

Policy Department on Budgetary Affairs

Committee on Budgetary Control WORKSHOP

**"The follow-up of the European Anti-Fraud Office's (OLAF)
administrative investigations in Member States"**

2.00 p.m. – 5.30 p.m.

ASP 1 G 2

INDEX

Programme.....	3
Luis Rodriguez SOL Prosecutor at the Anticorruption Prosecutor's Office The situation in Spain	7
David LEVY Assistant Director, Fraud Prosecution Office The situation in the United Kingdom	13
Thomas LAMIROY and Jean Pascal THOREAU Federal magistrates The situation in Belgium	19
Alfredo ROBLEDO and Francesco CAJANI Public Prosecutors Information exchange between the judicial authorities and OLAF.....	25



Directorate-General for Internal Policies of the Union
Directorate for Budgetary Affairs
Secretariat of the Committee on Budgetary Control

Brussels, 16 February 2009

Draft programme
Workshop of the Committee on Budgetary Control (CONT):

**"The follow-up of the European Anti-Fraud Office's (OLAF)
administrative investigations"**
Thursday, 19 February 2009,

European Parliament, Rue Wiertz 60, 1047 Brussels
ASP 1 G 2, 2 - 5.30 pm

(Interpretation/translation languages available: DE, EN, ES, FR)

Documents related to the workshop can be found on the following website:
<http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=CONT>

Thursday, 19 February 2009

- 14.00 h **Ingeborg GRÄBLE, MEP**
Opening and introduction
- 14.10 h **Luis Rodriguez SOL**
Prosecutor at the Anticorruption Prosecutor's Office
The situation in Spain
- 14.20 h **David LEVY**
Assistant Director, Fraud Prosecution Office
The situation in the United Kingdom
- 14.30 h **Jeannot NIES**
Advocate General, Luxembourg
The situation in Luxembourg

- 14.40 h **Thomas LAMIROY, Jean Pascal THOREAU,**
federal magistrates
The situation in Belgium
- 14.50 h **Alfredo ROBLEDO**
Public Prosecutor, Milan
Information exchange between the judicial authorities and OLAF
- 15.00 h question time
- 15.50 h **José Narcisco DA CUNHA RODRIGUES**
Judge, European Court of Justice
The Court's experience
- 16.00 h question time
- 16.15 h **Michel MAGNIER**
Director, Investigation and Disciplinary Office of the European
Commission (IDOC)
The IDOC experience
- 16.25 h question time
- 16.40 h **Franz-Hermann BRÜNER**
Director of the European Anti-Fraud Office
The OLAF experience
- 16.50 h question time
- 17.15 h **Ingeborg GRÄBLE, MEP,**
Conclusions
- 17.30 h End of the workshop

In attendance:

- * Sten FRIMODT NIELSEN, Judge
The European Court of First Instance

- * Members of the Court of Auditors

- * Francesco CAJANI
Prosecutor, Milan

- * Eberhard BRANDT, Head of Unit
Secretariat of the OLAF Supervisory Committee

- * Keir FITCH, Member of Cabinet,
Vice-President KALLAS, European Commission

- * Désirée OEN, Member of Cabinet,
Vice-President KALLAS, European Commission

The follow-up of OLAF administrative investigations

THE SITUATION IN SPAIN

In Spain the person responsible for carrying out the criminal investigations in its first steps (the so-called “criminal instruction”) is not the Prosecutor, but the investigating Judge, called “Judge of Instruction”. The investigative powers of Prosecutors during this phase of the proceedings are very restricted. Some investigative measures, such as search and seizure or telephone interceptions, or measures restrictive of personal rights, such as prison or freezing of assets, are not allowed to Prosecutors and can only be decided by the Judge. Besides, the general rule is that investigations carried out by Prosecutors, which are basically reduced to the hearing of witnesses and suspect people, as well as the obtention of documentary evidence, cannot last more than six months, or exceptionally one year if they are conducted by Anti-Corruption Prosecutors. Anyway Prosecutor's investigations are always pre-judicial, given that no Prosecutor can begin or continue an investigation once the same facts are already being investigated by a Judge of Instruction.

In our country there are approximately 430 judicial districts, and there is at least a “Judge of Instruction” in each one. In most places, the smallest ones, these “Judges of Instruction” are both criminal and civil judges, and obviously neither specialised nor familiarised with serious economic frauds. On the contrary, in the biggest cities, Madrid and Barcelona, there are respectively 54 and 33 “Judges of Instruction”. According to the 2008 Annual Report of the C.G.P.J. (General Council of the Judiciary) there are 1342 Judges of Instruction (among them 923 are both criminal and civil Judges) all over Spain.

The competent Judge to investigate a criminal offence is that of the place where the fact has been committed (*forum delicti commissi*). This rule is easy to apply in most “traditional” –so to speak– crimes, like murder or theft, even smuggling, but is problematic in some “modern” and elaborated crimes, as most financial frauds undoubtedly are. Nowadays, in our jurisprudence there is not a clear criterion about where the fraud must be considered to have been committed. For instance, what happens if a Community subvention is illegally obtained? For some, the offence is committed where the company has its legal domicile; for others, instead, it is committed where the company’s bank accounts are placed, or where the company develops its main activities.

For the trial and the judgment, the competence is attributed to one of the 50 provincial Courts, that of the province where the investigating Judge is placed.

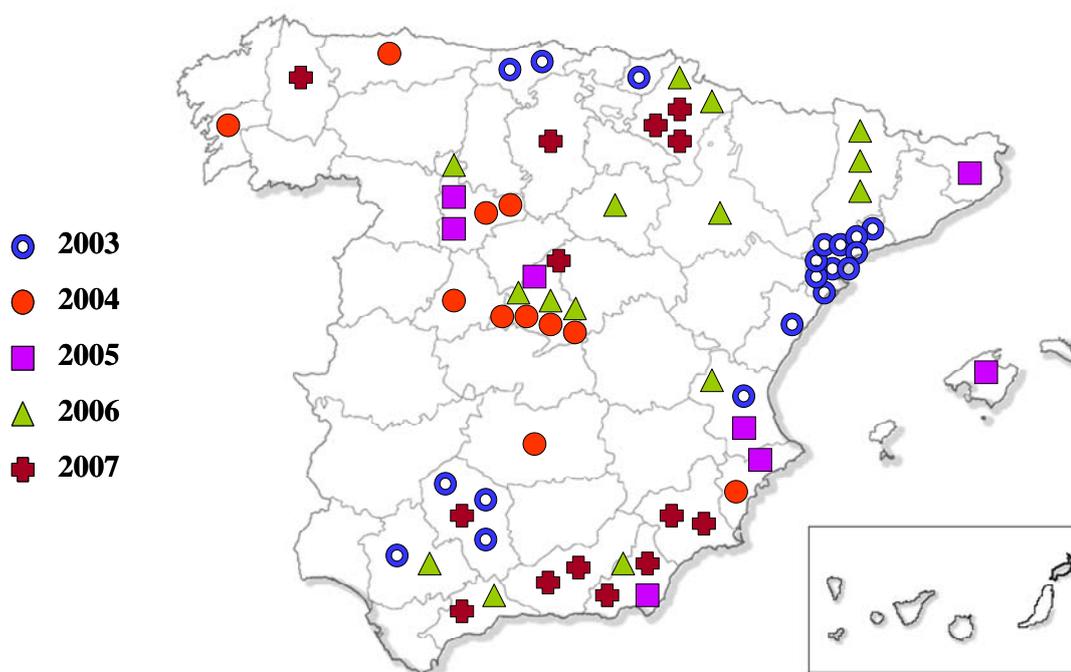
Only exceptionally, when the fraud affects or may affect seriously the trade safety or the national economy, the competence is attributed to a central and specialised Judge (for the instruction) and to a specialised Court (for the trial), namely the “Central Judge of Instruction” and the “National Court”.

However, our Supreme Court is generous when applying this principle and has established that judges have to take into account, not only the concrete amount of the fraud, but also the easiness which could derive from an instruction carried out by a central authority with more material and human resources and more effective means of investigation. In spite of this, as there are only six Central Judges of Instruction, only a few cases can be attributed to them.

So, this may be considered the first problem for an effective follow-up of the proceedings initiated by OLAF and forwarded to the Spanish judicial authorities. We cannot be sure about who the competent judicial authority will be. Furthermore, we run the risk of forwarding a very complicated case to an inexperienced judge.

Some figures referred to the last five years may help to understand this. According to statistics published in the Prosecution Service Annual Reports from 2003 to 2007 (unfortunately, the 2008 Report has not been published yet), these were the judicial proceedings concerning frauds against the financial interests of the Community which were initiated during those years: 19 in 2003, 12 in 2004, 8 in 2005, 16 in 2006, and 14 in 2007.

As to the geographical distribution of these cases, only 2 were attributed to the National Court, one in 2004 and other in 2006. The others were initiated by different Judges of Instruction, placed all over the country, as it can be seen in the following graphic. Sometimes a single investigation in its origin is divided into several proceedings when the whole case is forwarded to the Judge, as we can also see in the graphic below.



Unfortunately, our statistics do not distinguish between the cases related to communitarian frauds originated in OLAF investigations and those initiated in investigations carried out by national administrative bodies.

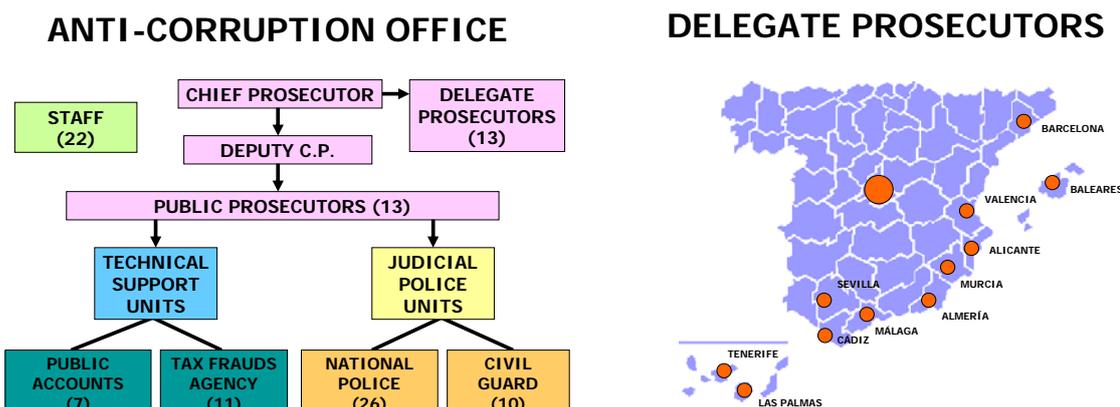
According to the data submitted by an OLAF member in the 6th Conference of Anti-Fraud prosecutors, held in Madrid in September 2008, only 7 cases were forwarded by OLAF to the Spanish judicial authorities from January 2006 to September 2008, which means that less than a quarter of the judicial cases regarding frauds against the financial interests of the Community during that period were originated in OLAF investigations. Obviously, the other three quarters are usually originated in investigations and reports carried out by Spanish administrative authorities, such as the *Fondo Español de Garantía Agraria* or FEAGA (Spanish Agricultural Guarantee Fund).

As to the Prosecutors competent to deal with communitarian frauds, an instruction of the Spanish Attorney General, which dates back to 1996 (the year of the beginning of the

Special Anti-Corruption Prosecution Office’s activities) established that this Special Office would be the responsible for intervening in all the judicial proceedings in which the financial interests of the Community were at stake, unless it was considered a minor fraud. This instruction was renewed two years ago, in 2006. In addition, it is important to stress that Special Anti-Corruption Prosecutors, unlike the territorial ones, are allowed to act before any Spanish judicial authority, wherever it is placed, both in the instruction and the trial phase of the judicial proceedings.

Whereas there are 2189 Prosecutors in Spain, only 15 of them are members of the Anti-Corruption Prosecution Office, located in Madrid. Nevertheless, this Special Office has Delegate Prosecutors appointed in the territorial Prosecution Offices where corruption cases are more frequent, basically on the Mediterranean coastline and the islands, because this is an area where business linked to building, tourism and money laundering are widespread, but it is not necessarily the zone where frauds affecting Community financial interests are more frequently committed, as shown in the previous graphic.

The following graphics show the composition of the Special Anti-Corruption Prosecution Office, whose real name is “Special Prosecution Office against Corruption and Organised Crime”, and the location of its Delegate Prosecutors. The figures in brackets indicate the number of people in each category according to the 2007 Annual Report of The Special Anti-Corruption Prosecution Office.



The following figures indicate the number of cases investigated by OLAF regarding Spanish companies or individuals during the period 1996-2007, according to the data provided by OLAF.

CASES INVESTIGATED BY OLAF (1996-2007)

PROSECUTION OFFICE	Pending	Dismissals or acquittals	Guilty judgements	Convicted people	TOTAL CASES
Anti-Corruption	12	8	3	37	23
Others	39	16	1	1	56
TOTAL	51	24	4	38	79

We can draw the following conclusions. In Spain these proceedings are extremely long, and most of them are still pending. Less than a half of them are attributed to the Special Anti-Corruption Prosecution Office, but they are those in which more people are involved, and in consequence the more serious and difficult to deal with. As to the results,

there are very few convictions, especially when the case is not attributed to the Special Anti-Corruption Prosecution Office.

Anyhow, I think that the existence of a central and highly experienced Prosecution Office, which deals with most proceedings regarding Communitarian frauds and in any case the most complex of them, is a clear advantage of our judicial system. This should facilitate tremendously the contacts between OLAF and the Spanish Prosecution authorities in this field, and in consequence the correct follow-up of judicial proceedings regarding OLAF investigations.

Moreover, a Cooperation Agreement has been signed between the Spanish General State Prosecution Office or *Fiscalía General del Estado* (hereinafter FGE) and OLAF on 24th January 2008. According to article B.1 of this agreement, “the partners intend to provide one another with assistance, in particular by exchanging (spontaneously or upon request) all information of relevance for the prevention and detection of fraud to the detriment of the financial interests of the European Community or Spain”. Both the Technical Secretariat of FGE and the Special Anti-Corruption Prosecution Office have been designated as Spanish contact points to guarantee the effective and confidential transmission of the information exchanged.

In our Law there is also another possible way of collaboration between OLAF and national Prosecutors, which has never been put into practise though. I am referring to the possibility that both representatives of OLAF and Spanish Prosecutors take part in a joint investigation team.

Anyway, I think we have the most effective measure for OLAF to know the current status of the proceedings at any time. I am referring to the possibility for the offence victims to intervene in the proceedings using both or either the criminal and the civil action. As established in our Criminal Procedural Law, every investigating Judge is obliged to inform the victim, in the first steps of the proceedings, about this possibility, which is recognised as a victim’s right according to Spanish Law.

Since, pursuant to article 282 of the European Community Treaty, the Community is represented in judicial proceedings by the Commission, the Commission has to be informed about the existence of any proceedings in which a possible damage to the Community budget is investigated, and about the right the Community has to intervene in those proceedings.

As far as I know, the European Commission, when it has been informed about this right, has decided to intervene in the proceedings as a civil claimant.

On the other hand, it is true than the European Commission is not the same as OLAF, but is also true that OLAF is an Office within the Commission, and OLAF members are in close relation with the Commission representatives so that OLAF can have information, through the Commission officials or directly from their lawyers, about what is happening in the proceedings at any time.

Whereas all Spanish Judges and Prosecutors know the obligation they have of informing the victims about their right to intervene in the proceedings, because it is an essential rule of our criminal procedure, maybe not all of them are aware of what is the victim in a communitarian fraud, that this victim (the Community and not the Spanish State) is represented by the European Commission, and what is the correct way to inform it about its rights in the judicial proceedings. This is the reason why I think a bigger effort must be done in order to train Judges and Prosecutors in this field. However, some measures have

been taken. For instance, a talk on the topic of OLAF and its relationships with Prosecutors has been introduced in the initial training course for Spanish Prosecutors. Besides, the draft inventory on “the role of OLAF in national criminal proceedings” has been distributed among the Prosecutors specialised in judicial cooperation; there is at least one of them in each one of the 50 provincial Prosecution Offices. It is important to stress that, because in the inventory you can read that “when the Community is damaged, it may participate in the trial as victim or even civil claimant”, and that “Community is represented by the Commission and, more specifically, OLAF as a Commission department”.

In addition, last year OLAF decided to organise the 6th Conference of Anti-Fraud Prosecutors in collaboration with FGE. It took place in Madrid from 24th to 26th September 2008, and was attended by many Spanish Prosecutors as well as several Prosecutors from other countries.

As to the contribution of OLAF officials to the good success of judicial proceedings in our country, we must stress that the OLAF officials who have carried out and signed OLAF reports are usually summoned to ratify them both in the instruction and the trial phase.

Besides, according to art. 9 paragraph 2 of the Regulation (EC) N.º 1073/1999 of the European Parliament and of The Council, of 25th May 1999, “reports drawn up (by the OLAF) shall constitute admissible evidence in (administrative or) judicial proceedings of the Member State (in which their use proves necessary), in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors”. So, in any matters related to OLAF investigations, an OLAF investigator can give evidence before the Spanish courts like any Spanish administrative inspector, generally as a witness, but not always. Sometimes he could give evidence as an expert instead of a witness, or both witness and expert, because OLAF investigators are not only people who have seen or heard something related to crime (the classic definition of “witness”), but people with a specific knowledge about the sort of offences they investigate.

On the other hand, as to the value as evidence of OLAF reports, we can also find the answer in the above mentioned art. 9 paragraph 2 of the Regulation (EC) N.º 1073/1999 of the European Parliament and of The Council, of 25th May 1999, which establishes that reports drawn up by OLAF “shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports”.

Finally, I may summarise this brief report saying that, although some aspects must be improved, generally speaking the Spanish judicial system provide both the Spanish Prosecution Service and OLAF with useful instruments to follow-up the judicial proceedings originated in administrative investigations carried out by OLAF, and even those originated in investigations about Communitarian frauds carried out by any national administrative authorities different from OLAF.

Madrid, 9th February 2009

Luis Rodríguez Sol
Prosecutor
Special Prosecution Office against Corruption and Organised Crime
Madrid (Spain)

**The follow-up of the European Anti – Fraud Office’s (OLAF)
ADMINISTRATIVE Investigations in Member States**

A. The Situation in the United Kingdom

1. The first issue to grasp is that the United Kingdom is not one homogenous legal entity and unlike many other Countries in Europe does not have a single criminal legal (justice) system [CJS]
2. England & Wales have the same CJS and form part of a unified Judicial & Policing process, albeit there are 42 separate police forces.
3. There is one National Prosecution Service under the Attorney General and that is the Crown Prosecution Service (CPS) only created by Statute in 1985
4. There are a number of Specialist arms to the CPS including Serious & Organised Crime (SOCA), Terrorism and the Fraud Prosecution Service which was only created in 2005 to handle complex and serious frauds in London and elsewhere in the England & Wales.
5. Scotland is part of the UK but has its own CJS (albeit very similar in many respects to the UK) but the legal & criminal procedure is quite different and English lawyers are not qualified as of right to practice in Scotland. The proceedings are different and are based on an amalgam of French, Roman & English process.
6. Northern Ireland is again based on similar processes and procedure as “mainland UK” but there is no automatic right of audience for English Prosecutors / Defenders in their Courts. The procedures are far closer to England & Wales than say Scotland
7. The point of this analysis is to spell out the fact that the United Kingdom is no more unified than the rest of Europe when it comes to Criminal Law and CJS (not to mention the Welsh Assembly, Scottish Parliament and the Northern Ireland Parliament)

B The Position of the FPS

8. Whilst the situation is not as extreme or diverse as may be hinted at above there are clear impediments to resolving issues across borders or the water in the UK but the relations that exist between the various disciplines (police and prosecutors) is excellent – there are just different laws, procedures and pressures that can apply.
9. Hence the FPS can only speak for England & Wales and for those cases referred to it in the usual manner
10. For the record the FPS is a totally different entity to the Serious Fraud Office established in 1988 to handle serious & complex cases with a value in excess of £1million pounds requiring their special investigative powers
11. The acceptance threshold for FPS is £750,000.00 or above subject to an overriding discretion to consider any cases of particular political or other sensitivity, media interest or attack on public funds.
12. Hence the FPS do regard it as part of its remit to accept cases which involve the abuse or misuse of public money by public servants or others covering a wide scope of criminal activity from theft, false accounting, fraud and even corruption
13. The types of activity and offenders that have been brought to the FPS and successfully prosecuted have included:
 - Medical Practitioners (False claims)
Offence False accounting – Fraud
 - Dentists (False claims)
Offence False accounting – Fraud
 - Pharmacists (False prescriptions)
Offence False Accounting – Deception
 - Local Councillors (False claims & Charity Fraud)
Offence False accounting – Theft
 - Lawyers (Defraud Transport for London)
Offence Fraud

- Police Officers (False Expenses Claims – abusing their position of trust in the use of a Credit card)
Offence Misconduct in Public Office
- Organisers of Charities (Theft of donations)
Offences theft – False accounting
- Employees of Local Authorities (Making corrupt arrangements in the allocation of contracts and accepting bribes)
Offence Corruption & conspiracy to receive corrupt payments
- False claims for Housing Benefit by members of Public
Offence obtain by Deception / Fraud

14. The above examples are not exhaustive of the type of attacks on the public purse and funds that are dealt with by the FPS in their offices in London and York.

15. This leads on the issue of “referral” by OLAF of cases to the FPS. The remit of the FPS is to prosecute cases referred by a Police Force (Section 3 of the Prosecution of Offences Act 1985) and to also take over certain prosecutions brought by private individuals which by Section 6(2) states:

“Where criminal Proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage”

16. Under the provisions of the Prosecution of Offences Act 1959 the powers of the Director are delegated to senior lawyers such as the Assistant Director of the FPS under Section 1(6) of the Act.

17. This delegated power also includes providing consent for a prosecution when DPP’s consent is required by statute.

18. What it does not do is cover the situation where consent from the Attorney General (AG) is required. In those cases such as corruption or bribery a full report and file submission must be made to the Legal Secretariat to the Law Officers (LSLO) for consent to be obtained

C. THE RELATIONS WITH OLAF

19. The position of OLAF investigations which are primarily “administrative” must be seen in the legal and constitutional context of the FPS and its role in the UK

20. In practical terms for the FPS to undertake a prosecution there should be a police involvement to cover the necessary legal requirements of the statutory regime on disclosure as set out in the Criminal Procedure & Investigations Act 1996 (CPIA). This deals with necessary analysis and evaluation of any unused material and the proper handling of the same in accordance with the CPIA and the Attorney General’s Guidelines. Thus there should be a police disclosure officer in any case FPS handles

21. It would be anticipated that any case referred to the FPS which falls within its main criteria as set out above would be sympathetically and actively considered for acceptance by the Director or the Assistant Director of the FPS

22. If the investigators have already been in contact with a relevant police force (likely to be the City of London Economic Crime Department of the Metropolitan Police Service Fraud Department (SCD 6) then it would be anticipated that support of a police officer would be available to assist.

23. In the event the enquiry came direct to the FPS and it considered a criminal prosecution may be appropriate and would fall within its criteria then appropriate referral would be made to the most appropriate police service for support and assistance.

24. Once a case is accepted it will be reviewed by an experienced senior lawyer who will have to be satisfied that the case meets the Test set out in the Code for Crown Prosecutors under Section 10 of the Prosecution of Offences Act 1985.

25. In short the lawyer has to be satisfied that there is a realistic prospect of conviction – namely that a magistrate or jury properly directed on the law are more likely than not to convict. The lawyer must take into account all the evidence and material available and have regard to any matters raised by the suspect but should not be governed by unsubstantiated claims made on his or her behalf.

26. Once the evidential test has been dealt with and found to be met then the lawyer must consider whether it is in the public interest to prosecute and take into account a number of relevant issues such as:

- The seriousness of the loss & fraud
- Whether and how much harm is done
- Whether compensation can be recovered
- The mental & physical state of the defendant

27. This list is not exhaustive and it is more likely than not that a serious fraud on public funds would result in prosecution

28. There is a current referral by OLAF to the FPS which is being considered and should be best describes as “sub Judice”

29. Another case being dealt with by FPS York office relates to a fraud on funds obtained from the European Fund by a calculated deception in relation to a so-called training operation. That matter was reported direct to the police in Durham and the case is progressing with restraint of Assets. That matter clearly would have fallen within the remit of OLAF had the police not taken a proactive stance.

30. Other cases dealt with the FPS do include overseas corruption (one involving the UN) and another involving a Danish & Ugandan who were involved in corruption and bribery over contracts with the Ugandan Government.

31. This case was successfully resolved with convictions and was the first such case in the UK.

David Levy
Assistant Director
Fraud Prosecution Service
Rose Court
London
SE1 9 HS

0044 207 023 6505
0044 7775 937 914

David.Levy@cps.gsi.gov.uk

Le suivi des dossiers transmis par l'OLAF aux autorités judiciaires belges.

1. Introduction.

- 1.1. La Belgique abrite le siège des institutions européennes. Ses juridictions se trouvent dès lors compétentes pour juger un nombre important de dossiers pénaux qui concernent l'Union. Qu'il s'agisse d'enquêtes internes à propos de fonctionnaires indéliques ou d'enquêtes externes pour des fraudes commises au sein des 27 pays-membres, il faut constater que dans un nombre très important de cas, les faits répréhensibles ont eu lieu au moins en partie à Bruxelles. Ceci n'exclut toutefois pas que d'autres pays puissent se trouver compétents pour juger. Il y a donc préalablement à toutes poursuites une réflexion à engager sur le choix du pays le plus indiqué pour agir. Cette réflexion aura pour cadre initial les institutions de l'Union européenne et pourra le cas échéant se compléter par un échange entre procureurs des pays concernés à l'intermédiaire d'EUROJUST notamment.
- 1.2. Au-delà de cette réflexion initiale, l'objet de la présente communication est de faire le point sur les possibilités offertes par le droit belge aux problèmes rencontrés par l'Union européenne et de détailler les infrastructures qui ont été mises en place par l'Etat belge afin de répondre aux besoins de l'Union en matière de protection de ses intérêts financiers.

2. Critères de compétence

- 2.1. Critères généraux : Sous réserve des immunités diplomatiques ou internationales, toutes les infractions commises sur le territoire belge sont punies devant les tribunaux belges conformément aux lois belges. Il suffit pour ce faire que un élément constitutif de l'infraction ait été réalisé en Belgique alors même que les autres éléments auraient été réalisés à l'étranger. Exemple : Les tribunaux belges sont compétents pour juger l'utilisation au siège des institutions européennes à Bruxelles d'un faux document établi et remis à l'étranger.
- 2.2. Compétence universelle : La Belgique est compétente pour juger les infractions de corruption commises par un fonctionnaire européen quel que soit l'endroit de commission de l'infraction pour autant toutefois que l'inculpé soit trouvé en Belgique. Exemple : Les tribunaux belges sont compétents pour juger un fonctionnaire européen qui a commis un fait de corruption à Kiev (Ukraine) dès lors qu'il a été arrêté à l'aéroport de Bruxelles.

3. Une entrée unique : Le parquet fédéral.

- 3.1. Principe : En Belgique les plaintes pénales sont communiquées directement ou à l'intermédiaire des services de police à l'un des 27 procureurs du Roi du Royaume. Les critères de choix du procureur compétent dépendent du lieu où a été commise l'infraction, du domicile de son auteur ou du lieu où il aura été arrêté.

Cette situation rend parfois compliqué le dépôt de plainte même si dans la plupart des cas le procureur du Roi de Bruxelles sera compétent pour recevoir les plaintes de l'OLAF compte tenu de la localisation des autorités européennes sur le territoire belge.

Afin de rencontrer cet écueil, le législateur belge a créé en 2002 un 28^{ème} procureur dont les compétences lui permettent d'intervenir sur la totalité de l'espace national : le Procureur fédéral.

3.2. Le Procureur fédéral. Il dirige un corps de 22 magistrats fédéraux établi à Bruxelles dénommé le Parquet fédéral.

3.2.1. *Quelles sont ses fonctions ?* La loi lui confie quatre fonctions essentielles : exercer l'action publique, en coordonner l'exercice, faciliter la coopération internationale et surveiller le fonctionnement général et particulier de la police fédérale. La compétence du parquet fédéral s'étend à l'ensemble du territoire du Royaume.

3.2.1.1. Exercer l'action publique (les poursuites) :

Le parquet fédéral peut exercer l'action publique dans le cadre d'une liste limitative d'infractions visées par la loi. Il peut se saisir d'un dossier sur la base du critère de sécurité qui recouvre les infractions commises avec usage de violence à l'encontre de personnes ou d'intérêts matériels, pour des motifs idéologiques ou politiques, dans le but d'atteindre ses objectifs par la terreur, l'intimidation ou les menaces et du critère géographique qui recouvre les infractions qui dans une large mesure, concernent différents ressorts de cours d'appel ou qui ont une dimension internationale.

3.2.1.2. Coordonner l'exercice de l'action publique.

Le but poursuivi est de prévenir et résoudre les conflits de compétences entre autorités judiciaires saisies de faits connexes, en faisant appel à la concertation. L'intervention du parquet fédéral consiste soit à centraliser les dossiers répressifs au sein d'un parquet ou auprès d'un juge d'instruction, soit à améliorer la circulation et l'échange d'informations, quelles que soient les infractions concernées.

3.2.1.3. Faciliter la coopération internationale.

A la demande des autorités belges et étrangères, le parquet fédéral facilite l'exécution de demandes d'entraide judiciaire, quelles que soient les infractions visées, notamment en fournissant des informations juridiques et pratiques, en accélérant l'envoi des demandes, et en les exécutant ou en coordonnant leur exécution en Belgique. Il s'emploie également à rendre plus aisée la coordination des enquêtes au niveau international. Le parquet fédéral constitue également le point de contact central judiciaire pour les autorités judiciaires et les institutions internationales telles que, par exemple : les tribunaux pénaux internationaux, le Réseau Judiciaire

Européen, EUROJUST, EUROPOL et INTERPOL. Le parquet fédéral autorise aussi toutes les opérations transfrontalières policières qui ont la Belgique comme pays de destination ou de transit.

3.2.1.4. Surveiller le fonctionnement général et particulier de la police fédérale.

Cette fonction comporte essentiellement trois volets : veiller à ce que les missions judiciaires spécialisées soient exécutées conformément aux réquisitions des autorités judiciaires ; veiller au fonctionnement du service de répression de la corruption (O.C.R.C.) et présider l'organe de contrôle de la gestion de l'information. Cet organe contrôle le respect des règles d'accès et de transmission des données et informations à la banque de données générale nationale.

3.2.2. *Comment fonctionne-t-il ?* Le parquet fédéral peut se saisir d'une affaire après en avoir été informé par le procureur du Roi, le procureur général et l'auditeur du travail ; suite à ses propres constatations, à une plainte ou une dénonciation directe par des institutions internationales ou des autorités judiciaires étrangères et enfin, suite aux informations communiquées par la direction générale judiciaire de la police fédérale. C'est le procureur fédéral qui décide, le cas échéant en concertation avec le magistrat qui l'en a informé, s'il se saisit ou non d'une affaire, suivant une procédure décrite dans une circulaire commune du ministre de la Justice et du Collège des Procureurs généraux. Il est appuyé, pour ces tâches de coordination et de coopération internationale ou d'analyse de certains phénomènes criminels, par les services spécialisés des directions générales de la police fédérale. Pour effectuer ses enquêtes, le parquet fédéral fait appel à la police fédérale et notamment, les services judiciaires d'arrondissement (S.J.A.) et les offices centraux de répression de la corruption (O.C.R.C.) et de lutte contre la délinquance économique et financière organisée (O.C.D.E.F.O.).

3.3. Notification des plaintes au Parquet fédéral. Par Circulaire (9/2003) du Collège des Procureurs généraux, les autorités belges ont décidé que les communications de l'OLAF faites dans le cadre de fraude aux intérêts financiers de l'Union européenne devaient être faites au Procureur fédéral. Dans cette hypothèse, le Procureur fédéral peut décider de trois orientations :

- Exercer lui-même les poursuites.
- Classer le dossier sans suite.
- Transférer le dossier à l'un des 27 procureurs du Roi (souvent celui de Bruxelles) pour qu'il se trouve compétent.

4. Un service policier spécialisé de la police fédérale: l'OCRC.

4.1. L'Office Central pour la Répression de la Corruption (OCRC).

En raison de la présence des institutions européennes à Bruxelles, l'OCRC est chargé chaque année de plusieurs enquêtes concernant des infractions commises par des fonctionnaires européens. L'OCRC collabore dès lors étroitement avec l'Office européen anti-fraude (OLAF).

- 4.2. L'OCRC constitue, au sein de la police fédérale, un service central avec une compétence opérationnelle. Cela signifie que ses membres peuvent mener des enquêtes judiciaires (perquisitions, saisies, auditions, arrestations, etc.), soit de façon autonome, soit en appui ou en collaboration avec les Directions judiciaires déconcentrées dans les arrondissements, en fonction de la gravité de l'enquête, de son caractère sensible, de la fonction occupée par les auteurs, de la complexité des actes demandés, etc.
- 4.3. Les investigations de l'OCRC concernent ainsi surtout les infractions de corruption, et détournement dans les domaines des marchés publics, subsides, permis et agréments.
- 4.4. L'OCRC compte 63 membres du personnel et est dirigé par un chef de service, assisté d'un secrétariat et d'un analyste stratégique. L'OCRC est organisé en 2 sections composées d'enquêteurs appartenant aux rôles linguistiques français et néerlandais :
- 4.4.1.1. La **section « Marchés publics »** compte 26 enquêteurs et s'occupe principalement de dossiers relatifs à des fraudes en matière de marchés publics.
 - 4.4.1.2. La **section « Fraudes financières »** compte 32 enquêteurs et s'occupe de tous les autres dossiers de fraudes confiés à l'OCRC (notamment les fraudes aux subsides ou en matière de permis ou agréments). Chaque section est divisée en différentes équipes d'enquête dont la taille varie selon l'importance et l'ampleur du dossier.
- 4.5. Par décision du Procureur fédéral, les dossiers communiqués par l'OLAF à la justice belge sont systématiquement adressés dans un premier temps à l'OCRC. Ce service est chargé de procéder à l'analyse opérationnelle des éléments repris à l'enquête de l'OLAF et de proposer le schéma d'enquête et les moyens nécessaires à leur réserver. Le dossier pourra le cas échéant être conservé par l'OCRC ou délégué à un service d'enquête décentralisé qui travaillera le cas échéant avec l'appui technique de l'OCRC.

5. Le rassemblement des preuves

5.1. L'enquête de l'OLAF.

Lorsqu'une enquête interne ou externe est transmise à la justice belge, elle se compose d'un ensemble de constatations et d'auditions. Quelle est la valeur probante de ces documents ? Pour répondre à cette question, il faut énoncer quelques principes qui fondent la preuve.

En Belgique, il n'y a pas de répartition de la charge de la preuve aussi eu égard à la présomption d'innocence, la charge de la preuve repose entièrement sur la partie poursuivante sous le contrôle du juge. Le prévenu peut se contenter d'un rôle purement passif.

Le droit belge consacre le principe de la liberté de la preuve aussi tout élément de preuve est admis dès lors que celui-ci permet d'asseoir la conviction du juge. La preuve doit toutefois pour être admise être soumise à la contradiction et en principe avoir été obtenue de manière régulière.

Ces considérations feront que le dossier OLAF sera intégré au dossier de procédure soumis au tribunal et constituera avec les autres pièces les éléments de preuve. Les juridictions belges ne se contenteront toutefois pas du seul dossier de l'OLAF. En règle, celui-ci constituera un point de départ pour une enquête plus large effectuée par les enquêteurs belges.

5.2. L'instruction.

5.2.1. Les différents devoirs d'enquêtes sont réalisés sur le terrain par les services de police. Ceux-ci sont exécutés à la requête du Procureur du Roi (ou fédéral) ou d'un juge d'instruction. Pour distinguer cette dualité dans la gestion des opérations, on dira en simplifiant que les devoirs d'enquêtes qui se limitent aux auditions de personnes, au rassemblement de données ouvertes sont faites par le Procureur du Roi qui est la partie poursuivante au procès. Les devoirs qui nécessitent par contre des mesures attentatoires aux libertés (perquisitions, détention préventive, écoutes téléphoniques) sont de la compétence d'un juge d'instruction. Lorsqu'un juge d'instruction est requis, il prend le dossier et gère l'enquête en totalité avant de transmettre les pièces au Procureur.

5.2.2. La majorité des plaintes communiquées par l'OLAF (certainement pour les dossiers les plus importants) est attribuée à un juge d'instruction dans la mesure où des perquisitions sont le plus souvent indispensables à la manifestation de la vérité. Il s'ensuit une enquête pouvant se développer sur une longue période, le droit belge permettant notamment à toutes les parties de solliciter des mesures d'enquête particulières à un certain stade de la procédure.

5.2.3. Au terme de l'instruction, le juge d'instruction fait rapport au tribunal. Celui-ci statue ensuite sur les réquisitions du procureur après avoir entendu les parties et ordonne le renvoi ou non du dossier devant une chambre correctionnelle distincte du tribunal. Celle-ci traitera l'affaire au fond sur base du dossier constitué par le juge d'instruction.

6. Les dossiers OLAF transmis aux autorités belges.

6.1. Depuis trois ans on peut évaluer à une moyenne de 5 par an le nombre de dossiers communiqués par l'OLAF aux autorités belges. Il s'agit le plus souvent de faits de corruption ou de fraudes aux subsides. Des irrégularités plus ponctuelles ont également été dénoncées à propos de certains fonctionnaires pour détournements ainsi qu'un dossier visant une fraude importante au plan des législations sociales (emploi de main d'œuvre irrégulière pour l'exécution de contrats de nettoyage).

6.2. Les décisions ou les jugements interviennent assez vite pour les affaires simples. Plusieurs dossiers répondent toutefois à un degré élevé de complexité et sont actuellement en cours d'instruction chez des juges d'instruction. Il s'agit dans ces derniers cas principalement d'affaires de corruption.

- 6.3. En ce qui concerne les rapports avec les autorités belges, il est absolument nécessaire que toutes les plaintes soient adressées au Procureur fédéral compte tenu notamment des circulaires internes. L'absence de respect de cette condition n'invalide pas la procédure mais empêche les autorités belges d'avoir une vue générale des affaires européennes en cours et contrarie les premiers développements de l'enquête. Le suivi des dossiers en cours passera également par la même voie même si un contact avec le magistrat titulaire du dossier au parquet ou à l'instruction peut être envisagé de l'accord des autorités concernées.
- 6.4. Au plan interne, la bonne évolution des dossiers est suivie par le ministère public.
- 6.4.1. En ce qui concerne les dossiers dévolus à un arrondissement en particulier, le Procureur du Roi contrôle l'évolution des enquêtes conduites par le juge d'instruction et peut prendre des initiatives pour éviter les retards. Il est lui-même contrôlé dans cette mission de surveillance ou dans la manière dont il conduit l'enquête par le Procureur général (Il y a 5 procureurs généraux pour 27 procureurs du Roi).
- 6.4.2. En ce qui concerne les dossiers traités au niveau fédéral, le Procureur fédéral exerce sous l'autorité du Ministre de la Justice, toutes les fonctions du ministère public. Il assurera donc le suivi des dossiers confiés à un juge d'instruction ou assumera lui-même l'enquête.

7. Conclusion.

Les enquêtes de l'OLAF dénoncées aux autorités belges font l'objet d'un suivi par des autorités spécialisées tant au niveau de la police que de la magistrature. Les dossiers en cours connaissent une suite utile ; il n'y a pas actuellement de contentieux sur leur évolution. Les autorités belges demandent aux institutions européennes de continuer à être attentives au respect des structures en place en Belgique pour répondre de la manière la plus efficace à leurs demandes.

Tom Lamiroy
Magistrat fédéral

Jean-Pascal Thoreau
Magistrat fédéral

**PUBLIC PROSECUTOR'S OFFICE
MILANO COURTROOM - ITALY**

Alfredo ROBLEDO

*Deputy Public Prosecutor, Coordinator of the proceedings in the field of crimes
to the detriment of Public Entities of the Government and of the European Union*

Francesco CAJANI

Deputy Public Prosecutor, High Tech Crime Unit

In response to the growing volume and complexity of frauds against EU financial interests, the Milan Public Prosecutor Office would like to suggest a way to strengthen the institutional relationship with Olaf by implementing a new form of operational cooperation that could eventually be replicated by all member states.

In general, we believe that tighter forms of European investigative cooperation are necessary to respond to the growing speed and depth of transnational criminal activities we see in our increasingly globalized world. The recent worldwide financial meltdown is the latest example of how quickly financial relationships – not only legal but also illegal ones - develop, proliferate and modify and how they almost always transcend national lines. Considering the immense strain the current crisis is putting on our entire society, we feel the need to sponsor the development of more effective ways of detecting, analyzing and understanding these phenomena.

In our opinion the current system of mediation by national authorities is not able to respond with the necessary speed as it often slows down the process of exchanging information, making it difficult, if not impossible, to keep up with criminal developments.

European institutions such as Olaf were built to transcend national boundaries and reinforce assistance among member states to mutual benefit. In that spirit of solidarity we believe that a more immediate form of cooperation among local agencies - mediated by Olaf - would forge a deeper investigative and judicial integration within the EU and help us better achieve our common goals, while keeping intact our respective professional cultures.

Our suggestion is to create a more direct platform to share information and integrate informational databases that would strengthen Olaf and all of its members by inviting the various local judicial agencies to share the ongoing results of their criminal investigations through a process of data exchange in real time. This will allow for a better and more immediate understanding of criminal activities. The goal would be to broaden the flow of available data so as to provide an enhanced means of responding to illegal transnational activities.

The idea is to facilitate a flow of data that is no longer unidirectional but rather one that shifts back and forth between Olaf and all the local agencies willing to accept a confidentiality protocol that will govern the data exchange so that the most significant elements of investigations could be shared in real time via Olaf.

This new dynamic would eliminate the systemic delay in the reporting and sharing of information about active criminal cases handled by local agencies, which until now is made possible when the criminal events under investigation are usually long concluded.

We believe that our proposal would optimise the timing of cooperation and significantly improve the effectiveness of our respective investigative work.

The real time exchange of information would facilitate an immediate understanding of an event, strengthen investigative and judicial responses, help prevent the spread of criminal activities and improve the timing and effectiveness of EU institutional reactions.

We also offer an additional suggestion: in the last few years the Milan public prosecutor office registered a substantial increase of frauds against the State or other public institutions, including frauds devised to access public funds or European financial aids. The Milan Prosecutor Chief Manlio Minale responded by assigning the task of coordinating our work in this area of criminal activity to the Deputy Public Prosecutor Alfredo Robledo, so that all public agencies – local, national or European – can interact on these matters with a dedicated single player that would be better prepared to safeguard their interests.

We believe that this overhaul approach, if replicated everywhere and made part of a common EU network coordinated by Olaf and with access to the new data exchange platform we proposed, could significantly improve the effectiveness of Olaf's and our respective investigative work.

As an initial experiment to verify the value of the data platform proposal, we suggest that we start with a trial limited to our own office and Olaf. The trial proposal would imply the following:

1. Olaf and the Milan Public Prosecutor office would sign a bilateral Memorandum of Understanding that would regulate the data exchange and identify specific liason officers in both agencies;
2. We would implement the necessary arrangements in order to guarantee the security of the planned channels of communication and protect the confidentiality of the transmitted data through special protocols approved by Olaf that would include the use of authentication, certification and cryptographic procedures;
3. We would identify investigative personnel working directly with the public attorneys in charge of the cases in question and train them in the transmission and safekeeping of the shared data;
4. We would establish an operational timeframe, not shorter than two years, sufficient to make necessary adjustments and to evaluate the effectiveness of the program.

As soon as such a Memorandum of Understanding is signed, the Milan Public Prosecutor office would start transmitting to the Olaf liason officer any information relating to a case of a possible financial crime that could affect EU interests or funds as soon as such a case is opened.

Within the proposed relationship, the magistrate in charge of an investigation and the designated Olaf officers could also exchange information, reciprocally request specific investigative activities or suggest a course of action to obtain a better understanding of a criminal event.

We believe that immediate data exchange in this manner would improve the quality of our investigative work, without interfering with our respective procedural MOs. Olaf's administrative findings could more easily enhance criminal proceedings, while information acquired by local

agencies could more quickly and efficiently reach Olaf, while keeping in consideration relevant defense rights.

We drafted a version of a possible MoU based on other equivalent ones between Olaf and the General Financial Prosecutor Office of Italian Court of Auditors.

Thank you very much for your time and consideration.

**COOPERATION ARRANGEMENT BETWEEN
THE "EUROPEAN ANTI-FRAUD OFFICE" (OLAF)**

AND

**PUBLIC PROSECUTOR'S OFFICE – MILANO COURTROOM
(PROCURA DELLA REPUBBLICA PRESSO IL TRIBUNALE DI MILANO)**

A - Purpose of the arrangement

The European Anti-Fraud Office (OLAF) and the Public Prosecutor's Office – Milano Courtroom (hereafter referred to as "the parties to this arrangement" or "the parties") intend to cooperate within the scope of their competencies in order to protect the financial interests of the Community as well as of the Republic of Italy. This cooperation arrangement sets out in writing the practical modalities of the working relations between the Public Prosecutor's Office – Milano Courtroom and the European Anti Fraud Office (OLAF). It shall not modify any relevant legal rules and does not interfere with the legal framework governing both institutions. It does not cover judicial assistance.

B - Terms of cooperation

1. With the aim of preventing and fighting fraud and other illegal activities to the detriment of the European Community's financial interests (EC fraud) the parties to this arrangement intend to support each other in the fulfilment of their legal tasks.

The parties to this arrangement provide each other assistance, in particular by exchanging spontaneously or upon request all information of relevance for the prevention and detection of EC-fraud as well as of fraud to the detriment of the financial interests of the Republic of Italy. In order to provide the information sought the parties intend to proceed as though acting on their own account.

2. OLAF supports the Public Prosecutor's Office – Milano Courtroom in its efforts at national level to ensure the coordination of all kinds of activities related to the protection of the Community's financial interests.

3. At the request of either party the partners intend to take the available activities to prevent operations that might have a detrimental effect on the Community's financial interests and to help the recovery of Community funds.

4. In the framework of its legal framework the Public Prosecutor's Office – Milano Courtroom intends to give OLAF staff the possibility to assist each other in their operational activities.

5. The terms of the exchange of personal data by OLAF are subject to the rules on control by and consultation of the European Data Protection Supervisor within the framework of Regulation (EC) 45/2001.

C - Structure of the information exchange

Information exchange, both spontaneously as well as on request for information should contain at least the following information:

- The persons and/or companies involved, and their unambiguous identification;*
- The sector of EC-fraud and other illegal activities to the detriment of the financial interests of the Community concerned;*

- A brief statement of the underlying facts, facilitating the receiver of the information to exploit the information effectively (in the case of a spontaneous exchange) or to conduct its research (in the case of a request for information).

D - Use of information by the parties and in relation to third parties, principle of prior consent

1. With the exception of information which is in the public domain, the arrangement does not cover the dissemination of information or documents obtained from the parties to any third party other than the competent authorities of the Member States of the European Community.
2. The arrangement does not cover the use or release of any information or document by the parties to third parties other than the competent authorities of the European Community or for purposes other than those stated in this arrangement without the prior consent of the disclosing party.
3. Information may only be sent to third parties if they guarantee to disseminate the aforementioned information only with the consent of the disclosing party and for the purposes of this arrangement.

E - Confidentiality rules and data protection

1. Information communicated or acquired in any form under this arrangement is covered by professional secrecy and protected in the same way as similar information is protected by the national legislation of Italy that received that information and by the corresponding provisions applicable to the Community institutions.
2. Such information may not be communicated to persons or authorities other than those within the Community institutions or in the Member States whose functions require them to know it nor may it be used for purposes other than to ensure effective protection of the Community's and the Italy's financial interests.
3. OLAF and the Public Prosecutor's Office – Milano Courtroom ensure, when processing personal data pursuant to this arrangement that the provisions from Community law, national and international law on the protection of personal data, are complied with. To OLAF applies in particular Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2001¹.

F - Cooperation in the field of intelligence and technical support (access to information technology applications)

In addition to the provision of mutual assistance, the parties intend to cooperate also in the field of threat assessment and risk analysis. For that purpose, and in conformity with the relevant rules, the Parties may share their specific technical tools and materials.

It provides for the use of a secure email system as well as other channels of electronic communication which can use certified systems of authentication, digital signature and encryption.

G – Mutual training

OLAF together with the Public Prosecutor's Office – Milano Courtroom intends to provide for and develop training programmes as regards the protection of the Community's financial interests.

The parties should cooperate in the field of professional training, seminars and workshops, by informing one another of and invite to relevant activities which they organise and which may be of common interest as well as by organising joint activities in this field.

¹ OJ L8,12.01.2001 p. I.

H - Privileges and immunities

The activities taken on the basis of this cooperation arrangement shall be without prejudice to the respective privileges and immunities of each institution.

I - Designation of contact points and transmission of information concerning financial crime to the detriment of the European Community

The parties designate the following contact persons within their organisation, in order to guarantee in particular the effective and confidential transmission of the information exchanged:

- *OLAF Unit 04: _____*

- *PUBLIC PROSECUTOR'S OFFICE – MILANO COURTROOM : Deputy Public Prosecutor Alfredo ROBLEDI, coordinator of the proceedings in the field of crimes to the detriment of Public Entities of the Government and of the European Union*

They should meet when necessary to establish and reinforce common strategies on cases and to resolve practical problems which may arise from the application of the present arrangement.

For the regular exchange of information the parties use a secured email-system as well as other channels of electronic communication which can use certified systems of authentication, digital signature and encryption.

The Parties provide for following functional mailboxes through which information is transferred:

- *OLAF: _____*

- *PUBLIC PROSECUTOR'S OFFICE – MILANO COURTROOM: _____.*

The Parties can ask the assistance of Judicial Police Officers from the High Tech Crime Unit in service at the Public Prosecutor's Office – Milano Courtroom (telephone number +39 02 54334607, fax number +39 02 55193065), with reference to the above mentioned section F and for the exchange of secure information.

Public Prosecutor's Office – Milano Courtroom, in adherence to the present arrangement, upon receiving communication of possible fraud and other illegal activities to the detriment of European Community's financial interests, will immediately transmit to the contact persons designated by OLAF the relevant information, following their storage in a digital form. Throughout the described arrangement, the magistrate in charge of an investigation and the designated OLAF officers may reciprocally request specific investigative activities, or acquire evidence believed necessary or relevant, or suggest a course of action to obtain a better understanding of a criminal event.

J - Evaluation of cooperation

Via their contact points/persons the parties should periodically meet to identify possible priority areas for cooperation and common strategic or operational objectives, to evaluate the application and the necessity for amendment of this cooperation arrangement.

K - Start of application

The present arrangement is applicable as from its signature both by the responsible of the Public Prosecutor's Office – Milano Courtroom and the Director General of OLAF.

L - Signature /Conclusion of the arrangement

This arrangement will be accepted by means of an Exchange of Letters, to be signed by the responsible of the Public Prosecutor's Office – Milano Courtroom and by the Director General of OLAF.