

**Committee of Independent Experts**

**SECOND REPORT**

**on**

**Reform of the Commission**

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

**VOLUME II**

**(10 September 1999)**

## Table of contents

### VOLUME I

<b>Chapter 1: Introduction.....</b>	<b>29</b>
<b>Chapter 2: Direct Management.....</b>	<b>33</b>
<b>Chapter 3: Shared Management.....</b>	<b>83</b>
<b>Chapter 4: The Control Environment.....</b>	<b>117</b>

### VOLUME 2

<b>Chapter 5: Fighting Fraud and Corruption .....</b>	<b>3</b>
<b>Chapter 6: Personnel Matters .....</b>	<b>55</b>
<b>Chapter 7: Integrity, Responsibility and Accountability in European Political and Administrative Life.....</b>	<b>108</b>
<b>Chapter 8: Final Remarks .....</b>	<b>140</b>

## 5. FIGHTING FRAUD AND CORRUPTION

### TABLE OF CONTENTS

#### INTRODUCTION

**5.1. Defining fraud and measuring its extent**

*Definitions*

*Incidence of fraud*

**5.2. Aspects of the fight against fraud**

**5.3. Political impetus**

**5.4. History**

*UCLAF*

*OLAF*

#### LEGAL FRAMEWORK

**5.5. Treaty provisions**

*Treaty establishing the European Community*

*Treaty on European Union*

**5.6. “First pillar” provisions: administrative powers**

*External inquiries*

*Council Regulation 2988/95 – The protection of the financial interests of the European Communities*

*Council Regulation 2185/96 – On-the-spot checks and inspections carried out by the Commission in order to protect the financial interests of the European Communities*

*Other regulations*

*Internal Inquiries*

*Conduct of UCLAF internal inquiries: early provisions*

*Conduct of UCLAF internal inquiries: the Commission Decision of 14 July 1998*

**5.7. “Third pillar” provisions: activities in the field of criminal law**

*Convention on the Protection of the European Communities’ Financial Interests*

*The two principal Protocols to the Convention*

*Europol*

**5.8. Remarks on the legal framework**

#### FIGHTING FRAUD IN PRACTICE

**5.9. The functioning of UCLAF**

*The rationale behind UCLAF*

*Court of Auditors’ report 8/98*

*The standing of UCLAF, conduct of inquiries*

*Relations with Commission audit and control services*

*Is UCLAF (OLAF) necessary ?*

*Results*

**5.10. Intervention of national judicial authorities**

*Basic principles*

*External cases*

**REMEDIES**

- 5.11. OLAF – an assessment**  
*Powers, structures and competences*  
*Functioning of OLAF*  
*Conclusions on OLAF*
- 5.12. The legal framework – a blueprint**  
*Introduction*  
*Premise*  
*Supervision of OLAF*  
*An EU Prosecutor’s Office*  
*Corpus Juris*
- 5.13. The new legal framework – gradual implementation**  
*The starting point : desiderata*  
*First Stage*  
*Second Stage*  
*Third Stage*  
*Time Schedule*
- 5.14. Recommendations**

**Annex 1: History of UCLAF**

**Annex 2: Summaries of legal and regulatory texts**

## INTRODUCTION

### 5.1 Defining fraud and measuring its extent

#### *Definitions*

5.1.1. This chapter is concerned with the manner in which the Commission (and others) address the problem of fraud and corruption. Its scope is thus restricted to action taken in relation to criminal or potentially criminal activities. This is in contrast to the previous chapter, which dealt with the processes of financial control (issues of sound and efficient management, financial regularity, etc.), and the following chapter, which (in part) deals with action taken in respect of individuals following personal and professional misconduct by way of disciplinary measures. Clearly there is overlap between the three, but it is important that the conceptual distinctions be drawn because the appropriate response of the institution varies depending on the nature of the problem.

5.1.2. This chapter therefore cannot but start with the distinction to be made between *fraud* and *irregularity*. Confusion between the two is the perennial source of alarmist (and inaccurate) headlines which declare anything between five and ten percent of the European Union's budget to be "lost in fraud". *Fraud* is not an equivalent concept in the legal systems of Member States - in some the term has no legal meaning at all - but the European Union does possess a workable definition, to be applied in the context of criminal law:<sup>1</sup>

*"... Fraud affecting the European Communities' financial interest shall consist of :*

*a) in respect of expenditure, an intentional act or omission relating to:*

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities*
- non-disclosure of information in violation of a specific obligation, with the same effect,*
- the misapplication of such funds for purposes other than those for which they were originally granted*

*b) In respect of revenue, an intentional act or omission relating to:*

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities*
- non-disclosure of information in violation of a specific obligation, with the same effect,*
- misapplication of a legally obtained benefit, with the same effect."*

---

<sup>1</sup> Definition quoted from the "Convention on the protection of the European Communities' financial interests" Article 1(1)a - OJ C316 of 27.11.95. (See also 5.7.1 and Annex 2)

5.1.3. An *irregularity*, on the other hand, is a contravention of rules and/or procedures which does not necessarily involve either illicit gain or intention, defined as follows:<sup>2</sup>

*"Irregularity' shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure"*

5.1.4. By this definition, quoted from a Community regulation, an irregularity is not a criminal matter but an administrative one. It is thus exposed to the possibility of an administrative sanction rather than a criminal one. Thus a distinction is immediately drawn between the sphere of criminal law and the sphere of administrative law. It is to be a vital distinction in this chapter, but one that is not unambiguous, for though an irregularity is not a criminal offence in a judicial sense, it is possible that a fraud, which is a criminal matter, lies behind an irregularity.

5.1.5. It is in consideration of the above that discussion of irregularities is central to the discussion of fraud. They represent the soil in which fraud can grow. Consequently, taking one step further back, tolerance of the slack administrative practices, poor regulations, over-complicated payment mechanisms, excessive exceptions and derogations, lack of transparency, etc., which tend to lead to abundant irregularities and errors<sup>3</sup>, amounts to a tolerance of a relatively high level of fraud.

5.1.6. *Corruption*, which can be viewed as a "special case" of fraud, is also defined in a European Union text (in a manner limited, spuriously perhaps, to EU interests), the first protocol to the Convention on the protection of the European Communities' financial interests<sup>4</sup>. A distinction is drawn between *passive* and *active* corruption, i.e. being corrupted and corrupting another:

*"...the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute **passive corruption**"*

(...)

*"...the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or a third party, for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute **active corruption**"*

---

<sup>2</sup> Quoted from Council Regulation 2988/95 Article 1 (2) (See also 5.6.2 ff and Annex 2)

<sup>3</sup> It is sufficient to consider the annual conclusions of the Court of Auditors' "Statement of Assurance" to appreciate the extent of the irregularity problem.

<sup>4</sup> Articles 2 and 3 of the first Protocol (OJ C313 of 23.10.96). (See also 5.7.5) This Protocol's scope has been completed and broadened by a "Convention relating to active and passive corruption on the part of both Community and Members States' officials" drawn up by Council act of 26 May 1997 (OJ C195 of 25.6.1997).

## *Incidence of fraud*

5.1.7. Fraud is by definition a hidden activity. It is only possible to assess its impact and extent by indirect means, for example by counting convictions for fraud, by extrapolating from confirmed occurrences, by citing reports of suspected fraud or irregularities likely to conceal fraud, by examining investigations in course and so on. To complicate matters further, an important variable is detection rates, whereby relative success in the detection and prosecution of fraud can give the appearance of a greater overall problem than where detection and prosecution are less effective and hence reveal fewer cases of fraud.

5.1.8. The approach taken by the Commission to measuring the extent of fraud is to rely on the official communication of irregularities by the Member States<sup>5</sup> and the resulting enquires (in the field of shared management) or on inquiries carried out (in case of direct management). Though highly imperfect, no better method exists.

5.1.9. The first remark to be made is that the relationship between the number of cases and the amounts concerned is far from a simple one. UCLAF's figures show that a mere 5% of the cases under examination account for well over half the total amounts in question. Put differently, a few big frauds are disproportionately important vis-à-vis a mass of smaller frauds. The importance of this point will become apparent when it comes to the investigation of fraud. Any serious attempt to deal with the bulk of the losses in value terms will involve the investigation of large-scale fraud operations. Experience shows these to be usually highly sophisticated, transfrontier operations, frequently the work of organised crime. The response has to be up to the scale of the task.

5.1.10. Secondly, one unambiguous conclusion which can be drawn from the Commission's statistics is that the vast bulk of irregularities, both in terms of cases and the amounts involved, occur in the fields of traditional own resources (essentially revenue from customs duties), agricultural expenditure and structural fund expenditure. In other words, in those parts of the budget which are jointly managed by the Commission and the Member States (see Chapter 3). Given that these areas account for about 80% of total expenditure and the bulk of revenue collection directly from third parties, this observation is in itself not surprising. It does serve however to make two important points. First, the Commission's own efforts to combat fraud can only be seen as part of the solution to the fraud problem - the Member States, which are in the front line as far as most fraud or potential fraud is concerned, are the primary line of defence. The Commission's role is thus above all one of guidance, coordination, legislation, etc. Second, the problem of fraud affecting directly managed expenditure is put into perspective - in the overall total, and notwithstanding the recent attention cases in this area have attracted, the amounts concerned are comparatively small.

5.1.11. This second point is not made to minimise the importance of the Commission effectively tackling the problems associated with direct expenditure. On the contrary, it is precisely in this area where the Commission can and must most of all demonstrate its commitment to the fight against fraud. In the light of the role the Commission plays, and hopes to play in the future, in the political life of Europe, nothing less than total commitment to the fight against fraud, and maximum effectiveness in this commitment, is acceptable.

---

<sup>5</sup> Under regulations nos. 1552/89 (Own Resources), 595/91 (EAGGF), 1681/94 & 1831/94 (Structural Funds). The figures communicated under these regulations are reported in UCLAF's Annual Report on the Fight Against Fraud (Last published 6 May 1998 for 1997 - COM(98)276

5.1.12. Exactly the same point applies to the fight against internal fraud and corruption. Though, according to the latest information, the number of UCLAF investigations involving Commission officials is a relatively low 30, the political impact of such cases and the importance of the manner in which the Commission deals with them far exceed their monetary impact. The issue here, more so than in the myriad cases of fraud elsewhere, is one of trust. The Commission's ambitions, which depend on the ambitions of ordinary Europeans for the European Union as a whole, can only be realised if the institution earns and retains the confidence of those it serves.

## **5.2 Aspects of the fight against fraud**

5.2.1. The fight against fraud is a multifaceted one, covering prevention, detection and sanction. There are thus a range of activities and a wide range of responsibilities involved, not all of which fall exclusively within the sphere of competence of the Commission. To summarise:

### Prevention

- a) Quality of legal documentation:
  - well-drafted, "fraud-proofed" legislation
  - simple and transparent rules and procedures;
  - well-drafted contracts
- b) Transparent and efficiently-managed tender procedures
- c) Effective control and monitoring procedures on the ground
- d) Effective internal audit in the Commission and in partner organisations
- e) A tight administrative "culture" (both formal and informal)

### Detection and investigation

- f) Effective, competent and qualified law-enforcement in Member States
- g) An effective investigative capacity at the European level
- h) Good coordination and information exchange between anti-fraud services
- i) Good internal cooperation between Commission services
- j) Adequate legal basis for investigations
- k) An anti-fraud culture - guarantees for whistle-blowers

### Prosecution and sanction

- l) Willingness and ability of national judicial authorities to prosecute EU fraud cases
- m) Good cooperation between Member States' judicial authorities
- n) Adequate legal framework for the prosecution of EU fraud, including of EU officials
- o) Effective coordination of administrative, disciplinary and judicial procedures
- p) Speedy resolution of fraud litigation in Member States' criminal courts

5.2.2. Many of these subject areas are covered elsewhere in this report, especially those relating to the prevention of fraud. The present chapter will thus concentrate on the mechanisms for the detection and investigation of fraud, and the possibilities for prosecutions and resolution of fraud litigation and the subsequent application of sanctions.



### **5.3 Political impetus**

5.3.1. In many, if not all, parts of the European Union, fraud is big news. Stories about the loss of taxpayers' money through fraud and corruption have been a constant feature of media coverage of "Europe" for many years. Although distortion and scaremongering have been an equally constant aspect of such coverage, it has served the useful purpose of ensuring that the issue of dealing with fraud has never been forgotten, even though it was perhaps submerged beneath perhaps more inspiring political projects in the expansionist Delors era in the minds of the European political classes.

5.3.2. Probably because of the popular and media interest in "fraud", it has been the European Union's sole directly-elected institution, the European Parliament, which has consistently made the running on anti-fraud policy, above all in the form of its Committee on Budgetary Control. The latter body has pursued its often thankless task with a great deal of persistence, with the result that all the principal anti-fraud and control mechanisms currently in existence one way or another had their genesis in this Committee.

5.3.3. The purpose of this observation is not to heap praise upon any particular grouping of politicians (it is - or should be - normal that the responsible committee of parliament lies behind many policy initiatives), but to make the point that the prime anti-fraud impetus must begin at the political level, not only in the European Parliament but throughout the institutions. It is no coincidence that most of the criticisms made by this Committee in its first and second reports arise in the context of structures, practices, procedures and a culture which developed in a period when concern about fraud and mismanagement had slipped off the mainstream political agenda.

5.3.4. The role of the democratic political structures of the European Union are examined later in this report (chapter 7). The present chapter, having noted the importance of political impetus, will deal with its more concrete manifestations, mainly UCLAF, but now also OLAF.

### **5.4 History**

#### ***UCLAF***

5.4.1. A brief "potted history" of UCLAF, providing a chronology of its key developments, is provided in Annex 1 at the end of this chapter. The following is thus the briefest of summaries.

5.4.2. UCLAF originally emerged as a result of sustained parliamentary pressure for a direct anti-fraud capacity within the Commission. Though what Parliament envisaged was a "flying squad" able to carry out inquiries in the Member States, UCLAF was initially constituted solely as a body for the *coordination* of the Commission's anti-fraud activities, which were hitherto dispersed in the principal expenditure/revenue directorates-general. The name it still bears reflects this early role<sup>6</sup>. UCLAF became operational in July 1988.

5.4.3. From that point on, and under constant pressure from the European Parliament, UCLAF's role and competences have been steadily upgraded. The biggest single change occurred in late 1994-early 1995, when three developments coincided. First, the Parliament voted 50 extra staff specifically for UCLAF. Second, in doing so, it specified that the new staff

---

<sup>6</sup> UCLAF (French acronym) = Unité de Coordination de la Lutte Anti-Fraude

should fulfil an *investigative* role. Third, in the light of these developments, the Commission concentrated all its anti-fraud activities within UCLAF, transferring the relevant staff from the operational directorates-general for agriculture (DG VI) and for customs and indirect taxation (DG XXI). Its enhanced role was subsequently reinforced by three significant pieces of legislation<sup>7</sup> and by the new Treaty of Amsterdam. (These are discussed in the next section.)

5.4.4. A further important step in UCLAF's development has been its increasing *de facto* involvement in judicial procedures. Tentative steps in the direction of attempting to ensure better cooperation between national judicial authorities, especially in the preparation of prosecutions, were given a boost by the findings of the European Parliament's Committee of Inquiry into the Community Transit System, which recommended UCLAF taking a more active role in this field.<sup>8</sup> (Again, this subject is developed in section 5.10 below.)

5.4.5. Finally, UCLAF is currently in the process of a further significant transformation, again as the result of direct pressure from the European Parliament and again with a view to increasing its operational effectiveness and independence. The change from UCLAF to OLAF, a fraud office operationally completely independent of the Commission, is reviewed in section 5.11 below.

### **OLAF**<sup>9</sup>

5.4.6. The rules applying to the conduct of UCLAF's inquiries are in the process of being superseded by the new provisions relating to OLAF, which officially (though for the time being only virtually) came into being on 1 June 1999<sup>10</sup>. They remain however of more than historical interest as the same, or similar, principles will have to apply to OLAF inquiries. Moreover, their effectiveness (or otherwise) in regulating the relations of UCLAF with other services can provide an indication of where potential difficulties will lie in the new institutional setup.

5.4.7. Except insofar as this chapter will specifically review the changes brought about as a result of the move from UCLAF to OLAF, it will, in its descriptive and analytical sections, by and large refer to UCLAF. This is not only because all past and present experience necessarily relates to UCLAF, but also because UCLAF will continue, for an indeterminate transitional period, to be the Commission's operational anti-fraud body. Generally speaking, it is safe to assume, unless otherwise indicated, that observations on the legal and operational attributes of UCLAF will apply equally to OLAF.

---

<sup>7</sup>

- 1) Convention on the protection of the European Communities' financial interests (26.7.95 - OJ C316 of 27.11.95)
- 2) Council Regulation (EC, Euratom) 2988/95 on the protection of the European Communities' financial interests (18.12.95 - OJ L312 of 23.12.95)
- 3) Council Regulation (EC, Euratom) 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (11.11.96 - OJ L292 of 15.11.96)

<sup>8</sup> Final Report and Recommendations of the Committee of Inquiry into the Community Transit System (A4-0053/97 of 19.2.97): see especially sections 8.2.5 and 15.2.2 and recommendation 18.

<sup>9</sup> OLAF (French acronym): Office pour la Lutte Anti-Fraude

<sup>10</sup> OLAF is discussed in detail below (Section 5.11)

## LEGAL FRAMEWORK<sup>11</sup>

### 5.5 Treaty provisions

#### *Treaty establishing the European Community*

5.5.1. Article 280 of the Treaty establishing the European Community (TEC), as modified by the Amsterdam Treaty, contains the following explicit provisions on the fight against fraud specifically affecting the EU budget:

*Article 280 (ex Article 209a)*

- 1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.*
- 2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.*
- 3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.*
- 4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.*
- 5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.*

5.5.2. This treaty article in paragraph three gives the Commission - and thus UCLAF (now OLAF) - together with the Member States a role in all "action aimed at protecting the financial interests of the Community against fraud". Specifically, the Commission and the Member States are called upon to participate in "close and regular cooperation between the competent authorities". Thus UCLAF acquires a formal responsibility not only in the coordination of investigations and the collation of intelligence, but also in prosecutions of anti-EC fraud.

5.5.3. The preparation and adoption of anti-fraud measures connected with the financial interests of the Community (in practice not always easy to distinguish from other anti-fraud measures), are brought in paragraph 4 firmly within the Community framework, under the co-decision procedure between the Council and Parliament<sup>12</sup>, this being the principal novelty of this article in comparison with the previous version (TEC Article 209a)<sup>13</sup>. In this case, however, measures affecting the "application of national criminal law or the national administration of

---

<sup>11</sup> This part of the chapter provides a brief discursive overview of the legal framework in place. A table showing the legislation in force, including more detailed summaries of its provisions, can be found in Annex 2

<sup>12</sup> TEC Article 251 (*ex 189b*)

<sup>13</sup> Also reproduced in Annex 2

justice" are specifically excluded. It is within the jurisdiction of the Court of Justice to interpret these provisions.

### ***Treaty on European Union***

5.5.4. Fighting crime in a broader sense, including through the application of criminal law, is nevertheless addressed in the Treaty on European Union (TEU), in Title VI as amended by the Amsterdam Treaty: "Provisions on Police and Judicial Cooperation in Criminal Matters". This part of the Treaty, which is outside the Community framework, introduces provisions aimed at tackling cross-border crime generally, covering areas such as police and customs cooperation - including through Europol - (Article 30), judicial cooperation and the prevention of conflicts of jurisdiction between Member States (Article 31), operations outside the Member State of origin (Article 32) and the possible approximation or harmonisation of national criminal laws through the adoption of framework decisions or the establishment of conventions (Article 34). The Court of Justice may be given jurisdiction, under certain conditions, to give preliminary rulings regarding such framework decisions or conventions and their implementing measures (Article 35 (*ex K.7*) TEU. The general aim of the Union is set out in Article 29 (*ex K.1*):

*Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia*

*That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:*

- *closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;*
- *closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;*
- *approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).*

5.5.5. In practice, it is clear that these general provisions on combating crime will also concern the fight against fraud affecting the Community budget. Frequently frauds to the detriment of the EU are only part of a wider fraud affecting national or private interests - an obvious example being VAT fraud, where a loss of revenue is suffered both by the EU budget and by national exchequers. From the point of view of the fight against EU fraud, and the mechanisms employed in this fight, notably UCLAF/OLAF, there is therefore a major interest in the broader measures provided for in Articles 29-34 of the TEU.

5.5.6. At the same time, the distinction between measures relating to anti-EC fraud (TEC, thus the Community framework, i.e. "First Pillar") and measures to combat EU crime in general (TEU, thus outside the Community framework, i.e. "Third Pillar") draws the key conceptual lines in the sand. On the one hand, there exists the possibility for the Community, using the co-decision procedure set out in Article 251 (*ex-189b*) TEC, to adopt *administrative* legislation specifically aimed at tackling anti-EC fraud, without explicitly touching on criminal matters, and for the Commission to assist and coordinate *all action* aimed at dealing with such fraud. On the other hand, any "legislative" measures touching on *criminal law* are exclusively the competence of the Member States, who may, in the context of the TEU choose to coordinate

their action, using the procedure set out in Article 34 (*ex K.6*) TEU (requiring unanimity), notably through the establishment of framework decisions or conventions.<sup>14</sup>

5.5.7. It is obvious that the distinction made (EU-fraud = Community = administrative measures *versus* crime in general = Member States = criminal law measures) is an artificial one and one which inevitably places UCLAF/OLAF in an ambiguous position. The ramifications of this ambiguity will be apparent in the course of this chapter.

## **5.6 "First pillar" provisions: administrative powers**

### *External inquiries*

5.6.1. The administrative measures in place and the powers given to the Commission (thus UCLAF<sup>15</sup>) to deal with fraud affecting the European Communities' financial interests fall into two categories, external and internal. The former category, which concerns the fight against fraud generally, and thus involves Commission (UCLAF, now OLAF) intervention on the ground in the Member States, is governed by formal Community legislation. This section is a brief review of this legislation.

### *Council Regulation 2988/95 - The protection of the financial interests of the European Communities*<sup>16</sup>

5.6.2. This regulation, contemporary with the Convention of the same name (see below), was intended to provide a framework for, though not supersede, the anti-fraud activities of the European Community already carried out under a disparate range of pre-existing sectoral regulations. It therefore establishes a number of general principles.

5.6.3. The regulation studiously avoids the term "fraud" with its criminal law connotations, by employing the word "irregularity", intentional or otherwise.<sup>17</sup> In the same spirit, the regulation consistently uses the adjective *administrative* to qualify the measures and sanctions for which it provides.

5.6.4. The importance of the regulation lies firstly in its mere existence, namely that it introduces a framework for the Commission's action against fraud in all sectors of the budget. Concretely, it provides the Commission with the authority to carry out administrative checks, introduce specific measures and apply administrative sanctions (including fines) in the protection of the European Communities' financial interests. In accordance with the Treaty principle that Community financial interests shall receive the same priority as national

---

<sup>14</sup> It is to be noted however that such measures may (and do) reserve a role for the Community institutions, including the Commission (hence UCLAF/OLAF) and, optionally, the Court of Justice.

<sup>15</sup> UCLAF, in its present form, exists only by virtue of internal Commission decisions. Its powers and obligations are delegated to it by the Commission, whose own position is defined in legislation.

<sup>16</sup> Council Regulation (EC, Euratom) 2988/95 of 18.12.95 - OJ L312 of 23.12.95

<sup>17</sup> The definition of "irregularity" employed in this regulation has already been cited at paragraph 5.1.3

interests<sup>18</sup>, it also places Member States and their services under an obligation to take measures to protect the European Communities' financial interests and to cooperate with the Commission for this purpose. (For details see Annex 2)

***Council Regulation 2185/96 - On-the-spot checks and inspections carried out by the Commission in order to protect the financial interests of the European Communities***<sup>19</sup>

5.6.5. This regulation lays down provisions for the administrative on-the-spot checks and inspections foreseen in Regulation 2988/95 (Article 10). It is a similar attempt to pull together a range of disparate rules (contained in sectoral regulations) into a common framework.

5.6.6. The effect of the regulation is to empower the Commission (in practice UCLAF) to carry out inspections of an administrative nature in the Member States *on its own authority and under its own responsibility* (Article 6(1)). These shall be carried out: (i) to detect serious irregularities or irregularities with a transnational dimension, (ii) in response to a weak control environment or (iii) at the request of the Member State (Article 2). The inspectors are given parity in terms of powers, access to persons, premises and documents with an equivalent national administrative service (Article 7(1)) and their inspection report has the same legal value as its national equivalent (Article 8(3)). The Commission is placed under an obligation to notify in advance and cooperate with the relevant national authorities (Article 4) and must, after an inspection, communicate its results to them (Article 8(2)). National inspectors may, but need not necessarily, participate in the inspection. (For details see Annex 2)

5.6.7. As a point of information, this regulation was applied 17 times in 1997 and 24 times in 1998. (It should be noted that it may still be more convenient for UCLAF/OLAF to operate under older, sectoral regulations, depending on the circumstances of the case.)

***Other regulations***

5.6.8. As has been mentioned, a number of sector specific regulations also provide the Commission with powers to act in the fight against fraud. Their is little point enumerating these here, but examples include: Regulations nos. 1552/89 (Own Resources), 595/91 (EAGGF), 1681/94 & 1831/94 (Structural Funds).

***Internal inquiries***

5.6.9. As far as inquiries *within* the Commission are concerned, there is clearly a great deal of scope for UCLAF/OLAF's powers to be extended by way of internal Commission decisions, while remaining within the scope of formally administrative action. Until July 1998, a surprisingly informal and *ad hoc* approach prevailed. Thereafter, following the internal ructions over the ECHO inquiry already referred to and a critical report from the Court of Auditors (see below) UCLAF's internal powers were formalised.

---

<sup>18</sup> Article 280(2) (quoted above at 5.5.1). NB This does not of course necessarily mean that the *same* degree of protection will be provided throughout the Union.

<sup>19</sup> Council Regulation (EC, Euratom) 2185/96 of 11.11.96 - OJ L292 of 15.11.96

5.6.10. It should be noted that it is in the context of internal inquiries that the position of OLAF has evolved most vis-à-vis UCLAF. The following is a resumé of UCLAF's position, OLAF will be discussed in Section 5.11.

#### ***Conduct of UCLAF internal inquiries: early provisions***

5.6.11. The explicit instructions or procedures which existed prior to the Commission Decision of 14 July 1998 covered only restricted fields, as follows:

- Notes from the Secretary-General concerning the obligations of officials vis-à-vis UCLAF and the latter's access to information. The first of these notes<sup>20</sup> incidentally confirmed the right of the Director of UCLAF to "initiate any investigation" as he saw fit.
- "Demarcation" agreements, specifying the competences of different services:
  - . Division of responsibilities between UCLAF and DGs VI and XXI on fraud-related matters (SEC(95)249 of 10.2.95)
  - . Cooperation and complementarity between Financial Control and UCLAF. (Note SG(94)D/141.662 and annex of 6.7.94)
- Agreement with the Court of Auditors on the exchange of information relating to possible fraud. (Exchange of letters between Mr Weber, responsible member of the Court (25.7.95) and Mrs Gradin, responsible commissioner (4.10.95))

#### ***Conduct of UCLAF internal inquiries: the Commission Decision of 14 July 1998***

5.6.12. Following a Communication entitled "Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption"<sup>21</sup>, which, albeit in rather vague terms, promised to tighten up internal provisions on the fight against fraud, the Commission adopted on 14 July 1998 a Decision on the conduct of UCLAF's inquiries. Although formally concerned with *all* UCLAF inquiries, be they external or internal, the Commission decision notes (Article 2) that its activities outside the Commission are regulated by Council regulations 2988/95 and 2185/96, together with the various sectoral regulations covering revenue and expenditure. The Decision is thus essentially concerned with regulating the conduct of inquiries *within* the Commission and/or the mutual obligations of UCLAF and other Commission services in relation to investigations. As the covering communication from the Commission President, and Commissioners Gradin and Liikanen points out, the Decision "consolidates already existing practices".

---

<sup>20</sup> Note SG(95)D/141.038 dated 1 February 1995

<sup>21</sup> SEC(97)2198 of 18.11.97

5.6.13. Most importantly, this Decision:

- obliges directors-general and heads of service to *report to UCLAF* all suspicion of fraud in their services affecting the European Communities' financial interests (other officials may inform either their hierarchical superiors or UCLAF directly);
- authorises the director of UCLAF to *undertake internal investigations* on his own initiative (he shall inform the secretary-general at the same time);
- obliges all officials fully to cooperate with UCLAF inspectors and to provide *unrestricted access* to all information and documentation;
- imposes a requirement on UCLAF to *inform the senior officials* responsible in advance of inspections and of any indication that Commission officials may be involved, except in exceptional circumstances;
- empowers the Director of UCLAF on his own authority to *notify the relevant national judicial authorities* of cases where criminal proceedings may be appropriate and to report to the AIPN where disciplinary action is indicated;

5.6.14. The above provisions were subsequently clarified by "Detailed Rules of Application" (Dec. 1998), which specify the internal procedures and responsibilities required for the application of these principles.

5.6.15. It is worth remembering that both the main Commission decision and the rules of application on UCLAF were adopted at a time when the Commission was under severe pressure on fraud issues from the European Parliament and the OLAF idea was already in the air. As with many recent developments concerning UCLAF, it is impossible not to see them as an attempt both to head off external pressure for a more convincing effort to deal with fraud and corruption within the Commission and, as a fall-back position, to write the ground rules for whatever finally emerged as the result of such pressure.

## **5.7 "Third pillar" provisions: activities in the field of criminal law**

### ***Convention on the Protection of the European Communities' Financial Interests*<sup>22</sup>**

5.7.1. As the Convention and its protocols remain outside the European Community legal framework and were adopted under the intergovernmental provisions of the "third pillar" to come into force they require ratification by all the Member States in accordance with national constitutional arrangements. At the time of writing, only four Member States had ratified the Convention.<sup>23</sup> In the meantime, the Convention and its protocols are being used "informally" by UCLAF/OLAF.

---

<sup>22</sup> Drawn up by Council Act of 26 July 1995 - OJ C316 of 27.11.95

<sup>23</sup> Austria, Germany, Finland and Sweden



5.7.2. In contrast to the regulations outlined above, the Convention deals with the criminal aspects of fraud affecting the EU budget under the general umbrella of the TEU provisions on tackling crime in general. Though it correspondingly reflects the habitual trepidation with which this subject is addressed, it nevertheless represents a step forward.

5.7.3. The Convention establishes a shared definition of fraud affecting the Communities' financial interests<sup>24</sup> and that offences meeting this definition will be treated as criminal offences punishable by criminal penalties, including custodial sentences for serious cases (Articles 1 and 2). It further includes provisions to ensure that rules on jurisdiction and/or extradition between Member States cannot provide loopholes to avoid prosecution for fraud (Articles 4 and 5) while placing Member States under an obligation to cooperate in the fields of criminal investigation, prosecution and sanction of fraud (Article 6).

### ***The two principal Protocols to the Convention***<sup>25</sup>

5.7.4. The first two protocols to the Convention, the most important ones for present purposes<sup>26</sup>, put flesh on these relatively bare bones in their respective subject areas.

5.7.5. In the first, dealing with corruption of public servants, a shared definition of such "corruption" of Community and national officials damaging to the European Communities' financial interests is established<sup>27</sup> and agreement is reached on it being treated as a criminal offence.

5.7.6. The second is more of a patchwork, including a range of disparate subjects. It is agreed: first, that money laundering is to be made a criminal offence in all Member States (Article 2); second, that legal persons are to be made criminally liable for offences of fraud, corruption and money laundering (Articles 3 and 4); third, that the proceeds of fraud against the financial interests of the European Communities are to be subject to confiscation (Article 5); and fourth, that the Commission is explicitly required to cooperate with Member States, both by providing technical and operational assistance (Article 7(1)) and by participating in the exchange of information, "so as to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering" (Article 7(2)).

### ***Europol***

5.7.7. Under the general heading of third pillar measures aimed at combating fraud, mention should be made of the creation of Europol, which is given an explicit role in promoting

---

<sup>24</sup> Article 1 (Already cited in paragraph 5.1.2)

<sup>25</sup> First Protocol on corruption drawn up by Council Act of 27 September 1996 - OJ C313 of 23.10.96  
Second Protocol on the liability of legal persons, confiscation, money laundering and cooperation between Member States drawn up by Council Act of 19 June 1997 - OJ C221 of 19.7.97

<sup>26</sup> A third protocol exists on the "interpretation, by way of preliminary rulings, by the Court of Justice ... of the Convention on the protection of the financial interests of the European Communities" (Council Act of 29.11.1996 - OJ C151 of 20.5.1997)

<sup>27</sup> The definition of corruption employed in this Protocol is cited at 5.1.6, along with reference to the related Convention of 26.5.97.

cooperation between national police forces, customs services and other authorities in Articles 29 and 30 of the Treaty on European Union, for example by coordinating individual operations, providing specific expertise, promoting liaison arrangements and centralising information on cross-border crime.

## **5.8 Remarks on the legal framework**

5.8.1. The legal framework described briefly above is characterised by a number of recurring themes.

- Both the European Community legislation and the EU Convention are driven by a need to establish a general framework, above and beyond the provisions of separate sectoral legislation, for the investigation and sanction of fraud.
- All texts touch on matters relating to the criminal jurisdiction of Member States while cautiously avoiding any apparent infringement of national sovereignty. This is at the same time a recognition of the political sensitivity of the subject and a *de facto* acknowledgement that the fraud problem cannot seriously be addressed without criminal legislation taking on a European dimension.
- A strong emphasis is placed on effective cooperation between and coordination of the actions of Member States in the investigation, prosecution and punishment of fraud. In the administrative area, the Commission (i.e. UCLAF/OLAF) is given an increasingly prominent and explicit role in achieving these. In the criminal area, operational cooperation between police and other enforcement services of the Member States is reinforced, the collection and storage of intelligence data organised and judicial cooperation strengthened.
- The independent powers of the Commission in the administrative sphere (internally and externally), including its capacity to carry out investigations on a par with national authorities in the Member States, have increased significantly. In the criminal sphere, the Commission has become increasingly involved in the promotion of cooperation (e.g. by way of its duty to provide technical assistance, its involvement in the exchange of information, etc.)

5.8.2. The result of the various legislative and non-legislative processes described in this section, is a rather incoherent and ineffective legal framework. This is apparent at the outset from the simple observation that, although the Council clearly perceives the need for concerted action in the field of criminal law, the fruit of its labours, the Convention and its protocols, have not, in the absence of the necessary ratification by national parliaments, yet come into force and will not do so for some time to come. On the other hand, the legislation which is in force, the Treaty and the regulations, has provided the Commission with significant powers in the administrative area.

5.8.3. The distinction which has thus arisen between administrative and criminal jurisdiction is however not as clear as this contrast might suggest. UCLAF/OLAF possesses sweeping powers to investigate and gather intelligence on irregularities affecting the European Communities' financial interests and to carry out, on its own responsibility, on-the-spot "administrative" inspections. This work will, by its very nature, involve UCLAF/OLAF in criminal

investigations and criminal intelligence, albeit without itself possessing the police powers needed to gather some of it.

5.8.4. This factor will come into play most obviously in the context of external investigations. UCLAF/OLAF's assistance to Member States relates to both criminal and administrative matters. Thus it is implicit in the legislation that UCLAF/OLAF has a role in the sphere of criminal investigations and prosecutions, even though this role is never openly acknowledged by the same legislation in force. Moreover, there is a mismatch between the scope of UCLAF/OLAF's investigations and information-gathering, which is Europe-wide, and the competence of the judicial authorities it in effect serves, which have strictly national jurisdictions.

5.8.5. This issue has a special dimension when the potentially criminal acts under investigation are within the Commission, where UCLAF/OLAF is in reality the sole investigative body able to initiate fraud inquiries. In such cases, no judicial authority holds jurisdiction until such time as, in effect, the Commission grants such jurisdiction by waiving the immunities of officials and/or the inviolability of Commission premises.

5.8.6. These questions are more than purely theoretical ones. Coordination between national judicial authorities when dealing with "European" fraud cases and the relationship between the Commission and national judicial authorities have been a constant source of difficulty, with the result, that prosecution for frauds to the detriment of the European Communities' financial interests remain extremely rare and even more rarely successful.

5.8.7. This chapter will henceforth seek to look beyond the legal rules, firstly to the practice - namely how UCLAF, now OLAF, and the European Union's prosecution of fraud work in reality - and secondly to attempt a "blueprint" for the future of the fight against fraud.

## FIGHTING FRAUD IN PRACTICE

### 5.9 The functioning of UCLAF

#### *The rationale behind UCLAF*

5.9.1. The formal evolution of UCLAF described in the preceding sections has almost always been the result of an attempt to respond to perceived failings in the European Union's response to fraud. It has thus been designed piecemeal in order to plug the gaps in the system as they became impossible to ignore. Examples of such "gaps" include (in roughly chronological order):

- poor coordination between Commission services in the fight against fraud,
- poor information exchange with and between Member States,
- poor cooperation (even rivalry) between DGXX and UCLAF,
- poor coordination of enquiries into EU fraud carried out by different Member States' authorities,
- the need for the Commission to be able to participate in/carry out on-the-spot inquiries,
- a need for a central intelligence-gathering body concerned with EU fraud,
- ineffective prosecutions of EU fraud through low national priority for such action, poor communication and cooperation between judicial authorities (consequently a low conviction rate),
- the need for an independent body able to carry out inquiries within the Commission and able to deal directly with the judicial authorities.

5.9.2. These needs are real ones, interconnected ones and ones which could not collectively be met by any other body. However, the process by which UCLAF has taken shape has left a variety of open questions, which apply as much to OLAF in the future as to UCLAF in the past. Three in particular suggest themselves:

- Is UCLAF/OLAF necessarily the only or the best body to meet the needs identified?
- How well did UCLAF carry out its tasks?
- Does UCLAF/OLAF fully meet the needs of the EU in the fight against fraud?

5.9.3. The simplest response to these questions is that plainly UCLAF is not the Union's definitive response to fraud. The mere fact that OLAF has just come into being makes this point clear. The evolution continues and, one suspects, is bound to do so for some time yet. The next section will consider the deeper, abstract reasons for which UCLAF, henceforth OLAF, is not - *cannot be* - the end of the story. The present section, by contrast, will look at the reality on the ground.

### *Court of Auditors' report 8/98*

5.9.4. So bound up were all concerned with the Commission's need to equip itself with a body dedicated to the fight against fraud and to provide that body with the necessary powers, that the Court of Auditors' special report 8/98<sup>28</sup>, which examines UCLAF in the same critical way as it would any other Commission service, came as something of a shock.

5.9.5. The main weaknesses of UCLAF identified by the Court may be summarised as follows:

- a) Policy on and organisational arrangements for inquiries, both within the Commission and in relation to Member States' judicial authorities, were poorly defined or over-complicated. (*Here, the Commission decision of 14 July 1998, which the Court's report pre-dates, represents a partial response to the Court's criticism.*)
- b) Security measures and procedures were frequently not correctly implemented. Staff were not properly vetted and rules on confidential information were inconsistently applied.
- c) An excessive proportion of UCLAF's staff were temporary agents, leading to a lack of continuity.
- d) Electronic databases (the basis of much intelligence gathering work) were neither fully operational nor effective. The use made of the databases was in practice very limited.
- e) Management information on UCLAF's caseload of 1,327 open files (as at April 1997) was inadequate to ensure their correct handling. No standard procedures for documentation or for the pursuit of inquiries were in existence, nor were measures in place to ensure that case files were maintained to the standards of criminal evidence required in Member States.
- f) UCLAF's cooperation with Member States was hampered by the manner in which the privileges and immunities of EU staff are handled by the Commission, while national legislation in turn imposed serious practical constraints on UCLAF's inspections in Member States.

5.9.6. The criticisms of the Court are worrying, and indeed were one of the factors which encouraged the European Parliament to press for the creation of a new, reinforced (and more independent) anti-fraud unit, OLAF.<sup>29</sup> The criticisms fall into two main categories: those concerning UCLAF's efficiency, internal organisation and general functioning, and those which concern its position within the Commission and its relationship with national judicial authorities.

---

<sup>28</sup> "Special Report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the 'unité de coordination de la lutte anti-fraude' (UCLAF) together with the Commission's replies" - OJ C230 of 22 July 1998

<sup>29</sup> See Bösch report A4-0297/98, adopted by European Parliament on 7 October 1998

5.9.7. In terms of the first category, it is of course vital that UCLAF function as efficiently and effectively as possible. If it is to earn the respect - and thus full wholehearted cooperation - of both the Member States' investigative and judicial authorities and the staff and services of the Commission, UCLAF must show that its investigations are rigorous, objective, procedurally correct, reasonably rapid and, above all, produce results. It is the quality of the management and staff of UCLAF which, in the first instance, will determine whether it is able to achieve this. The Court's findings indicate that UCLAF (now OLAF) has some way to go in this area.

5.9.8. As to the second category, UCLAF can also point to "structural" failings elsewhere. The Court of Auditors is clear that the legal framework within which UCLAF works is undeveloped and that procedural rules and the constraints of national legislation place serious hindrances in the way of successful inquiries. Moreover, it challenges the Commission's good faith (at least on occasions): suggesting that it does not possess a "zero tolerance" policy towards corruption on the part of its officials, applies the privileges and immunities of Community officials too restrictively and hesitates to refer cases to the competent judicial authorities. It mentions occasions when "dossiers have been withheld from UCLAF investigators" and "incriminating documents have been systematically destroyed"<sup>30</sup>, finding that this indicates that UCLAF is insufficiently empowered within the Commission.

5.9.9. In other words, the Court finds a two-way problem: structurally UCLAF does not have sufficient status, but at the same time operationally it does not make the most of the status it has. The two are, needless to say, connected.

#### *The standing of UCLAF, conduct of inquiries*

5.9.10. The findings of the Court chime with those of the Committee. Although the Committee has not examined the internal workings of UCLAF in the detail of the audit carried out by the Court, it has perceived in the course of its work a counterproductive tension between UCLAF and other Commission services. Several of the operational services with whom the Committee have had contacts have expressed some reserves about the functioning of UCLAF, while some have seen its involvement as a positive obstacle to the resolution of an affair. To be fair, much reticence can be traced to the particularly strict requirements of confidentiality under which UCLAF, by the very nature of its job, must work. Investigators can thus be seen as intrusive and arrogant. Moreover, as is well known, no-one loves a cop...

5.9.11. Notwithstanding such unavoidable professional handicaps, it remains the case that UCLAF has encountered problems in its relations with Commission services to which it would do well to pay serious attention. Bitter recriminations have surrounded its handling of some internal cases, with UCLAF having been perceived, rightly or wrongly, as excessively secretive or not wholly objective. On the other hand, UCLAF may be right in pointing to a strong defensive reflex on the part of services within which internal inquiries are carried out. It is undeniable that far from treating UCLAF as an ally in the fight against fraud, services often perceive it as an antagonist with whom cooperation is to be kept to an indispensable minimum.

5.9.12. As far as the outside world is concerned, UCLAF continues to experience - though for different reasons - difficulties with its counterparts and interlocutors in Member States. Partly through sensitivities over sovereignty, partly through ignorance of UCLAF's role, partly through

---

<sup>30</sup> Special report 8/98 para. 2.33

reserves over providing detailed criminal intelligence to a body which is part of the Commission and allegedly too because of doubts about UCLAF's functional competence, some of the national investigative authorities are less than fully enthusiastic about cooperating with UCLAF. Nevertheless, progress is being made, thanks in part to a policy of recruiting from the ranks of national bodies, in improving the situation. Where relations are good and the reciprocal roles well understood, UCLAF has proved itself able to provide genuine added-value, leading to a number of highly-successful operations (for example in the fight against large-scale organised cigarette smuggling).

5.9.13. One result of a better understanding with national authorities has been a move to formal bilateral cooperation agreements. To date, one such agreement exists, with the Italian *Guardia di Finanza*, while three more are close to finalisation and another nine "on the table". More such agreements can be expected if and when UCLAF (now OLAF) succeeds in convincing national counterparts not only of its formal powers and status but also of its professionalism, reliability and usefulness.

### ***Relations with Commission audit and control services***

5.9.14. If operational services of the Commission show some reticence in their dealings with UCLAF, those in a similar line of work tend also to be critical. The most notable example is DG XX (Financial Control), the audit division of which has played a crucial role in uncovering many of the cases of fraud detected by the Commission. As indicated at the beginning of this chapter, the detection of administrative and/or financial irregularities is the basis of the detection of most fraud, certainly in the Community context. The skills of the auditor are often highly relevant in the constitution of a fraud file. In practice, as the Committee itself has seen, UCLAF leans heavily on the findings of DG XX auditors in the preparation of its cases. There is thus a large overlap between the work of the internal audit service and that of the anti-fraud unit, especially as UCLAF is itself only an administrative body by statute and thus does not always possess in its own right the police-style powers which are needed to go significantly beyond auditors can do.

5.9.15. This fact accounts for the dissatisfaction expressed to the Committee by several auditors as to UCLAF's conduct of investigations. The commonest complaint is that when files are handed over to UCLAF because they contain indications of fraud, they "disappear" with no visible follow-up.

5.9.16. The internal agreement defining the respective tasks of UCLAF and DG XX (Financial Control) referred to in paragraph 5.6.11 is of surprisingly little help in this context. Essentially, this document defines the respective tasks of the two departments, outlines areas where their activities potentially overlap and indicates which information should be exchanged. In practical terms, the document amounts to little more than a general undertaking to exchange relevant information and does not really resolve the day-to-day overlaps in competence which are bound to arise. Because of the interrelation between irregularities and fraud, they do so constantly.

5.9.17. The issue is not so much that overlaps of competence occur, but that of how an investigation should then proceed. In the context of its first report<sup>31</sup>, the Committee found that once a suspicion of fraud arose in any given case, UCLAF took over the investigation. The

---

<sup>31</sup> Especially paragraphs 9.4.15-18

subsequent *de facto* exclusion of DG XX from the dossier was often counterproductive in that the skills of the auditor remained necessary in the context of the inquiry, rather than those possessed by UCLAF, whose staff typically have a different professional profile<sup>32</sup>. It is in the nature of UCLAF's role that a great deal of its work will be in the field of what in the vogue term is known as "forensic accountancy".<sup>33</sup>

### *Is UCLAF (OLAF) necessary?*

5.9.18. Indeed, if, as this report elsewhere proposes (chapter 4), the internal audit function is to be significantly reinforced, the considerations above pose a question as to the nature of the added-value provided by a separate fraud unit. Some would go as far as to challenge its very existence: to put it more provocatively, is UCLAF/OLAF necessary?

5.9.19. The Committee would answer in the affirmative, whilst pointing out that it is salutary to ask the question, in that it concentrates the mind on the fact that, in spite of the functional overlaps, UCLAF (henceforth OLAF) is in law and in fact something very different from an audit service.

5.9.20. Function: It is worth recalling the essential functions of internal audit and the fraud unit. The former is primarily a diagnostic management tool, the purpose of which is to verify the regularity and efficiency of financial management and identify systemic weaknesses; the latter is a body set up to investigate specific cases of fraud and corruption within the scope of criminal law and, in accordance with the requirements of "due process", to prepare the file for whatever follow-up it is to receive. Although his findings may be relevant to a fraud inquiry, the auditor is not primarily concerned with the detection of criminal offences, nor necessarily possesses the skills to identify and investigate it, especially if the legal requirements of a criminal investigation (attention to the rights of defence, etc) are to be respected..

5.9.21. Independence: First and foremost, an investigative body must be - and be seen to be - independent of any influences which might compromise the objectivity, even impartiality, of its inquiries and other activities. The vision of internal audit favoured by this Committee - as a tool of management at the disposal of the President - will arguably have the side-effect of diminishing the independence of the audit service with respect to the Commission hierarchy. At the same time, the move to OLAF is specifically designed to reinforce the fraud unit's independence by distancing it from the Commission.

5.9.22. Relations with Member States: Independence is also one of the virtues which can reinforce cooperation with Member States' investigative and judicial services, some of which have hesitated to deal on an equal footing with a body which remained organisationally part of the large (and thus probably leaky) administration of the Commission. (Such hesitation particularly relates to the provision of information, which, for reasons of due process, must remain confidential.) Moreover, UCLAF's "criminal" competences depend on effective cooperation with those Member State authorities in possession of the necessary investigative

---

<sup>32</sup> By specialisation/background, the investigative staff of UCLAF (80 persons) is currently composed as follows: 25 customs investigators, 15 agricultural inspectors, 7 police, 8 tax inspectors, 8 accountants/financial inspectors, 2 magistrates, 2 lawyers, 2 computer specialists, 3 administration and 8 others.

<sup>33</sup> i.e. accountancy aimed at detecting and/or investigating crime



powers. Understanding of and competence in criminal investigation techniques, powers and due process are thus vital to UCLAF and do not form part of a professional training in audit.

5.9.23. Competences in the judicial sphere: A key part of UCLAF's task is to ensure appropriate judicial action is taken on the basis of fraud investigations. It has thus received not only the right to initiate inquiries, but also the right to decide, in cases where it has been responsible for the investigation, when files should be submitted to the judicial authorities for (i) further investigation with police powers, and (ii) possible prosecution. In cases where it acts primarily as a coordinator between Member State investigators, it assumes an important role in the preparation of prosecutions and should be able to assist with the preparation of cases and the provision of evidence in a form usable in criminal courts thus becoming a party to the secrecy which characterises criminal proceedings for the sake of the suspect's rights of defence.

5.9.24. Intelligence and information-gathering: one of the foremost "gaps" which UCLAF has to plug is the gathering of criminal intelligence on a Europe-wide basis. Experience has repeatedly shown that the fragmentation of criminal investigation and jurisdiction - and hence of intelligence - between 15 Member States (and beyond) is a substantial weakness in the fight against crime organised across borders, thus showing the need for a central collation point.<sup>34</sup> At least as far as the European Communities' financial interests are concerned, only a specialised and secure anti-fraud unit can fulfil this sensitive role.

5.9.25. So the need for UCLAF/OLAF does exist. This does not however prevent the reality of functional overlaps with other services, notably the audit service, within the Commission. The problem is thus essentially one of ensuring that UCLAF/OLAF possesses the professional competence it needs to accomplish its task as effectively as possible.

## ***Results***

5.9.26. It is the right and responsibility of any public service organisation to be judged by its results. So much of the discussion of UCLAF revolves around points of legal and other principle that its results are neglected. This is in part because "results" are extraordinarily difficult to measure in this context. UCLAF's central role, of coordination and facilitation of fraud investigations and prosecutions in the Member States, is not one which allows for the easy identification of a success rate", as the ultimate outcome of UCLAF activities is affected by numerous variables beyond its direct control. Even in the case of internal investigations, where UCLAF is - at least in the first instance - the sole investigating authority, a "result" in terms of administrative, disciplinary or judicial sanctions depends on other authorities.

5.9.27. Figures provided by UCLAF (May 1999) illustrate the difficulties of measuring results. Since 1996, 298 criminal prosecutions have been opened in respect of cases where UCLAF was involved. 51 of these involved more than one national jurisdiction. Only 13 of the 298 prosecutions have so far produced any judgement. In internal cases, of the thirty inquiries carried out by UCLAF, twelve have so far led to criminal prosecutions, but none to a conviction.

5.9.28. Another possibility is to look at the number of inquiries opened and closed by UCLAF. The following table shows the situation as at 10 May 1999 for cases opened since 1996:

---

<sup>34</sup> The European Parliament's Committee of Inquiry into the Community Transit System makes this point powerfully and at length. (Final report A4-0053/97)

Year Opened	Own resources		EAGGF G'tee		Structural actions		Direct exp.		Totals	
	Opened	Still open	Opened	Still open	Opened	Still open	Opened	Still open	Opened	Still open
1996	110	84	72	48	90	76	47	39	319	247
1997	83	72	48	28	60	54	41	34	232	188
1998	97	97	73	54	41	40	24	22	235	213
5-1999	28	28	18	18	6	5	11	10	63	61
<b>Totals</b>	<b>318</b>	<b>281</b>	<b>211</b>	<b>148</b>	<b>197</b>	<b>175</b>	<b>123</b>	<b>105</b>	<b>849</b>	<b>709</b>

5.9.29. These figures, which display a tendency for UCLAF enquiries to remain open for prolonged periods should obviously be treated with caution. A "case", for example, could be anything from a relatively minor one-off irregularity involving a small amount, to a multi-million Euro fraud committed by organised criminals. It is reasonable for UCLAF to prioritise its "big" cases. Clearly too, cases opened more recently can hardly be expected to have been closed. Moreover, the ability or otherwise of UCLAF to close a file may depend on others rather than itself. Nevertheless, read in conjunction with the findings of the Court of Auditors (5.9.4-9), the very high ratio of cases remaining open (84%), and especially those for a protracted period (79% from 1996/7) must be a cause for concern.

## **5.10 Intervention of national judicial authorities**

### *Basic principles*

5.10.1. In keeping with the principle that criminal law and the administration of justice remain outside the Community framework, criminal investigation, prosecution and punishment of fraud in the Member States against EU financial interests fall under the exclusive competence of national jurisdictions. Any criminal offence involving the European Communities' financial interests is thus investigated, prosecuted and sanctioned according to national rules.

5.10.2. Where acts of officials or members of the Commission itself are concerned, no Member State automatically holds criminal jurisdiction. Nor does any national authority automatically have the right of access to Commission premises. In practice, the competent Court is decided on a case-by-case basis, depending where the facts in question took place. For obvious reasons, Belgium is the jurisdiction most often called upon to act in connection with Commission officials. To proceed with a criminal investigation, a national jurisdiction must request waivers of official immunity (for suspects), of professional secrecy (for witnesses) and of the inviolability of Commission premises (for searches and access to documents).<sup>35</sup>

<sup>35</sup>

In this context, it should be noted that the obligations of cooperation between the Commission and the Member States work both ways. According to the Court of Justice, the Commission must cooperate in criminal investigations with the Member States' authorities, in acceding as much as possible to requests for waivers of immunity or of professional secrecy ("Zwartveld" ruling of 13.7.90 - Case C-2/88. Imm. Rec. 1990, I-3365).

## *External cases*

5.10.3. The development of the European Union, and above all the creation of a single market, is one (though far from the only one) of the factors which has served to make borders between Member States largely irrelevant in economic terms. This is a statement of fact rather than ideology. Customs formalities no longer exist between Member States of the Union, the introduction of the Euro removes exchange costs from cross-border transactions, financial markets already largely disregarded borders and the technology of money transfer means that vast sums can move around the world at a moment's notice. Economic activity, licit and illicit, is a Europe-wide affair, not to say a world-wide affair.

5.10.4. This Europe of free movement and exchange doubtless brings enormous benefits to its people, but has proceeded in an asymmetrical fashion. The protections that are provided to the citizen against economic crime (other forms of crime lie outside the mandate of this Committee), which includes fraudulent misappropriation of EU funds, have not kept pace. Where economic activities, money and private individuals move freely across borders, criminal jurisdiction stops. This is far from a theoretical difficulty, but gives rise to a series of legal and practical difficulties the extent of which is well known in professional circles but remains in practical terms largely unacknowledged by the political world in general.

5.10.5. By way of example, one might refer to the *Appel de Genève* (Geneva Appeal) launched by seven investigating magistrates from a variety of EU countries, plus Switzerland, in which the signatories denounced the extreme difficulty, not to say near impossibility, of pursuing international economic crime and called for the "[abolition] of outmoded protectionism in the police and judicial fields". From the statistics submitted by one of signatories, it would appear that only a limited percentage of the requests made for international assistance is granted and that the percentage is no higher in the case of requests between Member States than those involving third countries (34%).<sup>36</sup>

5.10.6. All attempts so far to respond to what is an acknowledged problem revolve around the political mantra of "better cooperation". Of course, it is impossible not to agree with calls for better cooperation between police, customs and other investigative services, and indeed between judiciaries. Such calls are easy to make, but the difficulties in achieving the desired level of cooperation are formidable, for two principal sets of reasons.

5.10.7. Firstly, the mechanisms of cooperation are frequently slow, formalistic and inefficient, and are likely to remain so as long as national systems remain significantly different. The structures, resources, priorities, skills, techniques, rules and procedures of national equivalents are often very different. It is often difficult for an investigator or a prosecutor even to identify the appropriate contact in another Member State, let alone obtain a swift and effective response to a call for assistance. Even in a supposedly integrated system such as customs, where a single customs area is being administered, it has been found that investigative cooperation is more form than substance:

---

<sup>36</sup> Drawn from speech at public hearing of the European Parliament on the "Geneva Appeal" - 15-16 April 1996 (see EP working document DG IV/LIBE 101 FR p.40)

*"...cooperation between customs is ineffective. This ineffectiveness begins with the reluctance to share basic operational intelligence (...) and ends with practical investigative cooperation which is, notwithstanding the best but necessarily limited efforts of UCLAF, successful only on an occasional basis"*<sup>37</sup>

5.10.8. If and when it comes to prosecutions, the same source is even more bleak:

*"Even where cases of transit fraud are successfully investigated by the authorities, the deterrent effect this may have is severely undermined by the legal difficulties in bringing effective prosecutions in cases involving more than one country. Prosecutors point in the first place to the practical obstacles to legal cooperation, which can be as simple as not knowing whom to contact in another Member State, and to the formalistic and burdensome procedures required to request assistance in a prosecution.*

*When cooperation is obtained, prosecutions can flounder on the differences between national legal systems. Standards of evidence vary, creating potential problems with the admissibility in court of documents and evidence from other Member States. At present there is no agreement between Member States on definitions of fraud [pending ratification of the Convention - ed.], the sanctions to be applied or the procedures by which cross-border prosecutions can be brought. The result is that similar offences receive substantially different treatment depending on the place of prosecution."*<sup>38</sup>

5.10.9. Secondly, cooperation, however effective, can only take place when the need for it has been identified. The mere realisation that a fraud has taken place, particularly if the fraud is a sophisticated international one and/or an EU-related one, is very often impossible from the perspective of a single Member State.

5.10.10. The notion of cooperation is thus to be taken with a pinch of salt, a fact which has not entirely escaped the European Union's legislator, which has attempted to make the concept more operational in a variety of ways. One example, responding in part to the second of the two observations quoted above and operationalising Articles 29-31 of the EU Treaty, is the European Convention on the protection of the European Communities' financial interests. This though, five years after adoption, is not yet in force. Another example is UCLAF.

5.10.11. UCLAF, for all the limitations outlined in this chapter, is a genuine attempt to overcome some of the problems of making cooperation work in practice, although its small size means that its impact remains limited. Moreover, its activities are concentrated in the field of investigation, rather than prosecution, though, with some prompting from the European Parliament, it has recently started to build up its legal competences with a view to assisting national prosecutors. At present, this latter field of activity remains embryonic, and without any formal status whatsoever. Moreover, as soon as UCLAF becomes involved in the process of prosecution, the question of its precise relations with judicial authorities arises. In complicated EU-centred cases, UCLAF could find itself principally responsible for the preparation of a case, though it would have to rely on the "police powers" of national authorities to obtain certain

---

<sup>37</sup> European Parliament's Committee of Inquiry into the Community Transit System - Final Report, paragraph 7.6.2

<sup>38</sup> *Idem.* Paragraphs 8.5.1 and 8.5.2

kinds of evidence. However, it works *in cooperation* with national authorities, not under the direction of any judicial authority. For work which is in nature, if not in name, a criminal investigation, UCLAF has hitherto been worryingly free of any judicial control beyond the legal review of a general kind exercised *a posteriori* by the Court of Justice over the Commission as a whole.<sup>39</sup>

### ***Internal cases***

5.10.12. This lack of an overseeing judicial authority is much more obvious and potentially damaging in cases involving Commission officials. Here, UCLAF more overtly plays a *de facto* role of criminal investigation, but answerable to whom and with the authority of whom? As noted above, jurisdiction over the Commission, its officials and buildings, is acquired on a case-by-case basis by whatever national authority or authorities are competent. But no judicial authority holds permanent authority over UCLAF, authorises its investigations, verifies the conduct and quality of its inquiries or ensures (until after the event, when it may be too late) that its results meet admissible standards of evidence. Bizarrely perhaps, UCLAF is equipping itself with internal "judicial" expertise (i.e. a team of magistrates) in a partial response to this void.

5.10.13. The protection of EU officials may admittedly not be at the top of their list of priorities, but a situation of this sort should be of some concern to civil libertarians. The provisions covering OLAF go some way to meet this objection, but are as yet insufficient.

5.10.14. Conversely, the absence of a judicial authority with any control over UCLAF or OLAF, or any general competence for criminal offences committed by EU officials, adversely affects the effectiveness with which judicial sanctions are applied. The first obstacle to expeditiousness in the judicial field is the requirement for national investigators and/or prosecutors to obtain waivers of immunity. Such waivers are granted by the Commission, which is supposed to assess the request on the basis of the "interests of the Communities"<sup>40</sup>. In the cases examined by the Committee, the Commission has almost always acceded to a direct request for waivers of immunity relatively quickly (though exceptions have occurred). More often, the reluctance, official or unofficial, to permit a national judiciary to exercise jurisdiction over Commission officials is manifest at an earlier stage, when evidence is (i) being gathered or (ii) is to be sent to judicial authorities.<sup>41</sup> In spite of recent moves to reinforce UCLAF's independence in these fields, the mere fact that the immunity waiver system exists is the first obstacle to effective judicial action.

5.10.15. It should be noted at this point that UCLAF investigations may also lead to disciplinary measures, including - in theory - monetary sanctions against authorising officers under Article 22 of the staff regulations. In practice, the existence of this potential sanction has done nothing to compensate for the inability of national prosecutors so far to bring successful

---

<sup>39</sup> TEC Articles 230-234 (*ex 173-177*)

<sup>40</sup> Staff Regulations, Art. 23: "The privileges and immunities enjoyed by officials are accorded solely in the interests of the Communities..."

<sup>41</sup> Following the Commission decision of 14 July 1998, the communication of a case file to judicial authorities has been at the sole discretion of the Director of UCLAF. Previously, the final decision fell to the Secretary-General.

criminal prosecutions. No monetary sanction under Article 22 has ever yet been applied. (The problem of disciplinary sanctions is examined in chapter 6 of this report.)

5.10.16. The second problem is more closely related to the national judicial authorities themselves. Since 1994, criminal prosecutions have been opened for alleged financial offences in the case of twelve EU officials. Not one has so far led to a conviction. The Committee has neither the intention nor the authority to comment on the merits of any case in particular, but nevertheless finds it surprising that convictions in national criminal courts are so hard to obtain. Reasons are likely to reflect those encountered outside the Commission: evidence is required from different Member States, fraud mechanisms are complex and require a detailed understanding of EU regulations and procedures, priority accorded to such cases is relatively low, resources are limited etc. Some of these problems are intrinsic to the nature of the offence (complexity, etc.) but others are attributable to a lack of expertise on the part of prosecutors and the dispersal of jurisdiction between different countries.

5.10.17. In one case, examined by the Committee, different parties to the same internal fraud were under investigation by different national judiciaries, and at one stage were simultaneously in custody. Even so, and even though UCLAF did its best to bring the authorities together, no effective coordination between them was possible. Neither of the suspects has yet been brought to trial. In other actions, UCLAF has submitted the same dossier at the same time to different national authorities with the result that some have acted, others have not. Such inconsistent follow-up, which may be down to a banal question of resources, substantially reduces the likelihood that a corrupt official and his/her accomplices will ever pay a judicial price for their actions.

## **REMEDIES**

### **5.11 OLAF - an assessment**

5.11.1. On 28 April 1999, the Commission decided to establish OLAF - "Office pour la lutte anti-fraude"<sup>42</sup>. The new Office came into being on 1 June 1999. At the same time, a new regulation of the Council and the European Parliament was adopted to regulate the activities of the Office<sup>43</sup>. The decision and the regulation are the culmination of a process driven by the European Parliament, and notably the rapporteur of the Committee on Budgetary Control, Herbert Bösch, to increase the independence of the anti-fraud unit vis-à-vis the Commission while at the same time bringing it under some kind of quasi-judicial supervision. In effect, OLAF responds to some of the objections to the status of UCLAF outlined above.

#### ***Powers, structures and competences***

5.11.2. Much of the regulation delineating OLAF's powers and competences for internal investigations is based on the Commission decision of 14 July 1998 on UCLAF. There are however some significant changes, the principal novelties of OLAF in relation to UCLAF being as follows:

---

<sup>42</sup> Commission decision of 28 April 1999 (SEC(99)802) - OJ L136 of 31.5.99

<sup>43</sup> Regulation (EC) 1073/1999 of 25 May 1999 - OJ L136 of 31.5.99

- OLAF is empowered to carry out administrative inquiries, without notice, within all the institutions and other bodies of the European Union. Inquiries may involve members and staff of the institutions (Article 4). (A separate interinstitutional agreement puts this provision into effect<sup>44</sup>).
- All institutions and other bodies are placed under a corresponding obligation fully to cooperate in OLAF inquiries and to communicate to OLAF any information concerning possible fraud. (Articles 4 and 7)<sup>45</sup>
- In accordance with the Staff Regulations (explicitly cited in the Regulation)<sup>46</sup>, an official is entitled to submit a complaint to the Director of OLAF in respect of any act committed by the Office as part of an investigation adversely affecting his/her interests. It follows that the Court of Justice hereby assumes a right of judicial review over OLAF investigations. (Article 14)
- Inquiry reports are formally required to meet the standards of evidence required in the jurisdiction where they are liable to be used in a subsequent prosecution (Article 9). OLAF reports also become sufficient in themselves to "establish ... the irregular nature of the activities under investigation" (Article 2)
- OLAF's activities will be monitored by a Supervisory Committee, composed of five suitably qualified independent persons, nominated by common accord of the Commission, the Council and the European Parliament (Article 11). Its task will be to give a general opinion on the activities of the Office, either on its own initiative or at the request of the Director of OLAF. It may not however interfere "with the conduct of investigations in progress" (para.1). It shall report, annually at least, to the institutions.
- The Director of OLAF shall similarly be appointed by common accord of the institutions, for a fixed five-year term (renewable once), on the basis of a shortlist submitted by the Commission. He/she shall report to the institutions on the activities of OLAF, without compromising the confidentiality of investigations. (Article 12)
- The Director of OLAF shall be the appointing authority (AIPN) for the staff of OLAF.
- OLAF will be funded by way of a separate budget section in Part A (administrative appropriations) of the Commission budget. (Article 13)
- It is foreseen that the total staff strength of OLAF will be in the region of 300, about twice the numbers available to UCLAF.

---

<sup>44</sup> Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) - 1999/352/EC, ECSC, EURATOM - OJ L136 of 31.5.1999

<sup>45</sup> Modifications to the Staff Regulations are probably necessary to provide a reliable legal basis for this provision.

<sup>46</sup> Articles 90(2) and 91 of the Staff Regulations

5.11.3. In reality, there are two fundamental aspects to the OLAF project: independence and supervision.

5.11.4. It is to be noted that OLAF remains administratively part of the Commission, in light of the fact that its formal powers in respect of the outside world (still, it should not be forgotten, the lion's share of its work) are attributed formally to the Commission. Moreover, it is useful for OLAF to be "inside" the Commission, both for the purposes of inquiries and in order to contribute to the shaping of legislation where there is a fraud interest. At the same time however, the legislator has ensured that OLAF is functionally and administratively independent, notably in the appointment procedure for the director, the separate staff structure and the separate budget. By these mechanisms, the degree of independence already given to the director of UCLAF, in particular to initiate inquiries and to forward conclusions to the judicial authorities, are guaranteed and reinforced.

5.11.5. In the light of its experience of the first report, and subsequent inquiries, the Committee supports this reinforcement of UCLAF's independence. Occasions have arisen in the past where the question of possible "political" interference from the Commission hierarchy has so insistently been posed that the issue must be resolved beyond any doubt, if for no other reason than to ensure confidence in the objectivity of anti-fraud inquiries.

5.11.6. It need hardly be repeated that such independence carries a risk, a risk which the legislator has attempted to allay (i) by giving all the institutions a voice in the nomination of the Director, (ii) by limiting the possibility of successive renewals of his/her term of office, (iii) by setting up a formal reporting requirement to the EU institutions and (iv) by creating a supervisory committee.

5.11.7. This final element is both the most interesting and unsatisfactory aspect of the OLAF reform. On the one hand, it is vital that there be some guarantor of the proper and effective conduct of OLAF's inquiries. The qualifications specified for the members of the Committee<sup>47</sup> clearly reflect a concern that the supervision exercised be akin to that of a judicial authority (e.g. a *juge de l'instruction*), able to assess the conduct of investigations with a professional eye. But precisely here lies the problem, quasi-judicial authority is placed in the hands of a group whose authority and status, with all respect for the future nominees, will be open to question.

5.11.8. The use of an *ad hoc* committee, or to use the popular parlance, the recourse to "wise persons", is a useful occasional mechanism (the present report could hardly suggest otherwise), but should never be more than an exceptional one. The members of the OLAF Supervisory Committee, whose names "emerge" in the somewhat mysterious processes which characterise such appointments<sup>48</sup>, will, through no fault of their own, have a legitimacy problem which sooner or later will have to be addressed. This would be particularly the case if the Supervisory Committee were to pass comment, though without breaking its obligation not to interfere in current investigations, on the regularity of individual decisions taken and conduct of specific inquiries carried out.

---

<sup>47</sup> "...five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the Office's areas of activity" (Regulation 1073/1999, Art. 11 (2)).

<sup>48</sup> The decision of the Parliament, Council and Commission appointing the Supervisory Committee of OLAF was made on 19 July 1999 (OJ C220 of 31.7.99)



## *Functioning of OLAF*

5.11.9. At the same time as it addresses the important structural problems of UCLAF, OLAF must provide a convincing response to the operational criticisms levelled at it, chiefly by the Court of Auditors. OLAF will be a new organisation with significantly increased resources and institutional status, and must therefore represent something of a new start, avoiding an uncritical "importation" of UCLAF's organisation and structures. It is not for the present report to go into detail on the internal management of OLAF, this being a matter for its director, but two or three specific themes do merit comment.

5.11.10. Information technology. The role of UCLAF as a central data and intelligence-gathering point has been repeatedly stressed as an area in which its contribution can be crucial. It has a perspective on the problem of EU fraud which cannot by definition be shared by any other body, and potentially possesses a tool whereby its Treaty obligation to enable cooperation between Member States can take very concrete form. However, the Court of Auditors is extremely critical of UCLAF's activities in this area, which depend essentially on the use of electronic data, a conclusion which has been confirmed by the Committee's own observations. It is therefore up to OLAF to remedy this failing through equipping itself with adequately qualified staff and with a concerted effort in the exploitation of information technology. As far as possible, the potential synergies and exchange of information with Europol should be maximised.

5.11.11. Competence in the field of audit. The operational dependence of UCLAF on audit findings has already been noted, as has its own lack of competence in this area. All the considerations concerning the position of OLAF, plus the recommendations of this report on the future of audit in the Commission persuade the Committee that it would be inappropriate to integrate the internal audit service and OLAF. However, in recognition of the likelihood that a substantial proportion of OLAF's cases will initially arise through the findings of the internal audit service, and that further investigation will continue to rely in many respects on the skills of the auditor, OLAF should equip itself with sufficient numbers of specialists in the field of "forensic" accountancy. It should moreover reach an operational working agreement with the new Internal Audit Service (and until then with DG XX - see chapter 4) on cooperation and information exchange as a matter of urgency.

5.11.12. Legal experts. UCLAF has begun, though as yet left uncompleted, the process of constituting a team of legal experts from each Member State<sup>49</sup>. At present, four such experts have been recruited. OLAF should pursue this initiative, the underlying objective of which is to respect the stipulation in the new regulation that OLAF files should be presented in a form acceptable to and admissible in Member States' courts. The role of the legal experts/prosecutors within what remains an administrative body should be to provide assistance and advice to the Director of OLAF, to investigative staff in the context of specific inquiries and, as necessary to national prosecutors dealing with EU cases.

---

<sup>49</sup>

Based on the recommendation of the Committee of Inquiry into the Community Transit system that the Commission "establish a legal "clearing house", composed of national legal experts, whose task would be to ensure that evidence for use in courts outside its Member State of origin corresponds to the requirements of those courts." (Recommendation 18)

5.11.13. Staff and resources. The case-load of UCLAF is out of proportion with its resources. While it is impossible to say what the "right" balance between workload and resources is, it is essential that OLAF be adequately equipped to accomplish its task. If a body established with such relative fanfare, and as the subject of such expectations, proves unable to cope with the task it has been given, it will be dead in the water from the outset. However, while staff numbers must be adequate to the task, the key question is one of quality. Given the criticisms levelled at UCLAF, the transfer of personnel from UCLAF to OLAF should also be the subject of critical evaluation.

### ***Conclusions on OLAF***

5.11.14. OLAF is a step forward as compared with UCLAF. It is an attempt to address the problems which have insistently arisen, not just as questions of theory, but in connection with specific inquiries, notably in the cases which indirectly set in train the series of events which led to the resignation of the Commission. It should become fully operational without delay. However, OLAF also represents unfinished business. It is hard not to see the Supervisory Committee and the presence of prosecution experts within OLAF as a provisional and ultimately unsatisfactory solution to a question which insistently arises.

5.11.15. We thus return to the issue which has lurked constantly in the background of this chapter. How can quasi-criminal investigations in UCLAF, the need for some judicial control over such investigations and more effective criminal prosecutions of EU fraud be reconciled with the principle that criminal jurisdiction is and for the foreseeable future will remain a prerogative of national legal and judicial systems?

## **5.12 The legal framework - a blueprint**

### ***Introduction***

5.12.1. It is a basic tenet of the Committee that it comes to its subject matter from "outside", without any kind of preconceptions. It has thus tried to base itself as rigorously as possible on the evidence available to it and argue its case from first principles.

5.12.2. This point is worth repeating here because the subject of this section is one which evokes strong political and ideological reactions. As has been made clear throughout this chapter, the administration of criminal justice touches national sensitivities in a way that many other subjects do not, this being a factor which has exercised a strong influence over the formulation of legislation affecting the protection of the European Communities' financial interests. For present purposes, it is therefore to be emphasised the Committee is, as it were, "neutral" on the subject. It will put its case purely on the basis of the problem presented to it, though clearly it would fail in its task if it were to ignore the current political circumstances

### ***Premise***

5.12.3. The Committee believes that this chapter has demonstrated that the distinction between administrative measures and measures in the criminal field which formally conditions UCLAF/OLAF's work in the fight against fraud is not a reliable one. The convenient fiction that OLAF is a *purely* administrative service also exposes the European Union to a dual risk: firstly that OLAF will enjoy *de facto* criminal investigation powers without proper supervision; secondly, and conversely, that prosecutions for EU-related fraud will continue to be

handicapped by the inability of national prosecutors to come to grips with internal EU and/or transnational cases.

5.12.4. These two "missing" aspects of the legal framework are thus taken in turn.

### ***Supervision of OLAF***

5.12.5. As discussed in the previous section, the EU legislator has attempted to address the problem of the supervision of the activities of an independent OLAF through the mechanism of a Supervisory Committee. This is a half-way-house about which the Committee has already expressed its reservations. In order to arrive at a more satisfactory system, it is worth briefly considering what precisely OLAF's supervisor should do. The important functions can be outlined as follows:

- Protection of individual rights: OLAF has considerable powers of direct intervention in the course of its inquiries and its findings can be highly prejudicial to the individuals concerned, including in terms of possible criminal charges. Under the rule of law, the investigative authority (OLAF) must be subject to a form of supervision designed to ensure that inquiries are conducted objectively, civil rights are protected and correct procedures are observed.
- Guarantor of "judicial standards": In a task which is complementary to the above (in fact is in many respects identical), the supervisor should also ensure that the inquiries conducted by OLAF are of sufficient quality to be usable in court: i.e. that procedures are respected, individual rights duly protected, evidence adequately presented, etc.
- Quality control: Beyond such "passive" supervision of the standards observed in inquiries, but for essentially the same reasons of presenting the best possible cases, the supervisor should also ensure that investigations are adequately thoroughgoing, pursue all avenues of inquiry, maximise cooperation between and sufficiently involve national authorities, etc.

5.12.6. The functions outlined above, particularly the first two, which are of a judicial nature, require not only expertise, but also total legitimacy. The current Supervisory Committee fails on both counts. On expertise, not because of any doubts about the personal qualifications of the five individuals chosen, but because five individuals, working moreover on a part-time basis, cannot know the judicial systems and procedures of fifteen Member States, examine all, or even a representative sample of, inquiries in sufficient depth or adequately knowledgeable about the investigative/law enforcement agencies of Member States, still less maintain contacts with them. On legitimacy, for the reasons outlined above: the members of the Supervisory Committee are nominated, according to criteria and processes which are vague, by a political authority and thus enjoy neither the backing or status of any recognised judicial body.

5.12.7. The EU legislator has in fact recognised these limitations, with the result that the tasks of the supervisor have been restricted (for example to the *ex post* review of the handling of cases only - see 5.11.2 ff), with the effect that it cannot in any case meet the *desiderata* for the supervisory body outlined above.

5.12.8. The qualities an OLAF supervisor must have are therefore apparent. For the purpose of the first two functions, it must be a judicial body. Moreover, it must have expertise in the judicial procedures in all Member States and have contacts with and access to the courts and the investigative services of all Member States.

5.12.9. The Committee can at present see no practical alternative to incorporating a judicial supervision function of the type envisaged within the existing apparatus of the European Union. Given that the function in question is substantially of a judicial nature - being akin to the control of legality of investigations carried out by a supervising magistrate (e.g. the "*juge de l'instruction*" - the judicial guarantor of the civil rights of suspects in inquiries) in several European legal systems - the Committee would propose the creation of a special chamber of the Court of First Instance (and, if necessary, also within the Court of Justice itself), with the purpose of exercising judicial supervision over the inquiries of OLAF.

### *An EU Prosecutor's Office*

5.12.10. In contrast to the necessary neutrality of the judicial supervisor, the European Union also stands in need of a judicial body which has the express purpose of defending its interests (and thus the interests of the European public as a whole) through the judicial system, just as, in national systems, public prosecutor's offices represent the interests of the general public.

5.12.11. An EU public prosecutor's office should be designed to provide the necessary competence to present criminal cases relating to EU fraud throughout the Union, while leaving the jurisdiction of national courts untouched and without implying any fundamental effects on national legal systems. It could also solve the thorny issue of jurisdiction over the Commission (and other EU institutions), its officials and premises, by making the very concepts of immunity and inviolability redundant. As far as legitimacy is concerned, this would be drawn from the judicial structure decided upon. The following are the essential principles which should characterise the prosecution office:

- Its competence should be restricted to investigations and prosecutions concerning the protection of the European Communities' financial interests.
- Its investigation and prosecuting acts should have the same legal effect throughout the EU in all Member States, in line with "the Union's objective", laid down in TEU Article 29 (*ex K.1*), "... to provide citizens with a high level of safety within an area of freedom, security and justice".
- It should be integrated with the national prosecution services of Member States, in order to be able to bring prosecutions in national courts, while retaining autonomy insofar as the prioritisation of cases and the conduct of inquiries are concerned.
- It should have the authority to direct investigations both by OLAF and, through national prosecution services according to national mechanisms, by the relevant national authorities.

- It should be responsible for ensuring optimum cooperation and coordination between national prosecution services and/or prosecutions taking place before different national courts.
- It should exercise direct, unrestricted jurisdiction over the members, staff and premises of EU institutions and bodies (i.e. no requirement for waivers of immunity, etc.)
- It should itself be subject to the jurisdiction of the European Court of Justice.

5.12.12. These *desiderata* point to a central EU public prosecutor, supported by a network of prosecutors within national systems (and subject to national rules) operating under his/her instructions and taking decisions with effect throughout the whole territory of the EU. It is important to emphasise the hybrid nature of model which emerges, which will in effect be as national as possible, with its Community structure kept to a bare minimum. However, it is essential that the ultimate authority on EU-fraud cases be the EU public prosecutor, who must be able to have a bearing on how prosecutions are selected, prioritised and conducted independently of instructions emanating from within national services. Unless the prosecutors in Member States are able to proceed in accordance with European priorities, prosecutions will quickly fall foul of the lack of coordination between Member States that characterise them now.

### *Corpus Juris*<sup>50</sup>

5.12.13. An effort to describe a system of the sort outlined in the preceding subsections, and notably an EU Public Prosecutor's Office, is contained within *Corpus Juris* (the exception being the arrangements for the supervision of OLAF, which it does not cover). The *Corpus Juris* is the result of a project for a "European Legal Area" launched following considerable preparatory consultations and reports and indeed interparliamentary conferences.

5.12.14. The departure point for the *Corpus Juris* provisions relating to criminal procedure (Articles 18-35) is the establishment of a single legal area for the purposes of investigation, prosecution, trial and execution of sentences for the offences described in the Criminal Law part of the *Corpus*, this legal area comprising the territory of all the Member States of the European Union. For this purpose, it proposes the creation of a European Public Prosecutor (EPP), made up of a European Director of Public Prosecutions and European delegated Public Prosecutors residing in the capital of every Member State. This EPP is indivisible, implying that any act of any of its members in any Member State is taken as an act of the EPP itself (Article 18). It further implies that members of the EPP have competence across the EU and that warrants for arrest, transfers of persons under arrest and judgements have full effect across the EU (Article 24).

5.12.15. Other key features of the *Corpus Juris* are that:

- (i) the decision to prosecute is taken by the EPP (Article 19);

---

<sup>50</sup> *"Corpus Juris: introducing penal provisions for the purpose of the financial interests of the European Union"* edited by Mireille Delmas-Marty. (Paris, 1997)

- (ii) it is up to the EPP to investigate cases and to do so neutrally, i.e. seeking evidence of innocence as well as of guilt (Article 20, which also details the powers of investigation) and, when the investigation is complete, either to bring or decide not to bring the prosecution (Article 21);
- (iii) it is for the EPP to present the prosecution before the court of trial, which shall be one of the 15 single national courts designated for this purpose by each Member State (in order to avoid conflicts of jurisdiction, the case shall be heard in the Member State (a) where most of the evidence is found, (b) where the effects of the offence are greatest or (c) where the accused is resident - with any disputes as to jurisdiction to be settled by the European Court of Justice) (Articles 22, 26 and 28);
- (iv) it is for the EPP, alongside the competent national authority, to oversee the implementation of sentences in the Member State designated as the place of execution of the decision (Article 23);
- (v) judicial control, throughout the preparatory proceedings (i.e. from the initial investigation until the decision to prosecute) is exercised by a "judge of freedoms" appointed by each Member State from the court where the EPP is based (Article 25)

5.12.16. The *Corpus Juris* solution contains a coherent solution for the problems posed by the prosecution of offences affecting the financial interests of the European Communities and other EU related criminal offences. However, its wish to effect far-reaching amendments in one step makes it subject to a range of potential legal, political and even constitutional difficulties, already apparent in the context of the follow-up studies.

5.12.17. Rather than rehearse again here the arguments which surround *Corpus Juris*, the Committee prefers to address the question of a new legal framework in terms of the practical - and practicable - steps which could be taken towards the creation of a genuine European legal area for EU-related financial offences. It should not be excluded that the end destination of this process would resemble the system proposed in *Corpus Juris* as it would be based on the same underlying principle of a single "area of freedom, security and justice" (Article 29 (*ex K.1*) TEU).

### **5.13 The new legal framework - gradual implementation**

5.13.1. The following schema for the gradual creation of a new legal framework would apply to the prosecution and sentencing in the criminal courts of the Member States of fraud and other criminal offences as defined in European Acts and Conventions. The first two stages could, in the view of the Committee, be implemented within the framework of the existing treaties, notably the so-called "third pillar" (Title VI of the TEU "Provisions on Police and Judicial Cooperation in Criminal Matters"). The third and final stage should be the subject of further progress in the context of the next Intergovernmental Conference (IGC), before the accession of new Member States.

#### ***The starting point: desiderata***

The Member States should ratify the existing Convention on the protection of the financial interests of the European Communities and the associated protocols. This would provide a first

stage in arriving at common definitions of the relevant criminal offences and in ensuring an equivalence of treatment through the Member States. Further definitions of the same, or other, EU criminal offences (basically those referred to in Article 29 (*ex K.1*) TEU) would in time have subsequently to be developed, by using first pillar regulations or directives (Article 280 (*ex 209a*) TEC) or third pillar legal instruments (conventions or framework decisions under Article 34 (*ex K.6*) TEU). In a similar fashion, common standards of criminal investigation should be agreed (though in the light of the fact that all Member States are signatories to the European Convention on Human Rights, this should be largely a technical process). In respect of such common definitions and standards, jurisdiction should be given to the Court of Justice.

5.13.2. Budgetary support could be made available from the European Union to the Member States to assist them in putting in place the structures proposed below, at 5.13.5, and in providing the necessary human resources.

### ***First Stage***

5.13.3. In order to improve the investigation and prosecution of EU fraud by members, officials and other agents of European institutions and bodies, the following steps are proposed:

- the EU would appoint a high-level official responsible for the coordination of prosecutions of EU fraud - *European Public Prosecutor*. S/he should possess the qualifications required for appointment to the highest judicial office and have extensive experience in the administration of criminal justice in one of the Member States.
- The *European Public Prosecutor* would have guaranteed independence from all European institutions. S/he would work in close cooperation with the Director of OLAF, who would report directly to him/her in connection with criminal cases.
- During the first stage, the *European Public Prosecutor* would only hold jurisdiction regarding internal criminal offences, i.e. those committed by members and staff of Community institutions and bodies. S/he would refer cases for further prosecution and judgement to the appropriate judicial authorities.
- The *European Public Prosecutor* would have direct, unrestricted jurisdiction over the members, staff and premises of EU institutions and bodies, without any requirement for waivers of immunity, etc.
- The legality and proper control of OLAF investigations and of decisions of the *European Public Prosecutor* would be supervised by the new chamber referred to in 5.12.9.

### ***Second stage***

5.13.4. During the second stage, all criminal prosecutions in matters referred to in Article 29 (*ex K.1*) TEU and including fraud and corruption affecting the financial interests of the European Communities, would take place, as now, according to national procedures. At this level the Committee proposes:

- On the basis of a framework decision of the Council or, if necessary, a convention<sup>51</sup> between Member States, each would establish, according to national law and procedures, a *Prosecution Office for European Offences* within its national prosecution services.
- These national *Prosecution Offices for European Offences* would each be concerned with the investigation and prosecution of criminal offences referred to in Article 29 TEU, including fraud and corruption affecting the financial interests of the European Communities. They would also be concerned with the investigation and prosecution of wider criminal offences which are intertwined with these.
- The *Prosecution Offices for European Offences* would be competent for the entire territory of their Member States. In Member States where different systems of criminal justice exist, different offices may be created.
- The *Prosecution Offices for European Offences* would act through national police forces and before national criminal courts, on the basis of the powers accorded by national law and in conformity with national criminal procedure.
- The *Prosecution Offices for European Offences* would be integrated within the relevant national structure, subject to exactly the same hierarchical authority, constitutional constraints, rules of professional conduct, etc. as all other national prosecutors.
- Each *Prosecution Office for European Offences* would be under an obligation to achieve maximum cooperation, where appropriate, with its counterparts in other Member States and with OLAF, particularly in view of the need to avoid conflicts of jurisdiction. Each should possess a specialised judicial police unit, competent for its entire territory concerning EU cases and operating under the responsibility and upon the instructions of the national *Prosecutions Office for European Offences*.

5.13.5. In order to facilitate and make effective cooperation between Member States and with OLAF within the framework of (particularly) Article 6 of the Convention on the Protection of the financial interests of the European Communities, the *European Public Prosecutor* referred to under 5.13.4 would at this stage:

- be given all information liable to give rise to criminal prosecutions in the possession of OLAF and would be responsible for referring it, with appropriate advice, to the competent national authorities, generally the national *Prosecution Offices for European Offences*.
- offer advice to national *Prosecution Offices for European Offences* and act as a liaison between them. In cases involving either more than one Member State or any Member State(s) plus any European Institution(s), OLAF would be bound to follow his/her advice while the *Prosecution Offices for European Offences* would be expected to do so, unless there are clearly motivated grounds for derogating therefrom.
- offer advice - in order to prevent conflicts of jurisdiction between Member States - to the *Prosecution Offices for European Offences* involved as to which jurisdiction should take precedence for the investigation and prosecution of a specific offence, making use of criteria

---

<sup>51</sup> TEU Article 34 (*ex-K.7*) paragraph 2(b)



like those set out in Article 26, para. 2 of the *Corpus Juris* (see above, 5.12.15 (iii)) would be used. The *Prosecution Offices for European Offences* involved would be expected to follow such advice, unless, again, they have clearly motivated grounds for derogating therefrom.

- hold jurisdiction to request the urgent authentication by the competent national authorities of judicial investigation and prosecution acts taken by the competent authorities in one Member State for use in another. If such authentication has not occurred within a period of three months following the request, the national authorities must give reasons, duly motivated, for not following it up.
- be required each year, on the basis particularly of the advice given to national authorities pursuant to the preceding paragraphs, to publish an *Annual Report* to be submitted to all EU institutions summarising the cases handled during the year, highlighting the action taken by national *Prosecution Offices for European Offences* and the results achieved. This report should be as detailed as possible without compromising due legal process. The *Prosecution Offices for European Offences* should provide the *European Public Prosecutor* with all information necessary for the preparation of this report.

5.13.6. At the latest during the second stage, Member States would designate the national court(s) where the national *Prosecution Offices for European Offences* is located and to be responsible for the supervision of the legality and proper conduct of the proceedings of its national *Prosecution Offices for European Offences* during the preparatory stages, i.e. from the initial investigation until the decision to commit the case to trial. Acts carried out during these preparatory stages by OLAF and by the *European Public Prosecutor* would be supervised as provided for in paragraph 5.13.4, last indent by the new chamber referred to in 5.12.11.

### ***Third Stage***

5.13.7. Arrangements set up in the first and second stages should be transformed during the third stage into a system similar to that proposed in the *Corpus Juris*, allowing the *European Public Prosecutor* and the *Prosecution Offices for European Offences* to develop into an indivisible and independent European Prosecutions Office with delegated public prosecutors in the Member States in possession of jurisdiction for both internal and external criminal offences and of which OLAF and the national investigation units would be part. This last stage in the reform should establish the European Union as a single legal area for the purposes of investigation, prosecution, trial and execution of sentence concerning EU offences. Acts of the European and national branches of the European Prosecutions Office should be subjected to judicial review during the investigation stage by independent judges at the Community and/or national level.

### ***Time schedule***

5.13.8. The gradual implementation of the legal framework described above should occur in accordance with a well-established time schedule. Of the three stages, the last should be decided by the next IGC or at an *ad hoc* IGC shortly thereafter, whilst the first should be implemented in the near future, with the second to follow as soon as possible thereafter.

5.13.9. In order to prepare the reforms and to implement them within the desired time-schedule, a working group should be established forthwith by the Council, Commission and Parliament to formulate detailed proposals as to the legal instruments needed and their content.

## **5.14 Recommendations**

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

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

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

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

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

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

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

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

- *Stage 1: Appointment of an independent European Public Prosecutor (EPP)*. The EPP would hold unrestricted jurisdiction (i.e. without the obstacle of official immunity or confidentiality) for offences committed by members and officials of EU institutions and bodies. S/he would work closely with the Director of OLAF and prepare prosecutions as appropriate. Prosecutions would be referred to the appropriate national court. The legality of OLAF investigations and of EPP decisions would be supervised by a special chamber of the Court of First Instance (5.13.4)
- *Stage 2: Creation in each Member State of a national Prosecution Office for European Offences (POEO)* which would be competent for its entire territory. A POEO would be established within each national prosecution service specifically to deal with cases wholly or partially affecting the financial interests of the European Communities. POEOs would act through national police forces and before national criminal courts in conformity with national criminal procedure. The legality of the POEO's activities would be supervised in each Member State by a single court, the same court at which it is located. (5.13.5, 7)

The EPP would receive from OLAF all information liable to give rise to criminal proceedings and be responsible for referring it, with appropriate advice, to the appropriate POEO. The EPP would moreover act as liaison between the POEOs of different Member States, notably advising them on possible conflicts of jurisdiction on cases involving more than one Member State and making recommendations for their resolution. The EPP would report annually to the EU institutions on its activities and on the action taken by the POEOs as a result of its recommendations. (5.13.6)

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

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

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

## ANNEX 1 - HISTORY OF UCLAF - CHRONOLOGY

Date	Reference	Development
1984-89		Repeated requests from the Committee on Budgetary Control of the European Parliament for the constitution of a "flying squad" able to carry out on-the-spot checks in Member States in cases of suspected fraud affecting the financial interests of the Community. Backing from Council and the Court of Auditors.
20.11.87	COM(87)572 & COM(87)PV891	On the basis of an internal report on its anti-fraud activities, the Commission decides to establish a central anti-fraud coordination unit, UCLAF ( <b>Unité de Coordination de la Lutte Anti-Fraude</b> ) and to generalise anti-fraud cells in the main spending/revenue services.
July 1988		UCLAF becomes operational
May 1989		45-point work programme for fraud prevention, cooperation with Member States, etc. presented to te Member States. Annual report published from 1989 onwards.
Nov.1992	SEC(92)2045 of 4.11.92	On the basis of Parliament recommendations in the 1990 discharge, UCLAF's role is strengthened, though still on the basis of shared responsibility with anti-fraud cells in DGs VI (Agriculture), XIX (Budget), XX (Financial Control) and XXI (Customs and Indirect Taxation). UCLAF staff totals 32, anti-fraud staff in DGs 89.
Early 1993		Political responsibility for UCLAF transferred to the Commissioner responsible for the Budget, Mr Schmidhuber.
Dec. 1993		European Parliament adopts 1994 budget, including 50 new posts (35 temporary - 15 permanent) specifically for UCLAF. Prior to this decision, total staff = 50
July 1994	Note SG(94)D/141.662	Division of competences and terms of reference agreed between UCLAF and DG XX (Financial Control)
Up to early 1995		Under pressure from European Parliament (postponement of 1992 discharge), Commission recruits the additional UCLAF staff foreseen, though 8 seconded national experts withdrawn. (Net gain 42 staff)

Jan. 1995		UCLAF placed under the responsibility of the Commissioner specifically responsible for the fight against fraud (and for financial control), Mrs Gradin. (Budgetary matters, financial control and the fight against fraud previously all under the responsibility of a single commissioner)
1.2.1995	Note SG(95)D/141.038	The Secretary-General informs all services of UCLAF's right to initiate inquiries on its own initiative on the basis of information from any source. Obligation on services to inform UCLAF of any suspicion of fraud in their areas of competence.
Feb – June 1995	SEC(95)249 of 10.2.95	All operational anti-fraud activities centralised in UCLAF. 40 staff (of 72 working in relevant units) transferred from DGs VI and XXI to UCLAF. Division of responsibilities between UCLAF and line DGs defined. Constitution of specialised units dealing with non-agricultural expenditure.
26.7.95	95/C 316/03	Council act drawing up the Convention on the protection of the European Communities' financial interests. Common definition of fraud, criminalisation of anti-EU fraud in all Member States ( <i>not yet ratified - not yet in force</i> )
18.12.95	Reg. 2988/95	Adoption of Council regulation on the protection of the European Communities' financial interests, providing general framework for Commission's activities in the fight against fraud.
26.2.1996	SEC(96)345	First reminder to services of obligation to communicate suspected irregularities/fraud to UCLAF
1.4.1996	Note from secretary-general	Following experience of documents having been withheld by officials, the Secretary-general authorises UCLAF directly to access documents held by authorising officers in Commission departments, with the prior approval of the secretary-general and the director-general for staff on a case-by-case basis.
25.7.96	Letter from Mr Weber, member of the Court	Agreement between the Commission and the Court of Auditors on the exchange of information relating to fraud or suspected fraud detected by the Court in the course of its work.
27.9.96	96C 313/01	First Protocol to Convention on protection of European Communities' financial interests: corruption of Community and national officials. ( <i>Not yet ratified or in force</i> )

11.11.96	Reg. 2185/96	Adoption of Council regulation providing overall framework for on-the-spot checks in Member States by UCLAF in the context of its inquiries.
14.4.97	SEC(96) 345/2 (replaces version of 26.2.96)	The Secretary-general issues second reminder of the obligation of services to inform UCLAF of suspected cases of fraud. Individual officials given the option of informing their superiors or going directly to UCLAF.
19.6.97	97/C 221/02	Second protocol to the Convention on the protection of the European Communities' financial interests: liability of legal persons, confiscation, money laundering and cooperation between Commission and Member States. <i>(Not yet ratified or in force)</i>
June 1997	SEC(97)1293 of 25.6.93	Secretary-general and the director general of the legal service confirm the rules on dealing with national judicial authorities and UCLAF's responsibility for contacts on fraud matters.
18.11.1997	SEC(97)2198	Commission communication on "Sound Financial Management - Improving Action against Incompetence, Financial Irregularities, Fraud and Corruption" proposes strengthening of UCLAF, the formalisation of its powers and the reinforcement of its independence within the Commission
1.5.98		UCLAF becomes a "task force". Total staff now 141 (118 statutory, of which 21 temporary, 13 seconded national experts and 10 auxiliary/interim/consultant)
14.7.1998		On the basis of an internal communication, Commission decision formalising the powers, competences and responsibilities of UCLAF and regulating the conduct of its inquiries.
7.10.1998	A4-0297/98	European Parliament calls for creation of "OLAF" (Bösch report)
4.12.1998	COM(98)717	First Commission proposal for creation of OLAF
9.12.1998		Implementing decision for decision of 14.7.98 with "detailed rules of application"
17.3.1999	COM(99)140	Amended Commission proposal for creation of OLAF
28.4.1999	SEC(1999)802	Commission decision to create OLAF
6.5.1999	A4-0240/99	European Parliament adopts Bösch report on creation of OLAF and related legislation (co-decision procedure)

25.5.1999	Reg. 1073/1999 IIA 1999/352	Adoption of regulation concerning the investigations of OLAF and of the interinstitutional agreement concerning its internal investigations.
19.7.1999	1999/C220/01	Decision appointing the supervisory board of OLAF

## ANNEX 2 - SUMMARIES OF LEGAL AND REGULATORY TEXTS

Administrative provisions (First pillar)		Criminal provisions (Third pillar)
External	Internal	
<b>T R E A T I E S</b>		
<p><b>EC Treaty Article 280</b> (<i>ex 209a</i>)  <i>Article 280</i> (<i>ex Article 209a</i>)</p> <p>1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.</p> <p>2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.</p> <p>3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.</p> <p>4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.</p> <p>5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.</p>		<p><b>EU Treaty Article 29</b> (<i>ex Article K.1</i>)</p> <p>Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:</p> <ul style="list-style-type: none"> <li>— closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;</li> <li>— closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;</li> <li>— approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).</li> </ul>



<p><i>For information</i></p> <p><b>EC Treaty (Maastricht) Article 209a – Previous Version</b> (i.e. before Amsterdam amendments)</p> <p>Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.</p> <p>Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.</p>		<p><b>EU Treaty Article 30</b> (ex Article K.2)</p> <p>1. Common action in the field of police cooperation shall include:</p> <ul style="list-style-type: none"> <li>(a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;</li> <li>(b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;</li> <li>(c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;</li> <li>(d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.</li> </ul> <p>2. The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam:</p> <ul style="list-style-type: none"> <li>(a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;</li> <li>(b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;</li> <li>(c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol;</li> <li>(d) establish a research, documentation and statistical network on cross-border crime.</li> </ul>
		<p><b>EU Treaty Article 31</b> (ex Article K.3)</p> <p>Common action on judicial cooperation in criminal matters shall include:</p> <ul style="list-style-type: none"> <li>(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;</li> <li>(b) facilitating extradition between Member States;</li> <li>(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;</li> <li>(d) preventing conflicts of jurisdiction between Member States;</li> <li>(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.</li> </ul>
		<p><b>EU Treaty Article 32</b> ( ex Article K.4)</p> <p>The Council shall lay down the conditions and limitations under which the competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State.</p>

		<p><b>EU Treaty Article 33</b> (ex Article K.5)</p> <p>This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.</p>
		<p><b>EU Treaty Article 34</b> (ex Article K.6)</p> <p>1. In the areas referred to in this Title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.</p> <p>2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:</p> <ul style="list-style-type: none"> <li>(a) adopt common positions defining the approach of the Union to a particular matter;</li> <li>(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;</li> <li>(c) adopt decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;</li> <li>(d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two-thirds of the Contracting Parties.</li> </ul> <p>3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 62 votes in favour, cast by at least 10 members.</p> <p>4. For procedural questions, the Council shall act by a majority of its members.</p>

## OTHER RULES AND REGULATIONS

### Regulation 2988/95

#### Main Provisions:

General rules are introduced concerning the checks to be carried out and the administrative measures and sanctions to be applied by the Commission relating to irregularities affecting the financial interests of the European Communities. (*Art. 1*)

Administrative checks, measures and penalties are introduced. These shall be determined by Community law. Their application shall be governed by national law. (*Art. 2*)

A limitation period for such checks, measures and penalties is introduced. (4 years, with numerous provisos) (*Art. 3*)

"Wrongfully obtained advantages" shall be either recovered (monetary amounts) or otherwise withdrawn (e.g. entitlements). Additionally, administrative fines and/or other sanctions (e.g. temporary or permanent exclusion from Community schemes) may be applied by the Commission. (*Arts. 4-5*)

The administrative measures provided for in this regulation shall be suspended in the event of criminal proceedings related to the same facts. (*Art. 6*)

Member States shall take measures to ensure the regularity and reality of transactions involving the Communities' financial interests, including by carrying out checks and inspections. The Commission shall also have the right to carry out checks and inspections within the scope of the existing sectoral regulations. A general regulation enabling such checks and inspections by the Commission will be introduced later. (*Arts. 8-10*)

### Early "ad hoc" rules and decisions:

#### Examples:

Notes from the Secretary-General concerning the obligations of officials vis-à-vis UCLAF and the latter's access to information. The first of these notes incidentally confirmed the right of the Director of UCLAF to "initiate any investigation" as he saw fit.

"Demarcation" agreements, specifying the competences of different services:

- . Division of responsibilities between UCLAF and DGs VI and XXI on fraud-related matters (SEC(95)249 of 10.2.95)
- . Cooperation and complementarity between Financial Control and UCLAF. (Note SG(94)D/141.662 and annex of 6.7.94)

Agreement with the Court of Auditors on the exchange of information relating to possible fraud. (Exchange of letters between Mr Weber, responsible member of the Court (25.7.95) and Mrs Gradin, responsible commissioner (4.10.95))

### Convention on the Protection of the European Communities' financial interests

#### Main Provisions

Establishes a shared definition of fraud affecting the Communities' financial interests (*Art. 1*)

Establishes that offences meeting this definition will be treated as criminal offences punishable by criminal penalties, including custodial sentences for serious cases. (*Art. 2*)

Establishes the criminal liability of heads of businesses in respect of decisions they take fraudulently affecting the financial interests of the European Communities (*Art. 3*)

Provisions are included to ensure that rules on jurisdiction and/or extradition between Member States cannot provide loopholes to avoid prosecution for fraud. (*Arts 5-6*)

Member States are placed under an obligation to cooperate in the fields of investigation, prosecution and sanction of fraud affecting the financial interests of the European Communities (*Art. 6*).

Principle of *ne bis in idem* (*Art 7*)

Jurisdiction of the Court of Justice in resolving disputes between Member States as to the interpretation of the Convention (*Art. 8*)

## Regulation 2185/96

Main provisions:

Without prejudice to either the existing sectoral rules or to Member States' administration of justice, this regulation shall apply to all areas of Community activity. (Art. 1)

On-the-spot checks may be carried out: (i) to detect serious irregularities or irregularities with a transnational dimension, (ii) in response to a weak control environment or (iii) at the request of the Member State. Overlaps with checks carried out by the Member State shall be avoided. (Arts 2-3)

The Commission shall prepare and conduct on-the-spot checks in cooperation with the relevant national authorities, which shall receive adequate advance notification. Officials of the Member State may participate in the inspection, or joint inspections may be organised if the Member State so wishes. (Art. 4)

All economic operators covered by regulation 2988/95 may be the subject of on-the-spot checks and must grant Commission inspectors access to premises, land, means of transport or other areas used for business purposes. (Art. 5)

On-the-spot checks shall be carried out on the Commission's authority and responsibility by duly empowered officials or other servants, including national experts on secondment. They shall be required to provide written authorisation for inspections carried out. They may seek the assistance of national officials. (Art. 6)

In the course of inspections, Commission inspectors shall have the same access to documentation and other information under the same conditions as national administrative inspectors. (Art. 7)

Information gathered during inspections shall be covered by professional secrecy and protected in accordance with the laws of the Member State concerned. The Commission shall report any indication of irregularity to the authorities of the Member States concerned. Inspection reports shall be drawn up in conformity with the legal requirements of the Member State in question and shall have exactly the same status and value as a report drawn up by equivalent national inspectors (including as admissible evidence in Court). (Art. 8)

## Commission Decision of 14 July 1999

Main provisions:

UCLAF's investigations are of an administrative nature. (Art. 1)

UCLAF shall cooperate with and assist Member States' authorities. (Art. 3)

The Director of UCLAF informs the competent Member State authorities of facts and suspicions indicating fraud. UCLAF shall remain the direct interlocutor of such authorities. (Art. 4)

Information gathered in the context of investigations is confidential and is only communicated on a need/right-to-know basis. (Art. 5)

Directors-general and heads of service are required to report to UCLAF all information giving rise to the presumption of fraud. Officials may inform either their director-general/head of service or UCLAF directly of such information. No official may suffer any inequitable or discriminatory treatment as a result of acting under these provisions. (Arts. 6-8)

Investigations shall respect the principle of equity, the right of reply of individuals and proper standards of evidence. (Art. 9)

Internal investigations shall be initiated at the initiative of the director of UCLAF. He shall inform the secretary-general at the same time. (Art. 10)

UCLAF inspectors, who shall properly identify themselves and state their purpose, shall enjoy the full cooperation of all Commission officials and unrestricted access to all information and documentation, including the power to copy or remove it. (Arts. 11-14)

The Director-General or the Head of Service concerned shall be informed in advance of a requirement for access to premises or documents. Exceptionally, if this is not desirable in the context of the inquiry, the Secretary-General and the Director-General for staff and administration shall be informed. (Art. 15)

Investigations shall be proportionate to the circumstances and complexity of the case. They shall not normally exceed one year. (Art. 17)

If indications arise of the personal involvement of a Commission official, the Secretary-General and the Director-General for staff and administration as well as the Director-General or Head of Service shall be informed before the investigation continues. Unless the investigation would be thus compromised, the individual concerned shall be informed, and shall in any case have the right to give his views before conclusions are drawn. This right may be deferred where the investigation is under the authority of national judicial authorities and in agreement with the Secretary-General. (Arts. 18-19)

Where disciplinary action is indicated, a report shall be sent by the Director of UCLAF to the Secretary-General and the Director-General for staff and administration. (Art. 21)

Where criminal charges within the Commission are indicated, the Director of UCLAF shall inform the President of the Commission, the Commissioners responsible for staff and administration and the area concerned as well as the Secretary-General. He shall notify the relevant national judicial authorities as soon as possible. (Art. 22)

The Director of UCLAF shall advise the Commission on any request from national judicial authorities for the waiver of official immunity. (Art. 23)

The Director of UCLAF shall inform the Committee on Budgetary Control of the European Parliament of the course of investigations while respecting the requirements of confidentiality and the rights of individuals. (Art. 24)

The provisions of this Decision shall apply also to persons who, though not officials of the Commission, act directly or indirectly on behalf of the Commission. (Art. 25)

*The above provisions subsequently clarified by "Detailed Rules of Application" (Dec. 1998)*

## First Protocol to the Convention on the protection of the European Communities' financial interests (Corruption)

Main features:

Shared definitions of active and passive corruption of Community and national officials damaging to the European Communities' financial interests are established. (Arts 2-3)

Member States undertake to ensure that their criminal provisions relating to corruption by holders of public office or public officials apply equally to holders of national and European office and to national and EU officials. (Art. 4)

Member States undertake to apply appropriate and proportionate criminal penalties for acts of corruption as defined in the protocol. (Art. 5)

Provision relating to jurisdiction. (Art. 6)

Competence of Court of Justice to resolve disputes between Member States concerning interpretation of the protocol. (Art. 8)

## Regulation 1073/1999 (OLAF investigations)

Main characteristics:

In the context of the fight against fraud, OLAF is empowered to exercise the powers of investigation conferred on the Commission by the various relevant sectoral and horizontal regulations. It shall assist Member States' authorities and facilitate coordination between them. It shall also carry out investigations within the institutions, bodies, offices and agencies of the Community in order to fight fraud and other serious matters liable to lead to disciplinary or criminal proceedings. (Art. 1)

OLAF shall carry out administrative investigations. These shall be sufficient to establish the irregular character of the activities under investigation. (Art. 2)

Externally, OLAF shall exercise the powers of the Commission under regulations 2185/95 and 2988/96 (Art. 3)

Internally shall be empowered to carry out investigations within and relating to European institutions and bodies. Its powers shall include the right to carry out unannounced visits and unrestricted access to persons, documentation and premises. Members and staff of institutions and other bodies shall be under an obligation to cooperate with OLAF. The civil rights of individuals shall be protected. (Art. 4)

Inquiries shall be opened at the initiative of the director of OLAF (Art. 5)

The director of OLAF shall direct the conduct of investigations. Office agents shall adopt an attitude in line with the rules governing equivalent national officials. Member States shall ensure the cooperation of their competent authorities. (Art. 6)

European institutions and bodies are placed under an obligation to supply all relevant information to its agents and to communicate to OLAF any information concerning possible fraud. Member States, insofar as their laws allow, shall communicate all pertinent information to OLAF. (Art. 7)

Data protection and confidentiality shall be ensured (Art. 8)

OLAF reports shall be drawn up in such a way as to respect the procedural requirements of the Member States concerned. Copies of reports of external investigations shall be given to the competent authorities of the Member State concerned, those resulting from internal inquiries to the institution in question. (Art. 9)

OLAF may at any time provide the competent authorities of Member States with information obtained in investigations, and shall provide information liable to result in criminal proceedings. (Art. 10)

OLAF's activities will be monitored by a Supervisory Committee, composed of five suitably qualified independent persons, nominated by common accord of the Commission, the Council and the European Parliament. Its task will be to give a general opinion on the activities of the Office, either on its own initiative or at the request of the Director of OLAF. It shall not interfere in investigations in progress. It shall report, annually at least, to the institutions. (Art. 11)

The Director of OLAF shall similarly be appointed by common accord of the institutions, for a fixed five-year term (renewable once), on the basis of a shortlist submitted by the Commission. He/she shall report to the institutions on the activities of OLAF, without compromising the confidentiality of investigations. (Art. 12)

OLAF will be funded by way of a separate budget section in Part A (administrative appropriations) of the Commission budget. (Art. 13)

Any official whose interests adversely affected in the course of an OLAF investigation may complain to the Director and thereby cause OLAF's actions to be submitted to judicial review by the Court of Justice, pursuant to articles 90-91 of the Staff Regulations (Art. 14)

In the third year of effect of the regulation, the Commission shall report on OLAF's progress and make appropriate proposals for the future development of the Office. (Art. 15)

## Second Protocol to the Convention on the protection of the European Communities' financial interests (various)

Main features:

Money laundering" to be made a criminal offence in all Member States. (Art. 2)

Legal persons to be made criminally liable for offences of fraud against the financial interests of the European Communities and shall be subject to effective, proportionate and dissuasive sanctions. (Arts. 3-4)

The proceeds of fraud against the financial interests of the European Communities to be subject to confiscation. (Art. 5)

The Commission and Member States are explicitly required fully to cooperate, both by exchange of technical and operational assistance and by participating in the exchange of information, "so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering" (Arts 6-7)

Data protection provisions (Arts. 8-11)

Jurisdiction of the Court of Justice for resolution of disputes of interpretation of the protocol (Art. 13)

	<p><b>Interinstitutional agreement on internal OLAF inquiries</b></p> <p>Main features of the IIA:</p> <p>The European Parliament, Council and Commission agree the following in relation to internal inquiries of OLAF:</p> <ul style="list-style-type: none"><li>- to adopt common rules on the conduct of internal investigations of OLAF. Investigations shall be aimed at (i) fighting fraud, corruption and any other illegal activity detrimental to the financial interests of the European Communities or (ii) bringing to light any other serious situation relating to professional misconduct susceptible to lead to criminal or disciplinary proceedings. <i>(Para. 1)</i></li><li>- to apply such rules by adopting an internal decision conforming to a model decision annexed to the IIA <i>(para. 2)</i></li><li>- to refer all requests for waivers of immunity to OLAF for opinion <i>(para. 3)</i></li></ul>	
--	--	--

## **6. MATTERS RELATING TO STAFF**

### **TABLE OF CONTENTS**

#### **6.1. INTRODUCTION**

*The structure of this chapter*  
*The challenges faced by the European civil service*  
*The general scope of the problems*  
*The specific requirements of the Commission*

#### **6.2. THE GENERAL PROBLEMS OF STAFF POLICY**

*The problem of the revision of the Staff Regulations*  
*No analysis of requirements and priorities*  
*Consequences for the organisation and redeployment of staff*  
*Consequences for the development of a quality policy*  
*'National balances'*  
*The risk of disappointment*  
*The role of the trade union organisations*

#### **6.3. OBJECTIVES AND INSTRUMENTS OF STAFF POLICY**

*Recognition of merit*  
*Training*  
*Mobility*  
*Empowerment and decentralisation*  
*Career incentives*

#### **6.4. ORGANISATION OF THE STAFF**

*The various categories of staff*  
*Staff employed under the Staff Regulations*  
*Established officials*  
*Other servants*  
*The case of research staff*  
*The problem of the termination of other servants' contracts*  
*Use of external staff*  
*The case of the TAOs*  
*Final observations*

#### **6.5. CAREERS**

*Recruitment*  
*Competitions*  
*Possible adjustments*  
*Lists of successful candidates*  
*Internal competitions*  
*Career progression*  
*Assessment and promotion*  
*Appointment of senior officials*  
*The new Commission's plans*  
*Termination of service*

*Professional incompetence*

**6.6. LEGAL STATUS OF THE STAFF**

*Entitlements and benefits*

*Immunities*

*Duties and obligations*

*Liability of officials*

*Difficulties of the system*

*Disciplinary proceedings*

*The disciplinary procedure and its shortcomings*

*The Disciplinary Board*

*Correlation between misconduct and disciplinary measures*

*Duration of proceedings*

**6.7. RECOMMENDATIONS**

**ANNEXES**



## 6. MATTERS RELATING TO STAFF

### **6.1. Introduction**

*The structure of this chapter*

- 6.1.1. Point 9.4.8. of the first report states: *'The Committee has not had time to consider staff management or any changes which might be made to the Staff Regulations. However, it notes that a number of Commissioners have, unprompted, expressed their conviction that no genuine improvement in the way the Commission works will be possible without in-depth consideration of these points'*.
- 6.1.2. In this second report, the Committee deems it necessary to develop this review for it to complete its analysis and propose recommendations for the future.
- 6.1.3. This chapter of the report therefore reviews those aspects of the European civil service which currently constitute the most serious problems inside the Commission to the extent that they reflect – to use the European Parliament's own terminology – *'allegations of fraud, mismanagement and nepotism (detection and treatment), and with the treatment by the Commission of cases of fraud, mismanagement and nepotism involving staff'*.<sup>52</sup>

*The challenges faced by the European civil service*

- 6.1.4. In general terms, the problems faced by the European civil service are quite similar to those that the national civil services have been encountering for some years now.
- 6.1.5. In a global society which has become increasingly characterised by a spirit of openness, dynamism and competitiveness, the European civil service must also face up to problems concerning the modernisation and rationalisation of its structures, justify its existence and the exercise of its powers and responsibilities by demonstrating the efficiency and quality of the services which it is required to deliver to European citizens and to taxpayers.
- 6.1.6. In the case of the European civil service, these problems are exacerbated by difficulties connected with its multinational character and by some specific developments which have occurred over the years as the integration process has progressed.
- 6.1.7. At this juncture, suffice it to say that the constant increase in the number of Member States, and, above all, the spectacular multiplication of the powers and responsibilities of the Union have profoundly affected the nature and scope of the institutions' activities. That trend looks set to continue with the prospect of the accession of new Member States.
- 6.1.8. However, from another angle, we might refer to the greater attention being paid by the general public to the sound administration of the European institutions and to their accountability and call not only for high-quality service exclusively based on the recognition of individual merit to be provided to the public but also for compliance with the principles

---

<sup>52</sup> Resolution of the European Parliament of 23 March 1999, paragraph 4.

of integrity and legality in a context which may guarantee the greatest possible degree of transparency.

### ***The general scope of the problems***

6.1.9. We would make it clear from the outset that the problems to which we have referred are broadly common to all the institutions of the European Union.

In practice, we have noted a kind of institutional individualism, in so far as each institution has tried to find solutions by developing its own procedures and practices, its own 'philosophy', as it were.

6.1.10. However, it remains appropriate, while taking account of the more specific requirements of each institution, to define uniform, or at the very least coordinated, solutions for all the institutions, partly in order to ensure parity of treatment for staff but also with a view to being able to deploy joint efforts in order to succeed in making genuine reforms.

### ***The specific requirements of the Commission***

6.1.11. It is, furthermore, true that, as far as the European Commission is concerned, the need for major changes in staff organisation and staff policy is becoming even more acute.

6.1.12. Indeed, no other institution has had to cope so directly with the consequences of the developments that have affected the Union in recent years. In particular, no other institution has had entrusted to it, and has accepted, a whole raft of new tasks and objectives which are not only more numerous than in the past but also qualitatively different compared with the traditional role played by the institution, such as management activities. It is not only the extent but also the very nature of the Commission's tasks which have profoundly changed: instead of being the body for considering the need for and monitoring legislation it once was, the institution has now become essentially a management body.

6.1.13. Despite those developments, neither the overall structure, nor the organisational criteria and arrangements, nor practices and procedures have been adapted to address the new situation. In a word, everything around the Commission has changed, but it has largely remained a spectator of such change.

6.1.14. Certainly, the problems described here have been analysed over a period of years within the Commission, and a considerable number of studies and reports have been drawn up by various internal Commission bodies - and even by external bodies<sup>53</sup>. Modernisation, decentralisation and rationalisation have become buzzwords that appear in virtually all these analyses. Unfortunately, they have not led to a coherent and accepted overall review, and have frequently not even been translated into operational follow-up measures (or at least incipient measures).

---

<sup>53</sup> For example, the 1979 Spierenburg report, more recent reports by the Inspectorate-General on TAOs (February 1998) and decentralisation (February 1998), the MAP 2000 Programme (30 April 1997), the Caston report (early 1998), the Williamson report (6 November 1998), the codes of conduct (April 1999) and, most recently, the Inspectorate-General's report entitled 'Designing tomorrow's Commission - DECODE' (7 July 1999).

6.1.15. Yet, at this juncture, the implementation of reforms no longer constitutes an option for the institution. They have become a total and urgent necessity, even a sine qua non for ensuring the efficiency of the Commission's activities and for maintaining its traditional role as the driving force behind European integration.

## **6.2. The general problems of staff policy**

6.2.1. It is undeniable that the Commission's staff policy has not been on a par with the best examples set by national administrations, and that it suffers from numerous shortcomings.

6.2.2. In the following pages, we shall briefly outline a few of these shortcomings, starting with some of a more general and horizontal nature, before going on to consider some more specific issues.

### *The problem of the revision of the Staff Regulations*

6.2.3. The Staff Regulations were drawn up more than thirty years ago when a single text was adopted to cover all the categories of staff employed by the European Community<sup>54</sup>.

6.2.4. Despite adaptations of individual parts of the Staff Regulations and the development of general principles through the case law of the European Court of Justice and of the Court of First Instance, the system has, in its application, been diverted to some extent from its initial objectives. This does not alter the fact that its broad outlines (protection and strengthening of the independence of the staff, attractive and competitive working conditions, recognition of merit, specific system of individual guarantees) still remain valid.

6.2.5. As a result, the real issue is not one of amending radically the current Staff Regulations system, but of correctly applying the rules and principles thereof.

### *No analysis of requirements and priorities*

6.2.6. Of all the general grounds which have prevented the principles laid down in the Staff Regulations from being properly applied, the foremost is the fact that there has never been any genuine analysis of the institution's requirements and priorities.

6.2.7. The entrusting to the Commission of new tasks (and its acceptance of those tasks) was not preceded or even accompanied by a rigorous appraisal of existing human, financial and organisational resources and by an in-depth assessment of the priorities and requirements connected with the tasks for which the institution was responsible or was planning to become responsible in the future.

6.2.8. However, only an assessment of that nature can provide reliable instruments and the basis for future programming with respect to the structural reforms to be carried out and, where necessary, to a request for an appropriate increase in its resources. As the Commission itself

---

<sup>54</sup> Regulation 259/68 (OJ L 56, 4.3.1968) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, adopted on 29 February 1968 after the entry into force of the Treaty of Brussels of 8 April 1965 establishing a Single Council and Single Commission of the European Communities.

stated in the DECODE document already referred to, such an assessment would have helped the institution *'in discharging its functions in an efficient manner in a continuing context of very limited growth in resources'*.

- 6.2.9. On the contrary, no screening of the organisation and the operation of this institution was carried out until November 1997 – and even then with limited purposes in view. It resulted quite recently in the document referred to.
- 6.2.10. That document clearly demonstrates serious shortcomings in the institution's organisation and practices, particularly services that do not reflect current powers and responsibilities, fragmentation of areas of responsibility, inefficient use of human resources or obsolete and inefficient working methods.

### ***Consequences for the organisation and redeployment of staff***

- 6.2.11. With particular regard to staff policy, the lack of any assessment of the institution's resources and actual requirements has adversely affected both the organisation of the staff and the conditions required for the development of a genuine quality policy.
- 6.2.12. With regard to the first aspect, for lack of such an assessment, the institution has been unable to initiate the reforms required to invest the system with efficiency and rationality. In particular, it has been unable to redeploy staff in an attempt to achieve optimum allocation of its existing resources and increase staff output and efficiency.

To that end, the Commission should have defined – on the basis of the priority of requirements and of a critical review of the structure of the Establishment Plan and any organisational malfunctioning - the tasks allotted to each service, the number of and qualifications required for the posts needed for the carrying out of those tasks, the available resources and the resulting surpluses or shortfalls.

- 6.2.13. Over time, such a policy would have enabled, and would enable, the institution to cope with an extension of its activities even during a period of zero-growth as regards the Establishment Plan and, hence, with a fixed number of staff.
- 6.2.14. And in fact the few attempts at redeployment encountered serious problems, beginning with a certain unwillingness in the directorates-general to allow staff (sometimes their most able officials) to leave their services. Some staff were unwilling to change posts. That unwillingness is all the more comprehensible when, as we shall see, such transfers are often not backed up in the appropriate manner.
- 6.2.15. But experience has above all shown, as confirmed in the DECODE report referred to above, that *'the concept of prioritisation and, in particular, the notion of negative priorities do not form part of the Commission's processes, and have not entered into its way of thinking'* (p. VIII).
- 6.2.16. It follows that, inside the Commission, there has been no genuine redeployment. The Commission did not decide until 1997 to redeploy each year 1% of the posts on the

Establishment Plan (i.e. about 150 posts per year), although the DECODE report took the view that it could have doubled that percentage.

6.2.17. Yet only an organisation which assigns its staff in a rational and efficient manner can create the conditions where all officials and other servants may feel motivated and that they have been given responsibility in their work, in that they are encouraged to seek or accept the tasks which they feel are most commensurate with their own abilities.

### ***‘National balances’***

6.2.18. In this context we should recall that serious difficulties in the European civil service stem from the constraints imposed by compliance with what are called ‘national balances’.

6.2.19. It is indisputable that a European civil service drawn from the widest possible geographical basis is required to run the decision-making process of the European Union. It is only through the employment of a staff of different nationalities working together and over a lengthy period of time that the problems of cultural, linguistic and national identity in general may be minimised.

6.2.20. Furthermore, the growing and imperative need to have available a sufficient number of officials and other servants with a knowledge of the various languages and an understanding of the political and social structure of several countries must be weighed against the consideration that the European institutions are not organisations where quotas involving nationality, culture or language are primordial, since all officials and other servants are, in principle, Europeans.

6.2.21. As the Herman report<sup>55</sup> emphasises: *‘The essential need, ..., is for narrow national and partisan political considerations to play less of a role than at present in the Commission of the future, not least in the appointments process at all levels. Up to a certain point the presence of these factors is ... inevitable. ... The current balance, however, appears to be wrong. In particular, the need to find “a geographical balance” between the nationalities of the senior office holders in the Commission appears to be compromising the independence of the European civil service, and ability and relevant experience should play a greater role in the appointments process. Moreover, this problem, if left untouched, is likely to become even more acute in the future with a large-scale enlargement of the European Union. ...’*

6.2.22. Indeed, despite almost 50 years of integration and of a practice of working together in multinational structures, the national balances requirements, far from decreasing, have become stronger. Over time, demonstrations of their influence have become even more glaring and frequently lie at the root of nepotism and maladministration.

6.2.23. On formal grounds, the significance of national balances in the selection of officials or in the development of their careers seems to contradict the principle which prohibits any

---

<sup>55</sup> Report dated 26 March 1999 by the European Parliament’s Committee on Institutional Affairs on improvements in the functioning of the Institutions without modification of the Treaties, Part B, point 25 of the Explanatory Statement (PE 229.072/fin. – Doc. A4-0158/99). See also point 7.3.4. of this report.

discrimination based on nationality, i.e. a general and fundamental principle of Community law (cf. Article 12, formerly Article 6 of the EC Treaty). Derogations from that principle are admissible on the grounds of specific national characteristics and the need to ensure that all the cultures of the Member States are represented. However, being derogations, they must be supported by a legal basis and, in accordance with the unwavering case-law of the Court of Justice, be exceptional and subject to testing to establish need and proportionality.

6.2.24. That conclusion is also confirmed by the Staff Regulations of Officials themselves, where the requirement to maintain a certain geographical balance is hedged around with serious reservations.

6.2.25. Accordingly, Article 7 thereof lays down: *'The appointing authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade'*.

6.2.26. Subsequently, Article 27 of the Staff Regulations lays down: *'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Member States of the Communities. ... No posts shall be reserved for nationals of any specific Member State'*.

6.2.27. Community case-law has also confirmed those conclusions even more precisely. In the *Lassalle* judgment, the Court of Justice stated: *'The interests of the service and regard for the eligibility of officials for the career bracket in question would be compromised if the administration, in order to secure a geographical balance, could reserve a post for a specific nationality without such action's being justified on grounds connected with the proper functioning of the service. However, it is not incompatible with these requirements ... that, where the qualifications of the various candidates are approximately equal, the administration should allow nationality to play a decisive role when it is necessary to maintain or to re-establish a geographical balance among its staff'*<sup>56</sup>. In the *Marenco* judgment, it also ruled: *'The need for the administration to remedy a geographical disequilibrium in the posts within its departments when recruiting must give way to the requirements of the interests of the service and the consideration of the personal merits of the candidates'*<sup>57</sup>.

6.2.28. It is high time therefore that we reverted to the spirit of European integration and at least attempted to reduce the significance of national balances.

6.2.29. To that end, we might consider a few remedies that would be both specific and realistic. For example, and in very general terms, professional training courses might be designed in such a way as to strengthen the 'European' nature of the civil service in the institutions and, hence, to reduce the significance of national origin (see the section on 'Training').

---

<sup>56</sup> Judgment of 4 March 1964, Case 15/63, *Lassalle v. Parliament*, ECR [1964] p. 31.

<sup>57</sup> Judgment of 29 October 1975, Joined Cases 81 to 88/74, *Marenco v. Commission*, ECR [1975], p. 1247. See also ground 6 of the judgment of 29 September 1976 in Case 105/75, *Giuffrida v. Council*, ECR [1976], p. 1402 which recalls that *'Article 29 of the Staff Regulations lays down the necessary recruitment procedures ... so that vacant posts may be filled by officials chosen on the basis of objective criteria and only in the interests of the service'*. See also the judgment of 30 June 1983 in Case 85/82, *Schloh v. Council*, ECR [1983], p. 2105.

- 6.2.30. More specifically, and following the same train of thought as that announced by the President-designate of the Commission, we should be encouraging the genuine ‘multinationalisation’ of Commissioners’ cabinets and ensure that they revert to their original role (see point 7.12 of this report).
- 6.2.31. We might also propose a revision of the number of directorates-general and the allocation of tasks among them, in accordance with the institution’s genuine requirements rather than national balances.
- 6.2.32. We might also think about the development of flexibility in the current system of ‘national quotas’, which would enable ability and professional experience to play a more decisive role in the appointments procedure (see below, section on ‘Appointment of the most senior officials’). At all events, that criterion should be applied with respect to the – somewhat ‘atypical’ - post of Secretary-General of the Commission.
- 6.2.33. More frequent rotation of staff from directors-general down to heads of unit, especially where they act as authorising officers, would also be useful in order to avoid any kind of ‘nationalisation’ of posts.

#### ***The risk of disappointment***

- 6.2.34. We cannot conceal the fact that the problems connected with the current staff policy have resulted in a certain degree of disenchantment, not to say discontent, among the staff themselves. The delays in implementing the increasingly necessary and urgent reforms and the fallout from certain scandals and their negative impact on the image and reputation of the European civil service among the general public have fuelled dissatisfaction, not to say frustration, among the staff. This is undoubtedly a major problem, since any reform designed to improve and strengthen the Commission depends principally on the sincere commitment of all the staff.
- 6.2.35. Yet (virtually all) members of staff simply want to be able to work in an institution where the social dialogue is effective and productive and where quality of work and conscientiousness are acknowledged and openly appreciated. In this respect, more broadly-based and more frequent consultations of staff would contribute to a better understanding of the problems and to the devising of solutions to those problems.
- 6.2.36. It is up to the competent authorities to address these demands efficiently and swiftly.

#### ***The role of the trade union organisations***

- 6.2.37. It is clear that proper social and trade union relations are essential. Of course, the administration must acknowledge the role of the trade union organisations; for their part, however, the latter must avoid any temptation to seek to set up a kind of alternative hierarchy designed to encroach upon the powers and responsibilities of the bodies which are officially responsible.

6.2.38. In this respect, the Committee wishes to emphasise the extent to which the trade union organisations exercise a responsibility that is crucial for the success of the plan to change and modernise the European civil service. If the service is to be reinvigorated, all the values that underpin its quality and efficiency must be rigorously promoted. Those values must be accepted, not only in terms of their principles but also of their practical consequences. The trade union organisations representing members of the European civil service will succeed only if they encourage that approach.

### **6.3. Objectives and instruments of staff policy**

6.3.1. Having an effective and forward-looking staff policy implies making every effort to recruit, train and retain a body of officials of the highest quality.

6.3.2. The Staff Regulations of the Community institutions are concerned to establish the necessary conditions for pursuing these objectives. However, the provisions of the Staff Regulations are not of themselves sufficient: they must be followed up by coherent practices capable of dealing with recent developments.

#### ***Recognition of merit***

6.3.3. One essential instrument required to create a real staff policy is the creation of a system of recognition of merit. There is no provision for a system of financial incentives in the European civil service, and this is the result of a desirable and understandable choice. There is then all the more reason for other forms of motivation to be used, which we will consider later.

6.3.4. Recognition of merit cannot be a mere slogan with no consequences in practice. It is a principle which must affect all aspects of staff policy. A policy of merit will raise the quality of the organisation as a whole; applied at all levels of the hierarchy it will have a copy-cat effect, encouraging motivation and improving output. Moreover, a culture of quality strengthens the feeling of participation and loyalty to the institution and may help weaken national idiosyncrasies, thus enhancing the confidence of citizens in the Union.

6.3.5. A policy of recognition of merit requires recruiting mechanisms which meet high standards of efficiency and rigour, efforts to improve personal and professional abilities, a correct and selective system of assessment for promotions, and an effective and credible method for penalising errors.

#### ***Training***

6.3.6. It is in the administration's interest to be able to rely on motivated and qualified staff, just as much as it is in the official's interest improve his own training and professional abilities and thereby improve the quality of his work and his opportunities to further his career. Training and mobility have an essential role in achieving these objectives, and these aspects are closely linked.



- 6.3.7. First of all, a policy of training and professional conversion should be conceived as a process, starting with the probationary period and forming an ongoing, compulsory element throughout the official's career. This means that the Commission must commit itself to training measures, even going beyond the current provisions of the Staff Regulations<sup>58</sup>
- 6.3.8. As early as the probationary period<sup>59</sup>, the training of new officials should be adapted to take account of their future duties, placing particular emphasis on the need to work in a multinational team, developing a genuinely 'European' spirit and culture.
- 6.3.9. Every effort should then be made to develop the official's abilities and their adaptability. Thus they should be given the opportunity of spending short periods in departments other than the one in which they are currently working, or even outside their institution.
- 6.3.10. A programme of specific seminars should also be drawn up, designed to meet the needs of the various categories of staff. In this connection, one might even consider founding a European Union college (or at least a training centre) or setting up, again at the instigation of the European Union, a network of external colleges to train the staff of all the Institutions.
- 6.3.11. For all officials, participation in training courses should be a factor to be taken into account in staff reports with a view to promotion<sup>60</sup>. In other words, training should promote career development, preparing officials for greater responsibilities. Apart from this, more specific training should be provided for the exercise of particular duties. This is true in particular of duties relating to the management of human and financial resources, since people management is an essential element in the strategy of administrative modernisation.<sup>61</sup> An aptitude for management should also be cultivated at the beginning of the official's career, not just when he or she is being given management duties, and should be specifically assessed in staff reports. One might even consider giving specific training to staff who are required to assess their subordinates (e.g. reporting officers and members of selection boards).
- 6.3.12. At present the Commission is developing a number of training programmes, but its efforts are centred – in respect of about half the training appropriations<sup>62</sup> – on language courses (which should concentrate on cases where training is in the genuine interests of the service and, in this context, should be organised in as effective a way as possible). On the other hand, appropriations for non-linguistic training fell considerably in 1996 and

---

<sup>58</sup> Article 24, third paragraph, of the Staff Regulations lays down that the Communities '*shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests.*'

<sup>59</sup> It will be recalled that Article 34 of the Staff Regulations lays down that '*Officials other than those in Grades A1 and A2 shall serve a probationary period before they can be established. The period shall be nine months for officials in Category A, in the Language Service or in Category B, and six months for other officials.*'

<sup>60</sup> According to Article 24, fourth paragraph, of the Staff Regulations, '*Such training and instruction shall be taken into account for purposes of promotion in their careers.*'

<sup>61</sup> Apparently the Commission will be reorganising its programmes to this effect.

<sup>62</sup> see Annex 6. The Commission's training policy is funded by two budget headings: A-4030 for language training and A-7060 for professional training (or computer training). See Annex 7 for the main branches of non-linguistic training.

1997. This trend was fortunately reversed by an increase in 1998 and another in 1999, taking account of the first stage of the management training programme and, more generally, of the increase in the number of training instruments in connection with the MAP 2000 (Modernisation of Administration and Personnel for 2000) programme.

- 6.3.13. Even taking account of these most recent increases, the appropriations allocated to training activities seem inadequate since they represent only 0.57% of the total appropriations allocated to salaries, while the average in national administrations seems to be of the order of 2% and that in the private sector is generally much higher, particularly at times when the organisation is restructuring (as should be the case with the Commission at present).
- 6.3.14. It goes without saying that these efforts should be monitored by setting up – perhaps in cooperation with the other institutions – an evaluation system making it possible to analyse the effectiveness of training measures.

### ***Mobility***

- 6.3.15. Mobility problems are closely linked to staff training, since the more adequately the training is organised, the easier mobility becomes. Like training, mobility benefits both staff and the institution, given that the institution's main interest in this context is to encourage the official's flexibility and ability to adapt to carry out different types of duties.
- 6.3.16. In fact, a regular change of duties or tasks guarantees the continued flexibility, motivation and productivity of staff. As Mr Priestley, Secretary-General of the European Parliament, stressed in his letter of 26 September 1997, the stability which results from keeping the same officials in the same posts is positive in the short and medium term because it facilitates acquisition of expertise, but harmful in the long term, since it can lead to stagnation. Mobility should thus be sought by the individual or prompted by the institution when stability is achieved and before stagnation sets in.
- 6.3.17. There are several provisions in the Staff Regulations which allow for and even provide the means for mobility (transfer, secondment etc.). In reality, however, this mobility is not adequately put into practice. On the one hand it is not sufficiently encouraged by the institution, and on the other hand many officials do not aspire to it, often having a tendency to remain in their original department, or at least in similar departments which do not involve reassessing their knowledge and their working methods. The result of this is that some officials never acquire a wide range of experience.
- 6.3.18. Mobility should be encouraged, and no exceptions should be allowed, and after a certain time it should become compulsory to change jobs. It might even be desirable to establish maximum lengths of service for all grades and functions. At any rate, flexibility should be recognised as a quality taken into account in connection with promotion. For Category A officials in particular, mobility should be an essential precondition for duties involving leadership or management of staff.

### ***Empowerment and decentralisation***

- 6.3.19. Empowerment is also an important element of staff policy and, more generally, of the organisation of the European civil service. Empowerment means enhancing staff members' professional awareness, their attachment to the institution and their feeling of involvement in the life and problems of their own administration. In other words, involving them more closely in their own work. However empowerment also means making officials clearly and directly responsible for their own activities and for accomplishing the duties allocated to them.
- 6.3.20. However, in the Commission, the conditions for genuine empowerment do not seem to be present. As this Committee remarked in its first report (para. 9.4.25), *'The studies carried out by the Committee have too often revealed a growing reluctance among the members of the hierarchy to acknowledge their responsibility.'*
- 6.3.21. Empowerment requires first and foremost that everyone's duties should be clearly defined, which means eliminating the ambiguities which exist in this connection at all levels of the Commission (see in this connection Chapter 7 of this report). It also requires that the efforts made to carry out the duties allocated to the official, and the results obtained, are encouraged and rewarded. This in turn means that each person's work should be 'visible', that is identifiable as being the individual official's own work by his immediate superior and not lost in the anonymous output of a group in which no-one knows (or is in a position to know) who does what.
- 6.3.22. In other words, it must be possible to identify the each link in the hierarchical chain in its individuality and specific function. This is all the more important since the wider and more important the tasks allocated to the official, the heavier the responsibilities on them.
- 6.3.23. In this context of empowerment, decentralisation (or perhaps one should say 'deconcentration') plays an important part. As the Commission's draft Third Code of Conduct for Officials points out, decentralisation and the allocation of wider powers to officials will encourage them to be more responsible in both senses of the word: assuming personal responsibility *for* the tasks allocated to them, and committing their personal responsibility *towards* the institution and ultimately towards the people. With this in mind, it is not desirable to create or maintain posts with no real responsibilities (or corresponding workload). In this connection, we should refer in particular to the situation of deputy Directors-General and advisers, which has justly given rise to a considerable amount of criticism. Not only do the distinctions among officials in the A1 grade seem to be justified rather by reasons of national balances than by real needs, they are also not always accompanied by a real allocation of duties.
- 6.3.24. For some years now, initiatives towards greater decentralisation have been taken within the Commission, though on the basis of practices which vary somewhat between the Directorates-General. However, in order to succeed, decentralisation must take place in an ordered manner – as the new Commission envisages in a rather ad hoc way<sup>63</sup> – *'in*

---

<sup>63</sup> See the document distributed by the new Commission on 12 July 1999 entitled "The operation of the Commission", Annex 3: "Principles of internal coordination."

*order to guarantee the coherence and effectiveness of the Commission's action and the quality of its initiatives'. But it is also necessary to ensure that there is genuine leadership, exercised correctly and indeed firmly. As Mr Priestley remarks in his above-mentioned document: 'Good quality management is not incompatible with public service; on the contrary, it is the key to its success. Sound administrative practice is essential, but so is efficient management, which is not the same thing. [...M]anagement staff must be given real responsibility, through decentralisation, and they must set an example to their staff in terms of commitment, competence, punctuality, conscientiousness, respect for rules etc....In general, all staff must be aware that, in addition to rights, they also have obligations towards the institution.'*

- 6.3.25. The responsibility of staff in management roles thus extends to the completion of tasks they have allocated to their subordinates and which they are supposed to supervise and monitor. This means that realistic objectives should be set and periodically updated, and that there should be effective and regular controls, with a monitoring system to check results.

### ***Career incentives***

- 6.3.26. It is regrettable that there is no real careers policy in the Commission. It is quite clear that career incentives are essential for a policy seeking to guarantee the motivation, effectiveness and quality of staff.
- 6.3.27. Looking at career structure, it is clear that the career brackets are rigid, in the sense that the Staff Regulations allocate staff to four distinct categories (A-B-C-D) the divisions between which are relatively hard to cross except by an internal competition, but also and particularly in the sense, as we will see, that in practice movement from one grade to another within these categories tends to be automatic and based on length of service, rather than being based on a genuine assessment and recognition of merit.
- 6.3.28. It is also a short career structure within each category. Excluding the limited percentage of officials reaching the peak of their career (A1 and A2), the normal career development covers 5 or 6 grades (from A8/A7 to A4/A3), which means that for the great majority of staff it covers a period of 20-25 years. On average, then, an official reaches the end of his career development at the age of around 50-55 with the prospect of staying there more than ten years. The career is even shorter for B and C category staff, moving through a total of only 5 grades.
- 6.3.29. Such a system may involve serious risks of stagnation and growing inflexibility. On the one hand, career incentives seeking to stimulate the commitment and ambitions of staff seem very limited. On the other hand, there is no effective mechanism to encourage a redistribution of staff or the departure of those who, since they have no further career prospects, are less motivated. One might even say that to some extent the current system these officials to stay on (e.g. increased pension rights for each year worked between the ages of 60 and 65).
- 6.3.30. Solutions should therefore be considered to reduce the risks of stagnation which this situation entails.

- 6.3.31. This set of problems (as well as reasons of a budgetary nature) may be linked to the introduction in 1988 of a ‘middle management’ system which involved separating grade from function in supervisory posts. In other words, a given grade does not always involve the same duties; on the contrary, they can be carried out by staff in different grades, resulting in management duties being allocated to a wider range of grades (A5/4/3). This has the advantage of not holding up some officials from progressing on the promotion ladder, while enabling other lower-ranking officials to carry out duties for which they are obviously already competent or prepared.
- 6.3.32. This practice, which is likely to encourage officials in lower grades, could be considerably developed, while eliminating some problems raised, as we shall see, by the promotion arrangements used in this connection (see below, under the heading ‘assessment and promotion’).
- 6.3.33. One might also consider genuine early retirement measures, similar to those used when new Member States join the EU. In particular, this solution could be considered as a part of the structural reforms announced by the new Commission. This early retirement scheme should be set up for 3-5 years to permit the Commission to implement a wider-ranging strategy.

## **6.4 Organisation of the staff**

### *The various categories of staff*

- 6.4.1. The Commission’s staff may be classified according to various categories: those who are or are not employed under the Staff Regulations, internal and external staff, permanent or temporary, contractual or non-contractual, employed under private or public law, etc.
- 6.4.2. For purely practical purposes we will use in this chapter two distinct notions, though in the case of auxiliaries and local staff these do in fact overlap, namely:
- staff employed under the Staff Regulations, including officials and other servants (temporary staff, auxiliary staff, local staff and special advisers); and
  - external staff, including the remaining contractual staff (temporary staff, service providers, detached national experts, etc.)<sup>64</sup>, but also, in some respects, the abovementioned auxiliaries and local staff.

---

<sup>64</sup> The judgment of 6 December 1989, case 249/87, *Mulfinger and others. v. Commission*, ECR 4127, may be cited, where it states: ‘*The Staff Regulations of Officials and the Conditions of Employment of Other Servants do not constitute an exhaustive body of rules prohibiting the employment of persons otherwise than within the framework of those rules. On the contrary, the Commission’s powers to conclude contracts governed by the law of a Member State extends to contracts of employment or contracts for the provision of services.*’

### *Staff employed under the Staff Regulations*

- 6.4.3. Staff employed under the Staff Regulations are subject to a system of rules set out in the Staff Regulations (for established officials) and the Conditions of Employment of Other Servants (for other staff).
- 6.4.4. The Commission's (1999) operating budget contains 16 511 permanent posts (officials) and 690 temporary posts<sup>65</sup>. These two categories taken together now account for almost 60% of the Community Institutions' total budgetary posts.

### *Established officials*

- 6.4.5. Established officials are full members of the European civil service. They hold permanent posts in one of the categories (A, B, C or D) and in one of the grades provided for by the Staff Regulations.
- 6.4.6. In principle, only established officials may carry out the duties of a civil servant. These duties are linked to the functions of the institution which derive from the powers conferred on that institution by the Treaties or by acts adopted in pursuance of the Treaties<sup>66</sup>.

### *Other servants*

- 6.4.7. Apart from established officials, who have a permanent employment relationship, there was from the very outset a need to call on temporary staff to fulfil, with a degree of flexibility, the Institution's specific ad-hoc requirements which it was not possible to satisfy immediately and adequately with established officials.
- 6.4.8. The latter constitute the category of 'other servants', for which a specific act (the Conditions of Employment of Other Servants) was adopted at the same time as the Staff Regulations in order to establish a general regulatory framework for them.
- 6.4.9. Given the many types of duties which these other staff are required to perform, it was found necessary to subdivide the category of 'other servants'. The Conditions of Employment of Other Servants provides for several categories of staff: 'temporary staff', 'auxiliary staff', 'local staff' and 'special advisers'. The first two categories are in turn divided into several sub-categories<sup>67</sup>.

---

<sup>65</sup> See tables in Annexes 1 and 2.

<sup>66</sup> The Court of Justice considers that the power to act in the capacity of a civil servant of the Institution can only be conferred on external staff in exceptional circumstances, whereas for 'other servants' this is quite a routine occurrence. (see judgment of 28.2.1989, joined cases 341/85 et seqq., *Van der Stijl and another* ECR p. 557) In the Court's opinion: 'it must be pointed out that in the case of posts involving the exercise of a power to take decisions the institutions must follow one of the legal procedures which are laid down limitatively in the Staff Regulations or in the Conditions of Employment of Other Servants of the European Communities.' (ground 11).

<sup>67</sup> See in [Annex 3](#) the overall statistics concerning staff actually employed by category and statutory or contractual working relationship.

- 6.4.10. Temporary staff are the main category of ‘other servants’. This category includes: staff engaged to fill a post which is included in the list of posts and which the budgetary authorities have classified as temporary; staff engaged to fill temporarily a permanent post in the list of posts; staff engaged to assist a person holding an office provided for in the Treaties or the elected President of one of the institutions or organs of the Communities or the Elected Chairman of one of the political groups in the European Parliament; and staff engaged to fill temporarily a permanent post paid from research and investment appropriations (Art. 2 of the Conditions of Employment of Other Servants ). The first of these categories is the most frequent as regards operating appropriations.
- 6.4.11. In accordance with the nature of the working relationship under which they are employed, other staff are engaged by contract<sup>68</sup>. However, the first sub-category of temporary staff (those in temporary posts) are required to go before a selection board. Similarly, auxiliary staff in category C and D have to take an aptitude test. The remaining staff in the ‘other servants’ category are not required to undergo any prior selection of this nature.
- 6.4.12. At present, although they are governed by a specific set of rules (the Conditions of Employment of Other Servants), what still distinguishes temporary staff from established officials is the temporary nature of their employment.
- 6.4.13. It should also be noted that temporary staff have been accorded the right to participate in internal competitions of the institutions for which they work, in order to acquire the status of officials<sup>69</sup>.

### ***The case of research staff***

- 6.4.14. Within the category of ‘other servants’ at the Commission, the staff known as research staff deserve particular mention. This is the last of the categories of temporary staff<sup>70</sup> referred to above.
- 6.4.15. These staff members are paid from the research budget. The list of research posts and the relevant administrative expenditure are entered in part B of the budget. For each specific programme a ceiling is set by the legislative authority, and the annual expenditure is set and submitted to the Budgetary Authority for checking. For example, it appears from Annex 3 that, in 1999, research and technological development accounted for 3 638 permanent and 74 temporary posts. These staff are divided between the Joint Research Centre (2 080 posts) and work on indirect measures (1 632 posts)<sup>71</sup>.

---

<sup>68</sup> Article 1 and 6 of the Conditions of Employment of Other Servants.

<sup>69</sup> See judgment of 8 November 1990, case T-56/89, *Bataille v. European Parliament*, ECR II-597.

<sup>70</sup> Article 2 (d) of the Conditions of Employment of Other Servants: ‘*staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the section of the budget relating to that institution.*’

<sup>71</sup> See the corresponding budget statistics in Annex 4.

- 6.4.16. Among research staff, who are recruited on a contractual basis, a distinction needs to be drawn between interim staff and auxiliary staff, detached national experts and visiting scientists, temporary staff on non-renewable three-year contracts and temporary staff on renewable five-year contracts.
- 6.4.17. The system of rules applicable to these staff makes them a kind of enclave within the general system of Commission staff, with quite specific rules and procedures, although these are gradually being brought into line with the general system.
- 6.4.18. In fact, major innovations have recently been made to deal with the problems which have appeared in practice, particularly with regard to a lack of transparency and too many ‘temporary’ posts. These innovations are intended to align with policy concerning staff paid from the operating budget, while preserving the specific characteristics of research staff, particularly in the field of direct measures.
- 6.4.19. Specifically for the recruitment of staff on five-year contracts – currently carried out by means of quite flexible and rapid selection procedures – a new system was introduced in 1999 to make these procedures more transparent and more similar to those used for the recruitment of established officials.
- 6.4.20. As regards the excess of ‘temporary’ posts, given that there was a need for more permanent research staff, the new policy adopted in 1996 provides for the balance between permanent and temporary staff to be restored.
- 6.4.21. The Committee recommends that these changes be put into practice effectively and speedily and in particular that the transparency of the system be adequately guaranteed.

### ***The problem of the termination of other servants’ contracts***

- 6.4.22. Regarding the problem of terminating other servants’ contracts, attention should be drawn first of all to Article 8 of the Conditions of Employment of Other Servants, which lays down that ‘*Temporary staff to whom Article 2(a) applies may be engaged for a fixed or indefinite period*’, whereas ‘*Temporary staff to whom Article 2(b)<sup>72</sup> applies shall not be engaged for more than two years, and their contracts may be renewed not more than once for a maximum period of one year. At the end of that time they shall no longer be employed as temporary staff.*’<sup>73</sup>
- 6.4.23. In reality, the fact that ‘other servants’ and in particular temporary staff are treated in the same way as officials, and the tendency for the Commission to employ staff on short-term contracts, have given rise to serious problems. What happens is that the user departments try to obtain exemptions from the rules governing the duration of contracts in order to keep contract staff for as long as possible. In other words they have shown themselves keener to maintain the number of staff they consider essential for the service than to comply with the statutory length of the contract. Consequently the practice has arisen of renewing fixed-term contracts for staff

---

<sup>72</sup> First of the aforementioned categories.

<sup>73</sup> See judgment of 1 February 1979, case 17/78, *Deshormes v. Commission*, ECR p. 189.



several times, or of not terminating contracts concluded for an indefinite period. The impression has thus spread that the ‘temporary’ nature of the contract was purely a formality in this case.

- 6.4.24. Serious difficulties then arose when the Commission decided in 1996 to go back to enforcing the temporary nature of other servants’ contracts. At the end of the transitional period it had laid down for this purpose, the implementation of the decision resulted in the departure of a significant number of temporary staff and created problems for the Directorates-General in which they were employed.
- 6.4.25. Having said that, it is clear that on principle of temporary contracts should be used for temporary staff. One way of eliminating the disadvantages mentioned might be to appoint temporary staff to permanent posts (Article 2(b) of the Conditions of Employment of Other Servants) rather than to temporary posts (Article 2(a) of the Conditions of Employment of Other Servants) included in the list of posts appended to the section of the budget relating to that institution. This would result in an obligation for the staff in question to leave, in accordance with those provisions, and there would no longer be any reason for them to apply pressure.
- 6.4.26. At the same time, it would be advisable to reduce gradually the list of temporary posts, and to return to the practice of allocating contracts to these posts on a case-by-case basis in the light of the technical nature of the task and the time needed to complete it.
- 6.4.27. Past practice is at the root of several difficulties. This practice led first of all to contracts being renewed without justification, and then to their being terminated under conditions which led several of the persons concerned to take legal action. Since proceedings are still pending on this issue, the Committee considers it inadvisable to make any further pronouncements on this matter.

### *Use of external staff*

- 6.4.28. In addition to its staff employed under the Staff regulations, the Commission has developed the practice of using other staff to help carry out a number of tasks calling for skills deemed not to be available within the organisation. This is one of the discretionary powers accorded to the Commission to organise its own operations, and may be considered to represent flexible management of human resources.
- 6.4.29. However, while recognising the legitimacy of this practice, the Court of Justice also defined its limits, ruling out the possibility of its being used, except in an emergency and in quite exceptional circumstances, for posts involving the exercise of the powers of a civil servant<sup>74</sup>. Recourse to external staff is thus permitted only for ad hoc or specialist tasks, which are accessory to those involving the exercise of civil service powers and are temporary in nature: administrative duties, technical assistance, provision of physical or intellectual services, etc.

---

<sup>74</sup> See *Van der Stijl* judgment, cited above.

- 6.4.30. In practice, this has given rise to a plethora of categories of external staff governed by widely varying rules as regards their legal basis (specific regulations, private law contracts, etc.), their conditions of employment and even their place of work (work or service contract, internal or external activities). Apart from the auxiliaries and local staff already mentioned, these staff include consultants, researchers, detached national experts, visiting scientists, freelance interpreters, interim staff (having a contract with an interim agency which has concluded a framework contract with the Commission), staff of companies providing services, hostesses, doctors, social workers, language teachers, etc.<sup>75</sup>
- 6.4.31. Over time, the use of external help has grown excessively and in a chaotic manner. This is mainly the result of the allocation of new tasks to the Commission, beginning in the 1980s. The Budgetary Authority also obliged the Commission to adopt a 'zero growth' policy for staff employed under the Staff Regulations.
- 6.4.32. This is one of the most striking consequences of the Commission's failure to carry out any real analysis of its needs and priorities, and thus to implement any rationalisation leading to appropriate redeployment measures. This imbalance between tasks and available staff is also clear from the fact that the Commission did not even exploit all the resources offered to it by the list of posts, as the abnormally high number of vacant posts shows. It is of course true that there is bound to be at any given time a minimum number of vacancies which are not filled, particularly as a result of the delays in recruitment under the Staff Regulations. However, it is particularly embarrassing – and hard to justify – that at a time when the Commission needs to explain its recourse to outside staff by pleading a lack of Staff Regulations posts, it has at the same time to advertise vacancies. It is also true that the arrangements for filling these posts are extremely long and unwieldy and should be speeded up considerably. Nevertheless the number of vacancies advertised is still much higher than would be required by the exigencies and mechanisms of replacement.
- 6.4.33. Moreover, the few operations aimed at restoring the balance in favour of Staff Regulations posts have been very partial and nowhere near commensurate with the requirements linked to the new management tasks allocated to the Commission.
- 6.4.34. Having said that, it should be remembered that the use of external staff is not as advantageous as one might think. It has many drawbacks: it does not guarantee that the powers of civil servants are exercised only by staff employed under the Staff Regulations; it favours a lack of transparency, as well as abuses and nepotism in recruitment; it leads to temporary staff costing nearly as much to employ as officials, sometimes more; and it leads to unorthodox practices (with the Commission awarding several successive contracts to the same person); but most of all, the use of external staff is tending more and more to be used to meet structural needs, with the result that the Commission is becoming excessively dependent on these staff.

---

<sup>75</sup> A Code of Conduct for external staff was even adopted by the Commission on 5 October 1994. See statistics in Annex 5 (pp. 48 and 51 of the 2000 PDB ).

### *The case of the TAOs*

- 6.4.35. The possibility of getting hold of external staff, and by means of much quicker and easier recruitment procedures, has led over time to the development of rather unorthodox practices, such as the use of operational appropriations (intended for the implementation of major Community policies) to cover administrative expenditure, including the provision of contract staff under various legal arrangements (the ‘mini-budgets’ condemned by the Court of Auditors).
- 6.4.36. Here, too, we must mention the cases of certain abuses which have been uncovered, such as the award of service contracts for project management and technical assistance to various kinds of private law bodies (non-profit-making organisations, commercial companies), known as ‘Technical Assistance Offices’ (TAOs) to help the Commission in its task of implementing the Community’s major policies. This practice is discussed above in Chapter 2.

### *Final observations*

- 6.4.37. The above analysis confirms that staff organisation in the Commission has become complex and hard to control, which could lead to serious shortcomings in the exercise of the powers of European civil servants.
- 6.4.38. After all these years of the application of the Staff Regulations, there is clearly an urgent need for an in-depth examination leading ultimately to the review of the system and the way in which it is applied.
- 6.4.39. This means, following a detailed analysis of the Commission’s needs, that:
- It needs to be clearly identified which are the civil service tasks, (involving the exercise of powers conferred by the Treaty and requiring to be performed by officials or temporary staff), which tasks can be carried out by other categories of contract staff, and which can be contracted out (not privatised);
  - A decision therefore needs to be made on the proportion of the Commission’s total staff which should be made up by external support staff;
  - If redeployment is not sufficient for this purpose, and if the level of dependence on contract staff is considered too high, while at the same time the need for new staff is considered to be structural, the Commission must request a new transfer of appropriations for jobs from the Budgetary Authority;
  - If, in the final analysis, temporary staff have to be called upon, the only system for filling these posts should be that set out in the Conditions of Employment of Other Servants, with strict limits on the use of other staff.

- 6.4.40. In other words, there should be a return to the Staff Regulations and the Conditions of Employment of Other Servants, thereby simplifying and rationalising the current staffing structure of the Commission.
- 6.4.41. The Committee is well aware that a reversal of the current situation can only be made gradually, given the scope of the necessary reforms and the difficulties involved. Nevertheless, the new Commission should set out its guidelines in this respect clearly and openly, and should adopt a coherent attitude to the question as soon as it takes office.

## **6.5 Careers**

### ***Recruitment***

6.5.1. Article 27 of the Staff Regulations stipulates that recruitment: *'shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities'*.

6.5.2. With a view to ensuring adherence to those principles, the institutions normally recruit staff by means of competitions. These take the form of external competitions in which all candidates who meet the specified requirements may take part and in which selection is carried out simultaneously in all the Member States on the basis of common qualifications and/or tests by an ad hoc selection board which, though independent, is appointed by the Administration itself and is often composed wholly or in part of members of the Administration<sup>76</sup>.

6.5.3. Article 29 of the Staff Regulations also refers to other procedures for filling vacancies, the most relevant of which for the purposes of this chapter is the internal competition. Special procedures are at the same time laid down for posts requiring special qualifications and for the recruitment of senior officials (particularly in grades A1 and A2). We shall deal with these when we take a look at promotion mechanisms.

### ***Competitions***

6.5.4. Despite its obvious merits, the competitions system has in practice given rise to serious problems deriving mainly from the fact that, over the years, the number of candidates has increased considerably: the last two open competitions organised by the Commission in 1994 and 1998 attracted 56 000 and 31 000 candidates, respectively.

6.5.5. Proper and efficient management of open competitions with such a large number of candidates is, effectively, impossible: organisation becomes a huge problem; the duration of the procedures places an unacceptable burden on the institution; the financial cost is too high; and it is

---

<sup>76</sup> For details of competition procedures, see Article 29(1) of the Staff Regulations and Annex III thereto.

almost impossible to ensure that the proceedings are above board. The fact that the second open competition referred to above had to be cancelled following the discovery of irregularities merely serves to confirm the extent of such problems.

6.5.6. Furthermore, selection cannot be carried out with due care and effectiveness in the presence of such a large number of candidates. The selection procedure, which is conducted by fairly diverse and heterogeneous selection boards, assisted by a large number of assessors, sometimes inadequately qualified, results in relatively effective recruitment. The primary aim of the procedure appears to have become the mass elimination of candidates so as to reduce numbers, rather than the proper selection of those candidates with the skills required by the institution.

6.5.7. However, the system does not ensure that the different nationalities are properly represented, given that some Member States yield fewer candidates (even in proportional terms), inter alia because the desire to pursue an international career is more prevalent and the necessary training structures better developed in some countries than others, and this is reflected in the results.

6.5.8. Despite the great efforts made by the Administration, the procedure has proved wholly unsatisfactory and this has had an adverse effect on the public image of the competitions system.

### ***Possible adjustments***

6.5.9. While acknowledging the organisational problems which exist in this area and the difficulties involved in reconciling diverging and sometimes opposing requirements, the Committee considers that adjustments could be made with a view to making good the shortcomings of the present system (or, at the very least, attenuating them).

6.5.10. For example, the pre-selection tests could be decentralised in each Member State. The successful candidates would then go on to take part in the competition proper, held at Community level.

6.5.11. Similarly, the practice of holding separate competitions by specialisation could be improved by means of more detailed job descriptions. Furthermore, such competitions could be used to promote the recruitment of older candidates who have more experience in the relevant area. They could also be organised at interinstitutional level.

6.5.12. What is more – bearing in mind that the ideas put forward are not mutually exclusive – separate competitions could be held by language. Competitions of this kind, which have already been held by the Council and the European Parliament, would ensure neutrality and allow the tests to reflect the cultural and professional differences existing between the Member States, while also having the unquestionable advantage of enabling existing or potential deficits in certain languages within the establishment plan to be made good. This proposal should not, of course, be implemented at the expense of recruitment standards.

### *Lists of successful candidates*

6.5.13. Adjustments should also be made with a view to putting an end to another questionable practice followed by the Commission in the recruitment field.

6.5.14. At present, the Commission does not use the method of holding a competition for a given number of posts and then drawing up a list of successful candidates classified by order of merit, on the basis of the results obtained in the competition.

6.5.15. It simply draws up and publishes<sup>77</sup> a ‘reserve list’ (i.e. a list of successful candidates classified in purely alphabetical order), from which people are taken on a case-by-case basis to fill vacant posts (Article 30 of the Staff Regulations). This is done extremely discretely and no specific reasons are given for the choice made.

6.5.16. In view of the absolute lack of certainty about when the choice will be made and the criteria on which it will be based, coupled with the fact that the decision is not publicised or explained, this system is wholly inappropriate. It gives rise to questionable practices which are far from transparent and which do not necessarily respect the rights of the candidates who, despite having got through a difficult competition, are obliged to roam the Commission corridors for months – and perhaps even years – in the hope of hearing something useful or (even better for them) finding what they are looking for.

6.5.17. The arguments put forward in support of this system are that the Commission needs to be able to choose a successful candidate whose profile matches the requirements of a given directorate-general and the risk that – on the basis of the current practice – selection based solely on merit would lead to there being too many people of one nationality, to the detriment of others.

6.5.18. The latter argument is a reflection of the growing concern over this matter, which could be addressed more effectively by adjusting the current competitions system as suggested above (for example, by introducing separate competitions by language).

6.5.19. As to the other argument, one should first of all re-establish the principle (which is merely a question of sound management) that successful candidates are appointed officials of the Commission itself, not of a given directorate-general; therefore, directorates-general do not ‘own’ the candidates whom they choose from a list. This would make the procedure less arbitrary and enable it to be based on merit, without linking the choice to the requirements (in some cases questionable or artificial) of a given directorate-general.

6.5.20. Consideration could, furthermore, be given to the possibility of drawing up lists based on merit for each specialisation. If necessary, derogations from the merit-based order could be provided for, on condition that they be granted on clear, objective grounds and justified by the interests of the service, as, indeed, Court of Justice case law allows<sup>78</sup>.

---

<sup>77</sup> Furthermore, it did not start publishing such lists until a few months ago, under pressure from the European Ombudsman (see the lists published in OJ C 187 of 3 July 1999, p. 21 et seq.).

<sup>78</sup> See, for example, the judgment of 15 December 1996 in Case 62/65, *Serio v Commission*, ECR p. 561, which states that: ‘*although it [the appointing authority] is entitled in making its selections to ignore the precise order of merit in the competition for reasons which it is incumbent upon the administration to evaluate and justify before the Court,*’

6.5.21. Whatever happens - even if it should prove necessary to retain the current system for the time being -, that system should be revised, possibly by amending Article 30 of the Staff Regulations in such a way as to ensure greater transparency. In particular, the list of suitable candidates should be made public, as should the choices made in each case and the reasons for those choices.

### ***Internal competitions***

6.5.22. External competitions are not the only means of recruiting Commission officials. The others include internal competitions (Article 29(1)(b) of the Staff Regulations), which are organised inter alia with a view to 'establishing' temporary staff and enabling officials to move from one category to another (Article 45(2) of the Staff Regulations).

6.5.23. The general comment that should be made here is that in such competitions there is always a risk of there being a tendency to 'keep things in the family', given that candidates may be known personally to the examiners. Consideration should thus be given to their abolition, or at least to the introduction of mechanisms which ensure genuine transparency and selectivity, thus guarding against this unwanted tendency.

6.5.24. Having said that, the Commission appears to have decided not to hold any internal competitions for the 'establishment' of temporary staff from the year 2000 onwards<sup>79</sup>.

6.5.25. Internal competitions could, however, still be used to enable officials to move from one category to another. However, should the Commission decide that they should not be used for this purpose either, it should grant officials wishing to change category special rights of access to open competitions, such as derogations from the age rule and, above all, a system of quotas of reserved posts. Furthermore, candidates for such posts should be obliged to gain a minimum number of points in order to be included on the list of successful candidates.

### ***Career progression***

6.5.26. In the European civil service career progression normally involves promotion to higher grades and moving through the steps within those grades; there is also the possibility of moving from one category to another.

---

*nevertheless it may not destroy the very concept of competition by departing substantially from the result of the competition without serious reasons.'* Similarly, the judgment of 18 December 1986 in Case 246/84, Kostonis v Council, ECR p. 3989, provides that: '*according to Article 30 of the Staff Regulations the appointing authority chooses from the list of suitable candidates yielded by the competition those whom it intends to appoint to the vacant posts [...]. [...] the appointing authority is entitled in making its selection to ignore the precise order of merit in the competition for reasons which it is incumbent on the administration to determine and to justify before the Court (...)* It follows that the administration is not in all circumstances bound to appoint the candidate placed first but may give preference to another candidate listed as suitable if it has reasons for doing so which can serve the interests of the service'.

<sup>79</sup> See in this connection the Williamson report, which recommends the abolition of such competitions. However, this raises the problem of how this is to be achieved, given that the case law established by the *Bataille* judgment referred to above enables temporary staff to apply for internal competitions in the same way as other candidates. Thought should be given to amending the Staff Regulations accordingly.

6.5.27. As we shall see later, special mechanisms are in place for certain grades and posts.

### ***Assessment and promotion***

6.5.28. Under the Staff Regulations, career progression and development are linked to an assessment/reports and promotions system.

6.5.29. Promotions are granted by the appointing authority by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials concerned and of the reports on them (Article 45 of the Staff Regulations). Such reports, which cover the ability, efficiency and conduct in the service of each official, are drawn up at least once every two years (Article 43)<sup>80</sup>.

6.5.30. The choices set out in the opinion of the Promotions Committee must be based on merit and on the staff report.

6.5.31. Merit has a decisive influence. The appointing authority's discretionary powers do not extend to challenging that influence; they cover only the manner in which merit is determined (for example, recommendations made by Directors-General, acceptance of assignments which are more complex or involve additional responsibilities, mobility, etc.). That authority therefore has the statutory right to take promotion decisions based on an assessment of the comparative merits of the candidates eligible for promotion, using the method that it deems most appropriate<sup>81</sup>.

6.5.32. The staff report is a vital element in the assessment of an official's career by the appointing authority, with a view to possible promotion<sup>82</sup>. However, as we saw above, the latter is not bound to rely solely on staff reports but may also base its assessment on other aspects of the merits of the candidates, such as information relating to their administrative and personal position, which is such as to qualify an assessment made solely on the basis of their staff reports<sup>83</sup>.

6.5.33. In this context of rewarding merit, seniority in the service and age are merely subsidiary criteria to be used for the purpose of deciding between candidates of equal merit<sup>84</sup>.

---

<sup>80</sup> The promotion procedure is initiated by each director-general, who job it is to consider the merits of all officials eligible for promotion in his service, with a view to drawing up promotion proposals. The directors' proposals, listed by order of priority, are posted in all the services. They are forwarded to the Promotions Committee (chaired by the Secretary-General and comprising the directors-general and twenty staff representatives), which draws up draft lists of the most deserving officials, using a points-based assessment method covering: the priorities laid down by the directorates-general (these extra points are discretionary and normally have a decisive influence); staff report; seniority in the grade and category; and age. Other criteria – mobility, equal opportunities and all other situations - are not awarded points. The appointing authority chooses from among the officials deemed the most deserving, taking account inter alia of a certain balance between the directorates-general and the priorities that they have laid down. The promotion decision is set out in an individual notice signed by the Director-General for Personnel and forwarded to the official, who may make any comments thereon which he considers relevant (Article 43 of the Staff Regulations).

<sup>81</sup> See in this connection the judgment of 1 July 1976 in Case 62/75, *De Wind v Commission*, ECR p. 1167.

<sup>82</sup> See the judgments of 5 June 1980 in Case 24/79, *Oberthür v Commission*, ECR p. 1743, and 17 December 1981 in Case 151/80, *de Hoe v Commission*, ECR p. 3161.

<sup>83</sup> See Court of First Instance judgment of 25 November 1993 in Joined Cases T-89/91 and T-89/92, ECR II-1235.

<sup>84</sup> See the judgment of 14 July 1983 in Case 9/82, *Ohrgaard and Delvaux v Commission*, ECR p. 2379: '*seniority is merely one of a number of criteria of assessment and can never take precedence over the merits of candidates*'.



6.5.34. A few remarks about the legal application of this system are necessary, since the clarity of the above principles is in some cases undermined by the discretionary component of the merit assessment process and by shortcomings in staff reports.

6.5.35. For example, it is a well-known fact that, owing inter alia to the lack of a genuine performance assessment culture, staff reports contain a number of imperfections and are in some cases poorly drawn up and inaccurate.

6.5.36. It should also be said that the approach to such matters tends to differ from directorate-general to directorate-general. Furthermore, it would appear that the interviews held prior to the drawing up of reports are not prepared with due care.

6.5.37. Furthermore, there is a general tendency to award an excessive number of points to all officials in respect of their performance, which means that it is difficult to make a genuine distinction between them when it comes to promotion. Therefore, in the absence of reliable factors on which such a differentiation may be based, the determining criterion is likely to be age and length of service, which, what is more, is contrary to the Staff Regulations, as we have already seen.

6.5.38. Also, the initial comparison of merits is made at directorate, rather than directorate-general level, which carries with it the risk of the system of values being distorted if the choice is made on the basis of a given number of officials eligible for promotion in each directorate.

6.5.39. The end result of all the above shortcomings is that the promotions system is not – or, at least, is not seen to be – fair and reliable.

6.5.40. A revision of the reports and promotions system is therefore necessary in order to improve the effectiveness of the selection process and restore the credibility of the careers system within the Commission (without forgetting that the same problems also exist in the other institutions). This should include changing the form taken by staff reports and simplifying their headings, introducing more carefully-targeted and homogeneous assessment criteria, recommending that marks be more clearly differentiated and that comments be more detailed and better substantiated, and encouraging officials to take a more active and responsible part in the proceedings.

6.5.41. Consideration could even be given to more radical solutions, such as the introduction of a system of internal competitions for a small percentage of the posts available, with particular regard to middle management posts, appointments to which are decided on the basis of a flexible procedure, which obviously carries with it some risk of favouritism. Such appointments are handled mainly by the relevant director-general, who has sole responsibility for making proposals and presenting them to the Consultative Committee on Appointments (with which we shall deal shortly). The Commissioner responsible confirms such appointments (which he can only oppose on specific grounds), while the director to whom the post is to be assigned is not even consulted on a formal basis. Conversely, the appointment of senior managers is a more collegial process.

6.5.42. The proposed system of internal competitions – which should be based on qualifications and tests, with proceedings being conducted by external selection boards or at least selection boards chaired by external figures – would enable officials who wish to speed up their career progression

or who feel that they are not sufficiently appreciated by the hierarchy an opportunity to ‘have a go’. It could also encourage the hierarchy to take greater care in drawing up staff reports, so as to guard against any embarrassing comparisons being made.

### *Appointment of senior officials*

6.5.43. The appointment of senior officials (A1 and A2) is a special case, in respect of which a distinction must be made between the two types of procedure provided for in Article 29 of the Staff Regulations. The first paragraph of that article deals with the normal promotion channel applying to all officials, involving: first promotion or transfer, then internal competitions, followed by transfer from another institution, and, lastly, external competitions; the second paragraph applies to senior officials alone, for whom ‘*a procedure other than the competition procedure may be adopted*’. In practice, the first channel (internal and interinstitutional procedures) is used in the first instance. The other channel, which can lead to the appointment of external candidates, is rarely made use of.

6.5.44. The College of Commissioners is always the appointing authority in such cases. For A1 posts, a purely oral procedure is used and decisions are adopted in a meeting of the Commissioners, on a proposal from the Commissioner in charge of personnel. For A2 posts, the opinion of the Consultative Committee on Appointments (CCA) must also be sought. This committee is chaired by the Secretary-General and comprises the head of the cabinet of the Commissioner in charge of personnel, the Director-General for Personnel and three other directors-general (in addition to three substitutes)<sup>85</sup>.

6.5.45. As everyone knows, such appointments are more bound more closely by requirements of ‘geographical balance’ – to which several references have already been made - than any other type of appointment.

6.5.46. Without wishing to ignore those requirements, one is obliged to note that over the years this system has shown its limits and the major risks to which it is subject, such as: questionable selection criteria, which do not necessarily bear any relation to the qualifications and experience required for the post; a form of ‘nationalisation’ of posts (and even of services, as a result of posts being reserved for a given nationality) resulting from one or more people of a given nationality holding a post for a long period of time.

6.5.47. A set of rules, or at least a code of conduct, laying down a number of objective and transparent criteria should therefore be drawn up to cover the recruitment of such officials, so as to reduce the risk of problems arising and to start to reverse the current trend. Thus, with regard to the significance of national balances, the flexibility of the current ‘quota’ system could be progressively increased, a time limit could be place on the length of service in such posts, the appointment of a successor of the same nationality could be prohibited, and so on. As regards recruitment procedures, more thorough selection criteria should be introduced, as should more transparent procedures.

---

<sup>85</sup> It might be useful to give a staff representative a seat on the committee, inter alia with a view to making the proceedings more transparent and given the presence of the head of the cabinet of the Commissioner in charge of personnel.

### ***The new Commission's plans***

6.5.48. The new Commission recently took up some of the above ideas in its first policy statements<sup>86</sup>, in which it announced that it intended to make appointment procedures for A1 and A2 posts subject to '*strict, transparent rules designed to guarantee that the persons appointed [...] are of the highest calibre*', and to draw on '*the sound practices in force in certain Member States*' in order to do so.

6.5.49. The following procedure is envisaged: publication of vacancy notices; assessment of candidates during a preliminary selection stage; drawing up of a clear and transparent scale of assessment for interviews with candidates (referring to management ability, familiarity with human and financial resource management procedures, knowledge of the area in question, etc.); wide-ranging interview by the CCA of the candidates selected; assessment of each candidate; opinion of the CCA and drawing up of a reasoned short-list; interview by the Commissioners of the candidates short-listed by the CCA; and appointment by the Commission.

6.5.50. With regard to internal and interinstitutional appointments in particular, provision is made for interviews with candidates to be held by the usual members of the CCA referred to above, plus, in the case of A1 posts, one or two directors-general with responsibilities in the area relevant to the post to be filled, and, in the case of A2 posts, the director-general concerned. In both cases, the CCA must call on outside expertise, which seems to indicate that a technical opinion would be sought from an outside figure.

6.5.51. A reasoned short-list is drawn up on the basis of the CCA's opinion and forwarded with the assessment sheets and the CV of each candidate selected by the Commissioners. It must be said that, given that it is conducted entirely in house, this pre-selection process comes across as another way of 'keeping things within the family'. It would be preferable for at least the Commissioner responsible to be involved. It would also be useful for such involvement to extend to the drafting of job descriptions.

6.5.52. As has already been mentioned, the short-listed candidates must be interviewed before any appointment proposal is made. For A2 posts, such interviews are conducted by the Commissioner responsible for the sector in question, and for A1 posts, by that Commissioner and the Commissioner in charge of personnel and administration.

6.5.53. In respect of A1 posts, the Commission's decision is taken on the basis of the CCA's reasoned opinion and the reasoned proposal of the Commissioner in charge of personnel and administration, with the agreement of the President and the Commissioner responsible for the area concerned. For A2 posts, the proposal is drafted jointly by the Commissioner and the relevant director-general. In this connection, it would be useful for appointment proposals to be accompanied by appropriate information to the College on the other candidates appearing on the short list.

6.5.54. As regards external recruitment, the Commission document makes no provision for the use of fixed-term contracts, which might in some cases be preferable.

---

<sup>86</sup> See point 4 (Procedures for appointments in grades A1 and A2) of the document distributed by the new Commission on 12 July 1999 under the title 'The Operation of the Commission'.

6.5.55. Having said that, the procedure described above applies in its entirety to external recruitment, the only difference being that vacancy notices aimed at external candidates are advertised more widely.

6.5.56. With regard to the profile candidates are expected to have, the document requires a minimum of 15 years' professional experience at a level equivalent to category A, gained after obtaining the qualification required for admission to that category. Those 15 years must include a minimum of 5 years' appropriate and duly confirmed experience in the relevant area. Evidence of practical experience in the discharge of managerial duties must also be produced.

6.5.57. It should be pointed out in this connection that the 15 years' professional experience required is less than that normally required of officials seeking promotion to the grades in question. Without wishing to question anybody's motives, one is obliged to note that such a system is open to the risk of people being 'parachuted in', particularly in view of the fact that the 5 years' experience in the specific area correspond exactly to the term of office of a Commissioner and, thereby, the members of his cabinet. At the very least, the 5-year period should be extended.

6.5.58. Lastly, the idea that provision may be made for a probationary period is also rather puzzling. In the case of internal appointments, to subject an official who has been in the Administration for many years to a probationary period would be quite absurd; to subject external candidates to one would be not just incomprehensible, given the type of appointment procedure described above, but downright dissuasive, in view of the career risks this would force them to take.

### *Termination of service*

6.5.59. The service of officials may be terminated by resignation, compulsory resignation, retirement in the interests of the service, dismissal for professional incompetence, removal from post, retirement or death<sup>87</sup>.

6.5.60. Dismissal for professional incompetence is the issue that is of most relevance to this chapter (for details regarding removal from post, see 'Disciplinary proceedings' below).

### *Professional incompetence*

6.5.61. The first comment to be made in this connection is that the hierarchy only very rarely takes appropriate action on the cases of professional incompetence or misconduct which actually come to light, as is demonstrated by the almost total lack of any precedents and the extreme scarcity of case law in this area. It must be said, however, that the provisions of the Staff Regulations governing such matters are far from being a model of clarity. The only provision applying thereto (Article 51) goes no further than to lay down the measures which may be taken should an official prove incompetent (dismissal or classification in a lower grade).

---

<sup>87</sup> See Article 47 of the Staff Regulations.

6.5.62. The ambiguity surrounding this matter is compounded by the relatively widespread tendency to confuse professional incompetence with disciplinary offences. Nonetheless, despite the fact that under the Staff Regulations the same procedure is applied to both (Annex IX), professional incompetence and disciplinary offences are quite separate concepts. The former covers requirements relating to quality of work, efficiency and commitment, while the latter relates to failure on the part of officials to comply with their obligations. Disciplinary offences normally take the form of individual punishable acts of misconduct, while professional incompetence consists of a combination of actions that must be assessed as a whole<sup>88</sup>.

6.4.63. In the first instance, cases of professional incompetence call for a constructive approach aimed more at solving the problems that have arisen than at taking punitive action. This means, for example, that the administration should first check whether the incompetence is 'structural' or whether it depends on the type of assignments allocated to the official (for example, managerial duties). It should also check whether it is caused by a lack of motivation which has gradually set in over time, owing to a lack of interest in the tasks assigned to the official (in which case it could be tackled by means of transfer to another post), or by other difficulties of an operational or personal nature.

6.5.64. If, despite the above efforts and, where appropriate, after transfer to another post or service, the incompetence persists, there should be no hesitation in applying Article 51. In this connection it should be pointed out that, although this has sometimes been forgotten in practice, the Administration can only make use of Article 50 in cases where the profile of a director-general or a director is not in keeping with the interests of the service.

6.5.65. Given the guarantees and procedures available, the difficulties involved in proving professional incompetence cannot be used as an excuse for failing to take such a decision. As we have already seen, all staff employed under the Staff Regulations are subject to a probation report and staff reports or other forms of appraisal. A negative comment in certain headings of such reports constitutes initial evidence of professional incompetence. If such comments are repeated over time or in respect of different posts, Article 51 should be applied<sup>89</sup>.

6.5.66. To conclude, it should be pointed out that the difficulties arising in the application of Article 51 derive also from the fact that the measures laid down for professional incompetence are out of proportion to the offence: dismissal and even downgrading constitute (or may constitute) penalties that are excessive in relation to the nature and seriousness of the shortcomings which have been established.

---

<sup>88</sup> See Williamson report, p. 60. As stated in the Court of Justice judgment of 21 October 1980 in Case 101/79, *Vecchioli v Commission*, ECR p. 3069: *'the specific nature of Article 51 [...] is in fact due not only to the grounds justifying it but also to the measures to which it leads and the nature and effects of which, unlike those in disciplinary proceedings, are better fitted to the situation which has to be rectified in the interests of the service'*.

<sup>89</sup> In its judgment of 21 October 1980 in Case 101/79, *Vecchioli v Commission*, ECR p. 3069 (referred to above), the Court of Justice found that: *'the incompetence of an official within the meaning of Article 51 of the Staff Regulations must be evaluated with particular regard to his ability, efficiency and conduct in the service, that is to say, to the factors referred to in Article 43 of the Staff Regulations concerning periodic reports'*, on the understanding that *'the authority [...] must be able to take into consideration the official's career as a whole'*.

## **6.6. Legal status of the staff**

6.6.1. It is in the interests of all the Member States and of the institutions themselves to maintain an independent body of officials of the highest calibre. The legal provisions applying to the status of Community staff were drafted with a view to both setting in place conditions and incentives which would make the European civil service attractive and competitive and imposing a range of obligations consistent with the duties the staff is expected to discharge in an independent, multinational organisation.

### ***Entitlements and benefits***

6.6.2. The entitlements enjoyed by the staff of the Community institutions are largely commensurate with those granted to civil servants in almost all of the Member States.

6.6.3. Special conditions are provided in order to both encourage people to enter the European civil service and take account of the difficulties which such a choice entails, including those deriving from moving to another country.

6.6.4. The working conditions of Community staff are criticised from time to time. However, such criticisms derive less from a perception that the benefits are excessive than from the fact that those benefits are not always justified in the light of the quantity and quality of the work performed. Such criticisms should be answered by means of a rationalisation of structures and a clear, transparent and effective distribution of work among officials.

### ***Immunities***

6.6.5. The 'privileges and immunities' enjoyed by officials are intended to safeguard the independence of the European civil service. They therefore do not constitute 'rights' held directly by officials, given that they are accorded exclusively in the interest of the Communities and are designed solely to prevent the operation and independence of the Communities from being hindered in any way. Each Community institution is therefore required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities<sup>90</sup>.

### ***Duties and obligations***

6.6.6. The Staff Regulations lay down the values and duties to which staff of the Community institutions are required to adhere in the performance of their duties (and even after termination of service)<sup>91</sup>.

---

<sup>90</sup> Article 18, subparagraph 2, of the Protocol on the privileges and immunities of the European Communities.

<sup>91</sup> See inter alia Articles 11 to 23.

6.6.7. In this connection, the Commission has drawn up a code of conduct for staff aimed at preventing, or at least reducing the scope for, abuses. It must be said, however, that this code basically repeats the provisions of the Staff Regulations and the principles implicit therein. What is more, the code's provisions appear to be more a set of moral guidelines than genuine rules that can be implemented in a practical, effective manner.

6.6.8. Furthermore, they make no reference to various situations of incompatibility (in the broadest sense of the term) which have emerged in practice over the years, such as incompatibilities concerning those involved in the budgetary procedure, those authorised to draw up and sign contracts and anyone likely to have an influence over such persons. In such cases, with the exception of Article 14 of the Staff Regulations<sup>92</sup>, there are no detailed rules governing possible conflicts of interest (ties of kinship or business relations) which might arise among officials responsible for expenditure and third parties (natural or legal persons, partners, shareholders or directors of companies and other persons or entities under contract, such as TAOs).

6.6.9. Another example is that of Community officials from certain Member States who held a post in the national civil service prior to entering the service of the European Communities. Such officials work for the Communities under administrative arrangements equivalent to special leave, which enable them not to lose their status as national civil servants, subsequently to return to their previous post in their country of origin and even, in some cases, to continue to receive certain allowances to which national civil servants are entitled. Situations are quite obviously likely to give rise to problems of inequality and of incompatibility with the status of Community official.

Lastly, with regard to situations of incompatibility which may arise after the termination of service, Article 16, subparagraph 1, of the Staff Regulations stipulates that: *'an official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits'*. The second subparagraph states that: *'each institution shall, after consulting the Joint Committee, specify what posts debar officials who have held them from engaging in any occupation, whether gainful or not, for a period of three years after leaving the service, except in accordance with the following provisions'* (declaration made to the institution and, where appropriate, approval granted by the institution).

6.6.10. The Commission has yet to draw up a list of such occupations (and the same is true of the other institutions). In the absence of such a list, the institutions are obliged to deal with each case on an ad hoc basis.

### ***Liability of officials***

6.6.11. Given that the obligations incumbent on officials (and former officials) are extremely varied in nature and scope, the consequences of failing to comply with those obligations also vary widely.

---

<sup>92</sup> This article – which, moreover, does not go into any great detail – requires officials to declare any interests likely to impair their independence, as follows: *'Any official who in the performance of his duties is called upon to decide on a matter in the handling or outcome of which he has a personal interest such as to impair his independence shall inform the appointing authority'*.

6.6.12. In the cases where failure to comply with an obligation does not constitute actual misconduct, those consequences may be felt at the staff report or promotion stages.

6.6.13. If, however, such a failure comes about ‘intentionally or through negligence’ (Article 86 of the Staff Regulations), disciplinary proceedings will be opened and may lead to the imposition of penalties on the official concerned. Articles 86 to 89 of the Staff Regulations and Annex IX thereto establish a fairly detailed framework for such cases, list the relevant disciplinary measures and set out the substantive conditions and procedural arrangements for their application.

6.6.14. Furthermore, officials may be held liable to payment of compensation for any damage suffered by the Communities as a result of serious misconduct on their part in the performance of their duties (Article 22 of the Staff Regulations). This principle is confirmed by the Financial Regulation (Title V, Articles 73 to 77) in respect of authorising officers, financial controllers, accounting officers, and administrators of advance funds, owing to the fact that they have specific responsibilities in respect of the management of the Community’s finances. The Financial Regulation merely establishes the principle of such liability, referring the reader to Article 22 of the Staff Regulations for the conditions under which such liability may be determined (see Chapter 4).

6.6.15. Lastly, it should be remembered that failure on the part of an official to comply with his obligations may lead to him being held criminally liable under the national law of the Member State in which that failure occurred.

### **The difficulties of the system**

6.6.16. Having said that, it may be noted that the provisions of the Staff Regulations concerning staff misconduct seem to be fairly clear and precise. From this point of view, it might well be said that there is a well-worn path for reacting appropriately to such misconduct. However, the way in which the system works is far from satisfactory, as practice over recent years has shown.

6.6.17. With regard to the principle of liability to pay compensation, it may be noted that, at least where those managing Community finances are concerned, it has only rarely been applied.

6.6.18. Criminal liability, in turn, is very difficult to enforce owing to the limits imposed by national laws (pending the entry into force of conventions concluded between the Member States<sup>93</sup>) regarding the punishability of offences which breach Community interests (see Chapter 5)

---

<sup>93</sup> See in particular the Council Act of 26 May 1997 drawing up, on the basis of Article K.3(2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195 of 25 June 1997). This convention, which has not yet come into force, requires the Member States to treat as criminal offences under their national legislation certain types of conduct (active and passive corruption) which are damaging to the Communities’ financial interests and are defined in the convention itself.



- 6.6.20. Finally, where disciplinary liability is concerned, implementation of the system has shown its limitations in terms of speed and effectiveness.
- 6.6.21. Restricting ourselves here to disciplinary issues, it may be noted that the Commission itself (on the basis of the experience gained, in particular, over the past few years, which have seen an increasing number of cases) is planning to propose major changes to the current system to make it more effective and to speed up procedures, while respecting the rights of the defence.
- 6.6.22. In some cases, such a reform would require changes to the Staff Regulations. In others, on the other hand, improved application of the Staff Regulations would suffice. We shall now briefly review the main aspects.

### **The disciplinary procedure and its shortcomings**

- 6.6.23. First of all, it must be borne in mind that, with the exception of very minor measures, disciplinary measures are imposed by the appointing authority after the *ad hoc* proceedings described in Annex IX to the Staff Regulations have been completed.
- 6.6.24. In particular, it is provided that a report is submitted to the Disciplinary Board (which will be discussed shortly) by the appointing authority, stating clearly the facts complained of and, where appropriate, the circumstances in which they arose. The report (which is drawn up by an official of at least the same grade as the official charged) is communicated to the chairman of the Disciplinary Board, who brings it to the attention of the members of the Board and of the official charged. After completing its deliberations, the Board delivers an opinion on the disciplinary measure which it deems appropriate to the facts. The opinion is transmitted to the official concerned and to the appointing authority. The latter, after first hearing the official, decides on the disciplinary measure to be applied. Throughout the proceedings, the institution must respect the official's individual rights and, in particular, his rights of defence<sup>49</sup>. The official must therefore first be heard and may be assisted throughout the proceedings by a lawyer<sup>50</sup>, which is not possible for the Administration<sup>51</sup>.

In practice, this procedure has revealed serious shortcomings, in several respects.

---

<sup>49</sup> As the Court has stated: '*The right to a fair hearing in disciplinary proceedings must be observed not only in the course of proceedings before the Disciplinary Board pursuant to the second paragraph of Article 87 of and Annex IX to the Staff Regulations but also in the course of disciplinary proceedings before the appointing authority governed by the first paragraph of Article 87.*' (judgment of 19 April 1988, Case 319/85 *Misset v Council* [1988] ECR 1861). See also Court judgments of 4 July 1963, Case 32/62 *Alvis v Council* [1963] ECR 99; 8 July 1965, joined Cases 27/64 and 30/64 *Fonzi v Commission* [1965] ECR 481; 7 May 1969, Case 12/68 *X. v Commission* [1969] ECR 109; and 17 December 1981, Case 115/80 *Demont v Commission* [1981] ECR 3147.

<sup>50</sup> All the more so because Article 4 of Annex IX to the Staff Regulations provides that '*...before the Disciplinary Board [the official] shall have the right to submit observations in writing or orally, to call witnesses and to be assisted in his defence by a person of his own choice.*'

<sup>51</sup> As the Court of Justice has found: '*Article 4 of Annex IX entitles the official charged to be assisted in his defence by a person of his own choice before the Disciplinary Board, but no similar right is given to him in respect of a hearing by the appointing authority*' (judgment of 16 December 1976, Case 124/75 *Perinciolo v Council* [1976] ECR 1953).

The rules concerning the formal circumstances of and arrangements relating to the procedure and the protection of individual rights are fairly vague and brief, which opens up the possibility of applying to the courts.

- 6.6.24. This applies as from the opening of the procedure and the investigation stage, in respect of which the Commission itself has noted the lack of a legal basis in the Staff Regulations and the lack of appropriate rules.

### ***The Disciplinary Board***

- 6.6.25. There are likewise problems with regard to the composition and workings of the Disciplinary Board. In the current system<sup>52</sup> the Board consists of a chairman and four members who are of at least the same grade as the official charged. They are appointed by lot, drawn annually from two lists drawn up by the Administration and by the local Staff Committee, respectively. The Board's membership thus varies in each case, which may be detrimental to its continuity of action and to the development of administrative 'case-law' and common practice.

To alleviate this problem, one possibility might be to appoint at least some members for a minimum period of three years, thereby affording a degree of stability. In addition, to guarantee the impartiality and credibility of proceedings, consideration should also be given to making the composition of the Board less 'internal'.

- 6.6.26. Annex II to the Staff Regulations requires members of the Disciplinary Board to be officials, but the same requirement does not apply to the chairman. He could thus be a person from outside the institution (such as a former Director-General or a former member of the Court of Justice or the Court of First Instance). An interinstitutional Disciplinary Board might also be considered, which would be a first step forward making it possible to move away from the situation of 'keeping things in the family'.
- 6.6.27. The Commission itself is contemplating such options and would, it appears, go so far as to propose entrusting that part of the proceedings which currently takes place before the Disciplinary Board to a committee consisting of persons from outside the institution. The Committee considers that this idea is worth exploring, particularly where senior grades are concerned.
- 6.6.28. Where the workings of the Disciplinary Board are concerned, it should be noted that no representative of the appointing authority takes part in its work, which is an anomaly. An appointing authority representative should consequently be permitted to attend during all the stages of the proceedings in which the official and/or his adviser are present.

---

<sup>52</sup> See Articles 4 to 6 of Annex II to the Staff Regulations.

### ***Correlation between misconduct and disciplinary measures***

- 6.6.29. In this connection, it will be recalled that the current Article 86 of the Staff Regulations lists a whole range of disciplinary measures, but does not lay down any correlation between misconduct and those measures.
- 6.6.30. As the Court of First Instance has stated: *'Once the truth of the allegations against an official has been established, it is for the appointing authority to choose the appropriate sanction. In view of the fact that Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various types of failures by officials to comply with their obligations, the determination of the sanction to be imposed in each individual case must be based on a comprehensive appraisal by the appointing authority of all the particular facts and the aggravating or mitigating circumstances peculiar to each individual case'*<sup>53</sup>.
- 6.6.31. However, in the absence of any 'disciplinary scale', i.e. a scale of acts of misconduct and corresponding disciplinary measures, the result in practice is that very different sanctions may be applied to identical shortcomings. A relatively fixed framework serving to some extent to lay down such correspondences would have the benefit of consistency and legal security.

### ***Duration of proceedings***

- 6.6.32. The average duration of disciplinary proceedings has proved to be too long. It is roughly four months if a case is not referred to the Disciplinary Board, and slightly more than 12 months if a case is referred (one month for hearing the official concerned, four months for the disciplinary inquiry and the report to the appointing authority, six months' work within the Disciplinary Board and one month for the decision by that authority). This does not include recourse to legal proceedings which, as we shall see, are open to officials and may even have suspensive effect. Such proceedings actually extend the genuine completion of disciplinary proceedings by several years.
- 6.6.33. Such time-scales are far too long for it to be possible to regard the proceedings as genuinely effective and exemplary, and doubly so in cases of fraud, which call for particularly speedy action.
- 6.6.34. In addition, it must be borne in mind that any suspension that the appointing authority may decide in the case of serious misconduct alleged against an official may not exceed four months: once that period is over, the official must be reinstated. Consequently, this implies - as the Commission itself is contemplating doing - either extending that period

---

<sup>53</sup> Judgment of 17 October 1991 in Case T-26/89 *De Compte v Parliament*. See also, among others, the judgment of 5 February 1987 in Case 403/85 *F. v Commission* [1987] ECR 645 and the judgment handed down by the Court of First Instance on 26 November 1991 in Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293.

or abolishing this provision. Moreover, under Article 88 of the Staff Regulations, if an official is prosecuted, disciplinary proceedings are suspended until a final verdict has been reached by the court hearing the case.

## **6.7. Recommendations**

*An in-depth reform of Staff policy is required. Practices and procedures must be changed in order to ensure that the Commission can operate effectively and retain its traditional role as the driving force behind European integration. What is really required is not an overhaul of the Staff Regulations themselves, but simply correct application of the rules and principles set out therein.*

*The Commission should vigorously enforce the principle of rewarding merit. This will improve standards throughout the organisation, which will in turn serve as an example to all and lead to a positive atmosphere at all levels of the hierarchy.*

*With this in mind the Commission should formulate a dynamic careers policy so as to foster greater commitment and ambition in its staff and head off all risk of stagnation.*

6.7.1. Proper social and trade-union relations within the Commission are essential. The Administration must recognise the role played by the trade unions, but the latter must in turn avoid any temptation to set up a kind of alternative hierarchy and must focus on the responsibilities they exercise which are crucial to the success of the plan to change and modernise the European civil service (6.2.34-38).

6.7.2. The significance of national balances within the Commission should be reduced by: designing professional training courses in such a way as to strengthen the 'European' nature of the civil service in the institutions; encouraging the genuine 'multinationalisation' of Commissioners' cabinets; reconsidering the number of tasks and their distribution among the Directorates-General, according to real needs, rather than national balances; making 'national quotas' more flexible; and rotating staff more frequently (6.2.18-33).

6.7.3. Training and professional conversion should be seen as an ongoing process, starting with the probationary period and forming a regular, compulsory element throughout an official's career. The Commission should step up the financial resources allocated to training measures (6.3.6-14).

6.7.4. Mobility should be encouraged and no exceptions should be made. It should be made compulsory to change posts at the end of a given period of time. This means that flexibility is a quality which is valued and rewarded in terms of promotion. Furthermore, mobility should be an essential precondition for duties involving leadership or management of staff (6.3.15-18).

6.7.5. Empowerment of staff requires that everyone's duties should be clearly defined and that the efforts made and the results obtained by each official in carrying out the duties allocated to him are recognised, encouraged and rewarded (6.3.19-22).

6.7.6. Decentralisation plays an important role in enhancing the sense of responsibility felt by staff. However, the tasks that are decentralised must be clearly defined and effective.

Thus the practice of creating or maintaining posts with no real responsibilities (or corresponding workload) should be regarded as contrary not only to the rationality and effectiveness of the system but also to the principle of empowerment.

Decentralisation should not become synonymous with confusion. The process of decentralisation must be accompanied by a reinforcement of programming and internal coordination and genuine leadership must be exercised (6.3.23-25).

6.7.7. The practice under which ‘other servants’ of the Commission – in particular, temporary staff – have ‘permanent temporary status’ should be brought to an end. Temporary staff should be appointed to permanent posts, which would oblige them under the Staff Regulations to leave within three years. At the same time, the list of temporary posts should be gradually reduced (6.4.22-27).

6.7.8. The use of external help should be reduced so as to decrease the institution’s dependence on external staff, who should only be used in exceptional circumstances, on the basis of better regulated conditions and procedures (6.4.28-41).

6.7.9. The system of open competitions for the recruitment of Commission staff needs to be thoroughly reviewed, since the number of candidates has increased considerably over time and the procedures followed have proved inadequate. One might consider decentralising pre-selection tests in each Member State, increasing the practice of holding specialist competitions with more precise job descriptions, and holding competitions for each language.

In order to prevent the lack of transparency in practice which occurs between drawing up the reserve list and recruitment, a list of candidates who have passed a competition should be published in order of merit reflecting the results of the competition. Any divergence from the order on the list when the actual recruitment takes place should be justified and made public.

Internal competitions for the establishment of temporary staff should be abolished. On the other hand, internal competitions to enable officials to move from one category to another should be retained. (6.5.4-25)

6.7.10 A reform of the staff reports and promotions system is necessary in order to demonstrate that these are genuinely selective and restore the credibility of the career structure. To that end there is a need to strengthen the assessment culture, review the form of the reports and simplify their headings, draw up more specific and balanced assessment criteria, award more clearly differentiated marks and provide more detailed comments with better justifications, and encourage more active and responsible participation by the officials concerned.

One might even consider a system of internal competitions for a limited number of available posts, particularly for professional and managerial staff, whose appointments are decided upon by a flexible procedure which is thus open to dangers of favouritism. This competition, based on qualifications and examinations, and carried out by external

selection boards or chaired by an external examiner, would the most ambitious and motivated officials an alternative means of trying their chances other than promotion under the Staff Regulations. (6.5.28-42.)

- 6.7.11 Over the years rather serious shortcomings have been revealed in the appointment of senior officials (A1 and A2). It is essential to establish rules, or at least a code of conduct, for their recruitment. As for national balances, one might consider gradually increasing the flexibility of quotas, placing a time-limit on the term of office, or banning the appointment of a successor of the same nationality. As for the recruitment arrangements, more rigorous selection criteria and more transparent procedures should be introduced within these quotas.

Although improvements will have to be made later, as regards the procedure to be followed, and the criteria and arrangements for selection, the Committee considers that the reforms envisaged by the new Commission are a step in the right direction (6.5.43-58).

- 6.7.12 Professional incompetence should be the subject of a more clear and precise system of rules. A procedure distinct from the one for disciplinary hearings should be introduced (6.5.61-66).
- 6.7.13 Practice in the field of disciplinary responsibility should be amended. It has shown severe limitations in terms of effectiveness and speed, with negative consequences for the European civil service and its image.

In particular:

- the rules on the formal conditions and procedural arrangements, as well as the protection of individual rights, should be specified;
- the membership of the disciplinary board should be much more stable and less internal to the Commission, particularly its chairman. An inter-institutional disciplinary board might also be a possibility. The idea of entrusting the part of the procedure which currently takes place before the disciplinary board to an external body should also be considered, particularly as regards the higher grades;
- a member of the Appointing Authority should be involved in the work of the disciplinary board, at least for all the stages of the procedure at which the official and/or his representative are present;
- disciplinary scales setting out a relatively standard correspondence between errors and penalties should be set to prevent widely diverging penalties from being imposed for identical failings (6.6.11-34).

## **6.8 Annexes**

- I. Table showing the Commission's 'training budget'**
- II. Tables showing non-language training programmes**
- III. Budget table showing staff of the Community institutions**
- IV. Budget table showing Commission staff/administration**
- V. Table showing staff working for the Commission as at 31.12.1998**
- VI. Budget tables showing Commission staff/research and technological development**
- VII. Table showing Commission external staff**

<b><u>6.9. Training budget</u></b>
------------------------------------

	<b><u>1. 7. A07060</u></b> Non-language training	<b><u>2. 8. A04030</u></b> Interinstitutional language training	<b><u>3. 9. TOTAL</u></b>
<b>1994</b>	3 357 000	3 650 000	7 007 000
<b>1995</b>	3 662 000	4 061 000	7 723 000
<b>1996</b>	3 471 000	4 000 000	7 471 000
<b>1997</b>	3 035 000	3 725 000	6 760 000
<b>1998</b>	3 175 000*	3 730 000	7 539 000
<b>1999</b>	4 500 000	3 960 000	8 460 000
<b>2000</b> (requested)	5 500 000	4 150 000	9 650 000

\* *(Excluding two special activities, namely DG XIX SINCOM training and SCR economic and financial analysis)*

NB: Computing-related training activities are financed under Title A5 of the budget.



**Annex II (1)**

	<b>1998 (□)</b>	<b>1999 (□)</b>	<b>2000 (□)</b>
<b>Training linked to institutional priorities and career development</b>	<b>944 000</b>	<b>1 045 000</b>	<b>1 200 000</b>
° Entry into service	218 000	300 000	
° Career development and retraining	251 000	250 000	
° Specific posts (selection boards, safety at work, internal instructors, etc.)	262 000	250 000	
° Mainstreaming and equal opportunities	53 000	75 000	
° SEM and MAP 2000, finance, auditing*	142 000	150 000	
° European news	18 000	20 000	
<b>Management training**</b>	<b>375 000</b>	<b>1 250 000</b>	<b>1 600 000</b>
° Top management		250 000	
° Middle management		750 000	
° Other managers		200 000	
° Further technical training		50 000	

\* A number of training courses are organised in-house

\*\* Because course structures were different in 1998, courses cannot be broken down in the same way as in 1999 and 2000.

**Annex II (2)**

	<b>1998 (□)</b>	<b>1999 (□)</b>	<b>2000 (□)<sup>***</sup></b>
<b>Training linked to specific practical needs of departments</b>	<b>981 000</b>	<b>1 225 000</b>	<b>1 500 000</b>
°Negotiating	44 000	50 000	
°Conducting meetings	26 000	50 000	
°Public speaking	62 000	60 000	
Speed reading/Memory training	43 000	40 000	
°Note taking	32 000	30 000	
°Media presentation techniques	50 000	75 000	
° Information and public relations	52 000	50 000	
Time management	74 000	60 000	
°Project management	106 000	150 000	
°Basic principles of economics	84 000	90 000	
°Library/Archives/Documentation	17 000	20 000	
°Specialised individual activities	301 000	350 000	
Analysis and drafting	15 000	50 000	
° Customer service	0	100 000	
Miscellaneous	75 000	50 000	
<b><i>Targeted activities in specific fields organised by DGs</i></b>	<b>505 000</b>	<b>600 000</b>	<b>800 000</b>
<b><i>Support</i></b>	<b>370 000</b>	<b>380 000</b>	
Logistics	120 000	100 000	
Technical and teaching aids	170 000	180 000	
Multi-media library	80 000	100 000	

<b><i>TOTAL</i></b>	<b>3 175 000</b>	<b>4 500 000</b>	<b>5 500 000</b>
---------------------	------------------	------------------	------------------

\*\* The figures for the year 2000 are intended purely for guidance at this stage.



**C. STAFF**

## Authorised Staff

Institution	1998		1999	
	Permanent posts	Temporary posts	Permanent posts	Temporary posts
Parliament and Ombudsman	3 490	620	3 491	611
Council	2 514	20	2 584	37
Commission :				
- administration	16 344	750	16 511	690
- research and technological development	3 598	114	3 638	74
- Office for Official Publications	525	-	525	-
- European Centre for the Development of Vocational Training	52	29	52	29
- European Foundation for the Improvement of Living and Working Conditions	83	-	84	-
Court of Justice	727	226	727	234
Court of Auditors	460	93	458	94
Economic and Social Committee and Committee of the Regions and joint organizational structure	711	28	709	28

(Source : OJ L 39, 12.2.1999, p. 129)

**Section III - Commission**  
*Administration*

Category and grade	1999		
	Permanent posts	Of which permanent posts in the Supply Agency	Temporary posts
A 1	28	-	-
A 2	194	-	22
A 3	554	2	32
A 4	1 323	3	154
A 5	1 240	1	133
A 6	898	2	41
A 7	998	-	-
A 8	100	-	-
<b>Total</b>	<b>5 335</b>	<b>8</b>	<b>382</b>
LA 3	54	-	-
LA 4	527	-	1
LA 5	486	-	2
LA 6	352	-	2
LA 7	448	-	8
LA 8	36	-	-
<b>Total</b>	<b>1 903</b>	<b>-</b>	<b>13</b>
B 1	786	1	46
B 2	668	2	52
B 3	852	1	58
B 4	526	3	31
B 5	467	-	-
<b>Total</b>	<b>3 299</b>	<b>7</b>	<b>187</b>
C 1	1 351	6	24
C 2	1 274	1	42
C 3	1 362	-	20
C 4	710	2	9
C 5	514	-	13
<b>Total</b>	<b>5 211</b>	<b>9</b>	<b>108</b>
D 1	463	-	-
D 2	230	-	-
D 3	70	-	-
D 4	-	-	-
<b>Total</b>	<b>763</b>	<b>-</b>	<b>-</b>
<b>Grand Total</b>	<b>16 511</b>	<b>24</b>	<b>690</b>

(Source : OJ L 39, 12.2.1999, p. 138)

**Annex V**

<b>Staff working for the Commission as at 31/12/1998</b>										
<b>Category</b>	<b>Status under the Staff Regulations or contract</b>									
	<b>FP</b>	<b>FS</b>	<b>TC</b>	<b>TP</b>	<b>TT</b>	<b>TR</b>	<b>AUX</b>	<b>END</b>	<b>PriM</b>	<b>Total</b>
<b>A</b>	5 144	278	79	71	223	1 060	196	730		7 781
<b>B</b>	3 450	125	21	70	121	470	212			4 475
<b>C</b>	5 552	126	88	81	1	688	817			7 353
<b>D</b>	815	21	6	0	0	28	91			961
<b>LA</b>	1 764	69	0	73	3	0				1 909
<b>PriM</b>									568	568
<b>Total</b>	16 725	619	194	295	348	2 252	1 316	730	568	23 047

**FP** Permanent official

**FS** Probationer

**TC** Member of the temporary staff working in a cabinet

**TP** Member of the temporary staff in permanent employment

**TT** Member of the temporary staff in temporary employment

**TR** Member of the temporary staff in permanent employment (research)

**AUX** Member of the auxiliary staff

**END** National expert on secondment

**PriM** Extramural service provider

**Research and technological development**

**Joint Research Centre**

Category and grade	1999		
	Scientific and technical	Administrative	Total
A 1	1	-	1
A 2	10	1	11
A 3	38	8	46
A 4	177	13	190
A 5	150	8	158
A 6	167	3	170
A 7	137	2	139
A 8	13	1	14
Total	693	36	729
B 1	178	36	214
B 2	146	20	166
B 3	90	12	102
B 4	103	8	111
B 5	64	5	69
Total	581	81	662
C 1	233	147	380
C 2	56	31	87
C 3	47	24	71
C 4	29	22	51
C 5	29	32	61
Total	394	256	650
D 1	12	13	25
D 2	5	3	8
D 3	5	1	6
D 4	-	-	-
Total	22	17	39
<b>Grand total</b>	<b>1690</b>	<b>390</b>	<b>2 080</b>

(Source : OJ L 39, 12.2.1999, p. 141)



**Indirect action**

<i>Category and grade</i>	1999					
	Permanent posts			Temporary posts JET		
	Scientific and technical	Administrative	Total	Scientific and technical	Aministrative	Total
A 1	1	-	1	-	-	-
A 2	17	2	19	-	-	-
A 3	71	8	79	2	-	2
A 4	278	27	305	5	4	9
A 5	245	24	269	11	3	14
A 6	129	17	146	3	-	3
A 7	76	4	80	-	-	-
A 8	9	2	11	-	-	-
Total	829	84	910	21	7	28
B 1	44	35	79	8	1	9
B 2	22	37	59	5	-	5
B 3	4	56	60	2	-	2
B 4	7	35	42	-	-	-
B 5	1	19	20	-	-	-
Total	78	182	260	15	1	16
C 1	-	90	90	-	-	-
C 2	-	90	90	-	-	-
C 3	-	106	106	-	-	-
C 4	-	87	87	-	-	-
C 5	-	45	45	-	-	-
Total	-	418	418	-	-	-
D 1	-	-	-	-	-	-
D 2	-	-	-	-	-	-
D 3	-	-	-	-	-	-
D 4	-	-	-	-	-	-
Total	-	-	-	-	-	-
<b>Grand Total</b>	<b>904</b>	<b>684</b>	<b>1 588</b>	<b>36</b>	<b>8</b>	<b>44</b>

(Source : OJ L 39, 12.2.999, p. 143)

**Annex VII (1)**

**Balance in 1998 compared with the initial appropriation and out-turn in 1997**

External staff employed		Appropriation 1998 before CAP deduction	Difference	Out-turn 1997	Difference 98/97
Resources	Appropriations 98 (1)	(2)	(3) = (1)-(2)	(4)	(5) = (1)-(4)
Auxiliaries	692	734	-42	775	-83
Temporary staff	296	244	52	360	-64
END	576	579	-3	564	12
Providers	407	286	121	398	9
<b>TOTAL</b>	<b>1 971</b>	<b>1 843</b>	<b>128</b>	<b>2 097</b>	<b>-126</b>

**EXTERNAL RESOURCES FINANCED UNDER TITLE A-7 (FORMER A-1) OF THE BUDGET**  
**AND BY BALANCES TO BE SETTLED FROM 1997**

(in man-years) FIELD OF ACTIVITY	BALANCE 1992	BALANCE 1993	BALANCE 1994	BALANCE 1995	BALANCE 1996	BALANCE 1997	BALANCE 1998
Internal market	782	637	496	475	497	458	443
Social area	512	729	549	521	369	301	258
Flanking policies	405	376	314	273	239	201	193
Economic development and Structural operations	164 0	135	130 0	111	103	121	125
Common policies	78	95	70	50	35	56	37
External relations	407	434	414	410	463	466	407
Coordination	390	378	289	292	307	267	246
Finance and control	56	35	36	35	38	36	35
Administration and Data processing	199 0	206	200 0	161	147	140	127
Languages	41	42	43	41	39	51	100
	0		0				
<b>TOTAL</b>	<b>3 034</b>	<b>3 067</b>	<b>2 541</b>	<b>2 369</b>	<b>2 237</b>	<b>2 097</b>	<b>1 971</b>

## **7 INTEGRITY, RESPONSIBILITY AND ACCOUNTABILITY IN EUROPEAN POLITICAL AND ADMINISTRATIVE LIFE**

### **TABLE OF CONTENTS**

#### **INTRODUCTION – THE CULTURAL FRAMEWORK**

- 7.1. Opening remarks**
- 7.2. The fundamentals**
- 7.3. A multi-cultural environment**

#### **INTEGRITY AND CONDUCT IN EUROPEAN PUBLIC LIFE**

- 7.4. Codes of conduct in public life**
- 7.5. Code of conduct for members of the Commission**
  - Principles*
  - Appointments to cabinets*
  - Size of cabinets*
  - Nationality considerations*
  - Political affiliation*
  - Concluding remark*
- 7.6. Rules of conduct for officials of the Commission**
  - Principles*
  - Openness v. secretiveness*
  - Whistleblowing*
  - Outsourcing*
  - Final remark*
- 7.7. How to give effect to codes of conduct?**
  - Committee on Standards in Public Life*
  - Training and consciousness-raising*

#### **RELATIONS BETWEEN COMMISSIONERS, DEPARTMENTS AND CABINETS**

- 7.8. The issue of responsibility revisited**
- 7.9. Commissioners, their director-generals and departments**
  - Formulation of policy v. implemetation of policy*
  - Status of director-generals*
- 7.10. Relations between commissioners – collective responsibility**
  - Collective responsibility in practice*
  - Organisation of the Commission*
- 7.11. The role of the Secretary-general**
- 7.12 The role of commissioners' cabinets**
- 7.13. Enforcement of ethical responsibility**

## **ACCOUNTABILITY AND POLITICAL RESPONSIBILITY**

### **7.14. The Commission in relation to the European Parliament**

*Accountability and political responsibility*

*Accountability and transparency*

*Mechanisms for accountability*

*The discharge procedure*

*Confidentiality and accountability*

*Political responsibility*

### **7.15. The Commission in relation to the Council**

*Power to take disciplinary action*

*The discharge procedure*

*Committees of Member State representatives (“comitology”)*

### **7.16 . Recommendations**

## 7. INTRODUCTION – THE CULTURAL FRAMEWORK

### 7.1 Opening remarks

7.1.1. In accordance with the Committee’s mandate, the bulk of this report examines concrete aspects of the Commission’s systems, practices and procedures. It is therefore able to arrive at recommendations aimed at resolving particular weaknesses. However, as the mandate also reflects, such weaknesses cannot be dealt with in isolation, but must be set against the backdrop of a particular administrative “culture” prevailing in the Commission.

7.1.2. It is impossible to discuss the Commission’s culture in the same way as one can discuss, say, financial control arrangements or contracting procedures, as a culture is, by its very nature, intangible and lies beyond the scope of explicit rules, procedures and legislation. Nevertheless, it is equally impossible – and utopian to boot - to ignore the influence that a given collective culture may have over the manner in which rules, procedures and legislation operate in practice.

7.1.3. This chapter attempts no systematic analysis of the prevailing culture in the Commission. Though perhaps entertaining, it would serve little purpose to do so. For present purposes, it suffices that the central “cultural” area of concern has already been identified: integrity, responsibility and accountability, going hand-in-hand with transparency and openness.

7.1.4. The concept of responsibility, as discussed in the Committee’s first report, is an amalgam of a range of related ideas, ranging from personal integrity and good conduct to the operation of formal processes of institutional accountability. The objective of this chapter is to look at these related ideas with a view to finding ways of reinforcing them and making them work. The exercise is based on the premise that it is not possible to legislate for a culture of integrity, responsibility and accountability, but that it is possible to take action to nudge a organisational culture in a positive direction by identifying its core values. It should be remembered that the tools for doing so – the classic mixture of “carrot and stick”, in the form of rules, codes, training, career incentives, sanctions, etc. – are not ends in themselves, but means to an end. Too often in bureaucracies and organisations everywhere, respect for form (e.g. the existence of codes of conduct, of sanctions for misconduct, training schemes, etc.) is confused with respect for substance. The Committee is fully aware, in making the proposals included in this chapter, that their value can only ultimately be judged by their long term effects.

7.1.5. This chapter falls into three main subject areas:

- Standards of personal conduct applying to commissioners, their cabinets, director-generals and the officials working under them.
- The chain of responsibility from the President of the Commission, through the Commission itself to individual commissioners and their *cabinets*, thence to the senior levels of the hierarchy and the officials and other agents below them.
- Institutional accountability of the Commission, commissioners and officials vis-à-vis the democratic institutions of the European Union, notably the European Parliament,

both positively (giving account) and negatively (being held to account).

## **7.2 The fundamentals**

7.2.1. "Corporate culture" is made up of both the tangible (rules, structures, working habits) and the intangible (attitudes, perceptions, mentalities). The cultural foundation of the EU institutions and their administrations is provided by shared ethical and political values and priorities flowing primarily from the concept of human dignity. These have been given formal expression in various international and European acts, particularly the European Convention on Human Rights and in national constitutional rules and traditions. They are based on the principles of democracy and respect for the citizen and on the rule of law, now confirmed by Articles 1 (*ex A*) and 6 (*ex F*) of the TEU, which read:

“This Treaty marks a new stage in the process of creating an even closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”

and

*"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States".*

7.2.2. Building on this basis, fundamental concepts of ethics and standards of behaviour are increasingly being formalised in written rules and codes of conduct, drawn up for example by international organisations, such as the OECD, as well as the institutions of the Community and of the Member States. From the outset, these concepts should be reflected in sound, therefore simple, administrative procedures, structures and working methods and in a clearly defined set of competences and responsibilities.

7.2.3. Within the institutional structure of the European Union, the European Commission is uniquely vested with a mix of legislative, executive and administrative tasks. These have grown in complexity due to the Community's geographic enlargement and the diversification of its activities. In contrast to the Council, where national interests are transformed, for better or for worse, into Community interests, the Commission is the prime actor in the preservation of the Community spirit and in strengthening the "*acquis communautaire*". Thanks to its right of legislative initiative, and the substantial direct and delegated legislative powers assigned to it, and to its function as the Community's executive, it remains the engine behind the development of Community policy and Community law.

7.2.4. The growing role of the European Parliament has made significant changes to the Commission's constitutional position. The Commission must now come to terms with both Council and Parliament where these share legislative competence, but more importantly, it must familiarise itself with a more stringent notion of the accountability inherent in parliamentary control. Recent events have highlighted that the Commission can no longer consider itself

immune either from intense parliamentary scrutiny or its consequences. The end result should not only be a stronger European Parliament, but also a stronger European Commission, provided that the new Commission draws the right lessons from past experience. It must opt unreservedly for openness and transparency, for responsibility and accountability in its relations towards the other institutions and towards those over whom it exercises power. These fundamentals must permeate its culture in all areas and at all levels; they are the basic essentials for creating credibility in the exercise of power.

7.2.5. In conclusion, the remarks in this chapter are made in the light of the fact that the Commission is situated at the heart of a modern European democratic structure built upon deep-rooted political and ethical values. In this framework the Commission plays the part of the executive branch and holds sole power of legislative initiative. It thus bears especially well-developed duties of responsibility and accountability towards the other participants in the political structure: Parliament and Council, and, above all, the citizens of Europe.

### **7.3 A multi-cultural environment**

7.3.1. In contrast with national administrations, any attempt to reform the Commission must take account of its multi-national and multi-lingual environment. This makes it difficult simply to “transplant” national management practices and regulatory frameworks, however successful they may be “at home”. European problems need European solutions.

7.3.2. Arguably, the multinational character of the Commission itself lies at the heart of some of its problems. Firstly, it can lead to differences in the interpretation of procedures, practices, rules and laws within the Commission which potentially give rise to a culture of moral flexibility and permissiveness.

7.3.3. Secondly, unhealthy national allegiances can cut across the formal structures of the Commission. During the first phase of its work, the Committee, in examining files, in interviews with officials and in correspondence received from outside sources, not infrequently encountered the existence of national reflexes, and even of national networks, within the Commission. It found that some commissioners, and/or their private offices, are not immune from such reflexes.

7.3.4. This problem is linked to the policy of appointing Directors-General and civil servants immediately beneath them, albeit for understandable reasons of proportionality, on the basis of national “shares”. This practice can (and does) result in the creation of national “fiefdoms” unless special measures are taken to avoid such an outcome. If allowed to develop, it will ultimately undermine Europe as a concept.<sup>94</sup>

---

<sup>94</sup> See also the EP “Report on improvements in the functioning of the Institutions without modification of the Treaties” - A4-0158/99 adopted 15.4.99 (Herman report)



## INTEGRITY AND CONDUCT IN EUROPEAN PUBLIC LIFE

### **7.4 Codes of conduct in public life**

7.4.1. One means to attain uniformity in the interpretation of legal rules and, more importantly, to shape a culture reflecting high standards of behaviour notwithstanding national differences, is the elaboration of codes of conduct. This has become common throughout the public sector as one technique “to restore respect for the ethical values inherent in the idea of public service,” while recognising that though “formal procedures have a role to play, (...) in the end it is individuals’ consciences that matter”<sup>95</sup>. Codes of conduct are not “formal procedures”, but are designed to provide an ethical reference point for officials and holders of a public mandate. They aim to assist them in living up to the principles of conduct which provide the foundations for public life and which have been defined as: selflessness, integrity, objectivity, accountability, openness, honesty and leadership<sup>96</sup>.

7.4.2. The growing need for high standards of conduct in public service is widely recognised at all levels and in different sectors. Leaving aside its intrinsic value, this trend is in part driven by a phenomenon which, in a restrained form, is visible in the Commission, namely towards privatisation, outsourcing and delegation of administrative tasks to an array of agencies and quasi-governmental organisations, thereby provoking the widespread use of “new” financial management techniques such as contracting out and competitive tendering.

7.4.3. To find an example of a major international organisation adopting a code of conduct, one recent illustration is provided by the adoption by the Council of the OECD on 23 April 1998 of a set of “Principles for Managing Ethics in the Public Service”<sup>97</sup>. Its twelve principles deserve to be restated in full. They are:

1. Ethical standards for public service should be clear;
2. Ethical standards should be reflected in the legal framework;
3. Ethical guidance should be available to public servants;
4. Public servants should know their rights and obligations when exposing wrongdoing;
5. Political commitment to ethics should reinforce the ethical conduct of public servants;
6. The decision-making process should be transparent and open to scrutiny;
7. There should be clear guidelines for interaction between the public and private sectors;
8. Managers should demonstrate and promote ethical conduct;
9. Management policies, procedure and practices should promote ethical conduct;
10. Public service conditions and management of human resources should promote ethical conduct;
11. Adequate accountability mechanisms should be in place within the public service;

---

<sup>95</sup> Standards in Public Life, First Report of the (Nolan) Committee, vol.1 May 95, p.16.

<sup>96</sup> See the Committee’s first report, para. 1.5.4, referring to Nolan Committee.

<sup>97</sup> See website [www.oecd.org](http://www.oecd.org). (This website also contains summary reports of ethical provisions in various Member States including the Netherlands, Finland, Portugal and the United Kingdom.)

12. Appropriate procedures and sanctions should exist to deal with misconduct.

7.4.4. The principles intend to prevent misconduct “by a range of integrated mechanisms, including sound ethics management systems”. They address different points of concern, some of which have a direct bearing on subjects dealt with in the Committee’s present and/or first report.

7.4.5. Principles 1 and 2 indicate that, although standards for public service may be of an ethical nature, and therefore do not constitute legal (i.e. judicially enforceable) rules, they must nonetheless be reflected in the formal legal framework. In other words “the legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant... (Therefore) laws and regulations ... should provide the framework for guidance, investigation, disciplinary action and prosecution”<sup>98</sup>. The point is that a code of conduct cannot exist in isolation, but must, though not law itself, be underpinned by and consistent with a coherent legal framework based upon the same underlying values and principles.

7.4.6. Shortly before its resignation, the EU Commission proposed two codes of conduct<sup>99</sup>. The first lays down rules of conduct for Members of the Commission, who are not covered by the Community's Staff Regulations. The code contains non-binding rules of a self-regulatory type. That is not necessarily inconsistent with the principles above, which are only formally applicable to officials. Moreover the code is based on Treaty provisions (see 7.5.1). If, as it should, the new Commission pursues the intention of laying down codes of conduct, it must ensure that the formal legal framework, in the form of binding laws and regulations is adequate. (This would include, for example, the clarification of the legal protection to be given to whistleblowers, as required by Principle 4 of the OECD code).

7.4.7. In the following sections we will first deal with the (proposed) code of conduct for members of the Commission and thereafter with the code of conduct for officials.

7.4.8. In this connection, it should be stressed that though the Committee’s mandate only concerns the Commission, it believes that members and officials of other EU institutions fall under similar obligations of good conduct and that similar provisions should equally be applied to them.

---

<sup>98</sup> Explanatory comment under Principle 2.

<sup>99</sup> *For a European political and administrative culture*. See [www.europa.eu.int](http://www.europa.eu.int). A third code, on officials, is still under preparation, while the incoming Commission has already amended and supplemented the first two codes with proposals of its own (to be adopted formally when it takes up office). These too have been posted on the Commission’s website.

## **7.5 Code of conduct for members of the Commission**

### ***Principles***

7.5.1. The code of conduct prepared by the outgoing Commission rightly takes the Treaty articles concerning the Commission (see TEC Article 213 (*ex 157*)) as a starting point, making particular reference to the independence enjoyed by the members of the Commission, who are required to discharge their duties in the general interest of the Community. It continues to state: “In the performance of their duties they must neither seek nor take instructions from any government or from any other body. The general interest also requires that in their official and private lives Commissioners should behave in a manner that is in keeping with the dignity of their office”.

7.5.2. The remainder of the code is devoted to setting limits to commissioners' outside activities (including the delivery of speeches or taking part in conferences against payment, the holding of posts or being an active member of political parties or trade unions) as well as to interests which could jeopardise their independence (declaration of financial interests and assets, and of activities of spouses). It lays down rules for missions, receptions and professional representation and acceptance of gifts, decorations or honours. More important matters concern the principle of collective responsibility and the composition of Members' private offices, dealt with below.

7.5.3. The proposed codes of conduct are a first, albeit modest, step in the right direction. The prohibition - or at least declaration - of situations giving rise to a possible conflict of interest is essential for good governance, just as it is to lay down the principle of collective responsibility. However, the codes define the latter notion as implying only a prohibition on Commissioners “[making] any comment which would call into question a decision taken by the Commission,” or “disclosing what is said at meetings of the Commission”. The principle of collective responsibility should also involve the definition of how the Commission as a whole bears a responsibility for decisions taken collectively and how, in practical terms, individual commissioners must assume responsibility for decisions taken collectively. The Committee recommends the Commission to re-define collective responsibility in that direction in light of the Committee's findings in its first report (see further in 7.10.1-2).

7.5.4. The question of collective responsibility is part of a much broader issue in that it concerns not only the relations between commissioners, but also relations with (and between) their departments. It also concerns the accountability of commissioners vis-à-vis Parliament and their relations with the Council. These broader issues are not dealt with in the outgoing Commission's code of conduct which limits itself mainly to issues of personal integrity. These broader issues will be discussed in later sections where further recommendations will be formulated.

### ***Appointments to cabinets***

7.5.5. The Commission's proposed code of conduct for commissioners puts forward specific rules on the composition of *cabinets*, for which the President of the Commission named appointing authority. The rules are intended to “secure an appropriate balance between officials

and temporary staff as well as in terms of nationalities and equal opportunities". Further, "at the end of their period of secondment to Member's Offices, officials shall be reinstated in Commission departments in accordance with standard procedures laid down in Staff Regulations. No commitment shall be given to temporary members of staff in respect of continued employment in the Commission after the Commissioner's term of office expires".

7.5.6. The importance of these rules cannot be overstated. The role of commissioners' *cabinets* is highly significant, and is further discussed below. In the present context of standards of conduct for Commissioners, it suffices to recall that the inclusion of externals as members of a private office, or as special advisers, has been the occasion of appointments based not on merit but on friendship, even family links, sometimes in violation of standing rules. The Committee recommends that objective rules be established concerning the appointment of personal relations to their *cabinets* or elsewhere, be they directly proposed or induced by commissioners, to ensure that they are clearly based on merit. Obviously, this should not lead to discrimination *against* such persons where merit can objectively be ascertained. However, in such instances, rules of transparency declaring the nature of the relationship must be laid down.

### ***Size of cabinets***

7.5.7. There are vast differences between the Member States as to the use of private offices or *cabinets* by members of the government. In some, private offices are unknown and ministers fully rely on their administration. In others, ministers have sometimes very large *cabinets* composed of personal collaborators of the Minister, handpicked by him/her from within, but often also from outside, the administration. The Member States in between allow for a number of "advisors" who serve as political or policy experts to the Minister, help them to prepare long-term policies and short-term decisions and to function as a first sounding board for ideas.

7.5.8. Here is not the place for a general discussion of the pros and cons of private offices. It suffices to say that the Committee subscribes to the view that large *cabinets* are damaging in that they become a "counter-administration", demotivate regular officials, lead to "*parachutages*" of outsiders within the administration and contribute, generally, to an administrative culture based on party, ideological and/or regional/national divisions. The Committee therefore recommends that the size of *cabinets* be kept to, at most, six category A members. It approves both the outgoing Commission's proposals in this respect and the president-designate's determination to promote multi-national private offices, to limit (even exclude) the appointment of outsiders and to exclude unduly favourable treatment of members of *cabinets* at the end of their term of office.

### ***Nationality considerations***

7.5.9. The issue of nationality arises in the codes in the requirement that commissioners ensure balance in terms of nationalities (and gender) in their *cabinets*. Nationality as a general criterion for appointment, though aimed at securing Member States a proportionate share in Community decision-making processes, inevitably gives rise to informal quota provisions<sup>100</sup>. Such "quotas"

---

<sup>100</sup> Whether this system is consistent with Community law is doubtful, given that the ECJ has held that job allocation should not be predetermined and should be decided on merit: "sur la base de critères objectifs de

DOC\_EN\DV\381\381230EN.doc 116

do not in principle apply to appointments in *cabinets*, where commissioners have wide discretion to select persons who have their full confidence. However, even there, that wide discretion may not be unrestricted, as the proposed code correctly suggests. It is unacceptable that *cabinets* - which are involved in policy making in the Commission (but see 7.12.1ff.) - should be composed exclusively or predominantly of persons of the same nationality as the commissioner. That would put the Community character of the commissioner's work too much at risk.

7.5.10. Nationality may only be a criterion insofar as it is permitted by law<sup>101</sup>. Outside the realm of such (Community) law, the use of nationality amounts to impermissible discrimination. This principle applies not only to appointments but also to all other areas of decision making, most particularly where financial incentives or subsidies are involved. Commissioners who, in the exercise of their office, use undue influence to favour their national interests should be deemed in serious breach of their obligation of independence.

### ***Political affiliation***

7.5.11. In this connection, the Committee emphasises that the use of other discriminatory criteria such as political affiliation of the person to be recruited, or selected or to receive any other advantage, is also to be considered a serious breach of the obligation of independence. Commissioners themselves, though appointed by common accord of the governments of the Member States (essentially on the basis of political considerations), must subsequently carry out their duties in full independence - meaning that they must act, and be seen to act, with political neutrality. The proposed code of conduct should not allow commissioners to "be *active* [i.e., in the Committee's understanding, office-holding] members of political parties or trade unions, provided that this does not compromise their *availability* for service in the Commission" (emphasis added). It is not availability, but political neutrality, which should be the decisive criterion<sup>102</sup>, at least under present Community law where the Commission, unlike a national government, is not the emanation of an elected political majority.

7.5.12. The events surrounding the resignation of the outgoing Commission illustrate how the political affiliation of commissioners contributed to a distortion of the European Parliament's power of censure, in that political groups were influenced by the actual or perceived political affiliation of the commissioners involved. Although it is normal for a directly-elected Parliament to react on the basis of political considerations, it is inconsistent, under present Community law, for the same to apply to the commissioners, who should not be perceived as being part of a political grouping of any kind.

### ***Concluding remark***

7.5.13. It emerges from the above that a code of conduct for commissioners must cover a broader range of issues than those dealt with in the draft prepared by the outgoing Commission. Because they relate to the public image of the Community as a whole, moreover, the issues in

---

sélection et dans le seul intérêt de service" (Cf Art 29 Staff regulations): Case 105/75, *Giuffrida v. Council* [1976] ECR 1395, par 6.

<sup>101</sup> See Chapter 6

<sup>102</sup> The proposed code rightly prohibits commissioners from holding any outside public office.

question are of direct concern not only to the Commission, but also to the other institutional players in the European Union. It is therefore recommended that when the new Commission prepares a new and, it is hoped, more comprehensive code, it will take the prior advice of Council and Parliament as well as the Court of Justice and the Court of Auditors.

## **7.6 Rules of conduct for officials of the Commission**

### *Principles*

7.6.1. It falls to the new Commission to adopt a code of conduct for its officials. This should be done following the principles laid down in other international or supranational documents, for example those adopted by the OECD Council (see 7.4.3), and in similar codes used in EU Member States. It is for the Commission to “create legislative and institutional arrangements that reinforce ethical behaviour and create sanctions against wrongdoing”<sup>103</sup>. Again, the other Institutions should be consulted, also with a view to achieving a degree of uniformity with similar codes of conduct for officials of those Institutions.

7.6.2. A code of conduct for officials, together with the rules and legislation underpinning it, should comprise a comprehensive set of standards regulating their conduct, not only indicating “official actions which will not be tolerated”, but also “articulating public service values that employees should aspire to”<sup>104</sup>. It should also emphasise the use of “basic principles, such as merit, consistently in the daily process of recruitment and promotion (which) helps (to) operationalise integrity in the public service”<sup>105</sup>. Mechanisms must exist to promote the accountability of officials for their actions to their superiors and, more broadly, to the public. These should focus not only on compliance with rules and ethical principles, but also on the achievement of results”<sup>106</sup>. Effective “mechanisms for the detection and independent investigation of wrongdoing such as corruption and provide reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative disciplinary sanctions to discourage misconduct”<sup>107</sup> must also be in place. Many of these points have been discussed elsewhere in this report and recommendations made.

### *Openness v. Secretiveness*

7.6.3. Three points relating to the conduct of the Commission, both college and services, are of major concern to the Committee. The first is “the whole tradition of secretiveness” which characterises both the Commission and the other EU institutions, above all the Council<sup>108</sup>. Secretiveness must not be confused with the need for confidentiality in certain instances. Secretiveness means a lack of openness in matters where no real justification for confidentiality exists. Confidentiality must be the exception, not the rule. Openness is not in the first place a

---

<sup>103</sup> Explanatory comment to Principle 5 of the OECD set of principles.

<sup>104</sup> Explanatory comment to Principle 9.

<sup>105</sup> Explanatory comment to Principle 10.

<sup>106</sup> Explanatory comment to Principle 11.

<sup>107</sup> Explanatory comment to Principle 12.

<sup>108</sup> Thus EU Ombudsman, Mr. Söderman in an interview with European Voice, (22.4.99)

question of legal texts<sup>109</sup> or codes of conduct, but a question of mentalities and attitudes, arising from the basic principle that the public has a right to know how public institutions use the power and resources entrusted to them. Accordingly, “public scrutiny should be facilitated by transparent and democratic processes, oversight by the legislature and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media”<sup>110</sup>.

7.6.4. There exists a “Code of Practice on access to Council and Commission documents”<sup>111</sup> which is a step in the right direction. Public scrutiny has also been strengthened by the creation of the office of Ombudsman appointed by the Parliament who is “empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies”<sup>112</sup> as well as by the right, contained in Article 194 (*ex 138 d*) of the Treaty, for such natural or legal persons to “address (...) a petition to the European Parliament on a matter which comes within the Community’s fields of activity and which affects him, her or it directly”. It should be noted moreover that the Ombudsman is himself in the process of preparing a “Code of Good Administrative Behaviour”, much of which deals with the need for openness and transparency on the part of officials vis-à-vis the public.

7.6.5. These mechanisms cannot in themselves bring about a change in mentality. In the first instance, it falls to the new Commission, and above all its President, to give an example by their own behaviour of a move away from the present mentality of secretiveness into one of openness.

7.6.6. It is important to appreciate that the thoughtful preparation of decision-making within the Commission should not however be hindered. Like all political institutions, the Commission needs the “space to think” to formulate policy before it enters the public domain, on the grounds that policy made in the glare of publicity and therefore “on the hoof” is often poor policy. Openness and transparency do not therefore imply routine and invasive public access to the inner counsels of the Commission in the course of its work, but complete openness as to all political and administrative acts of the Commission, the justification for these once they have been taken and as to the formulation of policy once it is sufficiently definitive to be laid before the public. It is for the Commission to establish internal guidelines – which should themselves be public – establishing when deliberations on policy are sufficiently advanced to be shared with the public.

7.6.7. The press, and media in general, clearly have a key role in this process. By and large, the contribution of the press in respect of the Commission, including in the course of recent events, has been a positive one: constantly pushing for greater transparency and openness in the implementation and examination of Community legislation and policy by the Commission and participating in the exposure of problems which would otherwise never have been addressed.

---

<sup>109</sup> Legal texts are not infrequently interpreted, by virtue of an “old-fashioned view of privacy” (thus the interview with the Ombudsman) to curtail transparency.

<sup>110</sup> Explanatory comment to Principle 6 of the OECD set of principles.

<sup>111</sup> OJ L340 of 31.12.93. The validity of this code is confirmed by inter-institutional agreement (Judgement of Court of Justice of 19.3.96: case C-25/94, *Commission v. Council* (1996) ECR I – 1496 and judgement of 30 April 1996 in case C-58/94, *Netherlands v. Council* (1996) ECR I-2169.)

<sup>112</sup> TEC Article 195 (*ex 138e*), para. 1

However, recent events have also underscored the wider public interest in the Commission developing a more effective press and information policy, whereby, through establishing a balanced relationship with the press, it would better handle some of the intense media pressure to which it is subject.

### ***Whistleblowing***

7.6.8. The second point of concern to the Committee is the need to delineate the obligation for officials to “expose actual or suspected wrongdoing within the public service ... [to] include clear rules and procedures for officials to follow... Public servants also need to know what protection will be available to them in cases of exposing wrongdoing”<sup>113</sup>.

7.6.9. The events leading up to the resignation of the former Commission demonstrated the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also showed how the reaction of superiors failed to live up to legitimate expectations. Instead of offering ethical guidance, the hierarchy put additional pressure upon one such official. This clearly flouts the principle referred to above, as well as with the third of the OECD principles, according to which “(i)mpartial advice can help create an environment in which public servants are more willing to confront and resolve ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace”.

7.6.10. This does not mean that officials must be encouraged to come forward in all instances where they believe that superiors or colleagues have not acted correctly. The duty of loyalty and discretion should not become an empty concept. But neither must it be used to install a conspiracy of silence. In this regard, a distinction has to be drawn between criminal behaviour, where there is an unambiguous duty of any civil servant to report to the appropriate authorities (particularly OLAF)<sup>114</sup>, and other breaches, which have to be reported in accordance with departmental procedures. Nonetheless, when these procedures have not made it possible to resolve concerns within a reasonable period of time, a mechanism should exist to allow the civil servant to address an external authority (for example, the Ombudsman, the parliamentary Committee on Petitions or the Court of Auditors.)

7.6.11. The Committee recommends that the Commission examine its rules, including the Staff Regulations, accordingly. (See Chapter 6)

### ***Outsourcing***

7.6.12. As its third and final point of concern, the Committee draws attention to principle 7 of the OECD set of principles, touching upon a subject which, as the First Report showed, creates numerous problems. Principle 7 demands “clear rules defining ethical standards [which] should guide the behaviour of public servants in dealing with the private sector, for example public procurement, outsourcing or public employment conditions... More attention should be placed on public service values and *requiring external partners to respect those same values*”<sup>115</sup>

---

<sup>113</sup> Explanatory comment to Principle 4 of the OECD set of principles.

<sup>114</sup> But see Article 19 of the Staff Regulations

<sup>115</sup> Explanatory comment to Principle 7.



(emphasis added). The latter requirement must be reflected in contractual or public procurement provisions. Observations on this subject have been made in Chapter 2.

### ***Final remark***

7.6.13. Here, the Committee would emphasise the role of the Commission's Legal Service. Contrary to a legal department in the private sector, which has the role of facilitating its principal's requirements, the Commission's Legal Service should always recall that its function is to provide an independent check on the legality of the Commission's intended action (or inaction). In other words, the Commission's Legal Service is of crucial importance in making the concept of the rule of law an essential part of the corporate climate of the Commission at all levels, including above all the commissioners and the directors-general.

## **7.7 How to give effect to codes of conduct?**

### ***Committee on Standards in Public Life***

7.7.1. An advantage of codes of conduct is that they give guidance by way of flexible rules, which are however as concrete as possible. Without imposing legally binding obligations, they may exert a high degree of moral persuasion because of their widely accepted ethical content. Such codes must have a legal basis, however, in that they should emanate from an authority having the competence to issue them.

7.7.2. The question arises as to who should prepare codes of conduct, and how they should be made as effective as possible. The answer to these questions, in the Committee's view, is that there should be a general code of conduct in which basic standards are laid down, applicable to all officials and servants of the Community institutions and bodies, but which leaves sufficient leeway to allow more specific codes in the light of the individual characteristics of the institution or body or persons for whom they are designed.

7.7.3. It is to be recommended that, in order to supervise the *general* standards, a Committee of Standards in Public Life be set up, under an interinstitutional agreement, and that *specific* codes of conduct would be drawn up by each institution concerned, in complement to the general standards.

7.7.4. The question remains as to whether such a committee should be "*ad hoc*" or take a more permanent form. The answer depends on whether it would be asked to come up not only with a set of standards, but also to update them regularly, monitor their application and implementation in more specific codes of conduct, and to give advice on specific particular issues or questions which are brought to its attention. If the latter were the case, as this Committee recommends, such a committee would develop over the years a body of practical rules, reflected in its annual reports, and acquire the moral authority that would help to establish and restore the credibility of the Community Institutions, both internally and externally. Recent events, involving a member of the outgoing Commission, have again emphasised the importance of this point.

7.7.5. It should further be noted in passing that such credibility is now seriously affected not only by allegations of abuses in the Commission, but also in the other institutions.

## ***Training and consciousness-raising***

7.7.6. Notwithstanding the fact that codes of conduct are, in the opinion of this Committee, a necessary basis for the transformation of the Commission's culture, and that both a legal framework and a Committee on Standards are vital to underpin such a transformation, they do not in themselves suffice. Hearts and minds are not, as it were, won with either rules or good intentions, and hearts and minds are the crux of any discussion of organisational culture. The problem is thus to ensure that the codes of conduct discussed above become a pervasive part of the Commission's culture rather than an external imposition.

7.7.7. No simple answers exist to this problem. However, just as it is possible to bring about "cultural" change in other fields by public education programmes, a clear example set from above, well-directed management action, training, information and consciousness-raising all have the potential to help the principles set out in a code of conduct take root in the Commission's administration.

7.7.8. Examples may help illustrate this point. Staff might be obliged to participate in (a limited number of) seminars or workshops at which the practical implications of codes of conduct could be examined ("What would you do if...?") and the ethical implications of particular working situations discussed. Such seminars might also serve to inform staff about "danger areas", how things can go wrong, the warning signs to watch out for and what to do when a case of suspected fraud/corruption arises. By the same token, more senior grades should receive professional training in the management techniques involved in inculcating a certain professional culture, identifying weaknesses/individuals "at risk" and so on.

7.7.9. For all that such training exercises risk being perceived amongst Commission staff as tiresome impositions which can achieve little more than state the obvious, they are common, accepted and fruitful practice throughout modern private-sector organisations. Such organisations have a clear incentive - in the form of the so-called "bottom line" - to make maximum use of such techniques. It is for the Commission, in this case together with staff organisations, to undertake an *active* role in finding an equivalent incentive in shaping its corporate culture, rather than trusting to undefined notions of public service.

## **RELATIONS BETWEEN COMMISSIONERS, DEPARTMENTS AND CABINETS**

### **7.8 The issue of responsibility revisited**

7.8.1. In its first report, the Committee stated (at 1.6.2), regarding the responsibility of the Commission as a body or of commissioners individually, that:

“The responsibility ... this Committee is dealing with concerns ethical responsibility, that is responsibility for not behaving in accordance with proper standards in public life, as discussed above (para 1.5.1). Such responsibility must be distinguished from the political responsibility of the Commission dealt with in Article [201,ex-]144 of the EC Treaty which is to be determined by the European Parliament, and from the disciplinary responsibility of individual Commissioners dealt with in Article [216,ex-]160 of the EC treaty, which is to be determined by the Court of Justice, on application of the Council or the Commission [footnote omitted]. That does not however, prevent the institution concerned, when determining political or disciplinary

responsibility, from basing its assessment in part on the findings of the Committee concerning the collective or individual behaviour of the Commission or of Commissioners.”

7.8.2. Here again the Committee wishes to turn to this issue, and more particularly to the distinction between ethical and political responsibility as applied to commissioners.<sup>116</sup>

7.8.3. *Ethical* responsibility is about (non-)compliance, intentional or negligent, with ethical, professional, legal rules of conduct on the part of an individual to whom blame can be attributed, individually or collectively. *Political* responsibility, on the other hand, is about (i) the political consequences arising from ethically, professionally, or legally reprehensible conduct, (ii) the nature of those consequences and (iii) the authority by which the consequences are decided.

7.8.4. An important question regarding the notion of political responsibility of commissioners is whether it can be applied only in respect of the (personal or professional) conduct of a commissioner him/herself, or whether it can also apply in respect of conduct of persons (mainly officials, but possibly also third parties to whom tasks have been ‘outsourced’) for whom Commissioners are held to be politically responsible. As a rule, only persons carrying out tasks which fall within the legal competence of a commissioner are able to engage the latter’s political responsibility.

7.8.5. This section will deal with the relations between commissioners and their departments, mainly their directors-general, and with the relations between commissioners. The role of the secretary-general and *cabinets* will be examined in connection with both of these relationships.

7.8.6. The distribution of tasks amongst commissioners and directorates-general determines the competences, and therefore (legal and ethical) responsibilities of both. Issues of political responsibility will be discussed later, mainly in connection with the European Parliament (7.14).

7.8.7. As a general remark on commissioners’ and director-generals’ responsibility, the Committee wishes to emphasise that no responsibility can be imposed, or assessed correctly, if it does not go hand in hand with a clear definition of competences, means, hierarchical structure, control systems and sanctions.

## **7.9 Commissioners, their director-generals and departments**

### ***Formulation of policy v. implementation of policy***

7.9.1. The Committee’s first report observed that commissioners sometimes evade responsibility for acts or omissions of their services on the pretext that commissioners are responsible only for laying down policy, while director-generals implement policy. This distinction, if strictly interpreted, is tenable neither in law nor in fact. It is not tenable in law,

---

<sup>116</sup> As indicated in the first report, ethical liability must also be distinguished from legal non-contractual liability (based on Article 288 (ex 215 ), par. 2) which is part of the provision in the EC Treaty on judicial review of administrative and legislative action of the Community institutions before the Community Courts.

because it would mean that the whole area of implementation of policy would escape scrutiny by Parliament. It could be argued that, since the commissioner concerned lacks legal competence, he/she cannot be held accountable to Parliament for the implementation of policy, whereas, at the same time, the director-general and his services only owe (executive or management) responsibility to their commissioner and have no direct (political or constitutional) responsibility towards Parliament. Nor is the distinction tenable in fact, as, as is generally agreed, the distinction between formulating and implementing policy, i.e. between policy and operational matters, is a falsely rigid one, difficult to define in principle and even more difficult to apply in practice.

7.9.2. The (second) code of conduct of the outgoing Commission, relating to commissioners and departments, after recalling that, “Relations between Commissioners (their Offices) and departments shall be based first and foremost on loyalty and trust”, states that “Commissioners shall assume full political responsibility. Directors-general shall be answerable to their Commissioner for the sound implementation of the policy guidelines laid down by the Commission and the Commissioner”.

7.9.3. The Committee accepts this principle if it is taken to mean that, in the *internal* relationship between commissioner and director-general, the latter assumes *prime* responsibility for the implementation of policy, and the former lays down policy. Such an internal division of labour does not however preclude the commissioner being operationally responsible too for the sound implementation of “his/her” policy, just as it does (or should) not preclude the director-general, and his services, being involved in policy formulation. The “full political responsibility” assumed by the commissioner should then be understood as an obligation to be fully accountable firstly to the Commission as a body, and then to Parliament for his/her own actions and for those of the director-general and other officials of his/her department. These are *in turn* answerable to the commissioner, and through him/her to the Commission and the Parliament.

7.9.4. It is recommended that the above principles be better elucidated in the code of conduct, which in its present version could be interpreted as subscribing to a strict separation of work *and* competence for policy and operational matters between the commissioner and the director-general respectively.

7.9.5. The *internal* relationship between commissioner and director-general is further described in the Commission’s code of conduct. In line with what is indicated above, it is for the departments to “implement the priorities and policy guidelines set at political level” but also to help to prepare those policy guidelines “by proposing strategy options advising the commissioner on individual political decisions and providing all the necessary background information”. Furthermore, “(T)hey shall provide the commissioner with information, reporting on any important event in departments, in the Member States or in international bodies which might have an impact on the management of his or her portfolio or his or her position within the Commission.”

7.9.6. The reverse situation, namely that the commissioner must be able to give instructions, or at least supervise, how policy guidelines are *implemented* by departments - this being the practical basis for his/her political accountability - is not given substance in the proposed code of conduct. Indeed, the principles mentioned at the outset state that commissioners “shall be

responsible for the efficient operation of their Directorate-General in compliance with the distribution of powers and responsibilities laid down in the Staff Regulations, the Financial Regulation, the Commission's Rules of Procedure as well as SEM 2000 and MAP 2000". The Committee recommends that it be made clear that such rules or regulations may not be interpreted so as to curtail the commissioner's managerial (not only political) responsibility for the overall organisation of his/her department, and that they should not be allowed to confer "immunity" upon commissioners in respect of the sound implementation of policy and the efficient organisation of their services. This is particularly important as the Commission's work progressively shifts "from drafting new legislation and developing new policy initiatives (towards) tackling the less glamorous, but increasingly important, task of managing existing programmes"<sup>117</sup>

7.9.7. In the aftermath of the outgoing Commission's resignation, one commissioner was heard to complain that commissioners cannot in practice supervise the actions of their directorates-general. That complaint must be taken seriously. It is not normal that commissioners must assume political responsibility for acts of their departments if they have no competence whatsoever to give instructions or at least to supervise managerial or important operational matters. However, the Committee does not know of any legal, or other, provision which prohibits a commissioner from instructing or supervising their departments, provided that the competence to do so is clearly defined.

### ***Status of director-generals***

7.9.8. This point raises the question of the status of directors-general. Since they are appointed for an indefinite period of time, whereas commissioners are appointed for a renewable five-year term, there is a serious risk that directors-general become excessively dominant in their spheres of activity. That is why, in some Member States, a "public mandate" is envisaged for heads of departments, implying that they are appointed for a limited but renewable term.

7.9.9. The Committee appreciates the delicacy of intervening in the balance of power between commissioners and directors-general, whereby it remains for the director-general to manage the financial and human resources in his/her department. Nonetheless, the matter has to be re-considered in the light of an increasing need for commissioners to be more involved in supervising the organisation and management of their services (including tasks which have been outsourced) and for the Commission, primarily its President, to regroup departments to make directorates-general more homogeneous (in order to prevent rivalry between departments having parallel competences). The matter must also be re-considered because of a wider recognition of commissioners' accountability towards Parliament. As stated above, such accountability towards Parliament implies broader competences on the part of the commissioners vis-à-vis their departments.

## **7.10 Relations between commissioners – collective responsibility**

### ***Collective responsibility in practice***

---

<sup>117</sup> Herman Report, B. 34

7.10.1. In the Committee's first report, responsibility was attributed to a few individual commissioners on the basis of their own personal or managerial conduct. Obviously to the surprise of the outgoing Commission, the Committee also established instances of collective responsibility. Collective responsibility may arise, in the Committee's view, in connection with decisions taken by the Commission as a body, e.g. where the Commission decides to relieve a director-general of his function, refuses to lift immunity of civil servants at the request of a national criminal court, or, even more importantly, where the Commission as a whole decides policy questions or fails to react to mismanagement on the part of a colleague of which it is aware or should have been aware.<sup>118</sup>

7.10.2. The outgoing Commission's proposed code on commissioners defines collective responsibility only as an obligation for each commissioner not to call into question a decision taken by the whole Commission, and to refrain from disclosing what is said at meetings of the Commission. In the Committee's view collective responsibility should also be defined to mean that each member of the Commission has the right and duty to keep him/herself informed as to the activities of every other commissioner. Thus one commissioner should not be able to evade responsibility for decisions which have been taken by the Commission as a college - whether nominally or in reality - by passing it to another commissioner. Once a policy has been announced, and once a decision has been reached, all commissioners are responsible for it. They are also collectively responsible, in the Committee's view, for failings and problems about which they know, or should know, for example where questions have been raised in Parliament or, in a credible way, in the media. All this presupposes that mechanisms are provided whereby commissioners receive information on matters falling within colleagues' portfolios, are able to put such matters on the agenda of the Commission.

### ***Organisation of the Commission***

7.10.3. The issue of collective responsibility is closely related to the way in which the Commission as a college is organised, and to the position of the President, the Vice-Presidents and the Secretary-General in allocating or overseeing tasks carried out by the commissioners. In this context, it is frequently heard that there are too many commissioners. This may lead to an excessive separation of tasks and responsibilities which, especially if combined with a feeling of responsibility only for the accomplishment of one's own tasks, undermines any sense of responsibility for the Commission's work as a whole.

7.10.4. Since the Amsterdam Treaty, it is the clear responsibility of the President of the Commission to deal with the problem of the reduction and rationalisation of Commission portfolios, possibly through the establishment of teams of commissioners for each subject area, especially as commissioners have been nominated with his agreement (Article 214, (*ex 158*), paragraph 2 TEC). Moreover, it is also the President's responsibility to give "political guidance" to the Commission (Article 219 (*ex 163*)) and accordingly to organise the work and the proceedings of the Commission in a way that reinforces, instead of weakens collective

---

<sup>118</sup> The principle of "collegiality" is a well established principle of Community law: it "is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted": Judgement of Court of Justice of 29.9.98, Case C-191/95, *Commission v Germany*, ECR(1998)I-5449, para. 39

responsibility. Collective responsibility requires that commissioners should be able to argue freely in private and at Commission meetings on what they hear, or perceive, to be a colleague's approach in his/her sphere of competence, "and can argue freely in private while maintaining a united front when decisions have been reached".

7.10.5. In modern government, different techniques of self-administration or management by contract have been developed whereby the execution of public tasks and the management of the relevant financial envelopes are delegated to civil servants grouped in executive agencies or working under covenants with the Minister. In the Community context, shared management with Member States, as discussed in Chapter 3, is a well established feature of Community policy and more recently it has become commonplace to outsource public tasks to private entities, as discussed in Chapter 2. Recourse to such forms of delegated and shared management may in no way impede commissioners and their director-generals from being held responsible for the organisation and supervision of policies implemented within their areas of competence.

## **7.11 The role of the Secretary-general**

7.11.1. The growing importance of the management tasks of the Commission and the need for commissioners to take joint responsibility with directors-general for the correct functioning of their departments, as well as the increased role of political guidance of the President of the Commission and the necessity to reduce the role of the Commissioners' *cabinets* in dealing with management issues, are all factors which tend to emphasise the importance of the role of the secretary-general of the Commission. He/she should, under the political guidance of the President, act as the interface between the political and the administrative levels of the Commission and promote transparency and accountability of the administration in its relations with the citizen. He/she should stimulate horizontal cooperation between the directorates-general and above all ensure that decisions of the Commission are effectively followed up.

7.11.2. More specifically, it is the secretary-general's task to encourage dialogue between horizontal and operational directorates-general on administrative issues. If, because of wider obligations, director-generals cannot participate in such a dialogue on a systematic basis, weekly meetings should be held "of assistants or Heads of Resources Units or the two together (to) clear up issues of interpretation but also offer a forum for raising new issues in implementation. This will provide horizontal services with early warning of questions which will otherwise be dealt with under the pressure of the procedures for individual financial decisions..."<sup>119</sup>

## **7.12 The role of commissioners' cabinets**

7.12.1. The task of a commissioner's *cabinet* should be no other than to be the emanation ("alter ego") of the commissioner. It should, in other words, have no competences beyond those of the commissioner him/herself and should act under the explicit personal instructions of the commissioner. Its members must therefore limit themselves to preparing the personal work of the commissioner and facilitating his/her political guidance, both vertically, i.e. towards the departments and officials, and horizontally, i.e. towards the other commissioners and their *cabinets*.

---

<sup>119</sup> In the words of a Director General in a report for an administrative inquiry  
DOC\_EN\DV\381\381230EN.doc 127

7.12.2. As to the first, vertical, aspect, members of the *cabinet* should beware of interposing themselves between their commissioner and his/her department, director-general, directors, etc. Obviously, the commissioner cannot be bothered by anyone for everything. However, *cabinets* often act as screens and fences, impeding direct communication between commissioner and departments.

7.12.3. The code of conduct proposed by the outgoing Commission on commissioners and departments reflects this distant, needlessly hierarchical and bureaucratic approach. It provides, for example, that it is for the *cabinet* to “inform the departments [thus also the director-general!?] about the Commission’s proceedings especially when they have a direct impact on the departments’ own activities” (sic) just as it shall “inform the departments about decisions taken by the Commissioner” and “keep the director-general fully informed about its contacts with the outside on matters falling within the portfolio”. Meanwhile, “departments’ contacts with the outside shall be co-ordinated with the Commissioner and his or her Office”. “Working methods and information channels shall be laid down at the start of the term of office by the Director-General and the *Chef de cabinet*, who will ensure that they are endorsed by the Commissioner”.

7.12.4. Of course, much will depend on the commissioner’s personal authority and talent for communication, and therefore his/her ability to work with these rules. That does not alter the fact, however, that on paper they encourage the departments, including the directors-general to keep at a “respectful” distance from their Commissioner. That is not how the Committee envisages relations between commissioners and their departments.

7.12.5. As to the second, horizontal aspect, it is the main task of members of the commissioner’s *cabinet* to keep “the commissioner informed about matters outside his or her own area of competence” in order “to ensure that the principle of collective responsibility operates correctly” and, in the same vein, “to make the preparations for securing political agreement by the Commission at the final decision making stage”. In other words, it depends largely on the *cabinet* how well a commissioner is informed about the work of his/her colleagues. Such information must obviously not be obtained through “espionage”, but in all openness through free and frank discussion between *cabinets*. If difficulties within the area of competence of other commissioners arise, the *cabinet* must be in a position to enable their commissioner to act.

7.12.6. Obviously, the *cabinet* of the President occupies a special position, as it is through this office that issues arising within the areas of competence of other commissioners are, if not detected, then dealt with and/or submitted to further dialogue and possible discussion in the Commission.

### **7.13 Enforcement of ethical responsibility**

7.13.1. As stated at the outset the individual and collective responsibility of commissioners is substantially an ethical professional/legal responsibility (to be distinguished from political responsibility which will be dealt with in the next section). This holds true for both non-compliance with rules and standards on proper personal behaviour in public life (duty of integrity) and non-compliance with rules and standards on proper managerial conduct in high office (duty of sound management). Civil servants also bear ethical responsibility for non-compliance with both sets of rules and standards.



7.13.2. There is, however, a considerable difference between the two cases, in that commissioners, unlike officials, are not subjected to Staff Regulations or conditions of employment and that the only way to hold commissioners responsible, leaving aside political responsibility<sup>120</sup>, is to bring suit against them before the Court of Justice under Article 216 (*ex I60*) in cases of serious misconduct or, under Article 213 (*ex-157*), para. 2, in cases of infringement of their duty to “behave with integrity and discretion”. Such action tends to compulsory retirement or deprivation of pension or other benefits, and is brought on application by the Council or the Commission.

7.13.3. It has been suggested that the possibility to bring proceedings of this sort should also be given to Parliament. The Committee does not agree, as such proceedings relate to *personal* misconduct, and may thus be seen as a form of disciplinary procedure, whereas Parliament’s role, as a democratically elected institution, relates to the enforcement of *political* responsibility as described below.

## **ACCOUNTABILITY AND POLITICAL RESPONSIBILITY**

### **7.14 The Commission in relation to the European Parliament**

#### ***Accountability and political responsibility***

7.14.1. The events preceding the resignation of the outgoing Commission showed the importance of the European Parliament - acting on the basis of reports of the Court of Auditors, of its own information or of articles in the press - in detecting and dealing fraud, favouritism and mismanagement within the Community. It is therefore of the utmost importance to examine the role of the European Parliament in its relation with the Commission. As in all parliamentary democracies, the relationship between Parliament and the executive branch (leaving aside for now the Commission's legislative competence) is of a dual nature: first, Parliament has a right to be informed by the Executive, which gives account of its action (hereafter **accountability**); second, it also judges the ultimate political responsibility of the Executive and draws the political consequences (hereafter **political responsibility**).

7.14.2. There are important differences in the constitutional systems of the EU Member States as to the precise form of ministerial accountability and responsibility. Moreover, the position of the European Parliament cannot yet be entirely assimilated with the position of a national parliament. This does not prevent, however, national parliaments from serving as a model, insofar as they reveal constitutional characteristics which may increasingly also shape the role of the European Parliament.

#### ***Accountability and transparency***

7.14.3. Accountability of ministers or commissioners towards Parliament is only one aspect of transparency in general. The more transparency a constitutional and administrative system displays towards the public at large the better citizens and the media, as a reflection of a

---

<sup>120</sup> Also leaving aside penal responsibility for criminal offences committed which is a matter for the court of the State where the offence is committed.

pluralistic public opinion, will be in a position to allow and encourage Parliament to control the action of the executive branch. The stronger the control by public opinion, the more forcefully ministerial accountability towards Parliament is able to operate in a democratic society. Giving full account to Parliament, at their own initiative, is also a form of self-defence for ministers and commissioners against the unhappy predicament of being submitted to unfocused and uninformed criticism by press and public opinion.

7.14.4. Pressure from public opinion plays a limited role in influencing the Commission at the European level, as it is still primarily shaped by national viewpoints and interests, and according to accepted standards of conduct which may vary. Moreover, criticism of individual commissioners is easily perceived by the public opinion in the home country of the commissioner as a criticism of the country itself.

7.14.5. It is of the essence of accountability towards Parliament that commissioners are open regarding policies, decisions and actions of their departments, and refuse information only, and exceptionally, when disclosure is definitely not in the public interest. They should give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Accountability however goes beyond the mere provision of information. It also implies that the policies, decisions or actions are explained, motivated and argued before Parliament. Officials should be expected to give information or evidence before parliamentary committees upon request, and under the direction and political responsibility of, their commissioner. However, it is for the minister, and only for him/her, to explain and defend his/her action before the Parliament.

### ***Mechanisms for accountability***

7.14.6. Accountability to Parliament manifests itself through answers to oral and written questioning and through the work of parliamentary committees. In some legal systems, it is incumbent upon a special Constitutional Committee to examine Ministers' performance of their duties and the handling of government business.

7.14.7. According to EC Treaty Article 197 (*ex 140*), members of the Commission may attend all meetings of the European Parliament and shall, at their request, be heard on behalf of the Commission. Furthermore, the Commission shall reply orally or in writing to questions put to it by the European Parliament or by its members. It must also submit an annual general report which the European Parliament shall discuss in open session (Article 200 (*ex 143*), EC). The information collected should permit the European Parliament to exercise political control over the Commission, which may, in extreme circumstances, culminate in a motion of censure as provided in Article 201 (*ex 144*) TEC, forcing the Commission to resign as a body.

7.14.8. One of the most significant procedures available to the European Parliament to force the Commission (or other institutions) to submit information is laid down in Article 193 (*ex 138c*). According to this article the Parliament may, in the course of its duties and at the request of a quarter of its members, set up a temporary committee of inquiry to investigate alleged contraventions or maladministration in the implementation of Community law<sup>121</sup>. Information to

---

<sup>121</sup> Decision 95/167/EC, Euratom, ECSC of the European Parliament, Council and Commission of 19 April 1995 (OJ L/113 of 19.5.95, p.2) and Article 136 of EP Rules of Procedure.

decide on the introduction of such a procedure may reach Parliament by a petition addressed to it, directly or indirectly through the ombudsman (Articles 194 and 195 (*ex 138d and 138e*), TEC), by “any natural or legal person... on a matter which comes within the Community's field of activity and which affects him, her or it directly”.

### ***The discharge procedure***

7.14.9. The European Parliament's prerogative to require the Commission to give account can be enforced most effectively in the framework of Parliament's competence to give discharge to the Commission in respect of the implementation of the budget. Article 276 (*ex 206*)

7.14.10. With a view to its decision on discharge, Parliament, like Council, will examine, among other documents, the annual report and any relevant special reports by the Court of Auditors as well as, since the Amsterdam Treaty, its “Statement of Assurance” (known as the “DAS” – see Chapter 4). Article 276, *ex 206*, para. 2 further provides: “Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request”.

7.14.11. If Parliament is not satisfied with the measures the Commission takes in light of Parliament's (or Council's) observation and comments, it can and may, refuse discharge. This may lead Parliament to adopt a motion of censure on the basis of Article 201 (*ex 144*).<sup>122</sup>

### ***Confidentiality and accountability***

7.14.12. In the course of application of Article 276 (*ex 206*) to the 1996 budget, a lack of understanding arose between the European Parliament and the European Commission concerning the communication of information (in particular regarding the ECHO file) to Parliament. Notwithstanding an agreement of 30 September 1998 between the Presidents of the two institutions concerning the communication of confidential documents in order to preserve the rights of individuals, no workable solution could be found. The discussion bears in such cases essentially on how to reconcile the right of Parliament under Article 276 TEC to determine itself (as follows from the text of the article) which documents it requires from the Commission and the need to respect confidentiality, most often to protect the rights of persons who are under investigation for reprehensible acts, including criminal offences..

7.14.13. In also refusing to give discharge for the 1997 budget, the European Parliament's rapporteur re-examined the question and came to the conclusion that the existing instruments, primarily Annex VII to Parliament's Rules of Procedure, are insufficient to prevent the unauthorised dissemination of confidential information<sup>123</sup>. It is recommended that an inter-institutional instrument be concluded, similar to the one existing within the framework of investigations carried out by committees of inquiry under Article 193 TEC, to ensure

---

<sup>122</sup> In the context of recent events, recourse to a formal motion of censure was rendered superfluous by the resignation of the Commission

<sup>123</sup> See report A4-0201/99 – adopted 4 May 1999

Parliament's unfettered right to information, subject only to the respect for basic rights and fundamental freedoms of individuals. The conclusion and implementation of such an inter-institutional agreement as early as possible would be a clear signal of the Commission's readiness to fulfil its constitutional duty to give account to Parliament.

7.14.14. In its first report the Committee has met at least one instance, outside the field of application of Article 276, where it noted the reluctance of Commissioners to inform Parliament to the best of their knowledge at a point in time when Parliament needed all information available to perform its own duties<sup>124</sup>. The Committee recommends that the new Commission make it clear that it will give the widest interpretation possible to its duty of accountability towards Parliament and that any member of the Commission who knowingly misleads Parliament, or omits to correct at the earliest opportunity any inadvertent error in information given to Parliament, will be expected to offer his/her resignation.

### ***Political responsibility***

7.14.15. Political responsibility concerns the political consequences attached to conduct of holders of public office, or to conduct of civil servants working under them within their sphere of competence, by the institution or person who can hold such holders of public office to account. Although political responsibility exists in all democratic legal systems, it exists in different forms and at different levels depending on the constitutional structure of the legal system concerned. Differences also exist:

- as to the extent of political responsibility: only for individual (personal or functional) misconduct or also for misconduct of subordinate civil servants?;
- as to the nature of the political consequence: dismissal, or other consequences of a lesser nature?; imposed collectively, or also individually?
- as to the institution or person called upon to impose the political consequence: parliament, president or prime minister?

7.14.16. The first distinction to be made is between the enforcement of *individual* political responsibility and the enforcement of *collective* political responsibility.

7.14.17. The principle of collective political responsibility of the Commission towards Parliament follows from the right granted to Parliament, from the beginning, to adopt a motion of censure in accordance with Article 201 (*ex 144*), in which case the Commission must resign as a body. On the occasion of the Maastricht Treaty revision, this power was reinforced by the opportunity for Parliament to set up committees of inquiry (Article 193 (*ex 138c*)). The political responsibility of the Commission is also implied in its duty to give account to Parliament in hearings or replies to questions as laid down in Article 197 (*ex 140*). It should be noted in passing that, in order for Parliament to exercise this role credibly, it should apply the same high standards to itself that it expects of those over whom it exercises supervision.

---

<sup>124</sup> First Report, Chapter 5

7.14.18. As for the political responsibility of individual commissioners, no changes have been introduced by the Amsterdam Treaty, except that it has been made clear that the Commission(ers) "shall work under the political guidance of its President" (Art. 219 EC) and that the President, once his/her nomination by common accord between the Member States has been approved by Parliament, will now be in a position to refuse his/her accord with the designation of a commissioner by the Member States (Article 214, para. 2). Note should be taken, moreover, of Declaration 32 adopted by the IGC where the Conference "considers that the President of the Commission must enjoy broad discretion in the allocation of tasks with the college, as well as in any reshuffling of those tasks during a Commission's term of office". These enhancements in the role of the president point the way towards, though do not make explicit, greater authority for the president vis-à-vis the members of "his/her" Commission. At the same time, Parliament's veto over the president points to its overarching role.

7.14.19. It is inconsistent with the need to strengthen the sense of responsibility of all persons working in the Commission, starting at the top, that no more specific provisions regarding the political responsibility of the Commission as a body, and no provisions at all regarding the political responsibility of individual commissioners, are to be found in the treaties. Such political responsibility of commissioners, whether collective or individual, must cover the whole range of competences for which they are responsible, namely their own personal, managerial and operational shortcomings in the exercise of their high office as well as important shortcomings in the functioning of their departments, even when the blame for these cannot be laid upon them personally.

7.14.20. With these needs and lacunae in mind, the Committee would stress that political responsibility should be enforced at two distinct levels. First, the collective responsibility of the Commission, under its president, is a matter for the Parliament in accordance with the current treaty provisions. This concept presents few difficulties and has moreover recently been illustrated in dramatic fashion.

7.14.21. Second, the individual political responsibility of commissioners should be enforced through a significant strengthening of the hand of the Commission President. Just as in most Member States the head of the government has a constitutionally free hand to dismiss or reshuffle the members of his/her government, the President of the Commission should be in a similar position with regard to commissioners. The President should be able to act, at his own initiative and on his own responsibility, to give concrete form to the political responsibility of commissioners. The exact nature of the action would be for him/her to decide. It cannot be excluded that the Parliament may itself express views on the suitability or otherwise of certain individuals to exercise a political mandate in the Commission, but it must remain for the President alone to establish what, if any, action should be taken in respect of that individual taken. He/she will be answerable to the Parliament for any such action (or inaction).

7.14.22. Treaty amendments are needed to set the principle of the President's authority with respect to commissioners on a firm legal footing. However, until the necessary amendments are possible the Committee takes note of and endorses the view expressed by the current president-designate of the Commission that any breach of the new codes of conduct on the part of a commissioner would indicate that the individual concerned would forfeit his/her place in the Commission.

## **7.15 The Commission in relation to the Council**

7.15.1. The role of the Council in holding the Commission to account is institutionally far less developed than that of the European Parliament. This, obviously, is the result of the evolution, over the years in the role of the Council, the Commission and the Parliament in their relations with each other and of the fact the Parliament is a directly-elected body, thus enjoying the highest possible form of democratic legitimisation: the will of the people.

7.15.2. The continuously growing role of the European Parliament in relation to the Commission has been mentioned already (7.14.1). This section will briefly examine the relationship between the three institutions, including the Council, summarising to the extreme. The Commission has a vast array of legislative, administrative, executive and even judicial powers. As far as the legislative field is concerned, the most important powers of the Commission are the right of initiative and the exercise of delegated powers. The Council plays, from the outset, a considerable role in the legislative process, foremost in that it has to vote its approval of Commission initiatives before they become law, and now also in that it may be pro-active in the process by virtue of TEC Article 208 (*ex-152*). The Parliament has seen its initially purely consultative role transformed into a substantial one in the legislative process, while its original powers to censure the Commission and to decide on the granting of discharge for the implementation of the budget have been strengthened, firstly, by its new right to approve a newly-appointed Commission and, secondly, by its extended rights to monitor the activities of the other institutions by asking questions and establishing committees of inquiry.

7.15.3. Beyond the changes contained within the treaties, it is even more important to understand the evolution in the political culture of the institutions. Whilst the Commission has always been, and will remain, the single most important force for political integration in Europe, it must now learn to keep pace with Parliament and Council in a continuously evolving inter-institutional context. Within this context, the pro-integration perspective of the Commission tends to create tensions with the inter-governmental perspective of Council. These have led Council to strengthen its own position through the growing importance of COREPER and through the creation of an array of committees allowing it to participate directly in the management and implementation of Community action by virtue of TEC Article 202 (*ex-145*) (“comitology” – see below). It is not for the Committee to express a view as to how the institutional balance will evolve with respect to the two extreme models: the Commission as a dynamic technocracy, with Council as the body required to ratify Commission action, or the Commission as a kind of federal government, with a bicameral parliament, the Council filling the role of second chamber representing the interests of Member States. Within this institutional relationship, the Parliament may even have to act as an arbitrator and intermediary between Community and national interests, using its budgetary, supervisory and censoring powers in a drive for openness, accountability and responsibility against not only the Commission but also the Council.

7.15.4. In this dynamic context of evolving inter-institutional relations, the Committee would like to address three specific areas.

### ***Power to take disciplinary action***

7.15.5. Mention has already been made of the Council’s power under Treaty articles 213 (*ex-*

152(2)) and 216 (*ex-160*) to apply to the Court of Justice in respect (i) of a failure to “behave with integrity and discretion”<sup>125</sup>, (ii) of “serious misconduct”<sup>126</sup> by individual commissioners or (iii) when the commissioner no longer fulfils the conditions required for the performance of his duties”<sup>127</sup>. This is the sole concrete provision in the Treaties enabling sanctions to be applied by an outside body against *individual* commissioners.

7.15.6. This power does not however correspond to the notion of political accountability in discussion in this section. First, it is not exercised directly: it is for the Court of Justice to decide the merits of each application. Second, it applies in cases of *personal* misconduct rather than the exercise of a political mandate as such, and should therefore be regarded as a disciplinary sanction (c.f. First Report 1.6.2 and 7.13.2 above).

7.15.7. The Committee offers no further comment on this mechanism other than to suggest that the treaty definitions of “misconduct” and behaviour with “integrity and discretion” might usefully be tightened up. It remains to be seen – in the context of a case currently pending at the Court of Justice - whether the present definitions of these terms, and procedures, are sufficiently apt for an early determination of the matter.

### ***The discharge procedure***

7.15.8. On the other hand, Council is a participant in a procedure, already described above, aimed explicitly at the enforcement of political, though not purely budgetary, responsibility: the discharge procedure. The power to give or withhold discharge is exclusively in the hands of the Parliament, but Council is nevertheless required to give a recommendation before it does so. Though its power in the decision itself is purely advisory, successive Treaty amendments have tended to upgrade the Council’s recommendation. The last two paragraphs of Treaty Article 276 (*ex-206*), which deals with the discharge, reads:

*The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.*

At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.

7.15.9. In other words, and slightly paradoxically, the recommendations of Council are theoretically as binding on the Commission as those of the Parliament, even though Council does not take the crucial decision. However paradoxical, this situation implies a responsibility on Council to take the discharge procedure with a degree of seriousness which has arguably not been manifest over the years. The Committee has already noted a lack of interest on the part of Council in the examination of reports by the Court of Auditors (one of the cornerstones of the

---

<sup>125</sup> TEC Article 213 (*ex-157*)

<sup>126</sup> TEC Article 216 (*ex-160*)

<sup>127</sup> TEC Article 216 (*ex-160*)

discharge procedure)<sup>128</sup> and would now add the observation that the Council's recommendations on discharge are usually formalistic in nature, arrive usually at the last minute and are in any case adopted at a relatively low political level (the Budgets Committee) of Council. In short, they do not reveal any great belief in the importance of this mechanism for enforcing accountability. The Committee hopes that recent events will have impressed on Council the need to give the discharge procedure the political weight it deserves.

7.15.10. In this context, the Committee would refer to the principle of budgetary discipline imposed upon the Commission when putting forward any proposal for a Community act or adopting any implementing decision likely to have implications for the budget. It is for Council and Parliament to monitor respect for this obligation when they act on proposed legislation. In its First Report, the Committee found, on the contrary, that Council and Parliament sometimes encourage the Commission to go assume tasks which make demands going beyond the available resources.

### ***Committees of Member State representatives (“Comitology”)***

7.15.11. In a wide range of policy areas committees of Member States' representatives have powers of management and supervision over the implementation of Community policies. In some, they have the final word on the allocation of funding to projects (the Phare and Tacis Management Committees are examples).

7.15.12. Though perhaps not designed primarily as a mechanism for the enforcement of accountability, these committees give the representatives of the Member States an opportunity to exercise a high level of monitoring and supervision over the management of programmes by the Commission. However, in practice, they tend to be a mechanism through which national interests are represented in the implementation of Community policies, sometimes to the extent that they become a forum for “dividing up the spoils” of Community expenditure and permit the Member States, at times, to use their influence in programme management committees to ensure that contractors from each Member State obtain a “fair share” of the overall funding available.

7.15.13. The Committee has no wish to go into the complex subject of “comitology” at this point, nor examine the rights and wrongs of the Member States attempting to accommodate national interests within the Community framework. However, it will allow itself to comment on one important point.

7.15.14. It is regrettable that a system which should introduce transparency and accountability into the management of programmes in fact can *remove* responsibility from the Commission for the management decisions taken. Commission managers can (and do) point to the extraneous demands of Member States as justification for management decisions which cannot be justified according to objective financial criteria. This *de facto* transfer of responsibility away from those whom are supposed to be held accountable runs counter to the entire philosophy this Committee has propounded.

---

<sup>128</sup> First Report 9.4.12



## **7.16 Recommendations**

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

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

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

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

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

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

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

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

7.16.9. An independent standing “Committee on Standards in Public Life” should be created by interinstitutional agreement to formulate, supervise and, where necessary, provide advice on ethics and standards of conduct in the European institutions. This Committee on Standards

should approve the specific codes of conduct established by each institution. (7.7.1-5)

7.16.10. All Commission staff should undergo professional training aimed at raising awareness of ethical issues and providing guidance, from both a personal and management perspective, on how to deal with practical situations as they arise. (7.7.6-9)

7.16.11. The code of conduct on commissioners and their departments should establish that each commissioner is responsible both for policy formulation and the implementation of policy by his/her department(s). The commissioner shall therefore be answerable to the Commission as a whole for the actions of the department(s), and accountable to the European Parliament. Officials in departments shall answer to their director-generals, which shall in turn be accountable to the competent commissioner. (7.9.1-9)

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

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

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

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

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

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

financial management. (7.15.8-9)

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

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

## 8. **Final remarks**

8.1. Throughout this report the Committee has sought, in accordance with its terms of reference, to analyse the specific, everyday management problems of the Commission. Nevertheless, now that it has completed its work, it feels obliged to say that the political and institutional dimension of the Commission's weaknesses are lurking just beneath the surface: often the Commission is only able to take half measures because it does not have the means, in particular the statutory means, to perform its responsibilities in full. It was not the Committee's task to suggest any institutional reforms that might be undertaken, yet it goes without saying that the Commission must have the means to perform its duties.

8.2. In this report, in accordance with its terms of reference, the Committee has considered management practices only at the Commission. However, both the Commission and the other Institutions could benefit from some of the recommendations made by the Committee. The fact that this analysis was confined to the Commission does not in any way relieve the other Institutions of the obligation to give thought to their own administrative and financial practices, on the way in which they slot into the system as a whole and on ways and means of improving the political culture of the Communities.

8.3. Another widespread problem that was frequently encountered is more cultural in nature: the Community civil service tends to favour planning and negotiation at the expense of management and monitoring which are less highly thought of. 'All material support will be provided' seems to be the watchword of a civil service which would prefer to think rather than to do. There are no specific ways of dealing with a problem of mentality, but the Committee believes it should encourage a process of reflection and internal discussion in this respect.

8.4. During the course of its work the Committee found evidence of many shortcomings in the way the Community civil service operates. However, the members of the Committee had the opportunity of meeting many Commission officials of widely differing levels of seniority and doing a great variety of jobs. In most cases the Committee were appreciative of their abilities, their spirit of public service and their sincere desire to play their part in the efforts needed to improve the system. This wealth of human resources is one of the major achievements of the Community. Maintaining it is one of the fundamental responsibilities of the Commission.