

Decision of the European Ombudsman closing his inquiry into complaint 2450/2008/(VL)BEH against the European Commission

Decision

Case 2450/2008/(VL)BEH - Opened on 17/10/2008 - Decision on 17/12/2012

The complainant is a German engineer who was in charge of supervising the construction of the Serious Crimes Court in Tirana, Albania. The building project was subject to a works contract concluded between the Albanian Ministry of Justice (the 'contracting authority') and a private building company (the 'contractor'), and was funded from the general budget of the European Commission. The complainant's contract as supervisor expired at the end of November 2007.

In 2008, the complainant turned to the Ombudsman and alleged that the Commission's Delegation to Albania failed properly to support him (i) in his efforts to ensure that the project works were carried out in accordance with the contract and (ii) in his related conflicts with other parties involved in the project. In support of the first aspect of his allegation, the complainant essentially argued that the contractor and the contracting authority agreed to use cheaper and inferior materials than the ones provided for in the works contract. The complainant also alleged that the Commission failed to call for an investigation of a fatal accident at the building site.

In its opinion, the Commission essentially rejected the complainant's views and asserted that it gave substantial support to the contracting parties and the complainant. Following an inspection of the Commission's file concerning the project, the Ombudsman noted that the complainant, who held key responsibility in the project, reported instances of threats and intimidations against him to the Commission. The Commission recognised the seriousness of these occurrences which were raised in two meetings. However, the Ombudsman did not consider this to be commensurate to the recognised seriousness in the face of which one would have clearly expected decisive action by the Commission so as to seek to prevent any such incidents from recurring in the future. The Ombudsman therefore concluded that the Commission did not sufficiently support the complainant and made a critical remark in this regard. He moreover took the view that the Commission did not use the powers at its disposal to call for an investigation seeking reliably to establish the facts of the fatal accident in which one worker lost his life. For instance, it did not request clarifications from the Albanian authorities. Accordingly, the Ombudsman made a further critical remark.

As regards the complainant's allegation that the Commission failed to support him in his efforts to ensure compliance with the works contract, the Ombudsman's investigation revealed no



maladministration. At the same time, the Ombudsman realised that certain aspects not covered by his inquiry, for instance, the approval, after the complainant's contract had expired, of an air-conditioning system of an apparently lower quality without a price reduction or an extension of the warranty period, could be of concern from the point of view of the sound management of EU funds. The Ombudsman therefore invited the European Court of Auditors, in view of its special expertise and responsibility in auditing the spending of EU funds, to consider these aspects.

The background to the complaint

1. The complainant is a German engineer who was in charge of supervising the construction of the Serious Crimes Court in Tirana, Albania (henceforth referred to as the 'SCC'). The building project was subject to a works contract concluded between the Albanian Ministry of Justice (henceforth referred to as the 'contracting authority') and a private building company (henceforth referred to as the 'contractor') and was funded from the general budget of the European Commission. Construction works started in 2007 and, on 5 February 2010, the SCC was inaugurated. The complainant's contract as supervisor expired at the end of November 2007 and he did not seek an extension.
2. On 11 March 2008, the complainant submitted a complaint to the Ombudsman (complaint 801/2008/WP) in which he pointed to certain difficulties encountered in his role of supervisor of the construction project and criticised the respective positions Albanian authorities and the European Commission's Delegation to Albania (henceforth: the 'ECD') had taken in relation to them.
3. On 11 March 2008, the Ombudsman informed the complainant of the inadmissibility of his complaint. To the extent that the complaint was about Albanian authorities, the Ombudsman pointed out that, in line with Article 2(1) of his Statute, he is not entitled to deal with complaints about national authorities. As regards the complaint about the ECD, the Ombudsman referred to Article 2(4) of his Statute which requires complaints to him to be preceded by appropriate administrative approaches to the institution concerned. Given that the complainant had not yet turned to the Commission in relation to his complaint, this aspect was also inadmissible. The Ombudsman advised the complainant to turn to the Commission if he wished to pursue the matter.
4. On 2 September 2008, the complainant submitted the present complaint (complaint 2450/2008/(VL)BEH), in which he pointed out that he had raised the matter with the Commission, but did not receive a reply to the letter he had sent it. He therefore asked the Ombudsman now to inquire into his complaint.

The subject matter of the inquiry



5. In his complaint, the complainant submitted the following allegations.

Allegations:

(1) The ECD failed properly to support the complainant (i) in his efforts to ensure that the project works were carried out in accordance with the contract and (ii) in his related conflicts with other parties involved in the project.

(2) The Commission failed to call for an investigation of a fatal accident at the building site.

6. In the course of the inquiry, the complainant objected to the Commission's qualification of certain annexes it submitted to the Ombudsman as being for the Ombudsman's and the complainant's information alone, and asked the Ombudsman to assess whether the Commission's position was correct. By letter of 14 February 2011 (see paragraph 9 below), the Ombudsman informed the complainant that he had apparently not made any prior administrative approaches to the Commission in relation to this further allegation, which was thus inadmissible.

The inquiry

7. On 17 October 2008, the Ombudsman requested the President of the Commission to submit an opinion on the complaint. The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations, which he sent on 24 April 2009.

8. Having examined the Commission's opinion and the complainant's observations, the Ombudsman considered that there was a need for further clarification. On 27 October 2009, he therefore requested further information from the Commission. The Commission's reply was forwarded to the complainant for observations. The complainant's observations were received on 10 June 2010.

9. On 14 February 2011, the Ombudsman asked the Commission to allow his services to inspect the Commission's entire file in relation to the SCC. The inspection took place in Brussels on 18 and 19 April 2011. A report on the inspection and a significant number of copies of documents obtained in its course were sent to the complainant for observations by 31 July 2011.

10. On 19 December 2011, the Ombudsman informed the complainant that he had not yet received any observations and extended the deadline for submitting observations to 15 January 2012, in case the complainant still wished to do so. The complainant replied that he was abroad until April 2012 and in any event considered the documents transmitted by the Ombudsman to amount to a random selection of minutes of meetings. In order to decide on his complaint, it would however be necessary to assess the monthly project reports as well as the works contract and the relevant General and Special Conditions. In his reply of 27 February 2012, the Ombudsman explained that he had forwarded to the complainant the monthly reports from October 2006 to October 2007, including annexes, as well as those sections of the monthly



reports from December 2007 to February 2008 which, in the course of the inspection, were identified to be of relevance to the inquiry. He also pointed out that, on 28 April 2010, he had provided the complainant with copies of the General Conditions, of the Special Conditions and of the works contract. In view of the complainant's stay abroad, the Ombudsman informed him that he could still submit observations by 30 April 2012. On 17 April 2012, the complainant submitted observations on the inspection report and the copies of documents forwarded to him.

The Ombudsman's analysis and conclusions

Preliminary remarks

11. In his observations on the inspection report, the complainant pointed out that, as regards his grievances about Albanian authorities, he had, following the Ombudsman's advice, turned to the office of the Albanian Ombudsman. At the time of writing, however, he had not received a reply. The Ombudsman recalls that pursuant to Article 228 of the Treaty on the Functioning of the EU (TFEU) and Article 2(1) of his Statute, he is empowered to inquire into complaints against the institutions, bodies, offices and agencies of the EU, but not into complaints against other institutions. It follows that the Ombudsman would have no competence to deal with a complaint against the office of the Albanian Ombudsman.

12. The present case concerns the implementation of a contract. In his complaint, the complainant alleged that the ECD failed properly to support him and that the Commission failed to call for an investigation of a fatal accident during the implementation of the contract. The question as to the Commission's and the ECD's role in implementing the project therefore arises.

13. There is no doubt that the Commission and the ECD were not a party to the works contract, which the ECD only "[e]ndorsed for financing by the European Community". However, the General Conditions equip the Commission with certain supervisory powers in the implementation of the works contract. Thus, for instance, Article 67.13 of the General Conditions stipulates that the contractor undertakes to supply the Commission on request with all supporting documents relating to the conditions of the contract's execution. According to that same provision, the Commission may carry out "whatever documentary or on-the-spot checks it deems necessary" to find evidence in cases of suspected unusual commercial expenses. Moreover, Article 69.1 of the General Conditions empowers the Commission to verify the implementation of the project by means of examinations of documents and on-the-spot checks. Article 5.3 of the Special Conditions in addition requires the Commission's approval in relation to a number of duties regarding the implementation of the contract. It follows that the Commission must be considered to exercise a degree of supervision as regards the implementation of the contract.

14. The Ombudsman notes that, in the course of the inquiry, the complainant repeatedly made reference to instances of alleged misconduct on the part of the contractor and the contracting



authority. It therefore appears pertinent to point out, in line with the consideration in paragraph 11 above, that the Ombudsman is not entitled to take any stance on any such alleged misconduct. Instead, his inquiry exclusively concerns the Commission's role in the implementation of the works contract.

A. Alleged failure properly to support the complainant

Arguments presented to the Ombudsman

As regards the first aspect of the complainant's allegation

15. The complainant alleged that the ECD failed properly to support him in his efforts to ensure that the project works were carried out in accordance with the contract.

16. In support of his allegation, he argued that the contractor and the contracting authority agreed to use cheaper and inferior materials for certain parts of the building than the ones provided for in the contract and in certain documents annexed to it. The products and supply companies for these materials were laid down in a specific form (Form 4.6.9) so as to ensure the use of quality materials. The elements of the building concerned were the air-conditioning, the facade and the sound proofing.

17. As regards the air-conditioning , the complainant submitted that the contractor refused to use the specific air-conditioning system named in Form 4.6.9. The complainant objected to this and contacted the ECD, which, together with the contracting authority, agreed that Form 4.6.9 should be considered as subordinate in relation to the Technical Specifications of the contract. The complainant disagreed with that approach and considered that Form 4.6.9 had been a decisive aspect in deciding to award the construction project to the contractor. In any event, the air-conditioning components proposed by the contractor did not fulfil even the lower standards of the Technical Specification. For this reason a coordination meeting was convened among the project partners and in the presence of the ECD, where certain minimum standards for the proposed equipment were agreed. However, a representative of the contracting authority accepted the products of inferior quality in complete disregard of that agreement. The complainant objected to such practices, but was not given any support.

18. As regards the facade , the complainant argued essentially in line with his submissions on the air-conditioning system. Moreover, he pointed out that the contractor refused to accept downward adjustments to the costs for certain adaptations/simplifications of the facade made by the complainant in his role as supervisor.

19. In relation to the sound-proofing , the complainant argued that the contractor intended to use bricks not corresponding to European norms which he rejected for that reason. However, at one of the coordination meetings, a representative of the contracting authority and the ECD decided to accept the lower quality of materials without a corresponding downward cost



adjustment.

20. In its **opinion** , the Commission confirmed, in relation to the air-conditioning , that, during the implementation of the project, the contractor proposed an air-conditioning system different from the one foreseen in the works contract. This gave rise to thorough discussions during a number of the Internal Coordination Meetings (henceforth referred to as 'ICM' or 'ICMs') and Monthly Progress Meetings (henceforth referred to as 'MPM' or 'MPMs'), as attested to by the minutes of these meetings, which the Commission enclosed. In a letter to the complainant and the contracting authority dated 4 October 2007, the ECD took a favourable position on the proposed change, as long as the replacing equipment was in conformity with the Technical Specifications and approved by the contracting authority. This view was based on the ECD's interpretation of the General Conditions to the works contract, according to which the Technical Specifications take precedence over " *the tender with the appendix* ". During the ICMs and MPMs of 11 December 2007, the supervisor in principle agreed to the proposed change and, in January 2008, approved it, after the supplier of the equipment had submitted a specific certificate.

21. Against this background, the Commission argued that the ECD closely monitored the matter at issue, participated in all relevant meetings, gave its opinion on the discussions held, and constantly reminded the contracting authority of the need fully to respect the contract, including the Technical Specifications.

22. As regards the facade , the Commission reported on the replacement of a sub-contractor specified in the works contract by another sub-contractor.

23. Concerning the sound-proofing , the Commission rejected the complainant's view that the contracting authority and the ECD accepted material of lower quality with no reduction in price. It submitted that the minutes of the ICMs and MPMs contain no record in relation to this issue or information suggesting any delivery of supplies, which would not be in conformity with the works contract.

24. In summary, the Commission submitted that the ECD gave substantial support to the contracting parties and the complainant during the implementation of the project. It was present at the ICMs and MPMs and, in this framework, actively followed-up on and monitored the implementation of the project. It assisted the parties in reaching common positions, gave advice on contractual issues and delivered various requests for action and variation orders.

25. In his **observations** , the complainant took the view that, in relation to the air-conditioning , the Commission did not address his submissions but instead referred to the approval of equipment different from the one originally foreseen by the supervisor succeeding him. The quality of the air-conditioning system proposed by the contractor was clearly far below the tender and had therefore been rejected by the mechanical engineer. Together with the latter he had compared the quality of the proposed system and informed the ECD of these joint findings as regards the lower quality. In the end, the representative of the ECD decided that, in case the contracting authority accepted the air-conditioning of lower quality, the warranty period would



have to be extended and a reduction in price would have to be agreed on.

26. During an ICM, the contracting authority accepted the lower quality of the air-conditioning system. Given that it appeared highly suspicious that the contracting authority and, thus, the ultimate beneficiary of the project, pushed for a lower quality of materials used, the complainant asked the representative of the contracting authority to sign a separate document in which he was clearly alerted to the fact that he deliberately accepted an air-conditioning system of a lower quality. The said representative confirmed this and signed the said document.

27. In view of these circumstances, the complainant questioned whether the Commission considered this to be normal practice. He also queried whether the Commission had verified if a price reduction or an extension of the warranty period had in fact been granted. He furthermore raised the question whether the ECD did consult the mechanical engineer who vehemently opposed the air-conditioning system proposed by the contractor.

28. More generally, the complainant explained that both he and the mechanical engineer had been put under enormous pressure. The company for which he worked and which provided supervision services advised him to take a less strict approach, given that corruption was rife in Albania. He also submitted that he had been pressured on a constant basis to approve products and works of lower quality.

29. In relation to the facade, the complainant stated that he had initiated a simplification of its structure which resulted in a cost reduction. At the end of his contract as a supervisor, he was negotiating with the contractor as regards the implementation of this cost reduction and asked the contractor to use the windows originally foreseen for the facade at the bridges connecting certain parts of the building. From the minutes submitted with the Commission's opinion, it was apparent, however, that these windows were never installed. Against this background, the complainant queried how, in the absence of air-conditioning and under the prevailing climatic conditions, one could omit to foresee windows for the bridges. He also noted that the change of the sub-contractor, which he had opposed, had been approved immediately after he had left the project. He asked (i) whether there had been a reduction in the price for the facade and (ii) why the trade-off between a simpler facade and additional windows in other parts of the building which was to be considered a minimum requirement had not been implemented.

30. The complainant also pointed out that, as emerges from the minutes submitted by the Commission, an amount of EUR 20 000 had been paid which had originally been retained due to a flaw in the bottom plate. The complainant and the ECD had agreed in writing that the said amount would only be paid out once the flaw would be repaired by using specific methods. This condition was subsequently accepted by the contractor. The complainant stated that, according to his information, this condition had not been complied with but the said amount was nevertheless disbursed to the contractor. In case the flaw had not been correctly repaired, this amounted to a long-term deficiency of the building which would lead to a substantial depreciation and increase maintenance costs due to infiltrating ground water.

31. The complainant concluded by saying that it was ironic that the construction of the SCC, a



court for adjudicating serious crimes, gave rise to a manifest suspicion of corruption. In case the ECD had been willing to do so, there would certainly have been a possibility to deal with less incriminated representatives of the contracting authority than the representatives actually involved in the project.

32. In his request for further information, the Ombudsman asked the Commission to provide him with copies of the General and Special Conditions to the works contract. Moreover, he put specific questions to the Commission concerning the ECD's position on the air-conditioning, the facade, and the repair of the bottom plate.

33. In its **reply**, the Commission stated that the air-conditioning system finally used at the SCC corresponds to the Technical Specifications stipulated in the works contract. According to the Commission, the capacity of that equipment is 529.3 kW (instead of 490 kW required in the Bill of Quantities and the specifications forming part of the works contract). The Commission further stated that the equipment proposed by the contractor at the time the complainant acted as supervisor was different from the air-conditioning system ultimately used and had never been approved or used.

34. In support of its position, the Commission submitted a number of documents. Thus, for instance, it provided a copy of a "*material proposal form*" in which the contractor, on 13 December 2007, proposed to use the equipment finally used. This proposal was approved by the supervisor on 15 January 2008. In the section signed by the supervisor, hand-written comments have been added which read as follows. "*As agreed on Monthly Progress Meeting from 11/12/07. The min capacity of 12,5% could be reached acc. attached Declaration from [the contractor] on 12/12/07 and will be checked after the requirement will be available.*" The minutes of the MPM on 11 December 2007 referred to in these hand-written comments were also submitted to the Ombudsman. The relevant section reads as follows: "*The new submitted material for the Chiller ... can reach the cooling capacity of 12.5% according Declaration from ... This technical cooling capacity was required on previous meetings and agreed between ECD, [the contracting authority] and Supervisor. Supervisor approved the proposed chiller and declared, if there would be any difference to the approved documentation or required specifications, immediately rejection of material of [the contractor] will appear.*"

35. The Commission submitted that the air-conditioning system finally approved met the Technical Specifications and was not of a lower quality than foreseen by the contract. There was no price reduction or an extension of the warranty period.

36. As regards the facade, the Commission posited that, to the best of its knowledge, there is no record of a simplification which was in fact realised with the number of windows originally designed and included in the tender dossier. Moreover, after agreement with the contractor, the bridges included a total number of 20 windows following an increase in the amount of the value of the contract by EUR 15 600.

37. In relation to the bottom plate, the Commission confirmed the agreement to pay an outstanding amount of EUR 20 000 only after the contractor had repaired a flaw. This



agreement was complied with and the flaws were repaired. The issue was under the control of the supervisor and discussed in a number of MPMs. Following repair, the outstanding amount was paid out to the contractor.

38. In his **observations** , the complainant reiterated, with respect to the air-conditioning , that Form 4.6.9 clearly formed part of the contract between the Commission and the contractor. Not only does this Form clearly state the producer of the air-conditioning system but also the exact type of system. The complainant pointed out that the air-conditioning system delivered by the contractor was 30%-40% cheaper than the equipment foreseen in the contract. By way of comparison, he referred to someone ordering a Mercedes S-class but obtaining a Volkswagen Passat instead, being told that also a Passat could go at more than 200 km/h. He stated that the ECD had instructed him to ask the representative of the contracting authority to confirm acceptance of the air-conditioning system of a lesser quality. In a written declaration dated 25 October 2007, the said representative stated the following: "*On behalf of [the contracting authority] , I accept the lower quality of the chiller, fan coil units and blowers as offered by [the contractor]*". The complainant questioned why the contracting authority, which did not make any financial contribution to the building project, was entitled to accept equipment of a lower quality. He also asked how the ECD could accept that equipment of a lower quality was used, without a corresponding price reduction or an extension of the warranty period.

39. Concerning the facade , the complainant submitted that the simplification consisted in using only one dimension between centre lines instead of different dimensions, as originally foreseen. The windows foreseen for use in the bridges could not be opened. In view of certain technical considerations, the complainant proposed to agree that cost-savings resulting from the simplification should be used for installing in the bridges windows, which can be opened. However, in the end, the facade was simplified without taking into account relevant cost-savings. Moreover, the complainant noted that the contractor received an additional EUR 15 000 for the windows which can be opened.

40. As regards the flaw in the bottom plate , the complainant specified that he had agreed with a representative of the ECD and with the contractor to retain EUR 20 000 until the problem had been resolved by a specialised company applying a high-pressure or equivalent process, the equivalence of which would have to be certified by an expert from central Europe. The complainant stated that, after he retired from his function of supervisor, this agreement was not complied with. Instead, a 'pseudo repair' had taken place which had given rise to the unlawful disbursement of the outstanding amount of EUR 20 000.

41. The complainant further submitted that the tender documents explicitly required that certain parts at the building's exterior would be made of hot-dip galvanised steel . The contractor informed the complainant that parts of the required size could not be galvanised in Albania and offered a coating of the relevant parts. This was rejected by the complainant, given that it would amount to a degradation of the building and lead to massive maintenance issues. The contractor finally agreed to obtain the required parts in Italy. According to the minutes of the MPM on 22 January 2008, however, the relevant parts would not be hot-dip galvanised. Instead, the "thickness of the coating layers for steel structure" was being discussed at that



meeting. According to the complainant, this amounted to a material breach of the contract and, even if a price reduction were to have taken place, should have never happened.

42. In the course of the inspection, the Ombudsman's services identified a number of documents of direct relevance to the present complaint. Copies of these documents were taken and, in so far as the Commission considered the documents copied not to be confidential, were forwarded to the complainant.

43. In his **observations** on the inspection report and the documents forwarded to him, the complainant started by stating that the supervision by his team did not only consist of an actual monitoring, but also of providing advice and support to the contractor. He then listed a number of examples in which the contractor benefitted from important cost reductions as a consequence of the technical advice provided. According to the complainant, it was usual in such circumstances that also the contractor would be prepared to make concessions and to react flexibly in situations in which the legal framework was unclear. In the given context, the complainant referred to the air-conditioning, the windows in the bridges, the repair of the bottom plate and the sound-proofing. While such projects were usually characterised by a 'give and take', in the present case, the contractor was only ready to take without offering anything in exchange. The complainant pointed out that he made these remarks in order to make clear that he and his team had acted very flexibly.

44. In relation to the air-conditioning, the complainant referred to a 4 October 2007 letter from a representative of the ECD assuring him of the ECD's support for using the products specifically listed in Form 4.6.9. The representative then referred to the hierarchy of contractual documents established by the works contract, according to which the Technical Specifications take precedence over Form 4.6.9. In this regard, the complainant pointed out that this hierarchy, among other things, served the purpose of settling any conflicts between different provisions. In the case of the air-conditioning, however, there was clearly no conflict between the general Technical Specifications and the specific information provided in Form 4.6.9. The complainant added that the aforesaid representative of the ECD himself informed him that Form 4.6.9 was an essential element in awarding the tender after complex negotiations which was also apparent from a number of documents obtained in the course of the inspection by the Ombudsman's services.

45. The complainant also reiterated his view that information available on the internet suggested that the air-conditioning ultimately used was of Chinese origin, although it was possible that the distribution was assured by German or French companies. However, it was doubtful whether this would meet the requirement of a 'Certificate of EU-Origin'. He asked the Ombudsman to assess whether such a certificate had been submitted in the present case.

46. The complainant also argued that, without holding relevant expertise, the representative of the contracting authority made an unsolicited statement at an early point in time that he would accept cheaper equipment of lower quality. In this regard, the complainant pointed out that it was rather unusual that a contracting authority would willingly accept a solution of lower quality and in fact lobby for that solution in a very active and aggressive way.



47. As regards the sound-proofing , the complainant emphasised the importance of complying with relevant norms so as to guarantee the confidentiality of conversations at the SCC. Moreover, deficiencies in the sound-proofing of the walls would render ineffective the expensive and elaborate sound-proofing of the ceilings. Referring to the documents obtained during the inspection, the complainant submitted that the representative of the ECD expressed surprise at the contracting authority's decision to accept the use of local materials of a lower quality, but did not otherwise support the supervision team in repeatedly seeking to implement a solution guaranteeing an acceptable level of sound-proofing.

48. With a view to the facade , the complainant pointed out that, as in the case of the air-conditioning, the question was whether the quality requirements of Form 4.6.9 had been complied with. The complainant moreover reiterated his view that a simplification of the facade initiated by him should have been offset by an arrangement whereby the contractor would bear - at least partly - the costs for installing additional windows in other parts of the building. Nevertheless, the contractor received the full amount for the additional windows.

49. In relation to the galvanisation of the steel structure, the complainant pointed out that this part at the building's exterior was heavily exposed to the elements and difficult to access. It was therefore essential that this structure be galvanised. The contractor, however, proposed to apply a paint finish to the structure instead of galvanising it, which, as the complainant pointed out, would mean a serious deterioration of quality and lead to costly and difficult maintenance. The complainant argued that it was not clear from the available documents how the contractor finally went about the steel structure. It appeared from the documents that the complainant's successor as supervisor of the building site had approved the change from galvanisation to a paint finish. In the given context, he took the view that the supervisor could not decide on an important change in quality which would in any event have led to an important price reduction.

50. As regards the repair of the bottom plate , the complainant maintained his view that the retained amount of EUR 20 000 should not have been paid out to the contractor, given that the condition of a repair by using specific methods had not been met. Instead, the complainant considered that the repair undertaken amounted to a 'pseudo repair' which meant that the basement was inferior and damp.

As regards the second aspect of the complainant's allegation

51. The complainant alleged that the ECD failed properly to support him in his conflicts with other parties involved in the project relating to his efforts to ensure that the project works were carried out in accordance with the contract. He submitted that he and his assistant had been intimidated by a foreman working for the contractor. He stated that he had been physically threatened and his assistant received a text message threatening her and her family's lives. In this regard, the complainant enclosed a report addressed to the ECD in which he pointed to intimidation against him and his assistant.

52. The complainant moreover submitted that his objections to using the materials proposed by



the contractor led the latter to level allegations of corruption against him. The complainant raised this issue in a coordination meeting, where he expected support and protection from the ECD. However, since the contractor insisted on its allegations, the result of that meeting was that the ECD decided that any objections against the complainant should henceforth be addressed directly to the ECD and not to the complainant himself. In light of this development, the complainant decided not to seek an extension of his contract.

53. In its opinion, the Commission pointed out that, on one occasion, the complainant informed the ECD's representative to the ICM of having been threatened. The latter asked him to put this in writing so that the ECD could take action. To the ECD's knowledge, the complainant never did so. The Commission stated that, at the following MPM, "*the ECD representative said that he had been informed verbally that people in the Supervision Team had been threatened while doing its work. He stated that such behaviour is not acceptable and then asked the contractor under the works contract to inform the [ECD] in writing if they had any problems with the Supervisor*". Following this, the representative of the ECD never heard of similar incidents and, in his understanding, the issue had been resolved.

54. In his observations, the complainant submitted that the Commission's statement that he had reported alleged intimidations only orally to the ECD was not correct. Instead, on 17 July 2007, he submitted a written report on massive intimidation by the contractor to a representative of the ECD. Given that, at the MPM meeting on the same day, the ECD raised this issue in a cursory manner only, the complainant insisted on an official reaction from the ECD. On the same day, he received a telephone call from the same representative of the ECD in which the latter explained that the matter went beyond his competencies. He would therefore discuss it with his superior. Following his approaches to the ECD and just before a meeting with the ECD and the contracting authority, a staff member of the company employing the complainant at that time insulted him and accused him of having sent, without his consent, a letter on the intimidation on company paper to the ECD. The same staff member stated that the complainant had thus sabotaged his efforts to keep good relations with the ECD and the contracting authority, adding that for which reason he would sue him for damages. At the meeting, the complainant informed the representatives of the ECD and the contracting authority of this incident. Both of them agreed that the situation was unbearable but did not know which steps to take at the moment. The complainant informed them that he would confront the EU in Brussels with the matter if they were not able adequately to deal with it. However, apart from an essentially fruitless meeting between the contractor's owner, the aforesaid staff member of the company, the complainant and the ECD, the ECD did not take any steps.

55. The complainant also stated that he reported to the ECD various insults of representatives of the contractor relating to alleged corruption levelled against him and the mechanical engineer. However, apart from instructing the contractor to submit complaints about the supervisor in writing, the ECD did not take action. In the given context, the complainant observed that the ECD did not refute the insults which begs the question why it had not investigated them.

56. In his request for further information, the Ombudsman pointed to the complainant's



statement that, on 17 July 2007, he submitted to the ECD a written report on intimidations directed at supervision staff, which he enclosed with his complaint to the Ombudsman. Against this background, he asked the Commission to comment on this report and indicate which steps, if any, it took to follow-up on it.

57. In its reply, the Commission stated that the complainant orally informed the representative of the ECD of having been threatened. However, to the best of its knowledge, the complainant never put these allegations into writing for the attention of the ECD.

58. In his observations, the complainant insisted that he had informed the ECD in writing and that his letter must be presumed to have been received by the ECD. This issue had also been included in the minutes of MPMs. Nevertheless, the ECD had taken no steps to protect and support him. The said minutes also contained allegations of corruption against him and other persons which had not been followed up by the ECD.

59. In the course of the inspection of the Commission's file by the Ombudsman's services, no trace of the complainant's report of 17 July 2007 on intimidations directed at supervision staff was found.

60. In his observations on the inspection report, the complainant insisted that he had handed over the aforesaid report to a representative of the ECD on 18 July 2007 at 12.00. That representative reacted nervously to the report and therefore involved his superior in a conversation with the complainant. While both members of the ECD appeared to be unsure as to how to react, the complainant stated that he expected a clear decision, which would also have been called for in view of further documents in this regard in which he was insulted of being guilty of corruption. The ECD would therefore have been under an obligation to either suspend the complainant and the mechanical supervisor or otherwise protect them from unfounded accusations. The ECD's instruction to the contractor to submit complaints about the supervisor straight to it amounted to a mockery instead of support.

The Ombudsman's assessment

As regards the first aspect of the complainant's allegation

Preliminary remark

61. The Ombudsman recalls at the outset that the first aspect of the complainant's allegation here at issue refers to his efforts to ensure compliance with the contract. It is clear that these efforts relate to the period of time during which the complainant acted as supervisor of the building site. The complainant's contract as supervisor expired at the end of November 2007. As regards the **temporal dimension** of the complainant's first allegation, it should therefore be noted that it does not extend to events, which took place after his contract expired. As regards the **material dimension** of the first aspect of the allegation here at issue, the Ombudsman points out that it is limited to the complainant's efforts to ensure compliance with the contract



and thus with the provisions of any of the contract documents [1] concerning the particular building project.

62. In the following, the Ombudsman therefore has to assess whether the ECD's position in relation to the contractual issues raised, for the period of time during which the complainant acted as supervisor, is reasonable.

As for the air-conditioning

63. In the Ombudsman's view, the Commission's position may be summarised as follows: The ECD took a favourable view to the proposed change of the air-conditioning system and considered it to be in conformity with the Technical Specifications and to have been approved by the contracting authority. In January 2008, the supervisor accepted a change of the air-conditioning system, which, in view of its technical capacity, corresponds to the Technical Specifications and was not of a lower quality than the system foreseen in Form 4.6.9. The Commission added that the particular equipment proposed by the contractor at the time the complainant acted as supervisor was never approved or used. There was no price reduction or an extension of the warranty period.

64. It is undisputed that Form 4.6.9 foresees a particular air-conditioning system which is specified by reference to its brand and type. In order to assess the change of the air-conditioning system, it is therefore imperative for the Ombudsman to clarify the legal relevance of Form 4.6.9 which is in dispute between the parties. In this regard, the Ombudsman notes that Article 3 of the General Conditions provides for an order of precedence of contract documents and, besides the Technical Specifications and further documents, list Form 4.6.9. It follows and has not been contradicted that Form 4.6.9 is part of the contract documents. There can thus be no doubt that Form 4.6.9 as such must be considered to be binding on the contractor.

65. As to the order of precedence of the contract documents, it is clear from Article 3 of the General Conditions that the Technical Specifications take precedence over Form 4.6.9. However, as the complainant convincingly argued, this hierarchy of contract documents must be understood to determine, in cases of conflict between different contract documents, which document prevails. It should be noted that, in the present case, none of the parties argued that there was in fact a conflict between the Technical Specifications and Form 4.6.9 which would have required setting aside Form 4.6.9. It should also be added that an interpretation of Article 3 of the General Conditions giving precedence to the Technical Specifications even in the absence of a conflict with Form 4.6.9 would be tantamount to accepting that Form 4.6.9 could be set aside at whim by reference to the more general requirements of the Technical Specifications. However, this interpretation could hardly be considered to do justice to the function Form 4.6.9 as a contract document was meant to serve. This view is corroborated by the documentary evidence, from which it emerges that particular importance was attached to the information provided on Form 4.6.9. Thus, according to point 4.1 of the Tender, all tenderers were required to submit, alongside other information and documents, the "*technical documentary evidence (Form 4.6.9)*". Most importantly in this regard, the minutes of the



Clarification Meeting on the Tender on 21 April 2006 record the following: " 4.1.5 *Particular attention during evaluation of the offers will be drawn on technical documentary evidence (Form 4.6.9). Listed items shall be supported by certificates, data sheet, catalogues, etc. "*

66. In view of these considerations, the Ombudsman takes the view that the contractor was, in principle, under an obligation to comply with the specifications made in Form 4.6.9 which could not be considered to be indicative only. While the ECD therefore must, as a matter of principle, be considered to have been required to see to it, within the limits of the powers which the contract documents bestow on it, that the equipment listed in Form 4.6.9 would be used in the construction of the SCC, these considerations do not rule out that, in the course of implementing the building project, contract documents would be modified. In fact, the "*Practical Guide to contract procedures for EC external actions*" [2] provides, in point 2.10, for a possibility of modifying contracts "*if the circumstances affecting project implementation have changed since the initial contract was signed*". The complainant did not deny that changes were possible, but submitted that this possibility would only exist in exceptional circumstances.

67. In a letter to the supervisor of 19 July 2007, the contractor took the view that the offers of its suppliers for the equipment mentioned in Form 4.6.9 were no longer valid "*due to the prolonged delays*". In the Ombudsman's view, it cannot be ruled out that certain delays which occurred in the implementation of the project could have amounted to reasons justifying a modification to the contract. In any event, he notes that the complainant himself conceded that the legal framework was unclear and that there was a certain need for flexibility. In these circumstances, the Ombudsman considers the Commission's position that a change in the air-conditioning system was possible as long as the replacing system complied with the Technical Specifications and the contracting authority and the contractor were in agreement on such change to be reasonable.

68. In any event, however, the Ombudsman notes that the complainant's main concern appears to be that the equipment proposed by the contractor to replace the equipment foreseen in Form 4.6.9 did not comply with the Technical Specifications and other contractual requirements.

69. It has become clear in the course of the inquiry that the contractor, apparently in July 2007, proposed an air-conditioning system to be used other than the one specified in Form 4.6.9. The complainant, while still the supervisor of the construction site, produced voluminous test data in order to establish that the proposed system did not conform to a number of contractual requirements. Moreover, the complainant repeatedly emphasised that, in relation to the proposed air-conditioning system, the contracting authority had explicitly declared in writing that it accepted a system of lower quality.

70. However, it emerges from the Commission's submissions, which are backed up by documentary evidence, that the air-conditioning system proposed by the contractor was not ultimately used at the SCC, but instead a different model of the same brand which was approved in January 2008.



71. In view of the above, it is clear that the Ombudsman would in any event be unable to conclude that, during the time the complainant was active as a supervisor, the Commission would have failed to ensure that the air-conditioning system to be used at the SCC would comply with contractual requirements.

72. It is true that, in his observations, the complainant criticised the air-conditioning system ultimately used, argued that it was of a lower quality and expressed doubt as to whether it was accompanied by a valid certificate of origin. The Ombudsman considers that, for the reasons set out in paragraph 61 above, the complainant's views on the air-conditioning system approved in January 2008, and thus after his contract as supervisor had expired, are not covered by the temporal scope of his allegation.

73. Still, the fact remains that the complainant convincingly argued that the air-conditioning ultimately used, although conforming to the Technical Specifications, was of a lower quality and substantially cheaper than the system foreseen in Form 4.6.9. The Ombudsman considers that principles of good administration require that funds allocated to a particular project are managed soundly. In circumstances in which a system cheaper than the one originally budgeted for is used, one would therefore expect that a price reduction and/or an extension of the warranty period would be negotiated. As the Commission pointed out, this did not happen in the present case. However, as stated above, this issue does not fall within the temporal scope of the allegation here under examination. Moreover, it also goes beyond the material scope of the allegation, given that it does not concern the question as to whether the contract documents relating to the air-conditioning system were complied with, but instead the sound management of EU funds. This aspect is therefore not covered by the Ombudsman's present inquiry.

74. The Ombudsman recalls that the European Court of Auditors has special expertise and responsibility in auditing the spending of EU funds, thereby contributing to the sound management of the EU budget. More specifically, in 2009, the Court of Auditors issued a Special Report on "*The Effectiveness of the Commission's Projects in the Area of Justice and Home Affairs for the Western Balkans*" [3] which scrutinises the Commission's activities in this area and makes numerous references to projects implemented in Albania. In view of the Court of Auditors' special responsibility and expertise in the field, the Ombudsman will therefore inform it of the present case and invite it to consider the issues raised by the complainant concerning the sound management of EU funds.

As for the facade

75. In the course of the inquiry, it became clear that the complainant's main grievance in relation to the facade concerns the effects of what he referred to as a simplification on the project costs. While the complainant also took the view that there arose similar issues concerning compliance with technical specifications as those concerning the air-conditioning and while he also raised certain aspects regarding sub-contracting, he did not specify his views in this regard. In this situation and bearing in mind that the Commission's file at first sight does not contain evidence in this regard, the Ombudsman considers that there is no need for him to consider this aspect further. The complainant also questioned how one could omit foreseeing



windows in certain parts of the building. The Ombudsman considers it clear that the complainant's latter view amounts to a criticism of the design of the building as such. There can be no doubt that, in view of his mandate, the Ombudsman would not be competent to take a view on this issue, which therefore will not be dealt with in the following. Thus, the Ombudsman will only address the issue of the simplification of the facade, which, according to the complainant, took place and had an impact on the project costs.

76. The Ombudsman notes that issues concerning the facade were repeatedly raised in the course of implementing the building project. Thus, for instance, the 7th Monthly Report (April 2007) contains the following statement: “ *We are detailing the facade for the contractor, to enable the manufacture of the façade to prepare the working drawing without too many queries. Due to the now detailed spacing of the window panels, some walls will have to be adjusted. This will slightly alter the size of some rooms.* ” It further emerges that the drawings for the facade were being prepared in May 2007 [4] , with an “ *action list* ” of May 2007 specifying the following task: “ *Amend architectural drawings: facade, brick walls etc* ” [5] . In a letter to the contractor of 15 May 2007, the supervisor reports that “[t] *hese drawings will conclude our revision and you can proceed to prepare the working drawings for the facade etc.* ” Moreover, reference is made to a “ *revised structural design* ”, without however specifying in how far this would have an impact on the facade [6] .

77. Finally, the minutes of the 4th ICM make reference to the “[g] *lass facade at bridge construction* ” and state that “[n] *o changes of the facade construction will be accepted (i.e. open bridges). The price for windows shall be reliable and shall not be too expensive* ”. Administrative Order No. 10 concerns a contract modification concerning the windows at the bridges and notes a need for 20 additional windows to be included in the bridges of the building at the additional cost of EUR 15 600.

78. In light of the documentary evidence reviewed above, the Ombudsman considers that it cannot be ruled out that there have indeed been certain changes to the design of the facade. This would in particular appear to be suggested by the complainant's letter to the contractor of 15 May 2007.

79. At the same time, however, the Ombudsman considers that the question as to whether there have been cost consequences arising from a simplification of the facade, if it indeed has taken place, goes beyond the material scope of the allegation here under review, given that it does not concern an issue of compliance with the contract. Therefore, the same considerations as in relation to the air-conditioning apply (see paragraphs 73-74 above).

As for the bottom plate

80. The Ombudsman notes at the outset that the parties to the dispute agree that there was a flaw in the bottom plate which the contractor was obliged to repair. It is moreover undisputed that it was agreed that an amount of EUR 20 000 would be withheld until the contractor would repair the flaw in the bottom plate. While the parties also agree that the flaw was subsequently repaired and thereby gave rise to the disbursement of the outstanding amount on 4 April 2008,



there is disagreement whether (i) the repair performed by the contractor lived up to the particular method of repair, which, according to the complainant, had been agreed beforehand and (ii) the ECD, on the basis of the repair actually performed, was entitled to disburse the outstanding amount.

81. The Ombudsman notes that, for the reasons set out in paragraphs 61 and 73 above, the issues raised by the complainant in relation to the bottom plate fall outside the temporal and material scope of the allegation here under consideration.

As for the sound-proofing

82. The Ombudsman takes into account the following documentary evidence: According to the 9th Monthly Report (June 2007), the contractor proposed to change the internal brickwork to "*light weight concrete bricks*" which gave rise to checks as to their acoustic requirements and performance by the company employing the supervisor. In a letter of 23 July 2007, the supervisor accepted the bricks proposed by the contractor for the basement, but, in view of their acoustic properties, rejected them for the other parts of the building and gave detailed reasons in support of his view. He also pointed to the Technical Specifications and the minutes of the clarification meeting, according to which "[a] *ll Plant, materials and workmanship unless otherwise specified shall be in accordance with the standards and recommendations of the International Organisation for Standardisation (ISO) and the International Electro Technical Commission (IEC) where such standards or recommendations exist*".

83. It emerges from the 10th Monthly Report (July 2007) that the contractor's change of bricks was approved under the condition that they would be reinforced by a particular plaster board shield for minimum acoustic quality. As a minimum compromise, on 27 August 2007, the complainant suggested to the contractor to use bricks of a dB value of 45. On the following day, the contractor informed the supervisor that bricks manufactured in Albania did not provide a coefficient of more than 39 dB. The contractor also took the view that there was no particular specification in the contract and therefore considered its choice to be appropriate. In reply, the supervisor, on 29 August 2007, agreed that there was no particular specification regarding noise reduction in the contract documents, but also pointed out that the contract was based on the relevant DIN/EU-Norm. Noting that the contractor was not ready to use a plaster board shield, the supervisor suggested to approve the bricks proposed by the complainant in July 2007. As for "*the two internal walls (approx. 11 linear meters) that separate the different departments*", the bricks should be covered by a plaster board.

84. According to the 12th Monthly Report (September 2007), the supervisor approved "*the local brickwork including the lower standard of acoustic quality*". The same report also records that the contractor executed the brickwork to a very low standard. As a consequence, the supervisor gave instructions to improve the workmanship and indicated that he would continuously monitor it. On 28 September 2007, the supervisor requested the contractor to increase the quality of the brickworks. The low quality of the brickwork is also referred to in the 13th Monthly Report (October 2007).



85. It emerges from the documents reviewed above that there appears to be agreement as to the absence of specific requirements in the contract documents concerning the bricks to be used by the contractor. While the complainant insisted on the need to use bricks conforming to relevant European standards, it appears that, as regards the quality of bricks to be used, an agreement was found which involved the complainant and his expertise. While it clearly emerges from the documentary evidence that the implementation of the solution found gave rise to concern, the Ombudsman considers that the complainant did not submit sufficient evidence which would allow him, that is, the Ombudsman, to conclude that the contracting authority and the supervisor would not have been entitled to approve the bricks ultimately used.

As for the galvanisation

86. According to the complainant, the contract documents explicitly required for certain parts of the building's exterior to be made of hot-dip galvanised steel. Notwithstanding this requirement, it emerged from the documents obtained during the inspection of the Commission's file that his successor as supervisor of the building site approved the change from galvanisation to a paint finish. The complainant took the view that the supervisor could not decide on an important change in quality which, in any event, would have had to lead to an important price reduction. The Commission did not comment on the issue of galvanisation.

87. The Ombudsman notes that the Technical Specifications, in point 2.3 under the heading of "Products" provides as follows: "*GALVANIZING: Galvanize after fabrication using zinc coating by thermal spraying (metallizing)*". It seems therefore clear that the contract documents required that the steel construction be galvanised. This is further corroborated by the 9th Monthly Report (June 2007) which records that the contractor "*proposed to change the steel structure from galvanised to paint finish*". According to the minutes of the 15th MPM (22 January 2008), the contractor "*will use galvanised steel columns according to the required specifications*". That same minutes also record that the "*thickness of the coating layers for steel structure*" was being addressed, stating at the same time that the contractor declared that the "*sun shading structure will be erected by galvanised steel columns*". Finally, the minutes of the 18th MPM (8 May 2008) record, however, that due to "*some discrepancies from the manufacture of the galvanized columns for the bridges, it was agreed that [the contractor] will repair the quality by painting*".

88. It follows from the above sequence of events that the issues raised by the complainant in the given context took place after his contract as supervisor has come to an end. For the reasons set out in paragraph 61 above, it therefore falls outside of the temporal scope of the complainant's allegation.

Conclusion

89. In view of the above considerations, the Ombudsman concludes that there has been no maladministration in relation to the events covered by the complainant's allegation in its temporal and material dimensions. As regards those aspects raised by the complainant which are not covered by his allegation, that is, that the ECD failed properly to support him in his



efforts to ensure that the project works were carried out in accordance with the contract, the Ombudsman will, in line with his considerations in paragraph 74 above, inform the Court of Auditors of the present case and invite it to consider these issues.

As regards the second aspect of the complainant's allegation

90. As for the ECD's alleged failure properly to support the complainant in his conflicts with other parties involved in the project concerning his efforts to ensure that the project works were carried out in accordance with the contract, it is undisputed that the complainant brought to the Commission's attention certain intimidations and threats made against him and other members of the supervision team. It is furthermore not in dispute that the ECD raised this issue in the framework of an MPM and pointed out that such behaviour was unacceptable. Moreover, the complainant himself pointed out that a meeting involving him, the ECD and the contractor was convened in this regard. It is furthermore clear that the ECD asked the complainant as well as the contractor to put any grievances they had into writing.

91. Together with his complaint, the complainant submitted to the Ombudsman a written report dated 17 July 2007 concerning alleged instances of intimidation by representatives of the contractor. The complainant insisted that he had handed over this report to the ECD and thus presented his allegations in writing, but that the ECD did not take appropriate action. The ECD stated that to the best of its knowledge it did not receive anything in writing in this regard.

92. The Ombudsman considers that he cannot ascertain definitively whether the ECD indeed received the complainant's report dated 17 July 2007. It should be noted, however, that the complainant credibly argued that he handed over his report to a representative of the ECD and provided detailed information in this regard. In any event, it is not necessary for the Ombudsman to take a definitive stance on this issue, given that it is not in dispute that the complainant had informed the ECD of threats and intimidations against him and members of his team.

93. The question therefore is whether the ECD took appropriate action after having been informed of these incidents.

94. The Ombudsman considers that it clearly emerges from the documentary evidence that the complainant held key responsibility in the implementation of the building project and exercised a decisive role in this regard. Moreover, it appears from the file that the ECD fully acknowledged the seriousness of these occurrences to which the complainant had drawn its attention, which it considered unacceptable and which gave rise to a meeting involving itself, the complainant and the contractor. In these circumstances, one would have clearly expected decisive action by the ECD so as to endeavour to prevent any such incidents from recurring in the future and to support the complainant in his role of supervisor.

95. The Ombudsman considers that the evidence submitted to him suggests that, in the present case, the Commission did not live up to this standard. While the Ombudsman acknowledges that the issue of intimidation and threats was raised in two meetings, he does not



consider this to be commensurate to the recognised seriousness of the incidents here at issue. Instead, the recognised seriousness was such that one would have expected the ECD to make contact with the Commission's headquarters in Brussels in order to consult about possible reactions. At the very least, one would have expected the ECD to record the incidents reported by the complainant, as well as its considerations as to which action to take on the file. However, apart from the minutes of the MPM referring to the issue, the relevant file does not contain any trace in this regard.

96. The Ombudsman therefore concludes that the Commission failed sufficiently to support the complainant in his conflicts with other parties involved in the project relating to his efforts to ensure that the project works were carried out in accordance with the contract. This constitutes an instance of maladministration.

B. Alleged failure to call for an investigation of a fatal accident

Arguments presented to the Ombudsman

97. The complainant alleged that the Commission failed to call for an investigation of a fatal accident at the building site, in which one worker was killed.

98. In its opinion, the Commission, before addressing the fatal accident at the building site, commented on the general safety level on the site. It pointed out that on-site safety was a recurrent concern for the ECD and that, as confirmed by the minutes of the ICMs and MPMs, the maintenance of safety standards was closely monitored by it. During the first MPM on 13 September 2006, the contractor presented a safety plan which was subsequently approved by the MPM. The ECD took an active role in relation to on-site safety and instructed the contractor to improve safety whenever the minimum standards were not met. In the given context, it referred to the minutes of subsequent MPMs recording the contractor's agreement to comply with the complainant's recommendations; later noting an improvement of on-site safety; recording a subsequent deterioration together with the ECD's recommendation to further secure the stairs; and, immediately before the fatal accident, an improvement of safety measures on the site. This was confirmed by a letter from the complainant in which he stated that, shortly before the accident occurred, he had approved the measures taken by the contractor further to improve safety standards.

99. In relation to the fatal accident, the Commission stated that it happened on 12 January 2008. By letter of 14 January 2008, the contractor informed the ECD and the supervisor in the following terms: "*... a group of the Criminal Police arrived at the site and made their investigation of the scene. On their preliminary report they declared that it was only an accident.*" After the accident, the ECD continued its close monitoring of safety measures on the construction site, as appears from the minutes of the ICMs and MPMs. At the MPM of 22 January 2008, the contractor stated that the Police did not wish to disclose any information until a final report was available. On 16 April 2008, the Office of the Prosecutor in Tirana delivered a



final report on the accident and closed the investigation. According to the final report, the fatal accident was not the result of a lack of safety measures on the construction site.

100. In view of these circumstances, the Commission submitted that the ECD did all it could to ensure that appropriate safety standards were met on the construction site. In so doing, the ECD relied on the recommendations given by the supervision team and, through the ICMs and MPMs, instructed the contractor to follow any such recommendations. The Commission therefore disagreed with the complainant's view that the loss of human life during the implementation of the contract was "*tacitly ignored by all parties*".

101. In summary, the Commission submitted that the ECD closely followed-up the fatal accident at the building site and was regularly updated on the investigation by the Albanian authorities and the contractor in the framework of the MPMs.

102. In his observations, the complainant accepted that safety had been an issue of discussion at the kick-off meeting. However, the ECD did not support his efforts to improve safety on the site, even though the precarious safety situation was known to it. As regards the fatal accident, the complainant took the view that it had to be clear to the ECD that, given that corruption in Albania was rife, a report by the police or the public prosecutor could not be accepted without being critically assessed. He also submitted that a critical reading of the letter by which the contractor informed the ECD of the accident raised doubts whether the chain of events which had led to the accident had been reported accurately. Against this background, he submitted that the ECD would have had to investigate the situation. He asked whether the ECD (i) had looked after the family of the deceased worker and (ii) had asked the contractor to explain its apparent admission of guilt.

103. In his request for further information, the Ombudsman asked the Commission to explain, in view of the fact that more than three months lapsed between the death of the worker and the conclusion of the investigation by the Albanian authorities, which steps, if any, it took during this period. In particular, he asked whether the Commission (i) sought to clarify the facts, for instance, by asking the contractor for further information, and (ii) insisted on adequate preventive measures for the future. If no such steps were taken, the Ombudsman asked the Commission to explain why it did not consider it necessary to become active. The Ombudsman moreover asked the Commission whether it verified the well-being of the deceased worker's family.

104. In its reply, the Commission referred to its opinion and insisted that it closely monitored safety measures in place. Moreover, it instructed the contractor through the ICMs and MPMs to follow all relevant recommendations issued by the supervisor. The Commission also enclosed a letter from the Albanian Minister of Justice, according to which the fatal accident "*was a case of misfortune and that it was not triggered as a result of non-application of rules of technical safety and work related protection*".

105. The Commission confirmed that it took an interest in the well-being of the family of the deceased worker. The Commission moreover enclosed a contract between an Albanian



construction company different from the contractor and the widow and the son of the deceased worker " *whereby the latter was donated an apartment for the measures and price indicated therein* ".

106. In his observations, the complainant recalled that, in the course of the tendering procedure, the contractor had been reminded that the EU was to serve as a role model in terms of safety. Once the safety standards on the site had progressively deteriorated and become life-threatening, the complainant ordered a suspension of the works on the site which had given rise to massive threats and even physical assaults against him. He took the view that the Commission did not support him in his function, even though he had brought to its attention the unbearable conditions on the site by means of photos, reports and an on-site inspection.

The Ombudsman's assessment

107. The Ombudsman notes at the outset that the complainant's allegation is limited to the Commission's alleged failure to call for an investigation of a fatal accident at the building site. This notwithstanding, both the Commission and the complainant have made extensive reference to the safety situation on the site. While, in examining the complainant's allegation, the Ombudsman sees no need to address these issues in detail, he considers it still pertinent to point out that the reports on the progress of the building, from April 2007 onwards, make repeated and constant reference to issues related to safety on the site and, on various occasions, contain specific instructions to the contractor to improve safety. On the basis of the reports, it would appear that the ECD was actively involved in seeking to enforce compliance with safety standards on the site.

108. As regards the events following the fatal accident which occurred on 12 January 2008, the Ombudsman takes into account the following sequence, as it emerges from the documentary evidence: By letter of 14 January 2008, the contractor informed the ECD of the fatal accident. The contractor's letter also contained the following statement: " *A group of the Criminal police arrived at the site and made the investigation of the scene. On their preliminary report they declared that it was only an accident.* " The same statement was contained in a letter sent to the supervisor on the same date. In that letter, the contractor stated in addition that the accident happened " *despite of all the safety measures taken on site from our Company* ". According to that letter, the deceased worker " *broke the safety barrier and felt [sic] down to the basement. This fall cause [sic] death to him* ".

109. The 17th Monthly Report (February 2008), as well as the minutes on the ICM in March and April 2008, record that a final report about the accident is still missing. Still in June 2008, the minutes of the MPM recorded that no report from the police is yet available.

110. From a letter of the Albanian Minister of Justice to the Head of the ECD of 4 November 2008, it emerges that the competent prosecutor initiated criminal proceedings for 'breach of rules of work-related protection'. According to the letter, the worker lost his life in a sudden and accidental way as a consequence of falling down from considerable height " *during the*



completion of works, but not due to non-application of rules of technical safety and work-related protection". It further emerges from that letter that the prosecutor considered this case as a case of misfortune for which reason, on 16 April 2008, it was closed.

111. It appears from the letter the contractor sent the ECD on 14 January 2008 that, shortly after the accident, the police formed the view that it was "*merely an accident*". However, there is no reference in that letter, which consists of two very short paragraphs, to the sequence of events which caused the death of the worker. In this regard, it is noteworthy that the letter, which the contractor, again on 14 January 2008, sent to the supervisor contains a number of further factual elements concerning the sequence of events which are absent from the letter to the ECD.

112. Given the absence of any information in the letter to the ECD on possible causes for the accident, one could have expected the ECD to seek to clarify these causes and to obtain further information. However, this appears not to have happened. In this regard, it should be remembered that, according to Article 20.2 of the General Conditions, the contractor shall ensure the safety of the site and take the necessary steps to prevent any loss or accident which may result from carrying out the works. Article 67.13 of the General Conditions provides that the contractor is under an obligation to supply the Commission on request with all supporting documents relating to the conditions of the execution of the contract. There can therefore be no doubt that the ECD could easily have requested further information from the contractor. Moreover, one would have expected the ECD to see to it that works on the construction site would be stopped, or that such a suspension of works was at least considered, until the causes of the accident had been sufficiently clarified. It would also have been appropriate for the ECD to seek, within the limits of its powers, implementation of concrete steps in order to avoid similar accidents in the future. However, there is no evidence that this happened in the present case.

113. It is not clear at which exact point in time the ECD learned of the details contained in the letter to the supervisor, including the information that the deceased worker broke a safety barrier. However, given the fact that coordination meetings took place at a regular and frequent pace, the Ombudsman considers it likely that the ECD would have learned about the information contained in that letter, even if it did not specifically request it. However, as soon as the ECD was aware of that information, requesting further details from the contractor or making relevant approaches to the Albanian authorities would have even more been called for, bearing in mind that the 15th Monthly Report (December 2007) records that the contractor "*has improved the safety on site but still has to fix some barriers at the lift holes*". It does not appear from the documentary evidence though that the ECD took such steps. In the given context, it should also be recalled that, as emerges from the documentary evidence, five months after the accident there was still no police report available. While it became clear in the course of the inquiry that the criminal proceedings were closed in April 2008, it appears that the ECD was only informed of this fact in November 2008. All the more would it have been called for to seek, within the limits of the ECD's powers, a clarification of the situation. In the given context, regard should also be had to the importance the ECD attached to the issue of safety on the site which was highlighted, for instance, during the kick-off meeting.



114. The ECD was informed of the outcome of the criminal investigation in November 2008. While the letter from the Albanian Minister of Justice describes in some detail why the criminal investigation was closed, it would appear that it leaves open a number of issues regarding the fatal accident. Thus, for instance, other than the assertion that the worker's death was not the consequence of the non-application of rules of technical safety and work-related protection, there is no reason given why it was considered that these rules were actually complied with. Nevertheless, in spite of these uncertainties, it does not emerge from the file that the ECD took steps designed to clarify the situation.

115. The Ombudsman finally considers it remarkable and rather unusual that it was apparently at the contractor's instigation that the family of the deceased worker was provided a flat, where one would instead have expected the contractor's insurance to take appropriate steps. While the Ombudsman is unable to ascertain whether the complainant is right in stating that this amounted to an acknowledgement of guilt on the contractor's part, he considers that, at the very least, the ECD should have considered this aspect reason enough to insist on further elucidation of the situation.

116. In view of the above considerations, the Ombudsman considers that the complainant has established his allegation. The Commission's failure to call for an investigation seeking reliably to establish the facts of the fatal accident amounts to an instance of maladministration.

C. Conclusions

In the present case, the Ombudsman found two instances of maladministration. When the Ombudsman finds an instance of maladministration, to the extent necessary and appropriate, he makes a friendly solution proposal or a draft recommendation to the institution concerned so as to allow it to remedy the instance of maladministration found.

As regards the first instance of maladministration here identified, namely, the Commission's failure sufficiently to support the complainant in his conflicts with other parties involved in the project relating to his efforts to ensure that the project works were carried out in accordance with the contract, the Ombudsman considers this to be a particularly serious issue, which could, as far as the complainant's role as supervisor is concerned, be of a systemic nature. However, given that the complainant's mission as supervisor has come to an end, it would not serve any useful purpose to submit a friendly solution proposal or a draft recommendation to the Commission in this regard.

As regards the Commission's failure to call for an investigation seeking reliably to establish the facts of the fatal accident, given the time that has elapsed since the accident occurred, it would not serve a useful purpose to make a friendly solution proposal or a draft recommendation to the Commission.

The Ombudsman will therefore make two critical remarks below.



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

There has been no maladministration as regards the first aspect of the complainant's allegation.

The Commission failed sufficiently to support the complainant in his conflicts with other parties involved in the project relating to his efforts to ensure that the project works were carried out in accordance with the contract. This constitutes an instance of maladministration.

The Commission failed to take appropriate steps at its disposal to seek reliably to establish the facts of the fatal accident at the construction site of the SCC. This constitutes a further instance of maladministration.

The complainant, the Commission and the European Court of Auditors will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 17 December 2012

[1] For this notion, see paragraph 64 below.

[2] February 2006 version.

[3] Online available at: <http://eca.europa.eu/portal/pls/portal/docs/1/8034856.PDF>

[4] Minutes of Site Meeting No 16.

[5] Minutes of Site Meeting No 18.

[6] Minutes of Site Meeting No 19.