WHISTLEBLOWING IN ACTION IN THE EU INSTITUTIONS

Prepared for ADIE by RBEUC, Tallinn / Brussels, end 2008

Prelude 1

One of the Grimm brothers' fairytales basically evolves around three characters: a twisted king with a demand nigh to impossible: to turn hay into gold; a miller's daughter in serious trouble; and a little man who up to three times helps out the troubled girl miraculously. Facing certain death, the girl even promises the little man her first-born child.

Later, when she is a queen and a mother and kept to her promise, it is thanks to the open ears of a loyal royal messenger that she narrowly escapes from this ordeal. Sent out to discover the little man's secret name, this messenger was at the right place at the right time when he overheard him singing his secret name (*Rumplestiltskin*) in a merry song.

Doing what he had been asked to do, the messenger chose sides against the one who had become the enemy of his master. Of his fate we learn nothing: not if he was rewarded by the queen for saving her child, perhaps by marrying the young princess; not if the little man who must have felt that he was ratted out took revenge on the whistleblower; if he lived happily ever after or not was irrelevant. He played his role, and now is no more than a nameless footnote in fairytale history.

PRELUDE 2

A whistleblower: "A whistleblower is anyone who discloses or helps to disclose fraud, irregularities and similar problems."

An MEP, in 2002: "If you have the courage to criticise your superiors, you run the risk of being kicked out of your job. It is highly disturbing and cannot be right."

A director: "I admire your courage, but it is not good for your career that you do this."

Shakespeare: "O monstrous world! Take note, take note, o world /
to be direct and honest is not safe!" (Iago, in Othello, III, iii)

A whistleblower: "If they're going to shaft me, that says more about them than about me."

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Note to the reader

This article is no exception to those that dedicate a couple of words to deplore the "un-translatability" of the word with a slightly negative connotation: whistleblower. "Denunciator", "sentinel", no one word covers adequately all informants who disclose information in the general interest and do so wider than their hierarchy would like them to. The one blowing the whistle in sports is the referee, the one whose "word" counts for something. A whistleblower's function is merely that of an assistant referee, who risks to see his or her "flagging up" of an apparent foul to be adopted, ignored, or overturned. For want of a better term, "whistleblower" is used throughout the text for informants, alarm bell ringers, etc. as they all have in common that they decided to give voice to the unspeakable, and disclosed the "undisclosable".

In order to save space, rather than for aesthetical reasons, the notation of many of the dates is "digital staccato" (e.g., 28.02.'03 rather than 28 February 2003, and 12.'01 instead of January 2001). This has not been followed rigorously either.

Many frequently used long words will be written in full the first time they appear. The abbreviation will be given immediately after, and this will then be the way the words are commonly referred to throughout the text. For reasons of readability this practice has not been followed rigorously:

Cocobu:	Committee on Budgetary Control, an important committee in the EP with currently 35 Members
CoR:	European Committee of the Regions, 344 Members representing regional and local government in Brussels
DG:	Either Director-General or Directorate-General
EC:	Here 'European Commission', not 'Communities'; over 33,000 staff members headed by 27 EU Commissioners
ECA:	European Court of Auditors, one Member per State (27)
EP:	European Parliament, 785 members; 732 or 751 after June 2009
MEP:	Member of the European Parliament, elected for 5 years
OLAF:	European Anti-Fraud Office, an "independent" DG of the EC, with a staff of around 450 (the many and often changing technicians included)

Part I: Key players

Introduction

This year's international annual report of Practical Philosophy and Methodology[1] is dedicated to the issue of whistleblowing. The editors aim to create an overall picture, on the private sector, on national practices, and other aspects of the subject based on opinions of specialists from all over the world. This article focuses on whistleblowing in practice in several institutions of the European Union. The attention for the subject slowly (and belatedly) but surely spreads from the Anglo-Saxon sphere to the rest of the world. The latest example is the Dutch government's promise to put its Parliament's wish for a single nation-wide advice, referral and complaints department into practice as of mid-2009.

Leaking inside information to Members of Parliament is not always safe, not even for those who receive the leaks. Damian Green, the United Kingdom's shadow minister for immigration, was arrested for nine hours as recently as November. The arrest enabled the police – in fact even counter terrorist officials - to seek access to the MP's house and offices. Although he faced no official charges, the grounds for the raids on the conservative's property were disclosures that were embarrassing for the government. Among them was the story of a cleaning lady who had access to House of Commons offices but had no passport. The permanent secretary of home affairs, a modern day Humphrey Appleby from the TV series Yes, Minister, had found the leaks to be undermining the effective operation of his department. Leaks can lead to charges of conspiracy to commit misconduct in a public office. Those in power decide on whether leaks have an overriding public interest or, indeed, if they do not.

More often than not, whistleblowers experience a typical form of violence called mobbing, bullying or harassment. In international environments, colleagues usually have a wide range of terms for the one who voices work-related criticism: he or she can expect to be spoken about behind their back as someone who "spoilt the birds' nest" (by German colleagues) or someone who "spit in the soup [we all eat from]" (by French colleagues).

The Shenwick case in the United States, where an American official working at the United Nations was essentially fired for disclosing information to elected representatives of the people, turns out to have its equal in Europe - manifold.

What are the three main institutions in the set-up of the EU depends of the situation. When it comes to law making one considers the Commission, the Parliament, and the Council. But the role of the last of these is scarcely relevant for whistleblowing, which is why this article focuses on the first two plus the European antifraud office commonly known under its French acronym, OLAF.

1. The European Commission

Since 01.05.'04, albeit without mentioning the very word, the European Commission (EC) has had in place explicit rules for whistleblowing. They can be read up in the latest edition of the Staff Regulations[2], applicable to all EU officials, under articles 22a, and 22b (which are reproduced in attachment). The exact wording had been prepared since 2000, when draft articles 22a, b, and c formed one page in an altogether 20-page thick consultative document that was sent to staff unions for debate on 29.11.'00. Four years is how long it took from draft texts to common rules, and one-and-a-half years are to be added if one starts to count from the whistleblower affair that received world-wide attention when the Santer Commission stepped down and set the wheels in motion.

As part of the administrative reform of the team of Commissioners that assumed office in autumn '99, the rules on whistleblowing that had existed since the institutions had agreed on the mandate of the antifraud office OLAF in spring '99 have been incorporated in the Staff Regulations.

The EC had dealt with dangerous inside information before, but until the Commission fell the ones drawing the short straw had always been the informants. As long ago as the early seventies somebody called Stanley Adams informed the European Economic Community of price-fixing in a merger case, on the condition that he remained anonymous. His name was however leaked and Mr. Adams, not an EU official, ended up in jail. It took ten years before his name was cleared and the European Commission had to pay half (!) of the expenses.

In the same year as Mr. Adams blew the whistle in Brussels, 1973, two Belgian cabinet ministers had to step down because of a Flemish whistleblower called Paul Demaeght. The EC did not draft rules on whistleblowing at the time, not even when one of its own economists, Bernard Connolly, voiced his warnings concerning the

predecessor of the euro, the “ecu”. After all, the EC had not lost the court cases he had brought in Luxembourg - the place where the EU settles its legal disputes - in the second half of the nineties. Until 1999 it was been possible to shrug off the problem of people who refused to be silenced – with a vengeance.

Five steps can be distinguished in EU whistleblowing rules: the OLAF mandate of 02.06.’99[3], the consultative document of 29.11.’00, the Decision on raising concerns about serious wrongdoings of 04.04.’02[4], a Commission communication on enhancing the application of rules on, and protection of, whistleblowers of 06.02.’04[5], and the adoption of the Staff Regulation articles 22a and 22b on 22.03.’04, in force per 01.05.’04. Between those periods the whistleblower rights of people working in EU institutions were not all equal (cf. the Committee of the Regions had its own rules on disclosure, laid down in Decisions 294/1999 and 26/2004).

The paper from 29.11.’00 evolves around the duty to report wrongdoing, wider disclosure than was the case thus far (to the Secretary-General and to OLAF), and impartial advice. Impartial advice however did not form a part of the draft articles, whereas the creation of a reinforced central mediation service had been mentioned in the White Paper on Reform of the beginning of the year 2000. The EC even made a reference to the OECD principle that a public service should provide its officials with access to impartial advice in circumstances like the reporting of financial malpractice within a service.

It was foreseen that the consultative document, which invited comments from all EC officials before 01.04.’01, were going to result in proposals to be transmitted to the decision-making European Council of 12.’01. For reasons which have not been investigated here the draft articles were not laid down definitively until on 22.03.’04, despite being virtually the same[6]. When the Council did not adopt the proposals for the staff of all of the EU’s institutions, the EC made them count for its own staff as of 04.04.’02 by adopting a so-called Decision.

One addition vis-à-vis the draft is the *bona fide* whistleblower’s right to be informed within two months on how long an investigation of the complaint - either by one’s institution or by OLAF - shall take (which may be a year). Another novelty is the fact that whistleblowing is not allowed when it concerns documents, information etc. held

for the purposes of legal cases, and that the promised protection is not granted if these data are disclosed outside.

Whistleblower rules were drafted in order to allow the employee to raise a concern about serious wrongdoing so that those in charge may look into it. The EC has attempted to strike a fair balance between the right to protection of the whistleblower and the right of those accused of fraudulent behaviour to be presumed innocent until shown to be culpable. Proof that the alleged wrongdoing has occurred is not demanded. Not all allegations will be followed up by enquiries; this despite an endlessly repeated mantra of the EC for "zero tolerance" when it comes to fraud. The main theoretical improvement of the new rules is that a possibility of external disclosure has been added to the duty to report wrongdoing internally. But despite years of preparation, how exactly the possible addressees (i.e. the Ombudsman or the President of the Council, the Parliament or the Court of Auditors respectively) are to give follow-up has been left open completely. In practice, the Council has no data available on what it has ever done concerning information received by whistleblowers as defined by Staff Regulations (SR) article 22a and 22b, even when in the case of Mr. Strack the – Irish - Council President of the time was addressed (see part II). Speaking of SR articles, by way of number 17 and 17a the freedom of expression of EU officials is seriously limited, (see annex).

Officials have the statutory right to lodge an appeal against decisions of their institution in disciplinary cases with the Civil Service Tribunal[7], a part of the European Court of Justice. They can also claim compensation and damages in that context. The EC promised to facilitate the reassignment of staff members who face potential hostile reactions from their immediate work environment. As of this year, each DG has appointed one or more persons of trust with who work floor complaints can be discussed in confidence. The correlation between harassment and whistleblowing cannot be investigated as data is confidential.

All EU staff members are nowadays obliged to report facts discovered in connection with their duties pointing to a possible illegal activity, including fraud or corruption, or to a serious failure to comply with professional obligations. If the immediate superior is informed, this disburdens the whistleblower in theory. In practice it may lead to further frustration as long as there are no penalties for the superiors who, for some reason or other, refuse to pass on the information to the

investigation office. But although the frustration of the whistleblower is sometimes fed by this “let’s-not-rock-the-boat-and-keep-the-lid-on” behaviour, whistleblowers are under no circumstances allowed to go to the press or to an MEP of their choice directly (the EP’s President excluded).

The current Commissioner responsible for administration (and for anti-fraud, an unlucky but not necessarily an incompatible combination) promised at the time of the sought approval of his appointment before the EP that the messenger of unwelcome news is not to be shot. But officials with problems have a hard time getting his personal attention, as they risk being stonewalled or otherwise encounter difficulties when trying to get past the cabinet members dedicated to deal with such nasty issues.

2. Attention in the European Parliament

Without going through the lengths of explaining in a detailed way all the different levels of decision making in the EP, it may be understood that there is a perculation system when it comes to certain policy decisions where the suggestions of 21 committee chairmen can address issues for the EC's legislative programme once every year. In 2007 the issue of reviewing the rules for protection of disclosure of information in the public interest was taken up first by the chair of the Committee on Budgetary Control (Cocobu) and then shared by the Chairman of the Conference of Committee chairmen, who integrated the following in the EP's suggestion to the Commission: "the committees deem the current rules unsatisfactory and call for amending them in the light of best practice elsewhere." However, in the list of follow-up, transmitted by the Commission's Secretary-General (SG) on 26.11.'07 to the SG of the EP, the EC made the following comment: "Rules on whisteblowing have been integrated in the new Statute (articles 22 bis and ter). The Commission is not aware of any specific problem linked to their implementation and, at this stage, a revision of the Statute is not foreseen."

Nevertheless, over the last ten years the issue of whistleblowing has had the warm attention of a small group of MEPs. In short, those asking the questions showed sympathy where the answering institution, the European Commission, often revealed antipathy, or at least a lack of the will to see whistleblowers as heroes or to treat them as officials whose criticism could have helped the institution to clear up its act.

2.1 A resolution

On 19.01.'00, four months after the Committee of Independent Experts had produced its second report, the European Parliament adopted a resolution that contained the following text:

> *32. Asks the Commission to draw up, as part of its forthcoming communication on reform, a procedure for officials whose conscience persuades them of the need to expose wrong-doings encountered in the course of their duties;*
>
> *considers that such a procedure should include a mechanism whereby, when it has not been possible to resolve concerns within a reasonable period of time, including through recourse to OLAF, officials would*

have the right to address, in confidence, an external authority such as the European Ombudsman;

calls on the Commission to base its proposal on the experience gained with similar procedures concerning 'whistle-blowers' in countries such as Sweden, the United Kingdom and the United States;

at the same time considers that the rights of officials accused of wrongdoings must be protected, as they may have been falsely accused;[8]

We can say that the consultative document mentioned under chapter 1 was an answer to a demand from the EP. We can also say, with some knowledge of those procedures, that the whistleblower procedures of Sweden and the United States have not been the basis of the consultative document. Rewarding whistleblowers with part of the budget that was saved with the help of their actions, for instance, has not been considered by the EC.

More 'resolutions' (as the committee reports are called once they are adopted by the plenary of the EP) have mentioned the word whistleblowing in passing, but never with equally important results.

2.2 Questions

MEPs have several means at their disposal by which they can hold the EC to account. Apart from private - and seldom published - letters, one way of expressing concern and of pressing for action is the tabling of parliamentary questions. This can either be a question for question time in Strasbourg, with possibly a debate with the Commissioner who answers – depending on the time available - or for a reply in writing. The first means has only been used one single time for obtaining clarity on the subject at hand, but due to lack of time it was handled in writing just like a normal written question (only faster). The latter means has been used a dozen or so times in the last seven years by half a dozen MEPs, on a total of over 6,000 questions per year. And only in one case was the private sector the object of interrogation – the answer being that there was no Community labour law on whistle-blowers and that the issue had not been addressed in the Social Policy Agenda adopted by the European Council in Nice, December 2000. The fact that this matter was not on the agenda of the social

partners at Union level could be the suject of study, but it is beyond the scope of this article.

The majority of the questions on this topic expressed sympathy for the whistleblowers and disbelief and disrespect for the treatment they received from the EU institutions – the Commission, the Court of Auditors, the Committee of the Regions. Normally, the Commission and the Council are however the only institutions answering questions, whereas the other institutions answer questionnaires once a year during the discharge procedure.

When the issue of the European Commission being sent home was still fresh in the end of 1999, a Swedish conservative MEP asked: "*The case of Mr van Buitenen has been the subject of debate all over Europe ever since he released the documents that revealed irregularities in the Commission. He has been honoured for his courage by organisations such as the Taxpayers. Association, yet reprimanded by the Commission's disciplinary committee. […] In view of the help Mr van Buitenen's actions have been in making possible changes to the rules as well as serious action to tackle the problems of fraud, is the reprimand really justified?*" The Commission rectified that it was the appointing authority, not the disciplinary committee, that had sanctioned the official. The message was that it would handle the same way in the future, should such cases occur where an official breaks the rules "*by divulging documents outside the Commission which related to cases that were under examination by the judicial authorities and also the subject of disciplinary proceedings, thus compromising the principle of the presumption of innocence*."

In the beginning of 2001 a Dutch MEP, in collaboration behind the scenes with the official mentioned in the paragraph above, asked the Commission a series of sixteen questions: on whistle-blowers' socially useful function in solving problems, and on how shortcomings in the draft rules discouraged and prevented their activities (numbers E-0111/01 until E-0113/01).

Specific questions included whether the Commission acknowledged that managers of all types of organisations are likely to keep instances of abuse that come to light concealed from the public, deny the problems or delay resolving them, and that criticism that does not fit in with this approach is not appreciated; whether the Commission agreed that it is not always reasonable to expect the whistle-blower to report to OLAF first before allowing him or her to blow the whistle elsewhere; why the burden of proof was solely and exclusively on the shoulders of the whistle-blower;

wasn't the protection of whistleblowers ill-defined; and was the advisory function proposed in its consultative document to be attached to the Commission's own mediation service or was a new facility for impartial and confidential advice going to be set up.

The answers of the Commission included that the implementation of arrangements of the kind proposed would give the Commission and its staff rules that were comparable with the best in any Member State in the Union; that public disclosure and debate have great value, but that untimely public disclosure can have the effect of compromising legal or disciplinary proceedings that may arise from the apprehension of wrongdoing; that an investigation by OLAF was the most appropriate means of enabling action to be taken by the employing institution if the allegations were confirmed by the investigation; ultimately, although many words were used, there was no clear answer as to what the independent and confidential advice should mean in practice. It is no surprise, given the lack of clear vision, that this advice post was not set up, nor was it referred to in later regulations – although "in order to provide advice and assistance to them", OLAF has established a so-called helpdesk as initial contact point for whistleblowers. Whether whistleblowers are satisified with that "helpdesk" is of course not known.

In 2002, before he had gotten involved in one case in particular, a young British conservative MEP asked what the Commission's state of play was vis-à-vis whistleblowers and those accused by them in terms of protection, in the light of developments in draft legislation in the US: "*It has been argued that so-called whistleblowers can save companies (and governments) a great deal of money by putting a stop to fraud and mismanagement.*" The Commission answered that in 1999 it had introduced a system for establishing the duty of EU civil servants to report any suspicions of wrongdoing. Further, that with a Decision on the issue of 04.04.'02 it considered to have struck a fair balance between the right to protection of the whistleblower and the right of those accused of fraudulent behaviour to be presumed innocent until shown by due process to be culpable.

As an MEP who was elected in June '04, former whistleblower Paul van Buitenen has repeatedly sought answers on the issue, and usually via written questions. For example he inquired whether there was something wrong with the present whistleblowing arrangements, given allegations of someone's leaked identity; if he could be informed whether consideration of a right to report, instead of a duty to

report, within the EU Institutions, would be useful; how many European whistle-blowers have there been since 1999;

The Commission admitted not to possess any statistics allowing it to state how many officials or agents have reported suspicions under Article 22a of the Staff Regulations. It did not believe however that the existence of the whistleblowing arrangements was "a disincentive" for officials to report suspected irregularities or fraud. A large share of the information reaching OLAF was said to come from within the institutions, with anonymous reporting also being important.

Further replies include that, in order to raise the awareness of the rules amongst staff, information about whistle blowing has become an integral part of the compulsory courses for new officials and for officials involved in financial management. Making the reporting of serious irregularities a *right* rather than an *obligation* would mean that members of staff would equally have the right *not* to report serious irregularities that they become aware of. This, the Commission answered, would be incompatible with an official's duty of loyalty to the Institution.

The answer to a question as to how many whistleblowers had been harassed to the degree of being forced to quit came down to "we do not want to keep records on that". The question as to how many EU whistleblowers there have been since 1999 could not be answered either, as a case management system had only been set up in 2002 – but a partial answer mentioned the double digit number of 10, in 2005.

As the last resort for a morally or psychologically harassed official – bullied, antagonised, pressurised, met with offensive behaviour and the refusal to be communicated with – he or she can invoke Article 90 of the Staff Regulations (see annex; all legal disputes of officials, not only of whistleblowers, need to go through this channel). But again, detailed records were not kept, it appeared; also not on the difference between men or women. Specific data on complaints reporting irregularities were not and are not available. In the six years before 01.01.'05 Commission staff had introduced 4,072 such complaints, introduced by Commission staff, of which 796 were upheld. But the degree of whistleblowers as originators of those complaints was and is unknown. An administration interested in the wellbeing of its staff should however want to know such figures.

One MEP raised awareness of UK practice, where whistleblowers who draw attention to the illegal activity or other wrong-doing of their employers can be entitled

to claim substantial compensation at an Employment Tribunal. But he did not make the demand to study an equivalent for the EU institutions.

Triggered by the case of Mr. Watt, of the European Court of Auditors (see part II) the aforementioned Dutch MEP asked the European Commission a series of questions that were shrugged off much too easily by the latter. The brief reply, namely that the questions ought to be addressed to the Court of Auditors, omitted to enter into the problems that were addressed expressly to the Commission as an institution that was partly involved, since OLAF was and is still a part of it. For example, the Dutch MEP asked if cases in which the competent authority of a (repeated) recommendation of a disciplinary committee constitutes contempt of that committee; and if the Commission shared his opinion that such committees should be composed of officials from other institutions, for at least more than 50 percent. Another question sought for the reasons why an OLAF press release had completely surpassed the fact that it had received the information leading to the investigation from the whistleblower mentioned in this paragraph. And a last one hoped to force the Commission to acknowledge that officials are driven to whistleblowing because of the lack of reaction to the initial warning reports that they submit to their superiors, leading to an escalation in feelings and use of language which culminates in an unwanted outcome for everybody but, ultimately, in many instances, simply for the whistleblower.

2.3 A study

After a vote to grant discharge to an institution where serious malpractices had happened (see part II, Robert McCoy), it was decided in May ’05 as some sort of compromise to ask for an external study to be undertaken into how the EU scored on a best practice scale in the field of whistleblowing. At the time the EP had an archaic database with a few dozen of names of companies and institutions that were commonly addressed when external studies were ordered. Two serious reactions came back, and in the first half of 10.’05 a German expert was appointed to write the approx. 25,000 euros study[9]. It was ready in 02.’06. The original idea was to let the presentation of the study be accompanied by a hearing where whistleblowers were going to attend. It is common practice to have external studies introduced by an MEP

in an expert committee meeting. In this case, the MEP in charge put forward certain conditions, such as the earlier agreed hearing. Although the rapporteur at first deemed a presentation without actual whistleblowers a useless undertaking, this is exactly what happened, on 15.05.'06.

The item was the last on the agenda of the Cocobu meeting, very few MEPs and not too many other people were present and the overhead equipment failed. The study hardly took account of what actual whistleblowers had experienced, although its summary says that the study "has received input from 4 EU Institutions and 6 EU whistleblowers who have been approached with standardised questions, specifying aspects of the terms of reference." The quotations from whistleblowers were kept anonymous. Two of the whistleblowers expressed their willingness to witness to the Parliament, so that their identity would be released, if the Parliament were to express a desire to hear them on the subject of the study. The committee, and therefore Parliament as a whole, did not insist. In the text there is not a single word from whistleblowers themselves.

This paragraph so far does not do justice to the study, which on the whole is absolutely recommended reading. More than occasionally it takes stances which are sympathetic to whistleblowers, and rather critical (but not sceptical) towards the institutions and the structures in place in 2005/2006 for dealing with them and their information. Two illustrative quotes: "it will be permissible to state that even the regulations themselves are technically and in their wording ill disposed to encourage risk communication, or grant whistleblowers meaningful protection." And: "The institutions promise no more than not to react negatively, if officials comply with these rules. This cannot be seen as an encouragement." However, it is necessary here to underline that at this unique opportunity several windows of opportunity were passed by.

2.4 An individual action

At a meeting held on 10.09.'07 former whistleblower and MEP Paul van Buitenen discussed with Estonian EU Commissioner Siim Kallas the neglected issue of whistleblowing in the office of the latter[10]. It had transpired that more than one year after its presentation, the Commissioner responsible for anti-fraud had not been made

aware of the study discussed above by anyone, which puts question marks over his credibility as someone who takes the issue seriously[11].

In the presence of two British experts and two EC officials the promise was made that the EC would carry out an anonymous survey under its personnel as to their trust in the functioning of the current rules. On the MEP's website the mixed message was announced, under "press releases", that "progress was made", as the Commissioner shared the criticism on the regulations in place, but that he saw no possibilities for improvement. More than one year on, nothing came of the promise to hold that promised survey.

Rather than following the procedures that in theory grant them protection after they wait patiently what Presidents of other institutions do with their information, in the words of Van Buitenen "EU civil servants are forced to leak to for instance Members of the EU Parliament or to the media. At present, not the message is addressed, but the messenger is being punished."

3. OLAF

In a FAQ published on OLAF's website in the summer of 2008, we read a short description: "*Staff of the European Institutions who want to inform about irregularities in their own service (whistleblowers) can receive special protection*". In its latest activity report, over 2007, OLAF distinguishes whistleblowers from the general category of informants as follows: "*Informants include: witnesses; anonymous sources, media and trade sources; and whistleblowers. In this context, a whistleblower is defined as an EU official or other EU staff member (temporary, auxiliary, local, or contract staff, or special advisers) who comes forward to OLAF with information they have discovered in the course of or in connection with their duties concerning matters which may be within OLAF's competence. Unlike informants, EU officials and other EU staff are under a legal obligation to come forward with such information.*" This definition was copied from an opinion of the European Data Protection Supervisor (EDPS) on OLAF internal investigations, of 23.06.'06. One year earlier, OLAF's description of a whistleblower was simply "*a member of staff of a Community body*".

In its report over 2005 OLAF specified that whistleblowers are defined as officials who report directly to OLAF rather than through their hierarchy. Therefore, there are more officials whose information ends up at OLAF after the information was transferred to OLAF by their superiors. At the end of 2005, OLAF had five active cases where the primary source of information was a whistleblower with two further cases in follow-up and one monitoring case.

In 2007 OLAF received eight new items of information from [an unknown number of] whistleblowers who sought protection under the provisions of the Staff Regulations. The annual report does not tell whether the officials asked for legal support under article 24 of the Staff Regulations, whether the protection was in fact given, or indeed whether the information led to the opening of a case (often information leads to so-called "*prima facie non-cases*" or "*non-cases*", upon a decision on the level of Head of Unit). But a Commission document on the fight against fraud (Com (2007) 390 of 06.07.07) mentions that "*In 2006, no OLAF investigations were launched as the result of information received direct from a whistleblower*." And OLAF itself wrote that in 2006 it even received no information from whistleblowers.

In answer to a Parliamentary question (E-0859/08) the European Commission replied that OLAF "*established in its Judicial and Legal Advice Unit a helpdesk as initial contact point for whistleblowers*". When asked more specifically, OLAF's answer revealed that this 'helpdesk' is nothing more than 'a dedicated telephone line', operational since 2004[12]. The earlier mentioned FAQ:

> "*To provide advice and assistance to whistleblowers OLAF has established within its Judicial and Legal Advice Unit C1* [around 20 staff] *a Helpdesk as an initial contact point [...]. No interviews are made over the phone but the whistleblower will be asked to report his concern [...] in writing which may be done in the course of a formal interview which the whistleblower will be asked to sign. OLAF keeps statistics on the number of cases opened further to information received from whistleblowers, not on the number of calls received through this telephone line.*"

Questions as to how many man hours per week / month are spent approximately on the help desk fell on deaf ears, the data in the annual reports being all there is. There is no indication whether the helpdesk is a sufficiently well-known channel, or if there are plans to familiarize the 33,145 Commission staff members with the 'helpdesk'. Whether the number of phone calls that end up in opened cases is increasing, decreasing, or staying the same is obviously something OLAF is either not keen to disclose, or not interested in to start with.

What are known however are the findings of a 10-minute survey carried out among those Commission officials at the end of 2007, with a response rate of almost 13 percent[13]. Around 80 percent of the 4,257 respondents[14] – who were given two weeks to fill in the questionnaire - declared to trust OLAF. But only a look on the full survey shows the harsher truth: this is the aggregate of 46 percent who say they trust OLAF to do what it should do, plus 33 percent who replied that they slightly agreed with that statement. Almost 30 percent believed that zero tolerance means that OLAF should conduct all investigations concerning possible staff misconduct that has any financial impact, however big or small. More than 15 percent however said they would not go to OLAF if they saw wrongdoing (a violation of the rules!). Although 97 percent said they had heard of OLAF, only 15 percent had a good knowledge of what OLAF is all about. It is difficult to understand why a press outlet[15] boasts the

results as very satisfactory when it is realized that officials have a duty to report wrongdoing. But in the history of the Commission no-one has ever been punished for not reporting to OLAF when they were in the position to do so, having become aware of reproachable facts. Despite an oral promise, to date this survey has not been put on-line on the OLAF website, only – apparently - on an intranet site for Commission officials.

On 20.02.'06 at an international conference on preventing and fighting corruption in public administration in Europe, held in Cologne, the Director-General of OLAF said that it might be a good idea to study the rewarding of whistleblowers "*e.g. in pecuniary way as a portion on the funds saved*". When questioned for this article, the answer was that such a study was never undertaken. The question what caused the change of view since February 2006 was simply ignored. The speech included the following:

> "*We should further develop appropriate safeguards to convince witnesses to report corruption cases. This can only be achieved by an effective protection of whistleblowers against victimisation and retaliation (loss of job, personal threats etc.). Formal rules are shown not to be sufficient if real protection is not guaranteed.*"

But when asked, OLAF was quick to say that this had not been a criticism of the existing whistleblower rules in the Staff Regulations – yet, again, neither the Commission nor OLAF could say what "appropriate" safeguards had been developed. At a meeting of the Cocobu of 04.11.'08, with reference to minutes obtained of an OLAF interview, an MEP even accused OLAF of having leaked the name of whistleblower Terry Battersby to his director, who was under investigation and found guilty.

Part II: EU whistleblowers

Introduction

Personal cases of EU whistleblowers are very delicate, but in order to learn from them it is useful to point out patterns among the many similar anecdotal aspects of their cases: for current and possible future whistleblowers, and for improving existing rules and practices. Stories told without the distortion of politically coloured newspaper articles can become lessons on how to act and how not to act.

It is difficult to pinpoint what, if anything, EU whistleblowers have already been able to learn from each other's experiences before taking the decision themselves to follow in the illustrious footsteps of courageous and righteous, but seldom victorious predecessors. Having stepped through the looking glass, many of them faced the new reality and underwent similar treatment, unable to prevent the pitfalls they should have prepared themselves for. The beginning of all of the cases that were studied, which are set out below, date from the time before the actual Staff Regulation articles on whistleblowing were in place. But all but one date from years when rules on the allowing of wider disclosure, under strict conditions, were being studied by staff unions or had been adopted for Commission staff only.

What many cases have in common, apart from the sense that doing the right thing for the greater good prevailed over worries about one's career, are:

- moments when to blow the whistle are generally chosen well in the light of certain urgencies, e.g. the approaching date for signing off the accounts, or a vote on a resolution in Parliament (including discharge resolutions);

- whistleblowers do not allow their superiors to take decisions that they consider to be evidently illegal, despite having agreed, as employees, that the ultimate policy decisions are in the hands of their employer;

- whistleblowers see a very high need for the existing rules regarding financial safeguarding to be applied.

- at the moment of whistleblowing most of the EU whistleblowers had been working five to eight years in the institutions, with two exceptions: one had only been and EU official for months, and one for more than 25 years.

In their famous book Whistle-blowing Around the World[16], the writers quote Australian researcher William De Maria who, "in a path breaking study, found that whistleblowers reported being helped by formal channels in fewer than one out of ten cases." The same statistics appear to be applicable to the EU institutions' opined and vocal organisational dissenters.

The following eight examples illustrate the fact that despite the fall of the European Commission in 1999 the promised change in culture has not taken place. Optimists would at best add "not yet", but the pessimists are in all likeliness closer to reality.

* * *

4. EIGHT EXAMPLES

Bart Nijs

In one or two lines:

In a letter sent to his Secretary General, a Court of Auditors official accused this EU "Financial Watchdog" of blackmailing staff denouncing mismanagement into withdrawing on invalidity pensions. After meeting with a blunt refusal to have this pension fraud allegation examined, the official was downgraded on slander charges. Officially, the Secretary General, accused of many irregularities, had to leave his office because of… invalidity.

Position:

Translator at the European Court of Auditors since 1996, old grade LA6, current grade AD9 step 5 after being downgraded from AD10 step 6, as a result of a disciplinary procedure for "conduct inconsistent with the dignity of his office". Suspended on full pay between 26.09.'06 and 01.10.'07. Two other disciplinary procedures against Mr. Nijs - whose office has since been in the Court's main building, two safe kilometres away from all other translators - are still pending at the time of writing.

Blew the whistle:

Internally, on 31.07.'03 and on 15.11.'03, in two requests he sent to Secretary-General Mr. Hervé, the former via his head of unit - who instead of forwarding the message immediately persuaded Mr. Hervé to take an illegal decision that would make it impossible for the latter to decide objectively on Mr. Nijs' requests. In the end of 04.'06 he disclosed some of his allegations about irregularities on a Court website. One could say that Mr. Nijs blew the whistle externally by going to Court, as this made his accusations public. He certainly did blow the whistle externally on 06.06.'08 (one week before the Irish referendum on the Lisbon Treaty), by publishing one of his many allegations on the websites of the Irish, British and German "indymedia" (e.g. www.indymedia.ie).

Content:

In 2003, Mr. Nijs informed his hierarchy about fraud to the detriment of the Community's invalidity pension scheme. In 2005 he added that his staff report over 2003 had been falsified. He also accused the Court of Auditors of having given a temporary promotion of a colleague without complying with the relevant publication and notification obligations. According to Mr. Nijs, the Secretary-general has held his post illegally since his omission to publish the temporary promotion in 2003. By doing so, still according to Mr. Nijs, Mr. Hervé created a situation in which none of his promotion decisions relating to the Translation Service can be regarded as legal.

Procedures followed:

- OLAF?

The fact that the Court of Auditors did not transfer the evidence submitted to the Secretary-general by Mr. Nijs to OLAF, as required by Article 22a, §2, of the Staff regulations, is one of the complaints dealt with by the Court of First Instance of the European Communities.

- European Court of Justice ?

Yes. Chronologically, Mr. Nijs introduced cases T-377/04 (16.09.'04), T-171/05 (02.05.'05), C-373/05 P (10.10.'05), F-49/06 (09.05.'06), C-495/06 P (01.12.'06), F-5/07 (21.01.'07), F-108/07 (15.10.'07), F-136/07 (06.12.'07), T-311/07 ()14.08.'07), F-1/08 (02.01.'08), F-64/08 (29.07.'08), and T-371/08 P, T-375/08 P, and T-376/08 P (all three filed 09/10.'08).

- European Court of Auditors ?

The institution concerned.

- European Ombudsman ?

No. This would not have a chance as the alleged facts had been / are the subject of legal proceedings in progress before the Civil Service Tribunal, the Court of First Instance and the European Court of Justice (cf. Article 195 (1) sub 2 of the Treaty establishing the European Community).

- European Parliament ?

Not until the moment of writing.

* * *

Christine Sauer

In one or two lines:

A German scientific officer denounced lax handling of nuclear material, only to find that safety risk and other apparent malpractices were played down. The case took unusually long before it was closed recently by the European Ombudsman.[17]

Position:

Ms. Sauer worked in the Institute for Transuranium Elements (part of DG JRC) in Karlsruhe from 01.10.'94 until 30.04.'99, first in the unit of nuclear chemistry and then in the unit of nuclear safety and infrastructure; she moved to DG Taxud in Brussels; on sick leave since autumn '03.

Blew the whistle:

Internally on 16.09.'02 to the DG of DG Admin; externally, on 02.01.'04, to the Ombudsman, followed two weeks later by a letter to the President of the EP.

Content:

On 16.09.'02 Ms. Sauer asked DG Personnel and Administration to open an inquiry into nine cases of maladministration in the field of protection against radiation and as regards transports of radioactive materials, particularly insofar as the ITU was concerned. One of these nine, deemed the most important one, would have been a deliberately illegal transport and export of radioactive materials in June, July or August '97. A completely inadequate management and control system and deficiencies as regards the training of staff would have allowed this to happen. Ms. Sauer also argued that the relevant staff of DG JRC were temporary agents and could thus be blackmailed more easily. A substantial number of the staff would have been afraid of the potential for an adverse impact on their personal circumstances in case they chose to respect the rules on security and on protection against radiation. Unwillingness from the hierarchy to admit mistakes and draw management conclusions would have led to depression. Ms. Sauer alleged that the Commission failed to handle the original request for access to documents in time and exhaustively, and also that the Commission was in breach of the German Nuclear Power Act. For its part, the Commission argued that since the German authorities looked into the case it was not obliged to take it further. It also attempted to avoid responsibility by pointing out that Ms. Sauer had taken five years before complaining.

Procedures followed:

- OLAF?

Her information was forwarded to OLAF by the European Commission, but - correctly so - OLAF did not consider the case to be relevant for them.

- European Court of Justice ?

No.

- European Court of Auditors ?

No.

- European Ombudsman ?

Yes. Written on 02.01.'04. He opened an investigation and issued a "draft recommendation" on 24.11.'04. The European Commission did not accept it and told the Ombudsman so in the last days of March 2005. Whereas the Ombudsman usually closes cases within one year, this case had taken almost five when it ended in 12.'08.

European Parliament ?

Yes. She wrote to the President on 15.01.'04. A partly blackened version of this letter, without annexes, is available on request via the registry of the EP[18]. Ms. Sauer never received a reply, acknowledgement of reception, let alone an invitation to talk about the case. On 01.10.'08 the incumbent President replied that there had not been an answer because the Ombudsman's case was still open.

* * *

Robert McCoy

In one or two lines:

Robert McCoy is a career British EU civil servant whose job it was, as the Financial Controller of the EU's Committee of the Regions, ostensibly to encourage sound financial management and prevent fraud. Or so he thought until he was constructively dismissed as a reward for going against the dictat of the senior management by asking the European Parliament and OLAF to deal with numerous cases of (subsequently confirmed) fraud.

Position:

Worked at the European Commission from 1972 to 1974. Head of Unit at the European Economic and Social Committee (EESC) from 1974, then at the Committee of the Regions (CoR) from 1996. Was appointed the CoR's Financial Controller in January 2000 and became the Committee's Internal Auditor in January 2003[19]. For more than three years the CoR had studiously ignored McCoy's repeated demands to call in OLAF when, in March 2003, McCoy informed the EP (see below) of the cases of fraud and irregularities he had uncovered in the exercise of his function.

OLAF's ensuing enquiry confirmed all McCoy's allegations and totally vindicated him and the action he took. The OLAF report also demanded disciplinary proceedings against the CoR Secretary General at the time and another senior official. OLAF severely criticised the CoR's mistreatment of McCoy in its Final Case Report on the CoR of October 2003[20] while the EP, in points 16, 23, and 24 of its January 2004 Resolution, condemned the CoR's *"official obstruction"* and *"individual and institutional harassment"* of McCoy[21]. Having immediately removed all McCoy's secretarial and administrative staff as an immediate reprisal for his having spoken to the EP, the CoR administration also raided his office and sequestrated all the incriminating documents he had collected before, subsequently, even officially barring McCoy from entering the CoR premises.

As a direct result of this sort of mistreatment (see below), McCoy was on sick leave from May 2004 onwards before being invalided out *manu militari* in July 2007 on medical grounds, which he has so far been unable to ascertain Currently he awaits a series of decisions on the work-relatedness/professional causes of the invalidity.

Blew the whistle:

Internally: from March 2000 onwards McCoy had reported the cases of fraud as they cropped up and repeatedly requested the CoR's Secretary General to inform OLAF. By early 2003, McCoy was under increasing pressure (including threats, ostracism, mobbing and harassment) from the CoR's senior management to cover up the fraud and not go public by reporting the cases in his annual report (discharge procedure 2001). In mid March 2003 McCoy met with the CoR's President and warned him that, in the absence of the appropriate follow up to his demands to call in OLAF to deal with the numerous cases of fraud he had uncovered over the years, he had no other choice but to request outside help.

Externally McCoy blew the whistle on 19.03.'03, with a "cry for help" to the EP's Committee on Budgetary Control, at the time that they were approaching the end of the cycle of granting or postponing discharge to the CoR for the 2001 budget.

Content:

OLAF's final case report of October 2003 confirmed numerous cases of fraud in relation to meetings expenses by several high-ranking CoR members involving quite considerable sums of money. It also confirmed that a number of senior CoR officials had "tampered" with certain public procurement procedures, colluded with suppliers in respect of the provision of fake competing offers and conspired to cover up the wrongdoing even after McCoy had uncovered the fraud and repeatedly requested the CoR to inform OLAF.

The EP first postponed discharge for the CoR, but later granted it when, inter alia, two demands were included "*that the Internal Auditor receive a formal apology from the President and Secretary-General of the Committee of the Regions"* and "*[a]sks the Committee of the Regions to take the necessary measures to ensure that in future whistle-blowers do not receive the same treatment as the Financial Controller did, as stated in the OLAF report"*.

Procedures followed:

- OLAF?

An MEP handed over McCoy's files. OLAF's DG however failed to forward its "Final Case Report" of 80+ pages of 08.10.'03 to the Belgian authorities as a Belgian OLAF magistrate had informed him that there was no chance that the Belgians would follow up the recommendations. Erroneously an OLAF official told the European Parliament that McCoy had not cooperated with the investigation.

- European Court of Justice?

Not yet, but McCoy is being advised by several high-profile Brussels-based lawyers in the pre-judicial phase.

- European Court of Auditors?

Indirectly. The EP demanded a report by the ECA, but it provided a mere half-page statement which the EP roundly condemned when it criticise the ECA in its 01.'04 resolution "*which, contrary to OLAF, was unable to detect any irregularities at the Committee of the Regions*".

- European Ombudsman?

No.

- European Parliament?

Yes. McCoy spoke at a meeting of the Committee on Budgetary Control on 19.03.'03. He was also invited to speak at a hearing organised by the Cocobu in 03.'06 but the hearing was cancelled as a result of pressure by the CoR to "gag" McCoy.

* * *

Marta Andreasen

In one or two lines:

Marta Andreasen was the first EU Chief Accountant who was qualified; she was also the only civil servant with that level of responsibility to be sacked after having the audacity to claim that the EU budget was out of control and for seeking to implement important and urgent changes that still not have been carried out six years later.

Position:

Chief Accounting Officer / Director in DG Budget with old grade A2 (later A15) from 01.01.'02 until Friday 24.05.'02; moved from her job to a nonsensical "principal adviser" post, under DG Personnel and Administration (for which Neil Kinnock was Commissioner), on 03.06.'02. Suspended on 28.08.'02 - against the advice of the Commission's legal service a disciplinary procedure Mr. Kinnock had already started early July. Eventually Ms. Andreasen was dismissed by a decision of the entire College of Commissioners on 13.10.'04, less than six weeks before the new Commission was appointed. Before this job she had been a senior accountant at the OECD. Currently she is a candidate for the European elections.

Blew the whistle:

Early in 02.'02 Ms. Andreasen started raising her concerns to her hierarchy, and she wrote a first note on the shortcomings she had observed. At a meeting with her DG and the Commissioner for Budget, Ms. Schreyer, she informed also the latter about the alarming unreliability of the accounting systems. She wrote to most of the directors-general on Monday 22.04.'02, setting out her continuing concerns. On 07.05.'02 she directed these concerns to the President and the two vice-presidents of

the Commission. After learning, on 22 May, that her Commissioner had announced her removal to the European Parliament whereas she had been given time to consider a change of jobs, she informed MEPs about serious flaws in the new Financial Regulation that was scheduled to enter into force as per 01.02.'03. On 01.08.'02 and 22.09.'02 she attended press conferences and meetings with MEPs and journalists.

Content:

Her proposals for quick and drastic reforms of the admittedly flawed accounting system (accounts were built on the basis of aggregation of spreadsheets, the input in the computer systems did not correspond to the output) were opposed by her hierarchy. Her director-general, later backed by the Commissioners, considered that the changes would require too much training, that the in-house developed computer systems weren't that vulnerable, and that a new system, as proposed by Ms. Andreasen, would be too expensive. As the deadline for signing off the 2001 accounts was approaching in April, the urgency was extremely high to solve the problem. Alarming emails were not answered, which worsened the situation in May. The disciplinary procedure took extremely long (between opening the procedure and setting up a disciplinary board, 20 months went by), which led to a further deterioration of relations.

Procedures followed:

- OLAF?

Yes, but OLAF replied it needed concrete indications of actual fraud before being able to open an investigation not indications of flawed computer systems, as they did "not snoop". The reply never arrived, as was the case with letters of DG Admin.

- European Court of Justice?

Yes. Case T-385/02 was introduced in 12.'02. Ms. Andreasen dropped this case and case T-250/03 of 06.'03 (both against transfer and suspension) after she was dismissed on 13.10. '04 as they were taken over by events. At the time of writing she is appealing the judgment of the Civil Service Tribunal case F-40/05 before the Court of First Instance.

- European Court of Auditors?

Ms. Andreasen informed the ECA by email, as this was part of her job, but no action or support came from their side.

- European Ombudsman?

Yes. She called the Ombudsman when she was moved to DG Personnel and Administration. A legal adviser told her that she would be losing her time as the Ombudsman's opinion was not binding. Instead she was advised to go to the European Court of First Instance (as a Civil Service Tribunal had not been set up).

- European Parliament?

Yes. Attended a press conference in Strasbourg in 09.'02, where she answered questions from the press. A decision concerning the petition she had sent to the Parliament's Petitions Committee ended up before the highly political gremium of the Conference of Presidents, who blocked it in October. On 04.12.'02 Ms. Andreasen attended an intergroup meeting but was not allowed to speak about her case.

* * *

Dougal Watt

In one or two lines:

With more than seven active service years behind him, this experienced Scottish auditor was gotten rid of by his institution of financial watchdogs when his well-researched allegations became an embarrassment for its image of "the clear conscience of the European project".

Position:

Qualified accountant, auditor at the European Court of Auditors (ECA) as from 1995; first as national expert, but from 1997 on as EU official. On sick leave from the moment he blew the whistle until his dismissal on 17.07.'03. Previous to that Mr. Watt had been working at the UK's National Audit Office since 1989.

Blew the whistle:

On Monday, 22.04.'02, by writing a four-page letter simultaneously to the European Ombudsman, to 500 MEPs, and to his 400+ colleagues in the ECA. The opening line was, "I wish to bring to your attention certain matters concerning the conduct of my employer, the European Court of Auditors, which I believe to be of public concern..." A month later, he informed colleagues at the Court and MEPs about the Nikolaou case (allegations of nepotism by the Greek member of the Court of Auditors) and other, now specified indications of maladministration.

Content:

Mr. Watt brought under the attention several indications for, and proofs of, nepotism engaged in by several Members of the Court over many years. Members would have secured the employment of inexperienced family members of friends. A disproportionate number of temporary staff came from the same French region, close to Luxembourg, as the place of origin of the Head of Administration of the Court - and in some cases these temporary staff members lost their jobs after complaining about sexual harassment. A senior official would have been pressurised into mental incapacity. Mr. Watt's worry was that personal and individual failures derived from structural weaknesses that gave rise to opportunities for abuse to take place. The ECA, the financial conscience of the EU, could not be trusted.

He refused to cooperate with a disciplinary hearing against him as the remit was only to establish whether he had talked to outsiders (press, MEPs) - something which was evident. Due to his decision to blow the whistle he went into hiding in Scotland, claiming his life was in danger. Conflicting news articles give no definitive answer if Mr. Watt was suspended with full or rather without pay, on 09.12.'02, but since an ECA doctor confirmed that he had genuinely been unwell he at least received payment that had been stopped from 09.'02 until 09.12.'02. A disciplinary board recommended, first on 13.05, then once again on 13.06.'03, a downgrading that came down to a pay cut of 2,000 euros a month. The ECA's Secretary-general however decided to go further and dismissed him altogether. He picked Mr. Watt's birthday to announce this.

Procedures followed:

- OLAF?

A dispute over the follow-up given by OLAF to some of his findings (on the Quatraro case, dealing with tobacco fraud and the mysterious death of a Commission official) was notably one of the reasons to blow the whistle. In a speech given in 09.'04, Mr. Watt said, "OLAF's vilification of me has deprived me of my career as an auditor."

- European Court of Justice?

No, although press articles of 07.'03 quote Mr. Watt as saying, "I'll be appealing to the European Court of Justice."

- European Court of Auditors?

The institution concerned.

- European Ombudsman ?

In his five-page letter of 22.04.'02 with 275 pages of annexes, Mr. Watt asked for "an enquiry, of a "management consultancy" nature, by the European Ombudsman, so

that lessons may be learned for the future; which should be of a scope, depth and scale sufficient to guarantee the protection of individual Court staff responding to that enquiry." Within two weeks the Ombudsman decided not to open an investigation into maladministration as the complaints were not sufficiently detailed, the internal procedures had not been exhausted, and the complaint had not been preceded by the appropriate administrative approaches to the institutions and bodies concerned.

- European Parliament ?

Mr. Watt wrote a letter to 500 MEPs. One week later, two British MEPs and several UK newspapers picked up the story. Mr. Watt was never invited to explain the facts he had become aware of during his work at the ECA.

* * *

Dorte Schmidt-Brown

In one or two lines:

A Danish employee in the Luxembourg-based statistics office of the EU, Eurostat, ended up in trouble after objecting to certain practices of a subcontractor. Her institution did not support her and the Court cases she brought in order to set an example were lost.

Position:

Eurostat official since 1993. Worked with the industrial product statistics programme PRODCOM since mid-1995 as head of sector, with a new team of colleagues. She was promoted while working on the project that she found very interesting and which brought along a lot of responsibility. New assignment in Eurostat as of 10.'00. On invalidity since 12.'02. At the time of writing she is still waiting for minutes of a meeting held in 04.'05, i.e. 3 1/2 years and several reminders later.

Blew the whistle:

Internally on 04.04.'00. On that day, although it was certainly not the first time she stressed the need for financial control of the 250,000 euro contract, Ms. Schmidt-Brown wrote to her head of unit that she was no longer willing to do the work for the contractor; work that it was duty bound to carry out itself. She wrote to OLAF on 15.11.'01, who, much later, interviewed her for eight hours when an MEP had taken her case to heart. Externally on 11.03.'02, by informing a Danish MEP who was a long-time member of the Committee on Budgetary Control.

Content:

When Eurogramme, a company led by a popular former intern, won the tender for

managing the PRODCOM programme, it was controversial as it had not been the number one. The agreed deliverables were not produced in time and a lot of the workload came down to Commission officials instead of to the contractor.

After protesting about the continued payments to an obviously incompetent and even fraudulent company (an internal audit confirmed that Eurogramme had obtained the contract after providing a false financial picture), she was side-lined, no longer invited to meetings. When she found out that the director of Eurogramme had twice used defamatory language in writing, she expected her Head of Unit to defend her. This did not happen, after which Ms. Schmidt-Brown appealed by introducing a so-called Article 90 (1), followed by an Article 90 (2). This meant that a disciplinary unit in DG Admin investigated her claims – but there are no means to contest the findings of this unit, even though serious and evident deontological errors were made. When the outcome was again negative, Mrs. Schmidt-Brown went to the Court of First Instance, and later appealed that judgment before the Court of Justice. Other instances of harassment undergone by Mrs. Schmidt-Brown after raising concerns were: moved to a position with no tasks, slow proceedings, colleagues portraying her in a Luxembourg newspaper as a hysterical woman who says one thing one day, another the next et cetera.

Procedures followed:

- OLAF?

Yes (see above), in 11.'01 in writing, and in 05.'02, in person. The Final Case Report of 26.09.'03 was sent to the Luxembourg authorities for judicial follow-up, but this fact was never communicated to her.

- European Court of Justice?

Yes, cases T-387/02 (action brought in 12.'02, lost on 05.07.'05) and C-365/05 P, with definitive order 05.10.'06.

- European Court of Auditors?

No, only DG Eurostat's own internal audit has gone over the files, not the ECA.

- European Ombudsman?

Yes, on 23.06.'03. Mr. Diamandouros had to close case 1128/2003/JMA after almost two years because the matter was dealt with in Court.

- European Parliament?

Yes, speaking with many members of the Committee on Budgetary Control, albeit not at any of its meetings.

Paul van Buitenen

In one or two lines:

The most famous whistleblower of the EU institutions blew the whistle ten years ago on facts that also concerned some of the then 15 Commissioners; rather than admitting errors and taking corrective actions, the College of Commissioners then soon dramatically resigned. Van Buitenen became an EU politician five years later, having won more than 7 % of the votes in his home country.

Position:

Assistant (internal) auditor from 1990 in several DGs in Brussels, among them the departments dealing with education and culture, and since 01.'98 Financial Control; later, after a suspension of several months, he worked in a Commission service in Luxembourg. After a stint at a police office in his home country, he returned to the Commission in '03, and was a successful candidate at the European Parliament's elections of 06.'04 with his own non-political party "Europe Transparent".

Blew the whistle:

On 31.03.'98, his Director informed him that he had sufficiently informed his hierarchy of irregularities in DG XXII, and that he was discharged from any further obligation under article 21 of the Staff Regulations. Mr. Van Buitenen replied that as a loyal official and as a Christian, he considered himself never discharged from the obligation to counsel his hierarchy. When he had no faith that the secretary-general of the European Commission was going to act upon what he saw as clear indications of maladministration and fraud, Van Buitenen wrote to Members of the European Parliament on 09.12.'98, days before a crucial vote. As a result, discharge was not granted for the budget of 1996. When it emerged that the Commission had sanctioned the whistleblower by suspending him and cutting his salary in half for several months, a Committee of Independent Experts was set up. It came with harsh conclusions, which in turn led the college of EU commissioners to take the decision to resign as a collective.

Content:

In a nutshell, Mr. Van Buitenen's allegations were that fraud was much more widespread than acknowledged, and that senior officials were covering this up. Apart from indications for fraud in programmes and sectors called ECHO, JRC, MED, and tourism, the Van Buitenen 'bomb' to the MEPs (the letter plus the annexes) contained allegations concerning Commissioner Cresson's dentist Mr. Berthelot and several other reproachable actions concerning the granting of contracts.

Procedure followed:

- OLAF?

Yes. Mr. Van Buitenen's (first) book details informal and formal contacts with UCLAF, as the much smaller predecessor[22] of OLAF was called at the time.

- European Court of Justice?

No.

- European Court of Auditors?

Yes. They transferred the files to the anti-fraud unit of the European Commission, UCLAF.

- European Ombudsman?

A Swedish citizen asked the Ombudsman if maladministration had taken place when the Commission decided to take disciplinary measures. The Ombudsman concluded on 18.12.'00 that this had not been the case but considered nevertheless that the principle of freedom of expression must be safeguarded.

- European Parliament?

Yes, by informing the party leaders and group advisers of MEPs who were member of the Committee on Budgetary Control by letter on 9 December. He was later interviewed by the Committee of Independent Experts. Ten years after this date, as MEP, he organised a press conference where he named and shamed errors committed by the EU antifraud office.

* * *

Guido Strack

In one or two lines:

Guido Strack was one of the first to test the new arrangements designed to protect whistleblowers. He found that they provided no rights in relation to the fraud investigation itself and that none of the foreseen adressees dealt with his complaints in a way that could have prevented him from becoming sick and ending up on invalidity.

Position:

Mr. Strack started to work for the Commission on 01.09.'95 in the Publications office (OPOCE) in Luxembourg, where he worked as head of sector between 1999 and

2002. On 01.04.'02 he moved to DG Enterprise, also in Luxembourg, where he worked on Cordis, the information system for the 6th Framework programme. Upon learning that Cordis was going to be attached to OPOCE he changed to DG Eurostat on 16.02.'03, where he worked until falling ill on 02.03.'04. Since 01.04.'05 Mr. Strack is home on invalidity. The Commission accepted the job relatedness of this invalidity but until this day denies lump sump damages payments foreseen in article 73 of the Staff Regulations. When he blew the whistle he was an old A6, new A*10 grade official.

Blew the whistle:

Internally his reservations with the done deal were made known in 2001. But even on explicit request Mr. Strack was not informed of what was going on. Instead, he was advised, for his own good, not to bother himself with political issues[23]. Externally on 30.07.'02, by writing to OLAF, making reference to the Commission's "whistleblowing" decision 845 of 04.04.'02. In January 2004, by informing the Ombudsman and the Presidents of the Parliament, the Council of Ministers, and the Court of Auditors with reference to that decision.

Content:

Despite being head of sector Mr. Strack was kept in the dark about an adaptation of the agreement with the company whose output his job it was to oversee. He wrote to OLAF that his hierarchy had mismanaged a 29 million euro contract with a consortium of companies that did not respect procedures after winning a call for tender. According to his calculations the damage to the EU budget amounts to an estimated 4 million euros, if penalties agreed in the call for tender would have been applied and if payments would only have been made as initially foreseen and only for delivered instead of for promised products. Mr. Strack also alleged that instead of cancelling the existing contract for bad performance the company, by means of an amendment, was given more money without compensation.
Given that the file is highly technical and larded with jargon (e.g. ciceros, couches, families of data, the workings of certain data bases) the lack of specialised knowledge might be one reason for OLAF not to carry out its own proper fact finding. However, OLAF neither questioned anybody apart from Mr. Strack nor did the investigators study the technical or financial dossiers involved.

When the Court of First Instance decided, in par. 40 of its judgment in case T-4/05, that OLAF's investigation had been profound and contained a detailed analysis of the facts, it had done so without holding a hearing, having access to the OLAF case file or with specialised knowledge on the technical matters either.

Procedure followed:

- OLAF ?

Yes, in writing on 30.07.'02. On 18.10.'02 OLAF opened an investigation. Mr. Strack was heard on 13.11.'02 to explain his information, and once again on 15.09.'03 to

discuss the delay of the OLAF enquiry. OLAF closed the case without follow-up on 05.02.'04.

- OLAF Supervisory board ?

The OLAF supervisory board (SC) was addressed for the first time in 04.'04. It took until September of that year before Mr. Strack was informed that the SC "does not look into single case issues". However, before giving this information its secretariat had prepared a draft report with criticisms on OLAF regarding this dossier. The SC confirmed it hadn't been informed by Mr. Brüner of the delay in handling the dossier.

- European Court of Justice ?

Yes. A grand total of fourteen cases – half of which are pending - have been brought before the three different divisions of the Court. One key case, about the right to question the validity of an OLAF investigation, was ultimately lost as inadmissible at the European Court of Justice. The discouraging judgment makes it hard to understand what rights a whistleblower is ultimately left with.

Mr. Strack has won two cases on notation and promotion; in a third he was awarded 2,000 EUR in damages for the illegal rejection of his application for a post at OPOCE. However in that very same judgement the Civil Service Tribunal stated that an official who decides on an application for a post of someone who blew the whistle against him cannot automatically deemed to be biased in making these decisions.

- European Court of Auditors ?

Yes, in writing on 07.01.'04. The court of auditors transferred the file to OLAF and used the argument of OLAF's final case report as their reason for closing the case. The exact same goes for the Council of Ministers.

- European Ombudsman ?

Yes, for the first time in writing on 07.01.'04. In total the Ombudsman has opened twelve cases upon receiving information from Mr. Strack, many of them dealing with requests for information. He found several cases of maladministration in which the Commission and OLAF did not respect the rights of Mr. Strack under Regulation 1049/2001 and under Commission decision (2002)845.

- European Parliament ?

Yes, for the first time in writing on 07.01.'04. The Board transferred the dossier to the Committee on Budgetary Control (Cocobu). Mr. Brüner has given statements on that case behind closed doors, but Mr. Strack was not heard. Later two MEPs, Paul van Buitenen and Ashley Mote, also asked parliamentary questions in relation to that case.

Conclusions and recommandations

This article has become quite extensive as it seized on the rather unique opportunity to combine information in the public domain with cases taken from the work floors in the European institutions. The main conclusion has to be that, in the light of the reactions of the powers that be, it can still not be said that a culture is now in place that warmly welcomes well-meant criticism. The progress that can be observed lacks too much speed to speak of 'momentum'. Also, it is more easily shown in theory than in practice.

The gradual theoretical improvements described in part I did not prove fruitful in practice, as was shown in the examples set out in part II. Internal channels do not always work, whereas the allowed external channels bring along their own, sometimes political, difficulties. For the whistleblower issue, the Council and the Court of Auditors have not been significant players. The Ombudsman's hands are tied by a mandate forbidding him to intervene when cases are before the Court. Parliament is not keen on hearing whistleblowers at meetings. The EU commissioner does not receive them in person despite his self-acclaimed devotion to the issue. Disciplinary procedures take too long. The institutions have an enormous advantage when challenged in Court by whistleblowers who have the burden of proof concerning bullying, who do not have the right to ask for witnesses to be heard, who face translation problems as jurisprudence is not available in most languages, etc. The fact that some judges have a past in (the legal service of) the European Commission is illustrative of the systemic difficulty EU whistleblowers are faced with at the end of a long journey for justice.

To conclude, this text gives several possible options that would enhance the visibility of the issue of whistleblowing. They are the first steps on a much longer path towards the demanded accountability of a currently miserably failing EU.

Short term

1. Organise a seminar with whistleblowers and academics in the panel. This seminar could be held on the symbolic date of Monday 16 March 2009, ten years after the fall of the Santer Commission. If cooperation of the EC is granted, this would show a genuine interest of the institution in the subject.

2. The European Ombudsman could be advised to add a category "harassment" in its database, allowing searches that could be useful for officials who are on the verge of disclosing inside information which is so unpopular with their hierarchy[24] that they may expect a nasty treatment (for the category of "whistleblowing" the reply received from the Ombudsman's office was that there are too few such cases lodged; an inquiry as to how many official whistleblower cases were addressed to the heads of other institutions appears to be underway).

3. The European Court of Justice could be invited to enter the 21st century and be advised to publish all judgments on-line; the ECJ could start with those judgments relevant for whistleblowers, with hyperlinks to points in jurisprudence to which the judgments refer. At the moment the reading of judgments is a costly puzzle. Complainants who often offered up their careers now spend huge amounts of money on lawyers who need to dig out obscure decennia-old references, while the institutions have a whole machinery to help them defend their case. If this advice on enhanced transparency is not adopted, the EP could then be advised to block the ECJ's budget until this technical device is put to the use of the complainants, who so far have a serious and unnecessary disadvantage vis-à-vis the institutions.

4. Reaffirm the recommendation made in the EP's external study and ask the European Commission to amend the relevant articles in the Staff Regulations in the light of best practice elsewhere. With this is meant that real case studies of whistleblowers in other multinational organisations as the UN, the UNDP, the OECD[25], and the International Chamber of Commerce ought to be studied. "Best practice" should really mean best practice, and not "best theory".

Medium term

Evaluate the results of those four points and, if necessary, reiterate, and reiterate again. The issue is too important to be left hanging in the air.

* * *

It is appropriate to conclude this document with an exemplary opinion of a disappointed whistleblower, dated 03.03.'04, given off after being told that the information he had provided had been "investigated":

> *"Let me tell you that in my view the Commission is absolutely right in making "transparency" a top point on its agenda and also in supporting "whistleblowing". However, without you giving me a chance to learn why OLAF came to its decision I do not think there is much "transparency" or support of "whistleblowing and there is hardly a chance that I will be able to understand and accept OLAF's decision."*

Words are far easier than actions, and promises, also when made by institutions, are there to be kept. Otherwise, people lose faith, the corner stone of all cooperation.

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END NOTES

[1] A joint initiative of The Polish Academy of Science and the Business Ethics Center.

[2] "Staff Regulations of officials of the European Communities and Conditions of Employment of other servants of the European Communities": Council Regulation 723/2004, adopted on 22 March 2004 and in force per 1 May 2004. The articles 22a and 22b replaced Decision C(2002)845 and, unlike the former, they are applicable to all EU officials.

[3] Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, OJ L 149, 16.6.1999.

[4] Commission Decision C (2002) 845 of 4 April 2002 on 'raising concerns about serious wrongdoings', adopted by the Commission (not published in the OJ; applicable to Commission officials only). This decision reinforced and extended the regime which was adopted by the Commission in 1999.

[5] Commission communication of 6 February 2004 on how to enhance effective application of the whistleblowing rules and protection of whistleblowers (SEC (2004) 151/2).

[6] Often the difference between the draft text of 29.11.'00 and the text of the Staff Regulation articles as adopted on 22.03.'04 is limited to the order of the words; at other times "his or her" was reduced to "his"; "evidence" became "facts"; and "head of service or DG" was replaced by "immediate superior". Readability was not always improved: The original "any adverse consequences" (which are not to be suffered as a result of blowing the whistle) has become "prejudicial effects on the part of the institution".

[7] The Council has recently decided to create a special Civil Service Tribunal for staff cases, which has become operational in 2005 – see its Decision of 2 November 2004 (OJ L 333, 9.11.2004).

[8] www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0017+0+DOC+XML+V0//EN&language=EN

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[11] Nobody from the EP, which had commissioned the study, ever took the initiative to present the study to the staff of the newly established Civil Service Tribunal in Luxembourg, which deals with whistleblower cases as the first of three steps of the EU's Court of Justice.

[12] The telephone number for whistleblowing EC officials is +32 2 29 67732; it should not be confused with the Freephone available to everybody in all 27 member states who wants to inform the EC on fraud and serious malpractice; the UK number of the Freephone is +44 800 963 595, the BE number +32 800 1 2426, the FR number +33 800 917 295, etc.

[13] The survey, carried out by an external consultant, says that this response rate is relatively high for internet surveys. The deputy spokesperson of OLAF turned this into "*good for this type of Commission internal polls*".

14 Among them only 6 officials working at DG Internal Audit Service, the division in the European Commission dealing with financial controls and, after DG OLAF itself, best placed to deal with the issue of fraud.

15 "*The OLAF survey – a service well on track*", in the free magazine 'Commission en Direct', distributed among the entire personnel in all EU institutions, nr. 472, 07.03 – 13.03.'08.

16 Calland, Richard and Guy Dehn (2004). Cape Town: Open Democracy Advice Centre.

17 Forthcoming, www.ombudsman.eu/decision/en/default.htm.

18 Ms. Sauer's letter is kept in the EP's database as document EP-PE_ LTA(2004)000856. It can be obtained if after a search for "whistleblower" on www.europarl.europa.eu/registre - advanced - words in title one goes to "Request a.document".

19 The Financial Regulation provided for this functional and terminological change-over.

16 Quotes from OLAF's report include: *"There is evidence of systematic incompetence and disregard for the essential rules of tendering procedures and financial management, including elements of fraud and fake offers" – "The endemic culture of unprofessionalism and improvisation where intransparency is preferred above openness, for instance in reporting facts to OLAF. The efforts of the administration of the CoR seems to have been focussed on discouraging the messenger of bad news" - "[The Secretary-General] even threatened to start an administrative enquiry against Mr McCoy if he would not 'obey' this instruction » (i.e. not ask for 'inappropriate' information)".*

21 "*23. […] expects the reform measures to allow open reporting of irregularity and fraud without risk of individual or institutional harassment as has occurred in the past; 24. Asks the Committee of the Regions to take the necessary measures to ensure that in future whistle-blowers do not receive the same treatment as the Financial Controller did, as stated in the OLAF report; 25. Demands that the Financial Controller receives a formal apology from the President and the Secretary-General of the Committee of the Regions."*

22 Technically speaking, UCLAF was the predecessor of the predecessor of OLAF. In between the two entities there was, for a brief period, a so-called Task Force for Co-ordination of Fraud Prevention. Source: Third recital of C 1999/352 of 28.04.'99, the Commission decision by which OLAF was set up. To put another minor matter straight, the current Chief Accounting Officer of the EC, Mr. Brian Gray, who took over on 01.01.'03, is the successor of the successor of the successor of Marta Andreasen: Messrs. Vandersteen and Oostens filled the gap between 03.06.'02 and 01.01.'03, but they were in power for a very, very short time on this crucially important job.

23 This information was obtained after a freedom of information request (an application of Regulation 1049/2001, OJ L 145 of 31.05.'01. Contrary to standard procedure, the information was not given in 15 working days, or in 30. The original request for access to information dates from 04.08.'08; it is said to have reached OLAF on 26.08.'08 via the EC's general secretariat, and the information was not provided until 19.11.'08.

24 Currently, the categories for which one can search in the European Ombudsman's database, apart from the separate sections for case numbers, data, and institution, are: abuse of power, avoidable delay, defence, discrimination, failure to ensure fulfilment of obligations, lack of competence, lack or refusal of information, legal error, negligence, procedures, reasoning, and unfairness.

25 The numbers of employees in those institutions can be expected to reflect upon the rules they have: UN worldwide 40,000, UNDP 6,530, the IMF 2,500, OECD 2,500, the Council of Europe 2,200.

Annex: Parts of several articles of the Staff Regulations

Article 22a

22a(1) 1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.

22a(1) sub 2 Information mentioned in the first subparagraph shall be given in writing.

22a(1) sub 3 This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

22a(2) 2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

22a(3) 3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

Article 22b

22b(1) 1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

22b (1) (a) (a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

22b (1) (b) (b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed the OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

22b (2) 2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

22b (3) 3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

[end of the fully quoted article 22; articles 90 and 17 are not quoted in full, below]

Article 90

90 (1) 1. Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

90 (2) 2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. The period shall start to run:

– on the date of publication of the act if it is a measure of a general nature;

– on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if, however, an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;

– on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided for in paragraph 1.

The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91.

Article 90a

Any person to whom these Staff Regulations apply may submit to the Director of OLAF a request within the meaning of Article 90 (1), asking the Director to take a decision relating to him in connection with investigations by OLAF. Such person may also submit to the Director of OLAF a complaint within the meaning of Article 90 (2) against an act adversely affecting him in connection with investigations by OLAF.

and

Article 17

17 (1) 1. An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public.

17 (2) 2. An official shall continue to be bound by this obligation after leaving the service.

Article 17a

17a (1) 1. An official has the right to freedom of expression, with due respect to the principles of loyalty and impartiality. [The two parts of Article 17a, paragraph 2, are slightly less relevant.]