



Supervisory Committee

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Members of the OLAF Supervisory Committee

Mireille DELMAS-MARTY

Chair until 9 October 2001

Professor at the Panthéon-Sorbonne University (Paris I)

Raymond KENDALL

Chair from 9 October 2001

Honorary General Secretary of INTERPOL

Edmondo BRUTI-LIBERATI

Deputy Prosecutor-General at the Milan Court of Appeal

Alfredo José DE SOUSA

Member of the Supervisory Committee since 1 April 2001

President of the Court of Auditors of the Republic of Portugal

Harald NOACK

State Secretary in the Government of North Rhine - Westphalia

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INTRODUCTION

The Committee maintained the monthly frequency of meetings: it met eleven times between September 2000 and September 2001, during which it regularly heard reports from the Director of OLAF and his staff. It maintained its contacts with the institutions, at its meetings or in connection with them: with Parliament (in particular with the Chairman and rapporteurs of the Committee on Budgetary Control); the Council (representatives of the Presidency and the Permanent Representatives Committee); the Commission (in particular Ms Schreyer, Mr Vitorino and the Secretary-General, Mr O'Sullivan); and the Court of Auditors (which it met twice).

The transitional period needed to set up structures adapted to OLAF's new functions was much longer than expected, and the Committee had to devote a more substantial share of its endeavours than it would have liked to the task of consolidating the Office's independence in establishing new structures and methods. At the end of this period, the Committee should be able to focus more on operational questions and fully exercise the function conferred on it by Regulations (EC) No 1073 and (Euratom) No 1074/99:¹ “regular monitoring of the implementation of the investigative function” of OLAF.

In its first report (Chapter 1.1, OJ C 360), the Committee stressed the limits flowing from the new structures and the proposed changes. A year on, the balance-sheet has plus and minus items as regards both the limits flowing from internal organisational aspects and those flowing from ambiguities in the Office's status.

- Regarding the limits flowing from internal organisational aspects, the sought-after improvements in internal organisation (P2 and P4) are gradually being achieved. The first effects yielded by the restructuring of OLAF, scheduled for summer 2000 in order to equip the Office to carry out its new tasks, were felt in relation to the transparency of operations. On 1 January 2001, a system for recording all cases was set up as recommended by the Court of Auditors. In addition, a major effort to codify and harmonise operational procedures was made in connection with the preparation of an OLAF Manual, also on 15 February 2001. Lastly, since the end of the first half of 2001, all investigation procedures have been managed by a Case Management System

presented to the Supervisory Committee, which stressed that it would inevitably be subject to further development.

In parallel with this injection of transparency into the management of OLAF, the Supervisory Committee adapted its operation so as to exploit the documentation and data thus obtained. OLAF now supplies updated monthly scoreboards covering all its operational activities and providing the main items of information that must be submitted under Article 11(7) of the Regulation. The Committee used these scoreboards, which amplify the reports submitted regularly by OLAF for a year on investigations running for more than nine months and information on cases referred to the national courts, to identify priorities for its own controls.

The Committee was also able to base its evaluation of operational activity in overall terms on OLAF's answers to questionnaires prepared by its rapporteurs and in specific terms on an analysis of a number of cases, supplemented if necessary by working sessions at OLAF's offices.

- Regarding the limits flowing from ambiguities in the Office's status, progress is slow and remains unsatisfactory.

With regard to OLAF's administrative and budgetary autonomy (proposal P1), the Council and Parliament confirmed their previous standpoints and spelled them out in Resolutions passed when the Committee's first report was presented. At meetings with Ms Schreyer, Commissioner responsible for OLAF, and Mr O'Sullivan, Secretary-General, the Supervisory Committee was able to satisfy itself that the Commission had the will to secure the Office's operational independence and wished to grant it the management resources it needed for this independence. It was agreed that a Code of Conduct governing relations between OLAF and the Commission would be prepared so as to give a constructive meaning to the ambiguities of OLAF's status noted by the Committee in its first report. The Commission in particular confirmed its will to take advantage of the duality of OLAF's functions – operational and legislative – and to exploit potential synergies between them.

Regarding the scope of Article 280 of the Treaty in all the Community institutions and bodies, including with regard to Members of Parliament (proposal P3),

¹ For purely practical reasons, only Regulation No 1073/99 will be cited in the rest of this report.

the situation has hardly developed and remains unsettled pending the judgments of the Court of First Instance.

Lastly, regarding the strengthening of the legal framework for the protection of the financial interests of the EU (proposal P5), initiatives have indeed been taken by Parliament and the Commission with regard both to the procedural framework (gradual introduction of a European Public Prosecutor) and to the substantive law (proposal for a Directive concerning the criminal-law protection of the financial interests).²

The establishment of Eurojust, which is supposed to improve cooperation, raises the problem of relations between OLAF and the new body. The Intergovernmental Conference on the reform of the institutions, which ended in Nice, did not agree on extending its powers to cover the protection of the Community's financial interests. It is clear, therefore, that OLAF has powers in relation to crime against Europe and Eurojust to crime in Europe. All aspects of the protection of financial interests, including the judicial follow-up, are thus matters for OLAF. This applies in particular to the fight against fraud, corruption to the detriment of the Community budget and the laundering of the proceeds of such offences.

The question of relations between OLAF and Eurojust was considered at a meeting between the Supervisory Committee, Mr Vitorino, Commissioner responsible for Justice and Home Affairs and Mr Brüner. At this meeting, it was made clear that both the Commission and OLAF wanted these relations to be organised in a concern for cooperation and complementarity.³

To give the fullest possible analysis and evaluation, this report is structured as follows:

- Administrative and budgetary independence (chapter I)
- Restructuring (chapter II)
- Description of investigation activities (Chapter III)
- Evaluation (Chapter IV)
- Conclusions (Chapter V)

² See *infra*, Chapter V.2.

³ Letter to Mr Vitorino dated 1.5.2001.

Chapter I - ADMINISTRATIVE AND BUDGETARY INDEPENDENCE

During its first year of activity, the Committee had to devote the bulk of its work to securing OLAF's administrative and budgetary independence. It reported on this last year, emphasising the legislature's determination to shield OLAF against all forms of pressure and influence in the context of its administrative and budgetary management, but at the same time it observed that that independence was not yet secured. Since then, the setting-up of OLAF has continued, and the following changes have been made:

With regard to the establishment of budget estimates, the powers conferred on the Office's Director on the basis of the Committee's opinion are basically appropriate and consonant with the need for independence. But for the second time, for reasons of timing, the Committee's opinion on the preliminary draft budget for 2002 did no more than take note of the Office's proposals as the preliminary draft was not presented early enough.

With regard to management of human resources, OLAF had to deal with recruitment difficulties and the restructuring process could not be completed. It was very difficult to manage selection procedures without a clear idea of the functions, qualifications, level and status of the staff to be recruited. And, of course, restructuring was bound to cause upheavals in working methods, organisation and working relations.

The Committee's deliberations and decisions are based on the opinions expressed by the institutions on its first report.

The Council resolution of 5 December 2000 on the Supervisory Committee's first report⁴ "calls on the Committee to pursue its function of monitoring OLAF and giving its constructive and critical assistance" (point 15). The Council particularly stresses the need to complete the establishment of OLAF's administrative and budgetary independence (point 12), in particular as regards recruitment (point 14).

Parliament wished OLAF to introduce procedures for recruitment to management posts involving the exercise of the powers of the appointing authority conferred on the Director by Article 6 of the Commission Decision of 28 April 1999.⁵ At its initiative, the budgetary authority placed in reserve 76 of the new posts given to OLAF in the 2001 budget to ensure that the recruitment policy followed by OLAF truly matched the

⁴ Attached.

⁵ Points 5 and 6 of the Resolution.

objectives set by the legislation and solved the problems generated by the transfer of UCLAF's staff in its entirety.

Following talks between the Committee and the Commission, an Advisory Committee for Appointments reflecting the specific status and other features of OLAF was set up.⁶

The result of all these discussions was an agreement to seek pragmatic solutions enabling the OLAF project to be put into operation as desired by the legislature. The Office is set up within the Commission's administrative and budgetary structures but, as far as the Committee is concerned, in such a way as to secure its investigative autonomy; the Commission's rules of procedure are applicable so long as they do not hamper the Office's independence. It is important that the Commission has agreed to solve the problems of staff redeployments. And action has been taken on proposal P2 of the first report – the dual mission of the Office in its investigative function and the Commission's legislation and policy function. The organisation as set up by the Office appears to meet the conditions for this dual mission.

It remained only to inform Parliament, which wished to seek the Committee's opinion, that the objectives pursued by OLAF actually corresponded to the legislative intention. A meeting convened by Parliament's Committee on Budgets on 13 June 2001 noted that the restructuring process could now be launched on the basis of a rebalanced establishment plan and the Commission had undertaken to support the redeployment of former UCLAF staff. The budgetary authority accordingly adopted an amending budget containing the establishment plan for OLAF, effecting the distribution of permanent and temporary A and B posts on the basis of a compromise between Parliament and OLAF.

The Supervisory Committee considers that the restructuring process is now irreversible. OLAF's new organisation chart highlights the separation of functions between investigations, intelligence, follow-up and judicial advice, and recruitment policy must be adapted in line with the new structure. The current position is that OLAF has recruited, in accordance with its own procedures, three Directors for Policy and Legislation, for Operations and for Intelligence, along with most of the judicial officers for the Judicial Advice Unit. The redeployment of former UCLAF staff is in motion and will be completed by October 2001.

⁶ Meetings on 7/8 November 2000 and 16/17 January 2001.

The final decisions concerning the release of the last 38 posts and the adjustment of OLAF's budget estimates for 2002 will be taken in October on the basis of an evaluation of progress in restructuring by the Supervisory Committee.

The Supervisory Committee considers that, the transitional phase being over, there is no longer any need for its active support in the process of restructuring the Office, in which it ran the risk of being forced into the position of arbitrator as between the institutions.

Chapter II - RESTRUCTURING

II - 1. Organisation

II - 1.1 Reorganisation of administrative structures

OLAF's administrative structures developed in stages, and the Director regularly briefed the Supervisory Committee.

The first stage, in September 2000, involved the establishment by the Director of two Directorates, one responsible for legal affairs and Community legislation governing the protection of financial interests (Directorate A) and one for investigations and operations (Directorate B). A number of units principally responsible for administrative and communication matters were attached direct to the Director.

The second stage came on 15 June 2001 with a new reorganisation decision, amplifying the mechanism set up in September 2000 in three main respects:

- the establishment of a third Directorate responsible for intelligence, operational strategy and information technology (Directorate C);
- changes in the management structure of the Investigations and Operations Directorate to meet the concern of the legislature for priority to be given to internal investigations, organising the advisers in charge of investigations in two teams dealing with (a) internal investigations, direct expenditure and structural actions and (b) external investigations and operations, -
- the establishment of a Unit in Directorate A to monitor recovery in accordance with action 96 of the White Paper on the reform of the Commission, relating to the more effective management of recovery of funds unduly paid.

In parallel with these structural changes, OLAF set up an Internal Investigations and Casework Board, consisting of the Director-General, the Investigations Director, the Operations Assistant, the advisers in the Investigations and Operations Directorate and the Heads of the Magistrates and Judicial Advice, and Pool and Support Functions Units.

The Board's role is to allow the rationalisation of decisions to open investigations, improve their follow-up and produce reports in compliance with the rules of procedure.

The changes have still, of course, to produce their full effects through proper recruitments and appointments, and especially by establishing strong and structured connections between investigators, judges and intelligence on the occasion of each investigation.

II - 1.2 Recruitment

Recruitment procedures have been established, but they have not yet borne fruit.

II - 1.2.1 *Advisory Committee on Appointments*

The three director appointments in OLAF posed a number of problems which concerned the Commission, the Director of OLAF and the Supervisory Committee.

In the end an agreement that maintained the Director's independence and autonomy was reached in the form of a Consultative Committee on Appointments, chaired by the Secretary-General of the Commission and including officials from the Court of Auditors and the Court of Justice, a member of the Supervisory Committee and an official from OLAF, and this enabled the Director of Directorate A to be appointed.

II - 1.2.2 *Selection Committee*

But as regards the two Director posts covered by the budgetary resources for temporary staff and not eligible for transfer to other Commission departments, the Advisory Committee for Appointments was left aside in favour of an internal OLAF Selection Committee chaired by a member of the Supervisory Committee.

This Selection Committee recruited the Directors in charge of Directorates B (Investigations and Operations) and C (Intelligence, Operational Strategy and Information Technology). But the candidates selected for Directorates B and C had not yet taken up duty at the time of writing.

II - 1.2.3 Independence and responsibility of officials and temporary staff

Regulation No 1073/99 determines the independent status of OLAF's Director. But OLAF's staff in general, and its temporary staff in particular, enjoy no specific status.

The provisions of the Manual relating to the independence of OLAF staff (point 1.5.3) refer mainly to their loyalty to the Director and the Commission and are based on the Staff Regulations of Officials and the Code of Conduct for OLAF staff.

The Committee considers that measures should be taken to ensure that OLAF officials and temporary staff do not come under pressures during their investigations that might jeopardise their independence.

In general terms, it would help to secure staff's independence if the Manual provided for rules to give effect to the disciplinary, financial and other responsibilities of OLAF staff, in particular in their investigation functions, especially as regards violations of litigants' rights.

II - 1.3 Role of the judicial officers

At the end of 2000 OLAF set about recruiting fifteen judicial advisers, who during the first half of 2001 were gradually recruited to OLAF departments, either in the Judicial Advice Unit or in the Investigations and Operations Directorate.

This recruitment answered calls made by the Council,⁷ the European Parliament⁸ and the Supervisory Committee.⁹

In certain conditions the current rules, laid down in the OLAF Manual, associate judges serving in the Legislation and Legal Affairs Directorate with investigations conducted by the Investigations and Operations Directorate.

The aim of establishing this Unit is to involve the judicial advisers in investigative activity and in contacts with the national judicial authorities via the European Judicial Network and Eurojust. The Unit will also provide the Office with internal legal advice so as to guarantee the legality of investigations, secure respect for fundamental rights of

⁷ Council Resolution of 5.12.2000.

⁸ Resolution A5-0116/2000 of 16.5.2000. Resolution A5-0116/2000 of 13.12.2000.

⁹ Supervisory Committee Report for 2000.

persons under investigation and avoid annulment actions when the case reaches the courts.

Under the current rules laid down in the Manual of Procedures, the judicial officers are involved at three stages:

- in investigation procedures, they can be involved throughout the procedure. they can also be consulted before the decision to refer the case to a national authority or to a Community authority is taken;
- they are consulted on coordination procedures involving activities in non-member countries;
- in mutual assistance procedures, they are involved wherever necessary in action on requests from the administrative or judicial authorities.

The Committee considers that the rules laid down in OLAF's Manual in this respect are inevitably only provisional and that the Unit's role and responsibilities will need defining more sharply. If the principle is that the judicial officers are simply consulted before cases are transmitted to the national judicial authorities or even formally referred to them, the responsibility for contacts with these same judicial authorities remains in the investigators' hands.

But on straight efficiency grounds, it would be preferable to involve the judicial advisers more closely, as they are by definition experienced in matters of relations with the courts.

Unit A.5 (Magistrates and Judicial Advice) in Directorate A should rapidly have an expert in each Member State's legal and judicial system. The number of staff with judicial experience could well increase as they are also to perform certain duties in relation to the Investigations and Operations Directorate, in particular where internal investigations are concerned.

They are not representatives of a Member State and are recruited by the Director of OLAF, like all OLAF staff, on the basis of procedures that are designed to secure their independence.

II - 1.4 Follow-up and recovery

The Director of OLAF adopted a decision¹⁰ establishing a Unit (A4) to monitor recovery in the Legislation and Legal Affairs Directorate (Directorate A). This decision falls within the context of action 96 of the White Paper on the reform of the Commission, relating to the more effective management of recovery of funds unduly paid.

This Unit will be responsible for monitoring the financial aspect of investigations, in particular as regards direct expenditure, where the Commission makes payments itself, but also the administrative and disciplinary aspects. Its role in judicial follow-up will have to be clarified.¹¹

The Supervisory Committee has observed that interdepartmental agreements are being negotiated between OLAF and the relevant Commission Directorates-General and the other institutions and bodies. OLAF quickly needs to have a clear concept of all aspects of its follow-up activity (administrative, financial, disciplinary, judicial etc.) and of its role and position in the Office's organisation.

II - 1.5 Intelligence, gathering and evaluating information

The Supervisory Committee was concerned from a very early stage about the fact that OLAF did not have a proper intelligence service responsible in particular for risk analysis and the gathering and analysis of information on transnational and international fraud in order to enable the Office to determine its policy on investigations.

This situation was all the more paradoxical as the Commission was involved in numerous cooperation or administrative information exchange agreements, in particular in the customs field, many of them at international level.

The recruitment and appointment (now in motion) of the Director of the Intelligence Directorate should enable this new department to be so organised as to meet two major preoccupations:

- intensify cooperation between the new department and Directorates A and B;

¹⁰ In June 2001.

¹¹ On this question, see also points 4.6, 4.7, 4.11, 4.19 and 4.20 of Court of Auditors Special Report No 8/98 on the Commission's anti-fraud units, notably the Unit for Coordination of the Fight against Fraud (UCLAF).

- and have regard for complementarity with the work of corresponding departments in the Member States and the Commission.

Procedures to sort and validate the flow of operational, legal and statistical information into the Office and, if necessary, relay it to the Member States still have to be boosted.¹²

The Committee observes, incidentally, that a major function of the Intelligence Directorate (Directorate C) will be to provide the basis for establishing OLAF's work programme for examination by the Committee under Regulation No 1073/99.

II - 2. Methods

II - 2.1 Managing cases: the Case Management System and scoreboards

In order to supply information on investigative activity, the Office has injected the necessary transparency into case management. The IRENE system, whose defects were highlighted by the Court of Auditors in Report 8/98, operated in place of a registration system.¹³ Apart from its technical weaknesses, it was far from systematically used. Its ambitions were excessive (storage of cases reported by Member States, management of UCLAF files, intelligence and analysis functions), it was cumbersome in operation and excessively fragmented, and it had become unreliable. The entry of cases, the classification of documents, notes and reports and management practices were not governed by precise, uniform rules.

In the autumn of 2000, the Committee, partly for its own information and partly for the sake of management transparency, asked for all cases to be recorded and for monthly scoreboards to be put to it.

The important job of updating data from IRENE was then undertaken and since the beginning of 2001 cases have been systematically and fully recorded.

¹² On this question, see also point 2.18 of Court of Auditors Special Report No 8/98 on the Commission's anti-fraud units, notably the Unit for Coordination of the Fight against Fraud (UCLAF).

¹³ On this question, see also points 3.8 to 3.10 and 3.13 to 3.18 of Court of Auditors Special Report No 8/98 on the Commission's anti-fraud units, notably the Unit for Coordination of the Fight against Fraud (UCLAF).

The decision was taken to transfer the entire management of cases to a new Case Management System (CMS), which came on stream in May 2001. This system, based on systematic recording, provides a full and ongoing overview of the caseload and is the source for information transmitted to the Supervisory Committee in the form of scoreboards.

To change over from IRENE to the CMS, OLAF carried out extensive work of checking and validating the files transferred.

The CMS database is now up and running, but improvements are still needed in several respects:

- the information on cases transmitted to the judicial authorities and on requests for judicial assistance from the national authorities;
- the information on the follow-up to cases (criminal, disciplinary or financial aspects);
- use of the possibilities offered by CMS as regards analysis and intelligence.

File management was still not structured uniformly. There was no general rule laying down criteria for classifying documents, notes and reports, and files generally suffer from the fact that there is no clear identification of documents (no summary contents list, no reference to sources, no indication of date and contents).

This lack of filing rules and the lack of a standard case layout could be counter-productive when cases are transmitted to the judicial authorities of the Member States.

II - 2.2 OLAF Manual

On 15 February 2001, the Director of the Office put into force an OLAF Manual. The purpose of this Manual, which is based on the Regulations applicable to OLAF, is to improve and standardise working methods and procedures in the Office and make them more transparent both internally and externally.

The Manual for the first time provides a guide to internal procedures that establishes a tight framework within which individual decisions are taken by OLAF's managers and investigators.

But harmonisation of the rules of internal procedure by the Manual, which helps to standardise the way the Office goes about its business, does not solve all the difficulties facing investigators.

The principle is that investigations must comply with Treaty provisions, and in particular with those of the Protocol on Privileges and Immunities, the Staff Regulations of Officials of the European Communities and a number of rules laid down by Community legislation or autonomous decisions of the institutions.

The Community legislation imposes a number of fundamental obligations.

The first obligation incumbent on OLAF, particularly important in terms of defence rights and of limitation periods,¹⁴ is to inform those concerned that an investigation is being opened (Regulation No 1073/79).

The second obligation is to enable those concerned to make their views known on all facts concerning them before conclusions referring specifically to them are drawn (cf. Article 4 of Commission Decision 99/396/CE, ECSC, Euratom of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, and Article 4 of Council Decision 99/394/CE, Euratom of 25 May 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests).

The Manual establishes the principles that people must be informed when an investigation is opened concerning them, together with a rather restrictive consultation process in that the person involved is invited to take note of a summary of the case and not of the entire file.

The Committee received two complaints from persons under investigation who considered that their individual rights were not safeguarded since they had not been given the full file.

If defence rights and therefore the legality of the proceedings are to be regarded as fully secured, any person whose case has not yet been referred to the national judicial authorities or a European disciplinary body should be guaranteed an absolute right of access to the entire file.

¹⁴ Article 3 of Regulation 2988/95.

Investigators are under a third obligation at the end of an investigation. The person being investigated must be able to know within a reasonable time that the investigation into him has been terminated.

The OLAF Manual does not provide clearly enough for the Director to inform the person involved at the end of the investigation. This is a gap that should be filled, and the right of any person under investigation to be informed that the investigation against him has been terminated should be secured.

The Manual should also restate the rule that any person investigated must benefit from a full and rapid investigation procedure.

II - 2.3 Relations with the Commission

Code of Conduct for relations between OLAF and the Commission; *MOU*

Rules of cooperation need to be laid down to specify the conditions for the Office's functional independence and the absence of interference by the Commission with the functions exercised by the Office as a department associated with the Commission.

Following talks with the Commission Secretary-General, who supported the initiative, the Supervisory Committee and the Director-General devoted several meetings to examining a draft Code of conduct laying down rules for cooperation between OLAF and the Commission. Essentially this cooperation can be examined under three different aspects: the reciprocal rights and duties of OLAF and the Commission, the organisation of interdepartmental work, and the management and administration of the Office.

This on-going project should clarify relations between the Office and the Commission and consequently express OLAF's independence as an investigation service.

The following matters are to be considered:

- relations between OLAF and the Secretariat-General and Directorates-General concerned by the Office's activities, in particular as regards follow-up on financial irregularities affecting the Structural Funds;¹⁵
- relations between OLAF and authorising and accounting officers regarding recovery;

¹⁵ See special report No 8/2001 by the European Court of Auditors.

- the relationship between the Office's internal investigations and the Commission's disciplinary and administrative procedures; and
- the conditions and obligations as to mutual information regarding investigations.

Likewise, the Supervisory Committee noted that the Director-General of the Office and the Director of the Commission's Internal Audit Service wished to come to an agreement clarifying or confirming the rules governing collaboration between them.

The agreement should help to avoid overlapping powers.

Chapter III - DESCRIPTION OF INVESTIGATION ACTIVITIES

The concept of investigation is based on Articles 2, 3 and 4 of Regulation No 1073/99 of 25 May 1999. Under these articles, investigations mean all checks and inspections or other action for the purpose of:

- "fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community,
- investigating to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of Officials."

There is a great variety of information sources underlying investigations: information may be transmitted by specialised departments in the Member States, the institutions, letters and freephone calls, whistle-blowers or press articles.

III - 1. Initial evaluation of documents and information

Information of all kinds relating to fraud activities is systematically recorded in a mail registration system in OLAF (ADONIS).

The rules laid down in the OLAF Manual ought to improve the way in which information received is quickly evaluated. The Manual lays down the rule that information received must in normal circumstances undergo initial evaluation within five days. After this initial evaluation, handled by an official who is not in charge of the investigation, the Casework Board is asked to give an opinion on the evaluation and consequently on the action to be taken on the initial information.

The Casework Board, consisting of the Director-General, the Director of Investigations, the Sectoral Advisers and the Heads of Unit A5 (Judicial Advice) and Unit B1 (Support Functions) meets weekly and is responsible for presenting OLAF's Director with proposals to formally open investigations.

The Committee points out that this first stage, when documents or information received are analysed, raises a number of difficulties and questions of principle.

First, it notes that there is no representative of Directorate C (Intelligence, Operational Strategy and Information Technology) on the Board.

This may be because when the Manual came into effect, Directorate C had not been set up and should be rectified, as the evaluation of information received and consequently the action to be taken depends for its validity on account being taken of other information already available, presumably held and analysed by the Intelligence Directorate.

Moreover, the involvement of the Head of Unit A5 (Magistrates and Judicial Advice) should also help to improve the evaluation of information prompting decisions to open investigations.

In certain cases the decision to open an investigation, and therefore to deploy exclusively administrative investigation resources, may prove inconclusive as only a referral to the judicial authorities, which have more effective procedural rules and means of coercion, will make it possible to ascertain the facts that can be used to ground criminal or disciplinary proceedings. The prospect of a referral to the judicial authorities is one of the dimensions of a case that should accordingly be considered as soon as the original information is analysed.¹⁶

Moreover the evaluation of information received frequently goes beyond the five-day time-limit set by the Manual.

The question arises therefore whether it is not advisable to review the standard that OLAF imposed on itself and set a more reasonable and realistic period.

¹⁶ On this question, see also point 3.8 of Court of Auditors Special Report No 8/98 on the Commission's anti-fraud units, notably the Unit for Coordination of the Fight against Fraud (UCLAF).

III - 2. Decision to open a case and choices of the form of investigation

Since 1 June 2000, all investigations have been opened by a decision of the Director of the Office, of his own motion or in response to a request from a Member State or a Community institution or body. The Director directs the conduct of an investigation.

The Director's decision to open an investigation is an important document which has implications both for the person who may be concerned and for the case investigators. This decision must therefore be taken very quickly after the information received has been evaluated and must be very clear as to the nature and scope of the facts that are to be investigated. Investigative acts undertaken outside the scope of the decision to open the investigation may be annulled as only the Director of OLAF is legally empowered to open investigations and determine their scope (Article 5 of Regulation No 1073/99).

If the decision to open the investigation were vague or imprecise, the persons under investigation would have an opportunity to challenge all or part of the procedure.

The Committee considers that, given the importance of drafting clear decisions to open investigations, setting out the nature and scope of the facts to be investigated, the Judicial Advice Unit should be asked for its opinion before the case goes up to the Director.

This opinion could also state the form to be taken by the investigation, in particular the value of transmitting it forthwith or not to the national judicial authorities in cases where there is manifestly a criminal dimension. OLAF's role is then to provide assistance to the national judicial authorities and in some cases to follow up progress.

III - 3. Procedure and results of investigations

III -3.1 Internal investigations

The internal investigations of UCLAF then of OLAF have come under a variety of legal frameworks.

First of all, until a Commission Decision of 14 July 1998, there was no specific instrument truly determining the conditions in which investigations internal to the European Union institutions and bodies were to proceed. They were based solely on the horizontal and sectoral legislation in force. Regulations specific to UCLAF, such as Regulation 2185/96, did not deal with internal questions. Certain investigation measures required prior authorisation from the Secretary-General of the Commission.

From 14 July 1998 internal investigations were governed by the Commission Decision of the same day. Detailed rules implementing this Decision were adopted on 9 December 1998.

Since 1 July 1999 the details of OLAF investigations have been governed by Regulation No 1073/99 and by decisions adopted by each institution.

These various legal frameworks laid the bases on which the methodology of investigations was gradually built up. Since 1 July 1999 the Office's investigations have been expanded for three reasons:

- first of all because of the extension of the Office's powers to the other Community institutions and bodies;
- then the regulatory obligation on all officials and other staff to report cases of which they were informed;
- lastly, the extension of OLAF's powers beyond purely budgetary fraud, resulting in an increase in the number of cases from 1 July 1999.

Analysis of the figures supplied by OLAF reveals that 92 internal investigation cases were in motion on 1 July 2001.

The Committee's rapporteurs examined a number of cases. Their examination reveals generally that OLAF defined the accusations in rather vague terms, which sometimes made it difficult to process cases. With regard to the charge, it is clear that the qualification of the facts investigated by OLAF staff should be along the lines of a criminal, disciplinary or financial offence.

Clear charges should be brought, based on the applicable provisions in the criminal law of whichever Member State is relevant to the proceedings, or the Staff Regulations of Officials of the Communities in disciplinary matters, or the financial regulations of the Communities for financial misconduct, as the case may be, so as to make the presentation of the cases more transparent and more rational.

The table below gives figures relating to the 92 cases of internal investigations recorded by UCLAF/OLAF.

Because OLAF does not use standard definitions of offences to be charged, the breakdown adopted may be a little imprecise, but this does not invalidate the basic data in the table. Fifteen of these cases were transmitted by other institutions, which are therefore behind the opening of the investigations. But 78 cases were opened by OLAF.

INTERNAL INVESTIGATIONS

Type of Fraud or irregularity (*)	Referral to Judicial Authorities	Result		Referral to Disciplinary Authorities	Result		Cases transmitted by other Institutions
		Judgments obtained	Closed without further action		Administrative penalty ordered by appointing authority	Closure decision ordered by appointing authority	
C: 8	5	1	1	3	1	1	1
CI-IG-IP: 16	5	-	2	4	-	2	1
E: 2	1	-	-	1	-	-	-
F: 10	1	-	1	3	2	-	-
FP: 16	6	1	3	3	1	-	6
MM: 19	2	-	1	1	-	1	4
MP: 8	1	-	-	1	-	-	1
SP: 1	-	-	-	-	-	-	-
ST: 7	3	-	-	2	1	-	1
TI: 2	1	-	1	-	-	-	-
UA: 2	-	-	-	-	-	-	1
V: 1	1	-	-	-	-	-	-
<u>92¹⁷</u>	<u>26</u>	<u>2</u>	<u>9</u>	<u>18</u>	<u>5</u>	<u>4</u>	<u>15</u>

- C = Corruption
 CI = Confusion of interest, IG: Interference, IP: Personal interest
 E = Embezzlement
 F = Favouritism
 FP = Forgery
 MM = Violation of management rules
 MP = Infringement of the public procurement rules
 SP = Professional secrecy
 ST = Infringement of the Staff Regulations of Officials
 TI = Trading of favours
 UA = Misuse
 V = Theft

(*) The data in the table above do not relate to specific criminal offences but to a classification of improper forms of conduct based on statistics extrapolated from OLAF records. The figures include both cases already closed, cases opened and cases in motion offer an evaluation in snapshot terms.

¹⁷ Of which four were external cases with an internal impact.

On the basis of the cases currently in hand, the judicial authorities have received referrals in 26 cases, with a positive result in two of them, and in nine cases a decision has been taken to terminate without further action.

The disciplinary authorities received referrals in 18 cases, with a positive result in five and a negative result in four.

Examination of the internal investigation cases reveals that there are several types of difficulty in the conduct of investigations which can affect their legitimacy and credibility.

First of all, investigations must be conducted rapidly, and the norm is set by Article 11(7) of Regulation No 1073/99, which introduced a nine-month deadline for the normal conduct of investigations.

The Committee observes that 58 out of 92 investigations exceeded the nine-month deadline. The reasons given were often based on staff shortages for internal investigations and the fact that no priority had been given.

In future this deadline should be respected as a matter of principle, both on grounds of efficiency of investigations and for the sake of litigants' rights, given that OLAF has attached priority to internal investigations, set up a structure for the purpose and equipped it with the requisite resources.

III - 3.2. External investigations

With a view to strengthening fraud prevention, OLAF exercises the external investigation power under the Regulation 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 (Regulation 2185/96).¹⁸

OLAF also exerts this authority in third countries for existing cooperation agreements.

In its external investigation function, the Office also carries out the checks and inspections provided for by the Regulation on the protection of the financial interests of the European Communities (Regulation 2988/95) and by sectoral regulations.

The "autonomous" investigation procedure, based on Regulation No 2185/96, should be used more efficiently.

In practice, frauds and other irregularities nearly always tend to be detected in close cooperation between OLAF and national investigation services. In such cases, the external investigation takes the form for the Office of a request sent to the Member States for the opening of an investigation; this investigation then proceeds under the responsibility of the Member States, which operate in their national legal framework. The Office is associated with the direction of the investigations.

The investigation may also be based on coordination and assistance for investigations conducted by the Member States. In this event, coordination activity consists of providing Member States with information received by the Community and giving guidance for operational action by the Member States' authorities, with their agreement.

In fact, almost all cases which involve complex fraud factors require a series of things to be done, sequentially or not, by OLAF investigators (associated control, coordination, assistance to judicial authorities) on a variety of existing legal bases, depending on the specific needs of the Member State or third country concerned.

The number of external investigation cases recorded in the Case Management System on 31 May 2001 was 2 343, according to OLAF's figures.

OLAF was unable to provide the Committee with precise information on the practical results obtained from these investigations in terms of the action by the Member States or third countries in cases in which there was either coordination and assistance or autonomous controls by OLAF. Nor did the Office indicate the breakdown between the two types of activity.

In particular, there was at the time no information on the administrative penalties imposed as a consequence of these investigations, on the nature of the proceedings brought in Member States or third countries concerned by these criminal investigations, on convictions and sentences, or on recoveries.

This information had not been systematically gathered. OLAF should make progress here with the introduction of monitoring activities involving the judicial advisers in matters relevant to them and with the development of the CMS database.

¹⁸ Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests

The disparities observed in the clear-up rate are explained by the complexity and the number of cases in the sector concerned. In addition, certain sectors of OLAF were obliged to work with limited staff over an extended period, which naturally affected the rate of processing of cases.

The defragmentation announced by the Director of OLAF does not seem to have been totally completed as regards external investigations and management is still, despite the existence of pools of investigators in the official organisation chart, conducted on a sectoral basis.

The latitude left to the Director of OLAF to recruit specialist investigators on contract rather than as permanent officials should enable OLAF in the long term to set up a team of versatile investigators.

Given the complexity of the legislative framework for investigation activity (Community law and criminal law of the Member States), the intention should be to form a team of versatile investigators capable of working together in a multidisciplinary context. This multidisciplinaryity involves assigning judicial officers to work with the investigators from the Member States' traditional investigation services (customs, tax inspectorate, police force).

The Director of the Office, at meetings with the Committee, announced his intention of continuing the reorganisation of OLAF along these lines.

III - 4. Closure of the investigation

At the end of the investigation, OLAF is left with two main formalities:

- produce a report for signature by the Director, reflecting the procedural requirements of the law of the Member State concerned;
- present a decision terminating the investigation for signature by the Director.

III – 4.1 The investigation report

The report produced on the investigation must contain the Director's "recommendations". It is then sent to the appropriate administrative or judicial authorities. The basic Regulation provides that, where an institution or body does not follow the recommendation adopted by the Director, the Supervisory Committee is to be informed. The Supervisory Committee has not been informed this year of cases in which institutions or bodies did not follow OLAF's Director's recommendations.

The Committee observed that in purely customs matters no report had been sent to judicial authorities as OLAF considered that the Member States' services had sole responsibility here. But the Director is entitled to submit his report to the judicial authorities of his own motion.

Regarding internal investigations, the report goes to the relevant institution or body and the interested party is informed. The administrative, disciplinary or financial action to be taken on these reports is the responsibility of the relevant institutions or bodies.

III – 4.2 The decision to close the investigation

The decision to close the investigation is no mere formality. It must give an account of all the facts investigated. It releases the investigator from the case by giving a decision that deals clearly with the facts under investigation.

A termination decision must be served on the persons concerned within a reasonable period following completion of the investigation.

Termination decisions might be better drafted if the Judicial Advice Unit were asked to give an opinion on all such decisions.

Chapter IV - EVALUATION

Article 11(7) of Regulation No 1073/99 requires the Director of OLAF to report annually to the Supervisory Committee on the Office's programme of activities, and the Committee states in Article 21(1) of its Rules of Procedure that it will evaluate the action taken in the work programme in its annual report. The Committee, even though OLAF has no work programme *stricto sensu*, was able to gather the information, and in particular the scoreboards, its visits, the questionnaires, the internal opinions by the Judicial Advice Unit and the reports by Directorate B on certain cases, which provide a basis for a partial evaluation of the Office's activities.

On this basis, it has been able to ascertain a number of features of the practices followed so far and to highlight the trends sought by OLAF as regards both internal and external investigations; some of the problems concern both types of activity.

IV - 1. OLAF's practice as regards intern investigations

Given the specific importance attached by Regulation No 1073/99 to internal investigations, the Supervisory Committee warmly welcomed the initiative by OLAF's Director to ask the Judicial Advice Unit to produce a document analysing internal investigations case by case and produce a summary report. Their work was extremely useful for our evaluation.

In quantitative terms, the number of internal investigations undertaken since the beginning (92) accounts for a low percentage of the total number of investigations undertaken by UCLAF/OLAF, but this area of activity is rapidly expanding and involves committing greater responsibilities and therefore greater resources. In particular, the percentage of cases referred to the judicial authorities as regards internal investigations (17%) is considerably higher than for external investigations.

But the really important distinguishing factors here are qualitative and concern the nature and objectives of the investigation, given the general reluctance to decide at the very outset whether OLAF's operational activities aim primarily at criminal or at disciplinary proceedings.

IV -1.1 Nature of internal investigation activity

The remarks made by the Supervisory Committee in its first report regarding the mismatch between OLAF's administrative status and the often criminal context of its investigations were illustrated quite eloquently by various analyses of its internal investigation activity. Both the purpose of the investigation and the proceedings reveal the lack of a clear vision of the need to conduct procedures on the basis of the result aimed at.

IV - 1.1.1 *The subject-matter of investigations*

Many cases, despite the criminal dimension that was obvious from the outset, were managed as though this aspect was secondary or even non-existent. The practical significance of this is that procedural acts intended to seek and ascertain facts in support of criminal or disciplinary proceedings were often reduced to merely gathering administrative documents and superseded by activities to gather and evaluate information and by assistance for the judicial authorities. But these activities, which are vitally important upstream and downstream of the actual investigation procedure, lose much of their effectiveness if they are merged into the general organisation of the investigation.

In the new structure of OLAF as currently envisaged there is to be a distinction but also a separation between these activities, with close cooperation organised between them. It would be worth amplifying the Manual on this point.

IV - 1.1.2 *Investigative acts*

A large proportion of the information gathered comes from anonymous letters and calls, whistle-blowers and press articles. All these information sources are basically matters for the evaluation and intelligence functions. For the actual investigation, they are not in themselves adequate evidence to ground prosecutions. Such information should not be taken to legitimate the opening of an investigation unless it is corroborated by hard evidence.

On the other hand, inadequate use is made of the procedure for hearing witnesses or persons under investigation, and then often in such conditions as to reduce or negate their value. The Supervisory Committee has had occasion to note that complaints it has received from litigants have tended to highlight this weakness.

It is recommended that OLAF investigations be based far more systematically on such hearings and that formal reports be drawn up in such a way as to guarantee their evidential status. The provisions of the Manual on this point should be clarified and amplified with the assistance of the Judicial Advice Unit.

IV -1.2 Objectives of internal investigation activity

Recital 10 to Regulation No 1073/99 guarantees "the principle that the conclusions of an investigation may be based solely on elements which have evidential value". According to Article 1(3) of the Regulation, the purpose of internal investigations is "investigating ... serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings".

OLAF's basic Regulation thus clearly defines the purpose of internal investigations in terms of principles. But in practice inadequate attention was paid in advance to deciding whether the case warranted criminal or disciplinary proceedings before the judicial advisers took office. Actually the Office is not working for itself. The point of an investigation is to establish facts to be used either by European authorities or by the courts in the Member States, always with full respect for fundamental rights and principles.

The lack of precision as to objectives has prompted OLAF to hesitate before assuming its new role with the institutions.

IV - 1.2.1 *New mission within the institutions*

OLAF's hesitations about its new mission came to the surface with two cases: given the legal disputes resulting in action against the Banks, the Office waived the opening of an investigation at the EIB; the investigation in the ESC only began two

years after the Council and Parliament asked for it to be opened;¹⁹ and the investigations opened in the European Parliament exceeded the Regulation's nine-month deadline for no apparent reason.

The relationship between internal investigations in the Commission and the disciplinary and administrative investigation procedures remains uncertain.²⁰ It would be helpful if this question was settled rapidly on the basis of the principles set out in the draft code of conduct²¹ and, where appropriate, in the Memorandum of Understanding with the Investigation and Discipline Office or any other department exercising equivalent investigation functions in relation to the protection of financial interests.

The arrival of staff with experience of criminal procedure, who work with the investigators already operating and newly recruited specialist staff, has already had beneficial effects on the quality of investigation reports and on the attention paid to the ultimate objective of the investigation – disciplinary or criminal.

IV - 1.2.2 *Complaints by litigants*

During this second year the Supervisory Committee received five complaints from litigants about acts of UCLAF or OLAF in connection with internal investigations. Acting in accordance with the principles it emphasised when it first began operating, the Committee, having regard to the regulatory provisions applicable (Articles 11 and 14 of Regulation No 1073/99) declined jurisdiction in respect of these complaints as individual actions and passed them on to the Director of OLAF.

But it took note for information purposes of the points made in them as material for its evaluation of investigative activity. This information amplified its analysis of OLAF's investigation practice and highlighted the inadequacy of the review facilities established by Article 14 of Regulation No 1073/99.

Examination of the complaints by the Director in accordance with that Article does not present any procedural guarantee of objectivity since, like any other administrative redress procedure, it is conducted by, or by persons reporting to, the

¹⁹ OLAF enjoyed such powers only after the entry into force of Regulation No 1073/99 and the internal decision of each institution or body.

²⁰ Proposal P3 in the first report.

²¹ Draft of 15.7.2001, p. 29.

person responsible for the act complained of. The review of these complaints by the Court of First Instance is totally inadequate, as the first report stated, since it takes place too late. This is borne out by the fact that one litigant took the initiative of taking his case to the European Ombudsman.

The Supervisory Committee repeats what it said in its first report: "a judicial body should permanently supervise all OLAF activities and, in particular, authorise or order measures restricting individual rights to be adopted during investigations, monitor their implementation and verify whether an investigation conforms to the evidence rules...".

IV - 2. OLAF's practice as regards external investigations

OLAF's investigative activities consist of administrative investigations exercised by the Office direct and of coordination and assistance measures in relation to investigations undertaken by the Member States.

The Committee has no accurate statistics on this point, but administrative investigations seem to be the preferred tool as regards the Structural Funds and direct expenditure. It is also used in the context of the agricultural policy, where the common organisation of markets is concerned.

By contrast, coordination and assistance procedures are applied mainly in the context of investigations in relation to own resources (customs fraud) and to some extent in agriculture.

OLAF's external activities come up against a number of difficulties relating to:

- knowledge of and compliance with national procedures;
- a lack of information on the follow-up to investigation reports;
- the absence of clear rules on the transmission of information and investigation reports to national authorities.
- the time taken by national authorities in the Member States or non-member countries to transmit the documents needed for the investigation, which sometimes causes the investigation to exceed the nine-month limit, particularly in customs cases.

IV -2.1 Familiarity and compliance with national procedures

The Office's investigations are often complicated by the problem of familiarity with all the requirements of the Member States' national procedures. The Office needs to improve its investigatory expertise by setting up "pools" of versatile investigators capable of coming together in multidisciplinary teams. Guides giving particulars of national procedural requirements should also be produced.

IV -2.2 The follow-up to reports

The Office is not properly informed of the follow-up by the Member States or the Community institutions and other bodies. But the Community rules impose an obligation on Member States to "transmit to the Commission administrative or legal decisions ... relating to the application of penalties for breaches of customs or agricultural legislation" (Article 49 of Regulation (EC) No 515/97). But the transmission of information between the Member States and the Commission remains sporadic, and the Office should expand its activities of gathering information from the Member States as regards the follow-up to its reports.

For the moment the Office does not have reliable general information on the administrative or financial follow-up to its reports.

IV -2.3 Transmission of reports to national authorities

The transmission of investigation reports to national authorities does not follow clear rules. The Office considers that, where the investigation was conducted in the form of "coordination-assistance" operations, responsibility for handing the Office's investigation report to the judicial authorities lies with the national administrative authorities to which the Office addressed its own report.

This situation explains why, in the customs area for example, where the bulk of the frauds against the Community budget are committed, the Office transmitted no reports to the national authorities, even though the frauds were transnational and purely national treatment of cases was out of order.

The Office actually has only incomplete knowledge of the few judgments given on the merits in civil or criminal cases based on its investigations. Even so, the Office's investigators are involved in certain judicial proceedings: they sometimes provide technical assistance in the preparation and execution of international letters rogatory or attend the actual trial as witnesses.

An effort will have to be made to see that the transmission of reports to the judicial authorities becomes both more general and more systematic and to improve the Office's judicial follow-up capacity.

IV - 3. Difficulties common to the two types of investigation

Analysing the case files also reveals difficulties that are unrelated to the nature of the investigation but concern the current situation of OLAF and the fact that, even if objectives have been defined, the resultant organisation and methods either are not yet in place or have not yet produced the expected effects. In this context, OLAF has begun reviewing the content of its cooperation with national authorities and considering the need to review the management of its investigations, but nothing concrete has yet emerged.

IV -3.1 Relations with the national authorities

The ambiguities mentioned earlier as to the nature of OLAF's investigations have their obvious impact on relations with the national authorities. Given that OLAF's investigations can actually range from merely gathering information to coordinating national investigations, it is necessary to determine when and how OLAF can take action before or in parallel with national investigations.

IV - 3.1.1 Judicial follow-up to OLAF investigations

The investigation procedure as described in the Manual implies that it basically takes place upstream of transmission to the national authorities (even if Article 10(1) of Regulation No 1073/99 authorises the Office to "at any time forward

to the competent authorities of the Member States concerned information obtained in the course of external investigations"). Yet, although most OLAF cases involve criminal elements, in only a tiny percentage of them was the report (Article 9) or other information (Article 10) transmitted to the national judicial authorities.

The reasons for the inadequate judicial follow-up to OLAF investigations are not clearly visible from the files. The Committee considers that the tardy transmission of files could prompt the judicial authorities to conclude that the material transmitted is insufficient. In addition, the excessive workload of the courts, their own priorities and the specific features of national legislation have the undeniable effect of considerably reducing the interest of the judicial authorities in the cases transmitted to them.

The Supervisory Committee notes by way of example that in one specific case the passive response of the national judicial authority was attributed to the following reasons, in declining order of importance:

- limited resources and low priority in the relevant Member State,
- legal uncertainty as to jurisdiction *ratione loci* and the offences to be charged,
- weakness of the file;

Regarding investigations in which a report or information was actually transmitted to the national courts, the Supervisory Committee observed inconsistencies in the choice of judicial authority and the timing - sometimes too early and sometimes too late - of the transmission. It also noted that in certain cases action by UCLAF/OLAF did not have the effect of generating harmonious cooperation between the various national authorities involved nor the use of all the possibilities offered by national law.

The restructuring and reorganisation should seriously improve the quality of the files produced and the speed with which they are transmitted. These improvements should inspire the relevant Member States to give priority to these cases and devote the requisite resources to them.

IV - 3.1.2 Cooperation by OLAF with national investigations

The information available to the Committee in this respect²² suggests that the nature of OLAF's cooperation with national investigations does not depend on progress in OLAF's own proceedings: its cooperation is much the same whether the investigation is in motion or already at the follow-up stage, even though the legal situations are different.

The Manual should improve matters here as it provides for the judicial advisers to be involved in such non-investigation situations.

But it is not possible at this stage to state that these provisions are already in effect. In procedural terms, when an investigation is opened, the Manual distinguishes between internal or external investigations and coordination or assistance cases. Yet practices have not yet fundamentally changed, and the judicial advisers do not manage these relations.

It is difficult to establish rules here and to allocate powers between departments without a clear idea of the content of the cooperation that OLAF can offer national investigations.

One of the first measures to give practical expression to the restructuring following the appointment of the three Directors should therefore be a definition of the content of this cooperation with the national authorities.

IV -3.2 Need to define a policy on investigations: intelligence

Before Regulation No 1073/99 came into force, there was strictly speaking no investigations policy based on priorities defined objectively and transparently. Whatever trends it was possible to detect flowed from a structure which at the time was compartmentalised: resources were allocated fairly evenly to sectors defined in such a way as to cover all the activities financed by the Community budget. Each sector developed its activities in accordance with its own specific features.

²² Statistics in the scoreboards and information sheets on individual cases prepared by OLAF. There is currently no comprehensive analysis except for internal investigations. It is in progress for external investigations.

OLAF is now planning to set up an investigations policy which will be defined in the work programme by the horizontal unit and will reflect the contributions of the various departments involved and in particular the new Intelligence Directorate.

Until recently, investigation activities have in practice continued to proceed without a work programme or a general policy. The decision whether or not to open an investigation is taken on the basis of specific criteria rather than a pre-determined policy.

Initially, the decision was based on an evaluation by an investigator specialising in the area where the fraud was perpetrated, and the criteria used could be somewhat subjective, especially as the evaluating investigator could well be put in charge of the investigation.

The fact that for the last few months the final decision has been taken by a Casework Board, in which the Judicial Advice Unit is now represented, should help to harmonise practices. But the Committee has been unable to identify the reasoning behind the decisions taken nor indeed to detect any consistency in practice. It has also observed that, even recently, the evaluation phase could extend well beyond the time-limit allowed by the Manual, possibly because there are no clear and precise criteria.

The absence of criteria and priorities for the decision to open an investigation is mirrored when it comes to reviewing of the grounds for exceeding the nine-month limit on investigations imposed by Article 11(7) of Regulation No 1073/99. In a large number of cases that ran over time, the explanation was: "no priority – lack of resources". The absence of priority confirmed nine months after the decision to open the investigation confirms that it was taken without regard for the question of priority - something which is of course difficult to judge. The lack of resources merely highlights the consequence of the absence of priorities.

This absence of priorities is also visible in the course of the actual investigations, where it often clear that there is little regard for the purpose of the investigation - criminal or disciplinary proceedings.

The Committee's first report stressed the need for an investigations policy and for proactive management. This was the subject of proposal P4 (first indent), and the Committee placed it at the heart of its recommendations for restructuring the Office.

The first task of Directorate C, whose Director should soon be taking up duty, will be to define such criteria on the basis of the gathering and analysis of all the information available on the economic and criminological environment of fraud against the financial interests of the EU, but also with regard to the resources available and the allocation of powers between the Member States and the Union.

OLAF's current plan of action, prepared at a time when the transition from UCLAF to OLAF is approaching completion but restructuring is just getting under way, thus focuses mainly on the objectives of the restructuring and on legislative activity. On the basis of contributions from the Intelligence, and Investigations and Operations Directorates, a genuine work programme should be prepared as soon as possible to make OLAF's activities both coherent and effective.

Chapter V - CONCLUSIONS

This activity report (covering the period from July 2000 to September 2001) consequently comes at a defining moment marking the end of a very long transition from UCLAF to OLAF and the operational launch of a genuine reform of practices making it possible to fully attain the objectives set for OLAF by the legislative authority. It is in this dual perspective that the Supervisory Committee sets out its proposals.

V - 1. End of the transition from the UCLAF to OLAF

Before completing this report, the Supervisory Committee was at pains to make sure that the old structure of UCLAF, designed for a primarily administrative form of investigation function, had indeed been replaced by a new structure matching the disciplinary or criminal proceedings aimed at by investigations, meeting the constraints of respect for individual and procedural rights and establishing and implementing an investigations policy. The Committee noted that, at the end of the report period, important and probably irreversible measures had been taken to replace structures and allow the development of a genuine work programme, as required by Article 11(7) of the Regulation.

V - 1.1 Replacement of structures

The management of investigations, which hitherto tended to be compartmentalised, opaque and to some extent arbitrary, should benefit from the measures taken with regard both to personnel (establishment of a new management structure and of a judicial officers unit) and to methods (transparency of management).

- Personnel: new managers, recruited by procedures allowing specific selection, should play a decisive role in the implementation of OLAF's new culture, defined by the Director, of cooperation between staff and units, information flows and transparency. The separation of the investigation, intelligence, follow-up and legal

advice functions was made in the structure, and the challenge now is to organise cooperation between the various units to which these functions have been given.

The "Magistrates and Judicial Advice" unit, which has just started to function with the investigators, should, within the limits of the possibilities offered by the existing legal framework, confer on the operational activities the legitimacy that flow from its expertise in criminal law and procedure in the fifteen national legal orders.

- Methods: a major effort has already been made with regard to the transparency of management. All OLAF cases are now well indexed and decisions to open an investigation are normally taken within no more than a month of the case being registered. Action has thus at last been taken on one of the main comments made by the Court of Auditors in special report 8/98.²³

The Committee also now receives the bulk of the information it needs to exercise its function of regularly monitoring the investigation function. Since December 2000, the scoreboards prepared by OLAF from its databases IRENE and subsequently CMS have made it possible to introduce the transparency that is essential for both monitoring and management. The first versions of an OLAF manual and the Case Management System at last made the Office's practices and procedures precise and rigorous.

V - 1.2 Definition of a proactive management project

To overcome the inability to lay down and implement a genuine policy on investigations because of the compartmentalisation and opacity of management in the previous period, OLAF planned to install the structures necessary for proactive management in cooperation with other departments of the Office.

As regards internal investigations, it should now be possible to give effect to the legislative authority's wish that this interinstitutional activity enjoy the visibility that it deserves as a priority activity. Care will also have to be taken to enhance the effectiveness and legitimacy of these investigations, conducted under OLAF's exclusive responsibility.

²³ See points 3.8 to 3.12 and 3.13 to 3.18 of the Court of Auditors Special Report No 08/98 on the Commission departments responsible for the fight against fraud, in particular UCLAF.

OLAF also plans to improve the whole range of its relations with national authorities by setting up a "platform of services" to be based on an inventory of its operational activity and in particular its external investigations.

Lastly, criminal-law, disciplinary, administrative and financial follow-up (recovery) is the subject of a study.

V - 2. Operational start-up of a genuine reform of the practices

The ambiguities observed by the Supervisory Committee with regard to the institutional positioning of OLAF and the conditions of the legitimacy of its investigations have not been fully resolved. The Office and the institutions have accepted that these ambiguities had to be taken into account and might even have to be used to prevent the OLAF project from being blocked. But there is general awareness that this is a provisional situation and that it is important to continue searching for more stable solutions.

The long transitional period from UCLAF to OLAF was therefore used as an opportunity to study in greater detail these ideas on the organisation and methods of the Office to be set up. The thinking process is now completed and the action stage can begin regarding both the institutional positioning of OLAF and the legitimacy and effectiveness of its investigations.

V - 2.1 The institutional positioning of OLAF

The Supervisory Committee, following the comments and proposals made in its first activity report, maintained its contacts with the institutions to promote the constructive interpretation of texts of which it had stressed the ambiguities, in particular with regard to OLAF's interinstitutional powers and status. OLAF is setting up instruments making it possible to organise transparency in its relations and its communication with the institutions and with all interested parties more generally.

The draft code of conduct governing relations between OLAF and the Commission, the product of convergent initiatives by the Secretary-General of the Commission and the Supervisory Committee, takes stock of the practical questions

raised by OLAF's specific situation and indicates solutions that reconcile operational independence and effective administrative management.

The guidelines for a communication policy for OLAF are intended to establish a relationship of trust with the institutions by exposing clearly the obligations and the constraints incumbent on the Office in its various information responsibilities. These guidelines deal solely with OLAF's relations with the institutions and not with public relations, which are not formally within this interinstitutional responsibility. But it would be desirable for these two types of activity to be subject to the same consistency.

But it should be noted that certain ambiguities can be finally cleared up only by court decisions and, if necessary, fresh legislative measures.

Whatever judgments may be given by the Court of Justice in the actions brought by the Commission against the ECB²⁴ and the EIB²⁵ and by the Court of First Instance²⁶ in the action brought by 71 Members of Parliament against Parliament could be significant in helping to clarify, if this is felt necessary, the scope of Regulation 1073/99 and thus remove all the ambiguities in that respect.

V - 2.2 The legitimacy and effectiveness of investigations

Transparent management having been established, the Supervisory Committee took stock of the deficiencies, in terms of legitimacy and effectiveness, in the way in which operational activities at OLAF have been organised until now. But it also notes that OLAF's awareness of these deficiencies has prompted it to adopt measures that could well solve them, even if they are partial and provisional, and to relaunch consideration by the institutions of the need to amplify the system for protecting the EU's financial interests.

The internal reorganisation of OLAF undertaken by its Director, after a long transition made inevitable by the decision to take over the old structure of UCLAF en bloc, began in accordance with guidelines designed to ensure the implementation of a policy of targeted investigations taking into account their disciplinary, criminal or administrative nature. The management staff corresponding to these guidelines have

²⁴ Case C11/00 (OJ C 102, 8.4.2000 p. 8).

²⁵ Case C15/00 (OJ C 102, 8.4.2000 p. 9).

been recruited and are already helping to complete the new structure. The Magistrates' Unit is in place and has begun fitting into the investigation management process in cooperation with the investigators already present. The judicial officers have begun by analysing internal investigations prior to reorganising them. It is planned that they will do the same for external investigations, given the number of cases.

With regard to the institutional environment, the limits noted by the Committee in its first report in connection with inadequacies in terms of judicial review have been taken into account by the institutions in initiatives already announced or in preparation.

The fact that the need to strengthen the legitimacy and effectiveness of investigations was more pressing and urgent in relation to internal investigations had led the legislature to make special provisions for them in Regulation 1073/99 and in the interinstitutional agreement. In its first report, the Supervisory Committee considered that the ex post review of the legality of these investigations by the Court of First Instance was completely insufficient, and it supported Parliament's call for the establishment of a judicial body to keep the activities of OLAF in this field under permanent review. In particular it wished such a body to have the power to permit or order measures restricting individual rights during investigations, to check their implementation and objectivity and to verify that investigation measures comply with the fraud rules. At Parliament's request, the Supervisory Committee issued an opinion evaluating to what point the management of internal investigations might be affected by the introduction of a European Public Prosecutor with jurisdiction confined to these cases.

Its opinions 5/1999 and 2/2000 supported this step taken by Parliament, which refers to the recommendation of the Wise Men's Report to gradually establish a European Public Prosecutor for the protection of financial interests; since then the Supervisory Committee has stated that "it is essential to fill in the gaps in the current legal framework, which prevent OLAF from operating totally efficiently" and that "initially the creation of an independent European Public Prosecutor for internal investigations, enjoying a statute defining his prerogatives and responsible and mandated to enforce common European rules, possibly inspired by the work done

²⁶ Case T17/00 (OJ C 122, 29.4.2000 p. 30).

since 1996 by the experts responsible for the Corpus Juris (1997 version and the Intersentia version of 2000) could supply a solution to this problem".²⁷

The Commission also took important initiatives to strengthen the legitimacy and effectiveness of OLAF investigations. After the rejection of its proposal, supported by the Supervisory Committee, to create a legal basis in the Treaty for eventually establishing a European Public Prosecutor for the protection of the Community's financial interests, the Commission embarked on a green paper for the consultation of all interested parties. On the basis of this consultation, it wishes to further review the procedures for establishing and operating a European Prosecutor in Community secondary legislation, once the requisite Treaty provisions have been adopted.

Moreover, the Commission sent Parliament and the Council a proposal for a Directive on the criminal-law protection of the Community's financial interests²⁸ to establish principles at Community level and obligation of the Member States to provide for those offences and the relevant penalties. These provisions, initially provided for under the Convention of 26 July 1995 and its protocols, should be adopted on the basis of Article 280(4) of the Treaty owing to the delays by the Member States in ratifying the third-pillar instruments.

All these measures and initiatives supply suitable solutions to the unavoidable problem of the legitimacy and effectiveness of OLAF's investigations. The Supervisory Committee, responding to requests from the Director of OLAF or of the institutions, gave them its support and stresses that their complementarity lies in the fact that they constitute stages in carrying out a coherent project for the protection of the financial interests of the EU, since, as the report of the Committee of Independent Experts²⁹ showed, this project can be carried out only at the rhythm permitted by the legal framework.

²⁷ [Opinion No 3/2001](#).

²⁸ [COM\(2001\)272 final](#).

²⁹ [Committee of Independent Experts, second report on the reform of the Commission, points 5.13 and 5.14](#).

V - 3. Proposals

The Committee supports the various measures envisaged by OLAF to consolidate its budgetary and administrative autonomy (internal rules; specific structures) and to adapt its management of investigations to developments in its methods (manual, CMS).

The Committee considers that by and large the proposals made in its first report for submission to the institutions have been well received (see supra: Chapter D).

The internal reorganisation of OLAF is proceeding in accordance with the guidelines set out in the first report. The Committee approves the measures taken and recommends that they be implemented as quickly as possible so that initial effects can be evaluated at the earliest opportunity, in particular as regards:

- establishing and implementing a reactive and proactive policy on investigations: integrate the Intelligence Directorate and the Operations departments in preparing the work programme, setting priorities and case-selection criteria and carrying out these tasks;
- involving the Magistrates' Unit in the investigation process, from the decision to open the investigation to the follow-up stage, and defining its powers in the OLAF Manual;
- raising the profile of the internal investigation function: taking account of the specific function, of the exclusive responsibility and of the increased powers of OLAF as regards investigations within the institutions; creating a clearly identified structure having the necessary qualified personnel to combat corruption, financial crime and crime in relation to public procurement;
- specifying OLAF's function in relation to external investigations and cooperation with national authorities: setting up a structure and recruit staff to handle this mission (on the basis of a current stock-taking exercise).

On questions concerning OLAF's interinstitutional environment, the Committee can confine itself to proposals supplementing initiatives already taken:

P1: Coordinate initiatives carried out to strengthen the legitimacy and effectiveness of OLAF investigations

The various initiatives to strengthen the legitimacy and effectiveness of OLAF investigations – internal reorganisation; prosecutor for internal investigations; European Public Prosecutor; criminal-law protection of financial interests – pursue the same objective and must be conceived in complementary terms.

P2 : Implement in the various institutions and bodies the obligations to cooperate with OLAF imposed by Regulation 1073/99

The institutions should implement more systematically Article 7 of Regulation 1073/99 concerning the information to be supplied to OLAF. In particular, it must be stressed that any delay in communicating information can entail problems of limitation periods.³⁰ In addition, it would be useful if OLAF could be informed of internal investigations relating to facts falling within its powers, even if the relevant institution sees no need for an OLAF investigation. Generally, further thought must be given to the relation between OLAF investigations and internal procedures in the institutions (administrative investigations; disciplinary proceedings; etc.).

P3: Amplify the regulations to consolidate OLAF's independence

Relations between OLAF and the Commission were defined in the draft code of conduct on the basis of constructive interpretation of the dual functions of OLAF. Effect should be given to these definitions not only in practice but in the regulations too. The institutions are therefore invited to promote the necessary reforms of the Staff Regulations and the Financial Regulation.

P4: Establish clear communication between OLAF and the institutions

The guidelines for a communication policy for OLAF should allow a transparent and foreseeable relationship with the institutions in this field. A dialogue should be established with the institutions on the basis of the document drawn up by OLAF.

Ultimately, after the second year of activities, it is clear not only that the innovatory mechanism set up by Regulation No 1073/99 met the urgent need to improve the organisation of the protection of the EU's financial interests but also that the formula selected, allowing synergy between operational and legislative functions, is workable as long as all interested parties approach its inevitable ambiguities constructively.

Decisive measures having been taken with regard to the transparency of management, recruitment of specific management staff and the setting up of a Magistrates' Unit, the conditions are now right for the Office to quickly establish its investigations policy, organise its cooperation with national authorities on the basis of a platform of services, perform its internal investigations function and see to the administrative, financial, disciplinary and criminal follow-up to its investigations.

With regard to the structural difficulties observed by the Supervisory Committee in its first report, the institutions took their thinking further but have still not changed the underlying philosophy,³¹ and the adoption of common rules of both procedure and substance and the creation of a European Public Prosecutor with jurisdiction throughout Europe is the only possible way of solving them.

Initiatives for action to follow up the Nice Intergovernmental Conference in this respect at least have the merit of reviving the debate. The Commission's work on a green paper on the criminal-law protection of the Communities' financial interests and the establishment of a European Public Prosecutor should provide the basis for a broad dialogue among the institutions and interested parties, and the current definition of the function of Eurojust will show how to establish synergy with OLAF. In the immediate future, OLAF's planned internal reorganisation, the proposal for a Directive concerning the criminal-law protection of the Community's financial interests and possible establishment of a European Public Prosecutor with jurisdiction over internal investigations should make it possible to advance in stages towards the adoption of permanent judicial control of OLAF investigations.

³⁰ Regulation No 2988/95, Article 3 (supra, p. 27 to 30, Chapter III – 3.1 Internal investigations.

³¹ The question of the scope of Regulation No 1073/99 in the institutions will not be settled until the Court of First Instance gives judgment in the cases concerning the ECB, the EIB and the 71 Members of Parliament.

OLAF Supervisory Committee**Opinion 3/2001****on the possible establishment
of a European public prosecutor responsible for internal investigations**

Parliament stated that it wanted the Supervisory Committee to deliver an opinion assessing the extent to which the conduct of cases relating to internal investigations might be affected by establishing a European public prosecutor whose remit would be confined to such cases. The Committee has on several occasions supported the principle of establishing a European public prosecutor³² and, in this opinion, considers, on the basis of its work in the context of monitoring investigation activity, the potential effects of establishing a European prosecutor responsible for internal investigations on the conduct of cases dealt with by OLAF.

The analysis made by the Committee covered OLAF's activity in the area of internal investigations in all the Institutions. It must be pointed out at the outset that such activity has been substantially limited owing to the dispute with the EIB and the ECB, as OLAF did not believe itself to be in a position to conduct investigations within those bodies. The establishment of a public prosecutor for internal investigations should resolve this problem.

The following differences need to be pointed out as regards the concept of internal investigations: in all Institutions, internal investigations relate to fraud or other unlawful activities³³ occurring in the field of administration and perpetrated by officials or other employees of the European Communities, i.e. expenditure on personnel or buildings management, the purchase and upkeep of equipment, documentation or information. At the Commission, this covers a wider field and also comprises direct expenditure and, pursuant to the principle of connectedness, cases of fraud and other unlawful activities harmful to financial interests, in particular those relating to the operational budget, implicating Members, officials or other employees of the Institution.

It should also be pointed out that the Committee made its analysis as OLAF was about to introduce a new structure, and new working methods had still not had any significant impact on the conduct of investigations. The analysis thus reveals the deficiencies in the old structure³⁴ whilst the solutions it proposes should in part be implemented through the new structure, which must obviously be taken into account.

³² See Opinion 5/99, Opinion 2/2000 and first Progress Report

³³ It should be recalled that the term 'financial interests' means more than just Community revenue and expenditure and that Regulation 1073/99 explicitly refers to measures affecting the Communities' assets (2nd recital)

³⁴ Where reference is made to management of OLAF, the analysis thus concerns both UCLAF and OLAF.

It should be noted that, as a result of the introduction of transparency into the management of OLAF several months ago, the Supervisory Committee now has tools enabling it to make an initial assessment of the impact of possible intervention by a prosecutor for internal investigations: scoreboards, information sheets on internal investigations, on investigations open for longer than the nine months specified in the Regulation and on files forwarded to judicial authorities; work carried out on the spot by its rapporteurs; its exchanges of views with the Director of OLAF and his staff. From the information thus obtained, it has concluded that OLAF activity in the field of internal investigations still accounts, in terms of the number of cases, for a small percentage of the total (about 80 out of 1700), but also that such activity has been increasing rapidly since the entry into force of Regulation 1073/99 (by 70% as compared with 20% for its activity as a whole). Moreover, the internal investigations dealt with by OLAF relate to cases of fraudulent personal enrichment of individual officials and employees acting alone and taking advantage of weaknesses in the administrative set-up, but even more to concerted action by several people, or even networks, and may involve substantial amounts of money.

Internal investigations more often than not entail more detailed investigations by OLAF, as it has sole responsibility for them.

Already, the observations made by the Committee in the context of monitoring internal investigations have revealed closely intertwined problems of *legitimacy* and *effectiveness*, which could to a large extent be remedied by establishing a public prosecutor.

1. Contribution of a public prosecutor for internal investigations as regards the legitimacy of investigations

The reservations concerning the legitimacy of OLAF investigations noted by the Supervisory Committee in its first Progress Report have been borne out subsequently; its examination of case files and objections raised by persons under investigation and its analysis of disciplinary and legal follow-up have shown the question marks regarding respect for the rights of defence to be warranted.

The establishment of a prosecutor for internal investigations should therefore result in a strengthening of the validity of procedures and of the objectivity of investigations.

1.1 Increasing the stringency of procedures

Procedures which have hitherto remained almost exclusively within the administrativedomain have been affected by a number of weaknesses:

- absence of judicial scrutiny of OLAF investigations, which has been used as an argument by some Institutions and bodies for contesting the legitimacy of such investigations within their ranks;
- absence of a legal framework for OLAF's investigation methods (examination of witnesses; drawing-up of witness statements; seizure of

- documents), which has given rise to objections from some people who have been under investigation;
- difficulties of maintaining an information communication policy which respects the rights of those under investigation (in particular to confidentiality in respect of their personal data and the presumption of innocence), given the pressure from the media in some cases;
- the enormous difficulty of taking fifteen very different systems of criminal law and criminal procedure into account when organising investigations.

The reorganisation of OLAF currently in progress (in particular the taking up of duties by magistrates, the introduction of a registration system, the drafting of a manual for investigators and the drawing up of an information policy) should help remedy these problems.

In the long run, however, the establishment of a public prosecutor exercising scrutiny over OLAF's internal investigations in all Institutions and bodies of the European Union would be the best guarantee for the proper conduct of such investigations, as the prosecutor's statute would be laid down as such and a unified set of clear rules would ensure that the evidence thus gathered was valid.

1.2 Strengthening the objectivity of investigations

The conduct of OLAF investigations seems hitherto to have taken place partly on a discretionary basis:

- despite a marked improvement in particular as regards the timing of the decision to open an investigation and of the registration of the case file, the Committee notes that it is still difficult to identify the criteria on the basis of which decisions to open, or not to open, investigations are taken by OLAF;
- in the objections of which the Committee has been aware (as it indicated in its first report), those under investigation argue that OLAF's investigations consist essentially in gathering incriminating evidence against them and that evidence in their favour is not taken into consideration.

Probably the most appropriate response is to establish a public prosecutor who would be specifically obliged to open an investigation when the required objective conditions were met (mandatory prosecution) and duty-bound to investigate both incriminating and exonerating evidence.

2. The contribution of a public prosecutor for internal investigations as regards the effectiveness of investigations

On various occasions, the Committee has recommended that all OLAF investigations be conducted from the outset in accordance with methods and procedures which take account of the possibility of criminal proceedings and which do not compromise the outcome thereof as a result of procedural irregularities. It also acknowledged the fact

that the new Director of OLAF, from the moment he took up his duties, stressed the importance he attached to this requirement.

Consideration of internal cases which OLAF has hitherto dealt with reveals inadequacies as regards judicial and, sometimes, disciplinary follow-up.

In the case of judicial follow-up, such inadequacies primarily stem from the fact that criminal proceedings fall within the jurisdiction of national courts and are covered by strongly divergent sets of national rules, although difficulties may also stem from inadequacies in the way investigations are conducted.

In the case of disciplinary follow-up, the Committee noted that the status of OLAF employees in disciplinary proceedings was characterised by ambiguities which weakened the effectiveness of such proceedings.

The intervention of a public prosecutor responsible for internal investigations would doubtless prevent such ambiguities and, more generally, be likely to improve the effectiveness both of the investigations themselves and of the interface between OLAF and the authorities responsible for the proceedings.

2.1 Effectiveness of investigations - the situation within OLAF

There is a twofold weakness in this area.

Firstly, OLAF employees do not have available to them all instruments used in the field of criminal law and, when they do have such instruments, they are not guided by precise rules ensuring proper use thereof; moreover, because there are no unified rules, it is not possible to guarantee the validity of the evidence gathered during investigations. If we take the basic regulations, i.e. 2185/1996 and 1073/1999, whose provisions on OLAF employees' powers of investigation are very vague, the means for conducting investigations are not very effective, as they are more limited than in the criminal law sphere. If a wider definition of such powers is sought, then there must be judicial scrutiny of how they are used.

Secondly, and perhaps as a result of the above, it is possible in certain cases to detect a tendency to confine investigations to inquiries into purely administrative irregularities.

Improved use of criminal law methods and criminal procedure should be achieved by applying the manual drawn up by the Director of OLAF and by recruiting specialised magistrates to OLAF. However, genuine improvements will be made only by establishing an independent public prosecutor and laying down a statute which clearly sets out the prosecutor's prerogatives (in particular as regards decisions to open investigations, to make inquiries in the course of an investigation, to close investigations and, if necessary, to refer matters to the relevant disciplinary or criminal law authorities) and responsibilities (disciplinary arrangements), and stating precisely the rules to be applied (advisability or mandatory nature of prosecution, investigations to secure both incriminating and exonerating evidence, common conditions for the examination of witnesses and questioning of suspects, searches and

seizures, or even the monitoring of telephone calls, etc.), so that the search for proof is more effective, and any evidence thus obtained is admissible in all Member States' legal systems.

This is the point at which the effectiveness of investigations is bound up with the effectiveness of follow-up (judicial or disciplinary), i.e. the interface with the responsible authorities.

2.2 An effective interface between OLAF and the authorities responsible for follow-up

Cases that have been the subject of internal investigations by OLAF and forwarded to judicial and/or disciplinary authorities have been few in number and often reveal difficulties that have adversely affected their outcome. In some cases, OLAF was unable to organise the allocation of powers and responsibilities between the various national authorities. In others, the specific features of the proceedings or of national criminal law were not adequately taken into account. In the case of disciplinary proceedings, intervention by OLAF is generally confined to forwarding files to the superior authority within the Institution concerned.

For the reasons set out above, the establishment of a public prosecutor for internal investigations would make it possible to markedly improve the interface with the authorities responsible for judicial and/or disciplinary proceedings.

To conclude, the Committee would firstly like to stress that the assignment of magistrates to OLAF, the distribution of a manual to investigators and the clarification of OLAF's information policy will make appreciable improvements possible in the short term.

However, the Committee also considers that it is necessary to fill the gaps of the existing legal framework which prevent an efficient action of OLAF. In a first step, only the establishment of an independent public prosecutor for internal investigations, governed by a statute which sets out the prosecutor's prerogatives and responsibilities and responsible for applying common European rules, which could be based on the work done since 1996 by the experts in charge of the 'Corpus Juris' project (1997 version and 2000), can provide a response to this problem.

The OLAF Supervisory Committee is of the opinion that, whether the aim is to remove the reservations on the part of certain European institutions with regard to OLAF, to provide a lasting solution to the current problems or to ensure both the effectiveness and the legitimacy of investigations, the establishment of a European public prosecutor responsible for internal investigations would meet a real need.

**Council conclusions
on the first report from the Supervisory Committee
of the Anti-Fraud Office (OLAF)**

The Council:

1. has noted with interest the high quality report of the Supervisory Committee, which is independent of the Institutions;
2. shares inter alia the Supervisory Committee's concern at the delays noted with regard to the transition from UCLAF to OLAF and the attendant transformation;
3. points out that the legislator's aim was to give OLAF complete independence to perform its operational tasks, strengthened by the Supervisory Committee, with autonomy in administrative and budgetary matters; notes that that aim has not yet been attained sufficiently;
4. shares the Supervisory Committee's analysis as to the need to improve methods and procedures to make OLAF's operational activity more effective; in particular, supports the efforts made by the Director of OLAF to improve transparency in the management of operational activities, and notably to step up his monitoring of the opening of investigations and the transmission of files to disciplinary or judicial authorities; supports the assignment of magistrates, within OLAF, responsible for providing legal advice and support, particularly in order to rationalise the conduct of investigations and to guarantee the quality of reports;
5. emphasises that the Director of OLAF, who has been given the power of appointing authority, is competent to establish, in compliance with the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (CEOS), the conditions and procedures for recruitment of his staff taking into account the special nature of the tasks of OLAF; regrets that the secretariat of the Supervisory Committee does not yet have appropriate operating funds;

the Council shares the view of the Supervisory Committee that the Director of OLAF must rapidly recruit the staff provided for in the establishment plan, while observing a high level of professional competence;

6. calls upon the Supervisory Committee to continue its supportive role providing OLAF with constructive and critical assistance.

Fight against fraud (1999)

[A5-0078/2001](#)

European Parliament resolution on the Commission's 1999 Annual Report 'Protecting the Communities' financial interests - the fight against fraud' (COM(2000) 718 - C5-0066/2001 - 2001/2036(COS))

The European Parliament,

- having regard to the Commission's 1999 Annual Report (COM(2000) 718 - C5-0066/2001),
- having regard to Articles 276(3) and 280(5) of the EC Treaty,
- having regard to Rule 47(1) of its Rules of Procedure,
- having regard to the report of the Committee on Budgetary Control ([A5-0078/2001](#)),

A. whereas in 1999 a start was made on reorganising the fight against fraud at Community level and the old Unit for the Coordination of Fraud Prevention (UCLAF) was replaced on 1 June 1999 by the European Anti-Fraud Office (OLAF), which is operationally independent and has an interinstitutional remit,

B. whereas in 1999 the Prodi Commission took office claiming that a policy of zero tolerance with regard to fraud and corruption would be implemented,

1. Recalls that in 1999 some very serious cases of fraud came to light, the complete clearing-up of which will constitute a test case for the effectiveness of OLAF and in respect of which the Commission must provide proof that it intends to put its promises into practice:

- (a) A criminal network was uncovered which had for years been perpetrating large-scale cross-border fraud involving adulterated butter. 100 000 tonnes of butter is now believed to have been adulterated with vegetable fat, beef fat and chemical substances, and the financial losses are probably far in excess of the EUR 45 million originally assumed. OLAF has said that the investigations cover several dozen firms throughout Europe and might need to be extended further. According to the Italian authorities, those responsible realised that their actions might endanger public health.
- b) In some Member States, it is suspected that serious irregularities and fraud involving EU subsidies for flax growing have occurred. In Spain production aid was apparently applied for and granted by the regional administrations, in breach of Community legislation on the common organisation of the market in flax. Amongst other things, inquiries have shown that production aid had been applied for in respect of goods that had never been processed and details of the actual amounts grown had been covered up by setting fire to the storage facilities, so that subsidies might have been calculated on the basis of partly notional production figures. The Spanish judiciary has sole responsibility for

determining whether anyone is to be held criminally liable. OLAF has announced that it will draw up its own report on the cases in Spain and other Member States, and this must indicate to what extent Community rules have been infringed and whether the competent national authorities failed to perform their supervisory role properly.

- (c) At the Commission office in Stockholm, irregular payments were discovered based on fictitious contracts. Although, compared with the two cases described above, the amounts involved were small, this case has done enormous damage to the EU's standing, especially as the public has been given the impression that double standards are being applied: the local employees involved have been dismissed, whereas no penalties have yet been imposed on the officials who were involved, on the contrary, the head of the office has been promoted.
 - (d) OLAF is expected to launch an investigation into the serious irregularities referred to in the Court of annual report 1999, published in December 2000, in particular with regard to special arrangements concerning imports of New Zealand dairy produce into the European Union,
2. Notes with great concern that the OLAF Supervisory Committee takes the view that the organisation of the protection of the European Union's financial interests has not yet improved perceptibly in practice⁽¹⁾ and that the persistent blocking of the recruitment of qualified staff⁽²⁾ for OLAF could even cause irreversible damage;

OLAF independence

- 3. Reminds the Commission that the independence of the Director was a precondition when Parliament and the Council conferred upon OLAF extensive powers⁽³⁾ to conduct administrative investigations not only within the Commission but also in the other Community institutions and bodies;
- 4. Reaffirms the belief expressed in paragraph 33 of its resolution of 19 January 2000⁽⁴⁾ on the second report of the Committee of Independent Experts on reform of the Commission that OLAF must earn the respect and wholehearted cooperation of EU institutions and personnel and of Member States' investigative and judicial authorities by ensuring that its inquiries are carried out in an independent, efficient and professional manner; notes that this applies especially to cases that are also politically extremely sensitive for the Commission (e.g. the Flécharde and flax cases);
- 5. Considers it unacceptable, therefore, that applicants for managerial posts in OLAF are to be scrutinised by a Commission-nominated Advisory Committee on Appointments;
- 6. Calls on the Director of OLAF to make use of his powers pursuant to Article 6 of the Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF)⁽⁵⁾ and set up OLAF's own

appointments committee to be chaired by an independent figure whose experience in the fight against fraud and corruption is beyond all doubt;

7. Considers it necessary to settle the question whether the Office's duty to provide information to the Commission and its Secretary-General might prejudice the independence of the Office in individual cases; calls on the OLAF Supervisory Committee to deliver an opinion, stating which cases were affected and to what extent the conducting of investigations was hampered;

European Public Prosecutor's Office

8. Calls on the Commission once again⁽⁶⁾ to submit a proposal, on the basis of the current Article 280 of the EC Treaty, for an amendment to Regulation (EC) No 1073/1999 which would allow the early appointment of a European Public Prosecutor whose jurisdiction would be limited, pending entry into force of the envisaged changes to the Treaty, to criminal offences committed against the financial interests of the European Communities by members and employees of EU institutions and who would have the task of heading the relevant OLAF investigations and facilitating the prosecution of such criminal offences in the appropriate national courts;
9. Recalls that it reaffirmed this demand on 13 December 2000 in paragraph 12 of its resolution on the Protection of the Communities' financial interests⁽⁷⁾, adopted by a majority of its members⁽⁸⁾, and that the Commission is therefore required pursuant to Article 192 of the EC Treaty to submit appropriate proposals for a relevant Community legal act;
10. Is of the opinion that such proposals should finally also take into account the calls⁽⁹⁾ it made in 1998 to the effect that the following matters should be dealt with on the basis of Article 280 of the EC Treaty:
 - (a) cooperation between the Union's institutions and the national judicial authorities;
 - (b) OLAF's exercise of its powers which have not yet been explicitly regulated, in particular as regards powers to bring proceedings, protect files and adopt measures to restrict a person's freedom;
 - (c) judicial scrutiny of the work of OLAF;
 - (d) the requirement for officers of OLAF to take the oath;
11. Notes that the European Public Prosecutor's Office must from the outset be located in Luxembourg, in the immediate vicinity of the Community courts, and that this would also safeguard and clearly emphasise its independence from the Commission;
12. Reiterates the call⁽¹⁰⁾ it made to the effect that OLAF should work in accordance with the principle of decentralisation and therefore have departments in Brussels

and Luxembourg and that, where necessary, branch offices should be set up in the Member States or third countries on a permanent or temporary basis;

13. Expects that, by the end of March 2001, the Commission will give a binding undertaking to submit such proposals by 1 June 2001 at the latest;

Cooperation between Member States and the Commission

14. Welcomes expressly the fact that several Member States have now joined the action brought by the Commission against big American tobacco concerns without whose involvement the current large-scale smuggling of cigarettes would not be possible;

15. Recalls that, as a result of such smuggling, the Community and Member States' budgets year after year suffer losses of revenue amounting to several billion euro; instructs its President to initiate the necessary steps without delay so that Parliament can assist the Commission as an intervening party against the tobacco concerns which have brought an action against the Commission before the Court of Justice of the European Communities in Luxembourg because they wish to have it denied the right to bring legal action against them in the USA;

16. Notes with concern that Member States' practices vary greatly when it comes to reporting cases of fraud and irregularities; calls therefore on the Commission to:

- (a) create incentives so that all Member States report fully and accurately, with the aim of avoiding distortion and achieving comparability;
- (b) make clear, when submitting its report, that the distinction between irregularities and fraud is based on the information available at the time and that in many cases it will not be clear whether activities liable to criminal prosecution are involved or not but that at all events the Union budget has been adversely affected;
- (c) develop a clear methodology classifying the degrees of financial irregularity from unintentional administrative oversight to premeditated fraud in order to obtain a clearer picture of the scale and nature of the issues to be addressed in protecting the Community's financial interests;

Cooperation with Switzerland

17. Recalls that European taxpayers suffer billions of losses because cooperation with Switzerland in combating international organised smuggling, in particular involving 'risk' products (cigarettes, alcohol, precious metals and electronic goods), does not function properly;

18. Stresses therefore the importance, in terms of close and good-neighbourly relations, that it attaches to the swift conclusion with Switzerland of an agreement to combat fraud in accordance with the negotiating mandate issued to the Commission by the Council; points out that the protocol which entered into force

in 1997 on customs cooperation is not sufficient effectively to combat organised crime;

Information to the European Parliament

19. Recalls that the provisions of the framework agreement of 5 July 2000 on relations between the European Parliament and the Commission in no way affect the obligations and rights of the Director of OLAF concerning the provision of information on the Office's investigative activities;
20. Notes that, in order to exercise its powers of scrutiny, Parliament needs access to the reports drawn up by OLAF on its external and internal investigations; wishes to make it perfectly clear that this applies also the reports drawn up by OLAF on the flax affair, the adulterated butter affair and the events at the Office of the Commission in Stockholm;
21. Demands, in the interest of public health, immediate access to any document in OLAF's possession containing an analysis of the composition of the adulterated butter mentioned in paragraph 1(a);
22. Expects a binding undertaking to be given by the end of March 2001 to the effect that OLAF reports will in future be forwarded to the European Parliament on request, and without attendant difficulties, so that they can be considered in accordance with the provisions of Annex VII of the Rules of Procedure; instructs its President, where appropriate, to initiate the necessary legal steps to ensure that Parliament is able to exercise its powers of scrutiny;
23. Reaffirms paragraph 24 of its abovementioned resolution of 16 May 2000 on the 1998 annual report on the fight against fraud, pursuant to which the Director of OLAF is to submit a full list of all cases under investigation of fraud, corruption or other unlawful activities against the Community budget; expects this list now to be submitted without delay and that it will be updated at least quarterly in future;
24. Expects the Commission's annual report on the fight against fraud and OLAF's annual report on its operational activities to be published together in future, albeit without this affecting OLAF's exclusive responsibility for the report on its operational activities; calls on OLAF to focus in that report more than hitherto on specific cases which have been especially important or typical of its previous year's work;
25. Instructs its President to forward this resolution to the Council, the Commission, the Director of OLAF, the Court of Justice and the Court of Auditors.

⁽¹⁾ Progress Report of the OLAF Supervisory Committee (July 1999 to July 2000): Conclusion (OJ C 360, 14.12.2000, p. 25).

⁽²⁾ OLAF Supervisory Committee Opinion No 3/2000 on the risk of the stalling of procedures for recruiting OLAF staff.

⁽³⁾ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999,

p. 1).

⁽⁴⁾ OJ C 304, 24.10.2000, p. 135.

⁽⁵⁾ OJ L 136, 31.5.1999, p. 20.

⁽⁶⁾ See paragraph 2 of Parliament's resolution of 16 May 2000 on the 1998 annual report by the Commission on protecting Communities financial interests and the fight against fraud (OJ C 59, 23.2.2001, p. 61).

⁽⁷⁾ Texts Adopted, Item 14.

⁽⁸⁾ Minutes of that sitting, Item 20 (roll-call vote on paragraph 12 (by 390 to 81, with 38 abstentions).

⁽⁹⁾ Paragraph 4 of its resolution of 7 October 1998 on the independence, role and status of the Unit for the Coordination of Fraud Prevention (UCLAF) (Court of Auditors Special Report No 8/98 concerning the Commission departments responsible for fighting fraud) (OJ C 328, 26.10.1998, p. 95.).

⁽¹⁰⁾ Paragraph 3(n) of its abovementioned resolution of 7 October 1998.