

Decision of the European Ombudsman closing his inquiry into complaint 3177/2008/(JDG)OV against the European Commission

Decision

Case 3177/2008/(JDG)OV - Opened on 29/01/2009 - Recommendation on 10/10/2011 - Decision on 20/09/2012

The background to the complaint

1. The present complaint concerns the termination of the contract of the Chief of Finance of the European Union Monitoring Mission (EUMM) in Sarajevo, Bosnia-Herzegovina. The EUMM (formerly the European Community Monitoring Mission, ECMM) was created by a Council Joint Action of 22 December 2000 (2000/811/CFSP) [1]. The EUMM operated under the Common Foreign and Security Policy (CFSP) and its primary objective was to contribute, via its activities and following directions from the Secretary-General/High Representative of the Council, to the formulation of the European Union's policy towards the Western Balkans.
2. The Head of Mission (Mr X.), who ensured the day-to-day management of the EUMM, was appointed by the Council. His employment contract was, however, with the European Commission, which employed him as a CFSP Special Adviser/Head of Mission. Article 11(1) of his contract provided that "[t]he Special Adviser shall conclude contracts of employment on his own behalf respecting the applicable social and labour legislation." When the EUMM ceased to exist on 31 December 2007, Mr X. became the Ambassador of his country to a third country.
3. According to Joint Action 2000/811/CFSP, the EUMM reported to the Council through the Secretary-General/High Representative of the Council. The Joint Action also provided that the Commission was fully associated with the EUMM.
4. The complainant had worked for the EUMM under various contracts since January 2001. His last employment contract, as 'Chief of Finance of the EUMM', entered into force for a period of two months (January-February 2007). The duration of the contract was later extended until 31 December 2007.
5. On 11 June 2007, the Head of Mission informed the complainant that his contract would be terminated with effect from 31 August 2007 [2].



6. On 2 January 2008, the complainant wrote to the Council to claim compensation for the early termination of his contract.

7. In its reply of 16 January 2008, the Council pointed out that the EUMM had ceased to exist as of 31 December 2007 [3] and that the relationship between the complainant and the Head of Mission fell under the competence of the Commission, to which the Council transferred the complainant's letter. On 16 January 2008, the Deputy Secretary-General of the Council wrote to the Secretary-General of the Commission. He referred to the complainant's claim for compensation and pointed out that, pursuant to Article 5(3) of Joint Action 2000/811/CFSP, the Head of Mission has to report fully to, and is supervised by, the Commission regarding the activities undertaken in the framework of his contract of Special Adviser. The Deputy Secretary-General of the Council explained that he had therefore transferred the complainant's claim to the Commission. On 11 February 2008, the complainant's lawyer contacted the Commission in this regard.

8. The Commission replied on 27 February 2008, pointing out that international staff recruited by the Head of Mission could not be considered to be "*Commission employees*". It stated that the issue was governed by the provisions of the contract concluded with the Head of Mission. In its further reply of 2 April 2008, the Commission argued that the complainant had been employed by the EUMM (via a contract concluded with the Head of Mission) and not by the Commission. It referred to the contract concluded between the Commission and Mr X., and pointed out that he had authority to conclude employment contracts "*on his own behalf*" and remained financially responsible for these contracts. It further recalled that, although the EUMM's mission ended on 31 December 2007, the EUMM had not yet ceased to exist at that point. The Commission took the view that there was no reason to deviate from the complainant's employment contract with the EUMM and thus to involve itself as a party. It suggested that the complainant could address himself to the EUMM, in particular to Mr X., regarding any claims he considered to have on the basis of his employment contract.

9. On 30 April 2008, the complainant wrote to Mr X. at his new address at the Embassy, where he had since been appointed as Ambassador. Given that Mr X. did not reply to this letter, and to a further letter sent to him on 15 May 2008, the complainant wrote on 27 May 2008 to the Ministry of Foreign Affairs requesting it to intervene in this matter.

10. On 23 October 2008, the complainant sent three identical letters concerning the matter to Commissioner Ferrero-Waldner, to Mr X. and to the EUMM. The letters contained the same claim for compensation as the one sent earlier. On 26 November 2008, the complainant submitted the present complaint to the Ombudsman.

The subject matter of the inquiry

11. The complainant suggested in his complaint to the Ombudsman that his dismissal was "*based on the fact that he informed Brussels about irregularities concerning the mission*". The



complainant stated that his complaint was directed against (i) the EUMM, (ii) Mr X. and (iii) the Commission.

12. The Ombudsman then informed the complainant that the complaint against Mr X. was outside his mandate, as he had no power to deal with a complaint against an individual person. He also noted that Mr X. no longer worked for the EUMM. The Ombudsman also informed the complainant that an inquiry against the EUMM had become impossible since the EUMM's mission ended on 31 December 2007.

13. The present inquiry therefore only concerned the complaint against the Commission. The Ombudsman summarised the complainant's allegations and claim as follows:

Allegation:

The complainant alleged that the Commission had failed properly to handle the matter.

Claim:

The complainant claimed monetary compensation, namely, his salary for four months (September until December 2007), the payment of his removal and travel expenses, as well as the payment of his health and insurance costs.

The inquiry

14. The complaint was forwarded to the Commission for an opinion. The Commission sent its opinion on 30 March 2009. It was forwarded to the complainant with an invitation to submit observations by 31 May 2009. No observations were received from the complainant [4] .

15. On 28 October 2009, the Ombudsman requested the Commission to provide further information on two points. The Commission sent its additional opinion on 1 December 2009. The Ombudsman forwarded it to the complainant, who sent observations on 27 January 2010.

16. On 18 June 2010, the Ombudsman made a proposal to the Commission for a friendly solution. The Commission sent its reply on 18 November 2010. It was forwarded to the complainant, who sent his additional observations on 27 December 2010.

17. On 10 October 2011, the Ombudsman made a draft recommendation to the Commission. The Commission sent its detailed opinion on 16 January 2012. It was forwarded to the complainant, who sent his additional observations on 28 February 2012.

The Ombudsman's analysis and conclusions



A. Alleged failure properly to deal with the matter and the claim for compensation

Arguments presented to the Ombudsman

18. The complainant alleged that the Commission failed properly to handle the matter. In particular, he argued that the Commission was avoiding its responsibility. He argued that it had created the EUMM and appointed Mr X. as Special Adviser. The complainant further argued that the Commission failed to provide clarifications concerning whether or not the EUMM still existed. He claimed monetary compensation, namely, his salary for four months (September until December 2007), his removal and travel expenses, as well as his health and insurance costs.

19. In its opinion, the Commission explained that it had employed Mr X. as a CFSP Special Adviser/Head of Mission and entrusted him with the agreed amounts from the CFSP budget so as to enable him to meet the expenditure arising from the implementation of the Joint Action. It pointed out that a Head of a CFSP Mission is contracted as a Special Adviser, and that the provisions of Articles 5, 123, and 124 of the Conditions of Employment of Other Servants of the European Communities (CEOS) are applicable. It further pointed out that a CFSP Special Adviser contract is a *sui generis* contract exclusively foreseen to allow a natural person to act on behalf of the Council in the field of the CFSP. As Head of Mission, the CFSP Special Adviser acts under the authority and operational direction of the High Representative for the CFSP and the Political and Security Committee (PSC). In line with the Joint Action and the CFSP Special Adviser contract, he/she is responsible to the Commission for the financial administration of the mission budget.

20. The Commission explained that, given the unique structure of CFSP missions, the precarious conditions in the field, the overall need for quick deployment and operability, and the limited duration of such operations, the Council, through a contract concluded with the Commission, entrusts the Head of a CFSP Mission with the recruitment and the employment of the staff he/she needs for the implementation of the objectives set by the Council. The overwhelming majority of staff in such missions consists of officials seconded by Member States. Consequently, the contract of a CFSP Special Adviser with the Commission, following his/her appointment by the Council or the PSC, foresees that the Head of Mission shall conclude contracts of employment on his/her own behalf. When doing so, he/she must apply the rules for staff employed by or seconded to Special Advisers, which are set out in the Commission Communication on Specific Rules for Special Advisers of the Commission entrusted with the implementation of operational CFSP actions ('the Commission Communication') [5] .

21. The Commission stated that the employment contracts of international staff concluded with the Head of Mission are subject to the labour law of the staff members' respective Member



States. These contracts contain the necessary clauses imposed by the applicable national social and labour law, including a termination and an arbitration clause.

22. As regards the case at hand, the Commission stated that it had informed the complainant's lawyer in its letters of 27 February and 2 April 2008 about the way the CFSP budget was implemented. It had also drawn his attention to the fact that the EUMM Head of Mission recruited the complainant on his own behalf. The EUMM's staff could not therefore be considered to be directly employed by the EU. The Commission stated that this was also confirmed in the Ombudsman's decision on complaint 3008/2005/OV. On the basis of the above, the Commission thus considered that it had properly dealt with the matter.

23. After examining the Commission's opinion, the Ombudsman concluded that further information was needed. He therefore asked the Commission to address the complainant's allegation that it had failed to comply with its responsibilities in the matter. In that context, he recalled that, in its letter of 16 January 2008 to the Commission, the Council stated that "*the Head of Mission reports fully to, and is supervised by, the Commission on the activities undertaken in the framework of the contract of Special Adviser that he concluded with the Commission.*" The Ombudsman also asked the Commission to comment on the complainant's statement that his dismissal was "*finally based on the fact that he informed Brussels about irregularities concerning the mission*".

24. In its additional opinion, the Commission pointed out that all joint actions concerning CFSP missions include a standard provision on the supervisory role of the Commission. Accordingly, Article 6(3) of Council Joint Action 2002/921/CFSP, extending the mandate of the EUMM [6], included the wording referred to by the Ombudsman. The Commission pointed out that, acting in this role, it set the framework for the mission's budget implementation through the adoption of the Commission Communication. In this context, the Commission defines the content of the contract to be signed with the Special Adviser/Head of Mission. By signing such a contract with the Commission, the Special Adviser becomes responsible, under the Commission's supervision, for managing the funds in accordance with the Financial Regulation applicable to the general budget of the EU, its Implementing Rules and the financial and budgetary rules set out in the contract. The Special Adviser also becomes personally responsible for concluding contracts of employment on his/her own behalf.

25. The Commission stated that, to its knowledge, the reason for the complainant's dismissal was caused by a lack of confidence triggered mainly by a fraud case which the complainant, in his role as Chief of Finance, had failed to identify. The Head of Mission had, it stated, identified a misappropriation of funds amounting to approximately EUR 100 000 that resulted from the falsification of fuel bills, over a period of at least two years, by one of the local employees of the EUMM. The Commission pointed out that it had duly informed the European Anti-Fraud Office (OLAF) about the case. It also pointed out that, in the summer of 2006, the complainant had expressed concerns about the way the EUMM disposed of a number of old cars in its possession. At the request of the Commission, the EUMM had submitted the relevant documents in this regard. After examining these documents, the Commission informed the EUMM that, in future, the prior approval of the Commission should be obtained for such



procedures, and clarified the type of documents that needed to be kept by the mission.

26. In his observations relating to the further opinion of the Commission, the complainant explained that he worked for the EUMM in different capacities since January 2001, including as Deputy Head of Mission during the second half of 2004 and the first half of 2005. He pointed out that he had discovered irregularities already in 2002 and 2003, but that these were quickly addressed with the assistance of the then Head of Mission. When the new Head of Mission took over in September 2003, the collaboration between the complainant and him was initially excellent. The complainant added, however, that the working atmosphere subsequently deteriorated, especially from 2006 onwards, given that he took a critical view of the day-by-day running of the EUMM and of the expenses that were incurred. According to the complainant, the situation escalated in June 2006, when he reported certain irregularities to the Commission concerning the sale of used cars and the payment of salaries. The Head of Mission thereupon forbade him from making further contacts with the Commission in Brussels. According to the complainant, the then chief of staff (who had the same nationality as the Head of Mission) and the Head of Mission became very angry with him and started to make his work impossible. This, he stated, caused him great frustration. The complainant further submitted that, in May 2007, he learnt from a local staff member that the Head of Mission had been involved in the irregular sale of used cars in 2006 and in the destruction of documents concerning this procedure. He pointed out that he had submitted relevant documents to OLAF in this regard. The complainant added that he felt let down by 'Brussels' and that it had been his duty as Chief of Finance to report the said irregularities to 'Brussels'.

27. The complainant observed that, in 2007, fraud relating to fuel expenses was also discovered. He was subsequently blamed for failing to discover it. He pointed out, however, that, when he raised the same issue as regards fuel expenses in 2006, he was told by the chief of staff that he should trust the declarations made by the persons concerned.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

28. The Ombudsman already had occasion to deal with the contractual position of staff of CFSP missions employed by Special Advisers/Heads of Mission in his decision of 26 July 2007 on complaint 3008/2005/OV, which was also directed at the Commission. It should first be noted that members of staff in such missions are not employed directly by the Commission. Instead, a two-tier structure has been set up for the implementation of operational actions under the CFSP. This two-tier structure involves, first, a contract between the Commission and the Special Adviser/Head of Mission employed by the Commission and, second, a contract between the Special Adviser and the staff member. In his decision in case 3008/2005/OV, the Ombudsman took the view that, in the absence of explicit rules governing the sector, the Commission has a certain discretion as to how to organise the contractual relationships with the staff working for CFSP missions. The Ombudsman noted in his decision that the Commission had set out its approach towards these contractual relationships in the Commission Communication – to which the contract of the complainant in the case at hand also refers – and that, at first sight, the



explanations provided by the Commission for the choice of this contractual structure appeared reasonable. The Ombudsman therefore concluded that there was no instance of maladministration by the Commission as regards the contractual structure as such.

29. Given that the complainant had a contract with Mr X., and not with the Commission, any claims that he considered to derive from this contract thus needed to be addressed to Mr X. first. This also applied to the claim for compensation raised in the present case.

30. However, even though there was no contractual link between the complainant and the Commission, it was clear that the Commission had a supervisory role to play as regards the way in which the Head of Mission carried out the duties assigned to him/her. As regards the case at hand, Article 4(1) of Joint Action 2000/811/CFSP provides that the Head of Mission shall ensure the day-to-day management of the EUMM operations. Article 5(3) adds that "[t] he Head of Mission shall report fully to, and be supervised by, the Commission on the activities undertaken in the framework of his contract ". The Ombudsman noted that this supervisory role of the Commission was also highlighted by the Deputy Secretary-General of the Council who, in his letter of 16 January 2008 to the Commission's Secretary-General, referred to the above Article when transferring the complainant's claim for compensation to the Commission. In this letter, the Council's Deputy Secretary-General pointed out that this supervision also covers the recruitment of staff by the Head of Mission. The Ombudsman noted that the Commission had not disputed this.

31. The Ombudsman considered it obvious that the fact that the Commission supervised the Head of Mission did not mean that it needed to carry out a minute review of each and every action undertaken by that person on the basis of his/her contract with it. Nor did it mean that the Commission was necessarily liable for any claims that a member of staff might derive from his contract with the Head of Mission. The Ombudsman considered, however, that the Commission's supervisory role meant that it should properly examine any complaints that it received concerning the way in which the Head of Mission had performed his/her duties under the latter's contract with it.

32. The Ombudsman considered that, as in contractual cases, his review should in this context be limited to verifying whether the Commission had provided him with a coherent and reasonable account of why it believed its position on the matter to be justified. If that were the case, the Ombudsman would conclude that his inquiry had not revealed an instance of maladministration.

33. It appeared fair to assume that, in most cases, this examination would be fairly straightforward. As a matter of fact, if a dispute between a member of staff and the Head of Mission concerned purely contractual matters, the Commission would normally be entitled to inform the member of staff of the possibility to enforce his or her rights against the Head of Mission. As the Commission had correctly observed, the relevant contracts entered into by members of staff contained a clause that foresaw the possibility of arbitration vis-à-vis the Head of Mission.



34. The Ombudsman noted, however, that there were two circumstances that could distinguish the present case from what might be called normal contractual disputes.

35. First, the complainant submitted that, after the expiry of the EUMM, Mr X. was appointed Ambassador of his country to a third country. The information available to the Ombudsman appeared to suggest that Mr X. did not react to the letters addressed to him by the complainant and his lawyer. However, if Mr X. were indeed to refuse to submit to arbitration or, because of his diplomatic immunity, to accept any other legal proceedings the complainant might wish to commence against him, the Commission's position that any claims should be addressed to Mr X. could effectively mean that the complainant was left without any remedy. Even though the Ombudsman understood the reasons that led the Commission to adopt the above-mentioned two-tier structure regarding its relations with heads of mission and mission staff, he had serious doubts that such a result could be considered equitable. In this context, the Ombudsman in particular recalled the established case-law, according to which the European Union is a Union based on the rule of law [7] . In the Ombudsman's view, it would not be in conformity with this fundamental principle if a decision adopted by a Union institution would have the practical result of leaving a citizen with no effective remedy.

36. Second, and even more importantly, the complainant suggested that his dismissal by the Head of Mission of the EUMM was the result of his having informed the Commission or OLAF about certain financial irregularities that, in his view, occurred at the EUMM. In his observations on the Commission's reply to the Ombudsman's request for further information, the complainant stated that the Head of Mission himself was implicated in these irregularities. The complainant thus basically argued that he was, in fact, punished for acting as what may be described as a whistleblower.

37. The Ombudsman considered that this was a serious matter and that the Commission should therefore try to ascertain whether the complainant's suspicions were well-founded. The Commission itself had explained that, as a result of concerns expressed by the complainant in the summer of 2006 regarding the way in which old cars were disposed of, it informed the EUMM that its prior approval should be sought in future for such a procedure. It would thus appear that the information communicated by the complainant was not without merit.

38. In its reply to a question to that effect put to it by the Ombudsman, the Commission made certain comments in this regard. However, its statement that, " *to the Commission's knowledge* ", the reason for the complainant's dismissal was a lack of confidence triggered " *mainly* " by a fraud case that the complainant had failed to discover, did not clarify this context and left many questions unanswered. In effect, this statement suggested that the Commission did not actively investigate the issue.

39. On the basis of the above, the Ombudsman concluded that the Commission had so far failed to show that it had properly handled the matter and that it had provided him with a coherent and reasonable account of why it believed that the way it acted was justified. In light of the above, the Ombudsman made the preliminary finding that the Commission's failure properly to handle the matter amounted to an instance of maladministration. He therefore made the



proposal for a friendly solution reproduced below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

40. As regards the complainant's argument that the Commission failed to provide clarifications concerning the existence or cessation of the EUMM, the Ombudsman first noted that the complainant and his lawyer did not specifically ask for clarifications on this issue. Furthermore, in its letter of 2 April 2008, the Commission informed the complainant's lawyer that, although the operational mission of the EUMM expired on 31 December 2007, the EUMM had not been liquidated at that time. This meant that the EUMM had *de jure* not yet ceased to exist. Moreover, in its additional opinion, the Commission provided further clarifications concerning the structure of CFSP missions. No further inquiries were therefore needed as regards this aspect of the present case.

41. Article 3(5) of the Statute of the Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant. In light of his findings outlined above, the Ombudsman made the following proposal for a friendly solution to the Commission:

Taking into account the Ombudsman's findings, the Commission could carefully reconsider its position, open an inquiry on the issues raised by the complainant, hear the parties involved and take any follow-up actions that might be necessary in light of the inquiry's outcome.

The arguments presented to the Ombudsman after his friendly solution proposal

42. In its reply, the Commission acknowledged that it should have elaborated on the steps it had taken to examine the irregularities reported by the complainant. The Commission stated that the measures proposed by the Ombudsman had in fact already been undertaken at the time.

43. In June 2006, the complainant informed the Commission of possible irregularities in relation to the sale of used cars (he did not report on irregularities in the payment of salaries). As evidence, the complainant provided the Commission with a list of the bids for seventeen cars, which, in his view, demonstrated that the cars had been sold to bidders who had not necessarily offered the highest price. The Commission compared this list with the overview of the winners of the procedure. This showed that, in 13 cases, the cars had been sold to the bidders with the highest offers. Of the four remaining cars, the list indicated that, in two cases, the highest offer had been withdrawn and therefore, these cars were in fact also sold to the bidders with the highest offers. The Commission also noted that the list presented by the complainant contained some handwritten text and symbols.

44. The competent Commission services discussed the issue with the Head of Mission in August 2006, during its on-the-spot mission to the EUMM. The Head of Mission explained that the bidding procedure had been rather informal and that the records were not of sufficient



quality. He also assured the Commission that, although not perfectly formalised, the procedure had been fair and the cars had been sold to the bidders with the highest offers. He also noted that some bidders had withdrawn their offers, which could have had an impact on the final sale.

45. Upon assessment of the information received, the Commission concluded that, in the two unclear cases out of the total 17 cars sold, the problem was most probably a question of poor documentation rather than a question of irregularities. The Commission also pointed out that, in contrast with public procurement, there are no specific EU rules governing bidding procedures for CFSP missions to dispose of assets. The possible risk to the EU's financial interest lies in lower income (in this case, an amount of EUR 2 950) rather than unjustified expenditure. Furthermore, CFSP missions are not obliged to sell unused or obsolete assets. These can also be donated, with the Commission's approval, to local beneficiaries or they can be transferred to other CFSP missions, thus not generating an income at all. This is in fact a more frequent practice. In light of the lack of detailed rules, the Commission informed the EUMM in writing that, in future, an *ex-ante* Commission approval of such a procedure should be sought. It also clarified the type of documents to be kept by the EUMM, namely, a report on the procedure, including names and prices offered by all bidders, with the originals of the offers and the list of selected bidders attached.

46. The Commission thus agreed with the Ombudsman that the information communicated by the complainant relating to the sale of cars was not without merit. However, the Commission disagreed with the statement that it did not actively investigate the issue, stating that it took up the issue with the Head of Mission and, on the basis of this contact, proceeded to inform the EUMM of the procedure to be followed in future.

47. The Commission pointed out that the complainant had also informed OLAF of possible irregularities. In this context, the Directorate-General External Relations (DG RELEX) provided OLAF with all the information and explanations referred to above. After verification, OLAF informed the complainant by letter of 14 May 2009 that it had referred the allegation relating to fraud involving car fuel to the competent judicial authorities. The case was being analysed by the Prosecutor's Office in Bosnia-Herzegovina. With regard to the other allegations, OLAF informed the complainant that no irregularities were found. This finding gave the Commission additional reassurance in relation to the case and confirmed the assessment made by DG RELEX. The Commission concluded that it had adequately examined the complaints at the time and that, in the circumstances, there was no need to open a new inquiry.

48. In his additional observations, the complainant argued that the Commission's reply to the friendly solution proposal did not address the termination of his contract and the fact that he could not be heard by the Head of Mission and the EUMM. The Commission again did not address the legality of his dismissal. He argued that, according to Dutch law, his contract was terminated prematurely and irregularly.

49. As regards the Commission's comment that the list of the bids for 17 cars contained handwritten text and symbols, the complainant stated that there had never been anything other than a handwritten list, which the complainant had copied from an original in his possession.



The complainant referred again to his observations of 27 January 2010 and quoted his statement therein, which asserted that the Head of Mission was involved in the irregular sale of cars and had given the order, together with the then chief of staff, to destroy certain bids. The complainant stated that, on the basis of the list, the Commission could not conclude that the highest bids had been withdrawn. The complainant referred to enclosed documents from which it appeared that certain bids had been removed and the relevant letters destroyed. The complainant stated that the Head of Mission was angry with him because he had informed the Commission about this.

50. The complainant also enclosed with his observations the annual financial statements and the independent auditor's report of the EUMM for the year 2006. In particular, he drew attention to the findings in points 4.5 ("*Bid offer for goods selling*") and 4.6 ("*Destroying of documentation*" [8]) of this report. The complainant further quoted from a letter he sent to his lawyer on 28 September 2007, following the termination of his contract by the Head of Mission. In that letter, he mentioned the alleged irregular sale of cars and the developments.

51. The complainant maintained the view that the matter had been insufficiently investigated, especially from the point of view of conflict of interest. He referred to the Commission's statement that it had discussed the matter with the Head of Mission. He pointed out that, as the Head of Mission was himself involved, this conversation could not have provided objective and independent information.

52. The complainant stated that it was correct that he had not reported on irregularities in the payment of salaries in 2006. The reason he had not done so was because the irregularities in the payment of salaries started only in the beginning of 2007. The complainant then reported these irregularities to the Commission. The complainant stated that it appeared from a letter of the Legal Adviser of the EUMM that the reduced confidence in him was a result of his having reported the irregularities in question.

53. As regards the OLAF investigation, the complainant pointed out that, by the time OLAF started its inquiry, the EUMM was already being dismantled. Undoubtedly, the inquiry was not an in-depth inquiry. Also, OLAF did not contact the most important staff members of the EUMM, such as the chief of staff. The complainant concluded that he was left on his own by the Commission which did not provide him with enough support, not recognizing the fact that, as Chief of Finance, he had the obligation to report irregularities.

The Ombudsman's assessment leading to a draft recommendation

54. The Ombudsman regretted that, in its reply to the proposal for a friendly solution, the Commission chose not to address the issue of whether the complainant was punished for reporting irregularities to the Commission. In short, instead of addressing the very substance of the present complaint, the Commission chose to focus only on how it dealt with the irregularities which the complainant reported to it. However, there could be no doubt that the core element of



the present complaint and the proposal for a friendly solution concerned the alleged relationship between the dismissal of the complainant and the fact that he reported irregularities to the Commission [9] .

55. The Ombudsman was of the view that it is important that staff on missions, which are funded [10] and supervised by the EU institutions, are not discouraged from reporting information to the appropriate authorities when they have grounds to suspect that irregularities have occurred. In its reply to the friendly solution proposal, the Commission implicitly accepted that the information communicated by the complainant concerning irregularities in the sale of used cars was not without merit [11] . Subsequent to that communication, the Commission requested that, in the future, the EUMM seek its *ex-ante* approval in cases involving the sale of assets. However, once the Commission had reached these conclusions, it did not elaborate further on the alleged *link* between the complainant's reporting the alleged irregularities and his dismissal.

56. The Ombudsman noted that, in his additional observations on the Commission's reply to the friendly solution proposal, the complainant quoted from a letter of the Legal Adviser of the EUMM, according to which, "*the deterioration of the level of trust between HOM [note: the Head of Mission] and COF [the Chief of Finance] started already middle of last year when COF on certain issues approached the European Commission in Brussels directly without informing his direct superior or HOM. Brussels itself immediately informed HOM about this occurrence. Mistrust towards the abilities of HOM has been the trigger on side of COF.*" This seemed to support the complainant's view that there was a link between the reporting of irregularities to Brussels and the Head of Mission's diminished confidence in him.

57. The Ombudsman was of the view that the Commission's supervisory role can only be made effective if it can reassure personnel employed by EU missions that suspected irregularities can be reported to it without sanction. The Commission should therefore have investigated thoroughly the possible existence of a link between the complainant's reporting of irregularities to the Commission and his dismissal.

58. There is no evidence that the Commission sufficiently investigated what was an extremely serious issue: the alleged sanction of dismissal imposed on the complainant. For example, the Commission did not seek to interview all relevant staff (the Head of Mission, the then Chief of Staff, the Legal Adviser of the EUMM, the complainant); nor did the Commission seek to obtain copies of all relevant documentation (such as copies of the e-mails exchanged between the relevant persons at the relevant time). Such actions, however, could have been helpful in clarifying the matter. These failures therefore left many questions unanswered.

59. The Ombudsman stressed that the Commission's failure to carry out a complete investigation of the alleged link between the complainant's dismissal and the reporting of irregularities left many questions unanswered. Nevertheless, he emphasised that he took no view on whether such a link actually existed. A position on whether such a link did or did not exist can only be taken once a complete investigation has been carried out by the Commission.



60. On the basis of the above, the Ombudsman concluded that the Commission's reaction to his friendly solution proposal was unsatisfactory. The Ombudsman therefore confirmed his provisional finding of maladministration, which was made in his friendly solution proposal.

61. Given the seriousness of this issue, the Ombudsman made the following draft recommendation to the Commission, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" The Commission should carefully reconsider its position, open an inquiry into the alleged relationship between the complainant's reporting of irregularities and his dismissal by the Head of Mission, hear the parties involved, assess the relevant documents and take any follow-up actions that might be necessary in light of the inquiry's outcome ".

The arguments presented to the Ombudsman after his draft recommendation

62. In its detailed opinion, the Commission pointed out that the fact that the CFSP Special Adviser is responsible to the Commission for the financial management of the mission budget does not mean that the Commission has a supervisory role. It only has such a role when financial management is directly involved. The Commission reiterated that, to its knowledge, the reason for the complainant's dismissal was lack of confidence triggered by a fraud case which the complainant, in his role of Chief of Finance, had failed to discover. It was the Head of Mission who discovered the misappropriation of funds resulting from the falsification of fuel bills, over a period of at least two years, by one of the local employees of the EUMM. The Commission reiterated that legal proceedings are ongoing in Bosnia-Herzegovina and that it duly informed OLAF about the case.

63. The Commission stated that the Council Joint Action setting up the EUMM states in Article 3.3 that "[t]he Secretary-General/High Representative [SG/HR] shall ensure that the EUMM functions flexibly and in a streamlined manner. In that context, he shall regularly re-examine the functions and the geographical territory covered by the EUMM so as to continue to adapt the internal organisation of the EUMM to the priorities of the Union in the Western Balkans ". At that time, the SG/HR was assisted in carrying out these tasks by an entity that was responsible for overseeing the operational aspects of CFSP missions, including the matters mentioned in Article 3.3 of the Joint Action. This entity became the Civilian Planning and Conduct Capability (CPCC) in August 2007. It formerly formed part of the Council Secretariat and it now forms part of the European External Action Service (EEAS). In the context of its work on the operational control of CFSP missions, the CPCC has developed a body of directives relating to disciplinary aspects of CFSP missions. Such work clearly falls within the notion of " internal organisation ". The Commission therefore considered the CPCC to be in charge of wider disciplinary questions, including any possible inquiry into the present case.

64. The Commission stated that it wished to be in a position to apologise sincerely to the complainant. It however felt that it had properly dealt with the matter and that it had done



everything in its power to address the matter, considering especially its limited supervisory functions, which are restricted to purely financial matters. The Commission respectfully suggested that the complainant address his complaint to the Executive Secretary-General of the EEAS, Mr Pierre Vimont. It stated that it would give the EEAS all possible assistance in dealing with the file and that it would communicate to the EEAS the information it possessed on the case. The Commission also added that it is working on proposals to clarify the status of staff employed in CFSP missions.

65. In his additional observations, the complainant pointed out that the Commission again avoided addressing the main issue and arguments. The Commission simply reiterated its previous positions, but did not in fact react on the draft recommendation. He submitted that part of the Commission's detailed opinion constitutes mere " *page-filling* " and that the Commission hides behind the CFSP Special Adviser who, in turn, has diplomatic immunity. So in the end, he stated, nobody is responsible. The Commission's reference to the CPCC shows, once again, that the Commission is avoiding responsibility. The complainant wondered why the Commission did not inform him three years before of the appropriate body to which to turn. The complainant could not believe that he would have to start the whole procedure again in order to, now, address Mr Vimont. This goes against the complainant's idea of justice.

66. The complainant underlined that, contrary to what the Commission argued, the lack of confidence was not triggered by the fact that he had **not** discovered an instance of fraud, **but** by the fact that he **had discovered** some irregularities and had reported them to Brussels in August 2006. Despite a prohibition from the Special Adviser and the Chief of Staff to make contact again with the Commission in Brussels, the complainant reported further irregularities in October 2006. The Commission, as supervisor, did not assist the complainant. The new requirement of *ex-ante* approval from the Commission was the result of the complainant's reporting of irregularities. In the complainant's view, it is the fact that he reported these irregularities that resulted in the Special Adviser's and the Chief of Staff's having less confidence in him - in sum, they considered such reporting to constitute a threat to their position.

67. The complainant argued that, after having reported the irregularities as Chief of Finance, he basically stood alone without any back-up, given the Commission's argument that it only has a limited supervisory role. The complainant found it shocking to read in the Commission's detailed opinion that it appears that he was dismissed because of a lack of confidence due to the fact that he had not discovered the falsification of fuel bills. The complainant pointed out that, already a year earlier, he had reported the issue and had introduced a different registration system for fuel consumption. However, the Special Adviser and Chief of Staff did not allow him to follow up the matter because, allegedly, he needed " *to have trust in others* ". The result is that the complainant now finds himself in a Kafkaesque situation - he is reproached for not having supervised certain behaviour, when in fact he was not allowed to supervise it by the Special Adviser and the Chief of Staff.

68. The complainant maintained that his salary from September to December 2007, as well as the removal expenses, should be paid.



The Ombudsman's assessment after his draft recommendation

69. The Ombudsman comes to the conclusion that, once again, the Commission did not react to his findings which led, first, to his friendly solution proposal, and, subsequently, to the draft recommendation. The Commission failed to investigate the core issue in this complaint, namely, the alleged link between the complainant's reporting of financial irregularities and his dismissal by the Head of Mission. Instead, the Commission argues that (a) it has no responsibility in the matter, (b) it did everything in its power to address it, and (c) the complainant should now turn to the Executive Secretary-General of the EEAS. As for the remaining issues, the Commission, in its detailed opinion, simply reiterated its previous position.

70. The Ombudsman considers that the Commission appears to be avoiding its responsibility in the matter. It is completely inappropriate for the Commission to suggest, four years after the complainant's lawyer first wrote to it (on 11 February 2008), that the complainant should now contact the Executive Secretary-General of the EEAS to ask for a new investigation. The Ombudsman recalls that, in January 2008, the complainant first wrote to the Council. It was then the Council which, in its reply of 16 January 2008, pointed out that the EUMM had ceased to exist as of 31 December 2007 and that the relationship between the complainant and the Head of Mission fell under the competence of the Commission, to which the Council transferred the complainant's letter. On 16 January 2008, the Deputy Secretary-General of the Council wrote to the Secretary-General of the Commission and noted that, pursuant to Article 5(3) of Joint Action 2000/811/CFSP, the Head of Mission has to report fully to, and is supervised by, the Commission regarding the activities undertaken in the framework of his contract of Special Adviser. The Deputy Secretary-General of the Council explained that he had therefore transferred the complainant's claim to the Commission.

71. The Ombudsman considers that the present complaint concerns a very serious issue. If an investigation were to show that the complainant was indeed dismissed because he reported financial irregularities, then this would mean that the complainant was in fact penalised for having acted as a "*whistleblower*". The gravity of the matter would be exacerbated by the fact that the complainant was the Chief of Finance of the EUMM and that, in that capacity, it was his very duty to report financial irregularities.

72. The Ombudsman points out that, even if under the present legal framework, the subject matter of the present complaint would need to be brought to the attention of the EEAS, and, more particularly, its Executive Secretary-General, this does not detract from the fact that in January 2008, when the Council transferred the case to the Commission, and when the EEAS had not yet come into existence, the Commission did not take any action on the matter. This occurred notwithstanding the fact that, at that time, it was clearly within its power to investigate the issue. The Ombudsman therefore understands the complainant perfectly when he states that he finds himself in a "*Kafkaesque situation*". The Ombudsman suggests to the complainant, if he wants to pursue the matter further, to indeed contact the Executive Secretary-General of the EEAS. In case of an unsatisfactory answer, the complainant has the



possibility of submitting a new complaint to the Ombudsman. However, with regard to the period when the Commission had the possibility to investigate the alleged link between the complainant's reporting of financial irregularities and his dismissal by the Head of Mission, but failed to do so, the Ombudsman will make the critical remark below.

73. The Ombudsman concludes that the Commission has failed to handle the matter appropriately. More particularly, the Commission failed to open an inquiry into the alleged relationship between the complainant's reporting of irregularities and his dismissal by the Head of Mission, to hear the parties involved, to assess the relevant documents and to take any follow-up action that might be necessary in light of the inquiry's outcome. This constitutes an instance of maladministration.

74. When an EU institution does not accept a draft recommendation from the Ombudsman - which is clearly the case here - the Ombudsman has the possibility to make a special report to Parliament. The submission of a special report gives Parliament, as a political body which derives its legitimacy from its direct election by citizens, and which exercises an important role in the Union's constitutional order, the opportunity to take a position on the Ombudsman's views and conclusions in cases of general importance. In his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament is of inestimable value for his work. He however added that special reports should thus not be presented too frequently and should be put forward only in relation to important matters where the Parliament is able to take action in order to assist the Ombudsman.

75. The present case certainly raises an important issue and a matter of principle, namely, the lack of an investigation into the question whether the complainant was dismissed for having reported financial irregularities, and thus for having acted as a whistleblower, within a policy monitoring mission operating outside the territory of the EU in the framework of the Union's Common Foreign and Security Policy. The Ombudsman nevertheless considers that it would not be appropriate to submit a special report to Parliament in the present case, for the following reasons.

76. First, in December 2010, the Ombudsman opened an own-initiative inquiry (OI/12/2010(BEH)MMN) in order to clarify which institution takes responsibility for possible instances of maladministration in the activities of CSDP Missions in third countries. Given that this general own-initiative inquiry is still ongoing, it would not be appropriate to make a special report on the present specific case which also raises the question of which institution is ultimately responsible. Also, as long as it is not clarified who (the Commission, the Council, or the High Representative/EEAS) has to take responsibility, Parliament would not be able to take any useful action following a special report. Finally, if the complainant were to decide to pursue his complaint with the Executive Secretary-General of the EEAS, as the Commission now proposes, and he were not satisfied with the outcome, he would still have the possibility of submitting a new complaint to the Ombudsman. The Ombudsman will therefore close the present inquiry with the critical remark found below.



C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission has failed to handle the matter appropriately. More particularly, the Commission failed to open an inquiry into the alleged relationship between the complainant's reporting of irregularities and his dismissal by the Head of Mission, to hear the parties involved, to assess the relevant documents and to take any follow-up action that might be necessary in light of the inquiry's outcome. This constitutes an instance of maladministration .

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 20 September 2012

[1] Council Joint Action 2000/811/CFSP of 22 December 2000 on the European Union Monitoring Mission, OJ 2000 L 328, p. 53. The mandate of the EUMM was extended several times. The last time was in late 2006, when the Council extended the mandate until 31 December 2007 (Council Joint Action 2006/867/CFSP of 30 November 2006 extending and amending the mandate of the European Union Monitoring Mission (EUMM), OJ 2006 L 335, p. 48).

[2] Article 16 'Duration' of the contract provided that " *the contract can be terminated by either the Employer or the Employee giving one (1) month's advance notice of intent in writing.* "

[3] The Council erroneously mentioned the date of 31 December 2008 instead of 31 December 2007.

[4] In his additional observations of 27 December 2010, the complainant pointed out that his lawyer had sent observations in an e-mail of 26 May 2009. However, a check by the Ombudsman's Registry showed that this e-mail had never been received by the Ombudsman's Office.

[5] C(2004) 2984 of 6 August 2004 and SEC (2007) 1746 of 21 December 2007.

[6] Council Joint Action 2007/40/CFSP of 22 January 2007 amending Joint Action 2002/921/CFSP extending the mandate of the European Union Monitoring Mission, OJ 2007 L 17, p. 22.



[7] Case T-70/05, *Evropaiki Dynamiki v European Maritime Safety Agency* , [2010] ECR, II-313, paragraph 64.

[8] " *During our audit procedures performed we have noticed existence of instruction for destroying documentation before the annual reports and audit report is completed* ".

[9] The Ombudsman noted that in paragraph 11 of his friendly solution proposal, under the heading " *subject matter of the inquiry* ", it was clearly stated that the complainant had suggested, in the cover letter to his complaint, that his dismissal was " *finally based on the fact that he informed Brussels about irregularities concerning the mission.* " In paragraph 34 of the friendly solution proposal, it was once again reiterated that the complainant had suggested he was dismissed because he informed the Commission and OLAF about certain irregularities.

[10] The Commission stated in its reply to the complainant that Mr X. had authority to conclude employment contracts " *on his own behalf* " and remained financially responsible for these contracts. However, the Commission also explained that (a), when it employed Mr X. as a CFSP Special Adviser/Head of Mission, it entrusted him with the agreed amounts from the CFSP budget so as to enable him to meet the expenditure arising from the implementation of the Joint Action and that (b) he was responsible to the Commission for the financial administration of the mission budget. As such, even if from a formal perspective Ms. D. should meet the expenditure resulting from the implementation of the Joint Action, including expenditure resulting from claims for compensation, the funds which would be used to meet such expenditure would be EU funds provided to him by the Commission. In this context, it is clear that the Commission should, as part of its supervisory role, always ensure that the Head of Mission does not incur expenses without good reason. This would, for instance, include any expenses resulting from claims for compensation.

[11] The Ombudsman moreover underlined that, as *Chief of Finance* , it was the complainant's very duty to report any financial irregularities. Failure to do so would have constituted a serious professional failure for the Chief of Finance.