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**OLAF Supervisory Committee**

**Opinion No 2/03**

**accompanying the Commission's report**

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

Regulation (EC) No 1073/1999 of the European Parliament and of the Council  
and Council Regulation (Euratom) No 1074/99  
(Article 15)

Luxembourg, 18 June 2003

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## **I. Introduction**

The main innovation of the 1999 reform was the creation of an investigative function to examine financial crime with a view to detecting facts likely to establish individual liability (as opposed to administrative supervision or coordination activities). This entailed a change in the anti-fraud body's nature and status: from a unit coming under the Commission's Secretariat-General to a body which is functionally independent with respect to its investigative work and related activities.

Having created OLAF in a legal environment destined to change,<sup>1</sup> the legislator wanted to be able to review its operation after three years on the basis of an evaluation of its activities by the Commission, accompanied by an opinion from the Supervisory Committee, in order to decide, if appropriate, to modify or extend its tasks.

The Committee's contribution to this exercise, based on its supervisory activities and its three annual reports, complements that of the Commission, which itself refers to the Committee's work. The Committee, for its part, endeavours to assess the suitability of the arrangements put in place by Regulation 1073/99 when it comes to meeting the operational objectives assigned to the Office and to answer the following questions: Is the system viable? Should we go a step further and propose to "extend the Office's tasks" (end of Article 15 of Regulation 1073/99)? Is it possible to propose taking an additional step, as Parliament does in its resolution of 27 March 2003, towards creating a complete system for the criminal-law protection of the Community's financial interests?

The Committee's contribution highlights the evolving and temporary nature of the system, where an interinstitutional dimension and an internal Commission dimension co-exist within the same structure, and also considers the prospect of a European Public Prosecutor.

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<sup>1</sup> Article 14 of the Regulation refers to a future amendment of the Staff Regulations to settle the question of reviewing the legality of OLAF's investigative action with a view to protecting officials and other servants of the Communities. At the time, preparatory work on creating a European Public Prosecutor for the protection of financial interests was already well advanced at the Parliament and the Commission.

However, the Committee believes that for the Office to be viable, certain conditions are absolutely essential:

- an investigation policy presented annually to the Supervisory Committee as part of the programme of activities required under Article 11(7) of the Regulation;<sup>2</sup>
- a very clear sense of direction;
- prioritisation.

As long as these recommendations by the Committee have not been taken into account, the legislator's objectives cannot be met.

The Committee will first outline the legislator's objectives and OLAF's intentions, before assessing OLAF's implementation of these objectives and its place in the institutional, administrative and budgetary framework.

## **II. Objectives**

From the outset of its work, the Supervisory Committee, stressing that its remit covered the implementation of the investigative function, took note of the fact that Regulation 1073/99 created an investigative function within the Office which was fundamentally different from the functions previously performed by UCLAF. The new function co-exists within the Office alongside these former tasks, but the legislator chose to place them in a new framework. This analysis was in principle shared by OLAF, which outlined a structure based on it; however, its implementation has been hindered by administrative constraints within the Office and outside it, existing structures tending to view OLAF as no more than an extension of UCLAF.

In order to avoid this misunderstanding and to reduce the ambiguities identified by the Committee on several occasions, we propose to describe OLAF's status, not, as the Commission does in its report, in terms of its hybrid status, but in terms of its dual role, entailing the coexistence and synergy within the Office of functions whose nature and status are fundamentally distinct.

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<sup>2</sup> It must be stressed that the work of programming administrative activities which the Commission requires of its Directorates-General and in which OLAF takes part is useful at an administrative and budget management level but cannot replace an investigation policy.

## II.1 Structure of the Regulation

Regulation No 1073/99 assigns OLAF the general objective of contributing to the protection of the Community's financial interests, and confers on it two types of task: conducting investigations<sup>3</sup> and providing the Commission and the Member States with assistance in order to protect the Community budget against fraud.<sup>4</sup> The features of the new investigative function are its aim of disciplinary, administrative and/or criminal proceedings, the nature of OLAF's reports, which have to constitute admissible evidence in disciplinary, administrative and/or criminal proceedings, its independence (procedure for appointing the Director, creation of a Supervisory Committee), the requirements in terms of respect for human rights and fundamental freedoms laid down by the legislator, the investigative methods used, the cooperation it entails with the disciplinary, administrative and/or criminal-law authorities at various levels (investigations under OLAF's responsibility in cooperation where appropriate with the police or judicial authorities — Article 2(6) of Decision 1999/352) and lastly the interinstitutional scope of its tasks. This is what distinguishes the new function from the on-the-spot inspections traditionally carried out by other Commission departments in close cooperation with the relevant authorities in the Member States. Under the Regulation, OLAF continues to perform the Commission's tasks in the fields of anti-fraud legislation and policy.

It is essential that the Office's operational activity is also distinct from the work of monitoring the correct application of Community law and from audit work designed to evaluate the operation of systems, which remain the responsibility of managing departments in the Commission or the Member States. The tasks and objectives assigned to OLAF by the legislator in Article 1 of the Regulation cover a vast area and can be carried out only on the basis of rational use of the available resources. In particular, this means that:

- the Office must not go beyond the framework laid down by the Regulation;
- priorities must be allocated to the various functions, taking particular account of the subsidiarity principle, and within the investigative function to the sectors affected by fraud;

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<sup>3</sup> See Chapter 1 of the Commission's evaluation report on "The Office's operational task: a new approach".

- the Office's internal organisational set-up must allow such priorities to be implemented and must not hinder their implementation by rigid rules or fragmentation;
- the Office's operational work must be concerned with detecting offences likely to lead to disciplinary, administrative and/or criminal proceedings.<sup>5</sup>

### **II.1.1 Creation of a new function (Recitals 4, 9 and 10; Article 1(1) and (3) of the Regulation)**

The primary goal of the 1999 reform was to create a new investigative function for types of case which at the time had deeply affected the Community and to assign to this function a number of powers which were either newly created by Regulation 1073/99 or which the Commission already had and which were transferred to OLAF for the purposes of the new function. In the absence of ongoing judicial review of the activities related to the investigative function, the reform has remained incomplete with respect to the protection of individual rights. Although the legislator envisaged an amendment of the Staff Regulations to define the rights and obligations of officials and other servants and required the Community institutions and bodies to adopt internal rules laying down the terms and conditions under which internal investigations were to be conducted, the Staff Regulations have not been amended and the internal rules of the different institutions, designed to apply temporarily, are not capable of ensuring uniformity of OLAF's practices. Thus, the link between OLAF's internal investigations and proceedings for holding officials and other servants liable has not been resolved.

#### **II.1.1.1 Administrative investigations (Article 2 of Regulation 1073/99)**

Article 1(1) of Regulation 1073/99 sets out the primary objective of the reform by assigning to OLAF powers of investigation in the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community. However, its wording does not highlight two key characteristics of the investigative role, which are laid down in other provisions of the Regulation and which are decisive for the

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<sup>4</sup> See Chapter 2 of the Commission's evaluation report on "The Commission's general tasks: a specific expertise of the Office".

<sup>5</sup> See above: this activity is enhanced by OLAF's independence.

status, operation and priorities of the Office, namely its novelty and its disciplinary, administrative and/or criminal-law purpose. In particular, the new investigative function is backed up by provisions ensuring its independence.

The novelty of the role resides first of all in the fact that Article 4 introduces a power specific to OLAF, which the Commission never had and which it could not exercise, namely that of conducting internal investigations, including in the other institutions and bodies. Article 4 establishes the role and lays down the corresponding investigative powers and the conditions under which it may be exercised.

The disciplinary, administrative and/or criminal-law purpose of investigations is also new. It is referred to in Articles 4(6), 9 and 10, and in Recital 10 of the Regulation, which states that "the conclusions of an investigation may be based solely on elements which have evidential value" and Recital 16: "the reports should have the status of admissible evidence in administrative and judicial proceedings".<sup>6</sup> The Commission also (in Chapter 1 of its evaluation report) stresses the importance of this purpose which in its view determines the specific scope of OLAF's operational activities which "[focus] on the investigation function" (cooperation with the police and judicial authorities — Article 2 of Decision 352/99).

In order to meet the most urgent needs at the time it was drafted, the Regulation makes a distinction between internal and external investigations.

The powers to conduct internal investigations are new and specific to OLAF (Article 4(2), (4) and (5)), and they supplement the Commission's former inspection powers under Regulation 2185/96 (Article 4(3)). The new investigative powers are extensive with respect to information and documents held by the institutions and bodies, but limited when it comes to information held by the members or staff of those institutions and bodies.

The powers to conduct external investigations derive from the transfer to OLAF of the Commission's former powers to conduct administrative investigations under Regulation 2185/96, with due regard for fundamental rights (Recital 12 of Regulation 2185/96). Assigning such inspections to OLAF for its external investigation work (Recital 9 and Article 3 of Regulation 1073/99) was intended to enable it to carry out real

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<sup>6</sup> Although Article 8 of Regulation 2185/96 specified that the Commission's inspection reports could be used in administrative or judicial proceedings, in practice their purpose was rarely to establish

administrative investigations. However, in practice, OLAF's intervention to date has occurred long after the events, which makes it particularly difficult to establish personal responsibility. Moreover, the nature of such investigations varies from one sector to another owing to the differing role of the Commission in the financing and supervision arrangements. Such investigations can be opened, in accordance with the principle of subsidiarity, to identify the types of fraud and irregularity covered by the Regulation (Recital 7 and Article 2 of Regulation 2185/96), "especially where, owing to the scale of fraud, which is not confined to one country and frequently involves organised rings, or where, on account of the special nature of the situation in a Member State, those objectives cannot, in view of the seriousness of the damage done to the Communities' financial interests or to the credibility of the Union, be fully realised by the Member States alone and can therefore be better achieved at Community level".

The distinction between internal and external investigations therefore has major implications for OLAF's investigative powers, but also for guaranteeing individual rights, which seems to be confined by Articles 4(6)(b) and 14 to internal investigations, whereas for external investigations Regulation 2185/96 (Article 6(1)(3)) requires OLAF investigators to comply with national law. This distinction also masks another distinction established by paragraphs 1 and 2 of Article 1 between investigation activities on the one hand and coordination and design activities on the other.<sup>7</sup>

### **II.1.1.2 Guarantees of independence**

The first subparagraph of Article 12(3) of the Regulation gives the Office's Director primary responsibility for ensuring the full independence granted him by the Commission (Recital 4). Both Recital 4 and the first subparagraph of Article 12(3) limit this independence to the investigation function and specifically to "the performance of his duties with regard to the opening and carrying out of external and internal investigations or to the drafting of reports following such investigations". Article 12(4) lays down the general conditions for holding the Director liable, but makes no

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individual liability, but infringements of the legislation, which really comes under the sectoral legislation.

<sup>7</sup> Article 1(2) of the Regulation constitutes not a new legal basis for coordination work, but simply a reminder. In its evaluation report, the Commission categorises such work under the Office's general tasks (Chapter 2).

distinction between his responsibilities for investigations and his other responsibilities, and fails to lay down the practical arrangements for this very specific procedure.

Article 11(1) of the Regulation gives the Supervisory Committee the task of reinforcing the Office's independence by regular monitoring of the investigative function. Paragraph 7 lists the means by which this task is to be accomplished, the most important being the Office's programme of activities, on the basis of which the Director, having submitted it to the Committee for examination, should be able to take decisions in full independence.

### **II.1.2 Carrying out old tasks in a new framework**

Article 1(2) of Regulation 1073/99 confers on OLAF other, non-investigative, tasks which are not covered by its independent status or by the "regular monitoring (by the Committee) of the implementation of the investigative function", even though the Committee has to be informed about them with the "Office's programme of activities referred to in Article 1". OLAF thus provides the Member States with assistance from the Commission in organising close and regular cooperation between their competent authorities in order to coordinate their anti-fraud activities at a strategic level (COCOLAF).

OLAF also assists the Commission in its task, for which it retains full responsibility, of designing and developing methods of protecting the Community's financial interests.

## **II.2 The outline sketched out by OLAF**

The system designed by the Regulation can be regarded as in the process of being put in place only if account is taken of OLAF's intentions and the outline it has sketched out.

Although OLAF has produced no document clearly setting out the objectives pursued by the changes in its structure, the Committee has identified the main aims:

The Committee's recommendations on the organisation and transparency of management have essentially been taken into account. The case management system and the manual continue to be improved with this in mind.

OLAF has shown that it intends to programme operational activities and identify priorities for an investigation policy based both on an analysis of data from the Member States' notifications and OLAF's operations and on the impetus from the institutions

responsible for protecting financial interests (policy, programming and intelligence functions).

OLAF has also indicated its intention to enhance respect for individual rights and consideration of national and Community procedural requirements (by its judicial advisers), the organisation of relations with national authorities (platform of services) and the effectiveness of investigations (recruitment of investigators, improvement of procedures).

Given the late arrival of the two Directors of "Investigations and Operations" and "Intelligence" respectively, it is not yet possible to assess the capacity of OLAF's structures to attain these objectives, but this should be done as soon as possible. Problems with the coexistence and cooperation of the investigative function with the other functions continue to give rise to a certain confusion. The Committee has therefore recommended that the problems created by this dual role be resolved by the Office's organisation and internal structure and by agreements with the Commission; in particular, it has proposed that the investigative function be identified and visible in the structure.<sup>8</sup>

### **III. Suitability of OLAF's operation in terms of meeting the objectives**

As stated in the introduction, an assessment continues to be hindered by the chronic absence of a programme of activities for the Office and of real procedural rules for investigations, which are in the process of being drawn up, as well as by the absence of a clear concept of the role of the judicial advice unit. Nevertheless, an initial assessment enables us to identify difficulties with the implementation of the Regulation's provisions that could be resolved by clarifying or more fully implementing the rules.

In conducting its assessment, the Committee has endeavoured to reply to the following questions, taking into account the investigative methods used, the evidential value of OLAF's investigation reports and information communicated to the judicial authorities, including elements such as police reports, and the forms used for drawing up such documents:

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<sup>8</sup> At the start of its work, the Committee did not have the data to be able to assess the external investigation function and limited its proposal to internal investigations.

- What has been the value added of OLAF's investigations? How did the cooperation with the national judicial authorities work?
- Did OLAF's investigations meet the institutions' expectation to see delicate cases, often with political implications, handled effectively and objectively? How do the institutions assess the investigations that concern them?

### **III.1 Creation of an investigative function exercised by the Office (Recitals 4, 8, 9 and 16; Articles 1 to 7)**

The investigative function was set up on the basis of the old structures of UCLAF, whose job was geared to conducting inspections and checks to protect against fraud. As regards internal investigations, OLAF's task was entirely new,<sup>9</sup> at least with respect to investigations in the other institutions and bodies, and new powers were created by Regulation 1073/99 (Article 4) for tasks which could indisputably be carried out under better conditions by a Community body than by national services.

It was quite a different situation for the external investigative function, which had to be performed with the same powers as those available to UCLAF and by the structure that came out of it, and which was governed to a far greater extent by the subsidiarity principle: the legislator took the view that the Member States were primarily interested in receiving OLAF's assistance with their own anti-fraud investigations and considered an external investigative function of value only in the situations referred to in Recital 7 and Article 2 of Regulation 2185/96.<sup>10</sup> It was therefore difficult for OLAF both to define its new investigative function, separating it from the other functions conferred on it by Article 1(2) of Regulation 1073/99, and to set in place the necessary instruments to carry it out.<sup>11</sup>

It is in the light of these considerations that we must examine the extent to which the first objective of Regulation 1073/99 — conferring the investigative function on OLAF — has been realised to date or, failing that, the extent to which the instruments set in place can contribute to its achievement.

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<sup>9</sup> The external investigative powers laid down by Regulation 2185/96 having been scarcely used.

<sup>10</sup> "... especially where, owing to the scale of fraud, which is not confined to one country and frequently involves organised rings, or where, on account of the special nature of the situation in a Member State, those objectives cannot, in view of the seriousness of the damage done to the Communities' financial interests or to the credibility of the Union, be fully realised by the Member States alone and can therefore be better achieved at Community level".

<sup>11</sup> With a view to distinguishing it from the on-the-spot checks carried out by the Directorates-General.

### **III.1.1 Creation of new powers for internal investigations (Article 4 of Regulation 1073/99)**

OLAF's internal investigative work started off, as far as the Commission was concerned, on the basis of cases opened by UCLAF, which had neither the tools nor the legal bases for such a task. The information and documents collected under these conditions therefore had no particular evidential value and often took the form of inspection or audit reports drawn up by other departments or bodies. OLAF had to manage these cases and attempt to close them satisfactorily, which first of all overburdened the available workforce, but more especially made it very difficult to produce useable investigation reports. Internal investigation work in the other institutions seems to have been affected by this unusual beginning and has not yet fully benefited from the judicial advisers' assistance, which has often been confined to arranging the information collected.

The legislator's goal of achieving objective and effective handling of cases which are often delicate because of their personal or political implications cannot yet be considered to have been attained satisfactorily in that the disciplinary, administrative and/or criminal proceedings aimed at by investigations are not yet sufficiently taken into account. On numerous occasions, the Committee has recommended that OLAF take more account of individual rights and procedural requirements and in particular that it adopt procedural rules to protect these rights and ensure that investigations are conducted with a view to the admissibility of evidence in any disciplinary, administrative and/or criminal proceedings and to respect for the rights of any individuals under investigation.

### **III.1.2 Use of existing powers of inspection for external investigations (Article 3 of Regulation 1073/99)**

Unlike Article 4, Article 3 of Regulation 1073/99 does not create any new legal bases, but allows the use of existing investigative powers set in place by Regulation 2185/96 and by the sectoral rules.<sup>12</sup> Conferring this new purpose on old or little used powers has

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<sup>12</sup> See Article 9 of Regulation 2988/95.

posed numerous problems for OLAF in terms of defining its new external investigation function:

### III.1.2.1 **Investigation policy**

The Office's priorities should focus on the areas of Community intervention and funding where Member States cannot take action, such as direct expenditure;<sup>13</sup>

### III.1.2.2 **OLAF's conception of investigative work**

In some areas (anti-corruption, direct grants and direct expenditure), the approach of investigators is increasingly geared to finding evidence with a view to establishing personal liability. The information received in these areas relates to specific facts attributable to individuals and related to quite specific responsibilities. However, in other areas, we have observed some difficulties with consolidating this investigative culture. In the customs field, for example, initial investigations tend to relate to the smuggling of goods which have been imported into the Community using false declarations of origin in order to avoid paying antidumping duties and/or to circumvent preferential arrangements.

Moreover, investigators' preliminary work in the customs sector mainly involves checking that the imports took place and in what quantities. OLAF first has to establish that the transactions took place, before seeking to identify individual responsibility.

The extent of these phenomena (number of imports, need to cross-check export data and bills of lading, on-the-spot visits to non-EU countries) has the effect of lengthening the average duration of customs investigations. OLAF's coordination enables the Member States to investigate suspect behaviour by importers.

In this area, OLAF's role is to provide the Member States with information enabling them to conduct and close their investigations, holding natural or legal persons liable. OLAF's role is thus not to initiate investigations in the strict sense.

One might wonder if OLAF should not abandon this type of preliminary work. However, it must be borne in mind that:

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<sup>13</sup> Recommendation No 3 of the Commission's evaluation report.

- i. Community sectoral legislation imposes certain obligations, and
- ii. Member States do not always get involved in detecting fraud in the antidumping and/or preferential regimes fields — the subsidiarity principle requires OLAF to intervene. Without its preparatory work of collecting and transmitting information, the Member States would not be able to deal with this type of fraud.

In other areas, such as agriculture and the structural funds, even with detailed information on fraud, OLAF investigators can be faced with a failure to carry out checks on the part of the relevant authorities. In these circumstances, and given that the only legal basis for detecting fraud is Regulation 2185/96 and that OLAF's intervention usually occurs long after the events, it is particularly difficult to identify individual responsibility. The inevitable result is that the final report can take the form of an audit report which does not describe individual behaviour likely to lead to criminal proceedings, but which sometimes highlights the shortcomings of control systems.

### III.1.2.3 **Collaboration with the national judicial authorities**

Ultimately, OLAF's external investigation work as such<sup>14</sup> remains very limited, tied up in other activities, and seems not to be well received by some national courts, which want the proof submitted to them to be collected in accordance with their national procedures.<sup>15</sup> On the other hand, the national judicial authorities are happy to accept OLAF's assistance in this area, i.e. pursuant to Article 280 of the EC Treaty and Article 1(2) of Regulation 1073/99. The arrangements for this vertical cooperation derive from the second Protocol on the protection of the Community's financial interests, which some Member States still have to ratify.

In any event, investigations must comply with the following principles:

- subsidiarity (Recital 21 of Regulation 1073/99): OLAF should open an investigation only if the allegations meet the criteria of Recital 7 and Article 2 of Regulation 2185/96, failing which it should submit them to the relevant national authorities, if appropriate in the context of the collaboration provided for in Article 1(2) of

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<sup>14</sup> That is, work aimed at detecting facts likely to establish individual liability.

<sup>15</sup> Judgment by the Court of Setúbal on 10 January 2001 in Case 1/97.4 ABLSB.

Regulation 1073/99. However, it is only recently that decisions to open investigations have been subject to empirical criteria. Moreover, for a long time OLAF did not sufficiently distinguish between external investigation work and on-the-spot checks of the correct application of the legislation, which are the responsibility of managing departments.<sup>16</sup> Lastly, the Committee feels that operational recovery work is the job of the Commission's authorising departments.

- proportionality: in accordance with this principle also referred to in Recital 21, OLAF should open an investigation only if the chances of success in disciplinary, administrative and/or criminal-law proceedings are reasonable or if the alleged offences are sufficiently serious. Ultimately, OLAF does not yet have the means to assess such chances.

### **III.1.3 Controlling the opening and managing of investigations (Recitals 12 and 14; Articles 5, 6 and 11(7) of the Regulation)**

The Regulation gives the Director wide powers to open and manage investigations, and to programme activities, and gives him the means to monitor the Office's employees, for whom it also lays down rules of action.

The Committee has recommended, in particular with a view to the subsidiarity principle set out in Recital 21, that conditions be created for keeping the investigative function under control.

**III.1.3.1** First, investigation work must be governed by the programme of activities stipulated in Article 11(7) of the Regulation and comply with the priorities set by the Office on the basis both of recommendations made by the different institutions in the context of their responsibility for protecting the Community's financial interests and of the analyses and processing of data performed by its intelligence unit.

Now that this unit is in place, the priorities can be set and the rule concerning the programme of activities laid down in Article 11(7) be applied. The Committee would point out that the Commission makes a similar recommendation (R.11).

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<sup>16</sup> See Chapter 1.2.3 of the Commission's evaluation report.

**III.1.3.2** Second, the management of investigation staff should be sufficiently flexible to ensure the best possible allocation of resources to the priorities set out in the programme of activities. In particular, the Committee has pointed out that the fragmentation of the investigation department into sectoral units might prevent implementation of the Office's priorities by replacing them with sectoral priorities and preventing flexibility of management. It has therefore recommended a non-sectoral structure for this department. The status (temporary/permanent) of investigative staff should also be specified and conditions laid down in which they can change status as part of a staff policy for the Office. Implementation of Article 6(3), under which only those officials or employees of the Office assigned to an investigation are authorised to conduct it, could then be ensured, supplemented by an oath-swearing procedure. This recommendation must be implemented.

**III.1.3.3** Third, the judicial advice unit should review the opening and performance of investigations, in accordance with rules yet to be defined in order to take account of the Director's responsibility in this regard and his authority over this category of OLAF staff. Since May 2003, special efforts have been made to specify the nature of the work to be done as soon as an investigation is opened. OLAF endeavours to divide its operations into the following categories: internal investigations, external investigations, coordination, (criminal-law) assistance and monitoring. In doing so, it considers the content and value of the information, subsidiarity and the availability of resources.

It has proved to be difficult to put these recommendations into practice owing to problems with setting up the new structures and because of the Regulation's complexity. Nevertheless, the necessary structures for controlling the investigation function have been created,<sup>17</sup> although the late arrival of the Directors has delayed their implementation, which will have to be subjected to a management audit in future.

## **III.2 Implementation of the investigative function: increasing the effectiveness and legitimacy of the fight against fraud and irregularities - (Recitals 3, 4, 7, 10, 11, 13, 15, 16, 19; Articles 8 to 10)**

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<sup>17</sup> The intelligence directorate for programming independent operational work, the judicial advice unit for ensuring compliance with procedures, and the investigations directorate for operational activity

In the implementation of the investigative function, the Committee considers that the objectives of effectiveness and legitimacy are inseparable. It would also point out that the provisions concerning these objectives are to be found essentially in the Regulation's recitals and hardly at all in its operational provisions, though this could not in any way justify their still insufficient implementation.

### **III.2.1 Respect for human rights and fundamental freedoms (Recital 10 of the Regulation)**

The Committee frequently receives copies of complaints sent to the Director of OLAF by persons under investigation or in connection with other OLAF activities, or notes setting out these persons' grievances. In almost all cases, these persons invoke the infringement of their fundamental rights in the course of the procedures followed by OLAF, in particular their right to be heard before conclusions making accusations against them are drawn. The Committee then asks the Director of OLAF either to inform it what action has been taken on these complaints or to take a position on the arguments put forward.

To implement the system for protecting individual rights provided for by the Regulation, OLAF's internal rules of procedure, having been approved by the Supervisory Committee, could govern the link between the procedures required under Article 9 (drawing up a report closing the investigation and containing conclusions that comply with the principles listed in Recital 10 for the institution or the Member State) and Article 10 (forwarding to the judicial authorities information obtained by the Office during internal investigations into matters liable to result in criminal proceedings). OLAF has just referred to the Committee a draft along these lines.

### **III.2.2 Respect for national law and the Staff Regulations (Articles 4(1), 6(4) and 9(2))**

The aim of these provisions is to ensure that OLAF's investigation reports or the information gathered during OLAF's investigations have evidential value before the

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(investigations, assistance and cooperation with the administrative and criminal-law authorities, other checks).

national administrative or judicial authorities and before the disciplinary authorities of the institutions. In practice, it has proved very difficult to apply them and the expertise of the judicial advisers recruited by OLAF is very useful.

Moreover, it can happen that the OLAF investigation is based on an inspection or audit report drawn up by another body not subject to these requirements, without OLAF checking the facts. It would therefore be difficult for the recipient authorities to accord the reports or information forwarded by OLAF the evidential force desired by the legislator. This practice could also lead to failure to respect the provisions of national law or the Staff Regulations enshrining the protection of individual rights or adversarial proceedings.

### **III.2.3 Obligations relating to the continuity and duration of investigations (Article 6(5))**

A large proportion of investigations have not complied with these obligations as a result of the caseload, inherited from UCLAF, of files opened without prior evaluation. It is to be hoped that this situation will disappear when the caseload has been brought down, a task which OLAF has tackled head on. However, another practice has emerged, consisting of delaying the closure of an inquiry by using the obligation to forward the information to the judicial authorities provided for in Article 10(2) of Regulation No 1073/99 to forward not information, but an interim or *de facto* report, with the risk that responsibilities overlap with the national courts. The Committee feels that the desired effect could be obtained using other procedures, such as assistance or monitoring.

It should be noted that these obligations concern only investigation activity. However, it would be useful for OLAF to have a role in controlling the duration of the cooperation and assistance activities, though these are subject to other constraints under national law.

### **III.2.4 Appeals and examination of complaints (Article 14 of the Regulation)**

The procedure laid down by Regulation 1073/99 to organise the review of the legality of OLAF's activities is both provisional and partial. It concerns only those of OLAF's activities carried out within the framework of internal investigations and thus highlights the priority given by the legislator to internal investigations. However, above all it is presented as a provisional solution which should ensure that OLAF's internal

investigations dovetail with disciplinary procedures. This procedure is therefore nothing other than the ordinary law procedure open to officials and other staff of the institutions and other Community bodies before the appointing authority (automatic right of appeal) with the possibility, if it is rejected, of bringing an administrative appeal before the Court of First Instance. It therefore has the characteristics of these procedures, namely examination of the appeal by the authority responsible for the act complained of. To avoid this pitfall, since the acts in question here are very specific administrative acts, namely investigations, a department other than that which handled the case should be made responsible for examining the appeal.

### **III.2.5 Data protection (Article 8 of the Regulation)**

Article 8(4) gives the Director of the Office and the Supervisory Committee responsibility for ensuring that the provisions on protecting the data obtained in the investigations are implemented.

The Committee has laid down, in Articles 7(4), 8 and 19(3) of its rules of procedure, the provisions enabling it to take on this responsibility.

As far as the management of OLAF is concerned, the Committee has recommended that the information disseminated by the Office be channelled and that it should meet the criteria set by the guidelines. Commission recommendations R.16 and R.17 on standardised information procedures for the institutions, the national authorities and those involved and on setting up a communication unit are based on its considerations.

### **III.3 Independence of investigations (Recitals 4, 12, 17 and 18; Articles 11 and 12 of the Regulation)**

The basis for independence should, in the Committee's view, consist of an investigation policy which sets out the priorities and criteria for launching operations, drawn up openly on the basis of recommendations by the institutions (Court of Auditors reports; Parliament, Council and Commission resolutions) and of information extracted from data sent by the Member States or gathered by OLAF as part of its operations and other risk analyses. Such an instrument would allow OLAF to take its decisions with full accountability on the basis of information defined previously in a transparent fashion.

Regulation 1073/99 provides for instruments to reinforce this independence: the status of the Director<sup>18</sup> of OLAF (Article 12) and the creation of the Supervisory Committee (Article 11). The status of OLAF's staff<sup>19</sup> could also play a positive role in this and the Committee has, notably, taken up the proposal that investigators should take an oath before the Court of Justice, which could also have the effect, as highlighted by the Commission in its report, of strengthening the evidential force of the investigation reports.

### **III.4 Other OLAF activities (Recitals 4, 5 and 6; Article 1(2) of Regulation 1073/99; Article 280 of the EC Treaty)**

#### **III.4.1 Operational activities: collaboration, coordination, assistance**

OLAF gives the Member States support on behalf of, and therefore under the responsibility of, the Commission.

Firstly this means assistance from OLAF in the Member States' investigations involving cooperation with the national judicial authorities and police.<sup>20</sup>

OLAF also cooperates with the national authorities in tasks falling under an institutional partnership (Chapter 2 of the Commission's report), which remains within the Commission's sphere of responsibility, where such tasks involve cooperation with the relevant national authorities. As for on-the-spot checks for the correct application of Community law, the Commission indicates that this work is done in collaboration with its other departments and, in the light of the need to rationalise use of the available resources, cannot be a priority for OLAF (point 1.2.3 of the evaluation report).

This work by OLAF is very important and responds to a need on the part of the Member States, the Community and the Commission. However, it does need to be better identified and, in particular, be distinguished from activities focusing on the investigative function, and from external investigations and on-the-spot inspections conducted by other Commission departments. This is the aim of the planned platform of services, which should raise such work to the level of a strategy based on coordination geared to the Community's anti-fraud work.

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<sup>18</sup> See Chapter I.3.1 of the third Supervisory Committee activity report; OJ C 234, 30.9.2002, p.7.

<sup>19</sup> See Chapter I.3.1 of the third Supervisory Committee activity report; OJ C 234, 30.9.2002, p.8.

<sup>20</sup> Article 2(6) of Decision 352/99.

### **III.4.2 Legislative and policy work**

In its evaluation, the Commission rightly stresses the positive effects of the synergy between the Office's general tasks and operational functions. The Supervisory Committee noted with interest the analysis and recommendations formulated in Chapter 2 in particular.<sup>21</sup> It would also highlight the importance of the intelligence function for introducing a fraud prevention policy, which has yet to be formulated.

### **IV. Suitability of the institutional framework in terms of meeting the objectives**

The Supervisory Committee has on several occasions emphasised the value of the synergies which the legislator set up by providing the same body with the task of investigation functions and the function of coordinating the actions of Member States in the area of Community budget fraud and of preparing the Commission's legislative and strategic activities in this field. It is, however, necessary to underline the limits of this approach and to outline the problems it poses at various levels. The Committee has also on several occasions highlighted the ambiguities which emerged with the implementation of OLAF's institutional set-up and has called for them to be corrected.<sup>22</sup> In particular, the Committee stressed that OLAF is operationally independent while at the same time forming part of the Commission's structure, which means that the Commission, and its Legal Service in particular, is responsible for dealing with any complaints or civil actions brought following OLAF investigations.

This situation has the disadvantage of creating a potential conflict of interest for the Commission, which must defend both the financial interests of the Community and the interests of its members, officials and other servants.

### **IV.1 Legal and budgetary status**

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<sup>21</sup> Within its own sphere of responsibility, the Commission formulated a number of general recommendations, implementation of which would improve some of the Office's activities. To this end, the Supervisory Committee supports the following recommendations: R1, R3, R6, R7, R12, R13 and R14.

In order to retain investigative independence, OLAF must be free to draw up and submit to the budgetary authority its own estimated budget and staff requirements, to match the priorities of its investigation policy. It goes without saying that the Office must have established those priorities in full transparency and in accordance with Regulation 1073/99 and Decision 1999/352 (opinion of the Supervisory Committee on the preliminary draft budget).

The Supervisory Committee has therefore suggested that OLAF be included in the list of bodies treated like institutions listed in Article 1 of the Financial Regulation.

## **IV.2 Human Resources**

Under Article 6(1) of Decision 1999/352, the Director of the Office exercises the powers of appointing authority and, in particular, lays down the conditions and detailed arrangements for recruitment. The Committee notes that the Commission shares its point of view, recommending that "the Office, in full compliance with the Staff Regulations and the principle of transparency, should define its own staff management policy as required in both internal and external respects."<sup>23</sup> This would thus make it possible to improve the quality of recruitment, to offer staff a framework for a stable career and to provide objective reasons for differences in the status of various categories of staff. It is helpful in this respect to consider the importance of Article 6 of Decision 352/99, which gives the Director the power to lay down the detailed arrangements for the recruitment of temporary OLAF officers, thus enabling him to reflect the priority afforded by the legislator to investigative activities by creating the right conditions for recruitment based on expertise and full independence and on the guarantee that such staff will be used only for the tasks for which they have been recruited.

## **IV.3 Communication**

OLAF has set up its own autonomous public relations department and conducts an active policy of communication with the public and the media. However, the Committee feels that, while communication is important, it is none the less secondary and should

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<sup>22</sup> See especially Recommendation P3 in the 1999-2000 activity report and proposal P3 of the 2000-01 activity report.

<sup>23</sup> Recommendation No 15.

remain limited in view of the risks it entails for the respect of fundamental rights and the reputation of the institutions and their members, officials, and staff.

Moreover, it is of the utmost urgency that OLAF implement the guidelines drawn up at its request and follow Recommendation 17 by the Commission in this respect.<sup>24</sup>

#### **IV.4 Relations with partners: Europol, Eurojust**

Under Article 2(6) of Decision 1999/352, OLAF is in direct contact with the police and judicial authorities of the Member States and should accordingly have a special relationship with Europol and Eurojust. Given the implications that such relations could have for the Office's independence, the Committee, following an exchange of views with the Commissioner responsible, has issued a number of recommendations regarding their nature and purpose. It has endeavoured to take account of the fact that the jurisdiction of the bodies concerned is not the same and that relations are limited to a common denominator: investigative activities relating to the protection of financial interests. It has also stressed that the relationships in question will be adjusted in keeping with institutional developments.

Lastly, it considers that the architecture of the relationships should be included in the proposed platform of services.

#### **IV.5 Status of the Supervisory Committee**

The solution of an independent Supervisory Committee is feasible only for a transitional period. It would also be desirable to remove certain ambiguities in the text that have resulted in minimalist interpretations. In particular, the Supervisory Committee is not a Commission committee but is independent and reports to all the institutions. The status of its members must be specified; its operation and its secretariat must not be subject to supervision by the bodies being supervised and it should be given the means of its independence in these fields. Moreover, the Committee shares the Commission's opinion that "the Commission and the Supervisory Committee should take a constructive and

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<sup>24</sup> "The Commission recommends that a communication unit be established in the Office to manage the Office's communication activities on a day-to-day basis and assist the Director on the basis of the guidelines established by the Office."

pragmatic attitude in order to solve these problems in full compliance with the legislation."<sup>25</sup>

## V. Conclusions

Now that OLAF has been operating for three years, it is clear that the provisions of Regulation 1073/99 and the specialised human resources granted by the budgetary authority have not yet all become fully effective.<sup>26</sup> They must therefore be fully implemented and it is only when this has been achieved that it will be possible to assess their effectiveness and, if necessary, consider modifying them or proposing an extension of the Office's tasks. The Committee therefore considers that, although it will be necessary to amend the Regulation once political solutions have been found, the time is not yet ripe for doing so, especially now that the EU has decided on its enlargement to ten new Member States and the Office's capacity to assume the functions conferred on it by the legislator will have to be assessed in these very different circumstances.

As regards the organisation of the investigation function, it should improve both efficiency and the protection of fundamental rights. It is also essential for independence and effectiveness that its structure and methods be clearly identified.<sup>27</sup> It will then be possible to organise the synergies with the other functions by implementing the proposed platform of services. Above all, however, it will then be possible to organise this function rationally as part of the Office's programme of activities by defining the priorities of an investigation policy and to make use of the work of the intelligence function for that purpose. To assist that organisation, the development of a staff policy would help to match resources more closely to priorities. The investigation function should be organised with a view to improving both efficiency and the protection of fundamental rights.

In short, the recruitment of police and prosecution specialists and the implementation of the new structures designed to help achieve the aims defined by the legislator have not yet had the desired effect, and the potential represented by those structures (judicial

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<sup>25</sup> Commission's evaluation report, p. 43.

<sup>26</sup> With a view to implementing the major innovation highlighted in the introduction: the investigative function.

<sup>27</sup> The Commission recommends giving OLAF the legal and organisational means to perform this new function and gearing all of its work to this aspect (Recommendations 3, 4, 5, 6, 7 and 11).

officers, intelligence, platform of services) needs to be used to enhance the results produced by the creation of OLAF's investigation function. It will be necessary to take stock of the effectiveness of the structures once they are fully effective in order to determine whether it is possible or necessary to adapt or supplement Regulation 1073/99. The Committee considers it essential that this stock-taking be carried out on the basis of a management audit in early 2004.

As regards the protection of fundamental rights, the measures taken to date by OLAF are not sufficient to implement the objectives defined in Recital 10 of Regulation 1073/99. In the absence of specific rules of procedure, the way OLAF operates at present entails a fairly significant risk for the protection of the fundamental rights of persons under investigation. As in most cases they are officials, other servants or members of Community institutions or bodies, this is a risk for the position of the European civil service in that the link between such persons and the institution or body is affected by the uncertainties of inadequately monitored procedures. The reform of the operation of OLAF is thus urgent not only from the standpoint of protecting fundamental rights but also from that of the reform of the Staff Regulations.<sup>28</sup>

OLAF must therefore rapidly implement the recommendations of the Supervisory Committee and establish rules of procedure for investigations that make it mandatory to apply the provisions of the Regulation, to respect fundamental rights and to apply national procedures in order, on the one hand, to ensure that the principles and rules governing the admissibility of evidence and respect of fundamental rights are taken into account and, on the other, to encourage the drafting of reports with recommendations that conform to the purpose of the investigation function. These rules of procedure should be submitted to the Supervisory Committee for its opinion.

Furthermore, as the amendments to the Staff Regulations provided for in Article 14 of Regulation 1073/99 to deal with the problems of the judicial review of OLAF investigations have not been adopted, there is still no overall interinstitutional solution to

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<sup>28</sup> The Commission refers in this context to the links between OLAF investigations and disciplinary procedures. They should resolve the question of the effective application of Article 4 of its Decision of 2 June 1999 concerning the terms and conditions for internal investigations: the right of officials or other servants to express their views on all the facts which concern them prior to conclusions being drawn referring to them by name.

the problem of the relationship between OLAF investigations and the procedures for invoking the liability of officials and other servants (the MoUs are only partial and temporary solutions).

Lastly, using the Judicial Advice Unit for supervisory tasks and directing investigations and as a department would enhance the legitimacy and effectiveness of operations.

As regards OLAF's status, the primary need is for work related to the investigation function to be clearly identified in the structure in order to clarify the Office's relations with the Commission. Account should be taken in particular of the fact that criminal or disciplinary investigations cannot be carried out by a department which could be identified with the Commission. The status of European interinstitutional office provided for in Article 174 of the Financial Regulation could be appropriate, but it would be better for OLAF to be covered by Article 1(2) of the Financial Regulation. That would correspond to its role as an investigative body and allow it to present to the budgetary authority, autonomously and on its own account, estimates of the resources it requires for its investigation function. As regards OLAF's relations with the institutions in general, the clear distinction drawn between the function of independent investigation and the other functions carried out on behalf of the Commission should, in connection with OLAF's various activities (operational, legislative, policy-related, communication and information), help to define individual responsibilities more clearly.