:

> *The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.*
>
> At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.

7.15.9. In other words, and slightly paradoxically, the recommendations of Council are theoretically as binding on the Commission as those of the Parliament, even though Council does not take the crucial decision. However paradoxical, this situation implies a responsibility on Council to take the discharge procedure with a degree of seriousness which has arguably not been manifest over the years. The Committee has already noted a lack of interest on the part of Council in the examination of reports by the Court of Auditors (one of the cornerstones of the discharge procedure)[238] and would now add the observation that the Council's recommendations on discharge are usually formalistic in nature, arrive usually at the last minute and are in any case adopted at a relatively low political level (the Budgets Committee) of Council. In short, they do not reveal any great belief in the importance of this mechanism for enforcing accountability. The Committee hopes that recent events will have impressed on Council the need to give the discharge procedure the political weight it deserves.

7.15.10. In this context, the Committee would refer to the principle of budgetary discipline imposed upon the Commission when putting forward any proposal for a Community act or adopting any implementing decision likely to have implications for the budget. It is for Council and Parliament to monitor respect for this obligation when they act on proposed legislation. In its First Report, the Committee found, on the contrary, that Council and Parliament sometimes encourage the Commission to go assume tasks which make demands going beyond the available resources.

Committees of Member State representatives ("Comitology")

7.15.11. In a wide range of policy areas committees of Member States' representatives have powers of management and supervision over the implementation of Community policies. In some, they have the final word on the allocation of funding to projects (the Phare and Tacis Management Committees are examples).

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238 First Report 9.4.12

7.15.12. Though perhaps not designed primarily as a mechanism for the enforcement of accountability, these committees give the representatives of the Member States an opportunity to exercise a high level of monitoring and supervision over the management of programmes by the Commission. However, in practice, they tend to be a mechanism through which national interests are represented in the implementation of Community policies, sometimes to the extent that they become a forum for "dividing up the spoils" of Community expenditure and permit the Member States, at times, to use their influence in programme management committees to ensure that contractors from each Member State obtain a "fair share" of the overall funding available.

7.15.13. The Committee has no wish to go into the complex subject of "comitology" at this point, nor examine the rights and wrongs of the Member States attempting to accommodate national interests within the Community framework. However, it will allow itself to comment on one important point.

7.15.14. It is regrettable that a system which should introduce transparency and accountability into the management of programmes in fact can *remove* responsibility from the Commission for the management decisions taken. Commission managers can (and do) point to the extraneous demands of Member States as justification for management decisions which cannot be justified according to objective financial criteria. This *de facto* transfer of responsibility away from those whom are supposed to be held accountable runs counter to the entire philosophy this Committee has propounded.

7.16. Recommendations

7.16.1. The Committee considered that the codes of conduct elaborated by the Commission remain insufficient and are not yet backed up by the necessary legal framework. The attribution of responsibilities and chain of delegation between the Commission, single commissioners and the departments are ill-defined and ill-understood by those concerned. Finally, the concepts of political responsibility and accountability remain unclear and the mechanisms for their practical application inadequate.

7.16.2. The code of conduct for commissioners should redefine the concept of collective responsibility to encompass not only a prohibition on calling into question decisions adopted by the college, but also the right and the obligation of each commissioner to keep him/herself fully appraised of the activities of every other commissioner and to take action in this respect as necessary, for example by having frank and open discussions with other commissioners both inside and outside the college. (7.5.1-4, 7.10.1-2)

7.16.3. Commissioners' *cabinets* should be limited to a maximum of six category-A officials. The commissioner must ensure that the *cabinet* is multi-national in character and rules must be introduced to exclude any unduly favourable treatment of *cabinet* members at the end of their service. (7.5.7-8)

7.16.4. Clear rules should be established as to the applicable criteria to the appointment of individuals to commissioners' *cabinets*, with a particular view to eliminating the possibility of favouritism based on personal relationships. Full transparency as to any personal relationship

between a commissioner and a member of his/her *cabinet* must be ensured. (7.5.9-10)

7.16.5. Commissioners who use undue influence to favour fellow nationals or wider national interests in any sector for which they are competent are in serious breach of their obligation of independence, and should be subject to an appropriate sanction. (7.5.9-10)

7.16.6. Commissioners must carry out their duties with complete political neutrality. They should not be permitted to hold office in any political organisation during their term of office. (7.5.11-12)

7.16.7. The Commission must establish clear internal guidelines – to be made public – designed to ensure maximum openness and transparency as to acts and decisions of the Commission once taken and the processes by which they were arrived at. (7.6.3-7)

7.16.8. The rights and obligations of officials to report instances of suspected criminal acts and other reprehensible behaviour to the appropriate authorities outside the Commission should be established in the Staff Regulations and the necessary mechanisms put in place. The Staff Regulations should also protect whistleblowers who respect their obligations in this regard from undue adverse consequences of their action. (7.6.8-11)

7.16.9. An independent standing "Committee on Standards in Public Life" should be created by interinstutional agreement to formulate, supervise and, where necessary, provide advice on ethics and standards of conduct in the European institutions. This Committee on Standards should approve the specific codes of conduct established by each institution. (7.7.1-5)

7.16.10. All Commission staff should undergo professional training aimed at raising awareness of ethical issues and providing guidance, from both a personal and management perspective, on how to deal with practical situations as they arise. (7.7.6-9)

7.16.11. The code of conduct on commissioners and their departments should establish that each commissioner is responsible both for policy formulation and the implementation of policy by his/her department(s). The commissioner shall therefore be answerable to the Commission as a whole for the actions of the department(s), and accountable to the European Parliament. Officials in departments shall answer to their director-generals, which shall in turn be accountable to the competent commissioner. (7.9.1-9)

7.16.12. The Secretary General should be considered as the prime interface between the political and administrative levels of the Commission. He/she should above all ensure that decisions of the Commission are effectively followed up by the administration. (7.11.1)

7.16.13. Members of *cabinets* should not be permitted to speak on behalf of their commissioners. The primary function of *cabinets* is to provide information and to facilitate communication vertically (between the commissioner and the services) and horizontally (between commissioners). In neither case should the *cabinet* prevent direct communication with the commissioner, but rather stimulate such communication. (7.12.1-6)

7.16.14. The Commission is accountable to the European Parliament. To this end, it is under a constitutional duty to be fully open with Parliament, providing it with the complete, accurate and truthful information and documentation necessary for Parliament to carry out its institutional role, notably in the context of the discharge procedure and in connection with committees of inquiry. Access to information and documentation should only be refused in exceptional, duly motivated circumstances and in accordance with procedures agreed between the institutions. (7.14.1-13)

7.16.15. The enforcement of the individual political responsibility of commissioners should be a matter for the President of the Commission. The President should be empowered to dismiss individual commissioners, modify the attribution of responsibilities between them or take any other measure in respect of the composition or organisation of the Commission he/she deems necessary to enforce political responsibility. The President of the Commission shall be accountable to the European Parliament for any action (or inaction) in this context. These powers of the President should be made explicit in the Treaties, but, until this is possible, all commissioners should agree to abide by these principles. (7.14.16-22)

7.16.16. Any commissioner who knowingly misleads Parliament, or omits to correct at the earliest opportunity inadvertently erroneous information provided to Parliament should be expected to offer his/her resignation from the Commission. In the absence of an offer of resignation, the president of the Commission should take appropriate action. (7.14.14)

7.16.17. The Council should give greater political priority to the preparation of its annual recommendation to the European Parliament on discharge, as this would reinforce the political status of the prime institutional mechanism whereby the Commission is held accountable for financial management. (7.15.8-9)

7.16.18. Council and Parliament should be bound by the principle of budgetary discipline to take into account the resource requirements attached to any policy initiative they request from the Commission. The Commission should be able to refuse to assume any new tasks for which administrative resources are not available and cannot be provided through redeployment. (7.15.10)

7.16.19. The management of Community programmes, and in particular all questions of financial management are the sole responsibility of the Commission. Committees composed of Member State representatives should not therefore be empowered to take any decision relating to the ongoing financial management of programmes. Any risk that national considerations might affect financial management at the expense of sound financial management criteria should be excluded. (7.15.11-14)

8. REMARQUES FINALES

8.1. Le Comité, tout au long de ce rapport, s'est attaché, conformément au mandat qui lui a été confié, à analyser les problèmes de gestion concrets, quotidiens, de la Commission. Il estime toutefois devoir relever, à l'issue de ce travail, qu'apparaît en filigrane la dimension politico-institutionnelle des faiblesses de la Commission : souvent, la Commission ne peut s'en remettre qu'à des demi-mesures, parce qu'elle ne dispose pas des moyens, notamment réglementaires, pour exercer pleinement ses responsabilités. Il n'appartenait pas au Comité de suggérer des réformes institutionnelles à entreprendre. Il reste que, clairement, la Commission doit avoir les moyens de ses responsabilités.

8.2. Le Comité n'a traité dans ce rapport, ainsi que son mandat le lui prescrivait, que de la gestion de la Commission. Un certain nombre de recommandations formulées par le Comité pourrait cependant être mis à profit autant par la Commission que par les autres institutions. La délimitation du champ d'analyse du présent rapport n'exonère en rien ces dernières de leur devoir de réflexion sur leurs propres pratiques administratives et financières, sur leur contribution à l'architecture du système dans son ensemble, ainsi que sur l'amélioration de la culture politique des Communautés.

8.3. Un autre problème diffus rencontré de manière récurrente s'avère de nature plutôt culturelle : l'administration communautaire a tendance à privilégier les fonctions de conception et de négociation au détriment des tâches de gestion et de contrôle, moins considérées. "L'intendance suivra", tel semble le mot d'ordre d'une administration qui se voudrait plutôt visionnaire que gestionnaire. Aucune mesure ne peut traiter un problème de mentalité : le Comité estime cependant devoir encourager à cet égard à la réflexion et au débat interne.

8.4. Au cours de ses travaux, le Comité a constaté un grand nombre de défaillances dans le fonctionnement de l'administration communautaire. Cependant, ses membres ont été amenés à rencontrer beaucoup de fonctionnaires de la Commission, de niveaux et de fonctions très divers : dans la plupart des cas, ils ont pu apprécier leur compétence, leur souci du service public et leur volonté sincère de contribuer aux efforts nécessaires pour améliorer le système. Cette richesse humaine constitue l’un des acquis les plus importants à porter au crédit de la construction communautaire. Ne pas le laisser péricliter est une des responsabilités primordiales de la Commission.