THE EUROPEAN OMBUDSMAN

ANNUAL REPORT 2000

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EN

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

Strasbourg, April 2001

Madam 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 2000.

Jacob Söderman
Ombudsman of the European Union

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1 FOREWORD

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A new fundamental right for citizens

The Nice meeting of the European Council in December 2000 represented, in one important sense, a big step forward. For the first time ever, an international agreement on human rights, the new Charter of Fundamental Rights, included a right to good administration for the citizens. The highest body in the European Union has now described in detail the fundamental rights and principles that were until recently only mentioned in the Treaties. This will naturally have a practical impact on the administrative activities of the administration of the Union and will be applied by the Community courts and the European Ombudsman.

Article 41 of the new Charter is entitled "the right to good administration". This article foresees that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. It further mentions some basic requirements for good administrative behaviour including the right of the citizens to be heard, the right for them to have access to their own file and the obligation for the administration to give reasons for its decisions. It also contains the obligation for the administration to make good any damage caused by its institution, or by its servants in the performance of their duties. In addition, citizens now have the right to use any one of the languages of the Treaties in their communications with the EU administration.

It is clear that these basic requirements for good administration are not the only rules and principles to be followed by the institutions and bodies and their servants in order to guarantee good administration. A set of rules and principles, a law, or a Code on good administrative behaviour is needed so that the EU institutions and bodies and their servants can live up to the level of good administration provided for in the Charter.

So far no set of rules and principles has been adopted for the EU administration as a whole. It is therefore important that every institution and body adopt a set of rules and principles, that is a Code of good administrative behaviour, in which the rights of European citizens are clearly set out. Some Community bodies have already done so, but the main institutions have so far failed to adopt codes that truly fulfil the aspirations set out in the Nice Charter.

The progress made in Nice on this point will prove to be an important step forward in the long-running struggle for the EU administration to enhance relations with its citizens, the European citizens. It is important therefore that the intention expressed by the highest authority of the EU be fully observed and put into practice. The Nice Charter is a good paper for the citizens and I hope that it will become a living reality through common action by all the parties involved.

The International Ombudsman Congress, which meets every four years and represents over 100 ombudsman institutions and similar bodies from all the continents, met in Durban, South Africa, in late autumn 2000. The draft EU Charter of Fundamental Rights and the European Ombudsman's draft Code of Good Administrative Behaviour were distributed to all the participants. The Ombudsman's work to promote good administration was duly presented. The main subject of the final resolution of this international congress was to underline that there is a fundamental right to good administration for all citizens in our modern world. The Ombudsman institutions throughout the planet are there to promote and pursue that right.

The results

This Annual Report contains summaries of reasoned decisions taken in 61 cases out of 237 decisions taken during the year.

All reasoned decisions are regularly added to our Website both in the language of the complaint and in English. The Annual Report would become prohibitively long if all cases closed with a reasoned decision were included. The cases presented in this report have been selected so as to include all those of principle importance as well as at least one decision for each different subject and type of finding. We do hope that the collection gives the reader a clear picture of our work.

In the foreword of the 1999 Annual Report, I declared that the European Ombudsman Office was fully up and running. By this, I meant that it was functioning in a way that one could expect from an office dealing with the grievances of European citizens concerning the activities of the EU administration. This year, we have received more complaints than last year (1732 in 2000 compared to 1577 in 1999). The complaints within the mandate where an inquiry was initiated have also increased to 223, from 201 in 1999.

In 2000, we managed to close 237 inquiries with a reasoned decision compared to 203 inquiries in 1999. The outcome of these complaints was as follows (1999 figures in brackets): no maladministration 112 (107), settled in favour of the complainant 76 (62), critical remarks 31 (27), friendly solution 1 (1), draft recommendations accepted by the institution 12 (2), special reports issued 2 (1).

This shows that the Office has now made use of all the means at its disposal to undo an instance of maladministration and that the institutions and bodies of the EU have mostly responded positively and demonstrated a true will to put things right. This is clearly good news for the citizens.

During 2000, we also tried to fight the backlog, a well-known enemy of all Ombudsman institutions. The statistics show that some progress was made, but that the enemy has not yet been fully defeated.

On 31.12.2000, 46 open inquiries were over a year old compared to 50 inquiries the year before. Of these inquiries, 2 were waiting for a court decision, 3 cases were waiting for the outcome of a proposal for a friendly solution, 6 were waiting for the outcome of a draft recommendation and 2 cases were waiting for the outcome of a special report presented to the European Parliament. This leaves a residual backlog of 33 cases, as our objective is to close a case within one year whenever possible. We will continue struggling with the backlog in 2001, with success I hope.

Complaints received by E mail

The year 2000 has been the year in which Internet communication with the citizens has truly come of age. Of the 1732 complaints received in 2000, 420 were sent by E-mail. Early on in my first mandate, I decided to accept complaints by E-mail. This was in part due to proposals by Members of the European Parliament including, in particular, Mr Dell'Alba MEP. Complaints submitted by E-mail now account for 24% of all complaints received, compared to 17% in 1999. In addition, over 1200 requests for information were received and replied to by E-mail in 2000. Many of these involved requests for advice on where to turn for help or advice. The greatest number of E-mails received came from Germany and Spain, closely followed by Italy, Belgium and Austria.

Since starting to receive a significant proportion of complaints by E-mail in 1998, I have noticed that the quality of such complaints is often not as high as those received by post. This is partly due to the fact that although a complaint form is available on my Website in all Treaty languages, it is not easy to submit it electronically. This has meant that complainants are less likely to reply to the questions posed on the complaint form when complaining by E-mail. I therefore plan to add a new type of complaint form to my Website, which the complainant will be able to complete on screen and submit directly from the Site with one simple click of the mouse. The form will be structured in such a way that the computer ensures that the complainant has completed it correctly before

submitting it. This should help to guide complainants and to increase the proportion of admissible complaints.

E-mail provides a great opportunity for citizens to communicate cheaply, rapidly and efficiently with the institutions and bodies of the EU. It also however creates a significant extra workload for the administration, as the volume of communication received rises dramatically. In the Internet world, citizens expect rapid and comprehensive replies to their inquiries. To increase public confidence, the EU administration must rise to the challenge and meet these new expectations.

The future

There have been many proposals debated about the future development of the European Ombudsman institution. Dealing only with complaints concerning possible maladministration by the institutions and bodies of the EU is indeed a limited mandate. This is demonstrated by the constant flow of complaints (up to 70%) which are outside our mandate even though many concern Community law. In order to deal with this situation, my Office has established a close co-operation with the national ombudsmen and similar bodies in the Member States. This co-operation is carried out through a network of liaison officers and involves regular seminars on Community law issues, the publication of a liaison newsletter and, since September 2000, a new Website and Summit. The Summit consists of several Internet forums for exchanging information and views on Community law matters between the ombudsman offices in the EU. This type of co-operation is now being extended to equivalent regional organisations and will soon even be offered to the municipal ones that are interested.

All these measures have been taken to achieve an efficient handling of complaints concerning Community law in the Member States. The institutions in the Member States have shown a good spirit of co-operation. It is my view that more can be achieved by this kind of co-operation than by extending the mandate of the European Ombudsman to all administrative levels of the Union where Community law is applied. Such a wide-reaching role was in fact the very aim of the original Spanish governmental initiative to set up a European Ombudsman in the early 1990s, but is not the most efficient solution in my opinion. We have to put the important principle of subsidiarity into practice whenever possible and must respect it, not just talk about it.

Another possible way forward would be to develop an even closer co-operation with the European Parliament administration that deals with petitions. The right to petition the European Parliament is another important constitutional right for the European citizens that was introduced by the Maastricht Treaty. Given that this right is ensured by the European Parliament and its administration, it would not be proper for me to make any detailed comment on such a proposal at this stage. I would however like to publicly declare that I am open to discussing various alternatives to enable the handling of petitions and complaints to be improved, provided that the intention is to achieve a clear and beneficial result for the European citizens.

Strasbourg, 31 December 2000

Jacob Söderman

2 COMPLAINTS TO THE OMBUDSMAN

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 2000, the Ombudsman dealt with 2017 cases. 1732 of these were new complaints received in 2000. 1539 of these were sent directly by individual citizens, 114 came from associations and 76 from companies. 2 complaints were transmitted by Members of the European Parliament. 284 cases were brought forward from the year 1999. The Ombudsman also began 1 own-initiative inquiry.

As first noted in the Ombudsman's Annual Report for 1995, there is an agreement between the Committee on Petitions of the European Parliament and the Ombudsman concerning the mutual transfer of complaints and petitions in appropriate cases. During 2000, 1 petition was transferred to the Ombudsman, with the consent of the petitioner, to be dealt with as complaints. 3 complaints were transferred, with the consent of the complainant, to the European Parliament to be dealt with as petitions. Additionally, there were 72 cases in which the Ombudsman advised a complainant to petition the European Parliament. (See Annex A, Statistics)

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[1] and the implementing provisions adopted by the Ombudsman under Article 14 of the Statute. The text of the implementing provisions and of the Statute of the Ombudsman, in all official languages, are published on the Ombudsman's Website (*http://www.euro-ombudsman.eu.int*). The texts are also available from the Ombudsman's office.

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 took effect from 1 January 2000. A further amendment was made on 11 September 2000, to provide for the publication of the Ombudsman's Annual and Special Reports to be announced in the Official Journal. This amendment came into force on 1 October 2000. In June 1999, the European Parliament amended and re-numbered, as Rules 177-179, the provisions of its Rules of Procedure concerning the

[1] 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.

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.

During the year 2000, a complaint was made against the European University Institute. The Ombudsman considered that it was not excluded that the EUI could be considered to be a Community body for the purposes of his mandate (see complaint 659/2000/GG below, section 3.1.4)

Example of a complaint which did not concern possible maladministration

A Quaestor of the European Parliament complained to the Ombudsman alleging maladministration by one of the Parliament's governing bodies, the Bureau. It was alleged that in the field of management of the Parliament's properties, the Bureau had wrongfully and through inadequate procedures transferred powers to itself from another of the Parliament's governing bodies, the Quaestors.

In his decision, the Ombudsman concluded that the division of competences between the Bureau and the Quaestors, and the procedures related thereto, is a question that solely concerns the Parliament's internal organisation, and that this did not appear to be a possible instance of maladministration. The Ombudsman did not, therefore, open an inquiry into the complaint.

Case 1243/2000/PB

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.

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 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*).

Eight out of the ten decentralised agencies of the European Union adopted the Ombudsman's code.

In April 2000, the Ombudsman made a Special Report on the matter to the European Parliament in which he recommends that Parliament initiate the adoption of a European administrative law. (See section 3.8).

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 for lack of appropriate administrative approaches

A complainant believed that the Commission had served a reasoned opinion on Germany pursuant to Article 226 (formerly 169) of the EC Treaty in relation to the expulsion of EU nationals from Germany.

On 7 September 2000, the complainant wrote to the President of the Commission in order to ask for a copy of this document. The Secretariat General of the Commission informed the complainant in a letter of 25 September 2000 that it was working on this request.

The complainant claimed that the Commission acted illegally by refusing to provide the requested document.

The Ombudsman considered that, at the date of the complaint, the Secretariat General of the Commission had not had a reasonable time in which to deal with the matter. The Ombudsman therefore closed the case on the basis of article 2 (4) of his Statute which requires that the complaint must be preceded by the appropriate administrative approaches.

Case 1316/2000/GG

In a letter to the Ombudsman, Mr P. described his experiences with the Commission in relation to the management and payment procedures within the Leonardo da Vinci Programme.

The Ombudsman replied that he can only adopt a view on a dispute between a citizen and a Community institution or body after an inquiry, in which both parties have had the opportunity to be heard. It was therefore not possible for the Ombudsman to express a view on Mr M.'s dispute with the Commission in the absence of a complaint against the Commission. Details on how to submit a complaint and a form which may be used for the purpose on the Ombudsman's web site were sent to Mr. P, who did not reply. The Ombudsman therefore closed the case.

Case 510/2000/IJH

Examples of inadmissibility because of Court proceedings

In August 1999 an Austrian citizen made a complaint to the European Ombudsman concerning the alleged failure of the European Commission to pay the amount of 59.694,44 DM for work carried out for a construction project in Kiev.

During the investigation into the complaint, the complainant informed the Ombudsman that he had initiated legal proceedings before the Court of Justice in relation to the subject matter of his complaint.

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.

After careful examination of the pleadings, it appeared that the facts alleged in the complaint to the Ombudsman were now the subject of legal proceedings before the Court of Justice.

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 further action. The Ombudsman therefore closed the case accordingly.

Case 1055/99/VK

In February 1999, the complainant lodged a complaint with the European Ombudsman, concerning an alleged case of abuse of power by his superiors at the European Investment Bank.

From the information received during the inquiry, it appeared that the complainant had lodged three cases before the Court of First Instance. The Ombudsman noted that the arguments brought forward in the proceedings before the Court were based on the same underlying facts about which he had complained to the Ombudsman.

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.

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 further action. The Ombudsman therefore closed the case accordingly.

Case 224/99/IP

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 admissible. If 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.

Example of a case in which there were no grounds for an inquiry

On 24 March 2000, a UK citizen complained against the age limit established by the Commission for candidates in open competition EUR/B/142/98. The complainant's application had been rejected on the grounds of age.

The question of the use of age limits in the recruitment procedures of Community institutions had been the subject of own initiative inquiry 626/97/BB launched by the European Ombudsman on 14 July 1997. As a result of this initiative, the Commission informed the Ombudsman that it adopted the policy to abolish age limits in its notices of competitions on 21 January 1998. The Commission considered it necessary to put its decision into practice in the framework of a common agreement with the other institutions and that, in the meantime, it would apply a general limit of 45 years.

In view of these developments, the Ombudsman considered that there were no grounds to open an inquiry into the matter and closed the case.

Case 431/2000/IP

2.5 ANALYSIS OF THE COMPLAINTS

Of the 7002 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 registered in 2000 is provided in Annex A, Statistics.

During 2000, 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 95% of the cases. 28% of the complaints examined appeared to be within the mandate of the Ombudsman. Of these, 297 met the criteria of admissibility, but 74 did not appear to provide grounds for an inquiry. Inquiries were therefore begun in 223 cases.

Most of the complaints that led to an inquiry were against the European Commission (83%). 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 16 complaints against the European Parliament and 4 complaints against the Council of the European Union.

The main types of maladministration alleged were lack of transparency (95 cases), discrimination (27 cases), unsatisfactory procedures or failure to respect rights of defence (26 cases), unfairness or abuse of power (39 cases), avoidable delay (84 cases) negligence (23 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 (7 cases) and legal error (20 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 2000, advice was given in 805 cases, most of which involved issues of Community law. In 435 cases the complainant was advised to take the complaint to a national or regional Ombudsman or similar body. 72 complainants were advised to petition the European Parliament and, additionally, 3 complaints were transferred to the European Parliament, with the consent of the complainant, to be dealt with as petitions and 9 cases were transferred to the European Commission. In 155 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 143 cases the complainant was advised to contact other agencies.

Examples of cases transferred to the European Commission

On 1 December 1999, a doctor addressed a complaint to the European Ombudsman concerning the refusal of the Irish Medical Council to issue a certificate to enable him to practice as a specialist doctor. He alleged that the refusal was contrary to the provisions of Directive 93/16/EEC.

Since the Irish Medical Council is not a Community institution or body, the complaint was outside the mandate of the European Ombudsman.

Furthermore, Irish law specifically excludes the Medical Council from the mandate of the Irish Ombudsman.

The complaint fell within the competence of the Commission in its role as guardian of the Treaties, since it concerned the correct interpretation and application of a Directive. The complaint was therefore transferred to the Commission in January 2000, with the consent of the complainant.

A similar complaint against the Irish Medical Council, made in January 2000, was dealt with in the same way.

In February 2000, the Commission sent the Ombudsman a copy of its reply to the complainants. The Commission explained the provisions of the Directive and the relevant case-law of the Court of Justice. It concluded that the Irish Medical Council cannot be obliged to award the certificate in question.

Cases 1486/99/IJH and 41/2000/IJH

2.7 THE OMBUDSMAN'S POWERS OF INVESTIGATION

During 2000, the Ombudsman's power to hear witnesses was invoked in one case. At the end of 2000, inquiries into the case were still continuing.

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".

2.7.1 The hearing of witnesses

The general procedure applied for the hearing of witnesses is the following:

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 institution or body concerned, 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 Ombudsman's services and the Secretariat General of the institution or body concerned agree the language or languages of the proceedings. If a witness so requests in advance, the proceedings are conducted in the mother tongue 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.

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 2000, the Ombudsman's powers to inspect files and documents relating to an inquiry were invoked in 4 cases.

According to Article 3.2 of the Statute of the Ombudsman:

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

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 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.

2.7.3 Clarifying 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.[2]

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 (proposed amendments and additions to the existing text are in italics):

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.

[2] 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.

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.[3]

The European Parliament was dealing with this matter at the end of the year 2000. The outcome will be reported in the next Annual Report.

2.8 INQUIRIES BY THE OMBUDSMAN AND THEIR OUTCOMES

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.

[3] See Article 4 of Regulation 1073/1999, 1999 OJ L 136/1.

In 2000, the Ombudsman began 224 inquiries, 223 in relation to complaints and 1 own-initiative. (For further details, see Appendix A**,** Statistics)

76 cases were settled by the institution or body itself. Of this number 46 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). 6 cases were dropped by the complainant. In 112 cases, the Ombudsman's inquiries revealed no instance of maladministration.

A critical remark was addressed to the institution or body concerned in 31 cases. A friendly solution was reached in 1 case. 13 draft recommendations to the institutions and bodies concerned were made in 2000. 12 draft recommendations were accepted by the institutions in 2000, 6 being a draft recommendation made in 1999 (cases 398/97/GG, 489/98/OV, 507/98/OV, 515/98/OV, 576/98/OV, 818/98/OV). In the case of 2 other draft recommendations made in 2000, the deadline for a detailed opinion from the institution concerned did not expire before the end of the year.

In 2 cases, a draft recommendation was followed by a special report to the European Parliament. One concerned the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV) (see sections 2.2.2 and 3.8). The other concerned complaint 713/98/IJH (see section 3.8).

The full texts of the special reports are published on the Ombudsman's website in all official languages.

3 DECISIONS FOLLOWING AN INQUIRY

3 DECISIONS FOLLOWING AN INQUIRY

3.1 CASES WHERE NO MALADMINISTRATION WAS FOUND

3.1.1 The Council of the European Union

REFUSAL TO PROMOTE TO AN A2 POST

Decision on complaint 1280/98/(PD)GG (Confidential) against the Council

THE COMPLAINT

The complainant was an A3 grade official of the Council of the European Union. In September 1997, the Council published a vacancy notice for an A2 grade post in the Directorate of its Secretariat-General dealing with budget and staff regulation matters, to be filled by transfer or by promotion. According to the notice, the person to be chosen for the post inter alia needed to have an adequate knowledge of the general principles and procedures applicable in budget and staff regulation matters. The complainant and three other candidates applied for the post. The Secretary-General of the Council appointed a consultative selection committee that interviewed the candidates. By letter of 5 November 1997, the Secretary-General of the Council informed the complainant that his application had been unsuccessful and that another candidate had been chosen. The successful candidate, Mr H., was also an A3 grade official.

In February 1998, the complainant lodged a complaint under Article 90 (2) of the Staff Regulations. In this complaint, he demanded the annulment of the decision of 5 November 1997 rejecting his application. He also asked the Council to compensate him for the material and non-material damage suffered as a consequence of this decision. On 4 June 1998, the Council rejected this complaint.

In December 1998, the complainant turned to the Ombudsman. Attached to his complaint was a note in which the complainant described the background to his complaint. The complainant alleged (1) that the Council had infringed Article 45 (1) of the Staff Regulations and that the procedure had been irregular, (2) that the Council had infringed Article 5 (3) of the Staff Regulations and (3) that there had been a misuse of power. In the context of the latter allegation, the complainant claimed that in a case decided by the Court of First Instance in 1992 the Council had produced and used a document (a note drawn up by the Secretary-General of the Council on 23 May 1990) which contained untrue statements. The complainant suggested therefore to the Ombudsman that he should notify the competent national authorities of these facts.

THE INQUIRY

The Council's opinion

The complaint was forwarded to the Council for its opinion. In its opinion, the Council made the following comments with regard to the complaint:

The principle laid down in Article 5 (3) of the Staff Regulations pursuant to which officials belonging to the same category have to receive equality of treatment obliges the appointing authority not to treat comparable situations in a different way unless doing so is objectively justified. This rule had not been infringed in the present case.

According to Article 45 (1) of the Staff Regulations, promotion is by decision of the appointing authority and is exclusively by selection from among officials who have completed a minimum period in their grade after consideration of the comparative merits of the officials eligible for promotion and the reports on them. The four applications had been treated in a strictly equal way. The Secretary-General of the Council who had been the appointing authority had set up a consultative selection committee to advise him in this matter. This committee had carefully examined the applications and interviewed each of the applicants. On the basis of the report of the committee, the Secretary-General had then proceeded to examine the comparative merits of the candidates, including those of the complainant. On the basis of the results of this examination, the Secretary-General had interviewed the two candidates who appeared to be most suitable before choosing one of them. This procedure was compatible with the requirements of Article 45 (1) of the Staff Regulations.

As to the alleged misuse of power, such an allegation could only be maintained if the complainant had produced objective, relevant and consistent evidence capable of proving it. However, the procedure followed in the present case confirmed that the appointing authority had endeavoured to serve the interest of the institution.

The complainant's observations

In his observations, the complainant maintained his allegations. He stressed in particular that in so far as the issue of the misuse of power was concerned, the Council had failed to reply to his allegation that false documents had been produced and used by the Council in a case brought before the Court of First Instance by a former colleague of his, Mr Schloh[4].

FURTHER INQUIRIES

In September 1999, the Ombudsman wrote to the Council asking for further information in relation to the complainant's case. The Ombudsman asked the Council to specify why the appointing authority had in the present case decided to interview only two candidates whereas in other cases all the candidates appeared to have been interviewed. The Council was also asked to comment on the allegations made by the complainant with regard to a note of the Secretary-General dated 23 May 1990 and its contents.

The Council's reply

In its reply of October 1999, the Council made the following comments:

According to the case law of the Community courts, the appointing authority was free to choose the procedure, which it considered most appropriate for examining the applications for a given post. It was therefore entitled to make use of a consultative selection committee in order to carry out preparatory work. In the present case, this consultative committee had been presided by the Director-General of the Directorate-General where the post was to be filled. The other members had been a Director from the Legal Service and the Director in charge of Personnel and Administration. This committee interviewed all four candidates and then prepared a report. On the basis of this report, of the applications of all the candidates and of all other relevant elements the appointing authority had decided to interview the two candidates whom it considered to be best suited for the relevant post. The appointing authority had not been obliged to interview the complainant and the remaining candidate since it disposed of sufficient information in order to take an informed decision. The complainant had already, prior to the present case, applied 19 times for an A2 grade post. It was true that in an earlier case the appointing authority had interviewed all eight candidates for a post. However, the workload of the Secretary-General had considerably increased since then.

As to the note dated 23 May 1990 which had been drawn up by the Secretary-General of the Council in charge at that time, the Council did not dispose of any indications which would call in doubt the correctness of its contents. This note had been submitted to the Court of First Instance in Case T-11/91, and in these proceedings it had not been established that the contents of the note did not correspond to reality. It was surprising that the complainant had waited for six years before claiming that the said note contained wrong statements. Furthermore, the complainant had not produced any evidence supporting his claim.

The complainant's further observations

In his observations on this letter, the complainant insisted that the appointing authority should have interviewed him personally. The fact that he had already applied for A2 grade

[4] Case T-11/91 [1992] ECR II-203.

posts before was irrelevant, particularly in view of the fact that he had never had an interview with the Secretary-General who was in charge at the time of the disputed appointment. As to the note dated 23 May 1990, the complainant claimed that it was the Council's duty to prove that its contents were correct.

THE DECISION

1 Alleged infringement of Article 45 (1) of the Staff Regulations and procedural irregularities

1.1 The complainant, an A3 grade official of the Council of the European Union, had applied for an A2 grade post in the Council. The Council rejected this application and appointed Mr H. instead. The complainant alleged that by doing so, the Council had infringed Article 45 (1) of the Staff Regulations. He also claimed that the selection procedure had been irregular since the Council had failed to interview him.

1.2 The Council claimed that all the applications had been carefully examined by a consultative selection committee set up by the appointing authority (the Council's Secretary-General) which had interviewed all the applicants and that the Secretary-General had then personally interviewed the two most suitable candidates before choosing one of them for the post concerned. According to the Council, it was not necessary for the appointing authority to interview all the candidates.

1.3 According to Article 45 (1) of the Staff Regulations, promotion is by decision of the appointing authority and is exclusively by selection from among officials who have completed a minimum period in their grade after consideration of the comparative merits of the officials eligible for promotion and the reports on them.

1.4 As to the substantial aspect of this head of complaint, the complainant appeared to allege that the choice of the appointing authority had not been based on the candidate's respective merits. In this context the complainant claimed that in so far as the conditions set out in the vacancy notice were concerned, Mr H. did not have an experience or professional knowledge which could be compared to his own. However, the complainant did not claim that Mr H. had not fulfilled the conditions set out in the vacancy notice. On the contrary, the complainant explicitly acknowledged that the latter possessed the general professional qualifications required. On the basis of the information provided by the complainant, and bearing in mind that the appointing authority enjoys a wide discretion, it could therefore not be concluded that the appointing authority necessarily had to give the complainant preference over Mr H. The Council pointed out that the Staff Regulations do not confer an automatic right to promotion, even to officials who meet all the conditions for promotion[5] and that age and seniority can only be taken into account as a subsidiary matter[6]. These arguments appeared to be reasonable.

1.5 As to the procedural aspect raised by the complainant, the Ombudsman considered that the case law of the Community courts confirmed that the appointing authority was entitled to make use of a consultative selection committee to prepare the comparative examination of the applications, which it had to carry out[7]. It was on the basis of a report established by such a committee that the Secretary-General proceeded to examine the respective merits of the candidates and to interview two of them. It was true that nothing would have prevented the Secretary-General from interviewing all four candidates himself. The Ombudsman considered, however, that the decision of the Secretary-General to interview only those two candidates who, on the basis of the applications, the report of

5 Cf. Case T-3/92 *Latham/Commission* [1994] ECR-SC II-83 paragraph 50.

6 Case 293/87 *Vainker/Parliament* [1989] ECR, 23 paragraph 17.

7 See Case T-11/91 *Schloh/Council* [1992] ECR-II-203 paragraph 47.

the committee and other relevant information, had appeared to him to be most suitable for the post, appeared to be reasonable and in conformity with Article 45 (1) of the Staff Regulations as interpreted by the Community courts. Contrary to what the complainant claimed, this provision did not appear to require the appointing authority to interview all the candidates personally. The fact that this had been done by the Council in a previous case could not be considered to be relevant unless it was established that the appointing authority at the Council normally interviewed all the candidates in such cases and had departed from this practice in the present case without good reason. The complainant had not shown that such a practice existed.

1.6 The Ombudsman concluded that in these circumstances there did not appear to have been maladministration on the part of the Council in so far as the first allegation of the complainant was concerned.

2 Alleged infringement of Article 5 (3) of the Staff Regulations

2.1 The complainant alleged that the Council had infringed Article 5 (3) of the Staff Regulations when it appointed Mr H. to the post.

2.2 The Council of the European Union claimed that the principle of equal treatment had not been infringed.

2.3 Article 5 (3) of the Staff Regulations provides that officials belonging to the same category have to receive equality of treatment. In the absence of further clarifications in the complaint or the complainant's further observations, the European Ombudsman assumed that the allegation of unequal treatment was based on the fact that Mr H. and not the complainant had been chosen for the relevant post on the one hand and the fact that only two of the four applicants had been interviewed by the Secretary-General of the Council. Both these circumstances were also referred to by the complainant in support of his allegation according to which the Council had infringed Article 45 (1) of the Staff Regulations and committed procedural irregularities. However, in view of the considerations set out above (see 1) the Ombudsman concluded, on the basis of the evidence available to him, that the complainant had not shown that he had been subject to discrimination in these regards.

2.4 The Ombudsman concluded that in these circumstances there did not appear to have been maladministration on the part of the Council in so far as the second allegation of the complainant was concerned.

3 Alleged misuse of power

3.1 The complainant alleged that the appointment of Mr H. to the post concerned constituted a misuse of power by the Council of the European Union.

3.2 The Council retorted that the complainant had failed to produce objective, relevant and consistent evidence capable of proving his allegation.

3.3 The complainant had submitted a note to the Ombudsman in which he described the background to his complaint. However, the allegations which this note contained as to the reasons for the appointment of Mr H. and the reasons for several appointments to other A2 grade posts had not been confirmed by the Council. The complainant had not submitted any further evidence corroborating the claims made in this note. The Ombudsman therefore considered that these claims could not be regarded as having been established. Apart from these claims, the complainant relied on two concrete circumstances in order to substantiate his claim. The first of these was the fact that the complainant had been informed of the fact that his application had been unsuccessful in a note which contained what the complainant considered to be a standard formula. However, contrary to what the complainant alleged this was not incompatible with the announcement in the vacancy

notice according to which candidates would be informed «individually». The second of these circumstances related to a note drawn up by the Secretary-General of the Council on 23 May 1990 and submitted to the Court of First Instance in Case T-11/91. The complainant alleged that this document contained false statements since it included a report on an interview that the Secretary-General claimed to have had with him at that time but that in reality had never taken place. The Ombudsman considered that the complainant had not supplied him with sufficient evidence, which would have proven this allegation. In the absence of such supporting evidence, the Ombudsman was of the opinion that it was not necessary for him to ask the Council to produce the incriminated document for inspection by the Ombudsman. For the same reason the Ombudsman considered that the conditions of Article 4 (2) of the Statute of the Ombudsman[8] according to which the Ombudsman shall immediately notify the competent national authorities if he learns of facts which might relate to criminal law were not fulfilled.

3.4 The Ombudsman concluded that in these circumstances there did not appear to have been maladministration on the part of the Council in so far as the third allegation of the complainant was concerned.

4 Claim for damages

4.1 In his complaint, the complainant pointed out that he also objected to the rejection of his demand to receive compensation for the material and non-material damage suffered as a consequence of the rejection of his application for the post concerned.

4.2 The complainant had not put forward any specific arguments in relation to this claim. The Council had not commented on this claim.

4.3 The complainant's claim for compensation was based on the premise that the Council had been wrong to reject his application for the post concerned. As explained above, however, the Ombudsman had come to the conclusion that there was not enough evidence to support the complainant's allegations according to which the rejection of his application for the post concerned constituted maladministration. In view of this conclusion and given that the complainant had not put forward any specific arguments in relation to the rejection of his demand for compensation, the Ombudsman considered that there was no need further to inquire into this allegation of the complainant.

5 Conclusion

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

8 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.

3.1.2 The European Commission

ALLEGED FAILURE TO REPLY AND TO DECIDE ON A COMPLAINT FOR INFRINGEMENT OF STATE AID PROVISIONS

Decision on complaint 533/98/OV (Confidential) against the European Commission

THE COMPLAINT

In May 1998, X complained to the European Ombudsman on behalf of a Parish Council (hereafter "the complainant"). On 11 June 1997, the complainant had lodged a complaint with the European Commission for infringement of State aid provisions by the UK authorities with regard to State aid paid to Manchester Airport Plc and/or British Airways Plc and Continental Airlines and American Airlines. The complainant requested the Commission to open an investigation pursuant to Article 93(2) (new Article 88) of the EC Treaty and to declare the aid paid by Manchester City Council to Manchester Airport Plc to be incompatible with the Treaty, with the effect that it should cease forthwith. The Commission was invited to act without delay, as the matter was urgent owing to the timing of the proposed construction of the second runway. The complaint was personally presented by the representatives of the complainant at a meeting with DG VII (Transports) on 11 June 1997.

On 6 November 1997, the complainant sent more information to the Commission concerning the report of the UK Civil Aviation Authority following a report submitted to them by the UK Monopolies & Mergers Commission in August 1997. In this report, serious concerns were raised regarding the lack of Manchester Airport Plc's transparency in financial issues. Both reports re-enforced some aspects of the substance of the complaint.

Even if in December 1997, DG VII indicated that the Commission would decide on the complaint around the middle of January 1998, the Commission had still not decided on the complaint 11 months after it was lodged, and this despite frequent requests for information, telephone calls and e-mails from the complainant. The complainant annexed copies of all the correspondence sent to the Commission to the complaint.

The complainant furthermore observed that the UK authorities had not transposed Directive 80/723 as amended by Directive 85/413 regarding the transparency of financial relations between Member States and public undertakings which specifically applies to transport activities. The deadline for transposition was 1 January 1986 (Article 2 of Directive 85/413). The complainant stated that the UK's failure to transpose the directive was in breach of Community law and infringement proceedings against the UK authorities should have commenced soon after the matter was brought to the attention of the Commission. The Commission failed to address point 7 of the complaint regarding the interpretation of those directives.

On 21 July 1998, the complainant sent the Ombudsman a copy of a new letter to the Commission dated 2 July 1998 asking when the Commission would decide on the complaint. The complainant received no reply to that letter.

The complainant therefore complained to the Ombudsman alleging that the Commission

1) had failed to reply to the complainant's correspondence,

2) had not decided on the complaint after more than one year, and

3) had failed to deal promptly with the obligation of the UK authorities to transpose Directives 80/723 and 85/413 by 1986, and to address the specific points regarding the interpretation of those Directives (point 7 of the complaint).

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission first recalled that on 11 June 1997, the complainant had lodged a complaint with the Commission alleging that the funding of Manchester Airport (MA PLC) by a number of local authorities in the Manchester area involved illegal State aid to the benefit of the

Manchester Airport itself and some airlines. The complainant consequently asked the Commission to initiate the procedures under Article 93(2) of the EC Treaty to establish the existence of an infringement under Article 92(1) of the EC Treaty.

In particular, the complaint concerned two different types of financial transactions, those taking place between the airport owners and the airport and those between the airport and some airlines. In addition to that, the complainant claimed that the UK failed to transpose Directives 80/723 and 85/413 on the transparency of financial relations between Member States and public undertakings. However, the complaint formally requested the Commission only to start the proceedings pursuant to Article 93, and only with regard to the alleged aid paid by Manchester local authorities to MA PLC.

The Commission observed that it took a close and detailed look at the complaint, as the following shows:

- Contacts were established before the formal lodging of the complaint. By letter of 7 April 1997, the Commission informed the complainant about its general position in respect of the issue of public funding of infrastructure projects;

- The complainant was invited to a meeting on 11 June on DG VII's premises in Brussels to present the complaint. The complainant was informed again that the Commission did not consider public funding of infrastructure projects to be covered by the State aid rules;

- The complainant's letter of 30 June 1997 to DG VII was answered by letter of 16 July 1997;

- The complainant's letter of 1 July 1997 to DG VII seemed not to have reached the Commission. The Commission could not trace it in its archives and mail registers;

- By letter of 20 June 1997 to the Permanent Representative of the UK, the Commission asked the British authorities for their comments on the complaint. By letter of 18 July 1997, MA PLC and the City of Manchester Council submitted their response denying the allegations and inviting the Commission to reject the complaint as unfounded;

- The Commission further gave the complainant the opportunity to comment on MA PLC and the City of Manchester's statement. By letter of 1 August 1997 the Commission sent the complainant a copy of the British authorities' reply. On 9 October 1997 the complainant submitted additional comments, which the Commission acknowledged by letter of 8 December 1997;

- As regards the four letters of 15 and 18 December 1997, 16 February and 7 April 1998, they did not add any new information but simply urged the Commission to take a decision within a short time. Following the first of these letters, the Commission explained again its position to the complainant by telephone.

The Commission therefore carefully examined the factual and legal particulars brought to its attention by the complainant and concluded that the facts described in the complaint raised no concern about possible distortions of competition between Member States. Indeed, the constant Commission position on infrastructure financing[9] in the aviation sector considers that the construction or enlargement of aviation infrastructure projects financed by the public sector represents in principle a general measure of economic policy which does not fall under the Treaty rules on State aid in so far as it is aimed at meeting planning needs or implementing national transport policies. Nevertheless, since possible aid elements may result from preferential treatment of specific companies when using the infrastructure, the validity of this general principle is subject to the condition that the infrastructure concerned is accessible to all users on the basis of objective and non-discrimi-

9 See the Commission's Guidelines for the application of Articles 92 and 93 of the EC Treaty and 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350 of 10.12.1994.

natory criteria. In the present case there was no evidence that any discrimination had occurred, therefore it could be concluded that in principle the public investment in MA PLC did not fall within the scope of the Community rules on State aid. The Commission expressed this view to the complainant from the very beginning, in particular in the letter of 7 April 1997, in the meeting of 11 June 1997 and in the telephone conversation of 18 December 1997.

As regards the second allegation that the Commission failed to decide on the complaint after more than one year, the Commission recalled some aspects of the procedural rules in State aid cases[10]. Third parties writing to the Commission may be an important source of information about State aid, but are not intervening parties in the procedure, since in State aid cases the Commission and the Member States are the only parties. The Commission examines and answers all complaints, which it definitely did in the case at hand, but has no obligation to take a decision on the aid complained of. In addition to that, the Court of Justice stated in case C-367/95 P (Sytraval) that:

- neither the Treaty nor Community legislation lays down the procedural system for dealing with complaints objecting to grants of State aid. In particular in a case of alleged State aid there is no basis for the imposition on the Commission of an obligation to conduct an exchange of views and arguments with the complainant. Therefore, in the present case the Commission went beyond its obligations towards the complainant;

- the decisions adopted by the Commission in the field of State aid must be addressed to the Member States concerned. When the Commission adopts such a decision it proceeds to inform the complainants of its decision.

- If the Commission finds that no State aid as alleged by a complainant exists, the Commission must provide the complainant with an adequate explanation. The Commission is not required however to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance.

In carrying out its task of supervisor and regulator in the field of competition, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to a case brought to its notice. The Commission is facing a number of cases, which raise relevant problems for the correct functioning of the aviation internal market. The handling of such cases is a clear priority for the Commission compared to prima facie groundless complaints, and therefore time and resources are allocated to every single file accordingly.

As regards the alleged failure to address point 7 of the complaint concerning transparency and the alleged failure of the UK authorities to transpose Directives 80/723 and 85/413, the Commission noted that the complainant simply invited the Commission to provide clarification to the interpretation of the two Directives and not to open an infringement procedure. The complainant apparently formally requested the Commission to do so by its letter of 1 July 1997, which the Commission did not receive.

In their reply of 18 July 1997 to the Commission's letter of 20 June 1997, the UK authorities submitted that, under English law, no individual has a right of access to all documentation held by a local authority, without prejudice to specific rights which may have been granted in various legislation. Information was disclosed to the complainant in compliance with such legislation. The two Directives at stake impose on Member States the obligation to keep information at the disposal of the Commission for 5 years and to supply it to the Commission if it so requests. By letter of 1 August 1997 the Commission provided the complainant with the reply of the UK authorities calling for its comments. By letter of 9 October 1997 the complainant submitted further comments but did not ques-

[10] Competition law in the European Communities, Volume II A, Rules applicable to State aid – OPOCE, p. 45.

tion the legal arguments put forward by the UK, hence the Commission concluded it was no longer necessary to go back over this issue.

The complainant's observations

The complainant made no observations on the Commission's opinion. The complainant however wrote to the Ombudsman on 17 November 1998 stating that no further correspondence had been received from the Commission. The complainant expressed his concern about the delay in the determination of the complaint especially as construction works were underway.

Further information obtained from the Commission

On 26 July 1999, the Ombudsman received a copy of a letter sent to the complainant on 16 July 1999 by DG VII and by which the Head of Unit informed the complainant that the Commission took the decision that the financing of the development of Manchester Airport, as well as the financial and operating arrangements between Manchester Airport on the one hand and British Airways and Continental Airlines on the other, did not constitute aid. The Commission annexed to this correspondence a copy of the 5 pages long letter that the Commission had sent to the UK authorities. The letter would also be made publicly available on the Internet.

THE DECISION

1 The alleged failure of the Commission to reply to the complainant's correspondence

1.1 The complainant alleged that the Commission had failed to reply to the correspondence sent to DG VII after the complaint was lodged. The Commission observed that it replied on 16 July 1997 to the complainant's letter of 30 June 1997 and that the complainant's letter of 1 July 1997 had not reached the Commission. As regards the four letters of 15 and 18 December 1997, 16 February and 7 April 1998, it pointed out that they did not add any new information but simply urged the Commission to take a decision within a short time; following the first of these letters, the Commission explained again its position to the complainant by telephone.

1.2 The Ombudsman noted that, from the enclosures of the complaint addressed to him, it appeared that between 30 June 1997 and 7 April 1998 the complainant had sent 18 letters to the Commission, namely 13 letters to DG VII and 5 letters to DG XV. This is an average of about one letter every two weeks. The Ombudsman acknowledged that the Commission had not replied to every single one of these eighteen letters. However, from the annexes to the complaint it appeared that, on various occasions during the handling of the complaint by its services, the Commission replied to the complainant's correspondence.

1.3 On 16 July 1997, DG VII replied to the complainant's letter of 30 June 1997 and answered 4 requests raised by the complainant. In this letter DG VII informed the complainant that a copy of the relevant parts of the complaint had been passed on to DG IV, and that DG XVI would be the Directorate General most likely to fund infrastructure projects such as Manchester Airport. DG VII also informed the complainant that it was waiting for the observations of the UK authorities. On 1 August 1997, DG VII sent the complainant a copy of the response of the UK authorities. On 26 August 1997, DG VII sent a fax to the complainant in order to extend the deadline for the submission of observations by the complainant to 1 October 1997. On 8 December 1997, DG VII replied to the complainant's letters of 9 and 28 October, and 6 November 1997 and informed the complainant that it was carefully considering the complaint together with other Commission departments. On 5 June 1998 DG VII wrote again to the complainant. On 3 December 1998 DG VII replied to the complainant's letter of 17 November 1998 and

informed the complainant that the inquiry was still pending and that it could not take any commitment on a deadline.

1.4 It appeared from the above that, even if it had not replied to every single letter by the complainant, the Commission had sent 6 letters to the complainant in the period between July 1997 and December 1998. The Ombudsman therefore considered that the Commission had reacted reasonably to the complainant's correspondence. No instance of maladministration was thus found with regard to this aspect of the case.

2 The alleged failure of the Commission to decide on the complaint after more than one year

2.1 The complainant alleged that more than one year after the complaint was lodged on 11 June 1997, the Commission had still not decided on it. Referring to case law of the Court of Justice the Commission observed that neither the Treaty nor Community legislation lays down the procedural system for dealing with complaints objecting to grants of State aid. The Commission moreover stated that, in carrying out its task of supervisor and regulator in the field of competition, it is entitled to refer to the Community interest in order to determine the degree of priority to be applied to a case brought to its attention.

2.2 The Ombudsman noted that, according to the judgement of the Court of Justice of 2 April 1998[11], neither the Treaty nor Community legislation lays down the procedural system for dealing with complaints objecting to grants of State aid. It appears however from this judgement that the Commission has to respect some basic procedural guarantees towards the complainants. More particularly is the Commission required to 1) give notice to the parties concerned to submit their comments in conformity with Article 88(2) of the EC Treaty, 2) inform the complainants, in accordance with its duty of sound administration, of its decision that the measures complained of do not constitute State aid and 3) provide the complainant with an adequate explanation of the reasons for which the elements put forward in the complaint failed to demonstrate the existence of State aid[12].

2.3 In the present case, it appeared that those procedural guarantees had been respected by the Commission, because 1) on 1 August 1997 the Commission sent the complainant a copy of the response of the UK authorities for comments, 2) on 16 July 1999 the Commission informed the complainant of its decision that the financing of MA PLC did not constitute aid and 3) the Commission sent a copy to the complainant of the letter sent to the UK authorities on 14 June 1999 which contained the reasoning for the decision that the measures complained of did not constitute State aid.

2.4 The Ombudsman acknowledged that 2 years had elapsed between the lodging of the complaint on 11 June 1997 and the Commission's final decision of 16 July 1999. However, it appeared from the correspondence between the Commission and the complainant that during this time the Commission had actively inquired into this complaint, had asked the UK authorities for observations, and had respected the complainant's procedural rights. The Ombudsman therefore found no instance of maladministration with regard to this aspect of the case.

3 The alleged failure to deal with the obligation of the UK authorities to transpose Directives 80/723 and 85/413

3.1 The complainant alleged that the Commission had failed to deal promptly with the obligation of the UK authorities to transpose by 1986 Directives 80/723 and 85/413 on the transparency of financial relations between Member States and public undertakings, and to address the specific points regarding the interpretation of those Directives (point 7 of the complaint). The Commission stated that the complainant simply invited the

11 Case C-367/95 P, *Commission v. Sytraval*, [1998] ECR I-1719.

12 Case C-367/95 P, see more particularly paragraphs 45, 59 and 64 of the judgement.

Commission to provide clarification to the interpretation of the two Directives and not to open an infringement procedure. The complainant apparently formally requested the Commission to do so by its letter of 1 July 1997, which the Commission did not receive.

3.2 From point 7.1.10 of the original complaint lodged with the Commission on 11 June 1997, it appeared that the complainant did not ask the Commission to open an infringement procedure against the UK authorities, but merely invited the Commission "to provide clarification to the interpretation of the Directive in response to this aspect of the complaint". The Ombudsman therefore considered that the allegation according to which the Commission had not dealt promptly with the obligation of the UK authorities to transpose the Directives could not be sustained.

3.3 With regard to the interpretation of the Directives, the Ombudsman observed that on 1 August 1997 the Commission provided the complainant with the reply of the UK authorities asking the complainant to comment. However, the complainant did not submit any further comments on the legal arguments presented by the UK authorities. The Commission was therefore entitled to conclude that it was not necessary to further pursue this issue and thus acted within the limits of its legal authority.

3.4 On the basis of the above considerations, the Ombudsman found no instance of maladministration with regard to this aspect of the case.

4 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.

ALLEGED NEGLECT BY THE COMMISSION OF ITS DUTY AS GUARDIAN OF THE TREATY

Decision on complaint 715/98/IJH against the European Commission

THE COMPLAINT

In July 1998, TIE (Toy Industries of Europe) made a complaint to the European Ombudsman against the Commission, concerning the latter's handling of a complaint which TIE made to it in November 1994 against the prohibition, imposed by the Greek authorities, on television advertising of children's toys.

In the complaint to the Ombudsman, TIE alleged:

(i) ***undue delay***, in that the Commission did not send a letter of formal notice to the Greek authorities until two years after the complaint, not within one year as laid down in its own internal procedures. Furthermore, the complainant alleged that the Commission ignored its repeated requests for urgent treatment of its complaint;

(ii) ***lack of information***, in that the Commission never provided any official information concerning the actions taken on TIE's complaint;

(iii) ***neglect of duty***, in that the Commission decided to consult experts and interested parties before sending a reasoned opinion to the Greek authorities. The complainant claimed that where there is an obvious case to answer with regard to a suspected infringement it is for the Member State to provide the necessary information and not for the Commission or any third parties.

The complainant also alleged lack of impartiality by the college of Commissioners and requested the Ombudsman to examine the general efficacy of the Article 169 (now Article 226) procedure. The Ombudsman informed the complainant that the allegation and request did not appear to provide sufficient grounds for inquiry, as required by Article 195 of the Treaty establishing the European Community. The Ombudsman's inquiry in this case was therefore limited to points (i), (ii) and (iii) above.

THE INQUIRY

The Commission's opinion

The Commission explained that, in its complaint to the Commission, TIE had claimed that the prohibition on television advertising had a particularly detrimental effect on non-Greek Community producers of toys and alleged that, although it was presented as a measure to safeguard children, its aims were protectionist.

Undue delay

The Commission accepted that two years had elapsed between the date of the complaint to the Commission and the sending of the letter of formal notice, but enclosed a detailed chronology of events, in order to demonstrate that it had not remained idle during this period. The Commission also mentioned that its procedures had subsequently been improved so as to deal with infringement cases more quickly.

As regards the complainant's requests for urgent treatment, the Commission explained that they could not be satisfied because of the technical and sensitive nature of the problem. In particular, it was important to identify the correct legal basis of infringement proceedings and this involved many exchanges of memoranda with the Commission's Legal Service. Secondly, the disproportionate nature of the Greek measure had to be proven.

Lack of information

The Commission considered this aspect of the complaint to be particularly unjustified. Although the complainant was not systematically informed in writing of the different measures taken, its representative was regularly and precisely informed of developments, often on DG XV's initiative. These contacts took place mainly by telephone. The complainant was also received by the Director General of DG XV two months after the complaint was registered and also met other responsible officials on at least three occasions.

Neglect of duty

The Commission explained that the Greek authorities had stated in their reply to the letter of formal notice that the objective of the ban on television advertising of children's toys was to prevent children seeing advertisements which might cause them to suffer feelings of frustration, or to exert strong pressure on their parents to buy a toy that was beyond the family budget. The supposed public interest justifications of the law therefore concerned the protection of children and the safeguarding of family peace.

Before receiving the above reply, the Commission had believed that the Greek authorities were concerned about possible risks inherent in the content of the advertising message. The Commission considered that the objectives put forward in the reply shed a different light on the case, necessitating a thorough investigation.

The protection of children against risks cannot be taken lightly and the Commission recently set up a group of government experts in the field of commercial communications. Its role is not to take a decision on infringement proceedings but to discuss horizontal issues, such as the risks to which toy advertising may expose children and, if such risks are identified, the best means of combating them. The Commission services were currently evaluating the result of a discussion at the second meeting of the expert group, with a view to making a proposal to the Commission for an appropriate follow-up to the complaint by the beginning of 1999 at the latest.

The Commission also pointed out that the Court of Justice has consistently held that, under the Article 169 procedure (now Article 226), it is the Commission's responsibility to prove that an obligation has not been fulfilled.

The complainant's observations

Undue delay

The complainant questioned whether the Commission's internal rules of procedure on extension of deadlines for reply by a Member State to a letter of formal notice were complied with. Because there was no relevant Commission meeting between June and December 1997, the three-week delay in the reply from the Greek authorities caused a further five-month delay in the Commission's dealing with the matter.

The complainant also claimed that the Commission had acted swiftly against an identical Greek ban on advertising in 1991 and questioned why similar action was not possible against the measure adopted in 1994.

Finally, the complainant alleged that the delay of 13 months between the Commission's receipt of the reply from the Member State to the letter of formal notice and its decision to consult the group of experts was excessive.

Lack of information

The complainant acknowledged that DG XV provided regular information, but specified that this aspect of the complaint concerned other DGs, as well as certain Commissioners' cabinets and the Legal Service. The observations referred in particular to criticisms of the lack of transparency and dominant position of the Legal Service made in a report by a committee of the European Parliament and in the resolution subsequently adopted by the Parliament. The complainant supported the Parliament's call for the Commission to make the complete legal arguments on specific cases known to the complainant and to provide a possibility for the complainant to challenge this opinion before a final decision was taken on whether formally to pursue a complaint.

Neglect of duty

The complainant expressed the view that the primary responsibility of the Commission in infringement cases is the enforcement of the single market by eliminating obstacles to free movement as swiftly as possible. If there is a case to answer, the Commission should act within the time limits set by its own rules of procedure and use its discretionary powers effectively. If there is no case, the Commission should close the file. The fact that the toy advertising case had dragged on for so many years indicated that there was a case to answer. The fact that still no decisive action had been taken indicated neglect by the Commission of its responsibilities as guardian of the Treaty.

FURTHER INQUIRIES

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore invited the Commission to respond to the complainant's observations as regards the issues of undue delay and lack of information.

The Ombudsman also noted that the Commission's opinion stated that its departments envisaged making a proposal to the Commission for an appropriate follow-up to the complaint by the beginning of 1999 at the latest. The Ombudsman requested to be informed of any subsequent developments, as well as of any timetable for possible future action by the Commission in this matter.

The Commission's reply

Undue delay

The Commission explained that the relevant Commission departments had intended to table a proposal to send a reasoned opinion to the Greek authorities at the Commission infringement meeting in June 1997. However, this proposal was dropped when the reply from the Greek authorities was received. The reply was two to three weeks late, but the Commission was obliged to take account of it. In view of the substance of the reply, the case would probably have been held over to December 1997, even if the Greek authorities had complied with the deadline.

The Commission noted that the rules on extensions of deadlines to which the complainant referred did not apply in this case, since the Greek authorities had not requested an extension. However, it also stated that, at the time of the events in question, the Commission had sometimes been comparatively lenient with regard to late replies (some of which may only have been intended to buy time), but that in recent decisions taken with a view to improving its working methods in relation to infringement procedures the Commission had undertaken to adopt a firmer line towards Member States which failed to comply with their deadlines for replying.

As regards the comparison with the action taken when a similar ban was imposed in 1991, the Commission pointed out that it also acted swiftly in 1994, by sending a pre-Article 169 letter less than six months after the complaint was received. Furthermore, in 1991 the Greek authorities had complied immediately with the Commission's request, which was not the case in 1994.

As regards the delay of 13 months between the Commission's receipt of the reply to the letter of formal notice and its decision to consult the group of experts, the Commission explained the sequence of events between the reply (30 May 1997) and the decision to consult further (24 June 1998).

Lack of information

As regards the complainant's observations on this point, the Commission stated that there must be limits on the amount of information provided about the positions of particular departments or Member's private offices in order to safeguard the principles of consistency and collective responsibility for the work of the Commission.

As regards opinions of the Legal Service, the Commission referred to the order of the President of the Court of First Instance in *Carlsen and others v Council*[13].

The Commission also stated that the complainant and its representatives were kept regularly informed by the responsible department of the results of meetings of the heads of Commissioners' cabinets and of the Commission itself. They were received by the President's cabinet on 30 April 1996 and also had an opportunity to state their point of view at a meeting held on 27 March 1997 with the two officials in the Legal Service responsible for their case.

Developments since November 1998

The Commission explained the results of the discussion of the expert group and of its own examination of scientific studies on the subject and enclosed a 20-page summary paper drawn up by its services. Given the difficulty in arriving at a scientifically unassailable theory as to the risks and challenges involved in advertising for children, the Commission decided to investigate the matter more thoroughly and possibly enter into amicable

13 Order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97R, *Carlsen and others v Council* [1998] ECR-II 485.

dialogue with the Greek authorities with a view to jointly exploring the various alternatives which would guarantee a high degree of protection for children while safeguarding the requirements of freedom of movement. These discussions had not yet begun because the responsible Greek Minister ceased to hold office at the beginning of 1999 and because of the resignation of the Commission.

The complainant's observations

In December 1999, the complainant sent observations maintaining the complaint of undue delay as regards the 13 months between the Greek authorities' reply to the letter of formal notice and the Commission's decision to consult a group of experts.

The complainant considered that the Commission's intention to begin an amicable dialogue with the Greek authorities had been just another avenue for delaying a decision and pointed out that such negotiations normally take place only after a reasoned opinion has been delivered, since otherwise the Commission has no leverage vis-à-vis the Member State.

Finally, the complainant noted that the Commission had closed the file on the case in September 1999, on the grounds of lack of evidence and that the case had been pending for too long. The complainant had received notice of the intention to close the case and an invitation to submit new evidence within one month, which it had done. The complainant alleged that the decision to close the file had been taken by a "care-taker" Commission, in an atmosphere of desk-cleaning, with no proper legal assessment of the merits of the case, nor of the expert advice that the Commission had collected.

THE DECISION

1 The scope of the Ombudsman's inquiry

1.1 The complaint to the Ombudsman, which was made in July 1998, concerned the Commission's handling of an ongoing Article 169 (now Article 226) infringement procedure, investigating the Greek prohibition on television advertising of children's toys. The complaint to the Ombudsman alleged undue delay, failure to provide information about the ongoing infringement procedure and neglect by the Commission of its duty as guardian of the Treaty.

1.2 In observations made in December 1999, the complainant noted that the Commission had closed the infringement procedure in September 1999. The complainant alleged that this decision had been taken by a "care-taker" Commission, in an atmosphere of desk-cleaning, with no proper legal assessment of the merits of the case, nor of the expert advice that the Commission had collected.

1.3 The Ombudsman did not consider it justified to start inquiries into this allegation, which was outside the scope of original complaint. The complainant has the possibility to submit a new complaint to the Ombudsman, containing sufficiently precise allegations and supporting evidence to justify an inquiry, as required by Article 195 EC.

2 Undue delay

2.1 The complainant alleged that the Commission did not send a letter of formal notice to the Greek authorities until two years after the complaint; that the Commission had not enforced the deadline for a reply from the Greek authorities; and that the 13-month delay between the date of the reply and the Commission's decision to consult a group of experts was unjustified. The complainant also alleged that the Commission ignored its repeated requests for urgent treatment of its complaint.

2.2 The Commission explained that the complainant's requests for urgent treatment could not be satisfied because of the technical and sensitive nature of the problem. Furthermore, the Greek authorities had adopted a different attitude compared to that in 1991, when they had swiftly removed a prohibition on television advertising of toys following the Commission's request. The complainant did not pursue this aspect of the allegation of delay.

2.3 The Commission accepted that two years had elapsed between the date of the complaint and the letter of formal notice, but enclosed a detailed chronology of events in order to demonstrate that it had not remained idle during this period. The Commission also accepted that, at the time of the events in question, it was sometimes comparatively lenient with regard to late replies. The Commission mentioned that its procedures had subsequently been improved, so as to deal with infringement cases more quickly and to adopt a firmer line towards Member States that fail to comply with their deadlines for replying.

2.4 The Ombudsman noted that five years passed between the date of the complaint and the Commission's decision to close the file. Although part of this period was accounted for by the need properly to investigate a case raising complex and difficult issues, involving the protection of children, it was clear from the Commission's answers that some of the delay resulted from its internal procedures. However, in view of the fact that the Commission had subsequently made efforts to reform these procedures[14], the Ombudsman did not consider it necessary to pursue his inquiry into this aspect of the particular case.

3 Lack of information

3.1 The complainant alleged that the Commission never provided any official information concerning the actions taken on its complaint. During the Ombudsman's inquiry, the complainant acknowledged that DG XV had provided it with regular information. Furthermore, the Commission gave details, which the complainant did not contest, of meetings between the complainant's representatives and the cabinets of the President and other Commissioners, as well as with the relevant Commission services.

3.2 The complainant also argued that the Commission should have made the complete legal arguments on specific cases known to the complainant and provided for a possibility for the complainant to challenge this opinion before a final decision was taken on whether formally to pursue a complaint. In this context, the complainant referred to points made in a report by a committee of the European Parliament[15] and in the resolution subsequently adopted by the Parliament.

3.3 In reply, the Commission stated that there must be limits on the amount of information provided about the positions of particular departments or Member's private offices in order to safeguard the principles of consistency and collective responsibility for the work of the Commission. As regards opinions of the Legal Service, the Commission referred to the order of the President of the Court of First Instance in *Carlsen and others v Council*[16], which considered that an institution could refuse access to legal opinions, which are merely working instruments.

3.4 The evidence available to the Ombudsman in this case was that the complainant was provided with regular information about the progress of the complaint, but did not receive full information about the Commission's legal assessment of the case at the time when the

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14 See SEC (1998) 1733, "Improvement of the Commission's working methods in relation to infringement proceedings"; XVIth Report on monitoring the application of Community law COM(1999)301 final, 9/07/1999.

15 Report on the communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the foll1ow-up to the Green paper on Commercial Communications in the Internal Market (COM(98)0121 - C4-0252/98), A4-0503/98 (*rapporteur* Jessica LARIVE.)

16 Order of the President of the Court of First Instance of 3 March 1998 in Case T-610/97R, *Carlsen and others v Council* [1998] ECR-II 485.

Commission's decision to close the file on the complaint was taken. In the present state of Community law, and in view of the Commission's reasons for closing the file on the specific complaint, the Ombudsman found no maladministration in relation to this aspect of the case.

4 Neglect of duty

4.1 The complainant alleged that the Commission neglected its duty as guardian of the Treaty by deciding to consult experts and interested parties before sending a reasoned opinion to the Greek authorities. The complainant claimed that where there is an obvious case to answer with regard to a suspected infringement it is for the Member State to provide the necessary information and not for the Commission or any third parties.

4.2 During the inquiry, the complainant also claimed that the Commission should act within the time-limits set by its own rules of procedure and use its discretionary powers effectively. If there is no case to answer, the Commission should close the file. As regards respect for time limits, this point is dealt with in section 2.4 of the decision above.

4.3 The Commission explained that the Greek authorities' reply to the letter of formal notice had shed a different light on the case, by claiming that the prohibition of television advertising of children's toys was justified by the public interest in the protection of children and the safeguarding of family peace. A thorough investigation of these claims was needed and the Commission consulted a group of government experts in the field of commercial communications. According to the Commission, the role of the expert group was not to take a decision on infringement proceedings but to discuss horizontal issues. The Commission subsequently explained the results of the discussion of the expert group and of its own examination of scientific studies on the subject in a summary paper drawn up by its services. The complainant did not contest these explanations.

4.4 As regards the range of sources which the Commission consulted in order to obtain adequate information and evidence in this case, the Ombudsman's inquiry revealed no evidence that the Commission acted outside the limits of its legal authority as the guardian of the Treaty. The Ombudsman therefore found no maladministration in relation to this aspect of the complaint.

5 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.

FURTHER REMARKS

The general issues of whether the Commission has suitable procedures to deal promptly, fairly and effectively with citizens' complaints to it in its role as guardian of the Treaty, including whether the complainant could be informed of the Commission's legal assessment of his case and, if so, at what stage of the procedure, will be examined in a future own-initiative inquiry by the European Ombudsman.

IMPLEMENTATION OF DIRECTIVE 92/43/EEC ON HABITAT PROTECTION BY THE SPANISH AUTHORITIES

Decision on complaint 789/98/JMA against the European Commission

THE COMPLAINT

In July 1998, Mr P. lodged a complaint with the European Ombudsman on behalf of the Spanish environmental NGO "Centro de Acuicultura Experimental". The complaint, which had originally been lodged with the University Hospital "La Fe", was forwarded to the Ombudsman by that public Spanish institution. It concerned the allegedly unjustified closing of a complaint he had sent to the Commission, in which the complainant claimed that the regional authorities of Valencia were introducing non-native fish species in the Serpis river in Valencia with the ensuing damage to the native population, in breach of EC law.

In January 1994, the complainant lodged a complaint with the Commission which was registered by its services under file number P/4119/94. It concerned the introduction of foreign fish species (American trout) in the river Serpis in Valencia, and the negative impact that these actions were having on the population of a local species, *Valencia hispanica*. The complainant explained that in June 1994, the head of the responsible Commission services informed him that the institution could not take any action in the case since the only EC legislation applicable to the situation was Directive 92/43/EEC on habitat protection, which had entered into force after 6 June 1994.

In May 1995, the complainant wrote again to the Commission pointing out that the actions denounced in his previous complaint were still taking place. In August 1995 the Commission requested further details from him on the situation. The complainant forwarded the requested information in August 1996. In the absence of a reply from the Commission, the complainant sent another copy of his previous letter including some relevant documents to the institution in May 1997. The responsible Commission services replied in July 1997, still requesting further evidence. He submitted these documents (an 85-page dossier) to the Commission in October 1997.

Despite the evidence submitted, the Commission wrote to Mr P. on 20 May 1998 informing him that his complaint had been closed. Since the complainant considered that the decision was unreasonable, he lodged a complaint with the European Ombudsman, in which he stated that the responsible Commission services (DG XI) had ignored the evidence he had submitted, and requested that they reconsider the merits of his claims.

The complainant sent additional information to the Ombudsman in October 1998 in which he explained that in October 1997 and in 1998, he had submitted new evidence to the Commission in support of his claims, after not having received any reply from the institution.

In summary, the complainant considered that the Commission had failed to consider the evidence he had repeatedly submitted to the institution concerning an alleged infringement of Directive 92/43/EEC, and to properly deal with the related complaint (P/97/4858).

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission first pointed out that the complaint sent to the Ombudsman related to a Commission complaint (P/97/4858) which was currently being investigated, and which had not been closed as stated by the complainant. The institution indicated that the complainant had not made any previous administrative approaches towards its services regarding the handling of that complaint, in breach of the provisions of Art. 2(4) of the Statute of the European Ombudsman.

Having stated the administrative safeguards, which the Commission generally undertakes in the handling of any complaint, the institution explained the procedure followed in this particular instance. The complainant had sent several letters to the Commission in 1994 concerning the introduction of schools of American trout, a non-native fish species, into the river Serpis, Valencia. In his view, these actions could have negative effects on the *Valencia hispanica*, an endangered native species. This type of fish had been included as a protected fish species under Council Directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and wild fauna and flora[17].

Since, as explained by the Commission, the facts denounced by the complainant had occurred before the entry into force of Directive 92/43/EEC, his complaint had to be closed. In the letter notifying him of the closure of the complaint, he was told that should he provide new evidence, a new complaint would be registered.

The responsible Commission services in DGXI invited the complainant to submit further evidence in a letter of July 1997, which he did in October 1997. A new complaint, 97/4858, was then registered, and an acknowledgement of receipt sent to him.

In order to investigate this complaint the Commission services contacted the Spanish authorities, which sent some information to the Commission in February 1998. The Commission informed the complainant of the Spanish comments, which its services were assessing at that time. Having completed the evaluation, the Commission services wrote again to the complainant in May 1998, and indicated that the facts he had denounced did not appear to be in breach of Directive 92/43/EEC. The Commission explained at length the reasons which supported its conclusions, namely that,

1 The presence of the *Valencia hispanica* in river Serpis had not been confirmed, according to available scientific evidence.

2 The introduction of non-native trout species took place at the beginning of the 70s in most Spanish rivers for fishing purposes. It occurred therefore long before Directive 92/43/EEC had entered into force.

3 Properly speaking, no new introduction of non-native trout had occurred afterwards, but only a reinforcement of an existing presence, traces of which were found already in the 70s.

4 A scientific study supplied by the Spanish authorities explained that even in the case that the *Valencia hispanica* species were present in that river, its habitat differs from that of the non-native species and therefore the latter could not represent a threat to the former.

The previous conclusions have been drawn on the basis of a scientific study by Prof. Lobon Cervia published by the Spanish “Consejo Superior de Investigaciones Científicas”.

The Commission stressed that its letter to the complainant of May 1998 had not closed the case, as the complainant had stated to the Ombudsman.

The complainant’s observations

In his observations, the complainant stated that he had not had access to the evidence submitted by the Spanish authorities to the Commission. Furthermore he questioned the impartiality of the specialists who had given scientific advice to the Commission services on this matter.

The complainant believed that the statements made by the Commission to justify the closing of the case, namely that the introduction of foreign fish species could not have any negative impact on the local fauna of the river Serpis, and that the species *Valencia*

[17] OJ L 206, 22.07.1992, p.7.

hispanica was not present in that river, were scientifically unsupported. He referred then to a number of scientific opinions, in particular to those of Prof. Elvira and Prof. Doadrio.

The complainant also pointed out that the Commission was contradicting itself when it indicated, on the one hand, that the situation was not contrary to Directive 92/43/EEC, whereas at the same time, it indicated that the facts occurred, nevertheless, before the Directive's entry into force.

The complainant stressed that the responsible Commission services were not properly considering the factual and scientific evidence he had brought forward, and considered that the responsible Commission services were acting arbitrarily in this case.

In January 1999, the complainant informed the Ombudsman that he had forwarded several documents to the Commission on the same date, which proved that the illegal introduction of American trout was still taking place. The reply from the Commission, of January 1999, was deemed insufficient by the complainant. He thus wrote again to the Ombudsman claiming that the Commission was not properly responding to his complaints, and asking for information on the means to have disciplinary sanctions imposed on the civil servants in charge of this file.

THE DECISION

1 Admissibility of the case and further inquiry by the European Ombudsman

1.1 In order to be admissible, a complaint to the Ombudsman must be preceded by the appropriate administrative approaches to the institutions and bodies concerned (article 2(4) Statute of the European Ombudsman).

1.2 At the time the Ombudsman received the first letter from the complainant, it appeared as if the Commission had already closed the case. Moreover, since the Commission and the complainant had exchanged an extensive correspondence, the Ombudsman considered that the criteria for the admissibility of the complaint had been met.

1.3 The Ombudsman noted, however, that the Commission was right in pointing out that the complaint was still on going at that time, and that questions of admissibility could therefore have arisen.

Nevertheless, the Ombudsman considered that his inquiry should continue 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 Commission's handling of the complaint

2.1 In the complainant's view, the Commission failed to investigate his claims properly. In his view the scientific arguments employed by the Commission to conclude that there had not been a breach of Directive 92/43/EEC in this case were insufficient. Thus the Commission's decision to close the case was arbitrary and unjustified.

2.2 The Commission argued that it decided to close the case (complaint P/97/4858) on the grounds that it did not consider that the situation was in breach of EC law, in particular of Directive 92/43/EEC.

The reasons given to the complainant to justify this decision were the following: (i) no scientific evidence had confirmed the presence of the endangered local fish species *Valencia hispanica* in river Serpis; (ii) non-native trout species had already been introduced in the 70s in most Spanish rivers; (iii) therefore they had already their habitats in those areas when Directive 92/43/EEC entered into force, and (iv) the habitat of the local

Valencia hispanica differs from that of non-native trout species, and therefore the latter would never represent any threat to the former.

In order to support its conclusions the Commission relied on the assessment made in a scientific report published by the Spanish "Consejo Superior de Investigaciones Científicas".

2.3 Having reviewed all the relevant facts related to this matter, on the basis of supportive scientific evidence, the Commission decided to close the case. Although the complainant had submitted alternative scientific views, the mere reference to these divergent scientific opinions was not in itself sufficient to invalidate the Commission's reasoning.

2.4 The Ombudsman was not in a position to assess the merits of alternative scientific views, but he noted 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. The Commission had thus acted within the limits of its legal authority and there appeared to have been no maladministration.

3 Conclusion

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

BRIDGE STRENGTHENING WORKS IN ENVIRONMENTAL PROTECTION AREA

Decision on complaint 813/98/(PD)/GG against the European Commission

THE COMPLAINT

In July 1998, a complaint was lodged by an environmentalist association from the United Kingdom. This complaint essentially concerned the obligations arising for the member states of the EU and for the European Commission from Article 6 (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora[18]. A similar complaint (298/97/PD) had been lodged in 1997 by Mr Corbett MEP on behalf of another environmentalist association from the UK, Save Our Shoreline Southport Association (SOS). The European Ombudsman's decision in that case had been adopted in April 1999.

Directive 92/43/EEC envisages the setting up of a coherent European ecological network of special areas of conservation ("SACs") which is referred to as Natura 2000. Article 4 (1) of the directive calls on member states to propose a list of sites on their territory, which are suitable for inclusion in this network. This list is to be transmitted to the Commission within three years of the notification of the directive. According to Article 4 (3) of the directive, the list of sites selected as sites of Community importance shall be drawn up by the Commission within six years of the notification of the directive. Article 4 (5) of the directive provides that as soon as a site is placed on this list, it shall be subject to Article 6 (2), (3) and (4) of the directive.

Article 6 (3) of Directive 92/43/EEC provides as follows:

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, 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 authorities 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 general public."

18 OJ 1992 L 206, page 7.

The Natura 2000 network shall also include the special protection areas ("SPAs") classified by member states pursuant to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds[19]. Article 7 of Directive 92/43/EEC provides that obligations arising under Article 6 (2), (3) and (4) of this directive also apply to these SPAs.

The complaint concerned the strengthening of two bridges on the road, which runs alongside the coast near Southport (the "coast road"). In the South, it crosses an area which is constituted by two sites of special scientific interest ("SSIIs"), Southport Sand Dunes and Foreshore SSII and Ainsdale Sand Dunes and Foreshore SSII, which together have been recognised by the British authorities as a candidate SAC and are known as "Sefton Coast candidate SAC". In the North, the road appears to cross Ribble Estuary SPA[20]. On both ends, the coast road joins up with the A565 trunk road that runs through Southport.

The coast road appeared to have been a minor road in the past. Over the last years, however, the local authorities carried out various works in relation to this road. A concrete sea defence wall was built near Southport. This project gave rise to complaint 298/97/PD. In the first half of 1998, the Marine Lake Sluice Gates Bridge was strengthened to an extent that it could now carry 40 tonne heavy goods vehicles. The Ainsdale Pinfold Bridge was also to be strengthened to the same standard and widened. These works appeared to have been carried out in the meantime. According to SOS, the highway authorities furthermore had erected signs at each end of the coast road which directed all through traffic travelling to Preston in the North or Liverpool in the South, including heavy goods vehicles, away from the A565 trunk road and onto the coast road. SOS further claimed that signs had been put up which directed all tourist traffic to Southport and to destinations in town away from the A565 and onto the coast road.

Both the complainant and SOS put forward the view that the local authorities had pursued a policy of development of the coast road in the form of a succession of minor projects, none of which had been of a sufficient size or prominence to trigger the need for an ecological assessment. However, taken together these projects constituted a radical transformation in the nature of the road. The complainant and SOS took the view that the true nature and purpose of the bridge-strengthening scheme was to create a bypass for Southport. SOS referred to a "policy of development by stealth" in this context. According to SOS, the local authorities had taken the following further measures with regard to parts of the coast road and particularly of its southern section which were relevant in this context: A drainage system had been built in order to take surface water away from the road; the road had been widened, resurfaced with new tarmac and encroaching dunes had been mechanically removed; marram grass had been planted along the top of the tall mobile sand dunes which were located along the seaward side of the road in order to prevent sand being naturally blown landward, and thus onto and across the coast road.

The concerns that were raised by the complainant and by SOS could be summarised as follows: The sand dunes on the landward side of the coast road were being replenished by sand from mobile sand dunes on the seaward side. Turning the coast road from a minor road into a major route destined in particular for all through traffic by way of strengthening the two bridges and by taking concomitant measures like stabilising the mobile dunes or even removing parts thereof cuts off this supply and thus threatens the survival of the landward dunes. All these measures taken together could be expected to have a significant effect on the site, which call for an environmental assessment.

SOS also expressed the view that it was not enough to prohibit further projects. Already at its present level of development, the coast road was causing serious damage to the integrity of the candidate SAC. It was therefore necessary to assert the primacy of the

19 OJ 1979 L 103, page 1.

20 Only the southern part of the road is called Coastal Road whilst the northern part is known as Marine Drive. For the sake of convenience, the term coast road will be used here to denote the whole length of the Coastal Road/Marine Drive.

SAC's conservation objectives and to make the objectives of the road subordinate to the former.

The complainant furthermore claimed that there was an alternative inland route which could serve as a bypass for Southport and which would be much more direct and economical. It also claimed that the strengthening of the Pinfold Bridge would cause serious disturbance to a colony of Sand Lizards.

The complainant and SOS relied in particular on comments contained in a Draft Site Management Statement that had been drawn up by English Nature (the UK authority in charge of environmental matters at that time) in 1996, which read as follows:

"The maintenance of Coast Road by sand excavation, re-grading dune profiles with associated vegetation stripping and construction and maintenance of sand-trap fences starves the Birkdale Sandhills to the east of the road of its natural dune building supply of sand. The road effectively acts as a physical barrier to the gradual landward migration of sand upon which the dynamic dune system depends, rendering Birkdale Sandhills as a relic dune feature. In turn, this degrades the sand lizard habitat and poses a serious threat to the survival of the sand lizard population on this part of the SSII."

The complainant and SOS asked the Commission to intervene, alleging that the local authorities had infringed both national and Community law. The Commission carried out an investigation in relation to the construction of the sea wall defence. On 30 September 1996, it came to the conclusion that there had been no infringement of Community environmental law in that respect. As mentioned above, SOS complained to the Ombudsman in 1997 against this decision. In his decision adopted on 30 April 1999, the Ombudsman came to the conclusion that there appeared to be no maladministration on the part of the Commission. He stressed, however, that his examination had focused exclusively on the issues relating to the construction of the sea wall defence and that the other issues would be considered in his inquiry into the present complaint.

In so far as the other issues raised by the complainant and SOS were concerned, the Commission considered that the best way of treating them was to open a new case. This case was registered under number 98/4564 in the summer of 1998.

In its complaint lodged in July 1998, the complainant in substance made the following claims:

1 The Commission had failed properly to acknowledge receipt of its submissions.

2 The Commission failed to call a halt to the bridge-strengthening programme.

3 The Commission failed to protect the integrity of both the SPA and the candidate SAC.

THE INQUIRY

The opinion of the Commission

The complaint was sent to the Commission. In its opinion, the Commission made the following comments with regard to the complaint:

In its letter to the complainant of 25 August 1998, the Commission had explained the reason for what had seemed to be a duplicated acknowledgement of the complainant's letter of 3 June 1998, namely the fact that it had decided to open a new case (98/4564) in respect of which a separate acknowledgement had been sent.

When the Commission considered that a member state had failed to fulfil an obligation under the EC Treaty, it could take action under Article 169 (now Article 226) of the EC Treaty. The Commission had indeed raised the matters referred to by the complainant with

the UK authorities and had granted the latter a reasonable period to make observations in connection with these allegations. The Commission did not however have the powers to grant interim relief to stop projects in member states.

The complainant's observations

In its observations, the complainant maintained its complaint. It also lodged what it referred to as a further objection in which it asked the Ombudsman to investigate why the Member of the Commission in charge of environmental matters had not used her powers in order to intervene in the present case. In two subsequent letters, the complainant raised two further claims. First, the Ombudsman should investigate why the inland strategic route had not been signposted and used for its correct traffic purposes. Second, the Ombudsman should investigate why the Commission had failed to examine the Coast Management Plan that had been completed by the UK authorities.

FURTHER INQUIRIES

On 6 February 1999, the complainant sent to the Ombudsman a copy of a letter dated 25 January 1999, which the Commission had addressed to it. In this letter, the Commission pointed out that it had been assured by the UK authorities that the bridge strengthening works were required for genuine health and safety reasons and were not to increase usage of the coast road by heavy goods vehicles or other vehicles. According to the UK authorities, these works would not have a significant effect on the candidate SAC or an adverse effect on the populations of protected species. In this context, the Commission pointed out that the sand lizard referred to by the complainant was a species listed in Annex IV and not in Annex II of Directive 92/43/EEC and was therefore not part of the reasoning behind the UK proposing this site as a SAC. Furthermore, the Commission considered that there was currently no substantive evidence to show that even if there was an increase in the volume of traffic on the Coast road how this would have a significant impact on the conservation values for which the site had been proposed as an SAC. The Commission pointed out that it was satisfied that the UK authorities had properly concluded that the bridge strengthening works did not have a significant effect on the conservation objectives of a protected area under Directive 92/43/EEC or were likely to have a significant impact on the environment under Directive 85/337/EEC[21]. It concluded that in the light of these considerations it proposed to close the case. However, it invited the complainant to submit its comments within one month upon receipt of this letter. On 16 February 1999, SOS (which had received a letter with identical contents from the Commission) sent a letter to the Commission in which it set out the reasons for which it believed the inquiry should not be closed.

In the light of the submissions of the various parties, the Ombudsman came to the conclusion that he needed further information in order to deal with this case. He therefore asked the Commission

1 to explain in detail on what basis it arrived at its conclusion that there was no substantive evidence to show that even if there was an increase in the volume of traffic on the coast road this would have a significant impact on the conservation values for which the site had been proposed as an SAC and

2 to comment on the allegation of the complainant and of SOS according to which the local authorities had put up traffic signs directing all through traffic and all traffic bound for tourist sites within Southport away from the A 565 and onto the Coast road with a view towards using this road as a bypass, and on the question whether such re-routing of traffic

[21] 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, page 40.

(if established) would be compatible with Article 6 of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

In its reply to this request for information, the Commission made the following comments:

The principal purpose of investigating a complaint was to establish whether a breach of Community law had occurred. In this respect, the Commission had to take into account that if it decided to use the infringement procedure laid down in Article 226 (formerly Article 169) of the EC Treaty, the burden of proof lay with it and it had to be able to discharge that burden. Any recourse to Article 226 would thus only be possible on the basis of substantive and substantial scientific evidence.

In formal legal terms, the provisions of Article 6 (2), (3) and (4) of Directive 92/43/EEC would only become applicable on the inclusion of the relevant site on a list of sites of Community importance, which had yet to be done, and Article 6 (1) would only become applicable when the site was formally designated pursuant to the same directive.

In so far as the existing coast road (which remained unchanged) presented any conservation issues, these were related to the existing habitat fragmentation effect of the road. Any such effects would be within the scope of Article 6 (1) and (2) of the directive, as distinct from Article 6 (3) and (4). The Commission was satisfied that the UK authorities had taken and were taking extensive measures to address the requirements of Article 6 (1) and (2) of the directive.

In the context of already existing substantial measures for Article 6 (1) and (2), the Commission could not identify any additional measures that might be required by an increase in usage of the existing coast road. The Commission was unable to establish any potential significant issue of cause and effect between an increase in usage and the conservation needs of the site. Thus, even if it were to be argued that an increase in usage amounted to a new plan or project, the Commission would not be in a position to demonstrate that it would be likely to have a significant effect on the conservation values of the site.

In its observations of 28 November 1999 on these statements by the Commission, SOS made the following comments:

Article 6 (2), (3) and (4) of Directive 92/43/EEC were applicable in the present case by virtue of its Article 4 (5). The development of the coast road to carry all traffic up to 40 tonnes and all tourist traffic at all times of the year was a development within the meaning of Article 6 (3) of the directive. The character and volume of traffic using the coast road had changed dramatically since 1996. All that SOS was asking for was to apply Article 6 (3), that is to say, examine whether the development was likely to have a *significant* effect, and if so, whether it would have an *adverse* impact on the site. The two concepts were separate and had to be distinguished. Some of the measures taken by the UK authorities under Article 6 (1) and (2) were to be welcomed. However, they had no relevance for the issue to be resolved here.

THE DECISION

1 Failure of proper acknowledgement of submissions

1.1 In its complaint, the complainant claimed that the Commission failed properly to acknowledge its submissions. This claim was based on the fact that the Commission sent two letters in which it referred to the complainant's letter of 3 June 1998. The complainant appears to have found this confusing.

1.2 The Commission pointed out that in its letter to the complainant of 25 August 1998, it had explained the reason for what seemed to be a duplicated acknowledgement of the complainant's letter of 3 June 1998, namely the fact that it had decided to open a new case (98/4564) in respect of which a separate acknowledgement of receipt was sent.

1.3 The explanation provided by the Commission was reasonable, and the complainant had not reverted to the issue in the subsequent correspondence.

1.4 On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant was concerned.

2 Failure to call a halt to the bridge strengthening programme

2.1 In its complaint, the complainant claimed that the Commission should have intervened to stop the bridge-strengthening programme.

2.2 In its opinion, the Commission explained that when it considered that a member state had failed to fulfil an obligation under the EC Treaty, it could take action under Article 169 (now Article 226) of the EC Treaty. It did not however have the powers to grant interim relief to stop projects in member states.

2.3 The Commission's reply appeared to be correct.

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.

3 Failure to protect the integrity of the SPA and the candidate SAC

3.1 The complainant essentially alleged that the Commission had failed to ensure that the UK authorities complied with their obligations under Article 6 (3) of Directive 92/43/EEC in so far as the bridge-strengthening scheme was concerned. According to this provision, an environmental assessment has to be carried out for any plan or project not directly connected with or necessary to the management of a site protected pursuant to the directive that is "likely to have a significant effect thereon". The Ombudsman considered that the other issues raised by the complainant formed part of this main allegation and did not need to be discussed separately.

3.2 SOS had originally made what appeared to be a more comprehensive claim by arguing that the very existence of the road was the problem. However, in its letter of 28 November 1999 SOS pointed out that what it was asking for was the application of Article 6 (3) of the directive to the development of the road.

3.3 The Commission claimed that Article 6 of Directive 92/43/EEC was not yet applicable to the site concerned. It took the view that, if the existing coast road presented any conservation issues, these would in any event be within the scope of Article 6 (1) and (2) of the directive, as distinct from Article 6 (3) and (4). The Commission was satisfied that the UK authorities had taken and were taking extensive measures to address the requirements of Article 6 (1) and (2) of the directive. It was satisfied that the conclusion of the UK authorities according to which the bridge strengthening works would not have a significant effect on the candidate SAC was correct. The Commission was unable to establish any potential significant issue of cause and effect between an increase in usage and the conservation needs of the site. Thus, even if it were to be argued that an increase in usage of the coast road amounted to a new plan or project, the Commission would not be in a position to demonstrate that it would be likely to have a significant effect on the conservation values of the site.

3.4 The Commission's claim that the provisions of Article 6 of Directive 92/43/EEC were not yet applicable to the site concerned appeared to be correct on a purely literal interpretation of the relevant provision. Article 4 (5) of the Directive provides that Article 6 (2), (3) and (4) shall be applicable as soon as a site is placed on the list referred to in the third subparagraph of paragraph 2. The list, thus referred to, was the list to be established by the Commission, on the basis of the lists to be established by the member states. According to the Commission, this list had not yet been drawn up. However, the Ombudsman considered that it did not follow that Article 6 (3) was of no relevance for the present case. Article 4 (3) of Directive 92/43/EEC directs the Commission to establish the said list within six years of the notification of this directive which may be assumed to have taken place shortly after the adoption of the directive in May 1992. The Commission thus effectively argued that since it had failed to comply with its own obligations under the directive, Article 6 (3) did not apply. The Ombudsman considered that such an argument could hardly be accepted. The Commission itself had, on another occasion, put forward arguments that militated against its present stance. In its opinion of 18 July 1997 on complaint 298/97/PD, the Commission had referred to the protection of SPAs under Directive 79/409/EEC that provided for a similar mechanism. According to the judgement of the Court of Justice in Case C-355/90, a member state had to comply with the obligations arising under Article 4 (4) of that directive, which concerns the protection measures relating to such an area, even before that site had been formally classified[22]. The Court reasoned that otherwise the objectives of protection pursued by the directive could not be achieved. In its opinion on complaint 298/97/PD, the Commission had concluded as follows: "For [candidate SACs] there is no such established protection. However, it would be natural to consider the impacts due to its possible special status." The Ombudsman considered, therefore, that the Commission's argument based on the non-applicability of Article 6 of Directive 92/43/EEC was wrong.

3.5 The Commission furthermore appeared to query, albeit in cautious terms, whether an increase in the usage of a road could constitute a "plan" or "project" to which Article 6 (3) of Directive 92/43/EEC applies. The Ombudsman was of the view that this question did not need to be resolved here[23]. What was at stake in the present case was not the increased usage of the coast road as such but the strengthening of the two bridges and the measures allegedly taken by the local authorities to re-direct the traffic, and there could hardly be any doubt that these schemes could be considered as "plans" or "projects" within the meaning of Article 6 (3) of the directive. It had to be stressed that this provision expressly directed the member states to assess such plans or projects, where necessary, "in combination with other plans or projects".

3.6 The decisive question to be answered was thus whether the Commission had been right in concluding that the UK authorities had not infringed Article 6 (3) of Directive 92/43/EEC in the present case.

3.7 In cases like the present one, the Commission's assessment was normally limited to verifying whether national authorities had complied with procedural rules, whether the facts had been accurately stated and whether there had been any manifest error of appraisal or misuse of power. The examination of the Ombudsman in turn was thus limited to verifying whether the Commission's assessment appeared to be reasonable and whether it had taken into account all the relevant factors.

3.8 It appeared that the site concerned had been proposed as a SAC on account of the dunes that are to be found there. There was nothing to suggest that the bridge strength-

22 Judgment of 2 August 1993 in Case C-355/90, *Commission v Spain*, [1993] ECR I-4221, paragraph 22.

23 It was interesting to note, however, that Advocate-General Fennelly had recently put forward the view that the expression "plan" in that provision had to be interpreted extensively, pointing out that a narrow interpretation would be contrary both to the wording and the aim of the provision (Opinion of 16 September 1999 in Case C-256/98, *Commission v France*, [2000] ECR I-2487, paragraph 33).

ening works as such were likely to have a significant effect on the site in view of the latter's conservation objectives. It was therefore necessary to examine whether these works could have such an effect if they were considered "in combination with other plans or projects". The complainant, Mr Corbett MEP and SOS had put forward what appeared to be strong arguments to show that the actions of the local authorities had in fact been motivated by the wish to create a bypass for Southport. The alleged negative impact of using the coast road as a bypass for Southport would appear to consist in the fact that it cut off the dunes on the landward side from their supply of sand from the dunes on the seaward side. However, this effect would seem to flow to a large extent from the very *existence* of that road. This was confirmed by the Draft Site Management Statement drawn up by English Nature in 1996 on which the complainant and SOS relied. The view taken by the Commission according to which it had been unable to establish that the *increased* usage would potentially cause significant effects with regard to the conservation objectives of the site did not therefore appear to be unreasonable.

3.9 The Ombudsman did not exclude that such negative effects could possibly arise from the further measures that the local authorities had, according to the complainant and SOS, taken in relation to the usage of the coast road as a bypass (e.g. planting grass on the top of dunes on the seaward side of the road). However, there was nothing to suggest that the Commission had not taken these measures into account when it had formed its opinion as to whether or not there would be a likelihood of a significant effect on the site concerned.

3.10 On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the third allegation put forward by the complainant was concerned.

4 Conclusion

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

ALLEGED IRREGULARITY IN COMPETITION

Decision on complaint 1108/98/BB (confidential) against the European Commission

Note : The Ombudsman made the same further remark in two other cases concerning the same competition (1276/98/JMA and 120/99/IP)

THE COMPLAINT

In October 1998, X made a complaint to the European Ombudsman concerning an allegation that the Selection Board of Open Competition EUR/A/123 had admitted a candidate to the oral test who had not obtained the required minimum in one of the written tests.

The complainant alleged that it had come to his attention that the Selection Board of Open Competition EUR/A/123 had admitted a candidate to the oral test who had not obtained the minimum required in one of the written tests. On 19 October 1998, he wrote to the Commission and to the European Ombudsman. He requested a comparison of the lists in order to check whether such a candidate had been admitted or not.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. The Commission's opinion was as follows. By letter of 19 October 1998, the complainant informed the Selection Board that it had come to his attention that the Board admitted a candidate to participate in the oral test who had not obtained the required minimum points in one of the written tests. As regards the complainant's allegation, the Commission could only confirm that the Board had followed the Notice of Competition, which constituted a strict rule imposed on it.

In a separate section of its reply, the Commission enclosed some confidential information for the Ombudsman. The information concerned the number of candidates in the competition which had been admitted to the tests, those of them who had passed the written tests, those who took part in the oral interviews, and the number of candidates finally included in the reserve list.

The complainant's observations

In his observations the complainant maintained his complaint.

THE DECISION

1 Allegation that a candidate admitted to the oral test had not obtained the minimum required in one of the written tests

1.1 The complainant alleged that the Selection Board had admitted a candidate to the oral test that had not obtained the minimum required in one of the written tests. The Commission explained that it had strictly followed the Notice of Competition.

1.2 The Ombudsman observed that the Selection Board is strictly bound by the terms of the Notice of Competition.

1.3 Taking into account that the Commission had contested the allegation and that the complainant had not given any indication as to the identity of the candidate in question or of the person who brought the allegation to the complainant's attention, no instance of maladministration was established. The Ombudsman therefore decided that there were no grounds to inquire further into the matter.

2 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 REMARK

Having assessed the evidence marked as confidential in the Commission' opinion, the Ombudsman concluded that these materials bore no direct relationship with the subject matter of the complaint, and therefore they were not taken into account in the conclusions of this decision.

In the light of the content of this material, the Ombudsman could not comprehend the reasoning that led the Commission to such classification. The Ombudsman did not share the Commission's view that public disclosure of statistical information on the number of candidates who were accepted to the competition, those who passed the written and oral tests, or those finally included in the reserve list could by any means impinge on the secrecy of the work by the Selection Board, or on the other hand, exert any potential influence on its choice of candidates.

The Commission's extensive interpretation of secrecy in this case appeared rather misplaced if only compared with its announced overarching aim for an efficient, accountable and open administration, able to deliver the quality services European citizens rightly expect.

REASONS FOR FAILING TESTS AND ACCESS TO CORRECTED EXAM PAPER

Decision on complaint 1317/98/VK against the European Commission

THE COMPLAINT

In December 1998, Mrs S. made a complaint to the European Ombudsman against the European Commission concerning the assessment of her written tests in competition EUR/A/123.

The complainant took part in Open Competition EUR/A/123 organised by the Commission. The Commission informed her that she had obtained a result of 12.27/20 after oral tests and that the minimum requirement was 13/20. The complainant's name could therefore not be put on the reserve list. The complainant was not satisfied with this decision. She claimed the following:

1 She had not been given any reasons as regards the result

2 The incorrect translation of one of the tests led to incoherent results

3 She wished to obtain a copy of her corrected exam paper.

The complainant thereafter lodged a complaint with the Ombudsman.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission referred to its letter to the complainant of 27 January 1999 in which the chairperson of the selection board stated the following:

As regards the first allegation, the selection board verified the complainant's results and re-confirmed its previous decision to reject the application as she had not obtained sufficient marks in the different parts of the competition.

In view of the second allegation, the Commission stated that a more general wording was applied for describing the subject matter of the test, which was then completed by more specific questions and points. It concerned an extensive test, which aimed at verifying the candidates' knowledge in that particular field of the competition. It therefore did not seem possible that the questions raised in this test caused any confusion.

As regards the third allegation, the selection board assessed the test of the candidates in accordance with the notice of competition. The reserve list is not part of information handed out to the general public. It is not common practice to let the candidates consult their exam papers. The statute governing the selection board's work actually stipulates that the latter's work is secret.

The complainant's observations

In her letter of 5 August 1999, the complainant stated that a number of questions had not been addressed by the Commission. She referred to a copy of her letter to the chairman of the selection board in which she maintained her complaint.

THE DECISION

1 Alleged failure to provide reasons

1.1 The complainant alleged that she was not given any reasons for her failure in the written tests.

1.2 The Commission informed the complainant about the results she obtained. It verified the complainant's results and re-confirmed its previous decision as she had not obtained sufficient marks in the different parts of the competition.

1.3 According to the established case law of the Court of Justice, the communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based[24].

1.4 The Ombudsman found therefore that the Commission provided a reason for the complainant's failure in the test.

2 Alleged translation problems

2.1 The complainant put forward that the incorrect translation of one of the tests led to incoherent results and that this could have been the reason why she failed.

2.2 The selection board pointed out that in the paragraph in question, a more general wording was applied for describing the subject matter of the essay paper which was then completed by more specific questions and points. Its aim was to verify the candidates' knowledge in that particular field of the competition. It therefore did not appear possible that the questions raised in this test caused any confusion.

2.3 The explanation given by the Commission appeared to be consistent with the notice of Competition. The Ombudsman found no evidence to support to complainant's claim of maladministration.

3 Refusal to grant access to marked exam papers

3.1 The complainant alleged that she was wrongly denied access to her marked papers in the context of the written tests of competition EUR/A/123.

3.2 The Commission, at the time, took the view that it was not common practice to let candidates consult the papers of their written test.

3.3 On 18 October 1999, the Ombudsman submitted a Special Report[25] to the European Parliament. The Ombudsman recommended that, from July 2000 onwards, the Commission should give candidates the possibility to inspect their own examination papers. The Commission accepted this recommendation. It will give candidates access to their own marked examination scripts from 1 July 2000[26]. Given that the Commission agreed to change its position for the future, the Ombudsman did not consider that further inquiries into this issue were justified in the context of the present complaint.

4 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 closed the case.

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24 Judgment of 4 July 1996 in Cases C-254/95 P, *Parliament v Innamorati*, [1996] ECR I-3423, paras 31 and 32. Judgment of 17 December 1997 in Case T-217/95, *Passera v Commission*, 1997] ECR II-1109, paras 32 to 34.

25 Special Report following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures.

26 (cf. Press Release no. 16/99 of the Ombudsman of 15 December 1999).

ALLEGED LATE PAYMENT UNDER ESPRIT PROJECT

Decision on complaint 225/99/IJH against the European Commission

THE COMPLAINT

The complainant, the company ECA Ltd ('ECA'), was a partner in the ESPRIT project on International Commerce Exchange (ICX), which began as part of the 4th Framework project on 15 March 1997. The main contract was between the Commission (DG III - Industry) and International Computers Limited ('ICL'). ECA had a contract with ICL to do work under the ICX project.

The main contract provided for the Commission to pay 50% of the due amount in advance with further payments every six months on acceptance of submitted cost statements. According to the complainant, the initial payment was received but no other payments had been made by the date of the complaint, 26 February 1999.

The complainant alleged unnecessary delay by the Commission in making payment to the contractor ICL, with the result that payments by ICL to ECA were also delayed.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that its services received the first complete set of periodic cost statements from ICL, which were due in September 1997, on 7 August 1998. These cost statements were subsequently analysed and various corrections and clarifications were required.

The complainant contacted the Commission services on 10 November 1998 and expressed worry about possible payment delays. On the same day, the Commission services proposed by phone to ICL to consolidate the costs already documented and not wait for all the cost claims to come in, in order to help ECA.

Despite urgent reminders from the Commission services by phone, on 23 and 27 November 1998, valid cost statements were only received from ICL on 10 December 1998. This made it impossible to conclude the processing of the payment before the end of the 1998 budgetary year, even though the file was given priority treatment.

Each year, the opening of credit lines on the new budget takes some time due to the strict financial rules applied to the Community budget. Payment processing should normally have restarted by the end of January 1999. However, at the beginning of 1999, two additional elements led to a general delay of payment execution that affected some hundreds of payments:

- The opening of the budget for payments took longer than usual because of the transition from the Fourth to the Fifth Framework Programme for RTD, which required new budget nomenclature.

- The transition to a new central accounting computer system happened at the same time, resulting in additional delays.

In the following weeks, the unit in charge of the project was in constant contact with ICL. Likewise, contacts were maintained with ECA. The priority of the payment was repeatedly stressed in internal communications within the Commission.

In February 1999, several departments of the Commission services agreed to process manually the payments for the first of the cost statements, in order to minimise the risk of further delay. Illness of people dealing with the payment file caused a few days further delay, but on 19 February 1999, confirmation was received internally that the payment would be made within three working days. The Commission services immediately informed ICL by e-mail and phone. The payment was made on 24 February 1999. Under

the contractual arrangements concluded between ICL and ECA, the further transfer of the payment from ICL to ECA was the responsibility of ICL.

Normal processing of payments with the computer accounting system within the Commission resumed on 3 March 1999. The second and third payments to the ICX Project were handled by this system and payments were made on 24 March 1999.

As the Commission accepted the partial cost statements submitted by ICL on 10 December 1998, the Commission was responsible for delays in payment for these cost statements beyond the two months foreseen in the contract concluded between ICL and the Commission (delays of respectively 2 weeks and 6 weeks). These delays were caused by the technical difficulties mentioned above.

The complainant's observations

The complainant's observations made the following points:

It was true that ECA had a separate contract with the main contractor ICL, but the complainant considered that ICL acted as agents for the Commission.

ECA was unable to receive payments on time because the Commission did not properly carry out its duties under the main contract. The Commission had admitted that delays occurred as a result of the opening of the new budget and its transition to a new accounting system.

The clause in the main contract stipulating that all project partners' cost statements must be received and approved prior to payment caused unnecessary delay in payments to partners who submitted their individual cost statements on time.

For these reasons, the complainant claimed that the Commission should pay interest and compensation to ECA.

FURTHER INQUIRIES

The Ombudsman forwarded the complainant's observations to the Commission and asked it to respond to the claim for interest and compensation.

In its reply, the Commission emphasised the following points:

(i) there was no contractual link between the Commission and ECA .

(ii) the major part of the delays in relation to the submission and approval of cost statements were the responsibility of the main contractor ICL.

(iii) only the main contractor, ICL, could make a claim for interest against the Commission. ECA could make a claim only against ICL, in the framework of their contractual relationship.

The Commission therefore denied any liability to ECA.

In observations on the Commission's reply, the complainant repeated his view that ICL acted as agents for the Commission and that the clause in the contract between ICL and the Commission stipulating that all project partners' cost statements must be received and approved prior to payment caused unnecessary delay in payments to partners who submitted their individual cost statements on time.

The complainant also pointed out that ECA had not received any payment in relation to its participation in another project, which commenced in May 1999. This new issue was outside the scope of the original complaint. The Ombudsman therefore informed the complainant that it could not be dealt with during the present inquiry.

THE DECISION

1 The allegation of late payment

1.1 The complainant alleged unnecessary delay by the Commission in making payments to ICL, the contractor under a 4th Framework project. As a result, payments by ICL to a project partner company ECA were also delayed.

1.2 The Commission explained that most of the delay was the responsibility of the main contractor ICL, which submitted cost statements late. However, the Commission accepted responsibility for delays in payment beyond the two months foreseen in the contract concluded between ICL and the Commission. These amounted to 2 weeks in respect of one set of cost statements and 6 weeks in respect of another. These delays were caused by technical difficulties, which had resulted in hundreds of payments being delayed.

1.3 The Commission therefore acknowledged that there was some undue delay on its part and explained the causes of the delay. This information is being taken into account in the Ombudsman's own-initiative inquiry on late payment by the Commission (OI/5/99/IJH) and no further inquiry into this aspect of the present case therefore seems necessary.

1.4 The complainant also claimed that a standard clause in the main contract, stipulating that all project partners' cost statements must be received and approved prior to payment, caused unnecessary delay in payments to partners who submitted their individual cost statements on time.

1.5 The Commission pointed out that when it became aware of ECA's problems it immediately contacted ICL with a proposal to consolidate the costs already documented and not wait for all the cost claims to come in.

1.6 The Ombudsman was not aware of any binding rule or principle that should prevent the Commission from including such a standard clause in its contracts. Furthermore, it appeared that the Commission was prepared to waive the provision in question immediately it became aware of the complainant's problems. There appeared therefore to be no maladministration in relation to this aspect of the case. The Ombudsman, however, addressed a further remark to the Commission concerning the standard clause.

2 The claim for interest and compensation

2.1 In observations, the complainant claimed that the Commission should pay interest and compensation to ECA.

2.2 In response, the Commission repeated that the major part of the payment delays were the responsibility of the main contractor ICL. Moreover, it considered that only the main contractor, ICL, could make a claim for interest against the Commission and that ECA could make a claim only against ICL in the framework of their contractual relationship.

2.3 From the complainant's observations, it appeared that its claim for interest and compensation was based on the view that ICL acted as agent on the Commission's behalf. The complainant did not provide evidence to support this view, which raised potential issues of contractual and non-contractual liability. Furthermore, the Commission appeared to have provided a coherent and reasonable account of its denial of liability. The Ombudsman's inquiry therefore revealed no maladministration in relation to this aspect of the complaint. This conclusion does not, however, affect the right of the complainant to submit his claim to a court of competent jurisdiction.

3 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.

FURTHER REMARK

The contract between the Commission and the main contractor in this case contained a standard clause that all project partners' cost statements must be received and approved before the Commission would make payment to the main contractor. The Ombudsman welcomes the flexibility shown by the Commission, which was prepared to waive the provision in question immediately it became aware of the complainant's problems in this case. More generally, however, the Commission may wish to consider whether the legitimate purpose of the clause in question could be achieved in a way which is less likely to result in cash-flow problems for small and medium-sized enterprises.

FAILURE TO PROVIDE INFORMATION ON 'COMITOLOGY' AND COMMISSION ACTS

Decision on complaint 395/99/(PD)/(IJH)/PB against the European Commission

THE COMPLAINT

In March 1999, the complainant, a Member of the European Parliament, submitted a complaint concerning alleged failure by the European Commission:

a) to provide all the information requested for a research project that he was conducting, and

b) to provide the information in a specific format.

In October 1998, together with three other MEPs, the complainant had made an information request to the Commission in the following terms:

"In view of the ongoing work on questions like comitology, transparency, quality in legislation and other related areas, we are preparing a quantitative overview *of the Community committee structure. The objective of the overview is to attempt to provide an* objective and reliable basis *for both political debate and academic research.*"

The complainant enclosed with this letter a number of forms that contained a layout which the Commission was requested to use in its reply. The forms provided for information to be produced on various detailed issues, such as the procedures of the committees, the act establishing the committees, and the number of committee participants. The Commission was requested to produce a reply within 2-3 weeks.

On 4 November 1998, the Commission informed the complainant that the information requested was not available in the format requested, but that the Commission would examine the measures to be taken "to give you satisfaction".

On 21 January 1999, the Commission informed the complainant in writing that a database on committees was being set up, and that within a few days the Commission would be in a position to furnish him to a great extent with the information he had requested, albeit in a different format than the one suggested by the complainant.

On 23 February 1999, the complainant wrote to the Commission anew. The complainant added to his information request concerning committees, specifying that he wished to be provided with lists of committee participants in 1997 and 1998, as well as internal lists of all Commission committees for 1997, 1998 and 1999. He also requested a complete historical overview (i.e. from 1951) of:

- the number of committees, working groups and 'other organs'
- the number of participants
- the number of travel reimbursements
- the number of meetings

He asked the Commission to provide these "in total and split up on types and issue areas".

In addition to the information request concerning committees, the complainant asked the Commission to provide him with the total number of legal and other acts adopted by the Commission, including legal statements, pre-opening letters and other kinds of documents and soft law.

The complainant specified that he requested the information for the period 1951 to 1998. He added that:

"In so far as the procurement of early data will constitute excessive additional work and as I would like to finish this study by the end of this legislation, I would be happy to receive the information for the period 1987-1998 for a start."

On 8 March 1999, the complainant wrote to the Commission to express his dissatisfaction with the lack of reply.

On 18 March 1999, the Commission provided the complainant with some information relating to committees. It also informed the complainant that the other information requested in his letter of 23 February was not immediately available. The relevant Commission services had, however, been asked to gather the information. The complainant was informed that he would be sent the result of this information-gathering.

As regards the list of Commission acts, the Commission provided the complainant with a list of acts adopted annually and in force. The Commission also referred the complainant to the EU legal database called 'CELEX', which is free to consult for the Member of the European Parliament, as well as the Commission's annual reports on specific fields of Community law.

On 31 March 1999, the complainant wrote to the Commission stating that the information provided by the Commission did not correspond to his requests. He observed that the Commission had provided no explanation or apology for this. He also informed the Commission that he would lodge a complaint with the European Ombudsman.

On 16 April, the Commission provided the complainant with additional detailed information on committees. The Commission observed that the rest of the information was not immediately available, and that the relevant Commission services had been asked to gather it. The Commission also stated that the complainant's request for a complete overview of all Commission acts had been responded to in full in its letter of 18 March 1999. The complainant sent a copy of the Commission's letter, including annexes, to the European Ombudsman to let it form part of the Ombudsman's inquiry.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission referred to its correspondence with the complainant, as described above. The Commission considered that it had provided the complainant with such information as it had, and that its services had put a great deal of efforts into collecting the information asked for by the

complainant. It stressed that its services had been forced to undertake additional research to produce the information, which it had sent to the complainant.

Specifically on the request to provide the information in various formats defined by the complainant himself, the Commission considered that, minor changes apart, it is not the responsibility of its services to rework the information in the Commission's possession to meet the requirements of a specific research project.

The Commission concluded that it had in a proper manner met its obligations as regards access to information and transparency.

The complainant's observations

The Ombudsman did not receive any observations from the complainant.

THE DECISION

1 The allegations

1.1 The complainant alleged that the Commission had wrongfully failed:

a) to provide all the information requested for his research project, and

b) to provide the information in a specific format.

1.2 The Ombudsman first observed that the information requests by the complainant did not consist of requests for specific documents. The complainant's requests purely concerned a request for the Commission to produce certain information, and to produce it in a specific format. The legal rules on public access to documents were not, therefore, of direct relevance to the inquiry.

1.3 The Ombudsman recalled, however, the European Union's commitment to transparency, as it appears from inter alia Declaration 17 attached to the Final Act on the Treaty on European Union. The Ombudsman also pointed out that he had previously conducted inquiries into disputes concerning alleged failure of the administration to produce information[27].

1.4 It was furthermore relevant to note that legislative and judicial developments succeeding the lodging of the complainant's allegations have aimed to increase the transparency in the field of the so-called "comitology" committees, the category of committees that appears to have been of particular concern to the complainant. At the legislative level, the Council of Ministers issued in June 1999 a decision[28] that laid down new rules for the procedures of committees that assist the Commission in its regulatory and implementing activities. The preamble to the Decision, which was adopted on the basis of a proposal from the Commission and having regard to the opinion of the European Parliament, states that:

"the fourth purpose of this Decision is to improve information to the public concerning committee procedures and therefore to make applicable to committees the principles and conditions on public access to documents applicable to the Commission, to provide for a list of all committees which assist the Commission in the exercise of implementing powers and for an annual report on the working of committees to be published as well as to provide for all references to documents related to committees which have been transmitted to the European Parliament to be made public in a register" (Recital 11 of the Preamble.)

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27 See for instance Decision on complaint 104/1.9.95/IDS/B/PD against the European Commission; Annual Report for 1996, p 30.

28 Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184/23).

1.5 Article 7 of the Decision implements this purpose, establishing an active duty on the Commission to provide information on committees, and providing that the Commission shall set up a register with such information in 2001.

1.6 At the judicial level, a judgement of the Court of First Instance[29] has enhanced the right of access to documents in comitology committees by establishing that for the purpose of public access to documents, these committees should be regarded as part of the Commission's administration.

1.7 In respect of the allegations in the present inquiry, the Ombudsman observed that from the evidence submitted to him, it appeared that the Commission had responded to the complainant's request for information with a considerable degree of goodwill and co-operability. While it seemed regrettable that the Commission's early communications to the complainant led to expectations that were higher than the Commission was seemingly able to fulfil in the correspondence between itself and the complainant, the Ombudsman did not consider that there had been maladministration in the Commission's efforts to produce the information requested by the complainant.

2 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.

THE EUROPEAN COMMISSION'S DECISION NOT TO OPEN AN INFRINGEMENT PROCEDURE AGAINST ITALY

Decision on complaint 396/99/IP against the European Commission

THE COMPLAINT

In April 1999, Mr C. lodged a complaint with the European Ombudsman against the European Commission. It related to the European Commission's decision to close the complaint he had made concerning an alleged breach of Directive 90/313/EEC[30] by the Italian authorities.

Following the fire, which occurred on the premises of the chemical firm Enichem of La Macchia (on the outskirts of Manfredonia), on 2 August 1997, the Italian authorities decided to start a process of re-industrialisation of the damaged area.

According to the complainant, the competent authorities started the re-industrialisation despite the existence of residual toxic waste that can endanger the health of the local population. On 1 October 1997, he therefore wrote a first letter to the *Prefetto* of Foggia, asking to have access to information on the environment in accordance with Council Directive 90/313/EEC. A copy of this letter was sent to the Commission.

On 1 December 1997, Mr C. wrote a further letter to several Italian authorities a copy of which was also sent to the Commission. In this letter the complainant put forward his dissatisfaction with the information he had obtained concerning the fire which occurred in the area of Enichem's premises.

On 13 February 1998, the complainant wrote to Directorate General XI of the European Commission, this time complaining explicitly about the application of Directive 90/313/EEC on the freedom of access to information on the environment by the Italian authorities. The letter was registered by the Commission's services with the complaint number 98/4648. By letters dated 17 July 1998 and 3 August 1998, signed respectively by

29 Case T-188/97, Rothmans International BV v Commission, 1999 [ECR] II-2463 paras 58-60.

30 Council Directive of 7 June 1990 on the freedom of access to information on the environment, Official Journal L 158, 23/06/1990, p. 56.

the Head of the legal unit of Directorate General XI and by the Secretary General of the Commission, the institution notified the complainant that the Commission had opened an official complaint for a possible breach of Directive 90/313/EEC by Italy.

On 1 October 1998, the responsible Commission services informed Mr C. that no breach of Community law could be identified in the case. Therefore they announced the intention of the Commission to close the procedure. The complainant was invited to submit observations concerning any possible new elements within one month from the receipt of the letter.

In the absence of a reply, the Commission's services decided to close the case on 11 November 1998.

On 25 November 1998, the Commission received a letter from the complainant who disagreed with the decision of closing the case and raised some doubts on the efficiency of the Commission's services since he had received the letter sent out on 1 October 1998, only on 10 November 1998.

On 27 January 1999, the Commission therefore sent a letter to the complainant explaining its reasons for closing the case.

Against this background the complainant lodged a complaint with the European Ombudsman on 3 April 1999. He complained against the Commission's decision to close the inquiry concerning the alleged wrong implementation of Council Directive 90/313/EEC without starting an infringement procedure against Italy before the European Court of Justice.

THE INQUIRY

The Commission's opinion

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

The Commission firstly referred to the letters from the complainant of 1 October and 1 December 1997, underlining that the recipients of these letters were several Italian authorities and that the institution only received a copy of them.

By contrast, the letter dated 13 February 1998, in which the complainant explicitly complained about the implementation of Council Directive 90/313/EEC in Italy, was registered by the Commission as a formal complaint with reference number 98/4648.

On 16 July 1998, the Commission sent a letter to the complainant, in which it expressed interest in receiving more information on aspects other than access to information. The Commission asked to be informed about possible dumping and deposit of dangerous waste and soil contamination because in 1976, due to a fire in the industrial chemical plant of Enichem (21 years before the fire which occurred in August 1997), a large part of the soil around the installation had been contaminated by a leak of arsenious anhydride and no decontamination action had been taken as regards the soil in this area. The complainant supplied the information requested by the Commission on these issues on 10 August 1998.

The Commission replied on 9 September 1998 informing him that it had decided to register this letter as a new complaint with reference number 98/4802.

In its opinion the Commission pointed out that it should be considered that while the first complaint, n° 98/4648, was based on the possible breach of Directive 90/313/EEC on public access on environmental information by the Italian authorities, the second one, n° 98/4802, was based first of all on the possible breach of Directive 75/442/EEC as amended

by Directive 91/156/EEC[31] (with reference to the contaminated soil dumping) and then, following further information submitted by the complainant, also on the possible breach of Directive 85/337/EEC[32] (on the assessment of the effects of certain public and private projects on the environment) and Directive 96/82/EC[33] (with reference to the supposed environmental danger caused by the abandon of three landfills for urban solid waste in the same area).

On 1 October 1998, the competent services informed the complainant that they had concluded the investigation concerning complaint n° 98/4648. After having assessed all the information submitted by the complainant and received from the Italian authorities, the Commission concluded that no breach of Directive 90/313/EEC could be identified.

Therefore, pursuant to the agreement between the Commission and the European Ombudsman following the Ombudsman's own initiative inquiry 303/97/PD into the Commission's administrative procedures in relation to citizens' complaints about national authorities, the institution communicated to the complainant its intention to close the case. The complainant was invited to submit any possible further information revealing new evidences that Community law was being breached, within one month of receipt of the letter. He was advised that, in the absence of a reply, the case would be closed. The complainant was also informed that a case could always be reconsidered and re-opened, even after it is closed, where the Commission is informed of any new elements indicating a possible breach of Community law.

Since it received no reply to its letter of 1 October 1998, the Commission closed the case during a meeting of 11 November 1998.

The Commission then referred to the letter received from the complainant on 25 November 1998, in which he disagreed with this decision and pointed out that, since he had received the letter dated 1 October 1998 only on 10 November 1998, the period of one month to reply should have started from this date. The Commission regretted that the postal service took such a long time, but it held that it could not be responsible for this as the date of the postmark on the envelope showed that the letter was sent out from Brussels on 1 October 1998. Since these letters are not sent as registered mail, the Commission considered them as received after a reasonable time.

The institution underlined that deciding to close the case 42 days after sending the letter communicating it to the complainant cannot be considered as a way of denying him the right to defend his position. Moreover, the Commission stressed that complainant could, at any time, present the same complaint again and that the Commission is never exempted from the obligation of examining it.

As concerns the reasons to close the inquiry on complaint n° 98/4648, in a letter dated 27 January, the Commission firstly considered that the Italian authorities had correctly played their role in giving the requested information. Secondly, it underlined that Article 4 of Directive 90/313/EEC explicitly refers to the national judicial system to appeal against silence, inadequate reply or unreasonable refusal to give information by national authorities. Thirdly, the Commission referred to the Treaty provision concerning the Commission's discretionary power in taking the decision of opening infringement procedures. However, the institution highlighted that it does not consider this power to be purely discretionary and that accordingly it had set up guidelines for the management of the complaints and infringement procedures. The Commission pointed out that the procedure

31 OJ L 78, 26/03/1991, p. 32.

32 OJ L 175, 05/07/1985, p. 40.

33 OJ L 10, 14/01/1997, p. 13.

had been correctly followed in the present case and that the complainant had always been properly informed on the progress of the inquiry.

In the same letter, the Commission furthermore informed the complainant that the second complaint n° 98/4802, which was also the subject of a petition (ref. N° 874/98) before the Committee on Petitions of the European Parliament, was still under investigation.

By letter of 9 July 1999, the Commission replied to two further letters of the complainant dated 3 April and 28 May 1999, still concerning the decision to close the case n° 98/4648 on Directive 90/313/EEC. It its reply the Commission stated that, since no further evidence had been transmitted, there were no grounds to reconsider its original position.

The complainant's observations

As concerns the handling of complaint n° 98/4648, the complainant basically maintained his original claims.

Regarding complaint n° 98/4802, on the one hand he took note that the Commission was waiting for the information requested from the Italian authorities, on the other hand he stressed that the Commission should have taken action against them in order to require a prompt reply.

THE DECISION

Introductory remarks

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. On the basis of these provisions, the Ombudsman's inquiries into the case had therefore only been directed towards examining whether there had been maladministration by the European Commission.

The complainant's allegations concerning complaint n° 98/4802, which was still under investigation by the Commission's services, were not part of the original complaint to the Ombudsman. Therefore, the Ombudsman did not deal with this aspect of the case in the present decision.

1 The Commission's decision to close the file on the complaint

1.1 The complaint concerned the Commission's decision to close the inquiry concerning the alleged wrong implementation of Council Directive 90/313/EEC without starting an infringement procedure against Italy before the European Court of Justice.

1.2 In its opinion, the Commission stated that, after examining the documents sent by the complainant and the information submitted by the Italian authorities, it considered that there was no breach of Community law and on 1 October 1998 its services informed the complainant of the intention to close the file. The complainant was invited to present any possible new evidences concerning the case. Since no reply had been received from the complainant, in a meeting of 11 November 1998, the Commission closed the case.

1.3 The Commission also regretted that the complainant received the letter of 1 October more than a month later, but it underlined that it was exclusively due to a mail system problem and that it could not be held responsible for this.

1.4 The Commission's administrative procedures in relation to citizens' complaints about national authorities had been the object of the own initiative inquiry n° 303/97/PD launched by the Ombudsman on 14 April 1997. As a result of this own initiative inquiry

the Commission agreed to inform the complainants of its intention to close the file and to invite them to submit observations.

1.5 The Ombudsman considered that in the present case, by letter of 1 October 1998, the Commission informed the complainant of its intention not to open an infringement procedure against Italy, giving reasons for its decision and inviting him to submit his observations within a month.

1.6 The complainant received the letter sent on 1 October 1998 by the Commission only on 10 November 1998. The Commission regretted this inconvenience. The Ombudsman considered that the Commission could not be held responsible for the length of time taken by the postal system to deliver this. Thus, the period of time of 42 days from the sending of the letter on 1 October 1998 to the closing of the case on 11 November 1998 seemed to be reasonable.

1.7 The Ombudsman considered from the above that the Commission had properly complied with its commitments made following the Ombudsman's own initiative inquiry 303/97/PD[34] and that the complainant was properly kept informed on the progress of this case.

2 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.

DISPUTE OVER CONTRACTS IN THE CULTURAL FIELD

Decision on complaint 506/99/GG against the European Commission

THE COMPLAINT

In December 1996, the Commission concluded two contracts concerning the projects "DCC – Digital Content for Culture" and "Donna – Art, Design & Fashion Online" with two German companies, CSC Ploenzke AG ("CSC", the co-ordinator of both projects) and the complainant, a German company engaged in consultancy work. The "DCC" project moreover foresaw that CSC would be assisted by two associated partners, the Koninklijk Museum voor Midden-Africa (Royal Africa Museum) in Tervuren (Belgium) and the Deutsche Forschungsanstalt für Luft- und Raumfahrt e.V. On the Commission' side, these contracts were dealt with by its Directorate-General XIII (DG XIII[35])

The "DCC" project lasted from January 1997 to December 1997 and the "Donna" project from January 1997 to September 1997.

In October 1997, the Commission carried out a technical review of the "DCC" project which came to the conclusion that full technical and financial audits of the project should be carried out. The in-depth technical review was carried out in December 1997. The complainant claimed that no critical remarks whatsoever had been made with regard to itself and its contribution to the "DCC" project on that occasion but that the Commission had spirited away the relevant minutes which would confirm this. The report on the in-depth review recommended that the contract should be terminated. This report was sent to CSC (with a copy to the complainant) on 17 December 1997.

In a letter of 23 December 1997 addressed to CSC (with a copy to the complainant), the Commission terminated the contract.

In April 1998, the Commission informed CSC that a technical review of the "Donna" project was to be carried out. This review which took place in June 1998 led to the conclu-

34 See Ombudsman Annual Report 1997, p.270.

35 Now called DG Information Society.

sion that the project should be terminated. The complainant claimed that no critical remarks whatsoever had been made with regard to itself and its contribution to the "Donna" project on the occasion of this review but that the Commission had spirited away the minutes which would confirm this and had delayed the release of the minutes which had been falsified. The complainant also claimed that the technical review, which had taken place nine months after the official end of the project, had been in breach of the contract. According to the complainant, the Commission had acknowledged in writing receipt of all the items to be delivered pursuant to the contract (including the final report) already on 9 December 1997. The complainant relied on a provision in the contract that provided, according to the complainant, that in the absence of observations from the Commission the final report was deemed to have been approved within two months of its receipt by the Commission.

The financial audit of the "DCC" project and the "Donna" project was carried out in March 1998. The complainant claimed that the auditors had confirmed that its book-keeping and administration had been in order. According to the complainant the Commission had, however, suppressed the minutes that would confirm this. On 28 April 1998 and 27 May 1998 respectively, the Commission sent the draft audit reports for the "DCC" and "Donna" projects to the complainant. On 30 June 1998, the complainant's lawyers sent comments on these draft reports to the Commission. On 29 July 1998, the Commission sent the final audit reports and the Commission's assessments of the comments submitted on the draft audit reports to the complainant. In the report relating to the "DCC" project, the Commission concluded that out of the total costs claimed by CSC and the complainant of ECU 3,164,102 only ECU 26,290 were allowable. In the report relating to the "Donna" project, the amount allowed was ECU 42,601 out of the ECU 980,733 that had been claimed.

In late August/early September 1998, the Commission's Directorate-General XIX[36] issued recovery orders against CSC and the complainant in which it claimed the reimbursement of amounts overpaid in the framework of the "DCC" and "Donna" contracts. The claim against the complainant was for an amount of ECU 179,337. In a letter of 10 September 1998, the complainant's lawyers requested the Commission to state the reasons for the recovery order issued against the complainant. On 30 November 1998, the complainant sent two invoices to the Commission in which it demanded to be paid ECU 352,800 for its work in relation to the "DCC" project and ECU 110,781 in relation to work performed on the "Donna" project.

The complainant had furthermore participated in the "VR-Learners" project. The contract for this project had been signed in December 1997. The complainant claimed that the Commission had forced it to leave this project. In February 1999, the complainant sent an invoice to the Commission in which it demanded to be paid ECU 121,857 for its work in relation to that project.

On 5 May 1999, the complainant turned to the European Ombudsman. In its complaint, it made the following claims:

1 DG XIII had manipulated the minutes relating to the audits carried out with regard to the "DCC" and "Donna" projects.

2 DG XIII had been trying, for more than two years, systematically to eliminate the complainant and its partners as competitors and critics, using defamation, bullying tactics and blackmail. DG XIX took part in these efforts.

3 DG XIX had not given any explanations as to the reasons for the demand made by the Commission and had not reacted to the complainant's financial claims against the Commission.

[36] Now called DG Budget.

4 DG XIII and DG XIX had caused serious damage to the complainant.

THE INQUIRY

The Commission's opinion

The complaint was sent to the Commission. In its opinion, the Commission made the following comments:

The Commission had entered into two contracts concerning the "DCC" and "Donna" projects. During the execution of the projects, the Commission services had considered that the progress of the work and the intermediary results of the projects had not been satisfactory. An in-depth technical review had therefore been carried out regarding the "DCC" project in December 1997. In their final report, the external experts used by the Commission to carry out this review had concluded that the original objectives of the project had not been achieved and had recommended the termination of the project. The Commission had followed this recommendation. In June 1998, a technical review of the "Donna" project had also been initiated by the Commission services with the assistance of external experts that had led essentially to the same conclusions, i.e. the termination of the contract.

In October 1997, a financial audit had been initiated by the Commission services in order to check whether the financial contributions of the EC towards the "DCC" and "Donna" projects were justified. After several postponements requested by the companies concerned, this review had finally been carried out in March 1998. As a result of the audit, the Commission had had to reject almost all the costs claimed by CSC and the complainant because of serious inconsistencies with the contracts and a lack of substantiation of the costs concerned. Recovery notes had therefore been issued against CSC and the complainant in August 1998. Whilst CSC had since reimbursed the amount due to the Commission, the complainant had not paid but instead started spreading defamatory allegations against the Commission officials involved in the audits.

The complainant had participated as an associated contractor in the "VR-Learners" project. In the course of a re-negotiation of the contract, the Commission services had made it clear that the complainant could no longer be accepted as a participant in view of the serious financial irregularities established during the audits of the "DCC" and "Donna" projects and in view of the fact that the complainant refused to reimburse the amounts claimed in the recovery orders. The Commission services had based their position on the principles of sound financial management and the necessity to protect the financial interests of the Community. As a result of an audit, the "VR-Learners" project had been terminated since.

The Commission informed the Ombudsman that the officials targeted by the allegations of the complainant that it regarded as defamatory were envisaging taking legal action.

The complainant's observations

In its observations, the complainant maintained its complaint. The complainant claimed that it had sent a final report on the "DCC" project that had never been replied to. According to the complainant, the external experts who had carried out the technical review in 1997 were the same as those who carried out the in-depth review in December 1997. The independence of these experts was questionable. The complainant further stressed that these experts had not rejected all the work carried out but had accepted 49.5 of 130 man-months. The Commission therefore ought to have paid the complainant at least a further amount of € 40,723. The complainant also claimed that CSC had received the letter in which the Commission terminated the contract six days after the project had officially ended. With regard to the "Donna" project, the complainant reiterated its view that

the technical review had taken place after the project had already been officially approved by the Commission.

The complainant further claimed that after the departure of one of the partners in the "VR-Learners" project, the Commission had accepted that a new partner should join and that the budget envisaged for the complainant should be increased. It was only afterwards that the Commission had spread the incorrect allegation that the complainant owed money to the Commission, thereby putting pressure on the other partners in this project to exclude the complainant therefrom.

FURTHER INQUIRIES

Having received the complainant's observations on the opinion of the Commission, the Ombudsman considered that he needed further information in order to be able to deal with the complaint. He therefore asked the Commission

1 to provide the Ombudsman with a copy of the relevant documents on which it had based its opinion with regard to the "DCC" and the "Donna" projects,

2 to comment on the complainant's claim that due to the fact that the Commission allegedly had not commented within two months on the final report submitted by the complainant in the "Donna" project, the latter had to be considered as having been approved according to the general conditions applicable to that project, and

3 to comment on the complainant's claim that the legality of the termination of the "DCC" project by the Commission was questionable in view of the fact that the relevant letter of the Commission allegedly had been sent after the project had ended.

In its reply, the Commission pointed out that it disagreed with the complainant's interpretation of the relevant contracts underlying the arguments mentioned in the second and third question. The Commission took the view that both points did not affect the results of the financial audit carried out and the conclusions drawn from the audit findings. Since the Commission was in the process of pursuing its claim against the complainant in court and since these proceedings were likely to cover the issues mentioned under 2) and 3), the Commission considered that it would not be appropriate to elaborate on these points at this stage. The Commission also provided the documents requested by the Ombudsman.

In its observations on this reply, the complainant deplored that the Commission did not give any reasons why it did not accept the complainant's arguments. It disagreed with the Commission's view that these arguments were without relevance for the results of the financial audits. The complainant considered that the Commission's behaviour had the purpose of intimidating it.

THE DECISION

1 Introductory remark

1.1 In its opinion, the Commission informed the Ombudsman that the officials targeted by the allegations of the complainant that it regarded as defamatory were envisaging taking legal action. In its reply to the Ombudsman's request for further information, the Commission pointed out that it was in the process of pursuing its claim against the complainant in court.

1.2 By the time that the examination of the complaint came to be concluded, however, the Ombudsman had not been informed of the commencement of legal proceedings before a court in this matter. The Ombudsman was thus not prevented from proceeding to a decision in the present case.

2 Manipulation of minutes in relation to the audits carried out

2.1 The complainant claimed that the Commission had manipulated the minutes relating to the audits carried out with regard to the "DCC" and "Donna" projects.

2.2 The Commission did not make any specific comment on this allegation. However, it was clear that this allegation belonged to the allegations that the Commission considered to be incorrect and defamatory.

2.3 It appeared that the complainant essentially claimed that the minutes that had been produced by the Commission did not correctly reflect what had been said or transacted on the occasion of the reviews concerned. To take one example, in a letter dated 22 September 1998 the complainant's lawyers made detailed comments on the minutes relating to the technical review of the "Donna" project in which they criticised and corrected those passages of the minutes that they considered to be incorrect or incomplete. In the absence of further evidence on what had actually been said or transacted on the occasion of the reviews, the Ombudsman was not in a position to ascertain whether the minutes concerned were correct or whether the complainant's comments were justified. In these circumstances, the Ombudsman was unable to establish an instance of maladministration in so far as this allegation was concerned.

3 Causing serious damage to complainant

3.1 The complainant claimed that the Commission had caused it serious damage. In this context, the complainant referred to the fact that the Commission had terminated the "DCC" and "Donna" projects, had refused to accept most of the costs that the complainant had asked the Commission to cover in respect of these projects, had declined to pay the amounts that the complainant considered to be due to it on account of its work on the "DCC" and "Donna" projects and had excluded the complainant from the "VR-Learners" project.

3.2 The present allegation essentially concerned the obligations arising under contracts concluded between the Commission and the complainant or contracts in which the complainant had participated.

3.3 According to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it[37]. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

3.4 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

3.5 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

[37] See Annual Report 1997, pages 22 sequ.

3.6 In the present proceedings, the complainant had put forward various arguments to support its case that did not appear to be without merit. The complainant had queried whether the termination of the "DCC" project had been lawful in view of the fact that the relevant letter appeared to have been received only after the official end of the project. It had also invoked a contractual provision according to which its final report on the results of its work in the "Donna" project had been deemed to have been accepted before the Commission had decided to carry out a technical review. Finally, the complainant had objected to the results of the financial audits carried out in relation to these two projects.

3.7 The Commission relied on the result of the financial audits that had been carried out and took the view that the two arguments put forward by the complainant did not affect the results of these audits.

3.8 The Ombudsman considered that the arguments submitted by the Commission did not appear to be unreasonable. In these circumstances, and bearing in mind that the scope of the Ombudsman's review was limited in such cases (see paragraphs 3.2 to 3.5 above), the Ombudsman concluded that his inquiry had not revealed an instance of maladministration with regard to the "DCC" and "Donna" projects in so far as this allegation of the complainant was concerned.

3.9 The same conclusion applied with regard to the "VR-Learners" project. As mentioned above, the Ombudsman had not established that the Commission had been wrong when it had taken the view that the complainant had failed properly to fulfil its obligations in relation to the "DCC" and "Donna" projects and thus had to repay certain amounts of money to the Commission. The Commission's explanation that in these circumstances it could no longer accept that the complainant took part in the "VR-Learners" project whilst it refused to reimburse the sums claimed back by the Commission did not appear to be unreasonable. In these circumstances, the Ombudsman was unable to establish an instance of maladministration in so far as this allegation was concerned.

4 Lack of explanations and of reaction

4.1 The complainant claimed that the Commission had not given any explanations as to the reasons for the demand made by the Commission and had not reacted to the complainant's financial claims against the Commission.

4.2 The Commission did not make any specific comment on this allegation. However, the Commission had explained that the recovery order had been issued in order to retrieve the costs that had to be disallowed as a result of the financial audits into the "DCC" and "Donna" projects. It was true that the recovery order itself did not state the reasons on which it was based. However, the Ombudsman considered that it followed from the documents submitted to him that the complainant could not be under any reasonable doubt as to the reasons for the recovery order. The financial audits had come to the conclusion that only a small part of the costs that had been claimed could be accepted. The Commission had then proceeded to claim back the difference between the allowed costs and the sums that had already been paid out in advance. Furthermore, in a letter dated 21 January 1999 that was submitted to the Ombudsman by the complainant, the Commission had informed the complainant that the basis of the claim and the way in which it had been calculated had been explained in detail in the reports on the financial audits.

4.3 In so far as the complainant's counter-claims were concerned, it appeared that the Commission had not immediately reacted to the invoices sent by the complainant. However, since the claims were manifestly incompatible with the position the Commission had adopted in the matter, the complainant could not be under any doubt that the Commission would reject these claims. Furthermore, in a letter dated 30 March 1999 that was submitted to the Ombudsman by the complainant, the Commission had informed the complainant that there was no basis for these counter-claims, and that this had already been explained to the complainant in a previous letter.

4.4 In these circumstances, there appeared to be no maladministration in so far as this allegation was concerned.

5 Systematic elimination of complainant

5.1 The complainant claimed that the Commission had been trying, for more than two years, systematically to eliminate the complainant and its partners as competitors and critics, using defamation, bullying tactics and blackmail. The Commission denied these allegations.

5.2 In view of his conclusions regarding the other allegations submitted by the complainant, the Ombudsman considered that there was not enough evidence to support this allegation of the complainant.

5.3 In these circumstances, there appeared to be no maladministration in so far as this allegation was concerned.

6 Conclusion

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

ALLEGED MALADMINISTRATION IN THE PUBLICATION OF A REPORT

Decision on complaint 734/99/(VK)/IJH against the European Commission

THE COMPLAINT

The complainant, a journalist, was contracted by the Commission to write a Report on Wales in Europe, which was planned to be one of a series of 12 UK regional brochures. The intention was to publish the brochures to inform the public before the European Parliament elections of 10 June 1999. As required by the contract, the complainant submitted a first draft. The Commission required certain revisions, which the complainant made. The revised report was accepted by the head of the UK Representation of the Commission, Mr Geoffrey MARTIN, in February 1999 and the complainant's fee was paid in full. Publication of the Wales brochure was scheduled for 8 June 1999. However, the Commission stopped its publication at the last moment. The other UK regional brochures were published as planned.

The complainant alleged that:

(i) the delay in publication had frustrated the purpose of the report. i.e. to inform electors in Wales before the European elections;

(ii) the delay occurred as a result of intervention from Commissioner KINNOCK, who considered the report "too nationalistic" and maladministration by three named persons: Mr MARTIN; a member of Mr KINNOCK's cabinet and the head of the Commission office in Wales.

(iii) the Commission (specifically Commissioner KINNOCK and Mr MARTIN) subsequently covered up this intervention, by falsely claiming that the report contained factual inaccuracies, thereby maligning his professional reputation as a journalist and compromising his chances of obtaining work in the future. The complainant referred, in particular, to an article published in the *Western Mail* of 10 June 1999, quoting Commissioner KINNOCK and a letter from Mr MARTIN published in the *Western Mail* of 18 June 1999.

The complainant considered the above to constitute maladministration in the form of administrative irregularities, unnecessary delay, discrimination and abuse of power.

The complainant claimed that he should be exonerated from responsibility for the delay in the publication of the regional brochure for Wales and that the named members of the Commission services should be identified as being responsible for maladministration.

The complaint included part of a transcript of a telephone conversation between the complainant and Mr MARTIN, in which the latter stated his belief that the affair had been stimulated in Brussels by the head of the Commission office in Wales and that he had telephoned a member of Commissioner KINNOCK's cabinet, who had told him that the Commissioner considered the report too nationalistic.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission for an opinion. As regards point (i) of the complaint, the opinion stated that the contract did not require the Commission to publish the report in the form submitted, or at all. The Commission accepted that it originally intended to publish the report in advance of the European elections of 10 June 1999. However, this was not the sole purpose of the regional reports and it was more important to get the texts right than simply publish them regardless. The opinion also mentioned that some delay resulted from the need to translate the report into Welsh.

As regards point (ii), the Commission stated that the first draft submitted by the complainant contained a number of sweeping generalisations and highly political statements on issues like the single currency, which it would not have been prudent for the Commission to publish in the UK. The Commission Representation asked the complainant to redress the balance between fact and personal opinion in his second draft, which he duly did. The amended text was accepted and payment authorised. The decision on whether or not to publish the report lay with the Commission Representation in the UK. Neither Commissioner KINNOCK nor his cabinet at any stage attempted to block, delay, or influence the timing of the publication of the brochure. The comments attributed to Commissioner KINNOCK in the transcribed telephone conversation clearly refer to the first draft of the text. Neither Commissioner KINNOCK nor his cabinet raised any problems with the revised draft.

The Commission's opinion also underlined that the primary duty of all Commission Representations is to avoid entering into any national political debate in a manner which could appear partisan. In this case, if the London Representation had reasons to believe that a publication it intended to produce during an election period could be construed as containing a political bias, then it would have been prudence, not an abuse of power, to choose not to embroil the EC institutions in a domestic dispute.

As regards point (iii) of the complaint, the Commission's considered the complainant responsible for the fact that the delay in publication became public knowledge.

The complainant's observations

In his observations, the complainant insisted that no factual error in the report was ever identified to him. He put forward the idea that the decision to delay publication was taken in May/June 1999 because Commissioner KINNOCK mistakenly looked at the first draft of the Report, not the final text as approved by Mr MARTIN in February 1999. He considered this interpretation to be consistent with the Commission's opinion, which accepted that Commissioner KINNOCK commented on the first draft but did not say when. He considered that if the Commissioner received and commented on a draft that had been superseded by an amended and approved text, there must have been negligence in the Commission.

As regards the damage to his professional reputation, the complainant denied that he was responsible for the delay in publication becoming public knowledge. He responded to inquiries from the local media who wanted an explanation for the delay.

The complainant also invited the Ombudsman to examine the tapes of the telephone interview between himself and Mr MARTIN, referred to in his complaint.

FURTHER INQUIRIES

On 24 February 2000, the Ombudsman wrote to the Commission to ask why, if the revised text submitted by the complainant was considered suitable, the Wales brochure had not been published, although the other UK regional brochures had been published.

The Commission's reply was, in summary, as follows:

It was clearly desirable that Commissioner Kinnock should launch the Wales brochure, but delay was caused by the need to translate it into Welsh and then because the Commissioner's diary was so full that he could not visit Wales for this purpose until 8 June 1999.

This meant that it was no longer possible to fulfil one of the original purposes, that of informing opinion in Wales before the election. Therefore, publication was postponed to September in order to include the names of the new MEPs.

Subsequently, unfavourable publicity was created about the non-appearance of the brochure. It was fairly evident that the complainant was keen to criticise the Commissioner. Therefore, the Representation thought that publication in September was likely to attract even more adverse comment. For that reason, it was decided to arrange for an entirely new brochure to be written.

The transcripts of telephone conversations

The Ombudsman requested the complainant to supply a transcript of any parts of the telephone interview with Mr MARTIN, which the complainant considered relevant to his complaint.

On 16 March 2000, the complainant sent the transcript of his interview with Mr MARTIN, together with transcripts of telephone conversations (a) between himself and the official at the Commission Representation in the UK responsible for co-ordinating publication of all the UK regional brochures and (b) between another journalist, and, separately, Mr MARTIN; the head of the Commission office in Wales; and a member of Commissioner KINNOCK's cabinet.

The complainant's observations on the Commission's reply to the Ombudsman's request for further information.

The complainant firstly deplored the length of time taken to deal with his complaint.

The complainant considered that the Commission had accepted that responsibility for non-publication of the Report lay with Mr MARTIN and Mr KINNOCK and not with himself. The complainant also pointed out that, at the relevant time, Mr KINNOCK was the Commissioner responsible for transport, not Regional Development and queried why he had been involved.

The complainant also asked why the Commission did not state at the time that the reasons for the delay in publication were Mr KINNOCK's timetable and delays in the Welsh translation, rather than alleging that his report contained factual errors.

The observations also alleged that the non-publication of the complainant's report and the commissioning of a new Regional brochure for Wales were a waste of European taxpayers' money. The Ombudsman informed the complainant that, at this stage of the inquiry, it did not seem justified to inquire into this new allegation, which raises matters that are also within the competence of the Court of Auditors.

The meeting between the Ombudsman's services and Mr MARTIN

Mr HARDEN of the Ombudsman's services arranged to meet Mr MARTIN during a visit to London on 14 June 2000. In response to Mr HARDEN's questions, Mr MARTIN stated (i) that he had not been aware that his telephone conversation with the complainant was being recorded; (ii) that he had no objection to the Ombudsman forwarding the transcript to the Commission as part of the inquiry, (iii), after checking his diary, that his decision to postpone publication of the Wales brochure until September 1999 must have been made on a date between 5 and 11 May 1999.

The Ombudsman's second request for further information

On 21 June 2000, the Ombudsman wrote to the Commission to ask whether it considered that the complainant's text for the Regional brochure for Wales, as amended by the complainant and accepted by the Commission's Representation in the UK, contained factual inaccuracies and, in the event of a positive answer, to give full details of the factual inaccuracies.

The Commission identified two questions of factual inaccuracy in the revised text. Firstly, the revised text stated that the total allocation of regional funding to Wales under the new regulation will be determined by the availability of matching funds from either central government or private sources, whereas in fact, the allocation of these funds was based on a transparent formula of need. Second, the revised text's assertion that unemployment in Ireland at 7.2% was lower than the UK average of 8.3%, according to 1996 figures, was at odds with other sources which put the 1996 figure for Ireland at 11.8%.

The Commission made clear, however, that publication of the brochure was delayed for the reasons specified in the Commission's earlier replies to the Ombudsman.

THE DECISION

1 The allegation of excessive delay

1.1 The complainant alleged that the delay in publication of his report on Wales in the form of a Regional brochure had frustrated its intended purpose of informing electors in Wales before the European elections.

1.2 The Commission accepted that it had originally intended to publish the report before the European elections of 10 June 1999. However, its contract with the complainant did not require it to publish the report by any specific date, or at all.

1.3 The Ombudsman is not aware of any general legal obligation on the Commission to publish reports which it has commissioned. An instance of maladministration could therefore arise in relation to this aspect of the complaint only if the delay in publication of the Wales regional brochure resulted from an abuse of power or administrative irregularities. The complainant's allegations concerning these matters are examined in the next section of this decision.

1.4 During the inquiry, the complainant also alleged that the non-publication of the report and the commissioning of a new Regional brochure for Wales were a waste of European taxpayers' money. The Ombudsman informed the complainant that, at this stage of the

inquiry, it did not seem justified to inquire into this new allegation, which raised matters that are also within the competence of the Court of Auditors.

1.5 The Ombudsman's inquiries into this aspect of the complaint therefore revealed no maladministration.

2 The allegation that the delay occurred because of intervention from Commissioner Kinnock and maladministration in the Commission services

2.1 The complainant alleged that the delay in publishing the Regional brochure for Wales occurred as a result of intervention from Commissioner KINNOCK, who considered the report "too nationalistic" and maladministration by Mr MARTIN, by a member of Mr KINNOCK's cabinet and by the head of the Commission office in Wales.

The Ombudsman's findings of fact

2.2 On the basis of the evidence available to the Ombudsman, it appeared that the Head of the Commission Representation in the UK, Mr MARTIN, required the complainant to revise the first draft of the report. The complainant submitted a second draft, which was accepted by Mr MARTIN in February 1999. At some stage, the complainant's first draft was transmitted to the cabinet of Commissioner KINNOCK from the Commission office in Wales. When Mr MARTIN learnt of the Commissioner's concerns about the first draft, he took the initiative to contact a member of Commissioner KINNOCK's cabinet and supplied the cabinet with a copy of the modified and approved second draft. In early May 1999, it became clear that Commissioner KINNOCK would not be available to launch the brochure until two days before the European Parliament elections. Mr MARTIN then decided to postpone publication until September 1999, in order to allow inclusion of the names of the new MEPs. Following the subsequent political controversy, Mr MARTIN decided to abandon publication and commission a new report.

The Ombudsman's evaluation of the facts

2.3 It should first be remarked that the publication of a brochure is not a legal act, nor does there appear to be any specific procedure for preparation of such material laid down by law, or by administrative practice.

2.4 The decisions to suspend, and later abandon, publication of the brochure appeared to have been made by the person entitled to do so, the Head of the Commission Representation in the UK, for reasons which were adequate and appropriate.

2.5 It seems to be generally accepted that one of the functions of a Commissioner is to act as a two-way channel of communication and influence between the Commission and the Commissioner's Member State, consistent with the duty to be completely independent in the performance of his duties.[38] There is no evidence to suggest that the involvement of Mr KINNOCK and his cabinet went beyond the bounds of propriety or constituted an abuse of power.

2.6 Since Commissioner KINNOCK's cabinet was supplied with a copy of the modified and approved second version of the report, there was no evidence to support the allegation that decisions were made on the basis of outdated information.

2.7 The Ombudsman's inquiries into this aspect of the complaint therefore revealed no maladministration.

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[38] See e.g. Edwards and Spence, *The European Commission*, Longman 1994, esp p 35.

3 The question of factual inaccuracies and the allegation of a cover up

3.1 The complainant alleged that the Commission (specifically, Commissioner KINNOCK and Mr MARTIN) covered up the Commissioner's intervention, by falsely claiming that the complainant's report contained factual inaccuracies, thereby maligning his professional reputation as a journalist and compromising his chances of obtaining work in the future. The complainant referred, in particular, to an article published in the *Western Mail* of 10 June 1999, quoting Commissioner KINNOCK and a letter from Mr MARTIN published in the *Western Mail* of 18 June 1999.

3.2 The relevant facts, as found by the Ombudsman in paragraph 2.2 above, are that the complainant's first draft needed revision, but that this revision was completed by February 1999 when the revised report was accepted by Mr MARTIN. When it became clear that Commissioner KINNOCK would not be available to launch the brochure until two days before the European Parliament elections, Mr MARTIN decided to postpone publication until September, in order to allow inclusion of the names of the new MEPs.

3.3 The quotation attributed to Commissioner KINNOCK in the article in the *Western Mail* implies that factual inaccuracies in the complainant's report were the reason for delaying its publication. The Commission's answers during the Ombudsman's inquiry show that this was incorrect. At no stage during the inquiry did the Commission seek to defend the view attributed to Commissioner KINNOCK in the *Western Mail* article. The Commission explained that publication was delayed for other reasons. The record was therefore set straight, as the complainant claimed it should be, by the Commission's answers during the Ombudsman's inquiry.

3.4 Mr MARTIN appeared to have written his letter to the *Western Mail* as part of his official duties as Head of the Commission Representation in the UK. The letter refers to the need "to correct some factual references that were not entirely accurate". This could have been understood as the reason for the delay in publication of the report, but the letter did not necessarily imply this, since it could also refer to the need to revise the first draft. The purpose of the letter was evidently to seek to defuse a political controversy rather than to attribute blame. Taken as whole, therefore, the letter did not appear inappropriate.

3.5 The Ombudsman's inquiries into this aspect of the complaint therefore revealed no maladministration.

4 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.

ELIMINATION OF QUESTIONS FROM PRESELECTION TESTS

Decision on complaint 904/99/GG against the European Commission

THE COMPLAINT

In July 1999, the complainant complained against the refusal of the Commission to allow him to take part in the written tests of competition COM/A/8/98 organised by the Commission for which he had applied. In a letter of 28 April 1999, the Selection Board informed the complainant that he could not be admitted to the written tests since he had failed to achieve the minimum number of points in one of the four pre-selection tests. According to the Commission, the complainant had achieved 9.662 points in test (c) whereas the minimum number of points had been 10. On 11 May 1999, the complainant wrote to the Commission and queried this result. He pointed out that, on the basis of the number of questions to be answered and the points given or deducted for correct or wrong answers, it was not possible to arrive at the figure notified to him by the Commission. In its reply of 17 June 1999, the Selection Board claimed that the result notified to the

complainant was to be explained by the fact that some questions which had proved to be ambiguous had been eliminated, and that the points given or deducted for each answer had been adjusted accordingly.

The complainant thereupon complained to the European Ombudsman in which he raised several issues, which may be summarised as follows:

First, he claimed that the Commission had no right to 'neutralise' some of the questions, which it claimed, had proven to be ambiguous. This approach was contrary to the instructions given to the candidates at the pre-selection tests according to which all the answers in all four tests had the same value. He also queried why it was only after the tests had been written that the Commission had discovered that some of the questions had been ambiguous. In his view, the ambiguity of a question was a subjective matter. The elimination of such questions ran also counter to the principle of equal treatment since it disadvantaged those who had correctly answered the questions concerned. It had also falsified the test as such since each candidate had used the time at his disposal on the basis of the assumption that the test comprised 30 questions each of which had the same value.

Second, the Commission had failed to provide sufficient information on how it had proceeded. In its letter of 28 April 1999, the elimination of certain questions had not been mentioned at all. In its letter of 17 June 1999, no details had been given as to how many and which questions had been eliminated.

THE INQUIRY

The Commission's opinion

The complaint was sent to the Commission which, in its opinion, pointed out that the Selection Board had decided to eliminate question no. 66 from pre-selection test (c) for all candidates since it had proved to be ambiguous. As a result of this change, the value given for each correct answer had been 0.690 and the value deducted for each wrong answer 0.228 points. The Commission took the view that this 'neutralisation' had not disadvantaged any candidate whosoever, since there could not have been a correct or a wrong answer to the question concerned.

The complainant's observations

In his observations, the complainant maintained his complaint. He claimed that the elimination of question no. 66 had disadvantaged him since this question was among the 19 (out of a total of 30) questions which he had answered. According to the complainant, he would have achieved exactly the minimum of 10.000 points required with 16 correct and three wrong answers[39]. He claimed that the elimination of question no. 66 had in fact caused his exclusion from the competition, since 15 correct and three wrong answers now resulted in the 9.662 points notified to him by the Commission[40]. The complainant expressed the view that the Commission could have avoided this result if it had 'neutralised' the relevant question in a different way, for example by considering it to have been answered correctly by all candidates. Finally, the complainant claimed that the elimination of this question harmed all those candidates who had spent time trying to answer it. The complainant also alleged that the Commission's claim that under the adjusted values, 0.228 points were deducted for each wrong answer was wrong and that the correct value should be 0.230 points (a third of the value for a correct answer).

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39 Adding the points awarded for correct answers (16 times 0.667) and then deducting the points accruing from wrong answers (3 times 0.222 points). Incidentally, the result of this calculation would appear to be 10.006 (rather than 10.000) points.

40 15 times 0.690 points minus 3 times 0.228 points.

THE DECISION

1 Elimination of a question from a pre-selection test

1.1 The complainant claimed that the elimination of question no. 66 from pre-selection test (c) in competition COM/A/8/98 had been unjustified and had harmed him. He argued that according to the instructions given to the candidates at the pre-selection tests all the answers in all four pre-selection tests were to have the same value. He also queried why it had been only after the tests had been written that the Commission had discovered that some of the questions were ambiguous. In his view, the elimination of the question concerned ran also counter to the principle of equal treatment since it disadvantaged those who had spent time trying to answer it or had even correctly answered it like he had done. The complainant claimed that if the relevant question had not been eliminated or if the Commission had eliminated it in a different way, for example by considering it to have been answered correctly by all candidates, he would have had to be admitted to the written tests of the competition.

1.2 The Commission replied that the Selection Board had decided to eliminate question no. 66 from pre-selection test (c) for all candidates since it had proved to be ambiguous. As a result of this change, the value given for each correct answer had been 0.690 and the value deducted for each wrong answer 0.228 points. The Commission expressed the view that this 'neutralisation' had not disadvantaged any candidate whosoever, since there could not have been a correct or a wrong answer to the question concerned.

1.3 The complainant correctly observed that the Commission had not explained why exactly the relevant question had been eliminated for being 'ambiguous'. As the complainant observed, the reason for doing so may have been that among the possible answers there was more than one which was correct, or that all the possible answers were wrong, or that the question was simply badly drafted. The complainant did however not adduce any substantial arguments, which would have proved that the Commission had been wrong to consider the relevant question as being ambiguous. The following considerations were therefore based on the premise that the relevant question had indeed been ambiguous.

1.4 Good administrative practice requires that candidates at a competition shall not be asked questions, which are ambiguous. The Commission should therefore carefully check that the questions, which were going to be put to candidates, are free from ambiguity. When despite such scrutiny it is discovered after a test that a question has been ambiguous, the Commission must take appropriate steps to ensure that the result of the test is not affected by such a question. According to the information in the possession of the Ombudsman, the pre-selection test concerned comprised 30 questions one of which proved to be ambiguous. The Ombudsman considered that in such a case the Commission might proceed to eliminate this question from the test, provided that this elimination is carried out in a way such as to ensure that the interests of candidates are not negatively affected.

1.5 The complainant pointed out that the elimination of the question concerned resulted in a change in the value of each correct answer from 0.667 points to 0.690 points and a corresponding change in the (negative) value of wrong answers. He considered that this was at variance with the information provided to candidates at the pre-selection tests according to which all the questions in all four pre-selection tests were to have the same value. The complainant had not provided the text on which he relies. The Ombudsman assumed, however, that what the text referred to by the complainant had been trying to express was that in each of the four pre-selection tests each of the questions asked in *that* test was to have the same value. Indeed, if the complainant's interpretation were to be correct, the Commission would, in a case like the present, have little alternative but to annul the whole test and organise a new one since every elimination of a question by necessity affects the

value given to the other questions. The Ombudsman considered that such interpretation would therefore lead to disproportionate consequences where only one out of 30 questions caused concern as in the present case.

1.6 The complainant further argued that the approach adopted by the Commission infringed the principle of equal treatment and had led to his exclusion from the competition. However, all the Commission had done in the present case had been to eliminate an ambiguous question. By adjusting the value of the other questions, the Commission had ensured that each candidate could still reach the maximum number of points. For the 29 remaining questions, the (adjusted) value given to each correct answer was the same. Likewise, the number of points deducted for each wrong answer was the same for each question. The complainant's case rested on the assumption that he had provided a correct answer to the question that had been eliminated. However, and provided that it was indeed possible to provide a 'correct' answer to that question, it had not been established that this had indeed been the case. In any event, the Ombudsman considered that where the Commission proceeded to eliminate a question, which had proved to be ambiguous, the principle of equal treatment required that this was done with effect for all candidates. It was true that the elimination of such a question affected those candidates who had spent some of their time trying to answer this question. However, this was the inevitable consequence of eliminating such a question. Given that candidates in any event had had to provide correct answers to more than a dozen questions in order to pass the test, the resulting loss of time should not have been very important, anyway. Finally, the Ombudsman was of the opinion that the complainant's suggestion according to which the Commission could have 'eliminated' the relevant question by considering it to have been answered correctly by all candidates would have raised serious legal concerns. For all these reasons, the approach adopted by the Commission in the present case appeared to have been reasonable.

1.7 The complainant was right in pointing out that under the adjusted values, the correct value deducted for a wrong answer should have been 0.230 points rather than the 0.228 points indicated by the Commission. However, as the complainant himself concluded in his observations on the Commission's opinion, this discrepancy was irrelevant for the purposes of ascertaining whether the Commission's approach as such was legitimate.

1.8 On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant was concerned.

2 Failure to provide sufficient information

2.1 The complainant claimed that the Commission had failed to provide sufficient information on how it had proceeded. In its letter of 28 April 1999, the elimination of certain questions had not been mentioned at all. In its letter of 17 June 1999, no details had been given as to how many and which questions had been eliminated.

2.2 The Commission did not make any specific comment on this allegation.

2.3 In its letter of 28 April 1999, the Commission had informed the complainant of the results he had achieved at the pre-selection tests. When the complainant queried this result, the Commission explained, in its letter of 17 June 1999, that some questions, which had proved to be ambiguous, had been eliminated, and that the values given for correct and wrong answers had been adjusted accordingly. The Ombudsman considered that it would have been preferable if already on this occasion the Commission had specified which question had been eliminated and how the values attributed to answers had changed as a result. However, since the complainant's letter of 11 May 1999 had asked for a clarification of the 'methodology' used by the Commission and since the Commission ultimately supplied the necessary details to the Ombudsman, the latter did not see any grounds to pursue his inquiry in this context.

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.

3 Conclusion

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

DIPLOMA NECESSARY FOR ADMISSION TO COMPETITION

Decision on complaint 905/99/GG against the European Commission

THE COMPLAINT

In July 1999, the complainant complained against the refusal of the Commission to allow him to take part in competition COM/LA/1/99 organised by the Commission with a view towards employing French language translators for which he had applied. According to point III B 2 of the notice of competition published in the Official Journal[41], candidates had to have completed a course of university education and obtained a degree ("des études universitaires de cycle complet sanctionnées par un diplôme de fin d'études"). The notice of competition further pointed out that the Selection Board would take account of the differences between the educational systems, and that examples of degrees were listed, on an indicative basis, in an appendix of the "Guide" accompanying the notice of competition. This guide contained indications for each of the 15 member states of the EU, including France *(*"maîtrise ou équivalent"). The complainant, a Dutch national, had obtained a "Licence en Sciences Economiques" from the Ecole des Hautes Etudes Commerciales ("licence HEC") at the University of Lausanne in Switzerland in 1986.

In a letter of 10 May 1999, the Selection Board informed the complainant that he could not be admitted to the competition since he did not fulfil the condition set out in point III B 2 of the notice of competition. On 19 May 1999, the complainant queried this decision, pointing out that his diploma had been accepted on the occasion of previous competitions and when he had been employed, on 1 May 1999, as an auxiliary agent of the Commission. In a letter of 29 June 1999 the Selection Board confirmed its decision. According to the Selection Board, the complainant's diploma that had been obtained after three years' studies was not of the level required by the notice of competition, that is to say a "maîtrise" or an equivalent diploma.

In his complaint to the Ombudsman, the complainant expressed the view that he was being discriminated against. The requirement that a "maîtrise" or an equivalent diploma was necessary was specified in Appendix 1 of the "Guide" for France. However, for Belgium, Portugal and Spain a "licence" was required. The level of a "maîtrise" did not exist in Switzerland. Finally, the fact that he had been able to complete his studies in a shorter time (three years) was due to the fact that he had previously studied at the Ecole Polytechnique de Lausanne and had been given credit for some of the courses he had followed there. Today, the same "licence" was awarded after four years of studies in order to give students more time to acquire practical experience as trainees. The curriculum had however remained identical. The complainant expressed the view that his exclusion from the competition resulted from a lack of understanding of the Swiss University system.

In a letter to the Ombudsman, the University of Lausanne explained that until 1996 the "licence HEC" could be obtained after a minimum of three years' studies. Since then a minimum of 8 semesters and 240 ECTS (European Credit Transfer System) credits is required. This change enabled the university to add several hours of courses although the difference against the previous regime was not significant. The main purpose of length-

41 OJ 1999 no. C 21 A of 26 January 1999, p. 12.

ening the programme had been to include traineeships with companies, exchanges with foreign universities and more personal work (e g in seminaries). The "licence" obtained by the complainant could under no circumstances be assimilated to a French "licence" and should rather be compared to a "maîtrise" under the French system. International recognition of the "licence HEC" was well established nowadays. A framework agreement between France and Switzerland from 1994 recognised the equivalence of a Swiss "licence" and a French "maîtrise". According to a table attached to the letter from the University of Lausanne, the "licence HEC" comprised a total of 2310 hours of courses in 1986 (three years' studies) and of 2338 hours in 1999 (four years' studies) whilst a "licence" from the University of Paris comprised only a total of 1590 hours of courses in 1999 (three years' studies). The holders of "licence HEC" were furthermore admitted to postgraduate programmes throughout the world.

THE INQUIRY

The Commission's opinion

The complaint was sent to the Commission. In its opinion, the Commission made the following comments with regard to the complaint:

The Selection Board had already explained to the complainant that the fact that he worked for the Commission as an auxiliary agent was irrelevant in the present context since the post concerned at the time had been a category B post which did not require a university degree.

The "licence HEC" obtained by the complainant in 1986 was not completely equivalent to the corresponding diplomas awarded after 1996. Whilst it was true that the universities in Belgium, Spain and Portugal awarded degrees called "licences", these degrees required a minimum of four or five years' studies. Likewise the "maîtrise" in France was awarded after four years' studies whilst the "licence" which was not regarded as sufficient to allow its holder to be admitted to the competition was awarded after three years' studies.

The fact that holders of a "licence HEC" were admitted to postgraduate programmes in member states of the EU did not give them the automatic right to have these degrees recognised as being equivalent to the relevant national degrees (like the "maîtrise" in France). Such recognition depended on the Ministry of Education of the Member State concerned. It was current practice that this recognition was only granted if the applicant had passed one or more supplementary courses.

For these reasons, the Selection Board had, taking into account the existing differences between the educational systems, concluded that the complainant's degree did not give him the right to be admitted to the competition concerned.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following additional comments:

Since the Commission's opinion had been received by the Ombudsman after the deadline set for that purpose (31 December 1999), the Ombudsman should not take it into account when deciding upon the complaint. The decision of the Commission not to admit him to the competition was incompatible with the Convention on the Recognition of Studies and Qualifications in Higher Education adopted on 21 December 1979 by an international conference of states invited by UNESCO (United Nations Educational, Scientific and Cultural Organisation) and with the Recommendation on the Recognition of Studies and Qualifications in Higher Education adopted by UNESCO on 13 November 1993. Paragraph 11 of the latter provided that in order to assess the equivalence of a diploma

obtained in another country, the competent authorities should also take into account the rights which that diploma granted to its holder in the country where it was awarded. In this context, the complainant pointed out that since three months ago he occupied a post in the Swiss federal administration, which was equivalent to a category A post. Excluding the complainant from the competition would mean that no civil servant of the Swiss federation could become a category A civil servant of the EU and that all holders of Swiss diplomas awarded before 1996 would be excluded. The complainant further claimed that he had worked as a trainee in a Turkish company for three months during the summer break in 1985 and in a Canadian company for a year in 1986/87 after having obtained his diploma. He also pointed out that the EU and Switzerland were about to sign agreements which inter alia would provide for an official recognition of Swiss degrees in the EU and vice versa. This showed that the question of the recognition of the diploma was a purely formal matter and did not concern the nature of the degree as such.

The complainant concluded by stressing that in 1986, university studies in Switzerland were of a duration of three years and that no other choice was possible.

FURTHER INQUIRIES

Request for further information

In view of the above, the Ombudsman concluded that he needed further information in order to deal with the complaint. He therefore asked the Commission to provide information on (1) the reasons why it considered the complainant's diploma as insufficient to admit him to the competition concerned, (2) on the question as to whether a "licence HEC" awarded by the University of Lausanne after 1996 would have been regarded as sufficient and (3) on the claim made by the University of Lausanne according to which an agreement concluded in 1994 between France and Switzerland recognised that the Swiss "licence" corresponded to a French "maîtrise".

Shortly afterwards, the complainant informed the Ombudsman that he had been admitted to competition EUR/A/151/98 organised by the European Parliament and the Council of the European Union. The complainant considered that this should be regarded as a precedent.

The Commission's reply

In its reply to the Ombudsman's request for further information, the Commission made the following comments:

For the purpose of admission to its category A competitions, the Commission followed the rule that university diplomas or equivalent diplomas, that is to say diplomas that had been recognised as academically equivalent or had been recognised by the member states of the EU, were to be required. To date, the complainant had not proven that his Swiss diploma awarded in 1986 had been recognised as being equivalent to one of the diplomas required by the Commission.

The Commission considered that it could not comment on the question as to whether a Swiss "licence" awarded after 1996 would have been regarded as sufficient, given that it could not prejudge the decision of the Selection Board that was primarily competent to deal with these matters. It added, however, that the question as to how competitions should be organised and the issue of conditions of access in particular would be reviewed in the context of the forthcoming administrative reform.

The Commission further stressed that the University of Lausanne had not claimed that the Swiss "licence" was equivalent to a French "maîtrise". According to the 1994 framework agreement that had been concluded by the Conference of the Presidents of the Universities

(France) and the Conference of the Headmasters of the Swiss Universities, the Swiss "licence" awarded after at least eight semesters' studies "corresponded" to a French "maîtrise". However, the purpose of this provision was to facilitate the acceptance of the Swiss "licence" as a university diploma enabling its holder to pursue his or her studies at a French university. The agreement was not concerned with the recognition of the Swiss "licence" as a French "maîtrise" by the French Ministry of Education. The same applied with regard to the UNESCO Convention and Recommendation.

As regarded the complainant's admission to a competition organised by the European Parliament, each institution was sovereign as to how to draft its competition notices. Furthermore, candidates could not rely on the fact that they had been admitted to another competition.

The complainant's observations

In his observations on the Commission's reply, the complainant argued that since the Commission's reply had been received by the Ombudsman after the deadline set for that purpose (30 April 2000), the Ombudsman should not take it into account when deciding upon the complaint. The complainant also stressed that there was an incoherence, given that the European Parliament had accepted his diploma whilst the Commission refused to do so.

THE DECISION

1 Introductory remarks

1.1 In view of the fact that the Commission's opinion and the Commission's reply to the Ombudsman's request for further information had been submitted after the expiry of the deadline set for that purpose, the complainant asked the Ombudsman not to take these documents into account when deciding upon his complaint.

1.2 According to Article 195 of the EC Treaty, the Ombudsman shall, when he considers that there is a possible instance of maladministration, forward the complaint to the institution concerned "which shall have a period of three months in which to inform him of its views". There is, however, no provision in the Treaty that would oblige the Ombudsman to disregard an opinion of an institution that is lodged after the expiry of that period of time. In the present case, the opinion had been sent to the Ombudsman on 7 January 2000, i.e. only a few days after the deadline had expired, and the Commission had apologised for this delay to the Ombudsman. There was thus no reason why the Commission's opinion should not be considered by the Ombudsman.

1.3 In so far as the reply to the request for further information was concerned, Article 3 (2) of the Statute of the Ombudsman[42] needed to be considered. According to this provision, the Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them. If this assistance is not forthcoming, the Ombudsman shall inform the European Parliament, which shall make appropriate representations (Article 3 (4) of the Statute). The European Ombudsman makes a request for further information if he considers that this information is necessary for him to be able to deal with a complaint. It would thus be inappropriate to disregard a reply to such a request for the sole reason that it arrived after the expiry of the deadline set by the Ombudsman for its submission. The Ombudsman was of the opinion that a delay in providing information that he has requested may in itself constitute an instance of maladministration. In the present case, however, the reply had been sent to the Ombudsman on 11 May 2000, i.e. only a few days after the deadline had expired, and the Commission had apologised

[42] Decision no. 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113 page 15).

for this delay to the Ombudsman. There was thus no reason why the Commission's reply should not be considered by the Ombudsman.

2 Discrimination

2.1 The complainant claimed that the Commission had discriminated against him by refusing to let him take part in competition COM/LA/1/99 on the grounds that his "licence" obtained in Switzerland in 1986 was not sufficient to allow his admission.

2.2 The Commission replied that there had been no discrimination since the Selection Board had legitimately come to the conclusion that the complainant's degree was not sufficient to allow him to be admitted to the competition.

2.3 According to the notice of competition, candidates needed to have completed a course of university education and obtained a degree. Examples of degrees that were regarded as being sufficient were listed, on an indicative basis, in an appendix of the "Guide" accompanying the notice of competition. This guide contained indications for each of the 15 member states of the EU, including France ("Maîtrise ou équivalent"). Given that the complainant had obtained his degree in Switzerland, the decisive question was whether this degree had to be regarded as equivalent to any of the degrees indicated in the guide accompanying the notice of competition.

2.4 The fact alone that a "licence" obtained in Belgium, Spain or Portugal was considered as sufficient for admission to the competition could not be regarded as decisive in this context. The Commission had explained that these degrees required at least four years' studies whilst the complainant's diploma had been awarded after only three years of studies.

2.5 The Ombudsman considered furthermore that the fact that the complainant had previously worked as an auxiliary agent for the Commission could not be regarded as relevant, given that that post had been a category B post whilst the competition had been held for category LA posts. Neither could the fact alone that the complainant was admitted, on the basis of his diploma, to a category A competition by the European Parliament and the Council of the European Union oblige the Commission to consider that diploma as sufficient for the purposes of its own competition.

2.6 The complainant relied on the UNESCO Convention on the Recognition of Studies and Qualifications in Higher Education adopted on 21 December 1979 and the Recommendation on the Recognition of Studies and Qualifications in Higher Education adopted by UNESCO on 13 November 1993. The Ombudsman did not consider that these acts would have obliged the Commission to consider the complainant's diploma as sufficient for the purposes of the relevant competition.

2.7 The University of Lausanne also referred to the framework agreement concluded in 1994 by two bodies representing the universities in Switzerland and France. According to this agreement, the Swiss "licence" awarded after at least eight semesters' studies corresponds to a French "maîtrise". The Ombudsman considered, nevertheless that the complainant had not established that the 1994 framework agreement was relevant to his case. The agreement refers to a Swiss "licence" awarded after at least eight semesters' studies. However, the complainant's diploma had been awarded after only three years' studies. The complainant's references to the professional experience acquired during (in 1985) and after his studies (in 1986/87) did not appear to be relevant in this context.

2.8 The above did however not exclude the possibility that the complainant's diploma could have been regarded as equivalent to a French "maîtrise" on its own merits. The figures provided by the University of Lausanne confirmed the latter's claim that the

"licence" awarded to the complainant could not be assimilated to a French "licence" but should rather be compared to a "maîtrise" under the French system. It also emerged from these figures that whilst the Swiss "licence" was now awarded after four years' studies, the number of hours taught had not significantly increased (2338 instead of 2310). It thus did not appear to be excluded to treat the Swiss "licence" awarded under the system in force until 1996 as equivalent to the "licences" that were nowadays awarded by Swiss universities and that corresponded, as discussed before, to a "maîtrise" under the French system. The Ombudsman further considered that it was significant that two other Community institutions, the European Parliament and the Council of the European Union, had accepted that the complainant's diploma could be regarded as sufficient in order to allow him to take part in a category A competition.

2.9 It had to be considered, however, that the Selection Board disposed of a certain margin of discretion with regard to the decision as to which degrees could be regarded as "equivalent" and thus as sufficient for admission to the competition. There would therefore only have been an instance of maladministration if the Commission had clearly exceeded its margin of discretion. The Ombudsman considered that it had not been established that this had been the case.

2.10 On the basis of the above, there appeared to have been no maladministration on the part of the Commission. The Ombudsman nevertheless considered it appropriate to make a further remark in this regard

3 Conclusion

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

FURTHER REMARK

The Ombudsman would appreciate if the Commission could, in so far as future competitions are concerned, consider co-operating with the other institutions and bodies of the EU in order to avoid that different standards are applied with regard to the academic diplomas required for competitions for posts that are comparable.

FREEDOM OF EXPRESSION OF OFFICIALS

Decision on complaint 1219/99/ME against the European Commission

THE COMPLAINT

The complainant lodged a complaint with the European Ombudsman in October 1999. The complaint concerned the Commission official Mr van Buitenen who had passed internal Commission documents on to the European Parliament. The complainant stated that the Commission's actions towards Mr van Buitenen breached general principles of EC law regarding officials' freedom of expression. More specifically the complainant put forward the following allegations:

1 The Commission wrongly issued a reprimand to Mr van Buitenen.

2 Mr van Buitenen was wrongly transferred from Directorate General "Financial Control" to Directorate General "Personnel and Administration".

3 The Commission threatened Mr van Buitenen with judicial proceedings following the publication of a book concerning his time with the Commission.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission that made the following statements:

1 The Commission pointed out, that when Mr van Buitenen transmitted documents to bodies outside the Commission, he infringed the Staff Regulations, particularly those provisions enforced to protect the rights of those who are objects of disciplinary and criminal proceedings.

2 As regards the transfer, the Commission stated that Mr van Buitenen was reinstated in a new post corresponding with his grade and financial skills. Mr van Buitenen had not been reinstated in the audit department were he used to work, given that there may have been, to some degree, a breakdown of confidence between Mr van Buitenen and his hierarchy which could have caused problems in the day-to-day management.

3 Regarding the judicial proceedings, the Commission adduced that Mr van Buitenen had not been forbidden to express himself and that the Commission did not refuse to grant authorisation to publish. However, the Commission had advised him to review the contents of his book in order to ensure that it contained no defamatory statements. Thus, Mr van Buitenen was warned that he would bear sole responsibility for the consequences, which might include an obligation for the Commission to assist any officials who considered that the book defamed them. The Commission pointed out that by becoming an official, Mr van Buitenen had freely accepted the obligations imposed by the Staff Regulations. One of those obligations is that officials must seek permission before publishing material connected with their work, pursuant to Article 17 (2) of the Staff Regulations. In this respect, the Commission referred to the ruling of the Court of First Instance in joined cases T-34/96 and T-163/96, *Connolly v. Commission*, in which the Court confirmed that this requirement was legitimate and proportionate and thus fully in line with the right of free expression set out in particular in Article 10 of the European Convention on Human Rights.

The complainant's observations

In his observations, the complainant in summary repeated the content of his complaint underlining that the Commission's actions were in conflict with the freedom of expression.

THE DECISION

1 The issuing of a reprimand

1.1 The complainant alleged that the Commission wrongly issued a reprimand to Mr van Buitenen.

1.2 The Commission stated that Mr van Buitenen had infringed the Staff Regulations when he transmitted documents to bodies outside the Commission.

1.3 The Ombudsman noted that it is for the Appointing Authority to choose the appropriate penalty[43]. In the present case, there was no indication that the Commission did not act within its legal authority.

1.4 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this part of the case.

[43] 46/72, *Robert de Greef v. Commission*, ECR [1973] 543, paragraphs 45-46, 228/83, *F v. Commission*, ECR [1985] 275, paragraph 34 and T-146/89, *Calvin Williams v. Court of Auditors*, ECR [1991] II-1293, paragraph 83.

2 The reinstatement

2.1 The complainant alleged that the Commission had wrongly transferred Mr van Buitenen from Directorate General "Financial Control" to Directorate General "Personnel and Administration".

2.2 The Commission stated that Mr van Buitenen was reinstated in another post which corresponded with his grade and financial skills. He had not been reinstated in his previous post since there might have been a breakdown of confidence between Mr van Buitenen and his hierarchy.

2.3 The Ombudsman noted that in another complaint (1335/99/ME), also concerning allegations in relation to the reinstatement of Mr van Buitenen, the Commission informed the Ombudsman that Mr van Buitenen had not objected to the transfer and that he today holds a new position for which he himself successfully applied.

2.4 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this part of the case.

3 The judicial proceedings

3.1 The complainant alleged that the Commission threatened Mr van Buitenen with judicial proceedings following the publication of his book about his time working for the Commission.

3.2 The Commission explained that it had not forbidden Mr van Buitenen to express himself and it had not refused to grant authorisation to publish. The Commission had advised him to review his book to make sure that there was no defamatory statements and that Mr van Buitenen had to bear the responsibility for any consequences, and that the Commission might be obligated to provide assistance to affected persons. The Commission stated that as confirmed by the Court of First Instance, the Staff Regulations were compatible with the freedom of expression.

3.3 Article 17 (2) of the Staff Regulations outlines that an official shall seek permission from the Commission before publishing any matter dealing with the work of the Communities. As regards the right of freedom of expression, the Court of First Instance ruled in joined cases T-34/96 and T-163/96, *Connolly v. Commission*[44], that the way in which the Staff Regulations had been interpreted in that particular case was not considered as an unjustified limitation of the freedom of expression. Further, in T-82/99, *Cwik v. Commission*[45], the Court established the need to strike a fair balance between ensuring that a fundamental right (such as the freedom of expression) may be exercised and protecting a legitimate objective of general interest. The Ombudsman noted that the Commission did not take any disciplinary measures against Mr van Buitenen but that the Commission only reminded Mr van Buitenen of the provisions of the Staff Regulations. It could therefore not be considered that the Commission acted wrongly when it reminded Mr van Buitenen of his duties under the Staff Regulations or more generally, that the Commission did not strike a fair balance between the fundamental right of freedom of expression and the duties and responsibilities of officials.

3.4 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this part of the case.

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44 T-34/96 and T-163/96, *Bernard Connolly v. Commission*, ECR [1999] II-463, paragraph 149.

45 T-82/99, *Cwik v. Commission*, Judgement of 14 July 2000, paragraph 52.

4 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

As regards the freedom of expression of Community officials, this had already been the subject of a complaint to the Ombudsman in 1996 (794/5.8.1996/EAW/SW/VK). This complaint was reported in the 1997 Annual Report, part 3.1.5. In this decision dated 5 November 1997, the Ombudsman found no maladministration by the institution concerned, the European Commission, but issued further remarks in which the question of freedom of expression of Commission officials was discussed. The Ombudsman then stated:

The Commission may wish to consider whether it could provide guidance to its officials on what it considers to be a fair balance between their individual right to freedom of expression, which includes the freedom to impart information and ideas, and their duties and responsibilities as officials, in particular under Articles 12 and 17 of the Staff Regulations.

The Ombudsman also noted the decision of the European Court of Human Rights in case *Vogt v. Germany*[46] where it was stated that all officials are individuals and as such qualify for the protection of freedom of expression as laid down in Article 10 of the European Convention on Human Rights.

On the Community level, the Court of Justice and the Court of First Instance has ruled on the right of freedom of expression of Community officials, in particular in cases C-100/88, *Oyowe v. Commission*[47], T-34/96 and T-163/96, *Connolly v. Commission*[48], and T-82/99, *Cwik v. Commission*[49].

The Ombudsman noted that following the decisions of the Community Courts, some clarifications have been made as regards freedom of expression of Community officials. However, other questions remain in relation to Articles 12 and 17 of the Staff Regulations, in particular the question of what would be considered as a fair balance between the official's right to freedom of expression and the legitimate interest of the Communities.

The Ombudsman noted that the Commission has identified some related issues in its White Paper "Reforming the Commission – Part II" of 1 March 2000. Although not specifically referring to the right of the freedom of expression, Actions 57 and 58 of the White Paper state that the Commission is planning on issuing a handbook clearly explaining the officials' rights and obligations, internal rules for the opening of proceedings, and guidelines to sanctions based on their proportionality in relation to the gravity of the offence. Furthermore, Actions 59 and 60 contain intentions of extending the Staff Regulations with rules governing whistleblowing. These provisions should give officials the possibility to report wrongdoing through internal channels but also to channels outside the Commission. The Ombudsman noted that decisions are foreseen to be adopted in March and April 2001 respectively.

Recently the Commission has informed the Ombudsman of the steps to be taken to improve the transparency and service for Commission staff as regards their rights and obli-

46 *Vogt v. Germany*, Judgement of 26 September 1995, Series A no. 323.

47 C-100/88, *Oyowe v. Commission*, ECR [1989] 4285, paragraph 16.

48 T-34/96 and T-163/96, *Bernard Connolly v. Commission*, ECR-SC [1999] II-463, paragraphs 146-155.

49 T-82/99, *Cwik v. Commission*, Judgement of 14 July 2000, paragraph 47-60.

gations under the Staff Regulations and other administrative rules. A comprehensive database for the staff comprising these rules is about to be presented. In the longer term, there is an Action plan about the simplification of the Staff Regulations.

It appeared thus that the Commission has shown readiness to issue guidelines in this field and the Ombudsman welcomed these initiatives taken by the Commission. The Ombudsman however urged the Commission to take due consideration of the fundamental principle of freedom of expression in issuing guidelines for its officials as expressed also in the further remarks issued in the decision of 5 November 1997 in complaint 794/5.8.1996/EAW/SW/VK.

In the light of the Charter of Fundamental Rights proclaimed recently at the Nice European Council Meeting, the Ombudsman may in the near future open an own initiative inquiry on the safeguard of the principle of freedom of expression for officials of the Community institutions and bodies.

FAILURE TO ENSURE THAT ITALY COMPLIES WITH A REGULATION

Decision on complaint 157/2000/ADB against the European Commission

THE COMPLAINT

In 1994, Eilers & Wheeler (UK) Limited (hereinafter EW) exported twenty tonnes of concentrated butter to Italy. UK authorities tested, analysed and approved the butter as fully conforming to ECC Regulation 429/90[50].

Eighteen tonnes were sold directly to retail outlets in Italy whereas two tonnes were sequestered by the Italian authorities that found that the product did not conform to ECC Regulation 429/90. EW was therefore imposed a penalty.

EW considered this penalty to be unjustified. It challenged the test results and in particular objected that the product had been tested and approved by the UK authorities. Italy should not have carried out any further checks. EW therefore contacted both the European Commission and The Intervention Board Executive Agency of the UK Government (hereinafter Intervention Board).

Allegedly, the Commission failed to provide both the complainant and the Intervention Board with replies. The complainant also regretted the Commission's failure to ensure that the Italian authorities abide by the terms of the aforementioned regulation. On 1 February 2000 EW therefore lodged a complaint with the European Ombudsman and made the following allegations:

1 EW alleged that the Commission failed to respond to several requests made since May 1995 both by EW and by the Intervention Board.

2 EW alleged that since it had been made aware of the problem in May 1995, the Commission failed to ensure that the Italian Authorities abide by the terms of Regulation 429/90.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission whose opinion on the complaint was in summary the following:

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50 OJ L 45, 21.02.1990, p. 8-14
Commission Regulation (EEC) 429/90 of 20 February 1990, on the granting by invitation to tender of an aid for concentrated butter intended for direct consumption in the Community.

Regulation 429/90 provided for the grant of aid for concentrated butter intended for direct consumption in the Community. The aid was to be paid by the Member State in which the product was manufactured, in the present case the UK. The management of this aid scheme, including dispute settlement, was of the responsibility of the Member States.

Nevertheless, in the present case, at the Intervention Board's request, the Commission approached the Italian authorities on several occasions and corresponded with the Intervention Board. Several meetings between the competent authorities and the Commission had taken place. The Commission's correspondence dealing with the complainant's problem was enclosed with its opinion to the Ombudsman.

The Commission's opinion on the complainant's allegations:

1 The Commission considered that it had co-operated with the UK and Italian Authorities more closely than it was required to do. Furthermore, the file had shown only one letter from the complainant addressed to the Commission.

The Commission nevertheless apologised for not having informed the complainant directly. The Commission had considered that the issue needed to be discussed directly with the national authorities and that the complainant was aware of these steps.

2 The Commission challenged the complainant's second allegation. It pointed out that the provisions contained in a regulation are binding to all Member States. Italy had even adopted a circular on the application of regulation 429/90.

Even though, according to this regulation, the checks on butter are to be carried out in the producer country, there is nothing to prevent another Member State to carry out further routine controls on foodstuff. The Commission considers that it could not have addressed any objections to Italy.

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 27 June 2000, EW thanked the Ombudsman for his work. It expressed its satisfaction for the amount of information contained in the Commission's opinion and was thankful for the Commission's attention devoted to EW's case.

EW finally pointed out that the whole problem had shown that regulation 429/90 was mute on some important issues which should be clarified for the future.

THE DECISION

1 Failure to reply

1.1 EW alleged that the Commission failed to respond to several requests made since May 1995 both by EW and by the Intervention Board.

1.2 The Commission pointed out that it had had many contacts with the authorities involved, among which the Intervention Board, but it apologised for not having informed EW directly.

1.3 It appeared that the Commission had been active in EW's case. EW was informed of it through the Ombudsman's investigation and thanked the Commission for its efforts. The Ombudsman therefore concluded that there was no maladministration as regards this aspect of the case.

2 Failure to ensure that the Italian Authorities abide by the terms of Regulation 429/90

2.1 EW alleged that since it had been made aware of the problem in May 1995, the Commission had failed to ensure that the Italian Authorities abide by the terms of Regulation 429/90. Italy should not have carried out controls over products approved in the UK.

2.2 According to the Commission, there was nothing to prevent a Member State from carrying out additional controls over foodstuff. Italy had not infringed the aforementioned regulation and no objections could be addressed to it.

2.3 The Commission's explanation regarding this issue appeared to be reasonable. The Ombudsman therefore concluded that there was no evidence of maladministration regarding this aspect of the case.

3 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.

3.1.3 The European Parliament and the European Commission

LACK OF INFORMATION AND FAILURE TO REGISTER A PETITION

Decision on complaint 287/99/ADB against the European Parliament and the European Commission

THE COMPLAINT

The complainant is a civil servant working for the Italian National Railway Company. She considered that she was discriminated against as her employer infringed the right to equal payment between men and women. She unsuccessfully brought the case to court in Italy.

In that connection the complainant addressed the Commission's EUROJUS office in Rome and wondered whether her claim based on the equality of rights between men and women was well founded on the basis of community law. This information aimed at supporting an appeal against the Italian judgements, or if appropriate, at lodging a complaint on community level. On 3 April 1998, the EUROJUS office merely sent the complainant a leaflet on Community programmes.

On 24 August 1998, the complainant addressed a petition on the aforementioned discrimination to the European Parliament's information office in Rome and as a copy to the following e-mail address: webmaster@europarl.eu.int. On 11 September 1998 the Director of the Office in Rome informed the complainant that the European Parliament was not competent and told her that she should direct her request to the European Commission of Human Rights.

On 15 March 1999, considering that the Commission had failed to properly inform her, that the Parliament had failed to register her petition based on discrimination between men and women, the complainant lodged a complaint with the European Ombudsman.

THE INQUIRY

The European Commission's opinion

The complaint was forwarded to the Commission. The opinion of the European Commission on the complaint was in summary the following:

On 30 March 1998, the complainant sent an information request by fax to the EUROJUS service in Rome. She explained that she had taken action before a national court against

her employer and that she had also lodged an administrative complaint. In her fax, the complainant asked the Commission:

1 to examine her case;

2 to communicate an opinion on the subject;

3 to state whether her administrative complaint was founded;

4 to inform her as to whom she might address her case, ultimately, perhaps, at EC level.

EUROJUS sent the complainant an official publication of the European Commission entirely devoted to equal treatment between men an women, mentioning the relevant EC law references and the addresses of the competent authorities to refer to.

Given that EUROJUS's mission is to give free legal advice on matters relating to European citizenship, it did not consider it appropriate to give an opinion on the ruling of an Italian court.

The complainant's observations on the European Commission's opinion

The European Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. In her reply the complainant stressed that her fax to the Commission was not a request for information but rather a detailed report on discrimination between men and women.

The complainant included a copy of the fax sent to the Commission and claims that EUROJUS could have directed it to a department entitled to answer her claims.

The European Parliament's opinion

The complaint was also forwarded to the European Parliament. The opinion of the European Parliament on the complaint was in summary the following:

The complainant had sent a letter to the Information office of the European Parliament in Rome. In its reply, the Director of the office kindly suggested that the complainant contact the European Commission of Human Rights. He thereby misinterpreted the complainant's intention to actually present a petition. This error might be explained by the fact that 5 annexes mentioned by the complainant in her letter were actually not enclosed to it. Nevertheless, the complainant's letter had finally been registered as a petition with reference 230/99.

In order to prevent similar situations in the future, the Head of Division of the Committee on Petitions sent a note to the Director General for Information of the European Parliament. This note was also transmitted to all Information Offices. It mentioned that citizens should be informed of the applicable procedures and of the possibility to petition the Parliament or to complain to the European Ombudsman. Specific indications should be given for petitions submitted by e-mail.

The complainant's observations on the European Parliament's opinion

The European Ombudsman forwarded the Parliament's opinion to the complainant with an invitation to make observations. In her reply the complainant put forward that her letter was clearly a petition containing 6 and not 5 enclosures. Moreover, she is convinced that these enclosures were actually attached to the letter.

Finally, the complainant asked for her petition to be dealt with as a matter of priority.

FURTHER INQUIRIES

On 5 May 2000, on the Ombudsman's request, the services of the Committee on Petitions informed the Ombudsman that the Committee on Petitions of the European Parliament had decided to close consideration of the complainant's petition at its meeting of 23/24 February 2000.

THE DECISION

1 The European Commission's failure to take appropriate action further to the complainant's request

1.1 The complainant claimed that the Commission failed to take appropriate action further to her request based on alleged cases of sexual discrimination at work. The Commission put forward that it provided the complainant with detailed information on the subject matter of concern to her and that it refrained from giving an opinion on the ruling of an Italian court.

1.2 In her letter to the Commission, the complainant asked for a legal assessment of her claim and of the alleged situation of discrimination she witnessed. Given that the case had already been dealt with by two Italian courts, the Commission's EUROJUS service would have had to comment on the ruling of these courts.

1.3 Furthermore, the complainant asked the Commission to inform her about whom she might address her case to. The Commission provided the complainant with the requested information through the publication it sent. The complainant then decided to petition the European Parliament which is competent to receive petitions relating to equal treatment for men and women.

1.4 It appeared that the Commission's services had acted reasonably and that no instance of maladministration had been established.

2 The European Parliament's failure to register the complainant's petition

2.1 The complainant claimed that she had sent a petition to the European Parliament that failed to register it and advised her to present her case to the European Commission of Human Rights. The European Parliament admitted that its services had made a mistake.

2.2 Once it was made aware of the petition mentioned in the complaint lodged with the Ombudsman, the Committee on Petitions of the European Parliament registered the petition. To avoid similar situations in the future the Committee on Petitions also undertook to improve the procedure for submitting petitions in particular when they are sent by e-mail. The Ombudsman found no ongoing instance of maladministration as regards this aspect of the case and therefore considered that the European Parliament had taken the steps to settle the matter.

3 Conclusion

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

3.1.4 The European University Institute

REFUSAL OF ADMISSION BY EUROPEAN UNIVERSITY INSTITUTE

Decision on complaint 659/2000/GG against the European University Institute

THE COMPLAINT

Background

The European University Institute ("EUI") which has its seat in Florence was created in 1972 by the six original member states of the European Communities through the Convention setting up a European University Institute and started its activities in 1976. All the other countries that have joined the EU since the EUI was founded have acceded to this Convention.

The EUI is directed by a Principal (or President) who is responsible for the administration of the Institute. A High Council composed of representatives of the countries that have signed the Convention is responsible for the main guidance of the Institute. It directs the activities of the EUI and supervises its development. A representative of the EU takes part in the meetings of the High Council but has no right to vote. Finally, there is an Academic Council that has general powers with regard to research and teaching.

The EUI was originally financed exclusively by the Contracting States. It appears that presently part of its budget (some 15.5% in 2000) is financed by the EU.

The EUI figures on a list of organisations devoted to furthering the Communities' interests, drawn up in accordance with Article 37 of the Staff Regulations[51]. All the other bodies on that list appear to be within the Ombudsman's mandate. Furthermore, according to the Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[52], the EUI falls within that Convention's definition of "bodies set up in accordance with the Treaties". Subsequent to the Convention setting up the EUI, the Community has acquired competencies in the fields of education, culture and research (cf. Article 3 points (n) and (q) and Articles 149, 151 and 163 of the EC Treaty).

The complainant's case

The complainant, a Swedish national, applied to join the Doctoral Programme at the Department of Political and Social Science of the EUI in February 2000. This three-year programme prepares for the submission and defence of a doctoral thesis. According to the relevant brochure published by the EUI, candidates are selected in two steps. The first step is a selection based on the information provided in the application. The second step is based on a short-listed interview with the faculty of the department chosen.

When the complainant's application was rejected, she turned to the European Ombudsman for help (complaint 428/2000). She alleged that she had been a victim of racial discrimination. In a letter of 5 April 2000, the Ombudsman rejected this complaint on the grounds that the appropriate administrative approaches had not been made to the EUI, as required by Article 2 (4) of the Statute of the European Ombudsman[53].

On 7 April 2000, the complainant wrote to the EUI in order to ask for the reasons why her application had been turned down. In his reply of 4 May 2000, Dr Frijdal, the Head of the Academic Service at the EUI informed the complainant that he had chaired the meeting of the short-listing committee that had been held with a view to selecting Swedish candidates for an interview. He added that he had contacted the Department of Political and Social Science in order to ascertain the reasons why the complainant had not been selected. Dr Frijdal concluded that the committee had found that there had been stronger candidates

51 Rules determining the list of organisations devoted to furthering the Communities' interests referred to in the second indent of Article 37 (1)(b) of the Staff Regulations of officials of the European Communities.

52 Text approved by the Council on 3 December 1998, 1998 OJ C 391/1.

53 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, OJ 1994 L 113, page 15.

with research projects that were more interesting for the department and that tied in more closely with the individual professors' expertise. Regarding the complainant's allegation that her application had been rejected on racial grounds, Dr Frijdal stressed that it had only been the academic suitability that had been taken into account. Dr Frijdal also pointed out that most applicants had very impressive qualifications and that the fact that most of them were nevertheless not admitted attested to the highly competitive nature of the programme.

On 15 May 2000, the complainant turned to the Ombudsman again in order to lodge the present complaint.

The complainant claimed that there appeared to be a great degree of confusion regarding the short-listing committee and the persons actually responsible for the decision. She pointed out that Dr Frijdal had explained that he was the chairman of that committee but then had noted that he had had to contact the Department of Political and Social Science in order to ascertain the reasons why she had not been selected.

The complainant claimed that the EUI's response was clearly unsatisfactory. She put forward three arguments in this context. First, the EUI had, in her view, used the least objective of the criteria in order to reject her application, i.e. the adequacy and pertinence of the research proposal. It would have been more appropriate to base the decision on more objective criteria like the degrees or examination results obtained, academic references, the curriculum vitae and the knowledge of languages. Second, the complainant claimed that her research proposal did tie in with the expertise of at least five individual professors whose names she gave. Finally, the complainant argued that the quality and pertinence of the research proposal was something that only became important in the second round of the selection procedure, i.e. on the occasion of the interview.

The complainant concluded that her application had not been subject to a fair procedure and that the EUI had been unable to offer a valid explanation for her rejection. It appeared that the complainant also continued to believe that she had been the victim of racial discrimination.

THE INQUIRY

According to Article 195 of the EC Treaty, the European Ombudsman is entrusted with the task of examining instances of maladministration in the activities of the Community institutions and bodies. In his letter to the EUI, the Ombudsman expressed the view that there were several arguments that seemed to allow the conclusion that the EUI was to be considered a Community body for the purposes of the Ombudsman's mandate. He invited the EUI to comment on this issue. The Ombudsman also expressed his hope that the EUI would respond to the complainant's allegations.

The opinion of the European University Institute

The complaint was forwarded to the EUI. In its opinion, the President of the EUI informed the Ombudsman that in so far as the interesting question as to whether the EUI could be considered to be a Community body for the purpose of the European Ombudsman's mandate was concerned, he did not wish to propose a view in the absence of an opinion on the issue by the Institute's governing body, the High Council.

The President of the EUI confirmed the contents of the letter that had been sent to the complainant on 4 May 2000. He also quoted the wording of some of the rules in Chapter 2 (Admission) of the EUI's "Academic Rules and Regulations for the Doctoral Programme". According to Article 2.5 (1) of these rules, the selection was the collective responsibility of the faculty. Article 2.5 (3) provided that each department carefully considered the potential supervision of the candidate taking into account the profile of the department and distribution of supervision among its faculty for the whole of the period

concerned. According to Article 2.6, the meetings of the short-listing committees were chaired by the Head of the Academic Service. Article 2.6 also provides that the "departments prepare shortlists of potential candidates".

The President of the EUI pointed out that the decision not to propose the complainant for an interview was an academic decision, which was the responsibility of the faculty, and which was based on a comparative evaluation of academic merit, proposed thesis vis-à-vis department profile, and departmental capacity to supervise the proposed topic. The EUI's procedures did not provide for an appeal against such a decision.

The President of the EUI furthermore stated that in the 25 years of its existence, the EUI had never been accused of rejecting an application on racial grounds and that he completely trusted the academic judgement of the faculty in this matter. In his view, the complainant's application had been treated in accordance with the EUI's procedures in good faith and had not been ignored.

The complainant's observations

In her observations, the complainant maintained her complaint. She considered the EUI's letter to be an insulting refusal to reveal any facts. In her view, the EUI should have cited the number of Swedes of foreign origin that had been admitted in the 25 years of its existence rather than rely on the general statement that it had made in this context.

THE DECISION

1 The Ombudsman's jurisdiction

1.1 According to Article 195 of the EC Treaty, the European Ombudsman is entrusted with the task of examining instances of maladministration in the activities of the Community institutions and bodies.

1.2 The European University Institute ("EUI") was created in 1972 by the six original member states of the European Communities through the Convention setting up a European University Institute and started its activities in 1976. All the other countries that have joined the EU since the EUI was founded have acceded to this Convention. The activities of the EUI are directed by a High Council composed of representatives of the countries that have signed the Convention. A representative of the EU takes part in the meetings of the High Council but has no right to vote. The EU now provides part of the EUI's budget.

1.3 None of the Treaties establishing the European Communities and the European Union defines the term "Community body".

1.4 There are, however, a number of arguments which militate in favour of the proposition that the European Ombudsman should be entitled to receive complaints concerning instances of maladministration in the activities of the EUI.

1.5 The EUI figures on a list of organisations devoted to furthering the Communities' interests, drawn up in accordance with Article 37 of the Staff Regulations[54]. All the other bodies on that list appear to be within the Ombudsman's mandate. Furthermore, according to the Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union[55], the EUI falls within that Convention's definition of "bodies set up in accordance with the Treaties". In this connection, it should also be pointed out that, subsequent to the

[54] Rules determining the list of organisations devoted to furthering the Communities' interests referred to in the second indent of Article 37 (1)(b) of the Staff Regulations of officials of the European Communities.

[55] Text approved by the Council on 3 December 1998, 1998 OJ C 391/1.

Convention setting up the EUI, the Community has acquired competencies in the fields of education, culture and research (cf. Article 3 points (n) and (q) and Articles 149, 151 and 163 of the EC Treaty).

1.6 In his opinion, the President of the EUI informed the Ombudsman that in so far as the interesting question as to whether the EUI could be considered to be a Community body for the purpose of the European Ombudsman's mandate was concerned, he did not wish to propose a view in the absence of an opinion on the issue by the Institute's governing body, the High Council. No such opinion from the High Council was received by the Ombudsman.

1.7 In view of the above, the Ombudsman considered that it was not excluded that the EUI could be considered to be a Community body for the purposes of the European Ombudsman's mandate.

2 Lack of fair procedure

2.1 The complainant, a Swedish national, applied to join the Doctoral Programme at the Department of Political and Social Science at the EUI. This application was rejected. The complainant claimed that her application had not been subject to a fair procedure. It was clear, however, that this allegation also encompassed an attack regarding the merits of the EUI's decision.

2.2 The European University Institute took the view that the complainant's application had been treated in accordance with the EUI's procedures in good faith and that it had been an academic decision that was the responsibility of the faculty.

2.3 It appeared both from the comments made by the complainant and the EUI and from the documents submitted by both parties that candidates for the relevant programme are selected in two steps. The first step was a selection based on the information provided in the application. The second step was based on a short-listed interview with the faculty of the department chosen in Florence.

2.4 According to the EUI, the complainant's application had been examined by a short-listing committee chaired by the EUI's Head of the Academic Service. The EUI further submitted that the decision not to propose the complainant for an interview was an academic decision, which was the responsibility of the faculty, and which was based on a comparative evaluation of academic merit, proposed thesis vis-à-vis department profile, and departmental capacity to supervise the proposed topic.

2.5 The Ombudsman agreed with the EUI's view that the rejection of the complainant's application was an academic decision that was the responsibility of the faculty. Academic bodies taking decisions on the admission of candidates naturally dispose of a wide margin of appreciation. In such circumstances, the Ombudsman must limit his examination to the question whether the body concerned went beyond the limits of its legal authority and whether the procedural rules in place were complied with.

2.6 In so far as the procedural aspect of the complainant's claim was concerned, the complainant stressed that in his letter to her of 4 May 2000, the Head of the EUI's Academic Service had informed her that he had chaired the meeting of the short-listing committee that had been held with a view to selecting Swedish candidates for an interview but that he had also added that he had contacted the Department of Political and Social Science in order to ascertain the reasons why the complainant had not been selected. The complainant considered that there appeared to be a great degree of confusion regarding the short-listing committee and the persons actually responsible for the decision.

2.7 According to Article 2.5 (1) of Chapter 2 (Admission) of the EUI's "Academic Rules and Regulations for the Doctoral Programme", the selection is the collective responsibility

of the faculty. Article 2.6 of these rules provides that the "departments prepare shortlists of potential candidates". It thus appeared that the decision to invite candidates for interviews was made by the department, not the short-listing committee. One could however assume that the departments took their decision as to whom to invite for an interview on the basis of the result of the examination of the applications by the short-listing committees. In these circumstances, it was not surprising that the Head of Service who had chaired the relevant meeting of the short-listing committee still had to contact the faculty in order to ascertain the reasons why the complainant's application had been rejected. The Ombudsman thus concluded that it had not been proven that the EUI had failed to comply with its procedural rules when dealing with the complainant's application.

2.8 In so far as the substantial aspects of this claim were concerned, the complainant submitted that (1) the EUI had used the least objective criterion (i.e., the adequacy and pertinence of her research proposal) in order to reject her application, that (2) her research proposal did, contrary to what the EUI claimed, tie in with the expertise of individual professors at the EUI and that (3) the quality and pertinence of her research proposal should only have become important in the second round of the selection procedure, that is to say on the occasion of the interview. The EUI considered that it had acted properly when taking its decision, which was an academic one. This decision had been based on a comparative evaluation of academic merit, proposed thesis vis-à-vis department profile, and departmental capacity to supervise the proposed topic.

2.9 The Ombudsman considered that the view put forward by the EUI was reasonable. In his view, none of the arguments submitted by the complainant was capable of establishing that the EUI had gone beyond the limits of its legal authority when dealing with her application.

2.10 On the basis of the above, there appeared to have been no maladministration on the part of the EUI in so far as the first allegation put forward by the complainant was concerned.

3 Failure to provide a valid explanation for the rejection of the application

3.1 The complainant claimed that the EUI had failed to provide her with a valid explanation for the rejection of her application.

3.2 In its opinion, the EUI referred to the letter that had been sent to the complainant by its Head of the Academic Service on 4 May 2000 and confirmed the contents of this letter.

3.3 The Ombudsman considered that the explanations provided by the EUI in its letter of 4 May 2000 had allowed the complainant to understand on what grounds the EUI had rejected her application.

3.4 On the basis of the above, there appeared to have been no maladministration on the part of the EUI in so far as the second allegation put forward by the complainant was concerned.

4 Racial discrimination

4.1 In her original complaint (complaint 428/2000), the complainant alleged that she had been a victim of racial discrimination. It appeared that this allegation was also implicit in her present complaint. However, the complainant had not put forward any evidence to support her allegation.

4.2 The President of the EUI pointed out that in the 25 years of its existence, it had never been accused of rejecting an application on racial grounds and that he fully trusts the academic judgement of the faculty in this matter.

4.3 The Ombudsman considered that the inquiry had not brought to light any elements, which would have warranted the conclusion that, the complainant's application had been rejected on grounds other than academic ones.

4.4 On the basis of the above, there appeared to have been no maladministration on the part of the EUI in so far as the third allegation put forward by the complainant was concerned.

5 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, there appeared to have been no maladministration on the part of the European University Institute. The Ombudsman therefore closed the file.

3.2 CASES SETTLED BY THE INSTITUTION

3.2.1 The European Parliament

FAILURE OF INFORMATION AND DELAYS IN TENDER PROCEDURE

Decision on complaint 78/99/OV against the European Parliament

THE COMPLAINT

The complainant, a Dutch firm, participated in the tender procedure launched by the European Parliament for furniture for the bars and restaurants of building D3 of the Espace Léopold in Brussels (ref. PE MOB 97/1). The complaint concerned the way this tender procedure was run:

The complainant made an offer on 31 May 1997. On 19 June 1997 the complainant was invited to display its furniture for evaluation by the College of Quaestors of the Parliament, and this until 26 June 1997. On 25 June 1997 the complainant was informed that the furniture had to be displayed until 11 July 1997. On 22 August 1997 the complainant asked whether a decision had been taken on the tender and when the displayed furniture could be recovered. The complainant only recovered its furniture on 28 August 1997. On 5 September 1997, the Parliament decided that the complainant, together with 19 other candidates, should submit new offers before 3 October 1997.

On 13 November 1997 the complainant received a new invitation to display its furniture as from 1 December 1997 for a period of maximum 3 to 5 weeks. On 28 January and 4 February 1998 the complainant sent faxes to the Parliament in order to inquire when it could recover its furniture. The complainant was asked to leave its furniture for some more time, as the decision was to be taken on 16 March 1998. In March 1998 the company asked again what had been decided. The Parliament's reply was that it would be decided later, in April 1998. Finally the furniture was displayed for 23 weeks and some pieces of furniture disappeared, while others got damaged. The complainant sent a bill to the Parliament for the damaged pieces of furniture as well as for those which had disappeared. However, the Parliament did not pay the bill. The complainant therefore complained to the Ombudsman that

1 it was not kept informed about the evolution of the tender procedure and about the prolongation of the period during which the furniture had to be displayed (23 weeks instead of 3-5 weeks),

2 the bill for damaged and lost furniture had not been paid by the Parliament.

THE INQUIRY

The Parliament's opinion

As regards the first allegation, the Parliament observed that the delay in the tender procedure was caused by a number of factors: The samples had to be viewed and approved not only by the internal control committee, but also by the College of Quaestors, as the furniture in question was intended for use by Members. The timetable of this procedure was

clearly set out in the written reply to MEP Plooij-Van Gorsel whom the complainant had contacted.

The simultaneous complex calls for tender engendered by the purchase of two new building in Brussels and Strasbourg meant that the furniture division was under severe pressure. This situation was compounded by the absence, due to severe illness, of the official initially responsible for this file. The most regrettable consequence of these difficulties was that the firms, including the complainant, were not kept informed of the delays. The Parliament wished to apologise for this to the complainant and to ask for its understanding.

As regards the alleged delay in payment for the damage caused to the furniture, the Parliament stated that its insurance did not cover the damage, and because the furniture was on the European Parliament's property, it was not covered by the complainant's insurance. However, on 27 January 1999, the Authorising Officer instructed to pay the bill for the damaged furniture and the amount was received by the complainant on 29 January 1999. The Parliament's furniture division was subsequently in telephone contact with the complainant who confirmed its satisfaction in this matter.

The Parliament finally observed that, having installed the necessary structures ensuring that all bidders are kept informed in writing in the event of any delays in a call for tender, it had set up sufficient safeguards to ensure that similar problems would not occur in the future.

The complainant's observations

The complainant stated that the matter of the payment of the damaged furniture had been settled to its satisfaction. The complainant however observed that it was still not informed by the Parliament whether its offer would lead to a contract or not.

FURTHER INQUIRIES

The Ombudsman wrote on 12 October 1999 to the Parliament asking for an additional opinion on the allegation that the complainant was still not informed about the outcome of the tender procedure, namely whether its offer had been retained or not.

The Parliament's second opinion

The Parliament observed that tenderers whose offer had not been retained had not been informed of the result of the tender procedure. Measures have since been taken in order to guarantee that all tenderers are informed of the outcome of their offer. The Parliament regretted this fact and presented its apologies to the complainant. However, the complainant has since been informed of the final decision.

The complainant's additional observations

On 20 December 1999, the complainant sent a copy of a letter dated 15 November 1999 it received from the Parliament's administration, by which the Parliament informed it that its offer had not been retained.

THE DECISION

1 The alleged failure of information on the tender procedure and on the prolongation of the display of the furniture

1.1 The complainant alleged that he was not kept informed about the evolution of the tender procedure and about the prolongation of the period during which the furniture had

to be displayed (23 weeks instead of 3-5 weeks). The Parliament explained that the delay was caused by the fact that the samples had to be viewed and approved by both the internal control committee and the College of Quaestors. Moreover, the simultaneous complex calls for tenders for the two new buildings in Brussels and Strasbourg put severe pressure on the furniture division, and the official initially responsible for the file was absent. The Parliament however apologised to the complainant. As regards the failure of information on the outcome of the tender procedure, the Parliament observed that the participants had indeed not been informed of the result, but that measures have since been taken to guarantee that all participants are informed. Here also the Parliament expressed its apologies to the complainant.

1.2 Principles of good administration require that the EU institutions and bodies inform the citizens concerned in due time about the decisions and the administrative measures they take. If, because of the complexity of the issue, the matter can not be decided upon within a reasonable time-limit, the institution or body should inform the citizen thereof as soon as possible.

1.3 In the present case it appeared that the complainant made an offer on 31 May 1997 and was only informed by the Parliament on 15 November 1999, i.e. more than two years later, that its offer was not retained. The Parliament did not keep the complainant informed about the delays which occurred in this tender procedure, including those related to the display of the furniture. The Parliament however pointed out that it had installed the necessary structures ensuring that all bidders are kept informed in writing in the event of any delays in a call for tender, and that sufficient safeguards now exist to ensure that similar problems will not occur in the future. The Ombudsman therefore considered that no further inquiries were necessary into this aspect of the complaint.

2 The alleged non payment of the bill for damaged and lost furniture

2.1 The complainant alleged that the bill for damaged and lost furniture had not been paid by the Parliament. The Parliament observed that on 27 January 1999, the Authorising Officer instructed to pay the bill for the damaged furniture and the amount was received by the complainant on 29 January 1999. The Parliament's furniture division had subsequently been in telephone contact with the complainant who confirmed its satisfaction in this matter.

2.2 In its observations, the complainant stated that this matter had been settled to its satisfaction. The Ombudsman therefore noted that Parliament had taken steps to settle the matter and satisfied the complainant.

3 Conclusion

On the basis of the European Ombudsman's inquiries into part 1 of this complaint, there appeared to have been no maladministration by the European Parliament.

As regards the second allegation, it appeared from the European Parliament's opinion and the complainant's observations that the Parliament had taken steps to settle the matter and thereby satisfied the complaint. The Ombudsman therefore decided to close the case.

CORRECT REIMBURSEMENT OF TRAVEL EXPENSES FOR CANDIDATE IN COMPETITION

Decision on complaint 6/2000/VK against the European Parliament

THE COMPLAINT

The complainant expressed her interest in participating in Competition PE/210/LA of the European Parliament in 1998, when she was working and living in Uganda. She therefore provided the Parliament services with her Ugandan address. The complainant then received an invitation to participate in the competition at her Ugandan address.

The complainant's place of residence was fixed as being Uganda. The complainant stated that in its letters of 13 July and 12 August 1999, the Parliament refused to acknowledge her place of residence as being Uganda and to reimburse her for her travel expenses correctly.

The complainant referred to the rules for the reimbursement of travel expenses, which were attached to the invitation, according to which

- the reimbursement of travel expenses was dependent on the distance between the place of residence and the place where the competition takes place;

- the place of residence was defined as the place where the Parliament had sent the invitation to participate in the competition;

- any changes of address after this invitation was sent could not be taken into account.

The complainant thereafter complained to the Ombudsman. She alleged that she had not been reimbursed correctly.

THE INQUIRY

The Parliament's opinion

The complaint was forwarded to the Parliament. In its opinion, the Parliament referred to the "Provisions concerning the contribution to travel and accommodation expenses for candidates invited by the European Parliament to attend written tests in connection with competitions or notices of vacancy". Paragraph 3 provides that: "For the purposes of calculating the European Parliament's contribution to travel expenses, the candidate's place of residence is deemed to be the place to which Parliament sent the invitation to the competition. No subsequent change of address will be taken into account".

The Parliament stated that as the address in question was in Uganda, it fully accepted its obligation to reimburse the complainant at a rate of 180 EUR. Since the complainant had already received 60 EUR, the balance payable was 120 EUR. Instructions to make this payment were issued to the appropriate services.

The Parliament further explained that its officials make every effort to observe the rules applicable to the activities of the institution with due regard for the principle of sound financial management required by Article 2 of the Financial Regulation. In this particular case, the fact that the complainant was known to have travelled to Brussels from Helsinki rather than from Uganda led to some difficulty with the approval of payment at the maximum rate. Nonetheless, instructions were issued to the staff concerned to ensure that the rules governing the reimbursement of travel expenses in respect of participation in the written tests for a competition are applied in their entirety.

The complainant's observations

The Ombudsman's services contacted the complainant on 4 October 2000 by telephone. During this conversation, the complainant declared that she was satisfied with the outcome of the complaint.

A written note was sent by the complainant on 24 October 2000, in which she further stated that the amount reimbursed by the Parliament did not cover the full travel expenses. She also considered it reasonable that the Parliament should contribute to the accommodation costs.

THE DECISION

1 Correct reimbursement of travel expenses

The complainant claimed that she had not been reimbursed correctly for her travel expenses given that her place of residence and work was Uganda at the time she was invited for the competition. The Parliament confirmed that according to paragraph 3 of the relevant provision governing the reimbursement of travel expenses, the candidate's place of residence is deemed to be the place to which Parliament sent the invitation to the competition, which, in the complainant's case, was Uganda. It therefore issued instructions for the maximum payment of EUR 180 to the complainant.

2 Conclusion

The Ombudsman therefore considered that the Parliament had taken steps to settle the matter. The Ombudsman decided to close the case.

3.2.2 The Council of the European Union

ACCESS TO DOCUMENTS

Decision on complaint 1259/99/ME against the Council of the European Union

THE COMPLAINT

In January 1999, the complainant acting on behalf of a Danish paper, requested access to a number of documents from the Council of the European Union. In March 1999, the complainant sent a reminder letter. In April and May 1999, the Council informed the complainant that due to the unusually heavy workload, the request had not been considered within the normal time-limit and it apologised for the delay. The Council stated that the requested documents were drawn up by the Ministers responsible for immigration and were therefore not Council documents. However, the Council would proceed to an informal consultation with the Member States involved and the complainant would be informed of the outcome. In September 1999, the complainant sent a new letter to the Council. In October 1999, he complained to the Ombudsman, alleging unnecessary delay by the Council in handling his request.

THE INQUIRY

The Council's opinion

The complaint was forwarded to the Council. In its opinion, the Council stated that the requested documents, a series of so called "TREVI" documents, were not Council documents and access to them could not be considered according to the Council's rules on public access to documents[56]. However, in order to facilitate the procedure, the request had been examined on an informal basis by the Member States concerned. Being an unusual case, since the documents requested were not even to be found inside the Council or its General Secretariat, the examination of the documents and the consultation of the Member States had been a time-consuming process. With its opinion, the Council enclosed a copy of a letter to the complainant of February 2000 in which it explained the procedure it had used and apologised for the delay. The Council also gave access to 10 out of the 12 requested documents.

[56] Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, OJ 1993 L 340/43.

The complainant's observations

The Ombudsman forwarded the Council's opinion to the complainant with an invitation to make observations. No written observations were received from the complainant. However in a telephone conversation with the Ombudsman's secretariat, the complainant expressed his satisfaction with the number of documents he had received.

THE DECISION

1 The handling of the request for documents

The complainant alleged that the handling of the request for a number of "TREVI" documents by the Council had been unnecessarily delayed. The Council apologised for the delay and explained why the procedure had been a time-consuming process. After consultation with the Member States, access was granted to 10 of the 12 requested documents. The complainant expressed his satisfaction with the documents he was given.

2 Conclusion

It appeared from the Council's opinion and the complainant's observations that the Council had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

3.2.3 The European Commission

FULL REIMBURSEMENT OF MARGINAL COSTS IN CONTRACT

Decision on complaint 142/99/BB against the European Commission

THE COMPLAINT

In February 1999, Mr C. and Mr H. made a complaint to the European Ombudsman concerning the alleged maladministration by the European Commission regarding the reimbursement of marginal costs. On 3 August 1994 the complainants had signed a marginal cost research contract in connection with Contract STD 3 TS3-CT94-0343 "*Biotechnological Approaches to the Total Utilisation of Crustacean Shellfish and Shellfish waste*" between the European Commission and the University of Nottingham. The complainants had received the normal advance payment 40% of their marginal costs (44.000 ECU) in 1995. The complainants expected to receive a reimbursement of 100% of the marginal costs, however, DG XII sent a copy by fax indicating that the complainants would be reimbursed only 50%.

In 1997, the complainants complained repeatedly to the Project co-ordinator and Finance Manager, but without success. On 25 January 1998 and 19 February 1998 they complained to the Commission DG for Science, Research and Development.

The complainants claimed that they complied 100% with their project commitments, but only 50% of their marginal costs have been covered.

THE INQUIRY

The Background

The contract was negotiated at the end of December 1994 and signed on 31 January 1995 by the Commission and the University of Nottingham. The complainants' firm was an associated contractor.

Following the requests from the complainants and the fax from the University of Nottingham, the Commission acted on their request by preparing an amendment in March 1998. This amendment finalised the participation of the complainants on an additional cost

basis rather than full cost basis, from the starting date of the project and thus met their request.

Once the amendment was finalised, the Commission official responsible for the financial management of this file contacted the University of Nottingham on several occasions – through e-mails, faxes and letters – in order to clarify the costs submitted and to request missing documents and information for the final payment.

The 44.000 ECU referred to by the complainants, as their total projected expenditure was an estimated figure. The contribution of the Commission was based on the actual costs of the participant. An advance payment of 40% was paid by the Commission to the University of Nottingham in March 1995 for each participant.

The Commission received the final period cost statements for most of the partners on 30 March 1998. These forms were incomplete and contact was initiated with the contractor via fax on 7 April 1998 to ask for clarification on the cost statements already sent and to ask for the outstanding cost statements to be sent to the Commission.

The Commission's opinion

The Commission received all the required financial statements on 12 April 1999 and the Commission initiated the final payment on this contract immediately afterwards. For the complainants this payment included the adjustments to the costs previously declared and thus represented the total amount that should have been paid in addition to what the participant had already received. This meant that this participant has been paid for all acceptable costs, as a marginal cost participant.

FURTHER INQUIRIES

As the complainants did not make any observations, the Ombudsman's secretariat contacted them by telephone on 3 March 2000. The complainants expressed their complete satisfaction with the reimbursement of their marginal costs.

THE DECISION

1 The reimbursement of marginal costs of Contract STD 3 TS3-CT94-0343 "Biotechnological Approaches to the Total Utilisation of Crustacean Shellfish and Shellfish waste"

1.1 The complainants claimed that they complied 100% with their project commitments, but only 50% of their marginal costs were covered.

1.2 The Commission received all the required financial statements on 12 April 1999 and the Commission initiated the final payment on this contract immediately afterwards. For the complainants this payment included the adjustments to the costs previously declared and thus represented the total amount that should have been paid in addition to what the participant already received. This meant that this participant was paid for all acceptable costs, as a marginal cost participant.

1.3 The complainants expressed their complete satisfaction with the reimbursement of their marginal costs.

2 Conclusion

It appeared from the Commission's opinion and the complainants' response that the Commission took steps to settle the matter and thereby satisfied the complainants. The Ombudsman therefore closed the case.

LATE PAYMENT AND CALCULATION OF INTEREST ON ACCOUNT OF THE DELAY

Decision on complaint 521/99/GG against the European Commission

THE COMPLAINT

The complainant, a German company, had carried out work for the Commission on the basis of various contracts concluded under the EU's Phare programme (contracts no. 95-1224.00, 97-0450.00 and 97.0647.00). According to the complaint lodged in May 1999, the Commission had failed to pay the following invoices for a total of some € 200,000: 1) Contract no. 95-1224.00: Invoices sent on 29 June 1998 and due on 29 August 1998; 2) Contract no. 97-0450.00: Invoices sent on 22 September 1998 and due on 22 November 1998; 3) Contract no. 97-0647.00: Invoices sent on 21 January 1999 and due on 21 March 1999; invoices sent on 15 April 1999 and to become due on 15 June 1999.

THE INQUIRY

The opinion of the Commission

The complaint was sent to the Commission. In its opinion, the Commission made the following comments:

1 Contract no. 95-1224: The invoices had been received on 2 July 1998. However, since they contained a series of claims that were not covered by the contract they were initially disputed by the Commission. It thus took time to verify the situation and negotiate an amicable settlement for the disputed claims, payments for the whole amount being withheld as a matter of policy until an agreement could be reached. This agreement was signed on 26 July 1999 and the agreed amount was paid on 29 July 1999.

2 Contract no. 97-0450.00: The invoices that had been received on 23 October 1998 had been payable only after approval of the final report. Due, in particular, to the heavy workload of the Commission's services the final report was only approved on 27 April 1999. Payments were then made on 27 May 1999.

3 Contract no. 97-0647.00: The invoices of 21 January 1999 were received on 10 February 1999, accepted as "conforme aux faits" on 29 April 1999 and paid on 25 May 1999. The invoices of 15 April 1999 had been received on 21 April 1999 and paid on 15 June 1999.

The complainant's observations

In its observations, the complainant claimed that the claims disputed by the Commission in relation to Contract no. 95-1224.00 only related to a small part of the invoices. It would have been possible to pay the undisputed part of the invoices. Furthermore, the Commission had raised the issue more than one month after the payment period had expired, and the complainant had immediately sent documents supporting the disputed claims. The settlement procedure had nevertheless taken about eight months. The complainant pointed out that delay in payment had threatened the survival of the company and caused additional costs in terms of interest and administrative workload. It further claimed that the interest to which it was entitled under the general conditions governing the contracts were not sufficient to cover these costs.

The complainant therefore claimed that the Commission should pay interest to a total amount of € 3,356.39 in respect of the delays that had occurred:

1 Contract no. 95-1224.00: Interest of € 1,431.17 on account of a delay of 275 days

2 Contract no. 97-0450.00: Interest of € 529.13 on account of a delay of 187 days

3 Contract no. 97-0647.00: Interest of € 1,396.09 on account of a delay of 85 days.

The Commission's second opinion

In its opinion in relation to the additional claim put forward by the complainant, the Commission explained that it could not use interest rates other than those referred to in the general conditions of the relevant contracts (2.5 and 4.5% respectively). It pointed out that in its view a total amount of € 2,364.03 (of which € 1,117.78 had already been paid) was appropriate. In relation to the contracts concerned the Commission made the following specific comments:

1 Contract no. 95-1224.00: The undisputed amount of the invoices (i.e., € 30,812.94) could have been paid within the legal delay of 60 days. The Commission therefore calculated interest on this amount at a rate of 2.5% on the basis of a delay of 359 days, that is to say € 757.66.

2 Contract no. 97-0450.00: The delay started running on the date of receipt of the invoices. This resulted in a delay of 175 and 176 days. Consequently, the amount of interest due was € 488.59.

3 Contract no. 97-0647.00: Since the starting date for delay was the date when the Commission received the invoices, the number of delayed days had been 69 when the Commission made a payment of € 1,117.78 on 1 March 2000. The delay ran up to the day on which the Commission's account was debited whilst the date on which the contractor's account was credited was of no relevance.

The complainant's observations

No observations on the second opinion of the Commission were received from the complainant.

THE DECISION

1 Failure to pay amounts due

1.1 The complainant claimed that the European Commission had failed to pay various amounts totalling around € 200,000 that were due under contracts the complainant had entered into with the Commission.

1.2 The Commission replied that it had subsequently paid all the amounts that had been due.

1.3 The Commission had thus taken steps to satisfy the complainant in so far as this claim was concerned.

2 Failure to pay interest for late payment

2.1 The complainant further claimed that the Commission should have paid interest to the amount of € 3,356.39 in respect of the delays that had occurred.

2.2 The Commission replied that in its view only a total amount of € 2,364.03 (of which € 1,117.78 had already been paid) was to be paid in interest. It also provided the Ombudsman with an account of the reasons for which it believed that this lower amount was due.

2.3 The complainant did not make any observations on the Commission's opinion.

2.4 The present allegation concerned the obligations arising under contracts concluded between the Commission and the complainant.

2.5 According to Article 195 of the EC Treaty, the European Ombudsman is empowered to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies". The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it[57]. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

2.6 However, the Ombudsman considers that the scope of the review that he can carry out in such cases is necessarily limited. In particular, the Ombudsman is of the view that he should not seek to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the arguments of the parties concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

2.7 The Ombudsman therefore takes the view that in cases concerning contractual disputes it is justified to limit his inquiry to examining whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman will conclude that his inquiry has not revealed an instance of maladministration. This conclusion will not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

2.8 In the present case, the Commission put forward a coherent and reasonable account of the reasons for which it believed that only the lower amount calculated by it was due to the complainant.

2.9 In these circumstances, there appeared to be no maladministration in so far as this allegation was concerned.

3 Conclusion

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

INTEREST ON LATE PAYMENT

Decision on complaint 601/99/IJH against the European Commission

THE COMPLAINT

In May 1999, Mr A. made a complaint to the European Ombudsman on behalf of the European Human Rights Foundation, (EHRF) against the Commission, DG 1A. He alleged that:

(i) 172.535 ECU due under Phare Contract 97/0514 had been paid 101 days after receipt of the invoice, whereas the maximum delay specified in the contract was 60 days;

(ii) the Commission had wrongly refused to pay interest of 1551,63 ECU which was due under the contract in respect of the excessive delay.

The complainant also claimed additional interest on the unpaid interest, as from the date when the latter should have been paid.

57 See Annual Report 1997, pages 22 sequ.

THE INQUIRY

The Commission's opinion

The Commission explained that the invoice was received on 20 January 1998 but was not paid immediately because the financial services had asked the operational unit responsible for the project management to obtain additional documentation from EHRF, which was provided by fax on 28 April 1998. Payment was ordered on 9 June 1998 and the Commission's account was debited on 19 June 1998. In these circumstances, the Commission had originally contested the claim for interest for late payment, but to settle the issue amicably without a protracted dispute the Commission finally paid 1 628,45 € to EHRF on 17 June 1999, the Commission's account being debited on 30 June 1999.

The complainant's observations

Before the Ombudsman received the Commission's opinion, the complainant had informed the Ombudsman by letter that the Commission had agreed to pay the amount claimed.

In January 2000, EHRF confirmed to the Ombudsman's services by telephone that payment had been made and that the matter had therefore been satisfactorily resolved.

THE DECISION

1 The complainant claimed that the Commission had exceeded the contractual deadline for payment of an invoice under a Phare contract and had wrongly refused to pay interest, which was due in respect of the excessive delay.

2 The Commission stated that it had settled the issue amicably by paying the amount claimed. The complainant confirmed that the payment indeed had been received and that the matter had therefore been satisfactorily resolved.

3 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 closed the case.

STATE AIDS: ALLEGED FAILURE OF THE COMMISSION TO HANDLE A COMPLAINT PROPERLY

Decision on complaint 879/99/IP against the European Commission

THE COMPLAINT

In their capacity as attorneys of the "Terminal Rinfuse Genova s.p.a." (TRG), the complainants lodged a complaint with the European Ombudsman against the European Commission in July 1999.

TRG acts as a terminal operator in the port of Savona (Italy) where it loads and unloads coal and solid bulk, while similar services are carried out by another company, Funiviaria Alto Tirreno s.p.a. (Funiviaria), that also manages a cableway infrastructure to transport the coal and solid bulk to storage facilities outside the port.

On 8 February 1996, the complainants lodged a complaint with the European Commission, on behalf of TGR, in which they alleged that the Italian government had granted illegal State aid to Funiviaria, with the aim to cover certain losses of the company. They also expressed their concerns against the project of the Italian authorities to finance the building of a new terminal for the loading and unloading of large bulk goods in the port of Savona, because in their opinion this project would exclusively benefit Funiviaria.

The complainants requested the Commission to declare the decision of the Italian government to grant State aid to Funiviaria, incompatible with Community law and to determine whether there were further plans to aid this company in the construction of a new terminal.

From February 1996 to July 1999, the complainants had kept a regular correspondence with the Commission services, submitting further information to the Commission underlining the urgency of a decision on their complaint.

The complainants asked for the Ombudsman's intervention to obtain a final decision by the Commission. They considered the period of time taken by the institution to examine the file to be excessively long.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained that, after a preliminary assessment of all the elements provided by the complainants, the Commission requested further information from the Italian government, concerning the alleged aid to cover losses of Funiviaria. The Commission also reminded the relevant authorities of the obligation to notify the Commission in advance under article 88(3) of the EC Treaty.

In June 1997, the Commission services sent a reminder to the Italian government that responded by letter dated 11 June 1997. After this, several contacts between the Commission and both the complainants and the Italian authorities took place, including meetings on 11 December 1997 and 29 May 1998.

On 28 July 1998, the Commission was informed by the Italian government about plans to sell Funiviaria. On the basis of this new element, the institution addressed an additional letter to the national authorities and asked to be informed about the project of a new terminal in the port of Savona. In the absence of a reply, a reminder was sent on 13 January 1999.

Furthermore, in March 1999 the complainants demanded to be informed of the latest developments of the case. This request was promptly answered in a telephone conversation of 28 April 1999, in a letter of 30 April 1999 and in a meeting of 20 May 1999.

As concerns the fact that the Commission had not taken a final decision regarding the complaint lodged by the complainants in 1996, the institution recalled some procedural rules to be followed in State aid cases. After having received a complaint, the Commission writes to the Member State concerned to inform it about the allegation and, in some cases, to request further information. In this case, due to the complexity of all the aspects involved, a thorough examination was necessary.

Finally, the Commission underlined that its services had regularly provided the complainants with clear and punctual explanations on the progress of the case, and kept them informed of the developments and the difficulties encountered during the examination.

The complainants' observations

In their observations on the Commission's opinion, the complainants pointed out that, in order to clarify some points of the institution's opinion, they had considered necessary to meet the officials who were dealing with the case. A meeting took place in the Commission premises in Brussels, on 6 December 1999. During the meeting, the officials informed the complainants that the decision drafted by the services of Directorate General VII –transports- had already been transmitted to Directorate General IV - competition -

and to the legal services for examination. The complainant also thanked the Ombudsman for his efforts in resolving the case.

THE DECISION

1 The alleged failure of the Commission to handle a complaint properly

1.1 The complainants, who had lodged a complaint with the European Commission in February 1996, claimed that the institution had not properly dealt with it. They pointed out that the period of three years taken by the Commission before deciding on their case should be considered as excessive and an instance of maladministration.

1.2 In its opinion the Commission gave a detailed explanation of the actions taken regarding the examination of the case. The institution stressed that its services had regularly provided the complainants with all explanations requested about the progress of their case. It also underlined that such a length of time to take a decision was due to the complexity of the case and to the several requests of information submitted to the Italian authorities.

1.3 Since from the complainants' observations it appeared that during the meeting of 6 December 1999 with the Commission's services they were informed that a decision had been drafted by Directorate General VII and forwarded to Directorate General IV and to the legal services for examination, the Ombudsman contacted the complainants to make sure that they were satisfied with the outcome of the inquiry.

1.4 The complainants confirmed the previous information and added that they had been informed by the Commission that on 22 December 1999 a final decision was taken and that it was sent to the competent services for translation, before being sent to the Italian authorities and subsequently communicated to the complainants. Furthermore, they thanked the Ombudsman for his effort to solve their case in a satisfactory way.

2 Conclusion

On the basis of the information provided by the complainants and the opinion submitted by the European Commission, it appeared that the case had been settled by the Commission to the complainants' full satisfaction. The Ombudsman therefore decided to close the case.

CONDITIONS FOR AWARDING A CONTRACT UNDER INTERREG II

Decision on complaint 1043/99/(IJH)/MM (confidential) against the European Commission

A complainant lodged a complaint with the Ombudsman on behalf of an interest group on 9 September 1999. The complaint concerned the fact that the Commission insisted on receiving separate commitment letters from each organisation comprising the group in question, as a condition of awarding a contract under Interreg II.

On 23 November 1999, the European Ombudsman sent the complaint to the European Commission for an opinion, which was forwarded to the complainant on 21 February 2000. The Commission stated that in the meantime all five commitment letters required had been submitted and that the project in question had been subsidised.

On 18 September 2000, the complainant expressed by phone his satisfaction with the outcome of the complaint.

The Ombudsman took note that the case had been solved in a mutually satisfactory way and closed the case.

THE COMMISSION AGREED TO CANCEL A RECOVERY ORDER

Decision on complaint 1264/99/IP against the European Commission

THE COMPLAINT

In October 1999, the complainant lodged a complaint with the European Ombudsman against the European Commission, in his capacity as attorney of the Spanish company "Zumos y Conservas de Almería, S.A.". The complaint related to the alleged unfair decision by the Commission to cancel its financial contribution foreseen in decision C(86) 2100/525.

The Spanish company "Zumos y Conservas de Almería, S.A." participated in the call for proposals in the framework of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed[58]. Its project was retained and the Commission decided to grant the company a financial subvention of 115.342.000 ESP under the EAGGF (Commission's decision C(86) 2100/525).

By decision C(94) 1181 of 6 June 1994, the Commission decided to withdraw the grant and asked the complainant to repay the advance of 63.782.712 ESP.

The complainant requested the Commission to reconsider its decision, underlining the fact that the company had always acted in accordance with the programme's provisions.

On 5 October 1999, after examination of the complainant's file, the institution replied that there were no elements to change its original position. The complainant therefore wrote to the Ombudsman. In his complaint he claimed that the Commission's decision to ask him to repay the advance that had been paid was unjustified and poorly motivated. According to the complainant, this decision should therefore be annulled.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. The Commission sent its opinion on 8 February 2000, in which it informed the Ombudsman that, taking into account the allegations made by the complainant in his complaint to the Ombudsman, its services were further considering the case. Since the examination of the file was not completed, the Commission committed itself to reaching a conclusion as soon as possible and informing the Ombudsman accordingly.

On 25 April 2000 the Commission informed the Ombudsman that it had finally taken a decision on the case.

The institution explained that the repayment of 63.782.712 ESP was requested following the Commission's decision of 6 June 1994 to cancel the programme, due to the inactivity of the beneficiary at that moment.

According to article 19(2) of the Council Regulation (EEC) No 355/77:

"throughout the period during which aid is granted from the fund, the authority or agency appointed for that purpose by the Member State concerned shall, at the request of the Commission, forward to it all supporting documents which are of relevance in proving that the financial or other conditions laid down for each project have been fulfilled (…) The Commission may decide (…) to suspend, reduce or discontinue aid from the fund: (…) if the beneficiary, contrary to the details contained in his application and set out in the decision to grant aid, has neither begun the work within two years of the date of notification of that decision nor furnished adequate assurance before the end of the said period that

58 OJ n° L 051 , 23/02/77 p.1-6.

the project will be carried out. The Member State concerned and the beneficiary shall be notified of the decision. (…)"

However, the Commission pointed out that, after careful examination of the case, it appeared that the relevant decision could not be notified to the beneficiary. To be enforceable such a decision must be notified. Since this was not possible, the Commission agreed to cancel the recovery order.

The institution also stressed that it did not envisage to carry out a new notification of decision n° C(94) 1181 of 6 June 1996 since, according to the Spanish authorities, the beneficiary had started its activity again.

The Commission informed that it was still examining the opportuneness to start new proceedings to suppress or reduce the grant, on the basis of Council Regulation (EEC) N° 4253/88. In such a case, the proceedings would start with a letter from the Commission to the beneficiary in which he will be asked to comment on the Commission's grievances.

The complainants' observations

In his observations on the Commission's opinion, the complainant welcomed the Commission's decision to agree to cancel the request for restitution of the advance of 63.782.712 ESP.

The complainant also thanked the Ombudsman for his efforts in resolving the case and considered that the objectives of his complaint will be fully achieved.

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 closed the case.

NON-ADMISSION TO PARTICIPATE IN WRITTEN EXAMS OF AN OPEN COMPETITION

Decision on complaint 1478/99/OV against the European Commission

THE COMPLAINT

In December 1999, Mr L. made a complaint to the European Ombudsman concerning his non-admission to participate in open competition COM/C/3/99 organised by the European Commission for the recruitment of Dutch language typists (C5/C4). According to the complainant, the relevant facts were as follows:

The first selection tests took place on 7 July 1999. However, on 15 October 1999, the Selection Board of the competition informed the complainant that he did not possess the professional experience as required by point IV.B.2 of the competition notice, and that therefore he could not participate in the written exams of the competition. The complainant wrote on 20 October 1999 to the Selection Board to inform that, as a graduated language-secretary, he had three years of professional experience, which the Selection Board could verify from the documents he had sent with his application.

In his letter, the complainant asked for access to his results in the selection tests and for the detailed reasons, which led to his exclusion from the written exams. However, the Selection Board failed to reply to his original correspondence and to two other faxes dated 8 and 11 November 1999.

THE INQUIRY

From the e-mail, which the complainant sent to the Ombudsman on 8 December 1999, it appeared that on 6 December 1999, the Selection Board of the competition had finally decided to admit the complainant to the written exams, which would take place on 21 January 2000. The complainant informed the Ombudsman that he was satisfied with this outcome.

THE DECISION

1 The alleged non-admission to the written exams of open competition COM/C/3/99

1.1 The complainant alleged that, in its decision of 15 October 1999, the Selection Board of open competition COM/C/3/99 excluded him from the written exams because he did not possess the professional experience required by the competition notice. The complainant therefore wrote to the Selection Board to contest the said decision and to ask for the detailed reasons, which led to his exclusion from the written exams. However, the Selection Board failed to reply to his correspondence.

1.2 On 8 December 1999, the complainant informed the Ombudsman that the Selection Board of the competition had finally decided to admit him to the written exams, which would take place on 21 January 2000, and that he was satisfied with this outcome.

2 Conclusion

It appeared from the complainant's correspondence of 8 December 1999 that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore decided to close the case.

OUTSTANDING PAYMENTS BY THE CENTRAL LIBRARY

Decision on complaint 1527/99/MM against the European Commission

On behalf of a German publisher, Mr. P. lodged a complaint with the Ombudsman in December 1999 about alleged unsettled payments by the Central Library of the European Commission. According to the complaint the Central Library did return ordered and finally not wanted loose-leaf-collections and books but only after a long delay and in poor condition, so that the returns could not be credited. On 10 December 1999, the European Commission had not settled 12 invoices amounting to 1161,59 DM.

The complaint was sent to the European Commission for an opinion.

By letter of 2 May 2000, the complainant informed the European Ombudsman that the problem was solved, as the Central Library of the Commission had meanwhile settled all outstanding payments and would remain a customer.

The Ombudsman took note that the case had been solved in a mutually satisfactory way and closed the case.

RULES ON IMPOUNDING THE SALARY OF COMMISSION OFFICIALS

Decision on complaint 103/2000/GG (Confidential) against the European Commission

THE COMPLAINT

The complainant was the wife of a civil servant working for the European Commission in Brussels. After the divorce of her marriage, the complainant tried to obtain payment for claims that she had against her former husband. She therefore approached the Commission in order to impound her former husband's salary. It emerged, however, that only a small part of that salary could be impounded. This was due to the fact that the Commission had set the minimum amount that could not be impounded at more than € 1 900 per month. According to Belgian law, the amount that could not be impounded was € 961.82.

The complainant objected to the approach adopted by the Commission.

THE INQUIRY

The complaint was sent to the Commission for its comments.

The opinion of the Commission

In its opinion, the Commission explained that it was due to a mistake that in the past it had set the minimum part of its civil servants' salary that could not be impounded at an amount that was higher than the amount set by national law. The Commission pointed out that the complainant had tried to enforce her claims in Belgium and that consequently Belgian law and the minimum amount set by this law were to be applied. It informed the Ombudsman that it would take the necessary measures following therefrom in relation to the complainant's case.

The complainant's observations

In her observations, the complainant thanked the Ombudsman for his efforts. She reserved the right, however, to turn to the Ombudsman again in case the Commission should fail to comply with the relevant rules of Belgian law.

THE DECISION

1 Failure to comply with national law

1.1 The complainant claimed that the Commission had set the minimum part of the salary of its civil servants working in Brussels that could not be impounded at more than € 1 900 per month whereas according to Belgian law, the amount that could not be impounded was € 961.82.

1.2 The Commission replied that it was due to a mistake that in the past it had set the minimum part of its civil servants' salary that could not be impounded at an amount that was higher than the amount set by national law. It further stated that it would take the necessary measures following therefrom in relation to the complainant's case.

1.3 It appeared that the Commission had taken steps to settle the matter and had thereby satisfied the complainant.

2 Conclusion

On the basis of the Ombudsman's inquiries into the present complaint, it appeared that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

LATE PAYMENT

Decision on complaint 171/2000/IJH against the European Commission

THE COMPLAINT

In January 2000, the complainant, Mr I. alleged that the Commission had failed to pay him the fees and expenses due for work carried out in Brussels in July 1999 and for which he sent an invoice on 26 July 1999.

According to the complainant, the Commission services informed him that the reasons for the delay in payment related to two elements of his travel costs, which together represented 1.25% of the invoice. The first element concerned metro fares; the Commission asked the complainant to supply used tickets, which he did. The second element concerned the route taken by the complainant to travel from Finland to Brussels. The complainant considered that the Commission had not understood that it is normal for Finns to be at a summer cottage in July and that this explains his route to Brussels.

The complainant considered that the delay in making payment was especially serious because some €4000 or 44.2% of the invoice represented out-of-pocket expenses.

The complainant also referred to the Ombudsman's own-initiative inquiry into late payment by the Commission (OI/5/99/IJH) and stated that, in his view, the problems that had arisen in his case lie with financial control in the Commission and that a more decentralised system of making payments should be introduced.

THE INQUIRY

The Commission's opinion

The Commission's opinion was as follows:

"The complaint about the payment is justified. The payment experienced extraordinary delays, and at all the stages of processing, from the originating service to the central financial services. Part of the delay occurred since the payment file was not compliant with rules for payments. While the beneficiary had to be asked for supplementary information, this contributed only to a smaller part of the delay and is no excuse.

The payment was made on 29 February 2000 and the bank value date according to Sincom 2 is 9 March 2000. A letter of apology was sent to the beneficiary and he will be paid interest for late payment.

Staff involved was reminded to pay special attention to rapid processing of payment files when these are formally or in substance not completely compliant with regulations."

By the date on which the Commission's opinion was received, the complainant had already informed the Ombudsman that the Commission had made the payment due. It therefore seemed unnecessary to invite the complainant to submit observations on the opinion from the Commission.

THE DECISION

1 Delayed payment of fees and expenses

The complainant alleged that payment of his fees and expenses by the Commission had been delayed for over 7 months. The Commission accepted that the complaint was justified and made the payment due, together with interest and an apology to the complainant. The Commission therefore took steps to settle the matter and thereby satisfied the complainant.

2 Causes of the problem of late payment

2.1 The complainant also made comments on the causes of late payment in his case. He considered that the problems lie with financial control in the Commission and that a more decentralised system of making payments should be introduced.

2.2 The Commission stated that the payment experienced extraordinary delays, and at all the stages of processing, from the originating service to the central financial services.

2.3 The above views will be taken into account in the ombudsman's own-initiative inquiry into late payment by the Commission (OI/5/99/IJH).

3 Conclusion

It appeared from the Commission's comments and the complainant's observations that the Commission had taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closed the case.

LATE PAYMENT OF AN EXPERT

Decision on complaint 269/2000/IJH against the European Commission

THE COMPLAINT

In February 2000, Professor A. complained that the Commission had failed to pay him for services, which he provided in the evaluation of funding proposals submitted under the Human Potential programme of the 5th framework programme. The work was carried out in Brussels in September 1999 and the invoice submitted immediately on his return to Sweden. Despite repeated assurances that the claim would be dealt with, payment had not been made by the date of the complaint. The complainant claimed the payment due and interest.

In its opinion, the Commission explained that the complainant presented his invoice for €2 032.52 on 23 September 1999. The invoice was not forwarded to the financial department until all the invoices from the panel of experts had been received. In order to accelerate the procedure, this practice was recently changed and invoices are now sent to the financial department as soon as they are received.

The financial department received the file on 15 November 1999. Because of the work-load at the end of the financial year and the introduction of a new tool for checking and validating entries in the Commission third-party ledger the complainant's file was not validated by the financial department until 11 January 2000.

This delay was exacerbated by further technical delays in re-opening accounts in 2000. The payment order was finally approved on 10 February 2000 and sent to the bank on 22 February 2000.

The Commission expressed regret and apologised for the delays. A further payment of € 24.33 in respect of interest was authorised on 21 March 2000.

By the date the Commission's opinion was received, the complainant had already informed the Ombudsman that the Commission had made the payment due and that his complaint was satisfied. It therefore seemed unnecessary to invite the complainant to submit observations on the opinion.

THE DECISION

1 The complainant alleged that the Commission had failed to pay him for services which he provided. He claimed payment as well as interest for the delay.

2 The Commission made the payment due and also agreed to pay interest in respect of the delay. It expressed regret for the delay and made an apology to the complainant. It also explained why the delay occurred and measures taken to eliminate for the future one of its causes.

3 The Commission therefore took steps to settle the matter and satisfied the complainant. The Ombudsman therefore closed the case.

LATE PAYMENT OF SUBSIDY

Decision on complaint 379/2000/OV against the European Commission

THE COMPLAINT

In March 2000, Mr J. made a complaint to the European Ombudsman on behalf of the Gemeentelijke cultuurraad Waasmunster concerning the late payment by the Commission of a subsidy of € 1700 in the framework of a town-twinning programme.

On 16 June 1999, the complainant was informed by the Commission (DG X – Information, Communication, Culture and Audio-visual Media) that it would grant a subsidy of € 3100 to the municipality of Waasmunster in the framework of a town-twinning programme. The Commission further informed the complainant that it would grant another € 1700 for the travel costs of the invited municipality Kranjska Gora. It was the Belgian municipality that paid those travel costs.

On 30 August 1999 the complainant sent all the necessary documents to the Commission. According to the explanatory note concerning the grant of the subsidy, the payment should then have taken place within 60 days, i.e. on 30 October 1999. The € 3100 were paid on 30 November 1999. However, the remaining € 1700 had still not been paid.

The complainant made several ‘phone calls to the Commission. DG X replied that the file had been lost, that the payment would be made soon or that there was a personnel change in the Finance department. On 16 March 2000 the complainant therefore lodged the present complaint to the Ombudsman.

THE INQUIRY

The Commission’s opinion

The complaint was forwarded to the Commission. In its opinion, the Commission observed that some missing documents (the final report and the grant acceptance form) were sent to the Commission on 17 January 2000. These documents had been requested by the Commission on 10 December 1999, and meanwhile payment had obviously to be suspended.

The Commission was however pleased to inform the Ombudsman that the amount asked by the complainant had in the meantime been paid. The payment order was given on 2 May 2000 and the money should have accordingly reached the complainant’s bank account.

The complainant’s observations

In a telephone conversation of 29 August 2000, the complainant informed the office of the Ombudsman that he considered the case to be settled.

THE DECISION

1 The alleged late payment by the Commission of 1700

1.1 The complainant alleged that the Commission had still not paid the subsidy of € 1700 for the travel costs of the invited municipality Kranjska Gora, even if he had on 30 August 1999 sent all the necessary documents and that, according to the explanatory note, the payment should have taken place within 60 days of receipt of those documents.

1.2 The Commission stated that some missing documents (the final report and the grant acceptance form) were sent to the Commission only on 17 January 2000. The Commission however informed the Ombudsman that the amount asked by the complainant had in the meantime been paid and that the payment order was given on 2 May 2000. The complainant informed the office of the Ombudsman that he considered the case to be settled.

2 Conclusion

It appeared from the European Commission's comments and the complainant's reaction that the Commission had paid the outstanding amount of € 1700 and thus taken steps to settle the matter to the satisfaction of the complainant. The Ombudsman therefore decided to close the case.

AGREEMENT FURTHER TO A WORKING CONTRACT DISPUTE

Decision on complaint 491/2000/ADB against the European Commission

THE COMPLAINT

The complainant is French. She had worked as an accountant for the Delegation of the European Commission in Chad with a local agent contract since 1/11/1988. In 1998, the complainant first received a disciplinary warning and then was dismissed in March 1999. She allegedly lost some documents, and her hierarchy suspected her of having tight relations with a company participating in call for tenders for European Development Fund contracts.

The complainant disagreed with the reasons and the conditions of her dismissal. Given that the administrative approaches as well as the conciliation procedure foreseen by the working contract remained unsuccessful, she lodged a complaint with the European Ombudsman and made the following allegations :

1 The Head of the European Commission delegation in Chad abused of his powers.

2 The Commission failed to follow the adequate disciplinary procedure.

3 The complainant was discriminated against, and was treated unfairly.

4 The Commission refused to answer the complainant in the framework of the arbitration procedure provided for in her working contract, it also failed to find a friendly settlement to the case.

The complainant requested her reintegration in the post she occupied at the Commission as well as the revaluation of her post. Furthermore, she requested the payment of the salaries corresponding to the period of inactivity as well as a compensation for damages. In case the Commission would refuse her reintegration, she proposed a financial settlement.

THE INQUIRY

The European Commission's opinion

The Commission informed the European Ombudsman that an agreement had been reached between the complainant and the Commission. Both parties made concessions and a formal settlement was signed on 1 June 2000. This terminated all actions stemming from the working contract between the complainant and the Commission.

The complainant's observations

The complainant did not hand in any observations.

FURTHER INQUIRIES

On 22 November 2000, the European Ombudsman's services contacted the complainant's lawyer in N'djamena. He confirmed that a satisfactory agreement had been reached between the complainant and the Commission.

THE DECISION

1 Conditions and follow-up of the complainant's dismissal

1.1 The complainant claimed that conditions of her dismissal by the Delegation of the European Commission in Chad were unfair and that the Commission failed to apply the appropriate procedures. She therefore requested compensation.

1.2 The Commission informed the Ombudsman that on 1 June 2000 an agreement had been reached with the complainant.

1.3 The Ombudsman's services contacted the complainant's lawyer who confirmed that the complainant considered the case to be settled.

2 Conclusion

It appeared from the European Commission's opinion and the complainant's lawyer's indications that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

3.2.4 The Council of the European Union and the European Commission

ANTI-DUMPING: ALLEGED EXCESSIVE DELAY AND DISCRIMINATION

Decision on complaint 1487/99/IJH against the Council of the European Union and the European Commission

THE COMPLAINT

In December 1999, the solicitors Clifford Chance complained on behalf of N. Ltd against the Council and the Commission. N. Ltd, a company established in the European Union, is a wholly owned subsidiary of a Japanese company which exports Large Aluminium Electrolytic Capacitors (LAECs).

According to the complainant, the relevant facts are as follows:

In 1992, a definitive anti-dumping duty was imposed on imports of LAECs from Japan by Regulation 3482/92. In 1997, the Commission initiated an anti-dumping procedure against imports of LAECs from the USA and Thailand. At the same time, the Commission initiated a review of the existing duty on LAECs from Japan.

On 26 January 1999, the Commission proposed to the Council to impose definitive duties on LAECs from the USA and Thailand. The Council did not accept the proposal and the provisional duties in force therefore lapsed on 28 February 1999.

On 21 May 1999, the Commission advised N. Ltd of its intention to propose to the Council to terminate the review of the anti-dumping duty imposed by Regulation 3482/92 without any measures. This would lead to revocation of the duty on exports of LAECs from Japan. The Commission accepted that continuation of the duty on exports of LAECs from Japan without corresponding duties on LAECs from the USA and Thailand would constitute unlawful discrimination.

The Commission repeated that intention in a letter dated 27 October 1999. However, at the date of the complaint, the Commission had not made a proposal to the Council to terminate the review procedure. Nor had the Council called on the Commission to make a proposal.

In the complaint to the Ombudsman, N. Ltd. alleged that the Commission and Council had failed to take necessary and appropriate steps to terminate the review of anti-dumping duty on imports of LAECs from Japan, resulting in excessive delay and unlawful discrimination.

THE INQUIRY

The complaint was forwarded to the Council and to the Commission for opinions.

The Commission's opinion

The Commission's opinion pointed out that on 13 December 1999, the Commission adopted a proposal for a Council Regulation terminating the contested anti-dumping review. This proposal was formally submitted to the Council on the same day (Document COM (1999) 668 final). By letter of 13 December 1999, N. Ltd was informed of this and received a copy of the proposal. The review was formally terminated by Council Regulation (EC) No 173/2000[59] of 24 January 2000.

According to the Commission, the review was carried out with due diligence and in strict conformity with the applicable laws and regulations. Furthermore, N. Ltd., being an interested party, was kept fully informed at all stages of the findings of the Institutions and of the proposed course of action.

On 21 May 1999, the Commission informed the interested parties of its proposal that the review should be terminated on grounds of non-discrimination. On 31 May and 22 June 1999, another Japanese exporter raised the issue of retroactive termination from the date

[59] 2000 OJ L 22/1

at which the discrimination started. This claim raised new and difficult issues of law and policy. The claim for retroactivity was eventually accepted and interested parties, including N. Ltd, were informed of this on 27 October 1999.

Even if the Commission had used the 21 May 1999 document for its proposal to the Council, the contested review could have been terminated, at the earliest, in September 1999 (given the Commission and Council's internal decision making mechanisms). By taking the retroactivity claim into account, the Institutions were able to terminate the review in January 2000, but with a retroactive effect from 28 February 1999 onwards. This enables N. Ltd. to be eligible for the reimbursement of 10 months worth of anti-dumping duties paid. In other words, the additional time the Institutions had to take resulted in a significantly more favourable decision for N. Ltd. In addition, given the complexity of the issues at stake, the consultation process imposed by the basic Regulation and the necessary translations of the Commission proposal, at times of intense political activity (Agenda 2000 updates) and hence of voluminous other documents to be translated, the additional time taken by the Commission to adopt its proposal (approximately 3 months) should be considered as being rather short.

The Commission therefore rejected the complainant's allegations and considered that, in view of the adoption of a Regulation terminating the review, the complaint had become devoid of purpose.

The Council's opinion

The Council's opinion contained the following preliminary observations:

"the present complaint seeks to review an action of the Council in the field of anti-dumping measures (and thus of commercial policy under Article 133 of the EC Treaty). When adopting a regulation under the basic anti-dumping regulation[60] (on the basis of a Commission proposal), the Council does not act in an administrative but in a legislative capacity. Consequently, it is the view of the Council that the substance of the present complaint is judicial and not administrative in nature.

In this regard, the Council would like to point out that the complainants initially sent a notice to the Council and the Commission (of 18 October 1999) as a preliminary step for judicial proceedings under Article 232 of the EC Treaty."

As regards the substance of the complaint, the Council pointed out that while it is true that under Article 208 EC, the Council may call upon the Commission to undertake studies and submit appropriate proposals, it is clear that there is no obligation for the Council to do so ("may"). The Council also pointed out that even if it does request the Commission to submit a proposal under this provision, there is no legal obligation for the Commission to do so.

In any event, under the basic anti-dumping regulation, which lays down the conditions and the procedures for the imposition of anti-dumping duties, there is a clear separation of responsibilities between the Commission and the Council. It is the Commission's responsibility to initiate and conduct review proceedings and to submit proposals to the Council, either to terminate review proceedings or to maintain duties in force.

The Council can only act upon a Commission proposal, which presupposes that the Commission has concluded its review investigation. In this regard, the Council also pointed out that the continued imposition of anti-dumping duties while the review investigation is still pending results directly from Article 11 (2), first subparagraph of the basic anti-dumping regulation.

60 Council Regulation (EC) 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, 1996 OJ L56/1.

The Council also pointed out that the contested review was terminated by Council Regulation (EC) No 173/2000. The Council therefore considered that it has taken the necessary steps to remedy the complainant's situation and that the complaint is therefore without purpose.

The complainant's observations

The Commission's opinion, which arrived earlier than that of the Council, was forwarded to the complainant. In observations on the Commission's opinion, the complainant acknowledged that the termination of the anti-dumping review by Council Regulation (EC) No 173/2000 had satisfied its claims. The complainant also thanked the Ombudsman for dealing with the complaint in a timely manner and thanked the Commission for the care it had taken in its opinion on the complaint.

In view of the complainant's observations on the Commission's opinion, it seemed unnecessary to forward the Council's opinion to the complainant for possible observations.

THE DECISION

1 The competence of the Ombudsman to deal with the complaint

1.1 Neither the Council nor the Commission contested the competence of the European Ombudsman to deal with the complaint. However, the Council remarked that "*when adopting a regulation under the basic anti-dumping regulation*[61]*, the Council does not act in an administrative but in a legislative capacity. Consequently, it is the view of the Council that the substance of the present complaint is judicial and not administrative in nature*." The Council also pointed out that the complainants had sent a notice to the Council and the Commission as a preliminary step for proceedings under Article 232 EC.

1.2 As regards the remark concerning the legislative nature of the Council's activity in relation to anti-dumping, the Ombudsman pointed out that it is well-known that the formal categorisation of a Community act as a Regulation or Decision does not necessarily imply that it has, respectively, legislative or administrative characteristics. The Ombudsman did not, therefore, consider that the general possibility of an instance of maladministration in the Council's activity could be excluded in relation to anti-dumping as a matter of principle.

1.3 As regards the remark concerning the "judicial" nature of the complaint, the Ombudsman recalled that Article 195 EC precludes an inquiry if the alleged facts are or have been the subject of legal proceedings. If legal proceedings begin after the Ombudsman has opened an inquiry, he terminates his consideration of the complaint and files the outcome of the inquiries he has carried out up to that point without further action, in accordance with Article 2 (7) of the Statute of the Ombudsman. Neither of the above-mentioned provisions applied to the present case.

1.4 As regards the remark that the complainants had sent a notice to the Council and the Commission as a preliminary step under Article 232 EC,[62] the Ombudsman pointed out that such a notice does not itself constitute a commencement of legal proceedings but, on the contrary, is a necessary preliminary to legal proceedings. The Ombudsman also recalled that, under the scheme established by the Treaty, the mere possibility that a

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61 Council Regulation (EC) 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, 1996 OJ L56/1.

62 The relevant paragraph of which provides:

"The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months."

complainant could bring legal proceedings does not prevent an inquiry by the Ombudsman.

1.5 It should also be noted that the conditions of admissibility laid down by Article 232 relate only to proceedings in the Community courts. The admissibility of complaints to the Ombudsman is governed not by Article 232, but by Article 195 EC and by the Statute of the Ombudsman.

1.6 According to Article 2 (4) of the Statute, a complaint must be preceded by the appropriate administrative approaches to the institutions and bodies concerned. In determining whether this condition is fulfilled, the Ombudsman always has in mind that its purpose is to ensure that the institution or body concerned has the possibility to correct its behaviour, or at least explain itself, before a complaint is made to the Ombudsman. In reaching his decision on the admissibility of the present complaint, the Ombudsman considered that this condition would have been fulfilled even if the complainant had not given notice to the institutions concerned under Article 232 EC.

2 The allegation of excessive delay leading to unlawful discrimination

2.1 The complainant alleged that the Commission and Council had failed to take necessary and appropriate steps to terminate a review of anti-dumping duty on imports of Large Aluminium Electrolytic Capacitors from Japan, resulting in excessive delay and unlawful discrimination.

2.2 The Commission and Council answered the complainant's allegations in detail and considered that, in view of the adoption of Council Regulation 173/2000[63] terminating the review, the complaint had become devoid of purpose.

2.3 The complainant acknowledged that the termination of the anti-dumping review by the above-mentioned Regulation had satisfied its claims.

3 Conclusion

It appeared from the Council's and the Commission's opinions and the complainant's observations that the institutions have taken steps to settle the matter and have thereby satisfied the complainant. The Ombudsman therefore closed the case.

3.3 FRIENDLY SOLUTION ACHIEVED BY THE OMBUDSMAN

PAYMENT OF DELAYED INTEREST

Decision on complaint 390/99/ADB against the European Commission

THE COMPLAINT

Popignon SARL carried out a study under a contract with the Moroccan Ministry of Agriculture financed by EC funds. The invoice for the contract was addressed to the contractor in April 1998 but was actually paid by the Commission in April 1999. Thus, the complainants, owners of Popignon SARL, decided to lodge a complaint with the European Ombudsman to obtain the payment of interest for the delay. The complainants requested to be paid 10% (i.e. € 1.706,57) of the final bank transfer made by the European Commission.

THE INQUIRY

The Commission's opinion

The Commission explained that the delay in first place originated in the initial decision of the Moroccan Ministry of Agriculture to contest the invoice. Later, the Ministry decided to accept the invoice and requested its payment by the European Commission. This request

63 2000 OJ L 22/1

was endorsed by the Commission's Delegation in Rabat and reached Brussels on 11 November 1998.

Once the payment request was to be processed by the European Commission, the corresponding budget line was exhausted. New credits out of the 1999 budget only became available by the end of February 1999. The payment request was entered on 8 March 1999, and the complainants were paid on 6 April 1999.

The Commission stressed that it is its policy to pay interest on delayed payments. However, it considered that in the present case, the claim for interest arose from the contract between Popignon SARL and the Moroccan Ministry of Agriculture. It therefore had to be directed there. Furthermore, the question of delayed interest could not be discussed on the basis of the demands put forward by the complainants.

The complainants' observations

The complainants considered the Commission to be responsible for the delay which occurred between the day the payment request was received (11 November 1998) and the actual date when the payment (6 April 1999) was made. Given that the Commission committed itself to making payments within 2 months, the complainants asked that interest be paid for the period of time between 11 January 1999 and 6 April 1999.

The complainants based their estimation of the amount to be paid (i.e. 1% of the global contract price per week of delay) on the contract signed with the Moroccan authorities.

The Ombudsman's efforts to achieve a friendly solution

After careful consideration of the opinion and observations, the Ombudsman did not consider that the Commission had responded adequately to the complainant's claims.

The Commission committed itself to making payments within a period of 60 days. In the present case, the complainants did not demonstrate that the Commission was to be held responsible for the delay that arose out of the Moroccan Ministry's actions. However, the Ombudsman's provisional conclusion was that the Commission was to be held responsible for the period of time lapsed after it received the payment request. Therefore, the fact that the Commission refused to pay interest for the period of time exceeding 60 days after the reception of the payment request appeared to be an instance of maladministration.

The Commission was not bound by the terms of the contract between the Moroccan authorities and the complainants. The Ombudsman therefore proposed that the interest to be paid to the complainants be estimated on the basis of the Commission's proposal contained in internal note SEC(97)1205[64] , i.e. in accordance with the implementing provisions[65] of the Financial Regulation of 21 December 1977.

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64 III., para. 9. : "*(…) The interest rate will be determined in the same way as the rate applied to the Commission's debtors (Article 94 of Regulation laying down detailed rules for the implementation of the Financial Regulation)(…).*"

65 Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 OJ L 315 , 16/12/1993 p. 1–24.

Article 94

1. *Any debt not repaid on the due date shall be subject to interest as follows:*
   - *debts denominated in ECU: the rate of interest applied by the European Monetary Cooperation Fund to its operations in ECU (10), increased by one and a half percentage points,*
   - *debts denominated in a national currency: the three-month interbank offer rate for the appropriate market, increased by one and a half percentage points.*
2. *The rate of interest applicable is that in force during the month in which the debt is due.*
3. *Interest shall be calculated from the due date laid down in the recovery order to the date on which the debt is repaid in full.*

The Commission accepted the Ombudsman's proposal. According to the Commission's calculations the interest to be paid amounted to 195.67 €. On 29 June 2000 the complainants accepted the Commission's proposal.

THE DECISION

1 The Commission's refusal to pay interest for a delayed payment

1.1 The complainants decided to lodge a complaint with the European Ombudsman to obtain the payment of interest for a delayed payment. The complainants requested to be paid 10% of the final bank transfer made by the European Commission.

1.2 The Commission refused to pay interest on the basis of the complainants' estimation, which referred to the contract signed between the complainants and the Moroccan authorities.

1.3 In the Ombudsman's view the Commission could only be held responsible for delays originating in its own actions. Furthermore, the Commission was not bound by the contractual penalties for delayed completion provided for in the aforementioned contract.

1.4 Thus, in order to seek a friendly solution, in accordance with article 3(5) of his statute, the Ombudsman proposed that the Commission estimate the interest to be paid on the basis of its own internal note on late payments (SEC(97)1205).

1.5 The Commission subsequently accepted the Ombudsman's proposal and agreed to pay delayed interest. The complainants accepted to be paid the amount proposed by the Commission.

2 Conclusion

Following the Ombudsman's inquiry, a friendly solution to the complaint had been agreed between the Commission and the complainants. The Ombudsman therefore closed the case.

3.4 CASES CLOSED WITH A CRITICAL REMARK BY THE OMBUDSMAN

3.4.1 The European Parliament

STAFF - INCORRECT INFORMATION REGARDING A DAILY ALLOWANCE

Decision on complaint 288/99/ME against the European Parliament

THE COMPLAINT

In March 1999, the complainant submitted a complaint to the European Ombudsman. The complainant had been working at the translation service of the European Parliament for almost a year but had then left the service. In her complaint she alleged mainly the following:

By letter of 5 December 1997, the complainant received a job proposal from the Parliament, which she accepted. The letter stated that the complainant would receive, under the conditions and limitations established by Article 69 of the Conditions of employment of other servants of the European Communities, a daily allowance of 2.206 BEF the first 15 days and thereafter at a rate of 1.027 BEF. However, according to the complainant, she never received the daily allowance indicated in the letter. The complainant submitted a complaint to the Parliament in accordance with Article 90 of the Staff Regulations without success. The complainant enclosed copies of her correspondence with the Parliament. The correspondence showed that the Parliament had referred to the rate of the daily allowance applicable to a servant who had the right to a family allowance. However, the complainant did not have the right to family allowance and the administration of the Parliament had therefore applied a lower rate. According to the Parliament, it followed from the case law of the Court of Justice that information, which is not in accordance with the Staff Regulations, could not create a legitimate expectation by which the Parliament would be bound. The Parliament regretted the mistake. The complainant claimed to be in good faith as she had not been given the Conditions of employment and could therefore not verify the information given in the letter. The complainant requested the payment of the allowance, which had been promised to her.

THE INQUIRY AND THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful examination of the complaint and the documents submitted by the complainant in relation thereto, the Ombudsman considered that there was a prima facie instance of maladministration. He also concluded that it was still possible to remedy the maladministration and therefore wrote to the Parliament in accordance with Article 3 (5) of the Statute of the Ombudsman[66], with a view to seeking a friendly solution to the complaint. Since the Ombudsman found that the Parliament's view on the matter was already clearly stated in its correspondence with the complainant, the Ombudsman asked the Parliament to arrange a meeting in order to discuss the possibilities of a friendly solution. On 29 June 1999, a meeting took place between the Ombudsman's and the Parliament's services. At the meeting it became clear that the Parliament's representatives could not undertake, on behalf of the Parliament, to search for a friendly solution and further that the Ombudsman's representatives could not negotiate on behalf of the complainant. It was concluded that the Parliament's representatives would explore the possibilities for a friendly solution and inform the Ombudsman.

The Parliament's opinion

Following the meeting in June 1999, the Parliament sent its opinion to the Ombudsman in December 1999. In its opinion, the Parliament stated that it was aware that the complainant had been incorrectly informed of the amount of the daily allowance in the job offer. However, the letter had also referred to the fact that the daily allowance would be paid in accordance with and under the limitations laid down in Article 69 of the Conditions of employment of other servants of the European Communities. According to the case law of the Community Courts, information or promises, which provisions are not in accor-

66 "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."

dance with the Staff Regulations, cannot create any legitimate expectations. Therefore, the fact that incorrect information was given could not give rise to damages in breach of the provisions. As a result, the Parliament did not believe that the complainant, from a legal point of view, was entitled to receive a higher amount than what had already been paid to her. In absence of any legal base, it would be in breach of the rule of law if the Parliament paid an amount to the complainant, which could not be claimed on the basis of any provisions. The Parliament was therefore not in a position to propose a friendly settlement of the case. However, it assured the Ombudsman that it had taken steps to prevent similar situations from occurring in the future.

The complainant's observations

In her observations, the complainant maintained her complaint. She also underlined that she should be able to trust that the information given in the offer was correct and that she had no possibility to verify the information given in the letter since she did not receive a copy of the provisions in question.

THE DECISION

1 The Parliament's refusal to pay the complainant the daily allowances as promised in the offer

1.1 The complainant stated that in the letter of 5 December 1997 she was promised a certain amount of daily allowance when taking up her duties at the Parliament's translation service. However, she claimed that she never received the daily allowance indicated in the letter.

1.2 The Parliament admitted that it gave incorrect information regarding the complainant's daily allowance. However, it also stated that the complainant had been informed that the daily allowance would be paid in accordance with and under the limitations laid down in Article 69 of the Conditions of employment of other servants of the European Communities.

1.3 The Court of Justice and the Court of First Instance have consistently held that the principle of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force. Consequently, and also clearly expressed by the Court of Justice, promises which do not take account of the provisions in force cannot give rise to legitimate expectations on the part of the person concerned, even if it is proved that they were made[67]. It must therefore follow that the complainant had no right to demand payment of the daily allowance as promised to her by the Parliament since the amount indicated by the Parliament was not in accordance with Article 69 of the Conditions of employment of other servants of the European Communities.

1.4 Notwithstanding the fact that the complainant had no right to demand payment from the Parliament, it is good administrative behaviour to provide clear and understandable information. Naturally this means that the given information is correct. In the present case, it was established that the Parliament supplied incorrect information to the complainant. The Parliament did therefore not act in accordance with principles of good administrative behaviour. The Ombudsman therefore addressed a critical remark to the Parliament.

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67 Case 67/84 *Sideradria v. Commission* [1985] ECR 3983, para. 21, Case 162/84 *Vlachou v. Court of Auditors* [1986] 481, para. 6, Case T-123/89 *Chomel v. Commission* [1990] II-131, para. 28 and Joined Cases T-551/93, T-231/94, T-232/94, T-233/94, T-234/94 *Industrias Pesqueras Campos and others v. Commission* [1996] ECR II-247, para. 76.

2 Conclusion

On the basis of the Ombudsman's inquires into this complaint, it was necessary to make the following critical remark:

Not withstanding the fact that the complainant had no right to demand payment from the Parliament, it is good administrative behaviour to provide clear and understandable information. Naturally this means that the given information is correct. In the present case, it was established that the Parliament supplied incorrect information to the complainant. The Parliament did therefore not act in accordance with principles of good administrative behaviour.

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.

STANDARD REPLIES TO INDIVIDUAL APPEALS ADDRESSED TO THE SELECTION BOARD IN OPEN COMPETITION

Decision on joined complaints 1260/98/(OV)BB and 1305/98/(OV)BB against the European Parliament

THE COMPLAINT

In November 1998, Mr P. made a complaint to the European Ombudsman concerning Open Competition PE/83/A.. In December 1998, Mr A. lodged a similar complaint. The Ombudsman, therefore, decided to join the two complaints for the purpose of his inquiry.

The complainants complained against the refusal of the Parliament to allow them to take part in Open Competition PE/83/A (Greek language administrator in the Secretariat General) [68] organised by the Parliament for which they had applied. On 9 October 1998, the Parliament informed the complainants that their applications were excluded on grounds that their professional experience was not judged appropriate for the exercise of the duties mentioned in the notice of competition. The complainants wrote motivated letters to the Selection Board asking for a review of the Board's decisions, but in its decision letters of 16 November and 17 November 1998, the Board replied with a standard letter to both complainants without taking into account the particular arguments put forward in the complainants' letters.

The complainants made the following allegations:

The Selection Board rejected their applications arbitrarily without giving a reason:

- in complaint 1260/98/(OV)BB the Selection Board rejected the complainant's application on grounds that he lacked at least two years' professional experience, acquired after his university degree, of a standard equivalent to that of the duties referred to Section II of the notice of competition (Section III.B.2.b of the notice). The complainant alleged that the Board had under-valued his 10 years of professional experience as an official of the European Commission and a translator in the Translation Service;

- in complaint 1305/98/(OV)BB the Selection Board rejected the complainant's application on identical grounds on the basis of Section III.B.2.b of the notice. The complainant alleged that the Board had not taken into account his professional experience as a technical-architectural official. According to the complainant, the Board had not specified exactly what his lack of professional experience consisted of.

The Selection Board replied with a standard letter to the different arguments put forward by the complainants in their individual appeals dated 14 October 1998 and 2 November 1998.

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68 OJ C 77 A of 12 March 1998.

THE INQUIRY

The Parliament's opinion

The complaint was forwarded to the European Parliament, which in its opinion made, in summary, the following points:

As the Parliament had not foreseen pre-selection tests in the competition, prior to the organisation of the written tests and pursuant to Article 5 of Annex III of the Staff Regulations, the Selection Board considered the applications in the light of the requirements set out in the notice of competition and on that basis, drew up the list of candidates admitted to Open Competition PE/83/A.

With regard to Mr P.'s complaint, the Selection Board decided that his professional experience as a translator would not, for the purposes of this competition, be assimilated to professional experience of a standard equivalent to that of the job described in Section II of the notice of competition. This decision was applied equally to all candidates presenting this profile. The application was, therefore, not rejected arbitrarily.

With regard to Mr A.'s complaint, the reply sent to him following his appeal, which expressly referred to the requirements of the job description in Section II of the notice of competition, was the Selection Board's position in response to the details supplied by the complainant.

The Parliament pointed out that it had only recently received copy of the Ombudsman's decision in the case of complaint 850/3.9.96/IJH/FIN/KT/BB, which found that Selection Boards should provide individual explanations to those candidates who expressly ask for it. The Ombudsman should be assured that this position would be brought to the attention of future European Parliament Selection Boards.

The complainants' observations

The complainants maintained their complaints.

THE DECISION

1 The Selection Board rejected the complainants' applications arbitrarily and without giving an adequate individual reason in Open Competition PE/83/A

1.1 The complainants alleged that the Selection Board rejected their applications arbitrarily and without giving an adequate individual reason.

1.2 As the Community Courts have consistently held, although for a competition based on qualifications and tests the Selection Board has a discretion in evaluating the qualifications and practical experience of the candidates, it is nevertheless bound by the wording of the notice of competition. The basic purpose of a notice of competition, according to the Staff Regulations, is to give to those interested the most accurate information possible about the conditions of eligibility for the post, in order to enable them to judge whether they should apply for it and what supporting documents are important for the proceedings of the Selection Board and must therefore be enclosed with the application[69].

Furthermore, when the Selection Board decides not to admit a candidate to the tests, it is required to indicate precisely which conditions in the notice of competition are considered not to have been satisfied by the candidate[70].

69 Case T–158/89 *Van Hecken v. Economic and Social Committee* [1991] ECR II-1341.

70 Joined cases 4, 19 and 28/78 *Salerno and Others v. Commission* [1978] ECR 2403 and Case 108/84 *De Santis v. Courts of Auditors [1985]* ECR 947.

1.3 The notice of competition PE/83/A indicated all the necessary conditions to be met by the applicants. One of the conditions foreseen under Section III.B.2.b of the notice was to have at least two years' professional experience, acquired after a university degree, of a standard equivalent to that of the duties referred to Section II of the notice of competition.

1.4 The Ombudsman noted that, from the information submitted by the complainants and by the Parliament, it appeared that the Selection Board had acted in accordance with the notice of competition when deciding that the complainants' applications could not be accepted on the grounds that they did not fulfil the requirement requested.

1.5 As concerns the obligation of the Selection Board to indicate precisely which conditions in the notice of competition are considered not to have been satisfied by the candidate, the Ombudsman noted that in its letters of 9 October 1998 and of 16 and 17 of November 1998, the Selection Board referred to the duties described in Section II of the notice and gave the complainants a reason for their exclusion from the competition.

2 The Selection Board replied with a standard letter to the different arguments put forward by the complainants in their individual appeals to the Selection Board in Open Competition PE/83/A

2.1 The complainants alleged that the Selection Board did not reply to the different arguments put forward by them in their individual appeals to the Board.

2.2 The Selection Board had sent the complainants standard letter replies on 16 and 17 November 1998.

2.3 In the context of competitions, decisions by a Selection Board to reject a candidate must state the conditions of the notice of competition, which have not been fulfilled.[71] If there is a large number of candidates, the Selection Board may initially confine itself to stating the reasons for the refusal in a summary manner and informing the candidates only of the criteria and the result of the selection.[72] Nevertheless, the Selection Board must subsequently give an individual explanation to those candidates who expressly ask for it.[73]

2.4 In their letters dated 14 October 1998 and 2 November 1998 the complainants expressly requested that the Selection Board reassess their professional experience in the Open Competition PE/83/A. The Selection Board replied on 16 and 17 November 1998 by identical standard letters merely stating that, after having considered the matter in its meeting of 12 November 1998, the Board could only confirm its initial decision not to admit the complainants to Open Competition PE/83/A on grounds that the complainants' professional experience did not correspond to the nature of duties described in Section II of the notice of competition.

2.5 The standard replies by the Selection Board to the complainants did not contain sufficient details to enable the complainants to understand the factors on which the Board's decision in relation to their individualised appeals had been based, and to allow for a review of the grounds on which the decision had been taken. The reply failed therefore to give the complainants adequate individual reasons for the rejection of their applications.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

In the context of competitions, decisions by a Selection Board to reject a candidate must state the conditions of the notice of competition, which have not been fulfilled. If there is

71 Joined Cases 4, 19, and 28/78 *Salerno v. Commission* [1978] ECR 2403, par. 26-29.

72 Case 225/82 *Verzyck v. Commission* [1983] ECR 1991.

73 Case T-55/91 *Olivier Fascilla v. Parliament* [1992] ECR II-1757, par. 34-35.

a large number of candidates, the Selection Board may initially confine itself to stating the reasons for the refusal in a summary manner and informing the candidates only of the criteria and the result of the selection. Nevertheless, the Selection Board must subsequently give an individual explanation to those candidates who expressly ask for it.

The standard replies by the Selection Board to the complainants did not contain sufficient details to enable the complainants to understand the factors on which the Board's decision in relation to their individualised appeals had been based, and to allow for a review of the grounds on which the decision had been taken. The reply failed therefore to give the complainants adequate individual reasons for the rejection of their applications.

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.

3.4.2 The Council of the European Union

SELECTION BOARD'S REASONING NOT IN COMPLIANCE WITH NOTICE OF COMPETITION

Decision on complaint 1011/99/BB against the Council of the European Union

THE COMPLAINT

The complainant had applied to Open Competition Council/LA/385 (Finnish language translators)[74] organised by the Council. The complainant's application was excluded from the competition on the grounds that it failed to meet the condition set out under point III B, b of the notice of competition since the application showed neither a "*thorough*" knowledge of French nor a "*very good*" knowledge of English nor did the complainant have sufficient professional experience in which the use of the French language was essential. This assessment was based on the supporting documents transmitted by the candidate with his application.

He asked for a review of the Selection Board's decision alleging errors in the handling of his application. The Board replied that after re-assessment he appeared to have a "*very good*" knowledge of English, but not a "*thorough*" knowledge of French, and maintained its previous decision.

The complainant alleged errors in the assessment of his linguistic skills as well as of his professional experience on the basis of his application for Open Competition Council/LA/385. He further alleged that the Selection Board's reasoning in its letter of refusal was ambiguous and did not comply with the notice of competition.

THE INQUIRY

The Council's opinion

The complaint was forwarded to the Council for an opinion. In its opinion, the Council pointed out the particular conditions of eligibility for Open Competition Council/LA/385 required « *a perfect command of the Finnish language, a thorough knowledge of the French or English language, a very good knowledge of the other of these two languages and an adequate knowledge of one or more other official languages of the EC, i.e. German, Danish, Spanish, Greek, Italian, Dutch and Portuguese* ». Furthermore, candidates had to produce appropriate supporting documents to show that these requirements were satisfied.

From the supporting documents submitted by the complainant it emerged that he did not fulfil the requirements. As explained by the Selection Board in its letters dated 22 April and, in more detail, 31 May 1999, the supporting documents submitted by the complainant, while sufficient to show a « *very good* » knowledge of English, did not suffi-

74 OJ C 302 A of 1 October 1998.

ciently show a thorough knowledge of French, which he had chosen as his first language to be tested in.

In order to demonstrate a « *thorough* » knowledge of either English or French, the Selection Board considered that a candidate for a linguistic post in the General Secretariat of the Council had to show an educational background including at least the long curriculum at secondary school in the relevant language. The complainant, however, had not studied French, not even at secondary school level. The complainant's only connection with the French language was established through his work in a scientific research facility in France between April 1993 and July 1994. It appeared, however, that the French language did not hold a central position in the exercise of this post, as shown, for instance, by the fact that the complainant's publications were made in English. The same applied to the candidate's professional experience at the Translation Centre in Luxembourg. The Selection Board considered, therefore, that the candidate's professional experience was not sufficient to show the required level of expertise in French for the translation of difficult texts from that language into Finnish.

According to the Council, the assessment of the complainant's application was neither ambiguous nor in contradiction with the notice published in the Official Journal.

As a general remark, it was stressed that the Selection Board acts entirely independently. Accordingly, the Secretary General in his capacity as the Appointing Authority, is not in a position to overturn the decisions made by the Selection Board unless there is strong evidence of an illegal decision affecting the legality of the competition as a whole. According to the Council, the criteria applied and the procedures followed in the present case did not show any evidence of this kind.

The complainant's observations

The complainant maintained his complaint. The complainant pointed out that in its opinion the Council indicated that the applications had to show an educational background including at least the long curriculum at secondary school in French and English. This was not stated in the notice of competition. The Selection Board would have been able to assess the candidates' linguistic skills by organising a language test.

THE DECISION

1 Alleged errors in the assessment of the complainant's application for Open Competition Council/LA/385 and ambiguous reasoning which did not comply with the notice of competition

1.1 The complainant alleged errors in the assessment of his linguistic skills as well as his professional experience on the basis of his application for Open Competition Council/LA/385. Furthermore, he alleged that the Selection Board's reasoning was ambiguous and did not comply with the notice of competition.

1.2 The particular conditions of eligibility for Open Competition Council/LA/385 required « a perfect command of the Finnish language, a thorough knowledge of the French or English language, a very good knowledge of the other of these two languages and an adequate knowledge of one or more other official languages of the EC, i.e. German, Danish, Spanish, Greek, Italian, Dutch and Portuguese ». Furthermore, candidates had to produce appropriate supporting documents to show that these requirements were satisfied.

1.3 In order to demonstrate a «*thorough*» knowledge of either English or French, the Selection Board considered that a candidate for a linguistic post in the General Secretariat of the Council had to show an educational background including at least the long curriculum at secondary school in the relevant language. The complainant, however, had

not studied French, not even at secondary school level. Furthermore, the Selection Board considered that the candidate's professional experience was not sufficient to show the required level of expertise in French.

1.4 According to the case law of the Community Courts, selection boards have wide discretionary powers. In the exercise of these powers selection boards must respect the legal framework for their activities laid down in the notice of competition.

1.5 It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post. This information should enable the candidate to judge whether he should apply for it, what supporting documents are important for the proceedings, and must therefore be enclosed with the application form.[75] The notice of competition serves the function of properly informing the applicant in that competition of the requirements and conditions to be fulfilled. In the present case, the notice of competition did not explicitly state the requirement of submitting documents certifying "*an educational background including at least the long curriculum at secondary school*". Under these circumstances the Selection Board failed to provide the complainant with clear and accurate information regarding the fact that knowledge of French or English had to be supported by at least the long curriculum at secondary school. The Selection Board's decision thus left the applicant in doubts whether his linguistic skills and professional experience had been properly assessed in accordance with the criteria laid down by the notice of competition and this constitutes an instance of maladministration.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it was necessary to make the following critical remark:

It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post. This information should enable candidates to judge whether they should apply for it, what supporting documents are important for the proceedings, and must therefore be enclosed with the application form. The notice of competition serves the function of properly informing the applicant in that competition of the requirements and conditions to be fulfilled. In the present case, the notice of competition did not explicitly state the requirement of submitting documents certifying "an educational background including at least the long curriculum at secondary school"*. Under these circumstances the Selection Board failed to provide the complainant with clear and accurate information regarding the fact that knowledge of French or English had to be supported by at least the long curriculum at secondary school. The Selection Board's decision thus left the applicant in doubts whether his linguistic skills and professional experience had been properly assessed in accordance with the criteria laid down by the notice of competition and this constituted an instance of maladministration.*

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.

75 Case T-158/89, Van Hecken v. ESC, [1991] ECR II-1341.

3.4.3 The European Commission

PAYMENT UNDER A TACIS CONTRACT

Decision on complaint 161/98/ME against the European Commission

THE COMPLAINT

In February 1998, a consultancy firm lodged a complaint with the European Ombudsman. The complainant had a Tacis contract with the European Commission concerning the Establishment of a Food and Agriculture Policy Advisory Unit in Uzbekistan. The project was scheduled for completion at the end of August 1997. It was agreed that an addendum should be issued to the contract to extend it by three months. In July 1997, the contract addendum was issued by the Commission. The Commission signed the addendum and then sent it to the complainant for signature. However, the addendum did not include a reference to an additional payment as the complainant had requested. Therefore, the complainant contacted the Commission several times by fax concerning this issue. Following these queries, the complainant received a telephone call from the Commission. According to the complainant the responsible official of the Commission indicated that an additional payment would be possible and instructed the complainant to, due to the lack of time before the original contract would expire, hand-write the appropriate amendment on the existing addendum, then sign it and return it to the Commission. On the basis of this addendum the complainant sent invoices in September 1997, requesting payment. Since payment had not been issued after the contractual 60 days, the complainant made a series of contacts with the Commission, requesting both payment and information about whether the invoices had been accepted. Only in January 1998 (some 130 days later) and after several requests for payment and/or information about the progress, did the Commission notify the complainant that the invoices submitted in September 1997 were formally rejected. The reasons for the rejection were that the complainant had only one invoicing opportunity left, i.e. at the end of the project, and the September invoices should therefore be resubmitted at the end of the project.

Against this background the complainant lodged a complaint with the Ombudsman. The complainant alleged that no invoices under the contract had been paid within the contractual 60 days notice period and submitted a table which outlined the delays. The table showed delays of up to 223 days. The complainant also alleged that the information provided on how to claim interest was inconsistent, poor and confusing. As regards this matter, the complainant attached correspondence showing that after the complainant had failed to obtain interest, clarification was sought from the Commission. However, the complainant stated that differing advice was provided by the Commission. As a consequence the complainant was of the view that it had not been able to claim interest for late payment during the contract.

The complainant claimed payment of all outstanding fees and interest as well as compensation.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the European Commission. In its opinion the Commission put forward in summary the following points:

For Tacis programmes, contracts are established according to a standard model, comprising the contract as well as the "General Conditions". Each contract is also issued with specific guidelines for the presentation and submission of invoices.

According to Article 13 of the contract, any amendment to the contract must be properly agreed in writing, including modifications of the stipulated payment schedule. Article 46 of the General Conditions states that such amendments must consist in a supplementary agreement signed by each of the parties.

Article 6 of the contract provides a specific payment schedule, where the final payment is due only after approval of the contractor's Final Report. DG 1A's services are further instructed to only exceptionally accept amendments to the initially agreed payment conditions and moreover in the "Addenda aux Contracts" of Directorate General of DG 1A it is stated that modifications in the payment schedule cannot result in increasing the number of foreseen payments. Consequently, Financial Directorate F refused to carry out payments not foreseen in the initial payments' schedule.

As regards the invoice submitted by the complainant in September 1997, the Commission explained that the original contract expired on 18 July 1997 but was extended twice (Addendum No. 4 and 5) until 18 December 1997 in order to assure the correct completion of the project. However, in accordance with the "Addenda aux Contracts", the request for an additional, separate payment was not accepted. The Commission rejected having advised the complainant on the phone to unilaterally alter the text of Addendum No. 4, in particular by the official pointed out by the complainant, who was on vacation at the time.

As regards the payment of interest, the Commission pointed out that Article 31 of the General Conditions provides a payment deadline of 60 days from the receipt of the request for payment. If this time limit is exceeded, the contractor is entitled to delayed interest. However, delayed interest constitutes a contractual claim, conditioned by the payment schedule in the contract. Where no payment is due for invoices submitted outside this agreed schedule, no delayed interest can accrue. Furthermore, Article 31 of the General Conditions states that the Commission is not responsible for delays attributable to the Contractor's own omissions and deficiencies in presenting the invoices. The Commission also stated that all claims for Fees and Direct Expenses in relation to this project had been paid in full and one invoice, resubmitted in April 1998 after corrections, was being processed.

As regards the complainant's claim for damages, the Commission did not consider the question of damages relevant and, in any event, no proof of any damage has been provided by the complainant.

The complainant's observations

In his observations, the complainant stated that the hand written amendment to addendum No. 4 was only made as a direct result of verbal advice received by the Commission. Without having been instructed to do so by a person representing the Commission, the complainant would not have taken this action.

Concerning the delayed payments, the complainant pointed out that the Commission did not address this issue but only referred to contractors' omissions and deficiencies. The fact that interest for late payment had later been forthcoming meant that the Commission accepted its failure to adhere to contractual conditions. The Commission did not however offer any explanations for the persistent delays in processing the payments of interest.

As regards the allegation concerning inconsistent, poor and confusing information on how to claim interest, the complainant stressed that the Commission did not answer this point.

The Commission's statement that all claims for fees and direct expenses had been paid in full was in fact incorrect since the complainant's latest invoice was still outstanding. It had to be resubmitted because of the Commission's failure to apply agreed changes to an addendum to the contract.

As regards the claim for damages, the complainant considered that damages was relevant regarding interest for late payments submitted in September which were rejected, regarding the complainant's inability to claim interest during the first 18 months of the contract due to confusing information and also for the considerable amount of time the

complainant's staff spent in following up delays and conflicting information from the Commission.

FURTHER INQUIRIES

After a careful consideration of the Commission's opinion and the observations of the complainant, the Ombudsman decided to ask the Commission for further information regarding firstly, whether the Commission had written instructions for staff dealing with contractors on the telephone and secondly, whether the Commission had a standard information sheet, or equivalent, to inform contractors of the conditions under which interest is payable and the procedures to be used to claim interest. The Ombudsman also invited the Commission to comment on the complainant's observations.

In its reply the Commission stated that regarding the observations of the complainant, these focused on the request for an additional payment. The Commission reiterated that it had not found any evidence that the complainant was told over the phone to hand-write an amendment to addendum No. 4. The Commission added a letter from the official who had talked to the complainant, stating that no such advice had been given. The Commission stated that it did not have written instructions for staff dealing with contractors on the telephone, however it had specific instructions on how to handle requests for additional payments. As regards information to contractors on payment of interest, the Commission referred to Article 31 of the General Conditions (which were part of the contract) and Article 30 of the revised version of the General Conditions stating that these were self-explanatory. Further, the Commission referred to an instruction sheet, which is provided to contractors on how to present invoices.

The Commission's second opinion was forwarded to the complainant. In his further observations, the complainant again stated that the hand-written amendment was a direct result of advice given by a Commission official. The complainant was however unable to put forward documentary proof but underlined that he refuted the statement of the Commission official and further, an internal note of the Commission with instructions on how to deal with requests for additional payments did not prove that the recommended procedure had in fact been applied. The complainant stressed that the Articles explaining the procedures for claiming interest are not self-explanatory but confusing. The Commission failed to address this alleged maladministration. The latest invoice had still not been paid to the complainant and the Commission did not respond to any of the points raised concerning damages.

In a telephone call in October 1999 between the complainant and the Ombudsman's services, the complainant confirmed that the last outstanding invoice had been paid. However, the Commission had not paid the sum confirmed by the Commission in writing in March 1998, but a reduced sum based on later calculations. The complainant assumed that the reduced payment was in line with the regulations of the Commission but he found it unacceptable that the Commission formally informed him that he would receive a certain sum when it later reduced this sum.

THE DECISION

1 Request for an additional payment

1.1 According to the complainant, the Commission issued Addendum No. 4 to the contract, signed it and then sent it to the complainant for signature. However, since the addendum did not include a reference to an additional payment as the complainant had requested, it contacted the Commission. The complainant claimed that in a telephone call it was instructed to hand-write the appropriate amendment on the existing addendum, then

sign it and return it to the Commission. In accordance with the hand-written amendment to Addendum No. 4, the complainant then submitted an invoice in September 1997.

1.2 The Commission refused to pay this invoice on the basis that it did not accept the hand-written amendment. Further it rejected having told the complainant on the telephone to unilaterally add the amendment. It put forward a statement by the official in question and a note from DG 1A with rules concerning contract modifications.

1.3 The contract between the Commission and the complainant contained among other things the payments schedule and number of payments. According to Article 13 of the contract any amendment to the contract must be agreed in writing. According to Article 46 of Annex E (General Conditions for Service Contracts financed from TACIS funds) of the contract, the provisions of the contract and the annexes thereto may be amended only by a supplementary amendment signed by both parties.

1.4 In order to assure the correct completion of the project, Addendum No. 4 was issued to prolong the contract and to modify the breakdown of prices. It was signed by the Commission and then sent to the complainant for signature. However, before signing it the complainant made a hand-written amendment that an interim invoice could be submitted for payment in August 1997.

1.5 Regarding the hand-written amendment, the Commission provided a note from the official who had spoken to the complainant with the statement that the official had not given the complainant the advice to unilaterally add an amendment to the addendum. The complainant refuted this statement. The Commission also provided a note concerning contract addenda concluded by DG 1A. The note stated that modifications in the payment schedule could not result in increasing the number of foreseen payments. The complainant put forward that an internal note does not prove that the recommended procedure had in fact been applied. As regards this aspect of the case, there is therefore a conflict of evidence. In light of the above and further, since according to the rules of the contract, no formal amendment regarding an additional payment was made, it has not been proved by the complainant that the Commission advised him to unilaterally add the amendment to Addendum No. 4.

1.6 Therefore, the Ombudsman found that there was no instance of maladministration in relation to this aspect of the case.

2 Delayed payments

2.1 The complainant stated that all payments under the contract had been late and not paid within the contractual 60 days and submitted a table outlining the delays of up to 223 days. The complainant also later stated that the Commission did not offer any explanations for the delays.

2.2 The Commission did not comment on this allegation by the complainant, neither in its first nor its second opinion but only stated that payments had in the mean time been made.

2.3 It is good administrative behaviour to act in accordance with a contract and to make payments within a reasonable time. In the present case, the Commission did not comment on the allegation by the complainant regarding delayed payment. The Ombudsman considered that, even if payments now have been made, the information submitted by the complainant clearly showed that there were delays for which there was no due reason. This constitutes an instance of maladministration. The Ombudsman therefore addressed a critical remark to the Commission.

3 Information on how to claim interest

3.1 The complainant put forward that the information given by the Commission on how to claim interest was inconsistent, poor and confusing resulting in that the complainant had

difficulties to claim interest for late payment. As regards this matter, the complainant attached correspondence with the Commission.

3.2 The Commission did not comment in detail on the complainant's allegations regarding inconsistent and confusing information but referred to Article 31 of the General Conditions (which were part of the contract) and Article 30 of the revised version of the General Conditions stating that these were self-explanatory. Further, the Commission referred to an instruction sheet on how to present invoices.

3.3 Article 31 of the General Conditions concerns "Payment Schedule". It says that payment shall be made within 60 days of receipt of the request for payment. Paragraph 5 of Article 31 refers to interest, it states:

"If the time-limits for payments are exceeded, and the Contract has not given rise to any claim, the Contractor shall automatically and without notice be entitled to interest calculated pro rata on the basis of the number of calendar days by which payment is delayed, at the discount rate of the issuing institute of the State in which the Contractor has requested payment to be made"

Article 31 of the General Conditions hence provides the information that the contractor, i.e. in the present case the complainant, has the right to receive interest if the time limits for payments are exceeded.

3.4 It is good administrative behaviour to provide information upon request. The complainant sought clarification from the Commission on how to claim interest and on at least two occasions differing advice was given by the Commission. The Commission did not put forward any comments in its opinions to the Ombudsman on the complaint as regards this aspect. The Ombudsman found that the complainant showed that the Commission did not, upon the complainant's reasonable request, supply clear information within an acceptable period of time. This constituted an instance of maladministration. The Ombudsman therefore addressed a critical remark to the Commission.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it was necessary to make the following critical remarks:

It is good administrative behaviour to act in accordance with a contract and to make payments within a reasonable time. In the present case, the Commission did not comment on the allegation by the complainant regarding delayed payment. The Ombudsman considers that, even if payments now have been made, the information submitted by the complainant clearly showed that there were delays for which there was no due reason. This constitutes an instance of maladministration.

It is good administrative behaviour to provide information upon request. The complainant sought clarification from the Commission on how to claim interest and on at least two occasions differing advice was given by the Commission. The Commission did not put forward any comments in its opinions to the Ombudsman on the complaint as regards this aspect. The Ombudsman found that the complainant showed that the Commission did not, upon the complainant's reasonable request, supply clear information within an acceptable period of time. This constituted 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.

ENDORSEMENT OF A CONTRACT AND SUBSEQUENT REFUSAL TO FINANCE IT

Decision on complaint 540/98/(XD)ADB against the European Commission

THE COMPLAINT

The complainant, SYSTEMS EUROPE S.A. (hereinafter SE), was awarded a supply contract SEM/03/608/010 signed in the framework of an Electricity Support Program for Syria backed by the European Commission (Tender reference IB/0028). This contract was signed by SE and the Syrian Government on 11 September 1997 and was endorsed by the Commission's Delegation in Syria (hereinafter the Delegation) on 18 September 1997.

On 20 October 1997, the Delegation informed SE that Directorate General 1B (hereinafter DG 1B) of the Commission was not able to approve the contract at that stage. SE should not proceed with the work until receipt of such approval. The company decided not to suspend the work for the following reasons :

- SE had already begun the work and mobilised important human resources.

- The time schedule was particularly tight (the various stages of the project had to be finished respectively 4, 5 and 6 months after the signature of the contract).

- A cessation of the work would have had considerable drawbacks.

- Possible flaws in the tender procedure should have been known by the Commission before the endorsement of the contract.

On 12 January 1998, the Delegation informed SE in writing that the Commission could not approve the funding of the contract and that it would ask the Syrian authorities to cancel it. This was done on 19 January 1998. However, according to the contract, an important part of the work had to be finished by that date. SE put forward that the Commission gave no reasons for the cancellation request.

Further to SE's request for explanations a Commission official explained that SE did not bear any responsibility in the circumstances which led to the cancellation. Apparently this situation stemmed from internal errors within the Institution. The Commission assured that the quality of SE's work was not in question and that the company would remain included in the list of potential suppliers.

Having suffered considerable financial loss and given the dramatic consequences on its professional image, SE unsuccessfully attempted to obtain compensation and therefore lodged a complaint with the European Ombudsman.

The complainant made the following allegations :

1 SE alleged that the European Commission refused to finance a contract although it had been unconditionally endorsed by the Commission's Delegation in Syria.

2 SE alleged that it was not informed of the reasons for the Commission's request to cancel the contract, nor had SE been given the opportunity to defend itself.

3 SE alleged that the Commission refused to bear any responsibility for the cancellation of the contract and refused to pay damages to SE.

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 call for tenders was launched by the Syrian authorities in the framework of a financial protocol signed between Syria and the EEC. Before financing a contract the Commission carries out controls over the tender procedure.

The Commission found that the present tender procedure was vitiated by major irregularities. The only two applicants (ÉLECTRICITÉ DE FRANCE and SE) participated in the Syrian project as consultants. Given that they were likely to have participated in the design of the call for tenders, the Commission suspected conflict of interests.

Furthermore, the report made by the Syrian authorities did not mention any price comparison. Finally, during the tender procedure SE had twice been called for negotiations with the Syrian authorities, which in the Commission's view could indicate conflict of interests.

Given these circumstances, the Commission informed the Syrian authorities that it would not be able to finance the contract. The Syrian authorities decided out of their own sovereignty to cancel the contract, but could have financed it out of their own funds without the Union's help. Once the contract was cancelled, the managers of SE were informed of the reasons for the cancellation request.

The Commission rejected any responsibility. It held that claims for damages should be directed to SE's co-contractor, namely the Syrian authorities.

The complainant's observations

The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. In its reply of 28 October 1998, SE put forward that the Commission's opinion contained legal and factual errors. The complainant's observations can be summarised as follows :

The contract was indeed signed between SE and the Syrian authorities, but it had also been endorsed by the Delegation. The Commission was therefore a party to the contract and committed to financing it. Furthermore, the Syrian authorities decided to cancel the contract on the Commission's express request and not, as falsely alleged by the Commission, out of its own sovereignty. Thus SE considered itself prejudiced by the Commission's unilateral decision to break its commitment.

The factual circumstances surrounding the tender procedure, considered as irregularities by the Commission, were all known to the Commission before the formal endorsement. Thus they did not invalidate the Commission's consent to grant its financial assistance.

SE was indeed a consultant in the programme, but never participated in the branch of the programme for which it was awarded the contract. Nor did SE meet the Syrian authorities in charge of the tender to negotiate with it, but merely to provide technical information about its application.

FURTHER INQUIRIES

1 The Ombudsman asked the Commission to inform him whether it became aware of the alleged irregularities before the endorsement.

The Commission's additional opinion

The Commission repeated that it had never signed nor cancelled a contract with SE. The Delegation had considered that the conditions for financial assistance were met. On 18 September 1997 it provisionally endorsed the contract though irregularities were suspected beforehand. Subsequently the file was transmitted for the final decision to DG 1B of the Commission. On 20 October 1997, SE was asked not to begin with the work

before the final approval. Both SE and the Syrian authorities were informed of DG 1B's refusal to finance the project on 12 January 1998.

The complainant's additional observations

SE was given the opportunity to comment on the Commission's additional opinion. SE put forward that it had not been informed of the alleged provisional character of the Delegation's endorsement. It therefore believed in good faith that the Delegation had the power to commit the Commission. The lack of transparency in the sharing of responsibility in this kind of procedure had already been evidenced by the Court of Auditors in 1991[76]. The Delegation's endorsement produced legal effects towards SE, its withdrawal in turn created a situation which infringed the general principle of protection of good faith. Furthermore, the Commission took an act adversely affecting SE, but failed to motivate it and failed to give SE an opportunity to defend itself.

2 In order to clarify the decision making process in this case and to determine the actual decision making authority within the Commission, the Ombudsman asked the Commission for additional information as to the legal basis of the procedure followed. He also inquired about the delay in this procedure.

The Commission's additional opinion

The Commission informed the Ombudsman that in accordance with the EC Financial Regulation, Title IX, External Aid, it controlled the whole award procedure carried out by the local contractor (in this case PEGTE[77]). The agreement to fund a contract is materialised in its "endorsement". The responsibility for making this decision is divided between the Delegation and the "Headquarters" in Brussels (i.e. DG 1B). In the present case, as laid down in DG 1B's Instructions of 30 September 1996[78], for supply contracts exceeding 137.000 ECU, the endorsement should have been made by the Delegation after express authorisation by the "Headquarters". Actually the Delegation endorsed the contract before it transmitted the file to DG 1B/E2 in Brussels and before it received the authorisation from Brussels.

As to the delay in the procedure cited by the Ombudsman, the Commission repeated that SE had been warned not to proceed with the work one month after the endorsement of the contract. The length of time (4 months) for analysing such a complex case and deciding not to finance the contract was not considered as excessive by the Commission.

Finally, the Commission informed the Ombudsman that it "[contested] the complainant's arguments regarding its financial responsibility under the aspect of the protection of good faith and shall answer them eventually at the proper venue."

The complainant's additional observations

SE was informed of the Commission's additional opinion. It maintained its claim and declared that the refusal to finance the contract seemed arbitrary. SE sustained this allegation by mentioning that two companies in a similar situation were allowed to participate in a call for tenders under the same programme. Despite their prior involvement in the Syrian programme no conflict of interests had been suspected.

3 The Commission had refused to answer SE's arguments regarding its financial responsibility in the framework of the Ombudsman's inquiry. Thus the Ombudsman asked the Commission to reconsider its position or to inform him of the reasons for its refusal.

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76 Court of Auditor's Special Report 3/91

77 **P**ublic **E**stablishment for **G**eneration and **T**ransmission of **E**lectrical Energy (PEGTE)

78 Note for Mr Anacoreta, Mr. Defraigne, Mr. Frossati, Mr Rhein, Heads of Unit and Heads of Delegation : "*Service, works and supply contracts, including local purchases, on behalf of the recipient in the framework of financing or grant agreements.*" – 30 September 1996

The Commission's final opinion

The Commission confirmed its position as to the complaint. It handed in a detailed explanation regarding the reasons which made DG 1B consider that there had been a conflict of interests. Furthermore it stressed that the companies which participated in a second call for tenders, contrary to SE's allegations, were in a substantially different situation.

The complainant's final observations

In its final observations, SE repeated that the Commission once again refused to answer its arguments as to its financial responsibility. SE also contested part of the explanations given by the Commission in its latest opinion.

THE DECISION

1 Refused financing of a contract despite its unconditional endorsement

1.1 SE alleged that the European Commission refused to finance a contract although it had been unconditionally endorsed by the Commission's Delegation in Syria.

1.2 The Commission objected that the contract could not be funded due to irregularities in the tender procedure.

1.3 In the course of the Ombudsman's inquiry, the Commission stated that the alleged irregularities, which motivated the Commission's refusal to finance the contract, were known before the endorsement. The Commission however claimed that the endorsement was provisional. Finally, in its third opinion, the Commission admitted that the Delegation had failed to act in accordance with the applicable internal procedure.

1.4 The Ombudsman found that the contract endorsed by the Delegation did not indicate that the endorsement was provisional. A careful examination of the applicable internal procedure[79] handed in by the Commission, revealed that in this case it was DG 1B-E/2's[80] responsibility to endorse the contract and not the Delegation's. The procedure does not foresee any possibility of a provisional endorsement.

1.5 During the inquiry, the Commission explained that the agreement to fund a contract is materialised in its endorsement. Nothing in the file indicated that the SE had knowledge of the Commission's internal endorsement procedure. Nor is there any indication that SE could have been aware of the Delegation's failure to comply with this procedure.

1.6 The Commission claimed that on 20 October 1997 SE had been asked by the Delegation not to proceed with the work until the formal decision by DG 1B. However, it must be noted that this occurred while the contract had been signed on 11 September 1997 and endorsed on 18 September 1997 and once SE was bound by contractual obligations, in particular by short deadlines. SE was informed of the Commission's formal refusal to finance the contract only on 12 January 1998.

1.7 Principles of good administration require the institution to act consistently. In the present case, the Commission failed to apply its own internal procedure and although it had knowledge of alleged irregularities failed to carry out all the relevant controls before

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79 Annex XV - Supply Contracts - Value of the contract : over ECU 137 000 of the Note for Mr Anacoreta, Mr. Defraigne, Mr. Frossati, Mr Rhein, Heads of Unit and Heads of Delegation : "*Service, works and supply contracts, including local purchases, on behalf of the recipient in the framework of financing or grant agreements.*" – 30 September 1996

80 ***"Procedure (…)***
7. Delegation sends assessment report with comments to Unit IB-E/2.
8. Unit IB-E/2 endorses the contract award.
9. Contract is signed by contracting authority then by successful bidder. (…)"

endorsing the contract. Nothing in the file indicates that the complainant should have been aware that the Commission had failed to carry out the correct endorsement procedure. SE could therefore legitimately have considered that it was in possession of a duly endorsed contract financed by the Commission. The Commission's acting therefore constituted an instance of maladministration.

2 Failure to inform the complainant and to give it the opportunity to defend itself

2.1 SE alleged that it was not informed of the reasons for the Commission's request to cancel the contract, nor had SE been given the opportunity to defend itself.

2.2 According to the Commission, SE had been informed that the cancellation request originated in irregularities in the tender procedure.

2.3 The Ombudsman noted that four months after the Delegation had endorsed the contract, the Commission informed SE that it would ask for its cancellation without giving any reasons for it. At that stage SE was informed that it bore no responsibility in the process that led to this request for cancellation.

2.4 It appeared that SE had only been informed of the actual reasons for the Commission's request to cancel the contract (i.e. possible conflict of interests) through the Ombudsman's investigation. Furthermore, although the Commission's refusal partially originated in SE's actions (i.e. alleged negotiations with the Syrian authorities and conflict of interests), SE was not given the opportunity to defend itself.

2.5 It is good administrative behaviour to act fairly and to respect legitimate expectations raised by the Institution's acting. In the present case the Commission has had several direct contacts with SE. It acted as an interlocutor and thereby raised legitimate expectations of the complainant. SE could have expected to be informed of the actual reasons for the Commission's decision. Furthermore, as a matter of fairness, SE should have been given the opportunity to comment on the alleged irregularities originating from its actions. The fact that the Commission failed therein constituted an instance of maladministration.

3 The Commission's financial liability

3.1 SE alleged that the Commission refused to bear any responsibility for the cancellation of the contract and refused to pay damages to SE. In the course of the Ombudsman's inquiry, the complainant raised several legal arguments relating to the Commission's financial liability stemming from the endorsement of the contract. The Commission twice omitted to enter the discussion on these points, and declared that it would "answer them eventually at the proper venue".

3.2 The Commission refused to enter the discussion on the complainant's arguments relating to the Commission's financial liability. The Commission therefore failed to provide the Ombudsman with a coherent and reasonable account of the legal basis for its actions and why it believes that its position concerning the issue of liability is justified. The Commission seemed to indicate that it would be ready to present the relevant arguments before a court.

3.3 The Ombudsman therefore concluded by referring to the right of the parties to have their dispute examined and authoritatively settled by a Court of competent jurisdiction.

4 Conclusion

On the basis of the European Ombudsman's inquiries in this case, it appeared necessary to make the following critical remarks:

Principles of good administration require the institution to act consistently. In the present case, the Commission failed to apply its own internal procedure and although it had

knowledge of alleged irregularities failed to carry out all the relevant controls before endorsing the contract. Nothing in the file indicates that the complainant should have been aware that the Commission had failed to carry out the correct endorsement procedure. SE could therefore legitimately have considered that it was in possession of a duly endorsed contract financed by the Commission. The Commission's acting therefore constituted an instance of maladministration.

It is good administrative behaviour to act fairly and to respect legitimate expectations raised by the Institution's acting. In the present case the Commission has had several direct contacts with SE. It acted as an interlocutor and thereby raised legitimate expectations of the complainant. SE could have expected to be informed of the actual reasons for the Commission's decision. Furthermore, as a matter of fairness, SE should have been given the opportunity to comment on the alleged irregularities originating from its actions. The fact that the Commission failed therein constituted an instance of maladministration.

Given that in the course of the Ombudsman's investigations, the Commission refused to enter the discussion on its liability, the Ombudsman decided to close the case with these critical remarks.

ALLEGED FAILURE TO REPLY AND REFUSAL TO GIVE ACCESS TO MINUTES OF AN EXPERT GROUP

Decision on complaint 1346/98/OV against the European Commission

THE COMPLAINT

In December 1998, Mr G. complained to the European Ombudsman alleging that since 1997 the Commission (DG VII – Transport) had failed to reply to his correspondence in relation to the interpretation of Commission Regulation (EC) n° 2812/94 of 18 November 1994 concerning inland waterway transport[81]. The complainant wrote to the Commission on 30 July and 8 September 1997 concerning the position, which the Commission had taken as regards the interpretation of the Regulation.

On 27 October 1998, further to a previous intervention of the European Ombudsman, the Commission sent an answer to the complainant's letter of 2 September 1998. However, the complainant was not satisfied with the reply because the Commission referred to minutes of a group of experts (on the structural reorganisation of the inland waterway transport), access to which was denied to the complainant on grounds of confidentiality. On 6 November 1998, the complainant met with officials of DG VII of the Commission who gave him documents (texts of regulations), but not the minutes of the group of experts on the subject.

The complainant therefore complained to the Ombudsman alleging that 1) the Commission had failed to reply to his correspondence on the interpretation of Regulation (EC) n° 2812/94 of 18 November 1994 and 2) that he was refused access to the minutes of the group of experts, because of the confidentiality of those minutes.

THE INQUIRY

The Commission's opinion

As regards the alleged failure to reply to the complainant's correspondence concerning the interpretation of Regulation (EC) n° 2812/94 of 18 November 1994, the Commission recalled the facts underlying the complaint and made the following comments:

On 10 March 1997, the Dutch Breaker's Fund paid a visit to DG VII and informed them that the complainant had sent a complaint to the Dutch national Ombudsman because of

81 Commission Regulation (EC) n° 2812/94 of 18 November 1994 amending Council Regulation (EEC) n° 1101/89 as regards the conditions which apply to the putting into service of new capacity in inland waterway transport.

the bad treatment of his case by the said Fund in 1994. Further to that meeting, the Dutch Ministry of Transport interrogated the Commission by letter of 13 March 1997 on the significance and the objective of the transitional period of six months foreseen in Article 2 of the Regulation.

By note of 24 March 1997, DG VII consulted the Legal Service of the Commission on the interpretation of the Regulation as well as on the draft reply to the Dutch authorities. The Legal Service replied by note of 10 April 1997 and DG VII sent the response to the Director of the Dutch Breaker's Fund on 6 May 1997.

Three months later, the complainant sent a fax to DG VII on 30 July 1997 and two reminders on 3 August and 8 September 1997. However DG VII had agreed with the Dutch authorities to postpone any reply to the complainant until it received the official request for information from the Dutch Ombudsman in order to make complete and motivated answers on the file.

DG VII replied on 5 December 1997 to the letter of 24 October 1997 of the Dutch Ombudsman. DG VII thought that it had replied at that time to all the questions of the complainant on the interpretation of the Regulation. DG VII however received a new letter from the complainant dated 30 July 1998 in which the complainant asked questions on the interpretation that DG VII had given to the Regulation in its letter to the Dutch Ombudsman. On 13 August 1998, DG VII answered the 5 questions of the complainant.

On 2 September 1998, the complainant sent a new letter to DG VII in which he asked similar questions again. The complainant also sent a fax on 26 October 1998. By letter of 27 October 1998, DG VII replied to all the questions of interpretation.

After the complainant lodged the complaint with the European Ombudsman, DG VII continued to receive letters from the complainant to which it replied on 9 December 1998 and 29 January 1999. The Commission therefore concluded that there could be no doubt about the fact that there was no failure to reply by DG VII concerning the interpretation of the Regulation.

As regards the refused access to the minutes of the group of experts on the structural reorganisation of the inland waterway transport, the Commission made the following comments:

By fax dated 28 October 1998, the complainant asked DG VII for all minutes of the meetings of the group of experts since December 1994 and for a meeting in the offices of DG VII.

On 6 November 1998, the complainant was met by DG VII in Brussels and obtained a full file containing all the notes on the uniform application of Regulation 1101/89, as well as two sets of minutes of the group of experts containing the conclusions of the group on the preparation of Regulation (EC) n° 2812/94. DG VII also informed him that, for reasons of confidentiality, but also after having made the balance between, on the one hand, the interest of the complainant in obtaining the documents and, on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, it was not possible to provide him with all the minutes of the group of experts, because none of the meetings had studied his case which had been dealt with directly with the Dutch Breaker's Fund.

Later, in a series of e-mails between the complainant and DG VII, the Commission recalled that, in application of the Code on public access to Commission documents adopted by the Commission on 8 February 1994, the Commission only gives access to its own documents. When the request concerns a document from a third party, like a letter from a Member State, the applicant should address the author of the document. As regards the minutes of the group of experts, DG VII, in an e-mail of 13 November 1998, drew the complainant's attention to the principles and the references of the Code on public access

to Commission documents (OJ L 46/58 of 18 February 1994 and L 247/45 of 28 September 1996).

On the basis of the above observations, the Commission concluded that it could not give access to all the minutes of the group of experts constituted by professional organisations. The Commission annexed copies of all the letters, faxes and e-mails it had sent to the complainant.

The complainant's observations

The complainant maintained his complaint. According to the complainant, the Commission was supporting an interpretation of the Regulation, which was favourable to the Dutch authorities but not to the complainant. The complainant also observed that the Commission's interpretation could not be sustained by legal arguments and that the Commission officials had been wrongly informed by the officials from the Dutch Breaker's Fund.

THE DECISION

1 The alleged failure by DG VII of the Commission to reply to the various questions of the complainant

1.1 The complainant alleged that the Commission failed to reply to his correspondence in which he asked questions on the interpretation of Commission Regulation (EC) n° 2812/94 of 18 November 1994. Referring to the different letters it sent to the complainant and which were annexed to its opinion, the Commission concluded that there could be no doubts about the fact that there was no failure to reply by DG VII concerning the interpretation of the Regulation.

1.2 The Ombudsman noted that, from the different letters, which the Commission annexed to its opinion, it appeared that DG VII had on several occasions replied to the various interrogations of the complainant. DG VII, in particular, had sent answers to the complainant on 13 August and 27 October 1998, as well as after the lodging of the complaint with the Ombudsman, on 9 December 1998 and 29 January 1999.

1.3 In its reply of 13 August 1998 DG VII answered 5 questions put forward by the complainant concerning the interpretation which DG VII had given to Regulation n° 1101/89 as amended by Regulation n° 2812/94 in its letter of 5 December 1997 to Mrs L. De Bruin, the Dutch Deputy Ombudsman.

1.4 Regulation n° 2812/94 foresees a transitional measure concerning the so-called "old-for-new" rule and stipulates three conditions[82]. According to Article 2 of the Regulation, the 1:1 ratio between the old tonnage and the new tonnage (instead of the 1,5:1 ratio) continues to apply to vessels the construction of which has reached a certain stage and which are put into service within six months of the entry into force of the Regulation (i.e. on 9 June 1995). In its letter of 13 August 1998 to the complainant, DG VII replied that the aim of the legislator by introducing the transitional measure was not to prejudice the shippers who had invested in the construction of a vessel and foreseen a construction cost

[82] Article 2 of Regulation 2812/94 provides that: "*For vessels in respect of which the owner proves that: construction was underway on the date of publication of this Regulation, and that*

work already carried out by the date of publication of this Regulation represents at least 20% of the steel weight or 50 tonnes, and that

delivery and commissioning is to take place within the six months following the entry into force of this Regulation,

the conditions set out in article 8(1)(a) of Regulation (EEC) n° 1101/89, as they applied before the entry into force of this Regulation, shall continue to apply, on request to the authorities of the Fund covering the vessel".

"old-for-new" ratio of 1:1 by imposing at once the 1,5:1 ratio when the construction of the ship was still underway. DG VII informed the complainant that the Breaker's Fund could only evaluate the situation of the construction and the commissioning before the date of 9 June 1995. DG VII equally replied to the complainant that, when the vessel remained in the shipyard, it was not commissioned before 9 June 1995 and thus one of the conditions for the transitional measure was not fulfilled.

1.5 Further to a new letter from the complainant of 2 September 1998, DG VII replied on 27 October 1998 and confirmed its standpoint as communicated in its letter of 5 December 1997 to the Dutch Deputy Ombudsman and in its letter of 13 August 1998 to the complainant. On 9 December 1998 and 29 January 1999, DG VII sent two more letters to the complainant concerning the notions of "vessel under construction" and of "the owner" of the vessel.

1.6 From the above the Ombudsman concluded that the Commission had sufficiently well replied to the complainant's requests concerning the interpretation of the Regulation by providing him with the necessary information at the basis of the interpretation. As regards this aspect of the case, the Ombudsman therefore found no instance of maladministration.

1.7 As regards the interpretation given by the Commission, the complainant alleged that it could not be sustained by legal arguments and that it was favourable to the Dutch authorities but not to the complainant. The Ombudsman notes that DG VII, before replying to the Dutch Breaker's Fund on 6 May 1997, had previously consulted the Legal Service on the interpretation of the Regulation by asking its opinion on the draft reply of the letter to be sent to the Dutch Breaker's Fund. The Ombudsman would however like to recall that the Court of Justice is the highest authority on questions of application and interpretation of Community law.

2 The alleged refused access to the minutes of the group of experts

2.1 The complainant alleged that he was refused access to the minutes of the group of experts on the structural reorganisation of the inland waterway transport. The Commission observed that the complainant, who had requested access to all the minutes of the group of experts since December 1994, had been met by DG VII on 6 November 1998 and had obtained a full file containing all the notes on the uniform application of the Regulation n° 1101/89, as well as two sets of minutes of the group of experts containing the conclusions of the group on the preparation of Regulation n° 2812/94.

2.2 As regards the other minutes, the Commission first invoked that, because of reasons of confidentiality, but also after having made the balance between, on the one hand, the interest of the complainant in obtaining the documents and, on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, it was not possible to provide him with all the minutes of the group of experts, because none of the meetings had studied the complainant's case which had been dealt with directly by the Dutch Breaker's Fund. Later the Commission recalled that, in application of the Code on public access to Commission documents, the Commission only gives access to its own documents. When the request concerns a document from a third party, the applicant should address the author of the document.

2.3 From the additional information, which the complainant sent to the Ombudsman on 19 January 1999, it appeared that the complainant was finally given access to the minutes of the group of experts. In his letter of 13 January 1999 to the Commission, the complainant informed DG VII that, on the basis of the Dutch Law on Transparency of the Administration, he obtained access to all the minutes since 1994 in the Dutch Ministry of Transport. The Ombudsman therefore considered that no further inquiries into this aspect of the case were necessary.

2.4 The Ombudsman however made the following observations concerning the reasons invoked by the Commission to deny the complainant access to the said minutes. Principles of good administration require that a decision adversely affecting an individual state the

grounds on which it is based *by indicating clearly the relevant facts and the legal basis of the decision*[83]. The Ombudsman however noted that the Commission had in fact, on different occasions, given various reasons to refuse access to the complainant.

2.5 The Commission firstly observed that access could not be given because of reasons of confidentiality and after having made the balance between, on the one hand the interest of the complainant in obtaining the documents, and on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, and because none of the meetings had dealt with the complainant's case. However, later, in the e-mail of 14 November 1998, the Commission gave another argument to deny access which is that it could only give access to its own documents, and that for documents originating from a third party, the applicant should address himself to the author of the document.

2.6 The Ombudsman therefore concluded that taken together, the reasons were inadequate to explain the rejection of the complainant's request for access to the minutes of the group of experts. The Ombudsman therefore made the critical remark below.

3 Conclusion

On the basis of the European Ombudsman's inquiries into part 2 of this complaint, it appeared necessary to make the following critical remark:

Principles of good administration require that a decision adversely affecting an individual state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision[84]. *The Ombudsman however notes that the Commission has in fact given different reasons on different occasions to refuse access to the complainant.*

The Commission firstly observed that access could not be given because of reasons of confidentiality and after having made the balance between, on the one hand the interest of the complainant in obtaining the documents, and on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, and because none of the meetings had dealt with the complainant's case. However, later, in the e-mail of 14 November 1998, the Commission gave another argument to deny access, i.e. that it could only give access to its own documents, and that for documents originating from a third party, the applicant should address the author of the document.

The Ombudsman therefore concluded that giving different reasons for a decision on different occasions is a practice that may confuse a citizen and does not indicate the true reasons for the decision. Thus it constituted an instance of maladministration.

Given however that the complainant finally did obtain access to the information requested, no further inquiries into this aspect of the complaint were necessary. The Ombudsman therefore decided to close the case.

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83 See Article 18 of the Code of Good Administrative Behaviour of the European Ombudsman.

84 See Article 18 of the Code of Good Administrative Behaviour of the European Ombudsman.

OPEN COMPETITION: INFORMATION TO BE SUBMITTED BY EC OFFICIALS AND OTHER SERVANTS TO PROVE THEIR STATUS

Decision on complaint 198/99/(PD)JMA against the European Commission

THE COMPLAINT

The complainant applied to participate in open competition EUR/A/123, but the Selection Board refused to admit her to the tests. In a letter from the Commission's services of 25 February 1998 she was informed that she did not meet the criteria set out for Community officials and other servants to participate in the competition. The letter explained that by not including any supporting document, the complainant had not followed the requirements of points IV.3 and X.1 of the notice of competition. In an additional reply from the institution dated 16 April 1998, the Commission explained that the complainant had not included any document with her application form in order to prove her status as Community official.

She contested her exclusion on 12 March 1998, pointing out in her letter, that points IV.3 and X.1 of the notice concerned conditions applicable to all candidates, whereas the specific conditions applicable to Community officials and other servants, were set out as an Annex to the notice. The complainant explained that the age limit was the only condition she did not meet. However, as laid down in point 1 of the notice's Annex, Community officials were excluded from that requirement. Furthermore, she claimed that the letter from the Commission had not clearly stated the reasons for rejecting her application.

In the complaint to the Ombudsman, the complainant added that other candidates with similar conditions had been admitted to the tests, and that her exclusion therefore constituted an instance of discrimination by the Commission. The complainant considered it unreasonable for the Commission to request professional information from its own employees, especially since the institution, as the employer, was in a better position to obtain that data.

The complainant enclosed with her complaint a copy of a letter from the Commission to another candidate. The letter informed the candidate of his admission to the tests of the competition, and set another deadline for the presentation of additional documents, which could prove his status as an EC official. She also added a copy of a competition (COM/A/11-12/98) which was published in the OJ C 97 A of 31 March 1998 in which similar provisions had been inserted as regards Community officials and other servants. However, the text had been more precise and set in details the specific information to be submitted by EC officials and other servants to prove their status.

The complainant concluded that the decision of the Commission excluding her from the competition was illegal and discriminatory, since

(i) point 5 in the Annex of the competition's notice did not refer to the need to include additional documents, but merely that EC officials and other servants "provide all the information needed";

(ii) other candidates with the same status had been admitted to the competition and given additional time to provide additional information.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained the general background of the case. The complainant had applied to participate in open competition EUR/A/123 organised jointly by the European Commission and the Court of Auditors[85].

Point III of the notice of competition lays down the conditions applicable generally to all candidates: point III.A contains the general conditions; point III.B refers to some special conditions, whereas point III.C refers to the conditions applicable specifically to Community officials and other agents, which are set out in the Annex. In this last case, the provision contemplated a number of dispensations concerning age limit, professional experience and diplomas. Point 5 of the Annex states that "*it will be for the officials and other servants applying for the competition to provide all the information needed to show that they meet the conditions of seniority referred to in art. 1, 2 and 3*".

The Commission explained that the Guide to candidates taking the competition, published jointly with the notice of competition, indicated that candidates would not be admitted unless they had included supporting documentation with their application form.

Although the complainant had forwarded some additional documentation to the Jury on 12 March 1998 regarding her status as EC official, these documents could not be taken into account since they had been sent after the application date, as set out in point IV.3 of the notice.

As for the additional deadline given to other EC officials and other servants who had also applied to the competition, the Commission explained that this possibility had been granted by the Jury only to those EC officials and other servants who had already forwarded a *prima facie* proof of their status.

The Commission concluded by pointing out that in the absence of any element annexed to the application form which might have allowed the Selection Board to verify the complainant's status as an EC official, the general age criteria could not be excluded, and thus her application had to be declared inadmissible.

In a separate page added to the Commission's opinion and marked as confidential, the Commission enclosed some additional information for the Ombudsman. The information concerned the number of applicants and those among them who were EC officials. It also referred to the number of EC officials and other servants who were not admitted to the tests because they did not include sufficient proof of their status, those who appealed the decision, and the number of officials who were initially admitted under the condition that additional evidence of their status should be sent to the Commission.

The complainant's observations

The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. In her reply, the complainant generally maintained the arguments already stated in the original complaint.

The complainant stressed that she had included in the application form all the personal information required, as well as the data concerning her professional status as an EC official such as her personal number, administrative address and telephone number. She outlined that the information submitted included sufficient elements to show that she met the conditions specified in the Annex to the competition's notice. As for the reference to the Guide to candidates published jointly with the notice, the complainant considered that

85 OJ C 288 A of 23.09.1997, p.15

the Guide, unlike the notice, was merely an information document deprived of any legal value.

In the complainant's view, point 5 of the Commission's opinion was contradictory. The Commission had pointed out that it had only accepted those Community officials and other servants who had submitted *prima facie* evidence such as copy of "*a certificate of service, copy of the titularisation act, copy of the contract, last salary slip or copy of the ID card*". The complainant pointed out that these were the same elements which the Commission had taken into account to provisionally admit to the competition some EC officials and other servants who should provide, at a later stage, more evidence as regards their status.

THE DECISION

1 Information to be submitted by Community officials applying for competition EUR/A/123

1.1 The complainant claimed that she was improperly excluded from open competition EUR/A/123 since, as a Community official, she had forwarded the information required by point 5 of the Annex to the notice of the competition. In her view, the data she included in the application, namely her personal number, administrative address, current post and service, was sufficient for the institution to verify that she met the required conditions of seniority.

1.2 The Commission interpreted that when point 5 of the Annex to the notice referred to "all the information needed", it meant certain documents which by their nature constitute proof of the required seniority. These documents could include, *inter alia*, a certificate of service, copy of the titularisation act, copy of the contract, or last salary slip.

In support of its interpretation, the Commission pointed out that the Guide to candidates taking the competition, published jointly with the notice of the competition, indicated that candidates would not be admitted unless they had included supporting documentation with their application form.

1.3 As the Community courts have consistently held, the notice of competition forms both the legal basis and the basis of assessment for the Selection Board. The purpose of the notice is to give those interested the most accurate information possible about the conditions of eligibility for the post, in order to enable them to judge, first, whether they should apply for it, and secondly, what supporting documents are important for the proceedings of the Selection Board and must therefore be enclosed with the application[86].

1.4 The conditions applicable to candidates in open competition EUR/A/123 were laid down in point III of the notice of competition. Specific conditions applied to officials and other servants of the European Communities, were set out in the Annex to the notice. In order to benefit from the exclusions provided for in this Annex, its point 5 stated:

"It will be for the officials and other servants applying for the competition to provide all the information needed to show that they meet the conditions of seniority referred to at 1, 2 and 3".

1.5 The Ombudsman noted that, as illustrated by the complainant and not refuted by the Commission, the wording of similar provisions in ensuing competitions has been modified, and it is now more precise as to the type of evidence that EC officials and other servants ought to submit to prove their status. Thus, the Commission now requires that

86 See, T-158/89, *Van Hecken v. ESC* [1991] ECR II-1341 par. 23; T-54/91, *Almeida Antunes v. Parliament* [1992] ECR II-1739, par. 39.

Community officials and other servants enclose with their application certain documents such as the copy of the titularisation act or copy of the contract and the last salary slip.

In contrast, the notice for competition EUR/A/123, which constituted the only legal basis for that competition, only asked EC officials and other servants to provide the necessary information, so that the seniority requirements of the Annex could be verified. Information is a generic term, which can encompass documents or copies of them, but also facts being told, heard or discovered.

1.6 The complainant had submitted with her application form information regarding her career as a Community official. Given the nature of the data submitted, the competent Commission services could have easily verified her seniority in the institution.

The Ombudsman is aware that the role of the personnel service of the Commission is not to send to selection boards the complete file of some candidates in competitions, since this would impose a heavy burden and, as the Community courts have pointed out, run counter to the principle of proper administration[87]. However, in the present case, the Commission services would have only been called to simply verify certain information, as laid down in the notice of the competition.

1.7 The Ombudsman therefore concluded that by submitting data concerning her personal number, administrative address, current post and service, the complainant had provided the information referred to in the Annex to the notice of competition.

The Commission's failure to ensure that the complainant be admitted to the competition constituted therefore an instance of maladministration.

In view of the conclusion reached by the Ombudsman as regards this previous issue, it was not necessary to assess the additional claim made by the complainant, namely that she had been discriminated against compared to other Community officials who had been admitted to the competition.

2 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remarks:

The complainant had submitted with her application form information regarding her career as a Community official. The competent Commission services could have easily verified her seniority in the institution.

The Ombudsman therefore concluded that by submitting data concerning her personal number, administrative address, current post and service, the complainant had provided the information referred to in the Annex to the notice of the competition.

The Commission's failure to ensure that the complainant be admitted to the competition 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

Having assessed the evidence marked as confidential in the Commission's opinion, the Ombudsman concluded that these materials had no direct relationship with the subject

[87] Case T-133/89, *Jean-Louis Burban v. Parliament* [1990], ECR-II-245, par. 31.

matter of the complaint, and therefore that were not taken into account in the conclusions of this decision.

In the light of the content of these materials, the Ombudsman could not understand the reasoning, which might have led the Commission to classify them as confidential. The Ombudsman did not share the Commission's view that public disclosure of statistical information on the number of candidates who were accepted to the competition, the number of EC officials and other servants who were not admitted to the tests because they did not include a sufficient proof of their status, or those who appealed that decision, could by any means impinge on the secrecy of the work of the Selection Board.

INELIGIBILITY FOR A STUDENT JOB AT THE COMMISSION

Decision on complaint 890/99/BB against the European Commission

THE COMPLAINT

In July 1999, Mr L. made a complaint to the European Ombudsman on behalf of his daughter concerning the decision of the European Commission DG IX (Personnel and Administration). The complainant alleged an instance of maladministration in that eligibility for student jobs during summer holidays at the Commission is solely reserved for children of Commission employees. In May 1999 the complainant's daughter had applied for a student job during summer holidays at the Commission but was not eligible, because these summer jobs are reserved for children of Commission officials. The complainant is an employee at the European Parliament.

The complainant also alleged lack of reply to the fax he sent on 10 June 1999 to DG IX. In his fax, the complainant requested DG IX to investigate the manner of recruiting personnel for summer jobs at the Commission.

THE INQUIRY

The Commission's opinion

In its opinion the Commission made, in summary, the following remarks:

(i) The student jobs were advertised through internal information channels for the personnel of the European Commission.

It is true that the Commission reserves student jobs during the summer holidays for children of officials and agents of the Commission. The Commission regretted that this way children of employees in other institutions are excluded. However, the Commission was of the view that all changes to this practice would be unreasonable and contrary to the principles of proportionality and cost-efficiency.

Taking into account the limited number of jobs (about 60 in July and 60 in August), an opening for the entire personnel of the Community institutions would provoke a great number of applications and unnecessary frustration for the candidates.

The daily allowance (1.500 FB) is inferior to the conditions of the Brussels Market and therefore cannot be considered an advantage in favour of officials and agents of the Commission.

The limited access reduces the costs and administrative effort linked to the operation. This would not be the case if the system were open to all students of the European Union.

The Commission has no intention at this stage to modify the rules on eligibility for the few student jobs in its services. The Commission is of the view that it is up to each institution to decide whether to offer student jobs and how to do so. The alternative would most probably be simply to abandon the use of this type of services.

(ii) As regards the fax of 10 June 1999, the Commission regretted that the complainant did not receive a formal reply confirming on a higher level the negative reply he had received the same day on the telephone.

The complainant's observations

The complainant maintained his complaint. He considered that the explanations put forward by the Commission were self-contradictory. If the compensation were modest the only students interested would be the ones living in the Brussels area. There would in any case be no need to organise a big campaign for recruitment.

THE DECISION

Ineligibility for a student job at the European Commission

1.1 The complainant alleged an instance of maladministration in that eligibility for student jobs during summer holidays at the Commission is solely reserved for children of Commission employees.

1.2 In its opinion the Commission stated that is true that it reserves student jobs during the summer holidays for children of officials and agents of the Commission. The Commission regretted that this way children of employees in other institutions are excluded. However, the Commission was of the view that all changes to this practice would be unreasonable and contrary to the principles of proportionality and cost-efficiency.

1.3 Principles of good administrative behaviour require the Commission to respect the principle of equality of treatment in its activities. Members of the public who are in the same situation should be treated in a similar manner. If any difference in treatment is made, the Commission should ensure that it is justified by the objective relevant features of the particular case. To make eligibility for paid employment by a public body dependent on a family connection violates the principle of equality of treatment.

1.4 The Commission's opinion referred to the principles of proportionality and cost-efficiency. However, these principles have no bearing on a case, which involves a discriminatory practice by a public body using public money.

1.5 The Ombudsman therefore found that the fact that the Commission as a public body using public money reserves student jobs during the summer holidays solely for children of officials and agents of the Commission, constitutes an instance of maladministration.

2 Alleged lack of reply

2.1 The complainant claimed that he did not receive a reply from the Commission services to his fax of 10 June 1999.

2.2 In its opinion the Commission regretted the fact that the complainant did not receive a formal reply confirming on a higher level the negative reply he had received the same day on the telephone.

2.3 Principles of good administration require that correspondence from the citizens to the Commission administration receive a reply within a reasonable time. However, the Commission gave a reply to the complainant's fax of 10 June 1999 the same day on the telephone and it regretted the fact that the complainant did not receive a formal written reply. Therefore, the Ombudsman's inquiries did not reveal an instance of maladministration in relation to this aspect of the case.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it was necessary to make the following critical remark:

Principles of good administrative behaviour require the Commission to respect the principle of equality of treatment in its activities. Members of the public who are in the same situation should be treated in a similar manner. If any difference in treatment is made, the Commission should ensure that it is justified by the objective relevant features of the particular case. To make eligibility for paid employment by a public body dependent on a family connection violates the principle of equality of treatment.

The Commission's opinion referred to the principles of proportionality and cost-efficiency. However, these principles have no bearing on a case, which involves a discriminatory practice by a public body using public money.

The Ombudsman therefore found that the fact that the Commission as a public body using public money reserves student jobs during the summer holidays solely for children of officials and agents of the Commission, constitutes an instance of maladministration.

Given that the complaint concerned an individual case in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

N.B. After the European Ombudsman criticised the European Commission for reserving summer jobs for its employee's children, the Commission decided to abolish the system altogether. Civil servants said that the work could be done more efficiently and cheaply by full time staff.

EXCLUSION FROM AN OPEN COMPETITION ORGANISED BY THE EUROPEAN COMMISSION

Decision on complaint 1305/99/IP (Confidential) against the European Commission

THE COMPLAINT

In November 1999, X lodged a complaint with the European Ombudsman against the European Commission concerning the exclusion from Competition EUR/B/136 because X's diploma did not fulfil the conditions of the competition.

The complainant applied for competition EUR/B/136 (JO 1998 C 146 A/10) organised by the European Commission to constitute a reserve list of assistants (B5/B4) in Informatics/Telecommunications.

On 14 June 1999, the complainant was notified by the Selection Board that after the verification of the candidature, it had been rejected on the grounds that the qualifications did not comply with the notice of competition, namely the *"two years' further training in data processing and/or telecommunications"*, as established in point III.B.2.

In July 1999, the complainant, who considered this exclusion unfair and discriminatory, asked the Selection Board to re-examine the candidature. The complainant claimed to have completed a course of advanced secondary education (five years) and obtained a *Diploma di Ragioniere perito commerciale e programmatore*, which required an in-depth study of computer science. X therefore asked the Commission to take into account that the relevant diploma could be considered as inclusive of both a generic secondary diploma and the two years further training.

By letter of 3 September 1999, the Chairman of the Selection Board informed the complainant that after having re-examined his application, there were no grounds for the Board to reverse its original decision.

Not satisfied with the verdict of the Selection Board, the complainant wrote an additional letter to the Commission on 14 September 1999, asking to be informed of any possible

means to lodge a formal complaint against this decision. The Selection Board replied to the complainant by letter of 20 September 1999, in which it reaffirmed the contents of the previous correspondence. No reference was made to the complainant's request to know the possible means of appealing against the Selection Board's decision.

On 8 and on 28 October 1999, the complainant wrote further letters to the Commission underlining the urgency of the information requested, but no reply was given. Thus, the complainant lodged a complaint with the Ombudsman in which the following allegations were made:

1 The unfairness of the complainant's exclusion from competition EUR/B/136 organised by the European Commission.

2 The Commission's failure to inform the complainant of possible means of contesting the definitive decision of the Selection Board, despite the repeated requests, prevented the complainant from exercising his rights.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the European Commission. In its opinion, it referred to the background of the case, referring to the exchange of correspondence between its services and the complainant.

It pointed out that the complainant did not hold the diploma required in the notice of competition and was therefore excluded.

The notice provided in point III.B.2 that:

"2. Certificates, diplomas and experience

Candidates must have completed a course of advanced secondary education (and obtained a certificate) as well as at least two years' further training in data processing and/or telecommunications (and obtained a diploma recognised by a competent body), and have at least two years' professional experience in the fields covered by the competition."

As regards the alleged impossibility to attend such courses in Italy, the Commission indicated that it was in fact possible, giving examples of them. The institution also enclosed some information concerning the total number of applications received for competition EUR/B/136 and the number of candidates from each nationality, which had been admitted to the tests. 165 out of a total of 1375 were of Italian nationality.

The Commission underlined that the Selection Board had correctly followed the notice of competition from which it could not derogate. Moreover, the Commission stressed that, even if it recognised the relevant professional experience of the complainant, such experience could never be considered as substitute for the required diplomas.

The complainant's observations

The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations.

As regards the exclusion from the competition, the complainant put forward concerns regarding the fact that he was originally admitted and only in a further stage excluded from the competition.

The complainant also pointed out that only part of the exchange of correspondence with the Commission has been mentioned by the institution. In fact, the Commission enclosed to its opinion to the Ombudsman only copies of the letters that its services had sent to the complainant, but not of faxes and letters addressed to the institution by the complainant.

Furthermore, the complainant claimed that in the letter of 20 September 1999 the Commission did not reply to all the points raised in the letter of 14 September 1999. In fact, the Commission informed the complainant of the possible means to appeal a negative decision of the Selection Board only in its correspondence of 7 December, that is after the Ombudsman opened an inquiry on the case. In this letter, the Commission referred to the complainant's letter dated 8 October 1999, informing the complainant that the deadline to complain under article 90 of the Statute or to the Court of First Instance of the European Communities had already expired.

The complainant reaffirmed that he requested to be informed of the means of appeal on 14 September, at which time it would have still been possible to complain. The complainant considered therefore that because of the Commission's failure to deal with the request for information, the complainant was denied the possibility to exercise his rights.

THE DECISION

1 Alleged unfair exclusion from competition

1.1 The complainant alleged that the Selection Board's rejection of his application to participate in competition EUR/B/136 on the grounds that he did not hold the diplomas requested by the notice of competition was unfair.

1.2 The Commission stated that the Selection Board based its decision exclusively on the requisites mentioned in the notice of competition. Since the complainant did not fulfil them, the complainant's application could not be accepted.

1.3 As the Community Courts have consistently held, although the Selection Board for a competition based on qualifications and tests has a discretion in evaluating the qualifications and practical experience of the candidates, it is nevertheless bound by the wording of the notice of competition. The basic function of a notice of competition, according to the Staff Regulations, is to give to those interested the most accurate information possible about the conditions of eligibility for the post, in order to enable them to judge whether they should apply for it and what supporting documents are important for the proceedings of the Selection Board and must therefore be enclosed with the application[88].

Furthermore, when the Selection Board decides not to admit a candidate to the tests, it is required to indicate precisely which conditions in the notice of competition are considered not to have been satisfied by the candidate[89].

1.4 The notice of competition EUR/B/136 indicated all the necessary conditions to be met by the applicants. One of the conditions foreseen under Title III B.2 of the notice was to have completed a course of advanced secondary education, as well as at least two years' further training in data processing and/or telecommunications and have obtained a diploma recognised by a competent body. The complainant provided no evidence that he possessed such a qualification.

1.5 The Ombudsman noted that, from the information submitted by the complainant and by the Commission, it appeared that the Selection Board had acted in accordance with the

88 Case T–158/89 *Van Hecken v Economic and Social Committee* [1991] ECR II-1341.

89 Joined cases 4, 19 and 28/78 *Salerno and Others v Commission* [1978] ECR 2403; Case 108/84 *De Santis v Court of Auditors [1985]* ECR 947.

notice of competition when deciding that the complainant's application could not be accepted on the ground that the complainant did not fulfil the requisites.

1.6 As concerns the obligation of the Selection Board to indicate precisely which conditions in the notice of competition are considered not to have been satisfied by the candidate, the Ombudsman noted that in its letters of 14 June, 3 and 20 September, and 7 December 1999, the Selection Board specifically referred to point III.B 2 and gave the complainant reasons for his exclusion from the competition.

1.7 Furthermore, it has to be borne in mind that candidates could be excluded from a competition at any stage, in accordance with point IV.6 of the notice of competition EUR/B/136: *"should the Selection Board discover at a later stage in the procedure that the information on the application form is incorrect or does not tally with the supporting documents, the candidate will be disqualified"*.

1.8 In view of the above, the Ombudsman considered that there appeared to have been no maladministration by the European Commission in this aspect of the case.

2 The Commission's failure to inform the complainant of possible means of appeal

2.1 The complainant pointed out that, by letter of 14 September 1999, he asked the Commission to be informed of possible means of contesting the Selection board's decision to exclude the complainant from competition EUR/B/136. Nevertheless, in its reply of 20 September 1999, the Commission only confirmed his exclusion, without any reference to the complainant's request concerning the possible means to appeal the Selection Board's decision.

2.2 In its opinion on the complaint, the Commission did not consider this claim.

2.3 The Ombudsman had carefully examined all the correspondence between the Commission and the complainant. It appeared from the supported documents that in the letter of 14 September 1999 (sent by fax and by normal mail), the complainant had asked the Commission to be informed on the possible means of contesting the Selection Board's decision, with the aim of lodging a complaint with the competent authorities:

"…fa presente che è intenzione di X ricorrere ad un'autorità … in grado di esprimersi sull'oggetto del contenzioso. X richiede quindi gentilmente che vengano fornite, nel più breve tempo possibile, informazioni il più possibile dettagliate sull'organo al quale presentare istanza, sulla procedura e tempestività dell'intervento"

2.4 Since in its letter received by the complainant on 14 September 1999, the Commission did not reply to his request, he wrote a further letter to the institution the same day (also sent by fax and by normal mail), when it would have still been possible to lodge a complaint with the competent authority. In fact the deadline, as later indicated by the Commission in its letter of 8 December 1999, was 28 September 1999.

2.5 Principles of good administrative behaviour require the administration to reply properly to the citizens' queries and give them the most accurate information. In the present case it was unquestionable that the Commission did not reply to the specific request made by the complainant in both letters of 14 and of 20 September 1999, which the Commission should have answered.

By informing the complainant of any means of appeal only when the deadline had already expired, and despite two requests, the Commission did not give him the possibility to lodge a complaint against the Selection Board decision, if he so wished. This behaviour of the Commission constituted therefore an instance of maladministration.

3 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 the administration to reply properly to citizens' queries and give them the most accurate information. In the present case it was unquestionable that the Commission did not reply to the specific request made by the complainant in both letters of 14 and of 20 September 1999, which the Commission should have answered.

By informing the complainant on any means of appeal only when the deadline had already expired, and despite two requests, the Commission did not give him the possibility to lodge a complaint against the Selection Board decision, if he so wished. This behaviour of the Commission constituted therefore 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 closed the case.

N.B. On 29 June 2000, the European Commission sent further comments on the critical remark made by the Ombudsman. The Commission informed the Ombudsman that it had decided to include the relevant information on how to appeal a decision of a Selection Board in the Guide to candidates published in the Official Journal for internal and external competitions.

FAILURE TO REPLY TO THE COMPLAINANT'S APPEAL UNDER ARTICLE 90 OF THE STAFF REGULATIONS

Decision on complaint 1479/99/(OV)/MM against the European Commission

THE COMPLAINT

In October 1999, Mr S. lodged a complaint with the Ombudsman concerning alleged unjustified delay in his career progression and lack of reply by the European Commission to his appeal made under Article 90 of the Staff Regulations.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission disclosed the reasoning for the rejection of the complainant's appeal and stated that it had violated neither the complainant's rights nor a regulation. According to Article 90 of the Staff Regulations, a lack of reply constitutes an implied decision rejecting the appeal. Therefore, the Commission could not be held responsible for any maladministration towards the complainant.

THE DECISION

1 Unjustified delay in the complainant's career progression

1.1 The complainant alleged that in spite of all his merits his situation remained unchanged since 1994 and that he was the oldest person in this grade in the Environment Institute (EI).

1.2 The Commission put forward that the complainant was awarded an additional step in 1996 and therefore it was incorrect to state that his situation remained unchanged since 1994. Furthermore, the average seniority in grade B3 within the Joint Research Centre (JRC) was 5,37 years, so that the delay in his career could not be considered as excep-

tional. Futhermore, he had been proposed for promotion in 1999, which had finally not been taken into consideration.

1.3 The Ombudsman considered that the complainant had not provided the necessary evidence to support his allegation. In its opinion, the Commission stated the reasons, why it did not consider the delay in the complainant's career as exceptional. On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant was concerned.

2 No reply to the complainant's appeal under Article 90 of the Staff Regulations

2.1 The complainant alleged that he received no reply to his appeal made on 19 August 1998 under Article 90 of the Staff Regulations.

2.2 The Commission considered that the lack of reply did not constitute an act of maladministration, as according to Article 90 of the Staff Regulations, no response within four months after lodging a request implied a rejection of it. The Commission was of the view that an explicit lack of reply is foreseen in the Staff Regulations and therefore it violated neither the rights of the complainant nor a regulation.

2.3 According to Article 90 § 1 of the Staff Regulations, the authority shall notify the person concerned of its reasoned decision within four months. This is in line with the principles of good administration. If the authority fails to act in this way, i.e. if it does not follow the principles of good administration, the person concerned is protected from further delay by the rule that the lack of reply constitutes a negative decision. This last rule is meant to establish a possibility of a legal remedy for a citizen, even when an authority does not follow its legal obligations. It does not in any way give the right to the authority to omit principles of good administrative behaviour from its obligation.

2.4 In these circumstances, the Ombudsman concluded that the failure by the Commission to react to the complainant's appeal according to Article 90 of the Staff Regulations dated 19 August 1998 constituted an instance of maladministration. In its opinion, the Commission disclosed the reasoning for the rejection of the complainant's appeal, but did not apologise for having omitted to reply at an earlier stage. The Ombudsman therefore considered it necessary to make a critical remark in this regard.

3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it was necessary to make the following critical remark:

According to Article 90 of the Staff Regulations, the authority shall notify the person concerned of its reasoned decision within four months. This is in line with the principles of good administration. If the authority fails to act in this way, i.e. if it does not follow the principles of good administration, the person concerned is protected from further delay by the rule that the lack of reply constitutes a negative decision. This last rule is meant to establish a possibility of a legal remedy for a citizen, even when an authority does not follow its legal obligations. It does not in any way give the right to the authority to omit principles of good administrative behaviour from its obligation.

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 file.

LACK OF INFORMATION IN RELATION TO SUBSIDY GRANTED BY COMMISSION

Decision on complaint 422/2000/GG against the European Commission

THE COMPLAINT

In June/July 1997 the complainant, a federation defending the interests of people having a certain handicap, applied for a subsidy for a seminar and two courses for handicapped people (project 97/E3/II/047). According to the budget submitted by the complainant, the costs of the seminar were € 14 300 whilst the costs for the two courses were to be € 50 560. The complainant asked for a subsidy of € 45 400, i.e. 70% of the total expenditure envisaged. According to the complainant, this request was granted by the Commission.

In early 1998, the complainant received € 22 700, i.e. half of the total subsidy of € 45 400. The complainant subsequently informed the Commission that the actual costs had been lower than envisaged and had amounted to only € 36 323. As a consequence, the complainant expected to receive a final payment of € 2 726 from the Commission (i.e. 70% of € 36 323 minus the € 22 700 already received). Instead of that, in early 1999 the complainant received an undated invoice in French that contained no reference to the project. The invoice mentioned a 'real share' of € 21 078.30 (that represented 89.7943% of the 'real costs') and deducted this amount from the amount already paid by the Commission. The complainant was asked to pay back the balance of € 1 621.69.

After the complainant had queried this invoice, the Commission explained in a letter of 16 March 1999 that the calculation had been correct. According to the Commission, when the contract had been signed it had been agreed to disregard the expenses of € 14 300 for organising the seminar. As a result, the words "montant rejeté" had been added for that item and the complainant's representative had signed that page of the contract at the time.

The complainant subsequently paid back the relevant amount but queried on several occasions (notably in a letter of 15 June 1999) why the description 'Training courses and a seminar for [handicapped people]' had been used, why the first instalment of the subsidy had been based on the total estimated project cost and why the Commission had later raised a question in relation to the seminar if that seminar had not been part of the project at all. The complainant also asked for a copy of the page that had been mentioned in the Commission's letter of 16 March 1999.

In a short letter dated 11 January 2000, the Commission confirmed its position, pointing out that it had only accepted the estimated costs of the two courses of € 50 560 for the purpose of calculating its subsidy.

In its complaint to the Ombudsman, the complainant made the following allegations:

1 The Commission ought to have made a further payment of € 2 726 to the complainant instead of claiming back the sum of € 1 621.69.

2 The Commission had not provided sufficient explanations as to why it had claimed back the sum of € 1 621.69.

THE INQUIRY

The opinion of the Commission

The complaint was sent to the Commission. In its opinion the Commission claimed that it had agreed to grant a subsidy amounting to a maximum of € 45 400 where the costs of the project were estimated at € 50 560. A first instalment of 50% of that sum had been paid in accordance with Article 4 of the Agreement. The agreement, signed by both parties, covered the period from 16 June 1997 until 16 May 1998. Only expenditure incurred during that period was taken into account when determining the total of the actual costs. The seminar had been planned for 30/31 May 1997, i.e. outside the period covered. Consequently the costs for the seminar had been deducted from the costs to be taken into account.

The Commission further pointed out that the budgetary estimates set out in Annex II of the Agreement formed an integral part thereof. On the relevant page, the costs for the seminar had been excluded, by adding the words 'montant rejeté' for the item. The complainant's representative had signed that page of the contract at the time.

The Commission provided a copy of the agreement and mentioned that the original was in its possession.

The Commission claimed to have explained these facts to the complainant on several occasions.

The complainant's observations

In its observations, the complainant maintained its complaint and pointed out that the copy of the agreement provided by the Commission did not prove that it had been signed by its representative.

FURTHER INQUIRIES

In view of the fact that the copy of the agreement provided by the Commission did not show the signature of the complainant's representative, the Ombudsman inspected the file. On that occasion, the Ombudsman's agents were shown the original agreement the Commission had referred to.

THE DECISION

1 The Commission's failure to make a further payment of € 2 726

1.1 The complainant took the view that the Commission ought to have made a further payment of € 2 726 to it instead of claiming back the sum of € 1 621.69.

1.2 The Commission claimed that it had agreed to grant a subsidy amounting to a maximum of € 45 400 where the costs of the project had been estimated at € 50 560. According to the Commission, the costs of the seminar could not be taken into account since this seminar had been planned for 30/31 May 1997 whereas under the agreement, which covered the period from 16 June 1997 until 16 May 1998, only expenditure incurred during that period was taken into account. Finally, the Commission claimed that the costs for the seminar had been excluded, since the words 'montant rejeté' had been added on the relevant page of the contract and since the complainant's representative had signed that page.

1.3 An inspection of the original agreement between the complainant and the Commission led the Ombudsman to the conclusion that the Commission's position appeared to be correct. This agreement had been dated 27 November 1997 and had been signed by Mrs C. W. on behalf of the complainant. All the pages of the agreement and of its annexes had been initialled, and it appeared that these initials read "CW".

1.4 According to Article 3 of the agreement, the Commission agreed to grant a subsidy amounting to a maximum of € 45 400 whilst the costs of the project were estimated at € 50 560. The amount of the subsidy was proportionate to the estimated costs of the project and was to be reduced proportionately if the real costs were to be lower than the estimated costs. Article 2 of the agreement provided that only expenditure incurred during the period for which the agreement was entered (16 June 1997 until 16 May 1998) was to be taken into account for the purpose of determining the costs. However, according to the schedule contained in Annex I of the agreement, the seminar was to take place on 30/31 May 1997.

1.5 The budgetary estimates were set out in Annex II of the agreement that formed an integral part of this agreement (cf. Article 3 of the Agreement). On the second page of this annex, the words "*éléments considérés*" had been added next to the amount of € 50 560 for the two courses and the words "*éléments rejetés*" next to the amount of € 14 300 for the seminar. The relevant page in the copy of the agreement inspected by the Ombudsman appeared to be a photocopy. This page (like all the other pages in the agreement and its annexes) had been initialled in ballpoint. It thus appeared clear that the above-mentioned words had been added before the page was initialled.

1.6 In these circumstances, the Ombudsman concluded that the position adopted by the Commission appeared to be in conformity with the terms of the agreement.

1.7 On the basis of the above, there appeared to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant was concerned.

2 Failure to provide sufficient explanations

2.1 The complainant claimed that the Commission had failed to provide sufficient explanations as to why it had claimed back the sum of € 1 621.69.

2.2 The Commission replied that it had explained the relevant facts to the complainant on several occasions.

2.3 The Ombudsman noted that the Commission had indeed provided the main reason for which it had asked the complainant to pay back part of the subsidy in a letter of 16 March 1999. This letter pointed out that when the contract had been signed it had been agreed to disregard the expenses of € 14 300 for organising the seminar and that, as a result, the words "montant rejeté" had been added for that item. The Commission further explained that the complainant's representative had signed that page of the contract at the time.

2.4 It had to be noted, however, that the complainant had subsequently submitted several questions with regard to the reasons for the Commission's decision in its letter of 15 June 1999 and had asked in particular to be provided with a copy of the page of the agreement that the Commission had referred to. It appeared that the only written reply to this letter was a short letter sent on 11 January 2000 in which the Commission simply confirmed its position. None of the complainant's questions set out in the letter of 15 June 1999 were addressed. It further appeared that the complainant never received the copy of the page for which it had asked in that letter.

2.5 It is good administrative practice for the administration to reply to letters it receives within a reasonable period and in an adequate way. In the Ombudsman's view, this standard was not met in the present case, given that the Commission only replied to the complainant's letter in writing more than six months after it was sent, did not reply to the questions it contained and failed to provide a document that the complainant had requested.

2.6 In these circumstances, the Ombudsman concluded that the way in which the Commission had dealt with the complainant's letter of 15 June 1999 constituted an instance of maladministration. The Ombudsman therefore considered it necessary to make a critical remark in this regard.

3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it was necessary to make the following critical remark:

It is good administrative practice for the administration to reply to letters it receives within a reasonable period and in an adequate way. In the Ombudsman's view, this standard was

not met in the present case, given that the Commission only replied to the complainant's letter in writing more than six months after it was sent, did not reply to the questions it contained and failed to provide a document that the complainant had requested.

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 file.

FAILURE TO DEAL WITH APPLICANT'S REQUEST

Decision on complaint 500/2000/IP (confidential) against the European Commission

THE COMPLAINT

The Business Cooperation Network (hereinafter BC-NET) was created by a Council Resolution of 3 November 1986[90], with the aim of helping small and medium-size enterprises to become stronger through transnational co-operation agreements. The network members are private consultants, chambers of commerce and industry, professional organisations, consulting groups, banks or members of other networks.

On 13 January 2000, the complainant, an Italian lawyer, sent a fax to the BC-NET secretariat asking for an application form in order to apply following the call published in the Official Journal of 3 July 1999[91]. The deadline foreseen in the Official Journal, which should have been applied, was 31 December 2001. However, in its reply dated 25 February 2000, the Commission informed the complainant that the call for the BC-NET in question had been closed.

Since the Commission did not indicate in its reply on which legal provision the decision to bring forward the deadline had been taken, the complainant wrote to the institution on 21 March 2000. On 22 March 2000, he received a reply with the same content as that of 25 February 2000.

The complainant therefore lodged a complaint with the Ombudsman, in which he alleged that: *(i)* the Commission's decision to fix an earlier deadline than that originally foreseen in the Official Journal of 3 July 1999, should have been notified to the potential applicants through a publication in the Official Journal; *(ii)* the Commission failed to deal properly with his request of 13 January 2000.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission for an opinion. The Commission pointed out that the complainant's fax of 13 January 2000, in which he requested the BC-NET application form was registered on 24 January 2000.

On 25 February, the services of the Enterprise Directorate General replied to the complainant. The Commission explained that it was currently in a process of re-thinking the structure and operation of BRE (Bureau de rapprochement des enterprises) and BC-NET. The objective was to analyse how to obtain a closer relationship between the BRE, the BC-NET and the Euro Info Centres, as well as other Community networks that work in favour of small and medium-size enterprises. Since in the course of the year 2000 the structure and the organisation of the BRE and BC-NET networks would have been considerably modified, the Commission explained that it would therefore not examine any new applications to join the network and that the programme was closed.

90 OJ C 287 of 14.11.1986

91 OJ S 127 of 03.07.1999

As concerns the complainant's grievance that the decision to set an earlier deadline to apply for the BC-NET programme should have been notified, the Commission stressed that such a decision was been published in the Official Journal of 18 February 2000[92]. The institution also pointed out that if the complainant had asked, he would have been informed accordingly.

As concerns the reasons to close the programme, the Commission explained that the reply given to the complainant was the same standard letter sent to all candidates which expressed their interest *("…qui se sont manifestés après…")* after the closing of the programme.

The complainant's observations

The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations.

The complainant stressed that the Commission never referred to the Official Journal of 18 February 2000 in all correspondence with him, but only in its reply to the Ombudsman.

Concerning the Commission's explanation that the reply given to the complainant on 25 February 2000 was the same standard letter sent to all candidates which expressed their interest *("…qui se sont manifestés après…")* after the closing of the programme, the complainant put forward that he expressed his interest more than a month before the new deadline had been set. The Commission's claim could therefore not apply to his case. On the contrary, due to the Commission's negligence, he lost the opportunity to send his application in time and, possibly, to be selected.

THE DECISION

1 The Commission's decision to set a new deadline

1.1 The complainant put forward that when the Commission decided to set an earlier deadline than that originally foreseen in the Official Journal of 3 July 1999, it should have been notified through publication in the Official Journal.

1.2 The Commission explained that the decision in question was published in the Official Journal of 18 February 2000. The Commission recognised that in its reply of 25 February 2000 to the complainant it did not indicate that the decision had been published. However, the institution pointed out that in his further correspondence, the complainant did not explicitly ask for this kind of information.

1.3 Since it appeared that the Commission has published its decision in the Official Journal of 18 February 2000, making such a decision available to all the potential applicants, the Ombudsman considered that there appeared to have been no maladministration by the European Commission in this aspect of the case.

2 The Commission's handling of the complainant's request

2.1 On 13 January 2000, the complainant asked the Commission to send him the application form to apply to the BC-NET programme published in the Official Journal of 3 July 1999 with the deadline 31 December 2001.

2.2 In its opinion, the Commission explained that the reply forwarded to the complainant on 25 February 2000, was the same standard letter sent to all those applicants which expressed their interest after the closing of the programme.

92 OJ S 34 of 18.02.2000

2.3 The complainant argued in his observations that when he requested the application form from the Commission's services, the deadline had not expired. In fact, the decision to close the programme was taken more than one month later.

2.4 Principles of good administrative behaviour require that public administrations properly reply to the queries of citizens in due time. The Commission replied to the complainant's request made on 13 January only when the programme for which the complainant had applied was already closed, on 25 February 2000.

2.5 The Ombudsman considered that when the complainant made his request, the programme was still open and he should therefore have had the opportunity to present his application.

2.6 As a matter of good administration, the Commission should therefore have dealt with the request so that the complainant could have presented his application. The Ombudsman considered that the Commission's action in this aspect of the case constituted an instance of maladministration.

3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

As a matter of good administration, the Commission should have dealt with the request so that the complainant could have presented his application.

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.

3.4.4 The Court of Justice of the European Communities

ALLEGED UNFAIR AND DISCRIMINATORY DECISION OF SELECTION BOARD CONCERNING EQUIVALENCE OF LAW DEGREES

Decision on complaint 408/99/VK against the Court of Justice

THE COMPLAINT

In April 1999, Mr S. made a complaint to the European Ombudsman against the Court of Justice concerning his exclusion from competition CJ/LA/30 for the constitution of a reserve list for lawyer-linguists of Greek mother tongue. The competition was announced in the Official Journal (C303 A of 2 October 1998) and in the Greek newspaper "To Vima". As regards the candidates' education, the conditions required "a full legal education proved by a Greek University degree or equivalent law degree".

The competition was held in 2 stages. The first stage involved a selection process on the basis of qualifications. Successful candidates of this stage could then participate in the subsequent stage, the written examination. The complainant stated that he handed in his application together with the copies of the relevant certificates. On 5 February 1999, he received a letter from the personnel department of the Court of Justice in which it requested the complainant to send a certificate of DI.KA.TSA (Greek Inter-University Centre for the Recognition of Foreign University Degrees) before 24 February 1999. The certificate recognising the complainant's foreign law degrees as being equivalent to a Greek law degree was to be issued before 13 November 1998.

The complainant contested this decision by letter of 15 February 1999. In his letter he stated that although his university degrees were from public universities in Member States of the Union he had not yet pursued the recognition of equivalence by the DI.KA.TSA.. Since he was at the time following a postgraduate programme at the University of Amsterdam, there had been no need to do so.

The personnel department of the Court of Justice responded by letter of 8 March 1999. In this letter, the Court stated that the complainant could not be admitted because he did not submit the requested certificate of DI.KA.TSA.

The complainant thereafter filed an application for the re-examination of his application. In his letter he stated that by decision of the Court of Justice Greece was condemned because it refused to implement Directive 89/48 regarding the recognition of EU diplomas[93]. The complainant put forward that the Court did not act in accordance with its own decisions when it came to employing its own workforce. The complainant further stated that neither the general nor the specific provisions of the competition requested the production of a certificate of equivalence for candidates of other Member States, although this requirement was expressly mentioned for candidates educated in third countries.

According to the complainant, he did not receive a reply to his letter from the Court.

The complainant thereafter lodged a complaint with the Ombudsman.

As regards the "terms and conditions" of the competition, as published in the Official Journal, the complainant put forward in his complaint to the Ombudsman that there was indeed the requirement that foreign degrees are equivalent to Greek law degrees but that there was no requirement *for the actual submission* of a certificate of equivalence by the DI.KA.TSA. Furthermore, he stated that according to paragraph B.3. a and b of the Guide to Candidates the announcement of competition was addressed to citizens of all 15 Member States and it must cover the totality of educational systems at the various levels of all Member States with various educational systems. The complainant considered the practice of the Court unfair and discriminatory.

THE INQUIRY

The Court's opinion

In its opinion, the Court made the following comments with regard to the aspects of the complaint:

According to Article 22 of the Rules of Procedure of the Court of Justice, the Court shall set up a translating service staffed by experts with adequate legal training and a thorough knowledge of several official languages of the Court.

The Court experienced that its needs in this regard are best served by persons with an in-depth knowledge of the legal system of a Member State as well as of the terminology related to this legal system.

Therefore, the notice of competition required the candidates to have a full legal education evidenced by the "ptychion", a Greek degree, or an equivalent law degree.

In the comparative examination of diplomas other than the "ptychion", the Selection Board had to ascertain whether the knowledge and qualifications certified by these diplomas correspond to those, which are required for the award of the "ptychion".

The Selection Board considered that the most objective and reliable criterion was a certificate delivered by the Greek authority competent for the recognition of foreign diplomas, the DI.KA.TSA..

The personnel department therefore invited the complainant, by letter of 5 February 1999, to submit a certificate delivered by DI.KA.TSA.. Not having received it, the Selection Board rejected the complainant's application on that basis.

93 Case C-365/93, *Commission v. Hellenic Republic*, [1995] ECR I-499.

However, the notice of competition in question did not expressly require such a certificate in order to allow the Selection Board to assess whether law degrees other than the "ptychion" could be considered equivalent to it. Thus, the Selection Board should have examined whether the diplomas submitted by the complainant could have been considered equivalent to the "ptychion" using other criteria.

Finally, the Court mentioned that candidates who have not been admitted to participate in a competition may appeal against this decision to the Court of First Instance according to Article 91, paragraph 1, of the Staff Regulations or lodge a complaint according to Article 90, paragraph 2, of the said regulations.

The complainant's observations

In his observations, the complainant maintained his complaint.

THE DECISION

1 Alleged unfair and discriminatory decision of the Selection Board not to accept the complainant's degrees as equivalent to the Greek law degree

1.1 The complainant considered that he should not have been excluded from the competition on the grounds that he did not possess a DI.KA.TSA. certificate from the Greek authority competent for the recognition of foreign diplomas. As this criterion was not mentioned either in the general or in the specific conditions for the competition the complainant put forward that the decision was unfair and discriminatory.

1.2 The Court confirmed that the competition was foreseen for citizens of all 15 Member States and that the degrees of the Member States had to be taken into account. As the competition was for lawyer linguists of Greek mother tongue, the Selection Board had to ascertain whether the knowledge and qualifications certified by these diplomas corresponded to those required by the relevant Greek degree. In order to have a more objective and reliable comparative criterion, the Selection Board decided to invite the candidates with degrees from other Member States to provide the DI.KA.TSA. certificate. Not having received it, the Selection Board excluded the complainant from the competition.

1.3 In its opinion, the Court accepted that the notice of competition in question did not expressly require candidates to submit such a DI.KA.TSA certificate and that the Selection Board should therefore have examined whether the diplomas submitted by the complainant could have been considered equivalent to the Greek degree by using other criteria. The Selection Board therefore failed to deal properly with the complainant's application and this was an instance of maladministration.

2 Failure to reply to complainant's letter

2.1 The complainant alleged that his letter to the Court requesting re-examination of his application did not receive a reply.

2.2 In its opinion, the Court did not explain why it failed to answer the complainant's letter. The Court also mentioned the possibility for the complainant to submit a complaint under Article 90 of the Staff Regulations. However, it did not explain why it failed to treat the complainant's letter as such a complaint. The Court therefore failed to deal properly with the complainant's letter and this constituted an instance of maladministration.

3 Conclusion

On the basis of the Ombudsman 's inquiries into this case, it appeared necessary to make the following critical remarks:

The Selection Board should have examined whether the diplomas submitted by the complainant could have been considered equivalent to the Greek degree by using other criteria. The Selection Board's failure to deal properly with the complainant's application constituted an instance of maladministration.

The Court did not explain why it failed to answer the complainant's letter. The Court also mentioned the possibility for the complainant to submit a complaint under Article 90 of the Staff Regulations. However, it did not explain why it failed to treat the complainant's letter as such a complaint. The failure to deal properly with the complainant's letter was 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.

3.4.5 The European Environment Agency

THE HANDLING OF A TENDER PROCEDURE

Decision on complaint 608/98/ME against the European Environment Agency

THE COMPLAINT

In June 1998, the complainant lodged a complaint with the European Ombudsman. According to the complainant, he participated in a public tender at the European Environment Agency (EEA) in 1996 and had been informed over the 'phone that he had won the tender. The EEA had asked for clarification on his tax residency, which was in the Channel Islands, and his social security number in order to draft the contract. Later in 1996, the complainant was informed in a letter from the EEA that the tender had been given to someone else. The complainant tried to obtain an explanation without success. Finally he was offered, as compensation, another contract, writing a report for the EEA. However, this never materialised. He had also tried to obtain documents relevant to the tender procedure but the documents sent by the EEA were not relevant to the points in dispute.

In his complaint to the Ombudsman, the complainant put forward three allegations. Firstly, he claimed that he had been told by the EEA in September 1996 that he had won the tender, but he was later informed that someone else was awarded the contract. Secondly, the EEA said that it would make an offer for a smaller contract by treaty, but it never materialised. Finally, the EEA unfairly rejected an application for access to documents concerning the tender.

THE INQUIRY

The European Environment Agency's opinion

The complaint was forwarded to the EEA. In its opinion, the EEA stated that the complainant's application was duly taken into consideration. However, contrary to what the complainant said, he had not been informed that he had won the tender. At an early stage of the selection procedure, it was considered that a contract could be attributed to the complainant. However, after some further quality control of the complainant, the EEA decided to award the contract to someone else. Moreover, the location of the complainant's company was confusing due to the registration in the Channel Islands. As for the second allegation, the EEA put forward that it had never committed itself to offering the complainant a smaller contract. Regarding the third allegation, the EEA pointed out that it had on two occasions supplied information to the complainant.

The complainant's observations

In his observations, the complainant maintained his complaint.

FURTHER INQUIRIES

After careful consideration of the EEA's opinion and the complainant's observations, the Ombudsman undertook further inquiries. The main information contained in EEA's further opinion was that the EEA had contacted the complainant to check the legal basis of the complainant's company and to have all the elements needed to complete the file if a contract should be established with the complainant. The EEA was also confused about the complainant's residence in the Channel Islands, known as a "tax haven". The grounds for not awarding the complainant the tender was due to the contacts the EEA had with the Commission, mainly DG XII and DG XIII, which had shown that the type of services that the complainant had provided in the past were not really those that the EEA was looking for. The contacts with the Commission had been made by telephone only.

In relation to the EEA's further opinion, the complainant continued to maintain his complaint. He mainly underlined that the EEA was not permitted to contact him unless he had been given the contract and that his registration in the Channel Islands had never been a problem in his previous contracts with the European Commission. As far as DG XII was concerned, the complainant had not worked there since he was an official in 1982. At that time, the director he was working for, who was now a member of the EEA Board, disliked the complainant. After having sent his observations, the complainant continued to send information mainly relating to his attempts since January 2000 to obtain some new documents from the EEA.

THE DECISION

1 The selection following the tender procedure; the alleged notification to the complainant and the grounds for the decision

As regards this allegation, the Ombudsman found it necessary to address the following two critical remarks to the EEA:

It is good administrative behaviour to provide clear and understandable information. In the present case, the EEA contacted the complainant and led him to believe that he would be awarded the contract although, in fact, no final decision had been made. The EEA did therefore not act in accordance with principles of good administrative behaviour.

It is good administrative behaviour to state the grounds of a decision. The statement of reasons must be adequate, clear and sufficient, it will further normally indicate the main facts, arguments and evidence. In the present case, on three occasions the EEA put forward a differing reasoning. It also appeared that the EEA based its decision on information it collected after the tenders had been submitted. The EEA has not been able to provide any record of the collected information or its contacts, although that information was of great importance for its final decision. It appeared that the EEA did not clearly state the grounds of its decision and further based it on facts for which there was no visible record. The EEA did therefore not act in accordance with principles of good administrative behaviour.

2 The alleged offer for a smaller contract as compensation

As regards this allegation, the Ombudsman found that the complainant had not been able to provide enough proof to support his allegation.

3 Request for access to documents

As regards this allegation, the Ombudsman found it necessary to address the following critical remark to the EEA:

94 OJ [1997] C 282/5.

It is good administrative behaviour to act according to the law and apply the rules and procedures laid down in Community legislation. The right of access to the EEA's documents is governed by the Decision of 21 March 1997 on public access to European Environment Agency documents[94]*. The EEA did not provide any evidence to the Ombudsman that it had in fact followed its own rules on access to documents.*

As it was also brought to the Ombudsman's attention by the complainant that he had tried to obtain some new documents since January 2000, the Ombudsman noted that the question of access to these documents fell outside the scope of the present inquiry and was therefore not dealt with in this decision. The Ombudsman further noted that it was for the EEA to apply its rules on access to documents and communicate the result to 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. The Ombudsman therefore closed the case.

Remark: The full text of the decision on this complaint (12 pp), can be obtained on the Website of the European Ombudsman (***http://www.euro-ombudsman.eu.int***), or from the Ombudsman's secretariat.

3.5 DRAFT RECOMMENDATIONS ACCEPTED BY THE INSTITUTION

3.5.1 The European Parliament

FAILURE OF INFORMATION BY THE EUROPEAN PARLIAMENT WITH REGARD TO OUTCOME OF DESIGN COMPETITION

Decision on joined complaints 507/98/OV, 515/98/OV, 576/98/OV and 818/98/OV against the European Parliament

THE COMPLAINT

In May and July 1998, Mr W. 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 Leopold Building of the European Parliament in Brussels. On 13 May 1998 (515/98/OV), 1 June 1998 (576/98/OV) and 29 April 1998 (818/98/OV) respectively, other persons lodged similar complaints. For the purpose of the inquiry, the four complaints were therefore joined.

THE DRAFT RECOMMENDATION

The 1999 Annual Report of the Ombudsman contains details of the decisions and of the draft recommendation made to the Parliament on 17 December 1999, in accordance with Article 3(6) of the Statute of the Ombudsman[95]. The draft recommendation was that:

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 of the complainants in which they explicitly asked for information on the results of the competition.

The Ombudsman informed the Parliament that, according to Article 3 (6) of the Statute, it should send a detailed opinion before 31 March 2000 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 Parliament's detailed opinion

On 9 March 2000, the President of the Parliament sent its detailed opinion. The President informed the Ombudsman that the Parliament accepted the draft recommendation and that it had sent an apology letter to the different complainants. Those letters read as follows:

"Further to the complaint that you lodged with the Ombudsman concerning the competition for the design of the VIP entrance to the D1 Building and the entrance to the D1

95 Annual Report 1999 page 220.

Building from the D3 Building, the European Parliament wishes to inform you that, in the interest of sound management, the competition selection board, which had taken the view on 17 April 1997 that none of the designs submitted was suitable, took a decision to review its findings. A second assessment was made in February 1998, and the result thereof was set out in its formal notice of confirmation dated 29 May 1998. That notice was forwarded to competition entrants on 17 June and 4 August 1998.

Nevertheless, in accordance with the recommendation forwarded by the Ombudsman to the European Parliament on 17 December 1999, Parliament acknowledges that the duration of the competition procedure was too long and that the consequent delay in notifying results was unacceptable. Accordingly, the European Parliament wishes to convey its most sincere apologies to you.

The European Parliament also acknowledges that telephone answers given by its relevant departments to written requests from competition entrants did not constitute an appropriate form of reply and that, given the length of the procedure, its failure to send written acknowledgement of receipt of the various letters in which you specifically requested information about the results of the competition amounted to unprofessional conduct on the part of the European Parliament".

After careful examination of the Parliament's detailed opinion, the Ombudsman considered that the measures described were satisfactory to implement the draft recommendation.

The complainants did not make any observations on the Parliament's detailed opinion.

THE DECISION

1 On 17 December 1999 the Ombudsman addressed the following draft recommendation to the Parliament, in accordance with Article 3(6) of the Statute:

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 of the complainants in which they explicitly asked for information on the results of the competition.

2 On 9 March 2000, the President of the Parliament informed the Ombudsman of its acceptance of the draft recommendation and enclosed copies of the letters of apology to the different complainants. The Ombudsman therefore closed the case.

3.5.2 The European Commission

ILLEGAL EMPLOYMENT SITUATION OF EXTERNAL STAFF

Decision on complaint 398/97/(VK)/GG against the European Commission

THE COMPLAINT

The most important *facts* alleged by the complainant in his complaint lodged in May 1997 may be summarised as follows:

The complainant applied for a job at the Commission and was offered a post within its Directorate-General V that is based in Luxembourg. The complainant was told by the Commission that for budgetary reasons he would have to be paid by a private company which had entered into a contract with the Commission, and that the duration of the contract would be limited until the end of the year to start with. The contract was handed over to the complainant by the private company in the offices of the Commission. In this contract, the company figured as the employer. Neither the type of work nor the place where it was to be carried out was specified but it was indicated that the tasks of the employee would be determined directly by the Commission. The complainant started to work in April 1994. A few months later, following a restructuring in the services concerned, the complainant was charged with working on the control of the transposition into national law of Directive no. 92/29/EEC and the handling of legal and other related issues.

In December 1994 the complainant received a new contract limited to three months (January to March 1995). The contract corresponded to the one he had previously signed. However, the contract named as the employer another firm with which the complainant up to that moment had not had any contact. Three months later, the same firm sent the complainant an identical contract for a further nine months.

At the beginning of 1996, the complainant received a new contract. This contract for the first time failed to refer to the Commission and mentioned the seat of the firm (Senningerberg in Luxembourg) as being the place of employment. However, the complainant kept his office at the Commission.

The complainant received his instructions concerning his work exclusively from the Commission. His job was integrated into the regular work of the unit. The role of the firms with which he had concluded the above-mentioned contracts was restricted to the transmission of his monthly salary, the payment of taxes and social security contributions and the receipt of his holiday lists sent by mail.

After the complainant had raised the problem of the legality of his employment within his Directorate, he was informed that his contract would not be extended. The complainant addressed himself to the Director-General of DG V and the President of the Commission, but without success.

On the basis of the above, the complainant made the following *allegations*:

His employment situation had to be regarded as illegal from November 1994 onwards at the latest. While he was officially working as an employee of a company, which had concluded a contract for the provision of services with the Commission, he was in fact carrying out tasks, which should have been carried out by Commission staff. The construction used for his employment had been chosen by the Commission with a view to avoiding the application of the Staff Regulations or the Conditions of Employment of Other Servants. The Commission had thus infringed Community law in so far as his employment situation was concerned. The Commission had also infringed Luxembourg labour law.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission claimed that the complainant had been given various fixed-term contracts by firms outside the Commission for the purpose of providing the Commission with "specific supplementary technical expertise" in order to help it perform its tasks in accordance with the provisions of its "Code of Conduct"[96]. These firms worked completely independently. The complainant had not been employed by the Commission.

The complainant's observations

In his observations, the complainant maintained his complaint. He accepted that the Commission's "Code of Conduct" contained very good provisions but insisted that these had not been respected in his case. He had not worked "independently" but had had the position of a de facto employee of the Commission. In his view, the Commission's reply failed to address the relevant questions.

FURTHER INQUIRIES

On the basis of the above, the Ombudsman came to the conclusion that he needed further information from the Commission in order to deal with the present case. This information was requested in January 1999.

The Commission's reply to the Ombudsman's first request for further information

In its reply to the request for further information, the Commission made the following comments:

According to the judgement of the Court of Justice in the *Mulfinger* case[97], the criterion for judging the legality of a direct contract under national law was whether the tasks entrusted to the employee were permanent tasks essential for the functioning of the Community civil service. However, the complainant had only provided "one-off assistance"[98]. In so far as the general provisions on the relations between the Commission and certain categories of staff were concerned, the tasks carried out by the complainant required temporary and specific expertise entirely in line with Sections II and III of the Code of Conduct of October 1994. The working conditions under the contract were *extra muros*. There was no employer/employee relationship between the Commission and the complainant. The relevant provisions of Luxembourg labour law applied to the company which employed the complainant and not to the Commission.

The complainant's observations on the Commission's reply to the first request for further information

In his observations on the Commission's letter, the complainant maintained his allegation that the Commission had used private companies in order to avoid the application of the Staff Regulations. He expressed the view that control of the transposition of directives was not a task of a temporary character. The complainant persisted that his working conditions had at no time been *extra muros*.

The complainant also submitted copies of a number of documents.

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96 Code of Conduct containing General Rules Governing Relations between Commission Departments and Certain Categories of Staff, adopted in October 1994.

97 Case 249/87 *Mulfinger and others v. Commission* [1989] ECR 4127.

98 In the French original, "une assistance ponctuelle".

The Ombudsman subsequently decided to address a second request for further information to the Commission. This request was sent in June 1999.

The Commission's reply to the Ombudsman's second request for further information

In its reply to the second request for further information, the Commission made the following comments:

The documents relating to the case, including those supplied by the complainant, fully supported the Commission's position. The responsibility to supervise the implementation of directives by member states belonged to Commission officials and could not be delegated. The facts set out by the complainant did not show that anything of the sort had happened here. The complainant provided technical assistance to the officials responsible. External advisers were hired precisely because they had expertise, which was not systematically available within the Community public service.

The complainant's observations on the Commission's reply to the second request for further information

In his observations, the complainant expressed the hope that the new President of the Commission would do his best to enforce accountability and political responsibility at all levels of the Commission. He regretted the way the Commission continued "to play ping-pong" with him. He reiterated his view that the Commission had infringed its own Code of Conduct, which underlined that the Commission had to respect the relevant provisions of national law. The complainant stressed that he disagreed with the Commission's interpretation of the legal meaning of the term "control". Finally, he expressed the view that there were no legal obstacles, which would prevent the Commission from issuing a reference on his work for the Commission.

THE DRAFT RECOMMENDATION

By decision dated 4 November 1999 the Ombudsman addressed a draft recommendation to the Commission in accordance with Article 3 (6) of the Statute of the Ombudsman[99]. The basis for the draft recommendation was the following:

The complainant alleged that his employment situation (that is to say the fact that he worked for the Commission under a contract of employment concluded with a private company that, in turn, had concluded a contract with the Commission) had been illegal under EU law. He claimed that the work carried out by him should have been carried out by Commission staff.

The Commission replied that the complainant had only provided "one-off" technical assistance to the officials responsible, had worked under the supervision of the latter and had at no time been involved in the resulting decisions relating to the conformity of national law with Community law. The Commission claimed furthermore that it had fully complied with the provisions of its Code of Conduct adopted in October 1994 in the present case.

The Commission's Code of Conduct provides that Community public service tasks are to be performed exclusively by officials or by members of the temporary staff of the Communities. According to the Code, 'public service tasks' are "those connected with the functions of the Institution deriving from the powers conferred on it by the Treaties or by secondary legislation." Always according to the Code, they "include tasks involving (…) control (notably monitoring compliance with Community law)"[100]. The decisive criterion

99 Decision no. 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113 page 15).

100 Code of Conduct, Section II.

allowing a conclusion as to whether or not a public service task was concerned was thus represented by the nature of the services concerned.

The duty imposed by Article 211 (formerly Article 155) of the EC Treaty on the Commission to ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto were applied constituted one of the functions which were assigned to the Commission and were thus to be carried out by the agents of the Commission, that is to say, by staff employed under the Staff Regulations or the Conditions of Employment of Other Servants. On the other hand, the Commission claimed that even in this area it could resort to other means in order to obtain "expertise which is not (…) available within the Community public service".

The Commission claimed that the complainant had carried out his duties under the control of Commission officials and that his work could thus not be considered as forming part of a public service task. However, the fact that the complainant had been working under the control or supervision of Commission officials did not appear to be incompatible with his claim that he had participated in a function assigned to the Commission by the EC Treaty. Given that the Commission was structured hierarchically, control was immanent in the process leading up to the adoption of a position or decision. A Commission official working on the control of the implementation of a given directive certainly also had to work under the supervision of his superiors. The question as to whether the complainant's tasks were "permanent" in nature or whether the complainant provided what the Commission referred to as "one-off assistance" did not appear to be relevant, either. The case law of the Community courts referred to the *nature* of the task and not its duration as the decisive criterion[101]. This also appeared to be the view which the Commission itself had adopted in its Code of Conduct where it distinguished between "public service tasks" (which were to be reserved to Commission staff) and "non-permanent tasks", making it clear that the latter were tasks *other* than "public service tasks"[102].

It was therefore important to look at the nature of the work carried out by the complainant in the context of the control of the implementation of Directive 92/29. The Commission had stressed on several occasions that the complainant only provided "technical assistance" to the Commission officials. Section III C 3 a) of the Commission's Code of Conduct provided that the Commission may conclude a contract for the provision of conceptual or advisory services with a third party if the relevant tasks could not, by reason of their technical nature, be provided by Commission staff. However, the Commission had failed to specify the exact nature of the "technical assistance" to be provided by the complainant (or the company employing him) and to explain why it could not be provided by Commission staff. The complainant's claim that he had checked the implementation of Directive 92/29 by comparing the texts of the national laws concerned in languages which neither he nor his hierarchy mastered in close co-operation with the translation services had not been challenged by the Commission. There did not appear to be any clear evidence to prove that the complainant's work in this context differed materially from the work of a civil servant in charge of controlling the implementation of a directive by member states. The Ombudsman thus concluded that the evidence concerning the nature of the complainant's work would appear to support the latter's claim according to which he had carried out tasks which should have been reserved to Commission staff in accordance with the Code of Conduct.

This conclusion was confirmed by several circumstantial factors.

First, several of the documents submitted by the complainant allowed the conclusion that instructions relating to the work of the complainant had been given directly by the

101 Cf. the *Mulfinger* judgment loc. cit., paragraph 14

102 Code of Conduct, Section II.

Commission, and not by the companies with which the complainant had entered into contracts of employment. The Commission had not been able to explain this discrepancy between the formal legal position and the practical reality.

Second, the complainant had given a detailed description of how he had come to work for the Commission. The Commission had not made any substantial comment on these allegations.

Third, the evidence available strongly suggested that the employment situation of the complainant had not been *extra muros* as claimed by the Commission. Although the issue was without importance for the question as to whether or not the complainant carried out tasks which should have been reserved to Commission staff, the fact remained that according to the complainant's allegations the Commission appeared even to have taken steps to camouflage the presence of external staff on its premises. The Commission had refrained from making any substantial comments on these allegations which appeared to be confirmed by the documents submitted by the complainant.

Finally, the Commission's claim that its actions had been "entirely in line with Sections II and III of the October 1994 Code of Conduct" would not appear to be well founded. There were at least two provisions in this Code, which did not appear to have been respected in this case. First, according to the Code the conditions for the execution of contracts with third parties must not lead to the distortion of these contracts or the possibility that they could be qualified as contracts for the loan of personnel or labour[103]. Second, the Code provides that external staff have to carry out their work outside the Commission's offices, and that the presence of such persons in the Commission's offices must be strictly limited and justified by the material impossibility to carry out the work elsewhere[104].

In view of the above, the Ombudsman arrived at the conclusion that the employment of the complainant on the basis of a contract of employment with a private company which, in turn, had entered into a contract with the Commission, was not compatible with the principles which can be deduced from the Commission's own Code of Conduct and thus constituted an instance of maladministration. 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 set out below.

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 take the necessary steps in order to remedy the illegality of the employment situation of the complainant. It should therefore issue the complainant with a reference for the period of time during which he worked for the Commission.

THE COMMISSION'S DETAILED OPINION

The Ombudsman informed the Commission that, according to Article 3 (6) of the Statute, it should send a detailed opinion before 29 February 2000 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it had been implemented.

On 23 February 2000, the Commission sent to the Ombudsman the following detailed opinion:

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103 "The conditions under which service contracts are performed must not be such as to alter the nature of the contract and possibly result in its being reclassified as a manpower supply contract or an employment contract" (Section III C 2 of the Code of Good Conduct).

104 "The presence of the staff concerned on Commission premises must be strictly limited to cases where it is physically impossible for the work to be performed elsewhere" (Section III C 3 a of the Code).

"In accordance with your recommendation, Mr Coleman, Director General of Health and consumer protection has already sent a letter of reference to Mr M. concerning the period of time during which he provided technical assistance to the Commission.

This letter of reference is based on the factual situation of Mr M. and on his own activity report (November 1994 to June 1996). It also corresponds to the terms of the contracts the Commission had with the companies that employed Mr M."

The Commission submitted a copy of a letter from Mr Coleman to the complainant dated 31 January 2000 and the letter of reference enclosed with that letter.

Already on 19 February 2000 the complainant wrote to the Ombudsman to point out that the letter of reference did not bear the Commission's letter-head and had not been signed. The complainant further criticised that the time period referred to in the reference was wrong, given that he had worked for the Commission from 18 April 1994 till 30 June 1996.

On 23 February 2000, the Ombudsman wrote to the Commission to express his satisfaction at the fact that the latter had taken steps in order to implement the draft recommendation. However, in the light of the comments made by the complainant in his letter of 19 February 2000 the Ombudsman invited the Commission to verify whether the dates mentioned in its letter of reference were correct and to consider whether it would not be proper to sign this document, in accordance with normal practice.

On 4 April 2000, the Commission sent a further letter to the Ombudsman in which it stated:

"In accordance with your recommendation, Mr Coleman, Director General of Health and Consumer Protection has sent a revised letter of reference to Mr M. taking into account the comments made by the complainant in his letter of 19 February 2000."

Attached to this letter was a copy of the revised letter of reference dated 20 March 2000 and signed by Mr Coleman. This letter referred to the period from 18 April 1994 to 30 June 1996.

The Commission's letter of 4 April 2000 was forwarded to the complainant on 10 April 2000 and the complainant was invited to make observations, if he so wished, before 31 May 2000. No such observations were received by the Ombudsman by that date.

THE DECISION

On 4 November 1999, the Ombudsman addressed the following draft recommendation to the Commission in accordance with Article 3 (6) of the Statute of the Ombudsman:

The Commission should take the necessary steps in order to remedy the illegality of the employment situation of the complainant. It should therefore issue the complainant with a reference for the period of time during which he worked for the Commission.

On 23 February and 4 April 2000, the Commission informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and of the measures, which it had taken to implement it. The measures described by the Commission in its letter of 4 April 2000 appeared to be satisfactory and the Ombudsman therefore closed the case.

DISCRIMINATION IN THE GRADING OF FISHERY INSPECTORS

Decision on complaint 109/98/ME against the European Commission

THE COMPLAINT

On 9 January 1998, three temporary agents working for the European Commission lodged a joint complaint with the European Ombudsman concerning their grading as fishery inspectors at the Commission. After having started to work, they noticed that all the other fishery inspectors, who were recruited before as well as after them, had been placed in higher grades. As they did not receive any satisfactory reasons for these differences, they thought that there was unjustified unequal treatment and initiated internal complaints' procedure in the Commission. During this procedure it became clear that the advertisement of the posts in grades B4/B5 was the consequence of an administrative error. However, since the Commission did not reclassify the complainants, they complained to the Ombudsman

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the complainants had not been discriminated against. It relied on the fact that the recruitment procedure, which led to the complainants' employment, was not the same as that for the inspectors who were placed in a higher grade. It also stated:

"Since the notice of competition (…) stated that the intended salary category was B4/B5, it is evident that the persons concerned applied for posts with the Commission at this level, and that they cannot deny this fact as they applied for the posts voluntarily."

The complainant's observations

In their observations the complainants maintained their allegations. They also claimed that the fact that the notice of competition indicated grades B4/B5, did not remove the obligation on the Commission to explain the objective grounds for different treatment of people who have the same qualifications and experience and who perform the same work.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After a careful examination of the file, the Ombudsman considered that there was a prima facie instance of maladministration. He also concluded that it was still possible to remedy the maladministration and therefore wrote to the Commission in accordance with Article 3 (5) of the Statute of the Ombudsman[105], with a view to seeking a friendly solution to the complaint.

By referring to the observations of the complainants, the Ombudsman pointed out that, on the basis of the evidence in the file, the Commission did not seek to contradict the allegations put forward by the complainant, nor did it attempt to explain the changes in the grades. The Ombudsman did not feel that the Commission's actions in this matter met the high standards, which one is entitled to expect from the Community institutions. Thus, the Ombudsman suggested that the Commission might review its position in relation to the complaint.

In its reply, the Commission referred to its new recruitment policy, adopted in November 1996 which meant that competitions should not be opened to all grades within a category as it had been in the past, but that the grades should be specified in the notice of competition following the expressed need by the service in question. In case the service did not state differently, the competition was intended for the lowest grade. On these grounds, competition 25/T/XIV/95, to which the complainants had applied successfully, was

105 "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."

arranged for grades B5/B4 and accordingly the highest grade possible for recruitment of the complainants was B4. A basic principle for the new recruitment policy was that competitions should concern the intermediate B3/B2 grades. The future competition 7T/XIV/97 for fisheries inspectors was therefore arranged according to these conditions. The Commission further pointed out that the Commission had to respect the grade mentioned in the competition notice and to deviate from it would not be in line with the principles of sound financial management. It would be criticised by the Financial Control and could be criticised by the Court of Auditors. Hence the Commission regretted that it could not comply with the friendly solution as suggested by the Ombudsman.

THE DRAFT RECOMMENDATION

By decision dated 18 January 2000, the Ombudsman addressed a draft recommendation to the Commission in accordance with Article 3 (6) of the Statute of the Ombudsman[106]. The basis for the draft recommendation was the following:

1 It is good administrative behaviour to ensure that the principle of equality of treatment is respected and that discrimination is avoided. The Court of Justice has held on numerous occasions that the principle of equality of treatment is of fundamental importance in relation to employment.[107] Although most of the case law of the Court is based on Article 5 (3) of the Staff Regulations, which is not applicable to temporary agents, the Court has established that the principle of equality of treatment is applicable also to temporary agents.[108] If any difference in treatment is made, the Community institutions have to ensure that it is justified by the objective relevant features of the particular case.

2 In the present case, the complainants were recruited as fishery inspectors by the European Commission and placed in grades B5/B4. Fishery inspectors already employed by the Commission, who were equally or less qualified, had however been placed in higher grades, namely B3, B2 and B1. After the complainants had been employed, a competition subsequent to their own advertised employment as fishery inspectors in the grades B3/B2. The complainants allege that their recruitment in the lower grades was the result of an administrative mistake.

3 The Commission explained the different treatment by the fact that the complainants had been recruited on the basis of their successful participation in competition 25/T/XIV/95. This competition had advertised the posts as leading to employment in grades B5/B4. The Commission further explained the different treatment as being part of its new recruitment policy leading to that future competitions should comprise the intermediate grades, i.e. B3/B2. However, in case the service did not state differently, as in the present case, the competition was intended for the lowest grade. The Commission also claimed that it risked criticism by its Financial Controller and the Court of Auditors.

4 Against this background, the Ombudsman reached the following conclusions:

The principle of equality of treatment is fundamental in relation to employment. Any difference in treatment has to be justified on relevant objective grounds. In the present case, the Commission had not contested that the posts were advertised in the lower grades as the result of an administrative mistake. Thus the reason for recruiting the complainants in the lower grades seemed to be an administrative error by the Commission. Since this was not

106 Decision no. 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113 page 15).

107 See for example: Case 119/83, *Appelbaum v. Commission*, ECR [1985] 2423, Joined cases 129 and 274/82, *Charles Lux v. Court of Auditors*, ECR [1984] 4127 and Case 92/85, *Hamai v. Court of Justice*, ECR [1986] 3157.

108 See for example: T-207/95, *Ibarra Gil v. Commission*, ECR-SC [1997] I-A-13, II-31 and T-211/95, *Petite-Laurent v. Commission*, ECR-SC [1997] I-A-21, II-57.

an objective ground, which could justify different treatment, there was a breach of the principle of equality of treatment and therefore an instance of maladministration.

5 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 take the necessary steps in order to remedy the discrimination in the former employment situation of the complainants.

THE COMMISSION'S DETAILED OPINION

The Ombudsman informed the Commission that, according to Article 3 (6) of the Statute, it should send a detailed opinion before 30 April 2000 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it had been implemented.

On 12 May 2000, the Commission sent to the Ombudsman the following detailed opinion:

(…) In the interest of justice and fairness, and considering the exceptional circumstances in the case and the long experience of the three fishery inspectors concerned, the administration accepts to comply with the Ombudsman's recommendation.

As an exceptional measure, it could therefore be considered to re-examine the files of the three complainants as if competition 25T/XIV/95, which they passed, had been announced for B3/B2 grades and to reconsider their grading when entering the service on this basis.

The Commission's detailed opinion was forwarded to the complainants, who informed the Ombudsman by telephone on 6 June 2000 that they were satisfied with the outcome and further thanked the Ombudsman for his intervention.

THE DECISION

On 18 January 2000, the Ombudsman addressed the following draft recommendation to the Commission in accordance with Article 3 (6) of the Statute of the Ombudsman:

The Commission should take the necessary steps in order to remedy the discrimination in the former employment situation of the complainants.

On 12 May 2000, the Commission informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and of the measures, which it has taken to implement it. The measures described by the Commission appeared to be satisfactory and the Ombudsman therefore closed the case.

FAILURE TO RESPECT THE PROCEDURE OF REINSTATING 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 to refuse to pay him a compensation for the loss of salary and the reduced pension.

THE DRAFT RECOMMENDATION

The 1999 Annual Report of the Ombudsman contains details of the decision and of the draft recommendation made to the Commission on 4 November 1999, in accordance with Article 3(6) of the Statute of the Ombudsman[109]. The draft recommendation was that:

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.

The Ombudsman informed the Commission that, according to Article 3 (6) of the Statute, it should send a detailed opinion before 29 February 2000 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 13 March 2000, the Secretary General of the Commission sent the following detailed opinion to the Ombudsman:

"(…) The Commission regrets that Mr P.'s professional abilities in relation to each vacant post corresponding to his grade were not checked at the time and that as a result the procedure for establishing whether he satisfied the requirements for each of these posts did not actually take place.

The Court has consistently ruled that failure by the administration to verify systematically the abilities of the official in relation to each vacant post in which he could have been reinstated constitutes a service-related fault for which the administration could be held liable if after such an examination, even carried out subsequently, it transpires that there was a vacant post in which the individual concerned could have been reinstated. In such a case, the Commission is required to make good the material damage suffered by the official as a result of not being reinstated in the post thus identified.

In this case and at this stage in the procedure, there is no evidence that such an examination would have led to the identification of a post in which Mr P. could have been reinstated. But nor do we not have the necessary information to establish that Mr P. did not satisfy the requirements for each of the 25 vacant posts which would have enabled him to be reinstated in one of them.

In view of the foregoing, and on the basis of the Ombudsman's recommendation, the appointing authority agrees to award Mr P. compensation equivalent to two months salary for the damage he suffered, subject to deduction of any net earned income received by him for the same period while engaged in other activities."

After careful examination of the Commission's detailed opinion, the Ombudsman considered that the measure it described was satisfactory to implement the draft recommendation.

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[109] Annual Report 1999 page 224.

The complainant's observations

On 6 April 2000, the complainant sent his observations on the Commission's detailed opinion. He observed that the compensation for material damage, which the Commission had agreed to pay and which was supported by case law, seemed correct and just.

He however pointed out that, as to the concrete payment of this compensation, he had not received any news from the Commission, as the office of the Ombudsman was his only channel of communication with the Commission.

THE DECISION

1 On 4 November 1999, the Ombudsman addressed the following draft recommendation to the Commission, in accordance with Article 3(6) of the Statute:

The Commission should compensate the complainant for the material damage he directly suffered as a result of the Commission's service related fault, i.e. 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.

2 On 13 March 2000, the Commission informed the Ombudsman of its acceptance of the draft recommendation and of the measures which it took to implement it. The measures, which consisted of awarding the complainant a compensation equivalent to two months' salary for the damage he suffered, appeared to be satisfactory and the Ombudsman therefore closed the case.

DELAYS IN ADOPTING INTERNAL GUIDELINES ON CHILD ABUSE

Decision on complaint 521/98/ADB against the European Commission

THE COMPLAINT

In September 1995, the European Commission put a Belgian company, ESEDRA s.p.r.l., in charge of running the *"Early Childhood Centre Clovis"* (hereafter ECC Clovis) in Brussels, a crèche set up for children of the personnel of Community institutions, among which the children of the complainants.

In October 1997, the parents of children attending the ECC Clovis heard rumours about an alleged investigation of a paedophilia case within the crèche. During the second half of October 1997, these rumours were confirmed by the European Commission through written communications and meetings with the parents.

According to the information disclosed, the investigation by the Belgian authorities originated in a complaint by the parents of a child attending the ECC Clovis, and led them to suspect members of the personnel employed in the crèche. The director of the crèche was informed of the problem by the end of May 1997, and the European Commission was informed at the beginning of June 1997.

(i) In summary, the complainants claimed that during the whole process the Commission failed to act in an effective, transparent and timely way. It failed to inform the parents. Other Community institutions, the paediatrician of the crèche and the Joint Committee on the Management of the Early Childhood Centre were only informed months after the Commission became aware of the issue, and once the case had already been made public. According to the complainants the information disclosed was insufficient and inadequate, furthermore, the Commission failed to request important information from the Belgian authorities in charge of the investigations. In the complainants' view the Commission could have disclosed information without infringing the secrecy of procedures or the right of privacy of the persons victims.

Regarding this first claim the complainants considered that the Commission should adopt a code containing clear provisions in order to avoid similar flaws in cases of suspected abuse. In addition they urged the Commission to disclose the information it withheld so far.

(ii) The second claim brought forward by the complainants related to the supervision of ESEDRA s.p.r.l., the company in charge of running the ECC Clovis. The complainants expressed the view that the Commission services, because of understaffing, failed to use all the control possibilities provided for in the contract with ESEDRA s.p.r.l.

The complainants asked the Commission to take appropriate steps to solve both the procedural problem and the question of understaffing.

THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission. The Commission's opinion on the complaint was in summary the following:

As a preliminary matter, the Commission stressed that the alleged cases of child abuse were being prepared for a possible judgement by the Belgian authorities, therefore the information relating directly to the cases was confidential. Furthermore, the Commission emphasised that it had taken all possible measures for the security of children in its crèches.

(i) The information available had been transmitted at all levels but always with mindful care for the privacy of the victims, and the secrecy of the judicial proceeding. Meetings were organised with the parents, the personnel of the crèche, the Joint Committee on the Management of the Early Childhood Centre, and with external Belgian Institutions. Conferences as well as specific training and awareness sessions for the personnel were organised. The members of the personnel of the crèche were only suspected at a late stage of the procedure, and the case was made public in October 1997.

Regarding the security, the Commission's Security Office had permanently taken steps to reinforce the security. It thoroughly investigated the case by getting in touch regularly with the parents, the personnel, and the Belgian authorities.

(ii) For the control over the contractor, the Commission had regularly carried out a series of controls notably in the form of on the spot visits.

The Commission explained that it had already taken, and had the intention to take preventive measures against abuse in crèches. This occurred through specific training, contacts with local specialised organisations such as the "Office de la Naissance et de l'Enfance" (ONE), and with several Member States.

All the above-mentioned measures were taken in the course of the investigation, and in accordance with the requirements imposed by the judicial procedure.

The complainants' observations

The European Ombudsman forwarded the European Commission's opinion to the complainants with an invitation to make observations. In their reply of 25 January 1999, the complainants made the following observations.

(i) Although the Commission knew about the problems since early June 1997, the information measures mentioned in the Commission's opinion were all taken in October 1997. Information could have been disclosed earlier without infringing the secrecy of the judicial procedure.

The information itself was poor. The Commission had failed to obtain it from the main source, i.e. the Belgian authorities. Furthermore, the Commission refused to take civil action, although it could in this way have obtained more detailed information. Furthermore, the Security Office persistently refused to disclose the reports it had prepared.

The complainants regretted that the Commission had not committed itself to adopting a code of conduct, which would clearly set out the procedure in similar cases.

(ii) As to the control over the contractor, the complainants referred to the addendum to a report established by a Monitoring Committee in charge of the Clovis case. This Committee concluded that it had no knowledge of on the spot investigations carried out by the Commission, which in its view should have been carried out by surprise. In summary the controls were considered inappropriate. Finally, the contractor's work was called into question.

FURTHER INQUIRIES

Further request for information

The Ombudsman asked the Commission to comment on the points made by the complainants in their observations.

The Commission confirmed that when it was informed about the case it only had knowledge of few elements concerning the alleged events. Furthermore, the parents of the victims had asked for discretion and did not want the Administration to intervene. Both the wishes of the parents, and the judicial secrecy convinced the Commission that all the parents should not be informed before a minimum amount of evidence was brought together.

As to the quality of the information, the Commission put forward that it was informed of progress in the case by the office of the King's prosecutor of Brussels. If the Commission had taken civil action, it would not have improved the information provided to the parents of the victims who took civil action themselves, nor would it have been conceivable to disclose the information it might have obtained given that the Commission would in turn have been bound by the secrecy of the procedure.

The Commission stated that it envisaged to set up a specific internal procedure for cases of mistreatment, in collaboration with specialised institutions like the ONE.

The Commission has drawn up a list of controls already undertaken and follow-up measures concerning the control over the contractor, involving the Administration, the Joint Committee on the Management of the Early Childhood Centre, the Medical department, the parents, and the contractor himself. One official is in particular in charge of monitoring the contract.

The Commission also stressed that contacts were made with the Belgian ONE to establish collaboration for the quality control of the Commission's crèches, and for the training of its personnel in cases of mistreatments.

The complainants' further observations

The complainants regretted that two years after the events, the Commission only "*envisages*" to adopt an internal procedure.

As to the control over the contractor, the complainants informed the Ombudsman of an opinion adopted by the Joint Committee on the Management of the Early Childhood Centre, in which the European Commission was asked not to renew the contract with

ESEDRA s.p.r.l. Furthermore, the complainants expressed the wish to be informed of all the responsibilities of the official in charge of the control, and wondered if a single person could cope with this work for the restaurants and crèches.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

Having examined the information obtained during the inquiry, the European Ombudsman considered that there was a *prima facie* evidence of maladministration. Principles of good administration require that decisions be made within a reasonable time limit. More than two years after the events, the Commission had not adopted an internal procedure for dealing with alleged cases of abuse within its crèches.

In accordance with article 3(5) of his Statute[110], the Ombudsman therefore addressed the President of the European Commission, asking that the Commission commit itself to elaborating an internal procedure to meet the complainants' requests. In addition, the Ombudsman asked the Commission to consider the complainants' fears regarding the human resources available for the supervision of childcare contracted out by the Commission.

On 23 November 1999, the Commission informed the Ombudsman that it had prepared a set of internal guidelines which were submitted to the ONE for consultation. The latter's reply was imminent. The procedure however was very complex, sensitive and in particular affected the social rights of the workers, security and statutory provisions. A specific training programme for the crèche's staff was to be completed in the first quarter of 2000. The Commission also informed the Ombudsman that it was about to establish a contractual collaboration with the ONE, and its Flemish equivalent Kind & Gezin, to set up an external control of the Commission's crèches. Regarding the official in charge of the control, the European Commission ascertained that he was dealing full time with the supervision of ESEDRA s.p.r.l.'s contract. The new contract, for which a new tender procedure had twice been launched, foresees reinforced controls.

The complainants expressed their satisfaction as to the steps taken by the Commission but regretted that none of them had been completed so far. They repeated their concern about the workload of the official in charge of the control within the Commission, and stressed that it should find the means to set up an efficient control. As a conclusion, the complainants stated that they trusted the Commission's intention to achieve what was undertaken, but asked the Ombudsman, before closing the case, to make sure that the Commission would respect its commitments.

THE DRAFT RECOMMENDATION

1 The handling of the case of abuse and adoption of an internal procedure

1.1 The complainants considered that the Commission failed to take the appropriate steps in connection to suspected cases of abuse in one of its crèches. In particular it did not act in an effective, transparent and timely way. The complainants therefore urged the Commission to adopt a code containing clear provisions as to the procedure to be followed in similar cases. The Commission argued that it took all the possible measures, and that it acted with mindful care for the privacy of the victims, and the secrecy of the judicial proceedings.

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110 Article 3.5 of the Statute of the European Ombudsman : "*As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.*"

1.2 The Ombudsman's inquiries into this case revealed that the Commission was aware of the necessity to set up a specific internal procedure, which however, more than two years after the events, had not been adopted.

1.3 In accordance with article 3(5)[111] of his Statute, the Ombudsman therefore addressed the President of the European Commission to achieve a friendly solution. The Ombudsman asked that the Commission commit itself to adopting an internal procedure.

1.4 On 23 November 1999, the Commission informed the Ombudsman that the adoption of an internal procedure was imminent. However, on 31 January 2000, an informal request by the European Ombudsman revealed that there had been no significant progresses towards the adoption of a procedure. Principles of good administration require that decisions should be made within a reasonable time limit. The Ombudsman decided to address a draft recommendation to the Commission.

2 The supervision of the contract

2.1 The complainants considered that the Commission did not properly supervise the contractor in charge of running the ECC Clovis. The complainants also questioned the possibility of the personnel in charge of the control to cope with the workload. The Commission declared that it carried out several series of controls, and that one official was dedicated full time to the supervision of the contract.

2.2 The Ombudsman noted that the Commission had taken measures to improve and reinforce both the internal and external control procedures over the next contractor in charge of running the ECC Clovis from August 2000. Given the forthcoming changes in the control procedure, the Ombudsman considered that it was not necessary to pursue the investigations any further regarding the workload of the department in charge of monitoring the present contract. The Ombudsman however trusted that the Commission would make sure that the new tasks assigned to its department were accompanied by organisational measures allowing a proper and efficient completion of the additional work.

In view of the above, and in accordance with Article 3 (6) of the Statute of the European Ombudsman[112], the Ombudsman made the following draft recommendation to the Commission:

The Commission should adopt an internal procedure to ensure that cases of alleged abuse of children within its crèches are dealt with in an effective, transparent and timely way. It should be adopted before 31 July 2000.

The Commission and the complainants were informed of this draft recommendation. The Ombudsman informed the Commission that according to article 3 (6) of the Statute, the Commission should send a detailed opinion before 31 July 2000 and that the detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description on how it had been implemented.

THE COMMISSION'S DETAILED OPINION

On 28 July 2000, the Commission transmitted its detailed opinion to the Ombudsman. It explained that an internal procedure containing rules to be applied in case of suspected child abuse within its crèches had been adopted on 30 June 2000. It enclosed a copy of this

111 Article 3.5 of the Statute of the European Ombudsman : "*As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.*"

112 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, OJ 1994 L 113/15.

procedure and stressed that it resulted from an exhaustive internal and external consultation procedure. The text had been transmitted to all interested parties.

The Commission's detailed opinion was forwarded to the complainants on 31 August 2000.

THE DECISION

1 On 15 March 2000 the Ombudsman addressed the following draft recommendation to the Commission :

The Commission should adopt an internal procedure to ensure that cases of alleged abuse of children within its crèches are dealt with in an effective, transparent and timely way. It should be adopted before 31 July 2000.

2 On 28 July 2000 the Commission informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and of the measures which it had taken to implement it. The measures described by the Commission appeared to be satisfactory and the Ombudsman therefore closed the case.

3.5.3 Europol

RULES ON PUBLIC ACCESS TO DOCUMENTS HELD BY EUROPOL

Decision closing own-initiative inquiry OI/1/99/IJH as regards Europol

In April 1999, the Ombudsman launched an own-initiative inquiry into public access to documents held by four bodies, including Europol, which were established or which became operational after the closure of his earlier own-initiative inquiry on the same subject.[113]

The 1999 Annual Report of the Ombudsman contains details of the decisions concerning three of the bodies concerned by the own-initiative inquiry and of the draft recommendations made to Europol on 13 December 1999, in accordance with Article 3 (6) of the Statute of the Ombudsman.[114] The draft recommendations were that:

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 was requested to send a detailed opinion within three months, in accordance with Article 3 (6) of the Statute of the Ombudsman.

On 7 March 2000, the Director of Europol addressed a letter to the Ombudsman reaffirming the commitment to ensure that appropriate rules for Europol on public access to documents are adopted. He stated that, in this respect, he fully accepted the draft recommendations. He also stated, however, that he could not guarantee the adoption of rules within three months because the Management Board was not able to reach agreement at its meeting on 22 February 2000 on the draft rules which Europol submitted to it, so necessitating further study of the issue before a final decision could be taken.

In reply, the Ombudsman requested Europol's detailed opinion by 31 May 2000. On 16 June 2000 a reminder letter was sent to Europol, establishing a new deadline of 31 July 2000 and mentioning that if no reply, or an unsatisfactory reply, was received, it would be

113 616/PUBAC/F/IJH

114 Annual Report 1999 page 245.

necessary for the Ombudsman to make a Special Report to the European Parliament on the matter, in accordance with Article 3 (7) of the Statute of the Ombudsman.

In a detailed opinion sent on 6 July 2000, Europol informed the Ombudsman that its Management Board wishes to resume discussions on the subject of public access to Europol documents once discussions on the recent proposals from the Commission have led to concrete new regulations for other European bodies. As an interim measure Europol will deal with requests for public access to Europol documents through the application by analogy of Council Decision 93/731. The public will be informed of this through publication on Europol's web site at *http://www.europol.eu.int*.

The Ombudsman considered that Europol's detailed opinion shows that it accepted the draft recommendations and had taken satisfactory measures to implement them. The Ombudsman therefore closed the case.

3.6 QUERIES FROM NATIONAL AND REGIONAL OMBUDSMEN

In February 2000, the Ombudsman of the Basque Provinces (Ararteko) addressed a query to the European Ombudsman concerning the conformity of administrative requirements with the principle of free movement of goods. In one of his cases, a citizen complained that in order to register his second hand car imported from another EU-Member State, he was obliged by the Spanish administration to provide, in addition to the standard approval foreseen in national law, a fact sheet indicating the fiscal power of the car in Spain. Moreover, the citizen was obliged to bear the costs for the document.

ADMINISTRATIVE REQUIREMENTS FOR REGISTERING IMPORTED SECOND HAND CARS IN SPAIN

Query from the Regional Ombudsman of the Basque Provinces Q1/2000/MM

In transmitting his query to the European Ombudsman, the *Ararteko* wished to obtain an authoritative opinion from a European Institution. Since the question related to a very specific issue in the field of the internal market, the European Ombudsman decided to consult the European Commission on this matter.

In its response to the European Ombudsman, which was transmitted to the *Ararteko*, the European Commission expressed its view that the administrative requirement appeared to be in conformity neither with national law and possibly nor with Articles 28 to 30 EC. The Commission would handle the matter as a complaint and proposed to get in contact with the *Ararteko* in order to get further information and to find a rapid solution to the problem with the assistance of the informal network dealing with the internal market on national level.

FREE MOVEMENT OF WORKERS IN TUSCANY

Query from the Regional Ombudsman of Tuscany Q2/2000/ADB

On 15 March 2000, Mr. Romano FANTAPPIÉ, Regional Ombudsman of Tuscany (Italy) transmitted a query to the European Ombudsman. In the framework of one of the cases he had to deal with, Mr. Romano FANTAPPIÉ was informed that the Municipality of Siena would only deliver Taxi licenses to people actually residing in Siena. The same condition applied for other posts or public offices, like for instance, the senior executives of the Monte dei Paschi di Siena Bank. He wondered whether this requirement did not infringe Community Law provisions in relation to the free movement of workers. He therefore asked for his query to be transmitted to the European Commission for an authoritative opinion.

The Commission informed the Ombudsman that the case had to be analysed in view of the right to freedom of establishment as laid down in article 43 *et seq.* of the Treaty of the

European Communities. Discriminatory or restrictive measures can only be justified by the general interest (such as public security, public health or public policy). In the Commission's view, the requirement imposed for the deliverance of Taxi licenses in Siena could be considered as unnecessarily restrictive. The situation however did not appear to constitute a discriminatory measure on the ground of nationality. Furthermore, the case did not reveal sufficient Community dimension (the case had been presented by Italians living in Italy) to be pursued by the European Commission. The Commission's opinion was forwarded to the Ombudsman of Tuscany.

THE OMBUDSMAN FOUND NO GROUNDS TO QUESTION THE COMMISSION'S ACTION

Query Q3/2000/ME (confidential) from the Irish Ombudsman

In September 2000, the European Ombudsman received a query from the Irish Ombudsman. The query referred to a letter from an EU citizen addressed to the European Commission in October 1998, a letter that in substance was related to query Q2/97/IJH which was closed by the European Ombudsman on 23 April 1999.

The citizen had informed the Irish Ombudsman that no reply was received from the Commission in relation to the letter. The Office of the Irish Ombudsman therefore asked the European Ombudsman to pursue the matter further with the Commission.

Since the letter related to query Q2/97/IJH, the European Ombudsman examined the file of Q2/97/IJH and found out that a reply had been sent by the Commission on 15 September 1999. The Commission's reply was forwarded to the Irish Ombudsman who transmitted it to the citizen for observations. The European Ombudsman was subsequently informed by the Irish Ombudsman that the citizen was not satisfied with the content of the letter.

The European Ombudsman noted that the content of the letter related to query Q2/97/IJH.

The European Ombudsman firstly noted that Q2/97/IJH had been closed on 23 April 1999. As regards Q3/2000/ME, the European Ombudsman referred to the reply sent to the citizen by the Commission on 15 September 1999, and found that there were no reasons to inquire further into this issue.

3.7 OWN INITIATIVE INQUIRIES BY THE OMBUDSMAN

OWN INITIATIVE INQUIRY ON FAULT-EXEMPTION PROVISION CONCERNING INACCURATELY FILLED-IN AGRICULTURAL AID-FORMS

Decision on own initiative inquiry OI/3/99/(IJH)/PB against the European Commission, based on query Q5/98/IJH from the Irish Ombudsman

THE QUERY

In October 1998, the Irish Ombudsman addressed a query to the European Ombudsman concerning EC agricultural aid applications by a number of Irish farmers. The Irish farmers had applied to the Irish Department of Agriculture and Food for grants under Special Beef and Extensification Premium Schemes in 1993 and 1994. The Department either rejected the applications or provided only a restricted payment, the reason being that the farmers had made inaccurate declarations on certain Area Aid forms. The Area Aid forms were an essential part of the application procedure.

The farmers did not dispute that they had made inaccurate declarations, but nevertheless considered that they had been treated unfairly. Their allegation was based on the fact that they had in good faith relied on advice by a specialised agency, Teagasc, to fill in the Area Aid forms. Teagasc is a national statutory body that was set up to provide independent advisory, research, education and training services to the agricultural and food industry in Ireland; it is financed mainly through the budget of the Department of Agriculture and Food, and its governing board is appointed by the Minister for Agriculture and Food. It remains outside the Irish Ombudsman's jurisdiction.

In his query to the European Ombudsman, the Irish Ombudsman considered that the allegation of the farmers was correct. More specifically, the Irish Ombudsman submitted that the Department of Agriculture and Food should have applied an EC legal provision which provides that penalties arising out of mistakes on Area Aid applications

"shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority"[115]

The Irish Ombudsman had already asked the Department of Agriculture and Food to reconsider its decisions on the farmers' applications. The Department informed the Irish Ombudsman that it had asked the European Commission if the above provision would apply. The Commission had replied that in its opinion the provision does not apply

"for services provided by semi-State agencies within their role of advising farmers to fill in application forms. The benefit of the doubt given to the farmer by this article is limited to information provided by Ordnance Survey or similar authorities. I am therefore of the opinion that the approach of the Department taken up to now in this context should not be subject of any modifications."

The Irish Ombudsman considered that this interpretation was unnecessarily restrictive, unduly harsh in its application, and unfair. He also pointed out that as long as the Department of Agriculture and Food was acting in accordance with advice by the European Commission, he could not pursue the matter further with the Department. The Irish Ombudsman therefore asked the European Ombudsman to examine the Commission's interpretation of the above provision (hereinafter 'the disputed provision').

THE EUROPEAN OMBUDSMAN'S PRELIMINARY REMARKS

The procedure for dealing with queries of this kind 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."

115 Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration hand control system for certain Community aid schemes; OJ L 391, 31.12.1992, p 36, Article 9 (2).

The query procedure does not resemble the procedure of Article 234 EC (former Article 177), which provides for the Court of Justice to give preliminary rulings on questions of Community law raised in pending cases before 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 from 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.

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.

In accordance with the above procedure, the European Ombudsman accepted the query from the Irish Ombudsman. The European Ombudsman therefore forwarded the query to the President of the European Commission, with a request for a response.

THE COMMISSION'S RESPONSE

In its opinion dated 10 February 1999, the Commission maintained its view that the disputed provision should not apply for services provided by semi-State agencies within their role of advising farmers to fill in application forms. More specifically, the Commission stated that

"Official information does not seem to be given by the agency TEAGASC whose role is described as providing advisory, research, education and training services to the agriculture and food industry."

The Commission's response was forwarded to the Irish Ombudsman.

THE IRISH OMBUDSMAN'S OBSERVATIONS

On 31 March 1999, the Irish Ombudsman submitted his observations to the Commission's response. The Irish Ombudsman maintained his view that the Commission's interpretation of the disputed provision was unfair. He submitted that information provided by Teagasc to farmers should be regarded as "information recognised by the competent authority" within the disputed provision, and that there could be little doubt that information furnished by Teagasc is "recognised" by the Department of Agriculture and Food (the "competent authority").

The Irish Ombudsman also disagreed with the Commission's conclusion that information provided by Teagasc is not "official" information, given that the agency operates under the aegis of the Department of Agriculture and Food.

THE EUROPEAN OMBUDSMAN'S DECISION TO BEGIN AN OWN INITIATIVE INQUIRY

On 24 April 1999, the European Ombudsman decided to begin an inquiry on his own initiative, under Article 138e of the EC Treaty (now Article 195), into a possible instance of maladministration by the Commission in relation to the guidance which it has given to the Irish Department of Agriculture and Food concerning the application of Commission Regulation 3887/92 to the cases raised by the complaints to the Irish Ombudsman.

The reason for the inquiry was that the Commission's interpretation of the disputed provision, i.e. Article 9 (2) of Commission Regulation (EEC) 3887/92, appeared narrower than the literal meaning of the provision and produced a result which was unfair, in that it penalised applicants for aid who acted in good faith on official advice. Furthermore, the Commission's interpretation appeared to depend in part on the classification of Teagasc as a "semi-state" body. It was not obvious, however, why the legal status, which the Member State has chosen to confer on such a body, should be relevant in this context. Finally, the European Ombudsman was not aware of any case law of the Community Courts, which supported the Commission's interpretation of the provisions in question.

The Commission was asked to provide its opinion on these points.

The Commission's first opinion on the European Ombudsman's own initiative inquiry

On 7 June 1999, the Commission provided its opinion on the European Ombudsman's own initiative inquiry. The opinion first made reference to the Ombudsman's request for an opinion, in the following terms:

"In his letter of 29.04.1999 the European Ombudsman requires the Commission to modify its interpretation of part of Article 9 (2) of Commission Regulation 3887/92 ...".

The Commission's opinion then stated that

"The Commission notes that according to Article 1.2 of his Statute, 'the Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties.'

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 Commission also stated that it would nevertheless endeavour to re-examine its stance on the interpretation of the disputed provision.

The Commission's comments on the European Ombudsman's competence are addressed in a further remark to this decision.

The Commission's final opinion on the Ombudsman's own initiative inquiry

In its final opinion, the Commission first pointed out that part of the purpose of adopting the legislation, which contains the disputed provision, *i.e.* Regulation 3887/92, was to prevent and penalise irregularities and fraud effectively. It added that the correct management of the aid schemes is one of the essential requirements in the administration of the agricultural policy, aiming *inter alia* at avoiding excessive expenditure to the EU-budget.

As for the substance of the European Ombudsman's inquiry, the Commission observed that the starting point is that farmers who apply for aid are themselves responsible for the accuracy of the data entered on the relevant forms. This applies also if the farmers have received assistance and support to fill in the forms. If the farmers have received incorrect advice, then they have legal means of recourse against the advisor. The legal status of the organisation or body, which provides the information, is, however, irrelevant.

An exception to the principle of application of sanctions in the case of mistakes on Area Aid forms is contained in the disputed provision, i.e. Article 9 (2) of Regulation 3887/92. According to the case law of the Community Courts, an exception must be construed in a restrictive manner. As Article 9 (2) concerns mistakes in the "determination of the area", the "information recognised by the competent authority" is that which relates to the measurement of parcels. Such information is provided by the Ordnance Survey, the Cadastre or

similar bodies. The Commission does not consider that Teagasc, although operating under the aegis of the department of Agriculture, could be considered one of these authorities. It is more likely that it acts as an independent advisor, which avails itself of some kind of official information, while offering a wider service to the farmers.

The Commission furthermore noted that Regulation 3887/92 provides for Member States to allow claims of Area Aid to be adjusted without sanctions in cases of genuine error which have to be recognised as such by the competent Authority of the Member State, which is the authority entitled to receive and check the aid claims (Article 5a, inserted by Regulation (EC) No. 229/95, OJ L 27 of 4.2.1995, p 3[116]). The responsibility of recognising errors lies with the Member States.

The Commission also pointed out that it had modified Regulation (EEC) No. 3887/92 by introducing a clause giving farmers the possibility, under certain conditions, of correcting information in their applications which could lead or have led to the imposition of penalties (Article 11.1a, as amended by Regulation (EC) No. 1678/98, OJ L 212 of 30.7.1998, p 23[117]). The relevant authorities of the Member States therefore now have at their disposal mechanisms to obviate the imposition of penalties in circumstances, which they may consider to be unfair.

Under these circumstances, the Commission saw no reason to modify its position as expressed in its communication to the Irish Department of Agriculture and Food.

The Irish Ombudsman's observations on the Commission's opinion

The Irish Ombudsman re-stated his view that information provided by Teagasc should be considered "information recognised by the competent authority" within Regulation 3887/92. He referred to Teagasc's legal status and its expertise on EU agricultural legislation.

The Irish Ombudsman also addressed the Commission's reference to Article 5a of Regulation 3887/92, as inserted by Regulation (EC) No. 229/95. He asked for clarification from the Commission on whether this provision could be applied by the Irish Department of Agriculture and Food to re-asses the merits of the individual cases that the Irish Ombudsman was investigating.

The Irish Ombudsman finally observed that the Commission's reference to Article 11.1a of Regulation 3887/92, as inserted by Regulation (EC) No. 1678/98, was irrelevant in that the provision was not available at the time when the farmers in question received the decisions of the Department of Agriculture and Food.

THE DECISION

1 The reasons for the European Ombudsman's own initiative inquiry

1.1 The European Ombudsman's decision to conduct the own initiative inquiry was prompted by a query from the Irish Ombudsman, submitted under the query procedure between national ombudsmen and the European Ombudsman. The query revealed facts,

116 "Without prejudice to the provisions contained in Articles 4 and 5, an aid application may be adjusted at any time after its submission, in cases of obvious error recognised by the competent authority."

117 "The penalties applicable according to Articles 9 and 10 shall not be imposed in cases where the farmer, on finding that the application which he has lodged contains errors other than those made intentionally or by serious negligence incurring one or more of the said penalties, within 10 working days of finding these errors, informs the competent authority in writing, provided that the authority has not notified the farmer of its intention to carry out an on-the-spot control, the farmer has not been able to learn of this intention in any other way and the authority has not already informed the farmer of the irregularity in the application."

which could suggest that there had been maladministration in legal advice given by the European Commission to the Irish Department of Agriculture and Food.

1.2 The potential maladministration concerned the Commission's interpretation of Article 9 (2) of (EEC) Regulation 3887/92. Article 9 (2) provides that penalties arising out of mistakes on Area Aid applications

"shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority".

1.3 The Commission advised the Irish Department of Agriculture and Food that Article 9 (2) was not applicable in cases where farmers had inaccurately filled in their application forms as a result of incorrect information provided to them by the Irish body 'Teagasc', an agency described as a "semi-state" agency. The Commission's advise had led the Irish Department of Agriculture and Food to maintain its decisions to reject aid-applications by a number of Irish farmers, or impose penalties.

1.4 The Commission's advice to the Department of Agriculture and Food suggested a narrower interpretation than the literal meaning of the provision and produced a result, which was unfair, in that it penalised applicants for aid who acted in good faith on official advice. Furthermore, the Commission's interpretation appeared to depend in part on the classification of Teagasc as a "semi-state" body. It was not obvious, however, why the legal status, which the Member State has chosen to confer on such a body, should be relevant in this context.

2 The Commission's re-examination of its interpretation

2.1 The European Ombudsman requested the Commission to re-examine its interpretation of Article 9 (2) Regulation 3887/92. In its final opinion, the Commission, stated that it applied the principle of the case law of the Community Courts that exceptions shall be interpreted restrictively. The Commission therefore interpreted Article 9 (2) to refer only to information concerning the "determination of the area". The information would therefore have to be produced by bodies, which are specifically concerned with area determination, such as the Irish Ordnance Survey or similar bodies. According to the information held by the Commission, the Teagasc agency does not produce such information, but has a primarily advisory function. The Commission also concluded that the legal status of the body that produces the information referred to in Article 9 (2) is irrelevant.

2.2 The European Ombudsman acknowledged the applicability in this case of the legal principle that exceptions shall be interpreted restrictively. The Ombudsman also took note of the fact that the Commission appeared to have modified its view on the relevance of the legal status of the Teagasc agency.

2.3 The Commission appeared to have applied in a reasonable manner the principle that exceptions shall be interpreted restrictively. The Ombudsman did not, therefore, find reason to conclude that there has been maladministration in the Commission's interpretation of Article 9 (2) of Regulation 3887/92.

2.4 As regards the status of the Teagasc agency, the Ombudsman welcomed the clarification of the Commission's stance in respect of the status of the body that produces the information referred to in Article 9 (2). While the Commission's initial formulation appeared to support the view that Teagasc's status as a "semi-state" agency was a determining factor in the application of the exception provided for in Article 9 (2), the Commission's final opinion to the present inquiry revealed that this was not the case. It was therefore not implied in the Commission's interpretation that the creation of quasi-public bodies in itself reduces citizen protection within the framework of Regulation 3887/92. The fact that the Teagasc agency is outside the Irish Ombudsman's jurisdiction was a national matter, which was not within the European Ombudsman's competence to comment on.

3 The Commission's additional legal information and advise

3.1 In addition to its re-examination of its interpretation of Article 9 (2) of Regulation 3887/92, the Commission provided information on other legal provisions which may enable national authorities to avoid or remedy unfairness in their application of EC aid schemes. It referred to Article 5a of Regulation 3887/92, inserted by Regulation (EC) 229/95, and Article 11.1a, as amended by Regulation 1678/98. The Commission appeared to suggest that Article 5a was a basis on which the Irish Department of Agriculture and Food could possibly provide some remedy to the Irish farmers. Article 11.1a was, as noted by the Irish Ombudsman, not directly pertinent to the farmers concerned, given that the provision did not exist at the relevant time of the farmers' dispute with the Department.

3.2 While it is regrettable that the Commission did not draw attention to Article 5a in its original reply to the Irish Department's request for information on Article 9 (2), and although Article 11.1a does not have a direct relevance to the farmers concerned, the Ombudsman welcomed the fact that the Commission had endeavoured to provide information on other possible means to avoid or remedy injustices.

3.3 As concerns the Irish Ombudsman's request for a clarification of the Commission's stance on the applicability of Article 5a, the European Ombudsman noted that this request went beyond the inquiry.

4 Conclusion

On the basis of the Ombudsman's own initiative inquiry, initiated on the basis of a query submitted by the Irish Ombudsman, there appeared to be no maladministration in this case. The Ombudsman therefore closed the case.

FURTHER REMARKS

The Commission's opinion on the Ombudsman's competence

The European Ombudsman considered that two points in the Commission's first opinion to his own initiative inquiry required comment since they appeared to be based on misunderstandings about the procedures and mandate of the European Ombudsman.

The first point concerned the Commission's statement that *"the European Ombudsman **requires** the Commission to modify its interpretation"*. This is not an accurate description of the opening of an inquiry by the Ombudsman, which consists of a request to the institution or body concerned to give its opinion on a possible instance of maladministration.

The second point concerned the Commission's statement 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 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. In practice, however, neither the Irish Ombudsman nor the Irish citizens who complained to him brought, or could easily have brought, legal proceedings concerning the issue.

The Ombudsman also pointed out that the meaning of the term "maladministration" is of fundamental importance for the work of the Ombudsman. For this reason, the Ombudsman 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 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 Marin 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 on the 1996 Annual Report by the Parliament, there was a call for a more precise definition of maladministration and the European Ombudsman undertook in the plenary debate to provide such a definition. The Ombudsman asked the national ombudsmen and similar bodies to inform the Ombudsman 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 unlawfully"*.

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[118]. This 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.

Against this background, the European Ombudsman expressed his surprise that the Commission should 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.

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[119]. 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 facts *"are or have been the subject of legal proceedings"*.

The European Ombudsman informed the Commission that in addition to receiving the outcome of the Commission's re-examination of its stance on the disputed provision of the

118 OJ 1998 C 292/168.

119 The Administration and You: a handbook, 1996 p. 44.

present inquiry, he would also be grateful to be informed of whether the Commission accepts the definition of maladministration, included in the Ombudsman's Annual Report for 1997 and welcomed by the European Parliament in the resolution which it adopted on 16 July 1998, following the proposal by the Committee on Petitions[120].

The Commission's response dated 15 July 1999

In response to the European Ombudsman's remarks on his competencies, the Commission sent a reply in which it intended to clarify its position. It referred to the definition of "maladministration", according to which *"maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it"*, and stated that:

"Commissioner Gradin agreed on behalf of the Commission on 14 July 1998 in the European Parliament to this definition and underlined that it was most useful that this definition had now been clarified".

The Commission added that it agreed with the Ombudsman that he may investigate interpretations given which produce results that may be unfair.

The European Ombudsman noted that the question of the Ombudsman's competence is settled, and requested the President of the European Commission to ensure that the responsible Commission services take into account these further remarks, as well as the Commission's response to them, when preparing the Commission's replies to the Ombudsman.

FINANCIAL COMPENSATION FOR MATERIAL DAMAGE SUFFERED

Decision closing the own initiative inquiry OI/1/2000/OV against the European Commission

BACKGROUND TO THE INQUIRY

In September 2000, the Ombudsman started an own initiative inquiry into the delay of the Commission to give effect to the draft recommendation which he made in complaint 489/98/OV, concerning the failure of the European Commission to reinstate the complainant at the end of his unpaid leave on personal grounds (1 October 1996) and its refusal to pay him a compensation for the loss of salary and the reduced pension.

By decision dated 4 November 1999[121], following an inquiry into the complaint and given that it was not possible to find a friendly solution between the parties, the Ombudsman addressed the following draft recommendation to the Commission in accordance with Article 3(6) of the Statute of the Ombudsman:

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.

By letter of 13 March 2000, the Commission informed the Ombudsman of its acceptance of the draft recommendation and of the measure, which it had taken to implement it, namely awarding the complainant a compensation equivalent to two months salary for the damage he suffered. Considering that this measure appeared to be satisfactory, the Ombudsman closed the case by decision of 12 April 2000.

120 A4-0258/98.

121 See Annual Report 1999 of the European Ombudsman, page 224

THE INQUIRY

From the letters which the complainant sent to the Commission on 30 June and 17 August 2000 with a copy to the Ombudsman, it appeared however that, after a period of 6 months, the Commission had still not paid the complainant the two months of salary to which it referred in its letter of 13 March 2000.

In accordance with Article 3.1 of the Statute of the European Ombudsman, the Ombudsman therefore started the present own initiative inquiry and asked the Commission to submit an opinion on it.

The Commission's opinion

The Commission informed the Ombudsman that the request for payment was introduced on 11 September 2000, i.e. one day before the launching of the own initiative inquiry, and that the sum due to the complainant was transferred on his bank account on 20 September 2000.

The complainant's observations

In his observations, the complainant acknowledged that on 22 September 2000 his bank account was credited by the Commission with GBP 8.820,55 (BEF 597.116 or € 14.802,12). The complainant however observed that no calculation of the amount was provided by the Commission and that the amount fell short of the two months of salary which the Commission had agreed to pay as compensation.

He indicated that the amount roughly corresponded to two months' pension and not to two months salary for a post A4 (8), and that it should be increased by a factor of 100:52 as he is only on a 52% pension. Further more, there should be paid delay interests (4 years) and the household allowance should have been included in the calculation as the complainant was married on 25 October 1996. The complainant finally indicated that the conversion factor from BEF to GBP was not correct and was an arbitrary rate used by the bank. On the basis of his own calculations, the complainant reached the conclusion that the compensation should have been GBP 18.560 (or 18.263) instead of GBP 8.820,55. He therefore requested the necessary adjustments to be made.

THE DECISION

1 The delay in the Commission's payment of a compensation to the complainant

1.1 From the letters of 30 June and 17 August 2000 sent to the Commission with a copy to the Ombudsman, it appeared that, after a period of 6 months, the Commission had still not paid the complainant the two months of salary to which it referred in its letter of 13 March 2000 by which it accepted the Ombudsman's draft recommendation in case 489/98/OV.

1.2 On 10 November 2000, the Commission informed the Ombudsman that on 20 September 2000 it had credited the complainant's bank account. From the complainant's observations it appeared that the complainant had received a compensation of GBP 8.820,55 (BEF 597.116 or € 14.802,12). The complainant observed that the compensation granted by the Commission was not taking into account several elements and that the amount should be adjusted to GBP 18.560.

1.3 The Ombudsman noted that, when on 13 March 2000 the Commission accepted the draft recommendation to compensate the complainant for the material damage he had directly suffered as a result of its services related fault, the Commission proposed to *"award compensation equivalent to two months salary for the damage he suffered, subject*

to deduction of any net earned income received by him for the same period while engaged in other activities".

1.4 The Ombudsman considered that the amount credited on the complainant's bank account on 22 September 2000 corresponded to the Commission's undertaking of 13 March 2000 to compensate the complainant for the damage he suffered. The Commission thus duly executed the draft recommendation.

2 Conclusion

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

N.B. This own initiative inquiry constitutes the follow-up of the decision in case 489/98/OV, which can be found under the Section "Draft Recommendations accepted by the institution".

3.8 SPECIAL REPORTS BY THE OMBUDSMAN

OPENNESS IN EU RECRUITMENT PROCEDURES

Special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)/GG)

In 1997, the European Ombudsman opened, on his own initiative, an inquiry concerning the secrecy which forms part of the Commission's recruitment procedures. In this inquiry, the Ombudsman asked the Commission whether it envisaged

- allowing candidates in written examinations to take the questions with them from the examination room,

- communicating the evaluation criteria to a candidate who so requests,

- making known to the candidates the names of the members of the Selection Board and

- allowing the disclosure to a candidate in a written examination of the marked copy of his or her own examination script.

The Commission reacted positively to the first two of these suggestions. After the Ombudsman had recommended that the remaining two suggestions should be implemented as well, the Commission informed the Ombudsman that it would in the future inform candidates of the names of the members of the selection board.

However, the Commission continued to refuse to grant candidates access to their marked examinations scripts. It argued that Article 6 of Annex III of the Staff Regulations which provides that the "proceedings of the Selection Board shall be secret" prevented it from doing so.

In these circumstances, the Ombudsman submitted a Special Report to the European Parliament on 18 October 1999. In this special report, the Ombudsman recommended that the Commission should give candidates access to their own marked examination scripts upon request in its future recruitment procedures, and at the latest from 1 July 2000 onwards. This recommendation was made, in accordance with Article 3 (7) of the Statute of the Ombudsman, in order to remedy the instance of maladministration which the Ombudsman had detected.

On 7 December 1999, the President of the European Commission, Mr Romano Prodi, wrote to the Ombudsman in order to inform him that the Commission welcomed his recommendation and would take the necessary measures in order to comply with it as from 1 July 2000.

On 12 October 2000, the European Parliament's Committee on Petitions adopted a report in which it endorsed the Ombudsman's Special Report and submitted a draft resolution to that effect. The report was drafted by Herbert Bösch MEP.

On 17 November 2000, the European Parliament voted to approve the resolution on the Ombudsman's Special Report. In its resolution, the European Parliament recommended that candidates should have access to their marked examination scripts and called on all the institutions and bodies of the EU to follow the example set by the European Commission. The European Parliament also recommended some further measures, for example that candidates should be informed of the possibility of lodging a complaint with the European Ombudsman.

The European Ombudsman considered that the outcome of this case marked a decisive step towards further transparency in the EU's recruitment procedures. He was pleased to note that the Commission had acted swiftly to accept his recommendation and that the European Parliament had strongly supported his position.

THE OMBUDSMAN RECOMMENDS THE ENACTMENT OF A EUROPEAN ADMINISTRATIVE LAW

Special Report to the European Parliament following the own initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour OI/1/98/OV

This Special Report was addressed to the European Parliament in April 2000. It concerns the European Ombudsman's own initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of good administrative behaviour.

The inquiry was launched in November 1998. In July and September 1999, the Ombudsman made draft recommendations to 18 Community institutions and bodies to adopt rules concerning good administrative behaviour for their officials in their relations with the public. For adopting these rules, the Ombudsman stated that the institutions and bodies could take guidance from the provisions contained in the Ombudsman's Code of good administrative behaviour. The Ombudsman stressed that, in order to be efficient and accessible to citizens, the rules should be adopted in the form of a decision and be published in the *Official Journal*.

From the responses to the draft recommendations, it appears that only two decentralised agencies, namely the European Agency for the Evaluation of Medicinal Products (EMEA) and the Translation Centre for the Bodies of the European Union have adopted, respectively on 1 December 1999 and on 10 February 2000, the Code of good administrative behaviour proposed by the Ombudsman. These two agencies have correctly implemented the draft recommendations.

The European Commission presented a draft Code, but has not yet adopted it. Neither the European Parliament nor the Council have adopted a Code of good administrative behaviour. No other institution or, body had adopted a Code by 1 March 2000.

The European Parliament has stressed the urgent need to draw up as soon as possible Codes of good administrative behaviour which should be as identical as possible for all European institutions and bodies.[122] However, only two out of the 18 Community institutions and bodies concerned by the inquiry have implemented the Ombudsman's draft recommendations. The Ombudsman therefore concluded the Special Report with the following recommendation:

In order to achieve rules of good administrative behaviour which apply equally to all Community institutions and bodies in their relations with the public, the Ombudsman recommends the enactment of a European administrative law, applicable to all the Community institutions and bodies. This law could take the form of a Regulation.

The European Parliament, in its capacity as the only European institution democratically representing all European citizens, could consider using the procedure referred to in

122 Resolution on the annual report on the activities of the European Ombudsman in 1997 (C4-0270/98), OJ 1998 C 292/168; resolution on the annual report on the activities of the European Ombudsman in1998 (C-4-0138/99), OJ 1999 C 219/456.

Article 192 (2) of the EC Treaty in order to initiate the adoption of a European administrative law in this form.

THE OMBUDSMAN ASKS PARLIAMENT TO ACT AFTER COMMISSION REFUSES ACCESS TO INFORMATION IN UK BEER CASE

Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH

This Special Report to the European Parliament follows an investigation conducted by the Ombudsman after the European Commission refused to provide a UK citizen with the information that he requested.

In July 1998, the complainant contacted the Ombudsman on behalf of the Bavarian Lager Company, which imports German beer into the United Kingdom. The complainant had difficulty in selling his product because of exclusive purchasing agreements, which require many pubs in the UK to obtain their supplies of beer from particular UK breweries; these agreements were regulated by a United Kingdom law, known as the "Guest Beer Provision". In April 1993, he complained about the matter to the European Commission, alleging that this provision infringed Community law. The Commission registered the complaint as P/93/4490/UK and began an investigation under Article 169 (now Article 226) of the EC Treaty. The complainant had been in contact with the Commission about the issue and had requested it to inform him of the names of thoses persons who had made submissions in relation to his complaint against the UK Guest Beer provision and of the representatives of the "Confédération des brasseurs su marché commun" who had attended a meeting organised by the Commission in the context of its investigation of the complainant's allegation of a possible infringement of Community law by the UK. The Commission refused the request for information.

The Commission claimed that the EU Data Protection Directive required it to keep the names requested secret unless the persons concerned agree to their identities being revealed. The Ombudsman rejected this argument for two main reasons: firstly, the Directive is drafted in such a way as to support the openness of EU decision-making. Secondly, the Data Protection Directive is designed to protect fundamental rights. Providing information to an administrative body in secret is not a fundamental right.

The Ombudsman therefore made a Draft Recommendation to the Commission, which stated that the complainant should be provided with the information requested.

Although the Commission did eventually provide most of the requested names, it still withheld those where the persons concerned had refused permission for disclosure. The Ombudsman has therefore found it necessary to make a Special Report to the European Parliament in which he made the following recommendation :

The Commission should inform the complainant of the names of the delegates of the Confédération des brasseurs du marché commun *who attended a meeting organised by the Commission on 11 October 1996 and of companies and persons in the 14 categories identified in the complainant's original request for access to documents who made submissions to the Commission under file reference P/93/4490/UK.*

The European Parliament could consider adopting the recommendation as a resolution.

Remark: The full texts of the Special Reports are available in 11 languages on the European Ombudsman's Website (http://www.euro-ombudsman.eu.int).

4 RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

4 RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

The Charter of Fundamental Rights for the European Union

On 2 February, Mr SÖDERMAN addressed the Convention drafting the Charter of Fundamental Rights for the European Union, chaired by its President Mr Roman HERZOG. Mr SÖDERMAN welcomed the initiative to draft the Charter, which should strengthen the protection of the rights of European citizens. He emphasised the importance of effective supervision both by the Community courts and through the long-established system of the European Convention on Human Rights. Mr SÖDERMAN also called for the Charter to recognise the citizen's right to an open, accountable and service-minded administration as a fundamental right.

4.1 THE EUROPEAN PARLIAMENT

On 19 January, Mr SÖDERMAN presented his work and latest initiatives at the Nordic MEPs' Breakfast meeting in Strasbourg. The event was organised by MEP Karl Erik OLSSON and was attended by several Danish and Swedish MEPs. The presentation was followed by interesting questions from the MEPs to Mr SÖDERMAN.

On 11 April, Mr SÖDERMAN met the President of the European Parliament, Mrs Nicole FONTAINE to present the Annual Report for 1999.

Mr Söderman handing his Annual Report for 1999 to President Fontaine, on 11 April.

On 13 April, Mr SÖDERMAN was invited to speak at the European Parliament Conference of Presidents, under the presidency of Mme Nicole FONTAINE, President of the European Parliament. Mr Söderman explained his "three steps for citizens" project. He was accompanied by Mr HARDEN and Mr MARTÍNEZ ARAGÓN.

On 17 April, Mr SÖDERMAN presented his annual report for 1999 as well as his special reports on the code of good administrative behaviour and on the recruitment procedures to the Committee on Petitions of the European Parliament.

On 17 May, Mr SÖDERMAN met with MEP ALMEIDA GARRETT, from the Constitutional Affairs Committee, accompanied by Mr BOUMANS and Ms. CAMISÂO. Other officials present were Mr Ian HARDEN and Mr SANT'ANNA, respectively Heads of the Legal Department and of the Administration and Finance Department of the Ombudsman's office. Mr SÖDERMAN and Mrs ALMEIDA GARRETT discussed the

possible revision of the provisions of the Statute of the Ombudsman relating to the Ombudsman's powers to inspect files during inquiries and to take testimony.

On 18 May, Mr WEISSENFELS, Administrator at the "Citizens' Mail" division of the European Parliament paid a visit to the Ombudsman.

On 24 May, Mr SÖDERMAN spoke at a meeting of the Constitutional Affairs Committee which was examining Article 3 (2) of the Statute of the Ombudsman, with a view to removing the existing restrictions on the European Ombudsman's powers to take testimony from witnesses and to inspect the files of Community institutions and bodies during inquiries. The meeting was chaired by the President of the Committee Mr. NAPOLITANO. During the debate, Mr José María GIL-ROBLES GIL-DELGADO explained the history of the negotiations which led to the existing restrictions. Together with other speakers, including the rapporteur Mrs ALMEIDA GARRETT, Mr Andrew DUFF, Mrs Monica FRASSONI and Mrs Sylvia-Yvonne KAUFMANN, he supported the proposal to remove the existing restrictions.

On 5 June, Mr SÖDERMAN and Mr SANT'ANNA met with MEP Markus FERBER, draftsman for the Ombudsman's budget for the year 2001.

Later that day, Mr SÖDERMAN and Mr SANT'ANNA participated in the meeting of the Budget Committee of the European Parliament which was chaired by MEP Terence WYNN. Mr SÖDERMAN's presentation of the estimates of the European Ombudsman's office for the year 2001 was followed by questions from the members of the Committee.

On 15 June, Mr SÖDERMAN met with the Director General of Administration of the European Parliament, Mr Nicolas RIEFFEL. Mr. João SANT'ANNA, Head of the Ombudsman's Administration and Finance Department, and Mr Roger GLASS, Head of the Buildings Administration Division of the European Parliament also attended the meeting which dealt with the issue of the Brussels and Strasbourg premises of the Ombudsman.

On 16 June, Mr SÖDERMAN held a meeting in Strasbourg with Mr Julian PRIESTLEY, Secretary General of the European Parliament, to discuss the administrative cooperation between the European Ombudsman and the European Parliament. Mr. João SANT'ANNA and Mr. Constantin STRATIGAKIS, Director of Cabinet of the Secretary General also attended the meeting.

On 30 June, at the invitation of Mr Manfred PETER, Director of the Personnel and Social Affairs Directorate of the European Parliament and Ms Laura VIQUEIRA, Head of the Professional Training and Career Advice Division, Mr SÖDERMAN spoke about his role and work at a conference organised for the staff of the Parliament in Luxembourg.

On 18 September, Jacob SÖDERMAN participated in a working seminar entitled "Access to documents of the EU institutions: the key to a more democratic and efficient Union", held in Brussels. The seminar was organised by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the Constitutional Affairs Committee of the European Parliament, as part of the legislative procedure for examination of the proposal for a Regulation on public access to documents under Article 255 EC. The seminar was chaired by the rapporteurs for the committees, respectively Mr Michael CASHMAN and Mrs Hanja MAIJ-WEGGEN. Mr SÖDERMAN spoke on the subject of "Transparency and good administration: impact on the internal functioning of the institutions". Other speakers at the seminar included Mr David O'SULLIVAN, Secretary-General of the Commission and Mr Hans BRUNMAYR, Deputy Director General of the Council.

On 9 October, Mr Olivier VERHEECKE gave a lecture on the European Ombudsman in the framework of a seminar entitled "Parliamentary Information and Relations with the Citizens" organised by the European Parliament for Members of Parliament from candidate States.

On 9 October, Mr SÖDERMAN attended the Petitions Committee meeting to express his views on the draft report prepared by the committee (Bösch report) in relation to the recommendation made by the Ombudsman in his special report to the European Parliament on the secrecy which forms part of the Commission's recruitment procedures. This special report to Parliament followed the own initiative inquiry launched by the Ombudsman into this subject. The objective of the European Ombudsman's recommendation in this special report is that candidates taking part in competitions organised by the institutions may, upon request, have access to their own marked examination papers. Mr SÖDERMAN was accompanied by Mr João SANT'ANNA.

4.2 THE EUROPEAN COMMISSION

On 13 January, Mr SÖDERMAN accompanied by Mr VERHEECKE met with Mr David O'SULLIVAN, Head of Cabinet of President Romano PRODI, and Mrs Sarah EVANS, Member of the Cabinet. They discussed the Commission's draft Code of good administrative behaviour in the framework of the Ombudsman's draft recommendations in the own-initiative inquiry on that matter.

On 19 January, Mr SÖDERMAN accompanied by Mr HARDEN met with Janet ROYALL, member of Vice President Neil KINNOCK's cabinet. Subjects discussed included the Code of good administrative behaviour, public access to documents as well as the reform process of the Commission.

On 7 April, Mrs Hedwig EBERT, the European Commission's Mediator for its personnel visited the office of the European Ombudsman for an exchange of views and information.

President Romano Prodi greeting Mr Söderman, on 24 May.
(photograph: © Médiathèque Commission européenne)

On 12 April, Mr SÖDERMAN met the President of the European Commission, Mr Romano PRODI, for a working breakfast. They discussed transparency in the European Union and Mr SÖDERMAN informed Mr PRODI of his "three steps for citizens" project. Other participants at the breakfast were Mr David O'SULLIVAN, Mr Ricardo LEVI and Mrs Sarah EVANS of Mr Prodi's cabinet and Mr HARDEN, Head of the Ombudsman's legal department.

On 17 May, Mr. SÖDERMAN received the visit of Commissioner Philippe BUSQUIN, and his assistant Ms RUSSO.

On 24 May, Mr SÖDERMAN, accompanied by Mr HARDEN, met the President and the other Members of the European Commission. The President of the Commission, Mr Romano PRODI greeted the Ombudsman and hoped that it would become an annual practice for the Ombudsman to present the findings in his Annual Report to the Commission. Mr SÖDERMAN explained the results of his work for the year 1999, mentioning the good co-operation generally shown by the Commission in responding to the Ombudsman's inquiries. He also explained that the principles contained in the Ombudsman's model Code of Good Administrative Behaviour should be considered a key element of any programme to improve governance in Europe. In conclusion, he described the Ombudsman's efforts to enhance the effectiveness of the liaison network with national ombudsmen and similar bodies. He invited the Commission to explore the possibility that the network could deal with some complaints which citizens address to the Commission concerning infringements of Community law by Member States. There was then an exchange of views, to which Commissioners Loyola DE PALACIO, Antonio VITORINO and Margot WALLSTRÖM contributed. The meeting with the College of Commissioners was followed by a lunch given by the President of the Commission in honour of the Ombudsman.

On 26 October, Mr SÖDERMAN and Mr SANT'ANNA, met with Mr. Horst REICHENBACH, Director General for Personnel and Administration of the European Commission and Mr Matthias OEL, Administrator in charge of the relations with other institutions. The main object of the meeting was to evaluate the ongoing Commission reform process. Some general aspects of the dossiers concerning the implementation by the European Commission of the Ombudsman's previous recommendations were also reviewed.

4.3 THE COUNCIL OF THE EUROPEAN UNION

On 5 May, Mr SÖDERMAN met with the Secretary General of the Council and High Representative, Mr Javier SOLANA and informed him of the Ombudsman's Code of Good Administrative Behaviour and of his request to the European Parliament to amend the Statute of the Ombudsman so as to strengthen and clarify the Ombudsman's powers of investigation.

4.4 THE EUROPEAN INVESTMENT BANK

On 21 June, a meeting took place between the Legal Departments of the European Investment Bank and the European Ombudsman at the Ombudsman's premises in Strasbourg. The Bank was represented by Mr Luigi La MARCA and the Ombudsman's Office by Ian HARDEN, Ida PALUMBO and Maria ENGLESON. General questions relating to procedural matters and co-operation between the institutions were discussed.

5 RELATIONS WITH OMBUDSMEN AND SIMILAR BODIES

5 RELATIONS WITH OMBUDSMEN AND SIMILAR BODIES

5.1 RELATIONS WITH NATIONAL OMBUDSMEN

On 14 January, a joint delegation from the French *Ministère de la Ville* and the Office of the French *Médiateur de la République* paid a visit to the Ombudsman. The Office of the *Médiateur de la République* was represented by Mr Robert DEVILLE, *délégué général adjoint* and Mr LEROY, *chargé de mission*. Ms Isabelle PASSET represented the *Ministère de la Ville*. The purpose of the visit was to present a joint project to expand the network of « délégués du Médiateur » (from 123 to 423 within the next 3 years) in particular in the difficult neighbourhoods of large cities and to determine how the co-operation with the European Ombudsman could be further developed.

Mr SÖDERMAN welcomed the initiative to bring the administration closer to citizens as well as the importance of the preventive role of the « délégués ». Mr HARDEN explained the European Ombudsman's mandate and presented the code of good administrative behaviour which was drafted after consultation with the national Ombudsmen in the Member States. Mr MARTÍNEZ ARAGÓN then summarised the Ombudsman's activities in relation to the existing co-operation with national and regional Ombudsmen and in particular with regard to the Internet links between the respective sites and the development of an e-mail liaison account (EUOMB).

On 3 February, the Ombudsman of Greece, Mr DIAMANDOUROS visited the European Ombudsman's office in Strasbourg and had an exchange of views with Mr SÖDERMAN.

On 7 February, Benita BROMS took part in the 80th Anniversary celebration of the Finnish Parliamentary Ombudsman. (see 6.2)

On 24 November, the chairperson of the Committee on Petitions of the German Bundestag, Mrs Heidemarie LÜTH visited the office of the European Ombudsman in Brussels, together with 3 collaborators. The delegation was welcomed by the Ombudsman's head of Administration and Finance, Mr João SANT'ANNA and by the head of the Brussels office, Ms Benita BROMS. They discussed general questions concerning the petition and the complaint procedures as well as latest developments and actual cases.

5.2 THE LIAISON NETWORK

The liaison network was created in 1996 to promote a free flow of information about Community law and its implementation and to make possible the transfer of complaints to the body best able to deal with them.

The third seminar for liaison officers took place in Strasbourg on 22-23 September 2000. All the offices of national ombudsmen or similar body in the Member States of the EU were represented. (see 6.1)

5.3 RELATIONS WITH REGIONAL OMBUDSMEN AND SIMILAR BODIES

On 28 February, the European Ombudsman was invited to participate in the 15th anniversary celebration of the regional Ombudsman institution in the Basque Country (see 6.2).

On 15 March, the regional Ombudsman of Catalunya, Mr Anton CAÑELLAS paid a visit to Mr SÖDERMAN.

At the invitation of the Galician ombudsman (Valedor do Pobo), Mr José CORA RODRÍGUEZ, the European Ombudsman, made an official visit to Galicia, Spain on 22-24 March (see 6.2).

On 20 November 2000, Mr SÖDERMAN made an official visit to Namur at the invitation of the regional ombudsman of Wallonia, Mr Frédéric BOVESSE. (see 6.2)

5.4 RELATIONS WITH LOCAL OMBUDSMEN

On 6 April, Mr MARTÍNEZ ARAGÓN took part in the opening ceremony of the National Awards for Quality in Public Services, hosted by Mr Antoni PALLICER, local ombudsman of the city of Calvià, Mallorca. Mr MARTÍNEZ ARAGÓN spoke about the role of the European Ombudsman for a more open and accountable European administration.

5.5 COOPERATION IN DEALING WITH COMPLAINTS

During 2000, the European Ombudsman dealt with three queries. One was sent by the Irish Ombudsman and referred to query Q2/97 which was closed in 1999. The second query came from the Regional Ombudsman of Tuscany and was related to the issue of free movement of workers. The third query was addressed to the European Ombudsman by the Ombudsman of the Basque Provinces (*Ararteko*) and concerned the conformity of administrative requirements with the principle of free movement of goods.

5.6 RELATIONS WITH NATIONAL OMBUDSMEN IN THE ACCESSION STATES

On 16 March, the Ombudsman of Slovenia, Mr Ivan BIZJAK paid a visit to Mr SÖDERMAN.

On 17 March, Ms Ruxandra SABĂREĂNU, deputy Ombudsman of Romania paid a visit to the Ombudsman's office in Strasbourg and had an exchange of views with Mr SÖDERMAN and Mr HARDEN.

Mr Söderman welcoming Ms Sabăreănu, Deputy Ombudsman of Romania, on 17 March.

6 PUBLIC RELATIONS

6 PUBLIC RELATIONS

6.1 HIGHLIGHTS OF THE YEAR

THE OPEN DAY IN BRUSSELS AND STRASBOURG

In the context of "Europe Day", the European Ombudsman participated in the annual Open Day organised by the European Parliament. This event took place in Brussels on 6 May and in Strasbourg on 7 and 8 May. The number of visitors in Brussels was slightly lower than in the previous years but Strasbourg saw more than 50'000 persons among which a large number visited the Ombudsman's stand. Staff from the Brussels and Strasbourg offices provided general information on the Ombudsman's work and handed out brochures as well as annual reports.

THE ANNUAL REPORT 1999

The Annual Report of the European Ombudsman for the year 1999 was presented to the European Parliament at its plenary session on 6 July 2000. The session was chaired by Vice-President Guido PODESTÀ.

Mr Söderman presenting his Annual Report for 1999 to the European Parliament on 6 July, in the presence of Ms Loyola de Palacio.

Mr SÖDERMAN's speech to the plenary mainly focused on the ever increasing number of complaints received by his office and on the positive results achieved for citizens. Emphasis was made on the constructive co-operation shown by the Community institutions and bodies in trying to find satisfactory solutions to complaints.

On behalf of the committee on petitions, MEP Jean LAMBERT welcomed the Ombudsman's report. Other speakers including MEP Astrid THORS, the rapporteur for the Ombudsman's report, MEP Roy PERRY and MEP Nino GEMELLI, respectively vice president and chairman of the committee on petitions all congratulated the Ombudsman for his work and achievements. Ms Loyola de PALACIO, the responsible Member of the Commission also paid tribute to the Ombudsman's work.

THE SEMINAR FOR LIAISON OFFICERS

The third seminar for liaison officers took place in Strasbourg on 22-23 September 2000. All the offices of national ombudsmen or similar body in the Member States of the EU were represented. Liaison Officers from Norway and Iceland, who are newcomers in the network, also attended the event. The seminar dealt with Human Rights and with the Amsterdam Treaty.

Participants at the seminar for liaison officers also enjoyed the social programme, on 23 September. From left to right Mrs Andersen, Mr Jon Andersen (Denmark), Mr Sten Foyn (Norway), Mr Robert Spano (Iceland) and Mrs Marianne von der Esch (Sweden).

The speakers were: Mr Jacob SÖDERMAN, European Ombudsman (EU draft Charter of Fundamental Rights), Mr Álvaro GIL ROBLES, Commissioner for Human Rights (The Commissioner for Human Rights and the national Ombudsmen), Mrs Françoise TULKENS, Judge at the Court of Human Rights (Presentation of the Court of Human Rights), Mrs Anne-Marie DESCÔTES, Technical Adviser at the Office of the French Minister in charge of European Affairs (New developments in the area of freedom, security and justice after the Amsterdam Treaty).

A meeting of the liaison network took place at the end of the seminar. Mr Xavier DENOËL, Administrator at the Office of the European Ombudsman, presented a paper about the future of the network and Mr Ben HAGARD, Internet Communications Officer, presented the EUOMB-national project, which will comprise a Website and Internet Forum for use by the national ombudsmen and similar bodies and their staff.

MEETING IN THE FRAMEWORK OF THE FRENCH PRESIDENCY

On 27 September, Mr SÖDERMAN, accompanied by João SANT'ANNA, was received at the Quai d'Orsay by the French Minister for European Affairs, Mr Pierre MOSCOVICI. Subjects discussed included the European Ombudsman's initiative on the Code of Good Administrative Behaviour, the ongoing proposal to amend the Ombudsman's statute and the adoption of the Ombudsman's budget for the year 2001. The possible co-operation with the French public authorities in order to make the European Ombudsman's mandate better known to French citizens, was also on the agenda.

6.2 CONFERENCES AND MEETINGS

FINLAND

Turku

On 21 January, Mr SÖDERMAN was invited to give a lecture on "The meaning of the European Ombudsman for ordinary EU citizens". The lecture was part of a seminar, within the Robert Schuman Training Programme, organised by the Faculty of Law of the University of Turku; the Regional Court of Turku and the Finnish Ministry of Justice. Other speakers included Justice Minister Johannes KOSKINEN and University Dean Ari SAARNILEHTO.

Helsinki

On 10 and 11 January, Mr SÖDERMAN attended a Seminar on Good Administration in the Baltic Sea Region. The meeting was organised by the CBSS Working Group on Assistance to Democratic Institutions, in cooperation with the University of Helsinki, and the Ministries of Justice and Foreign Affairs of Finland. Other speakers at the meeting included Mr. Staffan SYNNESTRÖM from OECD SIGMA, Mr Bertrand De SPEVILLE, Scientific Expert of the Council of Europe, Dr Pekka HALLBERG, President of the Finnish Supreme Administrative Court, Prof. Ole ESPERSEN, CBSS Commissioner, Prof. Eivind SMITH, of the University of Oslo, and Dean Olli MÄENPÄÄ of the University of Helsinki. The venue of the meeting was the Faculty of Law of the Helsinki University.

Benita BROMS took part in the International Symposium entitled « Ombudsmen in the service of Human Rights : Challenges for the new millennium ». The symposium took place in Helsinki on 7 February on the occasion of the 80th Anniversary of the Finnish Parliamentary Ombudsman. Three themes were discussed: Roles for the Ombudsmen : Past, Present and Future ; Ombudsmen as Champions for Democracy and the Rule of Law and Finnish Parliamentary Ombudsman as Guardian of Human Rights and Constitutional Rights.

On 13 November, Mr Jacob SÖDERMAN gave a lecture to the final year University students of Political Sciences of the University of Helsinki. Under the heading "What happens to citizens' Europe", this lecture was part of the University's EU programme, which is aimed at becoming a multi-disciplinary programme open to all faculties as from the year 2001 onwards. This activity was coordinated by Mrs. Teija TIILIKAINEN, Senior Researcher at the Helsinki University and was held at the premises of the Political Sciences Faculty.

On the same day, Mr SÖDERMAN gave a lecture to the staff of the offices of the Chancellor of Justice and of the Parliamentary Ombudsman of Finland. The European Ombudsman spoke about the article on good administration contained in the Charter of Fundamental Rights and the Code of Good Administrative Behaviour.

Organised by the offices of the Chancellor of Justice and of the Ombudsman, the lecture took place at the hall of the Finnish Parliament's Grand Committee. A lively discussion on practical applications of the good administration principles followed Mr SÖDERMAN's presentation.

The 2000 FIDE Congress

From 1 to 3 June, Mr Jacob SÖDERMAN, Mrs Benita BROMS, Mrs Maria ENGLESON, Mrs Vicky KLOPPENBURG and Mrs Ida PALUMBO participated in the XIXth F.I.D.E. Congress in Helsinki, Finland. The Congress was chaired by Prof. Zacharias SUNDSTRÖM, President of FIDE. It had three Topics and one special session.

From the Ombudsman's Office, Mrs Benita BROMS and Mrs Ida PALUMBO participated in Topic I "*The Duties of Co-operation of National Authorities and Courts and the Community Institutions under Article 10 EC*". The General Rapporteur was Dr John TEMPLE LANG, Director in the Competition DG of the European Commission. Topic II which Mrs Maria ENGLESON attended, concerned "*Community Law (including competition rules) Affecting 'Networks' (telecom, energy and information technology) and its consequences for the Member States*", the General Rapporteur was Mr Piet-Jan SLOT, Professor at the University of Leiden. Mrs Vicky KLOPPENBURG participated in Topic III concerning "*Legal Consequences of the Single Currency*" for which the General Rapporteur was Mr Antonio SÁINZ de VICUÑA, of the European Central Bank. All the staff from the Ombudsman took part in the special session "*The 'Architecture' of the European Court of Justice*".

The FIDE Congress was attended by almost 500 delegates from the European Institutions, all Member States of the European Union and from Cyprus, Estonia, Hungary, Japan, Latvia, Malta, Norway, Poland, Slovenia and Switzerland.

The FIDE Congress was opened by Mrs Tarja HALONEN, President of the Republic of Finland. It was then followed by a welcome address by Prof. Zacharias SUNDSTRÖM. Mr Jean-Louis DEWOST, Director General at the Legal Service of the European Commission spoke on behalf of the President of the European Commission, Romano PRODI. After the first two days of working sessions, the discussions were closed in a plenary session during which the General Rapporteurs for the three Topics summarised the working sessions and presented the conclusions.

The special session concerning the Architecture of the Court of Justice opened with an introduction by Mr Gil Carlos RODRÍGUEZ IGLESIAS, President of the Court of Justice. It was followed by some remarks given by Mr Bo VESTERDORF, President of the Court of First Instance and by Mr Ole DUE, Former President of the Court of Justice. Then Mr Johannes KOSKINEN, Minister of Justice in Finland gave a speech, which was followed by some observations by Mr Pekka HALLBERG, President of the Supreme Administrative Court of Finland.

During the working session of the special session, statements by Mrs Ana PALACIO, MEP, by Mr Nicholas FORWOOD, Judge at the Court of First Instance and by Mr Onno BROUWER, Chairman of the CCBE permanent committee for the Court of Justice and the Court of First Instance were presented. Thereafter a general debate followed. Among the people who participated in the debate, one should in particular note Prof. Neville March HUNNINGS, National Rapporteur for the UK, Mr Leif SEVÓN, Judge at the Court of Justice, Prof. Robert MOK, Judge at the Supreme Court of Netherlands and Prof. Jürgen SCHWARZE of the Albert-Ludwigs-Universität Freiburg.

In the closing session Mr Francis G. JACOBS, Advocate General at the Court of Justice summed up the discussion. The closing address was given by Prof. Zacharias SUNDSTRÖM.

BELGIUM

Brussels

On 31 January, Maria ENGLESON took part in the round table discussion "The European Investment Bank: Accountable only to the Market?" which was arranged by the CEE Bankwatch Network and the *Heinrich Böll Foundation* in Brussels. The discussion related to questions of transparency, access to information, public participation and accountability within the European Investment Bank, and a policy report was presented. Among the

participants were Bashir KHANBHAI, Alexander de ROO and Heide RÜHLE, MEPs. The Bank was represented by Mr Max MESSNER.

On 29 November, Mr Olivier VERHEECKE gave a talk on the activities of the European Ombudsman in the field of openness and transparency at the Symposium "Fishing in the Dark" organised by the WWF and the European Policy Centre in Brussels on 28-29 November 2000.

On 1 December, the European Ombudsman was invited to attend the meeting of the Steering Committee of the Platform of European Social NGOs held at Altiero Spinelli Building in Brussels. Other participants at the meeting included Mr Dick JARRÉ International Council of Social Welfare; Mr Guampiero ALHADEFF, President of Solidar; Ms Josée VAN REMOORTEL, Mental Health; Ms Clarisse DELORME, European Women's Lobby; Ms. Katy ORR, European Youth Forum; Mr James BRIDGE, Save the Children.

FORUM: Internal Market at the Service of Citizens and Small and Medium-sized Enterprises

The European Commission, in collaboration with the European Parliament and the French Presidency, for the first time organised a Forum on the Internal Market, which took place in Brussels on 28 and 29 November 2000.

The main aim of the Forum was to focus the discussion on the problems and barriers encountered on a daily basis by SME's and citizens, including those who live, work or study in another Member State, and those who are consumers buying goods and services across national borders within the Internal Market.

The Forum did not concentrate only on problems, but also on the available solutions. The Forum wanted to build confidence in the functioning of the Internal Market.

Mrs Ana PALACIO, Chairman of the Committee on Legal Affairs and the Internal Market, European Parliament, Mr François PATRIAT, Secretary of State for SME's, Commerce, Craft Industry and Consumption, France and Mr. David BYRNE, Commissioner for Health and Consumer Protection, European Commission, opened the Forum.

The Programme was divided into two Round Table discussions and six workshops, which presented their conclusions before the Plenary. The workshops were divided in three groups : citizens, consumer/business and business/SME's.

Mrs Benita BROMS, of the European Ombudsman's Office, was the rapporteur of *workshop 4 –Citizens* which dealt with the forms of recourse available for the citizens to guarantee their freedoms in another Member State and the role of national administrations. Mr Antoine FOBE, ECAS – Euro Citizen Action Service, was the Chairman of this workshop.

The closing speech of the Forum was given by Mrs Nicole FONTAINE, President of the European Parliament.

The European Commission, the European Parliament and the French Presidency will prepare a report of the works which will be made available on the following website: *www.europa.eu.int/comm/internal_market/*.

Gent

On 16 and 17 March, Olivier VERHEECKE participated in the International Ombudsmen Conference held in Gent on the occasion of the 500th anniversary of the birth of Charles V (Carlos Quinto). The event was organised jointly by the Ombudsvrouw of Gent, Mrs Rita PASSEMIERS and the VZW "Keizer Karel". The theme of the conference was "Looking for ombudsman standards..." The participants were national, regional, munici-

pal and sectorial ombudsmen of the Member States, Eastern and Central Europe, Latin America, Africa and the Philippines.

Speakers at the Conference included Mr Frank BEKE, the mayor of Gent, Professor Ludo VENY from the University of Gent (Chairman of the Conference), Mr Gérard DELBAUFFE from the office of the Médiateur de la République, Mr Roy GREGORY from the Centre for Ombudsman Studies of the University of Reading and Professor Herman BALTHAZAR, Governor of the province East-Flanders. Mr VERHEECKE chaired the workshop on "Looking for ombudsman standards on the federal, national, European and international level". Mr VERHEECKE introduced the discussion on the basis of the European Ombudsman's initiative on a Code of good administrative behaviour.

Namur

On 20 November, Mr SÖDERMAN, accompanied by Mrs RICHARDSON made an official visit to Namur at the invitation of the regional ombudsman of Wallonia, Mr Frédéric BOVESSE.

The regional Ombudsman of Wallonia, Mr Bovesse, welcoming Mr Söderman in Namur on 20 November.

Mr SÖDERMAN first had an exchange of views with Mr BOVESSE and his legal advisers. He then had the opportunity to speak about his work at the Regional Parliament of Wallonia where its President, Mr Robert COLLIGNON and some members of the Bureau welcomed him. This meeting was followed by a press briefing where all the local and regional media were represented.

In the afternoon, Mr SÖDERMAN visited the "Bureau économique de la Province de Namur" and met with its Director General Mr Renaud DEGUELDRE as well as with representatives of the EURO INFO CENTRE.

Later in the afternoon, Mr SÖDERMAN was received by the Minister-President of Wallonia, Mr Jean-Claude VAN CAUWENBERGHE. Mr SÖDERMAN made a short presentation of his work, which was followed by an exchange of views. Mr VAN CAUWENBERGHE showed particular interest in the Ombudsman's code of good administrative behaviour and in the right to a good administration, which is provided for in the charter of fundamental rights of the European Union.

ITALY

St Vincent

On 8 February, Alessandro DEL BON represented the European Ombudsman at a Conference on "The Ombudsman and persons subject to particular authority relations". The conference was organised in St Vincent (Italy) by the European Ombudsman Institute (EOI) and hosted by the Regional Ombudsman of the Aosta Valley, Mrs. Maria Grazia VACCHINA. Reports were presented by Prof. Giovanni CONSO and Dr. Thomas WALZEL VON WIESENTREU. The Conference was immediately followed by the General Assembly of the EOI during which Mr. Anton CAÑELLAS regional Ombudsman of Catalonia (Spain) was elected president of the organisation.

University of Urbino

Mr SÖDERMAN accompanied by Ms Ida PALUMBO, legal officer, visited Italy on 6 and 7 April 2000. On 6 April, Mr SÖDERMAN participated in the seminar "Citizenship and the values of the new Europe", organised by the network "Imagine Europe" at the University of Urbino. Before the seminar, Mr SÖDERMAN met with Professor Luigi MARI, who then chaired the seminar together with professor Giuseppe GILIBERTI. Mr SÖDERMAN gave a speech on his role as European Ombudsman to an audience of students and professors. Other participants included Mr Fabrizio GRILLENZONI of the European Commission's Representation in Rome.

Professor Giliberti and Mr Söderman in Monteveglio, on 7 April.

At the invitation of Professor Giuseppe GILIBERTI, Mr SÖDERMAN gave a lecture on his role and activities to a group of students attending the "Master on Human rights and Humanitarian Help", in Monteveglio on 7 April. Mr SÖDERMAN also met with Mrs Teresa LAPIS, Ombudsman of the province of Venice.

Rome

On 4 October, following the invitation of the Ombudsman of Rome, Mr Alessandro LICHERI, Mr SÖDERMAN participated in the International Congress *"Civic Defence and Democratic Participation"*. Lectures were given by Mr SÖDERMAN who presented

his activities and made some reflections on the draft European Charter of Fundamental Rights, by Mr Anton CAÑELLAS, regional ombudsman of Catalonia and President of the European Ombudsman Institute (EOI), by Mr Daniel JACOBY, citizen's protector of Quebec, by Mrs. Maria Grazia VACCHINA, Regional Ombudsman of the Aosta Valley and by Mr. Giorgio LOMBARDI, professor at the University of Torino. About 200 persons attended the event. Participants included local ombudsmen, representatives of associations and students.

On 5 October, Mr SÖDERMAN visited the European Parliament's office in Rome where he met with Mr Giovanni SALIMBENI, Director of the office and Mr Roberto PISTACCHI. The European Ombudsman gave a speech to a group of representatives of consumer organisations and journalists. He also visited the new premises of the Commission's representation in Rome where he had an exchange of views with Mr Fabrizio GRILLENZONI.

Parma

On 6 October, Mr SÖDERMAN went to Parma, at the invitation of Mrs Mirella MAGNANI, the Ombudsman of the city. He had a meeting with the mayor of Parma, Mr Elvio UBALDI and with a group of ombudsmen from the Emilia-Romagna region.

Mr Söderman speaking to students of the university of Parma, in the presence of Mrs Mirella Magnani, ombudsman of the city. (photograph: © Pier Luigi Vasini)

The main event of the visit was the meeting with students of the University of Parma. The mayor opened the session and Professor Fausto CAPELLI, Director of the European Collegium of Parma introduced Mr SÖDERMAN who lectured to about 300 participants.

Catanzaro

On 21 October, Mr SÖDERMAN attended a meeting in Catanzaro, Italy, entitled "Furthering Justice: the Right to Petition and the Ombudsman". The programme and the invitation were initiated by Mr. Nino GEMELLI, President of the European Parliament's Committee on Petitions. In addition to the interventions by Mr GEMELLI and Mr SÖDERMAN, the discussion was further enriched by the contributions of Mr. Mario TASSONE, member of the Cabinet of the President of the Chamber of Deputies; Dr Corrado PARACONE, Piaggio Foundation; Ms Sabrina RISOLA, President of Euromedia; Mr Sergio ABRAMO, Mayor of Catanzaro; Mr Michele TRAVERSA, President Amnesty-Catanzaro; Mr Antonio SGROMO, General Affairs Advisor, Catanzaro City Council; Mr Nuncio RAIMONDI, Magna Graecia Universit, Administrative Affairs Advisor, Government representative; Mr. Alvaro COSTA, Vice-Mayor of Catanzaro; and Mr Adolfo LARUSSA, Ms Antonella PRESTIA and Ms Manuela RUBIO from Catanzaro Forum.

IIAS Conference

Olivier VERHEECKE attended the First Regional International Conference of the International Institute of Administrative Sciences (IIAS) on *Public Administration and globalisation: International and supranational administrations,* held at Bologna from 19 to 21 June 2000 and in the Republic of San Marino on 22 June 2000.

The Conference was officially opened on 19 June 2000. Amongst the speakers were Mr Fabio ROVERSI-MONACO, President of the Italian National Section, Rector of the University of Bologna, Mr Vasco ERRANI, President of the Region Emilia-Romana, Mr Franco BASSANINI, Minister of the Civil Service of Italy, Mr Domenico GASPERONI, President of the IIAS National Section of San Marino, Mr Ignacio PICHARDO PAGAZA, President of the IIAS, Mr Giancarlo VILELLA, Director General of the International Institute of Administrative Sciences, and Professor Carol HARLOW (London School of Economics and Political Science), the General Rapporteur for the Conference.

Olivier VERHEECKE attended workshop 1 which was entitled "Globalisation and administrative activity: towards new principles and a path for action", as well as the Panels "Codes and Codes of Conduct in International Organisations" and "Control of International Public Finance". He provided information on the Ombudsman's Code of Good Administrative Behaviour and the Special Report of the Ombudsman following the own-initiative inquiry in this matter.

FRANCE

The Council of Europe

On 22 February, Ian HARDEN gave evidence to the 5th Meeting of the Council of Europe Group of Specialists on Access to Official Information, chaired by Ms Helena JÄDERBLOM. He presented the work of the Ombudsman concerning access to official information, including the own-initiative inquiries on public access to documents; dealing with complaints under the Commission and Council Code of Conduct on access to documents; and the duty to provide the citizen with information, as set out in Article 22 of the Ombudsman's Code of Good Administrative Behaviour.

On 16 and 17 March, Gerhard GRILL attended the "First Council of Europe Round Table with National Human Rights Institutions/Third European Meeting of National Institutions" which was held in Strasbourg. The event was attended by some 80 participants.

Three main subjects were discussed: The protection and promotion of economic and social rights, the fight against racism and related discrimination and the co-operation between national human rights organisations and between them and the Council of Europe.

In December 2000, Mr MARTÍNEZ ARAGÓN participated on behalf of Mr SÖDERMAN in a Meeting of Western European Ombudsmen with the Council of Europe's Human Rights Commissioner. The meeting was aimed at improving co-ordination between the Council of Europe's Human Rights Commissioner, national ombudsmen from Western Europe and the European Ombudsman.

As a result of the meeting, it was agreed to strengthen mutual co-operation especially as regards the work being undertaken to improve respect for human rights in Central and Eastern Europe.

The European Court of Human Rights

On 1 and 2 March, Vicky KLOPPENBURG attended a conference in Strasbourg on the New Proceedings of the European Court of Human Rights. The conference was organised by the European Law Academy of Trier, and it concerned the Court's new responsibility for overseeing observance of civil and political rights and freedoms.

ECAS Forum

On 30 October 2000, Mr MARTÍNEZ ARAGÓN participated in the First European Citizenship Forum, a one-day seminar organised in Paris by the Euro-Citizen Action Service (ECAS) devoted to the subject of "Giving Legal Assistance to Citizens across Borders". The aim of the meeting was to analyse the feasibility of a European network of NGOs to provide legal assistance and advice to migrants, and more generally to citizens involved in cross-border disputes.

One of the areas of interest of the seminar was the citizens' means of redress to defend and enforce their rights. The subject was discussed by a panel representing EU institutions, which included among others, Mr Roy PERRY MEP, Vice Chairman of the Committee on Petitions. Mr MARTÍNEZ ARAGÓN spoke about the role of the Ombudsman and his most important initiatives, in particular those related to transparency and the Code of good administrative behaviour.

Seminar on Data Protection and Openness

On 14 December, a meeting on Data Protection and Openness was arranged at the Office of the European Ombudsman, following the proposal for a regulation on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community. Mr Jacob SÖDERMAN welcomed the participants and opened the meeting, which was chaired by Mr Ian HARDEN. Mr Kjell SWANSTRÖM, Secretary General at the Swedish Ombudsman's Office and Mr Jon ANDERSEN, Secretary General at the Danish Ombudsman's Office opened the discussion on the balance between the protection of individuals with regard to the processing of personal data and the principle of openness and public access to documents. This presentation was followed by comments from Mr César ALONSO IRIARTE of the European Commission and Mr Giovanni BUTARELLI, Chairman of the Regulatory Committee for the EU Directive on Data Protection. Mr Roel FERNHOUT, the Dutch Ombudsman, Mr Emilio de CAPITANI and Mr Ramón MARTÍNEZ SÁNCHEZ of the Committee on Citizens Freedoms and Rights of the European Parliament also attended the meeting. Participants of the European Ombudsman's Office included Mr João SANT'ANNA, Mr Gerhard GRILL, Mr Alessandro DEL BON and Mrs Maria ENGLESON.

Participants at the seminar on Data Protection and openness, 14 December.

THE UNITED KINGDOM

London

On 31 March, Ian HARDEN attended a seminar on Modernising Government in Europe at the Civil Service College, London. The seminar was addressed by Mr David BEARFIELD of the cabinet of Commissioner KINNOCK.

Scotland

Mr SÖDERMAN visited Glasgow and Edinburgh, Scotland on 1-4 May, accompanied by Ian HARDEN and Ben HAGARD. During his visit, the Ombudsman met members and staff of the Scottish Parliament and Scottish Executive, including Mr Tom MCCABE, Minister for Parliament, Jack MCCONNELL, Minister for Finance, George REID, Deputy Presiding Officer, John MCALLION, Convenor of the Public Petitions Committee and Roseanna CUNNINGHAM, Convenor of the Justice and Home Affairs Committee. The subjects discussed included the provision of information about the work of the European Ombudsman, the future development of the ombudsman system in Scotland and the functioning of the Scottish Parliament. He also presented his work to staff of the Scottish Executive.

On 2 May, Mr SÖDERMAN visited the Faculty of Law of the University of Glasgow at the invitation of Professor Tony PROSSER and gave a seminar to staff and students on "The European Ombudsman and the rights of European citizens". On 4 May, the Ombudsman, the head of the legal department Ian HARDEN and Mr Roy PERRY MEP, first vice-chairman of the Committee on Petitions of the European Parliament, were the three speakers at a conference on alternative remedies in EU law, organised by Professor John USHER at the Europa Institute of the University of Edinburgh.

SPAIN

Ararteko

On 28 February, the European Ombudsman was invited to participate in the 15th anniversary celebration of the "Ararteko" (the regional Ombudsman institution in the Basque Country, Spain). The commemoration took place in the House of Parliament in Vitoria-Gastéiz and was hosted jointly by the regional Ombudsman Mr. Xabier MARKIEGI and

the Basque Parliament. Among the personalities who attended the ceremonies were the President of the Government of the Autonomous Basque Country, Mr. José IBARRETXE; the President of the Basque Parliament, Mr Juan María ATUTXA; the first Ombudsman of the Spanish State, Mr. Joaquín RUIZ-JIMÉNEZ and a broad range of jurists and public figures.

Galicia

At the invitation of the Galician ombudsman (Valedor do Pobo), Mr José CORA RODRÍGUEZ, the European Ombudsman, made an official visit to Galicia, Spain on 22-24 March.

Mr Söderman, Mr Garcia Leira, President of the Parliament of Galicia and Mr José Cora Rodríguez, the regional ombudsman of Galicia, in Santiago de Compostela in March. (photograph: © Mónica Couso Boán)

Mr SÖDERMAN held several meetings with Mr CORA as well as with his personnel in order to further develop the good co-operation between the two institutions. MEP Daniel VARELA who is a substitute member of the Committee on Petitions of the European Parliament also took part in one of the meetings.

During his visit, the Ombudsman met the President of the Xunta of Galicia, Mr Manuel FRAGA IRIBARNE, the President of the Galician Parliament, Mr GARCIA LEIRA, as well as regional parliamentarians, and the mayors of the cities of Santiago and La Coruña.

Mr SÖDERMAN gave a lecture on the role of the European Ombudsman at the University of Santiago of Compostela. He also addressed the XVth Meetings of Education for Peace organised by the Institute Rosalía de Castro, in Santiago, at a session attended by Mr Adolfo PÉREZ ESQUIVEL, Former Nobel Peace Prize. Mr SÖDERMAN presented a paper on the role of the European Ombudsman in the defence of fundamental rights in the European Union.

FIO Conference

On 6-8 June, Mr MARTÍNEZ ARAGÓN took part in a conference of the members of the Ibero American Ombudsman Federation (FIO) aimed at setting some proposals for the protection of children. These proposals were to be presented to the Xth Summit of Heads of States and Governments of Latin America.

The meeting took place in Barcelona and was hosted by the regional ombudsman of Catalonia, and Vice-president of FIO, Mr CAÑELLAS. The acting Ombudsman of Spain, Mr Antonio ROVIRA as well as most of the national and regional ombudsmen from Ibero America were represented in this event, including, among others, Mr Leo VALLADARES, Ombudsman of Honduras and President of the FIO, the Ombudsman of Argentina, Mr Eduardo MONDINO, the Ombudswoman of Bolivia, Mrs ROMERO DE CAMPERO, and the Ombudswoman of Costa Rica, Mrs Sandra PISZK.

The meeting produced a final declaration in which all participants agreed to the need of all Ibero American countries to ratify the UN Convention on the rights of children, the ILO agreements on child exploitation and the 1993 Hague convention on adoption, the obligation to promote specific policies for children, and to forbid the use of children in the Army.

In his opening address, Mr MARTÍNEZ ARAGÓN, who spoke on behalf of Mr SÖDERMAN, stressed the importance of the protection of human rights as the basis for the work of an Ombudsman, and explained the recent work in the European Union in relation to the drafting of a Charter of Fundamental Rights.

SWEDEN

Europe Day

On “Europe Day” (9 May 2000), Mrs Maria ENGLESON gave a speech on the role of the European Ombudsman to a group of students at the University of Karlstad, Sweden. The speech was part of the seminar “From the Treaty of Rome to Europe of today” which was arranged by “Carrefour Värmland”. After the seminar, Mrs ENGLESON answered questions from the public at a stand ran by Carrefour in the town centre.

Stockholm

On 1 September, Mr SÖDERMAN visited the European Parliament Office in Stockholm. He met with news medias and organisations active in EU affairs and gave a speech on his role in helping European citizens.

Later that day, Mr SÖDERMAN gave a lecture on the EU and openness to the Swedish EU law network of the Stockholm University.

THE NETHERLANDS

EIPA Seminar on transparency and the rights to information

On 29 May, Olivier VERHEECKE took part in the seminar “An efficient, transparent government and the rights of citizens to information” organised by the European Institute of Public Administration in Maastricht. He delivered a lecture on the own initiative inquiries made by the European Ombudsman in the field of transparency, as well as on the Special Report following the own initiative inquiry on the Code of Good Administrative Behaviour. The seminar discussed in detail the Commission’s draft Regulation on public access to documents of the European Parliament, the Council and the Commission. Other speakers from EU institutions included Mrs Mary PRESTON from the General Secretariat of the European Commission, MEP Astrid THORS and Mr Martin BAUER from the Legal Service of the Council of the European Union.

EIPA Seminar on European Information

Mr SÖDERMAN gave a speech on access to documents in the framework of the Conference "Keep ahead with European Information" which took place in Maastricht on 20-21 November 2000. The Ombudsman was accompanied by Mr Xavier DENOËL.

The conference was organised jointly by the European Institute of Public Administration and the European Information Association. The main objective was to give both an overview and the perspectives of the new Communication policy of the European Commission further to the fall of the Santer Commission. The conference was opened by Ian THOMSON, President of the European Information Association. It was mainly attended by Information Officers from twenty-one European countries.

DENMARK

On 14 September, Mr Jacob SÖDERMAN accompanied by Mrs Maria ENGLESON visited the European Parliament's Information Office in Copenhagen. Mr Jacob SÖDERMAN met with Mr Peter JUUL LARSEN from the EU Information Office of the Danish Parliament; Mr Hans Otto JØRGENSEN, Mrs Britt VONGER and Mr Thomas ALSTRUP from the National Association of Local Authorities in Denmark; Mr Anders LADEFOGED from the association Danish Industry; Mr Peter STUB JØRGENSEN and Mr Peter LINDVALD NIELSEN from the European Commission's Representation in Denmark and Mr Niels-Jørgen NEHRING from the Danish Society of Foreign Affairs. At a press-lunch, Mr Jacob SÖDERMAN met with journalists from the Danish Television and Danish newspapers.

Later that day, Mr SÖDERMAN gave a lecture at the University of Copenhagen about his role as European Ombudsman and the latest developments within the European Union regarding openness and transparency, the Code of good administrative behaviour and the Charter of Fundamental Rights. The lecture was organised by professor Hjalte RASMUSSEN and was attended by Mr Ole DUE, former president of the Court of Justice of the European Communities.

On 15 September, Mr SÖDERMAN met with the Executive Director of the European Environment Agency in Copenhagen, Mr Domingo JIMÉNEZ-BELTRÁN. Mr SÖDERMAN then gave a lecture to the staff of the European Environment Agency concerning the practical effects of the entering into force of the Agency's Code of Good Administrative Behaviour which it had adopted following the Ombudsman's draft recommendation to adopt such a code.

SWITZERLAND

On 27 October, the European Ombudsman attended a Conference entitled "European Values: EU Visions for Europe", which was organised by the International Press Institute in Zurich. Mr SÖDERMAN spoke at the session on a Code of Practice for a Charter of Common European Values. The other panellist was Mr Marc FISCHBACH, Judge at the European Court of Human Rights. The panel was moderated by Mr. Janne VIRKKUNEN, Senior Editor in Chief of Helsingin Sanomat. The interventions were followed by a lively debate.

GERMANY

ERA Congress

On 27 and 28 October, Ida PALUMBO and Maria MADRID took part in the annual congress of the *Europäische Rechtsakademie* in Trier entitled "A Charter of Fundamental Rights for the European Union". The conference dealt with the legitimisation of the Charter by means of fundamental and civic rights, the procedure of elaborating it, its contents and its justiciable nature. Speakers included Dr. Hansjörg GEIGER, State Secretary, German Federal Ministry of Justice, Dr Johann CALLEWAERT, European Court of Human Rights, Lord Peter GOLDSMITH QC, the UK Prime Minister's representative to the Charter Convention, Michael McDOWELL, S.C., Attorney General, Dublin, Mr Leif SEVÓN, Judge at the European Court of Justice, Ms Ana PALACIO, Member of the European Parliament and Mr António VITORINO, Member of the European Commission.

SOUTH AFRICA

IOI Conference

From 30 October to 2 November, Mr SÖDERMAN, accompanied by Gerhard GRILL and Xavier DENOËL, attended the 7th International Ombudsman Institute (IOI) Conference, which took place in Durban, South Africa. The title of the conference was "Balancing the exercise of governmental power and its accountability - The role of the Ombudsman". A very large number of ombudsman institutions and similar bodies from all the continents were represented at the meeting.

Mr Dean Gottehrer, Member of the Board of Directors of the IOI and Mr Söderman at the International Ombudsman Institute Conference, in Durban, South Africa.

The conference was opened by Mr Selby BAQWA, Public Protector of South Africa, followed by keynote addresses by Mr Thabo MBEKI, President of the Republic of South Africa by Sir Brian ELWOOD, President of the International Ombudsman Institute.

On the first day, the conference dealt with “The integrity of the Ombudsman - concept”. On that occasion, the European Ombudsman gave a speech on “The effectiveness of the Ombudsman in the oversight of the administrative conduct of government”.

The second day of the conference dealt with “The work/methods of the Ombudsman”. In the evening, the delegates were invited to attend the inauguration of a new chair for human rights and ombudsman studies at the University of Natal.

The third day was devoted to the topic “The impact of the work of the Ombudsman”. The highlight of the conference was the closing address by Mr Nelson MANDELA.

In a final resolution, which was adopted unanimously, the conference underlined that there is a fundamental right to good administration for all citizens in the modern world.

6.3 OTHER EVENTS

On 13 January, Mr Jacob SÖDERMAN received Mrs. Birgitta DAHL, speaker of the Swedish Parliament together with a delegation from the Swedish Parliament. Mr. SÖDERMAN gave a presentation of the recent developments in the work of the Ombudsman. Further aspects of common interest were discussed.

On 26 January, Mr SÖDERMAN gave an interview to Mr Mark DECEUKELIER, a student of Journalism and Law from Liège, Belgium.

On 11 February, Mr Alvaro GIL ROBLES, the first Commissioner for Human Rights of the Council of Europe, visited the office of the European Ombudsman. Mr GIL ROBLES, former national Ombudsman of Spain, gave a speech to the European Ombudsman and his staff about the role and powers of the Commissioner for Human Rights.

On 14 February, Mr SÖDERMAN gave a speech on the role of the European Ombudsman at the VIIIth Winter University of the European Democrat Students in Strasbourg. The audience comprised some 90 students from around 35 countries. Mr SÖDERMAN was accompanied by Mr GRILL of his office.

On 15 February, the Counsellor at the Norwegian Delegation to the E.U., Mr Jan GREVSTAD paid a visit to the Ombudsman to discuss new proposals for a code of conduct regarding transparency in the institutions.

On 16 February, Gerhard GRILL gave a talk on the role and work of the European Ombudsman to a group of some 40 students from the *Fremdspracheninstitut* of the city of Munich.

On 18 February, the Secretary General of the Finnish Ministry of Justice, Mrs Kirsti RISSANEN paid a visit to the Ombudsman. She was accompanied by Mr Esa VESTERBACKA, legal adviser at the Ministry, Ms Anne EKBLOM-WÖRLUNG, Chief of Unit for international relations and Ms Sofie FROM-EMMESBERGER, Deputy-Ambassador at the Permanent Representation of Finland to the Council of Europe.

On 22 February, Benita BROMS took part in a Dinner Debate organised by the Kangaroo Group. The topic of the debate was the infringement procedure under Art. 226 of the EC Treaty and the discussion was highlighted by case examples. The main speakers were Jean-Louis DEWOST, Director-General, Legal Service of the European Commission, Ana PALACIO, Member of the European Parliament and Lionel STANBROOK, Director, The Advertising Information Company.

On 24 February, Mr SÖDERMAN met in Strasbourg with Mrs Helena JÄDERBLOM from the Swedish Ministry of Justice to present his work and discuss the draft rules on access to documents.

On 29 February, Mr SÖDERMAN addressed a meeting of the EU Committee of the British Chamber of Commerce, following an invitation by Ms. Valérie ECHARD, Secretary General of the Chamber. The meeting dealt with the roles and responsibilities of the European Ombudsman and took place at the Sweden House, in Brussels.

On 8 March, Ian HARDEN visited the Scottish Executive EU office in Brussels to give information on the work of the Ombudsman and to arrange the Ombudsman's visit to Scotland. Mr George CALDER informed Mr Harden about the role of the office in the constitutional context of devolution of governmental powers to Scotland.

On 10 March, Olivier VERHEECKE gave a lecture on the own initiative inquiries of the European Ombudsman and on the Code of good administrative behaviour to 40 officials of the EFTA Surveillance Authority.

On 13 March, Mr SÖDERMAN spoke to a group of representatives of Swedish companies who were visiting Strasbourg. The presentation, which was followed by questions from the participants to Mr SÖDERMAN, was arranged by the Swedish Institute for Industrial Management.

On 24 March, Mr Francisco OLIGUÍN-URIBE from the *Misión de México ante la Unión Europea* visited the Brussels Antenna of the Ombudsman's office. He had an exchange of views with Mrs Benita BROMS and Mr Olivier VERHEECKE.

On 27 March, Gerhard GRILL gave a talk on the role and work of the European Ombudsman to a group of some 40 articled clerks (Rechtsreferendare) from Munich.

On 11 April, Mr GRILL gave a talk on the role and functions of the European Ombudsman to a group of some ten students from Syracuse University, New York.

On 12 April, Mr GRILL gave a talk on the role and functions of the European Ombudsman to a group of some 60 members of the International Kolping Society from various member states and non-member states who were accompanied by Mr SALESNY, the person in charge of European matters at the International Kolping Society. Later that day, Mr GRILL lectured to a group of some 30 young Germans from the *Politischer Jugendring Dresden.*

On 27 April, Mr SURACHMAN from the Indonesian Ombudsman's office visited the Brussels Antenna of the Ombudsman's office. He had an exchange of views with Mrs Benita BROMS and Mrs Vicky KLOPPENBURG.

On 11 May, Ian HARDEN gave a lecture on the role of the European Ombudsman to a group of Finnish judges and lawyers on a study visit organised by the Helsinki Institute.

On 17 May, Mr Jacob SÖDERMAN made a presentation in Strasbourg about his role as European Ombudsman to a political group from the region of Norrbotten in Sweden. The presentation was followed by questions from the participants.

On 18 May, Mr SÖDERMAN received the visit of H.E. the Ambassor of the United Kingdom, Mr. Steven WALL who was accompanied by Mr. Peter WILSON.

On 23 May, Ian HARDEN, accompanied by Vicky KLOPPENBURG, spoke about the role of the European Ombudsman at a lunchtime seminar organised by the law firm *Linklaters & Alliance*, Brussels.

On 16 June, Mr GRILL gave a talk on the role and functions of the European Ombudsman to a group of some 45 citizens from the constituency of Dr. Thomas GOPPEL, former minister of state and now Secretary-General of the CSU. The group was guided by Mr Rainer SCHWARZER of the *Bayerische Staatskanzlei* (Bavarian Chancellery).

On 23 June, Mr SÖDERMAN gave a talk to judges and officials of the European Court of Human Rights, in Strasbourg. After explaining the work of the European Ombudsman, he

presented his views on how the proposed Charter of Fundamental Rights of the European Union could promote human rights and how it could relate to existing mechanisms, including the system of the European Convention on Human Rights.

On 6 July, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to two groups from Germany. The first was a group of 20 trainee teachers from Bavaria under the guidance of Mr Thomas GOSSNER. This visit was organised by the *Europäische Akademie Bayern* in Munich. The second was a group of 37 teachers and trainee teachers from Franconia under the guidance of Mr Jürgen FISCHER. This visit was organised by the *Bayerische Staatskanzlei* in Munich.

On 12 July, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some 40 students from the Aventinus-Gymnasium in Burghausen (Germany) who were accompanied by Studienrat Johannes KEILHOLZ, Studienrat Stefan ANGSTL and Studienreferendarin Ruth KNOLL. This visit had been organised by the *Europäische Akademie Bayern* in Munich.

On 23 August, Mr Alessandro DEL BON gave a lecture on the role and the work of the European Ombudsman to a group of 15 German citizens participating in a Seminar on the European Union organised by the *Internationales Forum Burg Liebenzell*. The Group was accompanied by Mrs. Gertrud GANDENBERGER.

On 1 September, Mrs Benita BROMS gave a talk on the role of the European Ombudsman to a group of some 20 visitors from Finland, at the request of MEP Ulpu IIVARI.

On 15 September, Mrs Maria ENGLESON met with Mrs Anna ÅKERBERG responsible at the EU Information Office in Malmö, which is part of the European Commission Information Network.

On 18 September, Professor Mehmet SEMIH GEMELMAZ of the Faculty of Law of the University of Istanbul, Turkey visited Mr. SÖDERMAN in Brussels.

On 2 October, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some 40 teachers from Mittelfranken (Central Franconia) in Germany who were accompanied by Mr Jürgen FISCHER.

On 10 October, Mr SÖDERMAN lectured to documentalists of Spanish NGOs who were visiting the European Parliament in Brussels. Their trip was organised by the European Parliament Office in Madrid and the delegation was guided by Ms Angeles FERRERAS and Mr Juan RODRIGUEZ of the European Parliament and by Ms Cristina FERNÁNDEZ of the European Commission.

On 11 October, Ms Vicky KLOPPENBURG explained the role and the achievements of the European Ombudsman to a group of 40 students of the *Politischer Jugendring Dresden*.

On 13 October, Mr Jacob SÖDERMAN and Ms Maria ENGLESON met in Strasbourg with Mrs Jessica LUNDAHL who works at the Division for European Union Affairs of the Swedish Ministry of Justice.

On 17 October, Mr SÖDERMAN gave a lecture on “Europe: institutions and internationalisation”, to a group of 46 students of the Catholic University of Nijmegen, Netherlands who were accompanied by Professor A. DE VAAL and Professor A.J.M. VAN VLEUTEN.

On 18 October, Mr SÖDERMAN lectured to a group of 26 Finnish secondary school students. Headed by their teachers Sari HALAVAARA and Juha-Pekka LEHTONEN, the students from the Olari High School (South of Finland) were visiting the European Parliament in the framework of the “Euroscola” programme.

On 19 October, Mr Jacob SÖDERMAN gave a lecture on the role and the work of the European Ombudsman to Members of the Committee on Legal and Constitutional affairs of the Regional Parliament of Lower Saxony. Mr. Albert HEINEMANN, chairman of the Committee, informed the European Ombudsman of the problems encountered in dealing with petitions in a Parliament which has no Committee on Petitions. An exchange of views took place as to the possibility to set up such a Committee or to create a Regional Ombudsman.

On 26 October, Mr Giampiero ALHADEFF, President of the Platform of European Social NGOs, paid a visit to Mr SÖDERMAN. Mr ALHADEFF and the Ombudsman exchanged views regarding the situation of NGOs.

On 10 November, Mr João SANT'ANNA, Head of the Administration and Finance Department was invited to give a speech on the European Ombudsman at the headquarters of the CLAE - "*Comité de liaison des associations d'étrangers à Luxembourg*" . Mr SANT'ANNA spoke about the creation of the European Ombudsman, his mandate and main achievements. This conference was part of an information campaign on the role of the Community institutions organised by the Luxembourg association "Amigos do 25 de Abril".

On 28 November, Mr SÖDERMAN invited an Indonesian delegation to Strasbourg. The delegation was composed of Mr SUJATA, Chief National Ombudsman, Mr SOERAHMAN, National Ombudsman and Mr SUDIRMAN, Official from the Ministry of Justice/Human Rights. After a visit at the Court of Human Rights, the delegation met with the European Ombudsman. Views were exchanged regarding the recently created institution of the Ombudsman in Indonesia.

On 29 November, Mr Olivier VERHEECKE gave a presentation in Brussels on the role and the activities of the European Ombudsman to a group of 30 students from the Hanzehogeschool Groningen (the Netherlands).

On 1 December, Mr SÖDERMAN was invited to attend a lunch meeting with Mr. George RADWANSKI, the Canadian Privacy Commissioner. Hosted by Mr. James BARTLEMAN, Ambassador of Canada's Mission to the EU, the lunch meeting was also attended, by Mr Paul THOMAS, Belgian Commissioner for the Protection of Privacy, Ms Anne-Christine LACOSTE, Legal Adviser, Belgian Commission for the Protection of Privacy.

On 11 December, Professor Alasdair ROBERTS, of the School of Policy Studies of the Queens University, Ontario, Canada, paid a visit to the Ombudsman. Prof. ROBERTS who is an expert in reseach on freedom of information law met with Mr SÖDERMAN in Strasbourg, during the European Parliament Session.

On 13 December, Mr SÖDERMAN met with Mr Jeroen SCHOKKENBROEK, of the External Relations and Events Unit of the Council of Europe. They discussed matters of interest to both institutions including the synchronisation of international events.

6.4 MEDIA RELATIONS

On 11 January, during his visit to Finland, the European Ombudsman gave a lecture to the Association of European Journalists (AEJ). This Helsinki-based association is organised in national sections and has about 1600 members.

On 17 January, Mr SÖDERMAN was interviewed by Ms Cornelia BOLESCH for the *Süddeutsche Zeitung* and Dr Willy TEICHERT who works for several German newspapers.

On 19 January, Mr SÖDERMAN gave an interview to Jouni MÖLSÄ for the Finnish daily *Helsingin Sanomat*.

On 27 January, Mr SÖDERMAN was interviewed by Ms Åsa NYLUND, correspondent for the Finnish *Yleisradio*.

On 28 January, Mr SÖDERMAN was interviewed by Mr Stephan DEPPEN for the German radio *Saarländischer Rundfunk* and by Ms Harriet TUOMINEN for the Finnish paper *Nya Åland*.

On 16 March, Mr SÖDERMAN gave an interview for the BBC's radio programme *Europe Today*. He was also interviewed by Matti LAITINEN for the Finnish *YLE Radio*.

On 17 March, Mr SÖDERMAN gave a telephone interview to Åsa NYLUND for the Finnish *TV-YLE*.

On 23 March, Ian HARDEN and Maria ENGLESON met with a group of Nordic journalists in Strasbourg. The journalists came from Denmark, Finland, Norway and Sweden. Mr HARDEN gave an introduction on the work of the Ombudsman which was followed by questions from the journalists. Most questions related to the Ombudsman's role in the drafting of the Charter of Fundamental Rights for the European Union.

On 27 March, Mr SÖDERMAN gave an interview to Heikki HAAPAVAARA for the Finnish paper *Optio*.

On 31 March, the European Ombudsmen gave a lecture in Paris to the Association of Local Papers Journalists of Finland, who were on a study trip in France.

On 3 April, Mr SÖDERMAN was interviewed by Eva HEDLUND for the Swedish paper *Journalisten*.

On 12 April, the European Ombudsman held a Press Conference in Strasbourg regarding progress towards the adoption of a Code of Good Administrative Behaviour by the institutions, bodies and agencies of the EU. Over 30 journalists attended the Press Conference.

On the same day, Mr. SÖDERMAN was interviewed by Mr Paolo CACACE for the Italian newspaper *il Messaggero*.

On 17 April, on the occasion of the European Ombudsman's presentation of his Annual Report for 1999 to the Committee on Petitions of the European Parliament, a press briefing was held in Brussels to present the Annual Report to Finnish journalists. The briefing was attended by Jouni MÖLSÄ from *Helsingin Sanomat*, Maija LAPOLA from *Turun Sanomat*, Åsa NYLUND from *YLE Television* and Marko RUONALA from the *STT* news agency.

The press briefing was followed by a press lunch, at which Mr SÖDERMAN presented his Annual Report for 1999 to the following journalists: Gareth HARDING from *European Voice* (EU), Bret STEPHENS from the *Wall Street Journal Europe* (EU), Conor SWEENEY from the *Irish Independent* (Ireland), Marisandra OZOLINS from *Tageblatt* (Luxembourg), Michael JUNGWIRTH from *Kleine Zeitung* (Austria), Rolf GUSTAVSSON from *Svenska Dagbladet* (Sweden), Emily von SYDOW from *Aftonbladet* (Sweden), Willy SILBERSTEIN from Swedish Radio (Sweden), Robert COTTRELL from *the Economist* (UK), Ambrose EVANS-PRITCHARD from *the Daily Telegraph* (UK).

On 7 May, Ben HAGARD was interviewed by a journalist of *Radio France Alsace* in the framework of the open day.

On 17 May, The European Ombudsman was interviewed by journalist Jarkko VESIKANSA, for the Finnish weekly magazine *Suomen Kuvalehti*.

On 18 May, the European Ombudsman was interviewed by Mr Bellabarba for the Italian Radio broadcasting Corporation, *RAI*.

On 24 May, José MARTÍNEZ-ARAGÓN, participated in a live radio debate broadcast by *COM Radio* from Barcelona on the rights of European citizens. The talk was conducted from Brussels by former EP Vice-President Antoni GUTIÉRREZ, and included the Spanish members of the European Parliament's Petitions Committee, Mrs Ana PALACIO, Mrs Maruja SORNOSA and Mrs Laura GONZÁLEZ.

On 8 June, Journalist Staffan DAHLLOF interviewed Mr. Söderman by telephone for a booklet to be published by the Swedish Trade Union organisation *Statstjänstemannaförbundet*. Mr DAHLLOF also produces articles for the Swedish daily *Göteborgs-Posten*, the Danish weekly *Det ny Notat* and *Journalisten* (Swedish Trade Union weekly).

On 9 June, Journalist Erik RYDBERG interviewed Mr SÖDERMAN for the Belgian paper *Le Matin*.

On 14 June, Mr Laurent BIGOT, working for the French Diplomatic Journalists Association interviewed Mr SÖDERMAN for the French magazine *Le Point*.

Also on 14 June, Mr SÖDERMAN gave an interview to Ms Jane LUSCOMBE for the *BBC World Television*.

Later that day, Mr Dara McCLUSKEY from *Tech Arts Media*, a subsidiary of the Dublin-based *Midas Productions*, filmed Mr. SÖDERMAN in the framework of the production of a CD-Rom for Irish secondary school students. This project is mandated by *The Communicating Europe Initiative Taskforce* in Ireland under the guidance of the Irish Department of Foreign Affairs.

On 15 June, The Danish Broadcasting Corporation (DR-TV), interviewed Mr SÖDERMAN in Strasbourg. DR-TV has been co-producing a series of documentaries about the EU. A total of 3 hours will be transmitted throughout Europe in the Fall. DR-TV's attention was particularly focused on the issue of late payments by the Commission, the Commission's proposal for public access to documents and the reform process.

On 27 June, Mr Mathias JONSSON interviewed Mr. SÖDERMAN for the *Ålands Tidning*, a newspaper from the Åland islands in the Baltic Sea.

On 4 July, Mr SÖDERMAN was interviewed by Mr Hans-Martin TILLIACK for the German magazine *Stern* and by Mr Peer SKIPPER for the Danish version of the European Parliament magazine *News from Europe.*

On 5 July, Mr SÖDERMAN participated in a press conference organised by the committee on petitions of the European Parliament in the context of the presentation of his annual report for 1999.

Also on 5 July, Mr SÖDERMAN was interviewed by Mr Víctor CANALES, a Spanish language correspondent for the Ibero-American Service of *Radio Netherlands International.* Mr CANALES also prepares a monthly feature, called *En vivo del hemiciclo*, for some 20 Spanish national and regional radio stations.

On 7 July, Mr SÖDERMAN was interviewed by Mr Torgeir ANDA for the Norwegian Business Daily *Dagens Naeringsliv*.

On 19 July, Mr SÖDERMAN was interviewed by Ms Mina MITSUI, the Brussels correspondent of the Japanese daily *Yomiuri Shimbun*. This daily's interest stemmed from the efforts of Japanese citizens groups in favour of the establishment of an Ombudsman institution in their country.

On 8 September, Mr SÖDERMAN was interviewed by Ms Anna VOROS, journalist for the Swedish Radio. The interview will serve as a basis to explain the role and the various

activities performed by the European Ombudsman in a Swedish publication entitled *The EU in Easy Swedish*.

On 19 September, Mr SÖDERMAN was interviewed by Mr BOGERTS for the Dutch newspaper *Volkskrant*.

On 10 October, Mr SÖDERMAN was interviewed by Ms Annegret LOGES for the German publication *DM-Magazin*.

On 12 October, Ms Marja-Liisa HUSSO interviewed Mr SÖDERMAN for the Finnish magazine *ET-lehti.*

On 16 October, Mr SÖDERMAN was interviewed by the Polish Community Aerial Television. The TV team was led by journalist Grazyna MIKOLAJCYK. The European Ombudsman was interviewed as part of a series of programmes aimed at introducing the European Union institutions and their activities to the Polish public.

On 17 November, Mr SÖDERMAN gave a telephone interview to Mrs Monserrat MINOVA for Radio 4 of Barcelona.

On 22 November, Mr SÖDERMAN gave a telephone interview to Ms Marie-Louise MOLLER for the *EU Observatory*. The interview dealt mainly with age-limits in recruitment procedures.

On 13 December, Mr SÖDERMAN gave an interview to Ms Caroline MONIN for the *Dialogue* magazine, published by the Ministry of the Wallonian Region.

7 ANNEXES

A STATISTICS CONCERNING THE WORK OF THE EUROPEAN OMBUDSMAN FROM 01.01.2000 TO 31.12.2000

1 CASES DEALT WITH DURING 2000

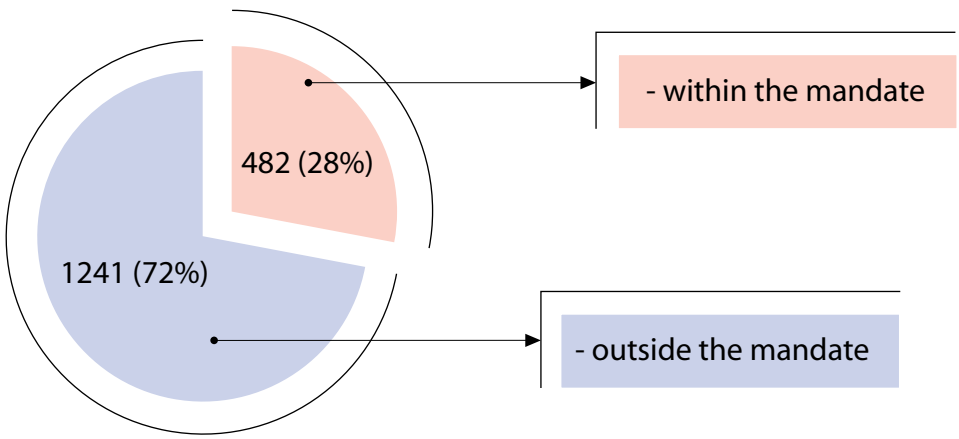
1.1 TOTAL CASELOAD IN 2000 2017

- complaints and inquiries not closed on 31.12.99	284[1]
- complaints received in 2000	1732
- own initiatives of the European Ombudsman	1

1.2 EXAMINATION OF ADMISSIBILITY/ INADMISSIBILITY COMPLETED 95%

1.3 CLASSIFICATION OF THE COMPLAINTS

1.3.1 According to the mandate of the European Ombudsman

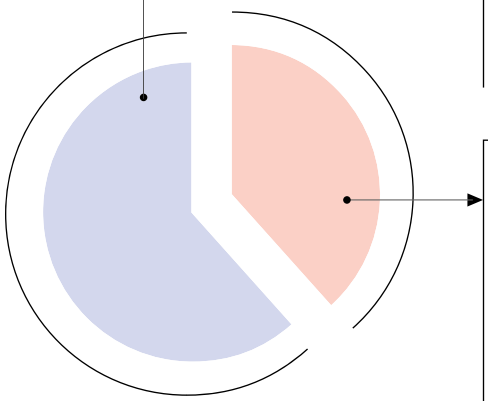


[1] of which 6 own initiatives of the European Ombudsman and 186 admissible complaints.

1.3.2 Reasons for being outside the mandate

- not an authorised complainant	12
- not against a Community institution or body	1141
- does not concern maladministration	90
- Court of Justice and Court of First Instance in their judicial role	1

1.3.3 Analysis of complaints within the mandate



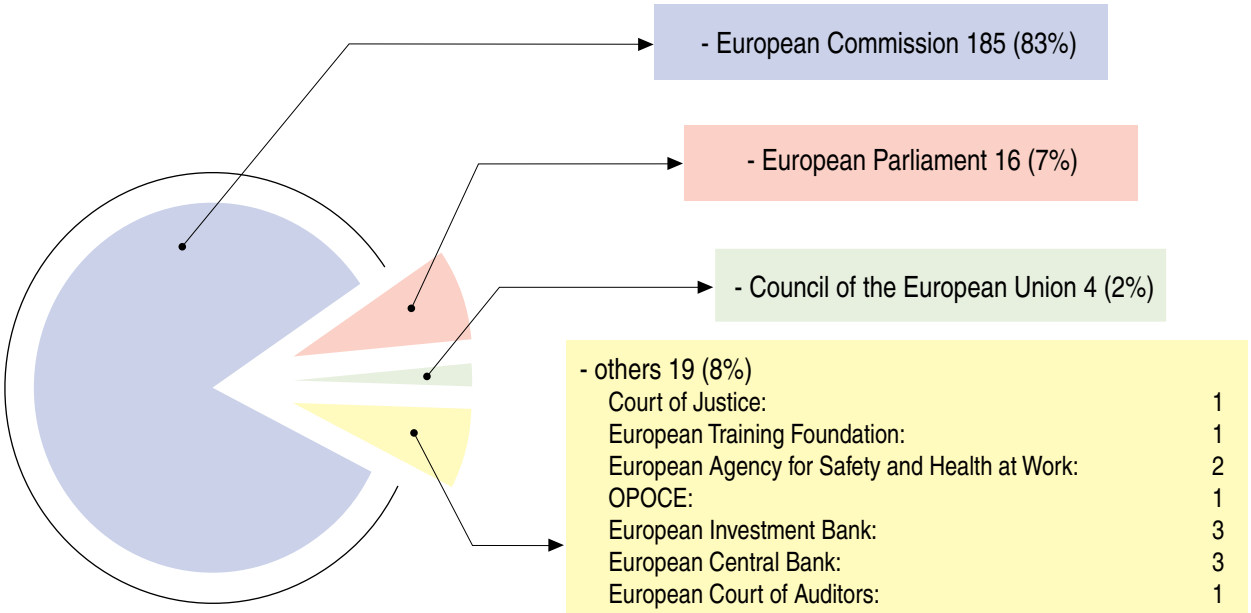
Admissible complaints	297
- inquiries initiated	223
- no grounds for inquiry	74
dealt with or considered by Committee on Petitions:	11
others:	63

Inadmissible complaints	185
Inadmissible because	
- author/object not identified	40
- time limit exceeded	2
- prior administrative approaches not made	107
- being dealt with or settled by a Court	11
- internal remedies not exhausted in staff cases	23
- alleged facts are or have been the subject of legal proceedings	2

2 INQUIRIES INITIATED IN 2000 224

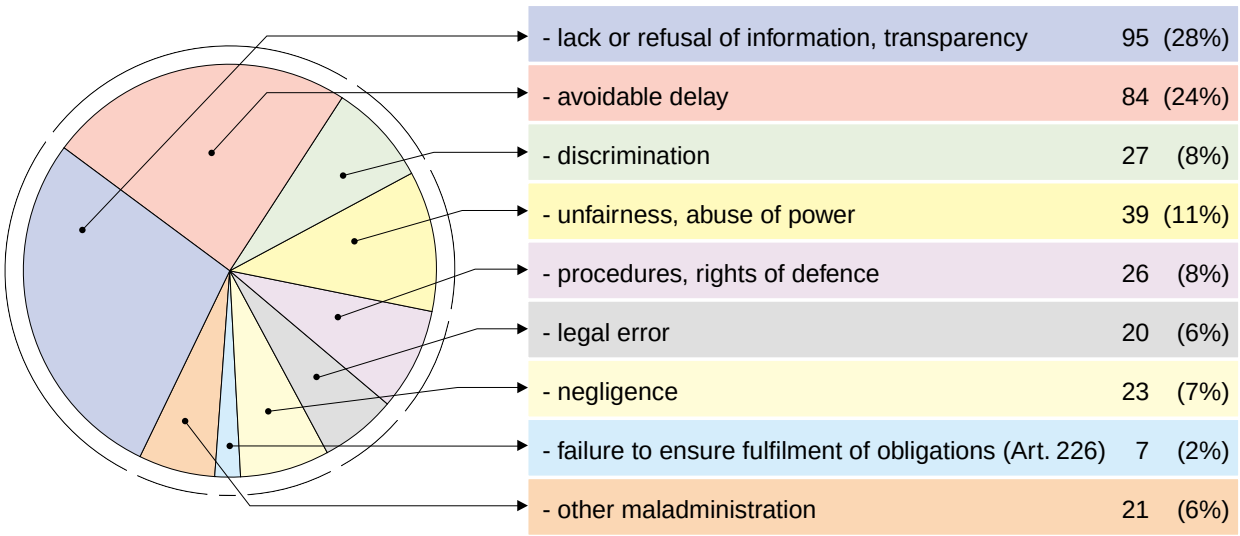
(223 admissible complaints and 1 own initiative of the European Ombudsman)

2.1 INSTITUTIONS AND BODIES SUBJECT TO INQUIRIES[2]



2.2 TYPE OF MALADMINISTRATION ALLEGED

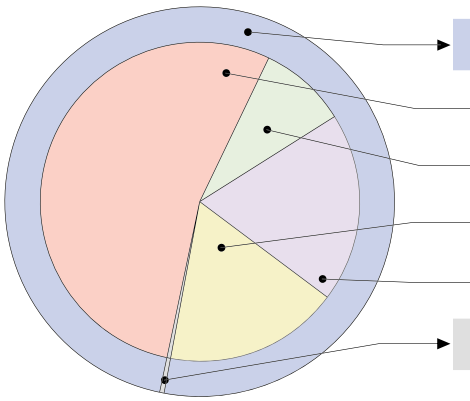
(In some cases, 2 types of maladministration are alleged)



[2] Some cases concern 2 or more institutions or bodies.

3 DECISIONS CLOSING THE FILE ON A COMPLAINT OR CONCLUDING AN INQUIRY 1737

3.1 COMPLAINTS OUTSIDE THE MANDATE 1241



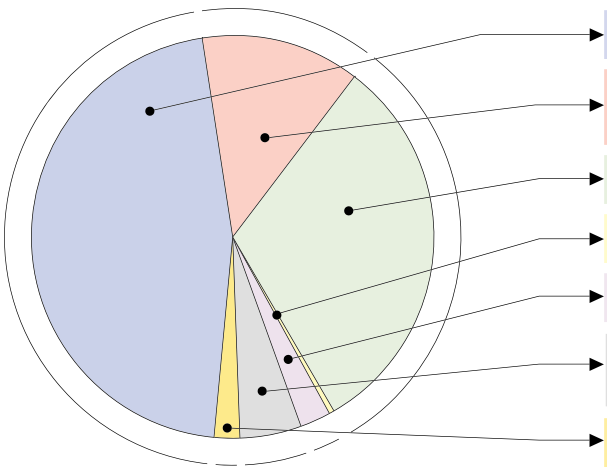
- complainants advised to contact another agency:	805
national/regional ombudsman or petition a national Parliament	435
to petition the European Parliament	72
the European Commission	155
others	143
- transferred as petition to the European Parliament	3

3.2 COMPLAINTS WITHIN THE MANDATE, BUT INADMISSIBLE 185

3.3 COMPLAINTS WITHIN THE MANDATE AND ADMISSIBLE BUT NO GROUNDS FOR INQUIRY 74

3.4 INQUIRIES CLOSED WITH REASONED DECISION 237[3]

(An inquiry can be closed for 1 or more of the following reasons)



- no maladministration found	112[4]
- with a critical remark addressed to the institution	31
- settled by the institution	76
- friendly solution	1
- dropped by the complainant	6
- draft recommendations accepted by the institution	12[5]
- other	5

3 Of which 4 own initiatives of the Ombudsman.

4 Of which 3 own initiatives of the Ombudsman.

5 Of which 1 own initiatives of the Ombudsman.

4 DRAFT RECOMMENDATIONS MADE IN 2000 AND SPECIAL REPORTS TO THE EUROPEAN PARLIAMENT

- inquiries resulting in finding of maladministration with draft recommendations	13
- presentation of a special report to the European Parliament	2

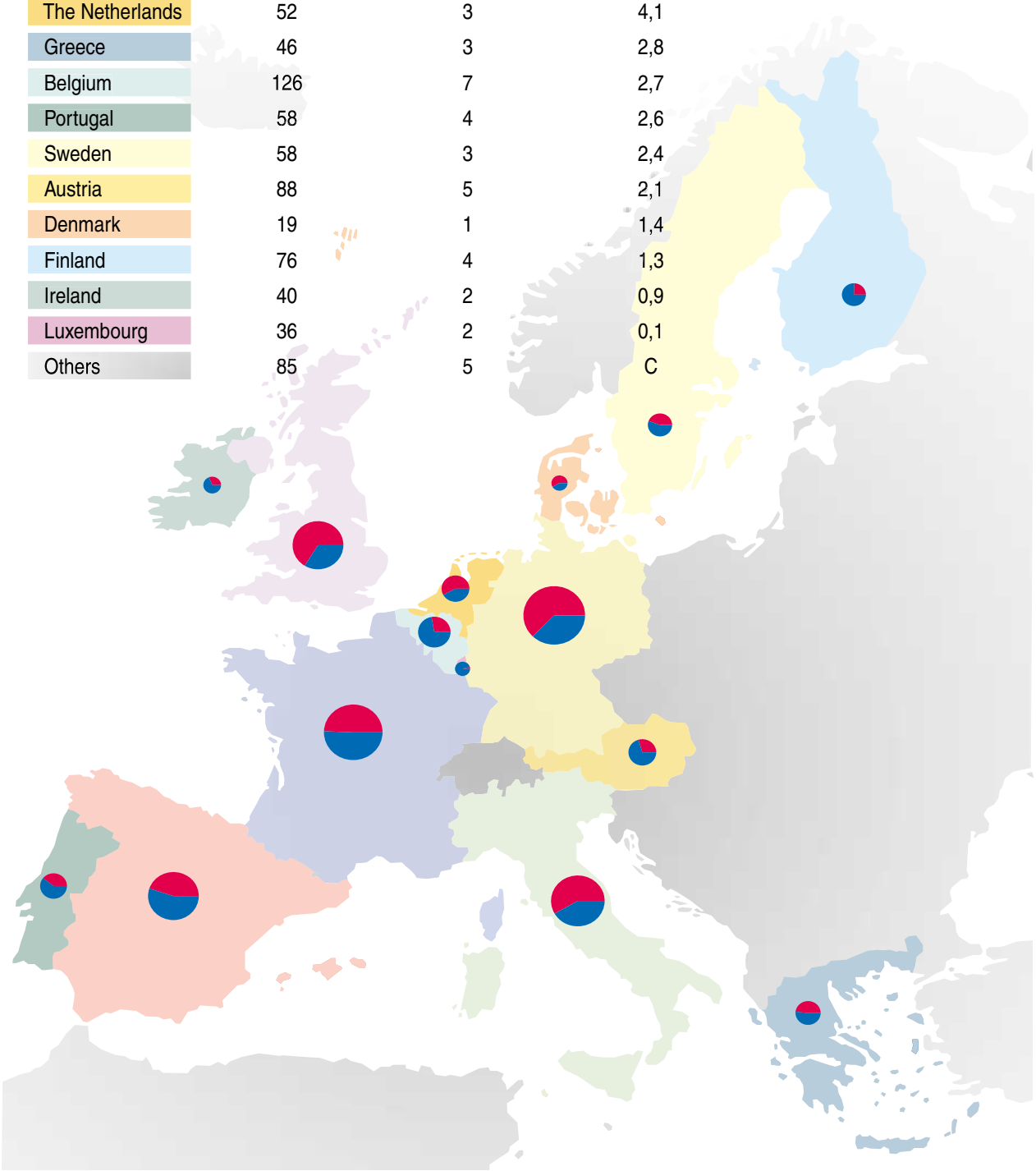
5 ORIGIN OF COMPLAINTS REGISTERED IN 2000

5.1 SOURCE OF COMPLAINTS

	- sent directly to the European Ombudsman		1729
by:	individual citizens	1539	
	companies	76	
	associations	114	
	- transmitted by a Member of the European Parliament		2
	- petition transferred to the European Ombudsman		1

5.2 GEOGRAPHICAL ORIGIN OF THE COMPLAINTS

Country	Number of Complaints	% of Complaints	% of the EU Population
Germany	213	13	21,9
United Kingdom	141	8	15,7
France	279	16	15,6
Italy	193	11	15,4
Spain	222	13	10,6
The Netherlands	52	3	4,1
Greece	46	3	2,8
Belgium	126	7	2,7
Portugal	58	4	2,6
Sweden	58	3	2,4
Austria	88	5	2,1
Denmark	19	1	1,4
Finland	76	4	1,3
Ireland	40	2	0,9
Luxembourg	36	2	0,1
Others	85	5	C



B THE OMBUDSMAN'S BUDGET

An independent budget

The Statute of the European Ombudsman provided originally for the Ombudsman's budget to be annexed to section I (European Parliament) of the general budget of the European Union.

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.[6] The Ombudsman's budget is now an independent section (section VIII) of the budget of the European Union.

Following this change to the Financial Regulation the European Ombudsman initiated the procedure for amending the articles in his Statute that had become obsolete.

Structure of the Budget

The Ombudsman's Budget is divided into three titles. Title 1 of the budget contains salaries, allowances and other costs related to employment. 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.

The efficiency saving to the Community budget from the co-operation between the European Ombudsman and the European Parliament is 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.

The 2000 budget included 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

6 Council Regulation 2673/1999 of 13 December 1999 OJ L 326/1.

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 2000 Budget

In 1999, the Ombudsman had presented an action plan for restructuring the office, including separation of legal work from administrative work through the creation of separate departments. The 2000 budget released the appropriations needed to recruit a new A3 official which permitted to implement this new structure. The establishment plan of the Ombudsman showed a total of 24 posts .

In 2000, the action plan for the transformation of temporary posts on the establishment plan into permanent posts started to be implemented. One A3, one A5, one A7, one B5 and one C2 post were converted from temporary into permanent.

The total amount of appropriations available in the Ombudsman's 2000 budget was 3.914.584 €. Title 1 (Expenditure relating to persons working with the Institution) amounted to 2.878.797 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounted to 824.000 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounted to 2.000 €. An amount of 209.787 € was entered to the reserve (Title 10).

The following table indicates expenditure in 2000 in terms of committed appropriations.

Title 1	€	2.643.429
Title 2	€	584.017
Title 3	€	1.543
Total	€	3.228.989

Revenue consists primarily of deductions from the remuneration of the Ombudsman and his staff. In terms of payments received, total revenue in 2000 was 330.844 €.

The 2001 Budget

The 2001 budget, prepared during 2000, provides for an establishment plan of 26, representing an increase of two from the establishment plan for 2000.

Total appropriations for 2001 are 3.902.316 €. Title 1 (Expenditure relating to persons working with the Institution) amounts to 3.011.390 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounts to 887.926 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounts to 3.000 €.

The 2001 budget provides for total revenue of 385.897 €.

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N.B. All the reasoned decisions taken by the European Ombudsman are available both in the language of the complaint and in English on the Ombudsman's Website at: http://www.euro-ombudsman.eu.int

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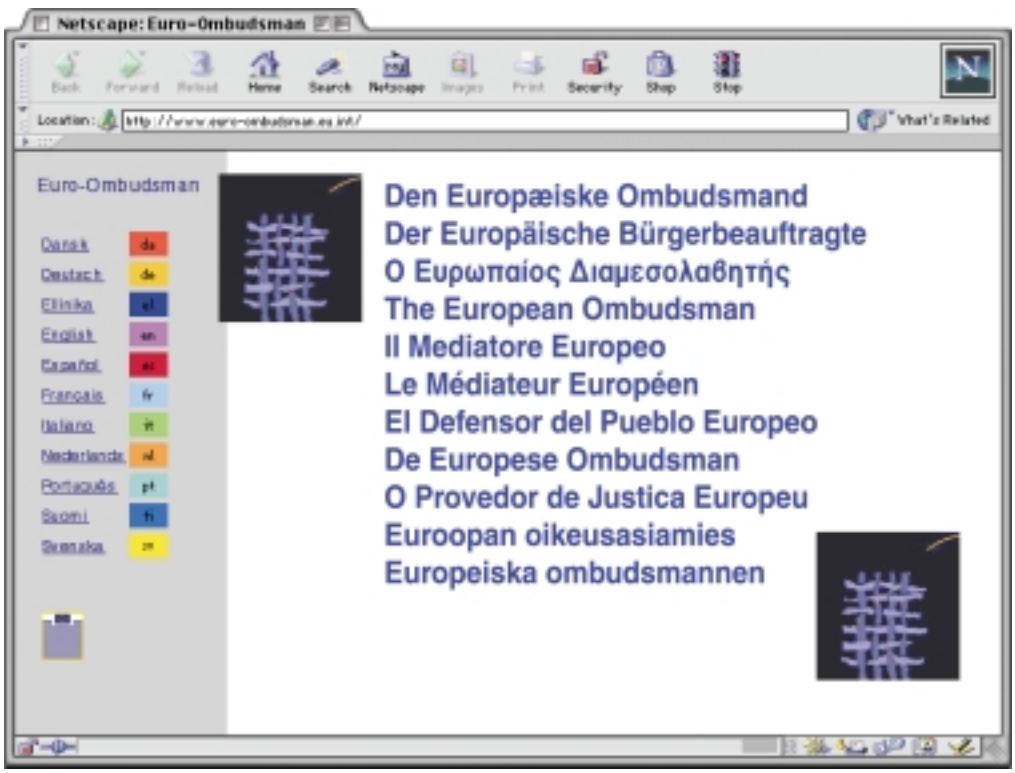

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