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THE ROLE OF OLAF IN THE FIGHT AGAINST EU FRAUD: DO TOO MANY COOKS SPOIL THE BROTH?

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ABSTRACT

This paper will consider the role of OLAF in the fight against EU fraud. It will examine its powers and its capacity to coordinate the activities of anti-fraud agencies in twenty seven member states and it will also consider the constraints which prevent it from operating in a more effective manner. The paper will also consider OLAF's relationship with other transnational agencies such as Eurojust and Europol and will seek to highlight the degree of fragmentation which exists with a multiplicity of actors involved in the fight against fraud, a fragmented legal approach and the difficulties this presents in attempting to police sophisticated transnational frauds. The effect of EU expansion on this situation will also be considered and the support offered to new member states who have been asked to bring their anti-fraud structures up to the standards of existing members within a very short period of time will be examined. The efforts of the Czech Republic in seeking to build up anti-fraud structures and systems will be covered in some detail. The paper will seek to draw wider lessons which could be of benefit to prospective member states and to OLAF itself. The paper will conclude that despite the best efforts of the actors involved, a fragmented legal system and institutions are hampering the fight against fraud

Introduction

OLAF or the European Fraud Prevention Office was established in 1999. This was as a result of a recommendation from the then European Commission President, Jacques Santer, in 1998. This recommendation was prompted by a critical report on the performance of UCLAF – the European Anti—Fraud Office which had been established in 1988. The report was compiled by the European Court of Auditors which whilst commending UCLAF for the good work it had done, did make some serious criticisms of the way it handled intelligence, managed case files and maintained security. Another pressure at the time was a report from the European Parliament (the Bosch Report), which called for an independent fraud prevention office.

The Commission's proposal was an anti-fraud body which would be based outside the Commission, unlike UCLAF, which was part of the Secretariat-General and would have complete independence from it. The proposal was presented to the Vienna European Council in December 1998. In response to the reactions of the European Parliament and the Council, an amended proposal for a Regulation: 'concerning investigations conducted by the Fraud Prevention Office', was adopted by the Commission in March 1999. The new body took over certain functions that had been previously been exercised by UCLAF. The proposal did not involve the creation of any new powers for the Commission. Nor did it involve the creation of a body with its own legal personality, although the Office was given, in theory at least, operational independence.

In terms of powers and competences, much of its original powers were based upon a decision adopted in July 1998 on the conduct of its predecessor UCLAF's enquiries, by the European Commission. This decision as noted by the Committee of Experts (1999b) who were appointed by the European Parliament to conduct an enquiry into fraud and corruption within the Commission after the resignation of the Santer Commission in 1999, is essentially concerned with regulating the conduct of enquiries within the Commission and /or the mutual obligations of OLAF and other Commission services in relation to investigations.

OLAF was empowered originally to:

- Carry out administrative enquiries, without notice, within all the institutions and other bodies of the European Union. Enquiries may involve members and staff of the institutions
- All institutions and other bodies were placed under a corresponding obligation fully to co-operate in OLAF enquiries and to communicate to OLAF any information concerning possible fraud.
- OLAF's activities were monitored by a Supervisory Committee composed of five suitably qualified independent persons, nominated by the common accord of the Commission, the Council and the European Parliament. Its task, then and now, is to give a general opinion on the activities of the Fraud Prevention 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. It is required to report annually to the various European Institutions (Council, Parliament etc).

- The Director of OLAF shall 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 is required to report to the institutions on the activities of OLAF, without compromising the confidentiality of investigations (Article 12).
- OLAF is funded by a separate budget in Part A (administrative appropriations) of the Commission. The budget in 2005 amounted to approximately 60 million euros.

OLAF's exercise of its powers has been criticised as a result of irregularities found within the Eurostat Statistical Office. These involved the payment of receipts from the sale of Eurostat publications into a suspect bank account. OLAF has been criticised for the delay in investigating the case and the Commission's lack of knowledge of the alleged irregularities. In response to these criticisms, the Commission proposed a number of amendments to Regulation 1073/99 which is one of the Regulations governing OLAF. The Commission's proposals have five objectives:

- to strengthen OLAF's operational efficiency
- to improve the information flow between OLAF and EU institutions and bodies
- to ensure fully the rights of individuals under investigation
- to enhance the role of the Supervisory Committee

In order to achieve these objectives, the proposed Regulation:

- prevents EU institutions and bodies from conducting their own internal administrative investigations on matters under investigation by OLAF (amended Article 1 (3));
- clarifies OLAF's powers to conduct external investigations (amended Article 3 (2));
- enables OLAF in the conduct of external investigations to have direct access to information held by institutions, bodies, offices and agencies relevant to those investigations (amended Article 3 (3));
- requires OLAF, on undertaking an investigation involving a member of an EU institution, immediately inform said EU institution of the investigation (new Article 6 (5a));
- establishes procedures to ensure the fundamental rights ("procedural guarantees") of individuals being investigated (new Article 7a)
- strengthens the role of the Supervisory Committee by increasing its membership from five to seven (one of whom would monitor the observance by OLAF of the rights of individuals) and entrusting it with the task of delivering opinions concerning procedural guarantees (amended Article 11) (House of Lords 2004).

The original reform proposal has been further amended by the Commission tabling a new proposal which takes into account proposals from the European Parliament and the Council of Ministers to further evaluate the performance of OLAF (Eurcrim, 2006, p.6). The new proposal includes two major changes to the original one which reflect the view of Commission Vice-President Kallas that OLAF's investigations need political

governance as well as an independent review of proceedings while ensuring the confidentiality of investigations (Eurcrim, 2006, 1/2). The two major changes are:

- The Supervisory Committee is to get more political functions. It is proposed that there should be regular meetings between the Supervisory Committee and representatives of the European Parliament, the Council of Ministers and the Commission. The main aim is to exercise political control over OLAF's investigations and its efficiency by discussing the definition of the Office's strategic priorities as well as the reports on its work programme and activities.
- The establishment of an independent "Review Adviser" is also suggested. The rationale behind the creation of such a post is that the Review Adviser would have an oversight function in respect of procedural rights. He/she would receive and scrutinise complaints from persons under investigation at all stages of an inquiry. He/she would also have the function of giving opinions, for example, if the OLAF Director wished to extend an investigation beyond twelve months or if the Director wished to postpone the obligation to hear the alleged person (Eurcrim 2006, 1/2).
- The amended regulation also includes a set of provisions designed to improve the information flow of OLAF's activities:
    - OLAF is obliged to inform Community institutions or bodies at an early stage in cases where officials or staff members are suspected of wrongdoing, so that the institution or body can decide whether to take precautionary or administrative measures. This amends the original

proposal whereby OLAF was required to immediately inform the institution about an investigation.

- The final investigation report must be communicated from OLAF to the suspects, in order to allow them to prove a breach of their procedural guarantees and eventually lodge a complaint to the Review Adviser
- Informers/whistleblowers must be informed, upon request, by OLAF on the outcome of the investigations.
- Finally, Member States are obliged to inform OLAF on actions taken when OLAF forwarded a case to their national authorities

These proposals have been subjected to a number of observations and criticisms.

OLAF's requirement to inform Institutions it is investigating them

Based on the original proposal, Professor Levi and Dr. Dorn in their evidence to the House of Lords European Committee, argued that the responsibility of OLAF to inform the institution that it was under investigation could well compromise the said investigation (House of Lords, 2004). This could lead to it being blocked and obstructed and, of course, evidence could be covered up or even destroyed. Levi and Dorn (2004) state that: 'The Commission will argue that it (and other institutions) need to know at the earliest opportunity that the integrity of an individual and project may be compromised, so that it can take remedial steps. Yet those steps are precisely what would undermine the secrecy needed to initiate cases, investigate and gain evidence of wrong-doing' (House of Lords 2004, p.6). Raymond Kendall of OLAF's Supervisory Board, took the view that rules could not be made about an issue like this – it should be at the discretion of the

investigator. These criticisms and observations could still be valid depending on when and at what stage, OLAF informs the institution. If it is too early on in the case, it gives the guilty party time to tamper with the evidence and frustrate or even "kill" the investigation. The decision to inform has to be at the discretion of the investigator, other wise it could appear that the Commission is not prepared to give OLAF full discretion in this area. This compromises the independence of OLAF and is ill-advised. OLAF when it was established, was in theory given full operational independence, even though it was part of the Commission. This position is badly dented by the proposals advanced by the Commission. OLAF could well have 'one arm tied behind its back', in the fight against fraud.

OLAF's Investigative Powers

The UK Government had concerns that the amendments proposed in Articles 3 (2) and (3) of the original proposals might have the effect of compromising and indeed harming the ability and right of national agencies to conduct investigations within a Member State. The House of Lords agreed with this view and stressed the importance of both OLAF and national agencies being able to co-operate harmoniously without frustrating the efforts of each other (House of Lords, 2004). This is an important point, because liaison between agencies investigating the same case is crucial, because evidence gathering could be compromised if national rules and regulations are not followed, also there could be duplication of effort and resources and there could also be credibility problems, if representatives from different agencies visit the same locations, question the same people asking the same questions. This hardly smacks of a co-ordinated approach! This problem

is illustrated by the competition which existed between the then anti-fraud office – UCLAF, and another Commission department DGXX – the Financial Control Directorate, in the late 1990's and the harm that was done to the investigation of fraud within the Commission itself. Rivalry and competition ensued, resources and effort were duplicated, files were 'lost' – fragmentation occurred. If this can happen within the Commission, then the scope for fragmentation is all the greater with a European Union of twenty seven members with a multiplicity of agencies which is an endemic feature of such a diverse organisation.

Given the inherent risks outlined above, the question can be asked: should OLAF be involved in external investigations? Stefanou & Xanthaki (2005) emphasise the investigative function of OLAF and observe that the results from OLAF investigations can be used in criminal proceedings and can serve as the preparatory phase for prosecutions in national courts. OLAF has sought to establish co-operation and collaboration agreements with national investigative bodies such as police bodies and also in the framework of the OLAF Anti-Fraud Communication network for exchange of information on EU–related fraud. The main objective of OLAF's involvement in the investigations which take place at the national level, is to increase their effectiveness and efficiency and to enhance the level of protection of the EU's financial interests (Stefanou and Xanthaki, 2005). They observe that this is achieved by:

- involvement of OLAF in the investigations;
- provision by OLAF of training and methodological support

- OLAF's contribution in promoting co-operation between various investigative and legal authorities in different Member States. This is extremely important as EU fraud often has a transnational dimension and can fall under the jurisdiction of two or more Member States.

OLAF has a European-wide view which no national agency could have. It collects data on suspected irregularities and liaises with national agencies across twenty seven member states. Its' staff has a wide range of expertise from police backgrounds, judicial, audit and accountancy, agricultural inspection, customs and so on.

Yet, OLAF's involvement in external investigations has been questioned. The UK House of Lords takes the view that OLAF's investigative work has been limited, yet they offer no evidence to support this particular assertion. They do quote from a 2003 Report by OLAF's Supervisory Committee which makes the point that OLAF's intervention tends to occur long after the event and that there have been problems with national courts accepting evidence collected by OLAF. 'National courts have wanted evidence to be collected in accordance with their own national procedures' (House of Lords 2004, p.8). This has led to the suggestion made by Professor Levi and Dr Dorn in their evidence to the House of Lords European Committee that external investigations should be carried out by the Commission through its Directorates-General working with Member States. They argue that if OLAF were to give up external cases (except those having an internal aspect – relevant to the EU institutions), then all of OLAF's resources could be brought to bear against internal fraud and corruption. There is a clear logic to this, yet in order to

achieve this aim, it would be necessary to re-establish anti-fraud units in relevant DG's (they were taken out of DG's and combined with UCLAF in the 1990's), might this not lead to a duplication of resources? Also, many external cases could have internal dimensions or could force internal investigations which OLAF would undertake anyway.

A variation on the above proposal would be to rely on Member States to carry out investigations on their territories leaving OLAF free to concentrate on purely internal cases. Stefanou & Xanthaki (2005) believe that following the principle of subsidiarity, Member States in their view, had primary responsibility for external investigations and should take responsibility for opening cases. The fact is that 80% of expenditure occurs at Member State level, so inevitably Member State agencies are going to be heavily involved in investigation. Yet, as many frauds do have a cross-border or transnational dimension, it would not be possible for Member State agencies to have the European-wide view which OLAF has, as well as the capability to facilitate co-operation across national boundaries.

Independence of OLAF

Other issues to be considered include: the independence of OLAF which inevitably impacts upon its operational capability. OLAF is still part of the Commission. The greater part of its work is attributed to the Commission. Its Director is appointed by the Council of Ministers and Parliament and the Commission. This therefore, gives the Commission a great deal of potential influence over: 'who gets the job'. Where is the oversight to ensure

that the selection process has been conducted fairly? Which agency or individual has this role? The situation is far from clear.

The Committee of Experts (1999b) took the view that it was useful for OLAF to be 'inside' the Commission, both for the purpose of its enquiries as well as for the contribution it could make to the shaping of legislation where there is a fraud interest or dimension. The Court of Auditors has taken the view that the hybrid structure of OLAF has not adversely affected the independence of its investigative function and being part of the Commission has enabled it make use of powers conferred upon that institution such as the power to carry out on-the-spot checks in Member States (Court of Auditors 2005). However, a major disadvantage of OLAF's position is that when it investigates allegations of wrongdoing within the Commission – 'internal investigations', it is surely a case of the Commission investigating itself. This cannot be right. This state of affairs has the potential to compromise independence. If OLAF had been placed outside the Commission, then it could still have had an "arms-length" input into the process of formulating legislation, through some kind of advisory committee for example. It is true to say that there has been a genuine attempt to secure and strengthen the independence of OLAF by giving it a separate budget from that of the Commission as a whole and by trying to ensure that the appointment of a Director is achieved without undue influence by any of the interested parties such as the Commission, Parliament or the Council of Ministers. There has been an attempt to establish legal guarantees to safeguard OLAF's independence which can be found in Articles 11 and 12 of Regulation (EC) No. 1073/99

which declare the independence of the Director and establish a Supervisory Committee which endeavours to oversee OLAF's investigations without interfering in them.

Notwithstanding these attempts to safeguard OLAF's independence, its current hybrid status where it is part of the Commission yet independent of it does mean that its activities are still subject to evaluation by the Commission (Stefanou and Xanthaki, 2005). It is unable to report to the European Parliament on its own legal grounds but as part of the executive (the Commission), and this could be seen to compromise its independence.

Another area where OLAF's investigations could be seen to be compromised and which bears directly on its ability to investigate fraud is in the area of staff recruitment. Given the diversity of functions which OLAF is required to perform, recruitment can prove to be problematic. Its investigations can prove to be administrative, disciplinary, financial, tax and customs based. A balance must be struck between the different categories of investigators such as those who deal with EAGGF frauds, frauds against the structural funds, frauds upon income such as own resources and those who are 'up-stream' of such investigations such as those involved with intelligence and administration. It can be quite a difficult task to recruit suitable staff to meet all these diverse needs. The preoccupation with nationality balance both in recruitment and maintenance of the staff establishment, can potentially mean that good staff are lost and less able staff are appointed. With each enlargement of the European Union, priority is given to nationals from new member states in the recruitment process. Given that the EU has recently expanded from fifteen to

twenty seven members, then this is likely to have a huge impact on recruitment and selection. New staff, by definition, lack experience in cross-border work, and also perhaps lack detailed knowledge of complex programme areas such as the Common Agricultural Policy and the Structural Funds.

The European Court of Auditors in their recent report evaluating the performance of OLAF (Court of Auditors, 2005), made this very point. The Court found that over 55% of staff in Categories A & B – over 130 posts, were employed on temporary contracts. Most of these temporary contracts will come to an end between 2007 and 2009, when the staff concerned will have to leave the Office (Court of Auditors, 2005).There is a high risk that all this accumulated knowledge and experience will disappear within a short period and when this difficulty is compounded by recruitment of less experienced staff from new member states who will face a steep learning curve, then the potential for disruption to quite complex investigations is all too apparent. This point was illustrated by a senior OLAF official who stated that he was losing a good member of staff with the effect of disruption to his department's work because of a too rigid interpretation of staff regulations by the Commission's Personnel department which had led to a temporary contract not being renewed.[1]These concerns about the number of staff employed on temporary contracts have been raised before by the Court of Auditors in its review of OLAF's predecessor – UCLAF in 1998 (Court if Auditors 1998) and also by the Committee of Independent Experts in their investigation of corruption and nepotism inside the Commission in 1999 (Committee of Experts, 1999a). OLAF's Supervisory Committee has also recently commented upon the significant number of temporary agents

[1] Interview with OLAF officials 2005

still employed by OLAF and there is a proposal to extend these temporary contracts for an unlimited period, yet OLAF does not operate independently in the area of human resources policy which is enforced by the Directorate General for Administration – part of the Commission (OLAF Supervisory Committee, 2007). This issue has taken a considerable amount of time both to address and to rectify and obviously has a direct bearing on OLAF's operational capacity and effectiveness.

There is a need for OLAF to be given more freedom for manoeuvre in its recruitment and selection procedures so that it can provide its investigators with more stable employment and career opportunities which should impact upon the quality of its investigative function.

The Legacy of UCLAF

In any consideration of the performance of OLAF the legacy bequeathed to it by its predecessor must be taken into consideration. The shadow of UCLAF and its perceived shortcomings has loomed large over the early years of its successor [2]. OLAF has had to see through to a conclusion, investigations begun by UCLAF. These have taken in some instances, over five years to conclude.

take in Table I

Table I: UCLAF cases before 1 June 1999 by sector and stage –situation as at 30 June 2004

[2] Interview with OLAF official 2005

Stage/Sector	Assessment	Non-Cases	Monitoring	Open	Closed Without Action	Follow Up	Follow-up Completed	Total Cases*
Agriculture		2			101	5		106
External aid		6	2		66	15		83
Alcohol					45			45
Internal Investigations		1			20	12	1	33
Cigarettes				3	50	7	1	61
Trade		11		2	288	35	2	327
Direct Expenditure				1	79	25	7	112
Customs		2		1	154	22	5	182
Structural Funds		1			142	150	24	316
Precursors					113			113
VAT					21	9		30
Total	0	13	2	7	1079	280	40	1408

Source: European Commission Complementary Evaluation of activities of the European Anti-Fraud Office (OLAF) (2005)

This point is amply illustrated by Table I above and the Court of Auditors review of OLAF's performance (Court of Auditors, 2005). OLAF had to take on around 1,400 active files as the Court's report states: 'this was a very burdensome legacy owing to the disorganised way in which many of these investigations had been managed' (Court of Auditors 1/2005, p.10). A special taskforce had to be set up to deal with these old cases. It is difficult to identify and quantify exactly how much work has been done on these old

cases as they were taken over by OLAF at different times and stages[3] . The fact is that OLAF's early years have been affected in terms of tying up resources and time in dealing with unfinished business from the past. Perhaps it was not the best start to the organisation's life and has obviously taken some time to put to rest.

Relationships with Eurojust and Europol

Eurojust according to the constitutional treaty should: 'support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes affecting two or more member states, or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the member states' authorities and by Europol' (Article III-273 (1)). Eurojust is composed of national prosecutors and by magistrates or police officers from each Member State and its objective is to facilitate co-operation between the national prosecuting authorities and to improve the co-ordination of criminal investigations and information exchange. Eurojust operates within the third pillar of the European Union. This is reflected in its membership which consists of one national member seconded from each Member State. Eurojust is directly accountable to the Council of Ministers to which it reports on a regular basis.

At first sight, it might appear that there is ample opportunity for OLAF and Eurojust to co-operate: OLAF on the investigation side, where it conducts administrative [1]investigations and Eurojust providing the link with national prosecutors. However, there have been difficulties. Eurojust in its evidence to the UK House of Lords, believed that

[3] Interview with OLAF official 2005

OLAF saw it as competitor. There were instances of OLAF liaising directly with national judicial authorities and not informing Eurojust and also setting up a magistrates unit within OLAF in competition with Eurojust (House of Lords, 2004). In defence of OLAF, it can be said that its Magistrates Unit is totally dedicated to fighting EU fraud, whereas for Eurojust, fraud is just another issue and may not rank as highly as terrorism and organised crime[4]. There was a feeling of resentment – OLAF considered Eurojust 'responsible for there not being a European Prosecutor responsible for fraud' (House of Lords 2004, p.27). Eurojust took the view that OLAF believed it had no role to play in fraud investigation unless other serious crimes were linked to EU fraud, such as using money fraudulently obtained from the European Budget to help fund drug trafficking or arms dealing for example. This view of Eurojust cannot readily be dismissed as paranoia. OLAF officials believe that its own Magistrates Unit is more than capable of liaising with national judicial authorities without the assistance of Eurojust [5]. Such 'territoriality' is not conducive to fighting fraud effectively and could inevitably lead to duplication and waste of resources. The two bodies have now signed a Memorandum of Understanding in which they undertake to co-operate in areas of mutual concern/benefit. There is potential here to develop the relationship and also to give OLAF some judicial authority which it has not had so far (Stefanou & Xanthaki, 2005). Eurojust believes that it is ideally placed to co-operate with OLAF in addressing its concerns that its investigations are not followed up by prosecutions in Member States (House of Lords, 2004).

[4] Interview with OLAF Official 2005
[5] Interview with OLAF Official 2005

In terms of Europol, its role in the fight against EU fraud has not really been developed. In its 2004 report, for example, there is barely a mention of the role it believes it can play. The report does mention OLAF and the agreement between both parties, but does not include any practical examples of co-operation between the two bodies (Europol, 2004). OLAF takes the view that Europol is far more interested in Customs issues than wider EU fraud matters [6]. There is some consistency to this view, as in the late 1990's there was a view in the Commission that: 'Europol is not really interested in fraud. It is more interested in drugs and terrorism'[7]. Europol does not have the investigative powers that OLAF has, it is more of an intelligence gathering and analysis organisation. Its powers are not those of OLAF. Yet its role in intelligence gathering and police co-operation would strengthen OLAF's investigative function if the two bodies could liaise closely.

Lack of a unified legal space

One of the most fundamental problems facing the European Union's central authorities and its member states, is having to fight fraud across twenty seven different legal systems within the union itself as well as across many more lying outside its boundaries. This is so, because fraudsters do not just base themselves within the European Union. The whole legal process is bedevilled with difficulties and differences in procedure as well as tradition and jurisprudence. '*Applicable penalties vary substantially, with Member States only obligated to ensure that penalties have a deterrent effect*' (Warner, 2003, p.255). An obvious difference between legal systems, is that which lies between the accusatorial system and the inquisitorial system. However, systems which superficially look quite similar can mask significant variations: as with many of the inquisitorial systems

[6] Interview with OLAF official 2005
[7] Interview with OLAF official 2005

operating on mainland Europe. Law enforcement bodies on the whole, have to comply with procedure and go through 'the proper channels': whereas criminals face no such difficulties. They operate in 'real time' and exploit differences in procedure, protocol, and consequent time delays to their advantage. The fact that the single market has removed commercial borders but left legal frontiers intact has provided 'safe havens' for criminals. Passas & Nelkin (1993) reveal how the courts in Italy, one in the North and one in the South, had great difficulty in co-operating with each other in a case involving European Union funds.

The response to the lack of a unified legal space has been on an ad hoc basis. There have been efforts to protect the financial interests of the EU through the criminal law process, the Convention on the protection of the European Communities' financial interests (PFI Convention) has been ratified by some member states although this has taken some years to achieve. It requires that national criminal definitions should be changed if necessary to ensure compliance with the PFI convention. Member states are also required to ensure that offences against the European budget are punished by effective and proportionate penalties which would allow heads of businesses or people who have the power to take decisions within business, to be declared liable under the criminal law of the member state in cases affecting the EU's financial interests (Official Journal C316, 27.11.1995).

More ambitiously, perhaps, there was an attempt to draft a legal code – the Corpus Juris proposals which attemped to construct a unified body of rules to deal with crimes against the European Budget. The proposals included the establishment of the post of European

Public Prosecutor. There was strong opposition, in particular from the British Government, which regarded the proposals as a surrender of national sovereignty. Yet, the investigation into the proposals undertaken by the UK House of Lords European Select Committee, recognised that substantial difficulties exist in terms of prosecuting frauds on EU funds in national courts. National criminal laws are essentially territorial in scope; few Member States have laws specially directed at prosecuting such frauds (House of Lords, 1999, para.25). Given such difficulties, then there can be little surprise that more drastic or radical proposals for legal harmonisation have been considered. The Corpus Juris proposals were however seen as too radical and different. Perhaps they were too idealistic, however, there is still a need for some kind of legal "umbrella" to provide a consistency to defining, investigating and prosecuting fraud.

The response that has been made so far to the lack of a coherent legal framework was given impetus by the Tampere European Council of October 1999 which enshrined the principle of mutual recognition as the 'cornerstone' of judicial cooperation. There have been attempts to establish common definitions for a range of offences including fraud. There have been attempts to co-ordinate judicial proceedings – the creation of Eurojust is an example of this. The European Arrest Warrant which establishes a procedure based on automatic recognition of judicial orders for arrest made in another Member State, thus replacing the present extradition arrangements. In dealing with fraudsters who seek to try to exploit differences in legal systems, then there is obvious potential here to speed up the judicial process. It is not obvious from OLAF reports as to how much use has been made of this instrument.

There has also been a proposal made by the Commission in its Green paper on criminal law protection of the financial interests of the Community to establish the post of European Public Prosecutor. This would be an independent judicial authority empowered to conduct investigations and prosecutions anywhere in the European Union into offences against the Union's financial interests. The House of Lords makes the point that sensing the strong reactions to these proposals, the Commission stressed that trial and judgement would remain in the hands of the national courts (House of Lords 2004).

The abandoned Constitutional Treaty envisaged the EPP being established from Eurojust which could then be transformed into a prosecution body. In its evidence to the House of Lords, OLAF believed that it could be envisaged that it could have criminal investigative powers to assist the European Public Prosecutor. This could then of course bring OLAF's relationship with Europol into question. The House of Lords wondered whether the two bodies could be merged – the EPP would be in control of the merged body.

These proposals are still undermined by the lack of a unified legal space. If the law is to have the support of the citizen, it has to be seen to be fair. There would still be scope in national courts for offences to be treated differently and different punishments to be handed out. If a centralised body is to have legal competence to fight fraud against the budget, then this needs to be underpinned by a legal code. The Corpus Juris was a step forward in terms of adopting a more effective and consistent approach to tackling EU fraud.

Impact of the expansion of the EU on the fight against fraud

The fight against fraud had been compromised by the fragmented response of then fifteen member states. Indeed there have been problems between courts within a country like Italy being able to cooperate with each other (Passas and Nelkin, 1993). Now that the EU has expanded to twenty seven members, this problem can only be exacerbated. For example, OLAF has to cope with twelve relatively new legal systems – this is hardly likely to improve the situation. Efforts have been made to prepare the then ten candidate countries for their responsibilities in the fight against fraud. The newly acceded countries received approximately three billion euros in financial aid between 2000 and 2004, and before accession, the candidate countries were required to 'create an efficient anti-fraud protection system with respect to funds provided in the framework of the Accession Partnership' (Murawska 2004, p.3). The accession countries were obliged to ensure that their legal systems complied with the *acquis communitaire* as part of their preparations for accession such as EC Regulations like the Convention on the Protection of the European Communities Financial Interests and Regulation 2185/96 which covers on the spot checks as well as Regulation No. 1073/1999 concerning investigations conducted by OLAF.

OLAF has sought to reinforce its support to Acceding and Candidate countries in their institutional preparation towards combating fraud against the financial interests of an enlarged European Union. It has sought to ensure good administrative co-operation and to encourage and support the capacity of anti-fraud institutions to prevent and detect fraud

and irregularities. By early 2003, twelve countries had nominated a central anti-fraud co-ordination structure (AFCOS) to act as co-ordinator for the implementation of legislative, administrative and operational preparation (European Commission 2003). Particular attention has been given to training public prosecutors who will take on responsibility for anti-fraud work and to technical training in the use of the Anti-Fraud Information System (AFIS).

Murawska (2004), outlines an example of early co-operation between Community and national institutions in the then candidate countries – this was a project called: 'OLAF Poland'. It was a special anti-fraud coordinating established in 2001 and financed by the PHARE programme [8]. The result of these investigations was recovery of PHARE funds, review of national procedures, as well as an opening of criminal proceedings by the Polish Prosecutor's Office against former Polish Officials.

Despite these efforts, difficulties still remain. New Member States are being asked to bring their anti-fraud structures up to the level and standard of established EU members within a very short period of time. Their structures are not as developed as those in the existing Member States. They are not as economically developed as existing members and may not have sufficient financial resources to employ to fund anti-fraud institutions and structures. The level and pace of economic development may create incentives to engage in fraud and irregularity.

[8] Phare Programme consists of three components development of antifraud structures, communication links and development of anti-fraud databases

Therefore, an enlarged EU can only increase the amount of fragmentation which already exists. The problems OLAF has tried to cope with since its inception, such as lack of the right to cross-borders and question suspects, seize documents, search premises and present evidence according to standardised rules and procedures are exacerbated in a twenty seven member union.

Despite the above acknowledged difficulties, OLAF has not been as active as it could have been in terms of establishing good operational relationships with the relevant authorities in the candidate countries. It has been criticised by the European Parliament for not establishing offices in the candidate countries and also for not filling the post of Chief Adviser to coordinate anti-fraud activities in the candidate countries although it was provided for in the budget from 2000 (European Parliament, 2004).

The experience of the Czech Republic affords an interesting example of the difficulties faced by new member states in seeking to develop effective anti-fraud structures and of forging a productive relationship with OLAF.

The Czech Republic and the fight against EU fraud

It is not possible or is it appropriate to study the phenomenon of EU fraud in isolation, but also to consider the broader context within which it operates such as the political, economic, social and historical circumstances (Scheinost, 2006). The Czech Republic having joined the EU in 2004, presumably with some enthusiasm, has now adopted a somewhat Euro-sceptic attitude towards Brussels. For example, it was opposed to the EU

Constitution and has serious concerns about the threats posed to national sovereignty with respect both to policymaking and the primacy of EU law and decision making. This scepticism emanates from President Klaus and cascades downwards through the Civic Democratic Party of which he is a former leader, to sections of the population at large. Such an attitude is potentially damaging to a nascent EU anti-fraud service, when that service is in need of support from its national government in the form of lobbying in Brussels for more training and assistance from the anti-fraud office and the rest of the European Commission.

In considering any form of economic crime, such as EU fraud, it is essential to be aware of and to understand the norms and mores that operate within a given society. As Scheinost (2006) explains, under the Communist regime of Czechoslavakia, as it was then, all property apart from personal belongings, was owned by the state. It was regarded as so-called 'property in socialist ownership' and it was afforded a greater protection under law than personal belongings and as a consequence, punishment for crimes committed against state property was far more severe. Despite this sanction, in the opinion of the general public, to take something from the state was considered to be a relatively minor offence and such behaviour tended to be tolerated by the general public (Scheinost, 2006). Jordan (2002) quotes a Communist era Czech axiom: "If you do not steal from the state, you rob your family".

When a society is in transition, values, norms and practices from a previous period interact with emerging norms and values of a free market economy. As Scheinost (2006,

p.77) comments: '…Toleration of theft of state property together with disrespect for the private property that has been nourished for many decades, encountered the appetite to get rich quickly, to achieve speedy success (expressed in money and social status) and exploit favourable opportunities. The speed of the transition process and ability of the entrepreneur to make headway in the new conditions was regarded more highly than strict observance of the law'. Jordan (2002) observes that during this period, administrative corruption persisted just as it did under the communist era. When this coincides with market reforms and privatisations, there are opportunities to make massive profits and gains. Barnes (2003) notes that the Czech government in the early 1990's was able to pursue sweeping economic reforms including privatisations of state industries and assets. This swashbuckling period of economic reform and transition did influence the extent and forms of economic crime. As Scheinost (2006) explains, it was very easy to acquire bank loans on the basis of entrepreneurial projects which were somewhat "thin" to say the least. The quality of these projects would not be closely scrutinised and the state would not allow key banks to become bankrupt. It was also of advantage to know that the courts could not cross-check the decisions of the privatisation committee which played a key role in the privatisation process. Whilst all transgressions were not necessarily unlawful, some were at least unethical and involved looking for opportunities often on the edge of legality, in the knowledge that economic crime and commercial sharp practice were not at the top of the list of priorities for investigation.

Now that this 'swashbuckling' period of transition is over, economic crime has become established as a feature of criminal activity and given the entry of the country into the

European Union, then a "honeypot" of EU funds must be an attractive opportunity for fraudsters. Criminals want to make money and they do undertake their own form of risk analysis – if the risks of detection appear to be low and the rewards are attractive, then it appears inevitable that they will direct their attention towards EU funds. In the late 1990's as the process of preparing for enlargement gained pace, officials of the then anti-fraud unit of the European Commission – UCLAF, were very worried about organised economic criminals in Central and Eastern Europe getting their hands on EU funds: 'Officials here are worried sick about EU money disappearing into a black hole"[9] How 'organised' these criminals are, is a matter of some debate both within and without the academic community. Van Duyne (2003) and Spencer (2007) have both noted that organisation can be very loose and local and consist of criminal entrepreneurs looking for opportunities. There may well not be a "Dr Evil" directing hierarchical criminal networks which are hell-bent on swindling the European Budget and taxpayer. This does not mean that EU funds are not under threat, even locally based fraudsters can still swindle the EU out of thousands of euros and even more. In order to counter this threat, a system of financial aid and technical support to candidate countries was introduced.

Efforts of the Czech Republic to prepare for accession

The Czech Republic was obliged to comply its legal system with the acquis communitaire, under the first pillar of the European Union, as part of its preparation for accession. As Murawska (2004), comments, the Community measures about protection of the Community's finances are fairly modest. These consist of three EC Regulations:

[9] Interview with UCLAF Official 1998

- Council Regulation (EC Euratom) No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests[10]
- Council Regulation (EC, Euratom) No.2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities financial interests against fraud and other irregularities[11]
- Regulation (EC) No.1073/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Fraud Prevention Office (OLAF)[12]

Also, the Czech government was expected to incorporate into its legal system, the Convention on the Protection of the European Communities Financial Interests (the PFI Convention) together with its associated protocols. The PFI Convention is intergovernmental and lies within the third pillar of the European Union.[13] The convention as Fenyk (2007) details, requires that member states shall incorporate frauds against the European Communities' financial interests into their criminal code and should take the necessary steps to ensure that fraudulent behaviour and conduct is punishable by criminal penalties that are effective and reasonable and also that heads of businesses and other senior executives that have the power to take decisions or exercise control "to be declared criminally liable in accordance with the principles defined by national law in

[10] OJL 312, 23/12/1995 pp.1-4
[11] OJL 292 15/11/1996 pp.2-5
[12] OJL 136 31/05/1999pp.1-7
[13] OJ C316, 27.11.1995, p.49

cases of fraud affecting the European Community's financial interests…" (Fenyk 2007, p.2).

The First Protocol to the PFI Convention requires that definitions on what is termed corruption, both active and passive (Articles 2-3) be assimilated into the criminal law and the Second Protocol to the PFI Convention requires national law to provide that legal persons can be held liable in cases of fraud or active corruption and money laundering committed that damage or are likely to damage the European Communities' financial interests (Fenyk 2007).

Even though Czech criminal law broadly follows similar principles to other member states of the European Union[14], in order to ensure full compatibility with the PFI Convention as well as Article 280 of the EU Treaty whereby member states are required to take the same measures to counter fraud against the Community's financial interests as they would to counter fraud against their own financial interests, there needed to be amendments and revisions of the existing Czech legal framework and these should have been achieved by the time of the accession of the Czech Republic to the EU.

Fenyk (2007) details how these amendments were not in fact made by the time of accession, apparently neither the PFI Convention or the protocols had been published in the Official Journal of the EU in the Czech language and the Ministry of Justice was engaged only in 2004 to draft the official translation of the text of the Convention and with time taken both for comments by officials of the Czech Supreme Prosecutors Office

[14] Interview with Czech officials 2006

as well as external experts, neither the Convention nor the Protocols were delivered to the Czech Parliament with the proposal for accession to the EU. The Czech Republic did not therefore commence the process of ratification, and there are still problems in this respect. The criminal code has still not been amended and the issue of legal liability of legal persons is a major omission from the code. Therefore we are still awaiting full ratification of the Convention and its Protocols which means that not all member states have incorporated crimes against the European budget into their legal framework and so in that sense we do not have a level playing field. Prospective member states should look to the example of the Czech Republic in this area and ensure that a fully translated and reviewed PFI Convention together with its associated protocols is delivered to their national parliament with the proposal for accession in order that the ratification process for the Convention can be completed at the earliest possible opportunity. The importance of the PFI Convention together with its Protocols cannot be overstated because these are important elements of a common basis for criminal law protection of the Union's financial interests, as they deal with aspects of substantive criminal law and judicial cooperation and its ratification and implementation is a step towards reducing the fragmentary nature of the legal approaches to fighting fraud against the EU.

In order to ensure effective co-operation between OLAF and the national administrations in the candidate countries as well as seeking to have in place organisational arrangements which would be capable of preventing and detecting frauds and irregularities as Murawska (2004) outlines, OLAF supported the creation of independent anti-fraud structures at a national level in then candidate countries. The rationale behind such

structures was to ensure effective co-ordination between legislative and administrative measures dealing with EU fraud policy (Murawska 2004). OLAF provided training and support although it has been acknowledged by academic commentators such as Murawska (2004) and by national officials that such support was not sufficient and in some cases was regarded as being fairly minimal[15]. This is an important consideration, given the complexity of EU programmes and fraud investigation, there was an obvious need for substantial and substantive support both from OLAF and from the Commission as a whole. For such support to be found wanting can have major consequences in terms of present and indeed future fraud investigation capacity and effectiveness.

In the case of the Czech Republic, it was recognised at a fairly early stage in the accession negotiations, that there was a need to create a system which not only permitted communication with OLAF regarding the notification of irregularities but also which made possible the timely detection of fraud and irregularities and their proper investigation within both the administrative and criminal spheres. The Ministry of Justice took the decision in May 2000, that the Supreme Public Prosecutor's Office should be appointed as the contact point for future co-operation with OLAF – in fact this effort started out with just the Deputy Chief Prosecutor and three officials[16]. According to the arrangements drawn up with OLAF, the Supreme Public Prosecutor's Office (SPPO) was appointed as the single contact point for OLAF for co-operation concerning the fight against frauds and other illegal activities detrimental to the Communities' financial

[15] Interview with Czech Officials 2006
[16] Interview with Czech Officials 2006

interests. The arrangement covered the following forms of co-operation between both authorities (SPPO 2005):

1. Mutual exchange of information on Czech legislation and case law concerning economic, financial and associated crimes and on EC legislation concerning protection of the Communities' financial interests, particularly if this information is important and urgent to both parties
2. Informing the Director-General of OLAF of any administrative and criminal investigation as well as any prosecution, which touches on the Communities' financial interests
3. OLAF could notify the SPPO of facts, which can indicate suspicions that an irregularity or a crime affecting the financial interests of the European Communities has been committed, and whose investigation or prosecution is within the jurisdiction of the Czech authorities. The SPPO is obliged to forward such notifications to the competent Czech authorities and to inform OLAF about this without delay.
4. Both authorities could within the administrative and legal framework of powers vested in them, exchange information for the purposes of investigation and mutual legal assistance in cases where the Communities' financial interests are concerned or in any other case where Community law requires the exchange of information.

At this formative period of time however, the European Commission did not launch an initiative in the Czech Republic like the "OLAF Poland" project. This was an early example of cooperation between a transnational European institution and competent

national bodies which involved an OLAF office being established in Poland and OLAF officials being based there. Polish authorities assisted by OLAF officials investigated frauds and irregularities within the PHARE programme, which aimed to support candidate countries in the creation of anti-fraud co-ordinating services and structures, establishing lines of communication, exchange of expertise and establishment of anti-fraud databases. The fact that OLAF staff were based in the country itself gave national officials experience of working closely with them which should establish good working relationships and understanding as well as improving and enhancing the skills set of national officials. No OLAF officials were or have been based in the Czech Republic[17] and indeed the perception of support from OLAF to the Czech authorities at this time and indeed subsequently, is seen as being "minimal" by Czech officials.[18] These are self-inflicted wounds and are very surprising given OLAF's own claims about the success of the Polish "experiment". If it was so successful, why was it not rolled out across more candidate states? If it was a question of resources, why was there not lobbying to secure the support for such a successful programme.

In 2003, the position of the SPPO in the Czech Republic and the equivalent co-ordinating organisations in other candidate countries was enhanced by being designated as AFCOS structures. AFCOS stands for Central Anti-fraud Co-ordination Structures. Within the Czech Republic agreements were drawn up between the SPPO and other ministries with responsibilities for implementing or monitoring EU expenditure as well as collecting revenues such as customs duties, value added tax and so on. Competent officials from

[17] Interview with Czech Officials
[18] Interview with Czech Officials

each Ministry were appointed to be responsible for co-operation with the SPPO and the structure for co-operation with OLAF in the Czech Republic was established. However, at this very moment – the genesis of the AFCOS system, we see a fundamental weakness which existed before the major enlargement of the EU in 2004, and that is fragmentation. Fragmentation has severely hampered the fight against fraud as a multiplicity of agencies with anti-fraud responsibilities and duties are difficult to co-ordinate, are rivals in terms of allocation of resources and often have different priorities as well as the potential for duplication of resources and of reporting.

Within a relatively small country like the Czech Republic, there were agreements between the SPPO and three departments of the Ministry of Finance: the General Directorate of Customs, the Central Harmonisation Unit for Financial Control and the Financial Analytical Unit – this is just within one ministry. There were other co-operation agreements with the Ministry of Agriculture which would have responsibility for implementing and allocating and monitoring Common Agricultural Policy funds, the Ministry for Regional Development which would have some responsibility for Structural Funds as well as with the Ministry of the Environment, the Ministry of Transport and two units of the police force – namely, the Unit for Combating Corruption and Financial Crime and the Department for Combating Counterfeiting. There was also an agreement with the State Audit Office which was independent of the executive authority – we can see that there are many different bodies and people involved in the anti-fraud mechanisms and processes[19]. One can see that these arrangements can be divided up into two sub-groups. In the one which we could call criminal investigation groups there are well

[19] Interview with Czech Officials 2006

established arrangements for contact and co-ordination between the SPPO, Customs and the police – these arrangements have stood the test of time. The second sub-group is composed of organisations that tend to undertake non-criminal investigations which are called administrative investigations, and these had no practical experience of liaising with the SPPO and particularly on matters concerning EU fraud and the protection of the Communities financial interests so, there is potential for confusion, inefficiencies, duplication and misunderstandings.

Assessment of the anti- fraud co-ordination arrangements prior to accession

Prior to accession, a mission to the Czech Republic was carried out by a consultancy firm – Investment Development Consultancy (IDC) working for the Directorate General-Enlargement in late 2002. Its goal was to examine the anti-fraud co-ordination and investigation arrangements. The subsequent report identified a number of problem areas:

- There were gaps in the level of understanding of anti-fraud topics and areas. All the relevant rules, legislation manuals etc needed to be gathered together in order to achieve a common understanding by officials
- There was an absence of practical insight and training into the different types of EU fraud cases, detection and investigation practices. There was a lack of knowledge of computer audit techniques and risk analysis techniques.
- Information technology support in terms of databases and case management systems, data encryption and security was also found to be poor.

In terms of the anti-fraud structures themselves, the consultants found there to be a skills gap in terms of being able to cope with the complexities of fraud investigation as well as there being a lack of strategic objectives so that all interested parties would be aware of the long term objectives of AFCOS and their role in helping them to be achieved. This led to delay in responding to requests from OLAF for assistance and a lack of co-ordination with respect to the conduct of investigations into suspected fraud and irregularities. There was a need for a comprehensive training programme for all interested parties. These findings beg the question as to why these difficulties and gaps in knowledge and operational skills, particularly on the administrative side of the investigation and reporting process could not have been foreseen and measures put in place to address these issues. The European Commission and OLAF should have been far more pro-active during the early period of the accession process and negotiations in order to ensure that the Czech AFCOS regime and constituent parts had the necessary skills and expertise in order to fully meet its responsibilities and commitments.

In mid 2003, the European Commission asked Sigma, the consulting arm of the OECD, to assess the anti-fraud structures in candidate countries. The objective of Sigma's assessment in the Czech Republic was to: 'evaluate the operational and administrative capacities of AFCOS and its partner institutions in the protection of the Community's financial interests and, where needed, to put forward proposals and recommendations for strengthening these capacities' (Sigma 2004, p.2). The main findings of the report were that despite the strong legal position of AFCOS which was an advantage of having the SPPO at its head, the following had yet to happen:

- AFCOS had not carried out a risk assessment of pre-accession funds and a National anti-fraud strategy had still not been developed
- The relevant ministries had not been given the OLAF reporting guidelines and the reporting format on suspected cases of irregularity
- No training had been given on the use of these guidelines
- The OLAF anti-fraud system (AFIS) which enabled constituent parts of AFCOS to securely communicate with each other and with OLAF had yet to be installed in the Directorate-General of Customs and linked by terminal to the relevant ministries
- No irregularities had been filed by AFCOS with OLAF

(Sigma 2004, p.2)

The Supreme Prosecutors Office as the lead agency in the AFCOS structure, needed to take a more proactive role in seeking more support from Brussels in terms of training and expert advice also in seeking the assistance of the private sector in terms of training in techniques of risk analysis for example. There could also have been contacts with AFCOS in other candidate countries to share experiences and also perhaps to share expertise and knowledge, which may well have helped to bridge some of the gaps identified. The fact that the national anti-fraud strategy had not been developed was a weakness because the AFCOS role needed to be highlighted and publicised and the emphasis on prevention needed to be highlighted because as the Sigma Report notes, it is a far more cost effective way of controlling fraud than investigation and prosecution and also improvements in control mechanisms and institutional co-operation reduce the potential for frauds to be successfully committed. Although to obtain convictions is very

useful because it shows results are being achieved and it can also serve as a deterrent "pour encourager les autres".

Upon Accession in 2004, it can be seen that although significant progress had been made, that there were gaps and problems in the response of the Czech Republic to the problem of EU fraud. The national anti-fraud strategy had not been completed by the designated deadline of December 31st 2003, but by May 2004, the Czech Government adopted Resolution 456 to the National Strategy against Fraudulent Activities Damaging or Threatening the Financial Interests of the European Communities. The Strategy includes: 'the system of internal control of the management of financial funds of the individual programmes from the European Union total budget, the AFCOS system and the internal communications network, announcement of ascertained discrepancies and legislation relating to the protection of the EU's financial interests' (Ministry of the Interior 2005, p.34). Also, in 2004 in order to strengthen the position of AFCOS in both legislative and operational terms an AFCOS section was created within the Department of Serious Economic and Financial Crime which would be supervised by the First Deputy Prosecutor general and would be composed of prosecutors experienced in the area of fighting against fraud and supported by administrative staff with managerial, organisational and language skills (SPPO 2005).

To have structures in place which appear to have the necessary expertise and capacity to carry out and fulfil particular missions is reassuring, but it is how these structures operate in practice that is the acid test of their effectiveness. The results to date are mixed to some

extent. The Director-General of OLAF in 2006 in his foreword to the 2005 OLAF Annual Report commended the Czech authorities for always meeting their reporting deadlines and stated that OLAF has good co-operation from the Czech tax authorities in the fight against VAT fraud, but did say that there was room for improvement in the Czech administration as a whole as far as communication about irregularities was concerned.

One area of irregularities communication that needs to be examined concerns the number of departments that communicate irregularities directly to OLAF. Each Ministry communicates irregularities to OLAF on a quarterly basis, despite officially there being only one contact point with OLAF, namely the Supreme Prosecutors Office[20]. This is one of the important principles which underpins the AFCOS system, yet this principle has been undermined with the full co-operation of OLAF. A common theme in the academic literature emphasised by commentators such as Passas & Nelkin (1993), Doig (1995), Sieber (1998), Pujas (2003), Quirke (2006) and (2007), is that fragmentation with a multiplicity of agencies involved in the fight against and reporting of fraud, complicates, and in fact dilutes the response to the problem of fraud, yet here within one relatively small member state we see this problem in microcosm. The Supreme Prosecutors Office should be provided with information before the regularities are reported to OLAF, but it is not clear that this always happens[21]. If the AFCOS system is to operate as it was surely was intended to operate, then all irregularities should be reported to OLAF through the SPPO and not around it.

[20] Interview with Czech Officials 2006
[21] Interview with Czech Officials 2006

Since accession, there have been problems with a lack of political support from the current Czech government which does not favour overt co-operation with Brussels at the present time[22] with issues of national sovereignty complicating matters. When an organisation is in its infancy, and should be seeking support from Brussels in terms of training and even secondment of experts and so on, the fact that the government has a negative attitude in this respect, severely complicates matters and handicaps the development of the infant organisation.

The duplication of requests for information from Brussels is frustrating for the Czech authorities. OLAF asks for information at one point in the year and then some time later, the Commission asks for the same information – this is inefficient and time consuming[23]. The SPPO has also been disappointed by a lack of support from OLAF, a particular example of this is in a case involving possible fraud and irregularity with respect to PHARE funds which funded specific projects in the run up to Accession. Eight officials entrusted with the process of transferring money from the PHARE fund to the Czech Republic were suspected of having tried to siphon off millions of Czech crowns into their own hands.. Two of these people were senior officials at the Ministry of Regional Development and were placed under investigation for fraud and embezzlement (www.radio.cz/en/article72526). There was a belief on the part of Czech officials, that OLAF officials some of whom were on temporary contracts and were perhaps unsure of their long term future with the organisation, were reluctant to get involved in the

[22] Interview with Czech academic colleagues 2006
[23] Interview with Czech Officials 2006

investigation when the SPPO sought support[24]. This claim has been refuted by OLAF officials who do not believe that such a consideration would affect the support offered to member state organisations [25]. The Czech government did not want an investigation to take place[26], no doubt concerned about political embarrassment which could have tarnished its reputation with the authorities in Brussels. The issue of the high proportion of OLAF staff on temporary contracts has been raised repeatedly, as has been mentioned above. The issue of political interference in criminal investigations was a contributory factor in the resignation of the head of the AFCOS system – the Deputy Chief Prosecutor[27]

Another high profile case which has come to the fore is that where senior government officials have been implicated in a situation where there was a plan to renovate the state owned Budisov chateau. The cost of the renovation was deliberately inflated to almost 70 million crowns which was around 30 million crowns higher than the real cost. This "difference" was then to be shared between three officials (www.radio.cz/en/article) – this is a classic structural funds fraud – over inflation of the cost of works and no doubt a siphoning off of interest earned on the funds as well. Such cases whilst embarrassing for the authorities are also useful in demonstrating that no one is above the law and providing an opportunity to show that cases of EU fraud will be vigorously investigated and prosecuted if the evidence warrants it.

[24] Interview with former Czech Official 2006
[25] Interview with OLAF Officials 2007
[26] Interview with former Czech Official 2006.
[27] Interview with former Czech Official 2006

Currently, there is some speculation that the Ministry of Finance is lobbying quite hard for the AFCOS designation and position to be taken away from the Supreme Prosecutor's Office and given to it. If it came to pass, this would be a very serious misjudgement, as the Ministry does not have the expertise or the experience to co-ordinate the activities of various investigatory bodies such as police and customs for example, where legal opinions and advice are a crucial part of the process[28]. The official OLAF position is that this is a matter for the Czech authorities and that they will be happy to deal with whoever is designated as the lead AFCOS institution.[29] This appears to be less than wholehearted support for the SPPO from OLAF, but it could be interpreted as an example of realpolitik, as OLAF will have to deal with whichever agency comes out on top in this power struggle.

Wider lessons that can be drawn from the Czech Experience

There are a number of lessons that can be drawn:

- There is a need for wholehearted support from the national government in terms of dealing with the Brussels authorities in seeking to gain material support and operational expertise and training
- The AFCOS organisation must be pro-active in analysing its strengths and weaknesses and using this analysis to put a case forward to OLAF and the European Commission for help, support and training in order to strengthen the organisation

[28] Interview with Czech academic colleague
[29] Interview with OLAF officials 2007

- The issue of fragmentation has to be tackled. Having a multiplicity of organisations involved in both investigation and reporting is difficult to co-ordinate and can lead to mixed messages being sent to the authorities in Brussels with some authorities investigating on an administrative basis and others on a criminal investigative basis – the individual ministries and the SPPO and police units in the Czech Republic for example.
- The authorities in Brussels need to actively support the lead institution in the AFCOS structure, there should not be separate reporting of irregularities by individual ministries as this undermines the authority and position of the lead institution
- The duplication of information requested by Brussels also needs to be considered. Member States should not be asked to provide the same information both to OLAF and also the Commission – this duplication is costly, inefficient and time consuming.
- OLAF officials should be based in the candidate countries as in the OLAF Poland project, this leads to a wider understanding of the issues facing national authorities on the part of OLAF, as well as experience for national officials of working and liaising with a transnational body like OLAF
- There should be a regular system of seconding national officials to OLAF in order for them to gain experience of the Europe wide perspective which OLAF has.
- The lead institution in the AFCOS structure should not have its position undermined by departmental lobbying and infighting as appears to be happening

with the Finance Ministry at present as this is a distraction from co-ordinating and supporting the fight against fraud.

Conclusions

The main conclusion that can be drawn from this discussion is that OLAF is attempting to lead the fight against fraud with one hand tied behind its back. It is hampered by the degree of fragmentation which exists. Fragmentation exists at different levels. On one level there is a high degree of legal fragmentation as there is no one legal code or system which exists to protect the European Budget. There are twenty seven different legal systems with differing law enforcement methods and methods of collecting evidence which makes it very difficult to take evidence before a court in another jurisdiction.

A second level where fragmentation exists is in the approach to investigation and control. There are multiple actors involved in the monitoring and investigation of fraud across twenty seven member states. OLAF in attempting to co-ordinate the activities of these agencies faces a mammoth task due to the territorial, linguistic, legal and cultural barriers which exist. When one considers that OLAF has faced difficulties in trying to co-ordinate its activities with those of a sister agency, Eurojust, then this does not bode well for more widespread co-ordination with twenty seven member state agencies.

There is no one agency which 'owns' fraud. OLAF may be the lead agency, but is highly dependent on Member State agencies and is also hampered by having a significant number of staff employed on temporary contracts and also by the political imperative of

ensuring that new member states' nationals are given priority in the recruitment and selection process, which can lead to a lack of continuity and new staff facing a steep learning curve in the middle of long, complex investigations.

OLAF's independence is still compromised due to the fact that it still is part of the Commission and the Commission has a role in the selection and appointment of its Director. OLAF's early years have also been overshadowed by the legacy of its predecessor, UCLAF. It has taken seven years to clear up the backlog of cases inherited from UCLAF. Although it has been in existence for approximately ten years, OLAF has faced severe difficulties in its early years and still faces enormous challenges. It is still a young organisation and it needs strong support from the EU institutions and from Member States and their politicians and officials.

The process of fairly rapid EU expansion has made a difficult situation even more difficult in terms of the increased fragmentation which has occurred as well as some of the difficulties encountered by new member states such as the Czech Republic which has been found to have significant gaps in the expertise and knowledge of some of its anti-fraud officials. These deficiencies need to be addressed by actively seeking the assistance of the Brussels authorities and perhaps also the private sector where appropriate. This effort needs to be actively supported by the Czech government which will enable the AFCOS structure to develop and enhance its expertise and efficiency, as well as by the European Commission which should be more proactive in seeking to assist new member states and shouldn't always expect them to come to Brussels with a "begging bowl". The

experience of the Czech Republic provides lessons for other candidate states in terms of seeking to reduce the level of fragmentation in the investigative and reporting dimensions as well as seeking the active support of the national government in dealing and co-operating with the Brussels authorities.

The fight against fraud suffers from a fragmented response at different levels both organisationally and legally and despite the best efforts of OLAF and all its partners, this is a critical and fundamental problem and difficulty.

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