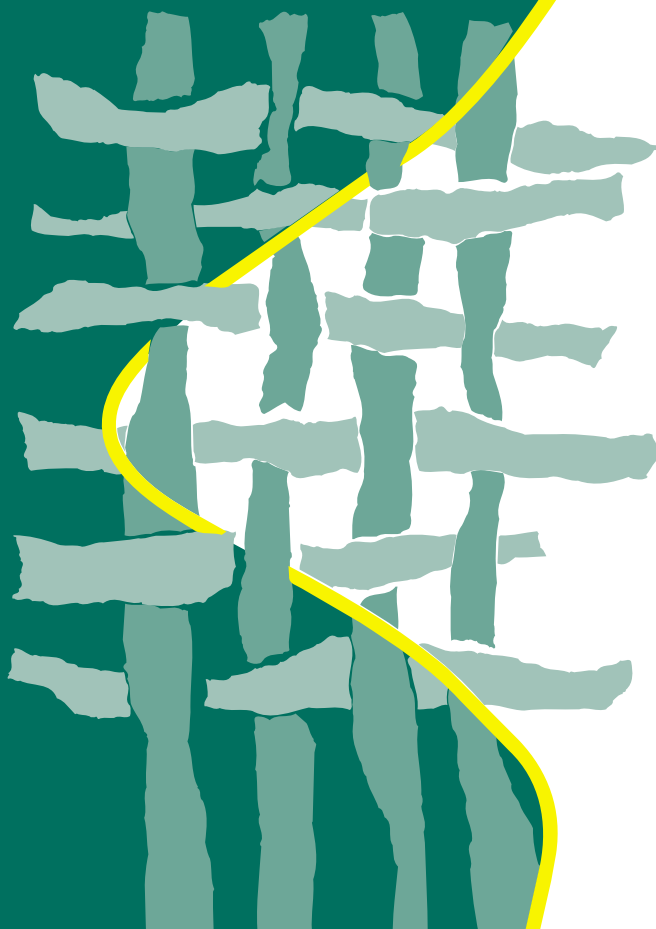


The European Ombudsman

# ANNUAL REPORT

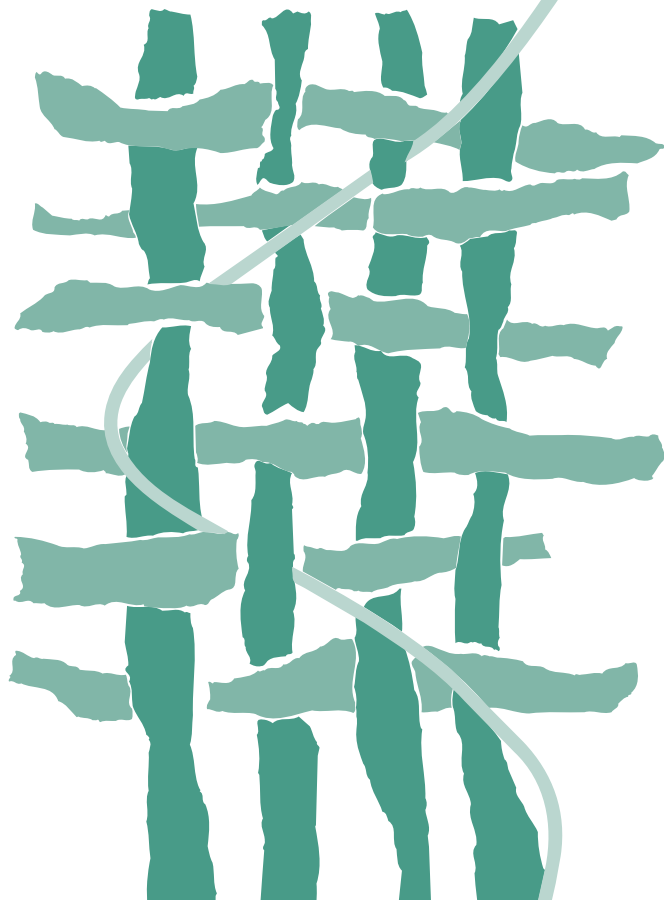
FOR 1999



The European Ombudsman

# ANNUAL REPORT

FOR 1999



*Mrs Nicole Fontaine  
President  
European Parliament  
rue Wiertz  
B - 1047 Bruxelles*

*Strasbourg, April 2000*

*Mrs President,*

*In accordance with Article 195 (1) of the Treaty establishing the European Community and Article 3 (8) of the Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, I hereby present my report for the year 1999.*

*Jacob Söderman  
Ombudsman of the European Union*

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## 1 FOREWORD

### All for results

The work of an ombudsman's office can be described in many ways. It should raise the quality of the public administration from the point of view of the citizen, it should enhance the relations between the citizens and the administration by its activities, it should provide standards of good administration and it should act to undo cases of maladministration and much more. The most essential task remains to intervene to assist citizens so that they are treated fairly and obtain promptly what they have the right to expect from the administration.

During the year, the European Ombudsman's activities have, to my mind, reached the level that one has the right to expect of a body which is just over four years old and consists of 25 persons working in a fairly complex legal and administrative environment.

In 1999, we received 1577 complaints (compared to 1372 in 1998), opened 206 inquiries (171 in 1998) into possible maladministration and launched five own initiatives (compared to only one in 1998). Of the complaints where an inquiry took place, 27 were closed with a critical remark to the institution or body concerned, 62 were settled by the institution in the complainant's favour, in one case a friendly solution was found and ten draft recommendations were issued to undo maladministration (compared to only one in 1998). Of the draft recommendations, 2 were promptly accepted and one led to a Special Report to the European Parliament. The institution concerned later accepted the recommendation which was included in the Special Report. In 107 cases (96 in 1998) no maladministration was found, but the complainant received a full explanation of why the contested decision had been made.

Furthermore we have managed, with only a few exceptions, to acknowledge receipt of complaints within one week and to decide on their admissibility within one month. The target of closing cases after an inquiry within one year has not yet been reached. About 40 cases more than one year old are still open, but the back-log is slowly diminishing. There is always more to be done to develop the activities in order to obtain better results for the citizens, but it is obvious that the year 1999 was the best so far. It is to be underlined that the institutions and bodies themselves have settled 62 cases (51 in 1998). In fact, this means that they found a friendly solution of their own when the complaint was drawn to their attention by the Ombudsman. This is very good for the complainants as it saves precious time. It also shows a good attitude within the administration to undo its errors, which must be mentioned as a sign of a profoundly positive attitude to the European citizens.

### Disputes

The constructive cooperation which we have had with the Community institutions and bodies has made our work for the European citizens more effective. In most cases the institutions and bodies have responded in time and with a comprehensive explanation to the allegations put forward by the

complainants. This has made it easier to discover the essential aspects of the case and what has really happened. However, some problems remain as regards the European Commission, whose activities are the major focus for the Ombudsman's inquiries : 163 out of 206.

There was an attempt by the services of the Commission to raise once again the idea that questions concerning the Commission's interpretation of Community law can be dealt with only by the Court of Justice and not the European Ombudsman. This dispute is explained in more detail in the Annual report itself. Let me only say, hoping this is the last time I have to underline it, that it is never good administration not to follow the law; that is rules or principles, that are binding upon a Community institution or body. In the two European countries where the national ombudsman cannot deal with cases for which a judicial remedy is possible, this limitation is expressively stated in the law itself. This is not the case for the European Ombudsman's mandate which was laid down by the Maastricht Treaty.

Furthermore if the Ombudsman's activity can prevent unnecessary litigation and so alleviate the burden of the Courts' present heavy workload this seems only positive for all parties. It should also be noted that, because of the limitations which Community law imposes on access to the courts, in many cases where unlawful actions by Community institutions and bodies are alleged the Ombudsman seems to be the citizen's only remedy. It goes without saying that the Ombudsman's decisions are always guided by the case-law of the Community Courts.

Another time-consuming dispute with the Commission concerned the Ombudsman's right to inspect documents. This subject was dealt with in more detail in the Annual Report for 1998. Although a satisfactory result was once again reached in 1999 after the usual misunderstandings and bizarre arguments, I have presented an initiative to the European Parliament to amend the part of the Statute of the Ombudsman that produces these disputes. It should be underlined that for all ombudsman offices it is important to have, as OLAF has been recently given, unlimited access to the documents needed for the investigation of a complaint. Otherwise the citizens do not trust the Ombudsman's investigations. At the same time, it is quite clear that the Ombudsman must respect the confidentiality of documents where it is correctly imposed and not reveal their contents publicly. I do hope that the European Parliament will deal with this initiative vigorously and that the other institutions will accept my arguments in this matter.

### **Openness**

During the year no major progress was made in the field of transparency or openness. The Commission was expected to produce a draft regulation on public access to documents under Article 255 EC, but no text was published during the year. Only a few leaks of its provisions became public, which usually met harsh criticism from organisations of journalists and other activists in this field. For the Ombudsman, this is an important issue as lack of information or wrong information is still the most frequent allegation in the complaints (23%).

The reason which is often given for maintaining traditional confidentiality – efficiency - seems rather paradoxical. Was it really efficient for the Santer Commission to collapse in March, leaving the Union's activities badly hampered for half a year in the absence of a lead from an active Commission? An important reason for the collapse was what had been done behind the curtain of confidentiality. Furthermore, experience shows that open administration, which is practised in many Member States, seems to be an effective tool against fraud and corruption, while a closed and confidential handling of public affairs appears to provide opportunities for fraud and corruption. I find it disturbing that those who oppose the increasing demands for more openness overlook this important point.

Whatever their arguments and reasons may be, the fact remains that their stubborn opposition to the necessary opening up of the Union administration in a modern way obscures the details of European Union funding, one of areas in which the Union is most criticised. Prevention is better than anything else, even the best police force can afterwards only address a small part of the undesirable activities which may occur in this field.

### **What is good administration ?**

In the Annual report for 1997 we presented a definition of the term maladministration which the European Parliament unanimously agreed to and which is now generally accepted. But to go further we presented a proposal for a Code of good administrative behaviour in July 1999. The Commission had been working on its own version of such a Code since 1997, but when the Commission collapsed in March the matter appeared to lapse and it was time for the Ombudsman's office to take up the challenge of publishing a Code of good administrative behaviour. The Ombudsman's Code is not concerned with the relations between management and civil servants. It deals with relations between citizens and civil servants. Its focus is the service which European citizens have the right to expect from the European civil service. To promote the idea we opened an own initiative inquiry into the matter.

The general attitude among the Community institutions and bodies was positive. Some told us that they had already adopted a Code of this type. One, the European Agency for the Evaluation of Medicinal Products in London, adopted our recommended draft with some positive changes, while others started to draft own versions. The Commission announced that they had given a first reading to their own version prior to negotiations with their staff and invited the Ombudsman to comment on it. At first sight, this version seemed fairly vague from the point of view of the European citizens.

A Code of good administrative behaviour of high quality would give the European citizens a positive message of a service-minded administration. That would be good for the Union's reputation in the Member States as a whole. It would also give the European citizens clear information as to what kind of service they have the right to expect and advise the officials what they should manage to deliver. The Code does not contain anything which could not be achieved with adequate commitment from management and training for staff. The own-initiative inquiry is still open, but in my view the

large spectrum of responses already received indicates that it might be better to consider a legal initiative to create a European Administrative Law on good administrative behaviour, following the example of many Member States. That means that either the Commission should take the lead by itself adopting a good Code as a first step, or the European Parliament should consider an initiative in this matter in due time. Adopting such a Code of good administrative behaviour would demonstrate to European citizens that the Union has a modern and service-minded administration ready to work for the benefit of citizens and that it should not be made the scapegoat for all the problems in Europe.

### **More cooperation**

When something does not work in the public sector the traditional attitude is to ask for more money or more powers, not to try to achieve results by more dialogue and more cooperation.

The proportion of complaints outside the mandate remains about 70%. Many of them are allegations that Community law has not been correctly applied in a Member State. During 1999, we advised 314 complainants (259 in 1998) to address the National or regional ombudsman's office or to petition the respective Parliament. Similar information was given to many other citizens who contacted the office in writing, by telephone or e-mail to ask for advice. As the Amsterdam Treaty is progressively implemented, especially the provisions concerning an area of Justice, freedom and security, more and more Community law will apply at all levels in the Member States and there will be even greater need for swift and effective judicial and extra-judicial remedies. For our part, we have accepted responsibility for informing the national and regional ombudsmen offices and the respective committees on petitions about Community law. We have also established a network to provide them with support and advice, making maximum use of the internet for this purpose. The meeting of the national ombudsmen and similar bodies in September in Paris and with the regional ombudsmen and committees on petitions in Florence in October showed that all these institutions and bodies are ready to further activate themselves in this field.

This means that a constructive cooperation in the true spirit of subsidiarity and equality might be the best way forward to assist the European citizens so that they can obtain what they have a right to under Community law wherever and on whatever level the dispute occurs throughout the European Union.

Thus Community law would be a living reality for all European citizens.

Jacob Söderman

Strasbourg, 31 December 1999

## 2 COMPLAINTS TO THE OMBUDSMAN

The most important task of the European Ombudsman is to deal with maladministration in the activities of Community institutions and bodies, with the exception of the Court of Justice and Court of First Instance acting in their judicial role. Possible instances of maladministration come to the attention of the Ombudsman mainly through complaints made by European citizens. The Ombudsman also has the possibility to conduct inquiries on his own initiative.

Any European citizen, or any non-citizen living in a Member State, can make a complaint to the Ombudsman. Businesses, associations or other bodies with a registered office in the Union may also complain. Complaints may be made to the Ombudsman either directly, or through a Member of the European Parliament.

Complaints to the Ombudsman are dealt with in a public way unless the complainant requests confidentiality. It is important that the Ombudsman should act in as open and transparent a way as possible, both so that European citizens can follow and understand his work and to set a good example to others.

During 1999, the Ombudsman dealt with 1860 cases. 1577 of these were new complaints received in 1999. 1458 of these were sent directly by individual citizens, 90 came from associations and 23 from companies. 11 complaints were transmitted by Members of the European Parliament. 278 cases were brought forward from the year 1998. The Ombudsman also began 5 own-initiative inquiries.

As first noted in the Ombudsman's Annual report for 1995, there is an agreement between the Committee and the Ombudsman concerning the mutual transfer of complaints and petitions in appropriate cases. During 1999, 3 petitions were transferred to the Ombudsman, with the consent of the petitioner, to be dealt with as complaints. 71 complaints were transferred, with the consent of the complainant, to the European Parliament to be dealt with as petitions. Additionally, there were 142 cases in which the Ombudsman advised a complainant to petition the European Parliament. (See Annex A, Statistics, p. 289)

### 2.1 THE LEGAL BASIS OF THE OMBUDSMAN'S WORK

The Ombudsman's work is carried out in accordance with Article 195 of the Treaty establishing the European Community, the Statute of the Ombudsman<sup>1</sup> and the implementing provisions adopted by the Ombudsman under Article 14 of the Statute. The text of the implementing provisions, in all official languages, is published on the Ombudsman's Website (<http://www.euro-ombudsman.eu.int>). The text is also available from the Ombudsman's office.

<sup>1</sup> European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994, L 113/15.

The implementing provisions deal with the internal operation of the Ombudsman's office. However, in order that they should form a document that will be understandable by and useful to citizens, they also include certain material relating to other institutions and bodies that is already contained in the Statute of the Ombudsman.

On 30 November 1999, the Ombudsman amended the implementing provisions so as to make clear that, following the Treaty of Amsterdam, complaints may also be submitted in the Irish language. The amendment takes effect from 1 January 2000. The brochure "*The European Ombudsman - could he help you?*" and the complaint form have been added to the Ombudsman's website in Irish.

In June 1999, the European Parliament amended and re-numbered, as Rules 177-179, the provisions of its Rules of Procedure concerning the Parliament's relationship with the European Ombudsman. The amendments make clear that the Ombudsman's Annual and Special reports are dealt with by the same responsible Committee (in practice the Committee on Petitions).

## 2.2 THE MANDATE OF THE EUROPEAN OMBUDSMAN

All complaints sent to the Ombudsman are registered and acknowledged. The letter of acknowledgement informs the complainant of the procedure for considering his or her complaint and includes the name and telephone number of the legal officer who is dealing with it. The next step is to examine whether the complaint is within the mandate of the Ombudsman.

The mandate of the Ombudsman, established by Article 195 of the EC Treaty, empowers him to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State, concerning instances of maladministration in the activities of Community institutions and bodies with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. A complaint is therefore outside the mandate if:

- 1 the complainant is not a person entitled to make a complaint
- 2 the complaint is not against a Community institution or body
- 3 it is against the Court of Justice or the Court of First Instance acting in their judicial role *or*
- 4 it does not concern a possible instance of maladministration.

### 2.2.1 “Maladministration”

In response to a call from the European Parliament for a clear definition of maladministration, the Ombudsman offered the following definition in the Annual Report for 1997:

**Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.**

In 1998 the European Parliament adopted a Resolution welcoming this definition.

During 1999, there was an exchange of correspondence between the Ombudsman and the Commission which made clear that the Commission has also agreed to this definition.

#### **Error of legal interpretation is a form of maladministration**

In October 1998, the Irish Ombudsman’s office sent a query to the European Ombudsman concerning the interpretation of Article 9 (2) of Commission Regulation 3887/92. The query arose as a result of a number of complaints to the Irish Ombudsman against the Irish Department of Agriculture and Food which, acting on Commission advice, had rejected or restricted payments to certain applicants for grants under Special Beef and Extensification Premium Schemes.

In February 1999 the Commission confirmed its interpretation of the Regulation. The Irish Ombudsman’s office then claimed that the Commission’s interpretation was unduly restrictive and unfair to the applicants concerned. In April 1999, after careful consideration, the European Ombudsman decided to open an own-initiative inquiry into the matter and informed the Commission accordingly.

In June 1999, the Commission agreed to re-examine its stance on the interpretation of the provision in question. However, it also stated:

*“The Commission is of the opinion that the legal interpretation of an article of a Regulation is not a matter of maladministration. According to art. 220 (formerly art. 164) of the Treaty, this question could eventually be decided by the Court of Justice.”*

The European Ombudsman’s reply to the Commission on this point included the following points:

“The Ombudsman is always mindful of the fact that the highest authority on the meaning and interpretation of Community law is the Court of Justice. Furthermore, in accordance with Article 195 of the EC Treaty the Ombudsman cannot conduct inquiries where the alleged facts are or have been the subject of legal proceedings (emphasis added). In practice, however, neither the Irish Ombudsman nor the Irish citizen who complained to him has brought, or could easily bring, legal proceedings concerning this issue.



I should also point out that the meaning of the term “maladministration” is of fundamental importance for the work of the Ombudsman. For this reason, I dealt with the matter in the very first Annual Report, for 1995, which stated:

*Neither the Treaty nor the Statute defines the term “maladministration”. Clearly, there is maladministration if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance.*

The Report also contained a non-exhaustive list of possible types of maladministration.

The 1995 Annual Report was considered by the responsible Committee of the European Parliament, which accepted the above explanation of maladministration, and a plenary debate took place on 20 June 1996 to which Commissioner Marín contributed. The explanation of the term maladministration in the 1995 Annual Report was also referred to with approval at the meeting of the European national ombudsmen held in September 1997.

In the discussion of the 1996 Annual Report by the Parliament, there was call for a more precise definition of maladministration and I undertook in the plenary debate to provide such a definition. I asked the national ombudsman and similar bodies to inform me of the meaning given to the term maladministration in their Member States. From the replies received, it appears that the fundamental notion can be defined as follows:

*Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.*

This definition was included in the Annual Report for 1997, together with a commentary which emphasised that when the European Ombudsman investigates whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, “his first and most essential task must be to establish whether it has acted lawfully”.

Following a plenary debate held on 14 July 1998, in which Commissioner Gradin welcomed the fact that the meaning of the term “maladministration” has now been clearly defined, the European Parliament adopted a resolution on 16 July 1998 welcoming the definition of maladministration and stating that the definition and the examples mentioned in the Annual Report for 1997 give a clear picture as to what lies within the remit of the European Ombudsman.<sup>2</sup> The definition was repeated in the 1998 Annual Report, which was debated in the European Parliament on 15 April 1999 in the presence of Commissioner Monti.

I am therefore surprised, that the Commission should now wish to re-open a matter which has already been dealt with through a procedure in which it has had full opportunity to make its views known.

<sup>2</sup> OJ 1998 C 292/168.



If the Commission considers that the interests of European citizens would be better served by making the Ombudsman's mandate narrower, it has the possibility to propose an amendment to the Treaty so as to exclude cases in which the complainant has a possible remedy before a court or tribunal. This restriction would be highly unusual, as is made clear by the Council of Europe's definition of an ombudsman's role, which includes review of the lawfulness of administrative acts.<sup>3</sup> Such a restriction does exist, however, in the law governing the Parliamentary Commissioner in the United Kingdom. Unless and until the Treaty is amended to impose a similar restriction on the European Ombudsman, however, he should continue to fulfil the present Treaty mandate, which allows inquiries unless the alleged facts "are or have been the subject of legal proceedings".

The office of the European Ombudsman was set up in order to enhance relations between the Community institutions and bodies and European citizens. In cases where the institution explains that it has acted correctly in accordance with the rules and principles that are binding upon it, the citizen is sometimes satisfied with the explanation, or at least has a better understanding of the institution's actions.

Furthermore, in carrying out his inquiries, the Ombudsman is always aware not only that the highest authority on the meaning and interpretation of Community law is the Court of Justice but also of the high degree of expertise of Commission officials in interpreting and applying Community law in different subject areas. It is therefore likely that in most cases, the Ombudsman will find no reason, at the end of his inquiry, to question the Commission's considered interpretation of a legal provision."

The European Ombudsman asked the Commission to inform him by 31 July 1999 whether it accepts the definition of maladministration, included in the Ombudsman's Annual Report for 1997 and, if not, to inform him of the reasons.

On 15 July 1999 the Secretary General of the Commission replied, stating that Commissioner Gradin had agreed to the above-mentioned definition of maladministration on behalf of the Commission on 14 July 1998 in the European Parliament. The Secretary General also confirmed that the Commission's review of its interpretation of the provision in question was under way and that the Commission would inform the Ombudsman in a prompt manner of its outcome.

Q5/98/IJH – OI/3/99/IJH

## 2.2.2 The Code of good administrative behaviour

In November 1998, the Ombudsman began an own initiative inquiry into the existence and the public accessibility, for the different Community institutions and bodies, of a Code of Good Administrative Behaviour for officials

<sup>3</sup> *The Administration and You: a handbook*, 1996 p. 44.

in their relations with the public. The own-initiative inquiry asked nineteen Community institutions and bodies whether they had already adopted, or would agree to adopt, such a Code for their officials in their relations with the public.

On 28 July 1999, the Ombudsman proposed a Code of Good Administrative Behaviour in the form of draft recommendations to the Commission, the European Parliament and the Council. Similar draft recommendations were made to the other institutions and bodies in September 1999. The Ombudsman's Code is available in all languages on the website (<http://www.euro-ombudsman.eu.int>).

The Ombudsman expects to make a Special Report on the matter to the European Parliament early in 2000.

### 2.3 ADMISSIBILITY OF COMPLAINTS

A complaint that is within the mandate of the Ombudsman must meet further criteria of admissibility before the Ombudsman can open an inquiry. The criteria as set out by the Statute of the Ombudsman are that:

- 1 the author and the object of the complaint must be identified (Art. 2.3 of the Statute)
- 2 the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling (Art. 1.3)
- 3 the complaint must be made within two years of the date on which the facts on which it is based came to the attention of the complainant (Art. 2.4),
- 4 The complaint must have been preceded by appropriate administrative approaches to the institution or body concerned (Art. 2.4)
- 5 in the case of complaints concerning work relationships between the institutions and bodies and their officials and servants, the possibilities for submission of internal administrative requests and complaints must have been exhausted before lodging the complaint (Art. 2.8).

#### **Examples of inadmissibility because of Court proceedings**

In July 1998 the Organisation Énergie pour l'Arménie lodged a complainant with the European Ombudsman. It claimed that the European Commission refused to pay an invoice for work carried out in the framework of a contract signed under the TACIS programme. The complaint was sent to the Commission for an opinion, and the complainant was given the opportunity to comment on it. Some further inquiries were made.

In accordance with Article 195 of the Treaty establishing the European Community, the European Ombudsman may not conduct inquiries where the alleged facts are or have been the subject of legal proceedings.

During the investigations on the complaint, the complainant informed the European Ombudsman that the facts alleged in his complaint to the

Ombudsmen were the subject of legal proceedings before Belgian Courts.

Article 2 (7) of the Statute of the Ombudsman provides that, when the Ombudsman has to terminate his consideration of a complaint because of legal proceedings, the outcome of any inquiries he has carried out up to that point shall be filed without any further action. The Ombudsman therefore decided to close the case.

*Case 739/98/ADB*

In July 1999, Mrs P. made a complaint to the European Ombudsman concerning the refusal of the Commission of the European Communities to admit her to the written examination of Competition COM/A/12/98.

The complaint was forwarded to the Commission for its opinion. In November 1999, the Commission informed the Ombudsman that the complainant had initiated legal proceedings before the Court of First Instance concerning the facts which had been put forward in the complaint. Because the complainant had brought an action before the Court of First Instance, the Ombudsman, after having heard the complainant on this issue, terminated his consideration of the complaint in December 1999 in accordance with Article 195 of the EC Treaty.

In accordance with Article 2 (7) of the Statute of the Ombudsman, the outcome of the Ombudsman's inquiries carried out up to that point was filed without further action.

*Case 867/99/GG*

## 2.4 GROUNDS FOR INQUIRIES

The Ombudsman can deal with complaints that are within his mandate and which meet the criteria of admissibility. Article 195 of the EC Treaty provides for him to "conduct inquiries for which he finds grounds". In some cases, there may not be sufficient grounds for the Ombudsman to begin an inquiry, even though the complaint is technically admissible. Where a complaint has already been dealt with as a petition by the Committee on Petitions of the European Parliament the Ombudsman normally considers that there are no grounds for him to open an inquiry, unless new evidence is presented.

## 2.5 ANALYSIS OF THE COMPLAINTS

Of the 5270 complaints registered from the beginning of the activity of the Ombudsman, 16% originated from France, 14% from Germany, 14% from Spain, 9% from the UK, and 12% from Italy. A full analysis of the geographical origin of complaints is provided in Annex A, Statistics.

During 1999, the process of examining complaints to see if they are within the mandate, meet the criteria of admissibility and provide grounds to open

an inquiry was completed in 93% of the cases. 27% of the complaints examined appeared to be within the mandate of the Ombudsman. Of these, 243 met the criteria of admissibility, but 42 did not appear to provide grounds for an inquiry. Inquiries were therefore begun in 201 cases.

Most of the complaints that led to an inquiry were against the European Commission (77%). As the Commission is the main Community organ that makes decisions having a direct impact on citizens, it is normal that it should be the principal object of citizens' complaints. There were 24 complaints against the European Parliament and 7 complaints against the Council of the European Union.

The main types of maladministration alleged were lack of transparency (66 cases), discrimination (31 cases), unsatisfactory procedures or failure to respect rights of defence (33 cases), unfairness or abuse of power (32 cases), avoidable delay (45 cases) negligence (29 cases), failure to ensure fulfilment of obligations, that is failure by the European Commission to carry out its role as "Guardian of the Treaties" vis-à-vis the Member States (9 cases) and legal error (29 cases).

## 2.6 ADVICE TO CONTACT OTHER AGENCIES AND TRANSFERS

If a complaint is outside the mandate or inadmissible, the Ombudsman always tries to give advice to the complainant as to another agency which could deal with the complaint. If possible the Ombudsman transfers a complaint directly to another competent agency with the consent of the complainant, provided that there appear to be grounds for the complaint.

During 1999, advice was given in 708 cases, most of which involved issues of Community law. In 314 cases the complainant was advised to take the complaint to a national or regional Ombudsmen or similar body. In addition, with the consent of the complainant 8 complaints were transferred directly to a national Ombudsman. 142 complainants were advised to petition the European Parliament and, additionally, 71 complaints were transferred to the European Parliament, with the consent of the complainant, to be dealt with as petitions. In 149 cases the advice was to contact the European Commission. This figure includes some cases in which a complaint against the Commission was declared inadmissible because appropriate administrative approaches had not been made to the Commission. In 101 cases the complainant was advised to contact other agencies.

## 2.7 THE OMBUDSMAN'S POWERS OF INVESTIGATION

In the Annual Report for 1998 the Ombudsman proposed that his powers of investigation should be clarified, both as regards the inspection of documents and the hearing of witnesses. The European Parliament adopted a Resolution which urged the Committee on Institutional Affairs to consider amending Article 3 (2) of the Statute of the Ombudsman, as proposed in the report drawn up by the Committee on Petitions.<sup>4</sup>

<sup>4</sup> Report of the Committee on Petitions on the Annual Report of the activities of the European Ombudsman in 1998 (A4-0119/99) Rapporteur: Laura De Esteban Martin.

In order to advance this process, the Ombudsman drafted the following proposal for revision of the text of Article 3 (2) and forwarded it to the President of the European Parliament in December 1999:

The Community institutions and bodies shall be obliged to supply the Ombudsman with any information that he has requested of them *and to allow him to inspect and take copies of any document or the contents of any data medium.*

They shall give access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

They shall give access to other documents originating in a Member State after having informed the Member State concerned.

*The members and staff of Community institutions and bodies shall testify at the request of the Ombudsman. They shall give complete and truthful information.*

*The Ombudsman and his staff shall not divulge any confidential information or documents obtained during the course of inquiries.*

The above draft was partly inspired by the Regulation concerning the powers of investigation of the European Anti-fraud Office (OLAF) which foresees that it shall have the right of immediate and unannounced access to any information and the right to copy any document held by the institutions and bodies.<sup>5</sup>

### 2.7.1 The hearing of witnesses

According to Article 3.2 of the Statute of the Ombudsman:

*“Officials and other servants of the Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy”.*

During 1999, the Ombudsman invoked this provision for the first time in two cases involving the Commission. One of the cases (1140/97/IJH) was closed in 1999 and is reported below (p.83). The inquiry into the other case (995/98/OV) continued into 2000.

<sup>5</sup> See Article 4 of Regulation 1073/1999, 1999 OJ L 136/1.

On the basis of the experience of conducting hearings, the Ombudsman wrote to the Secretary General of the Commission on 7 July 1999 setting out a general procedure to apply in future cases:

- 1 The date, time and place for the taking of oral evidence are agreed between the Ombudsman's services and the Secretariat General of the Commission, which informs the witness(es). Oral evidence is taken on the Ombudsman's premises, normally in Brussels.
- 2 Each witness is heard separately and is not accompanied.
- 3 The language or languages of the proceedings is agreed between the Ombudsman's services and the Secretariat General of the Commission. If a witness so requests in advance, the proceedings are conducted in the native language of the witness.
- 4 The questions and answers are recorded and transcribed by the Ombudsman's services.
- 5 The transcript is sent to the witness for signature. The witness may propose linguistic corrections to the answers. If the witness wishes to correct or complete an answer, the revised answer and the reasons for it are set out in a separate document, which is annexed to the transcript.
- 6 The signed transcript, including any annex, forms part of the Ombudsman's file on the case.

It was subsequently clarified that point 6 also implies that the complainant receives a copy of the signed transcript and has the opportunity to make observations.

### 2.7.2 Inspection of documents

During 1999, the Ombudsman's powers to inspect files and documents relating to an inquiry were invoked on several occasions.

In correspondence between the Commission and the Ombudsman it was made clear that the right to inspect includes the possibility to read the documents, to make notes, and to take photocopies.

The Ombudsman's instructions to his staff concerning inspection of documents include the following points:

The legal officer is not to sign any form of undertaking or any acknowledgement other than a simple list of the documents inspected or copied. If the services of the institution concerned make such a proposal, the legal officer transmits a copy of it to the Ombudsman.

If the services of the institution concerned seek to prevent or impose unreasonable conditions on the inspection of any documents the legal officer is to inform them that this is considered as a refusal.

If inspection of any document is refused the legal officer asks the services of the institution or body concerned to state the duly substantiated ground of secrecy on which the refusal is based.

The first point was added following a case in which the Commission services proposed that the Ombudsman's staff should sign an undertaking to indemnify the Commission in respect of any damage caused to a third party by release of information contained in the document.

## 2.8 DECISIONS FOLLOWING AN INQUIRY BY THE OMBUDSMAN

When the Ombudsman decides to start an inquiry into a complaint, the first step is to send the complaint and any annexes to the Community institution or body concerned for an opinion. When the opinion is received, it is sent to the complainant for observations.

In some cases, the institution or body itself takes steps to settle the case to the satisfaction of the complainant. If the opinion and observations show this to be so, the case is then closed as "settled by the institution". In some other cases, the complainant decides to drop the complaint and the file is closed for this reason.

If the complaint is neither settled by the institution nor dropped by the complainant, the Ombudsman continues his inquiries. If the inquiries reveal no instance of maladministration, the complainant and the institution or body are informed accordingly and the case is closed.

If the Ombudsman's inquiries reveal an instance of maladministration, if possible he seeks a friendly solution to eliminate it and satisfy the complainant.

If a friendly solution is not possible, or if the search for a friendly solution is unsuccessful, the Ombudsman either closes the file with a critical remark to the institution or body concerned, or makes a formal finding of maladministration with draft recommendations.

A critical remark is considered appropriate for cases where the instance of maladministration appears to have no general implications and no follow-up action by the Ombudsman seems necessary.

In cases where follow-up action by the Ombudsman does appear necessary (that is, more serious cases of maladministration, or cases that have general implications), the Ombudsman makes a decision with draft recommendations to the institution or body concerned. In accordance with Article 3 (6) of the Statute of the Ombudsman, the institution or body must send a detailed opinion within three months. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the recommendations.

If a Community institution or body fails to respond satisfactorily to a draft recommendation, Article 3 (7) provides for the Ombudsman to send a report to the European Parliament and to the institution or body concerned. The report may contain recommendations.

In 1999 the Ombudsman began 206 inquiries, 201 in relation to complaints and 5 own-initiatives. (For further details, see Appendix A, Statistics p.289)



Sixty two cases were settled by the institution or body itself. Of this number 39 were cases in which the Ombudsman's intervention succeeded in obtaining a reply to unanswered correspondence (see the 1998 Annual Report section 2.9 for further details of the procedure used in such cases). Five cases were dropped by the complainant. In 107 cases, the Ombudsman's inquiries revealed no instance of maladministration.

A critical remark was addressed to the institution or body concerned in 27 cases. A friendly solution was reached in 1 case. Ten draft recommendations to the institutions and bodies concerned were made in 1999. Two draft recommendations were accepted by the institutions in 1999, one being a draft recommendation made in 1998 (cases 1055/96/IJH and 633/97/(PD)IJH, see pages 232 and 234). In the case of 8 other draft recommendations made in 1999, the deadline for a detailed opinion from the institution concerned did not expire before the end of the year.

In one case, a draft recommendation was followed by a special report to the European Parliament. The case concerned was the own-initiative inquiry (1004/97/(PD)GG) into the secrecy which forms part of the recruitment procedures of the Commission.

The report, which is published in the *Official Journal*<sup>6</sup> and on the Ombudsman's website in all languages includes the following recommendation:

In its future recruitment competitions, and at the latest from 1 July 2000 onwards, the Commission should give candidates access to their own marked examination scripts upon request.

On 7 December 1999, the President of the Commission informed the Ombudsman that:

*“The Commission welcomes the recommendations you made in this report and will propose the necessary legal and organisational arrangements to give candidates access to their own marked examination papers, upon request, from 1 July 2000 onwards.”*

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<sup>6</sup> 1999 OJ C 371.



### 3 DECISIONS FOLLOWING AN INQUIRY

#### 3.1 CASES WHERE NO MALADMINISTRATION WAS FOUND

##### 3.1.1 The European Parliament

#### TRANSPARENCY IN THE PROCEEDINGS OF A COMPETITION ORGANISED BY A POLITICAL GROUP OF THE EUROPEAN PARLIAMENT

*Decision on complaint 1163/97/JMA against the European Parliament*

##### **THE COMPLAINT**

In December 1997, Mrs M. made a complaint to the Ombudsman concerning a number of irregularities in open competition A 1/97 (Spanish administrators) organised by the Socialist Group of the European Parliament. Her allegations referred to the composition of the competition's Selection Board, and the transparency of its proceedings.

The complainant participated in that open competition in 1997. According to her, even though she reached the last stage in the selection procedure, and was interviewed by the Selection Board, her name was not finally included in the competition's reserve list.

Mrs M. wrote to the secretariat of the Selection Board requesting to have access to her written tests. The Selection Board replied that since its work was confidential, as set out in the Staff Regulations and recognised by the case-law of the Court of Justice, it could not give access to her written test. The letter added that, although she had obtained high marks in the written tests (83 points out of 100), in view of the interviews carried out by the Selection Board, her name could not be included in the reserve list.

Following another request by the complainant, the Selection Board informed her in November 1997 that three candidates had been included in the reserve list for this competition, two of which had been selected to fill the available posts. The letter only referred to the names of these candidates. The reply did not mention the candidates' results, because of the confidential nature of the deliberations of the Selection Board. This decision was confirmed by the President of the political group responsible for the organisation of the competition.

The complainant therefore lodged a complaint with the European Ombudsman, putting forward the following claims:

- 1 Violation of a number of internal rules of the Socialist Group:
  - Article 8.1.5: no representative of the Staff Committee was present during the oral tests; the Selection Board included more than two members of the same nationality/language of the competition

(Spanish); the decision taken by the selection board had been signed by one of its members without voting rights.

- Article 8.1.6: the number of candidates included in the reserve list was less than three times the number of vacant post.
- 2 Failure to provide information and lack of transparency:
- According to the complainant, she did not receive appropriate explanations as regards the evaluation criteria followed by the Selection Board for the assessment of the tests. In relation to this aspect, the complainant indicated that it had taken the President of the Socialist Group a long time (2 months) to reply to her requests, and moreover that her letter to the member of the Selection Board representing the Staff Committee had remained unanswered.
  - The complainant also alleged that the fact that some candidates included in the reserve list had had working relations with certain members of the Selection Board, raised doubts as to the impartiality of its decision.

## THE INQUIRY

### The Parliament's opinion

The complainant was forwarded to the European Parliament. In its opinion, it referred to the comments which had been put forward by the Socialist Group.

- As for the absence of a Staff Committee representative in the Selection Board, the opinion pointed out that, in order to constitute the Selection Board, its President had only to verify whether the minimum number of members were present so as to form a quorum. Moreover, no candidate had raised any objection concerning this matter prior to the beginning of the tests.
- The Socialist Group explained that only two full members of the Selection Board had the same nationality: a representative of the Spanish delegation and the Group's secretary general. The latter was a member of the Selection Board on the basis of his institutional role in the Group. There was a second representative of the Spanish delegation who was however merely an observer, without the right to vote.
- Concerning the number of candidates included in the reserve list, the opinion pointed out that it only included the candidates who, in the opinion of the Selection Board, met the selection criteria.
- The opinion contested the allegation of partiality of the Selection Board based on the existence of working relations between some of its members and some candidates who were included in the reserve list. The Socialist Group explained that similar relations existed also in relation to other candidates who had not been chosen. Furthermore since the competition had been organised by the political group only a previous working relation with that group would have been relevant.

As regards the allegations of lack of information and transparency, the opinion indicated that, taking into account the need for confidentiality in the work of the Selection Board, the complainant had been given sufficient information. Accordingly, the Selection Board had no obligation to give any further information to the complainant.

The Socialist Group explained that the delay in the reply by the President of its group was due to her frequent travelling. As regards the lack of reply from the representative of the Staff Committee, it was noted that, in his capacity as a member of the Selection Board, he could not make statements on behalf of the Board in reply to the complainant's claim.

### The complainant's observations

The complainant stressed the allegations already made in her complaint.

She referred to each one of the aspects regarding the violation of the internal rules of the Socialist Group, which she considered as the basis for her claim:

- Firstly, concerning the absence of a representative of the Staff committee, the complainant considered that the presence of a staff committee representative is a guarantee. His absence is therefore a violation of the procedure established both in the Staff Regulations as well as the internal rules of the Socialist Group. She also pointed out that she had not contested the Selection Board's composition before the beginning of the test because she presumed that their members acted in good faith.
- The complainant also rejected the Parliament's explanation for the presence of a third Spanish national in the Selection Board. Although the Parliament had indicated that this person only acted on a consultative role, the complainant considered that this role should have prevented him from signing the final decision by the Selection Board.
- The complainant restated her claims as regards the allegedly low number of candidates included in the reserve list.

As regards the lack of transparency, she stressed that the extensive interpretation given in the Parliament's opinion to the principle of confidentiality of the deliberations of the Selection Board led to a lack of transparency and information. In her view, the confidentiality of the Board's deliberations would not be affected by the release of the selection criteria used for her final marks, as she had requested. The complainant supported her point of view with extracts from a recent judgement of the Court of Justice in case 254/95 (*European Parliament v. Innamorati*)<sup>7</sup>

The complainant rejected the Socialist Group's explanation about the delay in replying to her requests due to the travelling of its President. She referred to the rules applied by the services of the European Ombudsman, which establish that the complainant should receive an answer from any EU institution in a reasonable delay.

<sup>7</sup> Case C-254/95P, *European Parliament v Angelo Innamorati*, ECR [1996] I-3423.

## FURTHER INQUIRIES

In February 1999, the complainant wrote again to the European Ombudsman. Following a conversation with the President of the Spanish Socialist Delegation, she believed a friendly solution was possible, whereby her name would be added to the reserve list of the competition. On 8 March 1999, the Ombudsman forwarded the complainant's proposal to the European Parliament.

After several requests for an extension of the deadline, the Ombudsman received the comments made by the Socialist Group of the European Parliament on 15 June 1999. In this letter the group indicated that it could not accept the suggestion made by the complainant. It pointed out that the reserve list had already been established on the basis of the candidates that were considered suitable for the post, and at that time the complainant was not among the names chosen. It added that any modification of the reserve list would be discriminatory towards the other non-selected candidates.

## THE DECISION

### 1 Scope of the European Ombudsman's powers

- 1.1 Since the case was primarily addressed against a political group of the European Parliament, the Ombudsman deemed it necessary, before considering the merits of the case, to make a few considerations regarding the scope of his powers.
- 1.2 The facts of the case related to the decisions taken by a Selection Board of a competition organised by a political group of the European Parliament for the selection of several temporary agents to be employed by that group.
- 1.3 As set out in Article 2 § 1 of his Statute, "*the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies*". Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it<sup>8</sup>. There are limits to what may count as maladministration. Thus, complaints against decisions of a political rather than an administrative nature are to be regarded as inadmissible. That is the case of complaints against the political work of the European Parliament, or its organs<sup>9</sup>, most notably the activities of its political groups.
- 1.4 However, the organisation of a recruitment procedure for the selection of temporary agents by the European Parliament's political groups cannot be entirely considered as a political activity. Pursuant to article 14 of the Decision of the European Parliament's Bureau of 25 June 1997<sup>10</sup>, the political groups are empowered to select their own temporary agents, and in doing so they exercise by delegation the powers

<sup>8</sup> The European Ombudsman, Annual Report 1997, p. 23.

<sup>9</sup> The European Ombudsman, Annual Report 1995, p.17-18.

<sup>10</sup> PE 259.383/BUR.

of the institution's authority empowered to conclude contracts of employment under the conditions of employment of other servants of the Communities.

From this perspective, the organisation of competitions for the selection of temporary agents by the Parliament's political groups constitutes an administrative activity subject to certain Community rules. To that extent, this type of situations fall within the jurisdiction of the Community courts, and hence both the Court of First Instance and the European Court of Justice have the power to review the conformity of these competitions with Community law.

- 1.5 The inquiry of the Ombudsman had thus been limited to assess whether, in this case, Community rules and principles had been duly respected.

## **2 Alleged irregularities based on the internal rules of the political group**

- 2.1 The complainant claimed that a number of irregularities had taken place in the course of the competition. These irregularities referred to:

- a. The composition of the Selection Board: absence of a representative of the Staff Committee during the oral tests; presence of more than two members of the same nationality/language of the competition in the Selection Board; the signature of the final act of the Selection Board by one of its non-voting members; and working relations between some members of the Selection Board and several candidates.

- b. The limited number of candidates included in the reserve list.

The complainant stressed that all these irregularities were in breach of the Socialist group's internal regulations.

- 2.2 The Ombudsman noted that the allegedly non-respected regulations were addressed to the members of a European Parliament political group. In view of the political nature of their work, supervising the application of these rules was beyond the Ombudsman's remit.

- 2.3 Nevertheless, the alleged irregularities had taken place in the course of a recruitment procedure in which the political group was acting under the authority and on behalf of the European Parliament's authority empowered to conclude contracts of employment under the conditions of employment of other servants of the Communities appointing authority. From that point of view, the organisation of the competition constituted an administrative activity under Community law and subject to review by the Community courts.

In order therefore to assess the alleged irregularities, the Ombudsman sought to elucidate whether the Selection Board had failed to act in accordance with a Community rule or principle binding upon it.

- 2.4 Some of the complainant's claims referred to the incorrect composition of the Selection Board.

As established by the Community Courts, the composition of a Selection Board is to be considered improper if it cannot guarantee an objective assessment of the candidates' qualities<sup>11</sup>. From the information submitted in the course of the inquiry, the Ombudsman could not conclude that in assessing the candidates' qualities the Selection Board of the competition had not been objective. The Ombudsman therefore found that there was no evidence of maladministration in relation to this aspect of the case.

- 2.5 As regards the candidates to be included in the reserve list of the competition, the complainant believed that the number of selected candidates should include three times the number of posts to be filled. In the Parliament's opinion, the Socialist Group indicated that the Selection Board included in the reserve list only those candidates who were considered suitable on the basis of the competition.
- 2.6 The Ombudsman noted that Article 5 § 5 of Annex III of the Staff Regulation states that,

*“the Selection Board shall draw up the list of suitable candidates [...]; the list shall wherever possible contain at least twice as many names as the number of posts to be filled”.*

In view of the previous provisions, the Selection Board enjoys certain discretion as to the number of suitable candidates to be included in the reserve list. The Ombudsman considered therefore that there was no evidence of maladministration in relation to this aspect of the case.

### 3 Information on the criteria for the evaluation of the tests

- 3.1 The complainant stated that despite her many requests to the Selection Board's secretary, its member representing the Staff Committee and the President of the Group, no explanation had been given to her as to the criteria for the evaluation of the tests. In its opinion, the Parliament indicated that the complainant had been informed of her marks in the written and oral tests. No further information could be given to her on the grounds of the confidentiality of the Selection Board's deliberations.

In the present state of Community law there is no legal basis for considering that the Parliament is under an obligation to disclose detailed information on the criteria followed by the Selection Board for its evaluation of the tests. The Ombudsman therefore found that there was no evidence of maladministration in relation to this aspect of the case.

- 3.2 The Ombudsman, however, drew the Parliament's attention to the fact that, by communicating more detailed information on the criteria of evaluation to the candidates, the Parliament would considerably increase the transparency in the recruitment and could also alleviate

<sup>11</sup> See, Joint cases T-32/89 and T-39/89, *Georges Marcopoulos v. ECJ* [1990] ECR-II-0281, par. 37-41.

the work of Selection Boards in dealing with requests and complaints from applicants.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Parliament. The Ombudsman therefore closed the case.

### **FURTHER REMARKS**

Most of the claims made by the complainant referred to allegations of potential violations of internal regulations of a political group. As the Ombudsman had stated before, ensuring a correct application of these rules was beyond his remit. Nevertheless, in carrying out a recruitment procedure for temporary agents, a political group acts on behalf of the Parliament's authority empowered to conclude contracts of employment under the conditions of employment of other servants of the Communities, and therefore, should abide by the relevant Community rules and principles of good administration. Moreover, since these types of procedures are often perceived by the citizens as official Community competitions, the institution itself should also play a monitoring role in order to ensure that those recruitment procedures are properly carried out, in due respect of the applicable legal rules and principles. By doing so the Parliament would contribute to enhancing the Union's relationship with its citizens.

In reply to these comments, the President of the European Parliament wrote to the Ombudsman on 11 January 2000. In her letter, Mrs Fontaine expressed that political groups should respect principles of good administration in their recruitment procedures, and stressed that the Parliament's administration monitors compliance with these principles.

## **APPLICATION FOR A "ROBERT SCHUMAN" SCHOLARSHIP: ALLEGED FAILURE TO REPLY BY THE PARLIAMENT**

*Decision on complaint 287/98/IP against the European Parliament*

### **THE COMPLAINT**

In March 1998 Mr F. made a complaint to the European Ombudsman concerning the alleged failure of the European Parliament to reply to his application for a "Robert Schuman" scholarship.

In September 1996, the complainant had applied for a "Robert Schuman" scholarship from the European Parliament.

The Parliament sent him an acknowledgement of receipt on 16 September 1996, in which it informed the complainant that a decision on his application would be taken during the selection procedure of November 1996.

In his letter to the Ombudsman, the complainant claims that he never received the aforementioned Parliament's decision.



## **THE INQUIRY**

### **The Parliament's opinion**

The complaint was forwarded to the European Parliament. Its opinion was in summary the following:

The Parliament stated that in September 1996, its services of the Directorate General of studies sent the complainant an acknowledgement of receipt of his application. In the same letter, the institution gave the complainant some information about the selection procedure. In particular, he was informed that a decision on his application would be taken during the selection procedure of November 1996.

The institution pointed out that a restricted number of applications that had not been selected in November because of the small number of scholarships, would be re-examined during the following three selections.

Furthermore, the Parliament enclosed a copy of a letter that the complainant sent to the Parliament in September 1996, in which he disagreed with the modality of the selection procedure and decided to withdraw his application.

The Parliament stressed that in view of the above circumstances, it considered that no more exchange of correspondence with the complainant appeared necessary. In spite of this, the institution replied to a further letter of the complainant dated 26 February 1998, explaining that following the withdrawal, his application had not been examined.

### **The complainant's observations**

The Ombudsman forwarded the European Parliament's opinion to the complainant with an invitation to make observations. No reply to this request was received.

## **THE DECISION**

### **Alleged failure of reply by the European Parliament**

- 1 Principles of good administrative behaviour require that public administrations properly reply to the queries of citizens.
- 2 In this case, the complainant applied for a "Robert Schuman" scholarship from the European Parliament. He claimed that the institution failed to communicate the decision of the outcome of the selection procedure to him.
- 3 The Parliament pointed out that its services had duly sent the complainant an acknowledgement of receipt of his application. Then, by letter of 26 September 1996, the complainant asked the institution to withdraw his application. The Parliament had therefore considered any further reply to the complainant to be unnecessary.
- 4 The Ombudsman considered that in its opinion, the Parliament had reasonably explained its failure to inform the complainant of the outcome of the selection procedure.



- 5 Furthermore, the Ombudsman noted that the Parliament also had replied to a letter of the complainant dated 26 February 1998, explaining the reason why his application had not been examined.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Parliament. The Ombudsman therefore decided to close the case.

## **TIME LIMIT FOR SUBMITTING MEDICAL CERTIFICATE**

*Decision on complaint 689/98/BB against the European Parliament*

### **THE COMPLAINT**

In June 1998 Mr C., MEP, made a complaint to the European Ombudsman concerning a request by the College of Quaestors of the European Parliament to reimburse 50% of his general expenses for the reference period September 1996-August 1997.

During the parliamentary year 1996-1997 the complainant suffered from serious health problems and, as a result, was unable to be present at the required 50% of the Parliamentary Sessions. In fact, he was two days short of the 50% minimum. The complainant was notified of this fact and asked to refund 50% of the general expenditure allowance for the period in question.

According to the complainant the above mentioned two days corresponded to 14, 17 and 18 July 1996 during which period he was hospitalised. He sent the medical certificates after the summer holidays, believing that the Parliament was closed in August. These certificates were refused on grounds that they were submitted after the one month's time limit. The complainant indicated that he had acted in *bona fide* and that he wished to keep the other half of the general allowances.

### **THE INQUIRY**

#### **The Parliament's opinion**

In its opinion the Parliament made in summary the following points:

Article 28 (1) of the Rules on Members' expenses and allowances provides as follows:

*"Any Member who, in a parliamentary year (1 September to 31 August) is absent on at least fifty per cent of those days fixed by the Bureau for plenary sessions of the Parliament, shall reimburse to the Parliament fifty per cent of the general expenditure allowance, under Article 13, relating to that period".*

Article 28 (2) provides:

*“Any period of absence referred to in paragraph 1 may be excused by the President on the grounds of ill-health or serious family circumstances, or the presence of the Member concerned elsewhere on mission on behalf of the Parliament. Supporting documents shall be submitted to the College of Quaestors within a maximum of one month from the date on which the absence began.”*

The requirement that supporting documents must be submitted within a maximum of one month from the date on which the absence began was incorporated into the body of Rules by the Bureau's decision of 15 January 1996. The Bureau's minutes are circulated to all Members after adoption in accordance with Rule 28 (1) of the Rules of Procedure.

In the case of the complainant, he was two days short of the 50% minimum. He was notified of this fact by letter dated 16 September 1997 and asked to refund 50% of the general expenditure allowance for the period in question. On 26 September 1997, the complainant wrote to the Quaestor responsible for financial matters enclosing a medical certificate dated 23 September 1997 relating to medical tests on 14, 17 and 18 July 1997. In order to be accepted as valid, the medical certificate should have been submitted within one month of the date on which the absence began, i.e. by 14 August 1997.

The matter was discussed at the Quaestors' meeting of 22 October 1997. The College informed the complainant that the one month's time limit was clearly laid down in the Rules on Members' expenses and allowances and confirmed the request for repayment of 50% of the general expenditure allowance. This decision was notified by letter of 5 December 1997.

By letter of 17 December 1997 the complainant asked the President of the European Parliament to consider his request to be allowed to retain the whole of the general expenditure allowance, pointing out that this failure to respect the one month's time limit had been due to his belief that Parliament's administrative offices were considered closed during August.

The request was referred by the President to the College of Quaestors and considered at its meeting of 14 January 1998. The College replied by letter of 11 February 1998 that Parliament's administrative services continued to operate during August, where necessary on a “permanence” basis and that in any event it would have been open to him to submit his medical certificates in good time by fax or by registered letter. The College thus confirmed its earlier decision.

On 24 March 1998, the complainant wrote again to the Quaestor responsible for financial matters. This letter was considered at the College's meeting of 1 April 1998, but the earlier decision was confirmed.

According to the Parliament it has been consistent practice of the present College and previous Colleges of Quaestors to apply strictly the terms of Article 28 of the Rules on Members' expenses and allowances and, in par-

ticular, the requirement that medical certificates must be submitted within one month of the beginning of the period of absence in the case of illness.

The position adopted by the College is moreover strictly in accordance with previous cases involving the late submission of medical certificates by other Members.

### **The complainant's observations**

In his observations the complainant maintained his complaint.

### **FURTHER INQUIRIES**

On 30 April 1999, the Ombudsman sent a letter to the President of the Parliament making further inquiries about the complainant's allegation that he was in *bona fide* as regards the working hours of the Parliament's services during the summer. On 21 June 1999, the College of Quaestors replied stating that the complainant had submitted the medical certificate only after receiving the letter from the responsible Quaestor. Furthermore, the complainant could not claim ignorance as regards the working hours of Parliament's services during summer and so maintain that he acted in good faith.

On 19 July 1999, the complainant wrote to the Ombudsman indicating his wish to maintain his complaint.

### **THE DECISION**

#### **Claimed reimbursement of 50% of the general expenditure allowance for 1996/1997**

- 1 The complainant claimed that he failed to observe the one month's time limit for the submission of medical certificates on grounds that he in *bona fide* believed that the Parliament's administrative services were closed during the month of August.
- 2 According to the Parliament, the complainant was notified by letter of 16 September 1997 of the fact that he was two days short of the 50% minimum required attendance. He was therefore asked to refund 50% of the general expenditure allowance for the period in question. On 26 September 1997, the complainant wrote to the Quaestor responsible for financial matters enclosing a medical certificate dated 23 September 1997 relating to medical test on 14, 17 and 18 July 1997. In order to be accepted as valid the medical certificate should have been submitted within one month of the date on which the absence began, i.e. 14 August 1997.
- 3 Based on the Ombudsman's inquiries, the Ombudsman noted that the Parliament had followed the consistent practice of the present College and previous Colleges of Quaestors to apply strictly the terms of Article 28 of the Rules on Members' expenses and allowances and, in particular, the requirement that medical certificates must be submitted within one month of the beginning of the period of absence in the case of illness. Moreover, the position adopted by the Parliament and the

College of Quaestors was strictly in accordance with previous cases involving the late submission of medical certificates by other Members. It appeared that the complainant only reacted after he had received the letter of notification. Therefore there were no grounds for his claim that he did not send the medical certificate within one month's time limit because he believed that the Parliament's services were closed in August. Thus, there appeared to be no maladministration by the Parliament.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Parliament. The Ombudsman therefore decided to close the case.

## **3.1.2 The European Parliament and the European Commission**

### **ACCESS TO REGISTERS OF INTERESTS**

*Decision on complaint 59/98/OV against the European Commission and the European Parliament*

#### **THE COMPLAINT**

In January 1998, Mr S. complained to the Ombudsman that the Commission refused to send him a copy of the Register of Interests of the Members of the Commission.

The complainant wrote on 5 December 1997 to the Secretary General of the Commission in order to get a copy of the Register of business and financial interests of the Commission Members. According to the complainant, the Commission did not provide him with a copy of the Register, but invited him to consult it on the spot in the Commission's premises in Brussels. However, he could not afford a trip to Brussels for that purpose. He therefore complained to the Ombudsman alleging that the Commission refused him access to the Register, which was not publicly available in the different Commission Representations of the Member States either.

On 3 and 10 March and 1 June 1998, the complainant wrote further letters in which he complained also about lack of access to the Register of Interests of MEPs. In order to clarify his complaint he was requested to fill in the standard complaint form. It appeared however from this complaint form that the complainant had made no prior administrative approaches to the European Parliament. Therefore the office of the Ombudsman advised him to write to the College of Quaestors. On 17 December 1998, the Ombudsman received from the office of MEP and Quaestor Richard Balfe a file on the dealing of this complaint by the College of Quaestors.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission informed the Ombudsman that it decided on 24 March 1998 to send the requested documents to the complainant. In its observations, the Commission enclosed a copy of the letter sent to the complainant.

### The complainant's observations

The complainant sent the Ombudsman a copy of a letter he wrote on 23 April 1998 to the Secretary General of the Commission in which he expressed his dissatisfaction with the contents of the Register of Interests sent by the Commission. He alleged amongst other things that the Registers of Interests of some Commissioners were not dated, that other Registers of Interests were not updated, that some Registers of Interests were written in French and German without English translation. The letter also included various questions related to the responsibilities of the Commissioners as regards their Registers of Interests.

Together with those observations, the complainant also wrote to the Ombudsman as regards access to the Register of Interests of MEPs, given that the Register was not available in the London information office of the European Parliament. The complainant included correspondence on the subject between MEP Pauline Green, whom he had contacted, and the President of the Parliament. In his reply to Pauline Green dated 2 March 1998, the President observed that for the moment the Register of Interests was available for consultation in the three places of work of the Parliament. The current wording of Annex I to the Rules of Procedure is based on the second Nordmann Report of 30 May 1996 (A4-0177/96), adopted by the Parliament on 17 July 1996. The President added however that the question of public access to the Register of Interests of MEPs was under discussion both in the Rules Committee and in the College of Quaestors.

## THE DECISION

### 1 The access to the Registers of Interests of the Commission

- 1.1 The subject of the complaint concerned access to the Register of Interests of the Members of the Commission and had therefore to be considered under the Commission Decision of 8 February 1994 on public access to Commission documents<sup>12</sup>. On 5 December 1997 the complainant wrote a short letter to the Secretary General of the Commission asking for a copy of this Register, but received no reply. According to Article 2.4 of the Decision, failure to reply to an application for access to a document within one month of application being made constitutes an intention to refuse access. However, further to the intervention of the Ombudsman, the Commission decided on 24 March 1998 to send the requested document to the complainant. Therefore, the Commission complied with the application for access

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<sup>12</sup> OJ 1994 L 46/58.

to documents and no further remark by the Ombudsman seemed to be necessary.

- 1.2 As regards the various allegations raised in the complainant's observations, contained in the letter to the Secretary General of the Commission, the Ombudsman noted that they constituted new allegations which were not raised in the original complaint, and that therefore he could not deal with them in this procedure. The Ombudsman further noted that the complainant, in his application to the Commission for access to documents dated 5 December 1997, did not ask for any details as regards the Register of Interests, but only for a copy of it. Therefore, by sending him the requested documents, the Commission had duly answered his initial request and no instance of maladministration was therefore found.

## **2 The complaint against the European Parliament**

- 2.1 As regards the complaint about the Register of Interests of MEPs, it appeared from the complaint form that the complainant had made no prior administrative approaches on the subject. Therefore the Ombudsman's office advised the complainant to write to the College of Quaestors of the Parliament which is the competent body to deal with this matter, given that the Quaestors are responsible for administrative and financial matters directly concerning Members (Article 25 of the Rules of Procedure).
- 2.2 On 17 December 1998, the Ombudsman received from MEP and Quaestor Richard Balfe a voluminous file on the handling of the complaint by the College of Quaestors. From this file it appeared that the College of Quaestors had replied in detail to the letters of the complainant, on 5 and 19 November and on 14 December 1998. The College provided him with a large documentation (about 100 pages) on the subject of access to the Register of Interests of MEPs. In particular, the College of Quaestors sent him a copy of the second Nordmann Report (A4-0177/96) and its annex, which is a survey of the rules on the declaration of financial interests in the national parliaments of the Member States. The College also sent a copy of the form for the declaration of the Interests of MEPs and of the accompanying explanatory communication of the President to the MEPs, as well as a copy of the minutes for the meeting of the College of Quaestors of 18 September 1996. The College further sent a copy of two reports in the field of corruption<sup>13</sup>.
- 2.3 According to Article 3 of Annex I to the Rules of Procedure<sup>14</sup> of the Parliament, "The register shall be open to the public for inspection". In the present situation, this means that the Register is available for consultation in the three places of work of the Parliament. Until now, the

<sup>13</sup> Report of 3 March 1998 on criminal proceedings relating to the protection of the Union's financial interests (A4-0082/98, Rapporteur Mrs Theato MEP) and Report of 24 July 1998 on the Communication from the Commission to the Council and the European Parliament on a Union policy against corruption (A4-0285/98, Rapporteur Mr Bontempi MEP).

<sup>14</sup> Annex I (Provisions governing the application of Rule 9(1) - Transparency and Members' financial interests).

Parliament has never taken a decision to make the Register available in its information offices in the Member States, or in the form of a copy further to requests from citizens. In his letter to the complainant, MEP and Quaestor Richard Balfe stated that in the meeting of the College of Quaestors of 18 September 1996, he had requested that the Register be available in the Member State in which the MEP is elected. Finally, in his letter to MEP Pauline Green dated 2 March 1998, the President of the Parliament stated that the matter of public access to the Register of Interests of MEPs is currently under discussion in the Rules Committee and in the College of Quaestors. Taking into account the actions taken by the Parliament's administration, no further remark by the Ombudsman on this issue seems to be necessary.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission or by the European Parliament. The Ombudsman therefore closed the case.

### **3.1.3 The Council of the European Union and the European Commission**

#### **CENTRE FOR THE DEVELOPMENT OF INDUSTRY: RESPONSIBILITIES OF COMMISSION**

*Decision on complaint 41/97/(VK)OV against the Council of the European Union and the European Commission*

#### **THE COMPLAINT**

In December 1996, Mr N. made a complaint to the Ombudsman concerning the unilateral abrogation of his contract by the Centre for the Development of Industry (CDI), a joint ACP (African, Caribbean and Pacific countries)-EC institution set up in the framework of the Lomé Convention and funded by the European Development Fund.

The complainant was engaged as a senior consultant during the Lomé III-Convention (1985-1990) with a five year contract. However, on 30 June 1987 his contract was unilaterally abrogated by the Director of the CDI without notice and without financial compensation. On 5 January 1988 the complainant started an arbitration procedure with the CDI. On 5 April 1990 the arbitration tribunal rendered its decision by default of the CDI condemning the latter to pay about 6 million BF indemnity, as well as interests and the arbitration costs. The decision was made enforceable by order of the Court of First Instance of Brussels of 17 April 1990. The CDI appealed against this order asking for the annulment of the arbitration decision, invoking amongst other things its immunity from jurisdiction. By judgment of 13 March 1992 the Court of First Instance rejected the appeal, referring



to the fact that the CDI, by accepting the arbitration procedure, had renounced its immunity from jurisdiction.

Given that the CDI refused to execute the judgment of the Brussels Court of First Instance which confirmed the arbitration decision, the complainant wrote in December 1996 to the Ombudsman alleging that the CDI had still not paid the indemnities, nor the arbitration costs. The complainant drew the attention to the fact that the CDI was set up in the framework of the Lomé Convention, of which the contracting parties are, on the one hand, the European Communities and, on the other, the ACP states, that the CDI is a joint ACP-EC institution funded by the European Development Fund, and that DG VIII of the Commission is the Directorate General responsible for matters related to the Lomé Convention.

### **THE INQUIRY**

#### **The Council's and the Commission's opinions**

The complaint was forwarded to the Council and the Commission in March 1997. In their observations, the Council and the Commission stated that, although set up by the Lomé Convention, the CDI is neither a Community institution nor a Community body falling under their responsibility. The Commission added that it had no file of the complaint and that it was not aware that it has ever been seized of the matter. Both institutions observed that the provisions currently applicable to the CDI are Articles 87-97 of the Fourth Lomé Convention, which are supplemented by several decisions of the ACP-EC Council of Ministers and the ACP-EC Committee of Ambassadors.

Under these provisions, the Council and the Commission send an observer to the Executive Board of the CDI, which is composed of six independent, highly qualified persons appointed on the basis of parity between the ACP and the Community and who have substantial experience in the private or public industrial or banking sectors or in industrial development planning and promotion. This means that the Council and the Commission are not represented on the CDI Executive Board. The law applicable to the CDI and its Governing Board derives from the Lomé Convention implemented by the ACP-EC decisions. More particularly it is the joint ACP-EC Committee on Industrial Cooperation which supervises the CDI (Article 92) and reports to the joint ACP-EC committee of Ambassadors (Article 87) which adopts the CDI's Statute, financial and staff regulations and its rules of procedure (Article 93).

For these reasons both the Council and the Commission concluded that they had no direct managerial responsibility for the CDI and that therefore the complaint fell outside their competences. However, even though the Commission's observer on the Executive Board of the CDI has no voting rights nor a right to put subjects on the agenda of the meetings of the Board, the Commission stated in its observations to the Ombudsman that it would inform the Director of the CDI of the request of the Ombudsman and recommend that it be discussed at the next meeting of the Board.



### **The complainant's observations**

In his comments the complainant first observed that the Lomé Convention, under which the CDI is established, is the direct responsibility of the Commission, that the management of the CDI has always been appointed with the explicit consent of the Commission and that the budget of the CDI is a grant from the European Development Fund, and that therefore the competence of the European Ombudsman with regard to this complaint could not be questioned. The complainant further stated that his complaint should be directly submitted to the Chairman of the Governing Board of the CDI with a fixed deadline for a decision.

On 6 October 1997 the complainant sent to the Ombudsman a copy of a letter to the Chairman of the CDI Governing Board in which he asked for immediate action by the CDI to settle his complaint. In another letter of the same date the complainant informed the Ombudsman that the note from the European Commission never reached the Chairman of the CDI Governing Board. On 22 April 1998, the complainant asked the Ombudsman to send the complaint directly to the Chairman of the CDI Governing Board, given that the Commission had not transferred his complaint to the CDI. Further to this request the Ombudsman sent on 25 May 1998 the file of the complaint to the Chairman of the Board. On 2 October 1998 the Ombudsman sent a letter in order to be informed of the outcome of the complaint. No reply was received from the CDI. In a letter of 4 December 1998 the complainant sent to the Ombudsman a copy of the letter addressed to the Chairman of the CDI Governing Board in which he criticised the ongoing maladministration of the CDI which had still not given execution to the arbitration decision enforced by the judgment of the Brussels Court of First Instance.

## **THE DECISION**

### **1 The complaint against the CDI**

Article 138e of the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration in the activities of Community institutions and bodies. Therefore, since the CDI is not a Community institution nor a Community body in the sense of Article 138e of the EC Treaty, the Ombudsman has no power to deal with the complaint insofar as it is directed against the CDI Governing Board. In his letter dated 27 November 1996, the Ombudsman already informed the complainant that he could not deal with the complaint lodged on 26 August 1996 against the CDI.

### **2 The complaint against the Council and the Commission**

Insofar as the complaint was directed against the Council and the Commission, the Ombudsman notes that the Lomé Convention does not make them directly responsible for the decisions of the CDI Governing Board. Neither the Council nor the Commission have voting rights on the CDI Governing Board. Article 92.1 of the Fourth Lomé Convention provides that the Commission and the Council shall have an observer status at the proceedings of the Governing Board. Therefore, the fact that the CDI

Governing Board did not execute the arbitration decision cannot be considered as an instance of maladministration by the Council or the Commission.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Council or the Commission. The Ombudsman therefore closed the case.

### **FURTHER REMARKS**

As regards the Commission, the Ombudsman noted that the Lomé Convention as an instrument falls under its direct responsibility. More particularly, the Ombudsman noted that Directorate General VIII of the Commission is the Directorate responsible for Development and for cooperation with the ACP States under the Lomé Convention, that the budget of the Convention is funded by the European Development Fund, and that the Commission has a representative in the Committee of Ambassadors which is responsible for monitoring the implementation of the Convention.

Therefore it appears that the European Commission exercises a major influence in the implementation of the Lomé Convention. As regards the CDI, the Ombudsman noted that it is a joint ACP-EC institution funded by the European Development Fund. On the basis of the above considerations, the Ombudsman made the following remarks to the Commission:

In a society like the European Union which is governed by the rule of law, judgements and orders of courts should be duly executed. When setting up bodies like the CDI in the framework of Conventions, the Commission should seek to guarantee that the bodies so established abide by the rule of law and by the principles of good administrative behaviour.

In the present situation it appeared that in DG VIII of the Commission there exists a unit responsible for relations with the CDI. The Commission promised in its observations to the Ombudsman that it would recommend that the complaint be discussed at the next meeting of the CDI Governing Board. It appeared however from the information provided by the complainant that this had not been the case.

Therefore the Ombudsman considered it appropriate for the Commission to take the necessary steps in order to draw the attention of the Committee on Industrial Cooperation, which supervises the operation of the CDI Governing Board, to the alleged non-compliance by the CDI with the arbitration decision as enforced by the order of the Brussels Court of First Instance of 17 April 1990. The Commission should also consider drawing the attention of the Director of the CDI to this matter.

### 3.1.4 The European Commission

#### ADEQUATE STATEMENT OF REASONS FOR DECISION

*Decision on complaint 106/97/PD against the European Commission*

##### **THE COMPLAINT**

In February 1997, Mr B. lodged a complaint on behalf of an association, Friends of the Lake District, concerning a decision by the European Commission to close the file on a complaint that he had lodged with the Commission concerning the UK authorities. In substance, the complainant alleged that the Commission had failed to give adequate reasons for its finding that the UK authorities had not acted in breach of Directive 85/337.

The background to the complaint is in brief the following: In August 1995, the association lodged a complaint with the Commission against the UK authorities. The complaint concerned a planning permission application for a so-called Rock Characterisation Facility (RCF). The association considered that in dealing with this application, the UK authorities had acted in breach of Directive 85/337 on Environmental Impact Assessment.

The association judged that the RCF project should be considered indissociable from a planned deep repository for the disposal of nuclear waste. Only by taking the two projects as one, could a correct environmental impact assessment be made. The association considered that previous administrative practice of the Commission supported this view.

Moreover, the association considered that the UK authorities had acted in breach of Article 5 of Directive 85/337 by not requiring the applicant company to provide and make public information on possible alternatives to the RCF project.

After having investigated the matter, the Commission informed the association that Directive 85/337 leaves considerable areas for discretion to the Member States in relation to environmental assessments. Information needs only be supplied if the Member State considers that the information is relevant to the specific characteristics of a particular project and the environmental features likely to be affected. On the basis of the information available to it, the Commission did not find that the United Kingdom had breached Directive 85/337, and had therefore decided to close the file.

Considering that reply from the Commission unsatisfactory, the association lodged the complaint with the Ombudsman. In the complaint, it was in substance put forward that the Commission had failed to give adequate reasoning why the RCF project was dissociable from a possible deep repository for the disposal of nuclear waste and why information on alternative sites was not considered necessary.

##### **THE INQUIRY**

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of

maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into this complaint were therefore directed towards examining whether there had been maladministration in the activities of the European Commission.

### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission in substance repeated the reasoning previously given to the complainants.

### **The complainants' observations**

In its observations, the association maintained the complaint.

### ***FURTHER INQUIRIES***

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman considered that the Commission could have replied more adequately to the relevant arguments put forward by the complainant. The Commission was therefore requested to clarify, firstly, why the Commission had considered the RCF project dissociable from the planned nuclear waste deposit project; secondly, on what basis the Commission had concluded that the UK had not acted contrary to Directive 85/337 when refraining from requesting the applicant company to give information on project alternatives.

### **The Commission's second opinion**

In its reply, the Commission repeated that there was no evidence that the United Kingdom had failed to fulfil the obligations of Directive 85/337. The failure to require publication of alternative project options was accordingly not an infringement on the part of the United Kingdom. As for the dissociability of the project, the building of a nuclear depository would have required a separate planning application; the RCF project could therefore be considered dissociable from any such plans for a nuclear depository.

### **The complainant's further observations**

In its observations, the association maintained the complaint.

After careful consideration of the Commission's second opinion and the further observations from the complainant, the Ombudsman asked the Commission to elaborate further its opinion on why the RCF was a dissociable project and why information on alternative sites was not considered necessary.

### **The Commission's third opinion**

In its third opinion, the Commission first provided further clarification of the issue of dissociability. As for the information on project alternatives, the Commission took the view that since the two projects were dissociable, the

RCF project fell within Annex II of Directive 85/337. Thus, the matter was considered in relation to Article 4(2) of Directive 85/337, which states that projects listed in Annex II shall be made subject to an assessment where Member States consider that their characteristics so require. The RCF project being dissociable from a possible repository for the disposal of nuclear waste, the Commission considered that information on alternative sites was not needed.

### **The complainant's observations on the Commission's third opinion**

In its observations on the Commission's third opinion, the association maintained in particular the grievance that the Commission had failed to explain itself adequately on the question of alternative sites.

## **THE DECISION**

### **Failure to give adequate reasons**

- 1 Principles of good administration require the administration to give adequate reasons for the decisions it takes on submissions that citizens have made to it. In this case, it was apparent that the Commission initially failed to give adequate reasons on the complainant's two concerns, the dissociability of the RCF project and the need for information on alternative sites.
- 2 However, in the course of the inquiry, the Commission stated the reasons why it considered the RCF project to be dissociable and why it considered that information on alternative sites was not needed. It appeared that the Commission in essence considered that the RCF project was a dissociable project as it could stand alone from a possible repository for nuclear waste. As the project could stand alone, the Commission considered that information on alternative sites was not needed. This reasoning did not appear unreasonable.

The Ombudsman therefore concluded that the Commission has rectified its original failure to provide an adequate statement of reasons.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to be no maladministration by the Commission. The Ombudsman therefore closed the case.

## **HANDLING OF A COMPLAINT AGAINST THE UK AUTHORITIES**

*Decision on complaint 298/97/PD against the European Commission*

### **THE COMPLAINT**

In April 1997, Mr C. MEP complained to the Ombudsman on behalf of the association Save Our Shoreline Southport (SOS). The complaint alleged failure of the Commission to enforce Community environmental legislation

in the UK, as well as procedural errors in the handling of complaints from SOS.

The background to the complaint was in brief the following: On 10 December 1995, SOS lodged a complaint with the Commission, claiming that the UK authorities had infringed Community law by building a concrete sea defence wall at Southport. The association considered that the local authority which gave the planning permissions in 1993 and 1995 did not respect Community environmental legislation. The association had contacted the UK central government authorities who chose not to review or overturn the local authority's decision to grant planning permissions.

In the complaint to the Commission, SOS drew attention to the protected status of the area in which the concrete sea wall was to be constructed, a status which is provided by Directive 92/43 on habitats and Directive 79/409 on wild birds. The association considered that the concrete sea wall would cause direct damage to fauna and flora, as well as indirect damage by facilitating a heavy increase in traffic. The association therefore asked the Commission to assess whether the local authority had acted in breach of its obligations under the above Directives.

Art 6 of Directive 92/43 provides in respect of protected areas:

*“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, ... , shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the public.”(Underlining added; the same provision applies in respect of Directive 79/409, see Article 7 of Directive 92/43.)*

The association considered that the sea wall would have a significant effect on the area. In contrast, the local authority had considered that the sea wall was not “likely to have a significant effect” and had therefore not proceeded to conduct a full assessment of the environmental implications. The association contested the local authority's conclusions and put forward that a natural alternative to the concrete sea wall should have been considered. An adequate alternative would, according to the association, be sand dunes. The association also stated their suspicion that a concrete sea wall had deliberately been chosen to make increased traffic possible, an objective which would cause damage to the area's environment. This damage should have been considered in the environmental impact assessment under Directive 85/337.

On 4 July 1996, the Commission asked the UK authorities for comments on the matter. The UK authority which supplied the comments was *English Nature*, a statutory body under the Department of Environment, Transport

and the Regions. The opinion produced by *English Nature* concluded that the contested sea wall project would not breach Community environmental legislation. In addition to the information from *English Nature*, the Commission undertook an on-site inspection early September 1996. On 30 September 1996 the Commission concluded that there was no breach of Community environmental law. On 3 February 1997 the association was informed of this decision.

Being dissatisfied with the Commission's conclusions and its handling of the complaint, the association wrote to its local Member of the European Parliament who forwarded the matter to the European Ombudsman. In substance, the association claimed that the Commission:

- failed to involve the association in its on-site inspection in early September 1996.
- failed to inform the association in good time about the results of its investigation.
- interpreted Community environmental legislation incorrectly. The planning permissions should have been considered illegal because the planning process failed to consider natural sand dune defences in accordance with the conservation objectives and requirements under Directives 92/43 and 85/337.

### **THE INQUIRY**

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into this complaint were therefore directed towards examining whether there had been maladministration in the activities of the European Commission.

### **The Commission's opinion**

The complaint was forwarded to the Commission. In summary the Commission's opinion made the following points:

As regards the first grievance, the Commission stated that the visit by representatives of the Commission was informal and undertaken at the request of the local Council. The Commission's interest in undertaking such a visit was only to establish visually, at first hand, the area of coast and precise location of the project. Given the limited role of the visit, a discussion with the association was not considered appropriate. The Commission added that it had been in receipt of a substantial correspondence and material relating to the potential environmental impact of the project from the association and understood fully its concerns with regard to the proposed development.



As for the second grievance, the Commission acknowledged that the delay was excessive, and informed the Ombudsman that measures had been taken to avoid similar delays in the future.

As concerns the third grievance, the Commission stated that the trigger for applying the safeguards under the above mentioned Directives is the likelihood that a plan or project will have a significant effect on the site concerned. This likelihood is not only to be seen in terms of the plan or project itself, but also in terms of other plans or projects. After considering the submissions from the UK authorities, the Commission had concluded that the project would not breach Community environmental law or policy, since there was no negative assessment of the implications for the site in view of the site's conservation objectives.

### The complainant's observations

In substance, the association maintained its complaint.

### FURTHER INQUIRIES

After a careful consideration of the Commission's opinion and the association's observations it appeared that there were still outstanding differences between the Commission and the association, in particular as concerns the question whether the Commission investigated the option of allowing sand dunes to develop natural sea defences and as concerns the question why the Commission considered that the project would not have a significant impact on the area concerned in the meaning of Art 6 of Directive 92/43. Accordingly, the Ombudsman asked the Commission to submit an opinion on these issues.

### The Commission's second opinion

The Commission replied in more detail, stating that after having examined the evidence submitted by the UK authorities, it considered that none of the phases of the sea wall development would have a significant adverse effect on the protected area. It had also been able to verify that the assessment by the UK authorities had been carried out properly. As for the alleged failure to consider alternatives, the Commission repeated that Article 6(3) of Directive 92/43 requires the authorities to look for alternatives *only* when it has been considered that the proposed project will have a *significant impact* on the protected area. In this case it was considered that the project did not have significant environmental effects on the area in question, and it had therefore not been a legal requirement to look for alternatives. The Commission added that notwithstanding this lack of a legal obligation, the UK authorities had in fact investigated the option of allowing sand dunes to develop sea defences. They had explained to the Commission that after having examined the matter carefully, they had reached the conclusion that a natural defence could not provide, neither in the short nor in the medium term, the degree of flood protection afforded by hard (concrete) defences.



To substantiate and provide evidence for these conclusions and observations, the Commission provided the Ombudsman with the relevant confidential correspondence between itself and the UK authorities.

### **The complainants' further observations**

In substance, the association maintained its complaint.

## **THE DECISION**

### **1 Preliminary observation**

- 1.1 In its submissions, the association raised issues which were not put forward in the original complaint, in particular concerns about plans to strengthen and increase the use of coastal roads in Southport.
- 1.2 The Ombudsman shall observe that he has received a complaint from another association concerning the plans to strengthen and increase the use of coastal roads in Southport, complaint 813/98/PD.

The Ombudsman found that the substance of these new issues was better investigated within the inquiry of this other complaint, for which reason they were not to be decided on in the present inquiry.

### **2 The complainant's participation in the on-site meeting**

- 2.1 The association considered that the Commission should have ensured the association's participation in the on-site meeting, organised by the British authorities.
- 2.2 The exclusion of a complainant from a meeting intended to negotiate or otherwise discuss the subject matter of the complaint would prima facie be unreasonable in a normal administrative procedure in which the complainant is a party. In addition, beyond the complainant's individual interest in participating in such meetings, the participation can assist to bring about the most relevant information and deliberation and thus ensure a higher confidence in the correctness of the Commission's final conclusions.

However, in the present case, the on-site inspection had very limited objectives, and was furthermore undertaken at an invitation by the UK local authority. Against this background, the Ombudsman did not consider that the Commission had acted unreasonably by not ensuring the association's participation. However this aspect of the complaint led the Ombudsman to formulate further remarks to the attention of the Commission.

### **3 The failure to inform the complainant in good time about the results of the Commission's investigation**

- 3.1 The association considered that the Commission had failed to inform it in good time about the results of its investigations.
- 3.2 In 1997 the Ombudsman carried out an own initiative inquiry 303/97/PD concerning the Commission's administrative procedures in complaints like the present one. As a result, the Commission under-

took to keep complainants informed about the dealings with their complaints, in particular about its possible intention to close the file, so that the complainant concerned may comment thereon.<sup>15</sup> However, that undertaking was subsequent to the facts of this case; the administration cannot be requested to comply with undertakings which had not been made at the time of the disputed facts. Furthermore, the Commission acknowledged in this case that the delay in informing the association of its final decision to close the file was excessive. It also informed the Ombudsman that measures had been taken to avoid similar delays in the future. The Ombudsman therefore found that it was not necessary to conduct further inquiries into this part of the complaint.

#### **4 The Commission's conclusions concerning non-infringement**

- 4.1 The central points put forward by the association were, firstly, that the Commission wrongly concluded that the sea wall project was not likely to have a significant effect on the protected site in question, and secondly, that natural alternatives to a concrete sea wall should have been considered. The association referred to Directive 92/43 and Directive 85/337.
- 4.2 The Commission acknowledged that alternatives must be considered under Directive 92/43 *if* the project in question is deemed "likely to have a significant effect". The overall issue therefore turned on the Commission's assessment of whether such "significant effect" was likely or not. The Ombudsman's inquiry was aimed at investigating whether the Commission had acted correctly and diligently in making this assessment.

In cases like the present one, the Commission's assessment is normally limited to verifying whether national authorities have complied with procedural rules, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of power.

- 4.3 The association disputed the correctness and relevance of the facts provided by the UK authorities. The confidential correspondence to which the Ombudsman was given access by the Commission suggested that the submissions from the UK authorities contained relevant and objective criteria. Thus, the inquiry did not reveal evidence which would indicate that the Commission's reliance on the facts submitted by the national authorities was irrational or unreasonable and thereby constituted an instance of maladministration.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

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<sup>15</sup> Annual Report 1997, chapter 3.7.

### **FURTHER REMARKS**

It appeared in this case that a local association had lodged a complaint with the Commission concerning a local building project, alleging that the project infringed Community environmental law. In the course of the examination of the complaint, the Commission services responsible participated in an on-site inspection of the project, at the invitation of the authority concerned. The Ombudsman found that in such a situation, where the Commission services responsible are on the site because of the complaint, they should take steps to meet also with the complainant.

### **REFUSAL TO ALLOW A CANDIDATE IN AN OPEN COMPETITION A COPY OF THE MARKED TEST**

*Decision on complaint 365/97/JMA against the European Commission*

#### **THE COMPLAINT**

In April 1997, the regional ombudsman of Catalonia, in Spain, transferred to the European Ombudsman a complaint lodged by Mrs E.

In September 1996, Mrs E. had taken part in the written tests of open competition EUR/LA/97. In November 1996, she was informed by the Selection Board that her score in the first written test (3,51 out of 20), was below the required mark and that therefore she had failed the test.

The complainant requested a copy of her marked test in November 1996 and January 1997, in order to verify that the mark she had obtained corresponded to the corrections made in her test. Both requests were rejected by the Selection Board, because of the confidentiality of its work. In view of her academic and professional experience, the complainant expressed her concern as regards the low marks obtained, and asked the Ombudsman to get a copy of her marked test. She also indicated that the Selection Board's refusals of her requests were contrary to the principles of openness and transparency.

#### **THE INQUIRY**

##### **The Commission's opinion**

The complaint was forwarded to the Commission. Its opinion was in summary the following:

The Commission first set the background of the case. It explained that the complainant sought to take part in inter-institutional competition EUR/LA/97 organised for the establishment of a reserve list for translators (LA6/LA7) of Spanish mother tongue<sup>16</sup>. The European Commission organised the tests, and acted as the appointing authority. However, the Selection Board was composed of officials appointed by the different institutions.

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<sup>16</sup> OJ C 62A.

In the notice of the competition concerning the written tests (points VII.A and VII.B), it was indicated that the first written test (a) should consist of a translation into Spanish of a text of approximately 25 lines without a dictionary. The second written test (b), was to be made of a series of multiple-choice questions related to European integration and EC policies. These two tests would be marked first. Successful candidates should have obtained a minimum score in both tests (10 out of 20 for test a; 5 out of 10 in test b), and furthermore, be among the best 144 candidates.

Mrs E., having obtained only a 3,51 mark in the first written test (a), was therefore eliminated from the competition. In reply to her request of a copy of her test, the relevant Commission services explained that the results were in accordance with the marks attributed by the Selection Board.

The Commission also pointed out that its refusal to allow candidates to have access to their marked tests, was supported by the wide powers of Selection Boards to evaluate the merits of candidates, as recognised by the Court of Justice. In this context, the only obligation for Selection Boards is properly to reason their decision. In the present case, this duty had been met when the Selection Board indicated to the complainant the marks she had obtained, as well as the criteria used for the correction of the tests. The fact that all tests had been marked by two different evaluators, chosen among experienced translators, showed that no subjective considerations had taken place in the marking of the tests.

As regards the complainant's claim of lack of transparency, the Commission expressed its view that the Selection Board had operated with the largest possible degree of transparency, and with due respect of the rule of law and confidentiality principles. Article 6 of Annex III of the Staff Regulations imposes a duty of confidentiality upon the work of Selection Boards, in order to avert any potential pressure being put on their individual members.

### **The complainant's observations**

In her observations on the Commission's comments, the complainant expressed some reasonable doubts as to the very low marks given to her, especially in view of her career and professional experience. The complainant explained she had specialised in English philology, with Master courses in Phonetics and Linguistics at the University College London, where she also followed PhD courses, thanks to a research grant of the British Academy. Furthermore, she stressed that access to her marked test could hardly affect either the effectiveness of the Selection Board or the transparency of the Commission's work.

### **FURTHER INQUIRIES**

On July 1998, the Ombudsman wrote again to the Commission, requesting a copy of the written test of Mrs E. in open competition EUR/LA/97, with the corrections made and the marks given by the Selection Board.

In its reply, the Commission repeated the refusal to give copies of marked tests, recalling its arguments in a previous complaint (Ombudsman's own

initiative 1004/97), namely the need to preserve the confidentiality of the Selection Board's work as laid down in article 6 of Annex III of the Staff Regulation. The Commission also explained that the work of the Selection Board in this type of competition also involves a comparison of the merits of the candidates. This comparative assessment could not be properly undertaken by reviewing a single exam without reference to the other ones. In view of these considerations, the Commission regretted not being able to meet the Ombudsman's request.

The Commission added that the normal means available to candidates to contest the decisions of the Selection Board are the appeal provided for in article 90 of the Staff Regulations, and recourse to the Community courts.

In view of the Commission's refusal to grant access to the documents being requested, the Ombudsman wrote to Commission President Santer on October 1998, and reminded the institution of its duty under the provisions of Article 3 (2) of the Statute of the European Ombudsman<sup>17</sup>. The Ombudsman also indicated in his letter that he intended to have the document inspected by a member of his Secretariat at the Commission's premises, so that any possible misunderstanding regarding the potential use of the copy to be transmitted to him could be avoided. In its reply, the Commission agreed to hold a meeting "*to discuss the nature of our concerns, since the Commission, at this stage, is not in a position to fully meet your request*".

The meeting took place on 25 November 1998 at the Commission's premises in Brussels. In the course of the meeting, the Commission services responsible explained the procedure followed in the running of competitions, and in particular, the way corrections were made and supervised by the Selection Board. Taking into account the guarantees provided for by this procedure, and the limitations imposed by the case-law of the Community courts, it was suggested that there were sufficient elements to exclude any potential maladministration in the work of the Selection Board.

As for the requested inspection of the file, the representatives from the Commission stated that they could not take a final position on the matter before discussing it in the context of an inter-institutional meeting of the "Heads of Administration".

Since there was no formal reply from the Commission by the end of November 1998, the Ombudsman wrote again to the institution, and asked to inspect the relevant files, adding that

*"If the Commission refuses to give the Ombudsman access to the files concerned, I request you [President Santer] to state the duly substantiated grounds of secrecy on which the decision is based.*

*In order to ensure that any special report to the European Parliament can be made promptly, I would be grateful to receive your reply by no later than 11 January 1999."*

<sup>17</sup> "The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy".

In a letter signed by Mr Trojan, Secretary General of the Commission, dated 23 December 1998, the Commission finally agreed to organise a meeting for the Ombudsman to inspect the written tests of the complainant in this case.

The inspection took place in Brussels, on the Commission premises on 11 January 1999. A team of three members of the Ombudsman's secretariat examined the documents brought by the Commission services, which included the original written test drafted by the complainant, two marked copies with the corrections made, and the score given by both evaluators, and the criteria defined by the Selection Board and used by the evaluators in their assessment of the tests. In reply to questions from the Ombudsman's services, the Commission representatives explained the criteria laid out by the Selection Board for the marking of tests, and the procedure followed to ensure that the marked copies corresponded to the original test of the complainant. The Ombudsman's services inspected the complainant's translation into Spanish of the original English text, and the corrections and marks made by each of the two examiners.

## THE DECISION

### 1 Role of the European Ombudsman

- 1.1 In the course of the Ombudsman's inquiry into this case, the Commission stated that the normal means for candidates to contest adverse decisions taken by Selection Boards in open competitions are the appeal provided for in article 90 of the Staff Regulations, and recourse to the Community courts. It had also implied that the work of any Selection Board has sufficient internal controls and guarantees to exclude any potential instance of maladministration.
- 1.2 The institution of the European Ombudsman, as set up by the Treaty of Maastricht, was meant to underline the commitment of the Union to democratic, transparent and accountable forms of administration. To accomplish such an aim, the Ombudsman shall help to uncover maladministration in the activities of Community institutions and bodies, and make recommendations with a view to putting an end to it<sup>18</sup>. These Community activities which do not fall within his mandate, are explicitly stated in his Statute<sup>19</sup>.
- 1.3 No activity related to the organisation of a competition, or its procedure, let alone the decisions taken by Selection Boards, have been excluded from the Ombudsman's remit. Accordingly, the Ombudsman has the powers to launch any inquiry related to a potential case of maladministration in this type of cases.
- 1.4 As regards the means to contest a decision of a Selection Boards, in addition to the use of article 90, par. 2 of the Staff Regulations or

<sup>18</sup> Article 138e Treaty establishing the European Community; Article 2, par. 1, Statute of the European Ombudsman.

<sup>19</sup> For instance, cases before courts or related to a court's ruling (article 1, par. 3), or those activities of the Court of Justice and the Court of First Instance acting in their judicial role (article 2, par. 2).

recourse to the Court of First Instance, candidates may send a complaint to the European Ombudsman. Nothing precludes complainants in those cases from exercising their rights to apply to the Ombudsman as European citizens.

## **2 Claim by the complainant to have access to her marked tests**

- 2.1 The complainant had repeatedly asserted her right to have access to her tests once marked by the Selection Board, as a means to ensure that the process had been carried out with transparency and in due respect for the rule of law.

The Commission had rejected her requests on the grounds that the work of the Selection Board is confidential as set out in article 6 of Annex III of the Staff Regulations.

- 2.2 In the present state of Community law there is no legal basis for considering that the Commission is under an obligation to disclose a copy of corrected examination papers to the candidates. In this regard, the Ombudsman referred however to his own initiative inquiry concerning more transparency in the recruitment procedures followed by the Commission (ref. 1004/97/PD).

Furthermore, in order to dispel any potential suspicion concerning the corrections made in Mrs E. written test, the Ombudsman carried out an inspection of the documents on 11 January 1999.

## **3 Assessment of Mrs E.'s written test**

- 3.1 As established by Community case-law, in assessing the results of tests, Selection Boards enjoy a wide discretion. This power, however, is not unbounded. It can be reviewed to ascertain whether its exercise, which must be based on objective criteria, is vitiated by a manifest error or by a misuse of powers, or whether the Selection Board has manifestly exceeded the limits of its discretion<sup>20</sup>.
- 3.2 In order to ensure that in using its discretionary powers, the Selection Board had acted within the limits of its legal authority, the Ombudsman requested an inspection of the relevant documentation concerning this case, namely the complainant's written test in open competition EUR/LA/97 and the evaluation made by the Selection Board.
- 3.3 Having inspected the relevant documents in this case, the Ombudsman had found no evidence to question the judgements made by the Selection Board. The Ombudsman had therefore concluded that the Selection Board had acted within the limits of its legal authority. There appeared to be no instance of maladministration as regards this aspect of the case.

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<sup>20</sup> See, case T-46/93, *Fotini Michaël Chiou v. Commission* [1994] ECR II-929; par. 48; case 40/86, *Georges Kolivas v. Commission* [1987] ECR 2643; par. 11.



## CONCLUSION

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

## ARGENTINEAN DENTISTRY DIPLOMAS

*Decision on joined complaints 531/97/PD and 535/97/PD against the European Commission*

### THE COMPLAINTS

In April and June 1997, Mrs S. and Mr P. made a complaint to the Ombudsman concerning a statement made by the Commission about Argentinean dentistry diplomas. In substance, they put forward that the Commission wrongly discredited Argentinean dentists.

The background to the complaints was the following:

Spain, which became a member of the European Community in 1986, has for many years had Latin-American dentists working on its territory. These dentists have been allowed to work on the basis of international agreements between Spain and a number of Latin-American countries. In the late nineteen eighties, the European Commission concluded that some Latin-American diplomas in dentistry did not comply with the minimum requirements for dentistry diplomas, laid down by Directives 78/686/EEC and 78/687/EEC on harmonisation and mutual recognition of dentistry diplomas (OJ 1978 L 233/1 and OJ 1978 L 233/10). In 1990, the Commission therefore started to conduct investigations with a view to initiating infringement proceedings against Spain under Article 169 EC Treaty. Spain initially defended its case, referring to Article 1(4) of Directive 78/687 which provides that Member States are free to make their own arrangements for the recognition of third country diplomas. Spain later changed its legal rules to the satisfaction of the Commission which in 1997, decided not to initiate court proceedings.

In its annual reports on the monitoring on the application of Community law, the Commission gave amongst others the following information on the state of the on-going investigations against the Spanish authorities (see for instance the 14th annual report (1996), published in OJ 1997 C 332/1):

*“a case against Spain for admitting dentists with qualifications obtained in Latin America at a level far below the Directive's requirements.”*

It was this statement which gave rise to the complaints to the Ombudsman. The complainants considered that the statement wrongly discredited the holders of Argentinean diplomas in dentistry. In the complaints, it was in substance put forward

- that the Commission's interpretation of the applicable law was wrong and therefore wrongly led it to initiate the investigations against Spain, and



- that the statement in question was based on poor knowledge of Latin-American diplomas in dentistry and thus tainted by inadequate examination of the issues assessed.

In support of the first allegation, the complainants referred to the above mentioned Article 1 (4) of Directive 78/687, according to which Member States remain free to recognise diplomas from third countries.

In support of the second allegation, the complainants stated, amongst others, that the Commission had apparently not contacted the relevant sources for adequate information, for instance Latin-American education establishments. Furthermore, they submitted material that showed that Argentinean educations in dentistry had served as inspiration for the Spanish education in dentistry.

## **THE INQUIRY**

### **The Commission's opinion**

The complaints were forwarded to the Commission. The Commission's opinion stated, in substance, the following:

As for its view that third country diplomas recognised by individual Member States must comply with the minimum requirements laid down in the Dentistry Directives, the Commission stated that the aim of the Directives required such an interpretation. The public health and freedom of movement could be harmed if individual Member States were allowed to create categories of dentists who do not comply with the minimum requirements in the Community directives. The recognition of Latin-American dentists, who did not comply with the requirements of the Directives, had as a consequence that the free movement of European dentists was impaired.

As for the statement referred to in its annual reports, the Commission observed that the statement did not constitute a precise "technical" evaluation in itself. Such a statement was only intended to succinctly convey information of a factual nature. As for the substantive evaluation behind the statement, the Commission stated that this had been conducted with adequate regard to normal practice and due diligence.

### **The complainants' observations**

In their observations the complainants maintained the complaint.

## **FURTHER INQUIRIES**

After careful consideration of the Commission's opinion and the observations lodged, the Ombudsman decided to inspect the file underlying the Commission's statement. By letter of 2 July 1998, he requested the Commission to make the necessary arrangements for the inspection. The purpose of the inspection was to verify that the Commission had properly examined the file which constituted the basis for the statement. On 11 and 12 January 1999, two senior legal officers from the Ombudsman's Office carried out the inspection. During and after the examination of the file, the six Commission officials who represented respectively Directorate General

XV, the Legal Service and the General Secretariat also replied to questions put to them by the Ombudsman's officers.

## **THE DECISION**

### **1 The allegations**

The complainants made two allegations. First, they disputed the Commission's legal interpretation, in essence claiming that Community law does not prevent Member States from recognising third country diplomas which fall below the minimum standards of Directive 78/687. Secondly, they claimed that the Commission's statement about an examination of Latin-American dentistry diplomas was unwarranted.

### **2 The Commission's interpretation of the applicable law**

- 2.1 The Commission considered that the Directives in question do not allow Member States to recognise third country diplomas which fall below the minimum standards set out for Community dentistry diplomas. The complainants contended this view, referring to Article 1(4) of Directive 78/687, which states that:

*“Nothing in this Directive shall prejudice any facility which may be granted in accordance with their own rules by Member States in respect of their own territory to authorise holder of diplomas, ... which have not been obtained in a Member State to take up and pursue the activities of a dental practitioner.”*

- 2.2 It has to be conceded that read literally, this provision seems to confer absolute freedom to the Member States as concerns recognition of third country diplomas. However, the Commission considered that the provision must be read in its context and in the light of the aims of the Directive, aims which comprise public health and the free movement of persons. It considered inter alia that dentists from other Member States wanting to enter Spain would be in a less favourable position compared to persons with dentistry diplomas which have required less time and effort to obtain.
- 2.3 Against this background, the Ombudsman found that the Commission's interpretation appeared reasoned and well-founded. However, it has to be recalled that the Court of Justice is the highest authority on the interpretation of Community law.

### **3 The Commission's case-examination**

- 3.1 The complainants alleged in substance that the Commission's statement about Latin-American diplomas in dentistry was due to faulty examination of the facts and issues underlying the statement. In support of this allegation, they stated that the Commission had failed to make contact with education establishments in Latin-America which teach dentistry.

- 3.2 Principles of good administration require that the Commission carefully and diligently examines all the relevant aspects of the individual case in question.
- 3.3 In examining whether the Commission had complied with this requirement in this case, it shall firstly be observed that the statement in question did not as such refer to all Latin-American dentists. The statement merely informed that there were dentists working in Spain, whose Latin-American dentistry diplomas did not comply with the minimum requirement for Community diplomas. From the evidence available to the Ombudsman, it appeared also that Spain - who initially disputed the infringement proceedings - did not challenge the Commission conclusion that such dentists had in fact been authorised to practice on Spanish territory. Spain's objections were aimed at the Commission's legal interpretation of the Directives in question, an issue dealt with above.
- 3.4 Secondly, it shall be observed that the inspection of the Commission's file showed that the Commission was in possession of a large number of copies of diplomas, delivered in various Latin-American countries, which did not conform with the requirements of the Directives.
- 3.5 Against this background, the Ombudsman found that the Commission had not failed to comply with the requirement to carefully and diligently examine the case.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

## **HANDLING OF A COMPLAINT UNDER ARTICLE 86 OF THE EC TREATY**

*Decision on complaint 536/97/NK against the European Commission*

### **THE COMPLAINT**

In November 1996 and April 1997, Mr C. made a complaint to the Ombudsman against the European Commission, alleging that the Commission had not dealt properly with the complaint he made to it. The background to the complaint was in summary the following:

The complainant lived in Spain where the British Broadcasting Corporation (BBC) operates the English speaking pay-television channel World Service Television (WSTV). The channel is broadcast via satellite to viewers throughout Europe. In order to be able to watch this channel, viewers had to acquire a decoder and to take out a subscription. Due to a change in the transmission norm and in the encryption system, viewers needed to buy new decoders. The complainant considered that this constituted an abuse of dominant position, contrary to Article 86 of the EC Treaty.

In November 1992, the complainant therefore made a formal complaint under Article 3 of Regulation 17/62 to the Commission concerning this abuse of dominant position.

On 28 April 1994, DG IV sent the complainant a “provisional conclusion that his complaint was unjustified”. The complainant replied correcting errors of fact and asking for the case to be re-examined.

On 4 October 1994, the Commission sent a revised version of its letter in which it stated that the case was still not justified. The complainant again rejected this finding. He sent new evidence to DG IV.

In December 1995, the Commission wrote to the complainant that it was reconsidering the issue and that the investigations were continuing.

In April 1996, the Commission wrote to the complainant stating that it had requested information from the BBC and that it would contact the complainant in due time.

The complainant then tried to meet with Commission officials responsible for his complaint. The Commission replied that its officials could not meet with the complainant at the proposed time.

Against this background, the complainant lodged the complaint with the Ombudsman. He alleged that his case was being handled in a dilatory and discourteous way by the Commission. He also alleged avoidable delay and incompetence.

## **THE INQUIRY**

### **The Commission’s opinion**

The complaint was forwarded to the Commission. As regards the alleged incompetent and dilatory procedure, the Commission stated that DG IV had duly investigated this complaint. In accordance with Article 11 of Regulation 17/62, requests for information were addressed to the BBC on 25 November 1992, 27 January 1993, 11 December 1995 and 16 April 1996. Given the information supplied by the BBC in response to these requests, the Commission did not consider it appropriate to adopt a decision to allow an on-site investigation of the BBC’s offices in this case.

The Commission stated that DG IV wrote to the complainant on 14 May 1993 informing him that it did not believe that his complaint was founded. A pre-Article 6 letter was sent to the complainant on 28 April 1994. In that letter, the Commission concluded that WSTV/BBC did not hold a dominant position, and that even if they did, no abuse contrary to Article 86 EC had been committed.

Thereafter, an Article 6 letter was sent to the complainant on 4 October 1994. The Commission stated that the complainant contested the Article 6 letter sent to him. Therefore, a formal decision was being prepared which was to be adopted by the Commission and sent to the complainant before the end of the year 1997.

### **The complainant's observations**

In his observations, the complainant maintained his complaint.

### ***FURTHER INQUIRIES***

After due consideration of the Commission's opinion and the complainant's observations, the Ombudsman again wrote to the Commission. In view of the fact that the Commission had stated that it would send a formal decision to the complainant by the end of the year, the Ombudsman inquired whether such a formal decision had been adopted and sent.

In its reply of 27 November 1998, the Commission stated that a draft decision rejecting the complaint had been finalised. It further stated that the decision was expected to be adopted in the coming weeks. It would then be communicated to the complainant. Furthermore, the Commission expressed its regret that the procedure had taken longer than anticipated.

The Ombudsman's services then contacted the Commission by telephone to inquire whether this decision had actually been sent the complainant. The Commission informed the Ombudsman's services that a formal decision had been sent to the complainant on 30 October 1998. The Ombudsman received a copy of the decision letter.

### ***THE DECISION***

#### **Alleged incompetent and dilatory handling of the complaint:**

- 1 The complainant lodged a complaint with the Commission alleging an abuse of dominant position by the BBC in relation to its pay-television channel WSTV in Spain, contrary to Article 86 EC. The complaint was registered. The Commission then informed the complainant that his complaint was not founded. The complainant contested this conclusion. The facts of the case remained disputed. The complainant stated that he wished to receive a formal decision from the Commission on the subject. The complainant alleged that his case was handled in a dilatory and incompetent way by the Commission.
- 2 The procedural framework within which the Commission assesses these complaints is determined mainly by the Council Regulation 17/62 and Commission Regulation 99/63.
- 3 The Commission is required to examine thoroughly all complaints lodged. Article 6 of Regulation 99/63 provides that if the Commission considers that there are insufficient grounds for granting the application, it shall inform the applicant of its reasons and fix a time for the applicant to submit any further comments in writing.
- 4 The Commission requested detailed information from the BBC. It then sent a so-called pre Article 6 - letter to the complainant on 28 April 1994 informing him that it had concluded that WSTV/BBC did not hold a dominant position, and even if they did, no abuse contrary to Article 86 EC had been committed.

- 5 The Commission then sent an Article 6 - letter to the complainant which the complainant contested. The Commission thereafter had to produce a formal decision on the matter. The formal decision was adopted and sent to the complainant. The complainant may challenge this decision before the Community Courts, if he wishes.
- 6 It appeared therefore that the Commission had acted in accordance with the applicable rules. The Commission also apologised for the length of the procedure and adopted a decision which took a final position on the complainant's grievances under Article 86 EC. Therefore, there appeared to be no reason to continue the inquiry into the claim that the Commission was dilatory.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

### **DISCLOSURE OF ASSESSMENT REPORT**

*Decision on joined complaints 620/97/PD and 306/98/PD against the European Commission*

### **THE COMPLAINTS**

In June 1997, Mr C. MEP submitted a complaint to the European Ombudsman, on behalf of the Swedish newspaper "Västerbottens-Kuriren". The complaint concerned the European Commission's refusal to disclose an assessment report produced by a consultancy firm for the Commission in the context of a state aid investigation against Sweden.

In March 1998, the Ombudsman received a complaint which concerned access to the same report, complaint 306/98/PD by two other MEPs, Messrs S. and W. To deal with the complaints as efficiently as possible, the Ombudsman decided to treat them jointly.

The background to the complaints was in brief the following: The report to which the complainants wanted access was drawn up by a consultancy firm, Price Waterhouse, at the Commission's request. The report concerned a Volvo factory in the north of Sweden and the Commission used it in its investigations to establish whether it was compatible with the Common Market that Sweden gave State aid to the factory.

In refusing access, the Commission provided the following grounds:

- Firstly, business information provided to the Commission for the purpose of producing the report had been explicitly labelled "secret" by the Swedish authorities.
- Secondly, the report was part of an investigation conducted by the Commission. Releasing the report could be damaging to that investigation since the report would be placed out of its context.

The complainants considered that these grounds did not warrant a refusal to give access. In particular, they indicated and provided evidence that, at the moment of the refusal, the Swedish authorities and the Volvo factory did not any longer request confidentiality in respect of information provided for the report.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the report contained business secrets and therefore could not be disclosed on the ground of protecting commercial and industrial secrecy; ground upon which the Commission may refuse access under its Decision 94/90 on public access to its documents.

The Commission also considered that the secrecy requests by the Swedish Government and the Volvo company obliged it not to disclose the report.

Finally, the Commission put forward that disclosure would be prejudicial to the Commission's investigation and the rights of defence.

#### **The complainants' observations**

The complaints were maintained. The complainants added that the Commission could have decided to disclose a copy of the report without the commercially sensitive data, thus allowing partial disclosure.

### **FURTHER INQUIRIES**

After careful consideration of the opinion and the observations, the Ombudsman decided that the report should be inspected. The purpose of the inspection was to help ascertaining whether the Commission's refusal to give access had been made in accordance with principles of good administration, including the rules laid down by Decision 94/90. The inspection revealed that the report, apart from one page which contained the consultant's evaluations of the aids scheme, only contained factual elements submitted by the Swedish authorities and the Volvo factory.

#### **The Ombudsman's efforts to achieve a friendly solution**

The Ombudsman considered that the Commission's refusal to release the report constituted a *prima facie* instance of maladministration. He therefore asked the Commission to review its position with a view to a friendly solution, observing *inter alia* that the procedure for which the report had been produced was now closed and that the requests for confidentiality had been withdrawn.

In its reply, the Commission agreed to disclose the factual information contained in the report. The Commission could not, however, agree to disclose the evaluation part of the report because confidentiality was needed to enable it to conduct its investigation tasks properly. The fact that the investigation in question had been concluded, and the relevant decision taken, was in the Commission's opinion not a determining factor.



In their replies to the Ombudsman, the complainants expressed satisfaction over the fact that the factual part of the report had been disclosed. However, they maintained that the Commission should also give access to the evaluation part of the report.

### THE DECISION

#### Partial disclosure of the report

The complainants had requested access to the consultancy report in question. The inquiries showed that the request was justified as concerns most of the report. The Ombudsman therefore made a proposal for a friendly solution. The Commission accepted this and released most of the report, maintaining the confidentiality of the one page evaluation part of the report. Under Community law as it presently stands, the Commission appears to be entitled to refuse access to the evaluation part of the report<sup>21</sup>. Therefore, the Commission does not appear to have failed to comply with any rule or principle binding upon it. It should be recalled, however, that the Court of Justice is the highest authority on interpretation of Community law.

### CONCLUSION

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

## DELAY IN PROCESSING COMPLAINT ON STATE AID

*Decision on complaint 632/97/PD against the European Commission*

### THE COMPLAINT

In July 1997, Mr M. made a complaint to the Ombudsman on behalf of two Dutch agricultural organisations and three individual persons. The complaint concerned the Commission's handling of a complaint lodged with it in 1994 about a Dutch body governed by public law, the Landbouwschap. By letter of 11 October 1994, the Commission informed the complainant that the complaint had been registered as a complaint against the Netherlands under number 94/4890/SG (94)A/18715. The complaint was attributed to DG VI for examination in the light of the Treaty provisions concerning State aid.

As the Commission did not provide the complainant with any information on the processing of the complaint, the complainant lodged the complaint with the European Ombudsman. In his complaint, the complainant put forward that he appreciated that the Commission operates under great pressure of work, but that he considered it unacceptable that the Commission failed to give him any substantive communication concerning his complaint over a period of three years.

<sup>21</sup> See judgment of 5 March 1997 in case T-105/95, *WWF v Commission*, [1997] ECR II-313 and the order of the President of the Court of First Instance of 3 March 1998 in case T-610/97 R, *Carlsen and others v. Council*, [1998] ECR II-485.



## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion the Commission stated the following:

The complaint concerned all the activities of the Landbouwschap, a horizontal agricultural organisation in the Netherlands. The examination of the complaint required detailed assessment of the different aid-schemes of the Landbouwschap and the parafiscal taxes which finance them. There are more or less 80 schemes financed by roughly the same number of parafiscal taxes. The work involved by this examination was quite considerable. In comparison it should be mentioned that the total number of state aid cases dealt with by the unit responsible of DG VI in the Commission in 1995 was 276 and in 1996 336.

The files are classified into two categories : a) Notified aids and b) non notified aids. The examination of notified aids is a priority as the Court of Justice has imposed a time limit of two months for the preliminary examination, cf. judgement of 11 December 1973 in case C-10/73, *Lorenz*, [1973] ECR 1471.

The complaint in question concerned non notified aid. This explained the long time taken for the examination, taking into account the Commission's need to prioritise because of limited staff resources and the existing workload. This implies that the examination of non notified aid can only be dealt with within the limits of the technical possibilities of the service concerned.

However since the lodging of the complaint the Commission had examined ten aid schemes which in the meantime had indeed been notified by the Dutch authorities and which were covered by the complaint. In these cases the Commission had not found any violation of the Treaty.

By letter of 5 December 1997, of which the Ombudsman received a copy, the Commission informed the complainant about the name and telephone number of the official in charge of the file so that the complainant could make contact if he so wished. The Commission also stated in its letter that it would be useful if the complainant indicated in more detail which schemes of the Landbouwschap he considered to violate Community law.

### The complainant's observations

In his observations the complainant stated that the Commission's opinion was unsatisfactory as it did not bring any news on the examination of his complaint.

## FURTHER INQUIRIES

After careful consideration of the Commission's opinion and of the complainant's observations the Ombudsman addressed the Commission again. In his letter, the Ombudsman stated that the Commission had repeatedly recognised that complaints from individuals remain the most important source on which the Commission bases its task of monitoring the application of Community law. As concerns complaints related to Article 169 of the

EC Treaty, the Commission had recognised that complaints should normally be dealt with within one year from registration. The respect of this commitment seemed of particular importance in case of State aids, as the Commission is the sole instance competent to assess compatibility with the EC Treaty. Against this background, the Ombudsman asked to know which measures the Commission envisaged taking in order to reply to the complainant's original complaint.

### **The Commission's second opinion**

In its second opinion, the Commission stated that the time limit of one year for processing complaints concerning Article 169 could not generally apply to complaints related to State aid. However, the Commission apologised for the lack of communication with the complainant which had occurred in the processing of the complaint and it stated that it would soon again communicate to the complainant the state of the file. This was done by a letter of 23 September 1998 of which the Ombudsman received a copy. In the letter, the Commission communicated the name and telephone number of the new official in charge of the file. Furthermore, it reiterated that it would be helpful if the complainant could indicate in more detail which schemes of the Landbouwschap he considered to violate Community law. The Commission would then give priority to the examination of these schemes.

### **The complainant's further observations**

No observations were received on the Commission's second opinion.

## **THE DECISION**

### **The delay in processing the complainant's original complaint**

- 1 Principles of good administration require the Commission to deal diligently and within reasonable time with submissions from the citizens. The high standards that citizens are entitled to expect from the Community administration do not permit that cases linger on for years and that the citizens concerned are left in the dark as concerns the dealings with their submission. Thus, the Commission has also an obligation to keep the citizens informed.

As concerns for instance complaints relating to Article 169 of the EC Treaty, the Commission acknowledged that the said principles imply that the complaint shall be processed within a maximum period of one year, unless there are special reasons.

- 2 In the field in question in this case, that is State aids, it shall be observed that the Commission has exclusive jurisdiction to assess the compatibility of State aid with the Treaty. Thus, if citizens consider a State aid to be incompatible with the Treaty, they have nobody else to turn to for an assessment than the Commission. In the interest of good administration and the fundamental rules of the Treaty relating to State aid, the Commission must therefore conduct a diligent examination of complaints alleging aid to be incompatible with the Treaty, within reasonable time.

- 3 As concerns notified State aid, the Court of Justice has held that the Commission shall conduct its preliminary investigation of the aid within two months.
- 4 As concerns non notified State aid, there appears to be no imperative reasons why the time limit for examining complaints concerning such aid should in principle be different from the time limit of one year that applies to complaints related to Member States' breach of their obligations under Community law, Art 169 complaints. Thus, the maximum time limit for processing complaints concerning non notified Stated aid must be one year, unless there are special reasons.
- 5 In this case, three years had passed since the lodging of the original complaint with the Commission, without the complainant receiving any communication concerning the processing of his complaint. This is not in accordance with principles of good administration.
- 6 However, it also appeared from the Commission's second opinion that the Commission had apologised for this, that it had established communication with the complainant and taken steps to ensure the proper processing of the file. Against this background, the Ombudsman found that there were no reasons for inquiring further into the complaint.

## CONCLUSION

On the basis of the Ombudsman's inquiries into this complaint, there appeared to be no maladministration by the European Commission. The Ombudsman therefore closed the case.

## ANTI-COMPETITIVE SUBVENTION OF THE PIG PRODUCTION

*Decision on complaint 1007/97/JH against the European Commission*

### THE COMPLAINT

The complainant claimed that the Commission deliberately allowed a situation to develop which is anti-competitive and distorts market forces. According to the complaint, the Commission did this by allowing the United Kingdom to withdraw from an agricultural investment subsidy scheme, with the result that pig production is now subsidised in other Member States but not in the UK.

### THE INQUIRY

#### The Commission's opinion

The complaint was forwarded to the Commission. The Commission stated that the complaint had not been preceded by any administrative approaches to it. Nonetheless, it provided the following information:

Regulation 866/90<sup>22</sup> concerns the improving of the processing and marketing conditions for agricultural products. It permits Member States to pro-

<sup>22</sup> 1990 OJ L 91/1.

pose schemes to improve the structures of various product sectors and to request Community co-financing up to 50%.

By Decision 94/836/EC<sup>23</sup> the Commission approved a Single Programming Document for Community structural measures for improving the processing and marketing conditions for agricultural products in the United Kingdom between 1994 and 1999.

On 15 December 1995, the UK authorities presented a request to withdraw the scheme in England after 31 March 1996. According to the UK authorities, this request was based on the need to contain UK public expenditure and to fund other priorities.

Before carrying out the procedures to accept this request, the Commission Services asked the UK authorities to provide full clarification on the matter.

In February 1996, the United Kingdom presented to the Commission an updated Single Programming Document. As the Commission considered that the revised Document continues to meet the requirements for Community co-financing set out in Regulation 866/90, the British request to withdraw the scheme in England was then allowed by Commission Decision 96/388/EC.

### **The complainant's observations**

In observations on the question of prior administrative approaches, the complainant stated that Robin TEVERSON MEP had repeatedly sought clarification from the Commission on the issue of subsidies for pig production.

As regards the substantive issue, the complainant pointed out that the Commission appeared only to have considered whether the UK's revised Single Programming Document met the requirements for Community co-financing. In his view, the Commission should also have been concerned that, through the adoption of Decision 96/388 approving the UK's proposal, it was setting up a market distortion.

### **FURTHER INQUIRIES**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that two matters were in dispute between the parties:

- (i) whether the complaint was preceded by the appropriate administrative approaches, as required by Article 2 (4) of the Statute of the Ombudsman;
- (ii) whether Decision 96/388 took possible effects on competition into account.

As regards (i), the Ombudsman informed the Commission that he would continue to deal with the complaint for reasons which are explained in part 1 of the decision below.

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<sup>23</sup> 1994 OJ L 352/12.

As regards (ii), the Ombudsman asked the Commission to inform him of whether it considered possible effects on competition in the procedure leading to the adoption of Decision 96/388 and, if so what steps it took to ensure that it was adequately informed on the matter.

The Commission answered that the procedure leading up to the adoption of Decision 96/388/EC permitted it to take into account the potential effects of the measure, including those on competition and the market. The division dealing with competition in agriculture and the market division for pig-meat were consulted and, furthermore, the decision was in accordance with the opinion of the Committee on Agricultural Structures and Rural Development (the STAR Committee).

After considering the Commission's answer, the Ombudsman asked the Commission to provide detailed evidence as to how competition issues were taken into account in the procedure leading to the adoption of Decision 96/388/EC.

In reply, the Commission forwarded to the Ombudsman a detailed account of the various stages in the procedure leading to the adoption of Decision 96/388/EC together with copies of the documents concerned.

The complainant responded by stating, in summary, that the documents showed that the Commission took proper advice, but that the advice was erroneous insofar as the effects of the action taken could not have been known and the effect on the British pig industry was immense.

## **THE DECISION**

### **1 Prior administrative approaches**

- 1.1 According to Article 2 (4) of the Statute of the Ombudsman, a complaint "must be preceded by the appropriate administrative approaches to the institutions and bodies concerned." By giving the institution or body concerned the opportunity to resolve problems that could give rise to a complaint, Article 2 (4) is an important safeguard for efficiency.
- 1.2 In the standard form on which the complaint was submitted, the complainant referred to discussions with Commission officials. In its opinion, however, the Commission stated that the complainant had not previously addressed himself to the Commission. The complainant's observations referred to previous contacts with the Commission by the complainant's MEP, Mr Robin TEVERSON.
- 1.3 The Ombudsman informed the Commission that he would continue to deal with the complaint, since further administrative approaches were not an appropriate way to deal with the substantive questions which remained unresolved following the Commission's opinion and the complainant's observations.

### **2 The adoption of Decision 96/388/EC**

- 2.1 The complainant claimed that the Commission deliberately allowed a situation to develop which is anti-competitive and distorts market

forces, in that pig production is subsidised in other Member States but not in the UK.

- 2.2 The Ombudsman's inquiry revealed that in 1994 the Commission approved an agricultural investment subsidy scheme for the UK,<sup>24</sup> jointly funded by the UK authorities and the Community under Regulation 866/90.<sup>25</sup> In 1996, by Decision 96/388<sup>26</sup>, the Commission approved a request from the UK authorities to withdraw the scheme in England. The UK authorities based the request on the need to contain public expenditure and to fund other priorities in England.
- 2.3 The Ombudsman's inquiry also revealed the details of the Commission's procedures leading to the adoption of Decision 96/388 : the relevant division of DG VI prepared a working document and draft decision, on which there was consultation with other divisions of DG VI, including those responsible for competition and for the pigmeat sector and with other Directorates General and the Legal Service. The matter was then dealt with through an oral procedure at the Commission's weekly meeting and authorised to be adopted under delegated powers, after transmission to the Committee on Agricultural Structures and Rural Development (STAR Committee), which gave a unanimous favourable opinion.
- 2.4 The Commission forwarded to the Ombudsman the documents considered in the above-mentioned procedures including: the working document and draft decision; all the notes of agreement from the Commission services consulted; the documents prepared for the oral procedure of the Commission; and the minutes of the relevant meeting of the STAR Committee.
- 2.5 The complainant accepted that the above-mentioned documents showed that the Commission took proper advice, but considered that the advice was erroneous insofar as the effects of the action taken could not have been known and the effect on the British pig industry was immense.
- 2.6 Even if the complainant's assessment of the consequences of the withdrawal of processing and marketing grants in England is correct, the Ombudsman's inquiry revealed no evidence that the Commission's adoption of Decision 96/388/EC breached any rule or principle binding upon it. Consequently, there appears to be no evidence of any maladministration in the adoption of Decision 96/388/EC.

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<sup>24</sup> Approval was given by Commission Decision 94/836/EC (1994 OJ L 352/12) approving a Single Programming Document for improving the processing and marketing conditions for agricultural products in the United Kingdom between 1994 and 1999.

<sup>25</sup> Council Regulation 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products, 1990 OJ L 91/1.

<sup>26</sup> Commission Decision 96/388/EC of 17 June 1996, 1996 OJ L 155/58.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

## **FURTHER REMARK BY THE EUROPEAN OMBUDSMAN**

The Ombudsman notes the complainant's continued concern that the withdrawal of investment subsidies, at the request of the UK government, has caused the pig industry in England to become uncompetitive, as compared to the pig industry in other Member States where subsidies continue to be available. The Ombudsman also notes that the complainant has the right to petition the European Parliament on any matter which comes within the Community's fields of activity and which concerns him directly.

## **REGIONAL DIFFERENCES IN ABILITY TO MEET A TENDER CRITERION**

*Decision on complaint 1037/97/VK against the European Commission*

### **THE COMPLAINT**

In November 1997, Mrs P. made a complaint to the Ombudsman alleging that the Commission wrongly refused the bid she submitted in a tender procedure for the award of translation contracts.

The complainant, a professional translator, applied for a translation contract under the Commission's programme of calls for tender. Her application was refused on the grounds of non compliance with point 13f of the admissibility criteria<sup>27</sup>. Point 13f required applicants to provide evidence of having translated at least 1500 pages into the target language during a specified 3-year period.

The complainant put forward that this requirement could not be met by translators from the Eastern Länder in Germany as they had less opportunity to reach such a high number of translated pages. According to the complainant, the export oriented regional market did not have a high demand for translations from French into German.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In summary, the Commission's opinion was as follows:

The Translation Service of the Commission published a call for tenders for translation services into German in order to conclude a new set of frame-

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<sup>27</sup> Restricted tender of the European Commission, External Translation Unit, (97/S 62 - 36298/FR).

work contracts and to continue to meet its needs for external translation services without interruption.

In order to select the applicants, the awarding authority had to establish the technical and economic competence of those who responded to the call for tenders. The selection criteria set out in point 13 of the notice constituted a set of requirements which reasonably could be met by an established, full-time professional translator. Applicants had to meet all the requirements under point 13 of the tender notice in order to be considered for selection.

Any applicant failing to supply full and satisfactory information under any of the sub-points of section 13 was rejected.

The External Translation Unit keeps details of all applicants on file, and encourages them to update their files with any new information which may be relevant. In this way they may be informed of any future calls for tenders which the Commission may publish for the provision of translation services into its official languages.

### **The complainant's observations**

In her observations, the complainant maintained her complaint.

### **THE DECISION**

- 1 Point 13f of the selection criteria required applicants to provide evidence of at least 1500 pages translated into German during a specified 3-year period.
- 2 It is for the Commission to select the technical criteria for the award of contracts. The Commission explained its reasoning for adoption of the criterion in question. The Ombudsman's inquiry revealed no evidence to suggest that the criterion was not objectively justifiable.
- 3 The complainant claimed that the Commission should not have used the criterion because of differences in the ability of contractors from different regions to meet to criterion.
- 4 The Ombudsman is not aware of any legal rule or principle which would prevent the Commission from using an objectively justifiable criterion in a call for tender because of differences in the ability of contractors from different regions to meet the criterion.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore closed the case.



**DECISION TO CLOSE THE FILE ON AN ARTICLE 169  
(NEW ARTICLE 226) COMPLAINT**

*Decision on complaint 1060/97/OV against the European Commission*

**THE COMPLAINT**

In November 1997, Mrs V., President of Medasset (“Mediterranean Association to Save the Sea Turtles”) made a complaint to the Ombudsman concerning the way the Commission dealt with her complaint of 15 June 1994 alleging violation by the Greek government, on the island of Zakynthos, of Council Directive 92/43/EEC and of national and international law on the preservation of sea turtles.

On 15 June 1994 Medasset lodged a complaint to the Commission about violation by the Greek government, in the Laganas Bay of the Ionian island of Zakynthos, of Directive 92/43<sup>28</sup> with regard to the preservation of sea turtles (*Caretta caretta*). The complainant particularly alleged that the Greek government failed to transpose Directive 92/43 into Greek national law before the two years deadline stipulated in the Directive. In its complaint, Medasset equally drew the Commission’s attention to various violations by the Greek government of national and international law, more particularly the Convention on the Conservation of European Wildlife and Natural Habitats (the “Bern” Convention, Council of Europe). The complainant renewed its complaint each year since 1994 and kept DG XI (Environment) of the Commission regularly informed about the situation in Zakynthos by sending photographic evidence and special follow-up reports on the situation of the sea turtles in Zakynthos which Medasset had presented to the Environment Secretariat General of the Council of Europe<sup>29</sup>.

On 26 April 1996, Medasset received a letter from the Commission according to which the Commission was satisfied with the efforts made by the government to protect the *Caretta caretta* in Zakynthos, given that significant steps for the substantial protection of the sea turtles in the Laganas Bay had been taken. Therefore the handling of the complaint had been suspended. By letter of 11 March 1997 the complainant was finally informed by the Head of the Legal Affairs Unit of DG XI - B, that the file on the case had been closed.

The complainant therefore wrote to the Ombudsman in November 1997 alleging that the decision of the Commission not to take legal action against the Greek government in this case was unjustified and arbitrary. Secondly, the complainant alleged that the period between the registration of the complaint and the letter by which the Commission informed the complainant that it would not start proceedings against the Greek government was too long (more than two and a half years). Finally, in June 1997

<sup>28</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7.

<sup>29</sup> Different follow-up reports presented by Medasset to the 14th, 15th, 16th and 17th meetings of the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), concerning marine turtle conservation in Zakynthos (Laganas Bay), Greece.

Medasset put forward different questions on the matter to Commissioner Bjerregaard, responsible for environment, but never received a reply. The complainant enclosed extensive documentation on the subject, including the different follow-up reports presented to the Council of Europe.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission in December 1997. In its comments, the Commission first pointed out that it had acted in accordance with the undertakings it had made in the framework of the Ombudsman's own initiative inquiry (ref. 303/97/PD, Commission's reply dated 24 July 1997), even if the matter of the complaint predated those undertakings. The Commission particularly stated that it gave reasons to the complainant why the file on the complaint had been closed. The Commission described the handling of the complaint as follows:

The Commission registered the complaint letter of 15 June 1994 as a formal complaint (ref. P 94/4667). The complaint alleged failure of the Greek government to comply with Directive 92/43/EEC and the Bern Convention<sup>30</sup> with regard to the conservation of sea turtles in the Laganas Bay in Zakynthos. Since the registration of the complaint the Commission had actively followed the case through official correspondence, package meetings and within the framework of the Bern Convention.

After having gathered the relevant information, including from the Council of Europe, the Commission wrote on 3 August 1994 to the Greek authorities drawing their attention to the allegations of the complainant. Although it contained positive elements indicating concrete turtle protection measures being taken, the response of the Greek authorities dated 23 November 1994 did not satisfy the Commission. On 21 June 1995 Commissioner Bjerregaard therefore sent a letter to the Greek Minister for Environment with a request for immediate measures to be taken. In the summer of 1995, the Minister officially announced a series of concrete measures. After a new letter of the Commission dated 20 December 1995, the Greek authorities replied on 27 February 1996 by informing the Commission of measures which had already been implemented (amongst which the closing of illegal establishments) and announcing additional measures for the future (amongst them the creation of a marine park).

On 18 April 1996 the Commission informed the complainant about the content of the letter by the Greek authorities and asked for comments on it. The complainant was not satisfied with the measures which it considered insufficient. Another organisation which had also complained made overall positive comments on the development of the situation. The positive developments referred to by the Greek authorities were also confirmed by the results of a programme which dealt with the protection of *Caretta caretta* and which was financed by the Commission.

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<sup>30</sup> Convention on the conservation of European wildlife and natural habitats, done at Bern on 19 September 1979, OJ 1982 L 38/1.

After this reply and further discussions during a package meeting held in Athens, the Commission decided to close the file for lack of evidence of breach of Community law, but continued to pursue the matter through bilateral contacts with the Greek authorities in order to ensure the concrete implementation of the measures announced, in particular the creation of the marine park.

By letter dated 11 March 1997, the complainant was informed about the decision to close the file, as well as of the reasons which led to that decision. The Commission considered that it gave the complainant all the reasons which were relevant for its decision, i.e. those related to the nature of the legal requirements and to the nature of the information available to it. At the same time the Commission further pursued the case with the Greek authorities by letter of 14 March 1997 requesting additional information on the implementation of protection measures and on the progress in the creation of the National Marine Park in the Laganas Bay.

On 21 July 1997, the Greek authorities communicated a Ministerial Decision to the Commission approving a specific environmental study for Laganas Bay and a draft Presidential Decree creating the National Marine Park of Zakynthos. Further information on the progress of adopting the Presidential Decree was forwarded to the Commission on 22 September 1997. The Commission services studied the information provided by the Greek authorities and considered that the Presidential Decree positively addressed the eco-system of the area as a whole.

The complainant who was informed about these developments by the letter of 26 November 1997, was invited to provide the Commission with any relevant element showing a breach of Community environmental law, in which case the Commission would launch the Article 169 infringement procedure.

Against this background the Commission rejected the three allegations by the complainant. Firstly, as regards the allegation that the decision not to take legal action against the Greek authorities was unjustified and arbitrary, the Commission stated that it was diligent in dealing with the issue of turtle conservation and that it kept the file open until it was satisfied that substantial conservation measures were taken and that therefore there was no breach of Community law. With regard to the second allegation, the Commission considered that during the two and a half year period between the complaint registration and the decision not to start infringement proceedings, it had actively pursued the matter which was a complex and difficult nature conservation dossier, where precipitate action is inappropriate. Thirdly, as regards the alleged failure to reply by Commissioner Bjerregaard, the Commission pointed out that the Commissioner delegated this responsibility to her services which kept the complainant very well informed of the developments, in particular in the letter of 26 November 1997 informing of the latest evolutions since the meeting with the Commissioner in June 1997.

### **The complainant's observations**

In January 1998, further to the Commission's letter of 26 November 1997 asking the complainant to provide the Commission with new information

disclosing an possible breach of Community law, the complainant sent the Commission a copy of its report for the meeting of the Standing Committee of the Bern Convention (Council of Europe, December 1997). The complainant observed that the situation of the sea turtles in Zakynthos had not changed in three years, because the illegal constructions were still there and illegal taverns operated, and that the National Marine Park only existed on paper. The Presidential Decree had still not been adopted. The complainant annexed to its comments a copy of a report by the Sea Turtle Protection Society of Greece which was very much in line with its own report. The complainant further stated that DG XI's actions were solely based on the Greek government's announcements and completely ignored the actual facts in Zakynthos and the position of the Bern Convention Standing Committee. Concluding that it was clear that the Greek government was in breach of Directive 92/43 and of the Bern Convention, the complainant asked to keep the file open.

The complainant sent other information to the Commission on 29 June, 10 and 14 July 1998, drawing the Commission's attention to the complete lack of progress in the situation in Zakynthos and to the expiry of the 25 March 1998 deadline for the establishment of the National Marine Park as agreed between the Greek government, the Bern Convention Standing Committee and the EU. The Commission (DG XI - D/2) carried out an on the spot investigation in July 1998, but according to the complainant the local authorities had taken measures in order to present a false and positive situation, which was contradicted by photographic evidence presented by the complainant to the Commission. On 6 October 1998 the complainant sent to the Ombudsman a copy of its latest report presented to the 18th meeting of the Bern Convention Standing Committee.

### **FURTHER INQUIRIES**

In order to know which follow-up the Commission had reserved to the new information sent by the complainant and to the on the spot investigation carried out in July 1998, the Ombudsman's office contacted the responsible unit of the Commission (DG XI - D/2). The Commission informed the Ombudsman's office that, further to the on the spot investigation of July 1998, it decided in October 1998 to open ex officio a new infringement procedure against the Greek authorities, which was communicated in a press release. The Commission informed the complainant of the new infringement procedure in December 1998 at the 18th meeting of the Bern Convention Standing Committee in Strasbourg.

### **THE DECISION**

- 1 The allegation that the decision to close the file on the complaint was unjustified and arbitrary**
  - 1.1 The complainant alleged that the Commission's decision to close the file on the complaint, and not to take legal action against the Greek authorities, was unjustified and arbitrary. This aspect of the complaint thus alleged maladministration in the administrative procedure for dealing with a complaint for infringement of Community law by a

Member State (Article 169 procedure). When the Commission takes a decision to open an infringement procedure or to close the file, it has the duty to state the reasons for this decision and to communicate those reasons to the complainant. This obligation to give reasons for a decision can also be subject of supervision by the Ombudsman. The Ombudsman's inquiry into this part of the complaint therefore examined whether the Commission duly gave reasons for its decision to close the file on the complaint.

- 1.2 The complainant was informed about the decision to close the file by the letter of the Head of the Legal Affairs Unit of DG XI - Directorate B, dated 11 March 1997. The Ombudsman noted that, in this detailed letter of two pages, the Commission first informed the complainant that it took into consideration the new commitments undertaken by the Greek authorities at the meeting in Athens in May 1996. The Commission further evaluated the information provided by the complainant in a letter to Commissioner Bjerregaard dated 17 February 1997, as well as other information available to the Commission's services.
  - 1.3 The Commission decided that those elements did not disclose a breach of Community law. In particular, the Commission took account of the fact that the Greek authorities had taken a range of concrete measures to protect the breeding and nesting places of the sea turtle in Zakynthos. The letter contained a description of those measures.
  - 1.4 As regards the construction of the Marine Park, the Commission referred to the obligation which the Greek authorities undertook to finish the works before 25 March 1998. The Commission further stated that it can only supervise that the Greek authorities comply with the obligations of Directive 92/43, but that it can not intervene in the form of the implementing measures which is a matter of national competence.
  - 1.5 The Commission finally informed the complainant that DG XI would be following the progress in the implementation of the measures and, in case no progress was made, initiate infringement proceedings. The letter concluded by stating that the complainant would be kept informed about the outcome of the case.
  - 1.6 It appeared from the above that the Commission had duly given reasons for its decision to close the file and had informed the complainant in a detailed manner of those reasons. Moreover, the Commission decided to open ex officio an infringement procedure against the Greek authorities after the on the spot investigation. The Commission informed the complainant in December 1998 of this decision. The Commission had thus acted within the limits of its legal authority and there appeared to have been no maladministration.
- 2 The alleged excessive time period between registration of the complaint and the decision to close the file**
- 2.1 As regards the allegation that the time period between the registration of the complaint and the decision to close the file was too long, the

Commission observed that it was evident from the details it furnished that during this time it had actively pursued the matter. The Commission also drew the attention to the fact that, in complex and difficult nature conservation cases, precipitate action is often inappropriate.

- 2.2 The Ombudsman noted that, as regards this aspect of the Article 169 procedure, the Commission has, in its comments in the framework of the Ombudsman's own initiative inquiry 303/97/PD, observed that, under its internal rules of procedure, a decision to close a file without taking any action or a decision to initiate official infringement proceedings must be taken on every complaint within a maximum period of one year from the date it was registered, except in special cases, the reasons for which must be stated<sup>31</sup>. Those reasons may relate to the considerable time taken for discussions and exchanges with national authorities.
- 2.3 In the present case, where the decision to close the file was taken after a period of nearly 3 years, it appeared that the Commission had provided sufficient justification for this long period. The Ombudsman observed that the complaint was indeed a complex and difficult case about nature conservation. It appeared from both the information provided by the complainant and the details contained in the Commission's observations that, between July 1994 and March 1997, the Commission had actively been inquiring into this complaint, and involved also the complainant in its inquiry. In particular, the Ombudsman noted that, after having registered the complaint and having gathered the relevant information, including from the Council of Europe, the Commission wrote in August 1994 to the Greek authorities, which answered in November 1994. Dissatisfied with the response from the Greek authorities, the Commission wrote again in June 1995 and December 1995 with a request for information on the measures taken. In November and December 1995 correspondence was exchanged between Commissioner Bjerregaard and the complainant who remained also in close contact with DG XI. In February 1996 the Greek authorities informed the Commission about the measures already implemented and additional measures to be taken. In April 1996 the Commission informed the complainant, in a three page letter, of those measures and requested comments. In June 1996 the complainant presented observations to the Commission.
- 2.4 After the complainant's reply and discussions during the meeting in Athens in May 1996, the Commission finally decided to close the case and informed the complainant of its decision in March 1997.
- 2.5 It appeared thus from the above that, given the many exchanges of information which took place between the Commission, the Greek authorities and the complainant, the long period between the registration of the complaint and the decision to close the file could not be considered as an instance of maladministration.

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<sup>31</sup> 303/97/PD, reported in the European Ombudsman's Annual Report for 1997, p 272.



### 3 The alleged failure to reply by Commissioner Bjerregaard

- 3.1 As regards the allegation of the complainant that Commissioner Bjerregaard did not reply in writing to questions which were put to her during her visit in Athens in June 1997, the Commission observed that the Commissioner delegated this responsibility to her services which kept the complainant very well informed of the developments, in particular by the letter of 26 November 1997.
- 3.2 The Ombudsman noted that the complainant had indeed received a reply from the Commission services in the letter of 26 November 1997. In this letter, which refers explicitly to the questions raised in June 1997 to the attention of Commissioner Bjerregaard, the Commission informed the complainant of the latest developments (correspondence with the Greek authorities in March, July and September 1997) and invited the complainant to provide the Commission with any relevant new information disclosing an eventual breach of Community law. Therefore no instance of maladministration was found with regard to this aspect of the complaint.

### CONCLUSION

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

### CONFIDENTIALITY IN TENDER PROCEDURE

*Decision on complaint 1086/97/PD against the European Commission*

### THE COMPLAINT

In November 1997, Mr L. complained to the Ombudsman against the Commission's refusal to provide him with copies of eight successful proposals which had been submitted in connection to the SAVE II Programme.

The background to the complaint was the following: In 1997 the Commission published a call for proposals for the promotion of energy efficiency in the European Community under a Community energy saving programme, "SAVE II". The complainant submitted a proposal which was not selected by the Commission. When informed that his project had not been selected, he wrote to the Commission requesting copies of eight successful proposals submitted under the procedure. The complainant's letter to the Commission indicated that he wished to assess whether the successful proposals were as cost-effective as his own project or more so.

In its reply to the complainant, the Commission referred to the call for proposals, published in the Official Journal, which stated that:

*"Information given to the Community relating to a proposal application or the contract will be treated as confidential."*

On this basis, the Commission considered itself unable to provide the complainant with copies of the other tenderers' proposals.

In his complaint to the Ombudsman, the complainant claimed that the Commission had wrongly refused him access to the eight successful proposals, and had wasted public money by selecting unduly expensive projects.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission repeated its view that it was bound to act in accordance with its undertaking in the call for Proposals to keep all tender proposals confidential.

#### **The complainant's observations**

The complainant maintained his complaint.

### **THE DECISION**

- 1 As concerns the complainant's first allegation, it was clear that the Commission in its call for proposals promised possible applicants that the proposals would be confidential. The Commission was bound to respect that undertaking. The Ombudsman therefore found that the Commission's compliance with that undertaking did not constitute an instance of maladministration. However, the fact that the Commission made this undertaking led the Ombudsman to address below further remarks to the Commission.
- 2 As concerns the complainant's second allegation about waste of public money, there appeared to be no elements in support for this allegation. The Ombudsman therefore found that any further inquiry into the allegation was not justified.

### **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore closed the case.

### **FURTHER REMARKS**

In the light of the facts of the case, the Ombudsman considered it relevant to make the following further remarks. It appeared that the Commission had made a broad undertaking to observe confidentiality in respect of all information it received from participants in the procedure in question. It is clear that the Commission is bound to respect such an undertaking. It is also clear that such an undertaking hinders transparency and the participating parties' right of information. Therefore, the Ombudsman suggested that in view of promoting transparency in its activities, the Commission should reconsider the relevance of such a broad undertaking.



## CANCELLATION OF A TENDER BY THE GREEK GOVERNMENT (ARTICLE 226 EC)

*Decision on complaint 1140/97/JH against the European Commission*

### THE COMPLAINT

The complaint was made to the Ombudsman in November 1997. The complainant is a lawyer acting on behalf of a client, the consortium Casino d'Athènes. According to the complainant, the relevant facts were as follows:

The consortium Casino d'Athènes was awarded a casino licence by the Greek government on 13 January 1995, following an international call for tenders. More than a year later, the Greek government cancelled the licence.

On 20 December 1996, the complainant made a complaint to the Commission on behalf of his client claiming that the Greek government had infringed the Community Directives on Public Procurement. On 24 February 1997, Commissioner MONTI informed the complainant that the matter would be dealt with by DG XV/B/3.

On 20 June and 17 July 1997, the complainant had interviews with the Director of DG XV/B, Mr MATTERA, and on the latter date, handed over additional material concerning the complaint. It was agreed that DG XV would continue to investigate the case.

During the week 13-18 October 1997, the complainant's clients read in the Greek press that their case had been closed by the Commission. The complainant subsequently learnt that the Commission had closed the case at a meeting on 15 October 1997.

In his complaint to the Ombudsman the complainant claimed that:

- (i) the Commission should have warned him that the decision to close the file was foreseen and invited observations within a reasonable period, in accordance with the undertaking which it had given to the European Ombudsman in his own-initiative inquiry into the infringement procedure;
- (ii) the decision to close the file was made on the basis of a meeting of the heads of the Commissioners' Cabinets, whilst the case was still being dealt with by the competent service.

### THE INQUIRY

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman's inquiries into the complaint were there-

fore directed towards examining whether there was maladministration in the activities of the European Commission.

### **The Commission's opinion**

In summary, the Commission's opinion was as follows. The Commission services carefully examined the complaint which was submitted on behalf of the consortium Casino d'Athènes. By letter dated 23 April 1997, the Commission asked the Greek authorities for an explanation of the matter. The Greek authorities replied on 6 June 1997 and the matter was discussed at a bilateral meeting between the Commission and the Greek authorities, which was held in Athens at the end of June 1997.

The complainant subsequently asked for a meeting with the Commission services in order to be informed of developments in the case. At a meeting on 17 July 1997, the complainant was informed of the procedure and of the evaluation by the Commission services of the substance of the case. During this meeting, the Commission services expressed the hope that they would receive additional elements from the complainant in order to be able to pursue the case. However, no such new elements were presented.

As regards the complainant's first claim, the opinion stated that the Commission has now taken all the necessary internal measures to inform its services of the undertaking which it gave to the Ombudsman in the framework of his inquiry into infringement procedures. However, at the time when the decision to close the file in this case was taken, the Commission had not yet put in place the internal measures to give effect to its undertaking.

As regards the complainant's second claim, the Commission stated that in the light of the replies from the Greek authorities and since no new information had been supplied by the complainants, the file was examined by the Commission at one of the regular meetings dealing with alleged infringements. This meeting had, as normal, been prepared by a special meeting of heads of cabinets in the course of which the closure of the file was foreseen. The complainant having been heard before the decision to close the file was made, this decision was taken on the basis of sufficient information. The complainant was informed of the decision and the reasons for it by letter dated 11 November 1997.

### **The complainant's observations**

The Commission's opinion was forwarded to the complainant with an invitation to submit observations, but no observations were received.

### **FURTHER INQUIRIES**

In December 1998, after carefully examining the Commission's opinion, the Ombudsman requested a copy of the Commission's letter to the complainant dated 11 November 1997. The Commission forwarded the letter in January 1999.

On 1 March 1999, the Ombudsman informed the Commission that he had completed his inquiries into the first aspect of the complaint. As regards the

second aspect of the complaint, the Ombudsman stated that it was necessary for his services to inspect the relevant Commission file, in accordance with Article 3 (2) 1<sup>st</sup> indent<sup>32</sup> of the Statute of the Ombudsman.

In a reply dated 14 April 1999, the Commission gave further information concerning the procedure which led to the closure of its file on the Casino d'Athènes complaint. The Commission stated that under the Commission's internal infringement procedures, the case was due to be discussed at the Commission's meeting of 15 October 1997.

*“In preparation of that meeting, the Commission services prepared (3 September 1997) the requisite “fiche infraction” where they mentioned that they were waiting for further information the complainant might want to submit. By 30 September the services’ proposal had remained the same, but it was evident to them that no additional elements were forthcoming since more than two months had elapsed since the relevant request was made. In view of these elements, when the case was discussed at the meeting of the heads of Cabinets of 9 October 1997, since it was clear that no information was to be expected any more from the complainant, the decision was therefore taken to propose to the Commission the closure of the file. The Commission acted on that proposal and closed the file on 15 October 1997.”*

The Commission also enclosed, on a confidential basis, a copy of the standard form used for recording the progress of each Commission investigation into an alleged infringement (*fiche infraction*) and a timetable of events. The Commission stated that these were the only documents in the file which relate to the circumstances of its closure and that, for that reason, the Commission took the liberty of sending them to the Ombudsman rather than have his staff put to the trouble of inspecting them in situ.

The Commission also stressed that in their letter to the complainant of 11 November 1997, the Commission services informed him that new infringement proceedings could be initiated, provided he supplied the requisite additional facts and arguments, but that this invitation remains unanswered.

### **The inspection of the file and the taking of oral evidence**

On 22 April 1999, the Ombudsman wrote thanking the Commission for the additional information and for the copies of documents and repeating the request to inspect the file. The Ombudsman also informed the Commission that, after careful consideration of the information and documents forwarded to him by the Commission on 14 April 1999, he considered it necessary to take oral evidence from the officials in DG XV who dealt with the

<sup>32</sup> The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.

Casino D'Athenès complaint, in accordance with Article 3 (2) 4<sup>th</sup> indent of the Statute of the Ombudsman.<sup>33</sup>

In reply, the Commission invited the Ombudsman to contact the General Secretariat of the Commission to make the necessary arrangements for the inspection of the file and for the taking of oral evidence and informed him that the DG XV officials concerned are Mr Alfonso MATTERA, director and Mr Konstantinos TOMARAS, Administrator.

After further correspondence concerning the procedures for the taking of oral evidence, both the inspection of the file and taking of oral evidence were carried out by the Ombudsman's services on 24 June 1999.

Oral evidence was taken using the following procedure:

- 1 The date, time and place for the taking of oral evidence were agreed between the Ombudsman's services and the General Secretariat of the Commission, which informed the witnesses. The oral evidence was taken on the Ombudsman's premises in Brussels.
- 2 Each witness was heard separately and was not accompanied.
- 3 The language of the proceedings was agreed between the Ombudsman's services and the Secretariat General of the Commission. At the request of the witnesses the proceedings were conducted in French.
- 4 The procedure was explained to each witness before the oral evidence was taken.
- 5 The questions and answers were recorded and transcribed by the Ombudsman's services.
- 6 Each witness was sent the transcript of his evidence for signature. The witnesses were invited to propose linguistic corrections to their answers. They were informed that if they wished to correct or complete an answer, the revised answer and the reasons for it should be set out in a separate document and annexed to the transcript. The signed transcripts form part of the Ombudsman's file on the case.

The Ombudsman's services informed the complainant by telephone that an inspection of the file had been carried out and that oral evidence had been taken. The complainant stated that his client is no longer interested in the affair and that he did not therefore wish to comment on the oral evidence.

## **THE DECISION**

### **1 The complainant's first claim**

- 1.1 The complainant made a complaint to the Commission alleging an infringement of Community law by the Greek authorities in the Casino d'Athènes case. He claimed that the Commission closed the file in

<sup>33</sup> Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy.

October 1997 without giving him an opportunity to submit observations, contrary to the undertaking which it had given to the European Ombudsman in his own-initiative inquiry into the infringement procedure.

- 1.2 In April 1997, the Ombudsman began an own-initiative inquiry into the possibilities for improving the quality of the Commission's administrative procedures for dealing with complaints concerning infringements of Community law by Member States.<sup>34</sup> During the inquiry, the Commission undertook that, apart from cases where a complaint is obviously without foundation and cases where nothing further is heard from the complainant, it will ensure that a complainant is informed of its intention to close a case and its reasons. Complainants should therefore have the possibility to put forward views and criticisms concerning the Commission's point of view before the decision to close the file is taken.
- 1.3 In its opinion, the Commission stated that at the time when it took the decision to close the file in this case, it had not yet put in place the internal measures to give effect to the above-mentioned undertaking. However, it also stated that it has now taken all the necessary internal measures to inform its services of the undertaking.
- 1.4 The Commission's decision to close the file on the Casino d'Athènes case was contemporaneous with the letter of 13 October 1997 by which the European Ombudsman informed the Commission of the closure of the above-mentioned own-initiative inquiry. The Ombudsman's letter also informed the Commission of the importance which he attached to the undertaking it had given. The Commission's explanation of why it did not apply the undertaking in this case is therefore reasonable. Furthermore, it seems that the Commission has now taken all the necessary internal measures to give effect to the undertaking. There appears therefore to be no maladministration in relation to this aspect of the case.

## **2 The complainant's second claim**

- 2.1 The complainant claimed that the decision to close the file on his complaint about an alleged infringement of Community law by the Greek authorities was made on the basis of a meeting of the heads of the Commissioners' Cabinets, whilst the case was still being dealt with by the competent service, DG XV.
- 2.2 Article 211 of the EC Treaty establishes the role of the Commission as the "Guardian of the Treaty". Its duty is to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.
- 2.3 According to the written evidence supplied by the Commission, the case of Casino d'Athènes was due to be examined by the

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<sup>34</sup> 303/97/PD, reported in the European Ombudsman's Annual Report for 1997 pp 270-274 and see the Commission's 15th Annual Report on Monitoring the Application of Community law (1997), Introduction pp III-IV (COM (1998) 317 final).

Commission at its meeting of 15 October 1997, as part of the normal procedure for dealing with alleged infringements. On 3 September 1997, DGXV proposed that the case should be kept open to wait for further information which the complainant might want to submit and by 30 September 1997, its proposal remained the same. When the case was discussed at the meeting of the heads of Cabinets of 9 October 1997, the decision was taken to propose to the Commission the closure of the file, since it was clear that no information was to be expected any more from the complainant. The Commission acted on that proposal and closed the file.

- 2.4 The explanation and documents supplied by the Commission appeared not to exclude the possibility that the proposal to close the file had been made by the heads of Cabinets without giving the competent service enough time to complete an adequate investigation of the complaint. The Ombudsman therefore inspected the Commission's file on the complaint and took oral evidence both from the director of the unit in DG XV which dealt with the case, Mr MATTERA, and the official who dealt with the file, Mr TOMARAS.
- 2.5 The inspection of the file revealed no documents containing the reasons why the heads of Cabinet had apparently proposed to close the file on the complaint although the competent service had proposed that it should remain open.
- 2.6 The Ombudsman made the following findings of fact, based on the oral evidence given by Mr MATTERA and Mr TOMARAS in response to questions from the Ombudsman's services. The complainant was informed by DG XV at meetings in June and July 1997 that: (i) there appeared to be no infringement of Community law, since a tender can be cancelled, if there is justification to do so; (ii) the Greek authorities had supplied justification and; (iii) the complaint could not, therefore, be pursued unless the complainant supplied new elements, such as possible evidence that the tender had been cancelled in order to favour a competitor. On 3 September 1997, DG XV made a proposal to keep the case open in order to give the complainant a further opportunity to submit new elements. Before the meeting of heads of Cabinets on 9 October 1997, the competent service of DG XV was asked if, in its opinion, the case could now be closed. They answered that it could, since the complainant had not supplied any additional evidence. The complainant was informed that a new infringement proceeding could be initiated, provided that he supplied the requisite additional facts and arguments.
- 2.7 In view of the above findings of fact, there appeared to be no maladministration in relation to this aspect of the case.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

## THERMIE GRANT TO A WINDFARM PROJECT: ALLEGED FAILURE TO INVESTIGATE THE PROJECT

*Decision on joined complaints 1152/97/OV, 142/98/OV and 149/98/OV against the European Commission*

### THE COMPLAINT

In December 1997 (1152/97/OV) and January 1998 (142/98/OV, 149/98/OV) respectively, Mrs M., Mr and Mrs H., Mr and Mrs F. made complaints to the European Ombudsman concerning the conditions under which the Commission awarded an EC Thermie grant to the Windfarm Project at Mynydd Gorrdu, Ceredigion, Wales (ref. WE/225/91-UK-DK). Given that their complaints raised the same points, the Ombudsman decided to investigate them together.

One of the allegations raised in the complaints concerned the fact that no environmental impact assessment had been carried out for the project. However, this allegation had already been dealt with in the framework of petitions n° 71/96, 155/96 and 160/96. On basis of the common position of the Commission on those petitions, the Committee on Petitions of the European Parliament decided to conclude its examination of the petitions. For this reason, the Ombudsman informed the complainants on 26 March 1998 that there were no grounds for him to conduct inquiries into this part of the complaints.

According to the complainants, the relevant facts were as follows: The applicants for the Thermie grant were National Power plc., Nordtank Energy Group, and Dr. H. On 13 August 1991, the Commission accepted the proposal and notified the award of a grant of approximate GBP 1.3 million to the applicants.

The main allegation of the complainants concerned the fact that the Mynydd Gorrdu Windfarm Project was promoted as an “innovative, farmer led and locally orientated” scheme, the reason why it qualified for a grant under the Thermie Programme, but in fact was led by multinational commercial interests. The company Mynydd Gorrdu Windfarm Ltd was set up in June 1991 by the already existing National Power plc. and National Wind Power Ltd, in order to run the project as a commercial enterprise. Two of the directors were each directors of some 50 other windfarm companies, which would not appear to correspond to the “innovative” description of the project. For those reasons, the project had, contrary to its presentation, no link with the local community, which would not receive any benefit from it.

Moreover, the local community would suffer from a variety of negative environmental effects of the project. This was due to the fact that the promoters of the project avoided carrying out an environmental impact assessment, by putting pressure on the planning committee in order to obtain the planning permission. The complainants further alleged that the Ceredigion County Council made a serious mistake in granting the permission without requiring an environmental statement.

Under those circumstances, the complainants alleged that the European Commission seemed to have accepted too easily the project of the appli-



cants without any attempt, before awarding the grant, to make an on the spot investigation or to verify thoroughly the information contained in the proposal.

In 1996 several complaints concerning the absence of an environmental impact assessment were lodged with the European Commission, one of which was signed together by Mrs M., Mr and Mrs F., and by other residents. Similarly, since May 1996 several petitions were also made to the European Parliament by Professor T. (n° 71/96), Mr M. (n° 155/96) and Mr F. (n° 160/96). Furthermore, all the complainants in the present case, as well as other residents, wrote letters to Directorate F (Unit for coordination of fraud prevention - UCLAF) of the Secretariat General of the Commission and to DG XVII (Energy) in November and December 1997.

In its answer to the complainants, the Commission stated that the UK authorities had informed the Commission that, although the developer of the windfarm was not required to submit an environmental statement, the local planning authority had consulted widely about the proposal. More particularly, in reaching the decision to grant development consent, it had taken the views of consultees, the public and the consultant landscape architect into account. The Commission also indicated that, since the introduction of new UK legislation in April 1994, competent authorities may require wind farm proposals to be subject to an environmental impact assessment prior to the granting of development consent. The Commission however added that under the terms of Directive 85/337/EEC<sup>35</sup>, wind farms might require an environmental impact assessment where Member States consider that their characteristics so require. The Commission therefore stated that Member States have a great margin of discretion to decide whether projects shall be subject to an environmental impact assessment. For those reasons, the Commission considered that there was no breach of Community environmental law in this case.

This answer equally constituted the Commission's common position on petitions n° 71/96, 155/96 and 160/96, on the basis of which the Committee on Petitions concluded its examination of the petitions in January 1998.

Not satisfied with this answer, the complainants wrote to the Ombudsman. In addition to their complaint alleging the absence of an environmental impact assessment, which had been dealt with by the Committee on Petitions, they put forward two other complaints:

- 1 Firstly, they maintained their complaint that the Commission had awarded a Thermie grant to the Mynydd Gorddu Windfarm Project without a proper inquiry, for example by an on the spot investigation. This had as result that a grant had been awarded to a project which was promoted as an innovative, farmer led and locally orientated scheme, but which was in fact led by multinational commercial interests.

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<sup>35</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.



- 2 Secondly, the complainants alleged that several letters they had sent to DG XVII and to Directorate F (UCLAF) of the Secretariat General had not been answered by the Commission. The complainants enclosed numerous annexes to their complaints, amongst which the paper “Mynydd Gorddu: a Summary”, which describes in detail the whole background of how the Windfarm Project got approved.

## **THE INQUIRY**

### **The Commission’s opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the grant to the Mynydd Gorddu Windfarm Project was awarded in the framework of the Thermie Programme (Council Regulation (EEC) n° 2008/90). Article 2 of the Regulation provides that Community financial support may be granted to two kinds of projects, namely a) innovative projects, and b) dissemination projects. It is the Commission, assisted by a Committee (the “Thermie Committee”) composed by representatives of the Member States, which is responsible for the selection of the projects (Articles 9 and 10).

In the framework of the 1991 call for proposals, the Commission received the proposal for the wind energy project, submitted by National Power Plc. (Power utility-UK), Nordtank AF 1998 A/S (wind turbine manufacturer-Denmark, later renamed to Nordtank Energy Group A/S) and Dr. H. (land owner-UK). The proposal concerned the installation of a 6 MW wind farm at Mynydd Gorddu, Wales, consisting of twenty 300kW wind turbines. The total cost of the project was ECU 8.2 million

The project was evaluated as a “dissemination project” since it concerned the transfer of an already proven technology under different geographical conditions. Although the proposal mentioned that locally based skills would be used if possible, the project was not described as a farmer led and locally oriented scheme. The selection process, in which two independent experts and an expert of the Commission participated, examined whether, on the basis of the information submitted, the proposal met the eligibility criteria for support, including those directly related to the status of the promoting companies and their capacity (letters e and f of Article 6 of the Regulation). Following the favourable opinion of the Thermie Committee, the Commission took the decision to grant support to the project for a maximum amount of ECU 1.830.924.

After the Commission’s decision, National Power Plc. joined with British Aerospace Plc. and Taylor Woodrow Construction Holding Ltd., to form the company National Wind Power Ltd., in order to continue National Power Plc. wind farm developments and related research work. The promoters of the project requested the Commission to consider replacement of National Power Plc. by National Wind Power Ltd. The Commission accepted the replacement. On 15 January 1992 contract n° WE/225/91 was signed between the Community and National Wind Power Ltd., Nordtank Energy Group A/S, and Dr. H. An amendment to the contract was signed by the Commission on 23 December 1996 when the co-ordinator National Wind

Power Ltd. requested to withdraw from the contract and was replaced by Nordtank Energy Group.

The case was examined by UCLAF, which did not consider it necessary to initiate an investigation. The main allegations made were related to matters of environment, nuisance or safety, rather than to suspicions of improper use of Community funds. The information received from the authorising officer who looked into the matter confirmed that there was nothing to suggest that the Community's financial interests might have been harmed.

As regards the first allegation raised by the complainants, the Commission observed that it took the decision to support the project, which was a dissemination project, because all the Thermie requirements, eligibility criteria and conditions for selection were fully met. The project was not described in the submitted proposal as a farmer led and locally oriented scheme, nor would it have been necessary or relevant under the terms of the Regulation. Although small and medium size enterprises benefit from preference in the selection process (Article 6.3), the Regulation does not contain specific criteria or limits with regard to the size of the promoters.

With regard to the alleged failure to reply by DG XVII, the Commission observed that in November 1997 DG XVII was informed by Mrs M. that, for the project n° WE/225/91, the Commission had been misled. In late November 1997 Mrs M. submitted supporting evidence and was informed by the Commission that a written answer would be forwarded in due course. Following a finalisation of the in depth analysis which revealed no evidence that the Commission had been misled, DG XVII replied to Mrs M. on 28 April 1998.

UCLAF also received several letters from the complainants and other citizens. After the final analysis of all the data, UCLAF informed all the complainants on 19 May 1998 that it had not initiated investigations.

### **The complainants' observations**

No observations were received from the complainants. However, in their common letter of 30 April 1998, the complainants stated that, with regard to the absence of an environmental impact assessment for the project, which had been the subject of petitions 71/96, 155/96 and 160/96, they did not agree with the way their petitions had been dealt with by the Committee on Petitions. They alleged that the facts stated in their petitions had manifestly been misunderstood and incorrectly stated.

The complainants insisted once again on the fact that an environmental impact assessment should have been carried out for this project, but that the Ceredigion County Council ignored the advice received from different bodies to do so. The complainants further provided details showing the commercial interests involved in the Mynydd Gorddu Windfarm Project.

**THE DECISION****1 The allegation concerning the way in which the Committee on Petitions dealt with the petitions**

- 1.1 The first allegation of the complainants was that no environmental impact assessment was carried out for the Mynydd Gorddu Windfarm Project. The complainants therefore criticised the way in which the Committee on Petitions of the European Parliament had dealt with and concluded its examination of petitions 71/96, 155/96 and 160/96. In those petitions, the complainants had alleged the absence of an environmental impact assessment.
- 1.2 Since the Committee on Petitions, as a political body of the European Parliament, deals with petitions as a political task of the Parliament, complaints alleging maladministration by the Committee on Petitions are not considered to be within the mandate of the European Ombudsman. For this reason the Ombudsman could not deal with this aspect of the complaints.

**2 The alleged awarding of a Thermie grant without proper inquiries to the Mynydd Gorddu Windfarm Project**

- 2.1 The complainants alleged that the Commission awarded a Thermie grant to the Mynydd Gorddu Windfarm Project without making proper inquiries, for example by an on the spot investigation. This had as a result that a grant had been awarded to a project which was promoted as an innovative, farmer led and locally orientated scheme, but which was in fact led by multinational commercial interests. The Commission observed that it took the decision to support the project, which was a dissemination project, because all the Thermie requirements, eligibility criteria and conditions for selection were fully met. The project was not described in the submitted proposal as a farmer led and locally oriented scheme, nor would it have been necessary or relevant under the terms of Regulation n° 2008/90.
- 2.2 The Ombudsman noted that the conditions for receiving financial support from the Thermie programme were set out in Article 6 of the Regulation, as well as in point 4 of both the Call for proposals<sup>36</sup> and the Thermie information brochure and application form. As regards more particularly the status of the beneficiaries of the funding, Article 6(f) of the Regulation provides that, in the case of a project of a total cost of ECU 6 million or more, it must be submitted by at least two independent promoters established in different Member States. In the case of the Mynydd Gorddu Windfarm Project where the total cost was ECU 8.2 million, the proposal had indeed been submitted by promoters established in different Member States, namely in the UK (National Power Plc. and Dr H.) and Denmark (Nordtank Energy Group A/S) respectively. This condition of the Regulation had thus been respected for the Windfarm Project.

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<sup>36</sup> OJ 1990 C 215/11.

- 2.3 As regards the size of the promoters, the Ombudsman noted that the Regulation contained no specific criteria or limits which exclude large companies from funding under the Thermie Programme. It is true that Article 6.3(b) of the Regulation provides that, when selecting projects, the Commission shall, as an adjunct to the other criteria, take account of a preference to be given to projects proposed by small and medium-sized enterprises (SMEs) or by an association of such enterprises. However, this provision which leaves a large margin of discretion to the Commission, cannot be interpreted in a sense that it would exclude companies which are not SMEs from being selected. Moreover, point 5 of the Call for proposals refers to this preference to be given as a subsidiary selection criterion.
- 2.4 The Ombudsman finally noted that UCLAF examined the matter but did not feel it necessary to initiate an investigation. The information received by UCLAF from the authorising officer confirmed that there was nothing to suggest that the Community's financial interests might have been harmed. For the above reasons, no instance of maladministration was found with regard to the awarding of a Thermie grant to the Mynydd Gorddu Windfarm Project.
- 3 The alleged failure to reply by DG XVII and Directorate F (UCLAF) of the Secretariat General of the Commission**
- 3.1 The complainants alleged that several letters sent to DG XVII as well as to Directorate F (UCLAF) of the Secretariat General in November and December 1997 had not received a reply from the Commission. In its opinion, the Commission observed that, after the final analysis of the points raised, both DG XVII and UCLAF replied to the complainants respectively on 28 April 1998 and 19 May 1998. The Commission annexed copies of those replies.
- 3.2 As regards the alleged failure to reply to the letters sent to DG XVII on 18 and 21 November 1997 by the complainant in case 1152/97/OV, the Ombudsman noted that a reply was sent by the Commission on 28 April 1998. In this letter, the Commission first apologised for the late reply. The Commission then answered the different questions raised by the complainant. It explained the reasons why the Windfarm Project had received Community funding, namely that it had been considered as a dissemination project, and that the Regulation foresees no specific criteria regarding the size of the beneficiaries of the grant. The Commission also indicated the names and addresses of the promoters of the project to which the payments of the grant were made. With regard to the request for a copy of the application form submitted by the promoters, the Commission drew the complainant's attention to the provisions of the model contract which limit the Commission's right to pass confidential information on to third parties.
- 3.3 UCLAF sent replies to all the complainants on 19 May 1998. It apologised for the delay and informed the complainants that, according to the documentation available to the Commission, there were no reasons for UCLAF to intervene. It drew the complainants' attention to the possibility to have the case examined under the relevant UK legisla-

tion. Given thus that both DG XVII and UCLAF replied and apologised for the delay, no maladministration was found by the Ombudsman with regard to this aspect of the case.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore decided to close the case.

### **FURTHER REMARKS**

The Ombudsman noted that, alongside the allegations of maladministration by the European Commission, the complaints contained various other allegations of maladministration in the way the local UK authorities (Ceredigion County Council) granted a planning permission to the Windfarm Project, without an environmental impact assessment having been carried out. For the reasons explained above, those allegations could not be dealt with in the framework of this inquiry.

However, the Ombudsman drew the attention of the complainants on the possibility to bring those allegations in a complaint to the Commissioner for Local Administration in Wales (Derwen House, Court Road, Bridgend, Mid Glamorgan, UK-Wales CF31 1BN, tel: 165 666 1325, fax: 165 665 8317).

## **ALLEGED FAILURE TO START AN INFRINGEMENT PROCEDURE AGAINST THE UK FOR VIOLATION OF DIRECTIVES 77/187/EEC AND 76/207/EEC**

*Decision on complaint 33/98/OV against the European Commission*

### **THE COMPLAINT**

In January 1998 Mr D. lodged a complaint with the European Ombudsman concerning an alleged refusal of the European Commission to take the United Kingdom before the European Court of Justice for infringement of Council Directives 77/187/EEC (transfer of undertakings)<sup>37</sup> and 76/207/EEC (equal treatment for men and women)<sup>38</sup>. According to the complainant, the relevant facts were as follows:

The complainant, an employee of the Inner London Education Authority (ILEA), was unfairly made redundant together with 30.000 other employees further to the Education Reform Act of 1988 (and two Statutory Instruments) which abolished the ILEA with effect from 1 April 1990. He therefore complained to the European Commission in September 1997 using the standard complaint form 89/C26/07. He alleged that the UK

<sup>37</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses of parts of businesses (OJ 1977 L 61/26).

<sup>38</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39/40).

authorities infringed Directives 77/187/EEC and 76/207/EEC, because thousands of ex-employees of the ILEA were not transferred to the successor authority, and because some ex-employees were treated more favorably than others in new job procurement. The complainant therefore concluded that the Commission should take the UK authorities before the Court of Justice.

In November 1997 he received a letter from DG V (Employment, Industrial Relations and Social Affairs) from which he concluded that the Commission was not going to start an infringement procedure against the UK. In this letter, dated 6 November 1997, the complainant was informed that the two Directives had been transposed into national UK law, and that therefore it is primarily the responsibility of the competent UK judicial authorities to see that national law is correctly applied. In a dispute, the national court concerned may ask for a preliminary ruling by the Court of Justice on the interpretation of the applicable Community law. DG V also informed the complainant that there is no Community legislation dealing specifically with individual dismissal.

The complainant then wrote back to President Santer on 15 November 1997 asking for a review of the decision. He stated that the fact that the UK has transposed the Directives into national law did not mean that other UK acts might infringe the Directives. The Director General of DG V replied on 21 January 1998 confirming that there was not an obvious breach of Community law and that the subject of the complaint would rather appear to be a matter for seeking remedy under UK law. Not satisfied with the Commission's decision, the complainant lodged the present complaint with the Ombudsman alleging that the Commission was not taking the UK authorities before the Court of Justice.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission in May 1998. In its opinion, the Commission observed that the complainant's letter to the Commission, dated 26 September 1997, had been registered at the Secretariat-General on 2 October 1997. The relevant Commission departments examined the complaint and concluded that there were no grounds for registering the letter as a complaint. The Secretariat-General was informed accordingly in a letter dated 29 October 1997, and DG V sent also a reply to the complainant on 6 November 1997.

As regards the alleged infringement of the Directive 77/187/EEC on transfers of undertakings, and the complainant's statement that the application of the 1988 Education Reform Act led to his unfair dismissal, the Commission stated that this legislation in no way breached the Directive. The Education Reform Act, more specifically section 172 ("Power to transfer staff") deals with educational reforms and the transfer of certain categories of staff following the abolition of the ILEA, and thus aims to protect the acquired rights of employees in the event of the transfer of undertakings. The Commission also indicated that Article 4 of the Directive does



not prohibit dismissals that might take place for organisational reasons entailing changes in the workforce.

The Commission observed that all disputes concerning the criteria and practical arrangements for determining which employees perform tasks associated with the transfer are within the jurisdiction of the appropriate national bodies, particularly the relevant court and tribunals to which the complainant might, if appropriate, take his case.

As regards the alleged infringement of the Directive 76/207/EEC on equal treatment for men and women, and the complainant's statement that some ex-ILEA employees were treated more favourably than others, the Commission observed that it was clear from the information supplied by the complainant that he did not refer to discrimination on the grounds of sex which is the scope of the Directive.

### **The complainant's observations**

The complainant made no observations on the Commission's opinion.

### **THE DECISION**

#### **The alleged failure of the Commission to initiate an infringement procedure against the UK authorities for violation of Directives 77/187/EEC and 76/207/EEC**

- 1 The complainant's main allegation consisted in the fact that the Commission did not initiate an infringement procedure against the UK authorities for violation of Directives 77/187/EEC and 76/207/EEC, because of his unfair dismissal further to the 1988 Education Reform Act. The Commission observed that there was no breach of the said Directives and that it had informed the complainant on 6 November 1997 of its decision not to pursue the case.
- 2 The Ombudsman noted that the complaint concerned an alleged mal-administration by the Commission in the administrative procedure for dealing with a complaint for infringement of Community law by a Member State (the Article 226 procedure). As regards this administrative procedure, the Commission should abide by the undertakings it made in the framework of the Ombudsman's own initiative inquiry 303/97/PD<sup>39</sup>. According to these undertakings, the complainant is kept informed about the outcome of the investigation of his complaint, whether no action has been taken on it or infringement proceedings have been instituted, and a decision to close the file without taking any action must be taken within a maximum period of one year from the date when the complaint was registered.
- 3 In the present case it appeared that the complainant's letter of 26 September 1997 to the Commission was registered at the Secretariat-General on 2 October 1997 and that a reply was sent to the complainant on 6 November 1997. It further appeared that, on 21 January

<sup>39</sup> 303/97/PD, reported in the European Ombudsman's Annual Report for 1997 pp 270-274 and see the Commission's 15th Annual Report on Monitoring the Application of Community law (1997), Introduction pp III-IV (COM (1998) 317 final).

1998, the Commission answered the complainant's second letter addressed to President Santer on 15 November 1997 and asking for a review of the previous reply.

- 4 In both replies, the Commission informed the complainant that there was no obvious breach of Community law, that the said Directives had been transposed into national UK law, and that therefore, the complainant should seek remedy before the relevant UK courts and tribunals which have jurisdiction over such disputes. The Commission also indicated to the complainant that, in the event of a dispute, the national court seized may ask for a preliminary ruling by the Court of Justice on the interpretation of the applicable Community law.
- 5 In its opinion to the Ombudsman, the Commission provided the complainant with even more details on the reasons why there was no breach of Community law. As regards the alleged infringement of the Directive 76/207/EEC on equal treatment for men and women, the Commission observed that it was clear from the information supplied by the complainant that he did not refer to discrimination on the grounds of sex which is the scope of the Directive. As regards the alleged infringement of the Directive 77/187/EEC on transfers of undertakings, the Commission stated that the Education Reform Act, more specifically section 172 ("Power to transfer staff"), deals with educational reforms and the transfer of certain categories of staff following the abolition of the ILEA, and thus aims to protect the acquired rights of employees in the event of the transfer of undertakings.
- 6 The Ombudsman therefore considered that in this case the Commission respected the undertakings it made with regard to the Article 226 procedure and explained to the complainant the reasons why it decided not to start an infringement proceeding against the UK authorities. The Commission acted thus within the limits of its legal authority and no instance of maladministration was found.

## CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore decided to close the case.

## AUDIT OF CONTRACTOR

*Decision on complaint 568/98/PD against the European Commission*

## THE COMPLAINT

In June 1998, Mr T. made a complaint against the European Commission, on behalf of two companies. Since 1992, the two complaining companies had been involved in a variety of Community funded research projects. The involvement did not give rise to any problems.

In October 1996, the Court of Auditors performed an audit of the two companies. In February 1997, the Court of Auditors informed DG XIII of the



Commission that the audit had revealed problems. The Commission thereafter reviewed the scope of its contractual commitments with the two companies. It appeared that there were in total 17 contracts, managed by different services and on different legal bases. Within the Commission, the Unit for the Coordination of Fraud Prevention, UCLAF took over the file concerning the two companies.

In July 1997 the companies were informed that all payments to them from the Commission would be suspended. From 7 to 10 October 1997, the Commission undertook an on-the-spot inspection at the premises of the companies. Representatives of the companies participated in the inspection. Also in October 1997, other Commission services refused to enter into project contracts, in which the two companies would be involved.

On 10 March 1998 the Commission asked the companies to supply evidence in addition to the one supplied at the inspection. By letter of 24 March 1998, the complainant replied to this letter. According to the complainant, the Commission had received all necessary information and the Commission's behaviour was harming the two companies.

This was the background against which the complaint was lodged with the Ombudsman. According to the complainant, the Commission had behaved in an unfair manner towards the companies. The complainant in particular put forward that

- although the two companies had regularly informed the Commission over a period of more than six years of their execution of contracts, the Commission had not reacted to that information; the Commission had thus unfairly left the companies with the impression that things were in order;
- the Commission had unfairly suspended payments to the two companies, without first hearing them;
- the Commission had unfairly excluded the companies from participating in projects, and
- the Commission had acted with undue delay since the inspection.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the European Commission. The Commission stated that the audit carried out by the Court of Auditors showed that important irregularities had taken place in the two companies' way of handling Community funding. Therefore, precautions were immediately taken at the Commission, i.e. payments to the companies were suspended. According to the Commission, the on-site inspection made by the Commission services confirmed the findings of the Court of Auditors, in particular:

- expenditure statements were not based on real expenditure but systematically and substantially overcharged, especially as regards staff expenses and general expenses;

- supporting documents and bank statements were missing, and
- a co-financing obligation imposed on the companies by the contracts in question had not been complied with.

The report on the on-site inspection containing these findings had finally been established on 15 May 1998 and had been communicated to the two companies which had been given, both at the on-site inspection and afterwards, the possibility to put forward their viewpoints. Following the establishment of the report, the Commission was proceeding with the recovery of sums unduly paid.

As concerns the complainant's first individual grievance, the Commission stated in summary that the reports supplied over the years by the companies did not reveal any problems with regard to the conformity of the facts. The Commission thus did not have any reason to start inquiring earlier into the use of funds by the companies. It was only after the audit of the Court of Auditors that the Commission was prompted to carry out an in-depth inspection, which involved examination of supporting documents. These supporting documents had not been attached to the reports supplied over the years.

As concerns the second grievance, the Commission stated that it was under an obligation to protect the Community's finances, when, as in this case, it was confronted with serious irregularities against those finances. It was therefore justified that the Commission withheld payments to the companies, until it had inquired further into the matter. Furthermore, the on-site inspection showed this to be justified, as there were even important amounts, already paid out, which needed to be recovered.

As concerns the third grievance, the Commission stated that it was entitled to decide that it did not want to enter into any more contracts with the two companies concerned. Furthermore, the Commission stated that the companies themselves had accepted to withdraw from two future projects.

As concerns the fourth grievance, the Commission found that, given the complexity of the legal situation and the failure on the part of the companies to provide additional information, it had dealt with the matter timely and without undue delay. It stated that in the time between the inspection and the establishing of the report, several meetings had taken place inside the Commission to ensure co-ordination.

### **The complainant's observations**

In the observations, the complainant maintained the complaint. In particular, the complainant stressed that all relevant rules of Greek law had been complied with by the companies.

## **THE DECISION**

### **1 Scope of the inquiry**

- 1.1 The complaining companies were involved in 17 contracts with the Commission, funded by Community resources. After approximately six years, an audit of the companies was carried out by the Court of

Auditors. Further to the audit, the Commission suspended the payments to the companies under the contracts. The Commission's anti fraud unit proceeded to an on-site inspection of the companies' premises which, according to the Commission, established serious irregularities. Therefore the Commission did not want to enter into any further contracts with the companies and issued recovery orders for sums paid under existing contracts. The complainant considered that the Commission's behaviour was unfair and that the Commission had acted with undue delay.

Thus, the framework of the case were contractual relationships between the Commission and the two companies concerned and basically, the complainant questioned the Commission's powers when it is not satisfied with the performance of the other party to a contract.

- 1.2 Therefore it had to be recalled that the European Ombudsman does not seek to establish whether either party has acted in conformity with the contract. That question can only be dealt with effectively by a court of competent jurisdiction which would have the possibility to hear arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on the disputed issues of fact. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes its view of its position to be justified.

## **2 Unfair treatment by the Commission**

- 2.1 In the first grievance, the complainant reproached the Commission for not having reacted to the companies' reports for years. According to the Commission, the irregularities committed were of such a nature that the Commission would not have been able to detect them on the basis of the companies' periodic reports to the Commission and could not lead the complainant to believe that things were in order.

The Ombudsman found that the Commission's explanation for its failure to act was reasonable and could not constitute maladministration in relation to the two companies concerned.

- 2.2 As concerns the second and third grievances that the Commission was not entitled to suspend payments and to avoid future contracts with the companies, it appeared that the Commission did so in order to protect the financial interest of the Community, faced with what the Court of Auditors and itself considered to be serious irregularities over several years. It shall also be observed that as the case stood, the prudence of this measure seemed confirmed by the recovery orders issued subsequently by the Commission against the companies. The sums to be recovered were important. It did not appear unreasonable that the Commission, confronted with what the Court of Auditors and itself considered to be serious irregularities, sought to limit the extent of the financial damage that it considered itself exposed to.

The Ombudsman therefore found that there was no maladministration in these aspects of the complaint.

2.3 As concerns the complainant's fourth grievance that the Commission acted with undue delay, the Ombudsman observed that from the Commission inspection (October 1997) until the establishment of the report containing the findings of the inspection (May 1998), approximately seven months passed. According to the Commission, this lapse of time was caused by the complexity of the legal situation and the companies' failure to provide additional information. Furthermore, several meetings were held inside the Commission to ensure co-ordination.

Principles of good administration require that the administration acts within reasonable time to solve matters before it. What is reasonable time has to be determined in relation to the particular circumstances of the matter, as for instance the complexity of the case to be dealt with, the importance, for the parties involved, of the actions to be taken and the context. In this case, the examination by the Commission concerned a large number of contracts, which had run over several years and which required the involvement of several Commission services. To this has to be added the Commission's dispute with the complainants about additional information. In those circumstances, the time spent by the Commission in establishing the report did not appear unreasonable and did not therefore constitute maladministration.

## **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore decided to close the case.

## **PENALTIES UNDER THE COMMUNITY MILK MARKET REGIME**

*Decision on complaint 619/98/(JH)/GG against the European Commission*

### **THE COMPLAINT**

Regulation No. 1001/98 was adopted on 13 May 1998 and published in the Official Journal on 14 May 1998. Pursuant to its Article 2, it entered into force on the seventh day following its publication in the Official Journal. The regulation provided for certain penalties if purchasers (i.e. the dairies to whom the milk was delivered by producers) did not inform the national competent authorities on deliveries by 14 May each year.

In June 1998, a member of a provincial authority in Italy lodged a complaint with the Ombudsman. He argued that the institutions of the EU should not have adopted a regulation on the day before it was to be applied and published it on the day when it was to be applied. He was of the opinion that compliance with the regulation was very much put at risk in view of the fact that the national authority in Italy had not yet made available the relevant instructions and forms in the German language.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission.

In its opinion, the Commission pointed out that the obligation for purchasers to provide the relevant information to the national authorities before 15 May each year had been established by Article 3 (2) *first* subparagraph of Regulation No. 536/93 (which had not been modified by Regulation No. 1001/98). Article 3 (2) *second* subparagraph of Regulation No. 536/93 provided for certain penalties in case that this information was not supplied in time. The penalty to be paid was the amount of levy due for a 0.1% overrun of the reference quantity. It could not exceed ECU 20 000, however.

The penalty was the same, regardless of whether the purchaser was one day late in providing the information or three months. According to the Commission, this had been perceived to be inappropriate. Article 3 (2) *second* subparagraph had therefore been modified by Regulation No. 1001/98. The new version of this subparagraph provided for the same penalty of an amount equal to the levy due for a 0.1% overrun on quantities of milk delivered as the old version of this subparagraph, provided that the information was supplied after 14 May but before 1 June. Increased penalties were however laid down for cases where the communication was made after 31 May but before 16 June, after 15 June but before 1 July, and after 30 June. In addition, minimum amounts of penalty were now fixed for all these cases. According to Article 2 of Regulation No. 1001/98 these minimum amounts were however only applicable from 1999.

On the basis of the above, the Commission drew the following conclusions:

- 1 The deadline for the transmission of the relevant information (14 May) was not changed by Regulation No. 1001/98.
- 2 For communications made between 15 May and 31 May the penalty applicable was exactly the same as under the original version of Regulation No. 536/93, with the sole exception that a minimum penalty was fixed.
- 3 Article 2 of Regulation No. 1001/98 expressly provided that the minimum penalties did not apply until 1999.
- 4 A purchaser was therefore in no different position as a result of the modifications unless he had still failed to transmit the communication by 31 May 1998.

As to the difficulty to meet the deadline of 14 May as a result of the lack of instructions and forms in German, the Commission observed that the obligation of the purchasers to provide the relevant information had been established by Regulation No. 536/93 and had been applicable since 1 April 1993. Purchasers in all member states had therefore been fully aware of this deadline. In the Commission's view, there was no possible connection between the availability of such instructions and forms in the German

language and the provisions of Regulation No. 1001/98, as the instructions and forms were to be provided by the Italian authorities.

The Commission finally noted that no previous administrative approaches had been made to it by the complainant.

### **The complainant's observations**

No observations on these comments by the Commission were received from the complainant.

## **THE DECISION**

### **1 Admissibility**

In its opinion, the Commission drew attention to the fact that no prior administrative approaches had been made to it by the complainant. It has to be pointed out, however, that Article 2 (4) of the Statute of the Ombudsman<sup>40</sup> requires that a complaint be preceded by the "appropriate administrative approaches". The Ombudsman considered that the present case concerned a claim brought in the public interest (*actio popularis*) where such prior administrative approaches are not necessarily appropriate.

### **2 Date of applicability of Regulation No. 1001/98**

- 2.1 The complainant alleged that Regulation No. 1001/98 was adopted on the day before it was to be applied and published on the day when it was to be applied (14 May). It would therefore have been difficult for purchasers (i.e. the dairies to whom the milk is delivered by producers) to comply with their obligation to forward, by 14 May, to the national competent authorities information on deliveries. The Commission replied that the relevant date had already been fixed by Regulation No. 536/93 and that, notwithstanding the modifications in relation to penalties for non-compliance with this obligation that were introduced by Regulation No. 1001/98, a purchaser was in no different position than before, unless he had still failed to transmit the communication by 31 May 1998.
- 2.2 The Commission correctly pointed out that the obligation of purchasers to supply the relevant information to the national authorities by 14 May each year was already introduced by Regulation No. 536/93 in 1993. Regulation No. 1001/98 only deals with the penalties which accrue in cases where this deadline is not respected. It had therefore no impact on the ability of purchasers to comply with the obligation to provide information imposed on them by Regulation No. 536/93, and the fact that it was published on 14 May was therefore of no importance in this respect.
- 2.3 Although it does not expressly address this issue, the complaint could also be understood as querying the applicability in time of the new

<sup>40</sup> Decision no. 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the Ombudsman's duties.

penalties established by Regulation No. 1001/98. The Commission at least appeared to have interpreted the complaint in such a way since it compared the penalties fixed by the two respective regulations and discussed the question as to when the new sanctions would become applicable. In this respect, the Commission correctly pointed out that the new minimum penalties provided for by Regulation No. 1001/98 would (pursuant to Article 2 of this regulation) only become applicable in 1999.

### **3 Lack of instructions and forms in German**

- 3.1 The complainant relied on the fact that the Italian authorities in charge of matters relating to milk quotas had not made the necessary instructions and forms available in the German language before 14 May 1998. The Commission retorted that Regulation No. 1001/98 had nothing to do with the deadline of 14 May which had already been fixed by Regulation No. 536/93 and that the instructions and forms were in any event to be provided by the Italian authorities.
- 3.2 As the Commission pointed out, the obligation for purchasers to provide the relevant information was already set by Regulation No. 536/93. Purchasers thus had to be aware of this obligation since 1993 at least. The alleged lack of instructions and forms in the German language does not affect this conclusion. In any event, the responsibility to provide such instructions and forms would appear to rest with the Italian authorities. The alleged failure of the Italian authorities could thus not be examined by the Ombudsman whose mission consists of investigating possible instances of maladministration on the part of *Community* institutions or bodies.

## **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the Commission. The Ombudsman therefore closed the case.

## **THE COMMISSION'S HANDLING OF A COMPETITION CASE**

*Decision on complaint 75/99/ME against the European Commission*

### **THE COMPLAINT**

The complainant was a national representative for smaller businesses. One of the firms he represents, Microwave Ovenware Ltd. (MOL), claimed that it had been forced to cease trading in 1989 because of the behaviour of another enterprise, Dynopack, situated in Norway. MOL complained to the Commission in May 1988 about breaches of Articles 81 and 82 of the EC-Treaty (former Articles 85 and 86) by Dynopack. The Commission examined the complaint but did not find any breach of EC competition law. In 1994 it finally informed MOL that the file on its case was closed.

The complainant claimed that MOL tried for many years to get information and answers to questions arising from the complaint lodged with the



Commission. The complainant stated that the Commission refused to give MOL the requested information and that it did not handle the file nor did it examine the submitted documents properly. Further, the Commission wrongly stated that trade between Norway and the United Kingdom was not considered to be trade between Member States in the meaning of the EC competition rules.

According to the complainant, only at a meeting in September 1997 did the Commission provide MOL with the information it had requested for many years. The information demonstrated that the Commission had not handled the claim in accordance with the proper and correct procedure. In May 1998, the Commission agreed that trade between Norway and the United Kingdom was like trade between Member States. Despite this, it refused to reopen the file.

The Commission stated that it was not an investigative body but that it relied on written submissions and that administrative powers were insufficient. According to the complainant, this is not true since the Commission's investigative powers are well established, particularly in the area of competition law.

Moreover, the Commission never replied to the complainant's letter of 21 July 1998.

### Further information

In March 1999, Mr Elliott, MEP wrote to the Commission regarding MOL's case at the Commission and he sent a copy of his letter to the Ombudsman. In his letter he asked the Commission in summary the following four questions in relation to MOL's case:

- What examination was carried out by the Commission of the accuracy of the statements submitted to the Commission, bearing in mind MOL's claims that the evidence submitted was false?
- Mr Elliott sent a Parliamentary question in March 1991 concerning question number one. In its reply, the Commission stated that secrecy prevented any comment. On what grounds was the decision taken that professional secrecy applied and what action would be taken in relation to the allegations of false evidence?
- The Commission stated that the behaviour of Dynopack did not appear to have any effect on trade between Member States. No reason was given for this interpretation. On what grounds was that decision taken, and why was MOL not properly advised of this?
- The Commission stated that MOL had not been able to supply evidence of the alleged infringement. However, MOL stated that no substantive reply had been received to the request by MOL to provide dates and instances of these requests, in consequence, the Commission's statement was flawed. Mr Elliott asked the Commission to include the answers to these questions in the reply by the Commission to the Ombudsman.



## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion the Commission put forward that Microwave Ovenware Ltd. (MOL) complained to the Commission in 1988 alleging that it had suffered losses because of the behaviour of Dynopack, a firm that had earlier supplied MOL with accessories for use in microwave ovens. During the years 1988 through 1993, DG IV of the Commission examined the complaint and had numerous contacts with the complainant via letters and informal discussions. This was shown by a table which was annexed to the opinion outlining the communications and contacts between the Commission and MOL. However in 1993, the Commission sent MOL a letter under Article 6 of Regulation 99/63/EEC to advise them that the Commission envisaged rejecting the complaint. In this letter the Commission informed the complainant that the requirement of Article 85 of the EC-Treaty (now Article 81) was not met: trade between Member States was not affected. Following that letter, the complainant did not add any further evidence in support of his complaint and in 1994 the Commission informed MOL that the case was considered closed.

In 1997, more than three and a half years later, MOL asked for the case to be reopened. In doing this, MOL alleged mismanagement regarding the handling of its file and questioned the given reasons of lack of effect on trade between Member States. During this contact it also became clear that MOL had ceased trading in 1989. The Commission informed MOL by letter of 16 July 1998 in detail why the original case could not be reopened. In this letter the Commission referred to the so-called Article 6 letter and its letter from 1994 informing MOL that the case was closed. The Commission pointed out that following this correspondence MOL did not act and did not ask for a formal decision rejecting the complaint, so that MOL could have brought the matter before the Court of First Instance. As regards the request to reopen the case, the Commission pointed out that it would mean re-examining facts occurred between 1988 and 1993 concerning a firm that in the meantime had ceased any economical activity. The Commission pointed out that in accordance with the case-law of the Court of First Instance (T-77/95, SFEI and others v Commission, [1997] ECR II-1, para. 57) the Commission is not required to take action on complaints denouncing practices which have ceased. The Commission concluded that the reopening of the case would involve use of the Commission's resources which would be out of proportion to the importance of the alleged infringement for the functioning of the common market. It did, therefore, not find sufficient Community interest to justify the reopening of the investigation of MOL's complaint.

The complainant's letter of 21 July 1998 was regarded by the Commission as an acknowledgement of receipt of its own letter of 16 July 1998 since the same arguments were being repeated. The Commission felt that no reply was called for.

The Commission pointed out that it does not possess the same means as a national court to hear witnesses and it can therefore not establish the veracity of information provided by other parties.

Moreover, this was the subject of two written questions by Mr Elliott, MEP to the Commission. Mr Elliott also wrote directly to and received an answer from Sir Leon Brittan in 1991.

### **The complainant's observations**

In its observations the complainant put forward in summary the following points:

It was not possible to comment fully on the Commission's list of letters and replies annexed to its opinion, because page three of the list was lacking. There were no numerous informal discussions between MOL and the Commission. There was no evidence to show that the file was in fact examined.

As regards the question whether trade between Member States had been affected the Commission indicated that this requirement did not appear to be met. However, the Commission never explained why it had changed its view and until the meeting in September 1997, the Commission never answered MOL's request for clarification on this point. Finally, in 1998 the Commission agreed that trade between Norway and the United Kingdom was considered to be trade between Member States. Further the Commission should have explained why the case was opened under Article 86 of the EC-Treaty (now Article 82) and why a resubmission under Article 85 of the EC-Treaty (now Article 81) was allowed if there was no qualifying trade.

MOL did not act between 1994 and 1997 because it was clear to them that the Commission had no intention to respond to them. It was only when friends and lawyers advised MOL that the Commission should have answered MOL, that it resumed contact with the Commission through its business representative.

As regards the fact that the Commission is not required to act on complaints denouncing practices that have ceased, the complainant put forward a newspaper article stating that the Commission does act in relation to certain cases like this.

The Commission did not answer the letter of 21 July 1998, which, contrary to what the Commission stated, raised new points.

Contrary to what it says, the Commission has investigation powers under Article 14 of Council Regulation No. 17. The complainant did therefore not agree with the Commission's statement that it cannot establish the veracity of information submitted to it, being only an administrative body.

As regards the Commission's statement that it tried in vain to find solid evidence to support MOL's allegations, the complainant put forward that it supplied the Commission with, amongst other things, with copies of invoices and signed orders, sworn affidavits, import/export documents and bank

statements. If this was not evidence enough, the complainant asked the Commission to specify what it classed as evidence.

Finally, the complainant hoped for the Commission to give full answers regarding both the complaint and the four questions submitted to the Commission by Mr. Elliott, MEP.

## **THE DECISION**

### **1 Preliminary remarks**

In the observations, the complainant raised new points in relation to the original complaint. These points concerned requests for information and clarification from the Commission including receiving answers to the four questions put forward by Mr Elliott. The Ombudsman did not find it justified to start inquiries into the new points raised in the complainant's observations as they went beyond the scope of the original complaint and rather only constituted a request for information.

### **2 The handling of the file by the Commission**

- 2.1 The complainant claimed that the file was not handled or examined by the Commission. Furthermore it had not answered to the complainant's letter of 21 July 1998.
- 2.2 The Commission stated that it examined the complaint during the years 1988 through 1993 and that it had had numerous contacts with the complainant as shown in the table enclosed to its opinion. Furthermore it felt that no reply was needed regarding the letter of 21 July 1998, as no new points were raised in the letter.
- 2.3 As regards the handling of the case, the Commission enclosed a table concerning the communications and contacts with MOL but, as the complainant had correctly pointed out, page three of this table was missing. The table showed however, only the main documents of the file. Moreover, the documents submitted by both the Commission and the complainant (such as copies of correspondence) still permitted a proper evaluation of the handling of the case. The documents showed that there was a large amount of correspondence between the Commission and MOL during a period of several years. During this period the Commission regularly answered the complainant. Although, the Commission did not answer or acknowledge every single letter, sometimes because the complainant wrote so frequently, it always replied when it found it appropriate and it was clear that correspondence took place on a regular basis. Further, in competition cases like this, it cannot be required that the complainant receives a reaction on all the material handed in to the Commission when correspondence is taking place so frequently and over such a long period of time. The Ombudsman also noted that, although there were misunderstandings between the Commission and the complainant, along with the occurrence of some practical problems, the file showed that the Commission gave the complainant the opportunity to properly

take part in the procedures. In addition, the Commission respected the procedure foreseen in competition cases regarding for example the sending of a so called Article 6 letter. There was, therefore, nothing to indicate that the Commission did not handle the file correctly.

- 2.4 Concerning the complainant's allegation that the file was not examined, it shall be recalled that the Commission in its Article 6 letter of 5 February 1993 stated that it had carried out a thorough study of the case and that it was fully aware of the case. There was nothing in the file to indicate that the Commission had not fulfilled this statement or had not properly examined the case.
- 2.5 As concerns the complainant's letter of 21 July 1998, the Ombudsman noted that in general letters should be replied to. An evaluation of the letters by the Ombudsman revealed that the letter of the complainant of 21 July 1998 contained questions relating to the basis for the Commission closing the file and concerning the duty of the Commission to provide clear advice on the progress of the procedures. As regards the Commission's decision to close the case, in its letter of 16 July 1998 the Commission referred to its Article 6 letter of 5 February 1993 which properly dealt with this issue. Regarding the duty of the Commission to provide clear advice, the Ombudsman noted that the Commission did follow the procedures foreseen in competition cases and the Ombudsman did, therefore, not find it justified to pursue this point of the complaint further.
- 2.6 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this aspect of the case.

### **3 The Commission's opinion as regards whether trade between Norway and the United Kingdom is considered to be trade between Member States**

- 3.1 The complainant claimed that the Commission first considered that trade between Norway and the United Kingdom was like trade between Member States in the meaning of the EC competition rules (Article 81 and 82 of the EC-Treaty), but later it wrongly changed its opinion. Only in 1998, did it again agree with the complainants' view that it was to be seen like trade between Member States.
- 3.2 The Commission referred to its Article 6 letter of 5 February 1993 and stated that since trade between Member States was not affected, the requirement of Article 81 of the EC-Treaty had not been met.
- 3.3 As regards this question, it appeared necessary to refer to the Article 6 letter of 5 February 1993. This letter stated:

*"So far as Article 85(1) EEC is concerned, the evidence shows that the trade affected by the behaviour you have complained of is direct trade between Norway and the United Kingdom. While this does not mean that the behaviour complained of cannot have an effect on trade between Member States, there is no evidence in this case*

*of any appreciable effect on such trade. Thus, even if the Commission were to accept unquestioned that the situation is what you allege and that Dynopack and its British distributors or subsidiaries have “squeezed you out” of your United Kingdom markets, the evidence is lacking to show that one of the essential conditions for applying Article 85(1) EEC is fulfilled. We have tried to give you every opportunity of showing the opposite, which is why we have not moved to close the file sooner; we have to conclude, however, that you have not been able to provide any evidence of an appreciable effect on trade between Member States, although we have frequently emphasised that this is the main obstacle to pursuing your complaint.”*

- 3.4 When reading the Article 6 letter of 5 February 1993, the complainant had apparently misunderstood the position of the Commission. It was clear from the letter that the Commission did not state that trade between Norway and the United Kingdom can never be seen as trade between Member States. With the wording “While this does not mean that the behaviour complained of cannot have an effect on trade between Member States...” rather the opposite view is taken by the Commission. However, it appeared that the Commission did not find “any appreciable effect on such trade” in this specific case. Further, there was nothing in the file to indicate that the Commission did in fact state that trade between Norway and the United Kingdom cannot be considered as trade between Member States. What the Commission did state on the other hand was that there was no appreciable effect on trade between Member States in this specific case.
- 3.5 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this aspect of the case.

#### **4 The Commission’s investigation powers**

- 4.1 The complainant alleged that the Commission wrongly stated that it was not an investigative body but that it relied on written submissions and that its administrative powers were insufficient. According to the complainant, this is not true since the Commission’s investigative powers are well established, particularly in the area of competition law.
- 4.2 The Commission stated that it does not possess the same means as a national court to hear witnesses and it can therefore not establish the veracity of information provided by other parties.
- 4.3 The investigation powers of the Commission in competition cases are laid down in Council Regulation No. 17<sup>41</sup> and by case law of the Court of Justice. Although it is recognised that the Commission has broad investigation powers in the area of competition law, this does not mean that it possesses the possibility to hear witnesses or to control the veracity of documents submitted to it. According to Article 14 of

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<sup>41</sup> OJ 1962 13/204.

Regulation No. 17, the Commission has the right “to ask for oral explanations on the spot”. However, Article 14 applies to investigations of the Commission performed in the premises of the undertaking and further, the case law of the Court of Justice has recognised a limited privilege against self-incrimination to the effect that an undertaking is not required to answer to questions which would be an admission of the very offence which the Commission is investigating.<sup>42</sup> Moreover, there is no established right for the Commission to call witnesses, or to seek oral explanations outside the remit of Article 14 of Regulation No. 17.

Although any natural or legal person with a legitimate interest may complain to the Commission in accordance with Article 3 (2)(b) of Regulation No. 17, it is clear from the case law of the Court of Justice that this right does not include the right to obtain a decision, within the meaning of Article 249 of the EC-Treaty, as to the existence or otherwise of the alleged infringement.<sup>43</sup> This further indicates that the Commission has no obligation to inquire into the veracity of the documents submitted to it.

- 4.4 It appeared that the Commission did not break any rule or principle binding upon it when stating that it did not possess the same means as a national court to hear witnesses and that it cannot establish the veracity of submitted information. The Ombudsman, therefore, found that there was no instance of maladministration in relation to this aspect of the case.

## 5 The Commission’s refusal to reopen the file

- 5.1 After the complainant resumed contact with the Commission he requested the reopening of the file. The Commission informed MOL by letter of 16 July 1998 why the original case could not be reopened. In the letter the Commission stated:

*“With regard to your request, introduced in 1997 and confirmed in 1998, for reopening of the examination of the case, I regret to note that it merely seeks to have the Commission re-examine facts alleged to have occurred between 1988 and 1993. The justification you put forward is that false evidence was supplied at the time. You yourself concede, however, that the alleged infringement has ceased and that currently you carry out no relevant economic activity.*

*The Commission considers that it is not required to take action on complaints denouncing practices which have ceased (Court of First Instance, case T-77/95, SFEI and others v Commission, ([1997] ECR II-1, paragraph 57). The reopening of your case would involve use of the Commission’s resources which would be out of proportion*

<sup>42</sup> Case 374/87, *ORKEM SA v. Commission*, [1989] ECR 3283.

<sup>43</sup> Case 125/78, *GEMA v. Commission*, [1979] ECR 3173.

*to the importance of the alleged infringement for the functioning of the common market. There is therefore no sufficient Community interest to justify the reopening of the investigation of the complaint.”*

- 5.2 The Commission has discretionary powers to decide in competition cases what action to take as long as it gives reasons for its decision. In its letter of 16 July 1998, the Commission explained why it did not find it necessary to reopen the case. The reasons given were firstly that MOL had ceased trading which meant that the Commission was not required to examine the case further. Even if it were to be shown that the Commission pursues certain cases relating to activities that have ceased (as put forward by the complainant), it is within the powers of the Commission to decide which cases it wishes to examine. Secondly, the Commission considered that there was not sufficient Community interest to justify the reopening of the case. The reasons given by the Commission for denying the reopening of the case appear to be in accordance with the case law of the Community Courts. The Ombudsman therefore found that the Commission acted within the limits of its legal authority when denying the reopening of the case.
- 5.3 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this aspect of the case.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into this complaint, there appeared to have been no maladministration by the European Commission. The Ombudsman therefore decided to close the case.

### **3.1.5 The European Central Bank**

## **LANGUAGE RULES FOR COMMUNITY INSTITUTIONS**

*Decision on complaint 281/99/VK against the European Central Bank*

### **THE COMPLAINT**

In March 1999 Mr P. made a complaint to the European Ombudsman against the European Central Bank (ECB). The complainant had addressed the Bank's director for external relations, Dr. Manfred Körber, concerning the fact that the information on the European Central Bank's Website is available only in English and not in other Community languages. In his reply, Dr. Körber referred to the cost of presenting information in all languages. He also stated that the ECB's Website contains links to the Websites of all the national central banks, which could provide the necessary information in the other languages.

In his complaint to the Ombudsman, the complainant claimed that the ECB should comply with the same language rules as other Community institu-



tions and that provision of the information on the Website only in English is discriminatory.

## **THE INQUIRY**

### **The Central Bank's opinion**

In its opinion, the ECB stated that its Website had been intended to provide the public with a direct and useful means of communication. Most ECB documents are drafted in English. Publication in English has the advantage of presenting the public with original first-hand information without delay. If documents are prepared in other languages, they are made available on the Website in those languages as well. In addition, all major ECB publications, such as the Monthly Bulletin and the Annual Report, are published simultaneously in all Community languages. The ECB also provides different language versions via links to the Websites of the national central banks.

The ECB stated that, in view not only of the need for optimum efficiency and timeliness, but also of budgetary constraints, it considered that the solution it has adopted is a justifiable compromise for the time being. The Bank also pointed out that it was established only one year ago and that it was confident that first steps in the direction suggested by the complainant would become visible in due course.

### **The complainant's observations**

The complainant did not make any observations.

## **THE DECISION**

- 1 The complainant alleged that the provision of information on the ECB's Website only in English is discriminatory. He considered that the ECB should comply with the same language rules as other Community institutions.
- 2 The ECB explained that most of its documents are drafted in English and are published on its Website in English for reasons of cost efficiency and in order to make them public as quickly as possible. Its Website contains links to the Websites of the national central banks, which contain information in other languages.
- 3 The Ombudsman is not aware that the provisions of Community law concerning use of languages<sup>44</sup> could prevent a Community body publishing on a Website, as a public service, documents in the language in which they are drafted.
- 4 Effective communication requires that, as far as possible, the Community institutions and bodies should provide information to citizens in their own language. From its opinion, it appeared that the ECB envisages a progressive development of the provision of information on its Website in the other Community languages.

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<sup>44</sup> Regulation 1/58 as amended, 1958 OJ 17/385; Article 217 EC.

## CONCLUSION

On the basis of the above, there appeared to have been no maladministration by the European Central Bank. The Ombudsman therefore closed the case.

## FURTHER REMARKS

As a service to the citizens, it could be useful for the ECB's Website to explain, in all Community languages, the ECB's information policy and to contain all relevant material, especially legal texts, which already exists in all Community languages.

*Note: it appears that the ECB has now made available on its website (<http://www.ecb.int>) a compendium of ECB legal instruments in all the official languages.*

## 3.2 CASES CLOSED FOR OTHER REASONS

### 3.2.1 The European Commission

#### TACIS PROGRAMME: REFUSAL TO PAY AN INVOICE

*Decision on complaint 739/98/ADB against the European Commission*

On 16 July 1998 the Organisation *Énergie pour l'Arménie* lodged a complainant with the European Ombudsman. It claimed that the European Commission refused to pay an invoice for work carried out in the framework of a contract signed under the TACIS programme. The complaint was sent to the Commission for an opinion, and the complainant was given the opportunity to comment on it. Some further inquiries were made.

In accordance with Article 195 of the Treaty establishing the European Community, the European Ombudsman may not conduct inquiries where the alleged facts are or have been the subject of legal proceedings.

During the investigations on the complaint, the complainant informed the European Ombudsman that the facts alleged in his complaint to the Ombudsman were the subject of legal proceedings before Belgian Courts.

Article 2 (7) of the Statute of the Ombudsman provides that, when the Ombudsman has to terminate his consideration of a complaint because of legal proceedings, the outcome of any inquiries he has carried out up to that point shall be filed without any further action.

The Ombudsman therefore decided to close the case.

**REFUSAL OF ADMISSION TO COMPETITION COM/A/12/98**

*Decision on complaint 867/99/GG against the European Commission*

In July 1999, Mrs P. made a complaint to the European Ombudsman concerning the refusal of the Commission of the European Communities to admit her to the written examination of Competition COM/A/12/98.

The complaint was forwarded to the Commission for its opinion. In November 1999, the Commission informed the Ombudsman that the complainant had initiated legal proceedings before the Court of First Instance concerning the facts which had been put forward in the complaint.

Because the complainant had brought an action before the Court of First Instance, the Ombudsman, after having heard the complainant on this issue, terminated his consideration of the complaint in December 1999 in accordance with Article 195 of the EC Treaty.

In accordance with Article 2 (7) of the Statute of the Ombudsman, the outcome of the Ombudsman's inquiries carried out up to that point was filed without further action.

**3.3 CASES SETTLED BY THE INSTITUTION****3.3.1 The European Commission****COMPLAINT FOR INFRINGEMENT OF COMMUNITY LAW:  
ALLEGED FAILURE OF THE COMMISSION TO ACKNOWLEDGE  
THE COMPLAINT**

*Decision on complaint 245/98/OV against the European Commission*

**THE COMPLAINT**

In February 1998, Mr P. made a complaint to the Ombudsman concerning an alleged failure of the Commission to acknowledge receipt of his complaint about a possible infringement of Community environmental law by the Greek Authorities.

On 6 August 1997 the complainant, who acted on behalf of a Greek registered environmental charity, sent a complaint to the Commission alleging a violation of Community environmental law by the Greek Authorities as regards the construction of a dam on the Amari River in the District of Rethimnon, Crete. On 27 November 1997, the complainant sent a reminder with a request for an acknowledgement of receipt. As he received no reply, he contacted the Secretariat General of the Commission by telephone on 5 February 1998. Since he received no answer, he wrote to the Ombudsman asking for an investigation into the administrative procedure regarding his complaint.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission recognised that Mr P. had made a complaint in August 1997 and had sent a reminder on 27 November 1997. However, because of a regrettable administrative error, the correspondence received from the complainant had not been promptly registered as a complaint. The Commission pointed out that in order to correct this failure, it had registered the complainant's letter as complaint n° 98/4483 and that it had sent an acknowledgement of receipt to the complainant on 4 June 1998 informing him that the Commission services were examining the complaint. The Commission finally stated that the handling of the complaint was now being pursued according to the usual procedure. In its opinion, the Commission also recalled the allegations of the original complaint, which were that:

- a) the complainant's observations concerning the construction project had not been taken into account, as they should have been pursuant to Article 6 of Directive 85/337<sup>45</sup>, and
- b) the project would negatively affect the special protection area of the Gorge of Prasiana.

### The complainant's observations

No observations were received. However, the complainant wrote on 18 January 1999 stating that his complaint was only registered due to the intervention of the Ombudsman, but that since June 1998 he had received no further communication from the Commission. He referred also to the fact that he had made his initial complaint in August 1997. He therefore requested the Ombudsman to inquire into the outcome of the complaint.

## THE DECISION

### The failure of the Commission to send an acknowledgement of receipt

- 1 The complainant alleged that the Commission had not acknowledged receipt of the complaint he sent on 6 August 1997 nor replied to his reminder of 27 November 1997 in which he explicitly asked for an acknowledgement of receipt. The Commission observed that the complaint had not been registered because of a regrettable administrative error. To put an end to this failure the Commission finally registered the complaint, acknowledged its receipt on 4 June 1998 and informed the complainant that its services were examining the case. Therefore, by having registered and acknowledged receipt of the complaint, the Commission had settled the matter.
- 2 In his letter of 18 January 1999 the complainant however informed the Ombudsman that since the acknowledgement of receipt of June 1998,

<sup>45</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

no further communication was received from the Commission services with regard to the outcome of his complaint. The complainant drew attention to the fact that in its opinion the Commission had stated that the complaint would be processed according to the usual procedure.

### CONCLUSION

As regards the alleged failure of the Commission to send an acknowledgement of receipt, it appeared from the Commission's opinion and the complainant's observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

### FURTHER REMARKS

As regards point 1.2 above, the Ombudsman noted that, according to the Commission's own observations in the framework of the Ombudsman's own initiative inquiry 303/97/PD<sup>46</sup>, a complainant should be kept informed about the action taken by the Commission in response to the complaint. It appeared from the complainant's letter of January 1999 that since June 1998 he had received no communication about the action taken on his complaint. The Ombudsman foresees that the Commission will keep the complainant duly informed in accordance with the obligations it has undertaken in these cases.

## RECONSIDERATION BY THE COMMISSION OF FUNDING FOR PROJECT TO ASSIST VICTIMS OF VIOLENCE IN THE BASQUE REGION

*Decision on complaint 669/98/JMA against the European Commission*

### THE COMPLAINT

In June 1998, the regional ombudsman of the Basque Region (Ararteko), in Spain, transferred to the European Ombudsman a complaint lodged by the complainant, on behalf of a NGO, with that institution. The complaint concerned the allegedly unjustified refusal by the Commission to extend the time-scale for the completion of project 96/018 ("*Intervención Psicoterapéutica con Víctimas de la Violencia de Origen Político-Ideológico*"), funded by the Commission's services (DG IA/A).

In 1996 the Commission granted 50.000 ECUs to the NGO in San Sebastian, in order to pay for psychological assistance to victims of political violence in the Basque Region of Spain. This grant was to be paid for a period of 12 months, starting in September 1996, under the European Community's Human Rights and Democratisation Programme.

At the end of the agreed period, in September 1997, the NGO submitted a report, and requested an extension for a period of six months. The request was also formally made by letter of December 1997. The Commission con-

<sup>46</sup> Annual Report 1997 of the European Ombudsman, p. 270.

sidered that the request was not in accordance with the basis of the Programme since it had been made only after the initial contract had expired, and therefore did not accept it.

Moreover, the complainant informed the Commission that since the NGO responsible was unaware of the exact date for the conclusion of the project, it had continued to carry out the established tasks (providing assistance to victims of terrorism). It had therefore spent 1.989.020 PTA. during that extra period, which exceeded the amount which had not been spent (1.238.765 PTA.).

The Commission therefore asked the NGO to return the unspent funding. Since the association found the decision unjustified and without a proper consideration of the effects of the project on important groups of citizens in the Basque Region, it lodged a complaint with the regional ombudsman who transferred the case to the European Ombudsman.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the European Commission. Its comments were in summary the following:

The Commission first explained the background of the case. It indicated that its negative decision followed prevailing rules of financial management. The request to extend the period of project validity had been received well after the end of the contract, and could not therefore be treated as a simple contract amendment, because it would have involved a retroactive approval of expenditure.

The Commission had asked the NGO to submit financial reports covering the specific period of the original contract, in order to determine the precise amount legitimately spent. Also, a request had been made to return the unspent grant funds. The Commission considered this *"to be sound management of public funds pursuant to the applicable procedure"*.

In March 1998, the Commission reviewed the file, taking into account the fact that its position would have implied seeking the reimbursement of a considerable sum which had been spent by the NGO beyond the contractual period. Since the request for reimbursement may have imposed extreme conditions for the complainant, and moreover since these amounts had been spent in pursuit of the objectives originally specified in the project request, the Commission reconsidered its position. It decided to accept the position being proposed by the NGO, and informed it of its new position. In its reply, the Commission attached a form of dispute settlement agreement whereby the other party accept to spend the outstanding amount on further activities in conformity with the initially agreed conditions.

The Commission's proposal to settle the matter was dated July 1998, and covered the period for which expenditure could be considered to the end of September 1998.

### **The complainant's observations**

In his observation on the Commission's opinion, the complainant first expressed, on behalf of the NGO his gratitude for the Ombudsman's satisfactory resolution of the matter.

The complainant also made some remarks on the following points:

From the outset, their relations with the Commission had been difficult, particularly as regards the gathering of information concerning the examination of the project. Although the complainant recognised his lack of experience with Community matters, he had always informed the Commission of the work. Accordingly, before sending the final report (September 1997), the NGO had forwarded an activity report in February. The complainant also recognised that the NGO had overestimated the work that could be done in the original contract period.

In view of the important objectives of the project being developed, the complainant also asked the Ombudsman to support the NGO's request for a new contract with the Commission. Since this aspect was not part of the original complaint, and as the institution had no opportunity therefore to comment on it, the Ombudsman did not deem it appropriate to consider this new aspect. Furthermore, the EC Treaty empowers the European Ombudsman to inquire only into possible instances of maladministration in the activities of Community institutions and bodies. It is therefore beyond the remit of the Ombudsman to mediate before a Community institution in order to support the application for financial assistance of a particular project.

In May 1999, the complainant wrote again to the Ombudsman stating that despite the Commission's assurances, final payment of the grant had not been yet made. Having contacted the responsible Commission services, the Ombudsman was informed that the bank transfer to the complainant had already taken place. A copy of the bank operation was forwarded to the complainant in June 1999.

### **THE DECISION**

On the basis of the information provided by the complainant and the opinion submitted by the European Commission, the Ombudsman concluded that the case had been settled by the European Commission to the complainant's full satisfaction. The Ombudsman therefore decided to close the case.

## **REIMBURSEMENT OF A GRANT UNDER THE SOCRATES PROGRAMME**

*Decision on complaint 968/98/ME against the European Commission*

### **THE COMPLAINT**

In September 1998, Mrs K. made a complaint to the Ombudsman concerning the treatment of her application for a grant under the Socrates pro-



gramme and in particular the fact that the European Commission had demanded reimbursement of the grant.

In February 1996, Mrs K., a teacher at a public school of education for adults, had applied for a grant under the Socrates programme of DG XXII of the Commission. The grant was meant to widen the intellectual horizon of low-educated women by meeting people in the same situation in other Member States. A decision on the awarding of the grant should have been communicated to the complainant in June 1996. Only in September 1996 was she informed that she had been awarded ECU 2000 to perform preparatory visits. The money finally arrived in May 1997, 8-9 months later.

In May 1997, when the money arrived, the complainant was occupied with examinations and she had to postpone the realisation of the project. It then appeared that the schools that had invited the complainant for preparatory visits in the spring of 1996 were no longer interested in continuing the project. The complainant therefore wrote to the Commission twice, asking if she could postpone the visit to January 1998. She did not receive any replies, which she considered to be a positive answer. In January 1998 she went to Kensington-Chelsea College in London and established a partnership.

In March 1998, the Commission sent the complainant a request for reimbursement of the grant. The complainant sent the Commission a letter explaining the situation and enclosing all the relevant documents, including a copy of the partnership agreement with Kensington-Chelsea College. The complainant then received a reminder of the reimbursement request asking for immediate payment. Again, she sent a letter explaining the situation. She then received an unfriendly letter insisting on repayment. The letter further referred to the fact that late payment of the grant was caused by the complainant not sending her bank details. This was completely new to the complainant.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission shortly explained the aim of the Socrates programme. It then pointed out that the delayed payment, from September 1996 until May 1997, occurred because the complainant did not send the Commission any bank details and the signature of the legal representative of the project. However, the Commission expressed understanding for the fact that further delays had caused problems for the complainant.

The Commission pointed out that the preparatory visit took place outside the time set out in the contract and that the complainant, in changing the cooperation partner indicated in the contract, had decided to change the conditions of the contract unilaterally. According to the Commission, the Technical Assistance Office was, therefore, correct in requesting reimbursement of the grant. However, the Technical Assistance Office did not rule out that administrative irregularities could have taken place when requesting repayment. The Commission regretted that the situation had

occurred and considered that it should take into account the problems the complainant had to face. It, therefore, decided to prolong the term of the agreement so that the visit performed by the complainant fall within the term.

The Commission finally noted that the applicant had to fulfill the commitments as laid down in the terms of the agreement. This included giving the Commission all the information regarding the change of cooperation partner and the final report. The Commission would then make the final approval of the project.

### **The complainant's observations**

In her observations, the complainant stated the following:

The complainant was happy with the fact that the Technical Assistance Office did not rule out that administrative irregularities could have taken place when requesting reimbursement of the grant.

The complainant contested that she had changed the conditions of the contract unilaterally, referring to the letters sent to the Technical Assistance Office, asking to postpone the visit and the fact that she did not receive any replies from the Office. The complainant further pointed out, that she under no circumstances had the intention of not fulfilling the commitments of the contract. She stated that this was obvious from her letter of 10 June 1998, in which she welcomed the evaluation request and submitting of the final report.

In a telephone call from the Office of the Ombudsman to the complainant, the complainant expressed satisfaction with the fact that the reimbursement request had been withdrawn.

## **THE DECISION**

### **The Commission's request for reimbursement of the grant**

The Commission requested reimbursement of the grant on the grounds that the complainant had performed the preparatory visit outside the timetable set out in the contract and that the complainant changed the conditions of the contract unilaterally. However, the Commission stated that it could not rule out that administrative irregularities could have taken place when requesting reimbursement of the grant. The Commission therefore decided to prolong the term of the agreement so that the visit performed by the complainant falls within the term.

## **CONCLUSION**

It appeared from the Commission's comments and the complainants' observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

## **FAILURE OF THE COMMISSION TO ISSUE AN ADDENDUM TO A PHARE CONTRACT**

*Decision on complaint 1123/98/IJH against the European Commission*

### **THE COMPLAINT**

In February 1995 a Phare Contract was signed between the Commission and Glasgow City Council and the Council of European Municipalities and Regions. In 1995 the managing agents estimated that there would be a significant underspend on the project. Following discussions with the Commission, it was decided how the underspend would be used. The managing agents were later told by the Commission that an addendum would be necessary and the preparations for an addendum started in June 1996. In July 1997, the Commission formally accepted the need to issue an addendum and requested information from the complainants which was delivered to the Commission in October 1997. Because of the Commission's failure to issue the addendum to the contract, in October 1998 the complainants complained to the Ombudsman.

### **THE INQUIRY**

#### **Further information from the complainants**

In February 1999, the complainants informed the Ombudsman that the Commission had now issued the addendum to the contract, although no payment had yet been made under the addendum.

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion the Commission stated that it had re-examined its position and settled the dispute with the complainants.

#### **The complainants' observations**

The Ombudsman asked the complainants to comment on the opinion of the Commission but no written observations were received by the complainants. However, in a telephone call from the Ombudsman's services to the complainants, they confirmed that the addendum had been made and that the case, as far as the original complaint was concerned, was settled. They further stated that they had not yet received payment on the addendum but it appeared that they did not wish to pursue the payment issue at this stage.

### **THE DECISION**

The complainants complained about the Commission's failure to issue an addendum to a Phare contract. During the inquiry, the Commission re-examined its position and issued the addendum to the contract. The complainants expressed satisfaction with the action of the Commission.

## **CONCLUSION**

It appeared from the Commission's opinion and the complainants' observations that the Commission had taken steps to settle the matter and thereby satisfied the complainants. The Ombudsman therefore closed the case.

## **REIMBURSEMENT OF TRAVEL COSTS FOR CANDIDATES IN ANNULLED TESTS**

*Decision on complaint 1288/98/PD against the European Commission*

### **THE COMPLAINT**

In November 1998 Mr S. made a complaint against the European Commission. On 14 September 1998 the Commission organised written tests in competition COM/A/11/98. Shortly after the tests, the Commission considered itself obliged to annul the tests, in particular because there had been a leak of the questions asked to the applicants.

The complainant participated in the tests, at the exam venue in Düsseldorf. The complainant lived in New York, and had to bear the costs for a travel ticket New York - Düsseldorf and back in order to take part in the tests. Given the subsequent annulment of the tests, he considered that the Commission should reimburse his costs. He addressed the Commission on this subject but in vain.

Against this background, he lodged the complaint with the European Ombudsman.

### **THE INQUIRY**

#### **The Commission's opinion**

In its opinion the Commission regretted that it had had to annul the tests in question. Furthermore it explained that normally, it did not dispose of sufficient budgetary funds for reimbursing applicants. However, given the exceptional character of the situation, it had decided to reimburse applicants for their travel costs, provided that they participated in the tests organised in replacement of the annulled ones. The reimbursement would be subject to maximum limits.

#### **The complainant's observations**

No observations were lodged. In the absence of observations, the Ombudsman's services contacted the complainant. The complainant expressed satisfaction with the Commission's action and thanked the Ombudsman for his intervention.

## **THE DECISION**

### **Reimbursement of travel costs**

It appeared from the Commission's opinion that it had taken steps to grant the complainant's claim.

## **CONCLUSION**

It appeared from the Commission's opinion and the complainant's observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore decided to close the case.

## **PAYMENT OF COMPLAINANT'S INVOICES**

*Decision on complaint 1331/98/JMA against the European Commission*

## **THE COMPLAINT**

In December 1998, Mr J. sent a complaint to the European Ombudsman on behalf of FIAB, a Spanish Federation, concerning the failure of the European Commission to pay the amounts due for a contract signed with the institution (ALR/B7-311/95 138/E3/001), as well as to properly reply to his numerous written requests.

In February 1998, FIAB signed a contract with the European Commission in the framework of the AI-Invest programme. Under the terms of the contract, the complainant had to carry out a series of initiatives related to a conference with representatives from the European Union and Mercosur, which was to be held on 2 and 3 March 1998. The payments for the contract were to be made in different instalments: 30% of the total amount had to be paid after the signature of the contract, 40% at the conclusion of the meeting, and the rest once the final report had been approved.

Despite the fact that FIAB forwarded all the relevant information to the European Commission, the payments corresponding to the second and to the final instalments were not made. On a number of occasions the complainant contacted the Commission services, among others by telephone and by letter dated 17 September 1998. The replies given to the contractors to explain the situation of their payment were allegedly unsatisfactory.

Since the situation did not improve, the complainant lodged a complaint with the European Ombudsman on behalf of FIAB. In the letter, he claimed that the Commission had not paid the amount dues, and that the institution had not properly replied to his request for information.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the European Commission. Its opinion was in summary the following:

The Programme Al-Invest assisted businesses in Latin America by setting up a network of support centres, as well as specialised meetings and partnerships. In this context, FIAB submitted a proposal to organise a meeting, which was to be financed jointly by private and Community funds. The EC contribution could not exceed half of the total estimated expenditure.

The Commission paid the first part of its contribution in April 1998. The second instalment of 40% was not paid immediately, since it previously required that the Commission approved the documentation submitted by FIAB. According to the Commission, FIAB did not forward the complete documentation on time.

FIAB's final report was only submitted on 12 November 1998. However, since it did not contain all relevant documents, the Commission had to remind the complainant a few days later of the need to submit the missing documentation as a condition for the payment of the second and final instalments.

The Commission recognised that the late payment was due to the fact that its external relation services had been thoroughly reorganised in 1998, with the creation of the Joint Relex Service (SCR). The transfer of files and changes for task-managers made it harder to deal with approximately 2000 projects, including the present one. Despite these problems and some electronic complications, SCR made great efforts to close all pending Al-Invest files before the end of 1998. Following this undertaking, the Commission indicated that the FIAB invoices had been already paid.

As regards the alleged failure of its services to provide a satisfactory reply to the complainant's repeated request for payment, the Commission considered that its services had replied to the best of their ability. Moreover, the Deputy Head of Unit of DG IB had explained the situation to the complainant by telephone on a number of occasions, even though he was not in charge of payment matters.

Finally the Commission regretted that payments had been delayed, although it considered that its services had done their best under the prevailing circumstances.

### **The complainant's observations**

In his observations, the complainant confirmed that the Commission had finally paid the sums due, and expressed his gratitude to the Ombudsman. On behalf of FIAB the complainant accepted the apologies from the European Commission. He also mentioned that although his organisation could have claimed interests due for late payments, it had decided not to do so. The complainant underlined furthermore that the problem showed the inefficiency of the Commission procedure, and the need for clearer rules. The complainant claimed that due to the lack of any clear procedural

guidelines at Community level, European citizens do not know what to expect from the EC administration, nor whom to address.

In the complainant's view a set of rules governing the EC administrative procedure, similar to those followed by a number of Member States, would be appropriate.

### **THE DECISION**

On the basis of the information provided by the complainant and the observations submitted by the European Commission, the Ombudsman concluded that the case had been settled by the European Commission to the complainant's satisfaction. Against this background, the European Ombudsman decided therefore to close the case.

### **FURTHER REMARKS**

The Ombudsman received a number of complaints which referred to instances of maladministration which could have been avoided if clear information had been available about the administrative duties of Community staff towards the citizens. In order to correct this deficit, the Ombudsman launched an own initiative inquiry on 11 November 1998 into the existence and the public accessibility, in the different Community institutions and bodies, of a Code on good administrative behaviour of the officials in their relations with the public (OI/1/98/OV).

## **FAILURE TO REPLY – INTER-REGIONAL PROJECTS**

*Decision on complaint 19/99/(XD)ADB against the European Commission*

### **THE COMPLAINT**

In February 1996, the complainant addressed two letters to the European Commission, on behalf of two organisations. One was addressed to Directorate General (DG) XIII and aimed at obtaining information about the existence of direct financial support by the Commission for projects promoting the use of interlingua (modern Latin). The other one was addressed to DG XVI and aimed at informing the Commission of the creation of an organisation promoting "l'Occitanie" (regions in France, Italy and Spain in which the langue d'oc is spoken). The complainant inquired as to if, and how, the Commission could help this new organisation.

Having received no answer to these letters the complainant contacted DG XIII again on 24 December 1996, and DG XVI on 14 November 1997, explicitly referring to his previous correspondence. These letters were not replied to either. As the complainant considered this to be a very negative attitude by the Commission towards his two important initiatives, he asked the European Ombudsman to investigate the matter.



## **THE INQUIRY**

### **The Commission's opinion**

The opinion of the European Commission on the complaint was in summary as follows:

Regarding the letters addressed to its DG XIII, the Commission recognised that they had been received and duly attributed to the former Head of Unit XIII/E/6. The Commission deeply regretted that no appropriate follow-up had been given and stressed that the failure to reply was caused by some administrative problems which by no means implied a negative attitude towards the issues of concern to the complainant. Following a general reorganisation of DG XIII, the tasks of unit XIII/E/6 were transferred to unit XIII/E/4 which prepared an answer to the complainant's letters on 22 March 1999.

As far as the letters addressed to DG XVI were concerned, the Commission regretted that no proper reply had been sent to the complainant, and it stated that this did by no means denote any negative attitude towards Occitanian culture. It put forward that the large amount of work being dealt with by DG XVI might explain the failure to reply, without however justifying it. In its opinion to the Ombudsman the Commission explained that the complainant's project could only be funded following a general tender procedure. During the period 1996-1998, two out of three calls for tenders had to involve central European countries. Between 2000 and 2006 however, interregional co-operation projects will be funded in the framework of the INTERREG programme.

### **The complainant's observations**

The European Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. The complainant did not send in any observations.

On 1 September 1999 the complainant was contacted by the European Ombudsman's services by telephone. He informed the European Ombudsman that he had indeed received a letter from DG XIII and that in the meantime he also received several calls for tender likely to be of interest for his organisation.

The complainant thanked the Ombudsman for his intervention, and, although he regretted the delays that had occurred, declared to be fully satisfied with the information obtained from the Commission.

## **THE DECISION**

### **Failure to reply to requests for information**

- 1 The complainant addressed two different departments of the European Commission and asked for information which he did not receive even though he sent two reminders.
- 2 Further to the intervention of the European Ombudsman, the Commission acknowledged that some administrative problems had

led to this failure to reply, apologised for it and took action to settle the matter. The complainant informed the Ombudsman that he had received late but fully satisfying answers to his requests and several calls for tender which were of interest to his organisation.

## **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint it appeared that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore decided to close the case.

## **ALLEGED FAILURE TO PAY BY THE COMMISSION**

*Decision on complaint 478/99/IP against the European Commission*

### **THE COMPLAINT**

In April 1999, Mr A. lodged a complaint with the European Ombudsman against the European Commission, concerning the failure of DG X of the European Commission to provide the payment of 100 Euros for his participation in the Call for tender N° PR – AMI/96-08, in 1997.

The complainant presented a project for the promotional campaign for the Euro launched by the European Commission through the call for tender N° PR – AMI/96-08. As established in article 2.5 of the call for tender, all applicants were to receive the sum of 100 Euros for their participation, regardless of the result of the selection procedure.

Despite this provision and several contacts with the Commission services over a period of two years, Mr A. received no payment. Therefore, in April 1999, he complained to the Ombudsman against the Commission's failure to pay him the sum in question.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion the institution confirmed that the payment was finally made in June 1999.

The Commission explained that the long delay was due to both the incorrect transmission of the bank details by the complainant and the initial refusal by the complainant's bank to receive the payment in Euros.

The Commission also stated that an intense exchange of correspondence had been kept between its services and the complainant in order to solve the problem. After having received all the bank details and references in February 1999, a new procedure for the payment had to be started. Therefore, it was possible to transfer the sum of 100 Euros to the complainant only in June 1999.

### **The complainant's observations**

The Ombudsman asked the complainant to comment on the opinion of the Commission. No written observations were received. However, during a telephone call between the Ombudsman's services and the complainant, he confirmed that the payment was made in June 1999, to his satisfaction. Furthermore, the complainant thanked the Ombudsman for his efforts in resolving the case in a satisfactory way.

### **THE DECISION**

On the basis of the information provided by the complainant and the opinion submitted by the European Commission, it appeared that the case had been settled by the Commission to the complainant's full satisfaction. The Ombudsman therefore decided to close the case.

## **DELAYS IN THE REIMBURSEMENT OF TRAVEL EXPENSES**

*Decision on complaint 500/99/ADB against the European Commission*

### **THE COMPLAINT**

The complainant was occasionally invited by the European Commission, as an expert, to attend meetings in Brussels. The Commission reimbursed his travel expenses, however he considered the procedure to be excessively long. He for instance had to wait for seven and a half months for a reimbursement. In this context the complainant got in touch with officials of the Commission and with Members of the European Parliament to express his dissatisfaction. He even refused to participate in a meeting because of this problem.

With regard to the fact that the complainant was repeatedly told that the delays were inherent in the "system", he held that this should be reformed and asked the European Ombudsman to investigate the matter.

### **THE INQUIRY**

#### **The Commission's opinion**

The opinion of the European Commission on the complaint was in summary the following:

The objective of the Commission's services is to reimburse travel expenses to experts participating in meetings organised by the Commission within 60 days. During this period of time, the Directorate General (DG) organising the meeting shall gather the expert's bank identity. DG IX shall then fix the amounts to be reimbursed, and ask for the payment, which has to be authorised by DG XX and carried out by DG XIX.

The Commission undertook to replace its computerised accounting system with a new one (Sincom 2) by the end of 1998. This major change, which was meant to accelerate the reimbursement procedure, led to some problems and delays which were finally solved in March 1999 but which may

have affected the dealing with the complainant's file. Moreover, the Commission stressed that the delays suffered by the complainant were increased by the fact that he failed to provide essential information in due time.

However, the Commission regretted the inconvenience and expressed its determination to avoid similar situations.

### **The complainant's observations**

The European Ombudsman forwarded the European Commission's opinion to the complainant with an invitation to make observations. In his reply of 18 August 1999, the complainant expressed his satisfaction with the work of the European Ombudsman. Further, he welcomed the efforts made by the Commission to improve the reimbursement system, stressing that his complaint with the Ombudsman aimed at pointing out a general problem, without focusing on his particular case.

The complainant, however, rejected the allegations made by the Commission regarding his being late in handing in information necessary for the reimbursement. He claimed that he had in good faith, and without any objection of the Commission's officials, followed the procedure applicable under the old reimbursement system. Later he was informed that the procedure had changed and he was requested to provide information again, which he promptly did. The complainant considered therefore that the full responsibility for the delay lay with the Commission.

## **THE DECISION**

### **The delays in the reimbursement of travel expenses**

- 1 The complainant, an expert who was occasionally invited by the Commission to attend meetings organised in Brussels, complained against the Commission because of the delays in the reimbursement of travel expenses. He wished to see an improvement of the reimbursement system. The Commission declared that it was committed to improving the system and that the delays that had occurred in the complainant's case were precisely attributable to difficulties occurred while a new system was being set up.
- 2 The Ombudsman noted that the Commission committed itself to carrying out reimbursements of travel expenses within a period of 60 days and that it apologised for the inconvenience caused by the setting up of a new, more efficient, accounting system.
- 3 The complainant had expressed his satisfaction with the Commission's efforts to improve its reimbursement procedure, and informed the Ombudsman that the specific case of late payment mentioned in his complaint was only meant to be an example of the malfunctioning of the system. Therefore the Ombudsman considered that there was no need to investigate the matter any further.

## **CONCLUSION**

It appeared from the European Commission's opinion and the complainant's observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore decided to close the case.

### **3.4 FRIENDLY SOLUTIONS ACHIEVED BY THE OMBUDSMAN**

#### **3.4.1 The European Commission**

#### **FULL PAYMENT AND INTEREST FOR REGIONAL CO-ORDINATOR**

*Decision on complaint 955/97/JH against the European Commission*

#### **THE COMPLAINT**

In September 1997, Mr McGowan MEP made a complaint on behalf of Mr M. According to the complaint, the relevant facts are as follows. In November 1995, Mr M. was nominated to act as a long-term observer (LTO) on behalf of the European Union in the 1996 elections to the Palestinian Council. He was offered a daily allowance as an LTO. When he arrived in East Jerusalem, the Deputy Head of the European Electoral Unit asked him to act as a Regional Co-ordinator and offered appropriate recompense for this responsibility. The complainant accepted and worked as a Co-ordinator until completion of the mission in February 1996. However, when he asked the Commission to pay him the fee level appropriate for a Co-ordinator, the Commission refused to make any additional payment.

The complainant claimed that the Commission should pay him the difference between the rate of pay for a Co-ordinator and the daily allowances for an LTO, which he calculated as £4073.

#### **THE INQUIRY**

##### **The Commission's opinion**

In its opinion, the Commission stated that the observation of the Palestinian elections does not concern an activity of the European Community conducted under the responsibility of the Commission, but a joint action adopted by the Council on the basis of Article J 3 of the Treaty on European Union within the framework of the Common Foreign and Security Policy.

The joint action was financed from the general budget of the European Community under the responsibility of the Commission. Accordingly, the Commission made the necessary funds available and acted as financial manager of the joint action in conformity with Articles J 11 of the Treaty on European Union and 205 of the EC Treaty. Salaries, daily allowances and other financial compensation of observers, coordinators and others were determined by the respective governments and the Council. It was not in

the Commission's power to nominate regional co-ordinators or to fix unilaterally the financial terms of their work, nor has it done so.

The Commission stated that it had no knowledge of the complainant's arrangements with the Deputy Head of the European Electoral Unit (EEU), who is not a Commission official nor in any other way its representative. In any case, the EEU had no power to nominate regional coordinators because such a nomination would have had to be made by the Council. The Commission is not therefore in a position to accede to the complainant's request for additional payment at its own initiative, but would be ready to refer the matter to the Council for decision.

### **The complainant's observations**

In summary, the complainant's observations claimed that the limits to the authority of the EEU explained in the Commission's opinion were not known to him at the time. The Deputy Head of the EEU had assured him in good faith that he would be recompensed for acting as a Co-ordinator and had been embarrassed that he was unable to fulfil the commitment by the time the mission ended.

### **FURTHER INQUIRIES**

On 9 September 1998, the Ombudsman wrote to the Commission accepting its proposal to refer the complaint to the Council and requesting information on the Council's response by 31 October 1998. On 15 October 1998, the Commission forwarded to the Ombudsman a copy of a letter which its services had sent to the Council on 14 October 1998 requesting the Council to deal with the matter as it deems fit and to advise the Commission accordingly.

Since the Ombudsman had received no further communication from the Commission or the Council he wrote again to the Commission on 1 March 1999, asking to be informed of the results of its approach to the Council. On 30 March 1999, the Commission answered, enclosing a draft reply from the Common Foreign and Security Policy counsellors which contained the following conclusions:

1. *The Council decision of 25 September 1995 (95/403/CFSP, Oj L. 238 of 6.10.95, p. 4) explicitly provides that members of the European Electoral Unit may be required "as necessary" to undertake preparatory work, for which "they will be remunerated accordingly" (cf Annex 1, para 6). Should it be established therefore that Mr M. effectively carried out, on a provisional basis, such duties at the request of the Head of Unit or his Deputy, the Council considers that [the complainant] does not need to establish any special form of appointment.*

2. *The Head and Deputy head of the Electoral Unit represent the Presidency in the powers it holds under article J5 (2) of the TEU, their decisions and actions should be considered as implementing a CFSP measure on the*

*basis of a valid delegation of powers. If, on consideration of the material facts, - which are not in the Council's purview - , it appears that such powers were exceeded in the case in point, this should not be at the expense of third parties such as [the complainant].*

The Commission also remarked that it had not received any authority, instructions or funds to pay the complainant.

After unsuccessfully attempting to obtain information from the Council services by telephone and e-mail, the Ombudsman wrote to the Secretary General of the Council on 30 April 1999, asking for confirmation of the above draft statement and information about the modalities of an eventual payment to the complainant. By letter dated 25 May 1999, received by the Ombudsman on 21 June 1999, the Council informed the Ombudsman that the draft statement had been formally approved by the Council on 30 March 1999. The letter also stated that the Council's financial responsibilities under the relevant Treaty provision are limited to deciding to charge a given sum to the Community budget, whereas the implementation of the budget falls to the Commission. Since there appeared to have been a misunderstanding between the Council and Commission in this case and in order to speed things up, the Council had sent a copy of the letter to the Secretary General of the Commission.

The Ombudsman's services then contacted the General Secretariat of the Commission by telephone to request that the Commission services act to resolve the matter before the end of July 1999.

On 16 July 1999 the complainant forwarded to the Ombudsman a copy of his correspondence with the Commission services, from which it appears that the Commission has dealt with the matter through its procedure for contractual dispute settlement and agreed to pay the complainant the full sum which he claimed, together with interest. The complainant considers that a satisfactory conclusion has been reached.

### **THE DECISION**

- 1 The complainant claimed that the Commission should pay him the difference between the daily allowance which he had received as a European Union observer of the Palestinian election process in 1995-6 and the fee level appropriate for the role of Regional Coordinator which, at the request of the European Electoral Unit, he had actually performed.
- 2 The work of the European Electoral Unit was carried out under the terms of a joint action of the Council in the field of the Common Foreign and Security Policy. The Commission acted as financial manager of the joint action.
- 3 The Council accepted the principle that the complainant should be paid for the work which, at the request of the European Electoral Unit, he had actually performed.



- 4 The Commission subsequently agreed to pay the full sum claimed by the complainant, together with interest. The complainant considers that a satisfactory conclusion has been reached.

### **CONCLUSION**

Following the Ombudsman's inquiry, it appeared that a friendly solution to the complaint had been agreed between the Commission and the complainant. The Ombudsman therefore closed the case.

## **3.5 CASES CLOSED WITH A CRITICAL REMARK BY THE OMBUDSMAN**

### **3.5.1 The European Parliament**

#### **REASONS FOR FAILURE IN A COMPETITION**

*Decision on complaint 466/97/PD against the European Parliament*

#### **THE COMPLAINT**

In May 1997, Mr P. made a complaint to the Ombudsman concerning his participation in competition PE/81/A for assistant administrators of German mother tongue, organised in 1995 by the European Parliament. The complainant applied under this competition and was successful in the examinations. However, he was not included in the reserve list, as the notice of competition provided that only the ten best applicants would be put on the list. The complainant was not among the ten best candidates. This was communicated to the complainant by letter.

Subsequently an exchange of correspondence took place between the complainant and the Parliament. In this correspondence, the complainant put forward that he wanted access to his examination papers and that he wanted to know the reasons why he had failed in the competition. Thirdly he put forward that he had been discriminated against. The facts underlying this allegation of discrimination were: During the preparation for the competition the German authorities made contact with the European Parliament, to know whether the Parliament would be prepared to annex an information sheet to the notice of competition. This sheet provided information on seminars that applicants could attend in order to prepare themselves for the competition. The seminars were organised by two German institutes for European policy. As the complainant did not receive this information sheet, he considered that he had been discriminated against.

In its answers to the complainant's letters the European Parliament informed him of the marks he had obtained in the different examinations. However, the European Parliament did not give him access to his examination papers; nor did it give more detailed reasons for his failure in the competition. On both points the European Parliament invoked the case law of the Court of Justice according to which, in The Parliament's view, such

information could not be communicated without violating the confidentiality of the deliberations of the Selection Board. As concerns the discrimination issue, The Parliament stated that it had done everything in its power with regard to the dissemination of relevant information to ensure the equal treatment of applicants.

Against this background, the complainant lodged the complaint with the European Ombudsman. In the complaint he alleged that the European Parliament had committed maladministration by:

- refusing him access to his examination papers,
- failing to give reasons why he failed the competition and
- discriminating against him.

In support of the first allegation, the complainant put forward that under national law, an applicant normally had an extensive right to receive information about himself. In support of the second allegation, the complainant put forward that principles of good administration require the administration to give reasons for a decision such as the one in question.

As concerns the third allegation, the complainant put forward that the European Parliament had failed to ensure that all applicants received the information sheet in question. He stated amongst other things that he had made contact with Community information offices in Germany, both Commission and Parliament offices, which did not have any knowledge of the information sheet in question. Not having received the information sheet, he had fewer chances of succeeding in the competition. Thus he had been discriminated against in comparison with other applicants.

## **THE INQUIRY**

### **The Parliament's opinion**

The complaint was forwarded to European Parliament. In its opinion the Parliament maintained the position it had taken in the correspondence preceding the complaint.

### **The complainant's observations**

In his observations the complainant maintained the complaint.

## **FURTHER INQUIRIES**

After a careful examination of the Parliament's opinion and the complainant's observations thereupon, the Ombudsman addressed the European Parliament to obtain more detailed information on the procedures followed by the Parliament in order to ensure dissemination of the information sheet to all applicants. Furthermore the Ombudsman asked to inspect the Parliament's file.

### **The Parliament's second opinion**

In its second opinion, the Parliament explained the procedure it had followed ensuring the dissemination of the information sheet. In the adver-

tisement made by the European Parliament concerning the competition, it was indicated that applicants should address the Parliament's central services or the information office in Bonn in order to obtain the notice of competition. These services were in possession of the information sheet. Furthermore, in case that applicants should address other representations or information offices of the Communities in German speaking countries, the Parliament addressed these offices in order to underline the importance of handing out the information sheet in question to applicants who requested the notice of competition.

The Parliament also indicated that participation in the preparatory seminar did not guarantee success in the competition and that an applicant's failure in the competition due to the absence of the information sheet would be very difficult to establish.

### **The complainant's further observations**

In his observations, the complainant put forward that apparently there was no formal legal basis for the European Parliament's acceptance of disseminating such information about preparatory seminars. Furthermore he repeated that he had been in contact with information offices in Germany which had no knowledge of the information sheet in question.

### **The inspection**

The purpose of the inspection was to verify that the complainant's examination papers had been marked in accordance with principles of good administration. Selection Boards have wide discretionary powers in assessing applicants under a competition and this assessment can only be set aside in case of manifest violation of a rule or principle binding upon the Selection Board. The inspection did not show any violation. However, it appeared that the Parliament was not in possession of the corrected version of one of the complainant's examination papers.

## **THE DECISION**

### **1 Access to examination papers**

In the present state of Community law, it appears that there is no legal obligation for Selection Boards to disclose examination papers to the applicant concerned who so requests. On the other hand, there appears to be no obligation for Selection Boards to refuse disclosure. The question is thus whether principles of good administration require the administration to give access to examination papers. This question was the subject of the Ombudsman's on-going own initiative inquiry 1004/97/PD. The Ombudsman did therefore not inquire further into this aspect of the present complaint.

### **2 Failure to give reasons**

It appeared from the foregoing that in the present state of Community law there is no legal obligation upon Selection Boards to disclose the examination papers to the applicant concerned who requests so. Having regard to this and to the wide discretion of Selection Boards,

recognised by the Community courts, it is all the more important that the Selection Boards comply with the requirements which follow from the case law of the Community courts and principles of good administration. Therefore, Selection Boards should provide applicants with the reasons necessary for understanding the decisions the Boards take. In the present case, the Selection Board just communicated the marks obtained by the applicant. This does not appear to meet the said requirements. The Ombudsman therefore addressed a critical remark to the European Parliament to that effect.

### 3 Discrimination

- 3.1 Firstly, it should be observed that there appears to be no provisions hindering the European Parliament from accepting a government's request to disseminate information concerning preparatory seminars to a competition. In accepting such a request, the European Parliament shall obviously comply with the rules and principles binding upon it.
- 3.2 It is obvious that the European Parliament should take the necessary steps to ensure dissemination of the information sheet that it had undertaken to disseminate, and it is established that the complainant did not receive it. The question is whether this constitutes an infringement of the principle of equal treatment with the legal consequences this entails.

In addressing this question, one has to distinguish between information that the Parliament is under an obligation to communicate to all applicants as the organiser of the competition, and other information. It is clear that the principle would have been violated if the Parliament had failed to provide, for instance, the full wording of the examination questions to all applicants.

In this case, the information concerned was not part of the running of the competition and the Parliament had undertaken to disseminate it in the interest of German authorities; furthermore, there is no evidence that the reception of this information would have had an impact **on** the applicant's performance in the competition. Under these circumstances, the Ombudsman finds that the fact that one or more applicants did not receive the information sheet in question does not constitute a violation of the principle of equal treatment. As there is no conclusive evidence to the effect that the Parliament did not undertake the necessary measures to ensure the dissemination of the information sheet, there appeared to have been no maladministration by the Parliament in relation to this aspect of the complaint.

### CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

Selection Boards, in accordance with the case law of the Community Courts and principles of good administration, should provide appli-

cants with the reasons necessary for understanding the decisions the Boards take. Therefore, the Ombudsman found it insufficient that, despite the complainant's request, the Parliament did not provide more detailed information on why he did not succeed in a competition.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

### **FURTHER REMARKS**

At the inspection of the Parliament's file, it appeared that the file was not complete. As stated above, the file did not contain the marked copy of one of the complainant's examinations. Neither did it contain the evaluation criteria established by the Selection Board. This led the Ombudsman to make the following further remarks: The Parliament should ensure that the file of a competition contains the marked copies of the applicants' examinations as well as the evaluation criteria established by the Selection Board.

## **3.5.2 The Council of the European Union**

### **FAILURE TO REPLY**

*Decision on complaint 451/98/PD against the Council of the European Union*

#### **THE COMPLAINT**

On behalf of his foundation, Mr N. lodged a complaint with the European Ombudsman concerning the Council of the European Union. He put forward that the Council had failed to answer a letter by the foundation.

In accordance with the Ombudsman's normal practice in cases concerning failure to reply to citizens' letters, his services contacted the Council telephonically to hear when a reply would be given. These contacts were in vain. The Ombudsman therefore decided to open the inquiry.

#### **THE INQUIRY**

##### **The Council's opinion**

In its opinion, the Council stated that the letter had been received and registered by the Council. After thorough examination, the relevant services of the Council took careful note of the declaration that the letter contained. Given the declaratory nature of the letter and the absence of concrete questions in it, the services decided that it was not necessary to reply to it.

The Council added that in general, it strove to answer all incoming letters by at least an acknowledgement of receipt and, in cases where questions are asked, by submitting substantial remarks.

##### **The complainant's observations**

No observations were received from the complainant.

## **THE DECISION**

### **Failure to reply to the letter in question**

Principles of good administration require that the administration answers citizens' submissions. In this case, the Council decided not to reply to the complainant because of the declaratory nature of the letter in question. However, from the moment the complaint was lodged with the Ombudsman, it was clear to the Council that the complainant expected a reply. Still, the Council did not reply and thus, it acted in violation of principles of good administration. The Ombudsman therefore addressed a critical remark to the Council to the effect that it should have replied to the letter in question. Since the subject of the letter had lost its topicality, the Ombudsman did not pursue the matter further.

## **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

Principles of good administration require that the administration answers citizens' submissions. In this case, the Council decided not to reply to the complainant because of the declaratory nature of the letter in question. However, from the moment that the complaint was lodged with the Ombudsman, it was clear to the Council that the complainant expected a reply. Still the Council did not reply and thus, it acted in violation of principles of good administration.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

### **3.5.3 The European Commission**

#### **COMMISSION'S RESPONSIBILITY TO EXAMINE CLAIMS OF IRREGULARITIES IN EC FUNDED PROJECTS**

*Decision on complaint 194/97/JMA against the European Commission*

## **THE COMPLAINT**

In February 1997, the Regional Ombudsman of Andalusia transferred to the European Ombudsman a complaint which involved the alleged failure of the Commission to take properly into account the environmental consequences of some projects financed by the Cohesion and the Structural Funds in the Garrucha area, Almería.

In January 1997, the complainant had written to the Director-General of DG XVI of the Commission, informing him that his services were financing two nearby projects in the town of Garrucha, Almería, which were by their nature incompatible. The complainant argued that by doing so, the Commission had raised great concern among the local population, in par-

ticular among fishermen and tourists. A copy of the letter with some additional information was also sent to the Regional Ombudsman of Andalusia. He opened an inquiry into the matter as regards the role of the local and regional authorities in the authorisation of the projects, and informed the European Ombudsman of the alleged maladministration on the part of the European Commission.

One of the projects involved the rehabilitation of the Garrucha beach. The project had been carried out with a Community contribution of 85% of the total costs. EC funding had been also given for the extension of the commercial harbour of the same town. Both projects were being developed in the vicinity of each other.

With the enlargement of the harbour in Garrucha, large ships would be allowed to dock near the beach being regenerated, and as a result, the complainant argued, the bathing waters in the area could not possibly meet existing EC environmental standards. Furthermore, the project had been carried out against the wishes of the majority of the local population, which favoured the choice of a nearby harbour in Carboneras.

The complainant also indicated that the regional government had provided misleading information to the relevant Commission services in order to ensure Community funding. Thus, the documentation submitted regarding the environmental impact assessment of the project was inaccurate, and did not include relevant considerations.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission indicated that the situation had already been brought to its attention in 1995. Both projects had received Community funding : the regeneration of the Garrucha beach through the Cohesion funds, and the enlargement of the city's harbour through the Structural Funds. The Commission had approved funding of these projects, since they appeared to meet the criteria for eligibility, and complied with all relevant EC environmental provisions.

As regards the enlargement of the local harbour, the Commission stated that the project complied with all applicable rules, in particular the provisions of Directive 85/337/EEC regarding environmental impact assessments of private and public projects. Accordingly, the developer had carried out an environmental assessment, which had been subject to public comments. Following this consultation, the relevant Spanish authorities had established the final environmental impact assessment which included some corrective measures. The document was published in the Official Journal of the province of Almería on 11 July 1995. On the basis of this information, the Commission had concluded that the project did not breach the provisions of Directive 85/337/EEC.

The Commission pointed out that the initial selection had been undertaken by the regional government of Andalusia. This authority had included this



particular project in its operation programme for the period 1994-1999. The Commission underlined that the selection had been made by the competent authority in using its powers, and with due respect of the criteria for the management of EC Structural Funds which is based on the subsidiarity and partnership principles.

Having been informed of the potential incompatibility between both projects, the Commission services raised the matter before the Spanish authorities. In a written reply from the Spanish Ministry of Transport and Environment, the Commission was informed that the project to enlarge the harbour would not extend its length, and therefore that its impact on the nearby beach would be negligible.

In view of that information, the Commission concluded that there was no reason to oppose funding for both projects, since they seemingly complied with Community environmental directives, and moreover there appeared to be no incompatibility between them.

### **The complainant's observations**

In his observations on the Commission's opinion, the complainant objected to the Commission's view that the environmental impact assessment of the project to enlarge the local harbour had complied with EC requirements. As stated by the complainant, the environmental statement carried out by the developer had not been subject to a proper public consultation. Moreover it contained several errors and included misleading information. The final environmental assessment had also omitted relevant information such as the effects of the enlarged harbour on the nearby beach. On the basis of the same allegations, the Superior Court of Andalusia had decided to suspend temporarily the project until a judgement in the case could be rendered.

In support of his allegations, the complainant enclosed some pictures which showed the proximity of ships entering the enlarged harbour to the beach being regenerated.

### **FURTHER INFORMATION**

On November 1997, the Regional Ombudsman of Andalusia wrote to the European Ombudsman informing him that his office had decided to terminate consideration of his inquiry into this complaint, since he had learnt that a regional court was considering this matter, in particular as regards whether the national authorities responsible had violated any legal rule in the authorisation of one of the projects.

### **THE DECISION**

#### **1 Scope of the case before the European Ombudsman**

- 1.1 The problem denounced by the complainant had its origin in the allegedly misleading information submitted by the responsible Spanish authorities to the Commission to ensure Community financing for two projects.

- 1.2 It is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.
- 1.3 On the basis of the above provisions, the Ombudsman's inquiries had therefore been directed towards examining whether there had been maladministration by the European Commission.

## **2 Alleged failure of the Commission to consider irregularities brought to its attention**

- 2.1 The complainant alleged that the Commission had failed to consider properly the irregularities brought to its attention regarding two projects being financed by Community funds in Garrucha, Almería. These allegations involved, (i) the non-compliance of the project to extend the harbour of Garrucha with relevant EC environmental directives, and (ii) their mutual incompatibility.

The Commission had indicated that on the basis of the available information received, it appeared that the enlargement of the harbour in Garrucha had been subject to an environmental impact assessment in line with the criteria set out in Directive 85/337/EEC. The institution had no information, therefore, to identify a potential infringement of the Directive in this case. As for the incompatibility between the enlargement of the local harbour and the regeneration of a nearby beach, the Commission decided to set aside this claim, relying on the assurances given by the Spanish authorities.

- 2.2 In order to evaluate whether there had been in this case any instance of maladministration by the Commission, it was necessary first to establish the relevant legal obligations incumbent upon the institution.

The rules relating to the implementation of the economic and social cohesion provided for by Article 130a of the EC Treaty are laid down, among others, by Regulation (EEC) No 2052/88 as amended by Regulation (EEC) No 2081/93<sup>47</sup> which refers to all existing financial instruments, and also by Regulation (EC) No 1164/94<sup>48</sup> as regards specifically the Cohesion Fund.

The need to make this type of funding compatible with EC rules is clearly laid out in Article 7, par. 1 of Regulation (EEC) No 2052/88<sup>49</sup>:

*“Measures financed by the Structural Funds or [...] receiving assistance from other financial instruments shall*

<sup>47</sup> Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p.5).

<sup>48</sup> Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ 1994 L 130, p.1).

<sup>49</sup> A similar provision is to be found in Article 8 of Regulation No 1164/94 regarding the use of money from the Cohesion Fund.

*be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including [...] environmental protection.”*

The implementation of this provision has been given to the Commission<sup>50</sup>. In pursuit of this task, the Commission has to ensure effective monitoring, appraisal and evaluation of assistance from the Funds, in close cooperation with Member States<sup>51</sup>. As a means to achieve these tasks, the Commission can ask national authorities to supply detailed information, national reports of control, or documents regarding expenditures, having also the power, if necessary, to carry out on-the-spot checks.<sup>52</sup>

- 2.3 Principles of good administration require the Commission to carry out its duties under Art. 7, par 1, of Regulation (EEC) No 2052/88 with due diligence. This implies that, in the event of serious claims about potential irregularities involving Community funded projects, the Commission should take reasonable steps to verify the accuracy of the information it receives.

In this case, the Commission concluded that no breach of EC environmental law had taken place and that funding could therefore continue. In order to reach that conclusion, the Commission took account of the fact that a formal environmental impact assessment for one of the projects had been undertaken and that the national authorities responsible stated in a written reply that both projects were compatible. From the information supplied to the Ombudsman, it appeared that the Commission never considered the environmental claims made by the complainant. The Ombudsman therefore concluded that the Commission had not taken reasonable steps to ensure that these Community funded projects complied with EC law and policy.

## CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark :

Principles of good administration require the Commission to carry out its duties under Art. 7, par 1, of Regulation (EEC) No 2052/88 with due diligence. This implies that, in the event of serious claims about potential irregularities involving Community funded projects, the Commission should take reasonable steps to verify the accuracy of the information it receives.

In this case, the Commission concluded that no breach of EC environmental law had taken place, and that funding could therefore continue. In order to reach that conclusion, the Commission took account

<sup>50</sup> Article 18 of Regulation No 2052/88, and Article 13 of Regulation No 1164/94.

<sup>51</sup> Arts. 25, par. 1 and 26, par. 1 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

<sup>52</sup> Art. 23 Council Regulation (EEC) No 4253/88.

of the fact that a formal environmental impact assessment for one of the projects had been undertaken and that the responsible national authorities stated in a written reply that both projects were compatible. From the information supplied to the Ombudsman, it appeared that the Commission never considered the environmental claims made by the complainant. The Ombudsman therefore concluded that the Commission did not take reasonable steps to ensure that these Community funded projects complied with EC law and policy.

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

### **FAILURE TO GIVE REASONS FOR CLOSING THE FILE ON A COMPLAINT**

*Decision on complaint 323/97/PD against the European Commission*

#### **THE COMPLAINT**

In April 1997 Mrs J. complained to the Ombudsman that the Commission had failed to ensure that the Spanish authorities comply with their obligations under Directive 89/48.

The complainant, a Belgian national, holds a Belgian diploma “Licence en traduction”, delivered by the University of Mons. In 1992, the complainant asked the Spanish authorities to recognise the diploma so that she could take up professional activity in Spain as a language teacher. The request was submitted under Directive 89/48 which lays down the general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration (OJ 1989 L 19/16).

This Directive does not concern purely academic recognition, but recognition with a view to take up so-called regulated professions. The professions in Spain which the complainant considered to be regulated in the meaning of the Directive were “profesor de escuelas oficiales de idiomas” and “profesor de educación secundaria”.

As concerns the first profession, the complainant applied under a competition for entering the Spanish civil service as “profesor de escuelas oficiales de idiomas”. Apparently, the complainant succeeded in the competition but her appointment was later annulled on the ground that she had not submitted the required documentation, attesting that she holds the diploma necessary for the post.

As concerns the second profession, the complainant applied at the Spanish authority competent for recognition of her diploma so that she could teach French and English. The Spanish authority observed that according to Belgian legislation, the diploma could only entitle her to teaching if she had an “Agrégation” or a “Certificat d’Aptitude Pédagogique” (CAP). Furthermore, it observed that Spanish legislation also required the possession of a CAP; however, one could dispense from that requirement

in case the person in question had one year's teaching experience in an establishment of the appropriate level. As it was established that the complainant at that time did not possess a CAP, the Spanish authority rejected the complainant's request.

However, Article 5 of the Directive provides that Member States may facilitate the recognition of a diploma by allowing the citizen to undertake the part of the education that he/she is missing for obtaining recognition. On that basis, the complainant took the required CAP at a Spanish teaching establishment and in 1994, she was allowed access to the profession of "profesor de educación secundaria" for teaching in French and English.

However, the complainant considered that the original actions of the Spanish authorities were contrary to the above mentioned Directive. The complainant wanted therefore to have access to the professions with retroactive effect. The argumentation which seems to underlie this view, as concerns the "profesor de educación secundaria", may be summarised as follows : In notices for competition for entering the Spanish civil service as "profesor de enseñanza secundaria", there was a provision according to which one year's teaching experience could dispense from the CAP requirement. The complainant had two years' teaching experience in Spanish, acquired in Belgium from 1983-1985. The complainant therefore considered that her Belgian experience should be taken into account.

The complainant approached the Spanish authorities on the subject. These approaches were apparently in vain.

On 2 February 1995 the complainant then lodged a complaint with the European Commission. By letter of 16 March 1995, DG XV of the Commission acknowledged receipt of the complaint. The complaint gave rise to an extensive correspondence between the complainant, the services responsible in the Commission, the Belgian and Spanish authorities. Furthermore, at a certain moment the complainant started corresponding with DG V. The complainant and the Commission services were also in contact by telephone. While the Commission processed the complaint, the complainant continued her dealings before the Spanish authorities with a view to make them change their position.

By letter of 27 March 1997, the Commission notified to the complainant that the Commission had decided to close the file on her complaint. The letter contains two paragraphs; the first one that the Commission had decided to close the case; the second one that on the basis of the case law of the Court of Justice, individuals cannot challenge the Commission's decision not to initiate infringement proceedings.

This was in brief the background against which the complainant lodged the complaint with the European Ombudsman.

In the complaint it was firstly put forward that the Commission had taken too long to deal with the original complaint. Secondly it was alleged that the Commission could not archive the complaint as the Spanish authorities were continuously refusing to acknowledge the complainant's professional experience on the ground that the experience had not been obtained in Spain, but in Belgium. In the complaint, the complainant only referred to the

Commission's examination of her situation as regards the profession as "profesor de educación secundaria".

Annexed to the complaint were a number of certificates from Belgian authorities concerning the complainant's teaching experience. From these certificates it appeared that from 1983 to 1985 the complainant had given language courses in Spanish to adults at a level corresponding to secondary school. One certificate expressly mentioned that the complainant's diploma was covered by Directive 89/48. Furthermore, a letter of 23 September 1996 from DG V to the complainant was annexed. According to this letter, it would be contrary to Article 48 EC Treaty if the Spanish authorities did not consider her experience in Belgium just on the ground that it had not been obtained in Spain.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission firstly stated that it has discretionary powers as to the initiation of infringement proceedings against a Member State and that the documentation forwarded to the Ombudsman by the complainant in no way gave a representative vision of the file. The Commission annexed a list of the correspondence in the file.

As concerns the time taken for examining the complaint, the Commission acknowledged that the processing of the complaint, in taking two years, had exceeded the normal time limits set for dealing with citizens' complaints. However, the Commission observed that after the lodging of the complaint, the complainant had continuously submitted new and sometimes contradictory elements of which the Commission had to take account in processing the complaint. Furthermore, given the subject matter, i.e. recognition of diplomas, the Commission had to be in contact with both Spanish and Belgian authorities and the replies from this last ones had been quite delayed.

As concerns the decision to close the file on the complaint, the Commission stated that the attestation delivered by the Belgian authorities contradicted other evidence in the file and the information of general nature that the Commission possessed concerning the kind of diploma in question. The Commission therefore contacted the Belgian authorities which then confirmed that the "Licence" in itself without any "Agrégation" or CAP could not be considered a diploma within the meaning of Directive 89/48. Thereafter, the Commission recalled that a preliminary condition for recognition under the Directive is that the diploma in question gives access to the profession in the State of origin. The Directive applies if the holder of the diploma can exercise, in the State of origin, the profession for which recognition is sought in another Member State.

On the basis of the information from the Belgian authorities, the Spanish authorities had therefore been right to consider that the complainant did not fall under the Directive.

As concerns the claim that the Spanish authorities refused to recognise the complainant's professional experience on the ground that it had been obtained in Belgium, the Commission stated that it had persistently pursued this matter, both before and after the lodging of the complaint with the Ombudsman. The Commission had clearly stated its view that such a condition would be contrary to Article 48 EC Treaty and it had sought and obtained the Spanish authorities' acceptance of that view. The Commission had communicated this to the complainant.

### **The complainant's observations**

In her observations the complainant maintained her complaint. She also forwarded further documentation. From this it appeared

- that the complainant had lodged a court action before the Spanish courts concerning the subject matter,
- that the Belgian authorities had informed the Spanish authorities that the "Licence" only gives the holder the right to teach when the teaching establishment does not encounter a holder of a "Licence" with CAP or "Agréation" on the labour market,
- that the Commission had twice expressed the view that the civil service "profesor de escuelas oficiales de idiomas" was a regulated profession in the meaning of the Directive, and
- that the Spanish authorities continuously had held the opinion that the civil service "profesores de escuelas oficiales de idiomas" was an unregulated profession, to which the Directive did not apply.

It did not appear from the documentation whether the resolution of this last discrepancy of views between the Commission and the Spanish authorities would have an impact on the situation of the complainant.

## **THE DECISION**

### **1 The time for dealing with the complaint**

- 1.1 The complainant considered it an instance of maladministration in the form of avoidable delay that the Commission had not processed her complaint in less than two years.
- 1.2 In taking a stand on this, the Ombudsman shall observe that the complaint was not simple and that the Commission had evidenced that for a considerable time, the case was pending upon replies from national authorities, to whom the Commission had sent reminders. The list of correspondence submitted by the Commission did not point to passivity on the Commission's side. Consequently the Ombudsman found that there had been no maladministration by the Commission on this aspect of the complaint.

### **2 The Commission's decision to close the file**

- 2.1 The complainant considered that the Commission's decision to close the file was unjustified since she continued to experience problems in



having the Spanish authorities recognise her diploma with effect from 1992.

- 2.2 In taking a stand on this, the Ombudsman firstly observed that the complaint showed the problems related to recognition of diplomas that citizens may experience in exercising their right to free movement, a cornerstone of the Community. Faced with such problems, citizens may turn to the Commission which is the Guardian of the Treaty and which possesses the necessary expertise. They are entitled to expect a diligent and efficient examination by the Commission.
- 2.3 In this case there was, in particular on the basis of the copies submitted of the Commission's letters, no reason to doubt that the Commission had actively and diligently undertaken the examination of the complaint in question.
- 2.4 However, the Commission's decision to close the file was laconic and gave no reasons for the decision. Although this decision had to be seen in the context of the previous correspondence with the complainant, the decision left fundamental questions, material to the complainant, unanswered such as e.g. whether the Commission had not found an infringement, or whether it had actually found an infringement which it had decided not to pursue any further in the exercise of its discretionary powers. The decision did not permit the Ombudsman to ascertain whether the Commission had acted within the limits of its legal authority.
- 2.5 Principles of good administration require the administration to give reasons for the decisions it takes towards the citizen concerned. Such reasoning is essential for the citizen's confidence in the administration and for the transparency of the administration's decision making. In this case it appears that the Commission gave no reasons at all for its decision to close the file on the citizen's complaint. This lack of reasoning was mitigated by the Commission's previous correspondence with the complainant. However, the failure to give reasons left the citizen with fundamental questions unanswered. The Commission thus failed to comply with the requirement which follows from principles of good administration.

Given that it has now appeared that the complainant has lodged a court case against the Spanish authorities on the subject matter of her complaint to the Commission, the Ombudsman finds that there are no reasons for inquiring further into this aspect of the complaint.

## **CONCLUSION**

On the basis of the ombudsman's inquiries into this complaint, it appeared necessary to issue the following critical remark:

Principles of good administration require the administration to give reasons for the decisions it takes towards the citizen concerned. Such reasoning is essential for the citizen's confidence in the administration and for the transparency of the administration's decision making. In

this case it appeared that the Commission gave no reasons at all for its decision to close the file on the citizen's complaint. This lack of reasoning was mitigated by the Commission's previous correspondence with the complainant. However, the failure to give reasons left the citizen with fundamental questions unanswered. The Commission thus failed to comply with the requirement which follows from principles of good administration.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

### **ALLEGED FAILURE OF THE EUROPEAN COMMISSION TO PROPERLY MONITOR THE DISBURSEMENT OF COMMUNITY FUNDS. PUBLIC ACCESS TO COMMISSION DOCUMENTS**

*Decision on complaint 480/97/JMA against the European Commission*

#### **THE COMPLAINT**

In May 1997, Mr R. lodged a complaint with the European Ombudsman concerning the alleged failure of the European Commission to properly monitor the disbursement of funds through the European Social Fund (ESF) in the Region of Campania, Italy and to give information to the complainant regarding this matter.

On behalf of a group of firms from the Italian region of Campania, the complainant sought to receive Community assistance for the implementation of several of its projects. That request was to be financed through the programme funded by the European Social Fund (ESF) in that region.

In view of the request put forward by the regional authorities, the Commission had granted ESF financing for a number of projects to be carried out in Campania. The funds were to be disbursed over two periods: from 1990 to 1994, and from 1994 to 1996.

Payments to the final recipients of the aid by the Campanian authorities, however, encountered serious problems. Three years after the Community had made its first disbursements, these payments had not yet been made. In view of this situation, the complainant lodged a complaint in September 1996 with the European Commission against the authorities of the region of Campania. In the letter, the complainant claimed that there had been multiple irregularities in the management of the Community funds by the responsible regional authorities.

In November 1996 the complainant wrote again to Directorate General V of the European Commission, and asked for a copy of one of the Commission Decisions related to the granting of financial aid (Decision No. 3233 of 12 December 1994). According to the complainant, the terms of that Decision could be relevant for the defense of his rights. Since he received no reply from the Commission, the complainant wrote again in February 1997, asking for further information on the outcome of his complaint.

As the complainant considered that the Commission had not given a satisfactory response to his claims, he wrote to the Ombudsman in May 1997. In the letter, the complainant stated that the European Commission had failed to:

- 1 Monitor that the Region of Campania had properly distributed ESF payments to the final beneficiaries.
- 2 Initiate infringement proceedings against the Italian authorities, since the institution had already decided to suspend ESF payments to the region.
- 3 Inform the complainant of any developments concerning the two letters of formal complaint sent to its services in September 1996 and February 1997.
- 4 Reply to the complainant's request of a copy of a Commission Decision concerning the granting of aid to Campania (Decision No. 3233 of 12 December 1994).

### THE INQUIRY

The Ombudsman recalled that the EC Treaty empowers him to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. On the basis of these provisions, the Ombudsman's inquiries were therefore directed towards examining whether there had been any maladministration by the European Commission.

### The Commission's opinion

The complaint was forwarded to the European Commission. Its opinion was in summary the following:

The Commission underlined that the beneficiary of the financial contribution was the region of Campania, and therefore its authorities were solely responsible for the disbursement of the funds to the applicants. It quoted in support of this position the provisions of Article 21.1 of Regulation 4253/88 as amended by Regulation No. 2082/93<sup>53</sup>.

The Commission explained that the competent authorities of Campania had not submitted the relevant documentation to justify the completion of their financial operations as regards this aid in 1993, as required by Art. 21 par. 4 of Regulation 4253/88 as amended by Regulation 2082/93<sup>54</sup>.

<sup>53</sup> Council Regulation (EEC) No 4253/88 as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments; OJ L 193, 31.07.1993, p. 20 Art. 21, par. 1 : "payment of financial assistance shall be made [...] to the national, regional or local authority or body designated for the purpose in the application submitted by the Member State concerned as general rule within two months from receipt of an acceptable application".

<sup>54</sup> Article 21 par. 4 : "payment [...] shall be conditional on submission to the Commission by the designated authority or body referred to in paragraph 1 of a request for payment within six months of the end of the year concerned or of completion in practice of the operation concerned".

Accordingly, the Commission had requested the Campanian authorities to provide the necessary evidence that payments to the final beneficiaries of the EC assistance had been carried out.

The Commission gave further details concerning other irregularities identified in the implementation of the programme. In its view, the existence of potential problems was first unveiled in March 1995, following a visit *in situ* carried out by a group of experts from the Commission. As a result of this inspection, it appeared that a number of administrative irregularities had been made by the regional authorities in the implementation of the programme.

These irregularities regarding the disbursement of EC funds in the region had also become the subject of legal proceedings before a national court. In view of the situation the Commission had decided to suspend its financial contributions as a preventative measure to protect the Community general interest, at least until the legal proceedings had been concluded.

As regards the complainant's request to have access to a copy of Commission Decision No. 3233 of 12 December 1994, the Commission stated that since the document had been addressed to a Member State, and moreover, since it was not aimed at being published, access to it had no legal basis.

The Commission concluded by underlining the relevance it had given to this case, as demonstrated by the number of letters exchanged with the complainant and the national authorities, as well as the inspections carried out.

The Commission's opinion included no reference to two of the claims made by the complainant, namely the need to initiate infringement proceedings against the Italian authorities in connection with this situation, and the alleged failure to inform the complainant as regards the handling of his two formal letters of complaint.

### **The complainant's observations**

In his observations on the Commission's opinion, the complainant maintained his original claims, and stressed the failure of the Commission to properly monitor the correct application of Community law by the national authorities. In his view, the Commission had not properly carried out its role as Guardian of the Treaty. The complainant considered that, since the Commission had decided to suspend its financial support to the region, it should have also opened infringement proceedings against the responsible Italian authorities on the basis of article 169 (new Art. 226) of the EC Treaty.

As concerns his request to have access to a copy of Decision No 3233 of 12 December 1994, the complainant contested the Commission's explanation, and confirmed his right to have access to the decision concerned.

## THE DECISION

### 1 Alleged failure of the European Commission to properly monitor the disbursement of Community funds.

- 1.1 The complainant claimed that the Commission had not properly monitored the disbursement of ESF funds in the region of Campania, as shown by the existence of numerous irregularities. The complainant mentioned in particular that the Commission had failed to act in order to guarantee the timely payment to the final beneficiaries by the national authorities.
- 1.2 The Commission had recognised the existence of a number of problems in the implementation of the ESF programme by the regional authorities of Campania. It acknowledged specifically that the regional authorities were paying the grant to the final beneficiaries with undue delay, and their failure to submit a financial report for the operations carried out in 1993. In order to assess the magnitude of these alleged irregularities, the Commission services carried out on-site inspections in March and November 1995, and in May-June 1996.

In the light of the findings of these missions, and taking into consideration that judicial proceedings had been launched against the regional authorities, the Commission decided to suspend any further disbursement of funds, on the basis of Art. 24 of Regulation 4253/88 as amended by Regulation 2082/93.

As regards the late payment to beneficiaries, the Commission underlined that this matter falls under the remit of the national authorities. However, by letter of 8 June 1995 its services wrote to the regional authorities of Campania requesting further details on the causes for their failure to reimburse final beneficiaries.

- 1.3 One of the basic principles of the Community policy for economic and social cohesion is the so-called “partnership” among the different actors involved in the process. As laid out in the rules governing the activities of EC Structural Funds, Community operations are to be carried out through close consultations between the Commission, the Member State concerned, and its competent authorities and bodies, at national, regional or local level. This partnership must be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners<sup>55</sup>.
- 1.4 As regards the disbursement of ESF funds, the relevant regulations set out a clear division of responsibilities among the different actors, in application of the partnership principle. The Commission is responsible for the payments to the national, regional or local authorities referred to in the application for aid submitted by the Member State<sup>56</sup>.

<sup>55</sup> Council Regulation (EEC) No 2081/93 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 193, 31.7.1993, p.5; Art. 4.

<sup>56</sup> See *supra*, Council Regulation (EEC) No 4253/88 as amended by Council Regulation (EEC) No 2082/93, Art. 21, par. 1.

However, the responsibility for the payment to the final beneficiaries rests with the Member States which “shall ensure that the beneficiaries receive the advances and payments as soon as possible”<sup>57</sup>.

Faced with irregularities in the conditions under which a programme is being implemented, the Commission has to conduct a suitable investigation, and once the responsible authorities have been heard, it may reduce or suspend its assistance in relation to that programme or operation<sup>58</sup>.

- 1.5 In the light of these rules, the Ombudsman considered that the Commission did not fail to act towards the final recipients of its financial assistance, since this was a power lying with the Member State. In due respect of the partnership principle, the institution does not have the authority to take the place or substitute the responsible national authorities by channelling its contributions directly to the final beneficiaries.
- 1.6 As regards the actions taken by the Commission in response to the alleged irregularities in the handling of ESF funds in the region, they appeared to be in line with the relevant legal provisions governing the institution’s role to monitor and evaluate assistance from the Structural Funds. From the information submitted by the complainant, there was no indication that the Commission had exceeded its powers, or failed to act in accordance with them. The Ombudsman considered therefore that there was no maladministration as regards this aspect of the case.

## **2 Use of the infringement procedure provided for in Art. 226 of the EC Treaty**

- 2.1 According to its powers under Art. 24 of Regulation No 4253/88, as amended by Regulation No 2082/93<sup>59</sup>, the Commission had decided to suspend its ESF assistance to the region of Campania. The complainant considered that the institution should also have started in parallel infringement proceedings against the Italian authorities.
- 2.2 As the Community courts had stated in similar cases, the procedure for the suspension or reduction of Community financial assistance (Art. 24 Regulation No 4253/88) is independent and distinct from the procedure the aim of which is to obtain a declaration that the conduct of a Member State is in breach of Community law (Art. 226 of the EC Treaty). Those two procedures serve different aims and are subject to different rules<sup>60</sup>.

<sup>57</sup> See supra, Council Regulation (EEC) No 4253/88 as amended by Council Regulation (EEC) No 2082/93, Art. 21, par. 5.

<sup>58</sup> Art. 24, pars. 1-2.

<sup>59</sup> Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments; OJ L 374 , 31.12.1988, p.1.

<sup>60</sup> Order of the Court (Fourth Chamber) of 11.07.1996, Case C-325/94 P, *An Taisce- The National Trust for Ireland and WWF v. Commission* [1996] ECR-I-3727, par. 25.

2.3 The Ombudsman therefore concluded that this aspect of the case did not constitute an instance of maladministration.

### **3 Information forwarded to the complainant concerning his formal letters of complaint**

3.1 On 3 September 1996 and 12 February 1997, the complainant addressed two formal letters of complaint to the European Commission. Both letters had followed the standard model published in the Community Official Journal in 1989 ("Complaint to the Commission of the European Communities for Failure to comply with Community law")<sup>61</sup>. The complainant claimed that the responsible Commission services had not properly informed him on the follow-up given to his complaints.

3.2 The Commission did not make any specific reference in its opinion to this aspect of the case, but merely indicated that there had been an extensive exchange of correspondence with the complainant.

3.3 In the standard complaint form published in the Official Journal the Commission expressly indicates that "*any individual may lodge a complaint with the Commission concerning a practice or a measure which, in his opinion, infringes a Community provision*".

It further refers to a number of administrative safeguards which the institution undertook to respect for the complainant's benefit. These safeguards include :

*"- an acknowledgement of receipt will be sent to the complainant as soon as the complaint is registered.*

*- the complainant will be informed of the action taken in response to his complaint, including representations made to the national authorities, Community bodies or undertakings concerned.*

*- the complainant will be informed of any infringement proceedings that the Commission intends to institute against a Member State as a result of the complaint [...]"*.

3.4 On the basis of the information provided by the complainant, which the Commission had not rebutted, none of the previous administrative safeguards included in the standard complaint form published by the Commission were respected in the handling of the two formal letters of complaint sent by the complainant. The Ombudsman concluded, therefore, that such failure of the Commission constituted an instance of maladministration.

### **4 Public Access to the Decision granting ESF funds to the region**

4.1 The complainant claimed in his complaint that the Commission should not have rejected his request of 13 November 1996 to be given access to a copy of the Commission Decision regarding the financial

<sup>61</sup> OJ C 26, 1.02.1989, p. 7.



contribution to the region of Campania through the ESF (Decision No. 3233 of 12 December 1994). Such a refusal, in the complainant's view, was unjustified. Furthermore, by not having access to a document which could have been relevant for the legal proceedings currently underway before the national courts, the complainant could not properly defend his rights.

- 4.2 The Commission argued in its opinion that this type of Decisions were addressed to the Member States, and therefore they were not aimed at being published. Moreover, access to these documents had no legal basis.
- 4.3 In this context, the Ombudsman should recall that on 8 February 1994 the Commission adopted a Decision on public access to Commission documents<sup>62</sup>. The aim of this Decision is to give effect to the principle of the largest possible access for citizens to information, with a view to strengthening the democratic nature of the institutions and the trust of the public in the administration. As the Community courts have held, Decision 94/90 is a measure conferring on citizens legal rights of access to documents held by the Commission<sup>63</sup>, and is intended to apply generally to requests for access to documents<sup>64</sup>.
- 4.4 Access to a Commission document can only be refused by the institution on the basis of the exceptions listed in the Code of Conduct annexed to the Decision. These exceptions refer to the protection of public interest, such as public security, international relations, monetary stability, court proceedings, inspections and investigations, the individual and privacy, commercial and industrial secrecy, the Community's financial interests, and confidentiality.
- 4.5 None of these exceptions directly concerns the identity of the possible addressee of a document, or its potential publication. The Commission had therefore not relied on any of the specific exemptions provided for in Decision 94/90 to justify its refusal to provide the document requested by the complainant. In the absence of any such justification, the Ombudsman concluded that the Commission did not properly consider the request in the light of Commission Decision 94/90. Such failure constituted an instance of maladministration, and the Ombudsman would address a critical remark to the Commission as regards this aspect of the case.

## CONCLUSION

The Ombudsman's inquiries into this case revealed a case of maladministration on the part of the European Commission. It appeared necessary therefore to make the following critical remarks:

- 1 In the standard complaint form published in the Official Journal the Commission expressly indicates that "*any individual may lodge a com-*

<sup>62</sup> OJ L 46, 18.2.1994, p.58.

<sup>63</sup> Case T-105/95, *WWF UK v. Commission* [1997] ECR-II-0313, par. 55.

<sup>64</sup> Case T-124/96, *Interporc v. Commission* [1998] ECR-II-0231, par. 48.

*plaint with the Commission concerning a practice or a measure which, in his opinion, infringes a Community provision*". It further refers to a number of administrative safeguards which the institution undertook to respect for the complainant's benefit. These safeguards include:

- "- an acknowledgement of receipt will be sent to the complainant as soon as the complaint is registered.*
- the complainant will be informed of the action taken in response to his complaint, including representations made to the national authorities, Community bodies or undertakings concerned.*
- the complainant will be informed of any infringement proceedings that the Commission intends to institute against a Member State as a result of the complaint [...]"*.

On the basis of the information provided by the complainant, which the Commission had not rebutted, none of the previous administrative safeguards included in the standard complaint form published by the Commission were respected by the Commission in its handling of the two formal letters of complaint sent by the complainant.

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter.

- 2 Access to a Commission document can only be refused by the institution on the basis of the exceptions listed in the Code of Conduct annexed to the Decision. These exceptions refer to the protection of public interest, such as public security, international relations, monetary stability, court proceedings, inspections and investigations, the individual and privacy, commercial and industrial secrecy, the Community's financial interests, and confidentiality.

None of these exceptions directly concerns the identity of the possible addressee of a document, or its potential publication. The Commission had therefore not relied on any of the specific exemptions provided for in Decision 94/90 to justify its refusal to provide the document requested by the complainant. In the absence of any such justification, the Ombudsman concluded that the Commission did not properly consider the request in the light of Commission Decision 94/90.

Commission Decision 94/90 expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implied that the Commission would reconsider the rejection given to the complainant's application of 13 November 1996, and give access to the documents requested, unless one of the exceptions contained in Decision 94/90 applies. Since it was for the Commission to carry out this reconsideration and communicate the result to the complainant, the Ombudsman closed the case.

## REFUSAL OF ACCESS TO DOCUMENTS RELATED TO COURT PROCEEDINGS

*Decision on complaint 506/97/JMA against the European Commission*

### THE COMPLAINT

In June 1997, attorneys acting on behalf of a group of Italian wine-growers lodged a complaint with the Ombudsman concerning the allegedly unjustified refusal of the Commission to give them access to certain documents.

By letters of 13 February 1997 and 24 March 1997, sent to the Directorate General VI and to the Secretary General of the Commission respectively, the complainants requested access to several Commission documents. The request was for the working documents used by the Commission to estimate the compulsory distillation by producers of table wine in the 1993/94 wine year.

The complainants requested these documents in order to prove that the calculation of the amount to be distilled by each Member State had been made in a discriminatory manner, and that, as a result, Italy had been significantly penalised. They alleged that Italian wine-growers were required to distil a greater quantity of wine than those in other Member States whose production conditions were similar and that the Commission's calculation was incomprehensible. In particular, the complainants believed that the Commission had applied a different reference percentage to the various Member States when determining the respective amounts to be distilled and that the quantity of 12,150,000 hl for Italy had been calculated on the basis of inaccurate national data.

The complaint was made on the basis of Commission Decision 94/90<sup>65</sup> on public access to Commission documents.

The Commission rejected the initial application. In a reply dated 12 March 1997, the Commission's services informed the complainants that, as the decision of the Commission to open a compulsory distillation for the 1993/94 wine year was the subject of judicial proceedings before the Court of Justice, the Commission could refuse to release the relevant documents based on the exception provided for in Decision 94/90, regarding the protection of the public interest.

In relation to the confirmatory application by the complainants, the Secretary General of the Commission firstly informed them that in view of the large number of documents requested, its decision would probably not be taken within one month. On May 1997, the Secretary General sent a further letter to the complainants, which confirmed the refusal of their confirmatory application. The letter also indicated that the complainants should have addressed their request directly to the Court of Justice, since this is the only authority empowered to disclose procedural documents as established by Article 21 of its statute and Article 45 (2) of the Rules of Procedure.

<sup>65</sup> 94/90/ECSC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents, OJ L 046, 18.02.94 p. 0058-0061.

In view of the refusal of the Commission, the complainants asked the Ombudsman to start an inquiry into the matter and to investigate whether an instance of maladministration had taken place.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In summary the Commission's opinion made the following points:

The complainants requested access to Commission documents concerning the calculations for compulsory distillation of table wine in respect of the 1993/94 wine year. These materials had served as the factual support and reference for the Commission to enact Regulation n° 343/94 of 15 February 1994 opening compulsory distillation by producers of table wine in respect of the 1993/94 wine year<sup>66</sup>.

The Commission pointed out that the legality of this Regulation and its conformity with Community law was the subject of an action pending before the Court of Justice of the European Communities for a preliminary ruling (C-375/96). Given that situation, the institution could not agree to the release of the requested documents, because such action would have imperilled the defence of public interest in judicial proceedings. Therefore the Commission considered that it was empowered to deny access, on the basis of the exception provided for in the decision on public access. This allows the refusal of access to documents where disclosure could undermine the protection of the public interest.

Furthermore, the Commission stated that the complainants should have addressed their request for the disclosure of the documents directly to the Court of Justice. Should this institution order the release of the documents, the Commission could not have denied access to them except in the case of particularly serious "higher reasons".

It referred to the fact that a case bearing on very similar matters was pending in the Court of First Instance (*Case T-124/96 Interporc Im- und Export GmbH v. Commission*)<sup>67</sup>.

### The complainants' observations

In their observations, the complainants contested the reasons given by the Commission in its refusal to disclose the requested documents. They disagreed with the consideration of the documents as a part of court proceedings and the ensuing application of the exception relating to the protection of the public interest. The complainants argued that even if the documents related to ongoing proceedings before the Court of Justice, they could not be taken as part of court proceedings because they had not been prepared for this particular Court case, but existed independently of the

<sup>66</sup> Commission Regulation (EC) No 343/94 of 15 February 1994 opening compulsory distillation as provided for in Article 39 of Council Regulation (EEC) No 822/87 and derogating for the 1993/94 wine year from certain detailed rules for the application thereof. OJ L 044 , 17.02.1994 p. 9.

<sup>67</sup> Case T-124/96. Judgment of 6 February 1998 *Interporc Im- und Export GmbH v Commission*, [1998] ECR II-0231.

proceedings. They ought therefore to be considered as mere administrative documents.

Moreover, the complainants argued that, on the basis of existing Community case-law, when the Commission denies access to documents using an exception of Decision 94/90, it has to specify the reasons for each of the requested documents, and thus motivate the refusal<sup>68</sup>.

The complainants alleged that in this case, by contrast, the Commission had simply denied access on the basis of the protection of public interest, without giving accurate reasons and without striking a balance between its right of defence and the rights of citizens to have access to documents.

## THE DECISION

### 1 Refusal of access to documents connected to court proceedings

- 1.1 Access to the Commission's working documents assessing the compulsory distillation of wine for the year 1993/94 was refused on the basis of the need to protect public interest, as provided for in the first indent of exceptions of Commission Decision 94/90 on public access to Commission documents.
- 1.2 In reply to the confirmatory application, the Commission pointed out that the requested documents were instrumental for the enactment of Commission Regulation 343/94 opening compulsory distillation for the 1993/94 wine year, whose legality was being contested before the Court of Justice<sup>69</sup>. It argued that the complainants should have addressed their request for documents directly to the Court of Justice.

The Commission concluded therefore that :

*“The protection of public interest in the case of court proceedings gives it the power, in the framework of the Code of Conduct, to refuse access to documents which relate to a pending legal case”.*

- 1.3 The exception to the general principle of access to Commission documents based on the protection of public interest when the documents at issue are connected to court proceedings has been included in Decision 94/90. The Court of First Instance of the European Communities has already been called to define the scope of this exception to the general principle<sup>70</sup>. The Court has stated that

*“[...] a distinction must be drawn between documents drafted by the Commission for the purpose of a particular court case [...], and other documents which exist independently of such proceedings. Application of the exception*

<sup>68</sup> Case T-105/95, WWF UK (World Wide Fund for Nature) v. Commission of the European Communities [1997] ECR II-0313.

<sup>69</sup> The case has already been decided by judgment of the Court (Fifth Chamber) of 29 October 1998; Case C-375/96, *Galileo Zaninotto v Ispettorato Centrale Repressione Frodi* (reference for a preliminary ruling: Pretura circondariale di Treviso); not yet reported.

<sup>70</sup> Case T-83/96, Gerard van der Wal v Commission of the European Communities [1998] ECR II-545.

*based on the protection of the public interest can be justified only in respect of the first category of documents”.*<sup>71</sup>

- 1.4 The Ombudsman noted that the documents requested by the complainants had been prepared to evaluate the legislative options of the Commission, and were not created to serve a particular purpose in the context of a court proceeding. These documents were therefore independent of the court case regarding the legality of Commission Regulation n° 343/94, for which, however, they laid the ground.
- 1.5 Therefore, in line with the case law of the Community courts, the Ombudsman considered that the Commission had wrongly refused access to Commission documents on the grounds that the documents in question were connected to court proceedings. Such action constituted an instance of maladministration, and the Ombudsman considered necessary to make a critical remark to the Commission as regards this aspect of the case.

## **2 Reasons for the refusal of each specific document**

- 2.1 In their letter to the Ombudsman, the complainants also argued that the Commission’s refusal of their request did not comply with established Community case-law since it did not refer to each specific document.
- 2.2 Since the Ombudsman had concluded that the Commission should reconsider its decision in this case, there was no need to assess the merits of this additional claim.

## **CONCLUSION**

The Ombudsman’s inquiries into this case revealed a case of maladministration on the part of the European Commission. It appeared necessary therefore to make the following critical remark:

The Ombudsman noted that the documents requested by the complainants had been prepared to evaluate the legislative options of the Commission, and were not created to serve a particular purpose in the context of a court proceeding. These documents were therefore independent of the court case regarding the legality of Commission Regulation n° 343/94, for which, however, they laid the ground.

Therefore, in line with the case law of the Community courts, the Ombudsman considered that the Commission had wrongly refused access to Commission documents on the grounds that the documents in question were connected to court proceedings. Such action constituted an instance of maladministration.

Commission Decision 94/90 expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman’s crit-

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<sup>71</sup> Supra case T-83/96, par. 50.

ical remark implied that the Commission should reconsider the complainants' confirmatory application dated 24 March 1997 and give access to the documents requested, unless one of the exceptions contained in Decision 94/90 applied. Since it was for the Commission to carry out this reconsideration and communicate the result to the complainants, the Ombudsman closed the case.

### COMMISSION PROCEDURE FOR INVESTIGATING ALLEGED INFRINGEMENT (ARTICLE 226 EC)

*Decision on complaint 749/97/IJH against the European Commission*

#### THE COMPLAINT

In August and September 1997, Mr M. complained to the Ombudsman against the Commission, DG XI. He had previously complained to the Commission about the planned construction, with co-financing from the Community, of a dual carriageway road in the area of the Ballyseedy Wood, Tralee, County Kerry in Ireland, an area classified as a priority habitat under the Habitat Directive (Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna). Dissatisfied with how the Commission's investigation of the matter was proceeding, he complained to the Ombudsman, putting forward, in summary, the following points:

- (i) The Commission had failed to ensure an adequate scientific appraisal of the planned dual carriageway. It had not insisted that the Irish authorities produce an Environmental Impact Assessment under Directive 85/337/EEC. Given the established environmental importance of the Ballyseedy Wood, it was not in line with the Directive to base a decision only on informal information submitted by the Irish authorities. Furthermore, the Commission had failed to perform a visit to the site or to send its own experts in order to obtain independent information.
- (ii) The procedure used by the Commission was unfair in that the Irish authorities were put in a much better position than the objectors, who have very limited resources. In particular, the Commission had given the Irish authorities over a year to respond to the Commission's investigation, but gave the objectors only six weeks to comment on the standpoint of the Irish authorities. Furthermore, the Commission did not itself supply him with the reports submitted by the Irish authorities but instead referred him to Kerry County Council for access to the reports.

#### THE INQUIRY

##### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission noted that the Ballyseedy Wood had been identified as a residual alluvial forest which is a priority habitat type for the purpose of Directive 92/43/EEC. The Irish authorities indicated that Ballyseedy Wood



is one of 14 sites in Ireland which will be proposed as special areas of conservation for the habitat type under the Directive.

As regards the procedures, the Commission claimed that they were carried out correctly and that the objectors had been treated fairly. The complaint was registered on 22 January 1996 as number P95/5006. An initial evaluation and representations to the Member State took place on 14 March 1996 and 3 July 1996. A letter to the complainant explaining the representations made to the Member State was sent on 20 August 1996. The Irish authorities responded on 21 May 1997 and 13 June 1997 and the Commission informed the complainant on 1 July 1997 about this response, inviting him to comment within six weeks. The Commission was currently assessing the received information. Furthermore, no Community funds had yet been given to the project since the Commission is awaiting the outcome of the investigations.

The Commission also commented on the duration of its investigation, which exceeded the period of one year generally foreseen for the conclusion of an investigation into a complaint. It explained this by the fact that the complaint had raised several complex technical and scientific issues, thus requiring more time for a proper evaluation. Since the project had not proceeded during the time of investigation, no detriment had arisen. The Commission further pointed out that the fact that the Irish authorities had failed to complete a formal Irish list of sites intended for conservation under Directive 92/43/EEC, was subject to a separate infringement procedure addressing that issue.

As regards the complainant's allegation that six weeks for commenting on the Irish authorities' response was too short, the Commission stated that the position of the complainant is different to that of the Member State. The Member State is obliged to supply the Commission with information; an obligation not imposed on the complainant. There are also consequences for the Member State in not meeting the Commission's requested deadline for response. In contrast, the complainant is not faced with similar consequences. Furthermore, the Commission stated that six weeks is reasonable compared with analogous national processes.

The Commission stated that its own rules on access to documents did not allow it to provide the complainant with the reports since it was not their author. On the other hand, Kerry County Council was obliged to provide access to the reports by Directive 90/313/EEC on freedom of access to information on the environment.

The compliance of the project with Directive 85/337/EEC was subject to investigation. The complainant had been invited to comment on the response of the Irish authorities and his comments would be taken into account.

On the question of whether the Commission should send its own experts to visit the site, the Commission stated that it did not rule out the possibility of a site visit. Such visits are sometimes made in connection with important habitats under threat. However, up to the date of the complaint to the Ombudsman, a site visit was not required, as the obtaining of information

and evaluation thereof could be dealt with satisfactorily by way of correspondence.

Finally, the Commission stated that the complainant had been kept fully informed of all critical stages in the investigation and that a meeting had taken place between the complainant and the Commission services in the autumn of 1997. The Commission concluded by stating that it would keep the complainant informed of further developments.

### **The complainant's observations**

In his observations, the complainant maintained his complaint and made the following points:

When the objectors were told they had only six weeks to comment on various extensive reports by the Irish authorities, they gave up all hope of raising the money and finding experts to counter the arguments presented. The time allowed was totally unreasonable. This was particularly unfortunate since the reports were full of flaws. If the Commission wants an accurate procedure, it should make sure that both the Irish authorities and the complainants possess the necessary experts, and if not, supply them itself. The need for Commission experts was all the greater because, every time the complainants managed to obtain an expert opinion, the reports of the Irish State's experts were found to contain serious errors.

As regards the fact that the complainant had to obtain the reports from Kerry County Council, the complainant pointed out that the Commission firstly said that it would guard the anonymity of the complainants and then referred them to their adversaries for obtaining the relevant reports.

The complainant also underlined that his complaint was not against the staff of the Commission but against the established procedures. These were unfair to the complainants in that they left unreasonable and unfair advantages to the Member State with its massive resources.

### **FURTHER INQUIRIES**

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman deemed further inquiries to be necessary. For this purpose, the Ombudsman requested information from the Commission; firstly, concerning its opinion that its rules on access to documents "*did not allow*" it to provide the complainant with the requested reports and secondly, concerning the Commission's criteria as to whether, and at what stage, it finds it appropriate to undertake a visit to the site.

In its response, the Commission stated that there had been no formal request from the complainant as regards the reports produced by Kerry County Council. However, according to the Commission's rules on access to documents, it had the right to refer the complainant to the author. Regarding the possibilities of a visit to the site, the Commission informed the Ombudsman that there were no specific criteria for deciding whether, and at what stage, a site visit could be appropriate. Rather, site visits generally occur when this is needed for the understanding of the facts. In practice, such cases tend to present unique sets of circumstances.

The Commission went on to explain that it would have been premature to perform a visit to the site before the stage when the complaint was lodged to the Ombudsman. However, at a later stage when it had received both the Member State's and the complainants' submissions, the Commission found it necessary to carry out a study on certain aspects of the case. This study did not include a site visit by Commission staff, but a visit and interviews were conducted by outside experts engaged on the Commission's behalf. The study concluded that the proposed Tralee dual carriageway was in breach of EU policy and law in respect of the Environmental Impact Assessment Directive and the Habitat Directive and that the decision to co-finance the project should be reconsidered.

The Commission sent a copy of the above-mentioned study to the Ombudsman. It also informed the Ombudsman that a copy of the study had been provided directly to the complainant.

The complainant expressed satisfaction with the outcome of the study, however he pointed out that he had not received any further information or notice of a final decision by the Commission.

On the general issue of the procedure used, the complainant expressed concern that there had been no mention of an independent committee of experts until after the complaint to the Ombudsman.

The complainant also stated that requesting the reports from Kerry County Council had indeed revealed his identity as a complainant. After having requested and obtained the reports, he received a letter from Kerry County Council saying that he should send to it copies of the documents and letters which he had sent to the Commission.

## **THE DECISION**

### **1 The alleged failure to ensure an adequate scientific appraisal of the planned dual carriageway**

- 1.1 The complainant alleged that the Commission had failed to ensure an adequate scientific appraisal of the planned Tralee dual carriageway because it had failed to insist that the Irish authorities produce an Environmental Impact Assessment under Directive 85/337/EEC<sup>72</sup> and had failed to perform a visit to the site, or send its own experts to obtain independent information.
- 1.2 Principles of good administration require the Commission to base decisions involving scientific assessments on accurate information and to ensure, when appropriate, that there is opportunity for critical appraisal of relevant data and that different opinions are heard. If submissions from the Member State and the complainant are inadequate for this purpose, the Commission should take appropriate steps to ensure that it obtains accurate information.

<sup>72</sup> Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

- 1.3 During the course of the Ombudsman's inquiry, the Commission employed outside experts to carry out an environmental study of the planned dual carriageway as part of its investigation of the project's compliance with Directive 85/337/EEC. The complainant expressed satisfaction with the conclusions of the study.
- 1.4 As regards this aspect of the case, therefore, it appears that the Commission has taken steps to settle the matter and has thereby satisfied the complainant.

## **2 The fairness of the procedure**

- 2.1 The complainant alleged that the procedure used by the Commission was unfair, because the Irish authorities were put in a much better position than the objectors. In particular, the Commission gave the Irish authorities one year to respond to its investigation, whereas the objectors had only six weeks to comment on the Irish response. Furthermore, the complainant objected to the fact that the Commission did not supply him with the reports submitted by the Irish authorities but referred him to Kerry County Council, thereby jeopardising his anonymity as a complainant.
- 2.2 As regards the general procedure adopted by the Commission, the Ombudsman's inquiry showed that the complaint was registered by the Commission and that the complainant was informed about the representations made to the Irish authorities and about the latter's response, on which he was invited to comment. The Commission services also met with the complainant. After having evaluated the response from the Member State and the comments from the objectors, the Commission engaged outside experts to perform a study on certain aspects of the case, including a visit to the site. The Commission informed the complainant of the outcome of this study. Although the time for the investigation exceeded the normal period of one year, the Commission explained this by reference to the complex technical and scientific issues raised. It appears, therefore, that in general the Commission acted in accordance with principles of good administration by respecting the procedures to which it committed itself to in the Ombudsman's own initiative inquiry 303/97/PD.<sup>73</sup> The Commission further stated that it would keep the complainant informed of the development of the investigation, which is also in line with the commitments it gave in the Ombudsman's own initiative inquiry.
- 2.3 As regards the claim that the six-week time limit for reply was too short, the Commission pointed out that, unlike the Member State, complainants are not obliged to reply. Furthermore, the Commission claimed that six weeks is comparable to the period allowed in analogous national procedures. As regards the failure to supply the complainant with the reports on which it invited him to comment, the Commission stated that its rules on access to documents did not allow

<sup>73</sup> Decision in the own initiative inquiry 303/97/PD. See Annual Report for 1997, heading 3.7, OJ 1998 C 380/1.

it to supply the reports since it was not the author. However, when this was queried by the Ombudsman the Commission stated that its rules on access to documents allowed it to refer the complainant to the author of the reports.

- 2.4 It is a principle of good administration that time-limits should be reasonable. It was not unreasonable for the Commission to base its time-limit of six weeks for comments on a comparison with analogous national procedures. However, the Commission did not supply the complainant with the material on which to comment. In these circumstances, the Commission should have indicated its willingness to extend the time limit, on request, in order to take into account the extra time needed for the complainant to obtain the relevant material.
- 2.5 It is a principle of good administration that an administrative body should do its best to keep its promises to citizens. The standard form on which the Commission has invited individuals to submit complaints gives an undertaking to observe the customary rules of confidentiality when investigating the complaint.<sup>74</sup> Although there is no obligation on the complainant to comment on the Member State's response, the possibility of such participation is a normal part of the investigation procedure. The Commission required the complainant to obtain the reports on which to comment from an authority of the Member State which was under investigation. The complainant therefore had to sacrifice his anonymity in order to be able to participate normally in the investigation of his complaint. By this requirement the Commission failed to keep the promise made in its standard form.

## CONCLUSION

On the basis of the Ombudsman's inquiries into the first aspect of the complaint, it appeared from the Commission's comments and the complainant's observations that the Commission had taken steps to settle the matter and thereby satisfied the complainant.

On the basis of the Ombudsman's inquiries into the second aspect of the complaint, it was necessary to make the following critical remarks:

It is a principle of good administration that time-limits should be reasonable. It was not unreasonable for the Commission to base its time-limit of six weeks for comments on a comparison with analogous national procedures. However, the Commission did not supply the complainant with the material on which to comment. In these circumstances, the Commission should have indicated its willingness to extend the time limit, on request, in order to take into account the extra time needed for the complainant to obtain the relevant material.

It is a principle of good administration that an administrative body should do its best to keep its promises to citizens. The standard form on which the Commission has invited individuals to submit complaints gives an undertaking to observe the customary rules of confidentiality

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<sup>74</sup> 1989 OJ C 26/6.

when investigating the complaint. Although there is no obligation on the complainant to comment on the Member State's response, the possibility of such participation is a normal part of the investigation procedure. The Commission required the complainant to obtain the reports on which to comment from an authority of the Member State which was under investigation. The complainant therefore had to sacrifice his anonymity in order to be able to participate normally in the investigation of his complaint. By this requirement the Commission failed to keep the promise made in its standard form.

Given that this aspect of the case concerned procedures relating to specific events in the past it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

### **FURTHER REMARK**

The Ombudsman noted that the Commission's procedure for investigating a complaint about an infringement of Community law by a Member State is not yet organised as a normal administrative procedure, in which the complainant is treated as a party. In a normal administrative procedure, the Commission should itself supply the complainant with all the documents on which it invites comments.

## **UNANSWERED LETTERS**

*Decision on complaint 102/98/(XD)ADB against the European Commission*

### **THE COMPLAINT**

In January 1998, Mr R. complained to the Ombudsman concerning the Commission's failure to answer his letters.

In November 1997, Mr R sent a complaint to the Commission about the French CSG (Contribution Sociale Généralisée) and CRDS (Contribution pour le Recouvrement de la Dette Sociale). As he received no reply, he contacted the Commission Representation in Paris. Furthermore, he asked the Commission Representation in Marseilles how he could act against this failure to reply. Finally the complainant turned to the nonprofit making organisation "La Maison de l'Europe" in Perpignan.

Following these contacts, the complainant never received an answer, except two brochures (in particular one about the European Ombudsman) from the "Centre d'Informations sur l'Europe - Sources d'Europe" in Paris.

### **THE INQUIRY**

#### **The Commission's opinion**

The complaint was forwarded to the Commission. The opinion of the Commission on the complaint was, in summary, the following:

The issue raised by the complainant in his letter to the Commission, which was subject to an infringement procedure brought before the Court of

Justice, was simultaneously dealt with by Directorate General (DG) XV and DG V of the Commission. Given the fact that the cases were still pending before the Court of Justice, the substantive answer to the complainant's request was postponed. However, the Commission regretted that no holding reply was addressed to the complainant in the meantime.

As regards the information requested from the Commission representation in Marseilles, the Commission stated that the complainant did not live within this office's geographic zone of competence. As a consequence, the request was transmitted to Paris, and the complainant was sent the relevant information through "Sources d'Europe".

In its reply to the Ombudsman's request of 12 February 1998, the Commission enclosed a copy of a letter which was sent to the complainant on 20 February 1998, which informed him of the infringement procedure against France.

### **The complainant's observations**

In his observations, the complainant put forward that further to the reply sent by the Commission on 20 February 1998, he had addressed the Commission twice, on 2 March 1998, and as a reminder on 8 June 1998. He wished to know whether his complaint had been finally registered or if he needed to lodge a new complaint, and whether he would be informed about the progress of the procedure.

On 30 August 1998, the complainant informed the Ombudsman that he had not yet received any reply to his letters of 2 March and 8 June 1998, and expressed serious doubts about the regrets mentioned by the Commission in its opinion to the Ombudsman.

### **FURTHER INQUIRIES**

Following the additional difficulties faced by the complainant, the Ombudsman got in touch with the Commission on 10 September 1998. On 30 September 1998, the Commission acknowledged the receipt and registered the complainant's original complaint of 1 November 1997. On 5 October 1998 the complainant was informed of the progress of the infringement procedure against France.

### **THE DECISION**

#### **1 Failure to reply to the complaint**

- 1.1 The complainant put forward that he received no reply to a complaint he lodged with the Commission. The Commission explained that the delays were caused by the fact that the subject matter raised by the complainant was at that time being investigated by the Court of Justice. Nevertheless, the Commission apologised for the absence of a holding reply.
- 1.2 According to the information contained in the opinion of the Commission as regards its own procedures for dealing with com-



plaints (sent to the Ombudsman in the framework of his own initiative inquiry ref. 303/97/PD) :

*“All complaints which reach the Commission are registered in the Secretariat-General. No exceptions are made. (...)*

*When it receives a complaint, the first thing the Commission does is to acknowledge receipt. The letter acknowledging receipt is accompanied by an annex setting out the purpose and giving details of the infringement proceeding.”*

- 1.3 The Ombudsman noted that on 11 June 1998, in the framework of the Ombudsman's investigation, the Commission expressly recognised the problem, and apologised for the delay and the absence of a holding reply. However, despite those regrets, and two additional requests by the complainant, the complaint lodged on 1 November 1997 was only formally registered on 30 September 1998, and required an additional intervention of the Ombudsman.
- 1.4 According to the Commission's own observations in the framework of the Ombudsman's own initiative inquiry 303/97/PD, no exceptions are made to the rule that all complaints received by the Commission are registered and a timely acknowledgement receipt is sent. The fact that in the present case, the Commission, once it was made aware of, recognised and apologised for the delay, did still not hasten to register the complaint, constituted an instance of maladministration.

## **2 Failure to provide the complainant with the necessary information**

- 2.1 The complainant claimed that he didn't receive any information when he addressed the Representation of the Commission in Marseilles. The Commission explained that his request had been transferred to the geographically competent Representation and that he received the adequate information from the “Centre d'Informations sur l'Europe - Sources d'Europe” in Paris.
- 2.2 The Commission Representation in Marseille contacted the competent services to provide the complainant with the adequate information about the possible appeals against a failure to reply by the Commission. Thus, there appeared to have been no instance of maladministration concerning this aspect of the complaint.

## **CONCLUSION**

On the basis of the Ombudsman's inquiries into the second aspect of the case, there appeared to have been no maladministration by the Commission.

As far as the first aspect of the case was concerned, it appeared necessary to make the following critical remark:

According to the Commission's own observations in the framework of the Ombudsman's own initiative inquiry 303/97/PD, no exceptions are

made to the rule that all complaints received by the Commission are registered and a timely acknowledgement receipt is sent. The fact that in the present case, the Commission, once it was made aware of, recognised and apologised for the delay, did still not hasten to register the complaint, constitutes an instance of maladministration.

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

## CANCELLATION OF A CALL FOR PROPOSALS

*Decision on complaint 130/98/OV against the European Commission*

### THE COMPLAINT

In January 1998, Mrs Caroline Jackson MEP made a complaint to the Ombudsman on behalf of a foundation, alleging maladministration by DG XXIII in a call for proposals procedure. The relevant facts were as follows:

On 13 December 1996, the foundation (hereafter “the complainant”) submitted an application in response to the Call for proposals - 96/C246/15 issued by the European Commission (DG XXIII) under its Action in Favour of Cooperatives, Mutual Societies, Associations and Foundations programme.

The complainant received no information from DG XXIII about the outcome of its application until 24 August 1997, when the Commission placed an announcement in the Official Journal stating that the programme had been cancelled. However, no reasons were given for this cancellation. The complainant was officially informed of the cancellation by letter of DG XXIII dated 18 August 1997. Later, further to Parliamentary Question H-0717/97 of October 1997, Mrs Caroline Jackson MEP found out that the Call for proposals had been cancelled because the programme had never received the authorisation from the Council of Ministers and therefore missed a budget. The complainant, who had contacted itself the Commission in March and June 1997 for information on the outcome of its application, was never informed about these developments. Also, DG XXIII’s reply to the complainant stated that its application failed to meet the criteria of the 12 programmes finally approved for financing, but the complainant was never informed of those criteria.

The MEP complained to the Ombudsman on behalf of the complainant alleging, in summary the Commission: advertised a Call for proposals based on a programme which had no Council approval; failed to inform the complainant that the programme was still subject to Council approval and about subsequent developments; delayed excessively before cancelling the programme and in informing the complainant of the cancellation; failed to inform the complainant about the reasons for the cancellation of the programme, and about the fact that its application failed to meet the programme criteria.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that it understood that the cancellation of the call for proposals had caused disappointment, but that it did not share the view of maladministration. The Commission recalled the background and the legal situation of the case:

The Call for proposals was published on 24 August 1996 (OJ 1996 C 246/16) and was intended to co-finance from the budget line on social economy (heading B5-321 of the 1997 Budget) projects in which cooperatives, mutual societies, associations and foundations (CMAFs) were involved. These projects had to respect the principles laid down in the Commission's proposal for a multi-annual (1994-1996) work programme for CMAFs. This proposal, approved by the Commission on 17 February 1994, was submitted to the Council for adoption of a decision. The legal basis for this decision would be Article 235 of the EC Treaty, which requires unanimity. The Call for proposals was linked to the draft programme, which the Commission believed would be adopted on time. However, by the end of 1996, the proposal failed to obtain the general consensus. Following the publication of the Call for proposals, DG XXIII had received 173 requests for financing by 31 December 1996. An inter-department group which examined the projects during the first months of 1997, selected 22 projects according to the criteria set out in the Call for proposals and the commentary of budget line B5-321 for the year 1997.

In the meantime however, further to the Order of the President of the Court of Justice of 24 September 1996 in joined cases C-239/96 R and C-240/96 R (UK v. Commission, application for interim measures)<sup>75</sup>, the expenditure by the Commission on social exclusion and poverty, not based on acts adopted by the Council, was put in question. Given this legal uncertainty, the Commission decided that it would withdraw its proposal for a programme, to which the Call for proposals referred. On 29 July 1997 it took the formal decision to cancel the Call for proposals and to withdraw its draft programme. However, the Commission decided to take into account the results of the evaluation carried out by the inter-department group so that the work completed up to that date by both the candidates and the Commission services would be usefully turned out. It therefore decided to co-finance a limited number of projects (12 from the 22) which had been selected from the 173 submitted in the context of the Call for proposals. The proposal of the complainant however was not considered eligible under the criteria of the Call for proposals.

The decision to co-finance the 12 projects was taken on basis of the Commission's Communication of 6 July 1994 to the Budgetary Authority concerning legal bases and maximum amounts (SEC (94) 1106 final). The selected projects were "non-significant and pilot projects" within the meaning of the 1994 Communication. On 18 August 1997, DG XXIII sent a letter to all candidates whose project had not been selected in order to

<sup>75</sup> Joined Cases C-239/96 R and C-240/96 R, *United Kingdom v. Commission*, [1996] ECR I-4475.

inform them about the situation. Against this background, the Commission gave the following explanations for the different points raised by Mrs Jackson MEP:

As regards the allegation that the Commission published a Call for proposals based on a programme which was not approved by the Council, the Commission observed that it believed that, in accordance with normal practice, the programme would have been adopted and that the action for financing projects would have been continued through the next budgetary year. This position was reinforced by the fact that the Budgetary Authority decided that appropriations should be given for the social economy line for 1997 on the same grounds as it had been during the previous years.

As regards the allegation concerning the late cancellation of the programme, the Commission observed that it withdrew the project in July 1997 only after it became clear that there was no chance even for a late adoption of the programme.

As regards the alleged failure of information and the alleged delay, the Commission first stated that the Official Journal notice clearly mentioned that the programme was still a proposal to be adopted by the Council. This way of proceeding was in accordance with the practice at the time for carrying out preparatory actions and innovative projects. The Commission further observed that DG XXIII decided, until all legal problems were sorted out in July 1997, not to prepare preliminary replies to individual enquiries before that date. Therefore the Commission could not give a clear answer to the complainant in March or June 1997. The Commission further stated that it informed the applicants as soon as possible after the decision had been taken, i.e. 12 working days after 29 July 1997, which is not an unreasonable delay.

As regards the alleged failure to inform about the reasons for the cancellation, the Commission observed that, since the cancellation of the proposal for a programme was essentially a technical question unrelated to the merits of the applications, it decided that a standard letter which did not go into the complex legal and political reasons for cancelling the programme was most appropriate.

Finally, as regards the allegation that the complainant was never informed that its application failed to meet the criteria of the programme, the Commission answered that it is normal practice to inform applicants only when the final decision is taken and not at each stage of the selection procedure.

### **The complainant's observations**

The complainant did not submit any written observations. However, in a telephone conversation with the Ombudsman's office, the representative of the complainant stated that it was not satisfied with the answers given to their complaint.

**THE DECISION**

- 1 The advertisement of a Call for proposals based on a programme which had still not been approved by the Council**
  - 1.1 The first allegation concerns the fact that the Commission invited applications for a programme that had still no Council approval. The Commission observed that it believed in good faith that the programme would have been adopted on time, and that this position was reinforced by the fact that the Budgetary Authority decided that appropriations should be given for the budget line on social economy (B5-321) for 1997 on the same grounds as it had been during the previous years.
  - 1.2 The Ombudsman notes that the Commission's proposal for a Council Decision relating to a multi-annual work programme for CMAFs was sent to the Council on 17 February 1994. The Call for proposals, which was based on this draft programme, was published on 24 August 1996. It appears that, at that time, the Commission believed that the programme would be adopted by the Council. This information is confirmed by the fact that the Call for proposals itself clearly mentioned in footnote (1) that the European Parliament, as well as the Economic and Social Committee had given a favourable opinion at their respective plenary sessions, but that the examination of the proposal by the Council was not complete. This way of proceeding was also in accordance with the practice for carrying out preparatory actions and innovative projects. The Ombudsman therefore considers that the publication of the Call for proposals 96/C246/15 on a date when the Commission was still waiting for its draft programme to be adopted by the Council, did not constitute an instance of maladministration.
- 2 The alleged late cancellation of the programme in July 1997**
  - 2.1 As regards the alleged late cancellation of the programme, the Commission stated that it withdrew its programme only in July 1997 when it became clear that there was no chance even for a late adoption by the Council. The Commission also stated that it had decided to take into account the results of the evaluation of the applications, in order to usefully turn out the work carried out until that date.
  - 2.2 Principles of good administrative behaviour require that the Commission avoids unnecessary delay in its action, or provides a reasonable explanation when such a delay occurs. In the present case, it appeared from both the Commission's comments as from the answer given to Parliamentary Question E-3169/97<sup>76</sup> that the draft programme had not been endorsed by the Council by the end of 1996. Moreover, legal uncertainty had risen in September 1996 when, further to the Order of the President of the Court of Justice in joined cases C-239/96 R and C-240/96 R, the expenditure on social exclusion and poverty by the Commission, not based on acts adopted by

<sup>76</sup> Written Question No. 3169/97 by Raymonde DURY to the Commission, OJ 1998 C 196/2.

the Council of Ministers, was put in question. In those circumstances, the Ombudsman considers that the Commission's argument related to a chance for an even late adoption by the Council, can be sustained only with difficulty.

- 2.3 For those reasons, the Ombudsman considers that the Commission did not provide an acceptable and consistent explanation to justify why it only withdrew its programme on 29 July 1997, when already by the end of the year 1996, i.e. 34 months after the draft programme had been sent to the Council, it was clear that the programme had not been endorsed. The Commission's failure to avoid a delay in its decision to withdraw the programme and to cancel the Call for proposals therefore constituted an instance of maladministration.

### **3 The alleged failure to inform the complainant**

- 3.1 As regards the allegation that the Commission did not inform the applicants that the programme was still subject to Council approval, the Commission answered by referring to the notice of the Official Journal. The Ombudsman noted that the notice which announced the Call for proposals indeed mentioned that the examination of the proposal by the Council was not complete. The allegation that the applicants were not informed about this could thus not be retained.
- 3.2 As regards the alleged delay in informing the complainant about the cancellation of the programme and about the previous developments which lead to that cancellation, the Commission stated that it took the formal decision to cancel the programme on 29 July 1997 and informed the applicants on 18 August 1997. The Commission added that, until the final decision was taken, it was not possible to prepare preliminary replies to individual inquiries. Therefore the Commission could not give a clear answer to the complainant in March or June 1997.
- 3.3 Principles of good administrative behaviour require that the Commission keeps persons informed about the evolution of the file which concerns them and indicates the new legal or factual elements in that file. In the present case it appeared that, at no time since December 1996, when the Commission's draft programme was not approved by the Council and when legal uncertainty had risen further to the Order of the President of the Court of Justice of 24 September 1996, the complainant was informed about those elements. This failure of information therefore constituted an instance of maladministration.

### **4 The alleged failure to give reasons for the cancellation**

- 4.1 The complainant alleged that the Commission did not communicate the reasons of the cancellation of the programme and did not inform earlier that its application did not meet the criteria of the programme. The Commission observed that a standard letter which did not go into the complex legal and political reasons for cancelling the programme was considered most appropriate.

- 4.2 As regards this allegation, the Ombudsman notes that the complainant was at different stages in the procedure informed both that its application failed to meet the criteria of the programme, and that the programme had been cancelled. The Ombudsman considers that this contradictory information given to the complainant is due only to the confused legal situation which the Commission created by having cancelled the Call for proposals but, at the same time, having selected and co-financed 12 projects which had been presented under the cancelled Call.
- 4.3 According to the principles of good administrative behaviour, the Commission should be consistent in its administrative action and with the decisions it takes. The cancellation of a Call for proposals means that this Call is void and cannot have any legal effect anymore. In the present case, it appeared that, by a formal notice published in the Official Journal C 233 of 1 August 1997, the Commission announced that the Call for proposals was cancelled.
- 4.4 For those reasons, the Ombudsman considers that, by having cancelled the Call for proposals 96/C246/15 on 29 July 1997, and having subsequently co-financed 12 projects which were presented and selected under that cancelled Call, the Commission failed to act consistently. Similarly, by having informed the complainant that the reason why its application was not accepted was the cancellation of the Call for proposals, although in reality 12 projects had received funding further to that Call, the Commission failed to act consistently. Those facts therefore constituted instances of maladministration.

## CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remarks:

Principles of good administrative behaviour require that the Commission avoids unnecessary delay in its action, or provides a reasonable explanation when such a delay occurs. The Ombudsman considers that the Commission did not provide an acceptable and consistent explanation to justify why it only withdrew its programme on 29 July 1997, when already by the end of the year 1996, i.e. 34 months after the draft programme had been sent to the Council, it was clear that the programme had not been endorsed. The Commission's failure to avoid a delay in its decision to withdraw the programme and to cancel the Call for proposals therefore constituted an instance of maladministration.

The same principles require that the Commission keeps persons informed about the evolution of the file which concerns them and indicates the new legal or factual elements in that file. In the present case it appears that, at no time since December 1996, when the Commission's draft programme was not approved by the Council and when legal uncertainty had risen further to the Order of the President of the Court of Justice of 24 September 1996, the complainant was



informed about those elements. This failure of information therefore constituted an instance of maladministration.

According to the principles of good administrative behaviour, the Commission should be consistent in its administrative action and with the decisions it takes. The Ombudsman therefore considers that, by having cancelled the Call for proposals 96/C246/15 on 29 July 1997, and having subsequently co-financed 12 projects which were presented and selected under that cancelled Call, the Commission failed to act consistently. Similarly, by having informed the complainant that the reason why its application was not accepted was the cancellation of the Call for proposals, although in reality 12 projects had received funding further to that Call, the Commission failed to act consistently. Those facts therefore constituted instances of maladministration.

Given that those aspects of the case concern procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

## FAILURE TO PROVIDE INFORMATION TO A TACIS CONSULTANT

*Decision on complaint 307/98/IJH against the European Commission*

### THE COMPLAINT

In March 1998, Mr L. made a complaint against the European Commission. According to the complainant, the facts were, in summary, as follows:

From October 1995 to September 1996, the complainant worked as a resident monitor of the EC-funded Tacis<sup>77</sup> programme in Central Asia and Mongolia. He was employed under contract by a consultancy company. In February 1996, he was informed by his team leader that the Commission services in Brussels had asked for his dismissal, apparently as a result of a complaint made against him by the leader of the European Union Tacis programme coordinating unit.

The complainant in fact continued to work as a monitor until the expiry of his contract in September 1996. However, his contract was not renewed by the consultancy company and he was subsequently not accepted for employment on certain other Tacis projects.

On 7 November 1997, the complainant wrote to the acting head of Unit of DG1A/C4 of the Commission in Brussels. He explained the circumstances surrounding the non-renewal of his contract, his subsequent difficulties in obtaining alternative employment and that he considered that the Commission had, in practical terms, blacklisted him. He asked for comments on these points. He also asked a number of specific questions: what was the complaint that the Commission received against him in February 1996?; why did the Commission not inform him at the time either that the

<sup>77</sup> Technical Assistance to the Commonwealth of Independent States (States of the former Soviet Union and Mongolia).

complaint had been made or of its content?; and why had the Commission not approached him to seek his response to the complaint?

On 4 December 1997, the Commission services sent a three-paragraph reply. The first paragraph stated that all questions related to the complainant's contract should be referred to the company which employed him. The other two paragraphs were as follows:

*"Please allow me further to stress that it is impossible to comment on the reasons why tenders from consultants tendering for Tacis projects in which you have taken part has not led to any work. As you might know all tender procedures are confidential and the best way to have knowledge about the reasons that a consultant did not win a tender is to ask the consultant. As part of the procedure all tenderers receive a letter stating the reasons for not winning the tender and the name of the winner.*

*You seem to be speculating in the relations between an eventual complaint and the fact that consultants have not won a tender. Please understand that I don't analyse and comment speculations."*

Being dissatisfied with this reply, the complainant addressed the Ombudsman. He claimed that the Commission should have informed him of the complaint made against him and given him a chance to answer it.

## **THE INQUIRY**

### **The Commission's opinion**

The Commission's opinion included the following points:

The Commission has no direct influence on a Contractor's staff policy and cannot decide to terminate an expert's contract of employment. It is limited to a quality control of experts when awarding a contract and can only intervene with the Contractor if the performance of his staff in the execution of his contractual obligations is not satisfactory. It is then for the Contractor to take the necessary measures for improving his performance.

The Commission was aware of difficulties in cooperation with local authorities in the discharge of this assignment, but did not take action, leaving it to the Contractor to sort out his staff problems on the ground. Nor did the Commission exert pressure on the Contractor in order to terminate the complainant's employment.

When the monitoring contract was to be renewed in December, the Contractor proposed a slightly different team of monitors, not including the complainant. As far as the Commission is concerned, such replacements are a common occurrence, particularly as regards longer term assignments.

The Commission has not blacklisted the complainant for further work: *"the allegations put forward in this respect in the complaint are largely based on conjecture and are not substantiated enough to allow verification."*

### The complainant's observations

Not having received any observations from the complainant, the Ombudsman's services attempted to contact him by telephone and e-mail. In an e-mail sent on 21 September 1999, the complainant informed that Ombudsman that from September 1998 to January 1999 he had worked on a Tacis project in Russia and since February 1999 he has been employed in Russia as resident team leader of a UK Know How Fund project. He pointed out that the Commission's opinion ignored a number of points made in his complaint, but also indicated that he was no longer interested in seeking any further answers from the Commission in view of the time that had passed since the events in question.

### THE DECISION

- 1 The complainant believed that his contract with a Tacis consultancy was not renewed because of pressure from the Commission following a complaint against him. He wrote to the Commission asking what the complaint was, why he had not been informed of it or its content and why he had not been given the opportunity to answer it.
- 2 In its reply to the complainant's letter, the Commission failed to answer his questions. Nor did the Commission invoke any grounds of confidentiality as a reason for not providing the information requested. In its opinion on the complaint to the Ombudsman, the Commission similarly failed to respond to the complainant on these matters.
- 3 The principles of good administrative behaviour require that answers to correspondence shall as far as possible be helpful and reply to the questions which are asked. The Commission's evasive and unhelpful responses to the complainant constitute an instance of maladministration.

### CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

In its reply to the complainant's letter, the Commission failed to answer his questions. Nor did the Commission invoke any grounds of confidentiality as a reason for not providing the information requested. In its opinion on the complaint to the Ombudsman, the Commission similarly failed to respond to the complainant on these matters.

The principles of good administrative behaviour require that answers to correspondence shall as far as possible be helpful and reply to the questions which are asked. The Commission's evasive and unhelpful responses to the complainant constitute an instance of maladministration.

Since the complainant was no longer interested in seeking any further answers from the Commission, it was not possible to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

**ADMINISTRATIVE AND FINANCIAL HANDLING OF A PROJECT**

*Decision on complaint 440/98/JH against the European Commission*

**THE COMPLAINT**

The complaint concerned Ecotourism Ltd's project "Heritage trails: rural regeneration through sustainable tourism in regions of Bulgaria and Slovenia", funded by the Tourism Unit of the Commission, DG XXIII. The complainant claimed that Ecotourism had a very good relationship with the project manager throughout the project, which was a great success. However, the Commission mishandled the financial aspects of the project causing Ecotourism serious financial loss.

The complainant alleged in particular the following:

- (i) Unnecessary delay by the Commission as regards both the interim and final payments (four and ten months delay respectively) and lack of clarity by the Commission as to which accounting system it used and which documents Ecotourism had to supply;
- (ii) Lack of continuity in the project management. According to the complainant, Ecotourism had a very good relationship with the project manager throughout the project and it was clear that the project had been a great success. However, when the financial controller took over the situation changed and they continuously raised issues which had been discussed and agreed earlier with the project manager;
- (iii) The Commission made a large reduction in the final payment by replacing, without mentioning it to Ecotourism, the budget with the financial report which Ecotourism presented in the interim report. Furthermore, the Commission recommended a series of changes to the final financial report, some increases and some decreases. Ecotourism made all the changes. The Commission then added up all the reductions in the budget and ignored all the increases, thus arriving at a reduced budget.
- (iv) By making the interim payment in July 1996 the Commission accepted without comment the interim report, including the financial report. The financial report contained movements between individual budget headings and Ecotourism then continued the project on this basis. If there was nothing wrong with the interim report, then there is nothing wrong with the final report which is in line with the interim report.
- (v) The Commission refused to pay for work performed by Ecotourism, i.e. a manual produced by Ecotourism in agreement with the Commission and translation of a document into German at the Commission's request.

## THE INQUIRY

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission accepted that the disputes between the complainant and the Commission concerned the financial aspects of the project and not the technical aspects. Nevertheless, the fact that the technical aspects had been carried out in line with the agreement did not exempt the complainant from complying with the financial conditions.

In responding to the different allegations the Commission put forward, in summary, the following points:

- (i) As regards the interim payment, the interim report was received on 5 August 1996 and payment was issued on 4 December 1996. The delay arose partly from the fact that Ecotourism changed its name and bank account number. However, the Commission regretted the delay which occurred.

As concerns the final payment, the Commission stated that the delay which occurred could not have been avoided. Ecotourism submitted its final report and statement of accounts on 16 June 1997 and additional information was forwarded in August 1997. Following an examination of this material in Autumn 1997, the Commission decided to perform a control visit to Ecotourism in order to clarify the situation. The control visit took place in November 1997 and was followed by the Commission requesting additional information from Ecotourism, which was sent to the Commission in December 1997. Thereafter, a series of correspondence followed in relation to the finalisation of the payment. The financial controller approved the final payment on 20 March 1998 and the final payment was made on 1 April 1998.

- (ii) The reduction in the final payment was due to the requirement that all costs had to be accepted as eligible. The amount specified in the Declaration of the financial contribution is a maximum. The actual payment depends on proof of real costs incurred and individual items must not exceed the corresponding budget headings established in the agreed budget. The Commission stressed that this means that if a real cost incurred is lower than that indicated in the budget, the subvention must be reduced proportionately.

The Commission's approach to Ecotourism's project, which is standard for all Tourism actions for which subventions are provided, was:

- To insist on supporting documentation in the case of expenditure claimed;
- To reduce the amounts of eligible expenditure claimed where there are indications that they exceed the real costs or where proofs are not adequate;
- To disallow expenditure in excess of the budget headings which constitute the approved budget.

The final payment was based on the financial report submitted by Ecotourism in the interim report. The Commission found that the financial report, broken down into individual headings, represented a carefully prepared reassessment of the project needs. Since the total amount could not be increased, when some headings increased, others had to be reduced.

Basing the final calculation on the revised budget did not involve a breach of rules and did not disadvantage Ecotourism. In fact, it led to less reduction in the project expenditure than if the original budget would have been used for the calculation. Therefore, the complainant's allegation that the Commission replaced the budget with a financial report by Ecotourism in order to justify large reductions in the final payment were unfounded.

- (iii) The allegation that the Commission refused to pay for work performed was unfounded. It had only disallowed costs which it had found ineligible. In case of performed work, the Commission requested time sheets as proof of performed work. As regards the manual produced by Ecotourism, Ecotourism was paid the sum ECU 27 500, for which it presented an invoice. The balance of ECU 2 500 claimed by Ecotourism could not be accepted in the absence of proof that the costs had actually been incurred.
- (iv) The fact that the interim report was accepted without comment did not mean that the final report was automatically accepted. The interim report only shows how the project is progressing. Approving the interim report did not imply approval of the expenditure incurred as the final payment must always be subject to producing the necessary proofs of all expenditure claimed.
- (v) There was no lack of clarity as regards the accounting system. The fact that a large part of the complainant's project was accounted for by "in-kind" costs required particular vigilance in the matter of seeking proofs. Time sheets and pay slips are normal and reasonable requirements for personnel costs. The complainant had been kept fully informed of the situation and the need for contractors providing "in-kind" contributions to keep time sheets was communicated to Ecotourism at a meeting in Brussels in February 1996.
- (vi) There was no lack of continuity in the project management. It is normal practice that the project manager responsible for the technical aspects of the project does not deal with the financial questions. The project manager was available for further technical queries up to the end of 1997.

### **The complainant's observations**

In the observations the complainant maintained the complaint, stating that the main issues were the delays in the payments and the lack of justification as to why the Commission withheld funds. In particular the complainant stressed that:

- (i) The delay for the interim payment was not explained. Ecotourism had to pay for the delay and stated that the Commission's "regret" is not enough. As regards the final payment the complainant pointed out that five months passed between the visit to Ecotourism and the payment, and the Commission provided no explanation for this delay. In both cases the delays had caused severe financial damage to Ecotourism which will take several years to overcome.
- (ii) The Commission acted unreasonably by replacing the original budget with the financial report in the interim report thereby investing it with the authority of a contractual agreement without informing Ecotourism.
- (iii) The Commission did not comment on its refusal to pay the cost of a translation which it required from Ecotourism. Nor did it justify its refusal to pay for a manual produced by Ecotourism. The refusal was based on the fact that Ecotourism did not provide time sheets, which the Commission did not specify at any time. However, proof of the time spent on the manual could easily be provided, but the Commission never asked for this. Moreover, proof of all expenditure was submitted to the Commission. Ecotourism provided all the extra information that the Commission requested.
- (iv) After the submission of the interim report the Commission did not comment on the report, except for a phone call from the project manager who commended the report. This indicated that movements between budget lines were acceptable to the Commission. Movements between budget lines comparable to the ones in the interim report took place throughout the project.
- (v) The Commission had every chance to inform Ecotourism if any changes to their procedures were needed. Further, the question of time sheets was not discussed at the meeting in February 1996. No documentation can prove this. The only thing discussed was the issue of time records for sub-contractors and for partners making in-kind contributions. Ecotourism kept time sheets for all in-kind contributions and the sub-contractors provided invoices with details on the time spent, backed up by reports of the performed work.
- (vi) As regards the alleged lack of continuity, the complainant put forward that it had been involved in other projects with the Commission without having to face this problem. For example DG1 of the Commission provides guidelines at the beginning of the project and it has adopted procedures including a financial control before approving any change in the project. Since DG1 found it necessary to adopt such a procedure, the complainant wondered why the Tourism Unit did not.



## **THE DECISION**

### **1 Delay in the interim payment**

- 1.1 The complainant claimed that the interim payment was delayed by four months, although the importance of a prompt interim payment had been underlined by Ecotourism at the beginning of the project. The Commission regretted the delay in the interim payment and explained that it arose partly from the fact that Ecotourism changed its name and bank account number.
- 1.2 Principles of good administrative behaviour require outstanding payments to be made within a reasonable time. According to Article 4a of the Declaration of the financial contribution (hereafter referred to as the Declaration), the interim payment shall be paid after receipt and approval of the interim report. Article 4c of the Declaration states that it takes up to 60 days for the payment to reach the bank account after approval by the Commission.
- 1.3 The Commission received the interim report on 5 August 1996 and payment was issued on 4 December 1996. This is a period of four months, including part of the 60 days calculated for the arrival of the payment after approval. This means the Commission took approximately two months to approve the report and to undertake the changes of the name and bank account number of the complainant. This period is not obviously excessive, even taking into account the fact that the complainant had requested prompt payment. There appears therefore to be no maladministration in relation to this aspect of the case.

### **2 Delay in the final payment and lack of clarity**

- 2.1 The complainant claimed that the final payment arrived five months after the control visit took place. The complainant also claimed that there was a lack of clarity by the Commission as to which accounting system it used and which documents Ecotourism had to supply. The Commission stated that the delay was due to the complainant not submitting the relevant documentation, that Ecotourism had been kept fully informed of the situation and that normal methods were used in proceeding with the project.
- 2.2 According to Article 4a of the Declaration, the final payment shall be paid after receipt and approval of the documents mentioned in Article 8c of the Declaration, i.e. the final report and an account statement which must set out all details of income and expenditure. Further, Article 4c of the Declaration states that it takes up to 60 days for the payment to reach the bank account after approval by the Commission.
- 2.3 The final report was submitted in June 1997. After various exchanges of information between the Commission and the complainant in summer and Autumn 1997 a control visit to Ecotourism took place in order to inspect documents on 10 November 1997. The last documentation in relation to the account statement appears to have been submitted by the complainant in the beginning of December 1997. The

payment was approved by the Commission's financial controller on 20 March 1998 and payment was issued on 1 April 1998. Therefore, there was a period of approximately five and a half months between submission of the final report and provision of the last information requested by the Commission. There was then a further period of approximately three and a half months for the approval of the payment by the Commission.

- 2.4 As regards the five and a half month period, no evidence was supplied to the Ombudsman of any excessive or avoidable delay by the Commission. It appeared that the complainant was surprised both at the amount of financial information which had to be supplied and at the substantive rules governing allowable costs. However, the complainant had received notice of the financial requirements applicable to the project and there is therefore, no evidence of maladministration by the Commission. However, the Ombudsman made a further remark in relation to this point below.
- 2.5 As regards the three and half month period, the Commission did not describe in detail its procedures for approval of payment. However, the DG XXIII Tourism Unit stated the following in letters to the complainant:

*"I can inform you that the final payment for an amount of 71 647 ECU has been prepared and you will be informed after its approval by the Financial Control of the Commission."* (Letter of 16 February 1998)

*"(...)I must refer you to my letter of 16 February 1998(...)As indicated in this letter the final payment for an amount of 71 647 ECU is now awaiting approval by the Commission's Financial Control."* (Letter of 4 March 1998)

*"The arrangements for payment of this amount (71 647 ECU) are now in progress."* (Letter of 27 March 1998)

These letters contained no explanation visible to the complainant as to why the Commission needed a further three and a half months to approve payment following a five and half months period in which it had sought further information on various aspects of the complainant's final report. The letters contained only very vague wordings not clearly informing the complainant of when the payment was approved and when the 60 days, mentioned in Article 4c of the Declaration, would begin to run. The Declaration is also ambiguous when referring to the approval by the Commission in Article 4c of the Declaration, since it is not clear whether this refers to DG XXIII, or to the Directorate General for Financial Control, DG XX, or to both.

- 2.6 Principles of good administration require that payments should be made within a reasonable time and that clear and understandable information should be provided, on request, about the causes of any delay. In response to repeated inquiries from the complainant, the Commission did not adequately explain why it needed a further three and a half months to issue payment, following a period of five and a

half months during which it had sought further information on various aspects of the complainant's final report. Nor was it clear whether the approval of the payment referred to in the Declaration of the financial contribution means approval by DG XXIII, or by the Directorate General for Financial Control, DG XX. Moreover, the Commission did not appear to have informed the complainant when the final approval of the financial aspects of the project was given and when the 60 days period allowed for the payment to reach the complainant's bank account began to run.

### **3 Alleged lack of continuity**

- 3.1 The complainant claimed that there was lack of continuity in the Commission's dealings with the project. According to the complainant, Ecotourism had a good relationship with the project manager and made agreements with him about financial matters. However, the situation changed when the financial controller became involved since he was not aware of what had been agreed between Ecotourism and the project manager.
- 3.2 The Commission stated that it was normal practice that the project manager responsible for the technical aspects of the project did not deal with the financial questions.
- 3.3 The Ombudsman already addressed a critical remark to the Commission in paragraph 2.6 above concerning its failure to provide adequate information to the complainant about responsibility within the Commission for dealing with the financial aspects of the project. The Ombudsman was not aware, however, of any rule or principle which requires that the technical and financial aspects of a project should be dealt with by the same person or unit. As regards the alleged agreements between the project manager and Ecotourism, Article 10 of the Declaration provided that changes to the Declaration have to be agreed in writing. There appeared therefore to be no maladministration in relation to this aspect of the case.

### **4 The alleged replacement of the budget with the financial report**

- 4.1 The complainant alleged that, without informing Ecotourism, the Commission replaced the budget with the Ecotourism's interim financial report, thereby reducing the final payment. According to the Commission, it replaced the budget with the financial report because it found that the financial report, broken down into individual headings, represented a carefully prepared reassessment of the project needs. Moreover, its action did not breach any rule and did not disadvantage Ecotourism, since it led to less reduction in the project expenditure than if the original budget had been used for the calculation.
- 4.2 The Ombudsman was not aware of any rule or principle which would allow the Commission unilaterally to replace an agreed budget. However, since the Commission explained that the result of its action was to Ecotourism's advantage, the Commission did not act unreasonably towards the complainant. There appeared therefore to be no maladministration in relation to this aspect of the complaint.

## 5 Movements between budget lines

- 5.1 The complainant claimed that the Commission's approval of the interim report indicated that movements between individual headings in the budget were accepted since the financial report submitted with the interim report contained such movements. The Commission stated that the interim report only shows how the project is progressing and that its approval did not automatically mean that the final report would also be accepted. Rather, the final payment always depends on the supply of necessary proof of expenditure claimed.
- 5.2 According to Article 3a of the Declaration, Annex 2 which set out the details of project income and expenditure, was an integral part of the Declaration. According to Article 10 of the Declaration, amendments must be made in writing and approved by the Commission. This meant that movements between individual headings cannot take place without an amendment to the Declaration. The Commission's approval of the interim report could not therefore change the requirements set out in the Declaration. There appeared therefore to be no maladministration in relation to this aspect of the case.

## 6 The reduction in the final payment

- 6.1 The complainant alleged that the Commission made a large reduction in the final payment without justification. Ecotourism supplied all the information the Commission asked for and it had proof of all its expenditure. As regards the question of time sheets, the complainant stated that Ecotourism could supply proof of the time spent, but it claimed that the Commission never asked for this.
- 6.2 The Commission explained the reduction by the fact that some expenditures were not eligible. If no proof of real costs is provided, the amount could not be paid. As regards the question about time sheets, the Commission stressed that time sheets are normal and reasonable requirements in the case of claims for personnel costs. Furthermore, the Commission did not accept that individual items of cost could exceed the corresponding budget heading.
- 6.3 The Ombudsman noted that this part of the case relates to what kind of proof of expenditure the beneficiary should supply and what kind of proof was in fact provided by Ecotourism. The Declaration did not give a detailed explanation of what documents the beneficiary has to supply, but merely stated that "*all details of income and expenditure*" should be submitted. This very wide expression appeared to mean that Ecotourism must supply any document which it may reasonably be expected to provide in the context of the project. The Ombudsman made a further remark in relation to this point below.
- 6.4 The Ombudsman noted that the dispute arose mainly from the fact that Ecotourism did not supply the Commission with time sheets. The submission of time sheets appears to be a reasonable requirement for justification of claims for personnel costs. The complainant claimed that Ecotourism could supply alternative proof of the time spent on production of a manual, for which the Commission did not accept part

of the costs. The Commission should have been prepared to evaluate these proofs in order to establish whether they are comparable to time sheets. However, there was no evidence that Ecotourism actually submitted its claimed proofs to the Commission. There appeared therefore to be no maladministration in relation to this aspect of the case.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

Principles of good administration require that payments should be made within a reasonable time and that clear and understandable information should be provided, on request, about the causes of any delay. In response to repeated inquiries from the complainant, the Commission did not adequately explain why it needed a further three and a half months to issue payment, following a period of five and a half months during which it had sought further information on various aspects of the complainant's final report. Nor is it clear whether the approval of the payment referred to in the Declaration of the financial contribution means approval by DG XXIII, or by the Directorate General for Financial Control, DG XX. Moreover, the Commission does not appear to have informed the complainant when the final approval of the financial aspects of the project was given and when the 60 days period allowed for the payment to reach the complainant's bank account began to run.

Given that this aspect of the case concerns procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

### **FURTHER REMARKS**

It should be obvious to any beneficiary of a Community subvention that the Commission's responsibility for the correct execution of the Community budget requires it to adhere strictly to the conditions of eligibility of expenditure which are applicable to the subvention. Beneficiaries can therefore reasonably be expected to read these conditions and seek clarification if necessary. The Ombudsman noted, however, that the Declaration of the financial contribution used for this project appears to provide little useful guidance to beneficiaries as to what in practice will be expected of them. The Commission may therefore wish to consider whether the Tourism Unit could provide easily understandable written guidelines for beneficiaries of subventions, in order to help avoid possible problems and misunderstandings in the future.

## TAXATION OF TACIS AID TO RUSSIA

*Decision on complaint 620/98/JH against the European Commission*

### THE COMPLAINT

The complainant worked in Russia from February 1995 to February 1997 as project manager for a firm of consultants which had won a contract with the Commission under the Tacis<sup>78</sup> programme.

According to the contract between the Commission and the firm, expatriate staff from Member States were to be exempt from income tax in Russia. The complainant accepted the post of project manager on this basis.

In 1996, the Russian authorities agreed that the complainant should not pay tax on his 1995 earnings. However, in 1997 they required him to pay tax on his 1996 earnings. They based the tax demand on the fact that the Protocol signed by the Commission and the government of the former USSR on 2 August 1991, which provides that taxes are not to be financed out of European Community funds, was never ratified by the former USSR or by Russia.

The complainant claims that the Commission wrongly advised that the Protocol could be relied on. He also claimed that the Commission failed to answer his correspondence on this matter and abandoned both himself and other Tacis consultants in Russia.

The complainant claimed compensation for his financial losses as a result of the Commission's negligence: i.e. 25.000 US Dollars taxes paid for 1996 and a similar amount which he risked having to pay retrospectively for 1995.

The complainant also pointed out that Tacis aid money is allocated by the European Parliament for specific purposes and is already the product of taxation. To permit taxation of this money indirectly funds the policies of the Russian government, over which the European Parliament has no control.

### THE INQUIRY

#### The Commission's opinion

In its opinion, the Commission confirmed that the 1991 Protocol and the "General Rules applicable to the Technical Assistance of the European Communities" (signed with Russia in July 1997), exempt individuals working on Tacis contracts from Russian income tax. The Commission also stated that, despite its intensive efforts, neither the Protocol nor the General Rules have been ratified by the Duma or by presidential decree.

According to the Commission, until the present case, pragmatic solutions had been found in practice through the issuing by the Commission's Moscow delegation of certificates attesting exemption from tax. *"Although the legal situation may have been precarious and still is far from satisfac-*

<sup>78</sup> Technical Assistance to the Commonwealth of Independent States.

*tory, the presentation of these certificates to the respective tax offices together with a refusal to pay has generally solved the problem."*

As regards the complainant's personal loss, the Commission pointed out that its standard Tacis contract informs contractors about the tax privileges provided for in the Protocol but also warns them that it does not accept financial responsibility "*in the event that the authorities should refuse to apply in favour of the contractor the above-mentioned exemptions and privileges*". The contract requires the Commission to "exert its best efforts to support the contractor in dealing with the competent authorities."

The Commission claimed that it informed Tacis contractors about the status of the Protocol and General Rules at briefing meetings in 1996/7, two of which the complainant personally attended.

The Commission also claimed that it provided the complainant with every assistance which he could reasonably expect. In particular, when it became clear late in 1997 that the Russian tax administration had tightened its practices, "*the Head of Delegation immediately and repeatedly intervened on the complainant's behalf, but unfortunately without any tangible result.*" Copies of four letters from the Commission to the Russian authorities (dated in November 1997) were annexed to the Commission's opinion.

The Delegation discussed the situation with the complainant in April 1998 when the Russian tax authorities made their final demand for payment. In order not to undermine the Commission's continuing efforts to reach an overall solution by sending the wrong signal to the Russian tax authorities, the complainant was strongly advised to invoke the Protocol again and refuse payment.

### **The complainant's observations**

In his observations, the complainant maintained and restated the complaint.

As regards the claim of failure to answer correspondence and abandonment of himself and other Tacis consultants, the complainant pointed out that the Commission had not previously made him aware of the letters from its Head of Delegation to the Russian authorities.

The observations accept that the complainant has no contractual remedy. However they argue that the Commission has a duty of care, which arises because of the proximity of the parties. The observations claim that the Commission has been consistently negligent by failing to make further assistance to Russia conditional on ratification of the Protocol and by failing properly to explain the status of the Protocol to Tacis contractors and consultants.

Furthermore, the complainant claims that his losses were foreseeable and that the Commission is responsible for those losses. The Commission's suggested course of action of invoking the Protocol and refusing to pay tax was wrong because, in the absence of ratification of the Protocol, there was no legal defense to the Russian tax demands. The certificates of



exemption issued by the Commission misrepresented the position both to consultants and to the Russian tax authorities.

The observations also repeat the claim that the Commission has been negligent towards European taxpayers, since money allocated for aid programmes is taxed by the Russians and put to uses over which the European Parliament has no control.

## THE DECISION

### 1 The claims of misleading advice and lack of information

1.1 The complainant worked in Russia for a firm which had a contract with the Commission to provide technical assistance under the Tacis programme. The standard-form contract between the Commission and the firm contained the following provision (Annex F Art. 5.4):

*“Natural and legal persons, including expatriate staff, from the Member States of the European Community executing technical cooperation contracts financed out of EC grant shall be exempted from business and income tax in the NIS [Newly-Independent States].”*

1.2 Provision for exemption from taxes was included in a Protocol (1991) and in General Rules (1997), agreed between the Commission and the USSR and Russian authorities respectively. However, neither the Protocol nor the General Rules were ever ratified by the USSR or by Russia.

1.3 The complainant received and paid a demand from the Russian tax authorities for income tax on his earnings. He claims that the Commission wrongly advised that the Protocol could be relied on. He also claimed that the Commission failed to answer his correspondence on this matter and abandoned both himself and other Tacis consultants in Russia.

1.4 Principles of good administrative behaviour require that the Commission should take care not to provide misleading information. In 1995, the Commission included in its contract with the firm for which the complainant worked as a Tacis consultant in Russia a provision concerning exemption from taxes, although it knew that the relevant international agreement had not been ratified by the Soviet or Russian authorities. It should have realised that this was likely to mislead potential consultants concerning their tax position.

1.5 Principles of good administrative behaviour also require the Commission to reply to a citizen's requests. On the basis of the Ombudsman's inquiries it appears that, although the Commission intervened with the Russian authorities on the complainant's behalf, it failed to inform him of its activity in due time.

### 2 The claim for compensation

2.1 The Russian authorities required the complainant to pay 25.000 US Dollars in taxes on his Tacis earnings in 1996. The complainant

accepts that he has no contractual remedy, but claims that his loss was foreseeable and that the Commission is responsible for it. The Commission contests liability.

- 2.2 The non-contractual liability of the Community is governed by Article 235 EC and the second paragraph of Article 288 EC.<sup>79</sup> According to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage.<sup>80</sup>
  - 2.3 In the present case, successive Tacis Regulations all provide that taxes shall not be funded by the Community.<sup>81</sup> However, it is not obvious that failure to respect this provision results from an act or omission attributable to the Commission. Even if it does result from such an act or omission, it is not obvious that causation can be demonstrated, in view of the role of the Russian authorities.
  - 2.4 As regards misleading information, the case-law of the Court of First Instance bases non-contractual liability on a legitimate expectation.<sup>82</sup> Although the Ombudsman has made a critical remark concerning the Commission's conduct (para 1.4 above), it is not obvious that the criticised conduct could justify a legitimate expectation on the part of the complainant.
  - 2.5 In these circumstances, the Ombudsman does not consider that the complainant has demonstrated an entitlement to damages based on the existing case-law of the Community Courts concerning the general principles of non-contractual liability common to the laws of the Member States. The Ombudsman notes that the complainant has the possibility to pursue his claim before the Court of First Instance.
- 3 The allegation of failure to protect the interests of European taxpayers**
- 3.1 The complainant claims that the Commission has been negligent towards European taxpayers, since money allocated for aid programmes is taxed by the Russian authorities and put to uses over which the European Parliament has no control. In the complainant's view, at some point after 1991 when the Tacis programme began, the Commission should have made further aid to Russia conditional on ratification of the 1991 Protocol and later the General Rules signed in 1997.

<sup>79</sup> Art. 235: "The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288."  
Art. 288, second paragraph: "In the case of non contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

<sup>80</sup> See e.g Case T-113/96, *Édouard Dubois v Council and Commission* [1998] ECR-II 125.  
<sup>81</sup> (1991-3) Reg. 2157/91, 1991 OJ L201/2, Art 6 (3); (1993-5) Reg. 2053/93, 1993 OJ L 187/1 Art 7 (3); (1996-9) Reg. 1279/96, 1996 OJ L165/1, Art 6 (3).

<sup>82</sup> Case T-203/96, *Embassy Limousines v European Parliament*, judgement of 17 December 1998.

- 3.2 As noted in 2.3 above, successive Council Regulations on which the Tacis programme is based provide that taxes shall not be funded by the Community. This aspect of the complaint primarily concerns the Commission's responsibility for the proper execution of the Community budget. It therefore appears to fall within the remit of the Court of Auditors to "*examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound*" (Art. 248 (2) EC).
- 3.3 In application of the principle that a supervisory body with a general remit gives way to a specialised body, the Ombudsman considers that it is not justified to pursue further his inquiry into this aspect of the complaint. He will inform the Court of Auditors of the case.

### CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks:

Principles of good administrative behaviour require that the Commission should take care not to provide misleading information. In 1995, the Commission included in its contract with the firm for which the complainant worked as a Tacis consultant in Russia a provision concerning exemption from taxes, although it knew that the relevant international agreement had not been ratified by the Soviet or Russian authorities. It should have realised that this was likely to mislead potential consultants concerning their tax position.

Principles of good administrative behaviour also require the Commission to reply to a citizen's requests. On the basis of the Ombudsman's inquiries it appears that, although the Commission intervened with the Russian authorities on the complainant's behalf, it failed to inform him of its activity in due time.

As regards the maladministration identified in point 1 above, the Ombudsman does not consider that the complainant has demonstrated an entitlement to damages based on the existing case-law of the Community Courts. The complainant has the possibility to pursue his claim before the Court of First Instance. As regards the maladministration identified in point 2 above, given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

## TERMINATION OF ANTI-DUMPING PROCEDURE

*Decision on complaint 650/98/(PD)/GG against the European Commission*

### THE COMPLAINT

#### Background

In June 1998 a complaint was lodged by a German company against the decision of the Commission of the European Communities to terminate an anti-dumping procedure.

#### The complainant's allegations

The complainant made the following allegations:

- 1 The Commission's assessment of the facts was wrong;
- 2 The Commission manipulated the evidence and
- 3 Submissions and evidence were either wrongly interpreted or deliberately ignored by the Commission

These allegations were based on the following claims made by the complainant:

The definition of the relevant product was unsatisfactory and should have been extended. There had been imports into the EC from third countries during the relevant period and the Commission had failed to consider the relevant evidence or inquire into the matter. There had been offers from the People's Republic of China to supply the relevant product to customers in the EC. The Commission's allegation that the Chinese producer produced several other products and was therefore not likely to be interested in the product concerned was not supported by the evidence used. There was no evidence to support the argument that a switch to the production of the relevant product would entail substantial costs for the Chinese producer. The fact that the Chinese exporter had asked for a review of its undertaking showed that it did have an interest in exporting to the EC.

### THE INQUIRY

The complaint was sent to the Commission for its comments.

#### The Commission's opinion

In its opinion, the Commission made the following comments with regard to the complaint:

According to the undertaking reports submitted by the exporter and the Eurostat figures available to the Commission, there had been no imports of the product concerned since 1989. During the review investigation, the complainant had refused to provide some essential information to the Commission. The Commission had examined all the evidence available and come to the conclusion that the anti-dumping measures were no longer warranted on the basis of the following facts: First, there had been a major diversification from the product concerned due to the introduction

of substitute products. This fall in demand was the principal cause of any injury the complainant may have suffered. This conclusion was reinforced by the absence of imports since 1989. Second, although production and sales had fallen, prices for the product concerned had shown some relative improvement and the price for the main input had fallen. The complainant had thus been able to reach a satisfactory degree of profitability. Finally, there had been no likelihood of a recurrence of dumping or injury if the anti-dumping measures were allowed to lapse.

As to the allegedly wrong assessment of facts, the complainant's refusal to provide certain essential information had left the Commission with no option other than to use the information already in the file. The complainant had not produced any evidence that the Commission's findings were wrong.

The same largely applied to the allegation according to which the Commission had manipulated the evidence. It was reasonable to assume that, since there had been no imports since 1989, any problems which the complainant might have experienced had diminished, if not disappeared. Any suggestion that the evidence was manipulated to deliberately engineer an outcome unfavourable to the complainant thus could not be accepted.

As to the third allegation, the failure of the complainant to provide information had to be regarded as essential. It was difficult to neglect or misinterpret information that had not been provided. The evidence which had been provided had been irrelevant. The widening of the inquiry to differently defined products would have required a new investigation based on a complaint. The evidence submitted relating to imports had been rejected as insufficient. The purpose of anti-dumping measures was not to prevent trade, but to remove injury caused by unfairly traded goods. The evidence submitted contained no indication that the imports referred to were either dumped, in sufficient volumes or at prices that could be considered to be injurious, or in contravention of the terms of the undertaking. Neither had there been any acceptable demonstration that the alleged imports were of Chinese origin. Certain information provided by the complainant could not be taken into account because it referred to a period outside that investigated. No relevant evidence had been deliberately neglected or misinterpreted.

The Commission also stressed that the complainant could have attacked the contested decision before the Community courts.

### **The complainant's observations**

In its observations, the complainant maintained its complaint. It stressed that in its view the fact that the relevant product had been imported into the EC during the period concerned was also confirmed by the Eurostat figures themselves.

## FURTHER INQUIRIES

### Request for further information

On the basis of the above, the Ombudsman considered that he needed further information in order to proceed with the examination of the complaint. In his letter of 27 May 1999, the Ombudsman therefore asked the Commission (1) to indicate whether it considered that the product concerned had (or had not) been imported to the EC since 1989 and, if so, why it had considered that it was not established that these imports were of Chinese origin, and to comment on the complainant's claim that the Eurostat figures (and the figures of the German Federal Statistical Office) showed that such imports had in fact taken place, and to produce the Eurostat figures on which it relied, (2) to comment on the complainant's allegation that the various products referred to by the Commission were not manufactured by the Chinese *producer* but by another company and (3) to indicate the evidence on which the Commission had relied to support its conclusion that in view of the costs involved for switching production to the product concerned and given the higher rentability of other products, exports of the product concerned to the EC would be unlikely.

In its reply of 27 July 1999, the Commission made the following statements:

The Commission considered that there had been no imports of the product concerned since 1989. The customs codes under which the relevant product fell were "ex" codes, which meant that these codes did not only cover the product concerned but included also other products. A more precise analysis required the use of the Taric codes (official Eurostat codes used by the Commission in the administration of anti-dumping measures). On the basis of the 10-digit Taric codes, it appeared that some minor quantities had been imported into the Community from China under the relevant codes. However, these quantities were negligible and could not be interpreted as evidence of a likelihood of recurrence of material injury to the Community producer. Furthermore, price and quantity relationships were so different from those observed in the investigation, that the Commission concluded that the product imported under these 10-digit codes was not the product covered by the investigation. The complainant had failed to show otherwise. There was no contradiction in the Commission's comments of 23 September 1998. When referring, on page 5 of these comments, to imports which were "either dumped, in sufficient volumes or at prices that could be considered to be injurious, or in contravention of the terms of the undertaking", the reference was to the figures which the complainant had claimed were evidence of dumped imports, not to the Eurostat figures available to the Commission which showed no imports of the product concerned from China.

The absence of imports had also been confirmed by the verification visit carried out at the premises of the unrelated importer referred to at paragraph 5 (c) of the contested Decision.

The complainant had submitted statistics from the German Federal Statistical Office which contained an 11-digit code for imports from China. The Commission had been unable to accept these figures since the com-

plainant had failed to show that the German statistics referred to the relevant product.

The information on the products manufactured by the Chinese producer and on the costs of switching production had been in the non-confidential file, had therefore been seen by the complainant and had not been challenged by the latter.

### **The complainant's observations**

In its observations, the complainant challenged the arguments put forward by the Commission. In its view the Commission ought to have examined all imports to the EU from third countries. The complainant also asked the Ombudsman to take personal steps against the Commission officials in charge of the anti-dumping proceeding since they had failed to comply with their duties.

## **THE DECISION**

### **1 Wrong assessment of the facts and wrong interpretation of submissions**

- 1.1 The complainant claimed that the Commission, when deciding to allow the anti-dumping duties to expire, had wrongly assessed the relevant facts. It also claimed that the Commission had wrongly interpreted or deliberately ignored evidence or submissions which it had made. Although the complainant raised two separate allegations in this respect, the substance of these allegations appeared to be practically identical. It was thus appropriate to examine these allegations together.
- 1.2 The complainant claimed in particular that the Commission had failed to take into account the fact there had been imports into the EC from third countries during the relevant period. It further claimed that the Commission had also failed to prove its allegation that the Chinese producer produced several other products and its argument that a switch to the production of the relevant product would entail substantial costs for the Chinese producer and was therefore unlikely.
- 1.3 The Commission replied that there had been no imports of the product concerned from China since 1989 and that it had examined all the evidence available before coming to the conclusion that the maintaining of the anti-dumping measures was no longer justified.
- 1.4 The complainant originally also objected to the Commission's refusal to extend the scope of the anti-dumping measures to other products. However, the complainant did not appear to insist on this point any longer. Even if it had been otherwise, the Commission's view that such an extension would have required a (new) complaint appeared reasonable.
- 1.5 It was good administrative practice for the Commission to take account of all relevant evidence when deciding as to whether or not to continue anti-dumping measures. In its contested Decision, the



Commission claimed that there had not been any imports of the product concerned since 1989. The Commission also claimed that the complainant had not produced sufficient evidence to corroborate its allegation that the anti-dumping measures had been circumvented by imports transiting through third countries like Switzerland. Although the Commission also referred to other factors which are not seriously in dispute between the parties (namely the decline in demand) in order to support its conclusion that the anti-dumping measures should not be continued, it is clear that the absence of imports played an essential role in this context.

- 1.6 In order to support its allegation that, contrary to what the Commission believed, there had indeed been such imports, the complainant had furnished to the Commission statistics from the German Federal Statistical Office which showed imports from China. The Commission claimed that these figures were irrelevant since they referred to another product. However, at first sight the evidence submitted would appear to confirm that a product matching the definition of the relevant product was imported to the EC from China during the relevant period. The argument put forward by the Commission thus failed to convince.
- 1.7 The Commission argued, however, that a more precise analysis required the use of the so-called Taric codes. Even if this was correct, the fact remained that the Eurostat statistics which the Commission had submitted, further to a request from the Ombudsman, did show imports from China. In its reply to the request for further information, the Commission admitted that imports had taken place but claimed that the “price and quantity relationships” of these imports had been such that the product imported under these codes could not have been the product covered by the investigation. However, the Commission did not specify what exactly these “price and quantity relationships” were which it claimed to have considered here. In addition to that, the contested Decision did not contain any reference to such considerations. Finally, and most importantly, the Commission thus effectively claimed that even these statistics were not sufficient to ascertain the nature of the product concerned. However, the Commission itself claimed that these statistics were used for the administration of anti-dumping measures. The Commission had not offered any explanation to try and resolve this contradiction. In any event, it had to be noted that the Eurostat statistics provided by the Commission appeared to be *prima facie* evidence of the fact that the relevant product had been imported to the EC from China during the relevant period. The argument put forward by the Commission therefore failed to convince.
- 1.8 The Commission argued that the quantities concerned had been “minor” and were considered as “negligible”. The Ombudsman was not in a position to resolve this issue on the basis of the figures provided. However, it needed to be pointed out that the said argument was not to be found anywhere in the contested Decision. On the contrary, the Decision categorically stated that there had been “no imports” and

that the complainant had been enjoying a monopoly position in the EC. It could not be considered to be good administrative practice to base a decision not on the arguments mentioned therein but on arguments which were only disclosed to an interested party when the latter has lodged a complaint with the Ombudsman. The same applied to the allegation that the absence of imports had been confirmed by the verification visit carried out at the premises of the unrelated importer. This allegation appeared for the first time in the Commission's reply to the Ombudsman's request for further information.

- 1.9 The statistics from the German Federal Statistical Office provided by the complainant also showed what appeared to be substantial imports from Switzerland. In the contested Decision, the Commission claimed that these imports were irrelevant. There was no evidence to support this claim. In its opinion on the complaint, the Commission claimed that there had been no acceptable demonstration that the alleged imports were of Chinese origin. This argument did not appear to have been used in the Decision.
- 1.10 Since the evidence relating to these imports had been submitted to the Commission by the complainant, the Commission's allegation that the complainant had failed to provide essential information was irrelevant in this context.
- 1.11 In so far as the complainant's claim that the Commission wrongly assumed that the Chinese producer also produced several other products was concerned, it had to be pointed out that the brochure of the Chinese producer submitted by the complainant itself referred to a production of other products. In these circumstances the Ombudsman was of the view that there was not enough evidence to show that the Commission had made a mistake when it relied on the fact that the Chinese producer manufactured a number of products other than the relevant product.
- 1.12 Finally, in reply to the complainant's claim that there was no evidence to support the claim that a switch to the production of the relevant product would entail substantial costs for the Chinese producer and thus be unlikely, the Commission alleged that the relevant information had been contained in the non-confidential file, had thus been accessible to the complainant and had not been challenged at the time. However, even if the complainant should have seen the relevant documents (which it denied), the fact remained that in its letter of 30 March 1998 it had challenged the view of the Commission. The argument relied on by the complainant in this context was not devoid of persuasiveness. However, the Commission did not appear to have taken this argument into account when adopting its Decision.
- 1.13 It was good administrative practice that the Commission should, when adopting decisions, consider all the relevant facts and arguments. In the present case, the Commission had failed to take proper account of the evidence and the complainant's arguments in so far as imports from third countries and the costs for the Chinese producer of

switching its production to the relevant product were concerned. The Ombudsman concluded that this failure constituted an instance of maladministration. The Ombudsman wished to add, however, that this conclusion was without prejudice to the question as to whether the decision of the Commission was correct in so far as its substance was concerned. It could of course not be excluded that the Commission, after a proper examination of all the relevant evidence and submissions, could have reached the same conclusion as it did in its contested Decision.

## **2 Manipulation of evidence**

- 2.1 The complainant alleged that the Commission had manipulated the evidence when adopting the contested Decision.
- 2.2 The Commission argued that there was nothing to suggest that the evidence had been manipulated by the Commission in order to deliberately engineer an outcome unfavourable to the complainant.
- 2.3 The Ombudsman considered that although the Commission had in his view committed a mistake by failing to take proper account of the evidence and the complainant's arguments in so far as the two issues referred to above were concerned, there was no evidence which would have suggested that the Commission had deliberately manipulated the evidence.
- 2.4 On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the second allegation put forward by the complainant was concerned. The Ombudsman therefore considered that there was no need for him to consider the request by the complainant, in its letter of 20 September 1999, to take steps against the Commission officials in charge of the anti-dumping proceeding.

## **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

It was good administrative practice that the Commission should, when adopting decisions, consider all the relevant facts and arguments. In the present case, the Commission had failed to take proper account of the evidence and the complainant's arguments in so far as imports from third countries and the costs for the Chinese producer of switching its production to the relevant product were concerned. The Ombudsman concluded that this failure constituted an instance of maladministration.

Given that this aspect of the case concerned a specific event in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

## POSTPONEMENT OF ORAL EXAMINATION IN EXCEPTIONAL CIRCUMSTANCES

*Decision on complaint 687/98/BB against the European Commission*

### THE COMPLAINT

The complainant had participated in Internal Competition COM/T/A/98. He had passed the two written examinations. On 27 April 1998 he took the oral examination.

On 2 April 1998, he had sustained an accident which one week later led to a serious thrombosis in his leg. Thus, the complainant was not able to work for more than three weeks up until the day of the oral examination. In order to be able to participate in the examination he returned to work. He had not asked for a postponement of the examination date as the invitation letter unambiguously stated that this was not possible. He was under medication on doctor's orders when he took part in the oral examination. The medication made him unusually tired, a state he tried to compensate with a corresponding consumption of coffee. During the oral examination he experienced that this had increased his nervousness.

On 15 May 1998, the Selection Board sent the complainant a letter informing him of the results and explaining that he had not passed as he had obtained only 88.33 points whereas the minimum required was 90.

On 25 May 1998, the complainant appealed requesting a review of his examination results. On 10 June 1998, the Commission confirmed that his marks corresponded exactly to those given by the Board. The Commission sympathised with the complainant's situation and explained that he could have contacted the competition secretary to explain his problem when he returned to work on 14 April 1998 or, alternatively, he could have spoken with the Members of the Selection Board at the beginning of the oral examination; this would have enabled them to take whatever measures they felt necessary, for example they could have postponed his oral examination to a later date.

On 23 June 1998, the complainant wrote again to the President of the Selection Board. He pointed out that he only resumed work on 27 April 1998, the day of his oral examination and that it was only during the oral examination that he became aware of the abnormal reaction of his body under stressful conditions.

### THE INQUIRY

#### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion the Commission made the following points:

The complainant appeared at the oral examination in the normal way, making no mention of any health problems either prior to or on the day of the examination.

Only after having been informed of his results did the complainant inform the Selection Board of his accident and health problems. The candidate had neither contacted the secretary responsible for organising the competition, nor mentioned the matter to the members of the Selection Board during the oral examination so that steps might have been taken to rearrange the date of the examination.

The Commission pointed out that it was unable to offer a candidate the possibility of a second oral examination, nor could it re-open a procedure once the competition was finished.

The Commission pointed out that, if informed by candidates, both the Recruitment Unit and the selection boards take all possible steps which might be necessary for the correct running of the oral examinations, if exceptional circumstances prevent a candidate from attending on the day indicated in the invitation.

For organisational reasons, it is not possible to include a clause in the invitations to attend the oral examination which could allow candidates to alter the date and time of their interview as they see fit. If this were the case, candidates would be encouraged to produce all sorts of reasons (family or otherwise, including, for example, marriage, birth, holidays, etc.) as they already do, for rearranging the date and time of their interview.

The Commission is of the view that whenever a genuine problem arises, all possible steps are taken when candidates give due notice or where a genuine problem is perceived which was not the case in this matter.

### **The complainant's observations**

The complainant maintained his complaint. He stressed that the letter of invitation stated that it was not possible to alter the date of the oral examination. If he had known about the possibility to change the date of his oral examination he would have asked for it. Furthermore, the Board had assumed that he had returned to work two weeks earlier than the actual date. According to the complainant, the medical problem first presented itself during the oral examination and, therefore, he was not in a position to notify anybody in advance.

## **THE DECISION**

### **1 Exceptional circumstances in connection with the oral examination**

- 1.1 The complainant claimed that during the oral examination of internal competition COM/T/A/98 he was under medication on doctor's orders due to a recent accident. It was only during the oral examination that he became aware of the abnormal reaction of his body under medication. He had not asked for a postponement of the examination date as the invitation letter unambiguously stated that it was not possible.
- 1.2 In its letter of 10 June 1998 the Commission explained to the complainant that he could have contacted the competition secretary or, alternatively, he could have spoken to the members of the Selection

Board at the beginning of the oral examination as this would have enabled them to take whatever measures they felt necessary, i.e., postponing his oral examination to a later date. Furthermore, in its opinion the Commission pointed out that, if informed by candidates, both the Recruitment Unit and the selection boards take all possible steps which might be necessary for the correct running of the oral examinations, if exceptional circumstances prevent a candidate from attending on the day indicated in the invitation.

- 1.3 The European Ombudsman noted that the candidate's letter of invitation stated the following:

*“Je précise par ailleurs que l'organisation des épreuves ne permet pas de changer l'horaire qui vous a été indiqué.”*

*(“ I insist on the fact that the organisation does not allow any changes in the timetable communicated to you.” )*

However, as has been pointed out in paragraph 1.2 of this decision, the Commission, both in its letter of 10 June 1998 and in its opinion, expressed its willingness to take into consideration exceptional circumstances.

- 1.4 The Ombudsman's inquiry indicated that in practice the Commission is prepared to take all possible measures for the correct running of the oral examinations, if exceptional circumstances prevent a candidate from attending on the day indicated in the invitation. The Ombudsman therefore considered that, as a matter of good administrative behaviour, the Commission should include a clause in the invitations to the oral examination informing the candidates of this possibility.

## **2 Refusal to let the candidate retake the oral examination**

- 2.1 The complainant who had taken part in the oral examination although he was under medication on doctor's orders, later requested that the Selection Board should allow him to retake the oral examination after he learned that he had failed the competition.
- 2.2 A competition has to be conducted in accordance with the principle of equal treatment of candidates. Violation of this principle may lead to the annulment of the competition. That may entail considerable financial and administrative costs for the administration.
- 2.3 It appeared from the Commission's opinion that the Commission considered that it was unable to offer a candidate the possibility of a second oral examination. The Ombudsman noted that there were no elements at hand which indicate that the decision of the Commission to refuse to let the candidate retake the oral examination had been taken in violation of any rule or principle binding upon the Commission.
- 2.4 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this aspect of the case.

## CONCLUSION

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

The Ombudsman's inquiry indicated that in practice the Commission is prepared to take all possible measures for the correct running of the oral examinations, if exceptional circumstances prevent a candidate from attending on the day indicated in the invitation. The Ombudsman therefore considered that, as a matter of good administrative behaviour, the Commission should include a clause in the invitations to the oral examination informing the candidates of this possibility.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

Note: On 15 December 1999 the Commission informed the Ombudsman that it is prepared to include a sentence in the invitations to oral examinations stating that the time and date of the examination can be changed in exceptional circumstances. The candidate must address a written request to the Unit responsible for recruitment policy and provide all necessary documents as proof.

## UNDUE DELAY IN REPLYING TO CORRESPONDENCE

*Decision on complaint 723/98/BB against the European Commission*

### THE COMPLAINT

In July 1998, Mr W. made a complaint to the Ombudsman concerning the alleged lack or refusal of information, undue delay and negligence in replying to correspondence he had sent to the European Commission.

On 28 November 1997, the complainant had written to the Commission complaining that the Finnish authorities had violated Regulation (EEC) N° 918/83 and that the Finnish customs officials had violated the Finnish Alcohol Law 306/97 by confiscating two bottles of 96% ethyl alcohol on entry to the Community. On 20 January 1998, the Commission DG XXI informed him that his letter had been forwarded to DG VI to be dealt with by the appropriate department. In this letter the Commission indicated that for any further information the complainant could contact the Head of Unit E.2 (DG VI).

On 27 April 1998, the complainant sent a letter to the Head of Unit E.2 requesting the Commission to intervene with the Finnish authorities. This request was repeated in a letter of 4 June 1998. The Commission did not reply to this correspondence.



## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission. In its opinion, the Commission made, in summary, the following points:

- The complainant explained that the Finnish authorities had confiscated two bottles of 96% vol. alcohol imported from Estonia which according to him constituted a violation of Regulation (EEC) N° 918/83;
- The Commission sent a letter on 20 January 1998 informing the complainant that the appropriate department to deal with the matter was DG VI Unit E.2;
- On 27 April 1998, the complainant wrote to DG VI requesting an intervention by the Commission before the Finnish authorities. This request was repeated in a letter sent on 4 June 1998 in which the complainant expressed his intention to complain to the European Ombudsman unless he received comprehensive information on how the Commission has dealt with the matter;
- Regulation (EEC) N° 918/83 does not confer an unconditional right to import the goods in question free of duty. Relief from duty applies only to products that can be legitimately imported, and a Member State can prohibit or restrict the importation of certain products for reasons such as protection of consumer health;
- No common market organisation of alcohol exists on the Community level;
- On 12 February 1998, the Finnish Government asked the Commission to include in the EC legislation a provision to confirm that the maximum alcohol content for spirit drinks should be 80%; the matter has been discussed at the Implementation Committee for Spirit Drinks and the discussions are continuing;
- The matter raised by the complainant also had a connection with the wider question of the future of the alcohol monopoly in Finland, which is under detailed scrutiny by the Commission;
- The Commission regretted that the complainant had not received a reply sooner, as his complaint concerned matters under discussion and, therefore, the Commission did not have the necessary elements for a definitive answer;
- The Commission promised to send a letter to the complainant without delay and copy it to the European Ombudsman for information.

### **The complainant's observations**

The complainant maintained his complaint, stating that until 19 November 1998 he had not received any reply from the Commission and that therefore the Commission had not followed the principles of good administration.

### **FURTHER INQUIRIES**

The Commission had sent the reply to the complainant on 30 November 1998. The complainant acknowledged later that he had received this reply.

It needs to be mentioned that in its reply to the complainant the Commission did not apologise for the undue delay.

### **THE DECISION**

#### **Undue delay in replying to correspondence**

- 1 The complainant alleged that the Commission failed to reply to his letter of 28 November 1997 in which he complained about breaches of Community law by the Finnish authorities, as well as to the reminders he sent to DG VI on 27 April 1998 and 4 June 1998.
- 2 On 20 January 1998, the Commission had sent an acknowledgement letter to the complainant informing him that his letter had been forwarded to be dealt with by the appropriate department DG VI - Unit E.2. In its opinion the Commission claimed that the subject matter raised in the complainant's correspondence was being discussed and that the Commission did not have the necessary elements for a definitive answer. Therefore, the Commission had not replied to the complainant's correspondence.
- 3 Principles of good administrative behaviour require that complainants who write to the Commission receive a reply within a reasonable time.
- 4 It was only on 30 November 1998, after the Ombudsman had requested an opinion from the Commission that DG VI replied in substance to the complainant's letter sent on 28 November 1997. This could not be considered a reasonable time period for replying to correspondence. Therefore, the fact that the Commission only replied on 30 November 1998 to the complainant's correspondence of 28 November 1997 constituted an instance of maladministration.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

Principles of good administrative behaviour require that complainants who write to the Commission receive a reply within a reasonable time. Therefore, the fact that the Commission only replied on 30 November 1998 to the complainant's correspondence of 28 November 1997 constituted an instance of maladministration.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

### **FURTHER REMARKS**

The Commission explained in its opinion that it did not have the necessary elements in order to give a definitive answer to the complainant. This however, cannot constitute a reason for the Commission for failing to answer correspondence in due time.

## **OPEN COMPETITION ORGANISED BY THE EUROPEAN COMMISSION: THE SELECTION BOARD REFUSED TO GIVE ACCESS TO CANDIDATE'S MARKED PAPERS**

*Decision on complaint 1239/98/IP against the European Commission*

### **THE COMPLAINT**

In November 1998, the complainant, who had participated in open competition COM/A/1049 for the constitution of a reserve list of principal administrators in the financial management and audit sectors, lodged a complaint with the European Ombudsman. The complaint concerned the refusal of the Selection Board of the competition to provide him with detailed information about the corrections made in his written tests, and the refusal of the Commission to give him a copy of his own marked papers.

In July 1998, the Chairman of the Selection Board informed the complainant that his score for the tests (b), (c) and (d) had been 14,748. Since the minimum required was 15, he was informed that the remaining three tests (e), (f) and (g) would not be corrected. The complainant wrote to the Selection Board and asked for the re-examination of his tests on the grounds that the difference between the score obtained and the minimum required was only 0,252 points. He also requested more information on the criteria used by the Board for its evaluation of the tests, as well as a copy of his own marked papers.

The Selection Board replied that, having compared the marks given to him with the corrections made by the evaluators, there was no discrepancy. As for the complainant's demand to have access to his marked tests, the Selection Board rejected the request based on the confidentiality of its work.

Mr R. thus lodged a complaint with the Ombudsman, in which he claimed the following:

- (1) in his opinion the Commission only verified the correspondence between the marks given by the evaluators and those communicated to him, instead of re-examining the content of his tests;
- (2) the Commission did not provide him with more information on the evaluation criteria;
- (3) the Commission breached the Code of Conduct annex to the Commission decision on public access to Commission documents (94/90/ECSC, EC, Euratom) by not giving him access to his marked tests.

## **THE INQUIRY**

### **The Commission's opinion**

As regards the corrections in the complainant's tests, the Commission stated that following a manual check, the Selection Board confirmed that no error had taken place. The complainant only reached 14,748 points in tests (b), (c) and (d). Not having met the minimum required, he was excluded from the competition and informed of the results by letter of the Chairman of the Selection Board. As set out in point VII.B of the notice of competition, "pre-selection tests (a), (b), (c) and (d) will be marked first. Tests (e), (f) and (g) will be marked only in the case of the 100 candidates with the highest aggregate marks in tests (a), (b), (c) and (d); they must have obtained the requisite pass marks".

The Commission informed of the marks obtained in each test and how they had been calculated, as well as the evaluation criteria followed by the Selection Board. It also explained in detail the score system used in the different tests.

As regards the first pre-selection test which included a series of multiple-choice questions relating to the areas covered by the competition, answers were rated +1 in case of the correct answer, "0" in case of no answer or answer annulled, and -0.333 in case of a wrong answer.

As for the second, third and fourth pre-selection test, answers were rated 0.333, 0.357 and 0.143 respectively for a right answer; -0.111, -0.119 and -0.048 for a wrong answer, and "0" in case of no answer or answer annulled.

In the light of these criteria, the institution summarised the different scores obtained by the complainant in his tests, on the basis of his correct and wrong answers, as well as the questions with no response or those annulled.

In relation to the institution's refusal to give access to the marked papers, the Commission reiterated its position, and justified the refusal on the grounds of the confidentiality of the work of the Selection Board as set out in article 6 of Annex III of the Staff Regulation.

### **The complainant's observations**

In his observations on the Commission's opinion, the complainant pointed out the following:

As regards the request for the re-examination of his tests, the complainant underlined that the Selection Board had only checked the correspondence between the marks given by the evaluators and those which had been communicated to him, instead of carrying out a new correction of his tests.

Concerning the request to be informed on the evaluation criteria used by the Selection Board in the correction of the tests, the complainant welcomed the explanations given by the Commission. However, he added that the marks given by the Selection Board for right, wrong and annulled/no reply answers did not correspond with the information supplied to the can-

didates in the course of the tests. In support of this allegation, the complainant referred to the “Guide to candidates” distributed on the day of the exam.

Prior to each test, candidates were provided with a booklet containing practical information (reference of the competition; contents of the tests, time allowed, scoring system for the answers) and the relevant questions. The cover page of each booklet indicated the scoring system for each type of answer : +1 for a right answer, -0.333 for a wrong answer, and “0” for no answer or a cancelled one. The value given to each type of answers appeared then in contradiction with the information submitted by the Commission in its opinion.

The complainant also contested the Commission’s point of view as regards the refusal to allow him access to his own marked papers because of the secrecy of the Selection Board’s work. He agreed with the Commission that the work of the Selection Board be considered secret in the course of the corrections with a view to guaranteeing the independence and objectivity of its proceedings. By contrast, once the corrections have been made, there should not be any reason to refuse candidates access to their own marked papers.

The complainant alleged that the Commission had not assured the necessary transparency of its recruitment procedure, in breach of the Code of Conduct on public access to Commission documents. In his view, the marked paper of a candidate in an open competition does not fall under any of the exceptions provided for in the Code’s general principle of “widest possible access to documents held by the Commission”.

Finally, the complainant also stressed that in the letter of the Selection Board where it denied the access to a copy of his marked papers, there was no mention of any potential means to appeal against the Selection Board’s negative decision. The Code, however, explicitly indicates that a decision of the Commission refusing access to certain documents “must indicate the means of redress that are available, i.e. judicial proceedings and complaints to the Ombudsman [...]”.

### **FURTHER INQUIRIES**

The Ombudsman asked the Commission for a second opinion on the complaint, by letter of 5 July 1999. The purpose of this letter was to give the European Commission the opportunity to comment on the complainant’s grievance that the decision refusing him access his marked papers did not refer to the means of redress available, in breach of the Code of conduct annex to the Decision on public access. The Ombudsman also asked the Commission to give its opinion on the alleged discrepancy between the criteria followed by the Selection Board for the correction of the tests and the information supplied to candidates prior to each test.

#### **The Commission’s second opinion**

As concerns the first point, the Commission simply replied that candidates who participate in an open competition are entitled, as all Union’s citizens,

to complain to the Ombudsman or to the judicial authorities against the decision to refuse them access to certain documents.

Regarding the criteria followed by the Selection Board for the correction of the tests, the institution replied that because the correction had been made by an optical reader, the complainant's grievance on this point was not grounded.

Finally, as regards the access to the marked papers, the Commission maintained its original position.

## **THE DECISION**

### **1 Re-assessment of the complainant's tests**

- 1.1 The complainant asked the Selection Board to re-examine his tests since there had been a minor difference between the threshold required to pass the first tests and the score he had been given.
- 1.2 The Commission stated in its opinion that in reply to this request, a second manual check of the complainant's papers had been carried out. The results of this second assessment showed that no error had occurred in the determination of the marks attributed to the complainant.
- 1.3 As established by Community case-law, in assessing the results of tests, Selection Boards enjoy a wide discretion, which can only be reviewed to ascertain whether its exercise has been vitiated by a manifest error or by a misuse of powers, or whether the Selection Board has manifestly exceeded the limits of its discretion<sup>83</sup>.

In view of the information submitted by the complainant, the Ombudsman found no evidence which might question the judgements made by the Selection Board. The Ombudsman therefore concluded that the Selection Board had acted within the limits of its legal authority. There appeared to be no instance of maladministration as regards this aspect of the case.

### **2 Criteria used by the Selection Board for the selection of candidates**

- 2.1 The Commission spelled out in its opinion the criteria used by the Selection Board for the evaluation of the tests. These criteria referred generally to the scoring methods applied to each type of reply (right/wrong answers, no answer/annulled) in every test.
- 2.2 Having compared these values with the score system referred to in the booklet distributed to all candidates prior to each test ("Guide to candidates"), the complainant noted that those criteria did not correspond.

<sup>83</sup> See case T-46/93, *Fotini Mich  el-Chiou v. Commission* [1994] ECR-SC II-929; par. 48; case 40/86, *Georges Kolivas v. Commission* [1987] ECR 2643; par. 11.

- 2.3 Thus, the cover page of these booklets indicated that in the four tests the score system would be : +1 in case of a right answer, "0" in case of no answer or cancelled answer and -0.333 in case of wrong answer.

By contrast, the Commission described in its opinion a different score system for each one of the tests. It appeared that only for the first tests answers had been rated +1 in case of right answer, "0" in case of no answer or cancelled answer and -0.333 in case of wrong answer. As concerned the second, third and fourth pre-selection tests, answers had been rated 0.333, 0.357 and 0.143 for right answers; -0.111, -0.119 and -0.048 for wrong answers and "0" in case of no answer or cancelled answer.

- 2.4 The essential function of the Guide distributed to candidates in the course of a competition was to give candidates accurate information about the content of the tests and their score. In the light of this information, candidates might decide beforehand how to handle the different tests and whether or not to reply to individual questions.
- 2.5 Principles of good administration require that the Institution gives clear and accurate information to the citizens.

This was not the case as regards the Guide distributed to candidates before the beginning of open competition COM/A/1049, since the information on the marking of tests contained therein did not correspond with the criteria used by the Selection Board in the marking of the first pre-selection tests. Candidates might have been confused by the information given to them before the exams regarding the real value to be attributed to each answer of the test.

- 2.6 In order to better clarify this aspect of the case, the Ombudsman requested a further opinion to the Commission. In its reply the institution only mentioned that because the correction had been made by an optical reader, the complainant's claim was not grounded. The Ombudsman considered, therefore, that the Commission had not properly replied to the point raised by the complainant.

Both the Commission's failure to provide candidates with clear and unambiguous information on the content of the tests and their score, and the fact that the institution did not provide a precise answer to the points raised by the complainant in his complaint, constituted therefore an instance of maladministration.

### **3 Access to the complainant's exam papers**

- 3.1 One of the complainant's claims regarded the Selection Board's refusal to allow him access to a marked copy of his papers.
- 3.2 The substantive question of access to marked papers, had been the subject of an own initiative inquiry launched by the European Ombudsman into the secrecy which forms part of the recruitment procedures of the Commission (own initiative 1004/97/PD)<sup>84</sup>. As a result

<sup>84</sup> As a result of the inquiry launched on this matter, the Ombudsman recommended that the Commission give applicants access to their own marked papers upon request.



of this inquiry, the Ombudsman prepared a special report on the matter that was sent to the European Parliament on 18 October 1999.

3.3 The Ombudsman therefore considered that it was not necessary to pursue the inquiry into this aspect of the case and informed the complainant of the outcome of this procedure.

#### **4 Alleged breach of the Code of conduct on public access to Commission and Council documents**

4.1 The complainant claimed that the decision refusing him access to his marked papers did not refer to the means of redress available, namely judicial proceedings and complaints to the European Ombudsman, as laid out in the section on Processing of Confirmatory Application in the Code of Conduct on public access to Commission and Council documents.

4.2 This allegation was not part of the original complaint, but put forward in the complainant's observations. Furthermore, it was linked to the right to have access to the marked papers or not, which was still under investigation (point 3 of the decision).

4.3 The Ombudsman therefore considered that it was not necessary to deal with this aspect of the case in this context.

### **CONCLUSION**

On the basis of the European Ombudsman's inquiries into the second part of this complaint, the Ombudsman considered it necessary to make the following critical remarks:

Principles of good administration require that the information that the administration provides to citizens be clear and accurate. More so, in the case of information distributed in the course of an open competition, which may be, for many citizens, their first encounter with the Community administration.

This was not the case as regards the Guide distributed to candidates before the beginning of open competition COM/A/1049, since the information on the marking of tests contained therein did not correspond with the criteria used by the Selection Board in the marking of the first pre-selection tests. Candidates might have been confused by the information given to them before the exams regarding the real value to be attributed to each answer of the test.

In order to better clarify this aspect of the case, the Ombudsman requested a further opinion to the Commission. In its reply the institution only mentioned that because the correction had been made by an optical reader, the complainant's claim was not grounded. The Ombudsman considered, therefore, that the Commission did not properly reply to the point raised by the complainant.

Both the Commission's failure to provide candidates with clear and unambiguous information on the content of the tests and their score and the fact that the institution did not provide a precise answer to the

points raised by the complainant in his complaint, constituted therefore an instance of maladministration.

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

### **FURTHER REMARKS**

In its second opinion the Commission refrained from addressing the complainant's comments and the precise question that the Ombudsman asked the institution in his letter of 5 July 1999.

The Ombudsman pointed out that as he had stated in the decision, this was an instance of maladministration. Furthermore, he would like to underline that, if this unfruitful attitude becomes a general rule in the performance of the newly installed Commission, it would rapidly destroy the achievements of a fruitful and constructive co-operation in his dealing with complaints and make the Ombudsman's task of enhancing the relations between the European citizens and the Community institutions and bodies impossible.

## **3.6 DRAFT RECOMMENDATIONS BY THE OMBUDSMAN**

### **3.6.1 All institutions, bodies and decentralised agencies**

#### **DECISION CONTAINING DRAFT RECOMMENDATIONS TO ADOPT A CODE OF GOOD ADMINISTRATIVE BEHAVIOUR**

*Decision in the own initiative inquiry OI/1/98/OV (Draft Recommendations)*

#### **THE REASONS FOR THE INQUIRY**

On 11 November 1998 the Ombudsman started an own initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Conduct on good administrative behaviour of the officials in their relations with the public.

One of the reasons for this own initiative inquiry was that during his time in office, the Ombudsman received numerous complaints which brought to his attention instances of maladministration which could have been avoided if clear information had been available about the administrative duties of Community staff towards the citizens.

The more general reason was that part of the Ombudsman's mission is to enhance relations between the European citizens and the Community institutions and bodies. The creation of the Ombudsman's office was meant to underline the commitment of the Union to democratic, transparent and accountable administration. The Ombudsman should promote good administrative practices by improving the quality of administration.

The Ombudsman therefore observed in his own-initiative inquiry that, in order to improve the quality of the Community administration, Codes of Conduct on good administrative behaviour could play a valuable role. Such codes would be very helpful for the staff when they have to deal with requests/complaints from citizens. The Code would inform them in a detailed manner of which rules to respect in dealing with the citizens who contact their institution. If the codes are made easily accessible to the public, for instance in the form of a decision published in the Official Journal, they would provide the citizens with information on what are their rights and which standards of good administration they may expect from the Community institutions and bodies.

The European Parliament has welcomed very positively<sup>85</sup> the idea of such a Code for the European institutions and bodies and has stressed “the importance for such a Code to be, for reasons of public accessibility and understanding, as identical as possible for all European institutions and bodies”.

### **THE INQUIRY**

On the basis of these considerations, and in accordance with Article 3.1 of the Regulations and the general conditions governing the performance of the Ombudsman’s duties, the Ombudsman started an own initiative inquiry which was addressed to eighteen Community institutions and bodies (four Community institutions in the sense of Article 4 of the Treaty, four bodies established by the Treaty, and ten “decentralised Community agencies”)<sup>86</sup>. The inquiry had the following subject:

Firstly, the Ombudsman asked the institution or body if it had adopted a Code of good administrative behaviour for its officials in their relations with the public, which is easily accessible to the citizens. If such a Code did not exist, the Ombudsman asked if the institution or body would agree to take the necessary steps in order to adopt a Code of Conduct. As to the contents of this Code, he observed that it could include, in a list of provisions, general applicable rules on the substantive and procedural principles which were set out in the annex to his letter of 11 November 1998.

Secondly, considering that such a code would be most effective if it was a publicly accessible document containing precise provisions, the Ombudsman equally asked the institution or body if it could indicate in which form it would adopt the Code.

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<sup>85</sup> See the Resolution of 16 July 1998 on the Annual Report on the activities of the European Ombudsman in 1997 (C4-0270/98).

<sup>86</sup> The European Parliament, the Council of the European Union, the European Commission, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions, the European Investment Bank, the European Central Bank, the European Centre for the Development of Vocational Training (CEDEFOP), the European Foundation for the improvement of Living and Working Conditions, the European Environment Agency, the European Agency for the Evaluation of Medicinal Products (EMA), the Office for Harmonisation in the Internal Market, the European Training Foundation, the European Drugs and Drug Addiction Monitoring Centre, the Translation Centre for bodies of the European Union, the European Agency for Safety and Health at Work, and the Community Plant Variety Office.

### **The Commission's opinion**

On 10 February 1999, the Secretary General of the Commission sent to the Ombudsman, as well as to the Secretaries General of the Parliament and the Council, a copy of the draft "Code of Conduct applicable at the European Commission" which would be submitted to the Commission on 10 March 1999. The letter to the Secretaries General indicated that the adoption of this Code by the Commission and the implementing measures were also meant to give effect to the initiative of the Ombudsman.

The draft Code contained five sections: a) basic values, b) rights, c) obligations, d) professional qualities to be fostered and e) serving the public. The Ombudsman made observations on the draft Code on 23 February and 9 March 1999. This draft was also the subject of a meeting on 2 March 1999 between the Secretaries General of the Parliament, the Council, the Commission and the Ombudsman.

The last section of the draft Code entitled "Serving the public", which corresponded to the subject of the own initiative inquiry, took into account most of the substantive and procedural principles which were suggested in the annex to the letter of the Ombudsman of 11 November 1998.

On 11 March 1999, the Secretary General of the Commission informed the Ombudsman of three Codes of Conduct, concerning respectively the Commissioners, the relations between the Commissioners and the Commission departments, and the draft Code of Conduct for staff of the European Commission. The Ombudsman was informed that the two first Codes had been adopted by the Commission on 9 March 1999. However, as regards the Code of Conduct for staff of the European Commission, the Commission informed the Ombudsman that it was still a draft which had to be further discussed through consultations with staff representatives and the other European institutions, after which it would be formally adopted by the Commission.

Finally, on 19 April 1999, Mr Ebermann, Director in the Secretariat General, informed the Ombudsman that, unfortunately, in the present circumstances no formal follow-up to the draft Code of Conduct was possible for the time being, but that the Commission services hoped to be able to finalise the Code quickly once the new Commission was in place.

### **The Parliament's opinion**

In his reply of 12 February 1999, the President of the Parliament welcomed the initiative and indicated that the Parliament had already started the examination of the matter of a Code of good administrative behaviour. He observed that the question had been on the agenda of the meeting between the Secretary General and the Directors General of 8 January 1999. He indicated that, according to the progression of the work, the Bureau of the Parliament would be seized of a draft Code of good administrative behaviour which would be transmitted to the Ombudsman. Since 12 February 1999, no draft Code has been received from the Parliament.

### The Council's opinion

In his reply of 30 March 1999, the Secretary General of the Council referred to the meeting of 2 March 1999 between the Secretaries General of the Parliament, the Council, the Commission and the Ombudsman, in which he had indicated that the measures proposed by the Ombudsman would undoubtedly contribute to bring the citizens closer to the Community institutions. The Secretary General also observed that a Code should be adopted in the form of a Council decision rather than in the form of a decision of the Secretary General. He stated that he had given instruction to the Council's services to examine the question in the light of the specific circumstances of the Council and of the initiatives taken by the other Community institutions. The Secretary General finally indicated that he would keep the Ombudsman informed about the follow-up given to this matter. Since 30 March 1999, no new information has been received from the Council.

### The opinions from the other Community institutions, bodies and decentralised agencies

The *Court of Auditors* informed the Ombudsman on 24 November 1998 that it envisaged the elaboration of a Code in the future which should be precise and accessible to the public.

Both the *Economic and Social Committee* and the *Committee of the Regions* welcomed, respectively on 6 January 1999 and 4 December 1998, the Ombudsman's proposal and indicated that they were prepared to take the necessary steps in order to adopt a Code of good administrative behaviour. The *Committee of the Regions* indicated that the Code would be adopted in the form of a decision of its Bureau. Both Committees stressed also the importance of the Code to be common to all European institutions and bodies.

The *European Investment Bank* informed the Ombudsman on 2 December 1998 that a Code of Conduct applicable at the EIB had already been adopted in April 1997 and enclosed a copy of this Code. The Code had been formally approved by the Management Committee of the Bank and is complementary to the Staff Regulations. The Bank informed the Ombudsman that the Chapter 2 of the Code, "External Relations", contains the principles of good administrative behaviour for the staff in their relations with the public, and that the legal department of the Bank would examine the possibility of giving greater publicity to this part of the document.

The *European Central Bank* informed the Ombudsman on 4 February 1999 that it has few administrative relations with the general public, given that its contacts are primarily with central banks, the financial industry, governmental bodies and suppliers of goods and services. The Bank however observed that, for its dealings with the citizens, it would consider the adoption of a Code of good administrative behaviour as soon as circumstances allowed it and inform the Ombudsman of the steps taken.

Nine of the ten *decentralised Community agencies* welcomed positively the Ombudsman's proposal and expressed their intention to adopt a Code of good administrative behaviour, which should be approved by their respec-

tive Governing/Management Boards. On behalf of all the decentralised agencies, the Director of *Cedefop*, in his capacity of President of the group of agency directors/presidents, informed the Ombudsman on 26 February 1999 that an inter-agency working group had been set up to examine the matter and that the various decentralised agencies would adopt a concerted approach, based on the Commission's draft Code of conduct which should guide the code of conduct for the agencies. The Ombudsman would be kept informed of the progress.

On 2 December 1998, the *Office for Harmonisation in the Internal Market (OHIM)* indicated to the Ombudsman that, given its special activity of intellectual property, it functions not as a common administration but rather like a private company which has to satisfy at its utmost its clients. The OHIM therefore described in detail the numerous procedural and substantial guarantees (contained in various Commission and Council Regulations) it offers for those who deposit a Community trademark. For this reason the OHIM indicated that, at this stage, it already complied with the substantial and procedural principles contained in the Ombudsman's proposal for a Code of good administrative behaviour (such as the acknowledgement of receipt within 15 days, a direct contact with the responsible official, the rights of the defence, the obligation to state reasons for decisions, an appeal procedure, an information service and a complaint coordination unit).

### **Evaluation of the present situation as regards a Code of good administrative behaviour**

On the basis of the information obtained from the different Community institutions, bodies and decentralised agencies, it appears that, for the moment, none of them has adopted a Code of good administrative behaviour as proposed by the Ombudsman.

The *Commission* has started to elaborate a draft Code of Conduct for staff of the European Commission, section 5 of which deals with the relations of the Commission officials with the public. The Ombudsman was however informed that this Code had not yet been adopted and that in the given circumstances no formal follow-up to the draft Code was possible.

*The Parliament, the Council, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Central Bank* agreed to but have not yet adopted a Code of good administrative behaviour for their officials in their relations with the public.

On the other hand, the *European Investment Bank* has already in April 1997 adopted a detailed Code of Conduct applicable at the EIB. However, it appears that this Code, which is complementary to the Staff Regulations, mainly concerns the relations of the staff of the EIB with the institution itself and that even Chapter 2 entitled "External Relations" does not really contain provisions which effectively deal with relations with the citizens.

It further appears that nine of the ten *decentralised agencies* agreed to take the necessary steps in order to adopt a Code of good administrative behaviour, but are still waiting for the Commission's Code to be definitively approved in order to adopt, in a concerted manner, similar Codes.

Finally, from its reply it appears that the *Office for Harmonisation in the Internal Market* already complies with most of the substantial and procedural principles contained in the Ombudsman's proposal for a Code of good administrative behaviour. However, those guarantees do not concern all relations with the citizens, but are limited to the Community trademark procedure.

### **Draft Recommendations already made to the Commission, the Parliament and the Council**

In March and April 1999 the Ombudsman was informed that the Commission's Code of Conduct had not been adopted and that no formal follow-up was possible in the given circumstances. Therefore, and given also that the decentralised agencies in particular are waiting for the Commission's Code to be adopted in order to approve similar Codes, the Ombudsman made the present draft recommendations to the Commission already on 28 July 1999. On 29 July 1999, the same draft recommendations were also addressed to the Parliament and the Council. The three institutions were requested to send their opinion by no later than 30 November 1999.

### **THE DECISION**

#### **The necessity of a Code of good administrative behaviour for the Community officials in their relations with the public**

- 1 During his mandate the Ombudsman received numerous complaints which brought to his attention instances of maladministration by the different Community institutions and bodies. These have been reported in the Ombudsman's annual reports. The Ombudsman considered that many of these instances of maladministration could have been avoided if clear information had been available, in the form of a Code of good administrative behaviour, about the administrative duties of the Community staff towards the citizens.
- 2 Part of the Ombudsman's mission is to enhance relations between the Community institutions and bodies and European citizens. The creation of the Ombudsman's office was meant to underline the commitment of the Union to democratic, transparent and accountable forms of administration. The Ombudsman should in particular help to secure the position of citizens by promoting good administrative practices and improving the quality of administration.
- 3 The Ombudsman noted that the Amsterdam Treaty explicitly introduced the concept of openness into the Treaty on European Union, by stating that "This Treaty marks a new stage in the process of creating an ever closer union among the people of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen" (Article 1 of the Treaty on European Union). With regard to this, the Ombudsman considered that, in order to bring the administration closer to the citizens and to guarantee a better quality of administration, a Code which contains the basic principles of good administrative behaviour for officials when dealing with the public was neces-



sary. Such a Code is useful for both the Community officials, as it informs them in a detailed manner of the rules they have to follow when dealing with the public, and the citizens, as it can provide them with information on which principles apply in the Community administration and on the standard of conduct which they are entitled to expect in dealings with the Community administration.

- 4 A Code of good administrative behaviour can only be efficient if it is a publicly accessible document for the citizens. Therefore it is appropriate that it is published in the form of a decision, as has been the case for the Code of Conduct concerning public access to Commission documents, contained in the Commission decision (94/90/ECSC, EC, Euratom) of 8 February 1994<sup>87</sup>. Also, in order to be understandable and not confusing for the public, such a Code should be a unique document which contains rules exclusively on the relations of the officials with the public, and not on the relations of the officials with their institution (rights and obligations, explanation of provisions of the Staff Regulations), as in the draft Code of Conduct for staff of the European Commission.
- 5 The Ombudsman further noted that, in its Resolutions on the Annual Report on the activities of the European Ombudsman in 1997 and 1998<sup>88</sup>, the European Parliament stressed the urgent need to draw up as soon as possible a Code of good administrative behaviour, and the importance for such a Code to be, for reasons of public accessibility and understanding, as identical as possible for all European institutions and bodies. The Parliament equally indicated that such a Code should be accessible to all European citizens, and be published in the Official Journal.
- 6 On the basis of the information supplied to the Ombudsman by the different Community institutions, bodies and decentralised agencies, it appeared that none of them had adopted a Code of good administrative behaviour as proposed by the Ombudsman.

## CONCLUSION

On the basis of the above considerations, the Ombudsman concluded that during his mandate various instances of maladministration by the different Community institutions and bodies have been found. One of the reasons for these instances of maladministration is that no clear rules exist on the principles of good administrative behaviour which the Community officials should respect in their relations with the public. Therefore, in order to prevent the recurrence of similar instances of maladministration in the future, the Community institutions and bodies should adopt a Code of good administrative behaviour for their officials in their relations with the public. Such a Code can only be efficient if it is a publicly accessible document for citizens.

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<sup>87</sup> OJ 1994 L 46/58.

<sup>88</sup> Resolution of 16 July 1998 on the Annual Report on the activities of the European Ombudsman in 1997 (C4-0270/98), OJ 1998 C 292/168. Resolution of 15 April 1999 on the Annual Report on the activities of the European Ombudsman in 1998 (C4-138/99), OJ 1999 C 219/456.

Therefore it should be adopted in the form of a decision published in the Official Journal.

### **DRAFT RECOMMENDATIONS**

In view of the above, the European Ombudsman made, in accordance with Article 3(6) of the Statute of the Ombudsman, the following draft recommendations to the different Community institutions, bodies and decentralised agencies:

- 1 The institution or body should adopt rules concerning good administrative behaviour of its officials in their relations with the public. For adopting these rules, the institution or body might take guidance from the provisions contained in the annexed Code of good administrative behaviour.
- 2 In order to ensure that they can be easily understood by citizens, the rules should deal only with the relations of the officials with the public. If the institution or body also intends to adopt rules concerning the relations of officials with the institution, it could do so in a separate, publicly available, document.
- 3 In order to be efficient and accessible to the citizens, the rules should be adopted in the form of a decision and be published in the Official Journal.

The institutions, bodies and decentralised agencies were informed of these draft recommendations and were requested, in accordance with Article 3 (6) of the Statute of the Ombudsman, to send a detailed opinion within three months. In the present case, the opinion had to be sent by no later than 31 December 1999.

## **3.6.2 The European Parliament**

### **UNDUE DELAY AND FAILURE TO REPLY TO APPLICANTS IN A DESIGN COMPETITION**

*Draft recommendation in the joined complaints 507/98/OV (Confidential), 515/98/OV, 576/98/OV and 818/98/OV against the European Parliament*

#### **THE COMPLAINTS**

In May and July 1998 X made a complaint (507/98/OV) to the European Ombudsman concerning an alleged failure of information by the European Parliament with regard to the design competition (ref. 96/S 195-116670) for works in the Espace Léopold of the European Parliament in Brussels. In May 1998 (515/98/OV), June 1998 (576/98/OV) and April 1998 (818/98/OV) respectively, other persons have lodged similar complaints. The Ombudsman therefore decided to join the four complaints for the purpose of his inquiry.

According to the complainants, the relevant facts were as follows: The four complainants had sent an application for the design competition (ref. 96/S 195-116670) for the VIP entrance to the D1 building and the refurbishing of the entrance between D3 and D1 of the Espace Léopold of the European Parliament in Brussels. This competition was published in the Official Journal S. 195/39 of 8 October 1996. After a first evaluation of all the applications, the Selection Board of the design competition selected 15 architects/designers (amongst which the complainants) who were requested to submit their projects before the deadline of 15 January 1997. However, after that date the complainants received no further information with regard to the outcome of their applications. In three of the four cases, the complainants wrote different letters to the Parliament, explaining that they had carried out a considerable amount of work and incurred expenses for their applications, but received no reply. For instance, the complainant in case 507/98/OV wrote to the Parliament on 16 March, 8 September and 18 November 1997, explicitly asking for information on the outcome of his application, but received no reply.

The Ombudsman was later also informed by two of the complainants that it was only on 17 June 1998, i.e. 17 months after the application deadline, that the Director General of the Parliament's Administration informed the complainants of the Selection Board's final decision not to choose any of the 6 projects (selected from the 15 applications by the Advising Committee) for the designation of a laureate.

Therefore, the complainants wrote to the Ombudsman alleging that 1) since 15 January 1997 (deadline for the applications) they had not received any information on the outcome of their applications, and that 2) the Parliament failed to reply to their letters inquiring about the results of their applications.

## **THE INQUIRY**

### **The Parliament's opinion**

In its opinion, the Parliament observed that the opinion of the Selection Board was delivered on 29 May 1998 and that the candidates were notified of this decision by personal letter. The Parliament annexed copies of those letters.

The Parliament explained that the delay in notifying the candidates of the results of the competition was due to the length of time taken by the Selection Board to reach its decision, which in its turn was the result of the parliamentary workload of its members. The Parliament also pointed out that the administration's invariable reply to telephone calls from candidates was that, since the Selection Board had not yet completed its deliberations, the results of the competition could not yet be disclosed.

### **The complainants' observations**

The Ombudsman received observations from the complainants in case 576/98/OV. The complainants observed that they were unhappy that the competition prizes were never awarded and that nobody received a con-

tract to carry out the work. The complainants found inadequate the Parliament's excuse of being too busy in order to inform the applicants. The complainants equally observed that the Parliament had changed the timetable for the competition and that it had in general not run a fair and reasonable competition. The complainants believed that the Parliament, after holding the competition, decided that no services were required and excluded most of the applications on minor technicalities or design details in order to avoid awarding prizes.

The Ombudsman did not receive any comments from the other complainants.

## **THE DECISION**

### **1 The alleged failure to notify the complainants in due time about the outcome of their applications**

- 1.1 The complainants alleged that since 15 January 1997 (deadline for the applications) they had not received any information about the outcome of their applications. The Parliament observed that the delay in notifying the candidates of the results of the competition was due to the length of time taken by the Selection Board to reach its decision, which in its turn was the result of the parliamentary workload of its members.
- 1.2 The Ombudsman notes that Article 3.7 of the competition rules provides that the Selection Board will meet in the first term of 1997 to proceed to the examination of the applications, after a preliminary analysis by the Advising Committee. Article 3.9 of the same rules provides that the results of the competition will be rendered public in the days which follow the decision of the Selection Board.
- 1.3 The Ombudsman notes that, in the present case, the final decision of the Selection Board to retain none of the 15 projects for designating a laureate was taken on 29 May 1998. This decision was subsequently notified to the complainants on 17 June 1998 and 4 August 1998. From the decision of the Selection Board it appeared that, on 26 March 1997 already, the Advising Committee considered that 9 (amongst which 2 of the complainants) of the 15 projects could not be retained. It further appeared that, on 17 April 1997, the Selection Board considered that none of the projects finally merited to be retained. This conclusion was confirmed after a second evaluation by the Selection Board on 3 February 1998.
- 1.4 According to principles of good administration, applicants should be notified in due time about the decisions of the administration which affect their interests. In the present case, it appeared that the complainants had been notified of the decision of the Selection Board only 17 or 19 months after the deadline for the applications. The Ombudsman considered that this was an unreasonably long period, especially when considering that already on 17 April 1997, i.e. only three months after the deadline for the applications, the Selection

Board had already come to the conclusion that none of the 15 projects could be retained.

- 1.5 The Parliament did not provide the Ombudsman with a reasonable explanation for this delay, but merely referred to the workload of the Members of the Selection Board. More particularly the Parliament failed to explain to the Ombudsman why, after its meeting of 17 April 1997 where it concluded that none of the 15 projects could be retained, the Selection Board needed another 13 months to simply confirm this conclusion. The Parliament therefore introduced an unnecessary and unjustified long delay in informing the candidates about the outcome of their applications. This delay constituted an instance of maladministration. The Ombudsman therefore made the draft recommendation below.

## **2 The alleged failure to reply to the complainants' letters**

- 2.1 The complainants in cases 507/98/OV, 576/98/OV and 818/98/OV alleged that the Parliament had failed to reply to their letters in which they asked for information on the outcome of their applications. The complainant in case 507/98/OV for instance wrote to the Parliament on 16 March, 8 September and 18 November 1997, but received no reply. The Parliament merely observed that the administration's reply to telephone calls from candidates was that the results of the competition could not yet be disclosed.
- 2.2 Principles of good administrative behaviour require that letters from citizens to the Parliament administration receive a reply within a reasonable time limit. In the present case it appeared that the Parliament failed to reply to the various letters from the complainants. The Parliament did not give the Ombudsman valid reason why it could not provide the complainants with a reply, possibly a holding reply. This failure to reply therefore constituted an instance of maladministration. The Ombudsman therefore made the draft recommendation below.

## **CONCLUSION**

According to principles of good administration, applicants should be notified in due time about the decisions of the administration which affect their interests. In the present case, it appeared that the complainants had been notified of the decision of the Selection Board only 17 or 19 months after the deadline for the applications. The Ombudsman considered that this was an unreasonably long period, especially when considering that already on 17 April 1997, i.e. only three months after the deadline for the applications, the Selection Board had already come to the conclusion that none of the 15 projects could be retained.

The Parliament did not provide the Ombudsman with a reasonable explanation for this delay, but merely referred to the workload of the Members of the Selection Board. More particularly the Parliament failed to explain to the Ombudsman why, after its meeting of 17 April 1997 where it concluded that none of the 15 projects could be retained, the Selection Board needed

another 13 months to confirm this conclusion. The Parliament therefore introduced an unnecessary and unjustified long delay in informing the candidates about the outcome of their applications. This delay constituted an instance of maladministration.

Principles of good administrative behaviour require also that letters from citizens to the Parliament administration receive a reply within a reasonable time limit. In the present case it appeared that the Parliament failed to reply to the various letters from the complainants. The Parliament did not give the Ombudsman a valid reason why it could not provide the complainants with a reply, possibly a holding reply. This failure to reply therefore constituted an instance of maladministration.

In view of these conclusions, and given that it was not possible to find a friendly solution between the parties on these points, the Ombudsman made the following draft recommendation to the European Parliament:

The Parliament should, as a matter of good administrative behaviour, present its apologies to the complainants for the undue delay in informing them about the outcome of the competition, and for not having answered the various letters by the complainants in which they explicitly asked for information on the results of the competition.

The European Parliament will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Parliament shall send a detailed opinion within three months. The detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of the measures taken to implement it.

### 3.6.3 The European Commission

#### **FAILURE TO REINSTATE OFFICIAL AFTER UNPAID LEAVE ON PERSONAL GROUNDS**

*Decision on complaint 489/98/OV against the European Commission*

#### **THE COMPLAINT**

In April 1998 Mr P. made a complaint to the European Ombudsman concerning the failure of the European Commission to reinstate him at the end of his unpaid leave on personal grounds and the refusal to pay him a compensation for the loss of salary and the reduced pension. According to the complainant, the relevant facts were as follows:

The complainant, an A4 grade official of the European Commission, went on unpaid leave on personal grounds for one year from 1 October 1995 to 30 September 1996. He complained that two months after the expiry of his unpaid leave, the Commission had still not made an offer of reinstatement, nor was there any prospect for a reinstatement in the future.

The complainant consequently wrote to the Director General of DG IX on 25 November 1996 informing him that, in order to secure a source of reg-

ular income, and given that he had no other option than taking early retirement, he resigned from the service with effect from 1 October 1996.

On 10 June 1997, the complainant made a request, under Article 90(1) of the Staff Regulations, for a financial compensation for the loss of salary from the expiry of his leave up to the date of his letter of resignation, and for the reduced pension. On 5 August 1997, DG IX replied to the complainant saying that had made an unequivocal request for resignation as foreseen in Article 48 of the Staff Regulations, and that therefore, it could not take into consideration his request for compensation.

On 17 September 1997, the complainant submitted to the appointing authority an appeal against this refusal under Article 90(2) of the Staff Regulations, reiterating his demand for financial compensation. The appointing authority rejected the complainant's request in its letter of 16 February 1998. It considered that the Commission had not committed administrative irregularities and was not responsible for his resignation, and that therefore it had not to pay a compensation. The complainant therefore lodged the present complaint with the Ombudsman, alleging that the Commission had failed to reinstate him at the end of his unpaid leave on personal grounds and refused to pay a compensation for a) the loss of salary because of the failure to reinstate him and b) the financial loss due to his resignation.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission in May 1998. In its opinion, the Commission referred to the reply of the appointing authority dated 16 February 1998. The appointing authority had reminded the complainant of the provision in Article 40(4)(d) of the Staff Regulations which requires the institution to reinstate an official at the expiry of the unpaid leave for personal grounds in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post. The procedure for establishing whether an official satisfies these requirements must actually take place and must be conducted in such a way that the institution concerned can prove that the stipulation was complied with. Failure to carry out such checks would constitute a wrongful act or omission which would entail liability from the Commission towards the applicant.

The Commission then observed that an examination of the steps taken by the complainant on the one hand and the Commission on the other did not show any irregularity in the reinstatement procedure. The appointing authority considered that the fact that the complainant had not been reinstated at the end of November 1996 was reasonable given that his leave on personal grounds expired two months before, on 30 September 1996. On these grounds, the complainant's request for compensation was refused as regards the period from the end of his leave on personal grounds to the date of his letter of resignation.



The appointing authority pointed out that, in its judgement of 1 July 1976<sup>89</sup>, the Court of Justice ruled that in the case of an application for damages for failure to reinstate after the expiry of leave on personal grounds, the applicant cannot, in the absence of services rendered, claim payment of arrears of salary. He is nevertheless entitled to receive compensation for the actual damage he has suffered through the loss of this salary as a result of the unlawful conduct of the administration.

As regards the application for financial compensation from the date on which he retired, the complainant argued that he was forced to resign given that the administration left him with no income during the two months following the expiry of his leave. The Commission recalled the established case law according to which the Community institution is liable if the alleged conduct is unlawful, damage has actually been sustained and a causal link exists between the said conduct and the damage.

In the present case, the appointing authority checked that the Commission had actually taken steps and had done so in a proper manner, and that the period of two months between the expiry of the leave and his letter of resignation was a reasonable period, even if the complainant had not been reinstated. Also the complainant's resignation was the result of his having stated unequivocally in writing his intention to leave the service of the institution definitively, as laid down in Article 48 of the Staff Regulations. Given thus that the resignation was a voluntary act of the complainant, the Commission concluded that it bore no direct responsibility in this matter and that no blame could be attached to the Commission. Therefore the application for financial compensation was rejected.

### **The complainant's observations**

The complainant maintained his complaint. He stated that there were in fact a number of perfectly suitable posts vacant at the time, and that the Commission did not examine his qualifications for any of these posts. He stated that four suitable posts were reserved for other particular candidates or for individuals from the new Member States. Therefore the complainant considered that the Commission's statement that there had been no irregularity in the reinstatement procedure was not correct. The steps taken by the Commission had not been efficient given that they had not resulted in a single offer of reinstatement in the course of 3,5 months from the date he confirmed his intention to return, neither in a prospect of reinstatement in the future. The complainant concluded that the Commission's conduct was negligent, that he suffered damage and that the causal link between both was clear. On 22 April 1999, the complainant sent further details as regards 4 posts which were vacant at the time he asked for reinstatement.

### **FURTHER INQUIRIES**

In order to verify whether the Commission examined in detail the abilities of the complainant in relation to the vacant posts corresponding to his grade, the Ombudsman asked on 23 April 1999 for further comments from the Commission on three points.

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<sup>89</sup> Case 58/75, *Sergy v. Commission*, [1976] ECR 1139.

Firstly, the Ombudsman asked to obtain the list of all posts (including the requirements) corresponding to the complainant's grade (A4) which were vacant in the period following the expiry of his leave on personal grounds (30 September 1996).

Secondly, the Commission was requested to respond to the complainant's allegation that it did not examine his qualifications for any of the vacant posts, because they were reserved for other applicants.

Finally, the Ombudsman asked what was the justification for the consideration of the appointing authority that the posts which were vacant did not correspond to the complainant's qualifications (letter of Commissioner Liikanen dated 16 February 1998, page 3, last paragraph).

### **The Commission's second opinion**

The Commission sent the Ombudsman the lists of vacant management posts which were published every week between 18 July 1996 and 28 November 1996. The Commission reiterated that this dispute was the consequence of the complainant's unilateral decision of 25 November 1996 to resign from the Commission, less than two months after 1 October 1996. Therefore the Commission stated that it could not be held responsible for that decision or its impact on the complainant's income.

With regard to the complainant's allegation that it had not examined his qualifications for any of the vacant posts, the Commission observed that it was not disputed that there were A5/A4 posts vacant between 1 October 1996 and 30 November 1996. The complainant cited four Head of Unit posts. The Commission first pointed out that one of the posts to which the complainant referred was an A3 post and therefore not relevant. It was thus necessary to examine whether the complainant's curriculum vitae demonstrated that he satisfied the requirements for the other three posts.

According to the complainant's CV, as an A4 official he had been principal administrator (A5/4) and subsequently Head of Division in DG II (Economic and Financial Affairs) between 1974 and 1990. Between 1990 and 1995 he was counselor to DG I in Paris. The Commission observed that the complainant's CV was sketchy on his career and skills, and that until 1988 the post of Head of Division was reserved for A3 officials. After 1990, the complainant was no longer Head of Division (or rather, Head of Unit).

The vacancies in question were for Head of the External dimension of the Internal Market and Financial Services Unit in DG XV, Head of the Unit monitoring the impact of the European Social Fund in DG V, and Head of the United Nations Unit in DG IA. Each of these posts required special skills. The Commission stated that there was reasonable doubt as to whether the complainant satisfied the requirement for these posts, both in relation to the level of responsibility (a candidate for a Head of Unit post must have proven management skills) and the other requirements. The administration could therefore not be blamed for not having reinstated the complainant immediately, because in such circumstances it must request additional information from the person concerned. That the Commission did not do so was due to the fact that the complainant retired before this could be done within a reasonable period of time.

DG IX of the Commission also contacted various Directorates-General, including DG I, DG II, DG VI and DG XXI in an attempt to find a suitable post for the complainant. However, those attempts did not lead to his reinstatement because the complainant's CV did not contain sufficient details on his abilities. The Commission observed that this CV was too vague to make an immediate decision possible.

The Commission therefore concluded that the administration was far from inactive in this matter and had started taking steps to reinstate the complainant.

### **The complainant's additional observations**

The complainant maintained his complaint reiterating that he had not been offered any post in the 3,5 months following his request for reinstatement. The complainant also observed that his CV was intended to summarise his professional experience that had already been known to the Commission for 22 years. The complainant added that he was indeed occupying an A3 post as Head of Division in DG II-E-2 from 1986 to 1987. The complainant stated that the posts to which the Commission referred were all in line with his experience and responsibilities at the Paris Delegation. Finally, he observed that the Commission could have asked for the additional information concerning his CV.

## **THE DECISION**

### **1 The Commission's failure to reinstate the complainant at the end of his unpaid leave on personal grounds**

- 1.1 The complainant alleged that the Commission failed to reinstate him at the end of his unpaid leave on personal grounds, on 30 September 1996. More particularly, two months after this date he still had not received an offer of reinstatement, nor was there any prospect of reinstatement for the near future. The Commission observed that the examination of the steps taken by the Commission showed that there had not been any irregularity in the reinstatement procedure. In its second opinion, the Commission added that there were reasonable doubts as to whether the complainant satisfied the requirements for the posts which were vacant. The Commission also pointed out that the complainant's CV was too vague to take an immediate decision on his reinstatement.
- 1.2 The Ombudsman noted that Article 40(4)(d) of the Staff Regulations foresees that on the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post. According to the case-law of the Court of First Instance, the administration shall verify systematically, through a detailed examination, the abilities of the official awaiting reinstatement in relation to each vacant post corresponding to his grade. Therefore the procedure for verifying the ability of officials awaiting reinstatement must be effective and must take its course in such a way that the institutions can prove that it has been observed. With this regard, although the

competent authorities cannot be compelled to prove that they have examined the abilities of the official where there is a manifest divergence between his abilities and those required for a particular post which is vacant, such proof must nevertheless be adduced in all cases where, in the absence of such a manifest divergence, a complete verification of the abilities of the person concerned in relation to a vacant post is necessary. The failure to verify systematically the abilities of the official in question in relation to each vacant post to which he could have been reinstated constitutes a service-related fault which may give rise to liability on the administration's part insofar as such failure delays the reinstatement of the person concerned<sup>90</sup>.

- 1.3 The Ombudsman therefore verified whether, in the present case, the Commission had made a detailed examination of the abilities of the complainant in relation to the posts which were vacant. It appeared that the complainant asked on 12 August 1996 to be reinstated with effect from 1 October 1996. In its final decision of 16 February 1998 on the complainant's appeal under Article 90(2) of the Staff Regulations, the Appointing Authority merely observed that no Directorate General was able to offer a post to the complainant before the end of November 1996, because "either they had no pertinent vacant posts available, or the vacant posts did not correspond to the complainant's abilities". The Appointing Authority did not give any justification whatsoever for its conclusion that the complainant's abilities did not correspond to those required by the vacant posts, nor referred to the particular posts which were vacant.
- 1.4 The Ombudsman therefore asked for more details on the list of posts which were vacant in the period following the expiry of the complainant's leave on personal grounds. He also requested the Commission to indicate what was the Appointing Authority's justification for its conclusion that the complainant's abilities did not correspond to those of the vacant posts. From the lists of vacant posts published between 18 July 1996 and 28 November 1996, it appeared that during this period there were more than twenty-five A5/A4 posts vacant<sup>91</sup>.
- 1.5 However, in its opinion to the Ombudsman, with the exception of the 4 posts indicated by the complainant himself, the Commission made no reference to any particular vacant A5/A4 post out of these lists, nor gave a justification, even shortly, why the complainant could not be reinstated in one of those posts. With regard to three of the four posts mentioned by the complainant, the Commission again merely observed, without a detailed examination, that there was reasonable doubt whether the complainant satisfied the requirements for these

<sup>90</sup> Case T-48/90, *Giordani v. Commission*, [1993], ECR II-721, paragraphs 50 to 57; Case T-276/94, *Buick v. Commission*, [1995], ECR, II-667, paragraphs 34 to 46; Case T-205/96, *Bieber v. Parliament*, [1998], ECR II-723.

<sup>91</sup> Vacancies COM/088/96, COM/090/96, COM/093/96, COM/094/96, COM/095/96, COM/096/96, COM/R/5138/96, COM/036/96, COM/105/96, COM/104/96, COM/103/96, COM/109/96, COM/110/96, COM/065/96, COM/113/96, COM/118/96, COM/122/96, COM/120/96, COM/126/96, COM/115/96, COM/116/96, COM/128/96, COM/R/5659/96, COM/131/96, COM/155/96, COM/157/96, COM/163/96.

posts, both in relation to the level of responsibility (need of proven management skills for Head of Unit posts) and the other requirements. The Commission even added that, given this genuine uncertainty, the administration must, in such circumstances, request additional information from the person concerned. This requirement has also been confirmed by the jurisprudence of the Court of First Instance<sup>92</sup>. However, the Commission did not proceed to do so.

- 1.6 From the above, the Ombudsman concluded that the Commission failed to carry out the detailed examination, as required by the case-law of the Court of First Instance, of the complainant's abilities in relation to each vacant post corresponding to his grade. This was also confirmed by the fact that the Commission based its judgement on the abilities of the complainant with regard to the vacant posts only on the complainant's curriculum vitae, which it considered itself to be too vague and sketchy, and without asking the complainant for more detailed information. It also appeared that at no time did the Commission consult the details of the complainant's personal file, which it could have done given that he had worked for the Commission for 22 years.
- 1.7 It appeared thus from these considerations that the Commission's failure to undertake a detailed examination of the complainant's qualifications for the posts in question constituted an instance of maladministration capable of rendering the Commission liable to the complainant. Given that, because of the Commission's and the complainant's opposite opinions, it was not possible to find a friendly solution between the parties on this point, the Ombudsman made the draft recommendation below.

## **2 The complainant's claims for a financial compensation for the Commission's failure to reinstate him and the financial implications of his resignation**

- 2.1 The complainant claimed a compensation for 1) the loss of salary (between the end of his unpaid leave until the date of his resignation) due to the Commission's failure to reinstate him at the end of his unpaid leave on personal grounds, and for 2) the financial loss linked to the fact that he had to resign from the Commission. The Commission refused to pay both compensations because it considered that, on the one hand, it had not committed an irregularity in the reinstatement procedure, and on the other hand, it could not be held responsible for the complainant's unilateral decision to resign from the Commission.
- 2.2 With regard to the first claim for compensation due to the Commission's failure to reinstate the complainant, the Ombudsman notes that, according to the case-law of the Court of Justice, the applicant for damages for failure to reinstate after the expiry of the leave on personal grounds cannot, in the absence of services rendered, claim

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<sup>92</sup> See Case T-276/94 above, paragraph 43.

payment of arrears of salary. He is nevertheless entitled to receive compensation for the actual damage suffered through the loss of this salary as a result of the unlawful conduct of the administration<sup>93</sup>.

- 2.3 Therefore, in the present case, the Commission should compensate the complainant for the material damage directly suffered by him as a result of the Commission's service related fault which is the failure to undertake a detailed examination of the complainant's qualifications for the posts which were vacant after the expiry of his leave on personal grounds. The Ombudsman did not consider himself able to determine the amount of this compensation. He invited the parties to agree on the principle and the amount of a financial compensation. The Ombudsman therefore made the draft recommendation below.
- 2.4 With regard to the second claim, the Ombudsman noted that, according to the case law of the Court of Justice, the institution concerned cannot be held liable for any financial loss arising out of the official's decision to leave his employment before receiving notice of his reinstatement<sup>94</sup>. Article 40(4)(d) in fine indeed foresees that until effectively reinstated, the official shall remain on unpaid leave on personal grounds. The Ombudsman therefore considered that in the present case the Commission could not be held responsible for the complainant's unilateral decision to resign. Therefore the complainant's claim for compensation was not grounded, and no maladministration was found concerning this aspect of the case.

## CONCLUSION

According to the case-law of the Court of First Instance, the administration shall verify systematically, through a detailed examination, the abilities of the official awaiting reinstatement in relation to each vacant post corresponding to his grade.

In the present case, the Appointing Authority did not give any justification whatsoever for its conclusion that the complainant's abilities did not correspond to those required by the vacant posts. Also, with the exception of the 4 posts indicated by the complainant himself, the Commission made no reference to any particular vacant A5/A4 post out of the lists, nor gave a justification, even shortly, why the complainant could not be reinstated in one of those posts. The Commission based its judgement of the abilities of the complainant with regard to the vacant posts only on the complainant's curriculum vitae, which it considered itself to be too vague and sketchy, and without asking the complainant for more detailed information. Therefore, the Ombudsman concluded that the Commission failed to carry out the detailed examination, as required by the case-law of the Court of First Instance, of the complainant's abilities in relation to each vacant post corresponding to his grade. This failure constitutes an instance of maladministration capable of rendering the Commission liable to the complainant.

<sup>93</sup> Case 58/75, *Sergy v. Commission*, [1976] ECR 1139, paragraph 39.

<sup>94</sup> Case 292/87, *Pizzolo v. Commission*, [1988] ECR 5165.

In view of these conclusions (points 1.7 and 2.3), and given that it was not possible to find a friendly solution between the parties on this point, the Ombudsman made the following draft recommendation to the European Commission:

The Commission should compensate the complainant for the material damage he directly suffered as a result of the Commission's service related fault which is the failure to undertake a detailed examination of the complainant's qualifications for the posts which were vacant after the expiry of his leave on personal grounds.

### 3.7 DRAFT RECOMMENDATIONS ACCEPTED BY THE INSTITUTION

#### 3.7.1 The Council of the European Union

#### AN UP-TO-DATE LIST OF MEASURES ADOPTED IN THE FIELD OF JUSTICE AND HOME AFFAIRS

*Decision on complaint 1055/25.11.96/STATEWATCH/UK/IJH against the Council of the European Union*

#### **THE COMPLAINT**

On 22 November 1996, Mr B. complained to the Ombudsman that the Council does not maintain and make available to the public an up-to-date list of the measures which it adopts in the field of Justice and Home Affairs. He claimed that in the interests of informing citizens and conforming to democratic standards the Council should maintain such a list and make it available on request.

#### **THE DRAFT RECOMMENDATION**

By decision dated 8 October 1998, following an inquiry into the complaint and an attempt to achieve a friendly solution, the Ombudsman addressed the following draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the Ombudsman:<sup>95</sup>

The Council should make available to the public on request, in accordance with the provisions of Council Decision 93/731/EC, the list of all measures approved in the field of Justice and Home Affairs which is maintained by its General Secretariat.

Full details of the inquiry, the attempt to achieve a friendly solution and the draft recommendation are contained in the Ombudsman's decision of 8 October 1998, which is reported in the Annual Report for 1998 (section 3.6.1).

<sup>95</sup> Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, 1994 OJ L 113/15.



### **THE COUNCIL'S DETAILED OPINION**

The Ombudsman informed the Council that, according to Article 3 (6) of the Statute, it should send a detailed opinion before 31 January 1999 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

On 29 January 1999, the Secretary General of the Council sent to the Ombudsman the following detailed opinion which was adopted by the Council on 25 January 1999:

- 1 The Council accepts the Ombudsman's draft recommendation that it should make available to the public on request, in accordance with the provisions of Council Decision 93/731/EC, the list of all measures approved in the field of Justice and Home Affairs which is maintained by its General Secretariat.
- 2 The Council has taken the following measures to implement this recommendation:
  - The database on the Council's activities in the field of Justice and Home Affairs which was announced in the Council's letter of 13 July 1998 is now operational and accessible through the Internet (<http://ue.eu.int>). It allows at any time to obtain an up-to-date listing of the measures adopted by the Council in this area, either by date or by subject.
  - At present, the database contains the measures adopted by the Council in 1998. In due time, it will also cover the preceding years. In the meanwhile, a list of the measures adopted in the field of Justice and Home Affairs before 1998 may be obtained from the General Secretariat on request."

After careful examination of the Council's detailed opinion, the Ombudsman considered that the measures it describes were satisfactory to implement the draft recommendation.

The Council's detailed opinion was forwarded to the complainant, who informed the Ombudsman by telephone on 23 February 1999 that he was pleased with the outcome.

### **THE DECISION**

On 8 October 1998, the Ombudsman addressed the following draft recommendation to the Council, in accordance with Article 3 (6) of the Statute:

The Council should make available to the public on request, in accordance with the provisions of Council Decision 93/731/EC, the list of all measures approved in the field of Justice and Home Affairs which is maintained by its General Secretariat.

On 29 January 1999, the Council informed the Ombudsman of its acceptance of the draft recommendation and of the measures which it has taken to implement it. The measures described by the Council appeared to be satisfactory and the Ombudsman therefore closed the case.

### 3.7.2 The European Commission

#### A REGISTER OF COMMISSION DOCUMENTS

*Decision on complaint 633/97/PD against the European Commission*

##### **THE COMPLAINT**

In July 1997, Mr P. made two claims of maladministration against the European Commission.

The first claim was that the Commission's rules on public access to documents also apply to documents of certain committees which are involved in the Commission's implementation of Council legislation - so-called comitology committees - and that the Commission should not therefore automatically refuse to give access to such documents.

The second claim concerned the lack of a register for Commission documents. The complainant alleged that failure to establish such a register amounts to maladministration because it severely restricts the ability of citizens to make use of the rules on access to documents, laid down in Commission Decision 94/90, according to which the public shall have the widest possible access to Commission documents.

##### **THE INQUIRY**

###### **The Commission's opinion**

As regards the first claim, the Commission stated in summary that the committees in question could not be considered to be Commission committees, as the members of the committees were national representatives. Thus documents relating to the committees could not be considered to be Commission documents covered by the Commission Decision on public access to documents. The Commission also observed that the question of the status of documents relating to comitology procedures was the subject of pending court proceedings in case T-188/97, *Rothmans v Commission*.

As regards the second claim, the Commission stated that the Commission does not have an official document register which is open to the public. However, the Commission expressed understanding for the complainant's view that it is difficult for the public to gain access to documents if their existence is not known. The Commission would therefore study the proposal to introduce document registers.

###### **The complainant's observations**

In his observations, the complainant maintained his complaint. As concerns the pending court case, the complainant observed that he was not a party in that case.

## **FURTHER INQUIRIES**

Since the Commission did not consider its rules on public access to be applicable to comitology documents, the Ombudsman addressed the Council, in order to ask it for an opinion as to whether comitology documents are covered by the Council's rules on public access to documents.

### **The Council's opinion**

In its opinion, the Council stated, in substance, that the committees in question could not be considered to be Council committees and that, therefore, documents relating to the committees are not covered by Council Decision 93/731 on public access to Council documents. The Council added that normally it would not be physically in possession of the documents in question. The Council also drew the Ombudsman's attention to the pending case *Rothmans v. Commission*.

### **The complainant's observations**

In observations on the Council's opinion, the complainant maintained the complaint.

## **THE DECISION AND DRAFT RECOMMENDATION**

### **1 Access to comitology documents**

The Ombudsman concluded that no further inquiries into this aspect of the complaint were justified, because the issue of access to comitology documents was before the Court of First Instance in a pending case, T-188/97 *Rothmans International v. Commission*. In reaching this decision, the Ombudsman took into account that, although the complainant was not a party in the Rothmans case, his complaint does not concern any particular comitology documents, but rather the general question of whether the Commission's rules on public access apply to such documents. It appeared that this issue would fall to be determined by the Court of First Instance in dealing with the Rothmans case.

### **2 A Register of documents**

2.1 A basic principle of good administration is that a public authority should maintain an adequate register of documents it holds including the incoming and outgoing documents it holds. Such a register helps to ensure the consistency and continuity of the activities of the authority. A register also enhances the efficiency of the activities of the authority. Absence of a register could make it difficult to locate documents accurately and quickly. A register will also help ensuring that citizens get a timely reply to their submissions.

2.2 It is established case law that public access to documents forms part of the progressive affirmation of citizens' right to obtain knowledge of the information that a Community institution holds. The absence of a register of documents constitutes an obstacle to the exercise of this right; it is difficult for citizens to apply for access to documents whose

existence they ignore. This obstacle may be removed by virtue of the institution's power of internal organisation.

- 2.3 The fact that a document is included in a register does not automatically mean that the document is public. The register merely enables citizens to lodge a request for access to a given document. It is then for the institution to decide upon that request, under its rules on public access and confidentiality. Thus the creation of such a register does not stop the institution from respecting the confidential nature of a document.
- 2.4 Against this background, the Ombudsman found that the Commission's failure to keep a public register of documents constituted an instance of maladministration. Given that the maladministration did not concern a matter only related to the complainant, it did not appear appropriate to seek a friendly solution under Article 3 (5) of the Statute of the European Ombudsman.

In accordance with Article 3 (6) of the Statute of the European Ombudsman, the Ombudsman therefore made the following draft recommendation to the Commission:

The Commission should keep a public register of documents it holds.

The Ombudsman informed the Commission that, according to Article 3 (6) of the Statute, it should send a detailed opinion by 30 April 1999 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

### **The Commission's detailed opinion**

On 30 April 1999, the Commission sent to the Ombudsman the following detailed opinion:

The Commission shares the view of both Mr P. and the Ombudsman that the creation of a register of documents would give the public an indication of the documents that exist to which it can request access. It would also facilitate document search and increase the public impact of the policy on access to documents.

The Commission also believes that registers are an important way of informing the public about the institutions' activities and work in progress. Another useful tool in this respect has been the creation of the EUROPA server on the Internet. There is scope for developing this system further.

However, it is important to stress that the systems currently used by the Commission for registering documents are designed for administering incoming and outgoing mail and are not organised with a view to external distribution. Moreover, there is currently no uniform system of registering and archiving Commission documents. Document registration is completely decentralised and is the responsibility of each directorate-general and service.

As part of the implementation of Article 255 of the EC Treaty, which deals with access to documents, the Commission is studying the possibility of creating a public register which would in the first instance list documents in the categories most commonly requested, according to our statistics. Evidently, access would not be limited only to those documents included in the register, as this would be too restrictive.

The question of the creation of a register and the scope of its coverage will have to be put before the Commission in connection with the implementation of Article 255. In this context the Commission may also consider a revision of its registration system.

### The complainant's observations

The detailed opinion was forwarded to the complainant who responded that he did not regard it as satisfactory because it did not provide an unambiguous commitment to compile and maintain a register. He also mentioned that, at a conference in April 1999, a Commission official had refused the prospect of the Commission establishing a register. Finally he considered that the Commission's suggestion that it might begin with a register of documents which are frequently requested overlooks the possibility that the public would request many other important documents if only they came to its attention.

## THE DECISION

### 1 Comitology documents

- 1.1 The complainant claimed that Commission Decision 94/90<sup>96</sup> on public access to documents also applies to documents of certain committees which are involved in the Commission's implementation of Council legislation - so-called comitology committees - and that the Commission should not therefore automatically refuse to give access to such documents.
- 1.2 By decision dated 29 January 1999, the Ombudsman concluded that no further inquiries into this claim were justified, because the issue of access to comitology documents was before the Court of First Instance in a pending case, T-188/97 *Rothmans International v. Commission*. In reaching this decision, the Ombudsman took into account that, although the complainant was not a party in the Rothmans case, his complaint did not concern any particular comitology documents, but rather the general question of whether the Commission's rules on public access apply to such documents. It appeared that this issue would fall to be determined by the Court of First Instance in dealing with the Rothmans case.
- 1.3 On 19 July 1999, the Court of First Instance delivered judgement in the *Rothmans* case.<sup>97</sup> It held that, for the purposes of the Community rules on access to documents, comitology committees come under

<sup>96</sup> Commission Decision of 8 February 1994 on public access to Commission documents OJ 1994, L46/58.

<sup>97</sup> Case T-188/97 *Rothmans International v Commission*, judgement of 19 July 1999.

the Commission itself. It is therefore the Commission which is responsible for ruling on applications for access to documents of those committees under Decision 94/90.

- 1.4 It therefore appeared that the Court of First Instance has dealt with the question of principle, in a way which supports the claim made by the complainant.

## **2 A Register of Commission documents**

- 2.1 On 29 January 1999, the Ombudsman addressed the following draft recommendation to the Commission:

*The Commission should keep a public register of documents it holds.*

- 2.2 On 30 April 1999, the Commission responded with a detailed opinion which accepts the principle of a register of documents giving the public an indication of the documents that exist to which it can request access. The detailed opinion also identifies practical issues which must be dealt with before a register could be established.
- 2.3 Although the complainant did not consider the Commission's response to be satisfactory, the Ombudsman accepted that the Commission needs adequate time in which to deal with the practical issues involved in establishing a register of all the documents that exist to which the public can request access. The Ombudsman also noted in this context that the judgement of the Court of First Instance in *Rothmans International v. Commission* confirms that the Commission must also deal under Decision 94/90 with requests for public access to comitology documents. The Commission should therefore also include such documents in its register.
- 2.4 The Ombudsman noted with regret that the drafting of the Regulation foreseen by Article 255 of the EC Treaty, which establishes a Treaty right for citizens to have access to documents of the European Parliament, Council and Commission, was delayed by the resignation of the Commission. However, in view of paragraph 2.3 above, the Ombudsman considered it reasonable for the Commission to propose to implement the principle of a register of documents as part of its implementation of Article 255 EC.

The Ombudsman therefore considered the Commission's response to the draft recommendation to be satisfactory and closed the case.

### 3.8 QUERIES FROM NATIONAL OMBUDSMEN

#### REPAYMENT OF MILK SUPER LEVY

*Query from the Irish Ombudsman Q2/97/IJH*

##### **THE QUERY**

In June 1997, the Irish Ombudsman addressed a query to the European Ombudsman concerning the case of X, a farmer who had paid super-levy on his milk production. X was subsequently awarded a milk quota and so became entitled to repayment of the amount of the super-levy under Regulation 2055/93<sup>98</sup>. X requested compensation from the Irish Department of Agriculture, Food and Forestry for the loss suffered as a result of having to make the super-levy payment, but was advised by the Department that Regulation 2055/93 makes no provision for compensation. X complained to the Irish Ombudsman.

In the query to the European Ombudsman, the Irish Ombudsman made reference to the legal principle of unjust enrichment and to X's claim that the failure to pay compensation was unfair and an abuse of power. He requested the European Ombudsman to forward details of the complaint to the Council. Since the issues appeared to concern the correct application of Community law, the European Ombudsman proposed that the query be referred to the Commission. This proposal was accepted by the Irish Ombudsman.

##### **THE COMMISSION'S RESPONSE**

###### **The opinion dated 23 October 1997**

In its opinion dated 23 October 1997, the Commission stated that the determination of the right of X to compensation depended on the outcome of a pending case before the Court of First Instance concerning the liability of the Community institutions to pay compensation to so-called "SLOM III" milk producers.

###### **The complementary response dated 20 May 1998**

On 20 May 1998, the Commission sent a complementary response which referred to the judgement of the Court of First Instance in the in the above-mentioned case.<sup>99</sup> The judgement required the Council and Commission to pay damages for losses incurred as a consequence of the application of Community Regulations in the case of SLOM III producers. The Commission also referred to the likelihood that a Regulation providing under certain conditions for an offer of compensation to be made to the producers concerned would be adopted in the coming months.

<sup>98</sup> 1993 OJ L187/8 and corrigendum 1993 OJ L314/51.

<sup>99</sup> Judgement of 9 December 1997 in joined cases T-195/94 and T-202/94, *Friedhelm Quiller and Johann Heusmann v Council and Commission* [1997] ECR II-2247.



The Commission's complementary response also included the following points:

*"The complaint concerning [X] is not sufficiently detailed so as to enable the Commission to understand exactly the position of the complainant.*

*The Commission is therefore of the opinion that it would be useful to indicate to the Irish Ombudsman that it might be appropriate to inform [X] of the operation of the rules on time limitation which are referred to in the standard letter [sent to producers who have addressed applications to the Commission]. [X] may also wish to obtain advice from a producers organisation with a view to making an application to the Commission in order to preserve his rights..."*

*The Commission notes that no administrative approaches to it have ever been accomplished by [X].*

The Commission's complementary response was forwarded to the Irish Ombudsman.

### **THE IRISH OMBUDSMAN'S OBSERVATIONS**

On 8 January 1999, the Irish Ombudsman again wrote to the European Ombudsman about X's case, referring in particular to the conditions for waiver of the statutory time bar of five years for making a claim for compensation under Regulation 2330/98<sup>100</sup> (the Regulation foreseen in the Commission's complementary response dated 20 May 1998).

The letter stated that, from the evidence available, it appears that X did not make himself and the circumstances of his claim for compensation known to Community institutions before 1 August 1998 (the date on which the time bar commences) and is not therefore eligible to have his case considered under the Regulations.

The Irish Ombudsman pointed out that if X had made a postal claim or had instituted legal proceedings against the Council or Commission before 1 August 1998, he would have been entitled to have his case for compensation considered under the Regulation. The Irish Ombudsman expressed the view that:

- (i) X's original claim for compensation was notified to the Commission, via the European Ombudsman's office, before 1 August 1998; *and*
- (ii) such notification is reasonably to be regarded as the equivalent of making a postal claim or instituting legal proceedings.

Accordingly, the Irish Ombudsman considered that X should be able to benefit from the waiver of the statutory time bar.

The Irish Ombudsman requested that his further observations on X's case should be forwarded to the Commission. He also invited the European Ombudsman to make observations on the issue.

<sup>100</sup> 1998 OJ L 291/4.

### THE COMMISSION'S FURTHER RESPONSE

The Irish Ombudsman's observations were forwarded to the Commission. In its further response, the Commission refers to the procedural conditions for waiver of the time bar laid down by Article 7 of Regulation 2330/98.<sup>101</sup> It also made the following points:

“5 The complainant never addressed an application to one of the Community institutions referred to by the Regulation, nor did he bring an action before the Court.

6 In this situation the Commission considers that reasons of form and substance prevent it from regarding as equivalent to a postal claim or a legal proceeding the complaint addressed by [X] to the Irish and European Ombudsmen. Lastly, article 2.6 of the Statute of the European Ombudsman establishes that complaints submitted to the Ombudsman shall not affect time limits for appeals in administrative or judicial proceedings.”

### THE EUROPEAN OMBUDSMAN'S OBSERVATIONS

- 1 Although the Commission's further response refers to “*the complaint addressed by [X] to the Irish and European Ombudsmen*” X made no complaint to the European Ombudsman, who dealt with the case solely in the context of a query from the Irish Ombudsman.
- 2 The procedure for dealing with queries was agreed at the seminar for national Ombudsmen and similar bodies held in Strasbourg in September 1996.
 

*“The European Ombudsman will receive queries from national Ombudsmen about Community law and either provide replies directly, or channel the query to an appropriate Union institution or body for response.”*
- 3 The query procedure does not resemble the procedure of Article 177 EC, which provides for the Court of Justice to give preliminary rulings on questions of Community law raised in pending cases before

<sup>101</sup> 1. Compensation shall only be offered for the period for which the right to compensation is not time-barred.

2. For the purpose of determining the period for which compensation shall be offered:
  - (a) the date of interruption of the five-year time bar laid down by Article 43 of the Statute of the Court of Justice shall be the earliest of the following events:
    - in the case of an action brought before the Court of Justice or the Court of First Instance, the date on which the application is entered in its register,
    - in the case of an application addressed to a Community institution, the date of reception of such application by the Council or the Commission (whichever was the earlier) provided either that the applicant subsequently brought an action before the Court of First Instance within the two-month delay stipulated in Article 43 of the Statute of the Court of Justice, or that the Community institution accepted in writing that such application interrupted the time bar;
  - (b) the starting date of the compensation period shall be five years before the date of interruption of the time bar, but not before 2 April 1984 nor before the date on which the non-marketing or conversion undertaking expired;
  - (c) the closing date of the compensation period shall be 1 August 1993 or the date when the producer received a special reference quantity if earlier.

national courts. The Statute of the European Ombudsman explicitly provides that no authorities other than Community institutions and bodies come within his mandate. Although it could be argued that nothing prevents him providing an abstract interpretation of a Community law issue in a complaint pending before a national ombudsman, such an interpretation would in reality find either in favour or against the national authority concerned.

- 4 It is not to be excluded that the query procedure could lead to an inquiry by the European Ombudsman, either on his own initiative or on the basis of a complaint, into a possible instance of maladministration by a Community institution or body, including the institution or body to which a query has been channelled.
- 5 In the present case, the Commission's further response to the Irish Ombudsman's query does not appear to misinterpret or misapply the relevant provisions of Regulation 2330/98. Moreover, during the query procedure the Commission gave appropriate advice concerning the action which X needed to take in order to protect his rights. There appear, therefore, to be no grounds to justify an inquiry by the European Ombudsman into a possible instance of maladministration by the Commission.

## TAX BASE FOR THE CALCULATION OF VAT

### *Query Q4/98/ADB*

In the framework of a conference held in Verona (Italy) in September 1998, the European Ombudsman was transmitted a query by Mr. Fraizzoli, Ombudsman of the city of Verona. He wondered whether the fact that the tax base of VAT sometimes also includes other taxes is really legitimate. This question was of importance for several of his complainants.

In transmitting his query to European Ombudsman, the Ombudsman of Verona wanted to obtain an authoritative opinion from a European Institution. Since the question related to a very specific issue in the domain of indirect taxation, the European Ombudsman decided to ask the European Commission to provide him with a response.

In its answer to the European Ombudsman, which was transmitted to the Ombudsman of Verona, the Commission took stock of the applicable EU-legislation and case law, as well as of the Italian legislation. In summary the Commission explained that the situation mentioned by the Ombudsman of Verona neither infringed any of the above mentioned provisions, nor required any legislative intervention by the Commission.

**INTERPRETATION OF COMMISSION REGULATION 1251/70**

*Query from the Danish Ombudsman, Q1/99/PD*

**QUERY**

In February 1999, the Danish Ombudsman asked the European Ombudsman for his observations on a case which he was examining and which concerned Commission Regulation 1251/70, in particular Articles 2 (1) and 4 (2). Annexed to the letter was a legal opinion on the case, in an anonymous version, in which the Danish Ombudsman stated his provisional conclusion on the case. It appeared from the opinion that the Danish Ombudsman did not share the Danish authorities' interpretation of the Regulation in relation to the case in question.

In his letter, the Danish Ombudsman asked the European Ombudsman not to submit the case to any other authority, including the Commission, as the case contained sensitive information.

The European Ombudsman made this preliminary observation:

As the cooperation with national Ombudsmen is a matter which is particularly important to the European Ombudsman, he makes every effort to enhance it within the limits of his mandate.

The preamble of the Statute of the European Ombudsman provides:

*"...provision should be made for the possibility of cooperation between the Ombudsman and authorities of the same type in certain Member States, in compliance with the national laws applicable;"*

In continuation of that, Art 12 of the Implementing Provisions for the Statute provides:

*"The Ombudsman may work in conjunction with ombudsmen and similar bodies in the Member States with a view to enhancing the effectiveness both of his own inquiries and of those carried out by ombudsmen and similar bodies in the Member States and of making more effective provision for safeguarding the rights and interests of European citizens."*

On this basis, it is possible for the European Ombudsman to receive queries from national Ombudsmen about Community law and either provide replies directly, or channel the query to an appropriate Union institution or body for response. However, the European Ombudsman has no authority to engage in a procedure like the Art 177 procedure under the EC Treaty, by providing interpretation of Community law provisions in pending cases, which concern national authorities. Although one could argue that nothing hinders an abstract interpretation of the provisions in question by the European Ombudsman, such an interpretation would in reality find either in favour or against the national authority concerned. Due consideration has also to be given to the fact that the Statute of the European

Ombudsman explicitly provides that no other authorities than Community institutions and bodies come under his mandate.

Therefore, the European Ombudsman had to limit himself to undertaking research to provide the Danish Ombudsman with all necessary elements for the case he was examining.

Thereafter, the European Ombudsman observed:

The background to the Danish Ombudsman's letter was in brief the following:

A British citizen entered Denmark in July 1989 and took up employment in August 1989 which lasted until 31 January 1992. After that date he was involuntarily unemployed and subsequently he became permanently disabled because of diabetes. He considered himself entitled to remain in Denmark. He based this entitlement on the Article 2 (1) letter b) read in combination with Article 4 (2) of Regulation 1251/70. Article 2 (1) of the Regulation provides:

*"1 The following shall have the right to remain permanently in the territory of a Member State:*

*a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of the Member State for entitlement ...*

*b) a worker who, having resided continuously in the territory of that State for more than two years, ceases to work there as an employed person as a result of a permanent incapacity to work. If such incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, no condition shall be imposed as to the length of residence;*

*c) a worker who, after three years' continuous employment and residence in the territory of that State, works...."*

Article 4 (2) of the Regulation provides:

*"Periods of involuntary unemployment, duly recorded by the competent employment office, and absences due to illness or accident shall be considered as periods of employment within the meaning of Article 2 (1)."*

It appeared from the legal opinion annexed to the Danish Ombudsman's letter that in examining the case of the British citizen, he reached the provisional conclusion that Article 4 (2) has as a consequence that the worker, concerned by Article 2 (1) letter b), may be involuntarily without a job, when the permanent incapacity to work occurs. Thus, Article 2 (1) should grant such a worker the right to remain permanently in Denmark. The opinion contained a thorough examination of the case law and literature. It was stated that there is no case law on the specific question and thus, the

Danish Ombudsman reached his conclusion on the basis of the general parameters for the interpretation of provisions concerning the right to free movement for persons, i.e. the provisions shall be construed broadly and the exceptions to the right shall be construed narrowly.

The European Ombudsman's comments on this were as follows:

Council Directive 75/34 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14/10) contains identical provisions as the ones in question. The European Ombudsman therefore also examined whether there was any case law or literature on the problem which preoccupied the Danish Ombudsman in relation to the provisions of that Directive.

The result of the European Ombudsman's research was that there is no case law of the Community Courts which directly takes a stand on the question whether the provisions in question of Regulation 1251/70 or of Directive 75/34 should be interpreted so that they cover such a situation as the one of the British citizen in question. Neither were there any pending cases concerning the question by 1 April 1999, nor did the European Ombudsman have any knowledge of any Commission practice on the provisions, for instance as reflected in the Commission's replies to questions of MEPs. Legal literature at the library of the Court of Justice had been consulted. No literature dealing with the question had been found. Although preparatory works have a very limited role as a source of law when the fundamental rights of the Treaty are concerned, the Commission's explanatory memorandum to the proposal for Regulation 1251/70 was also examined. There appeared to be no stand on the specific questions that interested the Danish Ombudsman. However, the European Ombudsman drew the attention to a passus in the explanatory memorandum which could have a bearing on the question.

### 3.9 OWN INITIATIVE INQUIRY BY THE OMBUDSMAN

#### **OWN-INITIATIVE INQUIRY ON PUBLIC ACCESS TO DOCUMENTS HELD BY THE COMMUNITY PLANT VARIETY OFFICE, THE EUROPEAN AGENCY FOR SAFETY AND HEALTH AT WORK, EUROPOL AND THE EUROPEAN CENTRAL BANK**

##### ***THE REASONS FOR THE INQUIRY***

According to Article 195 EC, the European Ombudsman may conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of Community institutions and bodies.

In June 1996, the Ombudsman began an own-initiative inquiry (616/PUBAC/F/IJH) into public access to documents held by Community institutions and bodies other than the Council and the Commission, which

had already adopted their own, publicly available, rules governing public access to their documents.<sup>102</sup>

The predecessor of the European Central Bank (ECB), the European Monetary Institute (EMI), was included in the inquiry.

On 20 December 1996, the Ombudsman adopted a decision which considered that failure to adopt, and to make easily available to the public, rules governing public access to documents could constitute an instance of maladministration. The Ombudsman's decision included the following draft recommendations:

- 1 The institutions and bodies should adopt rules concerning public access to documents within three months;
- 2 The rules should apply to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality;
- 3 The rules should be made easily available to the public.

The detailed opinions which were subsequently sent to the Ombudsman, in accordance with Article 3 (6) of the Statute of the Ombudsman, showed that nearly all of the institutions and bodies had adopted rules governing public access to documents.

On 15 December 1997, the Ombudsman submitted a special report to the European Parliament, which adopted a Resolution congratulating the Ombudsman on the initiative and special report and welcoming the action in favour of transparency.<sup>103</sup>

The Ombudsman became aware of four bodies which became operational after the closure of own-initiative inquiry 616/PUBAC/F/IJH: the Community Plant Variety Office (CPVO), the European Agency for Safety and Health at Work (EASHAW), the European Police Office (Europol) and the European Central Bank (ECB).

In April 1999, the Ombudsman began a further own-initiative inquiry into public access to documents held by these four bodies.

The inquiry was closed as regards the CPVO, EASHAW and the ECB following the adoption by these three bodies of rules about public access to documents. The relevant decisions are set out below. As regards Europol, the Ombudsman made draft recommendations, which are also set out below.

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<sup>102</sup> Council and Commission joint Code of Conduct (OJ 1993 L 340/ 41); Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340/43); Commission Decision of 8 February 1994 on public access to Commission documents (OJ 1994 L 46/58).

<sup>103</sup> OJ 1998 C 292/170; A4-0265/98.



*Decision closing own-initiative inquiry OI/1/99/IJH as regards the European Agency for Safety and Health at Work*

### **THE INQUIRY**

On 7 April 1999, the Ombudsman wrote to the Director of the European Agency for Safety and Health at Work to request information about its situation as regards public access to documents; whether it has adopted rules on the matter and if so whether the rules are easily available to the public.

#### **The opinion of the European Agency for Safety and Health at Work**

The Agency informed the Ombudsman that, in June 1998, it had adopted rules on public access to documents which are aligned with the European Commission's rules. The Agency enclosed a copy of its decision ADM/98/1 dated 16 June 1998 establishing rules on freedom of information and protection of privacy and personal data. The decision consists of seven Articles, preceded by an explanatory memorandum of thirteen paragraphs.

Article 1 (2) defines "Agency documents" to mean "any existing written text or information made available on the Internet, whatever its format containing existing data and issued by the European Agency for Safety and Health at Work." Article 1 (3) makes specific provision for access to internal documents of the Agency, defined as documents which are "not finished or not destined to be published." The inclusion of the words "issued by" appears to limit the possibility of public access to documents of which the Agency is not the author (the "authorship rule"). This is confirmed by paragraph 9 of the explanatory memorandum.

Article 2 provides for applications to be made in writing to the Director of the Agency. Applications must be made in a sufficiently precise manner and must contain information enabling the particular document requested to be identified. Where necessary, the applicant shall be asked for further details. Applicants do not have to prove an interest.

Article 3 provides for applicants to have access either by consulting the document on Agency's premises after making an appointment, or by having a copy sent at his or her own expense. A fee may be charged to cover the cost of photocopies exceeding 30 pages, or for information provided in other formats.

Article 4 establishes a procedure for applications which is analogous to that under the Commission and Council rules. Applications are to be dealt with under the responsibility of the Director of the Agency, within one month. A negative decision must be reasoned. Applicants may apply to the Chairperson of the Administrative Board for review of a negative decision. The decision on the review shall be taken as soon as possible and within two months at the latest. If the application is rejected, the decision shall state the grounds on which it is based. At the same time, applicants shall be informed of the possibility of referring the matter to the Ombudsman pursuant to the provisions of Article 195 EC.

Article 5 provides for exceptions to the general right of access. The exceptions are in substance the same as those contained in the Council and Commission rules on access to documents.

Article 6 provides for review of the Decision after two years of operation. In preparation for that review, the Director shall submit in due time a report to the Administrative Board on the implementation of the Decision.

Article 7 provides that the decision shall take effect on the day of its adoption by the Administrative Board. It also requires the Decision to be published in the *Official Journal* and to be made available to the public.

The Agency also informed the Ombudsman that the decision is accessible on the its website (<http://agency.osha.eu.int/publications/other/infofreedom/>) and will soon be published in the *Official Journal*.

## THE DECISION

### 1 The adoption of rules on public access to documents

- 1.1 The Ombudsman informed the European Agency for Safety and Health at Work of a draft recommendation, made in a previous own-initiative inquiry, that Community institutions and bodies should adopt rules concerning public access to documents.
- 1.2 The Agency informed the Ombudsman of its Decision ADM/98/1 which came into effect on 16 June 1998. The Decision contains rules and procedures governing public access to Agency documents.
- 1.3 There is therefore no evidence of maladministration by the Agency in relation to the adoption of rules on public access to documents.

### 2 Making the rules easily available to the public.

- 2.1 The Ombudsman informed the European Agency for Safety and Health at Work of a draft recommendation, made in a previous own-initiative inquiry that rules on access to documents should be made easily available to the public.
- 2.2 The Agency's Decision ADM/98/1 requires the Decision to be published in the *Official Journal* and made available to the public. The Decision is published on the Agency's website (<http://agency.osha.eu.int/infofreedom/>).
- 2.3 There is therefore no evidence of maladministration by the Agency in relation to making its rules on access to documents easily available to the public.

## CONCLUSION

In view of the above, there appears to be no maladministration by the European Agency for Safety and Health at Work. The Ombudsman therefore closed own-initiative inquiry OI/1/99/IJH as regards the Agency.

### FURTHER REMARKS

The Ombudsman notes that the rules adopted by the European Agency for Safety and Health at Work, like those of the Council and the Commission, limit the possibility of public access to documents of which it is not the author (the “authorship rule”).

Although it appears to have no equivalent in comparable national legislation, it seems that the present state of Community law allows Community institutions and bodies to include the authorship rule in their rules on public access to documents. The Ombudsman notes, however, that the Court of First Instance has held that the authorship rule as adopted by the Commission must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency.<sup>104</sup>

*Decision closing own-initiative inquiry OI/1/99/IJH as regards the European Central Bank*

### THE INQUIRY

On 7 April 1999, the Ombudsman wrote to the President of the ECB to request information about its situation as regards public access to documents; whether it has adopted rules on the matter and if so whether the rules are easily available to the public.

#### The opinion of the European Central Bank

The ECB informed the Ombudsman that, on 3 November 1998, it adopted a decision concerning public access to documentation and the archives of the European Central Bank (ECB/1998/12). The ECB enclosed a copy of the decision and drew the Ombudsman’s attention to the following part of its preamble:

*“Whereas the European Ombudsman issued a Decision in the own initiative inquiry into public access to documents; whereas the recommendations of that Decision applied to the EMI only in relation to administrative documents; whereas the same limitations of the scope of application of the Decision are applicable to the ECB;”*

The ECB also informed the Ombudsman that it had sent decision ECB/1998/12 to the Office for Official Publications with a view to publication in the *Official Journal*.

### FURTHER INQUIRIES

The Ombudsman carefully examined the rules adopted by the ECB, which are based on those previously adopted by the European Monetary Institute (EMI).<sup>105</sup> The Ombudsman also noted that:

- unlike the Commission and Council rules on public access, the ECB’s rules do not contain any express provision restricting the pos-

<sup>104</sup> Case T-188/97 *Rothmans International v Commission*, Judgement of 19 July 1999, paragraph 55.

<sup>105</sup> 1998 OJ L 90/43.

sibility of public access to documents of which it is not the author (the “authorship rule”);

- the ECB’s rules relate to “administrative documents”, defined by Article 1.2 of ECB decision ECB/1998/12 to mean “*any record... which relates to the actual organisation and functioning of the ECB*”;
- the limitation of the ECB’s rules to “administrative documents” could have a similar effect in practice to the authorship rule, since a document of which the ECB is not the author seems unlikely to relate to the actual organisation and functioning of the ECB.

The Ombudsman is aware that the functions of the ECB are different from those of the EMI, in that the Governing Council of the ECB formulates the monetary policy of the Community.<sup>106</sup> He is also aware that the question of the availability of the minutes of ECB monetary policy meetings is a subject of public interest and discussion and therefore considers it important that European citizens should be clearly informed of the rules which would apply to any requests from the public for access to such minutes.

The Ombudsman therefore wrote again to the ECB, noting that Article 10.4 of the Statute of the ESCB/ECB provides that the proceedings of the meetings of the Governing Council of the ECB shall be confidential, but that the Governing Council may decide to make the outcome of its deliberations public. The Ombudsman also pointed out that although the preamble to the ECB’s decision ECB/1998/12 refers to the above-mentioned Article 10.4 of the Statute of the ESCB/ECB, the Decision does not expressly state that it applies to the minutes of monetary policy meetings.

The Ombudsman therefore requested the ECB to clarify the rules which would apply to any requests from the public for access to such minutes.

### The ECB’s reply

In its reply, the ECB pointed out that the draft recommendations made to the EMI in the Ombudsman’s previous own-initiative inquiry (616/PUBAC/F/IJH) concerned only administrative documents.

The ECB also stated that Article 10.4 of the Statute of the ESCB/ECB “*defines the limits of transparency according to the Treaty, in particular establishing clearly the confidentiality of the proceedings.*”

As regards the scope of application of decision ECB/1998/12, the ECB referred to Article 1.1 of the decision which reads:

*“the public shall have access to documentation and the archives of the ECB with regard to administrative documents in accordance with the provisions of this decision.”*

The ECB also referred to the definition of the term “administrative document” contained in Article 1.2 of decision ECB/1998/12 (“any record... which relates to the actual organisation and functioning of the ECB”) and

<sup>106</sup> Article 12.1 of the Statute of the ESCB/ECB.

expressed the view that this “*clearly does not include minutes of Governing Council meetings on monetary policy issues.*”

The ECB also informed the Ombudsman of the publication of decision ECB/1998/12 in the *Official Journal*.

### The Ombudsman’s response

The Ombudsman responded to the above reply from the ECB by addressing a further letter to the President of the ECB.

As regards the ECB’s remarks concerning the Ombudsman’s earlier own-initiative inquiry, the Ombudsman pointed out that, subsequent to the closure of that inquiry, the Court of First Instance has drawn a clear distinction between, on the one hand, questions of competence to review the legality of measures adopted and, on the other hand, competence in the matter of public access to those measures.<sup>107</sup>

As regards the ECB’s claim that Article 10.4 of the Statute of the ESCB/ECB “*defines the limits of transparency according to the Treaty, in particular establishing clearly the confidentiality of the proceedings*”, the Ombudsman pointed out that in fact the Article expressly foresees the possibility that the Governing Council “*may decide to make the outcome of its deliberations public.*”

As regards the ECB’s claim that the definition of the term administrative document in its decision ECB/1998/12 (“any record... which relates to the actual organisation and functioning of the ECB”) does not include minutes of Governing Council meetings on monetary policy issues, the Ombudsman made the following points:

*“The Ombudsman is not aware of any other rules adopted by the ECB concerning public access to minutes of Governing Council meetings on monetary policy issues. In the absence of other rules, exclusion of such minutes from the ambit of the ECB’s decision of 3 November 1998 would appear to operate as an exception to the general principle, referred to in [the aforementioned decision] of giving citizens the greatest possible access to information.*

*The Ombudsman notes that the Decisions of the Council and the Commission on public access to documents create rights of access to the documents of those institutions and that the correct interpretation of those Decisions is a matter of law, on which the highest authority is the Court of Justice. The Ombudsman also notes the recent case-law which establishes that, where a general principle is established and exceptions to that principle are laid down, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle.<sup>108</sup>*

<sup>107</sup> Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

<sup>108</sup> Case T-105/95 *WWF UK v Commission* [1997] ECR II-313; Case T-124/96 *Interporc v Commission* [1998] ECR II-231; Case T-188/97 *Rothmans International v Commission*, judgement of 19 July 1999.

*It does not seem obvious in this context that the minutes of Governing Council meetings on monetary policy issues could be considered to fall outside the category of documents "related to the functioning of the ECB." The ECB's Decision of 3 November 1998 should therefore, in the light of the above-mentioned case-law, also be considered to apply to minutes of Governing Council meetings on monetary policy issues."*

The Ombudsman concluded by pointing out that it is for the Bank to apply its rules, including the exceptions provided for in Article 4 of its decision ECB/1998/12, to such requests as it may receive from the public for access to documents.

## **THE DECISION**

### **1 The adoption of rules on public access to documents**

- 1.1 The Ombudsman informed the European Central Bank of a draft recommendation, made in a previous own-initiative inquiry, that Community institutions and bodies should adopt rules concerning public access to documents. In reply, the ECB informed the Ombudsman of its decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank.
- 1.2 The Ombudsman is aware of the case-law establishing that, where a general principle is established and exceptions to that principle are laid down, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle.<sup>109</sup> The Ombudsman considers that, in the light of the above-mentioned case-law, ECB decision ECB/1998/12 should be considered also to apply to the minutes of meetings on monetary policy issues. Naturally it is for the Bank to apply its decision ECB/1998/12, including the exceptions provided for in its Article 4, to such requests as it may receive from the public for access to documents.
- 1.3 There is therefore no evidence of maladministration by the ECB in relation to the adoption of rules on public access to documents.

### **2 Making the rules easily available to the public.**

- 2.1 The Ombudsman informed the European Central Bank of a draft recommendation, made in a previous own-initiative inquiry, that rules on access to documents should be made easily available to the public.
- 2.2 The ECB informed the Ombudsman that its decision ECB/1998/12 is published in the *Official Journal* of 28 April 1999, L 110 p. 30.

<sup>109</sup> Case T-105/95 *WWF UK v Commission* [1997] ECR II-313; Case T-124/96 *Interporc v Commission* [1998] ECR II-231; Case T-188/97 *Rothmans International v Commission*, judgement of 19 July 1999.

2.3 There is therefore no evidence of maladministration by the ECB in relation to making its rules on access to documents easily available to the public.

### **CONCLUSION**

In view of the above, there appeared to be no maladministration by the European Central Bank. The Ombudsman therefore closed own-initiative inquiry OI/1/99/IJH as regards the ECB.

*Decision closing own-initiative inquiry OI/1/99/IJH as regards the Community Plant Variety Office*

### **THE INQUIRY**

On 7 April 1999, the Ombudsman wrote to the President of the Community Plant Variety Office to request information about its situation as regards public access to documents; whether it has adopted rules on the matter and if so whether the rules are easily available to the public.

#### **The opinion of the Community Plant Variety Office**

The President of the CPVO informed the Ombudsman that the legislation governing its activities specifies which documents and material are to be open to public inspection and which are to be made available only to persons able to satisfy the Office that they have a “legitimate interest” therein.

The President of the CPVO also stated that the Office had prepared a draft Decision of its Administrative Council establishing rules in relation to public access to documents of the Office, based closely on the text of the European Commission’s rules. The draft decision would be presented to Administrative Council of the CPVO at its next meeting, in September 1999. Once adopted, the Decision would be made generally available and published on the CPVO website.

On 23 November 1999, the President of the CPVO forwarded to the Ombudsman a copy of the Decision of the Administrative Council of the CPVO establishing rules on working methods of the CPVO in relation to public access to documents of the Office.

The Ombudsman carefully examined the Decision, which consists of eight Rules.

Rule 1 defines “document” to mean “any existing written text produced by the Office in whatever medium which is not already covered by existing legal provisions allowing access or requiring confidentiality”. A footnote states that “Where a document held by the Office was not produced by the Office but by a natural or legal person, a Member State, another Community institution or any other national or international body, the application must be sent to the author.”

Rule 2 provides for applications to be addressed to the Office in writing. Applications must be sufficiently precise to enable the document in relation to which access is sought to be identified and where appropriate accompanied by the appropriate fee (see Rule 5 below).



Rule 3 establishes the procedure for dealing with applications. The decision to grant or refuse access must be made within one month. In the case of a refusal, the applicant has one month in which to apply to the Chairman of the Administrative Council for review of the refusal, failing which the application is deemed to have been withdrawn. If the Administrative Council upholds the refusal of access, the decision must give reasons and inform the applicant of possibilities of redress by complaint to the European Ombudsman or to the Commission under article 44(3) of Council Regulation (EC) No 2100/94.

The Ombudsman notes that there is express provision for reasons to be given for a refusal of access only on appeal to the Administrative Council. However, as a matter of good administration, reasons should also be given for an initial refusal of access.<sup>110</sup>

Rule 4 provides that where access is granted, the applicant may either consult the document at the premises of the Office, by prior arrangement, or receive a copy.

Rule 5 provides for a flat rate fee of € 5 for a copy of a document of up to 10 pages, and an additional fee of € 0.5 for each additional page.

Rule 6 provides for exceptions, which are in substance the same as those contained in the Council and Commission rules on access to documents.

Rule 7 provides for the rules to be published in the Official Journal at the earliest opportunity following their entry into force.

The Ombudsman notes that the CPVO has a website (<http://www.cpvo.fr>) where the rules could also be published.

Rule 8 provides that the rules shall apply from the day following the date of the meeting of the Administrative Council at which they are established.

The Ombudsman understands that the Decision of the Administrative Council of the CPVO was adopted at its meeting of 28 and 29 September 1999 and that the rules therefore came into force on 30 September 1999.

## THE DECISION

### 1 The adoption of rules on public access to documents

1.1 The Ombudsman informed the Community Plant Variety Office (CPVO) of a draft recommendation, made in a previous own-initiative inquiry, that Community institutions and bodies should adopt rules concerning public access to documents.

1.2 The CPVO informed the Ombudsman of legal provisions which provide for the possibility of public inspection of :

- the Register of Applications for Community Plant Variety Rights;

<sup>110</sup> See Article 18 of the European Ombudsman's Code of Good Administrative Behaviour.

- the Register of Community Plant Variety Rights; and
  - in case of a legitimate interest, documents relating to applications or to variety rights already granted.<sup>111</sup>
- 1.3 The CPVO also informed the Ombudsman of the Decision adopted by its Administrative Council at its meeting on 28 and 29 September 1999. The Decision establishes rules on working methods of the CPVO in relation to public access to documents produced by the Office.
- 1.4 There is therefore no evidence of maladministration by the CPVO in relation to the adoption of rules on public access to documents.

## **2 Making the rules easily available to the public.**

- 2.1 The Ombudsman informed the Community Plant Variety Office of a draft recommendation, made in a previous own-initiative inquiry, that rules on access to documents should be made easily available to the public.
- 2.2 The Decision adopted by the Administrative Council of the CPVO requires the rules to be published in the Official Journal at the earliest opportunity following their entry into force.
- 2.3 There is therefore no evidence of maladministration by the CPVO in relation to making its rules on access to documents easily available to the public.

## **CONCLUSION**

In view of the above, there appears to be no maladministration by the Community Plant Variety Office. The Ombudsman therefore closed own-initiative inquiry OI/1/99/IJH as regards the Office.

## **FURTHER REMARKS**

The Ombudsman notes that the rules adopted by the Community Plant Variety Office, like those of the Council and the Commission, limit the possibility of public access to documents of which it is not the author (the “authorship rule”).

Although it appears to have no equivalent in comparable national legislation, it seems that the present state of Community law allows Community institutions and bodies to include the authorship rule in their rules on public access to documents. The Ombudsman notes, however, that the Court of First Instance has held that the authorship rule as adopted by the Commission must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency.<sup>112</sup>

<sup>111</sup> Council Regulation 2100/94 1994 L/227/1, Articles 87-88; Commission Regulation 1239/95, 1995 L/121/37, Title V, Articles 82-86. NB These Regulations also make provision for the possibility of public inspection of the growing of varieties for the purposes of their technical examination or for purpose of verifying their continuing existence.

<sup>112</sup> Case T-188/97 *Rothmans International v Commission*, Judgement of 19 July 1999, paragraph 55.

The Ombudsman also notes that the Regulations governing the CPVO already provide for access to certain categories of documents (relating to applications for grant of a Community Plant variety right or to variety rights already granted) which include documents of which the CPVO is not the author.

*Draft recommendations to Europol in own initiative inquiry OI/1/99/IJH*

## THE INQUIRY

By letter dated 30 April 1999, the Ombudsman informed Europol of the own-initiative inquiry launched under Article 195 EC.<sup>113</sup> He requested information about the situation of Europol as regards public access to documents; in particular whether Europol has rules on the matter and, if so, whether the rules are easily available to the public.

### Europol's opinion

In its opinion, dated 15 July 1999, Europol informed the Ombudsman of

- the general rules concerning the confidentiality of information processed by Europol, laid down by the Council<sup>114</sup> acting under Article 31 (1) of the Europol Convention,<sup>115</sup> and
- the Security Manual, foreseen by Article 6 of the above-mentioned general rules, which was adopted by Europol's Management Board on 28 January 1999.

Europol's opinion also referred to provisions of the Europol Convention which give individuals the right of access to data relating to them stored by Europol<sup>116</sup> and to the efforts which Europol makes to inform the public about its activities, in particular through its website (<http://www.europol.eu.int>).

Europol's opinion, signed by its Director, expressed willingness to consider the possibility for Europol to adopt general rules on public access in the near future and to make those rules publicly available. The Director stated that in order to achieve this he would discuss the issue with the Council Presidency with a view to bringing the matter to the attention of the Europol Management Board. He undertook to inform the Ombudsman of progress before the end of 1999.

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<sup>113</sup> Article 41 of the Treaty on European Union, as amended by the Treaty of Amsterdam, provides for Article 195 to be one of the Articles of the EC Treaty which shall apply to the provisions relating to the areas referred to in Title VI of the Treaty on European Union (police and judicial cooperation in criminal matters). Title VI of the TEU includes the provisions relating to Europol and to the Council's promotion of cooperation through Europol.

<sup>114</sup> Council Act of 3 November 1998 adopting rules on the confidentiality of Europol information, 1999 OJ C 26/10.

<sup>115</sup> 1995 OJ C 316/1.

<sup>116</sup> Europol Convention, Article 19.

### **FURTHER INQUIRIES**

After carefully considering Europol's opinion, the Ombudsman addressed a further letter to its Director on 24 September 1999, welcoming Europol's positive attitude towards the adoption of rules on public access to documents.

The Ombudsman pointed out that, for any modern European administration, it is important to have the confidence and the support of citizens. For Europol, such confidence is even more important in carrying out its mission to make a significant contribution to the European Union's law enforcement action against organised crime, with a particular emphasis on the criminal organisations involved. It is therefore vital that from the beginning of its activity Europol should comply fully with the principles of good administrative behaviour.

The Ombudsman noted that the very nature of police work necessarily involves handling information and documents which, in the interests of citizens, must be treated confidentially. However this fact should not prevent Europol adopting rules on public access to documents, adapted to its own situation, as other institutions and bodies have done.

The Ombudsman also considered the timescale proposed by Europol for the adoption of rules to be reasonable, taking into account that it formally took up its activities only on 1 July 1999.<sup>117</sup> He therefore requested Europol to provide further information as soon as possible about its progress towards the adoption of rules before the end of 1999.

On 24 November 1999, Europol informed the Ombudsman that its Management Board is in agreement that rules on public access to documents should be established. The Management Board has asked Europol to prepare proposals based on the rules already established by other European Union institutions, notably the Council. There was also agreement that particular attention should be paid to ensuring the compatibility of Europol's rules with the rules of other institutions to which Europol documents may be sent and to ensuring that, in principle:

- (i) no access will be granted to personal data processed by Europol, since the Convention already specifies the procedures to be followed in such cases, nor access to personal data concerning Europol personnel;
- (ii) no access will be granted to protectively marked documents;
- (iii) no access will be granted to any information which may jeopardise ongoing investigations.

As regards (i), it should be recalled that the Ombudsman's own-initiative inquiry is limited to rules on access to documents that are not already covered by existing legal provisions allowing access or requiring confidentiality.

As regards (ii) and (iii), the Ombudsman notes that Europol's Management Board has referred to the existing Council rules on public access to docu-

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<sup>117</sup> Communication concerning the taking up of activities of Europol, 1999 OJ C 185/1.

ments as a possible model for drafting rules for Europol. The Ombudsman also notes that Article 4 of the Council rules specifically mentions “investigations” as an element of the mandatory public interest exception to the right of access.

The Ombudsman also notes that Europol’s letter of 24 November 1999 does not contain a definite timetable for the adoption of rules.

## **THE DECISION**

### **1 The adoption of rules on public access to documents**

- 1.1 The Ombudsman informed the European Police Office (Europol) of a draft recommendation, made in a previous own-initiative inquiry carried out under Article 195 EC, that Community institutions and bodies should adopt rules concerning public access to documents, within three months. At the same time, the Ombudsman informed Europol of the provisions of Article 41 TEU, as amended by the Treaty of Amsterdam, according to which Article 195 is one of the Articles of the EC Treaty which shall apply to the provisions relating to the areas referred to in Title VI TEU (police and judicial cooperation in criminal matters).
- 1.2 Europol informed the Ombudsman of existing rules which govern the confidentiality of information processed by Europol and individuals’ rights of access to data relating to them stored by Europol. Europol also informed the Ombudsman that its Management Board is in agreement that rules on public access to documents should be established and that the Management Board has asked Europol to prepare proposals based on the rules already established by other European Union institutions, notably the Council.
- 1.3 During the Ombudsman’s inquiry, in which Europol cooperated, no evidence was presented that it would be impractical or unduly burdensome for Europol to comply fully with the principles of good administrative behaviour by adopting, and making easily available to the public, rules governing public access to documents. It appears that Europol’s Management Board favours the adoption of rules based on those adopted by other European Union institutions, notably the Council.

### **2 Timetable for the adoption of rules**

- 2.1 The Ombudsman informed Europol that the draft recommendations made in the above-mentioned previous own-initiative inquiry established a deadline of three months for the adoption of rules by the institutions and bodies concerned. During the Ombudsman’s inquiry, in which Europol cooperated, no evidence was presented that it is necessary to envisage a longer timetable for the adoption of rules by Europol.
- 2.2 In its opinion dated 15 July 1999, it appeared that Europol envisaged the adoption of rules on public access to documents before the end of

1999, but further information provided by Europol on 24 November 1999 contains no definite timetable for the adoption of rules.

- 2.3 The principles of good administration require that decisions should be made within a reasonable time. To avoid unnecessary delay, it is therefore appropriate to establish a definite timetable for the adoption of rules.

### ***DRAFT RECOMMENDATIONS***

In view of the above, the European Ombudsman makes the following draft recommendations to Europol:

- 1 Europol should adopt rules concerning public access to documents within three months. The rules could be based on those already adopted by the Council, including the exceptions contained therein.
- 2 The rules should apply to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality.
- 3 The rules should be made easily available to the public.

Europol will be informed of these draft recommendations. In accordance with Article 3 (6) of the Statute of the Ombudsman, Europol shall send a detailed opinion within three months (i.e. by 31 March 2000). The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the recommendations.

#### 4 RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

The Ombudsman maintains a constant dialogue with the other institutions and bodies of the European Union. In order to secure the rights of European citizens, regular contacts are necessary to ensure an effective cooperation, good working relations and mutual trust.

On 2 March, Mr SÖDERMAN was invited to a meeting with Mr Carlo TROJAN, Secretary General of the European Commission, Mr Jürgen TRUMPF, Secretary General of the Council of the European Union and Mr Julian PRIESTLEY, Secretary General of the European Parliament. They discussed the question of a code of good administrative behaviour.

##### 4.1 THE EUROPEAN PARLIAMENT AND THE COMMITTEE ON PETITIONS

On 13 January, Mr SÖDERMAN, accompanied by Mr Peter DYRBERG and Mr Ian HARDEN met with the College of Quaestors who invited him to an exchange of views. They discussed the possibility of an internal complaints' procedure for Members of the European Parliament.

On the same day, Mr SÖDERMAN and Mr HARDEN met with MEP Edith MÜLLER, the rapporteur for the Ombudsman's budget for the year 2000.

Also on 13 January, Mr SÖDERMAN and Mr HARDEN met with Mr Christian COINTAT, Director General of DGV of the European Parliament and Mrs Brigitte NOUAILLE-DEGORCE, Head of the Personnel Division (DGV).

On 14 January, Mr SÖDERMAN and Mr HARDEN had a meeting with President GIL-ROBLES. They discussed the presentation of the Ombudsman's 1998 Annual Report to the European Parliament.

On 8 February, Mr Harald RØMER, Director General of DG I met with the Ombudsman. They discussed issues relating to the transition period between the first and the second Ombudsman mandates.

On 17 February, Mr SÖDERMAN presented his Annual Report for the year 1998 to the Committee on Petitions in Brussels.

On 11 March, Mrs Laura VIQUEIRA and Mrs Ildegarda DE SIMONE DIEHL of DG V visited the Ombudsman and discussed ways of informing newly recruited civil servants on the role of the European Ombudsman in the framework of training programmes.

On 24 March, Mr SÖDERMAN gave a speech at an inter-parliamentary conference on the creation of an area of freedom, security and justice organised by the European Parliament's Committee on Civil Liberties and Internal Affairs, with the participation of national Members of Parliament and non-governmental organisations. The subjects discussed were



European civil rights, anti-discrimination policies, immigration, asylum, visas, police and judicial co-operation. Other speakers included Mrs GRADIN, Member of the Commission, Mrs D'ANCONA, Chairman of the Committee, the Ministers of Justice and Interior of Germany and Finland and Mr FENNELLY, Advocate General at the European Court of Justice.

On 14 April, the Ombudsman presented his Annual Report for the year 1998 to the European Parliament during its plenary session in Strasbourg. (see 6.1)

On 26 April, Mr SÖDERMAN participated in a conference on transparency and access to documents entitled "Opening doors for democracy in Europe". The conference was organised jointly by the PSE, ELDR and Green Group of the European Parliament as well as the European Federation of Journalists. Mr SÖDERMAN gave the keynote address at the first session on the theme "Openness means accountable governance".

On 5 May, Mr SÖDERMAN and Mr HARDEN met with Mr LÓPEZ VEIGA, Director General of DG 8 and Mr HELLOT. They discussed the renewal of the cooperation agreements between the European Parliament and the Ombudsman.

On 10 June, Mr SÖDERMAN participated in an information seminar organised by DG V of the European Parliament for newly appointed A and LA staff in Luxembourg and spoke about his role and work.

On 14 July, Mr SÖDERMAN accompanied by Ms Vicky KLOPPENBURG had an exchange of views with Mr André MIDDELHOEK, the Chairman of the Committee of Independent Experts. They discussed recent developments in their respective offices.

On 15 July, Mr SÖDERMAN met with Mr Julian PRIESTLEY, Secretary-General of the European Parliament.

On 21 July, Mr SÖDERMAN and Mr HARDEN had a meeting with Mr CHEVALLIER, the head of the Paris Information Office of the European Parliament. They discussed the details of a press conference scheduled to take place in Paris in September.

On 22 July, Ms Loyola DE PALACIO, (Member of the European Parliament at the time) visited the Ombudsman's office and Mr SÖDERMAN explained his work to her.

On 28 September, Mr SÖDERMAN presented the results of his first mandate to the Committee on Petitions of the European Parliament and distributed a booklet summarising his achievements.

On 19 October, in the framework of his candidacy for the election of European Ombudsman, Mr SÖDERMAN was auditioned by the Committee on Petitions of the European Parliament.

On 14 December, Mr SÖDERMAN was invited by President Nicole FONTAINE to attend the inauguration by French President Jacques CHIRAC of the new "Louise Weiss" building of the European Parliament.

## 4.2 THE EUROPEAN COMMISSION

On 12 January, Mr SÖDERMAN and Mr HARDEN met with Mr Carlo TROJAN, Secretary General of the European Commission as well as Mr Jean-Claude EECKHOUT and Mr Klaus EBERMANN, Directors at the General Secretariat. They discussed the code of conduct on good administrative behaviour.

Mr SÖDERMAN met with President Jacques SANTER and Mrs Diane SCHMITT, Member of his Cabinet, on 10 February. They discussed the Commission's draft code of conduct for its officials.

Mr SÖDERMAN was invited to give a speech about the Commission's Article 169 procedure for dealing with complaints against Member States at a "Package Meeting" organised by DG XV of the European Commission on Friday 12 February 1999. Package meetings are held regularly and are intended to provide a forum for EU and national officials to encourage discussions on the correct implementation of Community law.

Mr SÖDERMAN provided a general introduction on the European Ombudsman, then explained to the audience his views on Article 169 procedures. He emphasised that Article 169 complainants cannot be treated as mere sources of information, although their role in bringing Member State infringements to the Commission's attention is undisputed. Mr SÖDERMAN then outlined the recent reform of Article 169 procedures, put in motion by the Ombudsman's own-initiative inquiry (303/97/PD).

Mr SÖDERMAN informed the delegates that his concerns about enforcement of Community law went beyond the issue of Article 169 procedures. Thus, the European Ombudsman network and better information campaigns were to be seen as corollary initiatives which would enhance Community law enforcement at national level.

Following the speech, Mr SÖDERMAN answered questions put by national delegates. The President of the Meeting from Commission DG XV then submitted remarks about the continuing efforts to implement the improved procedural rules proposed in the Ombudsman's own-initiative inquiry into Article 169.

On 14 July 1999, Mr. Jacob SÖDERMAN accompanied by Ms Vicky KLOPPENBURG met with Mr. Per Brix KNUDSEN, acting director of OLAF, the newly established European Anti Fraud Office. The objectives and the tasks of the new office were discussed.

Also on 14 July, Mr SÖDERMAN met with Mrs Anita GRADIN, Member of the Commission and later that day with Mr Jacques SANTER, President of the European Commission.

On 15 July, a meeting took place between Mr SÖDERMAN and Mr Carlo TROJAN, the secretary general of the European Commission.

Mr Horst REICHENBACH, Director General of the Personnel of the Commission paid a visit to the Ombudsman on 17 November. Mr EECK-

HOUT, director at the secretariat general of the Commission as well as Mr HARDEN and Mr GRILL of the Ombudsman's office attended the meeting.

#### 4.3 THE COUNCIL OF THE EUROPEAN UNION

On 23 July, Mr SÖDERMAN accompanied by Mr VERHEECKE attended the Working Party on Information organised by the Council of the European Union under the Finnish Presidency. Mr SÖDERMAN presented his achievements in the field of transparency as well as the code of good administrative behaviour. After the meeting, Mr SÖDERMAN had an exchange of views with the Finnish Ambassador to the E.U., Mr Antti SATULI.

#### 4.4 THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

On 19 October, Mr Jacob SÖDERMAN accompanied by Mr HARDEN spoke on "transparency in the Community institutions" at a colloquium held at the Court of First Instance in Luxembourg to mark the tenth anniversary of the Court. The session on transparency was presided by John COOKE, President of Chamber at the Court of First Instance. Other speakers included Mr Jean-Louis DEWOST, director-general of the Commission's legal service, Mr GARZÓN CLARIANA, juriconsult of the European Parliament and Mr Jean-Claude PIRIS, director-general of the Council legal service. The colloquium was attended by the President of the Court of Justice Mr Gil Carlos RODRÍGUEZ IGLESIAS, the President of the Court of First Instance Mr Bo VESTERDORF, as well as other judges and staff of the Court of Justice and Court of First Instance and members of the legal profession. Mr SÖDERMAN's speech is available on the Ombudsman's website in English, French and German.

#### 4.5 THE ECONOMIC AND SOCIAL COMMITTEE

On 15 October 1999, Mr Jacob SÖDERMAN accompanied by Ms Vicky KLOPPENBURG attended the "First Convention of Civil Society organised at European level" by the European Economic and Social Committee in Brussels where Mr SÖDERMAN gave a presentation on the role and the tasks of the Ombudsman. The aim of the conference was to specify the role and the contribution which civil society, and its diversity, can have in the building of Europe. The conference was opened by Mrs Beatrice RANGONI MACHIAVELLI, president of the Economic and Social Committee. The debates were introduced by Jacques DELORS, former president of the European Commission. Other key note speakers included Mrs. Loyola de PALACIO, vice president of the European Commission as well as Mrs. Sinikka MÖNKÄRE, Finnish Minister for employment on behalf of the president in office of the Council of the European Union.

#### 4.6 THE COMMITTEE OF THE REGIONS

On 3 December 1999, Mr. Jacob SÖDERMAN accompanied by Ms Vicky KLOPPENBURG attended a meeting on citizens' rights organized by Commission 7 of the Committee of the Regions in Brussels. The aim of the conference which was chaired by Ms Irma PEIPONEN was to address different aspects of citizens' rights and to discuss further developments of Union citizenship. Mr SÖDERMAN gave a presentation on the role and tasks of the European Ombudsman. He referred to his Code of Good Administrative Behaviour in which he defines the rights and the duties of civil servants when dealing with citizens. Mr SÖDERMAN also stressed the importance of openness and transparency.

## 5 RELATIONS WITH NATIONAL OMBUDSMEN AND SIMILAR BODIES

### 5.1 THE LIAISON NETWORK

The liaison network established following the 1996 Strasbourg seminar has been further developed. Links between the national ombudsmen's websites and the European Ombudsman's website have been created. An E-mail discussion group was set up in order to ensure a quick and efficient exchange of information and to facilitate communication between the members of the liaison network. A third liaison letter was published and distributed in July 1999.

On 20-21 January, Ian HARDEN visited the office of the Médiateur de la République, Mr Bernard STASI, to plan a joint seminar for national ombudsmen and similar bodies in Paris, in September 1999. During the visit, he also met the Délégué Général, Mr Gérard DELBAUFFE, the Secretary General, Mr Claude DESJEAN and Mr Philippe BARDIAUX (external relations adviser). He also met the chargés de mission for the different sectors of work of the Médiateur to inform them about the work of the European Ombudsman and discuss subjects of mutual interest.

The seminar for national ombudsmen and similar bodies entitled "Ombudsmen, the Amsterdam Treaty and European Integration" took place in Paris on 9 and 10 September. All 15 Member States were represented (see 6.1).

### 5.2 COOPERATION IN DEALING WITH COMPLAINTS

During 1999, 2 queries from national Ombudsmen were dealt with by the European Ombudsman. One was sent by the Irish Ombudsman and concerned the repayment of the milk super-levy, the other was sent by the Danish Ombudsman and was related to social security issues.

### 5.3 COOPERATION WITH REGIONAL OMBUDSMEN AND SIMILAR BODIES

On 10 May, Mr Ullrich GALLE, Ombudsman (Bürgerbeauftragte) of Rheinland-Pfalz paid a visit to Mr SÖDERMAN. They discussed the 25th Anniversary celebration of the German Ombudsman as well as a meeting of all regional ombudsmen scheduled to be held in November.

On 14 June, a delegation of Members of the Petitions' Committee of the German Landtag of Nordrhein-Westphalen visited the Ombudsman's office in Strasbourg and had an exchange of views with Mr SÖDERMAN.

A delegation of the Petitions' Committee of the German Landtag of Schleswig Holstein paid a visit to the Ombudsman in Strasbourg on 30 June.

### **CONFERENCE OF REGIONAL OMBUDSMEN AND COMMITTEES ON PETITIONS OF THE EUROPEAN UNION, FLORENCE**

On 11 and 12 November 1999, Mr. Jacob SÖDERMAN participated in the second Conference of Regional Ombudsmen and Committees on Petitions of the European Union which succeeded to the one held in Barcelona in 1997, further to the European Ombudsman's initiative. He was accompanied by Mr Alessandro DEL BON and Ms Ida PALUMBO.

The Conference in Florence was organised by the office of the Regional Ombudsman of Tuscany, under the guidance of six Ombudsmen of the European Union: Mr. BOVESSE from the Walloon region, Mr. CANELLAS from the Catalan region, Mr. CONTINI from Sardinia, Mr. FANTAPPIÉ from Tuscany, Mr. GALLE from Rheinland-Pfalz and Mr. SCIACCHITANO from the Lombard region. The reports presented by several Regional Ombudsmen, and Prof. Antonio PAPISCA from the University of Padova, tackled both the daily work of Regional Ombudsmen in the EU, and the forthcoming challenges with regard to the effects of the European integration on their work. A final resolution creating a Permanent Conference, with meetings to be held at least every two years, and foreseeing to establish regular contacts with the European Ombudsman and the European Parliament, was adopted at the end of the Conference.

Before the conference, on 10 November 1999, Mr. SÖDERMAN met with Prof. Angelo PASSALEVA, President of the Regional Council of Tuscany. On this occasion, as announced during the press conference that followed, the European Ombudsman underlined how important it would be for Italy to have a national Ombudsman, which for regional and local Ombudsmen *"should be considered a friend rather than a boss in Rome"*. Following the invitation of Prof. CHITI, Mr. SÖDERMAN then gave a lecture about his work at the University of Political Sciences of Florence.

## **5.4 COOPERATION WITH NATIONAL OMBUDSMEN IN THE ACCESSION STATES**

A seminar on "Ombudsmen and the law of the European Union", organised jointly by the European Ombudsman and the Slovenian Human Rights Ombudsman Ivan BIZJAK, was held in Ljubljana, Slovenia, 6-8 June 1999. The seminar was attended by the Parliamentary Commissioner for the rights of national and ethnic minorities of Hungary, Dr Jenö KALTENBACH; the Ombudsman of Cyprus, Mrs Eliana NICOLAOU; the Ombudsman of Malta, Mr Joseph SAMMUT; deputy Ombudsman of Romania, Mrs Ruxandra SABĂREĂNU; the Ombudsman of Lithuania, Mr Albertas VALYS; the Ombudsman of Poland, Professor Adam ZIELINSKI; as well as representatives from Estonia, Latvia, the Slovak republic and the European Union delegation to Slovenia.

Speakers at the seminar included Jacob SÖDERMAN on “the Maastricht Treaty and European citizens”, Judge Leif SEVÓN of the Court of Justice of the European Communities, who spoke on “The interpretation and application of Community law” and Ian HARDEN who spoke on “The Amsterdam Treaty and the National Ombudsmen”. The participants delivered country-specific reports and discussed the role of ombudsmen in the accession process.



*Jacob Söderman and Ian Harden with Mr Ivan Bizjak, Ombudsman of Slovenia and Mr Leif Sevón, Judge at the Court of Justice of the European Communities, at the seminar on Ombudsmen and the Law of the European Union held in Ljubljana, Slovenia, in June 1999.*

A report on the seminar, prepared by the Ombudsman of Cyprus Mrs Eliana NICOLAOU concluded that the seminar had made a very constructive contribution to preparation for accession and that more such seminars should be organised in the future. The participants welcomed the proposal by the deputy Ombudsman of Romania, Mrs Ruxandra SABĂREĂNU to host a follow-up seminar in 2000.

Papers delivered at the seminar and the final report are available in English on the websites of the European Ombudsman (<http://www.euro-ombudsman.eu.int>) and the Slovenian Ombudsman (<http://www.varuh-rs.si>).



## 6 PUBLIC RELATIONS

The information strategy of the European Ombudsman has two objectives. The first is to inform the people who might have a real reason to complain about maladministration in the activities of a Community institution or body of their right to complain to the European Ombudsman and how to do so.

The second objective is to improve relations between the Union and its citizens by informing the broader public of the Ombudsman's role in helping to realize the Union's commitment to open, democratic and accountable forms of administration. At the same time, it is essential not to create false expectations that might simply result in an increase in the number of complaints outside the European Ombudsman's mandate.

The information strategy has therefore mainly focused on targeting accurate information to groups of potential complainants. At the same time, both conventional publications and the Ombudsman's website are intended to be interesting and lively to allow them to be used for educational purposes, particularly for young people learning about Europe.

### 6.1 HIGHLIGHTS OF THE YEAR

#### ***THE ANNUAL REPORT FOR 1998***

The Annual Report of the European Ombudsman for the year 1998 was presented to the European Parliament at its plenary session in Strasbourg on 14 April 1999. The session was chaired by President GIL-ROBLES.

Reporting on behalf of the Committee on Petitions of the Parliament, Mrs Laura DE ESTEBAN MARTIN congratulated the Ombudsman on the report of his activities and for making it available to the Parliament as well as to the citizens in a transparent and rapid way.

Mrs DE ESTEBAN MARTIN welcomed the initiative of the Ombudsman towards the establishment of a code of good administrative behaviour, stating that such a code would improve the relations between the public and officials and should be comprehensible and accessible to the public. She also stated that the Ombudsman should be given access to all the files and documents of the institutions.

Emphasis was placed on the Ombudsman's use of new technologies in the field of information and communication that has brought the citizens closer to the administration.

#### ***THE OPEN DAY IN BRUSSELS***

On 8 May 1999, the European Union institutions and bodies arranged their annual open day in the Parliament's buildings in Brussels.

The European Ombudsman's stand was located next to the Court of Justice's and the Court of Auditors' to make it easier for visiting citizens to gain an overview over the EU's three primary supervisory bodies. Staff

from the Brussels Office explained the Ombudsman's work to a great variety of visitors, most of whom requested further information in the form of brochures and reports (approximately one hundred and fifty annual reports were requested, and many dozens of "Can he help you" brochures were handed out). The Brussels staff also explained to several citizens the differences between the work of the Committee on Petitions and the Ombudsman. In addition, a citizen from a local interest organisation received advice from a Legal Officer of the Brussels' office and lodged a complaint on the spot.

### ***SEMINAR OF NATIONAL OMBUDSMEN AND SIMILAR BODIES IN PARIS, 9-10 SEPTEMBER 1999***

#### **"Ombudsmen, the Amsterdam Treaty and European Integration"**

The entering into force of the Amsterdam Treaty was an opportunity for the national Ombudsmen and similar bodies of the European Union to meet for the second time (the first meeting was held in Strasbourg in 1996). The aim of these meetings is to strengthen the links between the national Ombudsmen and similar bodies thus enabling them to provide a better service to the citizens in Europe.

The seminar was jointly organised by Mr Jacob SÖDERMAN, the European Ombudsman, and by Mr Bernard STASI, the French Ombudsman. All 15 Member States were represented as well as members of the European Institutions. The total number of participants was 56.

The purpose of the seminar was to consider the impact for the work of national ombudsmen and similar bodies of the entry into force of the Amsterdam Treaty and, more generally, of the ongoing European integration process. The Treaty of Amsterdam foresees the development of the Union as an area of freedom, security and justice, as well as enhanced cooperation between the national administrations which are responsible for the implementation of Community law and policies in numerous fields.

The seminar had four working sessions: 1) Human Rights and the EU; 2) Principles of Good Community Administration; 3) Rights of Third-Country Nationals; 4) Free Movement of EU Citizens. Each session was introduced by an expert Rapporteur. Each participating delegation had also been invited to prepare in advance a written contribution on two or more of the four themes. During the seminar, most of the reports were available in French and in English. Simultaneous interpretation in English, French, German, Spanish and Italian were provided to the participants.

During the seminar, two declarations were adopted unanimously by the national Ombudsmen and similar bodies of the EU: the first declaration was taken on the initiative of the Portuguese Ombudsman, Mr José PIMENTEL. In the light of the dramatic events which were occurring in Eastern Timor, it supports the efforts of the EU Governments to stop the breach on the Human Rights in the region. The second declaration reminds the EU Governments of the content of Resolution 85/13 of the Council of Europe concerning the links between the Institution of the Ombudsman and the

protection of Human Rights. It was proposed by the Belgian Federal Ombudsman, Mr Pierre-Yves MONETTE.

An Official Press Conference was organised by the Information Office of the European Parliament in Paris. The Conference gave Mr SÖDERMAN and Mr STASI the opportunity to remind of the importance they attach to Human Rights and to the cooperation between the national Ombudsmen.

The Ombudsmen and similar bodies of the Union will meet again in Brussels in 2001.

### ***ELECTION OF THE EUROPEAN OMBUDSMAN***

Jacob SÖDERMAN was elected for a second term of office by the European Parliament on 27 October.

After the announcement of his re-election by the President of the European Parliament, Mr SÖDERMAN gave a press conference in which he presented the achievements of his first mandate and outlined his plans for the second mandate.



*MEP Ari Vatanen congratulating Mr Söderman on his re-election on 27 October 1999.*

## 6.2 CONFERENCES AND MEETINGS

**GERMANY****Bonn**

On 16 February, Mr SÖDERMAN visited the German Bundestag in Bonn and met with Mrs Heidemarie LÜTH, the newly elected chairperson of the Committee on Petitions of the Bundestag. They discussed their respective roles, general questions concerning the right to complain and to petition as well as the impact of new communication systems on their daily activities.

**Cologne**

*Speakers at the Forum on a European Charter of fundamental rights, Cologne, Germany, 27 April 1999. From left to right: Mr Söderman, Professor Meinhard Hilf of the University of Hamburg and Professor Spiros Simitis of the University of Frankfurt. (Photo: Eduard N. FIEGEL)*

On 27 April, Mr SÖDERMAN participated in a European Forum in Cologne entitled "Eine europäische Charta der Grundrechte - Beitrag zur gemeinsamen Identität". The forum was organised jointly by the European Commission and the German Ministry of Justice. Other speakers included Prof. Dr. Herta DÄUBLER-GMELIN, The German Minister of Justice,

Commissioner Anita GRADIN, MEP Edith MÜLLER and Prof. Dr. Günter HIRSCH, Judge at the European Court of Justice.

### Leipzig

Mr SÖDERMAN was invited by the EUROPA HAUS LEIPZIG on 3 May. The programme of his visit included a lecture at the University, a meeting with the Rector and an interview with a journalist. Mr SÖDERMAN also presented his work at a public meeting that was followed by a lively debate.

On 4 May, Mr SÖDERMAN paid a visit to the Committee on Petitions of the Landtag of Sachsen and had an exchange of views with its chairman, Mr Thomas MÄDLER.

### Mainz

On 27 May, Mr SÖDERMAN was invited to participate in a panel discussion in Mainz organised to mark the 25<sup>th</sup> anniversary of the institution of an ombudsman in the German land Rheinland-Pfalz. The panel was chaired by Mrs Maria VON WELSER from the ZDF (Zweites Deutsches Fernsehen). The other participants were Mr Kurt BECK, Prime Minister of Rheinland-Pfalz, Mr Ullrich GALLE, Ombudsman of Rheinland-Pfalz, Mr Christoph GRIMM, President of the Landtag of Rheinland-Pfalz, Mr Klaus HAMMER, Chairman of the Committee on Petitions of the Landtag of Rheinland-Pfalz, Dr. Udo KEMPF, professor at the Institute for Social Sciences of the Pädagogische Hochschule Freiburg and Mr REUTER from the Committee on Petitions of the German Bundestag. The audience of around 60 people included distinguished representatives of public life in Rheinland-Pfalz, including the two predecessors of Mr GALLE.

### Bonn

Ian HARDEN took part in the inaugural conference "Weltachsen 2000" of the Centre for European Integration Studies and the Centre for Development Research of the Rheinische Friedrich-Wilhelms-Universität, Bonn 10-12 November 1999. The conference had three themes: the universality of human rights; the dialogue of cultures; global markets and the future of the state. Speakers included Professor Olivier BLANCHARD, head of the Economics Department of the Massachusetts Institute of Technology, Mary ROBINSON, United Nations Commissioner for Human Rights, Oscar Arias SÁNCHEZ, former president of Costa Rica and Nobel Peace Laureate of 1987 and Lech WALESIA, former president of Poland and Nobel Peace Laureate of 1983.

## THE NETHERLANDS

### Maastricht

On 4 & 5 February, José MARTÍNEZ-ARAGÓN, principal legal officer, took part in a seminar entitled "Schengen : Still Going Strong : Evaluation and update", organised by the European Institute of Public Administration in Maastricht. The course sought to provide an update on the legal and political aspects of the incorporation of Schengen into the European Union, the prospects of finalising the incorporation process when the Treaty of

Amsterdam enters into force, and the implementation of the Schengen's regulatory framework. In this context, the new powers granted to the European Ombudsman by the Treaty of Amsterdam were discussed.

### **The Hague**

On 23 and 24 September, Ms. Vicky KLOPPENBURG attended an International Conference on European Asylum and Immigration Policy in The Hague. The purpose of the conference was to discuss the effects of the new objective of the Amsterdam Treaty which is for the Union to develop an area of freedom, security and justice. The conference was chaired by Professor Piet-Jan SLOT, Professor at the University of Leiden on the first day and by Mr. Nial FENNELLY, Advocate General at the EC Court of Justice on the second day. The topics discussed included the security of residence and access to free movement for settled legal immigrants, minimum standards for family reunification, legal questions concerning the comprehensive approach of the High Level Working Group on Asylum and Migration, temporarily protecting displaced persons or offering the possibility to start a new life in the European Union and adjusting the Dublin Convention.

### **THE UNITED KINGDOM**

#### **Cambridge University**

On 3 February, Ian HARDEN delivered a lecture on the work of the European Ombudsman to staff and students at the Centre for European Legal Studies, Cambridge University.

#### **Reading University**

Jacob SÖDERMAN delivered the opening address at a conference on "Complaints and Complaint handling in the European Union", held at Reading University, 26-27 March. Other participants included the British Ombudsman Mr Michael BUCKLEY, the Irish Ombudsman Mr Kevin MURPHY, Mr Edward NEWMAN, Vice-President of the Committee on Petitions of the European Parliament, John FITZMAURICE from the Secretariat General of the Commission and professors Roy GREGORY and Philip GIDDINGS who are carrying out research on complaint handling in the European Union at the University's Centre for Ombudsman Studies. Ian HARDEN was respondent to the paper of Mr FITZMAURICE.

#### **Sunningdale**

Ian HARDEN and Olivier VERHEECKE attended the conference of the International Institute of Administrative Sciences on *Accountability in Public Administration: reconciling democracy, efficiency and ethics*, held at Sunningdale (UK) 12-15 July. They presented the European Ombudsman's draft Code of Good Administrative Behaviour.

## **FINLAND**

### **Helsinki**

Mr SÖDERMAN visited the European Parliament's information office in Helsinki on 17 May. A press conference was organised and Mr SÖDERMAN spoke about his activities and his latest achievements to approximately 20 representatives of the Finnish media.

Also on 17 May, Mr SÖDERMAN paid a visit to the Finnish Chancellor of Justice. During his visit, he met with the staff of the office and informed them about his work.

On 26 August, the Ombudsman visited the Parliamentary Ombudsman Office in Helsinki and presented the Code of good administration at a staff meeting.

On 3 December 1999, Mr Ben HAGARD visited the offices of the Finnish Ombudsman and the Finnish Chancellor of Justice, for meetings to discuss how to improve liaison between the European Ombudsman and the national ombudsmen and similar bodies. In particular, the increased role that the Internet could play in facilitating exchange of information and debate was examined. As well as meeting with the liaison officers and the information officers in the two offices, Mr HAGARD also met with the Finnish Chancellor of Justice, Mr Paavo NIKULA.

### **Vasa**

The Ombudsman made an intervention at a meeting organised by the Carrefour Ostrobothnia in Vasa on 23 August and explained the remedies available for European citizens within the EU administration.

### **Tampere**

On 5 December 1999, Mr SÖDERMAN addressed the Citizens' Agenda NGO Forum in Tampere, Finland, about the creation of a Citizens' Europe. His presentation, which highlighted the work of the European Ombudsman and set out a number of important issues to be addressed in building a service-minded EU administration, formed the basis of a panel debate. Panel members included Mr Timothy CLARKE, Head of Unit at the European Commission, Mrs Anne-Marie SIGMUND, Member of the Economic and Social Committee and Mr Ikka KANTOLA, Bishop of Turku.

The closing session of the Forum was addressed by the Finnish Prime Minister, Mr Paavo LIPPONEN and by the Portuguese Secretary of State of European Affairs, Mr Francisco Manuel SEIXAS DA COSTA.

The three-day Forum was attended by over 1500 participants from almost 50 countries. Most of the participants represented national, European or international NGOs. The aim of the Forum was to raise the profile of NGO issues in the week before the EU Summit in Helsinki. Speakers at the Forum included Mr Erkki LIIKANEN, Member of the European Commission, Mrs Denise FUCHS, the President of the European Women's Lobby, and the Finnish author Mr Johannes SALMINEN. The European Ombudsman was represented at the Forum by Mr Ben HAGARD.



## GREECE

On the occasion of the Celebration of the 20th anniversary of the Marangopoulos Foundation for Human Rights, the Foundation invited Mr Jacob SÖDERMAN to participate in the international colloquy "*The Prevention of Human Rights Violations*". The colloquy took place in the Panteion University of Athens on 24 and 25 May 1999. Mr SÖDERMAN delivered a speech on "*The preventive activities of the European Ombudsman*". Other speakers in the colloquy included the Greek Ombudsman, Professor Nikiforos DIAMANDOUROS, the former Swedish Ombudsman Against Ethnic Discrimination, Mr F. ORTON, various professors as well as several representatives from the Council of Europe, the office of the UN High Commissioner for Human Rights, other UN institutions and the OSCE.



*Mr Diamandouros, Ombudsman of Greece, welcoming Mr Söderman in Athens, in May 1999.*

On 25 May 1999, Mr Jacob SÖDERMAN paid an official visit to the Greek Ombudsman. Mr SÖDERMAN met with Mr DIAMANDOUROS as well as the four Deputy Ombudsmen. They exchanged views on the recently set up office of the Greek Ombudsman who began his work in September 1998. Mr SÖDERMAN also met with the whole staff of the Greek Ombudsman and spoke about his experience as former national Finnish Ombudsman and as the first European Ombudsman. The visit was concluded by a press conference which was attended by the main Greek newspapers, radio and television.

## **SPAIN**

### **Guadalajara**

On 12 July 1999, following the invitation of Mr KIRKPATRICK, the Spanish Ambassador to the Council of Europe, on behalf of the Foundation Marqués de Santillana, Mr SÖDERMAN delivered the opening address of a Seminar on "Human rights and obligations" held in the city of Guadalajara, Spain. In his speech on "Human Rights Values in Europe", the Ombudsman stressed the role of human rights and their defence as one of the basic themes of his work. Participants in the seminar included Mr Mayor OREJA, Spanish Minister of Interior, Mr FERNÁNDEZ-MIRANDA, Vice-President of the Congreso de los Diputados, and Mr ÁLVAREZ DE MIRANDA, Spanish Ombudsman.

### **Madrid**

On 13 July 1999, Mr SÖDERMAN visited the Representations of the European Commission and the European Parliament in Madrid. He met Mrs BERISTAIN, Deputy Director of the Commission Representation, as well as Mr SAMPER, Head of the European Parliament Office.

## **ITALY**

On 30 September and 1 October 1999, Jacob SÖDERMAN accompanied by Gerhard GRILL attended the conference "Europe of the People: Towards the European Home Market" organised by the Kangaroo Group which was held in Rome. The conference was attended by some 100 participants.

On the first day of the conference, lectures were given by Professor François VANDAMME from the Belgian Ministry of Labour ("Social and labour mobility: problems and development"), Mr Paul ALTHERR from Coca-Cola ("Social and labour mobility: a pragmatic view from the industry"), Mr Francisco Manuel SEIXAS DA COSTA, the Portuguese Secretary of State for European Affairs ("New developments from the views of the Council"; the text was read by a member of the Portuguese embassy in Rome). Mr SÖDERMAN gave the after-dinner speech in the evening.

In the morning of the second day, lectures were presented by Mr Brian BALDOCK, Chairman of Marks & Spencer ("Challenges for trade in food due to consumer's perception and protection"), Mrs Ineke SETZ from the Consumenten Bond in the Netherlands ("Consumer's protection") and Mrs LAURITZEN, an advisor to the Commission ("European consumer's policy").

During lunchtime, Mr Peter SCHMIDHUBER, Member of the Board of the Bundesbank, spoke about "The Euro in the transitional period and consumers' protection".

In the afternoon, lectures were given by Mrs Nouchine OCHIDARI from PriceWaterhouseCoopers ("International mobility: tax and cost effective"), Mr Mario MONTI, Member of the Commission of the European Communities ("Competition in a social market economy") and Karl von WOGAU MEP ("The international role of the Euro").

## FRANCE

Ian HARDEN spoke on the work of the European Ombudsman at a workshop on "the role of the Ombudsman between public services and users" which took place in Strasbourg in December 1999 in the framework of "Les entretiens territoriaux de Strasbourg". Other speakers at the workshop were the French Ombudsman, M Bernard STASI and M Gérard LINDACHER, the French Ombudsman's representative in the department of Bas-Rhin.

## BURKINA FASO

### First Statutory Congress of the French speaking Ombudsman's Association

From 24 to 26 November 1999, Mr Jacob SÖDERMAN, accompanied by Mr Olivier VERHEECKE, attended the "First Statutory Congress of the French-speaking Ombudsman's Association" (1er Congrès Statutaire de l'Association des Ombudsmans et Médiateurs de la Francophonie - AOMF) in Ouagadougou, Burkina Faso. Mr SÖDERMAN was invited to this Congress by the Ombudsman of Burkina Faso, General Tiémoko Marc GARANGO, and by the President of the French-speaking Ombudsman's Association, Mr Daniel Jacoby, Protecteur du Citoyen of Québec.



*The President of Burkina Faso, Mr Blaise Compaoré, the Ombudsman of Mauritius, Mr Solomon M. Hatteea and Mr Söderman in Ouagadougou, Burkina Faso, in November 1999.*

The Congress was officially opened in the morning of 25 November 1999 by the President of Burkina Faso, Mr Blaise COMPAORÉ. Present at the opening ceremony were also the ambassadors of various foreign delegations in Burkina Faso. The same day, Mr SÖDERMAN paid a visit to the office of the Ombudsman of Burkina Faso.

Mr SÖDERMAN attended the following debates: "L'AOMF comme outil de renforcement et de développement des bureaux d'Ombudsmans et Médiateurs dans la Francophonie", "L'accessibilité des Ombudsmans et

Médiateurs” and “La promotion et la communication des bureaux d’Ombudsmans et Médiateurs”. In the framework of the theme “Les principes de bonne administration appliqués aux bureaux d’Ombudsmans et Médiateurs”, Mr SÖDERMAN presented to the Congress the Code of good administrative behaviour, subject of the own initiative inquiry which led to his draft recommendations to the different Community institutions and bodies. On 26 November 1999, the General Assembly of the AOMF decided to include the European Ombudsman as member of the Association, and more particularly granted him the status of voting member.

On 24 November 1999, Mr SÖDERMAN paid a visit to the European Commission Delegation in Burkina Faso, where he was received by the Head of Delegation, Mr Antonio GARCÍA VELÁZQUEZ.

### 6.3 OTHER EVENTS

The spokesman for the Finnish Representation to the E.U. in Brussels, Mr KEMPPINEN, paid a visit to the Ombudsman on 9 February.

At the invitation of Mr GAMMELTOFT-HANSEN, Ombudsman of Denmark and vice-president of the International Ombudsman Institute (IOI) and of Mr SCHWÄRZLER, president of the European Ombudsman Institute (EOI), Mr SÖDERMAN attended a meeting of the EOI/IOI Joint Coordinating Committee in Frankfurt, on 15 February.

Mr SÖDERMAN was invited to make a presentation of his work to the Finnish Association in Belgium, Suomi-Klubi a.s.b.l., on 16 February in Brussels.

On 21 February, Peter DYRBERG gave a talk on the European Ombudsman to heads of UN associations who were on a study visit to Brussels.

Mr SÖDERMAN gave a lecture on his role and activities to a group of students from Sweden, Finland, Denmark and Switzerland on 10 March.

On 11 March, the Norwegian Ambassador to the European Union, Mr BULL, accompanied by Mr GREVSTAD, visited the Ombudsman’s office and had an exchange of views with Mr SÖDERMAN on transparency issues within the Union.

On 12 March, the European Ombudsman gave a lecture on his role to a group of 30 visitors from Sweden.

On 17 March, Peter DYRBERG gave a talk on the Ombudsman and Community administration to a group of Danish students from the University of Roskilde.

On 18 March, a group of young leaders from future accession countries in Central and Eastern Europe who were participating in a seminar organised by the Friedrich-Naumann-Foundation were given a lecture on the European Ombudsman by José MARTÍNEZ ARAGÓN.

On 19 March, Mr SÖDERMAN gave a talk to a group of civil servants from Slovenia.

On 23 March, Peter DYRBERG gave a talk on the Ombudsman and Public Access to Documents at the General Assembly of the Society for European Affairs Practitioners.

Mrs Alicia OLIVEIRA, the Ombudsman of the city of Buenos Aires paid a visit to Mr SÖDERMAN on 31 March.

On 8 April, Mr SÖDERMAN lectured to a group of visitors of the CSU Freising, Germany.

The German Ambassador to the Council of Europe, Mr DOHMES, paid a visit to the Ombudsman on 12 April.



*Ms Alicia Oliveira, Ombudsman of the city of Buenos Aires, visiting Mr Söderman on 31 March 1999.*

On 13 April, Mr SÖDERMAN presented his work to a delegation of the Finnish national organisation of clerical employees (STTK) who were visiting the European Parliament.

On 14 April, Peter DYRBERG gave a talk on the Ombudsman and Transparency to a group of German students, Politischer Jugendingring Dresden.

On 22 April, Mr SÖDERMAN met with a group of Finnish civil servants of the Foreign Ministry who were visiting the Council of Europe.

On 26 April, Mr SÖDERMAN lectured to a group of Swedish pensioners in Brussels.

Mrs Florence MILLELIRE-BOISSAVY - a French lawyer who is preparing a manual on the subject of mediation intended for law professionals - interviewed Mr SÖDERMAN on 28 April.

On 29 April, Mr SÖDERMAN lectured to members of the association "*Internationales Kolpingwerk*" in the framework of their annual visit to the European Parliament in Strasbourg.

On 5 May, Mr SÖDERMAN gave a talk on his work to a group of Finnish public relations officials dealing with social affairs.

Also on 5 May, Mr SÖDERMAN lectured to a group of Austrian lawyers.

On 6 May, Mr SÖDERMAN spoke about his work to a group of Finnish lawyers of the Helsinki Institute.

On 26 May, Ian HARDEN gave a talk on the work of the European Ombudsman to a visiting group of students from the Institute for International Law of the University of Göttingen, Germany (Institut für Völkerrecht der Universität Göttingen).

On 21 June, Ms Vicky KLOPPENBURG gave a talk on the work of the European Ombudsman to a group of teachers from Sachsen Anhalt.

On 17 August, Mr GRILL gave a lecture on the role of the European Ombudsman to a group of some 20 Swedish officials.

A group of representatives of political parties of Finland paid a visit to the Ombudsman on 14 September.

Mr SÖDERMAN lectured to a delegation of the Legal Affairs Committee of the Finnish Parliament on 15 September. Among other members, the delegation included Mr Henrik LAX, the chairman of the Committee and Mr Lauri LEHTIMAJA, the Finnish Parliamentary Ombudsman.

On 20 September, Mr SÖDERMAN presented his work and the achievements of the first mandate to a delegation of the Rovaniemi Region (Lapland).

On 21 September, Mr SÖDERMAN gave a speech about the Ombudsman's role and work during the first mandate at a reception given by the representation of the Free State of Bavaria, in Brussels.

On 21 September, Ms. Vicky KLOPPENBURG received a group of civil servants from Sachsen-Anhalt, Germany in Brussels and gave a presentation on the work of the European Ombudsman.

On 22 September, Mr SÖDERMAN lectured to members of the Foreign Affairs Committee of the Finnish Parliament who were visiting the Council of Europe.

Mr SÖDERMAN was invited to speak on his role at a Breakfast Meeting of the *European Policy Centre* in Brussels on 11 October. The meeting attracted a large audience comprising diplomats, companies, trade associations, NGOs and regional bodies.

On 12 October, Mr Gerhard GRILL gave a talk on the tasks and the role of the European Ombudsman to a group of some 40 visitors from the Finanzamt (Tax Office) Zeil am Main, Germany.

On 25 October, Maria ENGLESON and Gerhard GRILL explained the role and the achievements of the European Ombudsman to a group of 30 students from the Fachhochschule Bielefeld who were accompanied by Professor Dr Joachim JEDZIG.

On 15 November, Mr SÖDERMAN met with a Danish group invited by MEPs Jens-Peter BONDE and Ulla SANDBÆCK in Strasbourg and gave a talk about "The work of the Ombudsman".

On 14 December, The President of the Youth Forum, Mr Pau SOLANILLA, accompanied by the Secretary General, Mr Tobias FLESSENKEMPER and Mr Juha MUSTONEN, Project officer for the Finnish EU presidency visited the Ombudsman and explained the activities of their organisation to him.

#### 6.4 MEDIA RELATIONS

On 12 January, Mrs Hia SJÖBLOM interviewed Mr SÖDERMAN for the Finnish paper "Salon Seudun Sanomat".

On 14 January, Mr SÖDERMAN reported on his activities to a group of 13 Nordic journalists lead by Mr Geo STENIUS.

Mr Brandon MITCHENER interviewed Mr SÖDERMAN for the Wall Street Journal on 14 January.

On 21 January, Mr SÖDERMAN gave a telephone interview to Ms SCHULZE for the "West Deutsche Rundfunk".

On 26 January, Mr Pirjo RAUTIO of the Finnish newspaper "Pohjalainen" visited the Ombudsman's office and was given an interview by Mr SÖDERMAN.

Mr Ole-Morten FADNES and Mr Henning A. HELLEBUST, two Norwegian journalists, interviewed Mr SÖDERMAN on 27 January on the issues of transparency and public access to documents in the E.U.

On 10 February, Mr SÖDERMAN gave an interview to Mr HARALAM-BOPOULOS in the framework of a television programme on E.U. institutions to be broadcast throughout the 16 regional television channels of Greece.

Mrs Anna KARISMO interviewed Mr SÖDERMAN on 10 February for the Finnish paper "Helsingin Sanomat".

On 11 February, Mr Michel GUETIENNE interviewed Mr SÖDERMAN for a television programme produced by the European Parliament.

Mr SÖDERMAN gave an interview to Mrs Leila PENTINPURO on 17 February for "Europa", a magazine produced by the European Commission's office in Finland.



Also on 17 February, Mr SÖDERMAN was interviewed by Mr BARTAK for the Czech News Agency and Mr FORIS for the Hungarian paper "Magyar Nemzet".

On 3 March, Mr SÖDERMAN gave a telephone interview to Mr EHRSTRÖM for the Finnish monthly magazine "Forum för ekonomi och teknik".

On 3 March, Mr HARDEN was interviewed by Ms Anja VOGEL of *Radio France Alsace* for "L'Europe au Quotidien", a weekly programme on the French Radio *France Info*.

Mr SÖDERMAN gave an interview to Mr Pierre BOCEV for the French daily newspaper "Le Figaro" on 9 March.

On 11 March, Mr SÖDERMAN gave a report on his activities to a group of journalists from the Nordic countries (Denmark, Iceland, Greenland, Sweden, Norway and Finland).

Also on 11 March, Mr SÖDERMAN gave a telephone interview to Mr Stephen CASTLE for the daily English paper "the Independent".

On 16 March, Mr SÖDERMAN was contacted by several journalists to express his views following the resignation of the members of the Commission. They included Mr REINEHEIMER for the weekly Luxembourg newspaper "Le Jeudi", Terttu LENSU for the Finnish Radio and TV Broadcasting company, Susanne PALME for the Swedish Broadcasting corporation, Hia SJÖBLOM for the Finnish paper "Salon Seudun Sanomat" and Jesper KNUDSEN for the Danish daily newspaper "Information".

Also on 16 March, Mr PFLETSCHINGER interviewed Mr SÖDERMAN for "Boulevard Europe", a television programme produced by the German "West Deutsche Rundfunk".

Mr SÖDERMAN was interviewed on 12 April for "Europe today" a programme of the BBC World Service.

On 13 April, Liisa KIISKI interviewed Mr SÖDERMAN for the Finnish news agency "Suomen tietotoimisto" (STT).

Ina BALTES of the German television "ZDF" interviewed Mr SÖDERMAN on 13 April for a new daily programme on Europe called "Heute in Europa".

On 14 April, a press conference was organized in Strasbourg on the occasion of the presentation of the Ombudsman's 1998 Annual Report to the Parliament.

The same day, Mr SÖDERMAN gave an interview to Thomas WOLF for the German magazine "Capital" and to Gareth HARDING for "European Voice".

On 18 April, at the invitation of MEP PAASILINNA, Mr SÖDERMAN met with a group of Finnish journalists who were visiting the EU institutions in Brussels.

On 19 April, Mr SÖDERMAN gave a lecture to a group of Finnish Chief Editors in Brussels in the framework of a seminar on EU matters co-organized with the European Parliament Information office in Helsinki.

Mr SÖDERMAN gave an interview to Matti PITKO that was published in the Finnish daily newspaper "Aamulehti" on 25 April.

On 5 May, Mr SÖDERMAN gave an interview to Mrs Ulrike OSTEN for the Bavarian Radio "Bayerischer Rundfunk" and to Mr Magnus RINGMAN for the Swedish paper "Aftonbladet".

On 5 May, Ian HARDEN gave an interview about the work of the European Ombudsman to Mr Pascal MAGUESYAN for the "réseau interdiocésain des radios chrétiennes".

On 6 May, Mr SÖDERMAN gave an interview to Mr Peter FERM for the Swedish "Nordvästra Skånes Tidningar" and to Ms Pirkka KIVENHEIMO for the Finnish "Turun Sanomat".

The French TV "Demain" interviewed Mr SÖDERMAN on 6 May for an information programme broadcast in the framework of the European elections.

Ms Ulla ØSTERGAARD interviewed Mr SÖDERMAN on 7 May for the Danish paper "Jyllandsposten".

On 9 June, Mr SÖDERMAN gave an interview to "ARTE" which was broadcast in the framework of an information programme on the European institutions.

On 23 July, Mr SÖDERMAN was invited to a press lunch in Brussels organized by the Permanent Representation of Finland to the European Union. Journalists present included Åsa NYLUND/YLE, Richard BRANDER/STT, Eija POUTANEN/Maaseudun Tulevaisuus, Tuulikki KUPARINEN/Taloussanomat, Reijo RUTANEN/Suomen Kuvalehti, Vesa PUOSKARI, and Maija LAPOLA/Turun Sanomat.

Mr SÖDERMAN gave an interview to Mr Neil BUCKLEY for the "Financial Times" on 29 July.

On 13 September, Mr SÖDERMAN was interviewed by Hannu TAAVIT-SAINEN for the Finnish monthly magazine "Kuntalehti".

On 14 September Mr SÖDERMAN gave an interview to Kristian ULF-STEDT for the Finnish Radio and to Leyla LINTON for the British "Daily Express".

On 16 September, Ms Birgit SVENSSON interviewed Mr SÖDERMAN for the German paper "Märkische Allgemeine" and Ms Kristina HELENIUS for the Finnish Television.

Mr SÖDERMAN gave an interview to Mr Heikko TUOMI-NIKULA, the chief editor of "Lapin Kansa" (the main newspaper of Finnish Lapland), on 20 September.

On 21 September, Ms Natascha ZEITEL-BANK interviewed Mr SÖDERMAN in Brussels for the Bavarian Television “Bayerischer Rundfunk”.

On 28 September, Ms LUUKKANEN interviewed Mr SÖDERMAN in Brussels for “Monitori” magazine.

On 29 September, Mr SÖDERMAN gave an interview to Robert COTRELL for “The Economist”.

On 1 October, an article about the European Ombudsman elections was published in “European Voice” following an interview that Mr SÖDERMAN gave to Gareth HARDING.

On 6 October, Mr SÖDERMAN was interviewed by Marja PALMUNEN for the Finnish paper “Turun Sanomat”.

On 7 October, Leyla LINTON interviewed Mr SÖDERMAN for “Parliament Magazine”.

Ms Anna KEHL, an independent German journalist interviewed Mr SÖDERMAN on 8 October.

On 11 October, Mr SÖDERMAN was interviewed by Danish journalist Mr RYBORG.

Mr SÖDERMAN gave an interview to Ina BALTES for the German Television ZDF in Brussels on 19 October.

On 27 October, Gerhard GRILL gave a telephone interview about the work of the European Ombudsman which was broadcast live on the German Radio SWR (Südwestrundfunk).

On the occasion of his reelection, Mr SÖDERMAN was interviewed by several journalists including Mr Willy SILBERSTEIN for the Swedish Radio as well as Ms HELENIUS and Mr ULFSTED for the Finnish TV on 27 October.

Mr SÖDERMAN gave an interview to Mr JOHANSSON for the Swedish paper “Från Riksdag & Departement” on 16 November and to Stephen BATES for “the Guardian” on 17 November.

On 18 November, Mr SÖDERMAN and José MARTÍNEZ presented the Ombudsman’s work and the achievements of the first mandate to a group of journalists from Barcelona who were visiting the Parliament.

On 29 November, an article on transparency was published in “Newsweek” magazine following an interview that Mr SÖDERMAN gave to Christopher DICKEY.

On 30 November, Mr SÖDERMAN gave a telephone interview to Gareth HARDING for “European Voice” regarding public access to information in the E.U.

Michaël JUNGWIRTH interviewed Mr SÖDERMAN for the Austrian paper “Kleine Zeitung” on 15 December.

## 7 ANNEXES

## A STATISTICS CONCERNING THE WORK OF THE EUROPEAN OMBUDSMAN FROM 01.01.1999 TO 31.12.1999

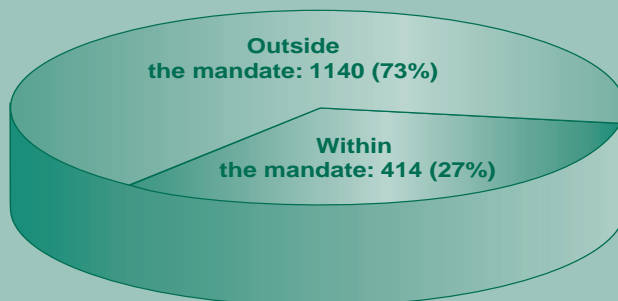
## 1 CASES DEALT WITH DURING 1999

<b>1.1</b>	<b>TOTAL CASELOAD IN 1999</b>	<b>1860</b>
	- complaints and inquiries not closed on 31.12.98	278 <sup>118</sup>
	- complaints received in 1999	1577
	- own initiatives of the European Ombudsman	5
<b>1.2</b>	<b>EXAMINATION OF ADMISSIBILITY/ INADMISSIBILITY COMPLETED</b>	<b>93%</b>

## 1.3 CLASSIFICATION OF THE COMPLAINTS

## 1.3.1 According to the mandate of the European Ombudsman

## Complaints according to the mandate



## 1.3.2 Reasons for being outside the mandate

- not an authorised complainant	20
- not against a Community institution or body	1032
- does not concern maladministration	88

<sup>118</sup> of which 2 own initiatives of the EO and 186 admissible complaints.

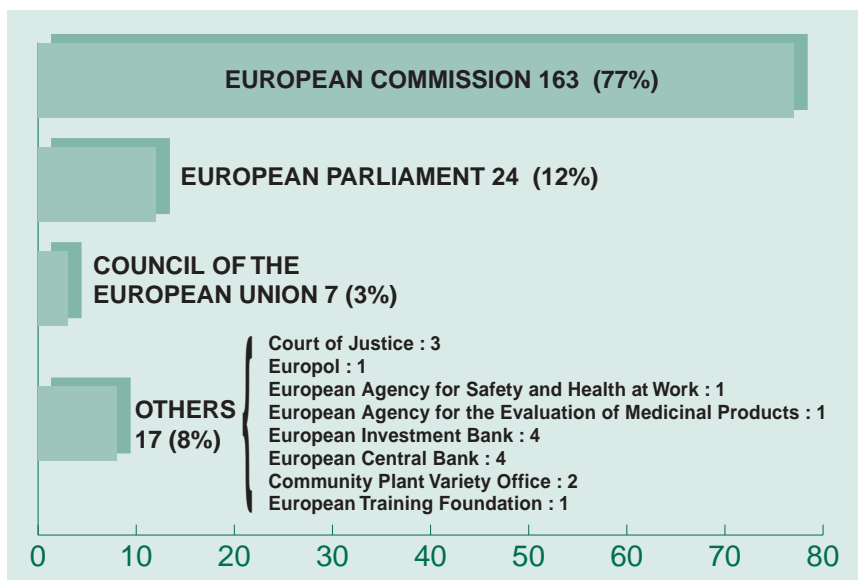
### 1.3.3 Analysis of complaints within the mandate

<b>Admissible complaints</b>	<b>243</b>
- inquiries initiated	201
- no grounds for inquiry	42
- dealt with or being considered by Committee on Petitions:	5
- others:	37
<b>Inadmissible complaints</b>	<b>171</b>
<b>Inadmissible because</b>	
- author/object not identified	46
- time limit exceeded	5
- prior administrative approaches not made	94
- being dealt with or settled by a Court	13
- internal remedies not exhausted in staff cases	13

## 2 INQUIRIES INITIATED IN 1999 206

(201 admissible complaints and 5 own initiatives of the EO)

### 2.1 INSTITUTIONS AND BODIES SUBJECT TO INQUIRIES<sup>119</sup>



<sup>119</sup> Some cases concern 2 or more institutions or bodies.

**2.2 TYPE OF MALADMINISTRATION ALLEGED**

(In some cases, 2 types of maladministration are alleged)

<b>66 (23%)</b>	Lack or refusal of information, transparency
<b>45 (16%)</b>	Avoidable delay
<b>31 (11%)</b>	Discrimination
<b>32 (11%)</b>	Unfairness, abuse of power
<b>33 (11%)</b>	Procedures, rights of defence
<b>29 (10%)</b>	Legal error
<b>29 (10%)</b>	Negligence
<b>9 (3%)</b>	Failure to ensure fulfilment of obligations (art. 169 - new art. 226)
<b>15 (5%)</b>	Other maladministration

<b>3</b>	<b>DECISIONS CLOSING THE FILE ON A COMPLAINT OR CONCLUDING AN INQUIRY</b>	<b>1556</b>
<b>3.1</b>	<b>COMPLAINTS OUTSIDE THE MANDATE</b>	<b>1140</b>
	- transferred	79
	- as petition to the European Parliament	71
	- to national Ombudsmen	8
	- 708 complainants have been advised to contact another agency:	
	- national/regional ombudsman or petition a national Parliament	314
	- to petition the European Parliament	142
	- the European Commission	149
	- Court of Justice of the European Communities	2
	- others	101
<b>3.2</b>	<b>COMPLAINTS WITHIN THE MANDATE, BUT INADMISSIBLE</b>	<b>171</b>
<b>3.3</b>	<b>COMPLAINTS WITHIN THE MANDATE AND ADMISSIBLE, BUT NO GROUNDS FOR INQUIRY</b>	<b>42</b>
<b>3.4</b>	<b>INQUIRIES CLOSED WITH REASONED DECISION</b>	<b>203<sup>120</sup></b>
	(An inquiry can be closed for 1 or more of the following reasons)	
	- no maladministration found	107 <sup>121</sup>
	- with a critical remark addressed to the institution	27
	- settled by the institution	62
	- friendly solution	1
	- dropped by the complainant	5
	- draft recommendations agreed by the institution	2
	- other	5
<b>4</b>	<b>DRAFT RECOMMENDATIONS MADE IN 1999 AND SPECIAL REPORTS TO THE EUROPEAN PARLIAMENT</b>	
	- inquiries resulting in finding of maladministration with draft recommendations	10 <sup>122</sup>
	- presentation of a special report to the European Parliament	1

<sup>120</sup> Of which 1 own initiative from the Ombudsman.

<sup>121</sup> Of which 1 own initiative from the Ombudsman.

<sup>122</sup> Of which 3 own initiatives of the Ombudsman.

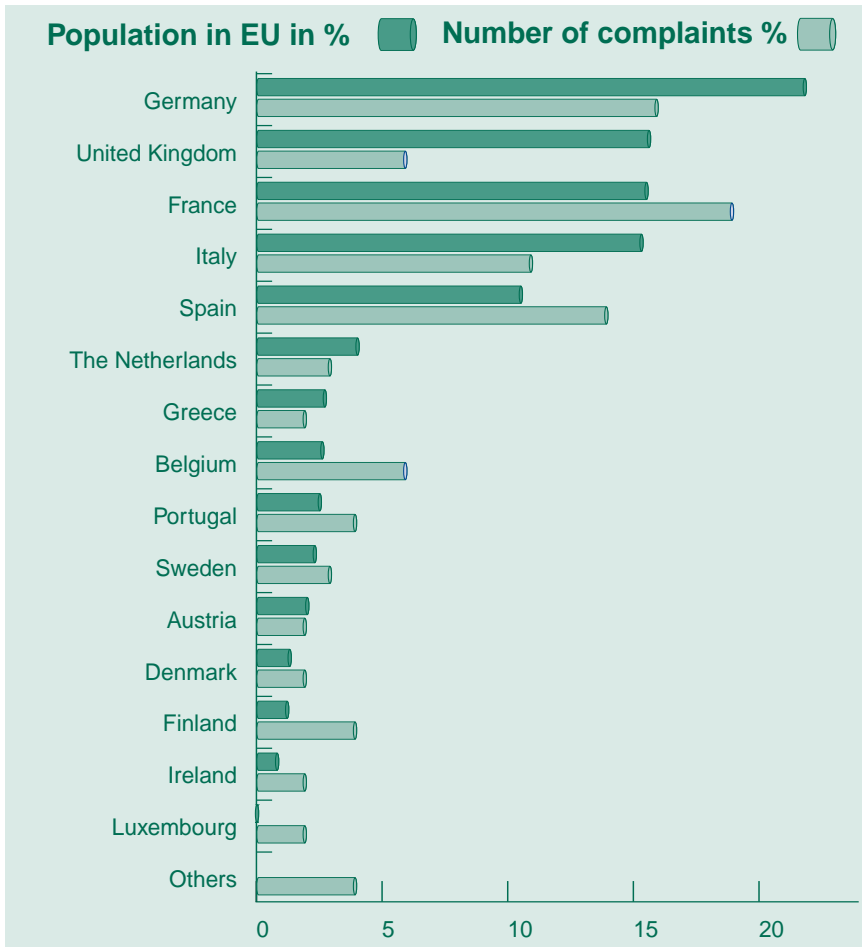


## 5 ORIGIN OF COMPLAINTS REGISTERED IN 1999

### 5.1 SOURCE OF COMPLAINTS

- sent directly to the European Ombudsman	1571
by:	
- individual citizens	1458
- companies	23
- associations	90
- transmitted by a Member of the European Parliament	11
- petitions transferred to the European Ombudsman	3

### 5.2 GEOGRAPHICAL ORIGIN OF THE COMPLAINTS



## B THE OMBUDSMAN'S BUDGET

In common with the other Community institutions and bodies, the European Ombudsman adopted the Euro for budgetary purposes from 1 January 1999.

Salaries, allowances and other costs related to employment are contained in Title 1 of the Budget. This Title also includes the cost of missions undertaken by the Ombudsman and his staff. Title 2 of the budget covers buildings, equipment and miscellaneous operating expenditure. Title 3 contains a single chapter, from which subscriptions to international Ombudsman organisations are paid.

### Co-operation with the European Parliament

To avoid unnecessary duplication of administrative and technical staff, many of the services needed by the Ombudsman are provided by, or through, the European Parliament. Areas in which the Ombudsman relies, to a greater or lesser extent, on the assistance of the Parliament's services include:

- personnel, including contracts, salaries, allowances and social security

- financial control and accounting

- preparation and execution of Title 1 of the budget

- translation, interpretation and printing

- security

- informatics, telecommunications and mail handling.

In 1999, the efficiency saving to the Community budget from the co-operation between the European Ombudsman and the European Parliament was estimated to be the equivalent of 5.5 posts.

Where the services provided to the Ombudsman involve additional direct expenditure by the European Parliament a charge is made, with payment being effected through a liaison account. Provision of offices and translation services are the largest items of expenditure dealt with in this way.

To improve transparency, the 1999 budget included for the first time a lump-sum fee to cover the costs to the European Parliament of providing services which consist solely of staff time, such as administration of staff contracts, salaries and allowances and a range of computing services.

The co-operation between the European Parliament and the European Ombudsman was initiated by a Framework Agreement dated 22 September 1995, completed by Agreements on Administrative Cooperation and on Budgetary and Financial Cooperation, signed on 12 October 1995. These agreements were due to expire at the end of the term of office of the Parliament elected in 1994.

In July 1999, the Ombudsman and the President of the European Parliament signed an agreement prolonging the original co-operation agreements until the end of 1999.

In December 1999, the Ombudsman and the President of the European Parliament signed an agreement renewing the co-operation agreements, with modifications, for the year 2000 and providing for automatic renewal thereafter.

### The 1999 Budget

The 1999 budget created six additional posts, including an A3. The European Parliament's Committee on Budgets blocked the appropriations for three of the new posts, including the A3, in the Reserve. Release of the appropriations was made conditional on the presentation of an action plan concerning the transformation of temporary posts into permanent posts. At the beginning of 1999, therefore, only 20 of the total establishment plan of 23 posts were funded.

In February 1999, the Ombudsman presented an action plan for restructuring the office, including separation of legal work from administrative work through the creation of separate departments. The action plan also provided for a gradual transition from exclusively temporary posts to a predominance of permanent posts. Despite accepting the action plan, the Committee on Budgets did not release the blocked funds for the additional A3 post needed to separate the legal and administrative roles of the Head of Secretariat. The proposed restructuring could not therefore be implemented until the beginning of 2000.

The total amount of appropriations available in the Ombudsman's 1999 budget was 3.474.797 €. Title 1 (Salaries, allowances and other costs related to employment) amounted to 2.350.953 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounted to 807.000 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounted to 2.000 €. An amount of 314.844 € was entered in the reserve (Title 10).

The following table indicates expenditure in 1999 in terms of committed appropriations.

Title 1	€	2.338.437
Title 2	€	632.904
Title 3	€	898
Total	€	2.972.239

Revenue consists primarily of deductions from the remuneration of the Ombudsman and his staff. In terms of payments received, total revenue in 1999 was 285.127 €.

### The 2000 Budget

The 2000 budget, prepared during 1999, provides for an establishment plan of 24, representing an increase of one from the establishment plan for 1999.

Total appropriations for 2000 are 3.914.584 €. Title 1 (Salaries, allowances and other costs related to employment) amounts to 2.878.797 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounts to 824.000 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounts to 2000 €. An amount of 209.787 € has been entered to the reserve (Title 10).

The 2000 budget provides for total revenue of 346.761 €.

### An independent budget

The Statute of the European Ombudsman provides for the Ombudsman's budget to be annexed to section 1 (European Parliament) of the general budget of the European Communities.

Discussions on the possibility of creating an independent budget for the Ombudsman began in 1998. In December 1999, the Council agreed to a proposal that the Ombudsman's budget should be independent and made the necessary change to the Financial Regulation, with effect from 1 January 2000.<sup>123</sup>

However, in accordance with the legal provisions in force and in agreement with the European Parliament, the 2000 budget was prepared in the form of an Annex to the budget of the European Parliament and on the explicit assumption that, if necessary, the Ombudsman could request a transfer from the Parliament's contingency reserve as was done in 1996 and 1998.

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<sup>123</sup> Council Regulation 2673/1999 of 13 December 1999 OJ L 326/1.

## C PERSONNEL

**EUROPEAN OMBUDSMAN****Jacob SÖDERMAN****SECRETARIAT OF THE EUROPEAN OMBUDSMAN****Ian HARDEN***Head of Secretariat*  
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(until 31.07.1999)  
Brussels Antenna**José MARTÍNEZ ARAGÓN***Principal Legal Advisor*  
Tel. 00 33 3 88 17 2401**Gerhard GRILL***Principal Legal Advisor*  
(from 15.04.1999)  
Tel. 00 33 3 88 17 2423**Benita BROMS***Principal Legal Advisor*  
Brussels Antenna (from 01.03.1999)  
Head of Brussels Antenna  
(from 01.09.1999)  
Tel. 00 32 2 284 2543**Olivier VERHEECKE***Legal Officer*  
Brussels Antenna  
(from 01.11.1999)  
Tel. 00 32 2 284 2003**Vicky KLOPPENBURG***Legal Officer*  
Brussels Antenna  
Tel. 00 32 2 284 2542

*The Ombudsman and his Strasbourg-based staff.*



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**Ilta HELKAMA***Press Officer (until 31.07.1999)***Ben HAGARD***Internet Communications Officer*

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**Murielle RICHARDSON***Secretary of the European Ombudsman*

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**Anna RUSCITTI***Secretary*

Brussels Antenna

Tel. 00 32 2 284 6393

**Ursula GARDERET***Secretary*

Brussels Antenna

Tel. 0032 2 284 2300

**Isabelle FOUCAUD***Secretary*

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**Stephanie KUNZE***Secretary (until 01.03.1999)***Isabelle LECESTRE***Secretary**Auxiliary agent (until 28.02.1999)**Temporary Agent (from 01.03.1999)*

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**Marie-Andrée SCHWOOB***Secretary**Temporary Agent (from 01.03.1999)*

Tel. 00 33 3 88 17 2393

**Félicia VOLTZENLOGEL***Secretary**Temporary agent (from 01.05.1999)*

Tel. 00 33 3 88 17 2422

**Patrick SCHMITT***Usher (until 31.08.1999)***Charles MEBS***Usher (from 1.9.1999)*

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**Eleni KEFALI**

*Trainee (from 01.01.1999 to 30.06.1999)*

**Alexandra AGOSTO**

*Trainee (from 01.03.1999 to 31.07.1999)*

**Panu RAINIO**

*Trainee (from 01.09.1999 to 31.12.1999)*

**Conor DELANEY**

*Trainee (from 01.09.1999)*



*The Ombudsman's Brussels-based staff.*



**D THE ELECTION OF THE EUROPEAN OMBUDSMAN****The legal provisions**

Article 195 EC provides that “The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.”

The Rules of Procedure of the European Parliament set out details of the election procedure:

*Rule 177*

- 1. At the start of each parliamentary term, immediately after his election or in the cases referred to in paragraph 8, the President shall call for nominations for the office of Ombudsman and set a time limit for their submission. A notice calling for nominations shall be published in the Official Journal of the European Communities.*
- 2. Nominations must have the support of a minimum of thirty-two Members who are nationals of at least two Member States.*

*Each Member may support only one nomination.*

*Nominations shall include all the supporting documents needed to show conclusively that the nominee fulfils the conditions required by the Regulations on the Ombudsman.*
- 3. Nominations shall be forwarded to the committee responsible, which may ask to hear the nominees.*

*Such hearings shall be open to all Members.*
- 4. A list of admissible nominations in alphabetical order shall then be submitted to the vote of Parliament.*
- 5. The vote shall be held by secret ballot on the basis of a majority of the votes cast.*

*If no candidate is elected after the first two ballots, only the two candidates obtaining the largest number of votes in the second ballot may continue to stand.*

*In the event of any tie the eldest candidate shall prevail.*
- 6. Before opening the vote, the President shall ensure that at least half of Parliament’s component Members are present.*
- 7. The person appointed shall immediately be called upon to take an oath before the Court of Justice.*
- 8. The Ombudsman shall exercise his duties until his successor takes office, except in the case of his death or dismissal.”*

### The 1999 election

The European Parliament published a call for nominations in the *Official Journal* of 31 July 1999<sup>124</sup>, setting 24 September 1999 as the deadline for submission of nominations.

At a meeting of the Committee on Petitions held on 28 September 1999, the chairman of the Committee announced that valid nominations had been received for two candidates, namely Mr Georgios Anastassopoulos (former MEP and Vice-President of the European Parliament) and Mr Jacob Söderman (incumbent European Ombudsman).

The Committee on Petitions organised hearings of the two candidates at a special public meeting held on 19 October 1999.

On 27 October 1999, the European Parliament voted to elect the European Ombudsman. The election result was as follows:

Total votes cast:	557
Mr Georgios Anastassopoulos:	256
Mr Jacob Söderman:	269
Spoilt papers:	32

Mr Söderman was therefore declared to have been elected.

The decision of the European Parliament appointing Mr Söderman for a second mandate was published in the *Official Journal* of 1 December 1999.<sup>125</sup>

<sup>124</sup> 1999 OJ C 220/29.

<sup>125</sup> Decision 1999/780/EC, ECSC, Euratom of the European Parliament of 27 October 1999 appointing the Ombudsman of the European Union, 1999 OJ L306/32.

## HOW TO CONTACT THE EUROPEAN OMBUDSMAN



The European Ombudsman  
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