

Decision of the European Ombudsman closing his inquiry into complaint 1906/2007/VIK against the European Commission

Decision

Case 1906/2007/VIK - Opened on 26/09/2007 - Decision on 23/07/2009

The complainant, an American citizen, was contracted by a consultancy firm, the Commission's contractor, to evaluate a project, financially supported by the European Initiative for Democracy and Human Rights (an EU programme that aims to promote human rights and democracy worldwide). During the course of the evaluation, the complainant believed he had discovered evidence of fraud and deliberate mismanagement of Community funds. His findings, however, were not included in the draft evaluation report sent to the Commission by its contractor, since the latter considered that the complainant's allegations had not been duly substantiated. The complainant, therefore, sent his own version of the report directly to the Commission. As a result, his contract with the contractor was terminated.

Against this background, the complainant alleged that the evaluation process set up by the Commission suffered from a number of problems and deficiencies such as (i) the lack of whistle-blowing arrangements for evaluators; (ii) the absence of a code of ethics; (iii) the lack of an independent complaints mechanism; and (iv) the existence of an inefficient and financially disadvantageous double contracting system which, in the complainant's view, led to a substantial loss of Community funds. He argued that by not accepting his version of the report, the Commission had violated its own evaluation standards.

After a thorough inquiry, the Ombudsman arrived at the conclusion that there was no maladministration by the Commission and that no further inquiries were justified. In particular, the Ombudsman noted that the European Anti-Fraud Office had, in the meantime, examined the complainant's allegations of fraud and mismanagement.

Having examined the information submitted to him by the complainant and the Commission, the Ombudsman did, however, note that he would consider opening an own-initiative inquiry as regards the availability of whistleblower arrangements for evaluators in the Commission's evaluation process.

THE BACKGROUND TO THE COMPLAINT



1. The complainant, a citizen of Country X, was hired as an expert by a research and consulting company ('the Contractor'). The complainant's task was to evaluate the Network of Schools of Political Studies ('the Network'), which was established by various civil society partners under the responsibility of the Council of Europe and supported by the European Community through the European Initiative for Democracy and Human Rights ('EIDHR'). The objective of the evaluation was to help the European Commission improve the impact of EIDHR's support to the Network. The complainant was to carry out the evaluation jointly with another expert, who had been contracted as team leader.

2. On 27 December 2006, the contract was signed by the Commission and the Contractor. It was governed by the General Conditions [1] of the Framework Contract ('General Conditions'), the Global Terms of Reference of the Framework Contract 'Commission' [2] and the specific Terms of Reference [3] ('ToR') of the contract, specifying the services to be performed by the Contractor.

3. The implementation of the contract began in mid-January 2007. On 21 May 2007, the draft final evaluation report was submitted by the Contractor. On the same day, the complainant submitted his own version of the draft final evaluation report. On 22 May 2007, the complainant informed the Commission that his contract with the Contractor had been terminated.

4. On 11 June 2007, following the termination of his contract, the complainant sent a complaint to the European Ombudsman (complaint 1607/2007/VIK). He alleged that a number of irregularities had occurred during the evaluation process and he criticised the Commission's evaluation process in general. He also indicated that he had asked the Commission for access to the draft evaluation report sent by the Contractor, but that access had not been granted. In addition, the complainant claimed that the Commission should make sure that he was fully compensated for the work he had performed for the Contractor, since the Commission had received his work product.

5. On 24 June 2007, the complainant submitted an "*appeal*" concerning these grievances to the Secretary-General of the Commission. The Ombudsman, therefore, took the view that Article 2(4) of his Statute, which provides that a complaint needs to be preceded by appropriate prior administrative approaches to the Community institution or body concerned, had not been complied with, since the Commission had not had sufficient time to consider the matter when the complainant filed his initial complaint with the Ombudsman. The Ombudsman, therefore, closed the complaint and informed the complainant that he could submit a new complaint, if the Commission were to fail to provide, within a reasonable period of time, a satisfactory reply to his letter of 24 June 2007. It appears that when the complainant filed his first complaint with the Ombudsman, he had also addressed his grievances to the European Anti-Fraud Office ('OLAF').

6. On 18 July 2007, the complainant informed the Ombudsman that, after having received the reply of the Commission's Secretary-General to his letter of 24 June 2007 [4], he wished to renew his complaint. The complainant's request was, therefore, registered as a new complaint (complaint 1906/2007/VIK). In its reply to the complainant's letter of 24 June 2007, the



Commission indicated that, in view of the fact that the complainant had addressed his grievances to OLAF, and that OLAF was acting in its investigative capacity, it was for OLAF to look into the matter and to inform the complainant of the follow-up to his case. The Commission explained that it would refrain from addressing the issues raised by the complainant, in order to allow OLAF to deal with the case with impartiality and integrity and in full respect of the rights and freedoms of individuals. In his letter to the Ombudsman, the complainant argued that it was thus clear that the Commission would not respond or seek to resolve the issues he had raised. In his view, the Commission had passed on the complaint to OLAF, even though only one of the several administrative concerns he had raised could be resolved by OLAF.

THE SUBJECT MATTER OF THE INQUIRY

7. In his complaint to the Ombudsman, the complainant submitted the following allegations and claims:

7.1. The evaluation process suffers from a number of problems and deficiencies, such as (i) lack of whistleblower protection for evaluators; (ii) the absence of a Code of Ethics; (iii) lack of an independent complaint mechanism and (iv) the existence of an inefficient and financially disadvantageous " *double contracting system* ", leading to substantial loss of Community funds.

7.2. The Commission failed to provide comments within 15 days after the complainant had submitted his draft report (as foreseen in the project's ToR) and the complainant had therefore not been able to finalise it.

7.3. The Commission should determine the appropriate amount of the fee to be paid, split this amount among the consultants forming part of the team and ensure that they were paid directly by the Commission, since the complainant's contract with the Contractor had been terminated.

7.4. The Commission wrongly failed to grant access to the report that the Contractor submitted to the Commission's EuropeAid Office on 21 May 2007.

7.5. The complainant further claimed that the Commission should not " *close its eyes* " and should help OLAF in the investigation of wrongdoings, as well as organise and conduct its own investigation.

7.6. The Commission should also make certain documents relating to the project, such as its Final Report, available to the public and, in particular, to the project beneficiaries and stakeholders.

7.7. Given that the complainant's contract with the Contractor had been cancelled, his work had been used illegally by the Commission. The Commission should, therefore, reimburse the complainant for his " *stolen* " intellectual property, since it had benefited from his work. In his further letters sent to the Ombudsman, the complainant clarified that the issue of the " *stolen* " intellectual property was also linked to the " *misuse (censorship and distortion)* " of his work.



During the inquiry, the complainant put forward the following further allegation:

7.8. The Commission had ultimately "*falsified and censored his report*".

8. It should be noted that, on 14 and 27 August 2007, the complainant sent letters to the Ombudsman in which he expressed certain grievances against OLAF. However, he did not make it clear whether he wished the Ombudsman to deal with these grievances. In any event, the complainant had not, at that time, made the appropriate prior administrative approaches as regards OLAF. The Ombudsman, therefore, informed the complainant that he should first address the matter to OLAF and that, if the latter were to fail to provide a satisfactory reply within a reasonable period of time, he could then consider submitting a complaint against OLAF.

9. On 3 October 2007, the complainant made use of that possibility and submitted a complaint against OLAF. This letter was registered by the Ombudsman as a separate complaint (complaint 2525/2007/VIK). From the information which the complainant provided in the framework of his complaint against OLAF, it appeared that OLAF had requested him to furnish concrete evidence, supported by documentation, as regards the allegation concerning mismanagement of funds and a possible fraud by the Council of Europe and the Commission. The complainant did not provide the requested evidence regarding these issues. OLAF then invited the complainant to give oral evidence in the course of a verification interview, which he apparently also refused to do. The complainant, in essence, explained that he was not willing to cooperate with OLAF, since its investigations were political and biased and because OLAF had deliberately limited its investigation in such a way so as to avoid addressing the key concerns, over the Commission's failures in the evaluation process. The complainant argued that he would only participate in the process, if OLAF were to fulfil a number of conditions formulated by him.

10. The Ombudsman took the view that nothing in the documentary evidence supplied by the complainant suggested that OLAF had failed to comply with the principles of good administration. In particular, there was nothing to suggest that there was any bias or conflict of interest on the part of OLAF in this case. In view of the above, the Ombudsman closed the complaint against OLAF on the basis of Article 195 of the EC Treaty, on the grounds that it lacked sufficient grounds for investigation. It should, therefore, be noted that the present inquiry concerns the Commission only and does not cover the complainant's grievances against OLAF.

11. In his further observations of 19 January 2009, the complainant raised an additional allegation against the Commission. He alleged that the Commission "*blacklisted*" evaluators who were not afraid to raise issues. In this context, the complainant argued that he had also been blacklisted. Given that the complainant does not yet appear to have addressed this issue to the Commission, the Ombudsman considers the relevant allegation to be inadmissible on the basis of Article 2(4) of his Statute.

THE INQUIRY



12. On 26 September 2007, the Ombudsman launched his inquiry into the present complaint. On 17 January 2008, the Commission sent its opinion, which was forwarded to the complainant with an invitation to make observations. The complainant's observations were sent on 27 February 2008.

13. On 1 October 2008, the Ombudsman launched further inquiries into the complaint. The Commission provided its further opinion on 2 December 2008, which was forwarded to the complainant on 5 December 2008. On the same day, the Ombudsman requested the Commission to provide additional clarifications as regards the issue of whistleblower protection for evaluators. The Commission sent its further comments on 23 February 2009. The complainant's further observations were provided on 19 January 2009, and on 24 March 2009, respectively.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

14. Before addressing the substance of the present complaint, a number of preliminary issues need to be considered.

As regards the complainant's grievances against the Contractor

15. In his complaint to the Ombudsman, the complainant submitted that the contract that the Contractor had asked him to sign contained provisions concerning conflicts of interest, which made it possible and easy for the Contractor to put pressure on him and to distort the results of the evaluation. In this context, the complainant pointed out that the contract was enforceable only in Country Z, instead of being open to international arbitration. The Contractor allegedly also refused to make reference in the contract to any evaluation regulations or professional codes of conduct.

16. The complainant further indicated that when, during the evaluation, he discovered evidence of fraud and mismanagement of Community funds by the Council of Europe and the Contractor, the latter attempted to interfere with his independence and with the evaluation process by putting pressure on him to falsify and censure his findings. He was threatened with dismissal and was not allowed to contact the Commission directly to discuss how sensitive issues ought to be presented. The complainant considered that he had no whistleblower protection and no channel through which to report the pressures to which he was being exposed. In his view, the Contractor had no right whatsoever to interfere in any way with the content of his findings.

17. The complainant also pointed out that he was surprised to discover that the Contractor and the team leader had worked on another version of the report, submitted subsequently to the Commission, which used his work, but contained false declarations, distorting the evaluation results. The complainant argued that the research conducted by the team leader was



insignificant and that the Contractor's administrative staff was not entitled, or competent, to substitute the professional findings at which he had arrived, following work conducted in the field.

18. Furthermore, the complainant alleged that the Contractor had illegally terminated his contract and announced its intention not to pay him. The complainant considered this to be a clear example of the type of financial pressures put on evaluators. At the same time, the Contractor was, according to the complainant, pretending that its disputes with him were related to the " *quality* " of the work and had nothing to do with the deficiencies of the evaluation process.

19. It is important to underline that the complainant's grievances *vis-à-vis* the Contractor do not fall within the Ombudsman's mandate, since the Contractor is a private company. In accordance with Article 2(1) of the Statute of the European Ombudsman, the Ombudsman can only examine complaints against Community institutions and bodies. As mentioned above, the present inquiry therefore only concerns the Commission.

Concerning the complainant's grievances against the Council of Europe

20. In its opinion, the Commission referred to an incident which took place in Country Y, when the complainant attended an activity organised by the Network with the participation of high-level representatives. According to the information received by both the Commission and the Council of Europe, during this event the complainant had an argument with a representative of one of the schools of political studies, which are part of the Network. The complainant allegedly behaved in a manner which did not comply with the rules or norms concerning proper behaviour.

21. In his observations, the complainant took the view that the Commission's response contained " *a direct and unsubstantiated attack on [his] professionalism based on hearsay from the CoE (the organization being evaluated)* ". Concerning the incident in question, the complainant explained that he had confronted an official of the Council of Europe, who was trying to undermine the evaluation while it was ongoing by interfering with the complainant's access to officials, under the false pretext that he did not know he was an evaluator, even though the complainant had met him several times before, including in his office in Strasbourg. According to the complainant, this Council of Europe official not only interfered with his work, but sought to put pressure on the Contractor to remove him as an evaluator.

22. In its further opinion, the Commission pointed out that, in order to verify that there was no reason to doubt the quality and integrity of the assessment carried out by the Contractor, it had contacted the Council of Europe. In its reply, the Council of Europe stated that the complainant " *ha [d] demonstrated a total lack of professionalism in the performance of his duties* ", that " *he lacked neutrality and objectivity in his interviews and appreciations* " and that " *such a distorted and biased analysis led to a totally unacceptable first draft evaluation* ". The Council of Europe official who signed the letter in question added that he " *had to spend a great deal of time and effort with the team leader, ... in order to redress the facts and contribute to a report of the*



required professional quality and standard ", which led to a "*radically different draft* ".

23. The complainant submitted that the above-mentioned letter clearly aimed to discredit him, since it did not contain any evidence of lack of professionalism on his part. In the complainant's view, the letter was "*the smoking gun* " that showed that the evaluation process was corrupt, because the public office which was being evaluated could falsify the evaluation, by directly intervening in the evaluation process. The other evaluator was apparently pressured to rewrite the report until it became radically different from what the complainant had suggested. The complainant concluded that this "*explosive evidence* " confirmed the coordinated effort on the part of the Commission and the Council of Europe to cover-up their wrongdoings.

24. The Ombudsman notes that the complainant's grievances *vis-à-vis* the particular official of the Council of Europe, or the Council of Europe as an organization, are outside of his scope of review. Since the Council of Europe is not a Community institution or body, the Ombudsman is not entitled to review complaints made against it. As regards the Commission, the Ombudsman considers that the position adopted by the Council of Europe, or the Commission's reference to this position, does not prove that there was an attempt by the Commission to cover up any mistakes it might have made.

As regards the confidentiality provisions binding on the complainant

25. During the inquiry, the complainant sought media coverage of his complaint and the alleged irregularities related to it. The Commission noted in this context that this might be seen as a breach of the obligation of professional secrecy provided for in Article 8.6 [5] of the General Conditions. According to the Commission, this might also invalidate the complainant's claim of lack of whistleblowing protection for evaluators. In his observations, the complainant took the view that the Commission actually threatened a whistleblower for whistleblowing and that the institution was illegally interpreting the above-mentioned Article 8.6 of the General Conditions. The complainant noted that the key words of the provision were "*professional secrecy* " and "*confidential* " information. However, what he considered to be public information on the wrongdoings of the Commission's officials did not fit into this category. He argued that in no case was evidence of criminality or incompetence by public officials ever to be considered as protected information.

26. The Ombudsman considers the above matter to fall outside his scope of review, because he is not empowered to investigate any violations allegedly made by persons and entities other than Community institutions and bodies. The question whether the complainant breached confidentiality provisions will therefore not be considered by the Ombudsman.

As regards the reforms suggested by the complainant

27. In the course of the present inquiry, the complainant underlined on several occasions his expertise in international development assistance and indicated that urgent measures needed to be taken in relation to the subject-matter of his complaint. The complainant pointed out that he wished to work directly with the Ombudsman in order to reform the Commission's evaluation



process and to find the appropriate solutions as soon as possible. In his observations, the complainant described what the Ombudsman and his office "*need [ed] to do now*" in response to his grievances. He argued, for example, that the Ombudsman's office should work towards establishing a legal mechanism whereby evaluators and experts can take the Commission directly to independent courts or binding arbitrators as regards actions taken by the Commission, either through its contractors or directly, and that these forums should be easily accessible and inexpensive for experts. He suggested, in particular, that a "*rapid response Ombudsman*" should be created in order to offer whistleblower protection for consultants, and that OLAF and other supervisory bodies should be restructured.

28. In his further observations, the complainant expressed dissatisfaction with the Ombudsman's work, as the latter had failed to make the structural and legal reforms in the Commission's evaluation process which, in the complainant's view, he was supposed to undertake.

29. The Ombudsman considers it appropriate to recall in this context that Article 195 of the EC Treaty empowers him to investigate complaints concerning maladministration in the institutions and bodies of the European Union. In cases where the Ombudsman considers that there has been maladministration, he endeavours to see to it that this maladministration is rectified by addressing, where appropriate, proposals for friendly solutions or draft recommendations to the Community institution or body concerned. However, it is then for the Community institution or body concerned to consider which measures need to be taken. The Ombudsman is not entitled to take measures or conduct reforms that might be necessary in order to rectify any maladministration that has occurred. In view of the above, the Ombudsman is unable to proceed as suggested by the complainant.

Concerning the complainant's grievances against the Ombudsman

30. During the course of the inquiry, the complainant also submitted a number of accusations against the Ombudsman. He alleged, in particular, that the Ombudsman remained inactive for nearly two years as regards his complaint and that, by simply forwarding letters to the complainant and to the Commission, he was acting only as a mailbox and that he was ultimately "*responsible for aiding and abetting the lawbreaking*". The complainant was particularly unhappy with the Ombudsman's decision to initiate further inquiries, since in his view, he had already submitted all the evidence possible concerning what he referred to as "*the continued criminality by EC officials*".

31. The Ombudsman regrets the above-mentioned accusations, which he considers to be entirely unfounded. In particular, the Ombudsman must reject the complainant's suggestion that he remained inactive and has thus delayed the present inquiry. It must be underlined in this context that a finding of maladministration can only be made where there is sufficient evidence to warrant such a conclusion. Where such evidence cannot be identified, a complaint must be rejected. The Ombudsman, therefore, uses all the means placed at his disposal by his Statute to examine a case as thoroughly as possible. In doing so, the Ombudsman may decide, if he considers this to be necessary, to launch further inquiries. In the present case, further



information was indeed needed in order to deal with certain aspects of the case and with a further allegation, which the complainant had submitted in his observations on the Commission's opinion. Given that the Ombudsman can only deal with allegations or claims, if the institution concerned has had the possibility to express its views thereon, it was imperative to carry out further inquiries in order to respect the Commission's right to be heard. The Ombudsman, furthermore, considers that he provided timely replies to the extensive further correspondence which the complainant addressed to him during the course of the inquiry. Therefore, the Ombudsman cannot accept the complainant's suggestion that he only acted as a mailbox, a suggestion that appears to be based on a misconception regarding the principles underlying the Ombudsman's procedures for conducting inquiries.

32. Should the complainant wish to maintain his accusations against the Ombudsman, he could, of course, consider submitting them to the European Parliament, to which the Ombudsman reports, or to the Community courts. The Ombudsman is confident that his work on the complaint submitted by the complainant will withstand scrutiny by either of these institutions and by the public at large.

33. It appears useful to add that the Ombudsman will continue to deal objectively, fairly and impartially with the present case, and that he will not allow the complainant's attacks on his own activity to influence his judgment and conclusions.

A. Allegation concerning the deficiencies in the Commission's evaluation process (point 7.1. above)

Arguments presented to the Ombudsman

The complaint

34. The complainant submitted that the Commission's evaluation process suffers from a number of deficiencies, such as (i) lack of whistleblower protection for evaluators; (ii) the absence of a Code of Ethics; (iii) lack of an independent complaints mechanism; and (iv) the existence of an inefficient and financially disadvantageous " *double contracting system* ", which resulted in a substantial loss of Community funds. The complainant argued that Community funds were being wasted and that the objectivity and integrity of the evaluation process was being compromised due to the conflict of interest built into the system and to the possibility provided to the Commission or the contractors to exercise political and financial pressures on evaluators, who had no means to protect themselves.

35. The complainant further argued that the use of contracting firms hinders the flow of communication and information between the evaluators and the Commission and that there is, in effect, little to be gained from hiring such firms, which, in any event, pass most of the cost of the evaluation to the evaluators, but then double the costs to the Commission for their role in the process. According to the complainant, when evaluators were pressured by contracting firms to distort their findings, the Commission claimed that it bore no responsibility, arguing that



this was a " *private* " dispute between contractor and evaluator. The complainant noted that the UN had improved the efficiency of their evaluation process by eliminating the system of double contracting, and by choosing evaluators directly. In the complainant's view, the EU should follow the same model.

36. The complainant took the view that the following standards, which he found on the Commission's website, had been violated and that the Commission had not done anything to enforce them:

" The evaluator's independence in his/her work must be respected and the evaluation results must not be interfered with ".

" The final evaluation report shall present the results and conclusions of the evaluator and the tenor thereof shall not be amended without his/her agreement ".

" The conclusions and any recommendations shall be rigorous and not be distorted by personal and partisan considerations ".

The Commission's opinion

37. In its opinion, the Commission explained that the rules applicable to the specific contracts constitute the regulatory framework for the execution of technical assistance assignments. More specifically, the Commission referred to Article 7 (General obligations of the contractor), Article 8 (Code of conduct) and Article 9 (Conflict of interests) of the General Conditions and Article 6.4 of the Global Terms of Reference. These provisions, which are binding both upon the contractor and its experts, include obligations such as the duty to perform the services with diligence, confidentiality and in accordance with the best professional practice, and also to act with loyalty and impartiality and as a faithful adviser to the Contracting Authority " *in accordance with the rules / or code of conduct of its profession as well as with appropriate discretion* ".

38. Concerning the complainant's criticism related to the existence of an allegedly inefficient " *double contracting system* ", the Commission pointed out that, for the purposes of the contract's implementation, the Contractor had to make available " *an appropriate management and backstopping mechanism* ", which was expected to include at least (a) one director, who would coordinate the management of the contract, ensure the appropriate quality control of output, and deal with the selection and recruitment of experts; and (b) one administrator (Article 6.1 of the Global Terms of Reference).

39. The Commission argued that outsourcing certain tasks was necessary in order to allow it to focus primarily on the general lines of Community policies. If the Commission could not delegate co-ordinating input, remuneration and assessment of the substance of the experts' activities, all these project related tasks would be shifted to the Commission's services. As a consequence, this would lead to a significant increase in the number of Commission staff needed to cope with the increased workload. The Commission argued that the practice of resorting to consultancy firms does not necessarily imply a loss of Community funds. The Commission stressed that it



attached great importance to how the EU taxpayer's money was spent. For this reason, the Commission ensures compliance with the Financial Regulation applicable to the general budget of the European Communities, by carrying out an effective and efficient control, in accordance with the principles of sound financial management.

40. The Commission submitted that the complainant had made some general allegations about problems and deficiencies of the evaluation process. He had not, however, made any concrete reference to the problems actually encountered, before and during the execution of his assignment.

41. The Commission also noted that it had no competence as regards the issues concerning the terms of contractors' contracts with their experts and could not, therefore, intervene with regard to contractual issues between the complainant and the Contractor. Furthermore, the contractual agreements between the framework contractors and their experts were confidential, and resolving the private disputes between them lay clearly outside the Commission's competence.

The complainant's observations

42. In his observations, the complainant reiterated his view that the evaluation standards available on the Commission's website are binding on Commission officials (see point 36 above). According to him, " *this law* " obliged the Commission to ensure that evaluators, whether contracted directly or through subcontractors, are duly protected. The complainant noted that the Commission was the only party that could enforce this and " *any attempt, therefore, to create a system or a mechanism that would relieve the EC of this obligation and try to transfer it to other parties, [was] blatantly illegal and in violation of the objectivity of the evaluation process.* "

43. As regards the issues relating to the system of contracting consultancy firms, the complainant submitted that the Commission did not respond to his comments on how the costs and their value are actually determined, on what role the contractors actually play in protecting quality rather than providing the Commission with political control, and on why paying outsiders could be more efficient than following the UN system of creating an internal recruitment office. The complainant reiterated that, in his view, the system was set up with the sole purpose of protecting the Commission officials, and that the Commission was paying the contracting firms to perform a " *censorship and falsification role* ".

The Ombudsman's further inquiries

44. After having carefully analysed the above arguments of the parties, the Ombudsman considered that further inquiries as regards the complainant's first allegation were necessary. The Ombudsman thus addressed the following question to the Commission:

" *In his complaint, the complainant alleged (first allegation) that the evaluation process suffers from a number of problems and deficiencies. In this context, the complainant referred, among other things, to a lack of whistleblower protection for evaluators and the lack of an independent*



complaint mechanism. In its opinion, the Commission did not address these issues. Could the Commission please provide its views on the above-mentioned issues? "

45. The Ombudsman also drew the Commission's attention to the standards quoted by the complainant in paragraph 36 above, and asked the Commission to comment on this issue as well.

The Commission's reply to the Ombudsman's further inquiries

46. In its further opinion, the Commission pointed out that Community law provides the means for individuals to make independent complaints. The possibility of filing a complaint with the Ombudsman was certainly one of them. Where an allegation of fraud is concerned, the Commission has to inform the complainant of the possibility of turning to OLAF and/or to transferring the information directly to OLAF. This is exactly what the Commission did in the present case.

47. As regards the alleged lack of whistleblower protection in the evaluation process, the Commission noted that every European citizen has the right to report potential or actual incidents of fraud and other irregularities to the competent authorities. If, for any reason, that citizen considers that he has suffered unlawful consequences as a result of having reported these occurrences to the authorities, he can bring a case before the competent court, including a Community court.

48. The Ombudsman considered that the above additional information relating to the alleged lack of whistleblower protection for evaluators was insufficient. In particular, the Commission did not comment on whether it had set up any specific whistleblower arrangements for evaluators within the framework of the evaluation process. The Ombudsman, therefore, requested the Commission to specify whether it had set up any such arrangements and, if it had, to explain what these arrangements are. If no such arrangements had been put in place, the Ombudsman asked the Commission to explain why it considered that such arrangements were not necessary.

The Commission's reply to the Ombudsman's request for additional clarifications

49. In its further reply, the Commission noted that it was mindful that whistleblowing protection generally implies legal protection, which mainly consisted of ensuring that individuals who disclose information concerning malpractice cannot, as a result, suffer adverse employment actions taken by their employers. Whistleblowing protection was thus commonly linked by nature to employment.

50. The Commission referred to the inter-institutional agreement of 25 May 1999, between the European Parliament, the Council and the Commission, concerning internal investigations by OLAF [6] , which provided for the principle of protecting whistleblowers against inequitable or discriminatory treatment. The Commission further explained that it had adopted a decision [7] , whereby staff had to report serious wrongdoings, either within the Commission, or directly to



OLAF. These principles were subsequently transposed into Article 22 a (internal whistleblowing) and Article 22 b (external whistleblowing) of the Staff Regulations [8] .

51. Furthermore, certain protective measures for Commission staff were specified in a 4 February 2004 Communication by the Commission, entitled " *How to enhance effective application of the Whistleblowing rules and protection of Whistleblowers* [9] ." These measures relate to the identity of the whistleblower, to mobility and to the staff report of the person concerned. The protection can be lost, if the official makes unwarranted or damaging allegations that he or she can not show to be honest or reasonable.

52. As regards third parties who report allegations of fraud, the Commission pointed out that there was no specific mechanism under Community law which imposes an obligation on contractors to put in place whistleblower protection arrangements. In this regard, the Commission reiterated that it could neither interfere nor exert control in third-party relationships (see also point 41 above).

53. The Commission pointed out, however, that the possibility to inform OLAF about suspicions of fraud or corruption affecting the financial interests of the EU constituted a mechanism available to any European citizen or resident. The citizen may either contact OLAF directly or inform the Commission. Where the latter, or any other European institution, receives this kind of information, the institution concerned is obliged to transfer the information directly to OLAF. If an informant wishes to remain anonymous, OLAF commits itself to conducting its investigation in an appropriate manner, so that anonymity is ensured. By doing so, OLAF guarantees that those citizens who report any suspected improper, illegal or wasteful use of Community funds will not as a result be treated in a discriminatory way. Moreover, the provisions of Article 287 of the EC Treaty, which deal with the obligation that binds European institution staff to non-disclosure of information covered by the obligation of professional secrecy, state that any infringement of these provisions may involve the non-contractual liability of the Community.

54. The Commission further reiterated that the complainant had not substantiated the adverse consequences suffered by him as a result of a lack of whistleblower protection.

55. As regards the evaluation standards, the Commission provided a set of its standards [10] which were different from the ones submitted by the complainant. More specifically, the Commission drew the Ombudsman's attention to the following standards:

" The evaluation must be conducted in such a way that the results are supported by evidence and rigorous analysis ".

" Evaluators must be free to present their results without compromise or interference, although they should take account of the steering group's comments on evaluation quality and accuracy ".

56. The Commission explained that, in accordance with the above standards, and although the evaluators' freedom of expression had to be respected, conclusions by evaluators had to be fully substantiated and the quality of their evaluation must be assessed in order to ensure that



the results are supported by evidence and rigorous analysis. This, in the Commission's view, was exactly what the complainant's employer did, namely, it checked and amended a draft report that lacked both a unified approach and clarity in order to ensure that it had the quality that was required.

The complainant's further observations

57. In his further observations, the complainant maintained his criticism of the evaluation process, as set up by the Commission adding that, in his view, it was clearly "*corrupt*", since the officials who were being evaluated could control every step of it. He argued that the evaluation process should be entrusted to a body that was independent and directly accountable to the public. He further suggested that the financial control must be in the hands of the European Parliament or of a new organization, to be established by the Member States, which should be outside and above the Commission.

58. The complainant maintained his view that using a contractor as an intermediary did not bring any additional value to the evaluation process and existed only to protect the Commission's officials. He further submitted that contractors obviously had a political and economic interest in receiving more contracts from the Commission, and that, if the Commission was taking the side of the contractors, it was by definition breaking the evaluation regulations. The complainant considered that his research was being used without his approval and "*behind his back*". In his view, this was in violation of the rule that "*the final evaluation report shall present the results and conclusions of the evaluator and the tenor thereof shall not be amended without his/her agreement*" (see point 36 above).

59. Concerning the issue of whistleblower protection for evaluators, the complainant expressed the view that it was not necessary for the Ombudsman to request further explanations from the Commission, since it was clear that no such protection existed. The complainant reiterated his conviction that the Commission was deliberately using the intermediary contracting firms to strip the evaluators of any whistleblower protection.

60. The complainant argued that the Commission's suggestion that it was possible for EU citizens to bring a case before the competent court was irrelevant for him, because the Commission knew very well that he was not an EU citizen, like many other consultants hired by the latter. Likewise, the Commission's reference to OLAF and to the Ombudsman was of no use, since these two bodies had done nothing to protect him.

The Ombudsman's assessment

(i) As regards the alleged lack of whistleblower protection for evaluators

61. According to the British Standards Institute, "[w] *histleblowing is the popular term used when someone who works in or for an organisation ... raises a concern about a possible fraud, crime, danger or other risk that could threaten customers, colleagues, shareholders, the public or the organisation's own reputation* [11]".



62. The Ombudsman notes that the idea of whistleblowing implies that the information disclosed by the whistleblower reveals something potentially wrong or illegal. It appears obvious that whistleblowers can thus play an important role in uncovering fraud or other illegal or detrimental behaviour. Given that whistleblowers are, as a rule, rarely popular in the organisation for which they work, since they criticise it (expressly or impliedly), some form of protection is needed in order to prevent such persons from suffering adverse consequences as a result of their actions.

63. The Commission referred to the whistleblowing arrangements that have been put in place for Community staff. As regards external staff and third parties, the Commission pointed out that there was no rule in Community law which imposes an obligation on the Commission's contractors to put in place whistleblowing arrangements in their contracts with third parties. The Commission explained, however, that external staff and third parties do have the possibility to turn to OLAF, which can examine their allegations. It added that OLAF can, furthermore, be asked to keep the name of the whistleblower confidential, thus protecting the latter from the possibility that his actions might have negative consequences for him.

64. The complainant has submitted that contractors have an interest in obtaining future contracts and may, therefore, be disinclined to uncover wrongdoing on the part of the EU institution or body awarding these contracts. In the Ombudsman's view, this risk can indeed not be excluded. It is, therefore, reasonable to assume that persons working for these contractors need to be given the possibility to draw attention to any fraudulent or otherwise illegal behaviour they consider to have occurred on the part of a Community institution or body. He further considers it reasonable that appropriate protection needs to be given to such persons. It should, in this context, be noted that, in accordance with the Commission's evaluation standards, one of the aims of the evaluations is to enhance "*transparency ... and accountability*". Against this background, it appears that external evaluators taking part in the Commission's evaluation process should be given the necessary protection from adverse consequences that may arise, if they decide to report, in good faith, on irregularities they have, or believe to have, discovered in the course of the evaluations. The lack of any whistleblowing arrangements for evaluators could, therefore, potentially undermine the purpose of the evaluations as such.

65. The Ombudsman considers that turning to OLAF does indeed give whistleblowers external to the institutions an important possibility to have their allegations examined by a body specialising in dealing with matters relating to potential fraud. However, it is doubtful whether this possibility affords sufficient protection to potential whistleblowers. It is true that an informer can ask OLAF to keep his or her name confidential. However, it is fair to assume that it will often, nevertheless, be easy for the contractor to identify (or to suspect) the person whose information has led to an examination by OLAF. It should, moreover, be noted that the whistleblowing arrangements put in place for Community staff also foresee the possibility of informing OLAF. Furthermore, these arrangements include the provision laid down in Article 22a(3) of the Staff Regulations, according to which the institution concerned is not allowed to take action that would be detrimental to a whistleblower who has acted reasonably and honestly. There does not, however, appear to be any rule providing similar protection for a third party, such as an evaluator.



66. What is more, the Commission has argued that the relationship between the expert and the contractor is a matter exclusively to be dealt with by those two parties. This would mean that an expert who acts as a whistleblower could face the risk of being dismissed by his or her contractor, without the Commission feeling obliged to intervene in any way. It should be recalled that the complainant considers that this is what has happened in his case. In the Ombudsman's view, the issue of whistleblower protection for persons who work for the Commission's contractors therefore merits further examination.

67. The Ombudsman notes that problems concerning, on the one hand, the experts' relationship with their contractors, and with the Commission, on the other hand, in particular, problems regarding differences of opinion between these experts and their contractors as regards the findings to be reached and how these findings are to be communicated to the institution concerned, have arisen in a number of other cases currently pending before the Ombudsman. In the Ombudsman's view, the issue concerning the need for whistleblowing protection for such experts thus needs to be examined more thoroughly. The Ombudsman will, therefore, consider launching an own-initiative inquiry as regards this aspect of the Commission's evaluation process. In case such an inquiry were to be opened, the Ombudsman would further consider bringing it to the attention of interested parties by way of a press release and a pertinent publication on the Ombudsman's website. This would enable all interested parties to express their views and give the Ombudsman the possibility of ascertaining which whistleblowing arrangements might need to be set up in this area. In view of the above, the Ombudsman considers that there is no need to pursue this issue further in the context of the present inquiry.

(ii) As regards the alleged lack of a Code of Ethics

68. From the information provided in the framework of the present inquiry, the Ombudsman understands that there is no separate document which exhaustively lays down the deontological rules governing the evaluation process. However, it appears that such rules do exist and are part of the General Conditions, the Global Terms of Reference and the Commission's binding evaluation standards. The Ombudsman, therefore, considers that the complainant's allegation that the evaluation process, as set up by the Commission, lacked ethical rules, has not been substantiated. The fact that these rules are to be found in different documents, and are not part of one single Code of Ethics pertaining to the evaluation process, cannot, in the Ombudsman's view, be considered to constitute maladministration.

69. The Commission could, however, consider drafting one single document, containing the evaluation standards and the specific rights, obligations and ethical rules pertaining to all the actors involved in an evaluation process. A further remark to that effect will be made below.

(iii) As regards the alleged lack of an independent complaints mechanism

70. The complainant argued that a further deficiency of the evaluation process concerns the alleged lack of an independent complaints mechanism. The Ombudsman notes, however, that the complainant has made use of the possibility of turning to OLAF as regards his grievances. It



should further be noted that the complainant has subsequently complained to the Ombudsman, which is an independent body entrusted with the task of dealing with complaints. OLAF, though technically part of the Commission, is operationally independent [12]. The Ombudsman thus considers that the complainant's allegation that, as an evaluator, he lacked access to an independent complaints mechanism, has not been established. To the extent that the complainant, by making the above argument, wished to criticize the lack of appropriate whistleblower protection, the considerations set out in points 61 - 67 above apply.

71. As regards the complainant's suggestion (point 57 above) that the financial control should be in the hands of the European Parliament, or performed by an independent body, which is placed outside and above the Commission, the Ombudsman notes that such a body does exist. The European Court of Auditors has the power independently to audit the expenditure of EU funds and to examine whether financial operations have been legally and regularly executed and whether the financial management of EU funds has been sound [13].

(iv) Concerning the allegedly inefficient "double contracting system"

72. In his complaint to the Ombudsman, the complainant suggested that, instead of using contractors as intermediaries who then recruit experts to carry out the evaluations, the Commission should resort to the UN system of direct contracting. In its reply, the Commission took the view that outsourcing certain tasks was necessary and inevitable. It argued that if it could not delegate, all the extra work would have to be carried out by its services. This would require a significant increase in staff.

73. The Ombudsman considers that the complainant's proposal has its merits. However, the arguments advanced by the Commission in this context do not appear to be unreasonable. Regard should be had to the fact that the choice of a suitable system concerning the organisation of the relevant tasks is ultimately a policy decision. The Ombudsman's mandate is limited to ascertaining whether or not there is maladministration. As regards the present case, maladministration would only exist if the system chosen by the Commission did not function, or if it led to considerable extra costs that could easily be avoided. The Ombudsman considers, however, that the complainant has not established this to be the case. The complainant argues that the Commission pays the contractors even though the work is carried out by experts such as himself. The Ombudsman, however, takes the view that the complainant has not proved that the Commission pays the contractors without receiving the relevant professional services in return. The Ombudsman, therefore, finds no maladministration as regards this aspect of the case.

B. Concerning the allegation that the Commission had falsified and censored the complainant's report (point 7.8)

74. In the course of the present inquiry, the complainant advanced one further allegation, which was that the Commission had ultimately "*falsified and censored his report*" (point 7.8 above). It should be recalled, in this context, that on 21 May 2007, the complainant submitted to the



Commission his own version of the evaluation report, which was different from the one submitted on the same day by the Contractor. The respective arguments advanced by the parties in this regard are set out in the following paragraphs.

The complainant's observations

75. In his observations, the complainant noted that the 27 June 2007 letter from the contractor (see paragraph 84 below) outlined the various pressures and demands that had been brought to bear on him to change the report and to attend an additional meeting where he was to be pressured to alter his findings, all in violation of his rights as an evaluator. The complainant took the view that the Commission had the burden of proof to prove that the parts of the report that had been removed were libellous and malicious, or that he, recklessly and knowingly, had violated established professional standards and the rights of certain individuals. The complainant more specifically stated the following:

" The EC uses the letter from the contractor (that it may have directed) as an attempt to justify the censoring of my report and my firing, as well as to indicate my unavailability to spend additional time, outside of my contract or my Terms of Reference with the EC, to have to respond to such pressures from individuals without the expertise for which I was hired as an evaluator. Had compensation for answering such claims been anticipated in the Terms of Reference and my contract, I would have been happy to offer it, but the fact that it isn't compensated reflects that its purpose is to exert a financial pressure on evaluators to force censorship and distortion of findings. Certainly, I would also have been available to meet with professionals in my field to discuss the standards and applications of methodology in the report, for additional improvements of the report. However, neither the EC nor the contractor made provisions for payment for any excess work that challenges an expert's findings and seeks to change them before they reach the public. "

76. The complainant added that the final report approved by the Commission eliminated the 100 pages of financial tables and evidence that he had provided to support his allegations of mismanagement and financial impropriety. In his view, removing this material had not been done with the aim of trying to improve the quality or accuracy of the report. He argued that the Commission ought to have requested additional funds and investigatory expertise for a full investigation of the allegations formulated by him, in order to determine whether there were errors in the conclusions at which he had arrived. The Contractor and the Commission had instead chosen to eliminate all that evidence.

77. The complainant submitted that the challenges concerning the methodology used in the report were " *falsified claims* " on the part of the Commission, since the latter could not really criticise the methodology in question, because he himself was the inventor of much of the methodology used in the field, and the author of a book in that area. It was, therefore, difficult to see how the Commission could claim that he was improperly using the methodology that he himself had designed, and how Commission officials could have become better experts than himself as regards his own methodology.



78. The complainant further mentioned that one of the reasons for censoring his report was the objection to the use of " *names* ". In his view, if the Commission intended to protect quality standards, it would have had to explain whether the individuals mentioned were subject to privacy protections and show that it was acting legitimately in order to protect individual rights. The Commission had, however, failed to do so. According to the complainant, the names that were removed from the report were those of certain officials in the Commission and the Council of Europe " *who are recipients of public funds and who may have been guilty of wrongdoings* ". In his view, it was " *entirely proper and an obligation of evaluators to list those names* " and " *the elimination of these names of public officials, at the direction of public officials, is an illegal act to cover up government waste and wrongdoing.* "

79. The complainant's understanding was that both the Commission and the Council of Europe were trying to hide from the public the fact that the Network spends public money holding meetings in foreign hotels, behind closed doors, at considerable expense, with a small elite group of young persons, who do not reflect the diversity of their own societies. He claimed that the schools could teach democracy and tolerance at a much lower cost, if they met in public school rooms. In his view, the hidden goal of the project was, in reality, to create links between future country leaders and European elites, and not to teach democratization.

The Commission's position

80. The Commission noted that, in the initial stages of the execution of the contract, it had raised the issue of the pre-screening of the reports with the Contractor, since the reports had been sent by the experts themselves and not by the Contractor. This had apparently been conveyed to the complainant, who informed the Commission on 5 March 2007, that the Contractor had requested that the next reports should be submitted first to it, before they were sent to the Commission. The Commission provided the Ombudsman with a copy of the complainant's e-mail of 5 March 2007.

81. The Commission submitted that, when the draft final evaluation report was submitted by the Contractor, the transmission message referred to the problems that had arisen as regards the complainant and specified that the latter " *was not in full agreement with the key messages of the report* " and " *was not listed as a co-author of the report* ". Given that, on the same day, the complainant submitted his own version of the draft final report, the Commission's services reacted to this situation immediately by sending a formal letter to the Contractor [14] , asking it to clarify the differences between the two draft reports, to specify the information that had been omitted in the draft final report submitted by the Contractor, and to give reasons for not having included certain input and comments provided by the complainant. The Commission's letter underlined that obtaining this information was very important, since the complainant was no longer named as a co-author of the draft report. The Commission pointed out that the aim of this letter was also to encourage, indirectly, the settlement of the dispute between the Contractor and the complainant.

82. On 27 June 2007, the Contractor replied to the Commission's request and explained that it had omitted allegations of financial impropriety and systemic mismanagement, which the



complainant had raised in his report and which, according to the Contractor, were inadequately justified or completely unsubstantiated. The Contractor noted that there were " *significant weaknesses with the application of the evaluation methodology required by ToR* " and that the complainant had failed to present solid evidence in order to justify some of his findings. In the Contractor's view, the draft report presented by the complainant lacked an adequate structure, contained inflammatory observations and personalised statements.

83. The Contractor further submitted that the complainant had been invited to meet with its internal evaluation specialists responsible for the quality assurance of evaluations, but that he had chosen not to attend this meeting. An e-mail had been sent to the complainant, asking him whether he wished to be included as a co-author of the report. He was further offered the possibility to make limited amendments to the draft report before it was sent to the Commission. The complainant had unfortunately ignored these invitations and had decided to submit his own version of the report directly to the Commission. In the Contractor's view, the complainant's version of the report contained poorly substantiated allegations, which did not address the Contractor's methodological concerns that had previously been communicated to the complainant.

84. The Commission explained that the Contractor had carried out an internal quality control on the draft final report and that the appraisal of the complainant's contributions to the report was a matter for the Contractor. It would consequently not have been proper for the Commission to substitute the Contractor's appraisal, since it was the task of the Contractor to ensure that the experts in the evaluation team include their findings, conclusions and recommendations in the final report. There had been no need for the Commission to express a lack of satisfaction with the report submitted by the Contractor, because the expectations concerning the requested outputs under the contract had generally been fulfilled. However, in accordance with usual practice, some changes were introduced in the report before its formal approval and publication.

85. As regards the draft submitted by the complainant, the Commission took the view that it " *required at least a review to allow final users for a clearer understanding of the report's conclusions* ". According to the Commission, the inclusion of individual quotations by name did not seem very orthodox, and made the reading of the draft report considerably more difficult.

86. The Commission concluded that the above-mentioned facts clearly indicated that it did not give any instructions to the Contractor concerning the complainant's draft report, and that it only issued its comments on the draft submitted by the Contractor, in accordance with usual practice. The Commission thus rejected any accusation made by the complainant regarding the falsification and censorship of his draft report.

The complainant's further observations

87. In his further observations, the complainant submitted that the Commission was in fact cherry-picking the evaluators in such a way that at least one would agree to falsify the overall outcome. The use of euphemisms, such as " *quality control* " and " *quality management standards* " only confirmed that the Commission was in fact simply using the contractors to



maintain control and that the contractors' role in the evaluation process was completely misrepresented. The complainant reiterated his view that the role of the contractors was merely to ensure that the report meets the required page length, but not to ensure the " *quality* " of the evaluators' professional conclusions.

88. The complainant underlined that he stood by all the conclusions he had submitted in his version of the report. Almost all of the information in the report was first-hand data that he had collected and neither the Commission nor the Council of Europe had demonstrated that the data he used was false. According to the complainant, his report had been changed so as to make it correspond to the pre-determined outcome. The complainant argued that this constituted direct censorship, falsification and distortion of his professional findings.

The Ombudsman's assessment

89. The complainant argued that the Commission falsified and censored his report, or that it directed the Contractor to do so. However, from the documentary evidence available to the Ombudsman, it clearly emerges that the disputed changes had been made by the Contractor and not by the Commission. No evidence whatsoever has been provided to suggest that the Commission directed the Contractor to change the evaluation findings so as to achieve a pre-determined outcome or that it pressured the Contractor to alter the evaluation results, as argued by the complainant.

90. It appears, however, that by submitting the present allegation, the complainant also intended to argue that his findings should not have been altered and that the Commission should, therefore, not have accepted the report submitted by the Contractor, since it omitted many of the complainant's findings.

91. The Ombudsman considers that, in order to comply with the mission entrusted to them, evaluators must be free to express their views. As noted in point 55 above, the Commission's evaluation standards provide that the " *evaluators must be free to present their results without compromise or interference, although they should take account of the steering group's comments on evaluation quality and accuracy.* " It should further be noted that, although evaluators' freedom of expression has to be respected, their conclusions should be fully substantiated and supported by evidence. The relevant standards of the Commission read as follows:

" The evaluation must be conducted in such a way that the results are supported by evidence and rigorous analysis. "

" The quality of the evaluation must be assessed on the basis of the pre-established criteria throughout the evaluation process and the quality criteria must as a minimum relate to relevant scope, appropriate methods, reliable data, sound analysis, credible results, valuable conclusions and clarity of deliverables. "

92. The Ombudsman notes that the wording of the evaluation standards referred to by the



complainant (see paragraph 36 above) differs somewhat from the above-mentioned standards provided by the Commission. The complainant submitted that the standards he had referred to were published on the Commission's website, but he did not mention any document or more specific source of information in that respect. The Ombudsman, therefore, carried out his own research regarding this matter and found that the standards referred to by the complainant form part of a document called " *Evaluating EU activities: A practical guide for the Commission services* [15] ." This document was published by the Commission in 2004, and aimed to provide guidance to the Commission's services concerning the organization and performance of evaluations. The revised evaluation standards [16] provided by the Commission were published in February 2007, and are binding upon all the Commission's services. The Ombudsman thus considers that the standards referred to by the Commission are the ones that currently apply.

93. On the basis of these evaluation standards, the Ombudsman arrives at the conclusion that the freedom of evaluators concerning the content of the evaluation report is not unlimited and can be subject to quality control, the latter being the responsibility of the contractors in the evaluation process. When exercising this control, the contractors must, however, respect the evaluator's independence in his/her work and must not interfere with the evaluation results. The Ombudsman considers that it will not always be easy to draw the line between these two policy goals and that there is a risk that contractors might, under the guise of quality control, try to modify the results reached by an evaluator for the simple reason that they are not happy with them. In these circumstances, the Ombudsman considers that the findings of an evaluator can only be modified or rejected, if the latter has clearly failed to comply with the qualitative criteria to be respected by him or her. In all other cases, the evaluator's conclusions need to be respected and the Commission must not accept any interference by the contractor or other persons.

94. The Ombudsman notes that in the present case, the Contractor intervened to remove certain allegations which it considered not sufficiently justified.

95. The Ombudsman has considered the contents of the report provided by the complainant and compared them to those of the final report approved by the Commission. It should be noted in this context that the Ombudsman clearly does not have the information or the expertise to assess whether specific conclusions are well-founded or not. He, therefore, considers that the review he had to carry out in this respect needed to limit itself to ascertaining whether there were any manifest errors. In other words, the review he carried out in this instance was similar to the limited scope of review he applies in contractual cases. Seen from this perspective, the Ombudsman considers that no such manifest error on the part of the Commission can be identified. It emerges clearly from the evidence submitted to the Ombudsman that the Commission did not simply accept the changes made by the Contractor but immediately took the matter up and asked the Contractor for explanations. The Ombudsman considers that the fact that the Commission finally took the view that the position adopted by the Contractor was largely justified cannot be considered to be manifestly incorrect. It should be mentioned in this context that the complainant himself recognised, in his version of the report, that he felt obliged as an evaluator to present his " *allegations of misuse of public funds, waste, hidden agendas of individuals.... even if such information.... is only that of a professional suspicion and concern*



and cannot be completely documented [17] ".

96. Even if one were to take the view that the Commission ought not to have accepted the changes to the complainant's report made by the Contractor, regard would have to be had to the fact that the Commission decided to ask OLAF to assess the allegations made by the complainant (see also section F below). The Ombudsman, therefore, takes the view that the Commission did not neglect the complainant's allegations and that it tried to assess them by referring them to the competent body. As already mentioned, OLAF did not consider that the evidence available allowed the conclusion to be reached that these allegations were well-founded. The Ombudsman, therefore, finds no maladministration on the part of the Commission as regards this aspect of the case.

C. Allegation that the Commission had failed to provide comments on the complainant's version of the evaluation report (point 7.2. above)

Arguments presented to the Ombudsman

97. On 11 June 2007, the complainant asked the Commission to comment on the report he submitted on 21 May 2007. The complainant alleged that the Commission failed to provide such comments. He noted that, in accordance with the ToR, the Commission should have responded by 5 June 2007. However, the Commission not only failed to do so, but also failed to provide any indications as to when it would be sending its comments on the report. The complainant argued that, even though he was no longer employed by the Contractor, he had a legal responsibility under the ToR to finalise the process and he had a "*de facto contractual relationship with the Commission*".

98. In its opinion, the Commission noted that the ToR applicable to the contract state that, after the report is presented to the Commission, the parties involved have two weeks to comment on it. On 4 June 2007, the Commission sent its initial comments on the report submitted by the Contractor, thus respecting the deadline. The Commission completed its comments on 6 July 2007, and the final acceptance of the report was given on 30 August 2007. According to the Commission, Article 27 (Approval of reports and documents) of the applicable General Conditions makes it clear that the obligations binding upon the Contracting Authority apply exclusively with regard to the Contractor. The Commission stressed that it never remained inactive *vis-à-vis* its Contractor and complied with the rules binding upon it.

99. The Commission reiterated that it had no contractual relationship with the complainant, and that the parties to the contract were the Commission and the Contractor only. The Commission, therefore, had no obligation with regard to the experts employed by its contractors, since they were not among its contracting partners. In this context, the Commission referred to Article 4.3 of the General Conditions, which provides that "*no sub-contract can create contractual relations between any sub-contractor and the Contracting Authority*".



100. The Commission further indicated that, on 1 June 2007, its services acknowledged receipt of the version of the final report sent by the complainant. It had, however, never commented on it, as it had no obligation to do so.

101. In his observations, the complainant stated that he wished to drop this allegation and the related claim for feedback on the part of the Commission.

The Ombudsman's assessment

102. The Ombudsman notes that the complainant has dropped this allegation. In any event, he considers that the Commission had to provide feedback only as regards the report which it received from the Contractor. It appears that the Commission did comply with this obligation. By refraining from commenting on the version of the report sent by the complainant, the Commission did not, in the Ombudsman's view, commit any instance of maladministration.

D. Concerning the complainant's remuneration (point 7.3. above)

Arguments presented to the Ombudsman

103. In his complaint to the Ombudsman, the complainant argued that, in March and April 2007, he undertook most of the research and drafting work for the project in question (more than 80%), since part of the work, which had to be performed by the team leader had been shifted to him. The complainant submitted that the Commission had agreed to allow some of the funds foreseen for the team leader to be transferred to him. Given that his contract with the Contractor was terminated on 22 May 2007, the complainant claimed that, since the Commission had received the product of his work and was informed in a timely fashion of the additional work that had been shifted to him, the Commission should ensure that he was duly paid for his work, including the extra work he had done on the project. The complainant claimed that, to that end, the Commission should determine the appropriate amount of a fee to be paid to him and to the team leader, split this amount between them and pay the experts directly. He claimed that the Commission should make the payment to him on the basis of the timesheet he had previously sent it.

104. In its opinion, the Commission stated that it could not be held responsible for determining or making payments due to the complainant from his employer for work done. Any payments to be made to the complainant were the full responsibility of the Contractor. The Commission submitted that it had duly fulfilled its payment obligations *vis-à-vis* the Contractor and that there were no outstanding payments to be made under its contract with the latter. It pointed out that it could not, therefore, accept the complainant's claim that he should be paid directly by the Commission. The Commission added that it could only encourage the complainant to settle his dispute directly with his employer.

105. Moreover, the institution remarked that the object of its contract with the Contractor was



precisely the provision of an evaluation report and that the report that it had ultimately accepted was not the same as the one sent independently by the complainant. Following from the above, the Commission considered that there was no basis on which financial compensation to the complainant could be granted.

106. In his observations, the complainant noted that the Contractor had, in the meantime, paid him for the number of days specified in the contract and also for the additional work which had been shifted to him. All the financial issues the complainant had raised with the Contractor were thus resolved. The complainant argued, however, that the Contractor and the Commission should, in future, be "*jointly and severally liable for payment and for upholding the law*" regarding any work performed by an expert.

The Ombudsman's assessment

107. The Ombudsman notes that there are no longer any outstanding financial issues to be settled between the complainant and the Contractor. Consequently, no further inquiries concerning the complainant's claim are needed, namely, that following the termination of his contract, he ought to have been paid directly by the Commission.

108. It should be noted, however, that the complainant raised a new issue concerning whether the Commission should, in principle, also be responsible for paying the experts hired by its contractors. The Ombudsman takes note of the Commission's reference to Article 4.3 of the General Conditions, which provides that there are no contractual relations between any sub-contractor, such as the complainant, and the Commission as a contracting authority. In light of this provision, the Ombudsman considers that the Commission cannot be held liable for potential failures on the part of the contractors to pay the experts recruited by them.

109. It appears, however, that the complainant effectively wished to suggest a change in the above structure, established and used by the Commission. This aspect would therefore appear to refer to the complainant's first allegation concerning the alleged deficiencies of the evaluation process. As noted above, the Ombudsman considers that the current system of contracting evaluators through contractors constitutes the result of a policy choice and is thus beyond his remit, which is limited to examining instances of maladministration. The relevant claim made by the complainant in this respect will not, therefore, be considered further by the Ombudsman.

E. Concerning access to the draft evaluation report provided by the Contractor on 21 May 2007 (point 7.4. above)

Arguments presented to the Ombudsman

110. The complainant's request for access to the report, which the Contractor sent to the Commission on 21 May 2007 was initially rejected by the Commission [18] . The latter took the view that the relevant document was covered by the exception laid down in Article 4(2), first



indent of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents [19] . This exception concerns the protection of commercial interests of natural or legal persons, including the protection of intellectual property. The complainant was advised that he could submit a confirmatory application to the Commission's Secretary-General. The complainant argued that the Commission had wrongly failed to grant him access to this document, because the Contractor's version of the report contained more of his own intellectual property than that of the Contractor.

111. On 3 October 2007, the complainant informed the Ombudsman that access had also been refused to a new version of the report produced by the Commission using his work. This new report had been distributed to stakeholders, but explicitly withheld from him. The Ombudsman took the view that the complainant's comment constituted a new allegation, since it concerned the issue of access to another document. However, given that the complainant had not produced any evidence to show that he had already requested the Commission to grant him access to the document in question, the Ombudsman advised the complainant to turn to the Commission first concerning this new aspect of his complaint. The Ombudsman added that the complainant could submit the matter to him again, if the Commission were to fail to provide him with a satisfactory reply. In his reply to the Ombudsman's letter, the complainant argued that the reason why he had not formally asked the Commission for access to this report was that he considered such disclosure to be part of the Commission's obligations to him. The complainant reiterated his view that he had not willingly resigned and that he was legally entitled to see that his professional work was being used appropriately.

112. In its opinion, the Commission pointed out that, when evaluating the complainant's request, it took into consideration that the document requested was a draft report, the quality of which was still to be assessed, and that making such a document public could have been harmful for the Contractor's commercial interests.

113. The Commission further noted that it was only on page 16 of the complainant's 21-page letter to the Commission's Secretary-General of 24 June 2007 that the complainant referred to his request for access to the document concerned. According to the Commission, this comment could not easily be interpreted as a confirmatory request, since at no time had the complainant clearly stated that he wished to maintain his request for the purposes of review. The Commission, therefore, regretted that the complainant's confirmatory request for access had not been addressed, and presented its apologies to the complainant. However, in view of the fact that the final evaluation report had recently been published on the EIDHR website, the Commission took the view that the complainant's request for access to the draft, sent on 21 May 2007, by the Contractor, had become devoid of purpose, since the complainant's aim could be attained by an examination of the publicly available final version of the document.

114. In his observations, the complainant did not reiterate his request for access to the document submitted by the Contractor on 21 May 2007.

The Ombudsman's assessment



115. The Commission has explained the reasons why it did not realise that, in his letter of 24 June 2007, the complainant wished to make a confirmatory application for access to the said document. The Commission also presented an apology for this oversight. In these circumstances, the Ombudsman considers that there is no need for further inquiries concerning the procedural aspects of this allegation.

116. As to substance, the Ombudsman notes that, in his observations, the complainant did not address the Commission's argument that his request for access to the draft report, submitted by the Contractor on 21 May 2007, had become devoid of purpose. Nor did the complainant indicate that he would still be interested in obtaining access to this document. In these circumstances, and in view of the fact that the Commission made the final version of the Contractor's report publicly available, the Ombudsman takes the view that no further inquiries concerning the substance of the present allegation are justified.

F. Concerning OLAF's involvement (point 7.5 above)

Arguments presented to the Ombudsman

117. The complainant claimed that the Commission should not "*close its eyes*" to the irregularities of the evaluation process and should help OLAF in the investigation of wrongdoings, as well as conduct its own investigation into the problems he had identified. The complainant accused the Commission of having sought to avoid responsibility by transferring the matter to OLAF.

118. In its opinion, the Commission explained that, as requested by the complainant himself, it had forwarded his correspondence to OLAF, and had informed him of this by letter dated 18 June 2007. OLAF had contacted the complainant on several occasions to request further evidence, also in the framework of an oral interview. The complainant did not accept OLAF's invitation. The matter was, nevertheless, being evaluated by OLAF. The Commission pointed out that it was ready to fully contribute to the possible investigation at OLAF's request.

119. The Commission further clarified that OLAF was the body which was competent to investigate allegations of irregularities and that there was, therefore, no point in launching its own separate investigation. OLAF could also handle the case with impartiality, integrity and in full respect of the rights and freedoms of individuals and preserve the independent status of its work. This had been explained to the complainant in the Commission's letters of 17 July, 28 September, and 31 October 2007.

120. In his observations, the complainant argued that, when he was dismissed, the Commission should have immediately decided to "*freeze all activity until a legal review had been completed*." The Commission should have immediately investigated the misconduct within its office and also by the Contractor, by collecting all documents and communications between itself and the Contractor, to determine the likely source of pressures emanating from the Commission and the



Council of Europe, which resulted in the complainant's judgment being overridden.

121. The complainant submitted that the Commission and OLAF appeared to be "*playing the bureaucratic football*", since the Commission seemed to know that OLAF would not investigate any law-breaking by the Commission or the Council of Europe other than individual acts of embezzlement. In his view, the Commission had a back channel of information and privileged communication with OLAF, which constituted evidence of a conflict of interest between the Commission and OLAF. The complainant, therefore, felt that a new, independent body should investigate his case.

122. After having analysed the information provided by the Commission and the complainant, the Ombudsman considered that further clarifications from the Commission were needed concerning this aspect of the complaint. He, therefore, requested the Commission to provide a reply to the following question:

" In its opinion, the Commission appears to argue that OLAF is examining all the allegations that the complainant raised in his letters to the Commission. However, it is not clear whether OLAF's inquiry does indeed cover all these allegations. Could the Commission therefore please specify whether OLAF's inquiry covers all the allegations raised by the complainant or, if this is not the case, why the Commission considers that no further action needs to be taken as regards the allegations that are not covered by OLAF's inquiry? It would be appreciated if, in this context, the Commission could also comment on the allegations put forward by the complainant in his draft evaluation report. "

123. In its further opinion, the Commission clarified that OLAF had considered in its evaluation the allegations made by the complainant which were within OLAF's competence. These were the ones concerning possible fraud and deliberate mismanagement of funds. The Commission noted, however, that OLAF did not seek to deal with the contractual issues involving the complainant, as these were not within OLAF's competence. Neither did OLAF seek to deal with what it considered to be policy issues, such as the policy concerning the Commission's contracts.

124. The Commission further noted that OLAF's conclusion was that the allegations made by the complainant did not indicate fraud or deliberate mismanagement of funds by either the Commission's services or the Council of Europe. In OLAF's view, the complainant's allegations were not supported by substantive evidence of fraud, serious irregularities, deliberate mismanagement of funds, or a "*hidden agenda*". OLAF reached this conclusion after having analysed the evaluation reports submitted by both the Contractor and the complainant, together with documents from the complainant, the Commission's services and the Council of Europe.

125. The Commission also recalled that OLAF had, in the course of a verification interview, invited the complainant on two separate occasions to provide specific evidence to it. The complainant declined OLAF's invitation on the grounds that OLAF was not prepared to enter into a discussion concerning his claims under civil law, for which OLAF was not competent.



126. Following from the above, the Commission concluded that, since the allegations of fraud and deliberate mismanagement of funds had been evaluated by OLAF, it saw no reason to take any further steps as regards these allegations and also abstained from making any comments on them.

127. As for the complainant's grievances concerning the evaluation process as such, the Commission submitted that it had provided specific arguments in the framework of the present inquiry as to why it had not envisaged further steps in that area.

128. In his further observations, the complainant argued that the claim that he did not appear for a "*verification interview*" was false and bizarre, and that it was also false to suggest that OLAF could not look into the allegation concerning the Commission's doubling of the evaluation costs through contractors. In the complainant's view, OLAF already had all the documentation it needed and there was no reason for him to waste more money and time by appearing at OLAF's premises at public expense.

129. The complainant also argued that the first purpose of the "*verification interview*" was to create a possibility for the official involved to eliminate the investigation. The second purpose was to "*size up*" the complainant and to meet behind closed doors, using the opportunity to pressure him or to buy him off. The complainant stated that he could not know which of these two purposes, if not both, OLAF had in mind when inviting him for an interview. He was convinced, however, that there was no justification in asking him to appear in person. He thus presumed that this was a "*corrupt tactic*" used by OLAF, which was also used in Third World dictatorships. The complainant concluded that he refused to fall victim of such a practice and asked the Ombudsman to make certain that OLAF and the Commission eliminate it from its repertoire.

The Ombudsman's assessment

130. It should be recalled at the outset that the present inquiry concerns the Commission only. As noted in paragraphs 9 and 10 above, the complainant's allegations against OLAF, on which the Ombudsman has already taken a stance in the framework of complaint 2525/2007/VIK, will therefore not be examined in this decision.

131. The Ombudsman notes that the Commission transferred to OLAF for the latter's consideration the complainant's allegations of fraud and deliberate mismanagement of funds, advanced in his version of the report. The complainant had, separately, also brought his grievances to OLAF's attention. The Ombudsman considers that the Commission could reasonably take the view that it was sufficient for the relevant issues to be examined by OLAF and that there was no need for it to carry out its own separate investigation.

132. As for the complainant's suggestion that the Commission should help OLAF in the investigation of wrongdoings, the Ombudsman notes that the Commission expressed its readiness to assist OLAF, if and when needed.



133. The Ombudsman notes, however, that on 24 June 2007, the complainant sent a 21-page letter to the Commission, in which he also expressed other grievances concerning the evaluation process (discussed in section A above), which were outside OLAF's specific competence and mandate. The complainant demanded a reply from the Commission concerning these issues. In its reply, the Commission limited itself to stating that it would refrain from addressing these issues in order to allow OLAF to deal with the complainant's case (see also point 5 and 6 above). The Ombudsman finds it regrettable that, in its reply to the complainant's letter of 24 June 2007, the Commission did not comment on those issues raised by him that fell outside OLAF's remit. However, the Commission did subsequently address these issues in the course of the present inquiry. The Ombudsman, therefore, considers that there is no need for further inquiries as regards this aspect of the case.

134. The Ombudsman notes that, in his observations, the complainant submitted that the Commission and OLAF appeared to be "*playing the bureaucratic football*" and that the Commission seemed to know that OLAF would not investigate any law-breaking other than individual acts of embezzlement. He also suggested that the Commission had a back channel of information and privileged communication with OLAF. The Ombudsman considers that the complainant has not provided any specific evidence that would suggest that the Commission had influenced, in one way or another, OLAF's handling of the complaint's allegations. These further allegations will not, therefore, be pursued by the Ombudsman.

G. Concerning the transparency of the information related to the project (point 7.6 above)

Arguments presented to the Ombudsman

135. The complainant claimed that the Commission should make certain documents related to the project, such as its final report, available to the public, and, in particular, to the project beneficiaries and stakeholders.

136. The Commission explained that the final version of the report, which had been approved by its services, was available on the EIDHR website.

137. In his observations, the complainant argued that the report submitted by the Contractor, which had been approved by the Commission and posted on the EIDHR website, should be replaced by his report. Alternatively, the two reports should be placed side by side on the EIDHR website, along with his observations provided in the framework of the present inquiry, so that the public was fully informed. The complainant indicated that he had made his evaluation, which had also been submitted to the Commission, available to the press and the general public.

The Ombudsman's assessment

138. The complainant's claim, which was investigated by the Ombudsman, was that certain



documents related to the project, such as its final report, should be made available to the public, and, in particular, to the project beneficiaries and stakeholders. It emerges from the Commission's submissions that the final report is now available on the Internet.

139. In his observations, the complainant claimed that further documents, such as his version of the report and the observations he submitted in the framework of the present inquiry, should also be made available on the relevant website. The complainant, however, did not indicate any legal basis for this further claim. The Ombudsman is also not aware of any legal basis that could support this claim. The Ombudsman further notes that third parties have the possibility to address to the Commission a request for access to any documents in its possession, should they need to obtain further information concerning the evaluation and its outcome. Regard should, moreover, be had to the fact that the complainant has stated that he made the above-mentioned documents available to the press and the public. In these circumstances, there appears to be no need for the Ombudsman to take any further action as regards this claim.

H. Concerning the allegedly illegal use of the complainant's intellectual property by the Commission (point 7.7 above)

Arguments presented to the Ombudsman

140. The complainant alleged that, given that his contract with the Contractor had been terminated, his work had been used " *illegally* " by the Commission. The Commission, therefore, had to reimburse him for this " *stolen intellectual property* ", since it had benefited from his work. The complainant argued in this context that, until he was fully paid for his work by the Commission, the work product he had produced was his own and he retained a commercial interest in its use.

The Ombudsman's assessment

141. Concerning the allegedly illegal use of the complainant's intellectual property by the Commission and his related claim for compensation, the Ombudsman fails to see how the Commission could be made responsible in this context. The Commission paid the Contractor in full for the evaluation produced on the basis of the contract concluded between itself and the Contractor. The Contractor had, in turn, paid the complainant for his work on the project. If the complainant were to continue to have any grievances regarding his intellectual property rights, these should thus be directed at the Contractor. The Ombudsman, therefore, takes the view that the complainant has failed to substantiate his claim that the Commission should reimburse him for his " *stolen* " intellectual property.

I. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman closes it with the following



conclusions:

- The Ombudsman finds no maladministration on the part of the Commission as regards the complainant's allegation and claims set out in points 7.1 (iii) and 7.1 (iv), 7.2, 7.3, 7.7 and 7.8 above.
- The Ombudsman considers that no further inquiries are justified as regards the remainder of the complainant's allegations and claims. However, the Ombudsman will consider launching an own-initiative inquiry as regards the availability of whistleblower arrangements for evaluators.

FURTHER REMARK

The Ombudsman notes that the ethical standards to be respected in the evaluation process at present appear to be spread across the General Conditions, the Global Terms of Reference and the Commission's binding evaluation standards. The Commission could, therefore, consider drafting a single document, containing the evaluation standards and the specific rights, obligations and ethical rules pertaining to all the actors involved in its evaluation process.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 23 July 2009

[1] General Conditions Framework-Contract EUROPEAID/116548/C/SV.

[2] Global Terms of Reference of the Framework Contract, Lot 4: Sectoral and Project Evaluations.

[3] Specific Terms of Reference, EIDHR Evaluation on the Network of Schools of Political Studies.

[4] The Commission's letter of 17 July 2007.

[5] Article 8.6 reads as follows: "The Contractor and its staff shall maintain professional secrecy, for the duration of the contract and after completion thereof. In this connection, except with the prior written consent of the Contracting Authority, neither the Contractor nor the personnel employed or engaged by it shall at any time communicate to any person or entity any confidential information disclosed to them or discovered by them, or make public any information as to the recommendations formulated in the course of or as a result of the services. Furthermore, they shall not make any use prejudicial to the Contracting Authority, of information supplied to them and of the results of studies, tests and research carried out in the course and



for the purpose of performing the contract."

[6] OJ 1999 L 136, p. 15.

[7] Decision 1999/396/EC, ECSC, Euratom of 2 June 1999, OJ L 149, p. 57.

[8] Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities, 1 May 2004, OJ 2004 L 124, p. 1.

[9] SEC(2004)0151.

[10] Evaluation standards (Annex II to the Communication to the Commission from Ms. Grybauskaite: "Responding to Strategic Needs: Reinforcing the use of evaluation" (February 2007 - SEC(2007)213).

[11] British Standards Institute, PAS 1998: 2008: Whistleblowing Arrangements Code of Practice, British Standards Institute, July 2008. Available on-line at: <http://www.bsigroup.com/PAS1998> [Link].

[12] Further information about OLAF's special independent status is available at: http://ec.europa.eu/anti_fraud/index_en.html [Link].

[13] Further information is available at: <http://eca.europa.eu/> [Link].

[14] The Commission's letter of 5 June 2007.

[15] See pages 57 and 90, available at: http://ec.europa.eu/budget/documents/publications_en.htm [Link].

[16] Communication to the Commission (SEC (2007) 213 of 21 February 2007) from Ms Grybauskaite in agreement with the President, Responding to Strategic Needs: Reinforcing the use of evaluation (Annex II), available at: http://ec.europa.eu/budget/documents/evaluation_en.htm [Link].

[17] EIDHR Evaluation on the Network of Schools of Political Studies, 16 May 2007, page 5.

[18] The relevant Commission's letter is dated 18 June 2007.

[19] OJ 2001 L 145, p.43.