Legal opinion

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

0. Executive summary

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

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

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

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

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

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

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

1. Introductory note

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

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

2. The Final Case Report (FCR)

2.1. The expected content of a FCR

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

2.1.1. The role of OLAF

OLAF itself describes its mission as follows:

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

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

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

2.1.2. The purpose of the FCR

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

2.1.3. General reporting standards

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

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

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

2.2. The content of the FCR of this case

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

2.2.1. The course of the investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.2. The allegations being object of the investigation

The FCR refers to three distinct allegations namely:

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

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

2.2.2.1. The penalty allegation

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

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

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

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

2.2.2.2. The Avenant application allegation

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

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

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

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

2.2.2.3. The award collusion allegation

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

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

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

2.2.2.4. The hidden agenda: the corruption allegation

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

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

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

2.2.2.5. Non-mentioned allegations

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

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

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

2.2.3. The legal background of these allegations

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

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

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

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

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

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

2.2.4. The factual findings of the investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Analysing the allegations

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

3.1. The penalty allegation

3.1.1. The information provided

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

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

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

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

3.1.2. Testing the facts

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

3.1.3. The legal background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.1. The information provided

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

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

The situation until ADL won contract 1896:

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

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

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

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

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

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

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

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

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

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

- The second document *"DRAFT FAISANT SUITE A LA REUNION AVEC M: CRANFIELD:"* then shows that after this first meeting someone had a brilliant idea how to get the whole thing accepted by the CCAM: Instead of ADL asking to earn more money, now the false image should be created that OPOCE was asking for a production rationalisation! But who was the author of this document stating the *"Motivation de l'OPOCE"*? As can be seen from the value of the field *"author"* hidden in the Word-document it was *"Carine Valance"*, a member of the staff of Infotechnique/ADL. But the first version of that document made by her and approved by her bosses was not yet good enough. Therefore Mr. Raybaut (using track-changes) himself added the reference to the *"accord entre le Parlement; le Conseil et la Commission"*, replaced the word *"retard"* which still could sound too honest by *"rattrapage"* and asked for explications of the new ADL techniques. Now the way for the fake dossier that should go to the CCAM was paved.
- Despite this request from Mr. Raybaut and even after the specific request of the CCAM ADL did never manage to come up with details of its new rationalisations concerning *"saving layers"* and *"saving prints"*. This is not surprising knowing that there was no such rationalisation, that those two techniques were used already continuously before and that their payment based on the initial price schedule had also been agreed more than half a year before the Avenant came into force. So there was no rationalisation! But even if there would have been, there is a logical fault in the argumentation of ADL and OPOCE: As it was always clear that both techniques would only be used in a few very specific dossiers (see May agreement) there was not even a possibility how this could have an effect on the majority of dossiers not at all treated with these techniques. So why should anybody agree to a general price increase applicable for a *"rationalisation"* implemented by a technique that only is used in a few specific cases, instead of just introducing a specific pricing for those specific cases concerned (i.e. just for those cases where the *"rationalisation"* really was applied)?
- There is also no explanation why, if they would have been acting in good faith my hierarchy never asked me or Mr. Dehoy, i.e. the only two people at OPOCE at that time being able to control ADLs invoices, to estimate the costs of the planned Avenant. This did not happen even though (or because!) my hierarchy was well aware that thanks to the invoicing control database developed by me it would have been very easy to do this calculation (as it was done later right after knowing about the Avenant by Mr. Dehoy leading to the estimated 58% cost increase). It clearly shows that the OPOCE hierarchy was not at all interested in knowing the truth - they were just interested in constructing Potem'kin Vil'lages for the CCAM.
- There was one thing that helped a lot to get the Avenant approved by the CCAM. As shown above the workload expectations when setting up the initial contract 1896 for uncertainty, budget and security reasons were far too high. So that's how Carine Valance of ADL could come to a calculation showing a saving of 4.947.193 euros thanks to the proposed Avenant which later, as this was clearly unrealistic and could have raised suspicions of the CCAM, reduced to a more moderate cost saving of only 14%. However, if in fact the costs of the project where far lower than initially estimated that was not at all because ADL worked cheaper or more effective, it was just because the initial estimates were far too high. As the calculations of Mr. Dehoy presented me showed, without the Avenant far less would have needed to be spend for getting the same results.

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

3.2.2. Testing the facts

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

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

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

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

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

3.2.3. The legal background

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

3.2.3.1. The penal code of Luxembourg

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

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

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

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

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

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

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

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

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

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

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

3.2.3.1.3. Article 208 of the penal code of Luxembourg

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

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

3.2.3.2. EU-law

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

3.2.3.3. The role of OLAF

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

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

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

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

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

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

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

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

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

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

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

3.3.1. The information provided

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

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

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

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

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

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

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

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

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

3.3.2. Testing the facts

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

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

3.3.3. The legal background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.6. Insufficient resources for controlling ADLs production

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

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

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

3.7. Allegation concerning Mr. Tonhofer

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

3.8. Allegation concerning OPOCEs treatment of Mr. Strack

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

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

3.9. Allegation concerning OPOCEs internal audit

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

3.10. Possible allegation concerning OLAFs investigation

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

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

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

3.11. Allegation concerning further treatment of ADL

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

4. Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wasserliesch, 16.04.2004

Guido Strack