Strengthening OLAF, the European Anti-Fraud Office

Report with Evidence
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(Q) refers to a question in oral evidence
(p) refers to a page of the Report or Appendices, or to a page of evidence
The mission of OLAF, the European Anti-Fraud Office, is to protect the financial interests of the Union and to fight fraud and corruption.

The efficiency and effectiveness of OLAF are currently under review and reports from the Commission and the Court of Auditors are expected later this year. In the meantime the Commission, reacting to the Eurostat case, has brought forward a proposal to amend the Regulations governing OLAF.

The aim of the proposal is to strengthen OLAF’s operational efficiency, to improve information flows, to ensure that the rights of individuals under investigation are respected, and to enhance the role of OLAF’s Supervisory Committee.

Our Report concludes that the Commission’s proposal is premature and would do little to enhance the independence or accountability of OLAF.

The Director General of OLAF would be obliged to pass on information to the Commission. The Report recommends that he be given some discretion to decide when, to whom and how much to disclose.

The Report recognises that there would be an advantage in setting out in the Regulation the rights of individuals under investigation but expresses doubts about the value of handing over a list of rights upon interview.

The Report rejects the proposal that the Supervisory Committee should be given responsibility for safeguarding “procedural guarantees”. The Supervisory Committee should not get involved in the operational activities of OLAF.

The Report notes that the future of OLAF has become entwined with the notion of the European Public Prosecutor. The Report urges that the debate on the EPP should not distract the Commission from the need to examine ways in which OLAF can be made more effective in the fight against fraud.
Strengthening OLAF, the European Anti-Fraud Office

CHAPTER 1: INTRODUCTION

1. The European Union has at its disposal, and disposes of, very large sums of public money raised by taxation in, or obtained by payments from, Member States. It is inevitable that these funds should attract the attention of fraudsters and be vulnerable to fraud and corruption. In 1988 the Commission established an anti-fraud unit, UCLAF (Unité de Coordination de la Lutte Anti-Fraude), whose remit it was to investigate allegations of fraud or corruption threatening Union funds or within Union institutions. But following the collapse in 1999 of the Santer Commission and an adverse report from the Court of Auditors, UCLAF was replaced by the European Anti-Fraud Office (OLAF). The intention was that OLAF should be more effective and enjoy a greater independence than its predecessor. Like UCLAF, OLAF is a creation of the Commission. Its Director-General and staff are formally part of the Commission. Its budget is provided by the Commission.

2. The mission of OLAF is to protect the financial interests of the European Union and to fight fraud, corruption and other illegal activity having financial consequences for the Union or its funds. OLAF carries out investigations into allegations of fraud and other illegality both within the Union’s institutions (internal investigations) and within individual Member States (external investigations). It passes on its findings to the institution in question or to the national prosecuting authority of the Member State in question, or to both, as the case may be. OLAF has no prosecuting power of its own.

3. The efficiency and effectiveness of OLAF are currently under review by the Court of Auditors and have been very recently reviewed by the Commission itself (see paragraph 26). The Court of Auditors’ report is expected this autumn. In the meantime, however, pre-empting these reports, the Commission has brought forward a proposal to amend the Regulations governing OLAF. The amendments would have implications for OLAF’s relationship with the Commission and for OLAF’s conduct of its day to day tasks. This Report considers the main changes being proposed by the Commission.

1 OLAF is the acronym for the French ‘Office Européen de Lutte Anti-Fraude’.
3 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/99 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1074/99 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The reason for there being two proposals is that OLAF is subject to two (almost identical) Regulations (Regulations 1073/99 and 1074/99, needed to deal with the separate legal frameworks of the EC Treaty and the Euratom Treaty) which set out OLAF’s operational independence, investigation powers and procedures. In this Report, for simplicity, we refer solely to the proposed amendment to Regulation 1073/99.
4. The main reason why the Commission has acted now, in advance of the publication of its own report and of the Court of Auditors’ report, appears to be a desire to demonstrate an immediate response to the criticisms it has faced arising from the Eurostat case (involving the payment of receipts from the sale of Eurostat publications into a suspect bank account). These criticisms related to the time being taken by OLAF in investigating the case and the Commission’s apparent lack of knowledge of the alleged irregularities that were under investigation. The Eurostat case has drawn public attention to the rather peculiar status of OLAF and its relationship with the Commission. The more recent Tillack case (involving allegations that an investigative journalist paid an OLAF official for information) has also raised questions about OLAF’s conduct of its business and about its accountability. Both these cases are ongoing and we have not gone into their respective facts. But they form part of the background because it seems clear that some of the changes that the Commission is proposing are directly linked to criticisms levelled at it over the Eurostat affair. The European Parliament chastised the Commission, on the one hand, for not taking immediate measures to stop the irregularities that had been disclosed and, on the other hand, for not having the information in order to be able to do so.5

The proposal in outline

5. The Commission has proposed a Regulation containing a number of amendments to 1073/99, one of the Regulations governing OLAF.6 The Commission’s draft has five declared aims:

— to strengthen OLAF’s operational efficiency;
— to improve the information flow between OLAF and EU institutions and bodies;
— to ensure fully the rights of the individuals under investigation;
— to fill a number of gaps jeopardising the effectiveness of OLAF’s investigations; and
— to enhance the role of the Supervisory Committee (whose function we describe in paras 20–22).

6. To achieve these objectives, the proposed Regulation:

— prevents EU institutions and bodies from conducting their own internal administrative investigations on matters under investigation by OLAF (amended Article 1(3));
— clarifies OLAF’s powers to conduct external investigations (amended Article 3(2));
— enables OLAF in the conduct of external investigations to have direct access to information held by institutions, bodies, offices and agencies relevant to those investigations (amended Article 3(3));
— requires OLAF, on undertaking an investigation involving a member of an EU institution, immediately to inform the EU institution of the investigation (new Article 6(5a));

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4 A further note on the Eurostat case is contained in Appendix 3.
5 See the evidence of Mr Kröger, for the Commission, at Q 143.
6 See footnote 3 for an explanation of the legislative framework.
—establishes procedures to ensure the fundamental rights ("procedural guarantees") of individuals being investigated (new Article 7a); and
—strengthens the role of the Supervisory Committee by increasing its membership from five to seven (one of whom would monitor the observance by OLAF of the rights of individuals) and entrusting it with the task of delivering opinions concerning procedural guarantees (amended Article 11).

The wider context

7. Sub-Committee E (Law and Institutions) decided to undertake a brief inquiry into the changes being proposed by the Commission and to consider, in particular, what impact they might have on OLAF’s work, the organisation’s independence and accountability, the role of the Supervisory Committee and, not least, the protection of the rights of those under investigation.

8. The changes being proposed by the Commission, though focussed on particular practical problems, expose a number of underlying issues. These include the status of OLAF, the absence of judicial control over its investigations and OLAF’s relationship with bodies such as Europol and Eurojust. These issues raise important questions the answers to which are dependent on the direction in which the Union, including its policy on criminal law, is to go. For example, as we explain in more detail below, some see the establishment of the European Public Prosecutor as the way forward. That, as the most recent discussion of the Constitutional Treaty shows, is a matter of some controversy. While this Report is primarily concerned with the proposed changes to Regulations 1073/99 and 1074/99 we draw attention to some of the wider questions to which we may have to return if and when more substantial changes are brought forward.

The inquiry

9. We received various comments on the detail of the Commission’s proposal, all of which were helpful in our examination of the issues raised. We are grateful to all those who gave evidence to us and in particular to the representatives of the Commission and OLAF, Mr Kendall from the Supervisory Committee and, not least M. René André, of the French National Assembly. The evidence, written and oral, is published with this Report.

10. At the same time as Sub-Committee E was conducting its inquiry into OLAF, Sub-Committee F (Home Affairs), was conducting an inquiry into Eurojust. One question raised in that inquiry was the relationship between OLAF and Eurojust. We draw attention in this Report to the points where the two inquiries and resultant Reports intersect.

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7 For a description of these bodies see footnotes 51 and 8 respectively.
8 Eurojust was established in 2002 in order to enhance the effectiveness of national authorities dealing with the investigation and prosecution of serious cross border crime. Its role is to improve coordination and cooperation between the competent authorities of the Member States. Eurojust is made up of representatives (senior prosecutors or judges) from each Member State. Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. [2002] OJ L 63/1.
Recommendation

11. The Committee considers that the proposal to amend the Regulation governing OLAF raises important questions to which the attention of the House should be drawn, and makes this Report to the House for debate.
CHAPTER 2: BACKGROUND

What is OLAF?

12. OLAF is an independent investigatory body situated within the European Commission. Its main task is to protect the European Union’s financial interests and to fight fraud, corruption and any other illegal activity affecting the Union’s finances. OLAF does this by conducting internal (within the Commission and/or other Union Institution) and external (in Member States) investigations. It presents its findings to the appropriate authority. This may be the relevant institution within the Union where disciplinary or other internal action is necessary. Where OLAF’s enquiries lead it to conclude that a criminal offence may have been committed, OLAF will pass its file to the prosecuting authority in the relevant Member State or States. Its work ends when it produces its final case report. OLAF does not itself bring the prosecution in the national criminal court. When it came into existence in 1999, replacing UCLAF, OLAF inherited many of the UCLAF staff as well as a substantial backlog of cases. The backlog has now been largely eliminated.

13. OLAF also has responsibilities for the development of anti-fraud policies and as part of this “legislative” work undertakes so-called fraud-proofing of EC legislation, ie checking proposed legislation at an early stage to identify and try to avoid any specific risks of increased fraud.

Fraud on the Union’s finances

14. Fraud on the Union’s finances may take many forms but, broadly, can be divided into (a) income or receipts fraud and (b) expenditure fraud. The income of the Union comprises four main elements: agricultural levies; customs duties collected on imports to the Community; a percentage of VAT; and, after all other sources of revenue have been taken into account, a budgetary resource based on each Member State’s Gross National Product (GNP).

15. As regards customs duties and CAP exports, the types of fraud typically involve deliberate misstatements on customs declarations (for example, as to value, tariff classification, origin and destination of the goods) made for the purpose of minimising duties payable to or maximising refunds from the Union. The main types of VAT fraud are failure to register for VAT, late or bogus registration, disappearance without remitting tax charged, failure to render returns, contrived liquidations, false export cases, misdescription of goods, fraudulent inflation of deductible input tax, and suppression of sales to reduce the true tax liability. In relation to VAT fraud, the loss to the national budgets will be far greater than that to the Union.

16. Expenditure frauds may involve, for example, the embezzlement of money from the European Social Fund or of other structural fund moneys. Or it may involve claiming agricultural aid on a fictitious or false budget or the

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9 OLAF will shortly be addressing a report to the Supervisory Committee describing how the backlog has been dealt with (Q 109).
misappropriation of payments under a contract to provide goods or services to a Union institution or body.\(^{10}\)

**Relationship between internal/external cases**

17. The vast majority of the cases investigated by OLAF are ‘external’, *ie* involving alleged fraud or irregularities in Member States. According to OLAF, out of the 500 to 600 cases that are currently open, only 50 are internal (about 10 per cent) (QQ 111, 112). Internal investigations, however, are a priority for OLAF. OLAF has a “zero tolerance” policy, investigating all allegations of corruption within the Union’s institutions. About half of the allegations of corruption concern irregularities in tenders and grant procedures and in awarding and carrying out contracts. The irregularities include alleged conflicts of interest.\(^{11}\)

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**Case Study**

Following an in-depth investigation by OLAF, Ms K, an official of the European Commission, was convicted in the Court of First Instance in Brussels of forgery, fraud and deception. It was alleged that she had created false documents in support of travel indemnity claims for participants at meetings which were never held. The Court imposed a sentence of 40 months imprisonment and a financial penalty of approximately €15 000. In addition she was ordered to reimburse the Commission approximately €670 000.

*Source:* OLAF—Fourth Activity Report for the year ending June 2003

18. The Commission Annual Fraud Report for 2002 states that in 2001, 33 out of the 381 cases investigated by OLAF were internal. From the new cases in 2002, 50 out of 415 cases were internal. The difference is even more marked in terms of the sums involved: in 2001 the internal cases amounted to €20.8 million out of a total of €564.6 million, while in 2002 the internal cases amounted to €13.72 million out of a total of €937.22 million.\(^{12}\)

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**Case Study**

In May 2003, a multi-national cigarette operation co-ordinated by OLAF culminated in the arrest of 10 people and in the seizure of several tonnes of smuggled cigarettes. In August 2001 the seizure of 25 million British-brand cigarettes from Lithuania and Latvia in the port of Antwerp led Belgian Customs to request OLAF to co-ordinate a cigarette anti-smuggling operation.

Requests for mutual assistance were sent to the countries concerned including Lithuania, Latvia, Estonia, the United Kingdom, the USA and the Netherlands. A co-ordination meeting was held in June 2002 with representatives of the investigation services of Lithuania, Estonia, Belgium, the United Kingdom and France. OLAF held a second meeting in October 2002, which was attended by investigators from the Netherlands, Germany and Belgium. The investigations had by then identified the route taken by

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\(^{10}\) For a fuller account of the sources of the Union’s finances and of the types and scale of fraud, see our earlier Report, *Prosecuting Fraud on the Communities’ Finances—the Corpus Juris* (9th Report 1998-99 HL 62, paras 5-9).

\(^{11}\) OLAF: Fourth Activity Report for the year ending June 2003, p 6.

the cigarettes. An important suspect was identified by Customs in Estonia. In Lithuania, an organisation involved in the smuggling was also identified.

On the basis of information gathered by OLAF, FIOD (the Dutch Fiscal Intelligence and Investigation Department) opened a new enquiry into cigarette smuggling from the Baltic States. The smuggling organisation, while using the same consignee as in the Belgian seizure, was using trucks and cover loads instead of ships. The subsequent joint action led to the arrests of seven people in the Netherlands, the seizure of 10.35 million cigarettes and the arrest of three Latvians in Germany, as well as the discovery of some 4 million cigarettes in a warehouse in Belgium. Belgian Customs also found some 35 tonnes of illicit hand-rolling tobacco in another warehouse. A complete tobacco production plant was discovered, used by the criminal organisation to manufacture and package counterfeit British-brand cigarettes. OLAF continues to provide assistance to ongoing investigations and judicial proceedings in the various countries.

Source: OLAF—Fourth Activity Report for the year ending June 2003

OLAF staff

19. OLAF has grown in size and now has some 340 staff who work in three directorates. Directorate A deals with Policy, Legislation and Legal Affairs. This Directorate has responsibility for general anti-fraud strategy and also undertakes the fraud-proofing of Union legislation. Directorate B has responsibility for Investigations and Operations. This Directorate includes OLAF’s investigators, most of whom come from national investigation services related to economic and financial crime. Directorate C, entitled Intelligence, Operational Strategy and Information Services, is a recently created support facility for OLAF and national competent authorities. It gathers and analyses strategic and operational information and monitors fraud and corruption on a Union-wide basis.

The Supervisory Committee

20. The Supervisory Committee was established following the creation of OLAF in order to monitor the activities of OLAF. The Supervisory Committee is composed of five independent persons from outside the Union’s institutions. They are appointed by common accord of the European Parliament, the Council and the Commission. The Committee meets regularly13 (each month except July and August). The current Chairman is Mr Raymond Kendall.14 The Committee has a small secretariat drawn from OLAF staff.

21. The role of the Committee is to ensure the independence of OLAF “by regular monitoring of the implementation” of OLAF’s investigatory function. The Director-General is required to keep the Committee informed of OLAF’s activities, its investigations, the results thereof and the action taken on them. The Committee is also informed of cases where the institution or

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13 The Regulation requires there to be at least 10 meetings per year (Article 11(6)).
14 The other members are Edmondo Bruti-Liberati, Deputy Public Prosecutor, Court of Appeal, Milan, Mireille Delmas-Marty, Professor, Université Panthéon-Sorbonne (Paris I), Harald Noack, State Secretary at the Ministry of Finance, North Rhine-Westphalia, and Alfredo José de Sousa, President of the Portuguese Court of Auditors.
body concerned has failed to act on OLAF’s recommendations and of cases which have been referred to national judicial authorities for action.\textsuperscript{15}

22. But, as Mr Kendall explained, the Supervisory Committee’s role has developed so that it has become also “a kind of management committee”. It has been concerned with the administrative structures within OLAF and with such matters as the rights of those being investigated. The Committee also comments on OLAF’s draft budget (QQ 216, 218)). The Supervisory Committee, it should be noted, is not a Commission (or a comitology)\textsuperscript{16} committee but is independent and reports to all the institutions.\textsuperscript{17} It is, however, dependent on the Commission for its budget.

\textsuperscript{15} Article 11(1) and (7). Regulation 1073/99.

\textsuperscript{16} The process in which the Commission, when implementing Community law, has to consult special Committees made up of experts from the Member States. For a fuller explanation see our Report Reforming Comitology (31st Report 2002-03, HL 135).

\textsuperscript{17} Article 11(8). Supervisory Committee: Opinion 2/03, at para IV.5.
CHAPTER 3: EXAMINATION OF THE ISSUES

General—timing of the proposal

23. There seems little doubt that the proposed Regulation is a response by the Commission to some of the problems shown up in the Eurostat affair. But, as explained in more detail below, practical arrangements have already been put into place to address the main problem raised by that case and other work is in hand reviewing the operation and effectiveness of OLAF. We have questioned, therefore, whether the proposal is premature.

24. Mr Kendall, Chairman of the Supervisory Authority, did not think the Eurostat case necessitated a legislative response. He considered it to be a one off case which involved errors by OLAF and by the Commission (Q 227). Professor Levi and Dr Dorn (Cardiff University) described the political and media debate initiated by the Eurostat case as being “entirely back-to-front and should not be taken as the basis for further debate or political action on this issue”. In their view it was the Commission, not OLAF, that should take the major share of the blame for the mishandling of the case (p 76).

25. Mr Kendall suggested that the motivation for the Commission’s proposal was political. He said: “My personal view is that these recommendations, which were based essentially on the gut reaction after the Eurostat affair, really do not take matters that much further forward, and to me, it just does not make sense not to wait, especially now. Nothing has happened before the change in legislature, so what is the point of trying to do something before the new legislature is in place? By that time the audit will have been done and we will be in a much better position to do things in a sensible way, as opposed to what to me is not clear” (Q 244).

26. We understand the reference to the “new legislature” to be a reference to the fact that a new Commission is shortly to be appointed and that a new Parliament has just been elected. The “audit” that Mr Kendall mentioned is the exercise currently being undertaken by the Court of Auditors. The Court of Auditors has, not unsurprisingly, a keen and continuing interest in the avoidance of fraud and other irregularity affecting the Community Budget. As part of its Work Programme for 2004, the Court decided to give priority to “an audit of the effectiveness and efficiency of OLAF”.

27. Yet another factor affecting the timing of any change is the Commission’s own Evaluation Report on OLAF. The Regulations governing OLAF required the Commission to produce a progress report on OLAF’s activities after 3 years. That Evaluation Report was delivered to the European Parliament and the Council of Ministers in 2003. It made a number of proposals intended to improve the working methods and effectiveness of OLAF. Having considered the issue of OLAF’s independence in the light of its peculiar hybrid status (an issue to which we return at paragraph 29 below), the Commission’s report concluded that what was needed was a European Public Prosecutor (EPP). The report was not, however, accepted

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by the Council who agreed that the report should be revised, in particular to examine the actual results achieved since OLAF’s creation.19

28. While we can well understand the Commission’s desire to be seen to be doing something in response to the Eurostat criticisms, due account should be taken of the imminent completion of a revised Evaluation Report and the arrival of the report of the Court of Auditors. There should be no decision by the Council on the proposed Regulations before the report of the Court of Auditors is published and both the Council and the European Parliament have had the opportunity to consider that report and the revised Evaluation Report.

Independence of OLAF

29. OLAF has, it is commonly said, a hybrid status. In his report to the French National Assembly, M. André, Député, spoke of the ambiguous status (un statut hybride et ambigu) of OLAF in its relations with the Commission. OLAF is formally part of the Commission: it is thus able to exercise the powers of the Commission, eg in relation to external investigations (see below). At the same time, OLAF has budgetary and administrative autonomy, intended to make it operationally independent. Dr Kuhl, for OLAF, said: “With respect to the core function of OLAF, which is the opening of investigations, conduct of investigations and the production of the final case report, there is complete independence” (Q 134). There are, however, certain aspects of OLAF’s work, in particular its legislative and “fraud-proofing” functions, which are closely related to the Commission. Mr Kendal described this part of OLAF’s functions as being under the control of the Commission (Q 217).

30. The operational independence of OLAF is presently secured in two main ways.

(a) the Director General

The Director General is appointed by the Commission and is a member of the staff of the Commission, which has disciplinary oversight over him (QQ 120, 127). But his appointment differs from other Commission employees, in that the Director General is appointed following consultation with the Supervisory Committee, the European Parliament and the Council of Ministers (Q 132). The Director General has the final say on appointments of OLAF staff, though they are not subject to any other special procedure.

The Director General is empowered to open investigations on his own initiative. The Regulations require that in exercising this power, he should neither seek nor take instructions from any government, the Commission or any other institution or body. If he considers that a measure of the Commission calls his independence into question, he is entitled to bring an action against it in the European Court of Justice.20


20 Regulation 1073/99, Article 12.
Regulation 1073/99 provides that “the Supervisory Committee shall reinforce the Office’s independence by regular monitoring of the implementation of the investigative function”. The basic constitution of the Committee (five independent outside persons) is described in paragraph 20 above. The Director General has to keep the Committee regularly informed of OLAF’s investigative activities.

The Supervisory Committee exercises its influence through its opinions and reports. The Committee can deliver opinions, either on the request of the Director General or on its own initiative, on OLAF’s investigative activities. It must not, however, interfere with the conduct of investigations in progress. The Committee is required to make at least one report each year on OLAF’s activities. The Committee’s reports are submitted to the Community institutions.

Witnesses differed on whether the Commission’s proposed Regulation would have any impact on the independence of OLAF. Dr Véronique Pujas, Research Fellow, Institut d’Etudes Politiques, Grenoble, did not believe that it would strengthen the independence of OLAF. The main weakness of OLAF remained, in her view, its semi-autonomous state (p 78). ACFE, Association to combat fraud in Europe, took a similar view and pointed to the practical problems for investigations: “OLAF’s ambiguous status as a part of the Commission is not resolved in the amended regulation. Given the distinct probability that OLAF’s investigations may involve combinations of abuse of the Commission itself, corruption or participation by Commission civil servants and the need to obtain evidence from Commission records and staff members, we consider it vital that OLAF’s precise status be resolved. Questions of exchange of information, data protection exemptions, participation in joint investigations and even ability to provide admissible evidence may turn on its legal status” (p 70).

Dr Stefanou and Xanthaki, Institute of Advanced Legal Studies, University of London, on the other hand, believed that the draft Regulation would strengthen OLAF’s independence. They believed that OLAF’s independence and its operational efficiency would be strengthened by new provisions allowing OLAF to concentrate on the priorities to be fixed in its annual work programme (this would increase the efficiency of OLAF by enabling it to concentrate on fewer cases and thus close investigations faster), as well as by the amended Article 1(3) which would allow OLAF priority and exclusivity in internal investigations (p 80).

We do not believe that the Commission’s proposals would do much to strengthen the independence of OLAF. Only a more radical change, severing OLAF completely from the Commission, would do this. It is at this point that the debate becomes more fundamental and deeply political. Although it is possible to envisage a number of ways in which OLAF might become independent, both legally and factually, of the Commission and the

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21 Regulation 1073/99, Article 11(1).
22 Regulation 1073/99, Article 11(1).
23 Regulation 1073/99, Article 11(8).
24 ACFE members are drawn from the staff of UK Government Departments, academic institutions and private firms with an interest in combating fraud on the Community Budget and in the EU generally.
other institutions, the future of OLAF has become entwined with the notion of the European Public Prosecutor.

34. In his forward to OLAF’s Fourth Activity Report, Mr Bruener, the current Director General, states that OLAF has “demonstrated that it has sufficient independence to combat fraud within the Institutions without fear or favour. There is no operational need for further independence. On the contrary, separation from the Commission would raise complex legal, management, operational and logistical questions”. Such questions would, in Mr Bruener’s view, divert OLAF from the job in hand and have negative effects on staff morale and effectiveness. But, Mr Bruener continued, “Such problems could be managed in the context of an orderly transition towards the European Public Prosecutor, where the objective was well understood and generally shared”.

35. M. André, from the French National Assembly, stated that the adverse effects of the “mixed status” of OLAF have been underestimated. In his view, the way forward was to split OLAF off from the Commission. This would be possible once there was a European Public Prosecutor (p 63).

36. We have on previous occasions expressed concerns about the creation of a European Public Prosecutor (EPP). We note that the Government share some of those concerns. Although the EPP did not appear to be one of the Government’s “red lines” in the recent negotiation of the Constitutional Treaty it was a matter on which the Government insisted on unanimity, though we note that towards the end of the negotiations they were prepared to abandon the requirement that the establishment of the EPP should in addition be subject to approval by national parliaments. We return to this issue below.

Accountability of OLAF

37. While it is, of course, the case that an investigative body such as OLAF needs to be, and to be seen to be, independent, it also needs to be accountable. The position of OLAF is somewhat complex. But in practical terms, OLAF is answerable to a number of bodies:

(a) the Commission—OLAF remains a part of the Commission. The Director General and his staff are subject to the disciplinary control of the Commission. The Commission is answerable for OLAF before the European Parliament and the Court of Justice.

(b) the Supervisory Committee—the Director General provides the Committee with OLAF’s programme of activities and keeps the Committee regularly informed of investigations and their results. The Committee is also informed of cases where information is sent to national judicial authorities and where a Community institution or body fails to act on an OLAF recommendation.

(c) the European Parliament—the Commission, including OLAF, is accountable to the Parliament. Under the Treaty, the Commission is required to report annually to the Parliament and the Council on measures.

taken to counter fraud affecting the financial interests of the Community.\textsuperscript{27} OLAF produces an annual report on the protection of financial interests of the Communities and the fight against fraud. Under the Regulations governing OLAF, the Director General has to report regularly to the European Parliament, the Council, the Commission and the Court of Auditors on the findings of investigations carried out by OLAF.\textsuperscript{28} OLAF produces an annual activity report. In practice the Parliament Budgetary Control Committee (COCOBU) exercises political oversight over OLAF. The Director General provides oral reports, in closed session, on the progress of specific cases. COCOBU has taken a keen interest in OLAF and Mr Kröger, for the Commission, spoke of the development of a special relationship between the committee and OLAF and its staff (Q 120). Mr Kendall believed that the Commission and COCOBU exercised some influence over OLAF (Q 223). M. André (French National Assembly) saw OLAF as a kind of political football being kicked between the Commission and the Parliament. He drew attention to the differing political affiliations of key figures on COCOBU and the responsible Commissioner (Q 296).

(d) the Court of Justice—the legality of the acts and omission of OLAF are subject, in the same way as other acts and omissions of the Commission, to review by the European Court of Justice and the Court of First Instance. It is the Commission’s lawyers, not OLAF’s, who defend OLAF (a part of the Commission) in court (Q 120). But as will be seen the Court of First Instance has been reluctant to deal with alleged irregularities in the course of an investigation before the investigation is completed.

(e) the Court of Auditors—the Court is required to provide the Parliament and the Council with an Annual Report on the implementation of the Community’s budget together with a Statement of Assurance as to the reliability of the Community’s financial accounts and the legality and regularity of the transactions underlying them. OLAF accepts that it should co-operate with the Court and, subject to the protection of personal data, supply information needed by the Court. The Court may also prepare Special Reports at any time. One such was Special Report No 8/98 on the Commission’s services specifically involved in the fight against fraud (UCLAF),\textsuperscript{29} which triggered a vigorous response from the European Parliament, prompted swift remedial action from the Commission and was a factor leading to the creation of OLAF. As noted above, the Court has decided in its Work Programme for 2004 to give priority to “an audit of the effectiveness and efficiency of OLAF”.

(f) the European Ombudsman—OLAF, as part of the Commission, is subject to the jurisdiction of the Ombudsman and aggrieved parties have on occasion complained to him. For the purposes of his inquiries the Ombudsman treats OLAF as a body independent of the Commission.

38. The Committee’s opinion is that the proposed Regulation would do little to increase the accountability of OLAF. Further, the Regulation would not make it any clearer whether the Commission, the Council, the European Parliament, or the Court of Auditors should be the body to which OLAF must account in respect of its investigatory activities. As explained

\textsuperscript{27} Article 280(5) of the EC Treaty.

\textsuperscript{28} Regulation 1073/99. Article 12(3).

\textsuperscript{29} [1998] OJ C 230/1.
above, OLAF is in practice answerable to each in different ways. We note, however, that the proposed Regulation would increase the number of cases where the Supervisory Committee could give opinions on decisions taken by the Director General, in particular as regards extensions of investigation deadlines, complaints from individuals, observance of procedural guarantees, and provision of information to the institutions and other bodies. We consider below the implications of this for OLAF and for the Supervisory Committee.

Requiring OLAF to inform institutions that it is investigating them

39. Under the Commission’s proposals, as soon as investigations reveal that a member, manager, official or other servant of an institution, body, office or agency may be involved, or show that it might be appropriate to take precautionary or administrative measures to protect the interests of the Union, OLAF must inform the institution, body, office or agency concerned of the investigation in progress. The information must include the identity of the person under investigation, a summary of the matter, any information that might assist the institution in deciding whether administrative measures are needed to protect the Union’s interests, and any special measures of confidentiality that are recommended (Article 5a).

40. The Commission acknowledged that the proposed change was a direct consequence of the Eurostat affair (Q 143). OLAF accepted that some change was necessary and that it might have had a tendency to withhold from the Commission for too long a time information concerning the involvement of Commission officials in the matters under investigation (Q 135). Dr Kuhl, for OLAF, said, that the Eurostat case had demonstrated a need for “a more structured information flow” between OLAF and the Commission or other institution concerned (Q 115).

41. In fact some changes have already been made. The Commission’s Evaluation Report 2003 identified a need for fuller and quicker exchange of information between the Commission and OLAF and in July the Commission and OLAF agreed a Memorandum of understanding aimed at improving the position and at ensuring a prompt exchange of information in relation to internal investigations. The arrangements under the Memorandum allow for “a very restrictive and limited information flow” (Q 135). OLAF notifies the Secretary-General of the Commission, who is responsible for forwarding the information to other officials, Directors-General and Commissioners, on a strict need-to-know basis (Q 146).

42. The difference under the proposed Regulation would be that OLAF would be under a legal obligation to provide information and that obligation would not be limited to disclosure to the Commission. In his report to the French National Assembly, M. André argued that legislation was required in order to ensure consistent treatment throughout the institutions and to give the rule legal backing. Dr Pujas, Institut d’Etudes Politiques, Grenoble, believed that there was a need to inform both Union institutions and national authorities as widely as possible in order to avoid the sorts of criticism levelled at OLAF in recent cases (p 78).

30 The memorandum of understanding was approved by the Supervisory Committee in December 2003.
Other witnesses, however, were critical of the proposal. The Treasury expressed concern that the proposed disclosure could alert wrongdoers to the fact of the investigation with the risk that evidence could be covered up or destroyed (p 2). Professor Levi and Dr Dorn argued similarly. They said: “The Commission will argue that it (and other Institutions) needs to know at the earliest opportunity that the integrity of an individual and project may be compromised, so that it can take remedial steps. Yet those steps are precisely what would undermine the secrecy needed to initiate cases, investigate and gain evidence of wrong-doing. The Commission’s stance logically entails the subordination of action under criminal law to the Commission’s own administrative steps. If that is the result aimed at, then it should be clearly proposed and debated. If not, the Commission (and other Institutions) will have to put up with a relatively short period of ignorance in every case whilst preliminary investigations are made by OLAF and the criminal law agencies of the Member States”. In Professor Levi’s and Dr Dorn’s view, information should not be supplied until after a preliminary stage in the investigation (so that evidence could be secured) and then only when the investigators judged it to be safe for them to do so (pp 75–76).

Mr Kendall doubted whether legislation was necessary. He accepted that there might be cases where the Commission should be warned so that it could, for example, stop awarding contacts to a suspect firm. But it should be a question for the discretion of the investigator. In Mr Kendall’s view, this was not something you should make rules about (QQ 264–5). Drs Stefanou and Xanthaki supported the Commission’s proposal in so far as it would encourage clarity and security in the procedure to be followed in such cases. But they were critical of the detail of information required to be given: “The obligation to inform must be interpreted as an obligation to merely inform that an investigation is taking place without disclosing details of the investigation, any evidence or staff identified in the process. Disclosure of additional information should be left to the discretion of OLAF” (p 80). ACFE expressed similar concerns. They believed that OLAF should be permitted to inform those under investigation and the institutions or companies for whom they work of the fact, providing this would not substantially impede or obstruct the investigation itself (p 70).

The Commission was not prepared to give OLAF full discretion to decide whether or not to inform the Commission. Mr Kröger, for the Commission, said that it could not be accepted that on the one hand the Commission remained fully responsible vis-à-vis the European Parliament for the execution of the Budget without having the information at hand to undertake, if needed, precautionary measures. There might be cases where the Commission would need to put an immediate end to any irregularities. The Commission could not accept that it should not be informed when cases were opened against its staff (QQ 142, 144, 148).

We can quite understand that the Commission, given its responsibilities as regards the Budget, will want to know at the earliest opportunity of any fraud or other irregularity, especially if committed by one of its staff or an agency for which it has responsibility. The Commission’s difficulty is, of course, exacerbated by the peculiar status of OLAF, being part of the Commission, and the potential for awkward questions being raised (and, it was suggested, political capital to be made (QQ 223, 296 & 319)) by the European Parliament. But against that must be balanced the potential need for confidentiality in the conduct of an investigation, particularly in the early
strengthening olaf, the european anti-fraud office

stages. olaf will want to know that there is something in the complaint or allegation (else an innocent official’s reputation may be unjustifiably and unnecessarily tarnished) and be confident that vital evidence may not be destroyed (else the possibility of successful prosecution or other action may be lost).

47. we share mr kendall’s doubts as to the need for legislation and note that there are already practical post-eurostat arrangements in place. but it seems clear that the commission will press for a rule in the legislation. any rule must give the director general of olaf a sufficient margin of discretion. he must have some room to decide when, to whom and how much information to disclose. the rule presently proposed is too restrictive and inflexible. it appears to be too much weighted towards saving the institution (in practice most frequently the commission from embarrassment and does not go far enough in safeguarding either the investigation or the individual concerned. article 5a should be amended to give the director general greater freedom as to when to notify the institution, individual or agency concerned. there should be an obligation on the recipient to restrict onward distribution of the information and to maintain confidentiality, if recommended by the director general. where an institution considers precautionary or other measures need to be taken, there should be a requirement to consult the director general in advance.

powers of inspection

48. as described above, olaf can conduct both internal and external investigations. olaf investigations are not restricted to the eu institutions and bodies and can be carried out in relation to economic operators in the member states (such as firms benefiting from eu contracts or funding).

49. its internal investigative function extends to all community institutions and bodies, including the european parliament, the council, and the committee of the regions. recent attempts by the european central bank and the european investment bank to retain competence over investigations of their respective internal cases were annulled by the european court of justice.

50. as regards external investigations, olaf is entitled to exercise the powers of investigation given by member states to the commission in regulation 2185/96. these investigatory powers are broadly similar to those of the commission in competition cases, which are more widely known. thus olaf has power to conduct on the spot inspections, to examine business records and ask for explanations. before carrying out such checks and inspections the commission must notify the competent authorities of the member state concerned. it should be noted that olaf has no powers to

52 out of 68 internal cases assessed by olaf in the reporting period (the 12 months ending on 30 june 2003) and 23 out of the 30 investigations opened involved the commission. see report of the european anti-fraud office: fourth activity report for the year ending june 2003, at p 20, fig.1.9.


34 council regulation (euratom, ec) no 2185/96 of 11 november 1996 concerning on-the-spot checks and inspections carried out by the commission in order to protect the european communities’ financial interests against fraud and other irregularities.
take coercive measures with respect to economic operators. If a firm obstructs or resists an on the spot inspection, then the Regulation requires the Member State in question to step in and provide the necessary assistance to enable the investigators to carry out the inspection (QQ 99, 156, 159, 160).

(a) clarification of Commission’s powers

51. The Commission claimed that the new Article 3 would clarify the powers of the Commission. There appear to be three elements to this. First, OLAF explained that the new Article 3(2) would make explicit the Commission’s powers where in an internal investigation some irregularity was suspected in a contractual relationship between the Commission or another EU institution and a company. The company might be bound under the contract to provide regular information to the Commission relating to the performance of the contract. But contracts do not always so provide. The new Article 3 would make clear that OLAF’s investigative powers apply in the context of a contractual relationship (Q 163). Second, Article 3(3) would enable OLAF to have improved access to information held by Union institutions and bodies relevant to external investigations.

52. OLAF relies heavily on Member States for assistance in carrying out external investigations. OLAF explained that in practice OLAF commonly asks the Member State’s authorities to carry out the investigation. So, third, the proposed Regulation would give legislative recognition to this practice. Article 3(4) provides that OLAF may pass information to a Member State’s authorities so that they can conduct the investigation under relevant national law. OLAF described this as “a concrete expression of the subsidiarity principle” (Q 155). OLAF doubted whether the Regulation should specify criteria for Article 3(4) to apply. Dr Kuhl, for OLAF, suggested that if OLAF could not add value to the investigation and if it would be better handled by the Member State’s authorities, OLAF should normally pass the information on (QQ 176-7).

53. The Government expressed concern that the amendments being proposed in Articles 3(2) and (3) might have the effect of extending the investigative powers of OLAF. They propose to seek assurances that Article 3 does not imply that the ability and right of national agencies to conduct investigations within Member States could be impaired by OLAF wielding their powers under the Article. We agree that it would be helpful to have such assurances. It is important that both OLAF and national authorities should be able to work in harmony, without risk of one frustrating or prejudicing the work of the other, in targeting serious or organised fraud (including corruption) on the Community budget.

(b) role of national authorities

54. Assigning external investigative work to OLAF was intended to enable it to carry out, in the words of the Supervisory Committee, “real administrative investigations”. But OLAF’s external investigative work has been limited. In practice, OLAF’s intervention has occurred long after the event, making it

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35 In the United Kingdom this might involve Customs and Excise using their powers so as to provide the requisite help. See Supplementary memorandum by HM Treasury, printed with this Report at p 15.

36 Explanatory Memorandum dated 9 March 2004 from Ruth Kelly, Financial Secretary to HM Treasury.
particularly difficult to establish personal responsibility.\textsuperscript{37} Further, there have been problems in national courts accepting evidence collected by OLAF. National courts have wanted evidence to be collected in accordance with their own national procedures.\textsuperscript{38} This prompts the question as to the role OLAF and/or national authorities should play in relation to external investigations and, more generally, demonstrates the need to improve co-operation and co-ordination between OLAF and national authorities. In the latter context we draw attention to our contemporaneous Report on Eurojust.\textsuperscript{39}

55. Professor Levi and Dr Dorn suggested reverting to the situation before OLAF was created. External investigations should be carried out by the Commission itself, through its Directorates General, working with the Member States. Professor Levi and Dr Dorn argued that if OLAF were to give up external cases (except those having an internal aspect, which would then run without the knowledge of the Commission until the preliminary stage of securing evidence had been completed), then all of OLAF’s resources could be brought to bear against internal fraud and corruption (p 77).

56. Another possibility might be to rely on Member States’ authorities to carry out investigations in the Member States, leaving OLAF to concentrate on internal investigations. Drs Stefanou and Xanthaki did not go that far but took the view that, under the principle of subsidiarity, Member States had primary responsibility for external investigations. “This is where external investigations should begin and it is the national authorities which, at least in principle, must open investigations even in the area of OLAF’s jurisdiction” (p 80). ACFE would like to see OLAF able to work more closely with national authorities and to be able to obtain all the preliminary evidence necessary to enable national authorities to make an informed decision to accept an OLAF referral and to act swiftly thereafter (p 68).

57. OLAF accepted that Member States’ authorities were in a prime position to prevent and counter fraud in their own countries and had investigative services of their own competence to act in this field. Nonetheless OLAF believed that it could add value, particularly where Member States’ authorities were not well-equipped or could not act (Q 97). OLAF was clear that it could not in principle accept a restriction on its entitlement to conduct external investigations. The ability for OLAF to undertake external investigations was therefore “absolutely vital” (Q 165).

58. On more than one occasion\textsuperscript{40} the Committee has drawn attention to the fact that it is the Europe’s honest taxpayers and traders who bear the large sums lost to fraud against the Union. The fight against fraud is a shared responsibility of the Member States and the Union’s institutions.\textsuperscript{41} It will also be recalled that the majority of fraud against the Union occurs in the

\textsuperscript{37} Supervisory Committee: Opinion 2/03—para II 1.1.1.
\textsuperscript{38} Supervisory Committee: Opinion 2/13—para II 1.2.3. See also the evidence of ACFE (p 1).
\textsuperscript{41} Article 280(1) of the EC Treaty.
Member States, not in the institutions. National authorities have an interest in ensuring that OLAF investigations are carried out effectively and fairly. They may be involved either in assisting OLAF in an investigation or in carrying out the investigation jointly with OLAF or carrying it out by themselves. The objective should be the same whichever course is adopted.

59. **OLAF and national authorities should work closely together so as to ensure that such evidence as is obtained during investigations is admissible in national prosecutions.** It is necessary to avoid any repetition of the problems that have occurred in providing usable information and evidence to national law enforcement agencies, as was described by ACFE (p 67). In our Report on Eurojust we point to the possibility of Eurojust playing a greater role in assisting the prosecution of offences of fraud against the Union’s finances.\(^2\) We note that under the Constitutional Treaty Eurojust would have the power to initiate investigations as well as the co-ordination of investigations and prosecutions relating to offences against the financial interests of the Union (Article III-174(2)). The Constitution envisages competent national authorities acting as the investigators or prosecutors.

**Enhancing the role of the Supervisory Committee**

60. The proposed Regulation would enhance the role of the Supervisory Committee by strengthening its part in monitoring the rights of individuals under investigation, the length of investigations, and the flow of information between OLAF and other bodies (Articles 6(7) and 11). It is proposed also that the membership of the Committee be increased from five to seven (one of whom would monitor the observance by OLAF of the rights of individuals).

61. The Government were somewhat sceptical of the proposal to increase the powers of the Supervisory Committee. They believed that the Committee should not interfere in operational matters (p 2). Professor Levi and Dr Dorn counselled against the expansion of the Supervisory Committee’s functions. The role of the Supervisory Committee should be oversight in the strategic management sense (p 77).

62. The focal point of interest for the Government and other witnesses was the proposal (in Article 11) to involve the Committee in the monitoring of so-called “procedural guarantees”, an issue at which we look in some detail later in this Report. Most witnesses welcomed the proposal to increase the role of the Supervisory Committee in this respect, while expressing concerns about the lack of clarity over what sanctions would be available to the Committee.

63. Drs Stefanou and Xanthaki said that there remained “ambiguity as to the procedure to be followed by complainants”. Would they be offered the opportunity to appeal to the Supervisory Committee against actions and omissions of OLAF? And if so, would the decision of the Supervisory Committee be subject to judicial review before the Court of First Instance? Could judicial review precede the final report? “These questions” they said “must be answered clearly and expressly in the proposed reforms” (p 81). ACFE referred to “a rag-bag of additional responsibilities” for the Supervisory Committee which did not appear to be backed by any direct

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enforcement powers and which did not clearly say whether or not the Committee had any role in OLAF’s accountability (p 69).

64. The proposed increase in the number of members of the Supervisory Committee from five to seven is also related to Article 11 and “procedural guarantees”. The Commission explained that the increase was not simply a response to the recent enlargement of the Union. The principal reason for the increase was to enable the Committee to exercise the function of monitoring OLAF’s compliance with rights of individuals, potential defendants. There would be an increased workload (Q 178). Mr Kendall said that the Committee itself was indifferent on the question of numbers but that he could see some benefit in the new Member States having representatives on the Committee (Q 284).

65. A number of witnesses suggested that the Committee’s membership should not only be increased but should also be strengthened. One possibility was to include representatives from or of the Court of Auditors, the European Ombudsman, the European Parliament’s Committee for Budgetary Control, and Eurojust. Drs Stefanou and Xanthaki acknowledged that this would increase the transparency and legitimacy of OLAF but thought it would compromise the independence of OLAF and therefore was not to be recommended (p 81). ACFE believed that it would make a great deal of difference, both to aggrieved individuals or firms and to OLAF itself, if the Supervisory Committee were to contain members of the judiciary and had clear powers in respect of OLAF’s activities (p 70).

66. We can see that it might be helpful, in a Union of 25 Member States, for more Member States to be involved in the work of the Committee and for the Committee itself to have wider resources to draw on. Were the Supervisory Committee to take on the role of monitoring procedural guarantees (an issue to which we return below) then its workload would certainly increase. But a further consequence of so strengthening the role of the Supervisory Committee should not be overlooked. That is the question of the accountability of the Supervisory Committee.

67. At present the Supervisory Committee does not have any final responsibility or take any decisions affecting the conduct of investigations. Mr Kröger, for the Commission, described the Committee as “experts giving advice to the Director of OLAF”. Consequently there was no need for them to be directly accountable to anyone. But, he pointed out, in practice they were accountable to some extent because they responded and provided reports to the institutions including, where asked, to the European Parliament and the Council (Q 180). Giving the Supervisory Committee any meaningful responsibility for safeguarding “procedural guarantees” would, we believe, change that. The greater the role regarding the conduct of investigations that the Supervisory Committee were to take on, and especially if it were to give rulings on compliance with procedural rights, the more important would become the question of the accountability of the Supervisory Committee itself.

The rights of the individual under investigation

68. There have been frequent complaints from those subject to investigation that their fundamental rights were infringed, in particular the right to be heard
before conclusions making accusations against them were drawn. Complainants have turned to the Court of First Instance (CFI), the European Ombudsman and the Supervisory Committee for help. The CFI has been reluctant to accept jurisdiction while an investigation was ongoing. OLAF has been subject to criticism from the European Ombudsman for failures to observe the rights of potential defendants. The Supervisory Committee cannot intervene in particular cases but has “on numerous occasions” recommended that OLAF take more account of individual rights and procedural fair trial requirements.

69. OLAF did not accept that present arrangements did not provide sufficient protection. Dr Kuhl pointed to the rights referred to in recital 10 to Regulation 1073/99, data protection measures, the Staff Regulations and general principles of Community law. But JUSTICE queried whether existing procedures even satisfied the basic requirements of Regulation 1073/99. JUSTICE noted that the Supervisory Committee had recently concluded that, in the absence of specific rules of procedure, the way OLAF operated entailed a significant risk of infringement of the fundamental rights of persons under investigation (p 72).

70. Mr Kendall told us that OLAF did not have a code of good practice for investigators. But OLAF did not accept this, pointing to its Manual and the Uniform Guidelines for Investigators adopted by OLAF and other agencies (such as the World Bank and the United Nations) when conducting administrative investigations.

(a) a uniform set of basic guarantees

71. Under the Commission’s proposals, there would be “a uniform set of basic guarantees applying to all investigations conducted by OLAF”. The rights to be guaranteed by the new Article 7a would include:

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43 Supervisory Committee Opinion 2/03, para III.2.1.
44 The matter came before the Community Courts in Case T-215/02, Gomez-Reino v Commission. Order of the President of the Court 17 October 2002. The President of the CFI dismissed the complaint of Mr Gomez-Reino that his rights of defence had been infringed by OLAF’s failure to notify him that an investigation had been opened concerning him individually, to inform him of investigations that could implicate him personally, and to give him the opportunity to express his views on the facts concerning him before OLAF reached any conclusions concerning him personally. His application was held inadmissible on the grounds that there was no act adversely affecting him which could be challenged. The opening and conduct of an investigation by OLAF, and the transmission of the final case report with conclusions and recommendations were all preparatory measures. What Mr Gomez-Reino would be able to challenge was the final decision of the institution concerned taking account of OLAF’s report. The Court was concerned that to allow a challenge of such preparatory acts would impede OLAF’s ability to conduct investigations in the interest of the Union with efficiency, confidentiality and independence.
46 Opinion 2/02, at para III.1.1.
47 Recital 10 requires OLAF investigations to be conducted ‘with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value’.
48 Article 286 of the EC Treaty provides that the Community institutions and bodies shall be bound by Community rules on the protection of personal data. See Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/1.
a right for an individual whose conduct was under investigation to be informed of the investigation;

— an opportunity for the individual to comment before OLAF reached any conclusions on matters concerning him or her;

— a right to be assisted by a person of his/her choice;

— the privilege against self incrimination;

— the provision before the interview of a list of rights of the person interviewed; and

— access to the record of the interview.

72. JUSTICE contended that the proposal did not go far enough. In order to protect the rights of a prospective defendant, in compliance with Article 6(3) ECHR and Article 48 of the EU Charter of Fundamental Rights, and to reflect recent Commission proposals on defence rights, Article 7a should include the right to legal assistance prior to being interviewed, the obligation on OLAF to inform the suspect of this right in the invitation to interview and the provision to the suspect of adequate time and facilities to consult with a lawyer prior to the commencement of any interview. JUSTICE argued that Article 7a should also include the right to legal aid and the right to free interpretation/translation services where necessary (pp 72–4). In his report to the French National Assembly, M. André also welcomed Article 7a but noted that access to the investigator’s file was not included in the list of rights. While the proposal was an important step forward it was, in M. André’s view, no substitute for the exercise of genuine judicial control over investigatory acts (p 64). We doubt, however, whether it would be desirable to include the right of access to the file during the investigatory stage of the proceedings. That right might arise at a later stage, when a prosecution or disciplinary proceeding has been initiated.

73. ACFE questioned whether it would be sufficient for Article 7a to make a cross reference to the ECHR: “After all, Art 6 ECHR jurisprudence covers all the issues likely to arise”. (p 70). Drs Stefanou and Xanthaki, on the other hand, did not believe that simple reference to the ECHR or the EU Charter would suffice. The rights should be identified (p 81).

74. It is clear that OLAF recognises its obligation to respect the rights of the individual or firm under investigation and seeks to put that into practice, for example through the instructions given to staff through its Manual. The changes proposed in Article 7a would nevertheless be an improvement, by drawing the attention of the party under investigation (and its advisers) to its rights. Article 7a identifies the principal rights engaged. But we agree with JUSTICE that consideration should be given to including within Article 7a a statement of the right to legal assistance and to interpretation/translation services.

75. We received differing views as to what and how much information should be given in the list of rights to be sent to the person to be interviewed. Mr Kendall thought that something akin to the police caution should suffice (Q 269). JUSTICE welcomed the suggestion of a list of rights, believing that it would improve the suspect’s ability to understand his/her rights, particularly in a cross-border context which might be unfamiliar and complex. JUSTICE contended that the list of rights should reflect the
guarantees of the ECHR as developed by the case law of the ECtHR, the EU Charter and the highest protections applied in the EU Member States. Further the list should be available in languages other than the official Community languages (p 75).

76. The draft Regulation does not set out the content of the list of rights and it does not appear that it has yet been settled. OLAF said that the list should include but would not necessarily be restricted to the matters set out in Article 7a (Q 191). The detail of what should be included would be fixed by rules of administrative practice. Dr Kuhl explained that OLAF had a Manual of operating working procedures in which some of these rights were catered for by rules of administrative practice required to be followed by OLAF when conducting interviews (Q 192).

**OLAF’s form of caution**

“The interview should begin by reading the following statement to the interviewee:

‘The interview is being conducted at [location] on [date] at [time]. The interviewee is [name]; the other persons present are [names]. The purpose of this interview is to gather information as to [subject]. You have the right to speak in any of the official Community languages; the right to have a legal or other representative present; and the right not to incriminate yourself.

You may request that any documents you produce be appended to the official record of this interview. You will be provided with a copy of the record of this interview, including all annexes. It may be used as evidence in any administrative, disciplinary, legal or penal procedures.’

Members of the institutions must also be informed of the following:

‘You have a duty to cooperate fully with OLAF, to lend any assistance required to the investigation, and to supply OLAF with all useful information and explanations’.

Except in purely disciplinary cases, the rules of evidence for the relevant jurisdiction(s) must be respected. Documents referred to during the course of the interview should be clearly identified, shown to the witness, and appended to the record.’


77. OLAF already has a form of “caution” (see box above). It is presumably intended that the list of rights would supplement this. It is for consideration, however, whether the proposed list is necessary and, if it is, what should be included in the list. It must not be too long or theoretical. As Dr Kuhl, for OLAF, suggested, the content of the list is not for the Regulation but can be settled later.

78. Despite the wide support for the provision of a list of rights to every person to be interviewed by OLAF in the course of an investigation, we have some doubts about this proposal. First, the list would probably be taken to be inclusive of all relevant rights. But the rights relevant to a particular individual being subjected to a particular line of questioning may be very different from the rights relevant to another individual facing a quite different line of questioning. For example, questioning may sometimes, but obviously not always, impinge upon rights of privacy. A list which would be comprehensive enough to include all rights relevant to any individual and any
line of questioning would, we think, have to be of a length that would undermine its utility. Second, some individuals to be questioned by OLAF investigators can properly be described as “suspects” or as “potential defendants”. In respect of these a full statement of their rights may be requisite. But others may be questioned simply in order for the investigator to understand some of the relevant background or in order that they may verify and explain background documents. To hand these individuals a “list of rights” before seeking their assistance would be likely to alarm them quite unnecessarily and be apt to engender defensive and uncooperative responses to the investigator’s questions. It is certainly right that care should be taken to protect the rights of prospective defendants, not only in their own interests but also in order to avoid subsequent challenges to the admissibility of their evidence. It is quite another thing for investigators to be required to treat every person to be interviewed as a suspect or potential defendant. Accordingly we would recommend that investigators be allowed some discretion concerning the provision of a list of rights to the person to be interviewed. As to the contents of the list, we would urge the Commission and OLAF to consult widely on the detail. Those consulted should include legal practitioners and the staff unions.

79. The “judge of the liberties” is not a new idea. The juge des libertés exists in French law, where his or her primary role is to ensure that individuals are not unnecessarily held in detention. A “judge of the liberties” was also included as a feature of the Corpus Juris, in which it was envisaged that he or she would be a national judge exercising judicial control over the investigation. What the Commission has in mind in the proposed Article 11 is neither of these, though it appears to be a response to the criticism that OLAF’s procedures currently lack judicial control.

| Article 11 |
|---|---|
| **Supervisory Committee** |
| 1. The Supervisory Committee shall reinforce the Office’s independence by regular monitoring of the implementation of the investigative function. It shall ensure that individual rights are respected and shall take account of the need to safeguard the Union’s interests. The Supervisory Committee shall give its opinion on the decisions of the Director of the Office in the cases provided for in this Regulation. It shall, at the request of the Director or on its own initiative, deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress. It shall also deliver opinions concerning procedural guarantees, at the request of the persons concerned, and about informing the institutions, bodies, offices or agencies concerned, at their request. All opinions given shall be sent to the Director of the Office and to the person requesting the opinion. The institution, body, office or agency concerned shall be given a copy. The Committee shall, where appropriate, indicate any parts of the opinion that need to be treated in confidence. |
| 2. The Supervisory Committee shall be composed of seven independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the Office’s areas of |
activity, appointed by common accord of the European Parliament, the Council and the Commission. The Committee shall set one of its members the task of preparing its proceedings concerning observance by the Office of individual rights.....

80. The new Article 11 would expand the role of the Supervisory Committee, notably in relation to the monitoring of procedural safeguards. The Article envisages the Committee delivering “opinions concerning procedural guarantees, at the request of the persons concerned”. It also provides that the Committee shall “set one of its members the task of preparing its proceedings concerning observance by the Office of individual rights”.

81. There was a suggestion that this part of the Commission’s proposals had been hastily put together. Mr Kendall said: “the recommendation came to Prodi through Madame Schreyer, and the Commission said, ‘He is going to have to make a speech about this Eurostat thing with some recommendations. Is there any way the Committee can help in what he can say?’ That is where our idea came up that if there cannot be a European Public Prosecutor, maybe there is an interim measure which could be put in place where somebody, at any rate, would be made responsible on a full-time basis for overseeing the judicial aspect of things, and that is where the idea of the juge des libertés, as Mireille Delmas-Marty calls him or her, would come into play” (Q 231). Mr Kendall explained that in the absence of any control by the Community courts, and there being no equivalent to the control exercised, for example, by juge d’instruction in the French system, the only real recourse for an individual was to go to the Ombudsman (Q 234-7).

82. M. André noted that the Supervisory Committee had suggested the creation of an avocat des libertés, a freedoms advocate, and not a juge des libertés or judge of freedoms (p 65). Mr Kröger, for the Commission, said that the intention behind its proposal was not for the Supervisory Committee to have an operational role or to be involved in the running of ongoing cases. (Mr Kendall confirmed that the Supervisory Committee did not want to intervene in operational matters and decisions (Q 241).) Mr Kröger explained that extending the Supervisory Committee’s remit to include monitoring compliance by OLAF of procedural guarantees would in effect codify the present practice whereby those under investigation made complaints to the Supervisory Committee (Q 178).

83. JUSTICE welcomed the possibility for ‘persons concerned’ to request an opinion of the Committee on procedural safeguards. However, JUSTICE was concerned that the proposal did not make it clear what the consequences would be of a finding by the Committee that individual rights had been infringed by OLAF. While there appeared to be an implicit presumption that the opinions of the Supervisory Committee would be followed (for instance the Director would have to inform the Committee if the Committee’s recommendations had not been acted upon), JUSTICE suggested that a negative opinion of the Supervisory Committee should have “greater consequences and in fact be permitted to impact upon the conduct of the investigations in progress” (p 75).

84. Not all witnesses supported the Commission’s proposal. Professor Levi and Dr Dorn were strongly opposed to the Supervisory Committee taking on the role of monitoring the “procedural guarantees”. In their view, “a committee that is so close to the agency—and in principle is not constituted in terms of juridical role or competence—cannot properly have the role of ensuring
substantive compliance ... The supervisory committee should desist from high-flown but vague and distracting ambitions, and focus on its job of oversight in the management sense. The Commission’s proposals in this respect could only produce a ‘half way house’—with muddle within the committee and between it and other entities—a situation that would please no-one who is interested in proper judicial control of action against EU fraud and corruption”. Professor Levi and Dr Dorn believed that the European Court of Justice should have the role of ensuring that procedural safeguards were observed (p 77).

85. ACFE also had doubts about the proposal. A close monitoring of procedural safeguards would mean the Supervisory Committee having day to day contact with OLAF and the conduct of investigations. This would be outside its constitutional function. It was difficult to see how the Committee could effectively monitor OLAF’s activities or safeguard the rights of individuals affected when it could not “interfere with the conduct of investigations in progress”. It was also unclear what value the Committee’s opinion would have. The Commission’s draft gave no indication whether the Director would be obliged to act upon the Committee’s findings. It was also not clear whether there would be any rights of appeal, to the Supervisory Committee or elsewhere. ACFE favoured supervision and control by the ECJ: “If procedural rules for internal investigations were to be published in a Community instrument, the ECJ could act as the ultimate court of appeal. In our view, this would be a better solution and a more transparent one” (p 69).

86. **We are not clear if the Commission’s proposal is just half-hearted (the Commission’s evidence was that Article 11 was intended to codify current practice) or simply half-baked (as other witnesses suggest).** Article 11 might appear to give rights to those under investigation but it fails to provide any sanction. As ACFE said, it is difficult to see how the rights are going to be “guaranteed” (p 68). But if Article 11 is intended to require the Supervisory Committee to do anything more than at present, receiving complaints from those under investigation, then it would extend and change the role of the Supervisory Committee. The Supervisory Committee would have to examine the facts and reach some form of finding or decision. This would have two consequences. First, the Supervisory Committee would inevitably become involved in the conduct of particular cases and the operational activities of OLAF. Second, if the opinion of the Committee were to have any impact on OLAF and on the conduct of the investigation the Committee itself would have to be made more accountable and, it might be argued, subject to judicial control.

87. That there should be some greater control over OLAF to ensure that procedural guarantees are respected seems to be generally agreed. **We do not, however, agree that the Supervisory Committee should become involved in monitoring procedural rights.** It should not, for the reason given above, become involved in the operational activities of OLAF. **Our clear preference would be for the Community courts to discharge the role.** But if that is not practicable then some other solution must be found. One possibility is for the magistrates unit within OLAF to take on an active role in monitoring compliance by OLAF investigators with procedural guarantees. Or a separate officer (akin to the
Hearing Officer in competition cases\textsuperscript{50} in the Commission might become involved. We acknowledge that the latter might give rise to even more “independence” questions but the Hearing Officer (and his independence) is now well-established in competition cases and demonstrates that practical solutions can sometimes be found to overcome institutional and legal hurdles.

\textbf{Relations with Europol and Eurojust}

88. One possible future development, advocated by some, including, for example, M. André in his report to the French National Assembly, would be a merger of OLAF and Europol (the European Police Office),\textsuperscript{51} or the absorption of the former by the latter.

89. As Mr Kendall noted, OLAF, Europol and Eurojust have been created in a piecemeal way. There appeared, in his view, to be an absence of co-ordination in the policy establishing these bodies (Q 224). \textbf{We agree.} There has been no overall plan as to how they should work or fit together. The powers of the three bodies are not the same (for example, OLAF has more powers than Europol, because it can undertake investigations, and OLAF has more immediate contact with the police and judicial authorities in the Member States). Relations between the three bodies are, therefore, limited to the common denominator, \textit{ie} investigative activities relating to the protection of financial interests of the Union. The Supervisory Committee has nevertheless urged that OLAF should have a special relationship with Europol and Eurojust.\textsuperscript{52} In April this year OLAF and Eurojust signed a memorandum of understanding providing for cooperation and the exchange of information between them.\textsuperscript{53} A working relationship is thus being developed.

90. M. André saw a merger of OLAF and Europol as providing a more efficient and effective use of resources (p 65). Mr Kendall acknowledged that there was a clear overlap in the functions of OLAF and Europol. He thought they should become one and the same body (Q 225). Professor Levi and Dr Dorn considered that the issue required further study. On the one hand, it might be regarded as sensibly placing policing of EU fraud and corruption within its wider context of economic crime in general. On the other hand, there was a question whether a combined intelligence and investigative agency would be more effective than the two separate bodies. Further, a merger of OLAF and Europol would raise issues of accountability (p 77). Under M. André’s proposal, the European Public Prosecutor (EPP) would exercise control over a merged OLAF and Europol (p 66).

\textsuperscript{50} See our Report \textit{Strengthening the Role of the Hearing Officer in EC Competition Cases} (19th Report 1999-2000, HL 125).

\textsuperscript{51} Europol was established by the Europol Convention Council Act of 26 July 1995 drawing up the convention on the establishment of the European Police Office. [1995] OJ C 316/L.

\textsuperscript{52} Supervisory Committee Opinion 2/03 para IV.4.

\textsuperscript{53} \textit{Judicial Co-operation in the EU: the role of Eurojust} (23rd Report 2003-04, HL 138), para 69 et seq.
European Public Prosecutor

91. The European Public Prosecutor (EPP) is controversial. The idea for the establishment of an EPP was first floated in the Corpus Juris.\(^{54}\) It was envisaged that the EPP would be a Community authority consisting of a Director and deputies in each Member State. The EPP would be responsible for investigation, prosecution, committal to trial, presenting the prosecution case at trial and the execution of sentences concerning fraud against the Community’s financial interests and related offences. It would be independent as regards both national authorities and Community institutions.

92. In 2001 the Commission published a Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Public Prosecutor.\(^{55}\) The Commission repeated the call for the establishment of an EPP which would be an independent judicial authority empowered to conduct investigations and prosecutions anywhere in Europe into offences against the Community’s financial interests, such as fraud and corruption. It was envisaged that the EPP would handle prosecutions in the national courts. However, perhaps sensing the strong political and public reactions in many Member States, the Commission stressed that trial and judgment would remain in the hands of the national courts. There was no question of the creation of a Community court or an autonomous European criminal code—this marked a significant departure from the harmonisation envisaged by the Corpus Juris. Notwithstanding the dilution of the Commission’s proposals, the Justice and Home Affairs Council in 2002 concluded that the time had not come to take such a radical step.\(^{56}\) It was generally felt that newly created institutions such as Eurojust and OLAF needed time to establish themselves.

93. The idea has not gone away. The Constitutional Treaty envisages the EPP being established “from Eurojust” (Article III-175). The Commission’s position is clear; they fully support the proposal contained in the Constitutional Treaty (Q 197). We sought clarification as to where this would leave OLAF. What role would OLAF play if an EPP was established?

\(^{54}\) A 1997 study funded by the Commission and prepared by a group of 8 academic lawyers from different Member States (including Mrs Delmas-Marty, now a member of the OLAF Supervisory Committee). The Corpus Juris proposed (Part 1 Criminal Law) certain specific fraud/corruption/money-laundering offences applicable in a European legal area (thus removing problems of differences between offences in Member States’ criminal laws and questions of extraterritoriality). It also specified penalties as well as provisions creating secondary offences and dealing with corporate liability. Part II dealt with procedure and evidence and included the creation of the office of EPP, who would have investigatory powers and be responsible for bringing the case before a national court. Determining which jurisdiction would be “appropriate in the interests of efficient administration of justice” would depend on a number of criteria; where the evidence was found, the residence of the accused and the place where the economic aspects of the offence were greatest. Certain of the rights of the defence would be protected by a so-called “judge of freedoms”, who would bring some judicial control over the investigatory activities of the EPP. The judge of freedoms would also ensure that ECHR (Art. 6, in particular) obligations were met. A detailed inquiry on the Corpus Juris proposals was conducted in 1999 by Sub-Committee E, under the chairmanship of Lord Hope of Craighead. Evidence was taken from a wide range of witnesses including those who drafted the Corpus Juris. In its Report, Prosecuting Fraud on the Communities’ Finances—the Corpus Juris (9th Report 1998–99, HL 62), the Committee concluded, at para 143: “It would be rash at this stage to rule out any possibility of its future value. But we are not persuaded that the Corpus Juris offers, at the present time, a practically feasible or politically acceptable way forward having regard to the state of the Union and public opinion.”


94. It is not clear exactly how the EPP would be established “from Eurojust”. OLAF identified at least three possible scenarios in this context: a very close co-operation between Eurojust and the EPP, each body following its own rules; the EPP becoming a member of the Eurojust College, as an addition to its current members; and the transformation of Eurojust into a prosecution body which would then represent the European Public Prosecutor (Q 200). For greater detail on the different scenarios see our separate Report on Eurojust.\footnote{Judicial Co-operation in the EU: the role of Eurojust (23rd Report 2003-04, HL 138), para 95.}

95. The role of OLAF in any of these scenarios remains open and uncertain. OLAF said that it had no aspirations to become the EPP (Q 203). OLAF told us that it could be envisaged that ‘OLAF would have in this context a role as an auxiliary of justice with criminal investigative powers to assist the European Public Prosecutor’ (Q 201). OLAF viewed the approximation of Eurojust and the EPP as being more appropriate than an approximation of OLAF and the EPP, as OLAF is an administrative and not a judicial service (Q 202). The ‘investigative’ role of OLAF leaves open the question of its relationship with Europol (which is not operational but has an intelligence-gathering role). One possible future development, as mentioned above, would be a merger of OLAF and Europol, or the absorption of the former by the latter. Such a change would fundamentally alter the character of Europol. The EPP would be in control of the merged body. The Supervisory Committee would presumably become redundant.

96. The Constitutional Treaty contains a provision (Article III-175) which would permit, subject to unanimous agreement in the Council, the establishment of a European Public Prosecutor. The jurisdiction of the EPP would be limited to crimes affecting the financial interests\footnote{However, in the consolidated text of the proposed Constitutional Treaty (CIG 86/04), Article III–175(2) includes within the proposed jurisdiction of the EPP “serious crimes affecting more than one Member State”. These words were included in the version of the draft Treaty (CIG 50/03) dated 25 November 2003. They were deleted in the text of Article III–175 which was included in the amendments proposed by the Irish Presidency (CIG 81/04). We understand these amendments, together with those in CIG 85/04, were agreed by Member States in Brussels on 18 June. The consolidated text (CIG 86/04) takes in the amendments to Article III–175 paragraphs 1 and 4 but not the deletion from paragraph 2 of the words “serious crimes etc”. We have assumed that this is accidental but the Committee has written to the Government in order to clarify the position.} of the Union but could be extended by unanimous agreement in the Council. The EPP would be responsible “for investigating, prosecuting, and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in offences against the Union’s financial interest, as determined by the European law” establishing the EPP. That law would also determine the rules of procedure applicable to the activities of the EPP, the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by the EPP to the performance of its functions.

97. As mentioned above, this is not the time to consider the potentially wide-reaching implications of the EPP. Some of our witnesses see an association between OLAF and the EPP as the way forward, not least because they see the EPP performing a role similar to that of the juge d’instruction in the French system and exercising an element of judicial control over OLAF’s investigative process. Whether or not to establish a centralised body with responsibility for investigating and prosecuting fraud on the Union’s finances is an issue on which there have been and seem likely to continue to be
divergent views. We will return to this question if and when a formal proposal for an EPP is brought forward. In the meantime that possibility should not distract the Commission from the need to consider ways in which OLAF can be made more effective in the fight against fraud. No doubt the forthcoming report of the Court of Auditors will reignite detailed consideration of that issue. That will be the time for decisions to be reached on the Commission’s proposals.
CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

98. There should be no decision by the Council on the proposed Regulations before the report of the Court of Auditors is published and both the Council and the European Parliament have had the opportunity to consider that report and the revised Evaluation Report (paragraph 28).

99. The Commission’s proposal would not do much to strengthen the independence of OLAF. Only a more radical change, severing OLAF completely from the Commission, would do this (paragraph 33).

100. The proposed Regulation would do little to increase or clarify the accountability of OLAF (paragraph 38).

101. Any rule governing the notification of an investigation to the Commission or other institution (Article 5a) must give the Director General of OLAF a sufficient margin of discretion. He must have some room to decide when, to whom and how much information to disclose. The rule proposed by the Commission is too restrictive and inflexible. Article 5a should be amended to give the Director General greater freedom as to when to notify the institution, individual or agency concerned. There should be an obligation on the recipient to restrict onward distribution of the information and to maintain confidentiality, if recommended by the Director General. Where an institution considers precautionary or other measures need to be taken, there should be a requirement to consult the Director General in advance (paragraph 46).

102. The Government propose to seek assurances that Article 3 (External investigations) does not imply that the ability and right of national agencies to conduct investigations within Member States could be impaired by OLAF exercising their powers under the Article. We agree that it would be helpful to have such assurances (paragraph 52).

103. OLAF and national authorities should work closely together so as to ensure that such evidence as is obtained during investigations is admissible in national prosecutions (paragraph 59).

104. It might be helpful, in a Union of 25 Member States, for more Member States to be involved in the work of the Supervisory Committee and for the Committee itself to have wider resources to draw on (paragraph 66).

105. Giving the Supervisory Committee any meaningful responsibility for safeguarding “procedural guarantees” would change the role of that Committee. It should not become involved in the operational activities of OLAF. The greater the role regarding the conduct of investigations that the Supervisory Committee were to take on, and especially if it were to give rulings on compliance with procedural rights, the more important would become the question of the accountability of the Supervisory Committee itself (paragraphs 67 and 87).

106. The changes proposed in Article 7a (Procedural guarantees) would be an improvement, by drawing the attention of the party under investigation (and its advisers) to its rights. Article 7a identifies the principal rights engaged. Consideration should be given to including within Article 7a a statement of the right to legal assistance and to interpretation/translation services (paragraph 74).
107. OLAF investigators should be allowed some discretion concerning the provision of a list of rights should be provided to the person to be interviewed. The Commission and OLAF should consult widely on the detail of the contents of any list. Those consulted should include legal practitioners and the staff unions (paragraph 78).

108. The Supervisory Committee should not become involved in monitoring procedural rights. Our preference would be for the Community courts to discharge the role. But if that is not practicable then some other solution must be found. One possibility is for the magistrates unit within OLAF to take on an active role in monitoring compliance by OLAF investigators with procedural guarantees. Or a separate officer (akin to the Hearing Officer in competition cases) in the Commission might become involved (paragraph 87).

109. OLAF, Europol and Eurojust have been created in a piecemeal way. There appears to have been an absence of co-ordination in the policy establishing these bodies (paragraph 89).

110. The debate about the future of OLAF has become entwined with that of the establishment of a European Public Prosecutor (EPP). We will return to the subject of the EPP if and when a formal proposal for its creation is brought forward. In the meantime that possibility should not distract the Commission from the need to consider ways in which OLAF can be made more effective in the fight against fraud. No doubt the forthcoming report of the Court of Auditors will reignite detailed consideration of that issue (paragraph 97).
APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee are:

- Lord Borrie (from 29 June 2004)
- Lord Brennan
- Lord Clinton-Davis
- Lord Denham
- Lord Grabiner
- Lord Henley
- Lord Mayhew of Twysden
- Lord Neill of Bladen
- Lord Scott of Foscote (Chairman)
- Baroness Thomas of Walliswood (until 29 June 2004)
- Lord Thomson of Monifieth
APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

* M. René André, Député, and M. David Siritzky, EU Delegation at the French National Assembly
  Association to combat fraud in Europe (ACFE)
* Mr Chris Austin, Head of EU Finance Team, HM Treasury
  F-H Bruener, Director-General, European Anti-Fraud Office (OLAF), European Commission
  Dr Nicholas Dorn, Cardiff University
JUSTICE
* Mr Raymond Kendall, Chairman, OLAF Supervisory Committee
* Mr Martin Kröger, Secretariat General of the EC Commission
* Dr Lothar Kuhl, Director of Legislation, Legal Affairs and Relations with other Institutions, and Mr Sébastien Combeaud, OLAF
  Professor Michael Levi, Cardiff University
* Mr Andrew Olive, Head of Fraud and Financial Management Branch, HM Treasury
  Dr Véronique Pujas, Institut d’Études Politiques, Grenoble
  Dr Constantin Stefanou
* Ms Janet Thomas, staff member, Fraud and Financial Management Branch, EU Finance Team, HM Treasury
  Dr Helen Xanthaki
APPENDIX 3: EUROSTAT

The fraud allegations concerning Eurostat centre on a bank account in Luxembourg, which was set up in the mid 1990s to hold receipts generated by the sale of Eurostat publications and data.

Eurostat’s own internal auditors discovered that at least one datashop (Planistat) had paid its receipts into the suspect ‘Eurodiff’ account rather than to the central Commission accounts. As yet, there is no evidence that these funds were used fraudulently. Eurostat’s Director-General, Yves Franchet, was transferred on 21 May 2003 to another position within the Commission at his own request, pending an OLAF investigation.

The Commission stepped in over the heads of OLAF, whose investigation into Eurostat had been criticised for moving too slowly. It announced a series of measures including:

- opening disciplinary proceedings against the three senior Eurostat officials and the replacement of almost all of the senior managers, to help restore confidence;
- all contracts with Planistat were suspended pending ongoing inquiries. Planistat, founded in 1991 in France, is an economic and statistics consultancy that has been contracted by Eurostat;
- Michel Vanden Abeele was appointed on a permanent basis as Eurostat Director-General. Mr Vanden Abeele has acted under the direct authority of Commissioner Solbes; and,
- a multi-disciplinary Task Force was set up to take forward the internal and external sides of the enquiries previously managed by OLAF alone. The Task Force was also charged with carrying out a full-scale administrative enquiry to assess the personal responsibilities of other staff involved with any financial irregularities.

The Task Force concluded that most of the alleged irregularities had their origins before 1999, whilst the period from 1999 to 2003 had been marked by progressive improvements in the management environment at Eurostat. These improvements were closely linked to Neil Kinnock’s Commission reform agenda, but also predate it. Indeed, it was the former DG—Yves Franchet—who set up an internal audit unit in Eurostat in the first place, and it was this audit function which identified problems in financial management. The Task Force stressed that they believe there were “genuine efforts” by Eurostat’s managers to improve financial management.

This was backed up by the findings of the internal audit service (IAS), which concluded that corrective action had been taken by Eurostat senior management in 1999 and that no evidence could be found of any of the past practices after 1999. But it also concluded that “the lack of control with which [the irregular funds] were managed created an unacceptably high exposure to the risk of fraud and irregularity”. The IAS felt that the Commission was ill-equipped to protect itself against the risk of collusion by third parties. It also noted that “there is little evidence of adequate transparency and communication between the former DG of Eurostat and both Eurostat’s Commissioner and his management team”.

Further measures taken since 1999, such as the adoption of the new Financial Regulation and the introduction of Annual Activity Reports, have enhanced overall protection. But improvements in the financial framework do not in themselves guarantee sound financial management. The other key ingredient is a change of culture, but that takes longer to achieve: it requires some change of staff; the lessons learned from training to take hold; and a realisation that embracing new methods of working is the key to career progression.

The Task Force’s main criticism for the period after 1999 was that little use was made of the audit work: in particular that audits were poorly disseminated, and while action was proposed, no formal action plans or timetables were drawn up. It concluded that a full audit of Eurostat would be required to judge whether the current systems and procedures were now sufficient. The IAS also noted that the Commission needed to address why crucial audit reports were not shared in their entirety with the whole of the management, nor with the political authorities.

Source: extract from European Community Finances—Statement on the 2004 EC Budget and measures to counter fraud and financial mismanagement. HM Treasury, Cm 6134, April 2004.
APPENDIX 4: REPORTS

Recent Reports from the Select Committee
Developments in the EU (13th Report session 2003-04, HL Paper 87)
Correspondence with Ministers (10th Report session 2003-04, HL Paper 71)
The Draft Constitutional Treaty (41st Report session 2002-03, HL Paper 169)
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