Evidence to the Budgetary Control Committee of the European Parliament

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for the Public Hearing "**The effectiveness of Whistleblowing**" on 25.05.2011

Content:

Executive Summary

This brief note aims to provide the Members of the European Parliament's Committee on Budgetary Control (EP-CONT) with the story of my whistleblowing experience in a nutshell: the lessons I learned, my recommendations for a revision of whistleblowing policy and practice, in EU Institutions and beyond. All statements expressed are my personal opinion.

As head of sector in the EU Publications Office in 2001 I was faced with an underperforming contractor. Instead of executing penalties, my bosses gave in to pressure exercised by the contractor and agreed to revise the contract - without justification. I estimated this to lead to a 4 million euro loss for the European taxpayer. It also violated the basic principles of public tendering.

In the summer of 2002 the Commission established new rules[1]. I followed my duty and informed OLAF, who launched an investigation. In January 2004 I informed all bodies you find mentioned in art. 22b SR and asked them very simply *"to bring light into the affair"*. The Ombudsman later found *"that OLAF's failure to provide the complainant with information as to the period of time within which it expected to conclude its investigation was an instance of maladministration."* All other institutions merely forwarded my complaint to OLAF and that was that. OLAF then closed the investigation without follow-up in February 2002. Afterwards nobody cared that the OLAF's *Final Case Report* on my case stated that all the facts I had provided were true. It also showed that OLAF has neither looked into the performance of the contractor nor at the reasons for the contract change.

EP-CONT listened to *"explanations"* given by the OLAF Director but not to me and I never received any feedback from the EP. While the *Final Case Report* did not mention any legal norm I wrote a detailed *Legal Opinion* showing the relevance of several criminal and administrative laws. None of the EU Institutions I addressed ever reacted to this. Later I tried to find justice before the courts but even though I won some court cases the basic lesson I learned is that the three EU courts are stuck in the French administrative procedures of the middle of the last century. I consider them as unfair and unlawful in respect to art. 6 ECHR. Beside up to now 20 court cases I made 22 complaints to the Ombudsman, and in eight of which he already found maladministration.

The attached comparison between the EU whistleblowing laws and policies with Transparency International's recommendations leads me to a concrete text proposal for reforming articles 22a and 22b SR. It needs really independent bodies with sufficient resources to listen to and investigate whistleblower complaints even if they are about OLAF. The door to public control should not be fully closed either. However my case shows that laws alone are not sufficient. It needs people who dare to take responsibility and oppose misbehaviour of high ranking officials and systematic weaknesses. Until now I have not found these people in any EU-Institution at least not in positions powerful enough to provide change. Thus I assume that the statements of the Wise Men Commission's report of 1999 claiming it was *very difficult to find anyone who is taking any responsibility* are still true.

Whistleblowing has huge benefits as an early warning and control system. Whistleblowers could become the natural allies of Parliamentarians when it comes to controlling the executive branch. To a certain extend this works in the US. In the EU it would need the EP to use the control powers it has. A perfect starting point for a new area could be to create an investigative committee to properly and thoroughly investigate all EU-whistleblowing cases since 1999. Whistleblowers only come forward if they believe in a chance to achieve change without getting hurt. With the current performance of EU whistleblowing policies there is no reason for such a belief, but if the EP would take a clear stance on the side of the whistleblowers, offers them – and me – protection, reforms the law and clears up the past cases then there might still be a chance to re-establish trust.

[1] C(2002)845 of 04.04.2002. In Mai 2004 these rules were incorporated into art. 22a and 22b of the Staff Regulations (SR).

Persönliche Stellungnahme anhand von 7 Thesen

Sehr geehrte Abgeordnete, Sehr geehrte Damen und Herren,

ich möchte Sie heute mitnehmen auf eine Zeitreise. Die Zeitreise meines Lebens in den letzten 11 Jahren, um Ihnen zu erklären, was mir passiert ist, was ich daraus gelernt habe, welche Vorschläge ich Ihnen zum Thema Whistleblowing und Whistleblowerschutz heute machen möchte. 11 Jahre in 15 Minuten ist ambitioniert, also legen wir am besten gleich los, zurück ins Jahr 2000.

1. **Knowledgeable project officers would be best placed to control effective spending of money – but there are no incentives for them to do!**

   Projektverantwortliche mit Sachkenntnis wären am besten in der Lage die effektive Mittelverwendung sicherzustellen – es gibt aber keine Anreize für sie dies zu tun.

Rechtskonsolidierung ist ein technisch und zeitlich ambitioniertes Projekt des Amtes für Veröffentlichungen mit dem noch vor der Osterweiterung alle jeweils geänderten EU-Rechtsakte in allen 11 alten und später auch den neuen Amtssprachen in einer konsolidierten Textfassung, zur Verwendung auch für die geplante Kodifizierung, verfügbar gemacht werden sollen. Ich bin seit mehr als 5 Jahren Kommissionsbeamter und der zuständige Sektionsleiter. Rechtskonsolidierung läuft bisher nur als kleines Projekt, welches mit etwa 10 Beamten im Haus auf wenige Rechtsakte beschränkt gemacht wird. Für das große Vorhaben muss jetzt eine neue technische Basis geschaffen werden (Definition der Dokumenttypen in SGML/XML). Zugleich werden ein Vertrag und ein Lastenheft für eine öffentliche Ausschreibung erarbeitet, die alte Produktion muss weiterlaufen und Vorarbeiten für die neue Produktion, die elektronische Reproduktion der Ursprungstexte, laufen auch noch parallel. Alles unter meiner Verantwortung und mit einem Team das gerade zerfällt, weil einige der alten Selbst-Konsolidierer kein Interesse daran haben zukünftig nur noch Managementaufgaben zu übernehmen und sich um interne Versetzungen bemühen. Ersetzt werden sie trotz erheblicher Ausweitung der Aufgaben nicht.

Mein Chef will für das Haushaltsverfahren Zahlen über den Umfang des Projekts von mir. Wie viele Akte müssen konsolidiert werden? Wie viele Änderungsrechtsakte mit wie vielen Änderungen gibt es? Die einzige Quelle, die Datenbank CELEX enthält Informationen nur zu einzelnen Rechtsakten, Statistiken: Fehlanzeige. Die Zugriffssprache Mistral ist äußerst antiquiert. Tools zum Zusammenstellen der Daten habe ich keine und IT-Support auch nicht. Also bastele ich mir selbst Programme zum Herunterladen der Daten und versuche diese dann mit Excel zu aggregieren. Dies gelingt auch weitgehend. Es geht um ca. 2.200 Familien, also Basisrechtsakten mit ca. 8.000 Änderungsakten sowie Berichtigungen. Nur ein Problem wird nicht bewältigt und auch noch unterschätzt. Es gibt einige Änderungsrechtsakte, die verschiedene Grundakte ändern und diese werden in der Statistik mehrfach gezählt. Auch der Umfang der jeweils nötigen Änderungen ist aus CELEX im Detail nicht ersichtlich; auch hier schätzen wir großzügig. Dies ist aber alles nicht so schlimm, denn wenn das Budget etwas zu hoch ausfällt, gibt uns dies ja höchstens mehr Flexibilität.

Ein weiteres Problem sind fehlende Unterstützung und falsche Auskünfte. Das Lastenheft, also die Aufgabenbeschreibung für eine externe Vergabe, und der zugehörige Vertragsentwurf (incl. harter Vertragsstrafen) werden zusammengestückelt aus älteren Mustern und meinem neuen Input. Um die Preisliste kümmert sich die Vertragsabteilung, sagt mein Chef. Aber dann heißt es auf einmal, die Ausschreibungsunterlagen müssen in drei Tagen fertig sein, die Vertragsabteilung will Klarstellungen und Änderungen, aber mein Chef setzt sich durch und sagt mir, ich müsse jetzt schnell die Preisliste machen und solle dabei versuchen, dem unterschiedlichen Aufwand der diversen zum Teil

optionalen Arbeitsschritte gerecht zu werden. Dies bedeutet für mich ein weiteres durchgearbeitetes Wochenende und die Liste steht. Zur Sicherheit und als Planungsgrundlage für uns gibt es neben der detaillierten Liste mit Preisen für ca. 50 einzelne Arbeitsschritte noch eine Kappungsgrenze. Der Preis ist nach den einzelnen Arbeitsschritten zu berechnen, aber er darf einen bestimmten Höchstpreis pro Seite nicht überschreiten. Für die preisliche Bewertung der Angebote gibt es Beispielsfälle anhand derer wir später die Kosten der unterschiedlichen Angebote auf der Basis der Einzelpreislisten und – soweit relevant – des Kappungspreises berechnen und bewerten. Die realen Preise pro Einheit sind dann natürlich von den Bietern im Rahmen der öffentlichen Ausschreibung festzulegen. Noch etwas anderes steht in unserer Ausschreibung. Bieter können Ihr Angebot auf einen prozentualen Anteil des geplanten Gesamtvolumens beschränken, soweit dieser mindestens ein Drittel beträgt. Die Idee dahinter, angesichts von 13.000 Seiten, die pro Woche zu produzieren sein werden wollen wir mehrere Text-Produzenten ins Boot holen. Aber es kommt ganz anders.

Ein Anbieter, der bisher eher am Rande nur bei der Produktion von unveränderten Texten eine Rolle gespielt hat, macht das Rennen und zwar für das ganze Volumen. Sein Angebot überzeugt - jedenfalls auf dem Papier. Tests sind im Rahmen des Vergabeverfahrens nicht möglich. Also sind wir auf die Papierform angewiesen. Seine Preise sind unschlagbar günstig. Im Juni 2000 wird der Vertrag unterschrieben. Darin steht: Die Produktion muss innerhalb von 3 Monaten 100 Prozent des Volumens erreichen. Andererseits gilt: wir müssen gar keine Aufträge vergeben, sondern entscheiden individuell welche Rechtsakte wir mit welchen Fristen wann beim Vertragspartner bestellen. Für uns gelten nur zwei Grenzen: nicht mehr als 13.000 Seiten pro Woche und nicht mehr als zwei Änderungsakte (Phasen) des gleichen Grundaktes pro Produktionstag. Für den Fall, dass unsere Vorgaben bzgl. Qualität, Volumen und Fristen nicht eingehalten werden, sind sehr hohe Vertragsstrafen vorgesehen so z.B. 1.000 EUR pro Fehler und zusätzlich 1 EUR pro davon betroffener Seite. Mit jedem Tag einer verzögerten Lieferung sinkt der zu zahlende Preis. So steht es in den Verträgen.

Die Praxis sieht anderes aus. Unser Vertragspartner schafft es nicht, die Produktion innerhalb von 3 Monaten auf 100% zu bekommen. Am Ende der Frist haben wir gerade einmal eine Hand voll Testlieferungen und dabei wimmelt es von Qualitätsproblemen. Aber es gibt viele Versprechungen: *„Alles wird bald besser“*. Der Produktionsleiter wird ausgetauscht. Aber es geht auch danach nur sehr langsam voran. Aber der Ton wird härter, der Vertragspartner geht jetzt zur Gegenoffensive über: Wir seien schuld. Der Grund für die Probleme seien Unklarheiten des Lastenhefts und des Vertrages.

Ich fange an mir Gedanken darüber zu machen wie es weitergehen soll. Sollten wir den zweiten Vertragspartner aktivieren? Jene Firma, die schon zuvor im Projekt involviert war, hatte auch mitgeboten. Und mit ihr wurde sogar ein Vertrag abgeschlossen. Wir durften aber aufgrund des deutlich höheren Preises keine Aufträge an jene Firma vergeben. Und einen Teil des Vertrages mit dem anderen kündigen wollten meine Chefs nicht. Also löste gerade in jener Zeit diese Firma ihre Abteilung für Rechtskonsolidierung auf. Unsere Alternative brach weg.

Im Mai 2001 kam es dann zu einer Einigung mit unserem Hauptvertragspartner darüber, wie der Vertrag und das Lastenheft zu verstehen seien und welchen Leitlinien wir bei der Auftragsvergabe folgen wollten. Meine obersten Chefs unterzeichneten diese Regelung genauso wie die Chefs unseres Vertragspartners. Für mich, der die Regelungen im Wesentlichen ausgearbeitet hatte, bewegten wir uns zwar am Rande, aber noch innerhalb des Vertrages. Wir legten nur Details aus und fest, aber die Grundlinien blieben erhalten. Außerdem hatten wir ein Einsparpotential realisiert. Bei wenigen sehr umfangreichen und sehr häufig geänderten Rechtsakten, die auch bisher schon regelmäßig im Amtsblatt in konsolidierter Fassung veröffentlicht worden waren (z.B. die Zollnomenklatur), würden wir nicht jeden einzelnen Änderungsakt berücksichtigen sondern uns an den im Amtsblatt

veröffentlichten konsolidierten Zwischenfassungen orientieren. Dies barg ein großes Einsparpotential hinsichtlich unserer Kosten, ohne dass es zu Nachteilen führen sollte. Die Einigung mit dem Vertragspartner bestätigte die Legalität dieses Vorgehens, die sich aus meiner Sicht aber schon aus unserer Dispositionsbefugnis ergab – aber immerhin hatte der Vertragspartner dies jetzt nochmals anerkannt.

Danach zog die Produktion etwas an, aber immer noch waren wir bei nur 40% der geplanten wöchentlichen Produktionsvolumina. Unsere Fristvorgaben wurden missachtet. Die Aufarbeitung der Rückstände wurde immer wieder versprochen, erfolgte aber nicht. Hinzu kam, dass etwa 30% der Produktion wegen Qualitätsmängeln zurückgeschickt werden musste. Hierdurch entstand auch für uns erheblicher Mehraufwand. 12 bis 14 Stunden Arbeitstage waren bei mir eher die Regel als die Ausnahme. Aber selbst die Korrekturen enthielten teilweise immer noch Mängel. Dabei war Qualität doch so wichtig. Immerhin ging es um Texte, die im Alltag der Anwender, die allein gültigen Rechtstexte des Amtsblattes de facto ersetzen sollten.

Meine Vorgesetze informierte ich fortlaufend über die Situation. Immer wieder wurde ich ins Feuer geschickt, der Firma neue Vorgaben und Druck zu machen. So manches Wochenende ging dabei drauf neue Produktionsvorgaben und detaillierte Liefervorgaben pro Akt zu machen, die mein Chef zuerst verlangte, nach Intervention des Vertragspartners und auf dessen vage Versprechungen hin dann aber immer wieder zurückzog. Wenn ich aber forderte man solle jetzt endlich die Vertragsstrafen, die ich ständig androhte, auch einmal verhängen, gab es keine Reaktion von meinen Vorgesetzten.

Im Sommer erfuhr ich dann, dass es ohne mich zu informieren zu Treffen von meinen Vorgesetzten mit dem Vertragspartner kam und hier offensichtlich Verhandlungen stattfanden. Ich bat um deren Protokolle und bekam die Antwort, es gäbe keine. Komisch nur, dass mir, als mein Chef einmal nicht da war, dessen Stellvertreter ein Protokoll zuleitete. Aber als ich nachfragte, hieß es auch hier nur lapidar: Das ist kein Protokoll. Noch etwas anderes fiel mir in jener Zeit in die Hände. Eine E-Mail des Vertragspartners mit einer nur wenig verklausulierten Drohung: Entweder ihr zahlt uns mehr Geld oder wir steigen aus dem Projekt aus.

Im Herbst war es dann soweit. Meine Vorgesetzten bis hin zum Amtsleiter hatten höchst selbst eine offizielle Vertragsänderung mit dem Vertragspartner ausgehandelt. Sie hatten sogar den damals noch existierenden und kurz darauf im Rahmen der Reformen der Kommission abgeschafften CCAM, einem zentralen Ausschuss in Brüssel, der allen Vertragsänderungen zustimmen musste, dazu bekommen, der Vertragsänderung zuzustimmen. Die diesem gelieferte – und wie ich später erfuhr, vom Vertragspartner vorformulierte - Begründung lautete: Effizienzsteigerung durch neue technische Innovationen, die zu Einsparungen von 14% der Projektkosten führen würden. Von all dem erfuhr ich erst als die Vertragsänderung beschlossen war. Sie erschöpfte sich darin, den bisherigen Höchstpreis als Endpreis zu definieren.

Ich schaute mir die Sache genauer an und stellte fest: Die 14%ige Einsparung die dem CCAM als Begründung vorgetragen worden war, ergab sich nur im Vergleich zu den früheren, aufgrund der mehrfachen Änderungsakte und der zu komplex eingeschätzten Änderungen, viel zu hohen ursprünglichen Kalkulationen. Auch die schon im Mai vereinbarten Produktionseinsparungen waren hier offensichtlich nicht einkalkuliert. Natürlich gab es auch keinerlei technische Innovation. Stattdessen zeigte der Vergleich mit der bisher bereits abgerechneten Produktion: im Durchschnitt lagen die bisher angefallenen, tatsächlichen und im Detail berechneten Kosten bei knapp über 50% der Kappungsgrenze. Jetzt wurden die Kosten auf 100% jener Grenze hochdefiniert. Dies schon bei normalen Grund- und Änderungsakten.

Aber es gab noch einen Sonderfall: Die Euroumstellung. Der Änderungsrechtsakt hierzu besagt grob: überall wo in irgendeinem EU-Rechtsakt das Wort ECU auftritt, ist es durch EURO zu ersetzen. Wir hatten schon früh beschlossen, diese Änderung nicht in jedem Fall umzusetzen, denn dies hätte einen enormen Aufwand, weit über unseren Möglichkeiten bedeutet. Stattdessen war einverständlich festgelegt worden, dass nur eine Fußnote auf der ersten Seite pauschal auf diese (nicht-vorgenommene) Änderung hinweisen sollte. Das Einfügen dieser Fußnote auf einer Seite pro Sprachversion wurde als einmalige Aktion auf der Basis der Einzelpreisliste berechnet und bezahlt. Nun aber sollte nach den Vorgaben meines Chefs und seiner neuen Vereinbarung mit dem Vertragspartner nicht mehr eine einzelne Aktion auf jeweils nur einer Seite bezahlt werden sondern ein Preis pro Seite. Für jede Seite, also auch jene ohne Fußnoten und ohne jegliche Änderung, der betroffenen Rechtsakte. Zwar gab es hierfür nach meinem Protest einen geringen Abschlag aber jener wurde vom Vertragspartner berechnet. Hinzu kam, die so erzeugte Konsolidierungsschicht wurde nicht einmal an uns geliefert, sondern existierte nur virtuell. Real war nur die Zahlung.

Aber damit immer noch nicht genug. Die Vertragsänderung galt für alle Lieferungen ab jenem Zeitpunkt also rückwirkend auch für all jene Rechtsakte, deren Konsolidierung wir schon zuvor bestellt hatten und die teilweise schon über ein halbes Jahr zuvor geliefert hätten werden sollen. Dabei waren die Vertragsklausel hinsichtlich der Abschläge bei verspäteten Lieferungen gar nicht geändert worden. Wir hätten hierfür also eigentlich ohnehin nichts mehr bezahlen müssen. Aber jene Abschlagsregelungen und auch die anderen Vertragsstrafen wurden nie angemahnt oder gar durchgesetzt, obwohl ich dies immer wieder forderte.

Ich sagte meinen Chefs, dass ich dieses Vorgehen für illegal hielte und mir einen neuen Job suchen würde. Und das tat ich auch. Nach dieser Aussage wurde ich dann erst recht geschnitten und mir wurden wichtige Informationen vorenthalten. Dies ging so weit, dass mein Chef Treffen mit meinem Team ohne mein Beisein organisierte. Außerdem stand mein Nachfolger schon fest, bevor mein letzter Arbeitstag im Amt für Veröffentlichungen gekommen war. Ich fuhr in Kur und versuchte den Stress abzubauen und dies alles zu vergessen, mich auf meine neue Aufgabe bei der Generaldirektion Unternehmen zu konzentrieren. Vergessen aber konnte ich dies alles nicht, zu eklatant war das, was ich als klare Rechtsbrüche zu Lasten des EU-Haushalts und als Mobbing mir gegenüber bezeichne.

Bei der Generaldirektion Unternehmen war ich nicht mehr Sektionsleiter, sondern nur noch Referent, ein anderer Job war so schnell in Luxemburg, in dessen Nähe ich gerade ein Haus gebaut und bezogen hatte, nicht zu finden. Der Job war ok, ich sollte erneut Ausschreibungen machen und externe Projekte im Zusammenhang mit der Forschungsdatenbank CORDIS managen und dass tat ich auch. Allerdings nicht ohne erneut Defizite beim Vertragspartner aufzuspüren und anzusprechen, was mir auch hier wieder Mehrarbeit und einigen Ärger bescherte. Auch hier wurde seitens des externen Vertragspartners wieder versucht, Gegendruck aufzubauen. Mein neuer Chef ließ mich zwar nicht alleine im Regen stehen, sonderlich beliebt machte ich mich durch mein Festhalten an der Erfüllung des Vertrages, die auch ihm Mehrarbeit bescherte, bei ihm aber wohl auch nicht. Aber dies merkte ich erst später, als es um meine Beurteilung ging.

Was habe ich gelernt?

Kontrolle externer Projekte erfolgt in den Institutionen – allen voran der Kommission – häufig formal. Aufgrund der Tendenz zum stärkeren Outsourcing und zu einer schlankeren und damit angeblich effektiveren Verwaltung haben immer weniger Leute wirklich Sachverstand in den Bereichen in denen sie externalisierte Projekte betreuen. Schon die Projektvergabe erfolgt auf der Basis der formalen Papierform. Wer danach in der Projektabwicklung jenseits standardisierter Formalkontrolle inhaltliche Erfolgskontrolle ausüben und dafür sorgen will, dass Projekte nicht nur auf dem Papier, sondern in der Realität einen Nutzen erzielen, hat es schwer. Wer inhaltliche Fehler des

Projektpartners aufdeckt und deren Behebung oder gar Sanktionen wegen Schlechtleistung einfordert, erhält zumeist keine hinreichende Unterstützung, macht sich als „Troublemaker“ unbeliebt und läuft Gefahr als interner Whistleblower von seinen Vorgesetzen ausgegrenzt zu werden. Irgendwie geartete Anreize zur Fehleraufdeckung – egal ob bei internen Vorgängen oder externen Vertragspartnern – gibt es keine. Daraus kann nur geschlossen werden: Es gibt eigentlich niemanden, der etwas davon wissen will. Also ist Schweigen „das erwünschte“ und in der Regel auch das gezeigte Verhalten. Dies alles scheint aber nicht nur bei Projektvergaben und Dienstleistungsverträgen, sondern auch bei der Vergabe von Fördermitteln und sogar bei der Kontrolle von Anti-Dumping-Regelungen zu gelten. Auch hier kenne ich Fälle von Whistleblowern innerhalb und außerhalb der EU-Institutionen, die keine Unterstützung erhielten und Angriffen ausgesetzt waren, obwohl sie nur die Einhaltung der Regeln einforderten. Die externen verloren ihren Job. Die internen verzweifelten, wurden krank und depressiv und endeten genau wie ich in der Frühpensionierung.

2. **It makes a difference if you blow the whistle against your boss and highest level officials and this difference which could also be addressed as an increase in the dangers for the whistleblower is even bigger if the whistleblowing addresses structural weaknesses in the concerned organization.**

   Es macht einen Unterschied wenn Whistleblowing sich gegen Vorgesetzte oder höchstrangige Beamte richtet und dieser Unterschied, der auch als Anstieg der Gefahr für den Whistleblower charakterisiert werden könnte, ist noch größer, wenn es um strukturelle Schwächen in der betreffenden Organisation geht.

Dies ist nicht nur die Erfahrung die ich machen musste sondern auch eine Erfahrung, die das größte mir bekannte Forschungsprojekt im Bereich Whistleblowing, das im öffentlichen Sektor Australiens durchgeführt wurde, voll bestätigte. Demgegenüber differenzieren die meisten Statistiken, die ich zum Whistleblowing kenne, nicht anhand der Kriterien „strukturell“ und „gegen oben gerichtet“. So gelingt es dann auch leichter Fälle darzustellen, in denen Whistleblowing erfolgreich war, während die eigentliche Stärke von Whistleblowing als Instrument zur Aufdeckung von Machtmissbrauch und strukturellen Defiziten unbeleuchtet bleibt.

Mein Fall war geprägt von dem Hinweis auf massive strukturelle Defizite und des Fehlverhaltens der gesamten mir übergeordneten Hierarchie. Er war daher nicht dadurch lösbar einfach jemanden als einzelnes schwarzes Schaf, als Sündenbock, abzustempeln und in die Wüste zu schicken. Die Institution wäre und würde nach wie vor in ihren Grundfesten erschüttert, wenn meinem Hinweis ordnungsgemäß bis zur Wurzel nachgegangen worden wäre. Zugleich hätte dies aber auch die Gelegenheit geboten, relativ kurz nach der Affäre um die Santer-Kommission zu zeigen, dass man es erst meinte mit „Null Toleranz“ gegenüber finanziellen Unregelmäßigkeiten. Aber diese Chance wurde vertan.

Dies belegt aus meiner Sicht, dass gerade die Verwaltungen der EU-Institutionen noch immer vom Geist der französischen Verwaltung der Mitte des letzten Jahrhunderts geprägt sind. Vorgesetzte haben per Definition Recht und deren Entscheidungen zu hinterfragen, wird als Verletzung dieses ungeschriebenen Kodex begriffen. Dies gilt natürlich erst recht dort, wo ihnen rechtswidriges oder gar kriminelles Verhalten nachgewiesen wird. Die oberen Schichten der Verwaltung bilden eine geschlossene Nomenklatura, die auch durch Auswechslung der politischen Führung kaum erschüttert wird und die in der Regel durch Kooptionsmechanismen bestimmt, wer in diesen edlen Kreis der Mächtigen aufgenommen wird. Es sind vergleichsweise kleine Zirkel, die um jeden Preis zusammenhalten. Ein diesem Kreis nicht zugehöriger Whistleblower, der nichts als die Wahrheit hat,

wird als leicht auszumerzendes Übel begriffen. Es gilt eine Wagenburgmentalität: Man schließt die Reihen. Eine Krähe hackt der anderen kein Auge aus. Und angesichts mangelnder äußerer Kontrolle, angesichts bisher geringen Interesses der Parlamentarier und Journalisten es sich mit dieser Nomenklatura zu verderben, angesichts der in den Mitgliedsstaaten ausgeprägten Denke vom fernen Brüssel und bei Medien, die auf Informationen und Fördermittel durch jene Nomenklatura angewiesen sind, gibt es auch kaum Mechanismen, die diese festgefahrenen Strukturen wirklich aufbrechen können.

Die verehrten Kollegen haben dies natürlich alle begriffen und sich anders als die paar verrückten Whistleblower längst mit dem System arrangiert. Entweder sie machen nur einen „9 to 5" Job und streichen ihre Kohle ein, oder sie bemühen sich mit Kräften darum, irgendwann einmal selbst in die Nomenklatura aufgenommen zu werden. Die Unterstützung von Whistleblowern ist in beiden Handlungsmodellen nicht vorgesehen. Im Gegenteil für jemanden der sich die Gunst der Nomenklatura erwerben will, ist das angezeigte Verhalten natürlich die Unglaubwürdigmachung, Ausgrenzung und Sanktionierung des Whistleblowers und das Vertuschen jener Angelegenheiten, die den Herrschaften da oben vielleicht doch einmal zum Problem werden könnten.

3. OLAF is not independent – and at least in my case it proved that it was/is not able and/or not willing to do its job when this could lead to hurting top Commission officials

OLAF ist nicht unabhängig – und zumindest in meinem Fall hat es bewiesen, dass es nicht in der Lage und/oder nicht willens war/ist seine Aufgaben dann zu erfüllen wenn dies bedeutet Spitzenbeamten der Kommission weh zu tun

Anhand der vorstehenden Überlegungen lässt sich auch relativ einfach erklären warum OLAF, seine Generaldirektoren und Mitarbeiter in der Vergangenheit und bis heute meinen Fall so behandelt haben wie sie ihn behandeln. Im Zuge der Reformen nach dem Sturz der Kommission unter Jaques Santer haben Öffentlichkeit und Parlament es versäumt den Druck auf die Kommission aufrecht zu erhalten. Sie haben den hehren Worten von Null Toleranz und mehr Transparenz bereitwillig geglaubt, man könnte auch sagen sie sind der Propaganda der Kommission auf den Leim gegangen. Insbesondere wurde trotz des Desasters von UCLAF versäumt OLAF als wirklich unabhängig von der Kommission und der bisherigen Nomenklatur auszugestalten und es zu einer kleinen, aber schlagkräftigen Truppe zu machen, die auf interne Ermittlungen in den Institutionen ausgerichtet ist. Auch der jüngste Bericht des Rechnungshofes zeigt, dass OLAF sowohl hinsichtlich der Personalverwaltung als auch der Mittelausstattung schwerpunktmäßig mit Aufgaben als normale Kommissionsdienststelle befasst ist und der Entstehungsgrund von OLAF, interne Ermittlungen, eine nur untergeordnete Rolle spielt. Dann muss man sich auch nicht wundern, dass es den Generaldirektoren von OLAF offensichtlich wichtiger ist ein gutes Klima vor allem mit der Kommission zu pflegen, als dieser genau auf die Finger zu schauen und notfalls auch zu hauen.

Ich selbst habe den mittlerweile verstorbenen Generaldirektor Brüner von OLAF Ende Juni 2002 über den oben geschilderten Sachverhalt informiert. Dies geschah mittels einer Email die eine Zusammenfassung enthielt und darüber hinaus zahlreiche Anlagen, u.a. mit Produktionsstatistiken aus denen Volumen, Zeit und Qualitätsdefizite der Produktion ersichtlich waren, den Kompromissregelungen aus dem Mai 2001, diversen Emails zwischen mir und dem externen Vertragspartner sowie meiner Hierarchie mit einigen meiner vorherigen Bemühungen. Aber auch mit Hinweisen auf den Druck, den der Vertragspartner ausübte, um eine Verbesserung seiner Konditionen zu erreichen. Beigefügt war auch das Ergebnis der von meinem Team durchgeführten Berechnungen über die tatsächlichen Mehrkosten des neuen Vertrages. Die erste Reaktion von OLAF auf diese Email: Keine.

Als ich nach einem Monat nachfragte, ob ich nicht wenigstens eine Eingangsbestätigung bekommen könnte, hieß es, Herr Brüner hätte meine Email „aus Versehen gelöscht“. Aus heutiger Sicht hatte man mir damit vielleicht nochmal eine Chance geben wollen, von meinem Vorhaben Abstand zu nehmen. Aber ich versäumte es diese Chance zu nutzen und schickte meine Email nochmal los.

Warum tat ich dies überhaupt? Letztlich gab es drei Gründe: Erstens weil mich mein Gewissen nicht in Ruhe ließ. Ich musste auch in der Kur und später im neuen Job ständig an die Vorkommnisse beim Amt für Veröffentlichungen denken. Es kann doch nicht sein, dass man sich so einfach einer Erpressung des externen Vertragspartners beugt. Wenn man dies durchgehen ließe, so bräuchte man doch gar keine Vergabeverfahren mehr durchzuführen. Hatte ich Jura studiert um bei solchen Ungerechtigkeiten, solchen Schädigungen der Interessen Europas, denen ich meine Arbeitskraft verschrieben habe und denen ich als Beamter meine Loyalität schuldete, einfach wegzusehen?

Zweitens gab es mittlerweile innerhalb der Kommissionsdienststellen in Luxemburg Gerüchte über eine bevorstehende Neuorganisation. Ausgerechnet der Dienst CORDIS, bei dem ich bei meiner Flucht aus dem Amt für Veröffentlichungen Unterschlupf gefunden hatte, sollte jetzt jenem Amt eingegliedert werden. Mir war klar: Wenn Du dahin zurückgehst, werden jetzt sie dort erst recht alles in ihrer Macht stehende tun, um dir das Leben noch mehr zur Hölle zu machen. Ich fing an mir erneut einen neuen Job zu suchen. Einfach würde dies im kleinen Luxemburg sicherlich nicht werden. Und wenn ich zum Amt zurück müsste, dann sollte mein Fall wenigsten dokumentiert sein.

Schließlich gab es jetzt ja Drittens – und dies wurde zum eigentlichen Auslöser meines Entschlusses mich an OLAF zu wenden, die Kommissionsentscheidung C(2002)845 vom 04.04.2002 (deren Artikel 1 und 2 im weitgehend identisch sind mit den später eingeführten Art. 22a und 22b des Beamtenstatuts). Der Generaldirektor der GD Unternehmen hatte diese in einem Rundschreiben bekannt gemacht. Ab jetzt war ich rechtlich verpflichtet, meinen Verdacht hinsichtlich finanzieller Unregelmäßigkeiten zu melden. Ich war unsicher, ob dem allen wirklich zu trauen war, aber letztlich tat ich meine Pflicht.

Nach der zweiten Email an Herrn Brüner bekam ich eine Eingangsbestätigung, hörte aber zunächst einmal länger nichts mehr von OLAF. Erst Anfang November 2002 wurde ich dann zu einem Interview eingeladen. Zufällig war ich in jener Zeit wegen einer dienstlichen Angelegenheit ohnehin in Brüssel und konnte den Besuch bei OLAF so einschieben ohne aufzufallen, denn schließlich sollte ja niemand von meinem Whistleblowing an OLAF erfahren. Das Interview lief in Englisch ab, was für mich soweit ok war, im Nachhinein wäre es aber vielleicht besser gewesen, auf meiner Muttersprache zu bestehen, denn so wäre ich wahrscheinlich doch besser in der Lage gewesen, mich noch differenzierter auszudrücken. Was mir im Laufe der Befragung auffiel, war der Eindruck, dass die Befrager meine Email und insbesondere deren Anlagen wohl noch nicht im Detail studiert hatten. Und auch das, worum es bei der Konsolidierung ging, wie diese ablief, wo wir welche Kosten überschätzt und eingespart hatten, was ja entscheidend für das spätere Vorspiegeln vermeintlicher Einsparungen war, schienen die Herren Befrager nicht verstanden zu haben. Das Interview wurde auf Tonband aufgezeichnet. Später habe ich versucht dieses Tonband unter Berufung auf die Dokumentenzugangsverordnung 1049/2001 von OLAF herauszubekommen. OLAF verweigerte dies sehr lange. Im Verfahren 3402/2004/PB vor dem Europäischen Ombudsmann wörtlich mit folgender Argumentation: „OLAF has no technical means for reproducing these cassettes“. Wenn es nicht so traurig wäre, könnte man sich darüber totlachen, dass OLAF entweder wirklich nicht in der Lage war, ein einfaches Tonband entweder zu kopieren, erneut aufzunehmen oder auch nur abzuschreiben. Wie sollte eine solche Behörde gerissenen Betrügern und deren Netzwerken auf die Schliche kommen? Oder sollte OLAF hier etwa nur einen Vorwand vorgeschoben und mich und den Europäischen Ombudsmann bewusst belogen haben?

Aber die Geschichte um die Herausgabe des Tonbandes, von welchem ich im Jahre 2010 dann tatsächlich eine vollständige und ungeschnittene Fassung von OLAF über Verordnung 1049/2001 herausgegeben bekam, die ich dem Europäischen Parlament auch gerne zur Verfügung stelle, war ein Vorgriff. Als es im November 2002 entstand, hatte ich zwar erste Zweifel, vertraute aber noch darauf dass OLAF seine Arbeit sorgfältig machen würde. Spätestens nach dem Interview, so dachte ich, würden die Ermittler sich die Unterlagen genauer ansehen, von ihren umfangreichen Ermittlungsrechten Gebrauch machen, auf die Originalakten beim Amt für Veröffentlichungen zugreifen, die von mir genannten Personen, also sowohl die drei Hauptbeschuldigten als auch die genannten Zeugen befragen und so die Angelegenheit umfassend aufklären. Aber davon, was bei OLAF passierte oder nicht passierte erfuhr ich nichts.

Ich erfuhr auch nicht, ob und wann und wem gegenüber OLAF meine Identität offen legte. In dem Interview – und jeder der es sich anhört kann dies nachvollziehen – hatte ich den Ermittlern hierzu extra eine Frage gestellt. Sinngemäß lautete die Antwort, dass es sein könnte, dass sie im Rahmen der Ermittlungen in eine Situation kommen könnten, in der meine Anonymität eventuell nicht mehr gewährleistet werden könnte. Hierauf sagte ich, dass ich mir dies aufgrund der Sachlage, inklusiver meiner frühzeitigen offenen Proteste im Amt ja schon fast so gedacht hätte und ich mich ja dennoch entschlossen hatte mich an OLAF zu wenden. Ich sehe hierin bis heute keinen vollständigen Verzicht auf meine Anonymisierung sondern nur einen bedingten, soweit es im Rahmen der Ermittlungen notwendig geworden wäre. Die wenigen Ermittlungen die OLAF dann tatsächlich unternahm – ausweislich des Untersuchungsberichts recherchierte man in einer internen Personaldatenbank, in einer Datenbank mit Unternehmensdaten u.a. über den Vertragspartner und dessen Konzernmutter und man ließ sich die Akte des CCAM kommen – machten die Offenlegung meiner Identität meines Erachtens nicht notwendig. Dennoch erfolgte diese und zwar unter Nennung meines Namens durch Herrn Brüner selbst in einem Schreiben von welchem einer der Hauptbeschuldigten eine Kopie erhielt und ausweislich dessen auch die anderen von mir Beschuldigten eine Abschrift des Abschlussberichts, in dem mein Name ebenfalls mehrfach genannt wird, bekamen. Einer solchen Identitätsoffenlegung hatte ich nie zugestimmt. Im Gegenteil – sobald ich davon erfuhr, beschwerte ich mich auch darüber u.a. beim Europäischen Datenschutzbeauftragten (Beschwerde vom 26.01.2005 – Aktenzeichen beim EDPS: C 2005-0015). Dies alles hielt die Kommission, vertreten durch Herrn Kallas, dann aber nicht davon ab, in einer Beantwortung einer Anfrage im Europäischen Parlament (E-0859/2008) im Mai 2008 zu erklären: *„ OLAF has informed the Commission that the informant, who had identified himself as a whistleblower, was asked by OLAF whether he wished his identity to be kept secret, and replied that he did not".* Ich frage mich und Sie: Wurde das Europäische Parlament hier von OLAF und der Kommission bewusst getäuscht?

Aber zurück zum Interview im Jahre 2002. Auch meine Angst vor einer Benachteiligung durch meinen Chef im anstehenden Beurteilungsverfahren hatte ich dort explizit angesprochen und OLAF insoweit um Hilfe gebeten. Auch wenn er von meinem Gang zu OLAF nichts wusste, so hatte ich aus meiner Beurteilung seines Verhaltens nie einen Hehl gemacht. Auch aufgrund seines sonstigen Verhaltens mir gegenüber war offensichtlich, dass er jene Gelegenheit nutzen würde sich zu revanchieren. Die OLAF Ermittler zuckten nur mit den Schultern. Aber nur kurze Zeit später kam es genauso, wie ich es befürchtet hatte.

Schlimmer noch! Im Frühjahr 2003, als die Beurteilung, nach dem frisch eingeführten, angeblich ja so objektivem, Punktesystem anstand, hatte mein Ex-Chef beim Amt für Veröffentlichungen eine Beurteilungsstellungnahme erstellt. An meinen nachweisbaren Leistungen konnte er kaum etwas kritisieren, aber die weichen Kriterien hatte er genutzt um mir eins reinzuwürgen: Aus „M. Strack est un chef d'équipe qui demande à ses collaborateurs le même engagement que le sein, qui forme ses

collaborateurs et qui génère autour de son travail un enthousiasme pour le projet“ in der vorherigen Beurteilung wurde daher „Malgré son engagement très au-dessus de la moyenne, comme responsable d’une équipe n’a pas su motiver et utiliser au mieux ses collaborateurs“.

Aber damit nicht genug. Auch mein neuer Chef gab mir kaum Punkte. Hintergrund hierbei war, dass er seine Punkte ja nur einmal vergeben konnte. Ich aber hatte ihm kurz vorher mitgeteilt, dass ich die GD Unternehmen verlassen und zu EUROSTAT wechseln würde. Dies, wie dargestellt, um nicht im Rahmen der sich konkretisierenden Umstrukturierung wieder zum Amt für Veröffentlichungen zurück zu müssen. Aber von meinem Whistleblowing und seinen Ursachen wollte ich meinem Chef nichts erzählen. Er sah daher nur den Mitarbeiter, der sich nach weniger als einem Jahr wieder davon machte. Warum sollte er seine Punkte an so einen verschwenden. Gegen meine Beurteilung und die sich daran anschließende Vergabe von Null Prioritätspunkten und Nichtbeförderung habe ich schließlich im Jahre 2004 geklagt. Im Januar 2008 habe ich aufgrund von Formfehlern der Kommission beide Verfahren voll umfänglich gewonnen. Die Kommission wurde auch verurteilt, die Kosten jener Gerichtsverfahren zu bezahlen. Kosten in Höhe von weit über 50.000 EUR, allein bezahlt hat die Kommission davon bis heute keinen Cent.

Auch hinsichtlich der aufgehobenen Beurteilungen unternahm die Kommission zunächst nichts. Erst ein Jahr nach den Urteilen bot man mir an ich könne mich in einem Telefonverfahren – solche sind nach ständiger Rechtsprechung bei Beurteilungen unzulässig – von just jenem Ex-Chef beim Amt für Veröffentlichungen beurteilen lassen den ich damals bei OLAF angezeigt hatte, und dies für einen sieben Jahre zurückliegenden Zeitraum. Ich lehnte ab und klagte im Sommer 2009 erneut. Aber was dann im Sommer 2010 vor Gericht passierte ist noch unglaublicher. Auf einmal drängte man mich seitens des Gerichts in einen Vergleich. Gegen eine geringe Schadensersatzzahlung, von der ich auch noch meine Anwaltskosten bestreiten musste und ein Zeugnis, sollte ich auf meine Beurteilungen verzichten. Ich entwarf ein Zeugnis und die Kommissionsvertreter signalisierten grundsätzliche Zustimmung, erklärten aber auch, dieses noch intern abklären zu müssen.

Aber der zuständige Richter ging noch einen Schritt weiter. Als ich erklärte, bevor eine Einigung über den endgültigen Zeugnistext herbeigeführt wäre, könne ich auch dem Vergleich nicht zustimmen, nahm er mir den Wind aus den Segeln. Sinngemäß erklärte er, er stünde jederzeit als Vermittler zur Verfügung, falls es noch Probleme mit dem Text des Zeugnisses geben sollte, es gäbe also keinen Grund dem Vergleich nicht direkt zuzustimmen. Dies tat ich dann auch im Vertrauen auf das Wort des Richters. Das Zeugnis, welches ich dann später von der Kommission bekam, war allerdings keineswegs wohlwollend sondern enthielt in vielen Formulierungen deutliche Verschlechterungen meines Entwurfs bis hin zu Unvollständigkeiten und sachlichen Fehlern. Allein, als mein Anwalt daraufhin den Richter anschrieb lautete die lapidare Antwort der Kanzlei: *„Richter … hat uns beauftragt, Ihnen mitzuteilen, dass das Verfahren … beendet ist, womit auch die Kompetenzbefugnisse des Gerichts in dieser Sache beendet sind … Richter … bitte Sie daher keine direkte Korrespondenz an ihn zu richten“*. Übrigens ist jener Richter danach an den Urteilen gegen mich aus dem Frühjahr 2011 ebenso beteiligt gewesen, wie er dies an sämtlichen noch vor dem Gericht für den öffentlichen Dienst laufenden Verfahren meinerseits ist. Obwohl bereits ein Befangenheitsantrag abgelehnt wurde (die Entscheidung dazu wurde vom Gericht merkwürdiger Weise nie veröffentlicht), habe ich jetzt „neue“ gestellt und will dies auch in den Rechtsmittelverfahren geltend machen. Hinsichtlich des Zeugnisses habe ich bereits eine neue Beschwerde beim Europäischen Bürgerbeauftragten erhoben und muss mir derzeit überlegen, eine neue Klage anzustrengen – wahrscheinlich landet auch diese wieder beim gleichen Richter.

Nach dieser erneuten Abschweifung ein erneuter Versuch zurück zugehen zum Interview, also ins Jahr 2002. Dort hatte man mir auch zugesagt ich werde bald eine schriftliche Zusammenfassung des

Interviews erhalten. Aber es dauerte Monate bis ich diese auch bekam. Als ich sie sah, traute ich meinen Augen kaum. Ich erkannte meinen eigenen Fall nicht mehr wieder, die Darstellung war völlig wirr. Ich machte mich daran selbst ein neues Protokoll zu erstellen, natürlich ohne dass mir die Bänder des Interviews vorlagen. Dieses schickte ich dann an OLAF und wieder bekam ich erst auf mehrmalige Nachfrage eine Bestätigung, dass man meinen neuen Text zu den Akten genommen habe.

Zwischenzeitlich, im Frühjahr 2003, war der Konflikt um meine Beurteilung entstanden und ich hatte meinen neuen Job bei EUROSTAT angetreten. Auch dort wieder Projektmanagement. Hinzu kam, bei EUROSTAT kochte just zu jener Zeit der große Finanzskandal hoch. Auf einmal war EUROSTAT in den Medien und OLAF und die Kommission bemühten sich zu erklären, man werde die Sache rückhaltlos aufklären und es gehe nur um Einzelfälle. Das Klima bei EUROSTAT war vergiftet, man wusste nicht, was man von OLAF zu erwarten hatte und die Auswechslung der Führungsspitze und einige Umstrukturierungen taten ihr Übriges. Ich tat meine Arbeit und begann mich zu fragen: Wieso redet Vizepräsident Kinnock von einem Einzelfall? Meinen Fall beim Amt für Veröffentlichungen, ebenfalls in Luxemburg, gibt es doch auch noch. Warum handelt OLAF hier denn nicht? Etwa weil mein Fall noch nicht in den Medien ist?

Ich entschloss mich, genau ein Jahr nach meiner ersten Mail an OLAF, zu einer Email an Herrn Kinnock mit Kopie an Herrn Brüner. Dessen Reaktion: Eine Einladung zu einem persönlichen Gespräch, welches im September 2003 in seinem Büro in Brüssel stattfand.

Brüners Eingangsbemerkung lautete sinngemäß: Ich habe mir die Unterlagen des Falles noch nicht angesehen, da ich mir zunächst ihre Sicht der Dinge einmal ganz unbefangen und im Zusammenhang anhören will. Danach werde ich mir dann aber selbst auch die zugehörigen Unterlagen anschauen. Ich begann zu erzählen. Brüner und sein Assistent schienen interessiert und betroffen zuzuhören, stellten aber nur wenige Zwischenfragen. Am Ende sicherte Brüner mir nochmals zu, sich nun der Sache anzunehmen und sich bald wieder bei mir zu melden. Beim Rausgehen bat er mich noch, ich möge jetzt doch bitte eine Email an Herrn Kinnock schreiben und ihm mitteilen, dass OLAF der Sache nachginge. Ich habe diese Email auch abgeschickt, frage mich aber bis heute, wie unabhängig waren und sind OLAF und sein Direktor wirklich, wenn sie einen derartigen Persilschein von mir brauchten?

Anfang Dezember 2003 hatte ich noch keine weitere Nachricht von OLAF oder Herrn Brüner erhalten. Ich wartete. Warten, dies ist einer der wichtigsten und zugleich zermürbendsten Phasen beim Whistleblowing. Warten darauf, dass endlich Informationen aus der Black Box der Ermittlungen zu einem dringen, dass man erfährt, woran man ist. Warten auf eine Reaktion des Angesprochenen, auf Entscheidungen auf den Fortgang von Gerichtsverfahren, auf Urteile. Immer wieder warten. Seit meinem Whistleblowing an OLAF waren jetzt schon fast eineinhalb Jahre vergangen. Eine inhaltliche Reaktion von OLAF hatte ich genauso wenig erhalten wie eine klare Aussage, wann mit einem Abschluss der Ermittlungen zu rechnen sei. Dabei war genau dies zu wissen, doch mein Recht: niedergeschrieben heute in Art. 22b des Beamtenstatuts aber auch schon damals in der Kommissions-Entscheidung C(2002)845. Das zermürbende Warten, das Verfahren um meine Beurteilungen, die Situation bei EUROSTAT und die Nachwirkungen der vorherigen Vorkommnisse beim Amt für Veröffentlichungen. All dies wirkte sich zunehmend auch auf meine Stimmung und meine Gesundheit aus. Ich wurde immer anfälliger für Infekte, war oft krank, niedergeschlagen und auch gegenüber meiner Familie aufgrund all dieser Frustrationserlebnisse auch immer unleidlicher. Letztlich zerbrach daran sowohl meine Gesundheit als auch meine Familie, aber bis dahin sollte es noch etwas dauern.

Aber zurück zu OLAF. Anfang Dezember 2003 entschloss ich mich in einem Brief an Herrn Brüner mein Recht auf Information, insbesondere über die voraussichtliche Verfahrensdauer, einzufordern.

Ich forderte ihn mit klaren Worten auf, seine Zusagen einzuhalten und mich bis Anfang Januar schriftlich zu informieren. Ich kündigte auch an, ansonsten von meinen heute in Art. 22b des Beamtenstatuts festgelegten Rechten Gebrauch zu machen und die dort genannten Personen zu informieren. Eine offizielle Antwort von OLAF auf dieses Schreiben habe ich nie erhalten.

Stattdessen rief mich am letzten Arbeitstag des Jahren 2003 ein Herr an den ich nicht kannte. Er sagte mir, er sei jetzt der für meinen Fall zuständige Ermittler und plane den Fall abzuschließen. Im Gespräch merkte ich, dass er überhaupt nicht verstanden hatte, worum es ging. Er sprach davon dass man bei der Ausschreibung keine Unregelmäßigkeiten gefunden hätte und dass es auch keine Anzeichen gäbe, dass irgendjemand geschmiert worden sei. Dies hatte ich aber auch nie behauptet. Ich versuchte ihm klar zu machen, dass es um das Verhalten nach Vertragsabschluss, um die Nichtdurchsetzung der Vertragsstrafen um die überzogenen Zahlungen und um die unrechtmäßige Vertragsänderung und deren rückwirkende Anwendung ging. Aber vier Millionen Euro Schaden zu Lasten der EU-Steuerzahler – so hoch bezifferte ich den Schaden aus Vertragsänderung, deren rückwirkender Anwendung und der Nichtumsetzung von Vertragsstrafen im geschilderten Fall – scheinen niemanden wirklich zu interessieren. Genauso wenig wie die hier vorgenommene völlige Aushöhlung des Vergaberechts durch welches jedes Jahr hunderte von Milliarden Euro in der EU verausgabt werden.

Ich bot an, ihm noch weitere CDs mit Emails und anderem Material zur Verfügung zu stellen. Allein auch von diesem Herrn hörte ich nichts mehr. Die nächste Mitteilung von OLAF, die ich bekommen sollte, erreichte mich am 02.03.2004. Die lapidare Mitteilung: Der Fall ist eingestellt.

4. When it comes to my whistleblowing none of the control bodies in place did what they should have done

Im Hinblick auf mein Whistleblowing hat keine der vorhandenen Kontroll-Institutionen das getan, was ihre Aufgabe gewesen wäre.

Zuvor, am 07.01.2004 hatte ich gemacht, was ich gegenüber Herrn Brüner angekündigt hatte. Unter Berufung auf die weitgehend identische Vorläuferregelung zum heutigen Art. 22b des Beamtenstatuts hatte ich mich an die dort genannten Personen bzw. Institutionen gewandt. Ich schilderte ihnen meinen Fall und die Kontakte zu OLAF, reichte sämtliche Originalunterlagen meines Whistleblowings an OLAF und die Protokolle meiner Vernehmung dazu und bat um Hilfe. Dies allerdings nicht nur bei einem, sondern gleichzeitig bei allen in Art. 22b des Statuts genannten Ansprechpartnern.

In der Folge musste ich feststellen, dass bis auf ansatzweise Bemühungen des Ombudsmanns keine dieser Institutionen zu inhaltlichen Fragen mit mir Kontakt aufnahm und keine tat, was ich erwartet hatte: Mir zu helfen und OLAF zu kontrollieren.

Der Präsident des Europäischen Parlaments: schickte mir ein Schreiben in dem er mich zu aller erst auf meine Schweigepflichten, die wenn überhaupt ja nur der Kommission gegenüber bestehen, also nicht wirklich seine Angelegenheit sind, hinwies. Dies war das einzige offizielle Schreiben, welches ich in dieser Angelegenheit jemals vom Europäischen Parlament bekam. Ich hatte in der Folge auch versucht über den direkten Kontakt mit verschiedenen deutschen Abgeordneten rauszubekommen was im Europäischen Parlament mit den von mir vorgelegten Informationen gemacht wurde. Letztlich bekam ich aber keine klaren Auskünfte. Scheinbar war OLAF in einer nicht-öffentlichen Sitzung des Haushaltskontrollausschusses befragt worden und danach wurde die Sache zu den Akten gelegt. In später von mir bei OLAF über Verordnung 1049/2001 erlangten Dokumenten findet sich eine Anfrage eines Europaabgeordneten an OLAF die dort abgewimmelt wurde und ein

Gesprächsangebot von OLAF an einen anderen von mir angesprochenen Abgeordneten. In jener Email heißt es, dass man ihm im Gespräch erläutern würde, dass die Angelegenheit *„um der Wahrheit den Vorzug zu geben“* von mir *„komplex gestaltet“* würde. Auch dieser Abgeordnete war später zu keiner inhaltlichen Aussage mir gegenüber bereit.

Feststellen möchte ich insoweit, dass sich das Europäische Parlament meiner Meinung nach in meinem Fall bisher nicht für eine wirkliche Aufklärung eingesetzt hat. Insbesondere wurde dem alten lateinischen Rechtsgrundsatz des *„audiatur et altera pars“* in keiner Weise Rechnung getragen. Ich hatte bisher nie Gelegenheit, die etwaigen Erläuterungen von OLAF zu erfahren und dazu Stellung zu nehmen.

Der Präsident des Europäischen Rechnungshofs: reagierte in dem er mir lapidar mitteilte man habe OLAF mein Schreiben zur Stellungnahme weitergeleitet. So also geht man mit externem Whistleblowing um, man informiert zunächst einmal voll inhaltlich den Angegriffenen. Mein Protest hiergegen blieb erfolglos. Später, nachdem OLAF den Fall abgeschlossen hatte, legte auch der Rechnungshof den Fall offenbar schnell zu den Akten. Mir stellte man noch in Aussicht sich mit der Thematik im Rahmen der nächsten regulären Prüfung befassen zu wollen. Als ich ein paar Jahre später einen Antrag auf Dokumentenzugang an den Rechnungshof richtete und die Dokumente zu meinem Fall und zu dessen späterer Prüfung einsehen wollte, teilte man mir sinngemäß lapidar mit: außer den Dokumenten die sie schon haben, gibt es keine weiteren. Eine Untersuchung hat also auch hier nie stattgefunden.

Der Präsident des Europäischen Rates: hatte damals zufällig die gleiche Staatsbürgerschaft wie der Hauptverantwortliche und Hauptbeschuldigte beim Amt für Amtliche Veröffentlichungen und der Parlamentspräsident. Aber auch in jener Hauptstadt schickte man mein Schreiben offensichtlich gleich an OLAF weiter und gab sich zufrieden mit der Verfahrenseinstellung durch OLAF. Dem Ratspräsidenten hatte ich dann sogar noch meine Legal Opinion geschickt, in der ich im Detail auf den Einstellungsbeschluss einging: Reaktion Fehlanzeige.

Der Europäische Bürgerbeauftragte: Der Ombudsmann war der einzige, der von mir angesprochenen, der ein ernsthaftes Verfahren einleitete. Problem hierbei: laut den für ihn geltenden Rechtsakten darf er keine Ermittlungen zu Sachverhalten anstellen, die Gegenstand von Gerichtsverfahren sind. Ein Beschwerdeführer muss sich also stets entscheiden, ob er den Rechtsweg beschreiten will oder den Weg zum Ombudsmann. Hinzu kommt, dass die Verfahren beim Europäischen Bürgerbeauftragten keinen Einfluss auf die Fristen des gerichtlichen Verfahrens haben. Dies ist in einigen Mitgliedsstaaten anders und besser geregelt, da dort eine Beschwerde zum Ombudsmann den Lauf von Verjährungs- und Klagefristen hemmt, man also zuerst eine gütliche Einigung beim Ombudsmann versuchen und danach notfalls immer noch klagen kann. Nicht so auf EU-Ebene. Hier gilt ein striktes entweder oder.

Wie bereits erwähnt hatte OLAF Mitte Februar 2004 beschlossen, das nach meinem Whistleblowing eingeleitete Untersuchungsverfahren *„ohne follow-up“* abzuschließen, wovon ich zunächst nur mit einem Ein-Zeiler in Kenntnis gesetzt wurde. In der Folge versuchte ich herauszufinden was passiert war und beantragte unter Verweis auf Verordnung 1049/2001 sowohl Zugang zu dem Abschlussbericht als auch Zugang zu der vollständigen Akte der Untersuchung. Es dauerte einige Zeit bis ich jedenfalls eine teilgeschwärzte Version des Abschlussberichtes bekam. Ich glaubte nicht, was ich da lesen musste. OLAF hatte keinen Teil meines Sachvortrages entkräftet oder auch nur angezweifelt. Im Gegenteil, meine Aussagen wurden sogar als zutreffend beschrieben. Aber was hatte OLAF mit diesem Sachverhalt gemacht? Nichts! Man hatte in über 18 Monaten nur die oben beschriebenen äußerst rudimentären Ermittlungsschrittchen unternommen. Außer mir waren weder Zeugen befragt noch jenseits der CCAM-Akte Originaldokumente gesichtet oder gar ausgewertet

worden. Aber auch rechtlich hatte man offensichtlich keinerlei Prüfung vorgenommen. Im gesamten Abschlussbericht findet sich kein einziger Verweis auf eine Rechtsnorm. Weder die Vereinbarkeit des Handelns meiner Vorgesetzten mit der Finanzordnung, noch jene mit dem Beamtenstatut oder den einschlägigen Strafrechtsnormen (in deutscher Terminologie z.B. Untreue oder Betrug zugunsten Dritter) waren geprüft worden. Zahlen zu möglichen finanziellen Auswirkungen des geschilderten Verhaltens gab es ebenfalls keine. Und auch die Vereinbarkeit und die Rückwirkungen solchen Verhaltens auf Vergaberecht und Vergabepraxis blieben völlig unberücksichtigt. OLAF suchte scheinbar nur nach jenen zwei Dingen, die ich nie behauptet hatte: dem Fluss von Bestechungsgeldern und der Manipulation der ursprünglichen Zuschlagsentscheidung im Ausschreibungsverfahren. Auf dieser Basis konnte man dann zusammenfassen, dass dafür keine Anzeichen gefunden wurden und dass das Verhalten des Amtes in einer schwierigen Situation nachvollziehbar und verständlich gewesen wäre.

Ich selbst versuchte mich daraufhin an einer rechtlichen Bewertung des von mir vorgetragenen und von OLAF ja bis heute nie in Zweifel gezogenen Sachverhalts. Diese ist niedergelegt in einer „Legal Opinion“ vom 16.04.2004. Auf dieses Papier, welches ich in der Folgezeit unter anderem jeweils mit der Bitte um Reaktion an den OLAF Generaldirektor Brüner, den OLAF Überwachungsausschuss, den Präsidenten des Europäischen Rates, den zuständigen Vizepräsidenten der Kommission Kallas und den Europäischen Ombudsmann und an sämtliche drei Ebenen der EU-Gerichte vorlegte, habe ich bis heute von keinem der Genannten eine detaillierte inhaltliche Reaktion bekommen. Keiner scheint willens zu sein sich damit auseinanderzusetzen und meine dort aufgeführten Argumente zu entkräften. Oder sollte ich am Ende mit all jenen Feststellungen, inklusive der Feststellung strafbaren Verhaltens meiner Vorgesetzten und derjenigen, die dieses später vertuschten, Recht haben?

Meinen vorletzten Versuch habe ich Anfang diesen Jahres mit dem neu ernannten OLAF Generaldirektor Giovanni Kessler unternommen. Nach einer vorsichtigen Anfrage, ob ich ihm über meinen Fall berichten dürfe und einer darauf erfolgten positiven Reaktion, habe ich ihm ein Anschreiben mit meinen Erwartungen an ihn mit zwei Anlagen, darunter meine „Legal Opinion“ geschickt. Meine Hauptforderung: endlich eine Reaktion auf meine „Legal Opinion“ zu erhalten.

Nach Monaten kam dann endlich eine Antwort. Auch Herr Kessler verweigert jedoch jegliche inhaltliche Auseinandersetzung und versteckt sich hinter den Aussagen der Gerichte in den Urteilen T-4/05 und C-237/06P sowie hinter den noch laufenden Prozessen, in denen OLAF durch die Kommission vertreten wird. Seiner eigenen Verantwortung entzieht er sich meines Erachtens damit völlig.

Das in seiner Antwort liegende Festhalten an der beharrlichen Weigerung von OLAF, mir umfassenden Zugang zur Untersuchungsakte zu geben, offenbart meines Erachtens die Abhängigkeit OLAFs von der Kommission und die Unfähigkeit bzw. Unwilligkeit gegen diese vorzugehen. Hier beruft sich OLAF hinsichtlich der Herausgabe diversen Schriftwechsels, der während der Ermittlungen zwischen OLAF und der Kommission geführt wurde, auf den Verweigerungsgrund *„Gefährdung eines Entscheidungsprozesses“*. Damit räumt OLAF aber zugleich ein, dass es im Ermittlungsverfahren einen gemeinsamen Entscheidungsprozess von OLAF und der Kommission, also gerade keine eigenständige und unabhängige Entscheidung von OLAF gegeben hat.

Aber auch zu den genannten **Gerichtsverfahren** und den dortigen Feststellungen möchte ich mich hier noch äußern. Ausgangspunkt war dabei meine Beschwerde gegen die Entscheidung von OLAF, die Ermittlungen in dem durch mein Whistleblowing angestoßenen Verfahren einzustellen. Da ich verpflichtet war, die Anzeige an OLAF zu machen, so die Grundlage meiner Argumentation, musste es auch ein zu jener Pflicht korrespondierendes Recht auf einen ordnungsgemäßen Umgang mit jener Meldung und auf jedenfalls nicht missbräuchliche Ermittlungen geben. Auch Art. 22b des Statuts

enthält schließlich die Formulierung „geeignete Maßnahmen“ und, so jedenfalls meine Argumentation, völlig unzureichende Ermittlungen können keine geeignete Maßnahmen sein und verletzen mich in meinen Rechten. Meine Beschwerde wurde sodann vom Generaldirektor von OLAF als unzulässig abgewiesen und hiergegen klagte ich zum Gericht Erster Instanz.

Schon diese Klage nahm der Europäische Ombudsmann dann zum Anlass, einen großen Teil meiner bei ihm anhängigen Beschwerde wegen eines anhängigen Gerichtsverfahrens einzustellen. Es gelang mir aber, ihn zu zwei Zugeständnissen zu bewegen: Erstens wurde die Beschwerde weiterverfolgt im Hinblick auf die Frage, ob OLAF mich rechtzeitig über den Fortgang des Verfahrens informiert hatte. Diese Frage war ja in gewisser Weise unabhängig von der Frage der Beurteilung der Endentscheidung durch OLAF und in der Tat stellte der Europäische Ombudsmann später in seiner Entscheidung zu meiner Beschwerde 140/2004/(BB)PB insoweit Verwaltungsfehlverhalten von OLAF fest.

Zweitens sagte mir der Europäische Ombudsmann schriftlich zu, dass ich, falls meine Klage als unzulässig abgewiesen werden würde, später eine erneute Beschwerde an ihn, auch hinsichtlich der Korrektheit der OLAF Entscheidung erheben könne.

Aber zurück zum Gerichtsverfahren. Hier verwarf das Gericht Erster Instanz mit Beschluss vom 22.03.2006 meine Klage als unzulässig. Dies geschah auf Antrag der Kommission in einem vereinfachten Verfahren, in dem ausschließlich eine Zulässigkeitsprüfung und keine materielle Prüfung der Begründetheit der Klage erfolgte. Zu jener hatte die Kommission nichts vorgetragen und ich hatte auch insoweit keine Möglichkeit zur Erwiderung. Dennoch enthält die Entscheidung des Gerichts auch hierzu Ausführungen und spricht von *„einer gründlichen Untersuchung und einer detaillierten Analyse des fraglichen Sachverhalts“* und davon meine Vorwürfe erfolgten zu *„Unrecht und im Widerspruch zu den offenkundigen Tatsachen“.* Weiter heißt es*: „Die These des Klägers, dass eine ordnungsgemäße Durchführung der Untersuchung die Feststellung einer erheblichen Rechtsverletzung ermöglicht hätte, entbehrt jeder Grundlage und jeder Rationalität. Dies würde bedeuten, dass das Ergebnis der Untersuchung dadurch vorweggenommen würde, dass die Anschuldigungen des Klägers für berechtigt gehalten würden, ohne die Ermessensbefugnisse des OLAF im Rahmen der internen Untersuchung zu berücksichtigen.“* Dabei hatte OLAF meinen Tataschenvortrag doch selbst in allen Punkten bestätigt und gar keine rechtliche Analyse und keine Beweissicherung hinsichtlich der entscheidenden Aspekte vorgenommen.

Ich legte ein Rechtsmittel gegen die Entscheidung des Gerichts Erster Instanz zum Europäischen Gerichtshof ein. Während jenes Verfahren noch lief, erkannte die Kommission an, dass ich seit dem 02.03.2004 aufgrund meines Whistleblowings dienstbedingt erkrankt war. Mein Anwalt schickte dieses Anerkenntnis an den Gerichtshof, da somit zumindest aus unserer Sicht auch der Zusammenhang zwischen der beklagten OLAF-Entscheidung und der Verletzung meines Rechts auf körperliche Unversehrtheit belegt und von der Kommission anerkannt worden war. Der Gerichtshof aber lehnte es rundweg ab, dieses Schreiben und dessen Anlagen überhaupt zu den Verfahrensakten zu nehmen.

Wenig später kam die Entscheidung: Rechtsmittel zurückgewiesen! Was die oben zitierten Ausführungen des Gerichts Erster Instanz angeht, so nahm der Gerichtshof zu deren Überprüfbarkeit wie folgt Stellung: *„Die Randnrn. 40 und 41 des angefochtenen Beschlusses können somit im Rahmen der Prüfung des Rechtsmittels nicht gesondert überprüft werden“.*

Auf genau jene Passagen aus beiden Urteilen sollte sich dann später der Europäische Ombudsmann beziehen. Damit rechtfertigte er, dass er sich trotz seiner ursprünglichen Zusage sich nunmehr weigerte, meine erneute Beschwerde auf inhaltliche Überprüfung der OLAF Entscheidung überhaupt zu untersuchen. Und selbst heute, im Jahre 2011, dienen jene Sätze aus den Gerichtsurteilen dem

neuen Generaldirektor von OLAF noch immer dazu, jegliche inhaltliche Auseinandersetzung mit meinem Vorbringen zu verweigern.

Bezeichnend ist andererseits aber auch, dass selbst die Gerichte nicht jeglichen Rechtsschutz für mich ausgeschlossen hatten. Sie hatten mich vielmehr darauf verwiesen, dass ich ja Schadensersatz fordern könne, soweit mir nachweislich ein Schaden entstanden sei. In der Praxis erweist sich dies allerdings bisher ebenfalls als de facto unmöglich. Die Kommission und tendenziell auch die Gerichte behaupten insoweit nämlich einen Vorrang der Entschädigungszahlung wegen Berufskrankheit nach Art. 73 des Beamtenstatuts. Soll heißen: Bevor endgültig über eine Entschädigung nach Art. 73 des Beamtenstatuts entschieden sei, könne ich keinen Schadensersatz geltend machen.

Die Entschädigung nach jener Norm ist aber wiederrum an ein kompliziertes Verfahren gebunden. Zunächst erklärten Kommissionsvertreter mir gegenüber insoweit eine Entscheidung könne binnen eines Jahres getroffen werden. Ich berief mich demgegenüber vor Gericht auf die Standardfristen von 3 + 4 Monaten nach den Art. 90f. des Beamtenstatuts, musste mir dann aber vom Gericht sagen lassen, dass diese hier nicht anwendbar sind und stattdessen keine konkreten Fristen gelten.

Während der nächsten Jahre verschleppte die Kommission das Verfahren dann weiter und es wurde insoweit unlängst in einem anderen Prozess festgestellt, dass die Kommission hierbei zu Unrecht ihren Ärzten nicht einmal die Frage vorgelegt hat, ob mir nicht wenigsten eine Vorschusszahlung zusteht. Auch mehr als sechs Jahre nach meinem ursprünglichen Antrag auf Entschädigung ist das Verwaltungsverfahren insoweit immer noch nicht abgeschlossen, wobei sich an jenes unter Umständen noch ein weiteres gerichtliches Verfahren anschließen kann, da zumindest meiner Meinung nach die Kommission auch unabhängig von der Verfahrensverzögerung in jenem Verfahren etliche Verfahrensfehler begangen hat.

Dabei hatte ich bereits Ende 2006, nachdem die Kommission erstmals die Berufsbedingtheit meiner Erkrankung dem Grunde nach anerkannt hatte, versucht, eine einverständliche Lösung aller Streitigkeiten mit der Kommission herbeizuführen und vorgeschlagen, hierzu ein unabhängiges Mediationsverfahren durchzuführen. Dieser Vorschlag wurde durch ein ärztliches Gutachten über die Gesundheitsschädlichkeit der weiteren Auseinandersetzungen untermauert und auch der Europäische Ombudsmann sprach sich in einem Schreiben an Kommissionspräsident Barroso dafür aus, diesen Weg einer einverständlichen Konfliktlösung zu beschreiten. Aber Barroso, Chef einer Institution, die bereits mehrfach Gesetzesinitiativen zur Förderung von friedlicher Streitbeilegung und Mediation eingebracht hatte, lehnte diesen Vorschlag rundweg ab.

Ein großer Teil der Auseinandersetzungen zwischen mir und der Kommission bzw. OLAF betraf und betrifft die Frage des Zugangs zu, meiner Personalakte, sonstigen bei der Kommission über mich vorhandenen Daten und Dokumenten sowie zu weiteren Dokumenten nach Verordnung 1049/2001, vor allem im Zusammenhang mit der OLAF-Untersuchung. Meiner Meinung nach wird mir hier seit Jahren systematisch der mir rechtlich zustehende Zugang zu Dokumenten und Daten verwehrt. Und mit dieser Meinung bin ich nicht ganz allein, denn ein Großteil der bisher abgeschlossenen Ombudsmann-Verfahren betraf genau diese Fragen.

Insgesamt habe ich bisher 23 Beschwerden gegen EU-Institutionen beim Europäischen Ombudsmann eingereicht. 19 davon sind beendet, in 3 Fällen korrigierte die Verwaltung ihr Verhalten bzw. entschuldigte sich, in 8 Fällen stellte der Ombudsmann mindestens ein Verwaltungsfehlverhalten explizit fest. Zum Vergleich: betrachtet man alle Beschwerden, so kommt der Ombudsmann nur in 1,2% aller Fälle zur Feststellung von Verwaltungsfehlverhalten, bei mir liegt diese Quote bei 42,1%.

So heißt es z.B. in einer Entscheidung gegen OLAF bzgl. des Dokumentenzugangs zur Untersuchungsakte: *„Es bestehen Missstände in der Verwaltungstätigkeit, die er unter den Punkten 1.12, 2.5, 3.6, 6.7 und 6.12 der vorliegenden Entscheidung festgestellt hat … Diese Fälle belegen einen*

allgemeineren und intensiveren Streit … in dessen Rahmen das Organ an seinen (häufig auf Prinzipien beruhenden) Standpunkten beharrlich festgehalten hat, selbst wenn der Bürgerbeauftragte sie auf der Grundlage einer gründlichen Analyse nicht für gerechtfertigt hielt. Er verweist darauf, dass er bereits ohne Erfolg einen plausiblen Vorschlag für eine einvernehmliche Lösung in diesem Falle unterbreitet hat, hauptsächlich weil das OLAF dazu neigte, an seinen Standpunkten festzuhalten anstatt ordnungsgemäß auf die Punkte und Feststellungen des Bürgerbeauftragten einzugehen und sich an die einschlägigen Erfordernisse der Verordnung 1049/2001 in der Auslegung durch die Gemeinschaftsgerichte zu halten".

Aber der Europäische Ombudsmann leitete diese gravierenden Feststellungen nicht etwa in Form eines Sonderberichts an das Europäische Parlament weiter. Nein, er empfahl mir: *„Diesbezüglich wäre ein erneuter Zugangsantrag an das OLAF gemäß Verordnung 1049/2001 unter Verfahrensgesichtspunkten vermutlich Gewinn bringender als ein Empfehlungsentwurf des Bürgerbeauftragten"*. Dieser Empfehlung folgend stellte ich einen neuen Antrag bei OLAF und in einem Parallelverfahren auch bei der Kommission. Diese wurde dann seitens der Kommission und OLAF aber als *„unzulässiger Zweitantrag"* zurückgewiesen. Ich klagte und das bereits 2008 eingeleitete Verfahren ist bis heute noch immer nicht über den Verfahrensstand des schriftlichen Vorverfahrens hinausgekommen, da die Kommission hier immer neue Bescheide erließ und so versuchte, mich über Verfahrenstricks auszumanövrieren.

Dabei tut sich in diesem Verfahren wenigsten ab und an etwas. In einem anderen Gerichtsverfahren vor dem Gericht ist das schriftliche Vorverfahren seit mehr als zweieinhalb Jahren abgeschlossen und seit dem passierte gar nichts mehr. Effektiver und zügiger Rechtsschutz sieht meines Erachtens anders aus.

Aber zurück zu erwähntem *„unzulässigem Zweitantrag"*, denn dieser spielt eine Rolle im Hinblick auf die Antwort die Kommissionspräsident Barroso dem Europäischen Parlament auf die Anfrage E-3134/10 gab. Dort behauptete er *„Die Kommission hat noch nie einen Antrag auf Dokumentenzugang aus dem Grund abgewiesen, dass es sich um einen unzulässigen Zweitantrag handelte"*. Stellt sich für mich die Frage: Hat die Kommission keinen Überblick über ihre eigene Argumentation vor Gericht und mein Verfahren übersehen oder wurde das Europäische Parlament hier bewusst getäuscht?

Gerichtliche Verfahrensaktenzeichen zu meinen Fällen gibt es mittlerweile 20. Und auch hier ist meine formale Erfolgsquote weit überdurchschnittlich. Wie oben am Beispiel Beurteilung/Beförderung gezeigt, hat dies alles letztlich nicht viele fassbare Erfolge gebracht sondern meist nur neuen Streit und Ärger. Aber auch eine Erkenntnis: Das Verfahren für Beamte und Bedienstete vor den EU-Gerichten genügt offensichtlich nicht den Anforderungen an ein faires Verfahren nach Artikel 6 Abs. 1 der Europäischen Menschenrechtskonvention. Von Waffengleichheit kann hier keine Rede sein. Dies fängt mit der Nichteinhaltung der Sprachenregelung an, geht über die Beschränkung des Vortragsvolumens, die eingeschränkten Klagearten die Beweislastverteilung und die regelmäßige Nichtdurchführung von Beweisaufnahmen und prozessleitenden Maßnahmen weiter bis hin zur unklaren Kostenregelung u.a.m.

Unabhängig darüber entscheiden, ob diese meine Analyse zutrifft, könnte nur der Europäische Gerichtshof für Menschenrechte in Straßburg. Nach dessen bisheriger Rechtsprechung ist es EU-Beamten aber verwehrt dort die Verletzung ihrer Menschenrechte durch EU-Institutionen gerichtlich überprüfen zu lassen. Dies gilt jedenfalls solange wie die EU-Beitrittsverträge zur EMRK nicht vorliegen, ratifiziert wurden und in Kraft getreten sind. Obwohl der Lissabon-Vertrag das Gegenteil vorsieht, sind EU-Beamte gegenüber ihren Institutionen also bisher allein auf die EU-Gerichte in Luxemburg angewiesen und damit zumindest mit Blick auf das effektive Endergebnis meist rechtlos.

Die meisten Prozesse werden als unzulässig abgewiesen und die Institutionen, allen voran die Kommission, tricksen was das Zeug hält. Und die Gerichte lassen sie gewähren. Ein Beispiel: Im Jahre 2004 hatte ich mich beim Amt für Veröffentlichungen als Referatsleiter für das Referat Verträge beworben. Bei jener Bewerbung war es - abgesehen davon, dass dabei genau jene Beamten die ich bei OLAF angezeigt hatte über meine Bewerbung entschieden, diese zu jenem Zeitpunkt wussten dass ich sie angezeigt hatte, ich aber umgekehrt nicht wusste, dass sie es wussten. Dies alles war aber für die EU-Gerichte später kein Anlass deren Entscheidungen wegen Befangenheit aufzuheben.

Von entscheidender Bedeutung hingegen war, ob sich im Verfahrensablauf des Stellenbesetzungsverfahrens das Vorauswahlgremium vor dem 01.05.2004 oder danach konstituiert hatte. Im Verwaltungsvorverfahren und im schriftlichen gerichtlichen Verfahren trug die Kommission hierzu stets vor *„Die Frist für die Stellenausschreibung lief am 15. April 2004 ab. Dementsprechend nahm das Vorauswahlgremium seine Arbeit an diesem Tag auf"* und verwies auf zwei mit Aktenzeichen genau benannte Dokumente. Das Problem dabei: Jene beiden Dokumente, die die Konstituierung jenes Vorauswahlgremiums erst enthalten, sind beide erst nach dem 01.05.2004 entstanden, belegten also genau das Gegenteil des Kommissionsvortrages. Ich sah hierin den Verdacht eines versuchten Prozessbetruges. Doch sowohl das Beamtengericht als auch das Gericht folgten mir hierin nicht. Darf die Kommission also in Prozessen ungestraft unwahr vortragen?

Es gäbe noch so viele Details zu erläutern, die sich alle zum in der Eingangsthese beschriebenen Gesamtbild zusammenfügen. So z.B. hinsichtlich der Rolle des **OLAF-Überwachungsausschusses**. Diesen hatte ich als einen der ersten angesprochen und versucht dazu zu bewegen, die Rechtmäßigkeit der OLAF-Untersuchung zu überprüfen. Zunächst sah es auch so aus, als ob man dies tun wolle. Dann kam allerdings der Tillack-Fall dazwischen und man bat mich um etwas Geduld. Besonders zuversichtlich wurde ich, als mir ein Berichtsentwurf des Sekretariats des OLAF Überwachungsausschusses in die Hände fiel, der zahlreiche Verfahrensverstöße von OLAF im Zusammenhang mit meinem Fall kritisierte. Aber was passierte damit? Nichts! Nach dem man mich fast ein halbes Jahr vertröstet hatte, erhielt ich im September 2004 die Antwort: Der OLAF Überwachungsausschuss befasst sich grundsätzlich nicht mit einzelnen Fällen. Aber womit denn bitte dann? Warum mit Tillack und nicht mit Strack? Nur weil erstere sich öffentlich abspielte, während ich mich immer an die Regeln und meine Verschwiegenheitspflichten gehalten hatte? War dies mein größter Fehler? Übrigens bekam ich eine ähnliche Antwort vom Überwachungsausschuss auch nochmals 2010. Zuvor hatte ich auf die oben erwähnte Merkwürdigkeit hingewiesen, dass das angeblich unabhängige OLAF sich im Verfahren auf Dokumentenzugang darauf stützte, einen Entscheidungsfindungsprozess mit der Kommission schützen zu müssen.

Merkwürdiges durfte ich auch mit dem **Europäischen Datenschutzbeauftragten** erleben. So hielt dieser mich mehr als acht Monate lang mit der Übersendung einer versprochenen Entscheidung hin. Am letzten Arbeitstag vor Weihnachten rief Herr Hustinx mich dann persönlich an und teilte mir mit das Computersystem im Parlament sei zusammengebrochen. Er habe alles fertig, könne es jetzt aber leider nicht mehr rausschicken, am ersten Arbeitstag des neuen Jahres würde ich die Entscheidung bekommen. Aber bis in den März hinein hatte ich die Entscheidung immer noch nicht. Ist so jemand geeignet die Datenschutzinteressen der Europäischen Bürgerinnen und Bürger zu wahren?

Wenn es daran geht, all dies zusammenzufassen, so ist das einfachste – neben dem Verweis auf die Ausgangsthese – wohl die Übernahme eines Zitats aus dem Bericht der vom Europäischen Parlament eingesetzten Untersuchungskommission zur Santer Kommission. Aus meiner Sicht gilt jedes Wort davon heute genauso wie damals und dies weit über die Kommission hinaus: *„Die Verantwortung der Kommissionsmitglieder oder der Kommission insgesamt darf in der Praxis nicht nur eine vage Idee, ein unrealistischer Begriff sein. Man muß sich ständig der Verantwortung bewußt werden. Jeder muß sich*

für den Bereich, für den er zuständig ist, verantwortlich fühlen. Im Verlauf der vom Ausschuß durchgeführten Untersuchungen wurde allzu oft festgestellt, daß das Verantwortungsbewußtsein in der hierarchischen Kette versickert. Es wird schwierig, irgendeine Person zu finden, die sich auch nur im geringsten verantwortlich fühlt. Dieses Verantwortungsbewußtsein ist jedoch von wesentlicher Bedeutung. Man muß es in erster Linie von den Kommissionsmitgliedern und ihrem Kollegium erwarten. Der Versuch, den Begriff der Verantwortung seines wirklichen Inhalts zu berauben, ist gefährlich. Dieser Begriff ist eigentlicher Ausdruck der Demokratie."

5. Legal reforms are needed!
Rechtliche Änderungen sind nötig!

Ja, es bedarf dringend klarerer und besserer Rechtsnormen zum effektiven Schutz von Whistleblowern. Auf der Ebene aller Mitgliedstaaten und auch auf der Ebene der EU-Institutionen. Meine neben dem soeben dargestellten Dauerkonflikt trotz meiner Krankheit – die mit vielen Tälern und lethargisch-depressiven Phasen verbunden ist – noch verbleibende Kraft, widme ich diesem Thema. Auf nationaler Ebene in Deutschland, aber auch auf internationaler Ebene. Aber das Problem ist hier nicht wirklich fehlende Erkenntnis. Die „Recommended draft principles for whistleblowing legislation"[2] die Transparency International auch unter Mitwirkung vieler Experten und auch vom Whistleblower-Netzwerk e.V. entwickelt hat, wären eine sehr gute Basis, um den Whistleblowerschutz europaweit und weltweit entscheidend zu verbessern.

Woran es bisher fehlt, ist allein der politische Wille der Mächtigen, dies auch tun zu wollen. Sie haben längst erkannt: Whistleblowerschutz ist heute ein unverzichtbarer Bestandteil einer *„balance of powers"*. Aber welcher Mächtige will sich schon durch dahergelaufene Whistleblower kontrollieren und in die Suppe spucken lassen. In den Augen der Granden der Kommission ist mein Verhalten doch letztlich wohl nichts anderes als Majestätsbeleidigung und gerade nach der Vorlage dieses Papiers werden sie sich wohl noch mehr bemühen, mich zur Strecke zu bringen. Werden Sie verehrte Abgeordnete mich dann eigentlich schützen?

Im Rahmen der aktuellen Studie, die im Auftrag des Parlaments von PwC durchgeführt wurde, habe ich PwC unter anderem einen tabellarischen Vergleich vorgelegt, in welchem ich meine Sicht der gegenwärtigen rechtlichen und tatsächlichen Situation von Whistleblowern in den EU-Institutionen am Maßstab der TI-Empfehlungen gemessen habe. Auf der Basis jener Analyse habe ich auch einen konkreten Gesetzesvorschlag für eine Neufassung der Art. 22a und 22b des Beamtenstatuts entwickelt und PwC übersandt. Beides füge ich dieser Stellungnahme bei.

Was schließlich die Frage der Europäischen Regelung von Whistleblowerschutz auch über die EU-Institutionen hinaus angeht, so hat Whistleblower-Netzwerk e.V. schon 2006 anlässlich des Grünbuchs „Arbeitsrecht" einen Vorschlag entwickelt[3] und diesen 2010 in einer Stellungnahme an das Isländische Parlament im Rahmen der Isländischen-Modernen-Medien-Initiative IMMI[4] und 2011 im Rahmen eines Gesetzgebungsvorschlages für ein Whistleblowing-Gesetz in Deutschland[5] weiter konkretisiert.

Die Vorschläge liegen auf dem Tisch, es liegt an Ihnen, als Politiker diese nun aufzugreifen und umzusetzen. Man kann meines Erachtens die gemachten Vorschläge sogar noch weiter, auf einige wenige altbekannte Verfahrensgrundsätze herunterbrechen, als da wären:

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[2] http://www.transparency.org/content/download/48525/775659/Principles_Whistleblowing_Legislation.pdf

[3] http://www.whistleblower-net.de/content/view/41/43/lang,de/

[4] http://whistleblower-net.de/pdf/WBNW_Response_IMMI_incl_Annexes.pdf

[5] http://www.whistleblower-net.de/content/view/229/99/lang,de/

- **Audiatur et altera pars** – hören sie die Whistleblower an, binden sie sie in Kontrollprozesse ein. Es ist kein Wunder dass ein Parlamentsausschuss zu dem Ergebnis kommt, dass OLAF korrekt mit Whistleblower-Hinweisen umgeht, wenn er sämtliche Informationen nur über OLAF bezieht und dem betroffenen Whistleblower keinerlei Gelegenheit zur Stellungnahme gegeben wird.
- **Reziprozität von Rechten und Pflichten** – wenn eine Pflicht zum Whistleblowing besteht, muss dieser Pflicht auch ein einklagbares Recht des Whistleblowers entgegenstehen die korrekte Behandlung seiner Informationen und seiner Person durch die Institutionen incl. OLAF gerichtlich überprüfen zu lassen.
- **Faires gerichtliches Verfahren** – es darf nicht sein, dass die EU-Gerichte und insbesondere deren Verfahrensordnung auf dem Stand des französischen Verwaltungsprozessrechts der Mitte des vergangenen Jahrhunderts festgefroren und festgefahren bleibt. Hier besteht dringender Reformbedarf und es muss schnellstmöglich die Möglichkeit der Kontrolle von außerhalb der EU-Nomenklatura, z.B. durch den Europäischen Gerichtshof für Menschenrechte in Straßburg, geschaffen werden. Es muss Beweiserleichterungen geben, es müssen Beweisaufnahmen durchgeführt werden, Klagearten geschaffen werden, mit denen auch Ergebnisse in der realen Welt erzielt werden können, die Verfahrensvoraussetzungen müssen abgeschafft, die Sprachenreglungen eingehalten und das Recht der Betroffenen auf rechtliches Gehör und angemessenen Sachvortrag darf nicht durch Präklusionsreglungen und Seitenzahlbegrenzungen beschnitten werden.
- **Qui tam und Verrechtlichung** – es entspricht ständiger Rechtsprechung dass sich niemand, insbesondere kein Beamter und kein Whistleblower vor den EU-Gerichten als Wahrer des Allgemeinwohls und des Rechts aufspielen darf. Stets müssen hier eine eigene Beschwer und die Verletzung eigener subjektiver Rechte geltend gemacht werden. Wobei die EU-Gerichte insoweit noch weit restriktiver sind als nationale Gerichte. Andererseits haben sich Verbandsklagen im Umweltrecht auch in Europa und qui-tam Klagen von Whistleblowern im Rahmen der *„False Claims Acts“* in den USA seit langem bewährt. Vielleicht braucht das Allgemeinwohl halt eben doch auch jemanden, der sich vor Gericht zu seiner Bewahrung einsetzt. Außerdem bedarf es auch eines greifbaren Strafrechts und Mechanismen die strafrechtliche Sanktionen auch dann unabhängig und ohne Ansehung der Person durchsetzen können, wenn es um höchste Würdenträger der EU-Institutionen und von OLAF geht. Es braucht auch gegenüber den EU-Institutionen handlungsfähige unabhängige Staatsanwaltschaften die nach dem Legalitätsprinzip arbeiten, statt einen abhängigen OLAF-Chefs der nach freiem Ermessen agiert. Untreue zu Lasten des EU-Haushaltes, (Prozess-)Betrug, Urkundenunterdrückung und -verfälschung, Rechtsbeugung und Strafvereitelung im Amt sind Schwerstkriminalität, die, wenn sie von Mächtigen sanktionslos begangen werden können, die Rechtsordnung insgesamt untergraben.
- **Primat der Legislative** – dort wo Exekutive und Gerichte versagen und das bestehende Recht so auslegen, dass es keinen hinreichenden und effektiven Schutz für Whistleblower bietet, sind die Parlamente gefordert. Der US-Kongress hat sich dieser Pflicht bereits in mehreren Iterationen der Gesetzgebung zur stetigen Verbesserung des Whistleblowerschutzes gestellt. Das Europäische Parlament und die Parlamente der Mitgliedstaaten sind gefordert diesem Beispiel zu folgen. Dies gilt umso mehr, als

Whistleblower die natürlichen Verbündeten der Parlamente sind: Jedenfalls dann, wenn sie sich ernsthaft um eine Kontrolle der Exekutive bemühen.

6. **But even with legal reforms whistleblowing against powerful people is still a fight betwen powers in which whistleblowers need powerful supporters: to reveal the truth, to protect the whistleblower, to achieve the necessary changes and to sanction the wrongdoers and those covering up.**

   Aber auch mit rechtlichen Änderungen ist Whistleblowing, welches sich gegen Mächtige richtet, ein Machtkampf bei welchem Whistleblower starke Verbündete brauchen: um die Wahrheit ans Tageslicht zu bringen, den Whistleblower zu schützen, die notwendigen Änderungen zu erreichen und die Übeltäter und Vertuscher zu sanktionieren.

Andererseits denke ich, dass mein Fall mit etwas gutem Willen und Aufrichtigkeit, mit der Bereitschaft Verantwortung zu übernehmen und Verantwortung auch bei anderen einzufordern, auch auf der Basis des geltenden Rechts hätte anders gelöst werden können, ja müssen. Das Hauptproblem ist demnach nicht das fehlende Recht, sondern die mangelnde Bereitschaft der Mächtigen es – ohne Ansehung der Person – anzuwenden. Die Spitzen der Institutionen der Europäischen Union sind aus der Sicht meiner Erfahrungen ein eng zusammenhaltender, abgeschotteter Kreis von sich gegenseitig deckenden Eliten. Wer es aus diesem Kreis wagen würde, sich an die Seite von Whistleblowern zu stellen, müsste damit rechnen, dass die Leichen aus seinem Keller an die Öffentlichkeit gespült werden, er aus diesem Kreis ausgeschlossen würde und somit selbst nichts mehr bewegen könnte. Vor die Wahl, zwischen Wahrheit, Ethos und Recht auf der einen Seite und Machterhalt auf der anderen gestellt ist klar, für welche Seite sich die politisch Agierenden entscheiden.

Grundsätzlich besteht diese Problematik auf nationaler Ebene ebenfalls, auf europäischer Ebene scheint sie mir jedoch nochmals verstärkt. Hierzu trägt die Komplexität und Intransparenz des Systems, die Isolation der darin befindlichen Einzelnen, aber vor allem der Mangel an einer beobachtenden europäischen Öffentlichkeit entscheidend bei. Auch Journalisten fahren besser, wenn sie sich mit diesem System arrangieren und so Einladungen, Informationen, Reisen und Kampagnengelder bekommen, als wenn sie gegen das System aufbegehren und unangenehme Wahrheiten an die Öffentlichkeit bringen.

7. **The choice and the responsibility are YOURS!**

   Die Entscheidung und die Verantwortung liegen bei IHNEN!

Als ich von meiner Einladung hörte, habe ich versucht andere EU-Whistleblower dazu zu bewegen, an diesem Hearing zumindest als Zuhörer teilzunehmen. Keiner der Angesprochenen hatte daran Interesse. Alle haben sie längst den Glauben verloren, noch irgendetwas bewegen und ändern zu können. Eine beispielhafte Aussage war: *"I strongly believe that to protect whistleblowers and make it easier for people to step forward, it is not about laws but a change of attitude. In my case a lot of rules and regulations COULD (and SHOULD) have been used to prevent what happened, but it was chosen not to use the rules..... But whether this is possible in the EU, I do not believe it anymore. There will always be a way around a law or rule.....and in my case the "guilty" ones are still in the EU or around"*.

Ich bin hier, weil ich noch nicht aufgegeben habe. Obwohl mir meine Vernunft genau dies rät. Ein rationales Analysieren meiner Erfahrungen kann nur zu einer Schlussfolgerung führen: Auch der Rechnungsprüfungsausschuss und seine Mitglieder werden sich nicht ihrer Verantwortung stellen.

Sie werden meinem Fall genauso wenig nachgehen, wie alle anderen angesprochenen Institutionen dies bisher getan haben. Keiner wird sich mit der übermächtigen Kommission und den sie deckenden Chefs der großen Parlamentsfraktionen anlegen. Was macht es da schon, wenn einige Milliönchen verschleudert wurden, die strukturellen Defizite bei der Mittelverwendung und -kontrolle fortbestehen, OLAF und andere Überwachungsgremien ihren Job nicht tun, die Gerichte nicht unabhängig sind und Aufklärung eher verhindern statt sie zu betreiben oder dass die Kommission auf Parlamentsanfragen nicht wahrheitsgemäß antwortet. Hauptsache der Schein und die Stabilität bleiben gewahrt, notfalls auch nach ein paar kosmetischen Korrekturen des Whistleblowing-Regimes die die „Null-Toleranz-Politik" dann in neuem Glanz erstrahlen lassen.

Dies sagt mein Verstand, aber mein Herz und meine Verzweiflung hoffen. Hoffen, dass Sie den Mut haben werden, Verantwortung zu übernehmen und den Dingen nachzugehen. Ich fordere Sie auf: machen Sie von Ihrem Recht und ihrer obersten Pflicht zur Kontrolle der Exekutive gebrauch, setzen Sie einen Untersuchungsausschuss ein, der alle Whistleblowing-Fälle seit dem Rücktritt der Santer-Kommission untersucht und vor allem dazu auch alle betroffenen Whistleblower anhört und einbindet. Danach werden Sie vermutlich wesentlich mehr darüber wissen wie die EU-Institutionen im Innern wirklich funktionieren und mit kritischen Geistern umgehen.

Aber nicht nur dies. Meiner Meinung nach ist die Aufarbeitung der jüngsten Vergangenheit auch die *„conditio sine qua non"* für den Erfolg jeder in die Zukunft gerichteten Maßnahme, wie z.B. einer Änderung des Beamtenstatuts. Beobachter von Missständen werden, selbst wenn es einen formalen Zwang zur Meldung gibt, nur dann zu Whistleblowern, wenn sie Vertrauen haben. Vertrauen, dass ihrem Vorbringen unabhängig nachgegangen wird, Missstände abgestellt werden und sie selbst dabei nicht zu Schaden kommen. Aber wie soll jemand, der sich auch nur ein wenig mit den Schicksalen von EU-Whistleblowern der letzten Jahre beschäftigt, Vertrauen entwickeln. Wer hinsieht, sieht nur aufrichtige Whistleblower, die am System und seinen tragenden Akteuren gescheitert sind und am Ende gefeuert, krank oder beides waren und Täter, die Karriere machten. Hier helfen keine schönen Worte und Gesetze mehr, sondern nur klare und eindeutige Taten. Eine Untersuchung der Altfälle und die Rehabilitation der Opfer, um dem nötigen Neuanfang wenigstens eine Chance von Glaubwürdigkeit zu geben.

Die Frage ist nur, wollen Sie dies? Wollen Sie funktionierendes Whistleblowing als Frühwarnsystem oder lieber in 1, 5 oder 10 Jahren die nächsten gescheiterten und zerstörten Whistleblower, den nächsten großen Skandal und wieder die gleiche fruchtlose Diskussion wie 1999, 2006 anlässlich der ersten Whistleblowing Studie? Die Entscheidung, sehr geehrte Abgeordnete, liegt bei IHNEN.

Köln, 12.05.2011 *Guido Strack*

Annexes:

Weitere Informationen über meinen Fall sind verfügbar unter: http://ansTageslicht.de/strack

ANNEX I

A comparison of the state of EU-internal-whistleblowing with TIs best practice principles

Please find under each TI-Principle my evaluation of that principle (on the left) and my change proposal as far as EU is concerned (on the right). Of course this is a purely subjective view.

Definition

1. *Whistleblowing* – the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.

There is no clear concept of WB in the institutions the staff regulation definition is far too narrow and unclear.	The EU needs to encourage politicians to make people aware of the strengths of whistleblowing and should adapt clear rules: a) for internal WB in the institutions (revised art. 22a and 22b of staff regulations); b) for WB to the EU-institutions and in areas where EU-laws and budgets are involved; and c) to strengthen and harmonise WB legislation in the member states

Guiding principles

2. *Disclosure of information* – whistleblowing legislation shall ensure and promote the disclosure of information in order to avert and sanction harm.

Currently there is no such promotion. The reality are a lot of failed WBs suffering and institutions that defend themselves and block any transparency.	Educational and informational efforts are needed to promote WB. What is needed is good examples of WBs who did not suffer but were praised for their achievements. EU would need to re-examine old WB-cases and to award damages to the victims it created among the WBs who have come forward until now in order to at least aim for some credibility.

3. *Protection of the whistleblower* – the law shall establish robust and comprehensive protection for whistleblowers, securing their rights and ensuring a safe alternative to silence.

There is not any reliable legal protection for WBs. Art. 22a §3 is useless as it leaves the burden of proof with the WB against the Institution that possesses all powers. As shown by T-4/05 and C-236/07P WB have no right to challenge investigation results or receive damages in court either. The STRACK story also shows that the whole court system is not able to protect WBs against the negative reactions they face. Strack is not a single case but most of the other WBs are also damaged, they just give up earlier.	The burden of proof must be changed. There must be a legal right to challenge the correctness of the investigation in court and the court system would also need massive reform to become fair and effective and to better assure equality of arms between the lonesome WB and the powerful institution.

Scope of application

4. *Broad subject matter* – the law shall apply to disclosures covering wrongdoing including, but not limited to, criminal offences, breaches of legal obligation, miscarriages of justice, danger to health, safety or the environment, and the cover-up of any of these.

Unclear and very limited scope and even in those areas OLAF does not necessary feel competent to	Any wrongdoing, risk or danger for the interest of the EU should be covered for internal and

act.	external WBs.

5. *Broad coverage* – the law shall apply to all those at risk of retribution, including both public and private employees and those outside the traditional employee-employer relationship (e.g. consultants, contractors, trainees, volunteers, temporary workers, former employees, job seekers and others). For the purpose of protection, it shall also extend to attempted and suspected whistleblowers, those providing supporting information, and any individuals closely associated with the whistleblower.

Only applicable to EU officials so very limited coverage.	My attached proposal also only covers EU-officials however there need to be similar rules in all areas involving EU activities and finally in all EU member states.

6. *Requirement of good faith limited to honest belief* – the law shall apply to disclosures made in good faith, limited to an honestly held belief that the information offered at the time of the disclosure is true. The law shall stop short of protecting deliberately false disclosures, allowing them to be handled through the normal labour, civil and criminal law mechanisms.

22a and b use a quite unclear language and do seem to go beyond that requirement.	See proposal, where I tried to follow the TI advice.

Disclosure procedures

7. *Incentivise internal reporting* – the law shall encourage the establishment and use of internal whistleblowing systems, which are safe and easily accessible, ensure a thorough, timely and independent investigation of concerns and have adequate enforcement and follow-up mechanisms. 2

The staff regulations foresees only an obligation to report internally or to OLAF first it does not create any obligation for the institutions to do anything but only obligations for the WB. The breach of the Obligation to inform Mr. STRACK which was found by the Ombudsman in 140/2004/PB did not lead to any consequences.	See proposal, where I tried to follow the TI advice.

8. *Ease of external reporting* – at all times, the law shall provide for easy external disclosure, including, among others, to regulatory bodies, legislators, professional media and civil society organisations. If there is a differentiated scale of care in accessing these channels3, it shall not be onerous and must provide a means for reporting on suspicion alone.

22b which is considered to be external reporting is not really external as information still is stuck within the institutions on the level of their presidents. To my best knowledge there is not any case where the addressed Presidents of the other institutions did do anything but to inform OLAF about whom the complaint was.	There should be an obligation for the current presidential addressees to investigate and to hear the WB, there must also be other external addressees e.g. member states and single members of EP if the presidents fail to act.

9. *National security* – where disclosure concerns matters of national security, additional procedural safeguards for reporting may be adopted in order to maximise the opportunity for successful internal follow-up and resolution, without unnecessary external exposure.

In the EU there would be nobody to investigate such WB in the first place, OLAF and IDOC are obviously incompetent in that field.	In principle here as well general principles should apply.

10. *Whistleblower participation* – the law shall recognise the whistleblower as an active and critical stakeholder to the complaint, informing him or her of any follow-up and outcomes of the

disclosure and providing a meaningful opportunity to input into the process.

WBs receive no information at all, not even if their identity is divulged to the accused persons.	See proposal, where I tried to follow the TI advice.

11. *Rewards systems* – depending on the local context, it shall be considered whether to include further mechanisms to encourage disclosure, such as a rewards system or a system based on *qui tam* which empowers the whistleblower to follow up their allegations.4

No rewards at all are provided.	Positive notation should be considered. Rewards in agreement with staff committee might also be useful, though not a priority in a civil service context.

Protection

12. *Protection of identity* – the law shall ensure that the identity of the whistleblower may not be disclosed without the individual's consent, and shall provide for anonymous disclosure.

There are some vague promises from OLAF but there is not any legal protection behind that and the WB would not even know if his identity is disclosed.	See proposal, where I tried to follow the TI advice.

13. *Protection against retribution* – the law shall protect the whistleblower against any disadvantage suffered as a result of whistleblowing. This shall extend to all types of harm, including dismissal, job sanctions, punitive transfers, harassment, loss of status and benefits, and the like.

Formally there is 22a § 3 but it only protects against the institution.	See proposal, where I tried to follow the TI advice.

14. *Reversed burden of proof* – it shall be up to the employer to establish that any measures taken to the detriment of a whistleblower were motivated by reasons other than the latter's disclosure. This onus may revert after a sufficient period of time has elapsed.

The WB has to prove in a court which typically does not even hear witnesses and against an institution who takes the decisions that decides which investigations they want to do and which documents they disclose. So no chance to win at all, and if you get sick Art. 73 blocks any damages and leads to very lengthy formal proceedings in which the institutions are the ones setting the rules and taking the decisions.	See proposal, where I tried to follow the TI advice.

15. *Waiver of liability* – any disclosure made within the scope of the law shall enjoy immunity from disciplinary proceedings and liability under criminal, civil and administrative laws, including libel, slander laws and (official) secrets acts.

No such thing in EU-law however legality of WB under 22a should exclude breaches of other staff norms.	At least some elements of this are implemented in my proposal.

16. *No sanctions for misguided reporting* – the law shall protect any disclosure that is made in honest error.

No fully clear under 22a and 22b.	See proposal, where I tried to follow the TI advice.

17. *Right to refuse* – the law shall allow the whistleblower to decline participation in suspected wrongdoing without any sanction or disadvantage as a result.

Art.21a of the staff regulation foresees a certain right to refuse but is not covered by any protection and not included in 22a and 22b	See proposal, where I tried to follow the TI advice

18. *No circumvention* – the law shall invalidate any private rule or agreement to the extent that it obstructs the effects of whistleblower legislation.

This should not be an issue for officials but there is to my knowledge no EU legislation on this, or in private employment areas either	Not relevant for my proposal but should be covered in other areas.

Enforcement

19. *Whistleblower complaints authority* – the law may create an independent body (or appoint an existing one) to receive and investigate complaints of retaliation and/or improper investigation. This may include the power to issue binding recommendations of first instance and, where appropriate, to pass on the information to relevant prosecutorial and regulatory authorities.

The ombudsman could play such a role but too often he either refrains from a fully fledged conflict with the institutions or his recommendations are ignored by the institutions. As with the successful complaints of Mr. STRACK at the ombudsman (e.g. 1434/2004/PB, 3402/2004/PB, 144/2005/PB, 3002/2005/PB, 429/2007/PB, 672/2007/(WP)PB and 56/2007/PB).	The ombudsman is there but he could do an even better job and more often act publicly and by informing the EP.

20. *Genuine day in court* – any whistleblower who believes he or she has suffered injury to his or her rights shall be entitled to a fair hearing before an impartial forum with full right of appeal.

No chance see T-4/05 and C-236/07P.	See proposal, where I tried to follow the TI advice.

21. *Full range of remedies* – the law shall provide for a full range of remedies with focus on recovery of losses and making the complainant whole. Among others, this shall include interim and injunctive relief, compensation for any pain and suffering incurred, compensation for loss of past, present and future earnings and status, mediation and reasonable attorney fees. The law shall also consider establishing a fund for compensation in cases of respondent insolvency.

In reality there is currently no chance to get any remedy.	Firstly the preconditions access to court, reform of the court-system and change of onus need to be solved

22. *Penalty for retaliation and interference* – any act of reprisal or interference with the whistleblower's disclosure shall itself be considered misconduct and be subject to discipline and personal liability.

Does not exist – however even current disciplinary rules could fit but are not used.	See proposal, where I tried to follow the TI advice.

Legislative structure, operation and review

23. *Dedicated legislation* – in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectorial approach.

Only staff rules.	For the moment my proposal sticks to the staff rules as well, but of course a wider legislation should be aimed for.

24. *Whistleblowing body* – the law shall create or appoint a public body to provide general public advice on all matters related to whistleblowing, to monitor and review periodically the operation

of the whistleblowing framework, and to promote public awareness-building measures with a view to the full use of whistleblowing provisions and broader cultural acceptance of such actions.

Does not exist – other institutions do not care and intervene even when they are addressed by WBs.	I did not take that into my proposal as it would involve major reforms – there are other institutions and there is OLAF which should simply do their job. So if there is any reform it should firstly aim to make OLAF really an independent body.

25. *Publication of data* – the law shall mandate public and private bodies of sufficient size to publish disclosures (duly made anonymous) and to report on detriment, proceedings and their outcomes, including compensation and recoveries, on a regular basis.

No data. As far as the related issue of access to documents is concerned with its revision proposal to regulation 1049/2001 the Commission is trying to gain even more control and implement even more restrictions.	This should become part of a transparency and WB-promotion initiative which also needs to enlarge and ease usage of access to information rights.

26. *Involvement of multiple actors* – it is critical that the design and periodic review of any whistleblowing legislation involves key stakeholders, including trades unions, business associations and civil society organisations.

No other actors are involved and staff representations do not care or protect whistleblowers.	The proposal tries to get some more actors into play.

27. *Protection of media sources* – nothing in the law shall detract from journalists' rights to protect their sources, even in case of erroneous or bad faith disclosures.

The Hans Martin Tillack case illustrates how EU-Institutions hunt such journalists and are even backed up by the EU-courts	Does not fully belong into a staff regulation based proposal, however some elements of going public are included in my proposal. Should of course be included in a full proposal of legal acts reaching beyond the staff regulation

ANNEX II

Proposal for the revision of articles 22a and 22b of the EU-staff regulation

Article 22a (Internal Whistleblowing)

1. Any official who becomes aware of or honestly believes in the existence of breaches of law, non-compliance of other officials with obligations or fundamental ethical principles, waste and/or risks detrimental to the interests of the European Union has the right to inform and to provide supporting information to either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions. Each institution must also provide a specific recipient and communication channel which allows anonymous communication of messages according to this article and keeps the name of the informing official as confidential as possible. In areas concerning the competences of the Anti-Fraud Office (OLAF), OLAF can also be addressed directly.
2. The institution assures that each official who communicates according to paragraph 1 (whistleblower) receives a prompt confirmation of reception and within four weeks is informed about the approximate duration needed for analysing his message, which should not exceed six months. If these six months are exceeded the whistleblower shall be informed about the reasons for this extended duration and the estimated total duration. The same applies for every consecutive period of three months. The institution and/or OLAF is also responsible for informing the whistleblower immediately of any breaches or risks to his anonymity or confidentiality.
3. Each whistleblowing message is promptly and adequately analysed and followed up by the recipient or its institution. The whistleblower has a right to be properly informed and heard before an analysis is finished. He is also informed about the final outcome and has the right to access the related documents.
4. Each institution assures that analyses are done by competent bodies and cannot be influenced by people accused or suspected by the whistleblower. If preliminary analysis gives reasons that the matter involves areas within the competences of OLAF the case is transferred to OLAF. The whistleblower shall be informed promptly about that transfer. In relation to the whistleblower and the treatment of the whistleblowing OLAF has the same obligations as a primary recipient and his institution.
5. The procedural, privacy and data protection rights of anybody involved as well as the secrecy needs of the institutions are respected throughout the treatment of whistleblowing cases.
6. An official shall not suffer any prejudicial effects of his whistleblowing or its preparation on the part of the institution and shall be protected by the institution against any such effects that do or could arise from other officials or third parties. If the whistleblower suffers negative effects and a relation to his whistleblowing cannot be excluded, it is for the institution to prove that such a relation did not exist. The institution is also responsible for assuring that persons accused or suspected by a whistleblower cannot negatively influence his career.
7. The previous paragraphs constitute rights of the whistleblower. The Institutions shall monitor and regularly evaluate the application of these provisions and undertake proactive measures and provide risk awareness and whistleblowing training and independent counselling to their officials to support best usage of these provisions.
8. Undue interference into a whistleblowing process by an official (e.g. breach of anonymity or confidentiality, manipulation of an analysis or any detriment of a whistleblower) shall make him liable to disciplinary action. The same fits for officials who misuse the whistleblowing process, However whistleblowers only lose their rights from articles 22a and 22b if it can be shown that they did not act with honest believe. This will require showing that the official had knowingly raised a false concern or knowingly provided false information.
9. This article applies also in any case in which an official uses his rights under article 21a or where an official has a duty to report about issues mentioned in paragraph 1

Article 22b (External Whistleblowing)

1. A whistleblower who honestly believes that his rights under article 22a were not respected (e.g. by not providing a reply within the given delay or by an insufficient analysis of his whistleblowing) or who honestly believes in the existence of breaches of law by officials in grade AD 14 or above and/or by Members of his institution or OLAF is entitled to inform and provide supporting information to the President of the Commission or of the Court of Auditors (if the areas of the competences of the Court of Auditors are concerned) or of the Council or of the European Parliament, or to the European Ombudsman.
2. A whistleblower who honestly believes that his rights under article 22b paragraphs 1 and 4 were not respected (e.g. by not providing a reply within the given delay or by an insufficient analysis of his whistleblowing) is entitled to inform and provide supporting information about suspected wrongdoing detriment to the interest of the European Union or suspected criminal behaviour of its officials and/or Members of its institutions to the government or the competent public procurement authorities of any member state or to any member of the European Parliament and the Court of Auditors.
3. The recipients mentioned in paragraph 1 and 2 also have the right to inform the public if they deem that this is necessary.
4. The rights and obligations of article 22a respectively apply to whistleblowers and recipients under article 22b. A recipient under article 22b has the right to question a previously involved recipient and/or institution about his treatment of the whistleblowing and shall be provided with the necessary information for his analysis.
5. Even if the procedures and formalities of article 22a and the previous paragraphs of this article have not been respected a whistleblower cannot be made liable to disciplinary action for unauthorised obtaining, disclosing and/or publishing information if this information was authentic and proves breaches of law by officials in grade AD 14 or above and/or by Members of the institutions. In all other cases of unauthorised whistleblowing the truthfulness of the information disclosed and its importance for the interests of the European Union must be taken into account before disciplinary action can be undertaken

Explanatory Remarks:

Article 22a

Deals with internal whistleblowing but according to article 22b§4 it also sets the basic rules for external whistleblowing of EU-officials and via article 11 of the conditions of employment of other servants also for other staff of the institutions.

§1

Constitutes a right to blow the whistle but avoids creating an obligation as such an obligation typically cannot be properly enforced anyhow. It uses a broad subject area to allow most benefit from whistleblowing and best cultural acceptance. The recipients of this internal whistleblowing are the same as those currently mentioned in article 22a§1 plus an extra channel that allows for anonymous communication (thanks to §2 and §3 this must be a channel allowing two-way communication). As a general rule the name of the whistleblower is kept as confidential as possible.

§2

This § constitutes reporting obligations for the institutions and/or OLAF and fixes a standard duration of 6 months for the analysis after which even stricter reporting rules apply.

§3

This § constitutes analysing and follow-up obligations for the institutions and/or OLAF. Of course this does not give the whistleblower a right to a certain result or measure against the wrongdoer, however the analysis must respect normal procedural rules and must be done truthfully. According to phrase 2 and 3 the whistleblower has a right to be heard and informed.

§4

The institutions are obliged to be prepared for doing a proper analyse where they are competent and to transfer to OLAF where OLAF is competent. The whistleblower here as well is kept informed.

§5

This § applies to the whistleblower as well as to suspects. It describes also limits of the information duties and possibilities vis-à-vis the whistleblower.

§6

This § represents the current 22a§3 in an enriched version including a shift of onus and a duty to protect against third parties and a career protection duty. Preparatory acts are equally protected.

§7

Explicitly stating that all these are rights of the whistleblower opens him article 90II and the way to the Court to challenge the correctness of analysis and follow up, thus the deficits shown by T-4/05 and C-236/07P are overcome. The phrases 2 and 3 assure that potential whistleblowers know their rights and that the institutions promote best practice usage and evolution of the system.

§8

This § creates a clear risk for those who misuse or interfere with the whistleblowing process. The third phrase makes clear that throughout articles 22a and 22b it is assumed that whistleblowers act with honest belief and that this assumption can only be overcome if there is proof that the whistleblower acted against his own better knowledge.

§9

Makes clear that remonstration is a sub-form of whistleblowing. It is also one for which there is already a duty. There could be other duties to report following from individual job descriptions (e.g. at supervising tasks or where an official has budget responsibilities) or form more general norms of the staff regulation as e.g. article 21 or form other EU-law. In all these cases whistleblowers should enjoy the full protection of articles 22a and 22b).

Article 22b
As its current counterpart deals with external whistleblowing to other institutions but also adds other possible direct or indirect recipients.

§ 1
The addressees are those mentioned in the current version but the conditions for addressing are different. The first alternative deals with secondary whistleblowing in which 22a has been used before but the whistleblower in good faith assumes that he or his information has not been treated correctly. The second alternative provides for a direct possibility of external whistleblowing to other institutions and has the same basic conditions but has a limited subject area compared to §22a§1 as it only applies to suspected breaches of law by very high ranking EU officials and representatives.

§2
This § creates a new really external whistleblowing possibility in cases where even 22b§1 failed. Here whistleblowing can be addressed to designated additional addressees that have a certain competence of controlling the EU-Institutions and/or its officials. The subject matter is limited to suspected wrongdoing detriment to the interest of the European Union and suspected criminal behaviour.

§3
The addressees mentioned in §§ 1 and 2 – but not the whistleblower himself – can inform the public if necessary.

§ 4
Makes clear that the general rules of 22a (information, analysis …) also apply under 22b and clarifies them in certain constellations.

§ 5
While for all previous norms it is sufficient that a whistleblower acts with honest belief and respects the procedures §5 takes an opposite approach and only comes into play if a wrongdoing of a high ranking official or Member really took place and can be proven from the material provided by a whistleblower. In this situation the content wins over form and the importance of the information becoming available and the corresponding interests of the European Union take precedent over the sanctioning of the whistleblower. The final phrase assures that in all other cases, especially of public and media whistleblowing, a whistleblower cannot be sanctioned before the truthfulness and importance of his message has been verified and taken into account. This § does not set wrong incentives as for the whistleblower the hurdle to prove the wrongdoing is quite high which normally will make him try the normal procedures first. However as a last resort this § is important.

EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Investigations & Operations
Internal investigations, direct expenditure and structural actions : Anti-Corruption

Brussels, 01687 05.02.2004
NT/sr D (2003-AC-19723)

OLAF Operations

Final Case Report

Case Identification

CMS No.	OF/2002/0356
CMS Title	Application of Commission Decision C(2002)845
Legal Basis	Art 9, Regulation (EC) No 1073/1999
Type of case	Internal investigation cases
Adviser in charge	BAADER Peter
Investigator in charge	THOMSON Neil

Summary

Date of opening decision	18/10/2002
Financial Impact (EURO)	None
Results of the investigations	☒ no irregularity found ☒ no follow-up action required

Executive summary

On the basis of information from [redacted] three main allegations were made against officials of OPOCE in relation to a contract with ADL to consolidate of EU legislation.

The first allegation, made [redacted] was that OPOCE officials had committed an irregularity in failing to levy penalties on [redacted] for underperformance, as provided for in the contract.

The second allegation, also made [redacted] was that OPOCE officials misled the CCAM to a possibly fraudulent degree when applying for an Avenant to the Contract benefiting [redacted]

The third allegation, which arose from a suspicion on the part of the OLAF evaluator, was that OPOCE officials colluded with [redacted] to award [redacted] the Contract at a low price and pay [redacted] more later.

On the basis of a review of the relevant documentation the third allegation has been dismissed outright and the other two allegations rejected on the basis that they refer to nothing more than commercial decisions taken in the context of a difficult contract.

Initial information

By an email to Mr BRUENER on 30 July 2002 (to which was appended a large amount of documentation), [redacted] made an allegation concerning OPOCE, [redacted]

OPOCE is the Office of Official Publications of the European Communities. According to his email, [redacted] allegation related to OPOCE Contract 1896.

Contract 1896 had been concluded in June 2000 by OPOCE with a consortium, which shortly afterwards took the name [redacted] contracted to provide to OPOCE consolidated texts of European legislation (ie, consolidating into single documents each original act with all its subsequent amendments and corrections).

[redacted] stated that [redacted] gained the Contract because they quoted a far lower price than their competitors.

[redacted] stated that the contract was a "*framework contract*", and [redacted] said that it was also concluded with Euroscript S.A., but that Euroscript, because of their much higher price, were never called upon by OPOCE. (In fact, it is clear from OLAF's review that the contract was concluded as a 'multiple framework contract'. This is a provision by which the European Commission can simultaneously conclude contracts for the same services with several contractors, on whom the Commission then calls, when making specific orders within the contract, in the order of the contractors' scores during the evaluation process. In this way, a lower-placed bidder may replace a higher-placed one where the latter is unable to carry out a particular order. It is stated in the 'CCAM Vademecum' that this procedure should be used only in exceptional circumstances, where there is uncertainty over the amount of work to be ordered by the Commission under the contract and of the capacity of the winning bidder to accommodate the full amount.)

[redacted] stated that from the start of the contract [redacted] failed to produce the number of pages of consolidated text which they had contracted for. Instead [redacted] complained that they were being asked to follow different procedures from those agreed. [redacted] later clarified this point: it seems that the Contract had two main phases: firstly the conversion of the legislation into computer source files in the format necessary to enable consolidation, and secondly the consolidation itself. In bidding for the Contract [redacted] had calculated that the greater part of its margin would come from the first phase, ie providing the source files; however, it turned out that OPOCE required far fewer source files than [redacted] had expected, with the effect that the Contract became uneconomic for [redacted] in fact threatened legal action against the Commission on the basis that OPOCE's tender specifications had been misleading as to the number of source files required.)

In May 2001, therefore, OPOCE and [redacted] arrived at a compromise, changing the requirements of the Contract to the benefit of [redacted]

[redacted] stated that [redacted] however, failed to comply even with the revised regime. Although the contract between OPOCE and [redacted] included provision for mandatory penalties which would fall on the contractor for failure to meet the contract terms, [redacted] stated that his Head of Unit, [redacted] refused to levy any penalties on [redacted]

[redacted] stated that in late summer 2001 [redacted] told OPOCE that [redacted] was losing money on the contract and faced bankruptcy unless the contract could be amended in [redacted] favour. [redacted] stated that the [redacted] was by this time OPOCE's negotiator with [redacted]

[redacted] stated that in December 2001, following negotiation, an 'Avenant' to Contract 1896 was agreed. This had the effect of increasing the unit price of [redacted] output, thus benefiting [redacted] At the same time the total number of pages required was supposed to be reduced, leading to a reduction of 14% in the total cost of the contract to OPOCE.

[redacted], however, that in early 2002, [redacted] asked to be paid for producing the pages that were supposed to have been "*saved*", ie pages which did not have to be produced, by the terms of the December 2001 Avenant. Ultimately OPOCE agreed yet another pricing structure which, according to [redacted] increased the cost to OPOCE by 58% compared with [redacted] original tender. [redacted] commented, however, that this still left [redacted] price far lower than that of the only other valid bidder at the time the contract was awarded).

The allegations

The first allegation – irregular failure by OPOCE officials to enforce the penalty clause of the Contract with [redacted]

In his email of 30 July 2002, Mr STRACK expressed his allegation as follows:

"*My fundamental concern is that* [redacted] *and* [redacted] *might have applied and amended contract 1896 in an incorrect way against the financial interests of the Communities.*"

Apparently, therefore, [redacted] was alleging only irregularities on the part of OPOCE officials.

In [redacted] email, Mr [redacted] did also make reference to [redacted] engaging in "*illegal activities, aiming more to assure sufficient financial benefits for* [redacted] *than to defend the financial interest of the Communities ...*" However, [redacted] explained that by speaking of "*illegal activities*" [redacted] meant that [redacted] continued to demand the right to be paid by OPOCE for more pages than had been previously agreed. [redacted] appears therefore to have been using the term "*illegal*" to mean something along the lines of "*in breach of contract*".

In any case, [redacted] made no allegation in [redacted] email of any illegality on the part of Commission officials.

The second allegation – possible fraud by OPOCE officials in misleading the CCAM when applying for an Avenant to the Contract

As discussed below, however, in a telephone conversation with the Investigator on 17 December 2003, [redacted] did allege that OPOCE officials acted fraudulently in misrepresenting the real position when they applied to the CCAM for the Avenant to the Contract in December 2001.

The third allegation – collusion between OPOCE officials and [redacted] in awarding the contract to [redacted] at a very low price with the intention of paying [redacted] more later.

OLAF's assessment of the initial information

An OLAF evaluator carried out an assessment of the case. The assessment was based on the contents of [redacted] email and the documentation attached to it, as well as on information obtained by the evaluator from the internet and from Worldbase about [redacted] and [redacted] the two contracting companies. It was discovered by the evaluator that these two companies, which together formed [redacted], were in fact both subsidiaries of [redacted]

In his assessment of initial information, the OLAF evaluator stated that the allegation was of "*collusion to frustrate contract conditions giving unfair competitive advantage to [redacted] to win contract and to subsequently negotiate more favourable terms*".

OLAF's assessment report does not make clear on the basis of what information the allegation was extended beyond that made in [redacted] email, to include collusion in the award of the contract itself, as opposed to irregularities in the operation of the contract. This wider allegation, unlike the allegation made by [redacted] could imply possible corruption on the part of OPOCE officials.

On the basis of the assessment report, an OLAF internal investigation was opened on 18 October 2002.

Investigative steps

SYSPER information

SYSPER records were obtained, which showed that the three named officials had held their present posts since the dates shown below:

[redacted] 1 August 2000;

[redacted] 16 March 2001;

[redacted] 1 May 2000.

Interview of [redacted]

On 13 November 2002, [redacted] was interviewed at OLAF, with the purpose of clarifying his complaint.

In the course of this interview, [redacted] stated that [redacted] himself had been involved in setting up the OPOCE contract and designing the tender specifications, as well as in the choice of the contractor.

[redacted] indicated in his interview that, although [redacted] main rival for the contract, Euroscript, were the 'incumbent' OPOCE contractor, OPOCE had no real choice but to select [redacted] for this contract given [redacted]'s much lower price. [redacted] stated that although the contract was designed as a 'framework' contract, allowing participation by more than one contractor, [redacted] bid for 100% of the contract and OPOCE could not find any financial justification for awarding to Euroscript even the 30% for which Euroscript had bid.

In [redacted] interview, [redacted] was asked if he was alleging corruption on the part of Commission officials. [redacted] stated: "*I don't have any indication for this.*"

[redacted] did mention that [redacted] had given him a cheque for BEF 10,000 (€250) to buy a present for his daughter. [redacted] said he had reported the matter to [redacted] and that [redacted] had advised [redacted] to return the cheque, which [redacted] duly did).

[redacted] indicated in [redacted] interview that in [redacted] view the OPOCE hierarchy committed irregularities, firstly in failing to apply the penalty clause in the contract, and secondly in accepting repeated variations to the agreement arrived at in May 2001 with [redacted]

[redacted] stated in the interview: "*I don't think there was any corruption, but the problem was that there was political pressure for the OPOCE to get this consolidation done.*" By this [redacted] appears to have meant that it was not practically possible for OPOCE to risk the failure of the consolidation project, and that OPOCE therefore had to meet [redacted] financial demands in order to ensure its completion.

Discussions in November 2002

Following the interview of [redacted] the members of the OLAF team held discussions on how to advance the case. A note was made of these discussions, of which the concluding paragraph is:

"At this stage it appears that OPOCE had taken on an incompetent contractor to carry out work of an urgent nature. It is also likely that OPOCE would have been under some political pressure to have the consolidation work completed as it related to candidate countries. It may be that OPOCE took what they believed to be practical steps to ensure that the contract was completed. The question therefore would appear to be whether the action taken was irregular which would warrant disciplinary or other such action."

It was stated in this note that OLAF intended to obtain and examine copies of the tendering documentation in order to investigate the matter further.

Documentation of the award of the contract

On 5 December 2002, the CCAM [*Comité Consultatif des Achats et Marchés*] Secretariat of DG BUDG made available its files on the tendering and contract award letting for the OPOCE consolidation exercise. Documents of interest to OLAF were copied and subsequently reviewed.

The file of CCAM documentation copied by OLAF contains the following:

- Contract-cadre multiple No 1896, signed on 15 June 2000, between the Commission and the companies [redacted] and [redacted]

  (Article 19 of the Contract, headed « *Penalités* », includes the following terms: » *En cas de retard ou de malfaçon dans l'exécution des prestations constatés par la Commission, un système de pénalités sera appliqué selon les modalités mentionnées au point 4.8 du cahier des charges annexé.*

  Ces pénalités seront exigibles sans mise en demeure préalable par les seuls faits du retard ou de la malfaçon... »

  The appended tender specifications, at section 4.8, include a detailed formula for calculating penalties, which, it is stated, were chargeable in case of delay in performance, « *sauf si le prestataire établissait de façon indiscutable le cas de force majeure* ».

  The tender specifications would of course have been seen by the directors of [redacted] and [redacted] before they submitted their bid).

- The First Avenant to the contract, dated 28 August 2000, in which [redacted] and [redacted] were replaced as contractor by the « groupement d'interêt économique [redacted] ».
- The Second Avenant to the contract, including documentation of the proceedings of the DG BUDG CCAM and the favourable decision of the CCAM dated 13 December 2001.

  (In OPOCE's submission to the CCAM, signed by [redacted], the prospective change to the contract represented by the Avenant was justified by the need to "*accelerate*" production in the light of the Interinstitutional Agreement on *« refonte »* of European legislation adopted by Commission on 12 September 2001. [*Refonte* is explained to mean amending an act by replacing it entirely with a new one, incorporating the amendments. To enable *refonte* of an act to be done, the act must first be consolidated, ie, a version of the act including all previous amendments has to be produced. Therefore the consolidation programme had to be accelerated.]

  The technique to be used was called "*grouping*". It was stated in OPOCE's submission that this meant that fewer pages needed to be produced, but, offsetting this, the added complication requires that the contractor be paid more per page. The overall effect was claimed to be a reduction of 14% in the cost of the contract.

  To justify the proposed avenant, reference was made to Article 15 of the Contract, which stated, in part: *« Le contractant s'engage ... à étudier toute possibilité de rationalisation du travail...La Commission pourra le cas échéant autoriser le Contractant à procéder à la mise en production des solutions proposées et avalisera par avenant les changements à opérer, tant au niveau technique que financier. »)*
- A draft of the Interinstitutional Agreement referred to above, with a covering Note dated 12 October 2001 to Directors General from Mr O'SULLIVAN and Mr PETITE;
- A letter from [redacted] to OPOCE dated 5 November 2001 offering, for the purpose of rationalising the consolidation process in the light of the need for a *refonte* of European legislation, to apply the techniques of "*saving layers*" and "*saving prints*", and giving a new maximum price per page;
- [redacted]s tender document for Contract 1896;
- The draft contract sent by OPOCE to bidders;
- The CCAM report on the award of Contract 1896 dated 24 March 2000;

  (This records that there were three bidders for the Contract: Jouve, [redacted] and Euroscript. On the qualitative evaluation these companies scored 28/40, 32/40 and 34/40 respectively. Their prices were €8,267.61, €4,782.25 and €10,754.14 respectively.

  It was noted, however, that Jouve had not been willing to state a maximum price in the required form, and Jouve were therefore excluded from the selection. [redacted] first, and Euroscript, second, were selected as the successful bidders, to be employed on the Contract with preference to be given to [redacted]
- Correspondence with the bidders and with other organisations which had expressed interest in the Contract following the initial advertisement;
- The record of the opening of offers on 14 February 2000;

(This shows that [redacted] chaired the opening committee; the other members are named as [redacted]

- The record of the evaluation of offers;
- (This shows that [redacted] and [redacted] were members of the committee; the others were [redacted]
- The draft contract between the Commission and [redacted]
- [redacted] tender.

[redacted] meeting with the OLAF Director General and subsequent contacts with the OLAF Investigator – the allegation of misrepresentation to the CCAM in relation to the Avenant

As a reaction to an email [redacted] had sent (in or about July 2003) to Commissioner KINNOCK on the subject of the Commission's treatment of whistleblowers, [redacted] was invited to a meeting with the OLAF Director General. This meeting was held at OLAF's offices on 15 September 2003.

Following a further email from [redacted] to OLAF on 2 December 2003, in which [redacted] referred to the September meeting and stated that if [redacted] did not hear from OLAF within a month [redacted] would publicise his complaints more widely, the Investigator in Charge telephoned [redacted] on 17 December 2003.

On this occasion [redacted] clarified [redacted] allegation to the extent that [redacted] focussed on the statements made by [redacted] and OPOCE leading to the agreement of the Second Avenant by the CCAM in December 2001. [redacted] stated that OPOCE officials, on [redacted] behalf, misrepresented the true position to the CCAM when applying for the CCAM's agreement to the Avenant. [redacted] claimed that this alleged misrepresentation was so great as to be of a criminal nature. [redacted] subsequently sent emails setting out what he considered the relevant passages from the German penal code and attempting to show how these provisions could be applied to the conduct of the OPOCE officials.

As a result of this the Investigator reviewed the papers again in the perspective of potential misrepresentation to the CCAM.

[redacted] particular concern in relation to the application for the Avenant was that, while stating to the CCAM that the new procedures would result in a reduction of 14% in the cost of the contract, OPOCE officials must have foreseen the agreement in 2002 for [redacted] to charge OPOCE for the "*saved*" layers, thus increasing the cost by 58% by [redacted] calculation.

As [redacted] put it in [redacted] interview: *"They knew when preparing the CCAM dossier, they must have known, that it is not a saving, that it could never have been a saving. All this was initiated by [redacted] to get more money out of it. So how could you go there and say it is a saving?"*

Assessment of the case

(1) The allegation of collusion in the award of the contract to [redacted] (**"the third allegation"**)

Taking first the allegation of collusion, as it was set out in OLAF's initial assessment, there does not seem to be any evidence in the papers reviewed by OLAF to sustain this allegation.

It can be seen from the Sysper information referred to above that of the three officials named in the allegations, only the most junior, [redacted] was in post at the time that the [redacted] contract signed in June 2000. Presumably, therefore, [redacted] and [redacted] must be free of the suspicion of potential involvement in any alleged collusion with [redacted] to agree a low price at the outset of the contract.

As far as [redacted] is concerned, the CCAM file shows that he was responsible, along with [redacted] for the initial proposal and for communicating with the bidders in relation to Contract 1896. [redacted] along with [redacted] was also responsible for making the OPOCE proposal to the CCAM to agree Avenant 2 to Contract 1896.

It is notable, as mentioned above, that [redacted] chaired the OPOCE meeting to open the bids for Contract 1896, and that [redacted] was also a member of the evaluation committee which produced the recommendation that [redacted] be selected. Indeed it is clear from the interview transcript and from the Investigator's conversation with [redacted] that [redacted] had a large part in both the design of the contract specifications and the decisions made in awarding the contract.

The proceedings of the evaluation meeting and the report to the CCAM indicate that [redacted] scored well on the qualitative assessment (with a score falling between those of the other two bidders), and were given preference over Euroscript on the basis of their much lower price.

It seems reasonable to surmise that, in order to gain the contract from the 'incumbent' Euroscript, [redacted] intentionally set a highly-competitive price. Given that [redacted] were able, in the opinion of the evaluators, to offer an acceptable quality of work, OPOCE and the CCAM seem to have had little choice, as [redacted] said in [redacted] interview, but to offer them the Contract.

(2) The allegation that the failure to levy penalty payments was irregular (**"the first allegation"**)

The next question to consider is [redacted] allegation of irregularities in the running of the Contract.

The specific example of an alleged irregularity given by [redacted] in [redacted] interview was the failure by the OPOCE hierarchy to impose penalties on [redacted] for delays, as allegedly ought to have been done under the terms of the Contract.

It is true that it is stated in the tender specifications, appended to the Contract that the Contractor should produce the equivalent of 2000 pages of the Official Journal per day, which equates, as [redacted] stated, to 10,000 per week. The terms of the Contract and the tender specifications, referred to above, are quite clear in stating that penalties should automatically follow delays or defects, although these delays or defects have first to be "*constatés*" by the Commission, and the rate of production required of the Contractor does not appear to be stated in the Contract itself.

According to [redacted] fell short of their contractual obligations from the start of the Contract, and a series of changes to their work-programme and remuneration were agreed by OPOCE as a result. These successive agreements were made in May 2001, December 2001 and early 2002.

Only the second of these three agreements, that of December 2001, was formalised by way of an amendment to the Contract (the second Avenant). At other times during the life of the Contract it might have been considered appropriate for OPOCE to seek to enforce the penalties against [redacted]. However, it is easy to understand why, in the context of extreme pressure to maintain output and the continuing claim by the contractor that its revenue was insufficient, the view may have been taken that it would be counterproductive to impose penalties. In this light the failure to do so cannot be regarded as an irregularity.

(3) The allegation that OPOCE officials knowingly misled the CCAM when applying for the Avenant (**"the second allegation"**)

The allegation here is that OPOCE officials misrepresented the position when they applied for the Avenant, in that they failed to reveal their actual intention, once the Avenant had been agreed, to pay [redacted] for the 'saved' layers which were supposed to be the object of the saving in the cost of the Contract.

The documentation obtained by OLAF shows that the "*OBJET*" of OPOCE's application to the CCAM for the Avenant was stated as being "*visant à rationaliser le mode opératoire de la consolidation en vue de son accélération et à adapter le bordereau de prix en consequence.*"

In the "*MOTIF*" of the application, it is stated that the reason for the Avenant was the necessity to accelerate consolidation in order to comply with the Inter-Institutional Agreement of 12 September 2001 on « *refonte* » of EU legislation. The method of rationalising production is stated as "*...regrouper, lorsque cela est possible, plusieurs cycles de production*". A letter from [redacted] appended to the application describes these procedures as "*saving layers*" and "*saving prints*". At the same time, [redacted] price would be increased to a flat rate of €5 per page produced. [redacted] explained that "*saving layers*" refers to avoiding producing separate versions of an act for each of several amendments all coming into effect on the same day, but instead producing only one which contains all these changes. "*Saving prints*" involved reducing the number of printed copies provided to OPOCE.

[redacted] persuasively argues that the Interinstitutional Agreement was in fact already in prospect at the time the Contract was signed, and indeed that consolidation (combining all previous changes to an act in a single document expressing the current state of the law) and *refonte* (enacting future amendments in such a way as to have the new state of the law contained in a single document) are two processes which depend on each other if they are to be useful. [redacted] argues, therefore, that the fact that the Interinstitutional Agreement had been signed could not have been the real reason for applying for the Avenant. [redacted] also stated to OLAF that the practice of "*saving layers*" was in use in the running of the Contract well before the application for the Avenant.

In the section "*CADRE ET OBJET DE LA NEGOTIATION*" of OPOCE's application for the Avenant, it is stated: « *L'offre technique et financière se traduira par une diminution estimée à 14 % du coût global de l'opération sur la période allant de janvier 2002 à mi-2003, date à laquelle le rattrapage de la consolidation devrait être achevé.* » The 14% reduction was to have resulted from the lower number of pages to be produced, as a result of « *saving layers* », in spite of the higher unit cost for each page.

The documentation provided by [redacted] shows that on 27 March 2002 (ie, just three months after the agreement of the Avenant, and after negotiations which seem to have been continuing at least since February 2002) [redacted] wrote a Note to his superior in OPOCE Mr M C NETO proposing that OPOCE should agree to pay [redacted] € 2.668 for each page which was 'saved' as a result of the changes agreed in the Avenant – thus increasing the overall cost, according to [redacted] by 58%.

It seems clear, as [redacted] has explained, that [redacted] were demanding more revenue from OPOCE at the time that the Avenant was arranged, regardless of the Interinstitutional Agreement. It also seems likely that, in order to meet the requirements of the Interinstitutional Agreement, the consolidation process had to be accelerated, not so much compared with the production rate envisaged in the Contract, but rather compared with the much slower rate which was actually being achieved by ADL.

As far as the saving of costs is concerned, it can be seen from the documentation that the CCAM, replying to OPOCE's application, asked OPOCE why "*saving layers*" could not be done using the existing cost structure, thus saving OPOCE even more money than the 14% mentioned in the proposal. In a Note replying to the CCAM, S BRACK, Head of Unit "*Services Auteurs*" at OPOCE, stated that the reason was that the new procedure *"implique des contraintes techniques et une complexité accrue pour le prestataire, donc un coût supplémentaire pour celui-ci."*

It was nowhere explained what these constraints or extra complexities might be, given that in reality the proposal amounted simply to [redacted] being asked to do less work. However, it is notable that in the CCAM's *"AVIS FAVORABLE"* to the Avenant dated 13 December 2001 the financial impact of the alteration is given as "*0,00 EUR*" and it is stated: « *La durée et le montant du contrat-cadre restent inchangés ...* » This statement appears on the face of it to be incorrect; in any case it suggests that the CCAM's decision to accept the Avenant was in fact not much influenced by the claims made by OPOCE about its financial impact (as opposed to the prospects it held out of accelerated production).

In fact it seems clear from a review of the relevant documentation that the impetus for the application for an Avenant came both from [redacted] who were demanding higher revenue in order to be able to carry out the contract, and from OPOCE, who needed faster production to satisfy the Institutions' demand to begin "*refonte*" and to avoid the embarrassment of admitting that OPOCE was failing in its task of providing the 'raw material'.

[redacted] main allegation is that the OPOCE officials making the application for the Avenant knew in advance that its terms would be changed, or at least added to, soon afterwards, by the introduction of a charge for the pages 'saved'. It would of course be extremely difficult to show that this knowledge or intention was in the minds of the officials at any particular time in the past. One may surmise, however, that, given [redacted] almost constant demands for more money, [redacted] were unlikely to be satisfied with a mere improvement in their rate of profit accompanied by a 14% fall in their revenue; [redacted] could be expected to make further claims in the future – and it is by no means impossible that OPOCE officials were aware of this prospect and consciously avoided mentioning it to the CCAM.

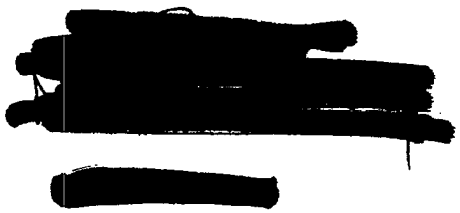
However, before concluding that OPOCE officials contrived some machiavellian scheme to arrive at the March 2002 agreement with [redacted] by way of a fraudulently-arranged Avenant, one would have to show that the Avenant actually played an important part in such a scheme. In fact, as mentioned above, neither the May 2001 compromise, by which [redacted] production requirements were changed nor the other more minor variations to working practices referred to by [redacted], were considered to require amendments to the Contract. The March 2002 agreement was justified on the basis that the arrangements for payment for 'saved' layers were not set out in the Avenant and these therefore had to be agreed separately between OPOCE and [redacted] But although this 2002 agreement was presented expressly as 'filling a gap' in the Avenant, there is no indication that it was even reported to the CCAM.

It seems therefore that there is a risk of overstating the importance of the Avenant and of the CCAM's agreement, to enable variations to be made to the Contract.

Conclusion

In the light of the above, it appears that, rather than being part of any larger plan, the Avenant represented a belated attempt to regularise a commercial relationship which from the start had been drifting away from its targets. While some of the statements made by OPOCE officials in the context of the application for the Avenant had the potential to mislead, there seems to have been no exagerration in the insistence on the Avenant's prime purpose, which was the need to accelerate the production of consolidated legislation.

It appears that this pressing need to do whatever was necessary to achieve the purpose of the Contract fully explains the series of compromises made by OPOCE officials and makes any charge of irregularities on the part of individuals inappropriate. There are insufficient grounds, therefore, either for disciplinary or administrative follow-up of this case.



Investigator in charge

Visas

Adviser in charge	[redacted]	[redacted]

ANNEX IV

Legal opinion

Concerning OLAF (OF/2002/0356) – Internal investigation case based on the Final Case Report of 05.02.2004 - NT/sr D(2003-AC-19723)

0. Executive summary

Analysing the quality of the Final Case Report and the investigation described in it, this legal opinion shows that:

- a lot of facts concerning the investigation are not mentioned,
- some factual statements are wrong others are imprecise,
- my allegations neither described correctly nor completely,
- these quality problems of the FCR implicitly tend to undermine my credibility,
- despite a general hint to the CCAM Vademecum the FCR mentions no legal norms,
- consequently it does not contain any legal subsumation under such norms neither,
- OALF did not undertake any own fact finding throughout the whole investigation,
- however the FCR concludes that intentionality of accused persons cannot be proofed,
- the financial implications of the case (ca. 4 MEUR) are not calculated,
- however the conclusions are mainly economical and not at all juridical,
- the principle structural issues raised by the case are not at all discussed.

Reanalysing the available facts this legal opinion concludes that there is sufficient evidence (e.g. it is shown that ADL was the author of a key paper called "Motivation de l´OPOCE") for reopening the investigation and undertaking real fact finding activities by OLAF (e.g. interviewing of other witnesses, verification of rejections, invoices and payments, acquiring related minutes and other documents) to enable proofing if OPOCE officials acted knowingly or not.

Concerning personal liability the relevant norms that could be violated are: articles 73, 29 and 2 of the Financial Regulation (2002) of the EU leading to liability to disciplinary action and payment of compensation; articles 246, 247 and 252, articles 496-1 and 496-2 and article 208 of the penal code of Luxembourg leading to penal responsibility; articles 11, 21, 22, 85 and 86 of the Statute of Officials; the CCAM Vademecum and the Code of conduct of EU officials.

Beyond the questions of personal liability this legal opinion also looks at more general aspects and follow-up needs arising from the case like:

- the similarities of this case with others (e.g. Eurostat),
- the lack of internal resources as one of the main reasons for problems,
- deficits in contract and outsourcing management,
- violations of the principle of fair competition through contract (non)application,
- the risk of non transparent dark circle management drifting away from the rules,
- the weak status and the isolation of whistleblowers,
- the relation between urgent policy needs and the rule of law.

In its Opinion 2/03 the Supervisory Committee recommended that OLAF should *"highlight the importance of the intelligence function for introducing a fraud prevention policy"*. If this is to be taken serious this case needs to be reopened to allow investigations and legal analyse of highest quality and also a deeper look on some of the structural reasons leading to irregularities within the EU public service.

1. Introductory note

I am writing this legal opinion as the person who raised the allegations which led to the investigation and to a certain extend see myself as a victim of the investigated affair and of the way the investigation itself was handled. The concerned Final Case Report is the first document of that type I ever saw which might explain why some of the criticism on the report might be too harsh and not 100% to the point. On the other hand I am a jurist with two German law degrees (with honour), professional legal experience and an expert in the subjects which are the background of the case. Aware of those pros and cons this legal opinion try's to analyse the case in an as much of objective matter as possible. It does not aim to replace the Final Case Report or to come to a final judgement on the case or the legal responsibilities of anybody involved therein. Its sole purpose is to bring up evidence and arguments for convincing the supervisory board of OLAF that the Final Case Report and the investigation as it was undertaken by OLAF Operations up to now do not meet the standards that they should meet and that therefore the investigation into the internal case OF/2002/0356 should be reopened taking into account this legal opinion.

Chapter 2 analyses the statements and findings of the Final Case Report of 05.02.2004 - NT/sr D(2003-AC-19723) (FCR) while the following chapters 3 and 4 try to re-analyse the original case brought forward by me from scratch with the aim to overcome the weaknesses of the FCR detected in chapter 2.

2. The Final Case Report (FCR)

2.1. The expected content of a FCR

As stated in the introductory note the I never saw an OLAF FCR before and I am not aware of any general standards for FCRs that might exist at OLAF neither. Therefore the first thing to be done is to derive those standards from the general role of OLAF in internal investigation cases, the legal basis and standards that exist for administrative reporting in general and specifically for reporting in comparable situations e.g. criminal or disciplinary proceedings.

2.1.1. The role of OLAF

OLAF itself describes its mission as follows:

"Our Mission
Our Objective : The mission of the European Anti-Fraud Office (OLAF) is to protect the interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions. In pursuing this mission in an accountable, transparent and cost-effective manner, OLAF aims to provide a quality service to the citizens of Europe.
Our Methods : OLAF achieves its mission by conducting, in full independence, internal and external investigations. It also organises close and regular co-operation between the competent authorities of the Member States in order to co-ordinate their activities. OLAF supplies Member States with the necessary support and technical know-how to help them in their anti-fraud activities. It contributes to the design of the anti-fraud strategy of the European Union and takes the necessary initiatives to strengthen the relevant legislation.

Our Principles : OLAF's activities will be carried out with integrity, impartiality and professionalism, and will, at all times, respect the rights and freedoms of individuals and be fully consistent with the law."[1]

"INTERNAL INVESTIGATIONS: A GUARANTEE OF THE SMOOTH OPERATION OF THE EUROPEAN INSTITUTIONS
Experience shows that no country or institution in the world is safe from cases of corruption or breaches of their obligations by its officials. In the light of the above, the European Commission wanted to be equipped with an investigation instrument in order to fight and protect itself from this nevertheless marginal phenomenon in view of the total honesty and loyalty of the great majority of its officials.
To this end, OLAF can carry out administrative investigations inside the institutions (see EC Decisions 1999/394 and 1999/396), the bodies and organs of the Community, in the event of fraud harmful to the budget of the EU. It is also responsible for detecting the serious facts, linked with the performance of professional activities.
These investigations are carried out in compliance with the rules of the treaties, in particular the protocol on privileges and immunities, and of the staff regulations of officials of the European Communities. They are carried out obviously also in full compliance with human rights, fundamental freedoms and the rules of confidentiality and data protection.
Insofar as the legal provisions are respected, the Office has a whole series of powers (examples: access to information and the buildings of the Community Institutions, with the possibility to check accounts and to obtain extracts of any document). In addition, the Office can request from any person concerned information that it judges useful for its investigations. In accordance with the arrangements laid down in Regulation N° 2185/96, it can carry out on the spot controls of the economic operators concerned, in order to have access to information concerning possible irregularities held by these operators."[2]

2.1.2. The purpose of the FCR

As far as the I could detect from the information available to me the purpose of the FCR is to inform OLAF management about the case and the course of the investigation thus enabling management to come to a conclusion if irregularities are considered to be found and if and what follow up action is required. It seems that in general and in the first place the FCR is the only information available to the management. Management will of course have the possibility to dig deeper into the case and its material, however the purpose of the FCR is to avoid that this is needed, so for reasons of efficiency management decision will typically be based just on the FCR.

2.1.3. General reporting standards

From the above mentioned purpose and general quality requirements the following standard content of a FCR can be derived.

A FCR should contain information on:
.1) the course of the investigation
.2) the allegations being object of the investigation
.3) the legal background of these allegations
.4) the factual findings of the investigation
.5) the assessment of the case i.e. testing facts against legal background and
.6) the results of the investigation and eventually the proposed follow up.

As for any other administrative document the information contained in an FCR should be as concise, precise and complete as possible and necessary, true and finally also impartial and none offending.

2.2. The content of the FCR of this case

[1] Quoted from: https://intracomm.cec.eu.int/home/dgserv/olaf/index_en.html
[2] http://europa.eu.int/comm/dgs/olaf/mission/mission/index_en.html#6

2.2.1. The course of the investigation

To put it simple the FCR should provide information on the course of the investigation in a way that for all important steps of the procedure three essential questions are answered: Who? What? When?

The FCR seems to answer some of these questions but looking a bit closer it becomes clear that a lot of pieces of information that are missing, presented incompletely or imprecisely and there is even false information. The following bullet points list those issues concerning the lack of quality of information on the course of the investigation in historical order of the events:

- according to the FCR a "large amount of documentation" was appended to my email to Mr. Bruener of 31/07/2002; this description is very vague and there seems to be quite a misbalance between this phrase and the almost two pages of the FCR that are used to list precisely each element in the CCAM file;
- the name of the evaluator who carried out the assessment of the case is not mentioned in the FCR even though his assessments are partly criticised;
- the name of the person responsible for the dossier after its opening on 18/10/2002 is not mentioned neither the "*members of the OLAF team*";
- the names of the people who conducted the interview with me on 13/11/2002 are not mentioned neither, from my perspective it is quite an important piece of information that apparently neither Mr. Baader nor Mr. Thomson were involved at that stage;
- it can be concluded from the FCR that the OLAF team requested the CCAM documents right after the interview on 13/11/2002; at this moment the interview transcript did not yet exist so it's a bit hard to understand that this decision was a consequence of the interview, on the other hand the CCAM and contract numbers were already mentioned in my email of 31/7/2002 so it might have been a more logical approach to get and study them before the interview thus enabling more specific questioning;
- anyhow if the team was formed only on 18/10/2002 it took less than one month to prepare the interview (without the CCAM dossier), while on the other hand it took the evaluator (who apparently was not member of the investigators team) already almost 3 months to get sufficient knowledge and understanding of the case;
- it is not mentioned that it took more than 2 months, i.e. until 24/01/2003 to set up the interview transcript, neither that it was done so badly that I had to revise it completely (without having the recorded tapes);
- it also might have been worth mentioning that I never got a reaction or even a confirmation of reception of this transcript which I sent back to OLAF on 24/02/2003 so that I needed to explicitly ask for that with an email to the interviewers on 18/6/2003 learning only from their response on 20/6/2003 that all my amendments were accepted (thus implicitly acknowledging the bad quality of the initial OLAF transcript);
- the correct date of my email to Mr. Kinnock was 31/7/2003 and its content were serious complaints about the way OLAF up to then carried out its investigation and also claims of discrimination because of my whistleblowing activity, all this is not at all mentioned in the FCR;

- concerning my meeting with Mr. Bruener it is not mentioned that the day after I had to sent (on Mr. Bruener's explicit request) an email to him with copy to Mr. Kinnock and Mrs. Schreier apparently for him to achieve absolution from Mr. Kinnock thanks to his non-kept promises to keep me informed at least from then onwards;

- the information in the FCR concerning my email to Mr. Bruener of 2/12/2003 is wrong: In fact I did not ask *"to hear from OLAF within month"* but referring to art. 2 (2) phrase 2 of Commission Decision C(2002)845 formally requested from Mr. Bruener that OLAF should provide me with the Final Case Report or a definitive date when I would get that report by 2/1/2004 as otherwise I would use my rights as laid down in this Decision. This is not at all properly described with the words *"publicise his complaints more widely"*. This differentiation is quite important as only trough this it becomes clear why I did not consider the telephone call of Mr. Thomson of 17/12/2003 as in any way meeting my request and consequently took the announced steps;

- concerning the telephone call of Mr. Thomson of 17/12/2003: I think it is quite an unusual way of proceeding with an investigation especially as Mr. Thomson was not present at my interview and never had any contact with me before. If he was really as unclear about my allegations as it seems from the FCR he should perhaps better have called me for a second interview for which there now would exists at least a formal transcript and not just undocumented statements from one side or the other;

- as far as I recall Mr. Thomson started the call on 17/12/2003 by introducing himself as the new investigator of the case stating that he became responsible for it only after the meeting between myself and Mr. Bruener (i.e. less than 2 months before [here as well the FCR is lacking a precise information when Mr. Thomson got responsible for the case!]) and that he already now started to draft his final report on the case coming to the conclusion that there was no need for any follow up. So apparently Mr. Thomson had already taken a decision to close the case before he had even talked to the man raising the allegations.

- proof that Mr. Thomson at that moment already had come to a (pre-) decision can also be drawn from one of his own emails to me (which are again not at all mentioned in the FCR) in which he stated: *"put my final case report on hold ... amend my report ... my conclusions are likely to be much the same as now"*;

- with this background it seems quite irritating that the FCR states that: *"On this occasion Mr. Strack clarified his allegation"* especially when the following paragraphs on page 7 of the FCR refer to information which was already made available in my first email almost 1 ½ years ago (the 58% cost increase) and in the interview which also took place more than a year before Mr. Thomson's call (the quoted text) respectively;

- in relation with the telephone call of 17/12/2003 the FCR also states: *"Mr. STRACK subsequently sent emails setting out what he considered the relevant passages from the German penal code and attempting to show how these provisions could be applied to the conduct of the OPOCE officials"*. This statement is once again incorrect and misleading in so far as it gives the impression that I might have thought that the German penal code is applicable. When referring to §§ 263 and 266 of the German penal code (which I by the way already did in my email to Mr. Bruener on 2/12/2003) I was instead referring to a fictive case. A case happening in Germany where a German head of national Administration would do similar things as those which might have been done by the OPOCE officials (and this character was also made clear in my

email to Mr. Thomson on 17/12/2003 with the phrase *"I am sure there is similar laws in other countries"*). What I in fact tried to illustrate was the seriousness of the allegations and the risk that they might – depending on the applicable criminal law, which I of course did not know in detail – give rise to the need of a formal penal investigation by *"the competent legal authorities"* which in my view should be an outcome of OLAFs investigation;

- it also might be of importance to note that in my emails of 17/12/2002 and 18/12/2002 I also provided Mr. Thomson with new information and new allegations (which will be analysed in another part of this legal opinion) which are not at all taken up in the FCR. In addition to all that I offered him: *"I have two CD-ROM with all e-mails that went through my mail-box and there are thousands; if you want them, if you will have resources and will to analyse them in detail, and if you provide me with your postal address, and if you assure me that my private mails (which are in there as well will not be used), I would be able to send them to you. In the meantime (see attached document) I just made another little selection (all I could find looking at the first CD for just 1 1/2 hours of my holiday time)."* However, I never got any reply from Mr. Thomson on that email.

As a preliminary conclusion at this stage it can be noted that already purely concerning the course of the investigation – and not at all the matter of the case – the FCR is often imprecise and lacking important information. It also at several occasions incorrectly refers to information or positions brought forward by me thus implicitly creating a climate that tends to undermine my credibility as the source of the allegations. In total the description of the investigation as contained in the FCR raises more questions than it is able to provide answers.

It is also interesting to note that apart from the (even there only partly done) analyse of the information gained from me according to the FCR throughout the whole 18-months investigation only three other initiatives for assembling facts on the case had been undertaken by OLAF:

- the research by the evaluator on internet and on Worldbase discovering that both companies Infotechnique and SISEG that formed ADL were in fact both subsidiaries of Getronics[3]
- the research in SYSPER on how long the named officials had held their present posts[4]
- the collection and analysis of the CCAM documents.

In relation to the fact assembling task of OLAF, the duration of the investigation and the statements of Mr. Thomson that there had been insufficient proof for the allegations, which (even so not part of the FCR) apparently has been repeated by Mr. Bruener at the COCOBU of the European Parliament, this seems to be quite a minimal extend of investigation compared to the powers of OLAF which had been shown at the end of chapter 2.1.1.

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[3] And even this is not 100% correct as in fact SISEG only became a subsidiary Getronics of in 2002, i.e. a long time after contract 1896 had become operational.

[4] Here again the information on Mr. Steinitz is only correct from a very formal point of view. A more correct picture is shown by Mr. Strack in his email to Mr. Thomson of 18/12/2003: "in fact he was long time A4 boss of the OJ Unit - with a huge financial budget and no mobility - then he changed to a very small unit called OP-7 formally giving up his post as HoU of OJ but still doing it "faisant function", after that the OJ HoU post was upgraded to A3 and guess who got it and is still sitting on it comfortably (now of course just having proofed mobility)".

2.2.2. The allegations being object of the investigation

The FCR refers to three distinct allegations namely:

- the penalty allegation
- the Avenant application allegation
- the award collusion allegation

In addition to those three which are formally called allegations, the FCR at several occasions refers to "corruption" and lacks references to other allegations contained in the information which had been brought to OLAFs attention by me.

2.2.2.1. The penalty allegation

Concerning this allegation page 3 of the FCR states on the one hand quoting my initial email: *"my complete hierarchy at OPOCE ...might have applied ... contract 1896 in an incorrect way against the financial interests of the Communities"* and concludes: *"Apparently, therefore, Mr. Strack was alleging only irregularities on the part of OPOCE officials."* While the same chapter on the other hand comes to the conclusion *"In any case, Mr STRACK made no allegation in his email of any illegality on the part of Commission officials"*. Also the other paragraph of that chapter is referring to illegal – in breach of law – activities of my hierarchy, i.e. the increased unnecessary source file demands which had not at all be covered by the investigation (see below).

The second chapter of the FCR dealing with the penalty allegation starts in the middle of page 8. While on the text in the first 2 ½ paragraphs on page 8 is summarizing the allegation quite correctly the rest is quite incorrect as for example contains the following text: *"the rate of production required of the Contractor does not appear to be stated in the Contract itself"*. This is fully contradictory to point 24 of the contract in combination with point 4.7. of its Annex A and the "100% production declaration" signed by the contractor on 8/2/2000. As those state: *"24. Conformément a l´article 1er, font partie du présent contrat les documents suivants : - Annexe A: le cahier des charges avec ses annexes ... 4.7. Délais de réalisation ... 4.7.1. Volume ... Pendant les 3 premières années du contrat la production devra atteindre 20 cycles de consolidation en moyenne, par jour ouvrable. En équivalent pages du Journal officiel, cela représente environ 2000 pages, toutes langues confondues, á produire chaque jour. Après une période de mise en place de 3 mois, ce volume de travail devra être atteint par les contractants retenus ... 4.7.2. Pour chacune de familles d´actes á consolider, le service compétent de l´EUR-OP déterminera sur une fiche de travail ad-hoc le délai de production que le prestataire devra respecter. Le dépassement de ce délai entraînera l´application des pénalités de retard prévues ci-après. ... DECLARATION ... Nous déclarons par la présente notre capacité á respecter les délais imposés par le cahier des charges pour la totalité de la production journalière (100% de la production objet du contrat 1896). »*

For the following text of that chapter (despite the last phrase which will be handled under conclusion) it is even more unclear how it refers to the penalty allegation as it is dealing with agreements and the amendment of the contract which never touched either the production volumes or delays nor the penalty clauses of the contract.

To summarize: the chapters describing the penalty allegation are showing a clear lack of understanding of the allegations and consequently also a lack of quality of the investigation.

2.2.2.2. The Avenant application allegation

As it is already quoted on page 3 of the FCR at the occasion of the penalty allegation, already in my initiating email of 30/7/2002 I stated that my *"hierarchy ... might have ... amended contract 1896 in an incorrect way against the financial interests of the Communities"*. It is therefore not at all understandable why the FCR only half a page later uses the word *"however"* thus indicating that this allegation has only been raised during the telephone conversation on 17/12/2003.

This contradiction within the FCR can also be found on page 7 where a quote from the interview of 13/11/2002 is used to demonstrate that this allegation was only clarified on 17/12/2003. The only thing which is really demonstrated by this is the lack of understanding of the investigator.

Even though I did put it in very clear terms in my email of 17/12/2003 stating two different allegations[5], one concerning the procedure in which the Avenant was agreed and the second one concerning the wrong application even of that Avenant by paying for non-delivered *"saved layers"* pages (for details see below), these two different issues are completely mixed up in the FCR.

And there are even more mistakes in the FCR: Concerning the 58% price increase it is incorrect when the FCR refers to it as *"Mr STRACK´s calculation"*. The figure origins form an email of Mr. Jean-Marc DEHOY – who at that time was responsible for controlling the invoices of ADL – addressed to me of 21/2/2002 which I at the same day (i.e. before the payment of € 2.668 per saved page was decided!) forwarded to Mr. Steinitz and which was part of the attachments of my initiating email of Mr. Bruener. So it was not at all my own calculation but done by the responsible person and based on a statistical sample of 50 invoiced consolidations. And it is also wrong when the FCR states that this calculated 58% increase was caused by the agreement to pay € 2.668 for each page which was *"saved"* as a result of the changes agreed in the Avenant. In Mr. Dehoy's email it clearly says that these 58% increase has been calculated based on the *"invoicing with the new Avenant and excluding the 2.66 EUR appearing nowhere under the Avenant 2"*. So, the € 2.668 per *"saved page"* have even to be added to the 58% increase thus leading to more than a 60% cost-increase without any additional benefits for OPOCE.

2.2.2.3. The award collusion allegation

It seems that this allegation which was not at all raised by me is the only one which was handled more or less correctly in the FCR. However this reminds on some lessons of rhetoric and psychology where one can learn, that in case one only has a few arguments it might sometimes help to be more persuasive to insert an additional fake counter-argument which

[5] „ - the CCAM dossier and the signature of the avenant just to provide ADL with more money made possible with the knowingly false reasoning that pages/money will be saved
- the payment of the "saving couche" invoices related to pages that were never requested, delivered and that according to the avenant would be saved on a price basis for which there was not any legal background"

can be destroyed with a solid reasoning right at the beginning of the discussion thus creating a positive climate for the in itself non-persuasive rest of an argumentation.

2.2.2.4. The hidden agenda: the corruption allegation

A similar thinking comes up looking at the hidden agenda corruption allegation that re-appears at several places in the FCR without being treated as a proper allegation. The basic question here seems to be what is meant by *"corruption"*. Here one should keep in mind that while Mr. Thomson is a native English speaker, I am not.

What I meant by using the term *"corruption"* was in fact the German term *"Bestechung"*[6] which automatically and always involves reception of improper inducement and perhaps should better be translated back into English with the term *"bribery"*. When asked about *"corruption"* during the interview I therefore directly told the story about the 10.000 BEF with which I felt that ADL tried to start to create a climate of bribery vis a vis myself. In this context I also said *"I don't have any indication for this"* meaning that I have no proof and even no indication that there was any bribery or reception of improper inducement involved on the side of my hierarchy and thus did not want to raise such an allegation.

In the FCR this - maybe improper use of the English language from my side - is used as an argument against me and my other allegations in an attempt to show some contradictions. When it is stated: *"Mr. STRACK stated in the interview: `I don't think there was any corruption, but the problem was that there was political pressure for the OPOCE to get this consolidation done´. By this Mr STRACK appear to have meant that it was not practically possible for OPOCE to risk the failure of the consolidation project, and that OPOCE therefore had to meet ADL's financial demands in order to ensure its completion"*. Reading *"bribery"* instead of *"corruption"* it becomes clear what I really meant and which perhaps could be made clearer with the following phrases: *As I do not have any proof that my hierarchy got money or other benefits from ADL (even though ADL tried to play the game like that with me) I must assume their innocence as far as bribery is concerned. However, I think they acted with intent to give some advantage inconsistent with official duty unlawfully and wrongfully using their station to procure some benefit for ADL contrary to duty, which might be called corruption*[7]*. I know that the political pressure for them was high but as they are officials which have the finest duty to respect the laws of the EU – and not the just the brilliant ideas of politicians as that might be the case in an unlawful dictatorship - they needed to resist pressure from ADL and from politics and at least stay honest. So in my view they are guilty even though there are some mitigation causes.*

2.2.2.5. Non-mentioned allegations

There are quite a lot of additional allegations raised in the documents brought forward by me which should also have been taken up in the FCR but for which there is not even a trace in it. These allegations will be shown and treated in the chapter 3 of this legal opinion.

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[6] Which according to Köbler, Rechtsenglisch, 5.Auflage is in fact one possible translation

[7] At least according to the definition of corruption as it can be found in the abridged 6th edition of Black´s Law Dictonary, 1991.

2.2.3. The legal background of these allegations

If there are investigations like this one where there is corruption and fraud allegations involved one would normally expect to see quite a lot of rules of law quoted in a FCR. Rules of law as for example criminal, disciplinary, financial handling, general duties of officials or procurement rules on the breach of which the allegations are based and against which allegations and facts will be tested. It says something about its quality that this FCR is referring to almost no legal rules at all. But without referring to the law it is impossible to check if activities are illegal, i.e. if they violate laws. However this deserves a closer look which brings up the following rules of law referred to in the FCR:

- on page 2 reference is made to the contract 1896 between the OPOCE and ADL but not to any specific rules of it,
- later on the same page contract 1896 is classified as a "multiple framework contract" without making clear from where this classification is derived
- still on page 2 one finds a reference to the *"CCAM Vademecum"* (without its legal character being specified) and to just one clause in it, which states that the instrument of a *"multiple framework contract" "should be used only in exceptional circumstances, where there is uncertainty over the amount of work to be ordered by the Commission under the contract and of the capacity of the winning bidder to accommodate the full amount"*.

  The three references found up to now seem to be correct and in fact the last quote describes exactly the reason why OPOCE constructed contract 1896 as a *"multiple framework contract"*. It is however interesting to note that the exceptional nature of the contract as a *"multiple framework contract"* is not used later on in the FCR to draw conclusions from it (e.g. that ADL had no right to get a minimum volume of source file orders)
- the contract 1896 and its Avenant are also mentioned on other pages of the FCR, for example on page 3 in the phrase *"Mr STRACK´s appears therefore to have been using the term `illegal´ to mean something along the lines of `in breach of contract´"*, thus once again misinterpreting my statements. What I really meant was that the accused EU officials *"illegally"* acted against their duties, duties which of course follow from their position and the general laws binding them and thus only indirectly from the contract between the OPOCE and ADL which they are themselves not a party of (but the question which duties they had isn't even asked in the FCR).
- the next – this time quite clear - reference to legal norms can be found on page 5 where the FCR quotes article 19 of the contract and number 4.8. of its Annex A both setting up the applicable penalty system
- the next legal reference is to the Interinstitutional Agreement on *"refonte"* adopted by the Commission on 12/9/2001
- finally there is on page 7 the reference to the German penal code explained already above.

So to sum this up, the whole FCR apart from the a general hint to the *"CCAM Vademecum"* and to the *as such* obviously not applicable German penal code does not refer to any norms by which the accused officials could have been obliged to act differently than they did. On this very weak basis it is no longer a surprise that no irregularities have been found.

One might now argue that I did not explicitly mention such rules by which the accused officials could have been bound neither, but this is incorrect and also irrelevant. Looking at my initiating email and the interview one finds at least some hints to the procurement rules and their purpose which in my view have been misused, a similar statement is true for the hints I gave to the German penal code stating that there might be something similar (and in contrary to the German one applicable) in other countries (e.g. Luxembourg – see below).

On the other it cant be expected from a whistleblower that he is providing a legal opinion (even though in chapter 3 of this document facing OLAFs incompetence proofed by the FCR this will be attempted) showing in detail which legal norms are violated how. The role of a whistleblower is to raise an issue and some suspicious facts. It would have been the role of OLAF to find the relevant norms, clarify the facts and subsume the facts under the norms. With the FCR as it is now OLAF already clearly failed at step one of this process.

2.2.4. The factual findings of the investigation

As there are no legal norms there are also almost no factual findings in the FCR. As already stated above by looking at the investigation fact finding during the investigation was limited to:

- the research by the evaluator on internet and on Worldbase discovering that both companies Infotechnique and SISEG that formed ADL were in fact both subsidiaries of Getronics[8]
- the research in SYSPER on how long the named officials had held their present posts[9]
- the collection and analysis of the CCAM documents

Even for the two of my allegations it deals with the FCR limits itself to – often incorrectly (see above) – repeating my statements and this also without going into details. However even there (as already shown above) the FCR does not bring up any evidence that my statements are in anyway contradictory or that the factual allegations brought up by me are false.

The perhaps most relevant and most interesting issue in that context is that of the financial implications of the alleged activities:

As far as the penalty allegation is concerned one of the documents attached to my initiating email to Mr. Bruener contained a very conservative estimation of the non-realised penalties until April 2001 which comes to a sum of at least 400.000 EUR (200.000 € quality penalties + 200.000 € delay penalties) which until then had not be executed by OPOCE. Another attachment of that email looking at the statistics of the production situation in week 40 of 2001 shows that by then the situation even got worse as instead of 40 * 13 000 = 520 000 (PDF) pages at that time only 217 102 PDF pages (i.e. approx. 300 000 pages less) had been

[8] And even this is not 100% correct as in fact SISEG only became a subsidiary Getronics of in 2002, i.e. a long time after contract 1896 had become operational.

[9] Here again the information on Mr. Steinitz is only correct from a very formal point of view. A more correct picture is shown by Mr. Strack in his email to Mr. Thomson of 18/12/2003: "in fact he was long time A4 boss of the OJ Unit - with a huge financial budget and no mobility - then he changed to a very small unit called OP-7 formally giving up his post as HoU of OJ but still doing it "faisant function", after that the OJ HoU post was upgraded to A3 and guess who got it and is still sitting on it comfortably (now of course just having proofed mobility)".

delivered by ADL with an average production delay of 68 days. Knowing that ADL took at least until spring 2002 to come close to the fixed weekly delivery volumes it does not at all seam unrealistic when I in my email to Mr. Thomson of 17/12/2002 come to the conclusion that alone the penalty issue was: *"leading to the non-realisation of millions of EUR of damages"*.

Concerning the Avenant allegation the picture looks quite similar. According to Mr. Dehoy's calculation OPOCE faced 58% of additional costs which using the figures provided in the Annexe 5 of the second Avenant request leads to (5,22 €/page * 1,105 million pages /158 * 58 =) 2.12 MEUR for the period 01/2002 – 06/2003 to which one would of course need to add the unjustified costs of 2,668 €/page for the 295 000 "*saving layers*" pages which add up to 787 000 EUR leading to a total estimation of the additional Avenant related costs of approximately 2 900 000 EUR.

Both allegations, if they are factually true, thus amount to a financial loss of the EU of far more than 4 000 000 EUR which is quite an impressive figure compared to the *"Financial Impact (EURO) None"* mentioned on the first page of the FCR. It would therefore have been worth to have a closer look if the factual allegations of Mr. Strack are true or not as a financial impact of 4 MEUR could also in a legal sense play an important role when it comes to judging if someone had the power to decide on an issue the way my OPOCE hierarchy did or not.

2.2.5. The assessment of the case i.e. testing facts against legal background

It is a well recognised legal technique that there is no need for any proof of facts if even when assuming that all negative factual allegations are true for legal reasons the accused person can not be guilty. In that sense, and only in that sense it might theoretically even be possible in this case to avoid more detailed fact finding if the action of the accused officials would anyhow be legal. However this would at least require a sound legal testing which has not been done in the FCR. It has already been shown that this FCR does not even refer to the legal rules important in this case. Consequently a subsumation was not possible. Instead the only thing that can be found are general statements which can are to a certain extend political and to a certain extend morally but in any case purely subjective and not based on any legal testing.

Concerning the penalty allegation the FCR comes to the conclusion: *"It is easy to understand why, in the context of extreme pressure to maintain output and the continuing claim by the contractor that its revenue was insufficient, the view may have been taken that it would be counterproductive to impose penalties. In this light the failure to do so cannot be regarded as irregularity"*. Concerning the Avenant allegation this same conclusion is rephrased into: "*It appears that this pressing need to do whatever necessary to achieve the purpose of the Contract fully explains the series of compromises made by OPOCE officials and makes any charge of irregularities on the part of individuals inappropriate*". Or as the FCR summary states: *"the other two allegations rejected on the basis that they refer to nothing more than commercial decisions taken in the context of a difficult contract"*.

These statements all refer to commercial decisions taken under pressure coming to the conclusion that there is no one to blame. Astonishingly it is not asked if this commercial decision was economically reasonable, i.e. if the benefits where higher than the costs (which

would of course have created the need for a detailed factual and financial analyse that has not been undertaken in the FCR), neither is the question asked if the situation here is really comparable with a situation in which the owner of a private company would take such a decision (it might be that there putting market and legal pressure on the counterpart is a legitimate means of activity) or if there are any special considerations to be drawn from the fact that here we have a situation where the (*"blackmailed"*) partner is a public institution, neither has it been considered that in parallel to renegotiations with contractor ADL renegotiations with others, especially Euroscript could have been undertaken or what at the end of the day rests from all the strict public procurement rules if afterwards the field for non-application of contractual clauses and renegotiations is that wide open. Finally the FCR does not answer the question who or which legal basis gave the officials the legitimation to develop such creative solutions. Solutions which allowed them to cut off the person responsible for the daily execution of the contract and to provide the controlling body with information that even according to the FCR *"had the potential to mislead"*. Solutions which cost the European Taxpayer at least 4,000,000 EUR[10] and which they did not even need to document properly and honestly or to report to the body responsible for steering the OPOCE (i.e. the OPOCE management board).

2.2.6. The results of the investigation and the proposed follow up

Based on the above conclusions it seems logically that the FCR came to the result that there are insufficient grounds for penal or disciplinary follow-up of the case against the alleged officials of OPOCE. This is not correct but consequent. But the FCR even comes to a second conclusion, i.e. that there is no need for administrative follow-up neither. This is not consequent.

According to OLAFs mission statement its primary task is "*to protect the interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions.*" And this includes that OLAF *"contributes to the design of the anti-fraud strategy of the European Union and takes the necessary initiatives to strengthen the relevant legislation"*. Opinion 2/03 of the Supervisory Committee of OLAF recommends that OLAF should *"highlight the importance of the intelligence function for introducing a fraud prevention policy"*. If all this is really meant to be serious, it is not at all understandable why in this case at least some of the following quite obvious questions have never been asked or answered:

- Assuming that the FCR would have come to a different conclusion i.e. there would have been proof for OPOCE officials receiving money from ADL in exchange for exactly the same actions; can the EU really allow keeping the line to bribery that thin?
- How would the case have developed now, in a situation where after abolishment of the CCAM and other Commission reforms Director Generals have even more power and are even less controlled – is this really the kind of improvement which helps?

[10] It does not play a role that continuing production with Euroscript might have caused even more as calculating things this way already assumes that ADL would have followed its blackmailing strategy to the end (which is quite unlikely as SISEG and Infotechnique could not afford to loose the EU market), that contractual damages vis a vis ADL would not have been realised (according to the terms of the contract additional production costs at Euroscript could have been claimed as damages from ADL) and that even through not paying ADL invoices (at the time of decision on the Avenant almost no invoices had been paid yet) no compensation would have been reached.

- How much is all this typically for situations in which the EU is outsourcing tasks to private contractors? – How far is the situation related to the lack of resources (e.g. during the phase of contract creation and tender evaluation) as mentioned in the wise men (Santer-Commission) report? - How great is the danger to get blackmailed and what could be done to help avoiding situations that put officials under such a high pressure right from the start?
- How much power and creativity to reach political goals should be allowed and are there any parallels to the Eurostat case where achieving policy objectives by special means might also have been a motivation of the actors at least at the beginning?
- What's the role of the law in all this, should law always govern politics or is there a need for exceptions from the rule of law?
- Does any legislative initiative need to be undertaken to clarify also from a legal point that renegotiating contracts after public procurement procedures and non-execution of penalty clauses in such contracts can be legally correct under certain circumstances and in which situations should that be allowed?
- Finally, what are the lessons learned from this case as far as case handling at OLAF and co-operation with and protection of whistleblowers are concerned? Should something be done to reconstitute my honour, e.g. by stating that I was right in opposing my hierarchy, in bringing forward these allegations to OLAF and in pressing OLAF to proceed as only my engagement enabled to have a closer look at such difficult cases thus enabling to come to more human, more fraud-resistant, more legal and more economic solutions in similar cases in the future?

3. Analysing the allegations

This chapter tries to summarise the different pieces of information which I during the course of the investigation provided to OLAF, to filter the different information and allegations out of it, to show how this information could have been handled within a proper investigation and to analyse the legal background.

3.1. The penalty allegation

3.1.1. The information provided

According to the information provided by me ADL did permanently underperform in quantity, timeliness and quality of the consolidated texts they were supposed to deliver. As can already be seen from the documents attached to my initiating email, I permanently informed my hierarchy (Mr. Steinitz, Mr. Raybaut and Mr. Cranfield) about that and requested them several times to execute the penalties as foreseen in the contract. However, to my best knowledge penalties against ADL where never executed (not even after the Avenant or after I left OPOCE).

Approximately 1 ½ years after the start of the production with ADL, at the moment (week 9/2002) when I set up my last production statistics before leaving OPOCE, the situation was the following:

- concerning **quantity** ADL had delivered 385 631 PDF pages while (since their already late first delivery in week 47/2000 i.e. within 70 weeks in which they should have delivered 10 000 OJ = 13 000 PDF pages each week) they should have delivered up to that moment at least 850 000 PDF pages i.e. they had a quantitative performance of around 45% of the agreed volume;
- concerning **timeliness** OPOCE normally calculated a delay of 21 days (3 weeks) per couche when fixing its deadlines, the average production delay (of the delivered pages) of ADL at that moment with 88 days was more than 4 times as long;
- concerning **quality** still a huge percentage of pages needed to be rejected because of mistakes which can be illustrated by the fact that ADL up to that moment had already redelivered more than 80 000 PDF pages which is more than 20% of their actual deliveries (and these are only dossiers for which ADL accepted their mistakes and had at that time already completed the redelivery – the actual OPOCE rejection rate might have been around 40%).

Contrary to what seems to be indicated by the FCR it was not only in a specific negotiating situation that OPOCE did not apply penalties, they never did. Neither right at the start of the contract when ADL did not get its production up and running, nor when ADL still underperformed after the compromise of May 2001 had been agreed and not even during 2002 when ADL already had a lot of money from the Avenant and still seriously underperformed especially in timeliness and quality. It therefore was not a - perhaps understandable - one time reaction in one critical situation; it was a systematic non-application of all penalty clauses of the contract.

3.1.2. Testing the facts

Up to now this could be regarded as unproved allegations by me which needed to be tested in a proper investigation. This has apparently not been done until now, but should not cause too many difficulties. Each of the demands done by OPOCE including its delivery date has been laid down in an ad-hoc dossier and each delivery and each rejection have been documented in the electronic CONSLEG management system MASY, in ARCEL the file repository system of OPOCE and on paper. Therefore it should in principle still now be possible to calculate how much penalties according to the contract 1896 should have been applied and thus to calculate the exact amount of money lost for the EU budget because of this non-application decision. My estimate is that this will sum up to several million euros.

3.1.3. The legal background

Concerning personal liability the legal background analysis in the first place needs to identify legal norms defining duties of the concerned officials and to test their behaviour against these norms. The contract 1896 has been concluded between OPOCE/the Commission and ADL and is therefore not directly applicable in relation to the concerned officials.

On the other hand norms directly binding for officials can be found in the FINANCIAL REGULATION of 21 December 1977 applicable to the general budget of the European Communities (as it was in force in 2001 and 2002) and especially in its article 73 who stipulates: *"Authorizing officers who, when establishing entitlements to be recovered or issuing recovery orders, entering into a commitment of expenditure or signing a payment*

order do so without complying with this Financial Regulation and the rules for its implementation, shall render themselves liable to disciplinary action and, where appropriate, to payment of compensation. The same shall apply if they omit to draw up a document establishing a debt or if they neglect to issue recovery orders or are, without justification, late in issuing them."

The question therefore is if all or one of the accused OPOCE officials have (and there it will be part of the investigation to find out who in each single case was the authorizing officer) *"omit to draw up a document establishing a debt"* or neglected *"to issue recovery orders"* as far as the possible penalties of contract 1896 are concerned.

The first condition for this would of course be that ADL was due to pay penalties and its here where the penalty clauses of contract 1896 come in. The penalty rules are set up in number 19 of the contract 1896 in connection with point 4.8. of its Annex A. As on the basis of the available information ADL constantly showed *"retard"* and *"malfaçon"* and apparently never claim any type of *"force majeure"* or any of the other *"seuls dysfonctionnements"* mentioned explicitly in point 19 of the contract, there is a very strong indication that all factual conditions for the application of penalties against ADL were met (and up to this point even the FCR does not state anything contradictory). This also has been constated by me and my team requesting our hierarchy to apply those penalties.

Knowing all this however the responsible officials decided not to apply penalties, so the fundamental question is if they had any such choice and if they executed this choice properly. The FCR seems to answer these two questions positively without providing any legal basis from which such a choice could follow. Looking into the Financial Regulation there seems to be only one article which could be used to derive such a right to choose in the sense of waiving penalties which normally would be due, i.e. article 29:

"1. The accounting officer shall assume responsibility for the recovery orders duly drawn up. He shall exercise all due diligence to ensure that the resources due to the Communities are recovered at the due dates indicated in the recovery orders, and shall ensure that the rights of the Communities are safeguarded.
The accounting officer shall inform the authorizing officer and the financial controller of any revenue not recovered within the time limits laid down. If necessary he shall initiate the recovery procedure.

2. If the authorizing officer waives the right to recover an established debt, he shall send beforehand a proposal for cancellation to the financial controller for his approval and to the accounting officer for information.
The purpose of the approval of the financial controller shall be to establish that the waiver is in order and conforms with the principles of sound financial management referred to in Article 2. The proposal concerned shall be registered by the accounting officer.
If approval is withheld, the superior authority of the institution may, by a decision stating the full reasons therefore, and on its sole responsibility, overrule this refusal. This decision shall be final and binding; it shall be communicated for information to the financial controller. The superior authority of each institution shall inform the Court of Auditors of all such decisions within one month."

So indeed there may be situation in which penalties could be waived, however there are two important conditions linked to it:

- the waiver must conform with the principles of **sound financial management** referred to in Article 2 of the Financial Regulation according to which: *"The budget appropriations must be used in accordance with the principles of sound financial management, and in particular those of economy and cost-effectiveness. Quantified objectives must be identified and the progress of their realization monitored. To this end, the mobilization of Community resources must be preceded by an evaluation to ensure that the resultant benefits are in proportion to the resources applied. All operations must be subject to regular review, in particular within the budgetary procedure, so that their justification may be verified."*, and
- the whole process of the waiver must be **properly documented**, in principle needs to be agreed by the financial controller and if such an agreement is overruled by the superior authority of the institution needs to be indicated to the Court of Auditors.

In the current case neither one of these two conditions is met. It might indeed be worth analysing if in negotiation situations spelling out penalties could harm the climate and be counterproductive and therefore economically not reasonable. However, this condition is no longer the case when it becomes a permanent situation, when afterwards new reasons for penalties arise almost on a daily basis without any consequences and when it is not about some few hundreds or thousands of euros which are lost but about millions as in the current case.

And anyway it needed to be properly documented and agreed by the financial control which already follows from the (auditing) principle that exceptions need to be properly documented. Only if the reasons for the waiver are laid down clearly on paper, if they are subject to auditing and financial control it can be guaranteed that *transparency* which is the keyword of Commission reform since years is respected. But here this was not at all the case, instead a dark circle came to a mute and secret decision, cutting of any control and even the persons initially responsible, which does not really leave much of a margin to a situation of back accounts and bribery.

It can therefore be concluded that – based on the currently available information – there is a strong indication that the accused officials are guilty of a breach of article 73 of the Financial Regulation and should therefore *"render themselves liable to disciplinary action and ...to payment of compensation"*. Consequently OLAF should either reopen the factual investigation or already now conclude that there is sufficient evidence for giving the dossier to the disciplinary authorities for further follow up.

3.2. The allegation concerning the agreement on the 2nd Avenant of contract 1896

3.2.1. The information provided

As the penalty allegation the Avenant allegation was clearly raised in my first email to Mr. Bruener and further clarified in the interview when I stated: *"They knew when preparing the CCAM dossier, they must have known, that it is not a saving, that it could never have been a saving. All this was initiated by ADL to get more money out of it. So have could you go there and say it is a saving?"*. Or to put it short: The acting OPOCE officials knew that there would be a cost increase but they lied to the CCAM telling them there would be savings to get the CCAMs agreement for the Avenant. They lied to the CCAM because they wanted to assure that ADL makes (higher) profit and they wanted this because they wanted that ADL keeps on with the consolidation which ADL threatened not to do without getting more money.

But beside this pure allegation I provided even more information that needs to be kept in mind when analysing that case:

The situation until ADL won contract 1896:

- The whole way of doing the consolidation as laid down in contract 1896 was technically brand new and just being tested for the first time while the call for tender was prepared. This lead to the consequence that OPOCE lacked experience when setting up the specifications.
- OPOCE never (and especially not before the contract had been set up) invested sufficiently into an IT system that would have allowed to get fully reliable information on the size of the consolidation task. The only available system was somehow hand-made by me - and I am not an IT-specialist. This also might have made it difficult to have precise estimations of the figures.
- The body of texts to be consolidated by definition changes on a daily basis as every day new corrigenda and amendments are published creating the need for new families and new couches while in parallel other legal acts repeal whole families. From this it follows that five year cost estimation in advance as done in the initial CCAM dossier can only be vague.
- During the whole process of setting up the tender specifications of contract 1896 until the start of the new production OPOCE had three productions of consolidated texts and source files going on in parallel. One with the old Interleaf based system, another one converting consolidations done by the Secretariat General into the new format and the third one using the existing OJ contract and already applying the new production method. At the moment when the specifications were set up it was totally open how many families could be produced with those methods until the new production under 1896 would start.
- The whole consolidation project was done under enormous time pressure and was from its start closely related to the codification and refonte project. The interinstitutional working group had already before agreed that the complete body of (amended) EU law should be in a first step consolidated and in a second step object of either codification (if no modification is needed) or refonte (if in parallel new amendments would needed to be worked in). The interinstitutional agreement on refonte was expected to be signed much earlier and was not at all a surprise when it finally was agreed.
- While setting up the tender specifications Mr. Steinitz had enough power to even avoid a discussion of legal issues with Mm. Wasbauer who tried to question some of the contractual clauses by just stating that the call for tender needs to get out, which might also explain some of the weaknesses of the contract picked up by ADL later.
- As Mr. Steinitz initially planned to attack the backlog of consolidation by year he explicitly requested me to set up the table in Annex A/8 of the call for tender following that yearly logic. All modifying acts which modified more than one basic act thus were automatically calculated in each family they modified. This was just part of the logic of that table as it was a family orientated *"Table of families behind with consolidation"* and did not even try to give indications about the amount of source files which really needed to be produced. The most severe differences in that sense arose from the two Norway (non-accession) decisions which both modified very many families and thus were counted X times while from a source file production point they of course needed to be produced only once.

- Keeping in mind all the uncertainties OPOCE had a clear interest to estimate the costs of the consolidation project based on a worst case scenario, i.e. as high as possible to assure a sufficient budget and also to get a CCAM agreement for a (the initial) contract for which one could be sure that the money would be sufficient.
- ADL on the other hand knew that, even so SISEG was already doing some consolidation and source file production Euroscript had more experience and therefore better chances to win the new contract 1896. Therefore they tried to make set their prices as low as possible to increase their chances to win. Another aspect leading to that strategy might have been previous experience especially of SISEG with OPOCE knowing that by putting some pressure on OPOCE some later interpretations and modifications of the contract in their favour would still be possible.
- ADL choose a price strategy in which they wanted to make their money essentially with the source file production – the field SISEG knew best – thus taking into account that they will have less profits from the consolidation itself – the complexity of which at least the Infotechnique guys who were knew to the subject and optimistic about their own competencies might also have underestimated.

<u>The situation after ADL won contract 1896:</u>

- ADL did not get the production up and running in time and they had a lot of quality problems. After only a few months in the project they exchanged their project manager who apparently was not able to handle the project.
- Seeing those difficulties Mr. Steinitz and myself tried to get ADL to reduce its production target of 100% thus enabling to avoid closure of the production team at Euroscript which was still there at the end of 2001 due to the old CONSLEG contract. But instead of going that way ADL kept on promising to produce 13 000 PDF pages a week and even more to work up the deficits of the first months. Firstly OPOCE believed them but at the latest early 2002 it became more and more clear that they would not manage to increase their production in the short run.
- From the start of the project ADL (SISEG even when reading the tender specifications) was aware that in special cases OPOCE in its consolidation always applied the techniques called *"saving couches"* and *"saving prints"*. Already before May 2001 and also afterwards ADL had produced families applying these concepts (e.g. Code de Douanes).
- ADL due to quality problems also exchanged one of their subcontractors, the printing house which was responsible for creating the PDF files from the SGML CONS.ACT instances in an OJ-like layout quality. The new printing house of course needed some months to get into the job - which led to further delays - and wanted for efficiency reasons to fully automate the process of deriving the layout from the SGML, thus avoiding manual work. But this was not done in the OJ and not 100% possible as the SGML wasn't constructed to allow this.
- When the new project manager at ADL realised in which difficult situation they were, instead of agreeing to a reduction of the volumes he changed strategy by opening discussions on the wording of the contract 1896 in a lot of aspects. Key aspect was the question if ADL had a right from the contract that OPOCE sends specific orders (for more source files, for 3 printed versions, for prints of couches that OPOCE did not need ...). So also they always had much more consolidation requests than they were able to handle they put pressure on OPOCE to send out even more requests and especially to request more source files (even if they were not needed). A second key issue was the question to

interpret the OJ-like layout in a less strict way through a lay-out manual thus enabling ADL to further automate this process.

- After several months of discussion and new claims from ADL at the beginning of May 2001 a compromise was agreed. This, for all questions raised by ADL, laid down a common interpretation of the contractual clauses. This compromise was signed by both sides and in its points 10 and 11 also included a complete solution of the all questions related to *"saving layers/couche"* and *"saving prints"*. This foresaw that both techniques will be continued to used and applied, but that OPOCE agreed fixing a maximum of families falling under this exceptional treatment (which was never exceeded not even after the Avenant) and that agreement was reached how these special cases should be invoiced using the pricing plan categories and the prices as they were laid down in the original contract 1896.
- Contrary to what is stated in the FCR this compromise was not and was not intended to be a modification of the contract as in all points clear reference to the existing contract was made and as the compromise limited itself to interpreting this contract providing answers to issues raised by ADL. There was not any change to the complex pricing plan or the prices fixed in the contract neither so this compromise cannot be addressed as an "Avenant".
- Contrary to what was expected by OPOCE when agreeing on the compromise in the months following May 2001 ADL still did not perform much better as far as quantity, timeliness and quality of the production were concerned. Another problem was that despite several requests from OPOCE right from the beginning of the project it took ADL until after summer 2001 to be able to send the first invoices to OPOCE. A time at which I on my own and without the IT support I demanded already had developed an automatic invoice control program that could derive the invoice able costs from the files delivered to OPOCE.

<u>The situation that lead to the 2nd Avenant of contract 1896:</u>

- It was in that situation that ADL restarted the contractual discussion. As they knew from daily project management that I was not willing to reopen the discussion without any new arguments they directly addressed themselves to the higher management of OPOCE namely Mr. Cranfield and Mr. Raybaut. However my management only consulted me before the first meeting with ADL and never afterwards so here I am lacking quite some information.
- From the two documents I got hold of during these negotiations thanks to a mistake of Mr. Neto[11] and which I sent to Mr. Bruener as attachments of my initiating email it becomes clear that ADL was kind of blackmailing OPOCE to pay more money threatening to stop consolidation. Looking closely at these two documents it is interesting to note that in the reported meeting of 21st September 2001 nobody seem to have referred to neither the Interinstitutional Agreement on Refonte nor the fact that ADL was changing and rationalising its production. A key phrase of this note is : *"ADL enverra à l´Office une proposition motivée de modification de certains postes du bordereau des prix en vue de procéder á la conclusion d´un avenant au contrat, sous réserve de l´accord de la CCAM, et ceci avant le 24 octobre 2001, date de la prochaine réunion."* In this phrase there is not a single word that OPOCE will carefully check the proposal and see what it will get in

[11] Mr. Neto was deputy head of unit in the unit headed by Mr. Steinitz and not his superior as wrongly stated on page 10 of the FCR.

compensation for this changes of the bordereau de prix (i.e. the price increase), no, the only problem ADL, Getronics and OPOCE saw was how to get *"l'accord de la CCAM"*.

- The second document *"DRAFT FAISANT SUITE A LA REUNION AVEC M: CRANFIELD:"* then shows that after this first meeting someone had a brilliant idea how to get the whole thing accepted by the CCAM: Instead of ADL asking to earn more money, now the false image should be created that OPOCE was asking for a production rationalisation! But who was the author of this document stating the *"Motivation de l'OPOCE"*? As can be seen from the value of the field *"author"* hidden in the Word-document it was *"Carine Valance"*, a member of the staff of Infotechnique/ADL. But the first version of that document made by her and approved by her bosses was not yet good enough. Therefore Mr. Raybaut (using track-changes) himself added the reference to the *"accord entre le Parlement; le Conseil et la Commission"*, replaced the word *"retard"* which still could sound too honest by *"rattrapage"* and asked for explications of the new ADL techniques. Now the way for the fake dossier that should go to the CCAM was paved.

- Despite this request from Mr. Raybaut and even after the specific request of the CCAM ADL did never manage to come up with details of its new rationalisations concerning *"saving layers"* and *"saving prints"*. This is not surprising knowing that there was no such rationalisation, that those two techniques were used already continuously before and that their payment based on the initial price schedule had also been agreed more than half a year before the Avenant came into force. So there was no rationalisation! But even if there would have been, there is a logical fault in the argumentation of ADL and OPOCE: As it was always clear that both techniques would only be used in a few very specific dossiers (see May agreement) there was not even a possibility how this could have an effect on the majority of dossiers not at all treated with these techniques. So why should anybody agree to a general price increase applicable for a *"rationalisation"* implemented by a technique that only is used in a few specific cases, instead of just introducing a specific pricing for those specific cases concerned (i.e. just for those cases where the *"rationalisation"* really was applied)?

- There is also no explanation why, if they would have been acting in good faith my hierarchy never asked me or Mr. Dehoy, i.e. the only two people at OPOCE at that time being able to control ADLs invoices, to estimate the costs of the planned Avenant. This did not happen even though (or because!) my hierarchy was well aware that thanks to the invoicing control database developed by me it would have been very easy to do this calculation (as it was done later right after knowing about the Avenant by Mr. Dehoy leading to the estimated 58% cost increase). It clearly shows that the OPOCE hierarchy was not at all interested in knowing the truth - they were just interested in constructing Potem'kin Vil'lages for the CCAM.

- There was one thing that helped a lot to get the Avenant approved by the CCAM. As shown above the workload expectations when setting up the initial contract 1896 for uncertainty, budget and security reasons were far too high. So that's how Carine Valance of ADL could come to a calculation showing a saving of 4.947.193 euros thanks to the proposed Avenant which later, as this was clearly unrealistic and could have raised suspicions of the CCAM, reduced to a more moderate cost saving of only 14%. However, if in fact the costs of the project where far lower than initially estimated that was not at all because ADL worked cheaper or more effective, it was just because the initial estimates were far too high. As the calculations of Mr. Dehoy presented me showed, without the Avenant far less would have needed to be spend for getting the same results.

- But even taking into account the facts mentioned in the last bullet point the argumentation in the FCR is wrong. The CCAM was interested in knowing the costs and did not at all take the position to say, *"fine, if the objective is ok we don't care"*. They explicitly requested further information and the only reason why they gave their agreement was that – after having asked if not even more money could be saved – in their mind at least the Avenant would not lead to an increase but to a cost decrease. It is obvious that if they would have known the real reasons and the real cost situation they would have never given their agreement. It might be true that also the CCAM could have investigated the case closer, but on the other hand nobody could expect them to assume that the General Director of OPOCE was just lying from A to Z.
- The FCR argues that the Avenant should lead to an accelerated production and was motivated by that purpose. If that would have been the purpose of the Avenant one should have expected to find concrete changes of the contract into that direction, e.g. an increase of the volumes to be produced, an increase of steering rights of OPOCE or a reduction of production delays. In fact none of these clauses has been changed in the contract. The only thing that did change was the price, where the – never reached – maximum price suddenly became the fixed price. So in fact there was a unilateral gaining of ADL for which OPOCE got nothing. At least nothing more than promises of ADL to respect from now on the contractual duties they had right from the start of contract 1896 – and as the production statistics show even that did not happen.

3.2.2. Testing the facts

The FCR states that concerning the real reasons for the Avenant as just illustrated *"It would of course be extremely difficult to show that this knowledge or intention was in the minds of the officials at any particular time in the past"*. But even the FCR also states: *"it is by no means impossible that OPOCE officials were aware of this prospect and consciously avoided mentioning it to the CCAM."* If those statements are true, should the consequence not have been a deeper investigation into the facts of the case?

In the Eurostat case – at least after the media pressure was high enough – OLAF sealed offices and had a huge team of investigators looking through the files in the offices of the concerned officials and private firms. Here apparently Mr. Thomson did not even look carefully at the information he had, as otherwise he should have noticed that ADL was the author of the OPOCE motivation. The information provided by me as such might not be sufficient for a penal court to find the concerned persons guilty but already these facts provide enough material to come to an adequate suspicion which should have lead to further investigations by the competent bodies. Based on the document provided by me which summarizes one meeting and speaks about other meetings scheduled to take place there seems to be a strong indication that there should be more minutes, email-exchanges and other papers on the subject at ADL and OPOCE that might help to get light into the issue.

A concrete suspicion raised by me was that the letter from ADL (ns/DVE/281 of 5/11/2001) which was adonised at OPOCE on 7/11/2001 had more than just the two pages which were later not presented to the CCAM and that these mind also enlighten the motivations. Did OLAF ever verify this? I also proposed that OLAF could talk to Mr. Dehoy, or Mm. Martina (who was at the meeting but is no longer working at ADL so she might be able to provide quite objective information). Even questioning the actors on their motivation and looking for divergences could have helped to learn more about their motivations, but OLAF at least

according to the FCR, besides looking into the CCAM dossier, did just nothing to find out more.

As just shown the investigation did not undertake sufficient initiative to find all facts. For the purpose of this legal opinion it will now be assumed that the acting OPOCE officials did know what they were doing and intentionally provided false information to the CCAM to get its agreement. This does of course not imply that they are in any form guilty, right on the contrary, if even with that hypothesis there would not be any legal responsibility of the actors the case could be closed without the need to undertake further fact findings and the actors would not at all be legally responsible.

3.2.3. The legal background

Concerning personal liability the legal background analysis in the first place needs to identify the relevant legal norms which in the current case could be violated:

3.2.3.1. The penal code of Luxembourg

As all activities took place in Luxembourg and as long as there is no more specific EU penal code the penal code of Luxembourg[12] is in principle applicable. In the concrete case the following norms need further testing:

3.2.3.1.1. Articles 246, 247 and 252 of the penal code of Luxembourg

*« **Art. 246.** (L. 15 janvier 2001) Sera puni de la réclusion de cinq à dix ans et d'une amende de 500 euros à 187.500 euros, le fait, par une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, ou investie d'un mandat électif public, de solliciter ou d'agréer, sans droit, directement ou indirectement, pour elle-même ou pour autrui, des offres, des promesses, des dons, des présents ou des avantages quelconques:*
1° Soit pour accomplir ou s'abstenir d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat;
2° Soit pour abuser de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable. »
*« **Art. 247.** (L. 15 janvier 2001) Sera puni de la réclusion de cinq à dix ans et d'une amende de 500 euros à 187.500 euros, le fait de proposer ou d'octroyer, sans droit, directement ou indirectement, à une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, ou investie d'un mandat électif public, pour elle-même ou pour un tiers, des offres, des promesses, des dons, des présents ou des avantages quelconques pour obtenir d'elle:*
1° Soit qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat;
2° Soit qu'elle abuse de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés, ou toute autre décision favorable. »
*« **Art. 252.** (L. 15 janvier 2001) 1) Les dispositions des articles 246 à 251 du présent code s'appliquent aussi aux infractions impliquant des personnes, dépositaires ou agents de*

[12] http://www.etat.lu/LEGILUX/DOCUMENTS_PDF/CODES/CODE_PENAL/CodePenal_PageAccueil.pdf

l'autorité ou de la force publiques, ou investies d'un mandat électif public ou chargées d'une mission de service public d'un autre Etat;
- des fonctionnaires communautaires et des membres de la Commission des Communautés européennes, du Parlement européen, de la Cour de justice et de la Cour des comptes des Communautés européennes, dans le plein respect des dispositions pertinentes des traités instituant les Communautés européennes, du protocole sur les privilèges et immunités des Communautés européennes, des statuts de la Cour de justice, ainsi que des textes pris pour leur application, en ce qui concerne la levée des immunités;
- des fonctionnaires ou agents d'une autre organisation internationale publique.
2) L'expression «fonctionnaire communautaire» employée au paragraphe précédent désigne:
- toute personne qui a la qualité de fonctionnaire ou d'agent engagé par contrat au sens du Statut des fonctionnaires des Communautés européennes ou du régime applicable aux autres agents des Communautés européennes;
- toute personne mise à la disposition des Communautés européennes par les Etats membres ou par tout organisme public ou privé, qui exerce des fonctions équivalentes à celles qu'exercent les fonctionnaires ou autres agents des Communautés européennes.
Les membres des organismes créés en application des traités instituant les Communautés Européennes et le personnel de ces organismes sont assimilés aux fonctionnaires communautaires lorsque le Statut des fonctionnaires des Communautés européennes ou le régime applicable aux autres agents des Communautés européennes ne leur sont pas applicables. »

The acting persons at OPOCE were and are still officials of the European Communities in the sense of article 252, so they are to be seen as *« personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, ou investie d'un mandat électif public »* in the sense of article 246. Therefore it has to be checked if they *« solliciter..., sans droit, directement ou indirectement, ... pour autrui, ... des avantages quelconques: ... pour abuser de son influence réelle ... en vue de faire obtenir d'une autorité ou d'une administration publique des ... décision favorable. »* So the question is, if they – without having the corresponding rights – directly or indirectly for the benefit of someone else misused their influence to achieve a positive decision from a public administration.

In the current case it can be subsumed that the decision concerned was the agreement of the CCAM to the 2nd Avenant. This decision was only reached thanks to the papers and the influence of the OPOCE officials. They acted under the pressure to get consolidation done but also (at least under the hypothesis that they knew what they were doing for which as seen above there is strong indication) because they wanted at least indirectly that ADL gets financial benefits out of this operation (this seemed to be their secondary intention without which they thought they could not reach their primary intension, i.e. consolidation). As there was no other valid legal ground for paying more money to ADL they also acted without a right. Consequently under the hypothesis that the OPOCE officials knew that there would not be any savings from the 2nd Avenant one comes to the conclusion that they are guilty according to article 246 of the penal code of Luxembourg. Under these circumstances the ADL actors would also be guilty according to article 247 of the penal code of Luxembourg as they were the ones proposing these activities.[13]

3.2.3.1.2. Articles 496-1 and 496-2 of the penal code of Luxembourg

[13] All these subsumation of the penal code of Luxembourg should be checked by a specialist in that field; I only try to show what might be worth having a second look at.

*« **Art. 496-1.** (L. 15 juillet 1993) Est puni des peines prévues à l'article 496, celui qui sciemment fait une déclaration fausse ou incomplète en vue d'obtenir ou de conserver une subvention, indemnité ou autre allocation qui est, en tout ou en partie, à charge de l'Etat, d'une autre personne morale de droit public ou d'une institution internationale.*
***Art. 496-2.** (L. 15 juillet 1993) Est puni des peines prévues à l'article 496, celui qui suite à une déclaration telle que visée à l'article précédent, reçoit une subvention, indemnité ou autre allocation à laquelle il n'a pas droit ou à laquelle il n'a droit que partiellement.*
(L. 30 mars 2001) Est puni des mêmes peines celui qui aura sciemment employé une subvention, indemnité ou allocation telle que visée à l'article précédent, à d'autres fins que celles pour lesquelles elle a été initialement accordée. »

Article 496-1 is violated when someone *« sciemment fait une déclaration fausse ou incomplète en vue d'obtenir ... une ... allocation qui est, ... à charge ...d'une institution internationale. »* The EU is such an international institution and the request for the agreement of the CCAM was objectively false (or at least incomplete not telling the true story) as it was talking about a saving while it was obvious that with the Avenant higher spending would take place. Still under the hypothesis that they were acting intentionally the OPOCE officials would therefore also be guilty according to article 496-1 of the penal code of Luxembourg. As afterwards ADL got the money their responsibility would then follow from article 496-2.

3.2.3.1.3. Article 208 of the penal code of Luxembourg

*« **Art. 208.** Tout fonctionnaire ou officier public qui, dans l'exercice de ses fonctions, aura délivré un faux certificat, falsifié un certificat, ou fait usage d'un certificat faux ou falsifié, sera puni de la réclusion de cinq à dix ans. »*

Article 208 of the penal code of Luxembourg might also be worth looking at. However, beside the question of the intentionality here it would also needed to be checked in detail if the request for agreement by the CCAM could be seen as a *"certificat"* in the sense of this article and if as 252 does not apply directly, EU officials could qualify as officials in the sense of that norm.

3.2.3.2. EU-law

Still under the hypothesis that it can be proofed that the OPOCE officials acted intentionally a lot of EU norms would also be violated, e.g. the Financial Regulation (articles 73 and 2), the Statute of Officials (articles 11, 21, 22, 85, 86), the CCAM Vademecum and the Code of Conduct.

3.2.3.3. The role of OLAF

Looking at the legal background under the hypothesis that OPOCE officials acted intentionally, it has been shown that under this condition the activities would have been violating different rules even of penal law. As above it had been shown that OLAF had and still has more means, competencies and therefore also responsibilities to investigate the facts of the case; these need to be used for further clarification of the facts.

It has also been kept in mind that already strong indices should lead to the decision of OLAF to give the case to the competent national penal authorities in Luxembourg for further

investigation. OLAF should not hinder them to take decisions that fully lie within their responsibility, i.e. either to undertake further investigations, to turn the case down because of lack of evidence or to bring it to the penal courts of Luxembourg for final decision.

3.2.4. Payments for "*saving layers*" and "*saving prints*"

From the information available to him me I concluded that it was already during the negotiations with ADL in which the conditions of the 2nd Avenant were defined that the participating OPCOE officials have agreed to pay an amount of around € 2,668 even for the non delivered pages, which at the same time was used as the argument to reduce the number of pages in rows 3 and 4 of the table in Annexe 5 of the CCAM dossier for justifying the 2nd Abeyant and the related cost savings.

According to the CCAM dossier leading to the 2nd Avenant, ADL thanks to the *"Rationalisation de la production" "Pouvoir traiter dans une seule couche tous les actes modificateurs et rectificatifs dont la date de validité de début est identique, donnant lieu à une nouvelle catégorie de documents : « saving layer » " and "Pouvoir traiter dans une seule couche plusieurs actes modificateurs et rectificatifs (sans tenir compte d'une quelconque date), donnant lieu à une nouvelle catégorie de documents : « saving prints » "*. From this it seems that at least from then on ADL could avoid producing any intermediary products which OPOCE never asked for; and that's exactly the pages for which OPOCE later paid € 2,668 per page.

There were 5 main reasons why I came to his conclusion:

- as shown above the whole purpose of the 2nd Avenant was to assure that ADL makes more profit, therefore they had no interest in not longer being paid for something for which they got at least some money before (according to the application of the initial price scheme as it was agreed in points 10 and 11 of the agreement of May 2001)
- at the first time when I in a personal meeting with Mr. Steinitz learned about the existence of the 2nd Avenant I directly asked Mr. Steinitz if an how the non delivered pages will be invoiced in the future and Mr. Steinitz explained me that it had been agreed with ADL that they should get paid a certain amount but not the full new fixed price of the 2nd Avenant
- ADL without ever having asked or discussed the issue handed in draft invoices in which they even after the 2nd Avenant claimed the price of € 2,668 for the non-delivered – and according to the Avenant justification even non-produced – pages (e.g. the case of 1998R2820)
- the remark of Mr. Schweitzer (head of production at ADL and also preparing their invoices) in his email[14] of 18/2/2002 to Mr. Dehoy (who asked the question why the € 2,668 / page had been invoiced) stating: *"Pour ce qui est du 2.668 EUR pour les cycles internes, il résulte d'une discussion HIGH LEVEL entre dirigeants d'Eur-OP et dirigents d' Infotechnique et le chiffre est la seule chose que l'on m'ait transmis"*
- the fact that the official note of ADL in which they requested the € 2.668 / page is dated only from 26/2/2002 and was only set up in reaction to Mr. Dehoy's refusal to accept the previous invoices.

[14] This email was already transmitted by Mr. Strack to Mr. Bruener in his initiating email of 31/7/2002

So this whole issue is another strong indication that OPOCE officials had agreed a common plan with ADL to assure more income for ADL and knowingly did not tell the true story to the CCAM. However it has to be noted that this issue might have been unofficially agreed at the occasion of the negotiations that lead to the 2nd Avenant, but from a legal point of view it had never become a formal part of this 2nd Avenant. Therefore the 2nd Avenant could not be a valid legal basis for payments related to this issue which leads to the next (separate!) allegation.

3.3. The allegation concerning the application of the 2nd Avenant of contract 1896 on non delivered pages: i.e. payment of € 2,668 per non delivered page

3.3.1. The information provided

While the second allegation was concerning the way the OPOCE officials managed to get the agreement of the CCAM for the 2nd Avenant this allegation essentially concerns the period after the 2nd Avenant got into force and precisely the fact that OPOCE made payments on invoices in which ADL claimed payment of € 2.668 per PDF page for pages related to *"saving layers"* and *"saving print"* dossiers which never had been requested by nor delivered to OPOCE.

As any payments made by the EU need a legal and or contractual basis the question is where this basis could be found concerning the payment of € 2.668 per page for saved (non-delivered) pages.

One of the key documents in that context seems to be the letter SERV-AUT(02) D/4177 of 12/4/2002 to Mr. Gray of ADL in which Mr. Brack under the *"Object: Avenant no 2 au contrat 1896 – facturation des 'saving couches'"* states the agreement of OPOCE to the invoicing of € 2.668 per concerned PDF page.

According to the FCR *"The March 2002 agreement was justified on the basis that the arrangements for payment for 'saved' layers were not set out in the Avenant and these therefore had to be agreed separately between OPOCE and ADL"*. However, from the following arguments it follows that if there is any legal basis for these payments at all, it can not be any kind of *"March 2002 agreement"* but it could only be found in the 2nd Avenant:

- Mr. Brack's letter is referring exclusively to the 2nd Avenant, so the payment of € 2.668 / page was based not on a new 3rd Avenant (as the FCR seems to argue) – which anyhow would have needed to be done in a much more formal way and also would have needed agreement of the CCAM[15] which they new they would never have got – but in the understanding of OPOCE on the contract as changed by the 2nd Avenant;
- this was also the understanding of ADL which in their letter of 26/2/2002 (fg/dgr/895) to Mr. Steinitz also exclusively refer to the 2nd Avenant *"par application de l'avenant 2"* and use only this as justification for these payments;
- in addition to all this and even ignoring the 2nd Avenant the price of € 2.668 has and could not be derived from the initial price scheme either. As shown in my email of 27/2/2002 to Mr. Steinitz the average payment that had been made (based on the initial

[15] Provided the CCAM did still exist in April 2002, but even if not according number 20 to the initial contract it would have needed an explicit 3rd Avenant signed by the two parties i.e. Mr. Cranfield.

price scheme applied as interpreted by the compromise of May 2001) was just € 0.73 per page.

So the essential question that needs to be answered is: Can the 2nd Avenant be seen as a proper legal basis for the payment of € 2.668 per page for saved (non-delivered) pages. This is exactly the question which I on request of Mr. Steinitz answered in my email *"Saving couches in ADL invoice under avenant 2"* of 27/2/2002 which also was attached to the initiating email to Mr. Bruener:

"Saving layers and saving couches cannot anymore be invoiced separately at all
ADL can treat everything in 1 step
The avenant 2 does not mention saving couches explicitly, however in its annexes there is a letter of ADL explaining that:
saving layer : « pouvoir traiter dans une seule couche tous les actes modificateurs et rectificatifs dont la date de validité de début est identique »
saving prints : « pouvoir traiter dans une seule couche tous les actes modificateurs et rectificatifs sans tenir compte d'une quelconque date ».
This is supposed to be the reason for the avenant 2, so having accepted this proposal ADL is now able to treat ***all steps in one and of course can only invoice this one step.***
Decrease of costs thanks to decrease of invoiced pages
In point 4 of the considerations of CCAM/01/0825, it is stated: « L'offre se traduira par une diminution estimée à 14% du coût global... ». Considering the increase of the fixed price per page this can only be true if there is a decrease of pages treated and this is implicitly referring to the ADL argumentation that they can now treat the things formerly called saving couche in one step. Only by not any longer invoicing "ex saving couches" there can be a lower total thanks to lower pages invoiced.
Pages delivered instead of produced pages
When the avenant explicitly refers to ***"pages livrées"*** *this as well is a strong, if not the strongest indication that things which are not delivered and have never been delivered in the past (in effect do not even exist on PDF), i.e. the "ex saving couches" cannot be object of an invoice neither. Referring just to really delivered pages is fully within the logic of the avenant as well considering that the positive effects of ADL being responsible for taking on board "correction auteur" and "question de responsabilités" can as well only appear on items really delivered to OPOCE. So saving couches not being delivered there is no basis for invoicing along the lines of the avenant.*
ADLs calculation
ADLs own calculation is wrong incoherent and based on wrong basic assumptions.
In fact until now ADL invoiced a total of 520.299.429 text characters and 169.754.860 table characters. So following the assumption of 2300 respectively 1380 characters per pages this leads to a relation of 65% text and 35% table pages or 1,15 € plus 1,20 € along the ADL calculation lines. The total price would therefore be 2,30 € instead of 2,668 € per page.
ADL speaks about 0,326 on page 1 and 0,329 on page 2 and uses a figure of 4,80 for which its origin is not at all clear.
Above all I made a calculation that based on the invoices we got until now from ADL there where 375 saving couche or print cases with a total of 101151 pages involved. This lead to an invoice amount of just 73,554 €. So until now the effective price per page was less than 0,73 €. As there is not any increase in value it's hard to see how the proposed increase in price can be justified."

3.3.2. Testing the facts

Here again it can only be stated that OLAF did not really investigate the facts of the case as this would have at least included:

- checking if any other documents or papers exist either at OPOCE or ADL that could further clarify the reasons
- asking ADL and OPOCE to explain how these pages could still be invoiced if they had been rationalised away
- calculating how much money was spend in total (thanks to the € 2.668 per page)

3.3.3. The legal background

According to part 1 point 1 of the CCAM Vademecum which itself is based on article 63 of the Financial Regulation:

> *"The ACPC must be consulted in advance on the following:*
> *(a) all proposed works, supply or service contracts and rental immovable property involving costs exceeding ECU 42 0001,2,3,4 and all proposed purchases of immovable property irrespective of the amount involved;*
> *(b) any proposed supplementary agreement to contracts referred to at (a), irrespective of the amount involved;"*

According to this any Avenant of contract 1896 would have need prior consultation of the CCAM which apparently did not take place here.

According to article 46 of the Financial Regulation as it was in force in 2002:

> *"1. The authorizing officer may make payments ... in accordance with contractual provisions."*

As the payment of € 2.668 per non delivered *saved* page as shown above was neither covered by a valid new 3rd Avenant nor by the terms of the 2nd Avenant, payments related to this were not made in accordance with contractual provisions and thus not in accordance with the Financial Regulation. This – as in the case of the first allegation – constitutes a violation of article 73 of the Financial Regulation and the responsible officials *"render themselves liable to disciplinary action and ...to payment of compensation"*. Consequently OLAF should either reopen the factual investigation or already now conclude that there is sufficient evidence for giving the dossier to the disciplinary authorities for further follow up.

At the same time also article 246 of the penal code of Luxembourg (by the concerned OPOCE officials) and article 247 of it (by the ADL actors) could be violated as here - at least for Mr. Steinitz who was in possession of my explanatory email - an intentional activity could hardly be denied.

3.4. The allegation concerning the retroactive application of the 2nd Avenant of contract 1896

While the first allegations were at least partly considered by the FCR a lot of other allegations that had been raised by me have not at all been discussed in the FCR. E.g. my initiating email to Mr. Bruener contained the following text: *"In addition to this the 'avenant' was applied retroactively to a lot of pending cases (i.e. where the demand for the delivery had been made before the avenant came into force) which in my view as well did not sufficiently respect the financial interest of the Commission."* A similar statement can be found in my interview.

The 2nd Avenant did not at all mention the cases to which it should be applied, so the normal procedure should have been to apply it only for ad-hoc dossiers (i.e. demands for consolidation) that were sent out after the 2nd Avenant came into force. Of course this was contradictory to the goal to assure higher profits for ADL as this would have meant that ADL would not have gained any additional money for all the hundreds of dossiers which at that time had already been ordered but not delivered. But even with a larger interpretation of the Avenant it is not at all understandable why a rationalisation should lead to a higher price for

dossiers which were already delayed, i.e. why ADL should not only not be affected by penalties (see above) but even get more money out of their non respect of delivery dates. Therefore at least for all dossiers for which the fixed delivery date had already passed before the day of entry into force of the 2nd Avenant this Avenant from a legal perspective could not be applied. Mr. Steinitz much larger *interpretation* was therefore not at all based on the 2nd Avenant but lead to unjustified additional payments for ADL. For which he is responsible according to the above quoted norms of the financial regulation.

3.5. The allegation related to additional source file demands not motivated by needs of the consolidation production

The corresponding statement in my initiating email to Mr. Bruener reads: *"the demands of ADL did not stop thereby referring to agreements with OPOCE that 250.000 pages of source files, a big part not at all needed for consolidation, should be demanded"*.

The source file issue was a key issue in ADLs *assure better profits* strategy as this was the part of their offer where they had prices that were as high as those of other competitors. As shown above - even though the table was formally correct - it was possible to interpret Annex A/8 in a way that it was indicating that OPOCE was estimating a need for approximately 700,000 pages of source files - a lot of which might be produced within the contract 1896. However there was not any engagement of OPOCE to request these amounts and not even a statement that this is the amount of source files estimated to be produced. From a legal perspective even that would not have been sufficient for creating any expectations of ADL that deserved protection. The concerning contractual clauses in contract 1896 and its Annexe E are very clear and had already been quoted by me in my position paper of April 2001 (that was attached to my initial email to Mr. Bruener):

> *"La réponse à cette question devient évidente en examinant certaines dispositions fondamentales:*
> *2.6.: "Le présent contrat n'entraîne en aucun cas une obligation à la charge de la Commission d'avoir recours aux services du Contractant".*
> *2.3.: "Les prestation sont attribuées conformément aux modalités décrites en annexe E du présent contrat."*
> *Annexe E: "Les quantités et les moments précis de livraison ou de prestation ne pouvant être définis a l'avance, ..."*
> *2.3.: "Les prestation à accomplir par le Contractant seront á chaque fois spécifiées par la Commission selon les modalités décrites dans le cahier de charges. Pendant l'exécution du contrat, les prestations pourrant ... couvrir qu'une partie de taches prévue par le cahier de charges."*
> ***Par conséquent, l'OPOCE peut limiter sa demande de services à des parties des services totaux sans que cette limitation ne laisse place pour des plaintes ou des exigences de compensation par ADL. »***

Despite these clear statements there are more than strong indications that OPOCE officials during the negotiations with ADL in autumn 2001 also agreed to order more source files even if they were not at all needed for consolidation purposes just to assure that ADL would gain enough money to continue with consolidation. While I was still at OPOCE I tried to block these by issuing only source file demands which at least had some relation to consolidation but ADL always kept pressing that they had been promised 250,000 pages. As I already stated in my initiating email to Mr. Bruener: *"there might even be written proof for those*

agreements as I once saw a related paper during a meeting at Mr. STEINITZ. However I never got hold of that paper".

To test these allegations it could have been expected that OLAF would search these kind of papers or even simply check which source files had been demanded and paid– especially after I left, i.e. from 03/2002 onwards – and if they were really needed for consolidation or if the contract 1896 and even the corresponding budget which was reserved for consolidation purposes was wasted for paying for source file demands that had no relation to consolidation. If the latter could be proofed that would constitute a misuse of the budget and also a violation of article 2 of the Financial Regulation that requires *"accordance with the principles of sound financial management, and in particular those of economy and cost-effectiveness"* and thus a financial irregularity falling within OLAFs competencies.

3.6. Insufficient resources for controlling ADLs production

Besides issuing demands for consolidation it was the responsibility of my consolidation team at OPOCE to control quantity, timeliness and quality of the products produced and delivered by ADL and to control the invoices of ADL. At several occasions I informed OLAF that in my view the personal and IT resources for doing this were insufficient. This is not an allegation of fraudulesc irregularities but however indicates serious mismanagement at OPOCE which also had financial implications and which adds up to the full picture that at least from a certain moment onwards assuring ADLs benefits for some OPOCE officials was more important than effectively controlling ADL and assuring the financial interests of the Commission. Therefore the FCR should have tackled this point at least in the sense of general follow up advices.

In the interview I stated: *"I developed on my own [an] invoice control system and I did that against the whish of my Director, because he, in a meeting said to me we should not care too much about how to collect all these invoicing data for the control services".*

Another part of this allegation was mentioned in my email to Mr. Thomson of 17/12/2003 by stating: *"we never had sufficient resources to do the work so ADL people were working at OPOCE (in my team) to check the work of ADL (they did effectively and were punished (e.g. no X-mas allowance) for this by the company without being protected by OPOCE). Formally this meanwhile (just a few months ago) has been stopped but as the lack of resources (and perhaps competence) still exists, I know that informally there is at least one SISEG/ADL guy still working regularly at OPOCE doing preparation of CONSLEG ad-hoc-dossiers."*

3.7. Allegation concerning Mr. Tonhofer

In the interview I also raised another allegation that had not at all been mentioned in the FCR: *"The former second man of OPOCE, who is now Director at the Parliament, is a Luxembourger (Mr. Tonhofer). During meetings he was claimed as a reference by ADL. He stepped back from his office at the publications office for a while and during this period apparently he worked as a private consultant for ADL in the procedure for call for tender."* By this – without having any proof beside the non-documented statements of several ADL staff – I raised the allegation that Mr. F. Tonhofer during a period of special leave worked as a paid consultant for ADL providing them with knowledge during the call for tender procedure and with arguments in the later contractual discussions with OPOCE. For me this could be an illegal activity of someone who still is EU official and should therefore have deserved further attention by OLAF. The FCR does not mention anything about it.

3.8. Allegation concerning OPOCEs treatment of Mr. Strack

In my email to Mr. Kinnock and Mr. Bruener of 31/7/03 I informed OLAF that I felt that because of the position I took and because of my clear statements vis a vis my hierarchy (trying to assure what I saw and still see as the financial interests of the EU) I was object of moral harassment and discrimination by my hierarchy at OPOCE also within the CDR procedure. While apparently according to Mr. Brueners statements in the discussion with me OLAF took some general political initiative on the question of the risk of discrimination of whistleblowers within the CDR procedure[16] OLAF apparently did nothing at all concerning my concrete discrimination.

Despite its independence OLAF is a Commission service and therefore bound by the duties of the Commission as defined in the Statute of officials and the court judgements that were made in its interpretation, this especially includes article 24 of the statute and the general support duty the Commission has. Applied on the concrete case this should not only have lead to a more thorough investigation but also to clear statements in the FCR that (especially if the allegations needed to be dropped just because the subjective motivation of the accused officials could not be proofed) I, based on the information available to me took the right decisions and acted fully in the interests of the Commission when trying to change the mind of my superiors and when informing and involving OLAF. This was not only legally but also morally owed to me and for me would be very important not only for my pending CDR law case (in which the Commission formulated a reserve depending on the outcome of the investigation) but also for reinstalling my believe in the willingness of the Commission to effectively fight against internal irregularities, fraud and corruption.

3.9. Allegation concerning OPOCEs internal audit

I do not recall anymore if I already informed OLAF about this, but in fact before providing Mr. Bruener with the information mentioned in my initial email, I did already provide Mr. Caneiro, the internal auditor at OPOCE with that very same information. As it would have been within the responsibility of the internal audit service to verify these allegations. Apparently this was not done with the necessary intensity which might also constitute an irregularity of its own. At the same time this raises a big question mark on the efficiency of the Commission reform of the internal audit which is now placed under the responsibility of the Director General at least when it comes to investigating irregularities in which the Director General himself might be involved.

3.10. Possible allegation concerning OLAFs investigation

Looking at the duration and the depth of this investigation and also at the bad quality of the FCR, I might now need to raise another new allegation: OLAF did not invest sufficient resources into this investigation and did not seem to have an interest in any results produced by it. There might also be reason for accusing OLAF of moral harassment against myself caused by the bad quality of the interview transcript, by the general non-information policy that OLAF took; by Mr. Bruener who obviously was only interested to achieve that I send my positive email to Mr. Kinnock. by the non-response to the request of 2/12/2003 to Mr. Bruener, by the non-response to the email to Mr. Thomson of 18/12/2003, by the official one-phrase case closure notice of Mr. Perduca by the email denying any additional information by Mr. Spitzer, and especially and finally by the many false statements in the FCR as shown

[16] And even here what has been achieved is minimal as it requires a CDR reduction of at least one point (i.e. a ½ point discrimination despite of far better merits is not sufficient) and a self-outing of the whistleblower giving him in exchange nothing more than a different person as appeal assessor.

above leading to the image that I was just someone complaining without reason. I hope that the investigation will be reopened and that at least some of these issues will be solved so that I do not need to formally raise such an allegation.

3.11. Allegation concerning further treatment of ADL

A final allegation which has not been raised explicitly until now is related to the fact that according to the information available to me even after the events in 2001 and 2002 ADL, SIESEG and Infotechnique were admitted to the selection of several calls for tenders issued by OPOCE and even won some of them. If the blackmail allegation raised above were objectively substantiated or even if it was right only right that as quoted in the FCR ADL was *"an incompetent contractor to carry out work of an urgent nature"* this should if pressure did not admit to take consequence within contract 1896 at least have led to consequences afterwards. I.e. to avoid getting into similar situations with the same contractor again. Apparently even that consequence has been considered neither by OPOCE nor by OLAF.

4. Conclusions

As shown in the previous chapter there are strong legal and factual indications for personal, maybe even penal, liability which should lead to a re-opening of the OLAF investigation OF/2002/0356, to further intensified fact finding activities and based on those eventually to follow-up activities vis a vis the accused officials. To assure better quality of this investigation OLAF will need to assure that sufficient man-power, resources and legal expertise is made available. Closer co-operation with me and other potential witnesses should be encouraged.

Under the header "conclusions" this chapter tries to discuss more general consequences and potential follow-up that goes beyond personal liability and tries to look at the *lessons to learn* from this case and the way it was handled up to now. Thereby this chapter also tries to provide ideas for possible answers on the questions raised at the end of the second chapter.

Assuming that the FCR would have come to a different conclusion i.e. there would have been proof for OPOCE officials receiving money from ADL in exchange for exactly the same actions; can the EU really allow keeping the line to bribery that thin?

Of course not! Bribery and corruption can only grow in the dark, so what is needed is *transparency* and solid documentation. Top officials should not start developing creative solutions in closed rooms sacrificing their own people and showing false images to controlling services. They should write official notes to politicians stating:

"Company X is threatening to stop working, if we don't pay them more money. Thanks to your decisions on small efficient public services we do not have resources to do the work on our own. Thanks to the harsh procurement rules we will never finish in time when we need to restart. What should be done? Should we pay and have a chance to succeed the project or should we cancel the contract and enter into legal conflicts?"

This way politicians would be faced with the consequences of what they asked for. They would see how often such situations come up and sooner or later there would be public discussion about means to avoid them in the first place. But even without involving politicians OLAF and other control services need to insist on transparency and proper, honest

documentation. Some flexibility should only be allowed if at least these basic principles are obeyed; a condition which in this case was certainly not fulfilled.

How would the case have developed now in a situation where after abolishment of the CCAM and other Commission reforms Director Generals have even more power and are even less controlled – is this really the kind of improvement which helps?

There is an evident risk that nowadays General Directors do even have more power to handle cases like this one the way they think it should be handled and not the way it really should be handled. As the case showed, the advance agreement by the CCAM build up a high hurdle – which indeed could be seen as the one making the difference between acceptable and non acceptable activities – that in similar cases often might have stopped DGs from going into dangerous directions. Now it all rests with the honesty of the General Director. He is the boss of operational activities and control activities in his DG. He is the one who chooses his auditing services and on whom it depends (not only thanks to the CDR). So if he decides that obeying the rules is more important than achieving operational targets that's fine but risks to put him into trouble for not achieving those targets. If on the other hand he puts rules into the second place there is a better chance reaching his targets and thus for nobody to come up raising questions. And finally, if he asks politicians in advance and puts such problems onto their desk he will be accused of not being able to solve his own problems which of course would not be good for his career.

How much is all this typically for situations in which the EU is outsourcing tasks to private contractors? – How far is the situation related to the lack of resources (e.g. during the phase of contract creation and tender evaluation) as mentioned in the wise men (Santer-Commission) report? - How great is the danger to get blackmailed and what could be done to help avoiding situations that put officials under such a high pressure right from the start?

It is typical, at least in situations where it's not about using outsourcing for buying standard products or services but where outsourcing is done in new fields in which technology and political priorities are constantly evolving. It's modern to have small and efficient public administrations and to spend as few money for administration as possible. It's far better to use the forces of the private market and to spend money for concrete projects. So what typically happens in the Commission is that there is plenty of money to be spend and very few resources to think about how it should be spend and to assure that it is spend the way it should be spend.

There are technical fields where officials forced into mobility and dealing with several subjects who never had a chance to do the outsourced job themselves simply can't hold up with people in private companies doing the same job for years and doing nothing but it. These officials can't write tender specifications which foresee all details and problems that will arise in the next 3-5 years (and that's typically the time from writing the specification until the end of the contracts application period) so problems will always arise.

Another aspect is that writing a call for tender also involves integrating clauses of the standard contracts. In calls where it is not about providing standard but innovative services that leads to a very specific kind of contract. For a lot of bidders, especially big market leading companies that already means that – if its not about real big money – they will not be interested in winning the contract. In the private marked they are strong enough to implement their own standard contracts which they and their lawyers know everything about. Therefore for them the investment of doing something off standard and taking risks that are difficult to evaluate will normally be too high. As a result those big experienced companies typically even don't

invest in answering to such call for tenders. What rests as competitors is – as this is the case for OPOCE – a small circle of (always the same) middle size companies (which base a huge percentage of their revenue just on the EU); a result which is quite contradictory to the ideas of public procurement and largest possible free competition.

For those companies on the other hand there is two completely different phases. The first phase in which they at any risk need to win the contract, and the second in which they need to get the job done. In the first they know that it is important to follow all the formalistic rules of the procurement law, to present a good looking concept and most of all to have a very competitive price. Typically they have specialist bid-writers doing this job. In the second phase however the bid-writers have left and the production guys need to get the real work done with costs as low as possible. It is obvious that also from there problems do arise.

How much power and creativity too reach political goals should be allowed and are there any parallels to the Eurostat case where achieving policy objectives by special means might also have been a motivation of the actors at least at the beginning?

Without being an expert of the Eurostat case it seems that also there at the beginning some officials still acted in good faith trying to get things done even if the did not have the proper instruments for this. So they slightly shifted money from one project to another still not for their private benefits but to overcome inflexibilities of the system. They started not to tell everything to everybody anymore and to paint nicer pictures to controlling bodies. And with the time all this became more and more autonom and solutions became more innovative and less legal. It needed to be assured even more that only few people knew about it, and from a certain stage onwards these few people might even have implemented their own agenda. Apart from the very last stage that might not (yet) have been reached the OPOCE case was going just the same way.

What's the role of the law in all this, should law always govern politics or is there a need for exceptions from the rule of law?

The EU is a legal body and it needs to stay one. It was a great achievement of the last centuries that politicians and officials were no longer allowed to do whatever they want and got bound by the law, a principle that should even then not been given up when in the short run it looks more economically reasonable to come to non-lawful solutions.

Does any legislative initiative need to be undertaken to clarify also from a legal point that renegotiating contracts after public procurement procedures and non-execution of penalty clauses in such contracts can be legally correct under certain circumstances and in which situations should that be allowed?

The procurement regulations are dealing very much with formalisms and the ways tenders need to be made and evaluated. There does not seem to be much about what happens afterwards. However their target, i.e. to reach fair competition, goes beyond the moment of the awarding of the contract and there also is a close linkage between the application of a previous contract and the bidding for the next. It is obvious that from this case companies like ADL learn that it can be a successful strategy to win the bid with a low price offer and to assure profits entering into renegotiations afterwards. It does not at all help that offers are perfectly sealed so company A does not know the price offered by company B if it is assumed to be a valid argument that: *"even after the Avenant A will still be cheaper than B"*. If competitor B thinks that the harsh terms of the call are irreversible and that foreseen penalty

clauses will be executed in practice, he needs to calculate all this into the price of his offer. Competitor A on the other hand knowing that his official counterparts are people who understand his commercial needs want to get things done, are flexible and would avoid penalties as they only harm the contractual climate will be able to offer a much better price. Such a competition is not at all fair anymore.

Of course there can be situations where contract adaptations are needed but it should be done in a transparent way. For example it should never be the organisation that is under pressure to get the work done that has the final say in agreeing to contractual changes but it should be an independent control organisation (as the CCAM was) which is sufficiently equipped to get a clear own picture (as at least in this case the CCAM did not have) of all circumstances and is assuring that rules are kept. It might also be good to allow previous competitors to know about planned Avenants in advance as this would give them a chance to assure that their interests and the principles of fair competition are not violated.

Anyway there should be serious consequences for companies that try to use pressure or "blackmail" public servants in situations like the one in this case. OLAF should, on own imitative or on request of the concerned service, have the competency to ban these companies (and perhaps also the companies owning them) from further EU competitions at least for a certain time. This would be an effective way of avoiding such situations in the future.

Finally, what are the lessons learned from this case as far as case handling at OLAF and co-operation with and protection of whistleblowers are concerned? Should something be done to reconstitute my honour, e.g. by stating that I was right in opposing my hierarchy, in bringing forward my allegations to OLAF and in pressing OLAF to proceed as only my engagement enabled to have a closer look at such difficult cases thus enabling to come to more human, more fraud-resistant and more legal and more economic solutions in similar cases in the future?

The best way to describe the situation of whistleblowers within the Commission are just three words: "you are alone". You are alone while your hierarchy and your colleagues arrange themselves with contractors. You are alone if you want to escape the situation by changing to another service. You are alone if your hierarchy punishes you using the CDR instrument. You are alone because you are not allowed to talk to anybody. You are alone because OLAF does not inform you properly and doesn't let you know what the others already know. You are alone because you have no rights and means to force OLAF to do anything if they don't want it for whatever reason. You are alone because it is your problem and all others managed to arrange with the way the administration did always work.

Whistleblowers could be a powerful instrument of OLAF for effective control and thus in assuring a correct and effective public European service. But looking at the concrete cases up to now one gets the image that they are considered just as troublemakers, they lost all career perspectives, got suspended or even fired, or ended up in permanent sickness. To change this OLAF must do whatever it can to support whistleblowers. Concrete measures that could be taken are:

- granting them automatic immunity from CDRs by biased hierarchy
- providing extra CDR points – in the interest of the service – for justified whistleblowing
- allowing them to change job into jobs at OLAF or other controlling services (thus getting them out of the fire and making use of their fraud sensibility) if they want to do so

- creating a whisleblower support unit at OLAF with the tasks is to provide social and personal support to whistleblowers or those who are thinking about it and to check claims of possible discrimination even after the case has been closed
- automatically providing whistleblowers with the draft full FCR and the right to raise their point before its approval (a similar right that accused officials already have)
- creating a whistleblower committee from representatives of whistleblowers attached to the OLAF supervisory board with the right to hear complaints of whistleblowers and to look into complete dossiers of any internal investigation reporting its findings to the supervisory board
- giving whistleblowers the right to go to court and get their case and OLAFs treatment examined by independent judges (a similar right that accused officials already have)
- including a statement at the end of FCRs stating if - independent from the outcome of the investigations - the whistleblower from his perspective took a legitimate decision to raise the issue thus assuring his honour.

It is obvious that the current case has not such a high criminal profile as bribery or other clear cases of fraud and corruption might have. However from a political point it might be even more important. It does not allow a simple verdict pointing fingers on a few officials who acted only for private benefits. It shows something much more structural but however typical. It shows officials that also because of the general situation within the EU public services (lack of resources, need for outsourcing, inflexibility of procurement rules, and lack of legal support) got into difficult situations and were forced to take difficult decisions. It shows the powers of loyalty to hierarchy (instead of loyalty to law) that worked well in getting everybody who was needed to play his part in overcoming formalistic rules and resistance of controlling services (who anyhow don't know and don't care that the job needs to be done).

If OLAF would take this case up seriously, it would need to spell out some truth that goes far beyond accusing individuals but would request political initiatives sometimes even contrary to those the current Commission undertook within the last years. Raising allegations officially, OLAF would also risk that the concerned and other officials would start to talk, to talk about other similar situations were similar things happened without anyone being alleged, thus putting the nice *"zero tolerance"* image of the Commission in great danger.

In addition despite all those political statements apparently OLAF does already now not have sufficient resources to deal with the clear cases of corruption it is occupied with, so it seems to be reasonable on the concentrate on serious *finger pointing* cases instead of risking to create even more concerns and thus cases. It might seem better to keep structural problems like the ones raised here in the dark and to invest the saved time into writing general papers on the importance of the fight against fraud. Also the General Director of OLAF knows that just with following the rules not everything can be achieved so its perfectly understandable that he does not at all want to attack one of his well known colleague Director Generals (who in other cases like the Andreassen one is even leading investigations himself) for those kind of things.

However, the Eurostat example shows that this strategy is dangerous that might only work for a short while as it risks that someone else will bring the truth up into the light. Perhaps for this case the risk that the media even if they would know could create an earthquake like the one at Eurostat is low but avoiding real investigations of those structural cases the next big one will come and might blow away more than just a General Director.

As participation rates in the European elections will soon show at least in the old member states public trust into the EU is decreasing more and more and continuing this strategy OLAF will not contribute to changing this trend.

Wasserliesch, 16.04.2004

Guido Strack