

## **Decision of the European Ombudsman closing his inquiry into complaint 1874/2008/BB against the European Centre for the Development of Vocational Training**

Decision

**Case 1874/2008/BB - Opened on 25/07/2008 - Decision on 22/12/2009**

### **THE BACKGROUND TO THE COMPLAINT**

1. The complainants are researchers at the National Institute for Careers Education and Counselling (NICEC), a career development organisation based in the United Kingdom. Their complaint is directed against the European Centre for the Development of Vocational Training (Cedefop). Cedefop is a European agency that helps promote and develop vocational education and training in the European Union.
2. On 31 March 2006, NICEC signed a service contract [1] (the "Contract") with Cedefop to draft a scientific paper, which was later published by Cedefop. At the time Cedefop and NICEC signed the Contract, Cedefop's citation practice allowed for the names of author/s to be cited on the publication's cover page.
3. On the basis of the Contract, the complainants' scientific paper, entitled "*Study of approaches in the European Union to career guidance provisions to support workforce development*", was accepted by Cedefop in May 2007. It was published by Cedefop in 2008. However, the complainants' names were not cited on the cover page. Instead, they were only mentioned as "contributors" in the Acknowledgement Section of the Report.
4. On 13 June 2008, Cedefop notified the complainants that it had changed its citation policy in October 2007. It indicated that, as a result of this editorial policy change, the authorship of external reports was no longer recognised in Cedefop's publications.
5. On 1 July 2008, the complainants turned to the Ombudsman.

### **THE SUBJECT MATTER OF THE INQUIRY**



6. The complainants alleged that Cedefop's refusal to recognise them as authors of the report "*Study of approaches in the European Union to career guidance provisions to support workforce development*" was inconsistent with Cedefop's previous practice and was unfair.

7. The complainants claimed that Cedefop should recognise their authorship of the report entitled "*Study of approaches in the European Union to career guidance provisions to support workforce development*", in accordance with the terms agreed originally.

8. The complainants also claimed that Cedefop should send the final manuscript to the complainants for final checking before publication.

## THE INQUIRY

9. On 25 July 2008, the Ombudsman asked Cedefop to submit an opinion, which it did on 30 October 2008. The opinion was forwarded to the complainants for observations, which they sent on 9 December 2008.

10. On 17 March 2009, the Ombudsman's services contacted the complainants in order to discuss a proposal for a friendly solution. The complainants sent further correspondence on 24 March 2009.

11. On 7 April 2009, the Ombudsman made a friendly solution proposal to Cedefop.

12. On 28 May 2009, Cedefop regretted that it could not accept the Ombudsman's friendly solution.

13. On 29 June 2009, the complainants sent his observations to Cedefop's reply to the Ombudsman's friendly solution.

## THE OMBUDSMAN'S ANALYSIS AND PROVISIONAL CONCLUSIONS

### A. Allegation that Cedefop's refusal to cite complainants as "authors" was unfair and inconsistent and the claim as regards the right to carry out final check

#### *Arguments presented to the Ombudsman*

14. The complainants alleged that Cedefop's refusal to recognise them as the authors of the report entitled "*Study of approaches in the European Union to career guidance provisions to support workforce development*" was inconsistent with its previous practice and unfair.



15. In support of their allegation, the complainants submitted the following arguments:

(a) NICEC signed a contract with Cedefop on 31 March 2006 with the expectation that, when the report was published by Cedefop, the complainants' names would appear on the cover page of the report.

(b) The report is entirely based on the complainants' research.

(c) In the pre-publication version of the report distributed to participants at a conference on "*Guidance for Workforce Development*" (Thessaloniki, 25-26 June 2007), Cedefop cited the complainants as the authors; and

(d) Cedefop's new citation policy should not have been applied retroactively. Even if the Cedefop policy had changed, the authors should have been informed of that change at the moment when they agreed to the Contract and not after they had worked on the drafts and submitted them.

16. Cedefop underlined that the Contract did not include any rules on citation policy. It pointed out, however, that Article II.8 of the Contract provided that:

*" Any results or rights thereon, including copyright and other intellectual or industrial property rights obtained in performance of the Contract, shall be owned solely by Cedefop, which may use, publish, assign or transfer them as it sees fit, without geographical or other limitation, except where industrial or intellectual property rights exist prior to the Contract being entered into. "*

This provision complied with the of the General Conditions of the Financial Regulation, which outline that an institution has ownership over the results of its service contracts and provide, in Article II.10, that an institution may "*decide on the use, distribution and publication of the results of the service contract, including the right to use parts of the results only, or not to publish any of the results, as it sees appropriate.*"

17. Until 2007, Cedefop had no clear citation policy regarding the papers drafted on the basis of the service contracts. Decisions in this respect were made on a case-by-case basis. In October 2007, Cedefop established its citation policy and rigorously adhered to it concerning all of its publications published from that date onwards.

18. As a result of this policy, authors of remunerated reports, commissioned by Cedefop on the basis of service contracts, are no longer cited as "authors" in the final publications. However, they "*are acknowledged in the Acknowledgement Section in line with their specific contribution to the result achieved, including the clear reference to the respective service contract.*" In contrast, the authors who submit non-remunerated articles for Cedefop's publication entitled [*t* *he European Journal of Vocational Training*] are recognised as authors.

19. In the complainants' case, Cedefop argued that it did not apply its citation policy



retroactively. It pointed out that the complainants' report was published after the new policy was adopted.

20. Cedefop also pointed out that informing potential external contractors, often represented by consortia, about its citation policy was not possible, given the number of service contracts it awarded. In any event, such contractors do not acquire the right to be cited as authors on Cedefop's publications.

21. Cedefop questioned the legal grounds on which the complainants based their expectation that their names would appear on the cover page of the report. It argued that no such terms were agreed at any time.

22. Cedefop also argued that several case studies in the report were drafted by other parties, and not by the complainants' team.

23. Finally, Cedefop maintained that the complainants' draft version of the report used at the Conference in Thessaloniki in June 2007 did not yet constitute a "*Cedefop publication*". On the cover page, it was clearly marked "*Background document/final report, EN not revised*". This meant that the document was unedited and unrevised (no additions or changes had yet been made by Cedefop's in-house experts).

24. In his observations, the complainants maintained their complaint. The complainants maintained that previous Cedefop reports, such as "Guidance policies in the knowledge society" (published in 2004), had clearly identified authors. The complainants also criticised Cedefop's argument that it had relied on its internal experts. According to the complainants, no expert help from Cedefop was available to them. Although the complainants agreed that several case studies in the report were written by others, they pointed out that this fact was acknowledged in their report.

25. The complainants felt that Cedefop had failed to properly communicate its *new* citation policy to them. The complainants maintained that naming them as authors of the reports they wrote would have been intellectually and ethically honest and would have protected the organisation from being responsible and accountable for every statement made in the reports concerned.

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

26. The Ombudsman noted that the complainant's names were mentioned as "contributors" in the Acknowledgement Section of the Report. As such, the Ombudsman observed that the complainants' contribution was expressly recognised by Cedefop. The Ombudsman acknowledged, however, that authors may receive a significant additional benefit, if their authorship is recognised by having their names appear on a cover of a publication.

27. The Ombudsman recognised that, when they submitted their paper for publication by Cedefop, the complainants were of the view that their names would appear on the cover page



of the publication containing their paper. This view was based on the consistent practice of Cedefop at that time. No information was provided to the complainants, before they submitted their paper, that the citation rules could be different from the established practice. The Ombudsman thus considered that the complainants had a legitimate expectation that this policy would apply to the paper that they had submitted.

28. The Ombudsman acknowledges that Cedefop is fully entitled to establish a new citation policy, whereby it does not cite the names of authors on a cover page. However, such a change of policy should not prejudice those authors who relied on a previous practice when submitting papers for publication. The new policy should only apply to papers that are submitted *after* the new citation policy is made public. In this regard, the Ombudsman pointed to the well established case-law whereby the retroactive withdrawal of a legal measure, which has conferred individual rights or similar benefits on an individual, is contrary to the general principles of law. [2]

29. In light of the above, the Ombudsman considered that, by applying its *new* citation policy to the complainants' report, which was submitted for publication before that *new* policy entered into force in October 2007, Cedefop (a) failed to act fairly and (b) did not respect the complainant's legitimate expectations based on Cedefop's citation practice at the time of submission. This could be an instance of maladministration. While it was not possible properly to recognise the authorship of the complainants in copies of the work which have already been published, it might be possible to do so in any copies which may be published in the future. The Ombudsman also considered it appropriate that, should copies of the work be published in the future, the authors should be afforded the possibility of reading the work before republication. Accordingly, the Ombudsman made the following friendly solution proposal, in accordance with Article 3(5) of the Statute of the European Ombudsman:

*Cedefop could apologise to the complainants for retroactively applying the new citation policy to the report and recognise, in accordance with the pre-October 2007 citation practice, the complainants' authorship of the report in all copies of the study that may be published in the future. Further, the authors should be afforded the possibility of reading the work before republication.*

*The arguments presented to the Ombudsman after his friendly solution proposal*

30. Cedefop did not agree with the Ombudsman's friendly solution proposal. According to Cedefop it had complied fully with the service contract, which formed the only legal basis for dealing with this matter. In this respect, it argued that the contracts concluded clearly did not give the complainants and/or any other consultant the right to have their names cited.

31. Cedefop also argued that the legal principle of legitimate expectations was not relevant in the present case, since no established long-lasting citation practice was in place before October 2007. Rather, decisions as regards citations were made on a case-by-case basis. In this context, a single occurrence does not constitute a "consistent practice". [3] In addition, no assurances whatsoever, not even to mention precise or specific assurances, [4] were given by



Cedefop that the complainants were to be cited as the author of the report. The fact that a newly recruited staff member made a vague and informal statement in this respect does not constitute an assurance in the meaning of relevant settled case law. Such a vague and non-committal statement by a staff member, which contains neither a promise nor assurances and is not in conformity with the legal provisions in force, does not bind the administration. [5]

32. According to Cedefop, the contracts explicitly and comprehensively assigned the intellectual property rights to Cedefop. The complainants were clearly aware of this. They were, therefore, not acting in good faith. Moreover, according to Cedefop, the complainants conceded in their complaints to Cedefop that, from a formal and legal point of view, a right to authorship did not exist. [6] As a result, the complainants could not possibly have legitimate expectations to derive a benefit which would in fact have been contrary to clearly stated contractual provisions. The principle of legal certainty has been adhered to, as the legal rules were clear and precise. [7] Cedefop underlined, that there is also no case law that would support the view that an incorrect application of a provision of one single previous service contract would allow for legitimate expectations to arise. In fact the incorrect application of a contract can never confer individual rights.

33. Cedefop further argued that an external contractor who signs a service contract with Cedefop does so in his capacity as a "service provider", and not in his capacity as "scientist". In sum, he or she provides services in line with very specific contractual provisions and is not providing a 'scientific paper'. The services to be rendered to Cedefop are spelled out in detail in the service contract, including the exact subject-matter, the focus of the research, including the length of the report to be delivered to Cedefop. The respective tendering specifications, which form part of the service contract, provide exact instructions on the scope and content of the report in question. In order to ensure full compliance with the tendering specifications by the external contractor, Cedefop staff oversees and monitors the tasks of the contractors step by step, giving guidance and instructions to the service providers/external contractors. What is more, the result of the service contract, that is, the report, may be published in a completely modified version, or in the original version. Cedefop may decide to re-write the report as it wishes, as it is Cedefop's intellectual property. Cedefop decides when and if to publish and may well decide never to publish a report.

34. Cedefop stated that the cut-off date for the citation policy was October 2007. This was applied rigorously and without exception by Cedefop. In any case, a citation policy did not exist before October 2007, the complainant's assumptions to the contrary notwithstanding. As confirmed by the Ombudsman, Cedefop may, within its margin of discretion, establish a citation policy, which is an internal matter of Cedefop. Due to its internal character, the complainants have obviously not received the citation policy of Cedefop.

35. Cedefop noted that the letter of 13 June 2008 was in fact a reply letter to the complainants informing them, upon their request, of the citation policy in force. This letter did not refer to a 'new' citation policy, but to the introduction of a citation policy, (that is, to the streamlining of the policy). Cedefop further mentioned that there were several other contributors to the report to which the complainants claim authorship. The attribution of the authorship to the complainants



would appear doubtful from this perspective and certainly unfair towards the other contributors of the report.

36. External contractors, including the complainants, are subject to the provisions of the service contracts concluded with Cedefop. In other words, their contributions are the result of the precise instructions and indications stipulated in the service contract, including guidance, review and corrections by Cedefop staff. Cedefop argued, in particular, that the legal principle of the protection of legitimate expectations was not pertinent in the context of the complaint presented by the complainants. Cedefop reiterated that it had fully adhered to the contractual provisions of the service contract which formed the only legal basis in this matter and followed up regularly and promptly in a professional manner with the complainants in their sole capacity as external contractors.

37. Cedefop was surprised that the complainants did not seem to appreciate that their contribution was reflected appropriately in the acknowledgement section of the published report, which is common practice in the European Union.

38. Cedefop regretted that it could not accept the Ombudsman's friendly solution, because it had applied a common practice fully compliant with the contractual provisions. Cedefop was concerned about the complainants' comments related to decisions of Cedefop's management and guidance provided by Cedefop staff. According to Cedefop, its staff continuously supported, guided and monitored the drafting of the report, in line with the contractual provisions. As conceded by the complainant, several case studies were drafted by others (as enumerated in Cedefop's opinion of 30 October 2008). As such, the reference to the complainants as the "authors" of the report would be simply incorrect and would diminish the contributions made by numerous other persons to this report. In conclusion, Cedefop asked the Ombudsman to reconsider his assessment and to conclude his examination of the case with a finding of no maladministration.

39. In their observations in relation to Cedefop's reply, the complainants maintained their complaint and concluded that the Ombudsman has sufficient information at his disposal to make a decision. As regards the case studies in the report, the complainants agreed that those were written by others. It stated that this was clearly acknowledged in the report. As regards the guidance given by Cedefop staff, the complainants explained that they did receive feedback and suggestions on the draft report from Cedefop. However, the feedback and suggestions were not extensive and "no more than would be expected". They argued, however, that subsequent to NICEC's involvement errors were introduced into the report. This suggested either a lack of care on Cedefop's behalf or a lack of expertise in this specialist area, or possibly both. According to the complainants, Cedefop's failure to take up the complainants' offer to read through the final edited version of the report and its failure consult the complainants in any way was unprofessional and, in the complainants' experience, unprecedented. The issue of quality assurances of reports issued by EU agencies is the complainants' major concern--especially given that the report seems to be widely consulted. [8]

*The Ombudsman's assessment after his friendly solution proposal*





40. The Ombudsman agrees that the contract concluded with the complainants does not give the complainants a contractual right to have their names cited as the author of a publication. However, at the same time, the contract does not *oblige* Cedefop not to cite the complainants as the author of a publication. Prior to the introduction of the new citation rules in 2007, Cedefop took advantage of this contractual flexibility, in order to cite authors on the cover page of publications, on a case-by-case basis. This contractual flexibility also allowed Cedefop to adopt the new citation policy from October 2007. That policy states that no reports paid for by Cedefop would cite the authors.

41. It must be underlined that the decisions to cite authors under the pre-October 2007 policy, and the decisions not to cite authors either under the pre-October 2007 policy or the post-October 2007 policy, did not give rise to any breach of contract by Cedefop (or by contributors, including the complainants).

42. The complainants were, therefore, not wrong to believe that the service contract signed with Cedefop allowed Cedefop the option to cite the complainants as the author of the paper in question.

43. The Ombudsman must underline that the policy in force prior to October 2007 did not require Cedefop to cite, *in every case*, the name of an author on the cover page of its publications. As Cedefop has indicated, prior to October 2007, decisions in relation to citing authors were made on a case-by-case basis. As such, during that period it was within Cedefop's margin of discretion to cite authors' names on the cover page on its publications, or to refrain from doing so. The Ombudsman has, however, consistently stated that a discretionary power is not the same as an arbitrary power. [9] An administration which has a margin of discretion should always be in a position to justify, on the basis of objective criteria, why it chooses a particular option. As such, if, prior to October 2007, Cedefop made decisions on a case-by-case basis as regards citing or not citing authors, it should have ensured that it was in a position to justify those decisions, on the basis of objective criteria. The importance of being in a position to justify such decisions on the basis of objective criteria is that the administration can thereby ensure that its decisions as regards citing authors would be neither discriminatory nor disproportionate.

44. The pre-October 2007 policy was that authorship was attributed on a case-by-case basis. The Ombudsman notes that, in the present case, it has now been established, on the basis of the more detailed information provided by Cedefop, that several case studies included in the paper submitted by the complainants were drafted by others. Further, Cedefop staff carried out editing on the document. Cedefop argues that this calls into question the complainants' claims to authorship. The complainants disagree. The Ombudsman underlines that he is not in a position to judge the relative importance of these case studies and editing for the scientific paper and, consequently, the possible impact upon the complainants' claims to authorship. He, therefore, makes no judgment as regards whether the complainants' claims to authorship are or are not justified. However, the Ombudsman does accept that Cedefop has, in this case at least, [10] put forward a reasonable *argument*, based on objective criteria, which could justify why,





on the basis of the pre-October 2007 policy, it would not cite the complainants as authors on the cover page of the publication.

46. The Ombudsman notes that the complainants claimed that Cedefop should send the final manuscript to the complainants for final checking before publication. The Ombudsman underlines that both contributors and authors have a legitimate interest in ensuring that publications in which their names are cited, as either authors or contributors, are accurate. Further, the Ombudsman considers that it would be good administrative practice for Cedefop, after carrying out editing but before actual publication, to send a final draft to authors or contributors, with a view to enabling them to identify any possible inaccuracies which might result from such editing.

47. Notwithstanding the above, the Ombudsman considers it necessary to clarify that he does not question the right of Cedefop, as the owner of the intellectual property rights and as publisher, to review and, where it deems it necessary, to edit, texts submitted to it before it proceeds to publish such texts. The Ombudsman also underlines that Cedefop, as the owner of the intellectual property rights, has the final decision as regards any text to be published by. In this context, should a contributor or author not be in agreement with modifications introduced by Cedefop, and should Cedefop insist (as is its right) that such modifications are appropriate, the authors or contributors (who might thus be of the view that their reputations would be damaged by such a publication) should be given the opportunity of not having their names cited as contributors or authors. In light of the above, the Ombudsman considers it appropriate to make a further remark.

48. The Ombudsman closes the case with a conclusion that no further inquiries are justified.

49. Notwithstanding the conclusions set out above, the Ombudsman considers it necessary to reject emphatically Cedefop's assertion that the complainants were acting in bad faith when they contested the application of the 2007 citation rules to the scientific paper. Indeed, notwithstanding the possibility that there may be objective reasons why Cedefop, applying the pre-October 2007 rules, could justify not citing the complainants as authors, the complainants was, in fact, correct to contest the application of the post-October 2007 citation rules to the scientific paper.

## C. Conclusions

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

The Ombudsman considers that no further inquiries are justified.

The complainants and Cedefop will be informed of this decision.



## Further remark

Authors and contributors should be afforded the possibility of reading, before publication, work which has been edited by Cedefop.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 22 December 2009

[1] Service contract No. 2006-0011/RP/B/JMC/CGS/008/05.

[2] See, in this regard, Case 159/82, *Verli-Wallace v Commission* [1983] ECR 2711, paragraph 8; Case T-123/89, *Chomel v. Commission* [1990] ECR II-131, paragraph 34, Case T-197/99, *Gooch v. Commission* [2000] ECR-SC I-A-271 and II-1247, paragraph 53 and Case T-251/00, *Lagardère SCA and Canal+ SA v. Commission* [2002] ECR II-4825, paragraph 139 .

[3] Case T-20/91 *Holtbecker v Commission* [1992] ECR II-2599, paragraph 53.

[4] Case T-113/96 *Dubois et fils v Council and Commission* [1998] ECR II-125, paragraph 68; Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraph 25; Case T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, paragraph 59.

[5] Case C-255/90 P *Burban v Parliament* [1992] ECR I-2253, paragraphs 10-12.

[6] Case C-188/88 *NMB (Deutschland) GmbH v Commission* [1992] ECR I-1689, paragraph 53.

[7] Case C-107/97 *Rombi & Arkopharama* [2000] ECR I-3367, paragraph 66.

[8] According to the complainant, it was listed as one of the top five downloads from the Cedefop website in both April and May 2009.

[9] See Case 413/2008/BB at paragraph 46.

[10] The Ombudsman notes that in Case 413/2008/BB no such objective justification was put forward.