# THE EUROPEAN OMBUDSMAN
## ANNUAL REPORT 2001



http://www.euro-ombudsman.eu.int

EN

ISSN 1680-3809

# THE EUROPEAN OMBUDSMAN
## *ANNUAL REPORT 2001*

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*President*
*European Parliament*
*rue Wiertz*
*B - 1047 Brussels*

*Strasbourg, 8 April 2002*

*Mr 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 2001.*

*Yours sincerely,*

*Jacob Söderman*
*Ombudsman of the European Union*

# 1 FOREWORD

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## Openness and good administration

During the year 2001, substantial progress was made in two fields essential for the Ombudsman's work on behalf of European citizens.

First, the European Parliament and the Council adopted the regulation on public access to documents, foreseen in Article 255 of the EC Treaty. After being presented with a poor first draft, the European Parliament and Council succeeded in negotiating a much better text and deserve congratulation on their success in this regard. The regulation became applicable only in December 2001, so its practical effects in promoting greater openness cannot yet be assessed. If the institutions keep faith with the principle of openness when applying the regulation, it will significantly promote the citizens' understanding of the work of the European Union institutions. The coming years will provide the test. Let us hope for the best.

Also in the field of openness, it will be important to follow closely the impact of data protection rules on the administration. These rules are intended to protect the private and family life of the citizens. If the institutions apply them for other purposes, they could undermine the openness of administration in the European Union, as well as diluting the needed protection of the fundamental right to private and family life.

The second field in which there has been a victory for European citizens is the principles of good administration. On 6 September, the European Parliament unanimously adopted the EU Code of Good Administrative Behaviour and called on the European Commission to propose a regulation on this subject. In answer to a question put forward by MEP Roy Perry, the European Commission has still refused to follow this request. Therefore the European Parliament will surely consider to take a legal initiative on the matter on the basis of Article 192 of the Treaty.

As these kinds of law on good administration exist in almost all Member States with the aim of promoting good relations between the citizens and the administration, it is hard to see what valid reasons the Commission could have to take such a cautious position in this matter.

The Parliament also instructed the European Ombudsman to apply the Code of Good Administrative Behaviour in carrying out inquiries into possible maladministration. Therefore an information campaign will be launched during next Spring about this issue and the Code will be used as a base for the work on complaints and own initiative inquiries. It appears that this will promote the citizens' fundamental right to good administration contained in Article 41 of the Charter of Fundamental Rights of the European Union, which the Presidents of the European Parliament, Council and Commission proclaimed at the Nice summit in December 2000.

## The Charter of Fundamental Rights should be respected

In last year's Annual Report, I described the Charter as a step forward for European citizens. Much to my regret, I have now to state that, apart from the progress mentioned above, the three institutions that proclaimed the Charter have not yet shown themselves to be serious about applying it in practice. On the level of words, both the President of the European Commission, Mr Romano PRODI and the Commissioner responsible for human rights, Mr António VITORINO, as well as the political authorities of the Parliament have declared that the Charter should be followed. In real life, this has not yet been followed by deeds. The European Parliament and the Commission have both continued, for example, to use the old rules about discrimination in their recruitment notices, neglecting the fact that the Charter also identified age as a prohibited form of discrimination. Furthermore, although we launched an own-initiative inquiry, inspired by the Charter, on the freedom of expression of officials and made a proposal, based on Article 41 of the Charter, for the Commission to adopt written rules of procedure in its role as "Guardian of the Treaty",

there seems to have been no progress in the institutions' positions during the year. The Commission's leisurely approach to dealing with a case of sex discrimination led me to submit a special report to the European Parliament in November and its apparent failure to ensure the right to parental leave for its own staff inspired another own-initiative inquiry which should receive an answer in February 2002.

There have been many claims presented that the Charter should be included in the Treaty, or in a possible Constitution of the European Union. To me, the most urgent task is for the institutions to show that they respect the promises which they made to European citizens in proclaiming the Charter. There is no point in giving legal status to a text if it is not intended to be followed in practice. I therefore do hope that, in the coming year, the institutions will prove in practice that they respect the Charter of Fundamental Rights. This would be good news for the citizens and would surely enhance the relations between them and the institutions.

### How to be better known

Also during this year, there have been loud voices declaring that the ordinary European citizen does not know about the right to complain to the European Ombudsman. The same goes for the citizens' right to petition the European Parliament. I must repeat to these critics that the right to complain to the European Ombudsman is limited to the activities of the Community institutions and bodies and that the Ombudsman's remit does not include the activities of national, regional or municipal administrations in the Member States, nor private enterprises or activities. Therefore our aim has been to secure that those who really are in contact with the EU administration will know, or at least that it is easy for them to find out, about the right to complain to the European Ombudsman.

We have informed the citizens by keeping the Commission representations in the Member States, the European Parliament information offices, the national and regional ombudsman offices and similar bodies, as well as all EU info centres equipped with our information material and by linking their websites to ours. The Ombudsman and his staff have taken part during the year in many conferences, seminars and meetings in Brussels and Strasbourg and in the Member States and have used these opportunities to inform about the right to complain and the results that we have achieved. We have also given information to MEPs and their assistants, as they meet a lot of citizens who are likely to have concerns about the EU administration.

We have managed to reach many citizens by keeping the Ombudsman's website furnished with fresh and useful information and linked to all websites that might be of interest to citizens looking for EU information. This is proved by the increasing number of complaints received using the electronic complaint form on the website. Nor have we neglected traditional press relations: a large number of interviews have been given and 24 press releases were sent out.

This work will be actively pursued in the future also. Some success can be noted during the year, as the total number of complaints is still rising. Furthermore, the fact that the European Ombudsman received the prestigious Alexis de Toqueville Prize awarded by the European Institute of Public Administration and was nominated for the election of the European of the year by *European Voice*, as well as the many University theses presented about the European Ombudsman show that the message has at least reached some circles.

In fact, I do not know of any ombudsman office in the world that does more to inform the citizens about the right to complain and there is no other office that has to do it in 15 Member States and in 12 Treaty languages. Furthermore, we have already begun to provide information in the applicant States, to bring their ombudsman offices into the network that links the European Ombudsman and the national and regional ombudsmen and similar bodies in the Member States.

Any advice on how it should be done better would be truly appreciated. Any practical help and cooperation in doing it would be even more welcome. Demands to act in a more populistic and noisy way will not be met, as they might damage the profile of the Ombudsman as a professional and serious actor within the European Union. To maintain his possibilities to achieve good results for the citizens, the Ombudsman must act in a fair and consistent way, based on impartial investigation of facts and respect for the law.

### Prompt complaint dealing

One of my most important objectives is to set a good example of public service by dealing with citizens' complaints as quickly as possible. Our internal management targets are to acknowledge receipt of complaints within one week, analyse their admissibility within one month and close inquiries within one year, unless there are exceptional circumstances which justify a longer inquiry.

The cases in which a decision on admissibility takes longer than one month are mostly those in which the Ombudsman decides to open an inquiry. Such cases normally take longer to prepare, because the complainant's claims and allegations must be precisely formulated and legal research is also needed in some cases. The average time for a positive admissibility decision on complaints in 1998 was over 50 days. This figure was reduced to 33 days in 1999, to 32 days in 2000 and was again 33 days in 2001.

The average length of time taken to complete an inquiry was 289 days for inquiries closed in 2001, compared to 316 days for cases closed in 2000. At 31 December 2001, the number of inquiries which had been open for more than one year was 31. In 9 of these cases, the inquiry is taking longer than usual because of the complexity of the case, involving a draft recommendation, or a special report to the European Parliament. The real backlog of cases at this date was therefore only 22, compared to 35 at 31 December 2000. Our performance has therefore improved considerably over the last year, but there is no room for complacency and we are determined to maintain the improvement.

Jacob Söderman

# 2 COMPLAINTS TO THE OMBUDSMAN

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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 2001, the Ombudsman dealt with 2179 cases. 1874 of these were new complaints received in 2001. 1694 of these were sent directly by individual citizens, 83 came from associations and 86 from companies. 4 complaints were transmitted by Members of the European Parliament. 301 cases were brought forward from the year 2000. The Ombudsman also began 4 own-initiative inquiries.

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 2001, 2 petitions were transferred to the Ombudsman, with the consent of the petitioner, to be dealt with as complaints. 9 complaints were transferred, with the consent of the complainant, to the European Parliament to be dealt with as petitions. Additionally, there were 167 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.

## 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.

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[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.

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.

**Example of a case where the complainant was not a person entitled to make a complaint**

In May 1999, Mr A. complained to the European Ombudsman on behalf of his company concerning an alleged mismanagement of a loan granted by the European Investment Bank.

As Mr A. was not a citizen of the Union or residing in a Member State, the Ombudsman informed him by letter of 29 June 1999 that he had no power to deal with his complaint. The Ombudsman however decided to investigate his allegations in the framework of an own initiative inquiry on basis of Article 195 of the EC Treaty.

In May 2001, the Ombudsman concluded his inquiries in the own initiative and found that they had not revealed any maladministration by the European Investment Bank. The Ombudsman therefore closed the case.

*Case OI/4/99/OV*

### 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

*The origins of the Code*

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 right to good administration in the Charter of Fundamental Rights*

On 2 February 2000, at a public hearing organised by the Convention responsible for drafting the Charter of Fundamental Rights of the European Union, the European Ombudsman called for the Charter to include the right to good administration as a fundamental right.

On 7 December 2000, the Presidents of the European Parliament, the Council and the Commission proclaimed the Charter of Fundamental Rights of the European Union at the meeting of the European Council in Nice. The Charter includes the right to good administration as Article 41.

*Towards a European administrative law*

On 6 September 2001, the European Parliament adopted a resolution approving a Code of Good Administrative Behaviour which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public. The Parliament's resolution on the Code is based on the Ombudsman's Code of 28 July 1999, with some changes introduced by Mr PERRY as rapporteur for the Committee on Petitions of the European Parliament.

At the same time as approving the Code, the European Parliament also adopted a resolution calling on the European Ombudsman to apply it in examining whether there is maladministration, so as to give effect to the citizens' right to good administration in Article 41 of the Charter of Fundamental Rights of the EU.

The Ombudsman will therefore apply the definition of maladministration so as to take into account the rules and principles contained in the Code.

Following a suggestion originally made by Jean-Maurice DEHOUSSE, draftsman for the Committee on Legal Affairs and the Internal Market, the European Parliament's Resolution of 6 September 2001 on the Code also calls on the European Commission to submit a proposal for a Regulation containing the Code of Good Administrative Behaviour, to be based on Article 308 of the Treaty establishing the European Community.

Incorporating the Code in a Regulation would emphasise to both citizens and officials the binding nature of the rules and principles that it contains. Article 192 of the EC Treaty gives the European Parliament the right itself to initiate the legislative procedure, if necessary.

## 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).

**Example of a case which did not fulfill the requirement of prior administrative approaches**

In April 2001, an MEP wrote to the Ombudsman enclosing a copy of a letter that he had sent on the same day to the Director General of the Research Directorate of the European Commission. The letter to the Director General concerned a dispute about the award of a contract by the Commission. The MEP requested the Ombudsman's views on the issues raised in his letter to the Director General.

In reply, the Ombudsman stated that he should give his views on a dispute involving a Community institution or body only after conducting an inquiry into a possible instance of maladministration, in which both parties have the opportunity to be heard.

Furthermore, Article 2 (4) of the Statute of the Ombudsman requires a complaint to be preceded by appropriate administrative approaches to the institution or body concerned. The MEP's letter to the Director General could be such an approach, but the institution must also be given a reasonable time in which to answer. At this stage, therefore, the Ombudsman could not deal with the MEP's inquiry as a complaint and so closed his consideration of the matter.

The Ombudsman also informed the MEP that if the Commission's future reply was not satisfactory, or if he did not receive a reply within a reasonable time, he could consider making a complaint to the Ombudsman.

*Case 557/2001/IJH*

**Example of inadmissibility because of Court proceedings**

**PERSONNEL POLICY AT THE JOINT RESEARCH CENTRE**

On 22 December 2000, an Italian lawyer, lodged a complaint with the European Ombudsman on behalf of five of his clients, against the European Commission. The complaint concerned the institution's personnel policy at the Joint Research Centre.

The complaint was forwarded to the President of the European Commission for an opinion. In its opinion, the Commission referred to the fact that the complainant had lodged a case on the same matter with the Court of First Instance of the European Communities.

During a telephone conversation between the Ombudsman's services and the complainant, the latter confirmed that a complaint had been lodged before the Court of First Instance on the facts alleged in the complaint 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.

*Cases 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP, 141/2001/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 where there were no grounds for an inquiry**

In September 2001, an Italian firm of lawyers complained on behalf of a company against the European Agency for Reconstruction (EAR).

The company participated in an open tender procedure organised by the EAR. The EAR cancelled the open procedure and used a negotiated procedure instead. The company was invited to participate in the negotiated procedure, but its offer was not accepted although, according to the complainant, it was technically compliant and the lowest-priced offer.

In the complaint to the Ombudsman, the firm of lawyers alleged that the EAR acted in violation of Community law and contrary to transparency and good administration. As grounds for the complaint, they referred to their enclosed correspondence with the EAR.

The complainant's correspondence with the EAR appeared to contain two allegations of unlawful action by the EAR: (i) EAR had misinterpreted one of the tender conditions and (ii) according to its own interpretation of the legal position, EAR should have excluded the company from the negotiated procedure.

As regards (i), there appeared to be no grounds for an inquiry under Article 195 EC because the complainant had produced no argument to show that EAR was not entitled to interpret the tender conditions as it did.

As regards (ii), there appeared to be no grounds for an inquiry under Article 195 EC because, even if the complainant was right, the company appeared to have lost nothing by not being excluded.

The Ombudsman also informed the complainant that his decision was without prejudice to any possible legal remedies that might be open to the company.

*Case 1323/2001/IJH*

## 2.5 ANALYSIS OF THE COMPLAINTS

Of the 8876 complaints registered from the beginning of the activity of the Ombudsman, 14% originated from France, 16% from Germany, 14% from Spain, 8% from the UK, and 11% from Italy. A full analysis of the geographical origin of complaints registered in 2001 is provided in Annex A, Statistics.

During 2001, 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 92% of the cases. 29% of the complaints examined appeared to be within the mandate

of the Ombudsman. Of these, 313 met the criteria of admissibility, but 109 did not appear to provide grounds for an inquiry. Inquiries were therefore begun in 204 cases.

Most of the complaints that led to an inquiry were against the European Commission (77%). As the Commission is the main Community organ that makes decisions having a direct impact on citizens, it is normal that it should be the principal object of citizens' complaints. There were 16 complaints against the European Parliament and 5 complaints against the Council of the European Union.

The main types of maladministration alleged were lack of transparency (84 cases), discrimination (19 cases), unsatisfactory procedures or failure to respect rights of defence (32 cases), unfairness or abuse of power (30 cases), avoidable delay (37 cases) negligence (32 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 (3 cases) and legal error (19 cases).

## 2.6 ADVICE TO CONTACT OTHER BODIES AND TRANSFERS

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

During 2001, advice was given in 909 cases, most of which involved issues of Community law. In 418 cases, the complainant was advised to take the complaint to a national or regional Ombudsman or similar body. 167 complainants were advised to petition the European Parliament and, additionally, 9 complaints were transferred to the European Parliament, with the consent of the complainant, to be dealt with as petitions, 8 cases were transferred to the European Commission and 12 cases were transferred to a national or regional ombudsman. In 157 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 167 cases, the complainant was advised to contact other bodies.

**Example of a case transferred to the European Commission**

**IMPOSITION OF INCOME TAX BY THE SPANISH AUTHORITIES TO THEIR CITIZENS WITH LEGAL RESIDENCE IN ANDORRA**

In November 2001, the European Ombudsman received a complaint from Mrs C., on behalf of the Council of Spanish Residents in Andorra. Mr Fiter, Ombudsman of Andorra, had also forwarded a copy of that letter to the Ombudsman. The complainant alleged that the Spanish authorities were improperly levying income tax to their citizens who had legal residence in Andorra. She also complained as regards the consideration of this problem by the competent Commission services in reply to a consultation from the Ombudsman of Andorra in May 2001.

The subject matter of the complaint related to actions of national authorities. It was outside the mandate of the European Ombudsman, and therefore he had to declare it inadmissible. Nevertheless, since some EC directives might have been relevant for the legal assessment of the problem, the Ombudsman decided to transfer the case to the European Commission on the grounds that it might fall within its mandate. The Ombudsman of Andorra was also informed of this decision.

*Case 1527/2001/JMA*

## 2.7 THE OMBUDSMAN'S POWERS OF INVESTIGATION

During 2001, the Ombudsman's power to hear witnesses was invoked in 1 case.

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 Commission, which informs the witness(es). Oral evidence is taken on the Ombudsman's premises, normally in Brussels.

2 Each witness is heard separately and is not accompanied.

3 The Ombudsman's services and the Secretariat General of the Commission 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 2001, 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]

On 6 September 2001, the European Parliament adopted a Resolution amending Article 3 (2) of the Statute, based on the report of the Constitutional Affairs Committee (*rapporteur*, Teresa Almeida Garrett) A5-0240/2001.

The text adopted by the Parliament is as follows:

*The Community institutions and bodies shall be obliged to supply the Ombudsman with any information that he requests of them and to allow him to consult and take copies of any document. 'Document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)*

*They shall give him access to all classified documents originating in a Member State after having informed the Member State concerned.*

*In all cases where documents are classified as SECRET (secret) or CONFIDENTIEL (confidential), in accordance with Article 4, the Ombudsman may not divulge the content of such documents.*

*Officials and other servants of Community institutions and bodies shall testify at the request of the Ombudsman. They shall give complete and truthful information.*

In accordance with Article 195 (4) EC, the Commission has the opportunity to give an opinion on the revised text, which will also require the approval of the Council acting by qualified majority before it can enter into force.

At the time the present report was drafted, the Commission had not presented an opinion.

## 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

[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 Martín

closed as “settled by the institution”. In some other cases, the complainant decides to drop the complaint and the file is closed for this reason.

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

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

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

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

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

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

In 2001, the Ombudsman began 208 inquiries, 204 in relation to complaints and 4 own-initiatives. (For further details, see Appendix A**,** Statistics)

80 cases were settled by the institution or body itself. Of this number 53 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). 1 case was dropped by the complainant. In 114 cases, the Ombudsman’s inquiries revealed no instance of maladministration.

A critical remark was addressed to the institution or body concerned in 46 cases. A friendly solution was reached in 2 cases. 13 draft recommendations to the institutions and bodies concerned were made in 2001. 10 draft recommendations were accepted by the institutions in 2001, 6 being a draft recommendation made in 2000 (cases 367/98/GG, 1372/98/OV, 457/99/IP, 610/99/IP, 1000/99/IP and 25/2000/IP). In the case of 4 other draft recommendations made in 2001, 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 complaint 242/2000/GG. The other concerned complaint 917/2000/GG (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

INTEGRATION OF THE SCHENGEN SECRETARIAT INTO THE COUNCIL'S SECRETARIAT GENERAL

*Decision on complaint 579/99/JMA (Confidential) against the Council of the European Union*

*THE COMPLAINT*

On 17 May 1999, the complainant lodged a complaint with the Ombudsman which was registered under complaint number 534/99/JMA. He argued that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council [henceforth the Council Decision] was arbitrary and discriminatory, since its Art. 3 (e)(i) limited the integration of staff to those who had been employed with the Schengen Secretariat on 2 October 1997. The complainant put forward several arguments in support of his claim.

In the light of the information submitted by the complainant in his letter, it appeared that no previous administrative approaches had been made towards the responsible institution. As required by Article 2 (4) of the Statute of the European Ombudsman, the complaint was declared inadmissible and the Ombudsman decided to close the case.

The complainant forwarded additional information in May 1999, which showed that before the Decision had been adopted, he had, in fact, had several exchanges with the Secretariat-General of the Council, concerning the discriminatory nature of the Council Decision. In the light of this new information, the Ombudsman decided to open a new complaint (579/99/JMA), and to start an inquiry into the matter. The new information furnished by the complainant described his written correspondence with the Permanent Representations of several Member States, as well as with the Secretary General of the Council, and included copies of these letters.

In summary, the complainant requested that the Council reassess its position not to consider him eligible for integration into the Council's Secretariat-General, even though he had joined the Schengen Secretariat after 2 October 1997.

*THE INQUIRY*

**The opinion of the Council of the European Union**

The Council first submitted that in its view the complaint did not fall within the powers of the European Ombudsman. It explained that the complainant had invoked the illegality of a Council Decision and, thus, of an act of general effect adopted by the Council in its capacity as legislature, not as Appointing Authority. Furthermore, the Council pointed out that the illegality of this Decision had been claimed by several direct actions currently pending before the Court of First Instance (case T-164/99 and case T-166/99).

The institution indicated that, after 1 May 1999, all related decisions taken by the Council's Secretariat General in its capacity as Appointing Authority had sought to implement the contested Council Decision of 1 May 1999. The Council concluded that it believed the outcome of the Court proceedings to be an essential element in determining whether any further action on the side of the General Secretariat of the Council was to be necessary in this matter.

**The complainant's observations**

In his observations, the complainant restated arguments already put forward in his complaint.

As regards the pending cases before the Court of First Instance, the complainant explained that he had been aware of the lodging of these cases, and indeed had been in contact with one of the plaintiffs. He was uncertain, however, as to implications which the rulings in the two pending cases might have on his particular situation.

*FURTHER INQUIRIES*

**Decision of the European Ombudsman to suspend consideration of the complaint**

On the basis of the Ombudsman's inquiries, there appeared to be two different cases against the Council of the European Union before the Court of First Instance (Cases T-164/99 and T-166/99). These cases involved similar legal allegations as the ones made in the complaint to the European Ombudsman.

Although the applicants in the cases before the Court of First Instance and the complainant in the case lodged with the Ombudsman were not the same parties, both raised identical legal issues. In the light of these circumstances, the Ombudsman decided in January 2000 to suspend his inquiries into the complaint until the Court of First Instance had ruled on the two pending cases.

**Rulings by the Court of First Instance on the two related cases**

On 27 June 2001, the Court of First Instance passed judgement in cases T-164/99 and T-166/99.

Case T-164/99, has been jointly decided with cases T-37/00 and T-38/00. These cases had been brought, among others, by a Council official and a successful candidate in an open competition organised by the Council. The applicants claimed that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council was unlawful, and that it should thus be annulled. They supported their claims on the following grounds: (i) that it was adopted in breach of the Protocol to the Amsterdam Treaty integrating the Schengen acquis into the framework of the European Union (Art. 7: integration of the functions of the Schengen Secretariat), certain provisions of the Staff Regulations (Arts. 7, 10, 27 and 29: recruitment of Community officials by means of competitions), the hierarchy of legal rules and the principle of non-discrimination, and, (ii) that it was vitiated by an error of law. Having reviewed the arguments of the parties the Court rejected all the pleas in support of the claims for annulment, and dismissed the actions.

Case T-166/99 had been brought by former staff members of the Schengen Secretariat. They also requested the annulment of Council Decision 1999/307/EC. The Council, however, raised a plea of inadmissibility and asked the Court to dismiss the action without considering the substantive arguments put forward by the applicants. The Court of First Instance concluded that the applicants could not be regarded as individually concerned by the contested decision, and therefore dismissed the action.

*THE DECISION*

**1 Ombudsman's competence to deal with the complaint**

1.1 According to the Council, the Ombudsman was not competent to deal with the complaint because it questioned the legality of a Council Decision which is an act of general effect adopted by the Council in its capacity as legislature, not appointing authority.

1.2 The Ombudsman pointed out that under Art 195 of the EC Treaty he is competent to inquire into possible maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The Ombudsman recalled that the definition of maladministration, accepted by a resolution of the European Parliament, is that it occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.

In the present case, the complainant alleged that the Council had breached the general principle of Community law excluding arbitrary discrimination. The Ombudsman therefore considered that he was competent to deal with the complaint as an allegation of maladministration.

## 2 Date set for the eligibility for integration

2.1 The complainant argued that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council was arbitrary and discriminatory, since its Art. 3 (e)(i) limited the integration of the Schengen staff only to those employed on 2 October 1997.

2.2 The Council explained that all decisions by its Secretariat General concerning former staff from the Schengen Secretariat had been taken in implementation of Council Decision 1999/307/EC. It pointed out that the illegality of this Decision had been claimed by several direct actions before the Court of First Instance (cases T-164/99 and T-166/99). Accordingly, the Council concluded that it believed the outcome of the Court proceedings to be an essential element in determining the subject matter of the complaint.

2.3 On the basis of the Ombudsman's inquiries, there appeared to be two pending cases against the Council of the European Union before the Court of First Instance (Cases T-164/99 and T-166/99), which involved legal allegations similar to the ones made in the complaint to the European Ombudsman.

Although the applicants in the cases before the Court of First Instance and the complainant in the case lodged with the Ombudsman were not the same parties, both raised identical legal issues. In the light of these circumstances and on the basis of Art. 2 (7) of his Statute, the Ombudsman decided in January 2000 to suspend his inquiries into the complaint until the Court of First Instance had ruled on the related cases.

2.4 On 27 June 2001, the Court of First Instance rendered its judgement in cases T-164/99 and T-166/99. In its ruling in case T-164/99, jointly decided with cases T-37/00 and T-38/00, the Court specifically addressed whether the choice of the date of 2 October 1997, as the time at which staff to be integrated into the Council's Secretariat General ought to have been employed by the Schengen Secretariat, was arbitrary and discriminatory. The Court made the following considerations:

*74. "The date of 2 October 1997 is that of the signature of the Treaty of Amsterdam, which includes the Protocol. On that date it thus became clear that, subject to the subsequent ratification of that Treaty, the staff of the Schengen Secretariat would be integrated into the General Secretariat of the Council, the detailed arrangements for which would be adopted by the Council.*

*75. In those circumstances, the Council cannot be criticised for having, in the autonomous recruitment scheme introduced by Decision 1999/307, determined the class of persons eligible for such integration by fixing at 2 October 1997 the beginning of the period during which those persons had to have been employed in the Schengen Secretariat. Since the Council was authorised to determine the detailed arrangements for integration independently of the Staff Regulations and the Conditions of Employment by taking account of the position of the persons employed in the Schengen Secretariat, it was entitled to avert an artificial increase in the number of those persons after the principle of integration had become public knowledge on 2 October 1997. The choice of the date of 2 October 1997 cannot thus be regarded as arbitrary."*

2.5 In the light of the above judgement, the Ombudsman considered that the choice of the date of 2 October 1997, as set out in Art. 3 (e)(i) of Council Decision 1999/307/EC, could not be regarded as arbitrary and/or discriminatory. The Ombudsman therefore concluded that there appeared to be no maladministration as regards this aspect of the case.

### 3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the Council. The European Ombudsman therefore closes the case.

## ACCESS TO DOCUMENTS AND PUBLICATION OF LEGISLATIVE DOCUMENTS

*Decision on complaint 327/2000/PB against the Council of the European Union*

*THE COMPLAINT*

In March 2000, the complainant submitted a complaint to the European Ombudsman against the Council. The complaint concerned the Council's refusal of the complainant's application, made under Council Decision 93/731, for access to document 14238/99, (Presidency consolidated text submitted to the working party on intellectual property concerning the amended proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society).

The complainant's initial application was refused under Article 4 (2) of Council Decision 93/731 on the grounds that the document contained detailed positions of national delegations on a question under discussion in the Council, that its disclosure could harm those deliberations, and that on balance the applicant's interest in disclosure was outweighed by the Council's interest in the effectiveness of its discussions which require in this case the preservation of the confidentiality of the document.

The complainant made a confirmatory application, pointing out that the Council had already given him access to working documents of the group of experts, which contained in large part the detailed positions of Member States. Furthermore, the document outlined the position at the end of the Finnish presidency without prejudice to possible modifications of national positions under the following presidency.

The Council refused the confirmatory application on the grounds that disclosure of the document, which summarised the delegations' positions on certain parts of the text, could affect still ongoing discussions on the matter. Again it was claimed that a balancing exercise had been conducted.

The Council also referred to the possibility of granting partial access to the document, and said that this matter was under consideration by the Court of Justice on appeal from the Court of First Instance.

The complainant made the following claims:

(i) the Council should release the document in question *and*

(ii) the Council should make public all the legislative documents that were being debated by the different Council Working Groups.

*THE INQUIRY*

**The Council's opinion**

The complaint was forwarded to the Council for opinion. In his letter to the Council, the Ombudsman asked the Council to include in its reply an opinion

(i) on whether it should have explained how it reached the conclusion that the complainant's interest in disclosure was outweighed by the Council's general interest in the effectiveness of discussions within the Council, and

(ii) whether in dealing with the complainant's confirmatory application the Council should have responded to the points made by the complainant concerning the reasoning of the refusal of his initial application.

The Council produced, in summary, the following opinion.

In regard to the complainant's first allegation, the Council stated that subsequent to the lodging of the present complaint, it had re-examined its decision to refuse access to the document in question. It concluded that the document could now be made public, since the discussions in the Council had resulted in a political agreement. The Council would therefore provide the complainant with the document as requested. On that basis, the Council considered that the two questions by the Ombudsman in his letter to the Council were no longer relevant.

In regard to the complainant's second allegation, the Council first observed that this allegation did not concern the application of the rules on public access to documents. Instead, the allegation concerned a political question rather than an administrative one, and was as such outside the Ombudsman's powers of inquiry.

Having made these preliminary remarks on the second allegation, the Council stated that in order to provide better information on the Council's work and facilitate access to Council documents, the General Secretariat of the Council publishes on the Internet a list of the items on the provisional agendas for meetings of the Council and its preparatory bodies on which the Council is acting in its legislative capacity. In addition, as part of the Council's drive to improve information on its legislative activities, the General Secretariat publishes a monthly summary of legislative acts and other instruments adopted by the Council, together with statements for the minutes, which the Council has decided to make public. The summary also mentions votes cast against adoption, abstentions and explanations of voting. The summary is to be found under "Transparency – Summary of Council acts" on the Council website (http://ue.eu.int).

### The complainant's observations

The complainant did not appear to have submitted any observations.

## *THE DECISION*

### 1 Refusal to release the document

1.1 The complainant alleged that the Council wrongfully refused him access to a document. The Ombudsman asked the Council for an opinion on the complaint, and requested the Council to respond to two questions concerning its handling of the complainant's request for the document. Subsequent to the lodging of the complaint to the Ombudsman, the Council decided to allow the complainant access to the document. The Council considered that its new decision made it irrelevant to respond to the two questions by the Ombudsman.

1.2 The Ombudsman first remarked that a misunderstanding appeared to have occurred in regard to the Council's response to the two questions by the Ombudsman. It is within the Ombudsman's competence to inquire into possible maladministration in past procedures or decisions that have been re-examined and changed. It was therefore wrong of the Council to conclude that the questions put to it by the Ombudsman became irrelevant as a consequence of the Council's decision to allow the complainant access to the document. However, given that the complainant was allowed access to the document, and given that he appeared not to want to pursue this matter further, the Ombudsman decided to end his inquiries into the first allegation.

### 2 Publication of legislative documents that are debated

2.1 The complainant claimed that the Council should make public all the legislative documents that are debated by the different Council Working Groups. The Council provided an account of its publication practices.

2.2 In the light of the Council's account of its publication practices, the Ombudsman concluded that there appeared to be no maladministration.

### 3 Conclusion

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

## 3.1.2 The European Commission

### RECOVERY OF MEDICAL EXPENSES

*Decision on complaint 1275/99/(OV-MM-JSA)IJH (Confidential) against the European Commission*

*THE COMPLAINT*

In October 1999, X complained concerning the circumstances of his compulsory early retirement from the Commission, the Commission's recovery from him of certain expenses of a Medical Committee and the failure of the Commission to reply to three letters which he sent to it.

The facts as presented in the complaint are as follows:

From 1964 to 1979, the complainant worked for the Commission services in Brussels and Luxembourg as a LA 5 official. Between 1965 and 1977, he suffered from depression, which caused frequent absence from work. On 1 March 1979, he was compulsorily retired due to invalidity. On 30 May 1980, the complainant appealed in order to have the occupational character of his illness recognised. At his request, a Medical Committee was convened to evaluate his case. On 23 December 1988, the Medical Committee concluded that his illness had a non-occupational character. On 13 January 1989, the Appointing Authority made a decision accordingly. The complainant contested this decision by means of a complaint under Article 90 of the Staff Regulations. This complaint, as well as subsequent appeals to the Court of First Instance and to the Court of Justice were unsuccessful.

On 3 April 1998, almost ten years after the final decision of the Appointing Authority on the non-occupational character of his disease, the Commission made a recovery decision against the complainant requiring him to reimburse 149.982 BEF to the Commission in respect of fees incurred for the medical expert chosen by the complainant and half of the costs for the third expert invited by the Medical Committee who had examined his case. The complainant introduced a complaint against the recovery decision in accordance with Article 90 of the Staff Regulations. The Commission rejected this complaint by a decision of 4 March 1999. The recovery decision was implemented by deductions from the complainant's pension.

In his complaint to the Ombudsman, the complainant presented the following allegations:

(i) Between 1965 and 1975, he was a victim of psychological harassment by his then superior at the Commission. His illness resulted from this psychological harassment.

(ii) As a Hungarian dissident following the revolution of 1956, he was under observation by the Hungarian secret services between 1960 and 1970. His then superior in the Commission was also a communist agent, who was in contact with the Hungarian secret services.

(iii) The Commission failed to reply to his letters of 3 March 1999, 16 March 1999 and 15 April 1999, addressed to (ex-) Director General Mr Steffen SMIDT and the head of unit

of DG IX (Personnel and Administration), Mr G. KAHN. In these letters, the complainant put forward new elements in order to obtain a re-examination by the Commission of his case and withdrawal of the recovery decision.

On the basis of these allegations, the complainant made the following claims:

(a) The Commission should afford him moral and financial rehabilitation by recognising the occupational nature of his illness and reconsidering its decision in 1979 to retire him compulsorily;

(b) The Commission should withdraw the recovery decision made against him in respect of expenses relating to the work of the Medical Committee in 1988.

On 13 December 1999, the Ombudsman informed the complainant that he considered allegations (i) and (ii) above and claim (a) to be inadmissible according to Article 2 (4) of the Statute of the Ombudsman, taking into account that the alleged facts dated back to the years 1960-1975.

The Ombudsman's inquiry therefore concerned only allegation (iii) and claim (b) above.

*THE INQUIRY*

**The Commission's opinion**

In summary, the Commission's opinion made the following points:

As regards the complainant's claim concerning the recovery of expenses relating to the work of the Medical Committee ten years previously:

A check made by the Commission's Medical Service in 1998 had revealed that the complainant had not paid for the medical expenses which he owed according to Article 23 of the Rules on the Insurance of Officials of the EC. The complainant had appealed against the decision to recover the amount involved from him. His appeal was rejected by decision dated 4 March 1999. The Commission considered this decision to be an appropriate and sufficient answer to the complainant's letter of 3 March 1999.

As regards the allegations of failure to answer the complainant's other letters:

The letter addressed by the complainant to the Director General of Personnel and Administration on 16 March 1999 contested the decision of 4 March 1999 and requested an extension of the time limit for contesting the decision of 4 March 1999 before the Court of First Instance. The Commission stated that it was not in its power to alter the time-limit and pointed out that, on 12 May 1999, the Commission's internal staff mediator had informed the complainant by letter that she could not intervene in his case and had suggested that he appeal to the Court of First Instance before the expiry of the time-limit on 4 June 1999.

According to the Commission, the letter dated 15 April 1999 addressed to Mr Kahn, and containing an annexed letter from the Hungarian Ministry of Defence, did not contain any information relevant to the question of the occupational character of the complainant's disease. The Commission acknowledged its failure to reply to this letter and corrected its omission by sending a reply to him on 21 March 2000.

The Commission annexed to its opinion a copy of its letter to the complainant dated 21 March 2000.

**The complainant's observations**

In his observations, the complainant criticised the Ombudsman's decision that his first and second allegations and first claim were inadmissible. He argued that the Office of the

European Ombudsman was created only recently, so that he was unable to complain beforehand. Furthermore, psychiatric knowledge had made considerable progress in recent years. The complainant also provided what he considered to be evidence of alleged neglect of duty by the Medical Service in medical check-ups carried out between 1970 and 1974.

*THE OMBUDSMAN'S ATTEMPT TO ACHIEVE A FRIENDLY SOLUTION*

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman wrote to the Commission on 26 October 2000, with a view to seeking a friendly solution to the claim concerning the recovery decision.

The Ombudsman's proposal for a friendly solution referred to the reasons which the Commission gave to the complainant for rejecting his Article 90 complaint against the recovery decision. The Commission had acknowledged that it had paid the whole amount of the fees of the Medical Committee experts in 1988 and regretted that it was only ten years later that it realised that these fees should have been charged to the complainant. The Commission justified its decision to ask for the reimbursement after a ten-year delay with the following arguments:

(i) According to Article 23 of the applicable regulations, the Commission was obliged to charge the fees to the complainant.

(ii) The complainant had introduced an appeal before the Court of First Instance, and then before the Court of Justice and the Commission therefore postponed the decision to charge the fees to the complainant.

As regards the first argument, the Ombudsman pointed out that Article 23.2, paragraph 4 of the applicable regulations provides a discretionary power for the institution to pay the whole costs of the Medical Committee even when, as in the present case, the Medical Committee's opinion confirms the draft decision of the appointing authority.[3]

As regards the second argument, the Ombudsman pointed out that the Commission did not appear to have notified the complainant that its payment of the whole amount of the fees was a preliminary decision, awaiting a final judgement by the courts. According to the Commission's opinion, it was only after carrying out a check ten years later that the Medical Service of the Commission discovered that the part of the expenses which could have been charged to the complainant had not been so charged.

The Ombudsman's provisional conclusion, therefore, was that the Commission had not adequately justified its decision of 3 April 1998 to recover the expenses from the complainant ten years later. He therefore proposed to the Commission a friendly solution in which the Commission would withdraw the recovery decision and reimburse the complainant with the amounts deducted from his pension.

In its reply dated 21 December 2000, the Commission submitted new evidence to show that the complainant had been formally notified by letter dated 23 February 1989 that the administration would not support all the expenditure related to the Medical Committee. Furthermore, the Commission considered the recovery decision, which it had adopted in April 1998 to be legally and administratively incontestable. However, the Commission declared itself prepared as an exceptional act of goodwill and without creating a precedent to withdraw its recovery decision and to reimburse 149.982 BEF to the complainant.

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3 *"However, in exceptional cases and by a decision taken by the appointing authority after consulting the doctor appointed by it, all the expenditure referred to in the proceeding paragraph may be borne by the institution."*

The Ombudsman informed the complainant that the Commission had agreed to accept a friendly solution, which would meet his claim that the recovery order should be withdrawn. He also forwarded a copy of the Commission's reply to the complainant. In his answer, the complainant thanked the Ombudsman for his efforts in the case, but noted that the Commission stated that the reimbursement was an exceptional act of goodwill. The complainant disagreed with this approach and proposed that the Ombudsman should investigate his secret file as a step on the way to a more general inquiry into communist activities in the Commission during the cold war. As an alternative, the complainant proposed that the Commission should instead pay the 149.982 BEF to the College of Europe, Bruges and that he should receive a letter of apology signed by the President of the European Commission. In reply to a further letter from the Ombudsman, the complainant confirmed that he did not accept the friendly solution, although he was grateful for the efforts of the Ombudsman and his services.

*THE DECISION*

**1 The admissibility of the first and second allegations and first claim**

1.1 The complainant alleged that between 1965 and 1975, he was a victim of psychological harassment by his superior at the Commission; that his illness resulted from this psychological harassment; and that his superior in the Commission was a communist agent, who was in contact with the Hungarian secret services. He claimed that the Commission should afford him moral and financial rehabilitation by recognising the occupational nature of his illness and reconsidering its decision in 1979, to retire him compulsorily.

1.2 The Ombudsman informed the complainant that he considered the above-mentioned allegations and claim to be inadmissible according to Article 2 (4) of the Statute of the Ombudsman[4], taking into account that the alleged facts date back to the years 1960-1975.

1.3 In his observations, the complainant argued that the Office of the European Ombudsman was created only recently, so that he was unable to complain beforehand. Furthermore, psychiatric knowledge has made considerable progress in recent years.

1.4 The Ombudsman acknowledges that his office has only functioned since September 1995. However, it is clearly the intention of Article 2 (4) of the Statute of the Ombudsman, which is a decision of the European Parliament, to restrict claims based on facts of which the complainant has been aware for more than two years. The Ombudsman maintains his decision that the above-mentioned allegations and claim, which are based on alleged facts dating back to the years 1960-1975 are inadmissible under Article 2 (4) of the Statute.

**2 The alleged failure to reply to the complainant's letters**

2.1 The complainant alleged that the Commission failed to reply to his letters dated 3 March 1999, 16 March 1999 and 15 April 1999.

2.2 In its opinion, the Commission considered that the letter dated 3 March 1999 was answered by its decision dated 4 March 1999, received by the complainant on 12 March 1999. Concerning the letter dated 16 March 1999, the Commission stated that it was not in its power to alter the time-limit for judicial proceedings as requested by the complainant and pointed out that, on 12 May 1999, the Commission's internal staff mediator informed the complainant by letter that she could not intervene in his case and suggested that he

4 *"A complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned."*

appeal to the Court of First Instance before the expiry of the time-limit. The complainant did not contest these points in his observations.

2.3 The Commission has acknowledged and apologised to the complainant for its failure to reply to his letter of 15 April 1999 and has corrected that failure by its letter dated 21 March 2000. In these circumstances, no critical remark by the Ombudsman is necessary.

### 3 The claim that the Commission should withdraw the recovery decision

3.1 The complainant claimed that the Commission should withdraw a recovery decision for 149.982, - BEF, made against him in 1998 in respect of expenses relating to the work of a Medical Committee which examined his case ten years previously. The recovery decision was executed by withholding part of the complainant's pension.

3.2 In its opinion, the Commission stated that a check made by its Medical Service in 1998 had revealed that the complainant had not paid for the medical expenses, which he owed according to Article 23 of the Rules on the Insurance of Officials of the EC. The complainant had appealed against the decision to recover the amount involved from him. His appeal was rejected by a decision dated 4 March 1999. The Commission justified that decision by stating that according to Article 23 of the applicable regulations, it was obliged to charge the fees to the complainant. The Commission explained that it had not done so in 1988, because the complainant had introduced an appeal before the Court of First Instance, and then before the Court of Justice and the Commission had therefore postponed charging the fees to the complainant.

3.3 The Ombudsman noted that Article 23.2, paragraph 4 of the applicable regulations provides a discretionary power for the institution to pay the whole costs of the Medical Committee even when, as in the present case, the Medical Committee's opinion confirms the draft decision of the appointing authority.[5] The Ombudsman also noted that the Commission did not appear to have notified the complainant that its payment of the whole amount of the fees was a preliminary decision, awaiting a final judgement by the courts.

3.4 On the basis of the above, the Ombudsman's provisional conclusion was that the Commission had not adequately justified its decision of 3 April 1998 to recover the expenses from the complainant ten years later. In accordance with Article 3 (5) of the Statute[6], the Ombudsman therefore proposed to the Commission a friendly solution in which the Commission would withdraw the recovery decision and reimburse the complainant with the amounts deducted from his pension.

3.5 In its reply, the Commission submitted evidence to show that the complainant had been formally notified by a letter of 23 February 1989 that the administration would not support all the expenditure related to the medical committee. Furthermore, the Commission considered the recovery decision, which it had adopted in April 1998 to be legally and administratively incontestable. However, the Commission declared itself prepared as an exceptional act of goodwill and without creating a precedent to withdraw its recovery decision and to reimburse 149.982 BEF to the complainant.

3.6 The complainant did not accept the approach of the Commission in considering the withdrawal of the recovery decision and reimbursement to be an "exceptional act of goodwill." He proposed that the Ombudsman should investigate his secret file as a step on the way to a more general inquiry into communist activities in the Commission during the cold war. As an alternative, the complainant proposed that the Commission should instead

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5 *"However, in exceptional cases and by a decision taken by the appointing authority after consulting the doctor appointed by it, all the expenditure referred to in the proceeding paragraph may be borne by the institution."*

6 *"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."*

pay the 149.982 BEF to the College of Europe, Bruges and that he should receive a letter of apology signed by the President of the European Commission.

3.7 The Ombudsman does not consider that any grounds have been presented for a more general inquiry of the kind proposed by the complainant. The Ombudsman considers that the Commission's undertaking to withdraw the recovery decision and to reimburse to the complainant the amounts deducted from his pension are sufficient to satisfy the claim which was the subject of the Ombudsman's inquiry and to put an end to any possible instance of maladministration.

**4 Conclusion**

The Commission has undertaken to withdraw its recovery decision and to reimburse 149.982 BEF to the complainant. On the basis of the Ombudsman's inquiries into this complaint and the undertaking mentioned above, there appears to be no maladministration by the Commission. The Ombudsman therefore closes the case.

*Note: on 2 July 2001 the complainant informed the Ombudsman that the Commission had transferred the above-mentioned sum to him.*

## ALLEGED WRONG INTERPRETATION OF COMMISSION REGULATION (EC) N°1370/95

*Decision on complaint 1298/99/(IJH)BB against the European Commission*

*THE COMPLAINT*

In October 1999, a French law firm made a complaint to the European Ombudsman against the Commission on behalf of its client C. concerning export licenses for pig- meat, issued under the regime established by Commission Regulation (EC) N°1370/95[7], as amended. According to the complainant, the company C. lodged applications for three export licenses with the relevant French national agency (OFIVAL), on 3 July 1999, for the export of certain quantities of pig-meat to Russia. OFIVAL issued the licenses on 5 July 1999.

The complainant alleged that Commission Regulation N°1370/95 of 16 June 1995 laying down detailed rules for implementing the system of export licences for the pig-meat sector, as amended, had been wrongly interpreted as applying to three export licences issued to his clients on 5 July 1999.

On 13 July 1999, the Commission made a Regulation N°1526/1999[8] that provides that:

*« No further action shall be taken in respect of applications submitted until 13 July 1999 for export licenses for pig-meat pursuant to Regulation (EC) N°1370/95 in respect of categories 1,2 and 3 of Annex I to that Regulation which should have been issued from 14 July and from 21 July 1999. »*

Regulation N°1526/1999 entered into force on 14 July 1999.

The complainant alleged that the Commission had interpreted the Regulation so as to apply to the three export licences, which C. received on 5 July 1999. This caused financial loss to C., since it lost both the export refunds, which it would have received, and 60% of the amount, which it was required to pay as a guarantee when applying for the licences.

Regulation N°1370/95, as amended, authorises the Commission to *«take special measures»* affecting the validity of export licences for *«the week in question»*. The complainant

7 Commission Regulation (EC) N°1370/95 of 16 June 1995 laying down detailed rules for implementing the system of export licences in the pig-meat sector, 1995 OJ L 133/9.

8 Commission Regulation (EC) N°1526/99 of 13 July 1999 determining the percentage of quantities covered by applications for export licences for pig-meat which may be accepted, OJ 1999 L 178/6.

considered that for the three export licenses issued on 5 July 1999, the *«week in question»* was 5-11 July 1999. The complainant therefore claimed that, since the Commission acted only on 13 July 1999, application of the Regulation to the three export licenses in question was a retrospective measure, contrary to general principles of law.

The complainant therefore claimed that his client was entitled to the refunds due under the three licences in question.

## *THE INQUIRY*

### The Commission's opinion

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

The complainant objected to the effects of Commission Regulation (EC) 1526/1999 of 13 July 1999 determining the percentage of quantities covered by applications for export licences for pig-meat which may be accepted, and alleged that the Commission had misinterpreted and misapplied this Regulation.

As a general rule, and pursuant to Regulation (EEC) N°2759/75 on the common organisation of the market in pig-meat, a request for an export refund in respect of such products is subject to production of an export certificate setting out the amount of the refund in advance.

The arrangements for the application of this system (for the period in which the operations in question took place) are set out in Commission Regulation N°1370/95 of 16 June 1995 and successive amendments.

The recitals of Regulation N°1370/95 explain that *'in view of the risk of speculation inherent in the system in the pig-meat sector, export licences should not be transferable and precise conditions governing access by traders to the said system should be laid down'*, and that *'the decision regarding applications for export licences should be communicated only after a period of consideration; …this period would allow the Commission to appreciate, to take specific measures applicable in particular to the applications which are pending…'*.

The recitals also refer to the need to respect Community obligations arising from the Uruguay Round agreements regarding the export volume, which *'shall be ensured on the basis of the export licenses'*.

The recitals of Regulations N°1122/96 further specify that *'it is necessary, for licences which are issued immediately, to allow for a waiting period relative to the granting of the refund, during which licences may be amended, if need be, according to the special measures taken by the Commission'*.

As regards pig carcasses and the main cuts (to which C.'s request related) the amount of export refunds is set on the basis of the pig-meat price. It is higher if the prices are low, and falls as the price goes up.

Decisions on the level of export refunds are generally taken by the Commission after consulting the relevant Management Committee. However, pursuant to Article 13(3), last paragraph, of the above mentioned Regulation N ° 2759/75, the Commission may at any time, independently and without following the Committee procedure, amend the amounts adopted.

For the current WTO year, the average quantity of pig-meat, which may be exported with a refund, is approximately 9000 tonnes per week.

During the reference period (mid-June to mid-July 1999), pig-meat prices were rising following a low period. It was therefore reasonable to expect that, at the Management Committee's meeting scheduled for 13 July 1999, a reduction in the refund would be adopted. Consequently, in order to benefit from the favourable combination of rising prices and high level of refunds, the pig industry presented an enormous quantity of meat for export, equivalent to some 34.000 tonnes.

On the grounds of sound budgetary management, and because of its international commitments, the Commission could not accept a quantity of this magnitude.

For that reason, on 13 July 1999 the Commission, made use of its powers under Article 3(4) of Regulation N°1370/95 and approved Regulation N°1526/1999 to which the complainant's objection relates.

The Regulation, having regard to the fact that 'the implementing adjustment of the refunds applicable to those products has led to the submission of applications for export licences for speculative ends', lays down (Article 1) that 'no further action shall be taken in respect of applications submitted until 13 July 1999 for export licences…which should have been issued from 14 July and from 21 July 1999'. The Regulation entered into force on 14 July 1999.

The complainant's assertion that the certificates it submitted were not covered by the period referred to in Regulation N°1526/1999, should be looked at in conjunction with the timetable set out in Regulation N°1370/95 as amended.

It was not disputed that the requests sent to the competent French authority during the weekend were registered by OFIVAL on Monday, 5 July 1999 and the certificates provisionally issued the same day.

As was clear from the photocopies produced by the complainant, section 22 on the certificate states: *'Certificate issued subject to specific measures pursuant to Article 3(4) of Regulation (EC) 1370/95'*.

According to Article 3(1) of Regulation 1370/95, *'Applications for export licences may be lodged with the competent authorities from Monday to Friday of each week.' Under Article 3(3), 'Export licences are issued on the Wednesday following the period referred to in paragraph 1' (i.e. the following week), 'provided that none of the particular measures referred to in paragraph 4 have since been taken by the Commission'*. Article 7(1) provides that *'Member States shall communicate to the Commission, each Friday from 1 p.m., by fax and for the preceding period:*

*(a) the applications for export licences with advance fixing of refunds referred to in Article 1 which were lodged from Monday to Friday of the same week…'*.

The certificates held by C., which were issued at the beginning of the week on Monday, 5 July 1999, were thus pending all week until the information from the Member States was forwarded to the Commission, which was scheduled to take place on Friday, 9 July, and from then until Wednesday of the following week.

After the information had been forwarded, the Commission noted the abnormally high, speculative level of requests submitted during the previous week and therefore adopted Regulation N°1526/1999 on Tuesday, 13 July 1999, which entered into force on Wednesday, 14 July and evidently covered the certificates held by C.

Finally, the Commission noted that, at the request of the BREIZE EUROPE Office, Mr. Nagel granted the director of C. an interview on 21 October 1999. It was during that interview that the firm set out the problems it had experienced as a result of the Commission measures. Mr. Nagel explained in detail the situation that had led the Commission to take the measures it took in July 1999.

On that occasion, C. gave Mr. Nagel the note, which was appended as Annex 2 to the complaint, and received a copy of the working document which was also appended to the complaint as Annex 3.

In addition to its complaint, C.'s lawyer sent another letter to the European Ombudsman on 16 November 1999, which the Ombudsman forwarded to the Commission on 20 December 1999.

In that letter the complainant specified that its objection also concerned the treatment of the deposits put down in connection with the export certificates to which the main complaint related, and claimed that these deposits should have been cancelled retroactively by the Commission.

The Commission noted in this connection that the treatment of deposits was a direct consequence of the entry into force of Regulation N°1526/1999, as had already been explained in paragraph 2 of the Commission's working document, which C. attached as an annex to its complaint.

**The complainant's observations**

The complainant did not send any observations.

*THE DECISION*

**1 Alleged wrong interpretation of Commission Regulation (EC) N°1370/95, as amended**

1.1 The complainant alleged that the Commission had wrongly interpreted Commission Regulation (EC) N°1370/95 of 16 June 1995, as amended laying down detailed rules for implementing the system of export licences for the pig-meat sector so as to apply to three export licences issued to his client C. on 5 July 1999. Regulation N°1370/95, as amended, authorised the Commission to *«take special measures»* affecting the validity of export licences for *«the week in question»*. The complainant considered that for the three export licenses issued on 5 July 1999, the *«week in question»* is 5-11 July 1999. The complainant therefore claimed that, since the Commission acted only on 13 July 1999, application of the Regulation to the three export licenses in question was a retrospective measure, contrary to general principles of law.

1.2 In its opinion to the Ombudsman, the Commission stated that during the reference period (mid-June to mid-July 1999), pig-meat prices were rising following a low period. It was therefore reasonable to expect that, at the Management Committee's meeting scheduled for 13 July 1999, a reduction in the refund would be adopted. Consequently, in order to benefit from the favourable combination of rising prices and high level of refunds, the pig industry presented an enormous quantity of meat for export, equivalent to some 34.000 tonnes. On the grounds of sound budgetary management, and because of its international commitments, the Commission could not accept a quantity of this magnitude. For that reason, on 13 July 1999 the Commission, making use of its powers under Article 3(4) of Regulation 1370/95, approved Regulation N°1526/1999 to which the complainant's objection related.

1.3 According to the Commission, the complainant's assertion that the certificates it submitted were not covered by the period referred to in Regulation N°1526/1999 should be looked at in conjunction with the timetable set out in Regulation N°1370/95 as amended. It was not disputed that the requests sent to the competent French authority during the weekend were registered by OFIVAL on Monday, 5 July 1999 and the certificates provisionally issued the same day.

1.4 The Commission underlined that the recitals of Regulation N°1370/95 specify that 'in view of the risk of speculation inherent in the system in the pig-meat sector, export licences should not be transferable and precise conditions governing access by traders to the said system should be laid down', and that 'the decision regarding applications for export licences should be communicated only after a period of consideration; …this period would allow the Commission to appreciate, to take specific measures applicable in particular to the applications which are pending…'. Furthermore, the recitals of Regulations N°1122/96 further specify that 'it is necessary, for licences which are issued immediately, to allow for a waiting period relative to the granting of the refund, during which licences may be amended, if need be, according to the special measures taken by the Commission'.

1.5 The Ombudsman observed that the content of the Commission Regulation N°1370/95[9] as regards applications for export licences is mainly as follows: According to Article 3(1), *'Applications for export licences may be lodged with the competent authorities from Monday to Friday of each week.*' Under Article 3(3), 'Export licences are issued on the Wednesday following the period referred to in paragraph 1' (i.e. the following week), 'provided that none of the particular measures referred to in paragraph 4 have since been taken by the Commission'. Article 7(1) provides that 'Member States shall communicate to the Commission, each Friday from 1 p.m., by fax and for the preceding period: (a) the applications for export licences with advance fixing of refunds referred to in Article 1 which were lodged from Monday to Friday of the same week…'.

1.6 On the basis of the interpretation of the above mentioned provisions, the Commission considered that the certificates held by C., which were issued to it at the beginning of the week on Monday, 5 July 1999, were pending all week until the information from the Member States was forwarded to the Commission, which was scheduled to take place on Friday, 9 July 1999, and from then until Wednesday of the following week (i.e. 14 July 1999). After the information had been forwarded, the Commission noted the abnormally high, speculative level of requests submitted during the previous week and therefore adopted on Tuesday, 13 July 1999 Regulation N°1526/1999, which entered into force on Wednesday, 14 July 1999 and evidently covered the certificates held by C.

1.7 Based on the Ombudsman's inquiries, the Commission's interpretation of the Commission Regulation N°1526/1999 appeared reasonable. Therefore, the Ombudsman found no maladministration as regards the main allegation put forward by the complainant. It should be recalled, however, that the Court of Justice is the highest authority in questions of application and interpretation of Community law.

## 2 Claims for a refund and for cancelling the deposits

2.1 The complainant was claiming a refund to compensate the financial loss caused to his clients since the loss of both the export refunds which it would have received and 60% of the amount which it was required to pay as a guarantee when applying for the licences. Furthermore, the complainant claimed that the deposits made by his clients should have been cancelled retroactively by the Commission.

2.2 Based on the Ombudsman's findings in point 1.7 of the decision, neither the claim for refund nor the claim for cancelling the deposits arose in this case.

## 3 Conclusion

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

9 As amended in particular by Commission Regulation (EC) N°1122/96 of 21 June 1996, OJ 1996 L 149/17.

## ALLEGED DISCRIMINATION IN FELLOWSHIP CONTRACTS FOR RESEARCHERS: PAYMENTS MADE IN EURO INSTEAD OF YEN

*Decision on complaint 1393/99/(IJH)/BB against the European Commission*

### *THE COMPLAINT*

On 9 November 1999, Mr S. made a complaint to the European Ombudsman on behalf of himself and 14 other European researchers working in Japan under a fellowship programme organised by the European Commission. According to the complainant, the researchers applied for their fellowships on the basis that they would be paid in Yen. They were however offered, at short notice, contracts, which specify payment in Euro, which they signed. Subsequently, the Euro fell in value against the Yen, with the result that the value of the fellowships was less then foreseen.

The researchers allege discrimination, in that there are some researchers, in otherwise similar circumstances, who are paid in Yen and not Euro. The researchers claim that the Commission has a legal and moral duty to compensate them for the exchange loss.

### *THE INQUIRY*

#### The Commission's opinion

The complaint was forwarded to the Commission. The Commission made the following comments.

1 As indicated in a letter dated 8 October 1999 sent by Mr Bourène, First Counsellor for science and technology at the Delegation of the European Commission in Japan, to the fellows, the Commission has fully respected the signed contract. Therefore, there is no legal duty to compensate the fellows.

2 However, as mentioned also in that aforesaid letter, the Commission services have duly taken into account the consequences of the fluctuations in the exchange rate of the Euro against the Yen on the fellows' incomes, and have therefore sought a satisfactory solution to the problem.

3 On 21 December 1999, the Commission decided to grant a complementary indemnity to 33 fellows that matched the financial loss registered in 1999 (Commission decision C (1999)4774). This indemnity was currently being paid by the Delegation of the European Commission in Japan.

4 In the coming weeks, the Commission was to propose to the fellows an amendment to their contract, in order to prevent the consequences on their incomes of any fluctuation in the exchange rate of the Euro against the Yen for the future.

#### The complainant's observations

The complainant maintained his complaint. In an e-mail of 16 May 2000, he informed the Ombudsman that the Commission had indeed paid a complementary indemnity to the fellows at the end of December 1999. This indemnity, however, did not cover the full year 1999, only until October 1999. The complainant pointed out that the Commission services had not provided any information as regards the proposed changes to their contracts. In his e-mail of 18 June 2000, the complainant informed the Ombudsman that on 23 May 2000, the Commission services contacted him indicating that the procedures to obtain clearance from the different authorities for the second compensatory payment was launched by DG Research in April 2000. It is expected that it will take at least one or two months for the process to reach the final stage, and until the actual payment is made. The complainant had some doubts that the Commission might take advantage from the situation and never make the remaining payments until November 2000.

*FURTHER INQUIRIES*

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. In order to pursue his inquiries into the complaint, the Ombudsman decided on 10 July 2000 to request further information from the Commission on the following points:

*"According to point 3 of the Commission's opinion, the Commission decided on 21 December 1999 to pay a supplementary indemnity to the complainant and other researchers in Japan to compensate for exchange rate loss in 1999. According to the complainant, the amount that has been paid does not cover the whole of the year 1999 but only the period up to October 1999. Furthermore, the complainant points out that the indemnity paid does not cover the two initial payments for travel to and installation in Japan.*

*According to point 4 of the Commission's opinion, the Commission will in the near future propose to the grant-holders an amendment to their contract to avoid negative effects in the future of Yen/Euro exchange rate fluctuations. According to the complainant, the amended contract has not yet been proposed. The complainant considers that the delay in implementing the Commission's undertaking on this matter is excessive."*

On 21 September 2000, the complainant informed the Ombudsman that the researchers had received the second compensation payment in the middle of August 2000 for the period from November 1999 to April 2000. The complainant mentioned that they did not know when the payment for the last period from May 2000 to November 2000 would be made.

**The Commission's second opinion**

The Commission confirmed that it had decided to grant complementary indemnities to the researchers with respect to the sole effect of the fluctuations in exchange rate of the Euro against the Yen on their regular incomes, to prevent any adverse consequence on their standard of living and their capacity to carry out their research projects.

As a consequence, these indemnities cover only the flat-rate monthly allowance paid on a quarterly basis throughout the duration of the contract, and not the allowances to cover travel and installation that were paid in the beginning.

The complementary indemnity decided by the Commission on 21 December 1999 matches the financial loss registered at the occasion of the three quarterly periods that were completed in 1999 (from February to 15 November 1999). The remaining period of 1999 being included in the first quarterly period of the year 2000 that ends in February, it is therefore only after its completion that the loss can be effectively quantified.

For the year 2000, the Commission has already decided on 24 July 2000 to grant a complementary indemnity in relation to the two completed quarterly periods of the year, that is from 15 November 1999 to 15 May 2000. This indemnity is currently being paid by the Delegation of the European Commission in Japan.

The Commission confirmed, as the fellows have been told repeatedly, that it will continue to follow this approach until the end of these contracts. Should the consequences of the above-mentioned fluctuations persist, a final complementary indemnity for the remaining two quarterly periods will be granted at the end of the contract.

As a Commission decision is necessary and also sufficient for each of those complementary indemnities, an amendment to the contract does finally not appear to be required.

### The complainant's observations

The complainant appears not to have sent his observations. The Secretariat of the European Ombudsman sent an e-mail on 20 February 2001 in order to inquire whether the complainant had received the indemnity for the remaining quarterly period. The Secretariat received no reply from the complainant.

## *THE DECISION*

### 1 Alleged discrimination in the fellowship contracts for researchers due to payments made in Euro instead of Yen

1.1 The complainant alleged discrimination, in that there were some researchers, in otherwise similar circumstances, who were paid in Yen and not Euro.

1.2 According to the Commission, its services had duly taken into account the consequences of the fluctuations in exchange rate of the Euro against the Yen on the researchers' incomes, and had therefore sought a satisfactory solution to the problem. On 21 December 1999, the Commission decided to grant a complementary indemnity to 33 fellows that matched the financial loss registered in 1999 (Commission decision C (1999) 4774).

1.3 In its second opinion the Commission stated that the complementary indemnity decided by the Commission on 21 December 1999 matched the financial loss registered at the occasion of the three quarterly periods that were completed in 1999 (from February to 15 November 1999). The remaining period of 1999 being included in the first quarterly period of the year 2000 that ends in February, it was therefore only after its completion that the loss could be effectively quantified. For the year 2000, the Commission had already decided on 24 July 2000 to grant a complementary indemnity in relation to the two completed quarterly periods of the year, that is from 15 November 1999 to 15 May 2000. The Commission informed the Ombudsman that the indemnity was being paid by the Delegation of the European Commission in Japan.

1.4 The European Ombudsman notes that the Commission has decided to pay a complementary indemnity to 33 researchers matching the financial loss due fluctuations in the exchange rate of the Euro against the Yen. Furthermore, the Commission has given confirmation that should the consequences of the fluctuation persist, a final complementary indemnity for the remaining two quarterly periods would be granted at the end of the contract. The European Ombudsman finds, therefore, that there is no instance of maladministration by the Commission as regards the allegation made by the complainant.

### 2 Conclusion

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

## ALLEGED BREACH OF COMMUNITY LAW BY SWEDEN IN CHARGING EXCISE DUTY – THE COMMISSION'S HANDLING OF THE FILE

*Decision on joined complaints 1554/99/ME and 227/2000/ME against the European Commission*

### *THE COMPLAINTS*

The complainant in complaint 1554/99/ME was the President of the Swedish free-trade association "Norrbottens Frihandelsförening" and complained to the European Ombudsman on behalf of the association in December 1999. The complainant in complaint 227/2000/ME was a citizen residing in northern Sweden close to the border of Finland and he submitted his complaint in February 2000. Moreover, the complainant in complaint 227/2000/ME had close contacts with the association "Norrbottens Frihandelsförening" and the two complaints were thus interlinked.

Taken together, the complainants put forward in summary the following:

The complainants stated that Sweden had wrongly implemented Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. Sweden thereby consistently breached Community law by charging excise duty on the transport of mineral oil from Finland to Sweden.

One complainant explained that in northern Sweden, import for personal use of mineral oil from Finland was common and had been so for decades. Since Sweden and Finland entered the European Union, the control of this trade had intensified.

According to Article 9(3) of Directive 92/12/EEC, the Member State may charge excise duty if the mineral oil is transported using atypical modes of transport. The Article also states that transportation in the tank of vehicles or in appropriate reserve fuel canisters should not be seen as atypical transports. The complainants stated that the Swedish Taxation authority interprets the term "atypical modes of transportation" as including all private transports of mineral oil. The complainants on the other hand meant that this provision must be interpreted strictly since it is an exception to the general principle of freedom of movement. The complainants stated that a private person transporting mineral oil in appropriate reserve fuel canisters must be allowed and was in their view in accordance with the provisions of Directive 92/12/EEC.

The association "Norrbottens Frihandelsförening" had assisted a very large number of persons with appeals to the Swedish administrative courts following decisions from the Swedish Taxation authority. The association had thereby requested that the courts ask the Court of Justice of the European Communities for a preliminary ruling according to Article 234 (previous Article 177) of the EC-Treaty. These requests had never been taken into account.

The complainants turned to the European Commission to complain about the matter. The complainants had also met with the Commission. They alleged that the Commission did not investigate the matter. One complainant stated that this was due to political pressures.

The complainants claimed that the Commission should resume its investigation of the matter and examine whether Sweden is in breach of Community law and in particular of Directive 92/12/EEC.

### *THE INQUIRY*

#### The Commission's opinions

The complaints were forwarded to the Commission. The Commission provided two different opinions. Taken together, the opinions contained in summary the following:

The Commission stated that it received a letter from the association "Norrbottens Frihandelsförening" in 1997. The letter contained information about systematic and arbitrary border controls and was interpreted by the Commission as relating only to the border

controls between Sweden and Finland. The complaint was therefore dealt with by Internal Market DG. By letter of 1 September 1998, the Commission asked the association to submit further information. No such information was received within the deadline and the Commission closed the file on 7 October 1998.

By letter of 28 September 1998, which was received by the Commission on 13 October 1998, further information with some new elements on border controls but also concerning the Swedish rules on excise duty was submitted by the association. The information motivated the Commission to deal with the matter, which was registered as a complaint. In May 1999, a meeting took place with the complainants. According to the Commission, this was the first time more precise information was provided by the complainants which allowed the Commission to better understand their concern. The Commission understood the complaint not to relate to a specific rule but to the methods used at the border controls and the scope and systematic character of the controls.

Following the meeting and an analysis of the complaint, the Commission contacted the Swedish authorities to explain the complaint and the details of the case. The Swedish authorities rejected the allegations of the complaint.

On 19 November 1999, the Commission requested further information from the complainants. No such information was received and the Commission explained in an e-mail to the complainants of 3 January 2000, that its proposal on the steps to be taken would be based on the material already at hand. Further contacts between the Commission and the complainants took place but no real substantial information was submitted. Nevertheless, on the basis of the information available to the Commission, Internal Market DG had made a proposal that a letter of formal notice shall be sent to Sweden. A formal decision from the Commission to send the notice was under consideration.

The allegation that the Commission's actions were based on political concerns was refuted by the Commission.

The Commission explained that during the whole procedure it had been very difficult to explain the legal situation to the complainants and thus receive relevant information in exchange.

As regards the specific rules on excise duty, the Commission stated that the general rule allows citizens to purchase goods in the Member State of their choice and to pay excise duty in that same state. There are however exceptions to this rule. Excise duty on mineral oil is such an exception and the excise duty should instead be paid in the Member State to which it is brought. There is one exception to this rule and that is transport in the vehicle tank or in an appropriate reserve fuel canister. Sweden may therefore charge excise duty if private persons use atypical modes of transportation in the meaning of Article 9(3) of Directive 92/12/EEC. This has been explained to the complainants and has been the reason for the Commission not to act against Sweden up to now.

### The complainants' observations

The respective opinions were forwarded to the complainants who submitted separate observations.

In summary, the complainants maintained their complaints. They referred to the term "atypical transportation modes" and to the fact that the Commission in its opinion stated that transportation in an appropriate reserve fuel canister would be allowed. In relation hereto, the complainants put forward that Directive 92/12/EEC does not mention the number of canisters and that the Swedish translation refers to *canisters*. The complainants also pointed out that canisters approved for the purpose of transportation according to national rules must necessarily be seen as appropriate reserve fuel canisters. If not, it would be a clear obstacle to the free movement and the principles of the EC-Treaty.

The complainants concluded that the Commission had not taken all relevant facts into consideration.

One complainant admitted that an investigation had been initiated against Sweden. It did however not appear to be satisfied with the Commission's actions in general.

That same complainant also put forward a new point. This related to the behaviour of the Finnish customs confiscating vehicles registered in Sweden claiming that the owner of the vehicle had lived permanently in Finland for more than 185 days. According to the association, it complained to the Commission at the meeting in May 1999 by written submission, but the Commission had not acted upon the complaint. As this was a new point not relating to the excise duty charged in Sweden, it was outside the scope of the original complaints and the Ombudsman did not find reasons to deal with it in the framework of the present inquiry.

The other complainant concluded that since the Directive appears to be contrary to the EC-Treaty, he requested that the Commission follow the Treaty and not the Directive. Furthermore, that complainant asked the Ombudsman for advice on were to turn about the fact that the Directive is not in accordance with the EC-Treaty, in the case that the Ombudsman could not deal with that issue. The Ombudsman therefore informed the complainant that, as regards this specific part of the complainant's observations, he could petition the European Parliament and provided the complainant with the relevant address.

**Request for further observations**

Since the Ombudsman found that the Commission's opinion received in complaint 1554/99/ME was more extensive than the one received in complaint 227/2000/ME, the opinion in complaint 1554/99/ME was forwarded to the complainant in complaint 227/2000/ME for comments. No such comments appear to have been received by the Ombudsman.

## *FURTHER INQUIRIES*

On 3 April 2001, the Ombudsman's services called the responsible official at the Commission, Internal Market DG, to query about the proposed letter of formal notice to Sweden. The responsible official thereby informed the Ombudsman that the formal notice had been sent on 13 June 2000. The Swedish authorities had replied to the notice on 29 August 2000. Moreover, the Internal Market DG of the Commission had made a proposal that a reasoned opinion shall be sent to Sweden, which was presently awaiting approval from the Commission. The responsible official stated that the complainants had been informed regularly by phone and with e-mails.

## *THE DECISION*

### 1 Investigation on the charging of excise duty in Sweden

1.1 The complainants alleged that the Commission had not investigated the complaint concerning Sweden's implementation of Directive 92/12/EEC and consistent breach of Community law. One complainant stated that this was due to political pressures. The complainants stated that Sweden wrongly charged excise duty on the transport of mineral oil from Finland to Sweden. The complainants claimed that the Commission should resume its investigation of the matter and examine whether Sweden is in breach of Community law and then in particular of Directive 92/12/EEC.

1.2 The Commission refuted the allegation that the Commission had failed to deal with the complaint because of political pressures. The Commission explained that it had in fact

acted upon the letter of one complainant but had closed the file when no further information was received. Further correspondence from that complainant had been registered as a complaint and the Commission had made a proposal to send a formal notice to Sweden. The Commission also explained the legal framework of excise duty on mineral oil.

1.3 The Ombudsman notes that it comes within the Commission's discretionary powers to decide on bringing legal proceedings against Member States under Article 226 of the EC-Treaty. Nevertheless, in the Ombudsman's own-initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community Law (303/97/PD) which was closed on 13 October 1997, the Commission undertook to respect certain procedural safeguards that the complainants enjoy in that procedure. There is nothing to indicate that the Commission in the present cases did not respect those safeguards.

1.4 As regards the allegation that the Commission did not investigate the matter for political reasons, the Commission refuted this. The Ombudsman finds that the complainant stating this did not put forward any evidence to support the allegation.

1.5 Regarding the complainants' claim that the Commission should resume its investigation, the Ombudsman notes that following the letter of 28 September 1998, the Commission initiated a new investigation into the matter. The Commission also met with the complainants and put forward a proposal to send a letter of formal notice to Sweden. The Commission therefore met the complainants' claim. Moreover, the Ombudsman was informed that the formal notice had been sent on 13 June 2000, that the Swedish authorities had replied on 29 August 2000 and further that a proposal to send a reasoned opinion to Sweden was awaiting approval. The Ombudsman therefore finds that there was no maladministration on behalf of the Commission.

**2 Conclusion**

On the basis of the Ombudsman's inquiries into these complaints, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the cases.

## ALLEGED IRREGULARITIES IN THE IMPLEMENTATION OF A PHARE PROJECT

*Decision on complaint 634/2000/JMA (Confidential) against the European Commission*

*THE COMPLAINT*

The complainant is a management consultant who, between 1997 and 1998, took part in the development of a PHARE project . He had acted as a consultant for a consortium, which acted as a PHARE contractor. The tasks assigned to him consisted in the preparation of study tours and the organisation of short-term workshops.

At the end of March 1998, the complainant submitted his timesheet for the PHARE-related work performed during that month. The consortium's team leader, however, refused to endorse it, and as a result, the complainant received no payment for some of the tasks he had allegedly performed for PHARE-related work. In the complainant's view, this situation was a consequence of his refusal to agree to pay a bribe to a senior staff member of the Project Management Unit (PMU). He explained that at the end of March 1998, and during his work at the PMU, he was summoned to the offices of the Director, and was asked to agree to pay $ 3.000 as a condition for undertaking one of the project's activities.

As the consortium refused to acknowledge part of his work, the complainant wrote to the Commission, asking it to recognise that the work reflected in his March 1998 timesheet fell within the programme's objectives. He also suggested that some anti-corruption clauses be inserted in future contracts. Following a number of written exchanges with the Commission services, the responsible Director in the DG Enlargement and responsible for

the implementation of the PHARE programme, concluded in a letter to the complainant dated 27 January 2000 that the Commission was not in a position to judge whether all the work in dispute was actually related to the PHARE strategic management programme.

In February 2000, the complainant replied to the Commission, alleging that some of the documents produced as a result of the project proved that his March 1998 timesheet was fully in line with PHARE's mission and objectives. There was no further reply from the Commission. The complainant considered that the Commission's position undermined his attempts to seek redress from the consortium.

In his complaint to the Ombudsman, the complainant considered that the Commission should have intervened in the situation, in order to ensure that the timesheets submitted by the consortium contained no false statements. He pointed out that his approaches to the consortium had failed. The complainant also asked the Commission to formally acknowledge that the work mentioned in his March 1998 timesheet was related to the aims of the PHARE programme. The activities, for which he had not been paid yet, consisted in the planning and organisation of a mission in 1998, as requested by the project management; as well as the production of a programme document.

Since his claims of corruption of PHARE senior management had apparently been disregarded, he also wished to know why the Commission, first, did not act upon his proposal to introduce anti-corruption clauses into future contracts; and secondly, reconfirmed the PMU Director despite allegations of illegal bribing.

In summary, the complainant made the following allegations in his complaint to the Ombudsman: (i) part of his work for this project has not been paid, and (ii) his claims of fraud to the Commission concerning the management of the project had not been properly investigated by the institution.

## *THE INQUIRY*

### The Commission's opinion

The Commission first offered a general overview of the situation, and then referred to the specific allegations made by the complainant.

#### *Background information*

The institution explained that the complainant worked as a consultant in a consortium, which provided technical assistance for a PHARE project. The contract had been established between: the Government of the assisted country and a consortium of several organisations.

Following allegations of fraud and mismanagement against the programme's PMU made by both the complainant, and also by Mr. J., a former Team Leader, the Commission decided in December 1998 to suspend the programme, and to order an independent audit to assess the allegations.

An independent accountancy firm carried out the audit, the results of which became available at the end of October 1999. It concluded that most of the allegations, and all of those related to fraud, had no grounds. Some management and financial recommendations were made, which the PMU and the contractor agreed to implement. At the end of this process and in the light of its results, the programme activities were resumed.

In March 2000, an independent consortium, which assesses European Union PHARE programmes, prepared an annual assessment report on the programme. As regards the overall achievement rating of the programme objectives, the assessment considered it "highly satisfactory".

The individual allegations made by the complainant had been specifically considered in the audit. As for the activities the complainant had reflected in his March 1998 timesheet, the audit concluded that they fell outside the direct scope of PHARE. The Commission explained, however, that these activities were different from the complainant's preparatory work related to the strategic management mission which, on the contrary, was an activity part of the PHARE programme. As regards the complainant's allegations of bribes and fraud, the report considered that they were unfounded.

The Commission also referred to some of the findings included in the audit and which related to tasks undertaken by the complainant without a contract. On the basis of these findings, his relationship with the consortium had to be redefined. Although the consortium had agreed to have him on a temporary contract, PMU decided not to continue its links with the complainant.

*Specific allegations made by the complainant*

As regards the first allegation made by the complainant concerning the disputed timesheet, the Commission underlined that the controversy had arisen between a consultant and a contractor in the framework of a PHARE programme, and the Commission could not interfere in such contractual disputes. The institution explained that the timesheet prepared by the complainant for the period March-April 1998 described two basic activities: (i) preparatory work carried out for a strategic management mission, and (ii) other tasks related to workshops and a seminar. As requested by the complainant, the Commission had confirmed by letter of 27 January 2000 that the strategic management mission, was in fact an activity funded by PHARE.

The Commission explained that it had been informed by the consortium that there was an internal sub-contracting agreement governing the consortium members whereby only the delivery of the courses would be paid, thus excluding preparatory work. On the basis of these explanations, the Commission had concluded that the refusal by the consortium to pay preparatory tasks constituted a contractual dispute internal to the members of the consortium, in which the institution had no role to play.

The Commission pointed out that responsibility for payments under this PHARE programme rested with the national authorities, not with the European Commission. Its services, however, requested further information on the timesheet issue, to ensure that only activities pertaining to PHARE had been submitted, and that some coherence was maintained among the timesheets submitted by the different consultants.

As for the allegations of fraud, the Commission explained first, that following the complainant's letter of March 1999 recommending the inclusion of anti-corruption clauses in new PHARE contracts, the suggestion had been brought to the attention of the services responsible for PHARE financial management (SCR). Moreover, the institution explained that it intended to enact new rules on contract procedures as part of a new manual for a "Decentralised Implementation System", and to introduce an ethics clause in the future contracts.

In the light of the findings of the audit, which concluded that the allegations against the PMU were unfounded, the programme activities were resumed under the same PMU management. The Commission pointed out that PMUs are an integral part of the national administration and the Commission has no role in appointing or reconfirming national officials.

**The complainant's observations**

The complainant replied in detail to the statements made by the Commission, restating his position as regards the work performed in March 1998 for the PHARE programme, as well as his allegations concerning the illegal demands made by the programme's PMU. He

enclosed with his observations a number of documents as supporting evidence for which he asked for confidentiality.

The complainant stressed that, as pointed out by the Commission, the question of non-payment for preparatory work was an issue to be settled between contractor and consultant. However, he insisted on the fact that the institution should have known of the tasks to be performed in the context of the PHARE programme, and thus whether timesheets submitted reflected actual PHARE work, or had been unduly altered. He explained that the work pattern had always been similar and that preparatory work was an integral part of it.

As regards the question of fraud, he indicated that the Commission's readiness to include anti-fraud clauses in future contracts was to be welcomed, as an effective deterrent to illegal practices. However, he insisted on his claims of fraud against PMU management, considering that the audit, which had been used to set aside his allegations, amounted to a whitewash. In his view, the auditor had chosen to accept the story put forward by the PMU without examining the relevant project documents, and without seeking additional information from him. He concluded that the fact that two separate experts, himself and Mr J, former Team Leader, had submitted independent complaints should have added weight to their allegations of improper behaviour.

*THE DECISION*

**1 Acknowledgement and payment of part of the complainant's work**

1.1 The complainant had alleged that a PHARE contractor (the consortium), did not pay for part of the PHARE-related work included in his March 1998 timesheet. Since his approaches to the contractor had failed, he argued that the Commission should have intervened in order to ensure that the timesheets submitted by the contractor contained no false statements. He also asked the Commission to formally acknowledge that the work mentioned in the timesheet was related to the aims of the PHARE programme.

1.2 The Commission had underlined that the problem constituted a contractual dispute between a PHARE contractor and one of its consultants, and that the institution did not have any role to play in this type of situation. Payment for the disputed work was, in the view of the Commission, an internal issue to be solved among the members of the consortium which acted as a contractor for the PHARE programme. It pointed out that responsibility for payments under this decentralised contract rested with the national authorities.

Furthermore, the institution explained that in reply of January 2000 to a query from the complainant, its services had confirmed that some of the activities in dispute, namely the strategic management mission, were in fact an activity funded by PHARE.

1.3 In order to determine first whether the Commission was under a duty to intervene to ensure that the programme's timesheets contained no false statements, it is necessary to consider the scope of the institution's powers and obligations in the context of a contract funded through the PHARE programme.

1.4 Under the basic regulation for the PHARE Programme[10], aid is granted by the Community either independently or in the form of co-financing. This financial assistance is funded by the Communities' general budget in accordance with the Financial

[10] Council Regulation (EEC) No 3906/89 of 18.12.1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p.11), as amended, by Council Regulations No 2698/90 of 17.09.1990 (OJ 1990 L 257, p. 1), No 3800/91 of 23.12.1991 (OJ 1991 L 357, p. 10), No 2334/92 of 7.08.1992 (OJ 1992 L 227, p. 1), No 1764/93 of 30.06.1993 (OJ 1993 L 162, p. 1), No 1366/95 of 12.06.1995 (OJ 1995 L 133, p. 1), No 463/96 of 11.03.1996 (OJ 1996 L 65, p. 3) and No 753/96 of 22.04.1996 (OJ 1996 L 103, p. 5).

Regulation, as amended, in particular, by Regulation 610/90[11]. As set out in its Arts. 107, 108 §2 and 109 § 2, as interpreted by the Community courts, contracts financed by the PHARE programme must be regarded as national contracts, which are binding only on the beneficiary country and the economic operator. The Commission, on the other hand, is responsible for the funding of the projects, and has therefore to ensure that the resources devoted to PHARE projects are economically managed[12].

1.5 The situation denounced by the complainant arose from a dispute in the framework of a work relation between a PHARE contractor and his consultant or subcontractor. This type of situations, by their own nature, are not likely to affect the general funding of the PHARE programme or the economic management of PHARE related measures, and therefore can seldom trigger the Commission's intervention.

As the relationship between the PHARE contractor, the consortium, and the complainant was set up on the basis of a mutually agreed contract, any dispute on the rights and obligations of the parties should be determined on the basis of contractual rules.

1.6 The complainant believed that, despite the contractual nature of the dispute, the Commission should have intervened. The Ombudsman noted that there is no obligation for the Commission to mediate in a contractual dispute among partners in a PHARE-related contract. Nevertheless, the Commission had intervened by requesting additional information from the contractor. The basis for this action was explained on the need to ensure that only activities pertaining to PHARE had been included and that some coherence was maintained among the timesheets submitted by the different consultants. Having reviewed these materials, the Commission did not seem to identify any element, which could have questioned their contents. The Ombudsman noted that, in order to establish its position, the Commission took stock of the findings made in the audit carried out by an independent accountancy firm, which reached a similar conclusion.

1.7 The complainant also requested that the Commission formally acknowledge that the tasks included in his March 1998 timesheet were related to the aims of the PHARE programme.

The Ombudsman noted that following the request from the complainant, the Commission confirmed by letter of its services of January 2000 that some of the activities referred to in the complainant's timesheet were in fact activities funded by PHARE. As regards whether or not some preparatory work should have been included and therefore paid for, the Commission had been informed by the consortium that the contractor had agreed with its consultants not to take into account preparatory work. On that basis, the Commission had taken the view that the disputed task was an internal issue between the contractor and its consultant, and that it thus ought to be settled between the parties.

1.8 Taking into consideration the nature of the PHARE-related contract and the parties and issues in dispute, the Ombudsman considered that the position taken by the Commission in relation to the unsettled tasks and their payment, as well as the information requested by the complainant concerning these issues, did not appear to be unreasonable. Thus, the Ombudsman concluded that the inquiry had not revealed an instance of maladministration as regards this aspect of the case.

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11 Financial Regulation of 21.12.1977applicable to the general budget of the European Communities (OJ L 356, 31.12.1977, p.1), as amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13.03.1990 (OJ L 70, 16.3.1990, p.1).

12 Case T-231/97 *New Europe Consulting V. Commission* [1999] ECR II-2403, par. 32; case T-185/94 *Geotronics v Commission* [1995] ECR II-2795, par. 31; case C-395/95 P *Geotronics v Commission* [1997] ECR I-2271, par. 12.

## 2 Investigation of the claims of fraud made by the complainant

2.1 The complainant had alleged that his claims of fraud to the Commission concerning the management of the PHARE programme had not been properly investigated by the institution. He considered that the audit of the PHARE programme prepared in response was a whitewash, since the auditor which had been charged with its preparation accepted the story put forward by the PMU without contrasting it. A lengthy confidential documentation was submitted with the complainant's observations in order to prove his allegations of fraud.

The complainant had also suggested that the Commission introduce anti-corruption clauses into future PHARE contracts.

2.2 The Commission had explained that following these allegations of fraud and mismanagement against the programme's PMU, it had decided to request an independent audit from a chartered accountancy firm. The audit, which was made public at the end of October 1999, had concluded that most of the allegations, and all of those related to fraud, had no grounds.

The institution had also indicated that it intended to enact new rules on contract procedures as part of a new manual for its "Decentralized Implementation System", and to introduce an ethics clause in future contracts.

2.3 As regards the last one of these issues, the Ombudsman noted that in response to the suggestion made by the complainant, the Commission had undertaken to insert an ethics clause in future PHARE contracts. The complainant welcomed this initiative which, in his view, should act as a deterrent to illegal practices. The Ombudsman underlined that in December 2000, the Commission made public its Practical Guide to PHARE, Ispa and Sapard contract procedures, which included an Ethics clause[13] in point 2.4.11. The special guarantees included in that clause should have been applicable to any PHARE contract as from 1 January 2001.

From the above information, the Ombudsman noted that the Commission had followed the suggestion made by the complainant.

2.4 In connection with the specific allegations of fraud made by the complainant, the Ombudsman noted that the Commission had not remained inactive in response to these allegations. Soon after the claims had been made, the institution had taken steps to have the programme assessed, and commissioned an audit from an independent accountancy firm. The audit had specifically reviewed the claims of fraud, and concluded that the programme's management had committed no wrongdoing.

The Ombudsman considered that, in the light of the audit findings and the other information available to it, the Commission had been entitled to consider that no further action was needed at that stage. The inquiry had therefore not revealed any maladministration by the Commission in relation to this aspect of the complaint.

2.5 Subsequent to the audit and to the Commission's opinion in this case, the complainant had submitted to the Ombudsman documents, which contained additional evidence in support of his allegations against staff of the Project Management Unit. The complainant

[13] One of the most relevant paragraphs in this section reads as follows*: "The European Commission reserves the right to suspend or cancel project financing if corrupt practices of any kind are discovered at any stage of the award process or during the implementation of a contract and if the Contracting Authority fails to take all the appropriate measures to remedy the situation. For the purpose of this provision, "corrupt practices" are the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the Contracting Authority"*.

did not appear to have submitted these documents to the Commission and asked the Ombudsman to treat them as confidential.

2.6 The Project Management Unit (PMU) is not a Community institution or body but part of the national administration. The European Ombudsman is competent to deal only with maladministration in the activities of Community institutions and bodies. He is not therefore competent to deal with allegations concerning the national administration.

Since the complainant had given his agreement to any potential transfer, the Ombudsman decided, in view of the nature of the new information, to transmit that evidence to the European Anti-Fraud Office (OLAF). It was therefore up to OLAF to decide whether further action was required and inform the complainant of any new development.

**3 Conclusion**

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

## 3.1.3 The European Training Foundation

**UNSUCCESSFUL TENDER**

*Decision on complaint 664/99/BB against the European Training Foundation*

*THE COMPLAINT*

In June 1999, Mr K. made a complaint to the European Ombudsman on behalf of Josupek Oy, StarSoft Oy and TAO-produktio Oy concerning the handling of tender bids within Project T-4/ES9612.02.01 *Procurement of Database management Software for Estonian School Administration System*. The deadline for submitting tender bids was fixed for 8 February 1999. The complainant claimed that in mid March 1999 he learned from another tenderer that the selection had already taken place. The complainant immediately contacted the organisers and requested information about the handling of the tender bids. The complainant was informed that the handling of tender bids had been transferred to Torino and that he would obtain information in writing on the results once the tender evaluation process was completed. On 6 April 1999, the complainant wrote to the Programme Manager. He received a reply on 8 April 1999 confirming the information given earlier. The Programme Manager also stated that she did not understand on what basis the complainant was lodging his complaint as all documentation and information related to the tender evaluation was still confidential. The complainant alleged that some tenderers were in a more favourable situation as regards the flow of information and that therefore there had been discrimination.

According to the information provided to the complainant by letter of 22 June 1999, his tender bid was excluded on grounds that the complainant did not have an Estonian local partnership (point 4.2.5. of the Terms of reference). The complainant claimed that in his letter of 6 February 1999 he had indicated that a tentative agreement of co-operation with Unikko Software from Tallinn had been concluded. The complainant was of the view that the requirement in the tender dossier could not have meant that an enterprise should be established in another country already at such an early stage of the tender procedure. The complainant pointed out that the text in point 4.2.5 of the Terms of reference referred to 'contractors' and not to 'tenderers'. The complainant implied that the reason for excluding his tender bid was arbitrary.

The complainant made the following allegations of maladministration:

- lack of information and discrimination in the handling of the tender procedure;
- lack of proper reason;
- undue delay in the handling of the tender procedure.

The complainant made the following claims:

- claim for damages
- liability of the official handling the tender procedure

*THE INQUIRY*

**The European Training Foundation's opinion**

The complaint was forwarded to European Training Foundation. As a background information, the European Training Foundation explained that it is an agency of the European Union established with the purpose of promoting co-operation and co-ordination of assistance in the field of vocational training reform in Central and Eastern Europe and the New Independent States and Mongolia and to the countries eligible for support from the MEDA Programme. A number of conventions have been signed between the Foundation and the European Commission in Brussels for the management of specific programmes through conventions agreed between the Foundation and the European Commission. The practical management of the tendering procedure was dealt with by the beneficiary country through the Programme Management Unit (PMU) on behalf of the Ministry responsible.

Against this background, and in full compliance with the PHARE Regulations, the Ministry of Education of Estonia launched a call for tender no. T-4 ES9612.02/ES/9622.02.01 for the *procurement of Database management Software for Estonian School Administration System* on 17 November 1998.

The Foundation gave a detailed description of the different stages of the procurement procedure. A total of seven firms out of eight applicants were invited to participate. All received, in accordance with the PHARE Regulations, the same set of tendering documents (including letter of invitation to tender, instructions to tenderers, General Regulation for tenderers for the award of PHARE service contracts, draft contract with annexes including detailed Terms of Reference as well as miscellaneous information).

The technical bids were analysed for their conformity with the criteria detailed in the tender dossier. Following this analysis the complainant's bid was missing the duly initialled Terms of Reference, the description of partners present in Estonia, the Curricula Vitae and declarations of availability of the Estonian experts, the description of the partner company profile and the user documentation. On 8 February 1999, the Evaluation Committee requested that the company rectify these omissions by 14:00 on 9 February 1999. However, the company did not present any experts' CVs, or any declaration of availability, signed partnership agreement or description of the partner company profile. The Committee decided to reject his bid on this basis.

As regards the European Training Foundation's analysis, the objections raised by the complainant are related mainly to the grounds of exclusion, evaluation procedure and provision of information. Since the procedure was carried out in the framework of the PHARE Regulations, it is in respect of the Phare rules that the complaint must be evaluated.

*Grounds for the exclusion*

On the basis of the Instruction to Tenderers para. A (7) and section C 1.2 first para. « Support Structure and Support Services », and 4.2.5 of the Terms of Reference the importance for this project to have a local partner is fundamental. The complainant company failed to provide any signed agreement demonstrating the legal existence of a partnership with an Estonian company or any description related to the profile of the local partner. At the request of the evaluation committee to provide a clarification on these items, the complainant replied in writing that « *their Estonian partner or their company*

*in Estonia, if it will be established, will organise the activities described in the Terms of Reference* ».

Moreover, Article 1.3 para (2) of the Instructions to Tenderers, requires companies to provide CVs of local experts. In spite of an explicit written request the complainant did not provide these CVs.

*Evaluation procedure*

The evaluation of the bids was made in full compliance with the PHARE Regulations using the standard forms and guidelines foreseen for a restricted call for tender. The strict application of these forms does not leave any room for interpretation or deviation from the PHARE Regulations. In addition the standard forms include tables which are targeted towards the clear and transparent comparison of bids. The scoring system with predefined weighting does not allow any room for interpretation or manipulation. Once the members of the committee have filled in their table the composite rating is calculated automatically.

*Provision of information*

The complainant's right to receive complete and detailed information has been fully respected during all the phases of the tendering procedure from the point of view of content and timing. In accordance with Articles 3, 9 and 23 of the PHARE Regulation communication between the European Training Foundation and the complainant was conducted in writing and within a reasonable timeframe. The request for information sent by the complainant on 6 April 1999 received a written reply from the European Training Foundation on 8 April 1999. In accordance with the rules the complainant was informed that its tender had been unsuccessful. The information was communicated to the complainant through the standard PHARE form for unsuccessful tenderers.

In view of the facts indicated above and with reference to the principles of sound administration of public funds and respect to the general principles of transparency and non-discrimination, the European Training Foundation in its role of Endorsing Authority of the above mentioned call for tender, considers that the PHARE rules and regulations have been fully respected in the evaluation of the tendering procedure in question and in particular in the treatment of the tender submitted by the complainant.

**The complainant's observations**

The complainant maintained his complaint. In his observations, the complainant explained that he was prepared to send CVs, but due to the short deadline the complainant decided to ask the Programme Management Unit Director how he would prefer the CVs to be sent. On 10 February 1999 at 13:11 PMU-Director sent an e-mail stating that: « There is no need to send CVs ». Therefore, the complainant did not send the CVs.

*FURTHER INQUIRIES*

After careful consideration of the Foundation's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore sent a request for complementary information to the Foundation on 21 July 2000. The Ombudsman requested the Foundation's opinion on whether the complainant was entitled to rely on the e-mail of PMU-Director sent on 10 February 1999 at 13:11.

**The European Training Foundation's reply**

With regard to the exchange of e-mails between the complainant and the Programme Management Unit (PMU) related to the above mentioned call for tender, the European Training Foundation made the following comments:

The Evaluation Committee has the authority to reject any offer, which does not conform to the requirements stated in the tender documents provided by the tenderers. However, the Committee has the option of asking tenderers to clarify elements of their bids or to provide missing documents that form an integral part of the bid submitted. This, however, may not prejudice the other tenderers. The principles of equality of treatment and non-discrimination amongst tenderers must, therefore, be respected. The time allowed for the provision of the missing documents or information should normally be limited in order to avoid delays in completing the evaluation procedure, which might cause detriment to the other tenderers.

According to the European Training Foundation, when the complainant sent his e-mail to the Director of the PMU, the deadline set by the Committee for the completion of the tender documents on 9 February 1999 at 14:00, had already expired.

The complainant sent two e-mails on 9 February 1999 at 12:28 and on 10 February at 11:43. However, in both e-mails he failed to provide the Evaluation Committee with the relevant documentation requested and particularly with the Curricula Vitae. Since the evaluation was still underway, the Evaluation Committee had to maintain the confidentiality of the proceedings. Therefore, the Director of the PMU was not in the position to inform the complainant at this stage that his failure to submit the requested documents in due time had led to the rejection of his bid.

In the light of the above considerations the European Training Foundation affirmed that the e-mail sent by the Director of the PMU to the complainant was correct and in line with the PHARE Regulation applied to the tendering procedure in question.

### The complainant's complementary observations

In his observations on the complementary information the complainant maintained his complaint. The complainant considered that the request by the European Training Foundation to obtain copies of the CVs of the experts was unnecessary, as it was not apparent from the tender dossier.

## *THE DECISION*

### 1 Lack of information and discrimination in the handling of the tender procedure

1.1 The complainant alleged a lack of information and discrimination in the handling of the tender procedure. According to the complainant it appeared that some participants were in a more favourable situation as regards the flow of information and that therefore there had been discrimination.

1.2 The European Training Foundation stated in its opinion that the complainant's right to receive complete and detailed information had been fully respected during all the phases of the tendering procedure from the point of view of content and timing. The request for information sent by the complainant on 6 April 1999 received a written reply from the European Training Foundation on 8 April 1999. In accordance with the rules the complainant was informed that its tender had been unsuccessful. The information was communicated to the complainant through the standard PHARE form for unsuccessful tenderers. According to the European Training Foundation, the general principles of transparency and non-discrimination in the treatment of the tender submitted by the complainant have been followed.

1.3 Taking into account the information provided by the European Training Foundation on the complainant's allegation, the Ombudsman was of the view that there appeared to be no instance of maladministration in relation to this aspect of the case.

## 2 Lack of proper reason

2.1 The complainant alleged that his tender bid was excluded without proper reason on grounds that the complainant did not have an Estonian local partnership. According to the complainant he had indicated in his letter of 6 February 1999 that a tentative agreement of co-operation with Unikko Software from Tallinn had been concluded. The complainant considered that the request to obtain copies of the CVs of the experts was unnecessary as it was not apparent from the tender dossier. Furthermore, the complainant claimed that on 10 February 1999 at 13:11 PMU-Director sent an e-mail stating: « There is no need to send CVs ». Therefore, the complainant did not send the requested CVs.

2.2 According to the European Training Foundation, the Instructions to Tenderers para. A (7) and section C 1.2 first para. « Support Structure and Support Services », and 4.2.5 of the Terms of Reference provide that a local partner is of fundamental importance for this project. The complainant company failed to provide any signed agreement demonstrating the legal existence of a partnership with an Estonian company or any description related to the profile of the local partner. At the request of the Evaluation Committee to provide a clarification on these items, the complainant replied in writing that « *their Estonian partner or their company in Estonia, if it will be established, will organise the activities described in the Terms of Reference* ». Moreover, Article 1.3 para (2) of the Instructions to Tenderers, requires companies to provide CVs of local experts. These CVs were not provided by the complainant in spite of an explicit written request from the Evaluation Committee. According to the European Training Foundation, when the complainant sent his e-mail to the Director of the PMU, the deadline, set by the Committee for the completion of the tender documents on 9 February 1999 at 14:00, had already expired.

2.3 The Ombudsman observed that point 4.2.5 of the Terms of Reference provided that "*The Contractor must have either a suitable partner in Estonia, or demonstrate clearly how such a partnership will be created…*". Furthermore, Article 1.3 para (2) of the Instructions to Tenderers, required tenderers to provide "*a standardised Curriculum Vitae for each Team member*". In this case, the Evaluation Committee had given the complainant the possibility to forward the required documents after the expiry of the deadline. As the complainant failed to do so, the European Training Foundation concluded that the complainant failed to provide information about the Estonian local partnership.

2.4 On the basis of information available to the Ombudsman it appeared that in its letter of 22 June 1999 to the complainant and in its opinion the European Training Foundation gave a proper reason to the exclusion of the complainant's tender bid. Therefore, there appeared to be no maladministration in relation to this allegation.

## 3 Undue delay in the handling of the tender procedure

3.1 The complainant alleged that there had been undue delay in the handling of the tender procedure. The deadline for tender bids ended on 8 February 1999. The Programme Management Unit informed the complainant on 22 June 1999 that his tender bid had not been successful.

3.2 The European Training Foundation stated in its opinion that in accordance with Articles 3, 9 and 23 of the PHARE Regulation communication between the European Training Foundation and the complainant was conducted in writing and within a reasonable timeframe.

3.3 The Ombudsman observed that it took the European Training Foundation four and a half months to complete the tender procedure within Project T-4/ES9612.02.01 *Procurement of Database management Software for Estonian School Administration System*. The Ombudsman was of the view that taking into account the nature of the procedure the period of time elapsed could not be considered excessive. Therefore, there appears to be no maladministration in relation to this aspect of the case.

### 4 Claim for damages and liability of the responsible official

Based on the above findings of no maladministration it appears that the complainant's claim for damages and liability of the responsible official did not arise.

### 5 Conclusion

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

## 3.1.4 The European Investment Bank

### THE INVESTMENT BANK'S FINANCING OF A MOTORWAY IN HUNGARY

*Decision on complaint 1338/98/ME against the European Investment Bank*

*THE COMPLAINT*

In December 1998, the Secretary General of the European Environmental Bureau lodged a complaint with the European Ombudsman on behalf of the Bureau. The complaint concerned the European Investment Bank and its financing of the construction of the northern part of the M0 orbital motorway (M0-M2 Motorway) around Budapest in Hungary. The complainant claimed that the planning and construction of the motorway violated both the Hungarian Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC[14].

The complainant stated that the northern section of the M0 orbital motorway was supposed to connect the M3 motorway with the main road N° 11. The M0 would pass through an almost uninhabited area near the M3, then connect with the new M2, also financed by the Bank. From there, the road would go through a 16 meter-high and 270 meter-long viaduct, which passes within 250-300 meters of a housing estate, called Káposztásmegyer II. This housing estate has 500 inhabitants. Junction 2, connecting the new M0 to an arterial road in the direction of downtown Budapest, was planned within 150 meters of a nursery school and within 400 meters of the apartment buildings. Projected traffic backing up on two-lane roads leading to the arterial road was planned only 15 meters from the apartment buildings, and runs between the local school, the nursery and the apartments. Junction 3 and the ring road, connecting the M0 to the M2, would pass through a nature protection area inhabited by Hippophae rhamnoides, a protected bush. Fencing, to protect it during construction had not been provided around that area.

The complainant put forward that experts had pointed out health risks. For example the increased traffic will generate nitrogen oxides and particles to a level 25-30% above Hungarian ambient air. Noise levels are expected to exceed the limits and reach 70-76dB in the day and 63-68 dB at night where the accepted limit values are 65 dB in the day and 55 dB at night. The increases in traffic will also affect the air quality. Moreover, the northern sector of the M0 ring road is the wind corridor from which clean air blows into Budapest.

According to the complainant, the public should have been informed of the project at a hearing but, as the hearing had not been correctly announced and not published in a major newspaper, no citizens or environmental groups affected were notified. Instead, the Ministry of Transport, Communication and Water Management signed a contract with UTIBER Ltd. in December 1997 to begin the work. The residents were only informed of the construction in early spring 1998, when they realised that the construction work had begun 250 meters away from their homes.

The complainant stated that the Bank financed the construction with a loan of 46 million ECU. In summary, the complainant thus alleged that the Bank's financing of the northern part of the M0 orbital motorway around Budapest violated both the Hungarian

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

Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC. The complainant claimed that it had written to the Bank asking it to withhold its loan.

*THE INQUIRY*

**The European Investment Bank's opinion**

The complaint was forwarded to the Bank. In its opinion, the Bank explained that the loan referred to by the complainant was a 72 million credit granted to the Republic of Hungary at the end of 1993 to part-finance a road project comprising the construction of about 35 km of road E77 north of Budapest, and the rehabilitation of approximately 350 km of existing roads. The complaint concerned a 270 meter-long stretch of a 4.3 km section of the by-pass – known as phase III (b) – where the road flies over a railway line and an existing local road. Upon completion, phase III (b) will relieve local roads in the north-eastern quadrant of Budapest from heavy congestion and it will be a direct link between E77 and motorway M3. The phase III (b) section will eventually be part of the planned and partially built M0 ring road of Budapest.

The European Council and the Pan-European Transport Conferences in Crete and Helsinki have defined ten corridors, which must be urgently upgraded and developed in central and Eastern Europe during the pre-accession years. The M0 ring road of Budapest is an integral part of the "Crete Corridor V". In 1993, Hungary requested a loan from the Bank to part-finance the road project, which is the subject of the complaint.

The Bank stated that its lending activities are governed by its Statute, a Protocol attached to the EC Treaty, and further guided by Community policies as well as the priorities of the countries where it operates.

In accordance with the Bank's policies, the environmental impact of the project was analysed when the loan request was appraised in 1993, prior to the submission of the loan proposal to the Bank's Board of Directors. The documents submitted by the executing agency for the project, the Ministry of Transport, Communication and Water Management in Hungary, demonstrated to the satisfaction of the Bank that although Hungary did not have an environmental legislation comparable to Directive 85/337, the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated, and further, that appropriate environmental impact reductions and mitigation measures (landscaping, game protection fences, noise barriers, etc.) had been included in the design of the project.

The Bank pointed out that there are limits to its responsibilities in this field and referred to Article 16 of the Bank's Environmental Policy Statement. It is for the promoter of the project to make sure that the project complies with legal obligations and standards relating to the environment. The Bank had also already pointed out to the complainant that it is not for the Bank to comment on national legal procedures for granting project permits and other permissions. Should a project be subject to legal testing in the courts this will be discussed with the promoter.

Furthermore, the Bank stated that it is fully committed to an active information policy although its role as a financial institution together with the nature of its commercial activities imposes a certain degree of reserve as regards specific operations.

**The complainant's observations**

In its observations, the complainant pointed out that the M0 ring road was, according to the Bank, part of the Helsinki corridors (referred to as "Crete Corridor V" by the Bank). The complainant however stated that the particular section of the M0 ring road that is the subject of the complaint, was not part of the Helsinki corridors.

As regards the environmental aspect, the complainant stated that according to independent experts, results of the studies done so far are based on incorrect calculations. In particular, a satisfactory investigation and analysis of the adverse impacts on air quality and residential areas resulting from the construction of the motorway segment in question were missing.

The complainant also commented on the Bank's information duties in general regarding projects that it is financing.

### *FURTHER INQUIRIES*

After careful consideration of the Bank's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Bank to specify in more detail how in this specific case it examined the present and likely future environmental legislation and the environmental impact assessments performed by the promoter. The Ombudsman also asked the Bank to supply the documents submitted by the executing agency for the project (the Ministry of Transport, Communication and Water Management) which appeared to be the main documents taken into account by the Bank when deciding to grant the loan, as regards the environmental aspects of the project.

#### The European Investment Bank's second opinion

In its second opinion, the Bank stated that the decision to finance the project in question was taken by the Bank's Board of Directors following the favourable opinion of the European Commission, pursuant to Article 21 of the Bank's Statute. Such decisions by the Board of Directors entail an exercise of the wide discretionary power, which has been conferred on the Board through the Bank's Statute. This is reflected in the fact that the decisions by the Bank's Board of Directors are not, according to Article 237 (c) of the EC Treaty, subject to judicial review with the limited exceptions of matters relating to the application of Article 21 of the Bank's Statute, as has been confirmed by the Court of First Instance[15].

Moreover, the Bank was of the opinion that the complaint lodged and the request to investigate, did not fall within the scope of investigation into maladministration in the sense that it had been defined by the European Ombudsman's Annual Report for 1997 (Section 2.2.1). The Bank did therefore not find it appropriate to make any further comments on this particular matter.

Finally, the Bank assured the Ombudsman that it would co-operate in accordance with the Ombudsman's institutional duties.

Following the Bank's second opinion, which the Ombudsman understood to be a refusal to co-operate further in the inquiry into the complaint, the Ombudsman wrote again to the Bank repeating the request for further information. In doing so the Ombudsman pointed out that his activities are not governed by Article 237 of the EC Treaty, but by Article 195. Furthermore, what the Ombudsman was examining was a possible instance of maladministration in the administrative procedure, which led up to the Bank's decision to finance the project.

#### The European Investment Bank's third opinion

In its third opinion, the Bank contested that it refused to co-operate in the inquiry. However, the Bank did not accept that the complaint related to an instance of maladministration in the meaning of Article 195 of the EC Treaty and referred to the definition in the Ombudsman's Annual Report for 1997. According to the Bank, the Ombudsman's

15 T-460/93, *Tête and others v. EIB*, ECR [1993] II-1257.

remit is not extended to an assessment of the Bank's lending policies, nor to the exercise of discretion that their applications entail, whether at the level of the decisions of the Board of Directors, or at the level of the appraisal conducted by the Bank's services, or that of the proposals adopted by the Management Committee for submissions to the Board of Directors. The Bank also enclosed some documents relating to the complaint, such as information deriving from a recent site visit to the project, and hoped that the information would help the Ombudsman to better understand the general context of the project which was the subject of the complaint.

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

The third opinion of the Bank was sent to the complainant. In its observations, the complainant maintained the complaint and put forward in summary the following: The northern part of the M0 motorway was not even mentioned in the Hungarian decree, which lists the main national roads to be constructed. There was no proof that the road would reduce the existing environmental degradation caused by the traffic crossing central Budapest. Further, the Hungarian Minister of Transport admitted in August 1999, that he had no data on the expected environmental impacts of the northern part of the motorway.

The complainant also referred in general to the Bank's lending policies. It thereby stated that one of the greatest problems of the Bank's activity was that there is no specific environmental policy for it to follow and further, the importance of the environmental considerations could have a lower priority than economical or other considerations. There is no appropriate legal framework for the Bank, which would make the Bank more responsible for its loans before the public.

Following the Bank's third opinion and the complainant's observations, the Ombudsman was still not satisfied that the Bank had supplied the requested information. The Ombudsman therefore wrote again to the Bank stating that it was the last time that he asked the Bank to supply the information. The Ombudsman also informed the Bank that, if the Bank refused again to co-operate, the Ombudsman would have to inform the European Parliament in accordance with Article 3 (4) of the Statute of the European Ombudsman.

### The European Investment Bank's fourth opinion

In its fourth opinion, the Bank did not dispute the Ombudsman's mandate to inquire into the complaint. The Bank put forward that the complaint concerned an assessment of the exercise of discretion that the application of the Bank's lending policies entails in the decision-making by the Bank's Board of Directors, thus reflecting a disagreement with the discretionary judgements that have been made on a particular project. These discretionary judgements are subject to the limits of the Bank's legal authority and to general limits on legal authority as established by the jurisprudence of the Court of Justice requiring that the Bank should act in accordance with fundamental principles of law. The Bank understood the Ombudsman's inquiry to concern whether the Bank had indeed acted within these limits when deciding to finance the project in question.

As regards the project that the Bank decided to finance in 1993, the Bank took into consideration the investment priorities of its client, the Government of Hungary, among which the modernisation of its national and international road network through the rehabilitation of existing roads and the construction of new roads, aiming at, *inter alia*, reducing urban traffic congestion and thereby improving the quality of the environment. The Bank then applied its usual criteria in examining the project's viability from an economic, technical, environmental and financial point of view. The Bank enclosed a list of all documents taken into consideration during the appraisal of the project.

The Bank again referred to the fact that although Hungary did not have an environmental legislation comparable to Directive 85/337, the documents submitted by the Ministry of

Transport, Communication and Water Management in Hungary, demonstrated that the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated and that appropriate environmental impact reduction and mitigation measures, had been included in the design.

The Bank also followed up on environmental issues after the decision to finance the project. In 1995, a special Environmental Impact Study was initiated by the European Commission in co-ordination with the Bank. The objective of the study was to compare the requirements of the Hungarian and Community environmental legislation applied to this specific road project. The findings and recommendations of this study were well taken into account during the final design and implementation of the project. Further, the Bank made disbursement of its loan conditional to receipt of confirmation by the Hungarian authorities that the relevant project components had received final environmental approval and development consent, which occurred in the period 1993-1996, and for phase III and the relevant by-pass in July 1996 as regards the final environmental permission and in September 1996 as regards the construction permit.

### The complainant's observations on the fourth opinion

The Bank's fourth opinion was forwarded to the complainant with an invitation to submit observations. No observations appear to have been received from the complainant.

### Inspection of documents

After careful consideration of the information supplied by the Bank and the complainant, the Ombudsman found it necessary to inspect the documents submitted to the Bank by the Hungarian Ministry of Transport, Communication and Water Management. The Ombudsman therefore wrote to the Bank announcing the examination of those documents. Upon this request, the Bank chose to send copies of the documents to the Ombudsman. Following this action, the Ombudsman considered that the Bank had fully co-operated in the Ombudsman's inquiry.

## *THE DECISION*

### 1 Preliminary remark

1.1 In the light of the fact that during the inquiry the European Investment Bank at first contested the Ombudsman's mandate to conduct inquiries into allegations relating to discretionary decision, the Ombudsman finds it necessary to make the following preliminary remarks.

1.2 According to Article 195 of the EC-Treaty, the Ombudsman conducts inquiries, either on his own initiative or on the basis of complaints submitted to him, concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Article 195 of the EC-Treaty does not provide for any exceptions other than those relating to the Community courts acting in their judicial role. Specifically, it does not provide for any exception relating to the Bank.

1.3 The Ombudsman's Annual Report for 1997[16] contained the following definition of maladministration: *Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.*

[16] The European Ombudsman's Annual Report for 1997, Section 2.2.1, OJ 1998 C 380/14.

1.4 On 16 July 1998, the European Parliament adopted a resolution welcoming this definition[17].

1.5 The Ombudsman also noted in his Annual Report for 1997 that there are limits to what could be considered as maladministration. When carrying out the administrative tasks conferred on it by the EC Treaty, a Community institution or body may have the legal authority to choose between two or more possible courses of action. The Ombudsman does not seek to question such discretionary administrative decisions, provided that the body concerned has acted within the limits of its legal authority. Discretionary powers do thus not mean absolute powers. General limits to the discretionary powers are established by the jurisprudence of the Community Courts which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms[18].

## 2 The Bank's financing of the northern part of the M0 motorway in Hungary

2.1 The complainant alleged that the European Investment Bank's financing of the northern part of the M0 orbital motorway around Budapest violated both the Hungarian Constitution and other Hungarian laws, as well as Council Directive 85/337/EEC. The complainant claimed that it had written to the Bank asking it to withhold its loan.

2.2 The Bank explained that it applied its usual criteria in examining the project's viability from an economic, technical, environmental and financial point of view. The documents submitted by the Ministry of Transport, Communication and Water Management in Hungary, demonstrated that the environmental impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated. A follow-up on the environmental aspects took place after the decision to finance the project, and the findings were taken into account during the final implementation of the project.

2.3 Firstly, it is necessary to establish the responsibilities of the Bank as regards environmental considerations when granting loans. The Ombudsman notes that there are no established rules to this respect. However, there are rules, principles and guidelines, that should be considered in aiming at establishing these responsibilities. The Statute of the European Investment Bank[19] does not give much guidance as regards the environmental concern but states that the Board of Directors has sole power to grant loans upon applications submitted to it by the Management Committee (Articles 11 and 21). The Bank itself stated that its lending activities are guided by Community policies, which is natural and logical. To that respect it is important to point out that Article 174 of the EC Treaty mentions the environment as a Community policy. Further, there are several secondary legislative acts

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17 OJ 1998 C 292/168.

18 Also relevant in this context is Council of Europe Recommendation No. R (80) 2 which states that an administrative authority, when exercising a discretionary power:

1. does not pursue a purpose other than that for which the power has been conferred;

2. observes objectivity and impartiality, taking into account only the factors relevant to the particular case;

3. observes the principle of equality before the law by avoiding unfair discrimination;

4. maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;

5. takes its decision within a time which is reasonable having regard to the matter at stake;

6. applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case

See "The Administration and You: a handbook", 1996 p. 362.

19 Protocol (No A) to the Treaty establishing the European Community.

in relation to the protection of the environment, of which Council Directive 85/337/EEC[20] should be mentioned.

2.4 The Bank has issued an Environmental Policy Statement and published Environmental Guidelines on its Website. From these documents it is clear that the viability of projects is evaluated from an economic, technical, environmental and financial point of view, that consideration of environmental issues is an integral part of the project appraisal regardless of sector and further, that the appraisal verifies the projects' compliance with Community and/or national legislation. In countries aiming for EU membership, such as Hungary, Community legislation is an obvious guideline.

2.5 Usually, the basis for the environmental appraisal is the Environmental Impact Assessment (EIA) and other environmental studies carried out by or on behalf of the promoter. Should the EIA or other studies reveal a particular environmental concern the Bank will review the proposed abatement measures and may, if necessary, introduce appropriate covenants into the loan contract between the Bank and the borrower. According to the Environmental Policy Statement, there are limits to its role and responsibilities in the environmental field. Thus, the promoter is responsible for compliance with the legal obligations and standards relating to environment, including the obligation to carry out an EIA.

2.6 Against this background, the Ombudsman concludes that when granting a loan it appears to be the Bank's responsibility to check whether a proper EIA or other sufficient environmental studies have been carried out for the project. What is a proper EIA or environmental study must necessarily depend on the context but for applicant states, the appropriate requirements set by the Community legislation should be taken into account.

2.7 In the present case, the Bank appraised the environmental impact of the road project in 1993. Regarding the environmental impact of the by-pass being the subject of this complaint, the Ministry of Transport, Communication and Water Management supplied the Bank with an Environmental Assessment Summary. According to the Bank, the documents demonstrated that the impact of the by-pass construction and operation on land, water, air, landscape, built-up areas and fauna had been fully investigated and appropriate environmental impact reduction and mitigation measures had been included in the design of the project. The complainant alleged however in particular that a satisfactory investigation on air quality and residential areas was missing. The Ombudsman's inspection of the Environmental Assessment Summary revealed that the assessment covered the ca. 35 km section of road E77 north of Budapest of which the by-pass forms part and that the environmental effects of the project, as regards plans completed in August 1993, in relation to the impact on land, water, air, landscape, built-up areas and fauna were examined in the Summary, and further that mitigation measures had been foreseen.

2.8 According to the Environmental Policy Statement, the Bank will review the proposed abatement measures should the EIA or other studies reveal a particular environmental concern. Although the Ombudsman concludes that the Environmental Assessment Summary did not reveal any particular environmental concern, the Summary is dated August 1993, while some Plans for Approval for some sections of the road project were foreseen to be documented and completed in September and October 1993. It is however noted that a second Detailed Environmental Impact Study was carried out in 1995 on the initiative of the European Commission and the Bank. The study was carried out with the objective to compare the requirements of the Hungarian and EU environmental legislation applied to the project. The findings and recommendations were taken into account during the final design and implementation of the project and the Bank made disbursement of its loan conditional to receipt of confirmation by the Hungarian authorities that the relevant

[20] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

project components had received final environmental approval and development consent. For the by-pass relevant to the complaint, consent was given in July and September 1996.

2.9 In relation to the complainant's allegations that some risks had been pointed out by experts, the Ombudsman notes that the mere fact that differing views regarding the environmental effects of a project are put forward cannot automatically mean that the Bank is obliged to refrain from granting a loan when acting as a financing institution.

2.10 In view of the above findings, the Ombudsman finds it established that the Bank did confirm that a proper EIA had been carried out. Moreover, the Bank also ensured that a second study was carried out, and it made its loan conditional to receipt of confirmation by the Hungarian authorities of final environmental approval. The Bank did thus take due consideration of the environmental aspects as required and it appears that the Bank acted within its legal authority. The Ombudsman's inquiries did therefore not reveal any maladministration.

### 3 Conclusion

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

## 3.2 CASES SETTLED BY THE INSTITUTION

### 3.2.1 The European Commission

#### ALLEGED IRREGULARITIES IN THE HANDLING OF A PHARE CONTRACT

*Decision on complaint 471/99/ME against the European Commission*

*THE COMPLAINT*

In April 1999, the complainant, the Director of the Centre for European Policy Studies (CEPS), lodged a complaint with the European Ombudsman concerning Phare contract No 95-1111.00. The contract concerned the Approximation of Legislation in Romania and was awarded by the European Commission to a consortium headed by CEPS in 1995.

According to the complainant, the project fell into two quite distinct phases. During the first eighteen months, the consortium had considerable difficulty in fulfilling its obligations. The complainant therefore intervened directly in the project in 1997. A settlement was reached with a cut of approximately 20% in fees. The Principal Adviser was replaced and the Commission agreed to an extension of the project for a further six months until June 1998 so that most work could be completed.

The level of commitment and quality of work improved enormously in this last period and the Romanian government praised the consortium, its Principal Adviser as well as CEPS on several occasions. Unfortunately, at the same time, the Commission no longer administered the project rationally or reasonably. The complainant stated that CEPS never disputed the Commission's right and obligation to scrutinise the consortium's output and financial administration. The overriding problem during the last fifteen months had however been that CEPS received no detailed documentation indicating why and at what points the Commission was dissatisfied with the consortium's work. The complainant had tried to contact the Commission several times and enclosed a diary of its contacts with the Commission from the end of 1997 to April 1999 illustrating the Commission's behaviour.

Against this background the complainant alleged that (i) the Commission had not paid any invoices, and (ii) the Commission did not provide any information indicating what was wrong or why the invoices had not been paid.

*THE INQUIRY*

#### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission initially explained that within the framework of the Community's "Pre-accession Strategy", the

Commission concluded contracts with consultants in order to assist and advise the governments of the accession countries in central and Eastern Europe in all matters relevant to approximating their internal legislation to the Communities' "acquis communitaire". CEPS won the contract for Romania.

The implementation of the project was beset by problems from the start. According to the Commission, the provision of training and documentation to the Romanian authorities could be considered acceptable, but the reports established on various sectors of Romanian law were of poor quality. In 1997, this led to a reduction of CEPS's remit, a replacement of the Principal Adviser and a reduction in the Commission's payment for the services rendered up to June 1997.

Although the Commission admitted that CEPS's performance improved from then on, the poor quality of most reports submitted and the unacceptability of other reports, was still the main issue of contention between the parties. The Commission's main objections were summed up in a letter of 13 July 1999 to the complainant. As a result of a special audit carried out in 1998, and after thorough analysis of all reports submitted, the Commission had proposed a final settlement with respect to the disputed invoices for the period between July 1997 and June 1998. According to the Commission, no invoices were outstanding in the Commission's books.

As regards the complainant's allegation that the Commission did not provide information as to why the invoices were not paid, the Commission rejected this and referred to the diary attached to the complaint and the audit in 1998, thereby stating that CEPS was fully aware at all times of the issues.

The Commission concluded that CEPS may not be satisfied with the proposal for a settlement but knows very well why it was made.

### The complainant's observations

In his observations, the complainant maintained his complaint.

In additional letters to the Ombudsman, the complainant put forward a number of comments regarding the Commission's behaviour. The complainant inter alia referred to the fact that invoices relating to training had never been disputed by the Commission, still they were paid only in July 1999. The most significant delay was the substantive report itself for which it took the Commission eight months to make minor amendments although the text was repeatedly requested by the complainant.

## *FURTHER INQUIRIES*

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman asked the Commission to submit further information in relation to (i) why the non-disputed parts of the contract (work performed in relation to training and documentation) were not paid on an earlier stage but instead included in the financial audit, (ii) the Commission was asked to explain the time it took to issue two payments, (iii) the question of interest for late payments was raised, and (iv) the Commission was asked to comment on the allegation that during eight months, no significant changes were made to the substantive report.

### The Commission's second opinion

In its second opinion, the Commission put forward in summary the following points.

As regards the costs incurred during the period 1 July 1997 to 31 March 1998 (which included costs in respect of training), payments could not be made because of several difficulties, which it explained in more detail. It had decided that the financial audit should

comprise a complete examination of the contract. As regards the two payments, the Commission accepted that it took more time than normal to issue these and provided some reasons. As to the question of interest for late payments, the Commission put forward that it is for the contractor to request interest.

### The complainant's second observations

The Commission's second opinion was forwarded to the complainant for observations. No observations appear to have been received from the complainant.

### Further information

In May 2001, the Commission informed the Ombudsman that following meetings with the complainant in February and March 2001, a settlement agreement had been informally approved by both parties on 26 April 2001. The agreement would be processed within the Commission and then submitted to the complainant for counter-signature.

The Ombudsman forwarded this information to the complainant for comments. The complainant subsequently informed the Ombudsman that he had accepted the settlement proposed by the Commission and that it was signed on 15 May 2001. As part of the agreement, the complainant had undertaken not to pursue the complaint with the Ombudsman. Finally, the complainant thanked the Ombudsman for his efforts in this case.

## *THE DECISION*

### 1 The complainant's allegations concerning lack of payment, lack of information and the substantive report

1.1 The complainant alleged that the Commission had not paid any invoices and that it had not provided any information indicating what was wrong or why the invoices had not been. Moreover, regarding the substantive report, the complainant alleged that no significant changes had been made during eight months.

1.2 The Commission rejected the allegations and explained its standpoint both in its first and second opinion. It stated that the invoices had been paid and it had kept the complainant informed. As regards the substantive report, the Commission did not put forward any specific comments.

1.3 In May 2001, the Commission informed the Ombudsman that a settlement agreement had been informally approved by both parties on 26 April 2001. In July 2001, the complainant informed the Ombudsman that a settlement had been signed on 15 May 2001. As part of the agreement, the complainant had undertaken not to pursue the complaint with the Ombudsman.

1.4 The Ombudsman notes that a settlement has been reached between the Commission and the complainant. It therefore appears that the matter has been settled.

### 2 Conclusion

It appears from the Commission's comments and the complainant's observations that the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case.

## ALLEGED NON-PAYMENT OF PART OF SUBSIDY

*Decision on complaint 1364/99/OV against the European Commission*

### *THE COMPLAINT*

In November 1999, Mr D. made a complaint to the European Ombudsman on behalf of M., a European Research Institute, concerning the late payment of a subsidy for the year 1998 amounting to € 48 679. The complainant is the Director General of M., which has annual subsidy contracts with the Commission (DG I-B, External Relations), for its activities.

Problems started when the third contract (March 1998-March 1999) was signed. In November 1998, M. presented its financial accounts to DG I-B for the previous contracts. The financial controller of DG I-B carried out an audit on these accounts in January 1999. The Commission auditor was not satisfied with the accounts presented, and the transfer of funds to M. was blocked until the end of the audit. A new contract was finally signed on 15 July 1999.

The final audit report was notified to the complainant on 30 September 1999 and concluded that € 48 679 would be paid to M. (recovery from M. for the 1996 and 1997 subsidies, compensated by the 1998 subsidy still to be paid) as soon as M. approved the conclusions of the audit.

On 8 October 1999, M. wrote to DG I-B, asking for some changes on two points in the audit. In its letter of 22 October 1999 the Commission rejected these. M. then accepted the Commission's position by letter of 22 October 1999.

On 29 October 1999, the Commission however informed M. that the amount of € 48 679 would be paid in two separate instalments of € 26 879 (to be paid immediately) and € 21 800. The second payment, corresponding to the costs of the realisation of a book/study (in the framework of the 1997 activities) would be paid only after the finalisation of this work, for which the deadline was end 1999.

In his complaint to the Ombudsman the complainant therefore alleged that, as decided in the letter of 30 September 1999, DG I-B of the Commission should pay the entire amount of the subsidy of € 48 679 and not only the first part of € 26 879 as decided in the later letter of 29 October 1999.

In his letters of 7 December 1999 and 5 January 2000 to the Ombudsman, the complainant made a second allegation. He observed that, as a result of his complaint to the Ombudsman, the relevant services of the Commission had penalised M. by refusing further discussions not only as regards the payments which were the subject of the complaint, but also as regards the work programme for the year 2000. The complainant also indicated that on 5 January 2000 the book/study would be handed over to the Commission.

### *THE INQUIRY*

#### The Commission's opinion

In its opinion, the Commission observed that since 1996 M. had been receiving an annual subsidy to finance its costs. The payments were split into an advance payment and a final payment. The final payment was only made after the checking of the justification documents concerning the costs made by the beneficiary for the year in question. Unable to determine the exact amount of the costs eligible for the 1996 and 1997 subsidies because of the lack of exactitude and precision of the costs presented by the complainant, the financial manager decided at the end of 1998 to proceed with an audit for the subsidies 1996 and 1997.

The audit report of 20 May 1999 concluded that there was bad management of community funds and fixed the amounts to be recuperated (€ 97 928 for 1996 and € 37 022 for 1997). The complainant contested these amounts.

During the months of June and July 1999 meetings between the complainant, the auditing service and the former DG I-B were organised in order to allow the complainant to present new pieces and supplementary financial documents justifying the costs declared and to clarify the points raised in the audit. However, given that the complainant could not provide the necessary justifications to establish the accuracy of the financial information transmitted, the definitive conclusions of the audit fixed the amounts of undue payments for the 1996 subsidy (€ 91 794) and the 1997 subsidy (€ 13 460).

In the meantime it was decided to proceed with caution and to pay only part of the 1998 subsidy to M.. The 1999 subsidy contract was however signed on 19 July 1999 and an advance of 80% was paid to M. in July so that it could continue to function. As regards the perspectives for 2000, the Commission had included in its pre-draft budget a sum of € 200 000 for M. which was confirmed by the Council and the European Parliament. The complainant's request for subsidy would be dealt with according to normal budgetary procedures.

Moreover, the audit report established that the amount of € 21 800, declared for the carrying out of a study as part of the 1997 activity programme and which was still not finished by the end of July 1999, should be recuperated. The complainant having indicated that the work was just about to be finished, DG I-B intervened in order not to recuperate immediately this sum and to grant a supplementary lapse of time for the finalisation of the study until the end of 1999.

The definitive conclusions of the audit and the proposal of compensation of the undue amounts of 1996 and 1997 with the 1998 subsidy were communicated to the complainant on 30 September 1999 after the consultation of the financial controller. The complainant having contested certain points of the definitive conclusions, an exchange of correspondence took place in October 1999.

As regards the book/study, the Commission informed M. by letter of 29 November 1999 that it would proceed with the payment of € 11 000 but that the amount of € 10 800 would only be paid when the work was finalised. The Commission services consider that a certain financial caution has to be applied before paying the entire amount of a work which had to be handed over by end 1998. On 5 January 2000 the work was handed over to the Commission, but after verification it appeared that it was not in conformity with the specifications of the contract. Consequently the Commission was not able to proceed with the final payment. The complainant was informed by letter of 19 January 2000.

As regards the second allegation, the Commission observed that it never penalised M. because of its complaint to the Ombudsman. A meeting with the complainant was indeed cancelled in December 1999. This decision was taken in order to respect the complaint procedure started by the complainant (the text of the complaint had still not arrived at the responsible services). Once the complaint had been analysed, the contacts with M. were taken up again on 4 January 2000 and the complainant was received on 5 January 2000, i.e. one day before the sending of the second complaint to the President of the Commission. During this meeting a second meeting was planned for 13 January 2000 in order to discuss the activity programme for 2000. The Commission added that the draft 2000 activity programme and the 1999 activity report were officially handed over to the Commission only on 12 January 2000. During this meeting the Commission asked the complainant to make some modifications to the activity programme. Once those modifications would be received and accepted, the Commission services would proceed, in conformity with the applicable procedures, with the signature of the 2000 subsidy.

### The complainant's observations

In his observations the complainant observed that the Commission had credited M. with € 10 800 corresponding to the outstanding amount which was due for the realisation of the study. The complainant thanked the Ombudsman for his help in this case.

As regards the allegation that he would have been penalised for having complained to the Ombudsman, the complainant observed in his letter of 21 January 2000 that, since the Ombudsman's letter of 6 January 2000, his relations with the Commission services had significantly improved. He stated that on 13 January 2000 he could present the work programme of M. for the year 2000 to the Head of Unit of the DG Relex and that the Commission had given assurances that the difficulties were about to be solved.

## *THE DECISION*

### 1 The alleged non-payment of the outstanding part of the subsidy

1.1 The complainant alleged that, as decided in the letter of 30 September 1999, DG I-B of the Commission should pay the entire amount of the subsidy of € 48 679 and not only the first part of € 26 879 as decided in the later letter of 29 October 1999. The complainant thus claimed that the Commission should also pay the outstanding amount of € 21 800 corresponding to the costs of the study. The Commission observed that it would proceed with the payment of € 11 000, but that the amount of € 10 800 would only be paid when the work was finalised. However, after verification it appeared that it was not in conformity with the contract specifications. The Commission could therefore not proceed with the payment.

1.2 The Ombudsman noted that, as it appeared from the Commission's opinion, the reason why the Commission did not pay immediately the amount corresponding to the costs of the work on study was that the complainant had not finalised this work by the dead-line which was initially foreseen for the end of July 1999. After having first indicated that this amount should be recuperated, the Commission finally agreed to grant a supplementary lapse of time to the complainant for the finalisation of the work until the end of 1999. The work was finally handed over to the Commission on 5 January 2000.

1.3 In November 1999, the Commission informed the complainant that it would already pay the first part of € 11 000. However, given that the final work was not in conformity with the contract specifications, the Commission refused to pay that outstanding amount of € 10 800.

1.4 However, in May 2000, the complainant informed the Ombudsman that the Commission had finally paid the outstanding € 10 800 and thanked him for his help in this matter. The Ombudsman therefore considered that with regard to this aspect of the case, the Commission had taken steps to settle the matter to the satisfaction of the complainant.

### 2 The alleged penalisation because of the lodging of a complaint

2.1 The complainant alleged that, as a result of his complaint to the Ombudsman, the relevant services of the Commission had penalised M. by refusing further discussions not only as regards the payments which were the subject of the complaint, but also as regards the work programme for the year 2000.

2.2 The Commission stated that it had never penalised the complainant because of the complaint to the Ombudsman. The Commission indicated that a meeting with the complainant had been cancelled in December 1999 in order to respect the complaint procedure started by the complainant, and given that the text of the complaint had still not arrived at the responsible services. However, the Commission afterwards met the

complainant on 5 January 2000, as well as on 13 January 2000 to discuss the activity programme for 2000. Moreover, on 21 January 2000, the complainant informed the Ombudsman that since the Ombudsman's letter of 6 January 2000 to President Prodi, his relations with the Commission services had significantly improved.

2.3 On the basis of the above considerations, the Ombudsman found that with regard to this aspect of the case, the Commission had taken steps to settle the matter to the satisfaction of the complainant.

**3 Conclusion**

It appears from the European Commission's comments and the complainant's observations that the Commission has taken steps to settle the matter and thereby satisfied the complainant. The Ombudsman therefore decides to close the case.

## REFUSAL TO PAY AN ARTIST IN RESPECT OF HIS COPYRIGHTS

*Decision on complaint 81/2000/ADB against the European Commission*

*THE COMPLAINT*

The complainant is an illustrator. She was asked to provide Directorate General X of the European Commission with 8 illustrations to be used in information brochures about the European Union ("*Questions and answers about the EU*"). These brochures were first published in 1996. Some were reissued but the complainant was never informed or paid for it.

According to the complainant, the initial order form only foresaw one edition. It neither foresaw the payment of further editions, nor the transfer of the copyright to the European Commission. The complainant therefore contacted the Commission to agree on additional payments in respect of her copyrights for the reissues. The Commission refused because it was not foreseen in the initial agreement.

The complainant therefore lodged a complaint with the European Ombudsman concerning the Commission's refusal to pay her in respect of her copyrights for illustrations published by DG X of the European Commission.

*THE INQUIRY*

**The European Commission's opinion**

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

According to the order form the complainant was asked to create 8 illustrations for 6.000 FF each. On her invoice the complainant only mentioned that the artist would remain the owner of the illustrations which ought to be returned in a perfect condition. The payment of 48.000 FF was made on 25 October 1996. The complainant had never mentioned that this payment was only for the creation and not for the publication of the illustration. The Commission would never have paid only for the creation of works without having the right to publish them. Six illustrations have indeed been reissued with a slightly modified text. The new editions were almost identical to the previous ones. Thus the complainant had not been informed.

Nevertheless, despite the discrepancy of interpretations between the complainant and the Commission the latter would contact the complainant in order to try to find a friendly settlement.

### The complainant's observations

The European Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. In her reply of 14 June 2000, the complainant welcomed the Commission's desire to find a friendly settlement to the matter.

According to the French Code of Intellectual Property Rights, the Commission has legal obligations towards the artist. The settlement could of course not be based on the previous unsatisfactory agreement. It should be based on payments usually made in respect of copyrights for works copied on 6 million brochures and distributed throughout the European Union.

## *FURTHER INQUIRIES*

On 16 August 2000, the complainant informed the Ombudsman that despite the Commission's commitment of 11 May 2000 to contact the complainant in order to achieve a friendly settlement, no action had been taken. On 8 September 2000, the Ombudsman therefore contacted the Commission to inquire about the delay. On 16 November 2000, the Commission informed the Ombudsman that delays had occurred because of staff changes in the responsible DG and because of the summer holidays. In the meantime, the Commission had contacted the complainant. On 31 January 2001, the Commission informed the Ombudsman of its offer to pay 36.000 FF to the complainant.

On 26 March 2001, the complainant informed the Ombudsman that in its proposal, the Commission had left out important criteria when evaluating the amount to be paid to the complainant. The complainant considered the Commission's offer to be insufficient and proposed to agree on 50.000 FF. The Ombudsman communicated this information to the European Commission.

On 15 May 2001,the complainant informed the Ombudsman that in order to put an end to the dispute, she had accepted the Commission's latest proposal to pay her 42.000 FF.

## *THE DECISION*

### 1 Refusal to pay the complainant in respect of her copyrights

1.1 The complainant lodged a complaint with the European Ombudsman concerning the Commission's refusal to pay her in respect of her copyrights for illustrations published by DG X of the European Commission.

1.2 The Commission admitted that there had been a discrepancy between the Commission's and the complainant's interpretation of the original contract. Nevertheless it had the intention to find a friendly settlement to the matter.

1.3 The Ombudsman notes that on 11 May 2001, the complainant accepted a financial settlement of the matter proposed by the Commission.

### 2 Conclusion

It appears that the Commission took the steps to settle the matter and thereby satisfied the complainant. The Ombudsman therefore closes the case.

*Note : On 31 August 2001, the complainant thanked the Ombudsman and informed him that the Commission had proceeded with the promised payment.*

## COMMISSION'S LATE PAYMENT OF PROJECT ON AIDS PREVENTION

*Decision on complaint 423/2000/(IJH)JMA against the European Commission*

### *THE COMPLAINT*

Acting on behalf of the GAP Network, the complainant lodged a complaint registered 52/2000/RI with the Ombudsman in January 2000. The complainant claimed that the Commission had not made the last payment for a Community financed project undertaken by his organisation ("*Programme of evaluation on HIV/AIDS prevention targeting homosexually active men in the European Union by a Network of European homosexual organisations*").

The complainant explained that the GAP Network had advanced a large sum of money to finalise the programme by the end of 1998, as originally scheduled. Despite official assurances that the project carried out by the complainant had been evaluated positively, the Commission had not yet reimbursed the amounts due. In the light of the information submitted by the complainant in his first e-mail, it did not appear that any previous administrative approaches had been made towards the responsible institution. In the apparent absence of any previous administrative approaches, as required by Article 2, par. 4 of the Ombudsman Statute, the complaint was declared inadmissible and the Ombudsman decided to close the case.

When the complainant forwarded additional information in March 2000 which showed that he had had several exchanges with the Commission concerning the payment of his dues, the Ombudsman decided to open a new complaint (423/2000/(IJH)JMA), and to start an inquiry into the matter. The new information provided by the complainant described his written correspondence with the responsible Commission services, and included copies of these letters.

In summary, the complainant requested that the Commission pay him the sums due for the completion of the project financed by the institution.

### *THE INQUIRY*

#### The Commission's opinion

The complaint was forwarded to the Commission. The Commission first explained the background of the problem. It indicated that the Commission and the GAP Network had signed a contract for the implementation of the project "Programme of Evaluation of HIV/AIDS Prevention Targeting Homosexually Active Men in the European Union by a Network of European Homosexual Organisations", for a period of validity from December 1997 to December 1998. The financial support for this project was granted within the framework of the Community programme for prevention of aids and certain other transmissible diseases. The contract stipulated that the GAP Network should submit the final project report in mid-March 1999.

The Commission was aware that, as claimed by the complainant, the third and final payment for the implementation of the project had not yet been made, and regretted the protracted negotiations related to the closure of the file.

The institution explained that in April 1998, as well as in February 1999, a series of changes in the contract had been made. Moreover, part of the problem lay with Euroskills, the agency responsible for following-up the implementation of the project. Until the end of July 1999, the office for technical assistance, Euroskills, had assisted the responsible Commission services with the implementation of the aids prevention programme, due to the lack of available resources within the Commission for the day-to-day administrative and technical management of project files.

The final project report was dated March 1999. However, Euroskills requested supplementary information from the GAP Network, which was forwarded without delay. Due to

the large number of project files, Euroskills had not been able to settle the final payment request before its contract with the Commission came to an end, at the end of July 1999. At that time, staff within the Public Health Directorate took over the work previously done by Euroskills.

The Commission indicated that its services had to verify and approve the actual expenditure incurred on the basis of supporting documents, in order to respect provisions of financial management. An analysis of the request for final payment, also involving finalisation of contractual changes, had been made at the end of June 2000. Since the payment request did not contain sufficient supporting documents a letter was sent to the GAP Network. In July 2000, the Commission received a letter from the GAP Network containing supporting documents.

On the evidence submitted by the complainant, the Commission made the third and final payment for the project. The institution indicated that the GAP Network should have already received the final payment which had been made by the Commission services at the beginning of August 2000.

**The complainant's observations**

In June 2000, the complainant sent additional information to the Ombudsman concerning the latest development of the case. He indicated that the Commission had contacted the GAP Network in June, informing the complainant that the delay in the payment of the contract had been due to the need to complete the formalities resulting from the amendments introduced twice in the original contract. The Commission services had also requested a number of documents concerning the economic report of the project. The complainant sent these documents to the Commission in July 2000, and informed the Ombudsman.

By an electronic mail of December 2000, the complainant confirmed that the Commission had finally paid the sums due and expressed his gratitude to the Ombudsman for his assistance in finding a solution to the problem.

*THE DECISION*

On the basis of the information provided by the complainant and the opinion submitted by the European Commission, the Ombudsman concludes that the case has been settled by the European Commission to the complainant's satisfaction.

Against this background, the European Ombudsman therefore decides to close the case.

## COMMISSION'S FAILURE TO MAKE PAYMENTS

*Decision on complaint 469/2000/ME against the European Commission*

*THE COMPLAINT*

In March 2000, the complainant lodged a complaint with the European Ombudsman concerning the European Commission's alleged failure to make payments in relation to the death of his daughter, a former employee of the Commission. The complainant's solicitor had tried for several months to obtain payment, without success. The complainant claimed: 1) reimbursement of funeral expenses; 2) payment of salary and 3) payment of medical expenses.

*THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the European Commission. In its opinion the Commission stated that payments had been made in January, May and June 2000, and the case had therefore been closed.

The Commission also explained the reasons for the delays. As regards the expenses for the transportation of the body, the invoices had been submitted by the complainant on 19 November 1999 and acknowledged by the salaries unit on 8 December 1999. On 13 December 1999, the Commission had requested further information by fax concerning the complainant's bank account. The fax had been answered on 14 December 1999 but the information was still incomplete. On 27 January 2000, the Commission sent the complainant a fax containing the comments of the Directorate-General for Budgets together with a new financial details form for the complainant to complete. No reply was received to this fax. Another financial details form was sent in April 2000. The Commission received the completed form from the complainant on 2 May 2000 and this file was finally validated on 16 May 2000.

As regards the other claims, problems had occurred in relation to the validation of the complainant's bank account and the fact that these expenses could not be paid until the costs for the transportation of the body had been honoured.

### The complainant's observations

In his observations, the complainant stated that he also considered the case closed. He thanked the Ombudsman for his attention to the matter related to his daughter's death and for his intervention in the case. The complainant agreed that problems with his bank and other individuals had caused some delay, but expressed doubts as to the Commission's mention of sent faxes, since he did not have a fax number.

*THE DECISION*

### 1 The Commission's failure to make payments

The complainant alleged that the Commission had failed to make payments in relation to his daughter's death and he claimed payments. The Commission explained the causes of the delay and stated that all payments had in the meantime been made. The complainant agreed that the case could be considered as closed and thanked the Ombudsman for his intervention.

### 2 Conclusion

It appears from the Commission's opinion and the complainant's observations that the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case.

## LATE PAYMENTS TO PROJECT MANAGER

*Decision on complaint 562/2000/PB against the European Commission*

*THE COMPLAINT*

In April 2000, the complainant submitted some allegations against the Commission on behalf of IWB (Institut für Wirtschaftswissenschaftliche Bildung Radolfzell e.V). The complainant was a project co-ordinator for two EU-funded projects, namely LEONARDO DA VINCI pilot project SERVITEC (http.//www.eduvinet.de/servitec), and SOCRATES pilot project (25202-CP-2-97-1-DE-ODL-ODL). Both projects were related to EU education policies.

In regard to the LEONARDO DA VINCI project, the complainant provided the following background overview:

On 27 April 1998, the project contract was received from the Commission. The contract start date was set to be 8 December 1997.

On 30 June 1998, the complainant received the first project support payment (€ 80 000), about seven months after the commencement of the contract.

On 12 August 1999, new forms were published on the internet for the presentation of interim reports for the pilot project. However, those reports had to be submitted by 31 August 1999, and they furthermore required the making of new contracts to be signed by each contract partner. It turned out that it was not possible to get the required contract signatures from the project partners during the summer holidays. The complainant therefore asked for a prolongation of the deadline for submission of the interim report. The Commission granted a prolongation until 31 December 1999.

On 19 November 1999, the complainant submitted the interim report to the Commission.

On 22 December 1999, the complainant received an acknowledgement of receipt from the Commission. The receipt stated that the interim report had been received on 26 November 1999. According to the contract, the Commission should pay the second support payment within 60 days after receiving the interim report (in this case € 60 000).

After several requests, Mr. van Neuss of Directorate General XXII informed the complainant on 9 March 2000 (i.e. 104 days after the Commission's receipt of the interim report) that the evaluation of the interim report had not been finished, and that he had requested for a second support payment.

As a consequence of these delays, the complainant had to change planned meetings with the project partners, and in one case it was necessary to cancel booked hotel reservations because the bank credit line foreseen for the project (€ 30 000) had been used up.

Further correspondence with the Commission in March and April 2000 led to no results.

In regard to the SOCRATES project, the complainant stated that they had been waiting for more than 1½ years for the last support payment (€ 20 000).

The complainant pointed out that their contract with the Commission does not allow to charge to the Commission or to the project budget interest payments for necessary bank credits due to late payment by the EU. Under such conditions, small and medium sized enterprises cannot lead any pilot projects anymore without facing payment and financing problems. In addition, the payment problems severely hinder or make impossible the realisation of the positive ideas of the European Parliament in regard to a European education policy.

## *THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the Commission. The Commission submitted the following opinion.

The LEONOARDO DA VINCI project was selected in 1997, and was scheduled to run for three years. The contract was signed in April 1998. The first advance of the Community grant was paid in June 1998: € 80 000, representing 40% of the total Community grant for the project.

The deadline for submission of the interim report was 31 August 1999. However, the contractor requested an extension, which the Commission agreed to in its letter of 15 November 1999, extending the deadline to 31 December 1999. On 31 December 1999, the contractor sent the required supplementary documentation, namely originals of the contracts with two of his partners and the originals of the signatures of all the partners in respect of the financial tables. The Commission received this documentation on 7 January 2000.

The evaluation of the financial element of the report took place in February 2000, following which the contractor was sent a fax recommending him to request a codicil amending the contract budget since a budget heading had been exceeded. The evaluation of the content element of the report was completed on 8 March 2000. On 9 March 2000 the contractor was informed by the Leonardo Cell (CLEO) that the evaluation of the interim report had been completed and that the evaluator had proposed payment of the second advance.

On 20 March 2000, CLEO's Contract Service asked the contractor, by fax, to verify the account number for the project. The rectification was received by CLEO on 21 March 2000. Meanwhile, the contractor had sent a new letter to CLEO on 6 June 2000 requesting payment of this advance. CLEO informed him orally on 7 June 2000 that the advance would be paid on 8 June 2000.

A 3-month period of time elapsed between the approval of the interim report and payment of the second advance. Under the terms of Article 5 of the contract, the deadline for payment of the second advance is 60 days after acceptance of the interim report by the Commission, and not 60 days after receipt. The Commission accepted that a 30-day delay had occurred in this case.

In regard to the SOCRATES project, the delay in processing this contract was unacceptable (the Commission provided a detailed time-schedule of the project). The Commission's services apologised to the complainant, and applied urgency measures. Accordingly, payment was settled on 7 July 2000.

The Commission's services were taking measures to feed the necessary input into the new project management system, which, hopefully, will not allow that such delays go unnoticed anymore.

### The complainant's observations

The complainant chose not to submit observations. In January 2001, the Ombudsman contacted the complainant to ask if he considered the matter settled. The complainant confirmed that he did consider the matter settled, and thanked the Ombudsman for his intervention.

## *THE DECISION*

### 1 The allegations of undue delay in paying the complainant

1.1 The complainant alleged that there was:

a) undue delay in payment of the second stage of support for a Leonardo da Vinci project "Servitec". According to the complainant, the payment should have been made within 60 days of the date on which the interim report was received by the Commission (26 November 1999). However, by the date of the complaint, neither the payment nor an explanation for the delay had been received.

b) undue delay in payment of the final support payment due for a Socrates pilot project (25202-CP-2-97-1-DE-ODL-ODL). According to the complainant, the payment is 1? years overdue.

1.2 The Commission confirmed that there were undue delays, and took steps to pay the complainant. The complainant informed the Ombudsman that he considered the matter settled by the Commission.

**2 Conclusion**

On the basis of the information provided by the complainant and the Commission, the Ombudsman concludes that the case has been settled by the Commission. The Ombudsman therefore closes the case.

## DECISION NOT TO AWARD A SCIENTIFIC GRANT

*Decision on complaint 833/2000/BB against the European Commission*

*THE COMPLAINT*

In June 2000 a complaint was lodged against the Joint Research Centre (hereinafter referred to as "JRC") of the European Commission in Ispra. The JRC conditionally accepted the complainant for a scientific and technical grant. The JRC requested some documents and medical tests from the complainant. Furthermore, the JRC asked the complainant if the arrival date set suited him and what his plans were in respect of accommodation. During four months, the complainant made preparations in order to move to Ispra. The complainant was then informed without any official explanation, that the JRC was not able to award him a grant.

In his complaint, the complainant claimed that:

(i) the JRC did not notify him of the reasons for not awarding him a scientific grant;

(ii) at the JRC's request, the complainant submitted the results of a medical examination, which he had paid for himself without obtaining any refund from the JRC;

(iii) he incurred unnecessary removal expenses.

*THE INQUIRY*

**The Commission's opinion**

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

On 3 February 2000, the complainant applied for a research training grant from the JRC. By letter dated 7 March 2000, the complainant was informed that his application had been conditionally accepted. On 14 June 2000, the complainant was informed that the JRC was not able to award him a grant.

The Commission stated that the complainant was notified of the decision by letter of 14 June 2000. As regards the failure to reimburse expenses incurred for the required medical examinations, the fees charged for the medical examinations are refunded only on presentation of the receipts. The complainant submitted his receipts only on 5 June 2000. The JRC's accounts department made the payment after verifying the documents submitted. The payment order is dated 19 June 2000.

As to the unnecessary removal costs, the Commission stated that it could not be held responsible for decisions of applicants for grants to move before they have signed the relevant contract.

### The complainant's observations

The complainant maintained his complaint.

### The Commission's complementary opinion

The Commission sent a complementary opinion without a request from the Ombudsman. The Commission stated that following a further in-depth examination of this file, the Commission had come to the conclusion that the way in which the complainant's application for a grant was handled was not satisfactory.

At the beginning of 2001, appropriations facilitating the award of research training grants were unblocked within the JRC. As a result, at the beginning of February 2001, one of the units at the JRC's Space Applications Institute suggested a grant contract to the complainant which is due to be signed on 1 May 2001.

The Commission regretted the trouble to which the complainant had been put, and was pleased that a solution had finally been found.

### The complainant's complementary observations

The complainant informed the Ombudsman that he was completely satisfied with the results of the inquiry. According to him, the contract was signed on 2 May 2001.

The complainant expressed his sincere thanks to the Ombudsman.

## *THE DECISION*

### 1 Decision not to award a scientific grant

1.1 The complainant claimed that the JRC did not notify him of the reasons for not awarding him a scientific grant. Furthermore, the complainant claimed that he had not been reimbursed for his medical expenses and that he had incurred unnecessary removal expenses.

1.2 The Commission stated in its first opinion that the complainant received a notification dated 14 June 2000 and that his medical expenses were refunded on 19 June 2000 after he had submitted his receipts to the JRC. Furthermore, the Commission underlined that it cannot be held responsible for decisions of applicants for grants to move before they have signed the relevant contract.

1.3 In its complementary opinion, the Commission regretted the trouble to which the complainant had been put. The Commission informed the Ombudsman that the complainant had been offered a scientific grant and that the contract was due to be signed on 1 May 2001.

1.4 In his complementary observations, the complainant informed the Ombudsman that he is completely satisfied with the results of the inquiry. According to him, the contract was signed on 2 may 2001. The complainant expressed his sincere thanks to the Ombudsman.

### 2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears from the Commission's comments and the complainant's observations that the European Commission has taken steps to settle the matter and has thereby satisfied the complaint. The Ombudsman therefore closes the case.

## EXCLUSION FROM COVERAGE BY EC JOINT SICKNESS INSURANCE FOLLOWING ALLEGED DIVORCE

*Decision on complaint 1139/2000/JMA (Confidential) against the European Commission*

### *THE COMPLAINT*

The complainant, originally born in Africa, moved to Luxembourg in 1986 in order to work for X, a Commission official from Luxembourg. They married in Africa in February 1994, and soon after they formalised the marriage before the Luxembourg authorities. Following a request from X to the responsible Commission services, his wife's social security coverage was taken over by the Joint Sickness Insurance Scheme from June 1994.

In March 1999, at the request of X, a Court of First Instance in Africa declared his marriage with the complainant void. On appeal, however, the court reversed the first judgement a year later, and declared that the marriage was valid. The dispute was still at the time before the courts, since this last ruling had also been appealed.

On the basis of the first court ruling, X wrote to the responsible Commission services at the end of April, 1999 informing them of his change of status, and requesting that his former spouse be excluded from the Community Joint Sickness Insurance Scheme. In June 1999, the Commission services informed him that they had taken note of his change of status, and that the social security benefits of his former wife would expire as of 1 April 1999. They requested, however, some further information concerning the inscription of the divorce in the relevant Registry Office, and evidence of his change of status in Luxembourg. The complainant pointed out that she had been excluded from the Community Joint Sickness Insurance Scheme, even though X had not provided additional evidence.

The complainant wrote to the Commission on several occasions, and informed its services of the valid status of her marriage as recognised by the responsible African courts. As a result of this situation the complainant was forced to take a personal insurance policy with the Luxembourg social security.

In her complaint to the Ombudsman, the attorney acting on behalf of the complainant requested that the Commission,

1) reconsider its position to exclude the complainant from coverage by the Joint Sickness Insurance Scheme with effect from July 1999;

2) compensate the complainant for the expenses incurred as a result of that exclusion, and reinstate her to all her statutory rights as spouse of a Community official

### *THE INQUIRY*

#### The Commission's opinion

The Commission explained that the letter from X had led its services erroneously to believe that his married status had changed. They therefore proceeded to change their records, although only provisionally since some additional documents were still needed. Until now, X has not submitted the requested documents, and thus the Commission concluded that the complainant should still be considered as X's spouse.

As a result of this situation, the Commission decided to revert the status of X as married, and accordingly to reinstate the complainant to all her statutory rights as spouse of a Community official with effect from 1 April 1999, in particular as regards social security benefits with the Joint Sickness Insurance Scheme.

The Commission also agreed to reimburse her for all contributions paid to the Luxembourg Social Security, provided that these expenses were properly accredited.

### The complainant's observations

In December 2000, the attorney acting on behalf of the complainant wrote to the Ombudsman, enclosing with her letter a copy of the ruling given by the responsible court of appeal, which upheld the decision of the lower court and declared the marriage valid. The complainant underlined her wish to have the Commission reinstate her as of June 1999 in all her statutory rights as spouse of a Community official.

In her observations to the Commission's opinion, the complainant's attorney expressed her satisfaction to the Ombudsman for the successful resolution of the case. She raised in the letter, however, a number of questions to be addressed to the Commission, namely, whether the institution had forwarded information on the complainant's change of status (i) to the Community Joint Sickness Insurance Scheme, and (ii) to the institution's concerned services; (iii) whether the retroactive change of status would affect X's statutory rights, in particular as regards the payment of certain allowances; and (iv) whether the institution was considering instituting disciplinary proceedings against X.

The Ombudsman considered, however, that it was not pertinent to ask the Commission for comments on the questions raised by the complainant. As regards questions (i) and (ii), the Ombudsman noted that the Commission had formally agreed to reinstate the complainant to all her statutory rights as spouse of a Community official with effect from 1 April 1999. This was a formal undertaking made by the Commission, and thus it should have been binding for all its services. As for questions (iii) and (iv), the Ombudsman took the view that they raised new issues which did not belong to the subject-matter of this case, as set out in the original complaint. Hence, it was not appropriate to pursue any inquiry in connection to these issues. These questions ought to have been addressed first to the responsible services in the Commission, as an appropriate administrative approach in accordance with Article 2 § 4 of the Statute of the European Ombudsman.

### *THE DECISION*

On the basis of the information provided by the complainant and the observations submitted by the European Commission, the Ombudsman concludes that the case has been settled by the European Commission to the complainant's satisfaction.

Against this background, the European Ombudsman decides to close the case.

## LATE PAYMENT FOR WORK CARRIED OUT

*Decision on complaint 1591/2000/GG against the European Commission*

### *THE COMPLAINT*

In 1999 and 2000, the European Commission conducted a European campaign to raise awareness of the issue of "Violence against women". On 2 December 1999, the Commission concluded an agreement with the complainant, an association of homes for women, pursuant to which the latter should take part in the above-mentioned campaign whilst the Commission agreed to contribute up to € 50 871 of the costs. In its complaint lodged in December 2000, the complainant claimed that the Commission had failed to make a final payment of ATS 350 000.

### *THE INQUIRY*

The complaint was sent to the Commission for its comments.

### The opinion of the Commission

In its opinion, the Commission stated that a first instalment of € 25 436 had been paid on 25 May 2000. The final report and the final financial statement of the operation, together

with the request for the final payment of € 25 435, had been received by the Commission on 17 July 2000 and approved by the latter on 29 September 2000. The Commission claimed that due to internal problems the payment could not be carried out at that time. It added, however, that the payment of € 25 435 had been made on 6 February 2001.

**The complainant's observations**

No observations from the complainant were received by the Ombudsman. However, the complainant informed the Ombudsman that she had already received the outstanding payment and thanked the Ombudsman for his effort.

*THE DECISION*

**1 Failure to pay final instalment**

1.1 The complainant claims that the Commission has failed to pay the final instalment of ATS 350 000 due under its contract with the Commission concluded in December 1999.

1.2 In its opinion, the Commission explains that the final report and the final financial statement of the operation, together with the request for the final payment of € 25 435, were received by it on 17 July 2000 and approved by it on 29 September 2000. The Commission claims that due to internal problems the payment could not be carried out at that time. It adds, however, that the payment of € 25 435 has been made on 6 February 2001.

1.3 It appears that the Commission has taken steps to settle the matter and has thereby satisfied the complainant.

**2 Conclusion**

On the basis of the Ombudsman's inquiries into the present complaint, it appears that the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case.

## CLAIM FOR PAYMENT OF LAST SECTION OF A FUNDING OF AN ECOS-OUVERTURE PROJECT

*Decision on complaint 457/2001/OV against the European Commission*

*THE COMPLAINT*

In February 2001, Mr T. complained to the office of Mr van den Bos MEP on behalf of the municipality of Zutphen (Netherlands), concerning complications in a project in Tartu (Estonia) financed by the European Commission in the framework of the Phare/ECOS-Ouverture programmes. This complaint was transmitted to the Ombudsman on 27 March 2001. According to the complainant, the relevant facts were as follows:

The project in question was approved in December 1995. A lot of delays have complicated the project. In June 1997, the complainant had already lodged a complaint with the European Ombudsman alleging maladministration in the project (592/97/PD)[21].

The present complaint concerns the payments, which should be made by the Commission to the ECOS Ouverture Programme. It is the latter which subsequently pays the municipality of Zutphen, the leading partner of the project in question.

[21] The case was closed on 16 April 1999. No maladministration was found by the Ombudsman, because the Commission had admitted the malfunctioning of the project and had apologised for it. The Commission had equally indicated that further measures had been taken to improve the smooth working of the project. The decision can be consulted on the Ombudsman's Website http://www.euro-ombudsman.eu.int.

On 7 December 2000, the complainant received a letter from the Director of the ECOS-Ouverture programme according to which the Commission would not pay the last section of the funding (a total amount of € 2,749). The reasons were that, it appeared from an audit report requested by the Commission that the complainant had changed the project's objective and had not respected the timing of the project.

The complainant did not agree with this refusal and therefore wrote to the Commission (DG Regional Policy, Directorate F) on 19 February 2001. In its letter, the complainant observes that the project met with the short-term goals of the project proposal. No reply to the letter was received.

The complainant therefore lodged the present complaint, claiming that the Commission should pay the final section of the project, namely an amount of € 2,749 in accordance with the complainant's letter to the Commission dated 19 February 2001.

## *THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the Commission in April 2001. In its opinion, the Commission first described the background of the case. The complaint relates to a project entitled Tartu which is carried out within the ECOS-Ouverture Energy Programme (Energy II contract) and is co-financed by the European Regional Development Fund (ERDF). It concerns a co-operation project between the cities of Zutphen, Deventer, Dronten (in the Netherlands), Uppsala (Sweden) and Tartu (Estonia). The complainant is the project promoter under this programme. The Energy II contract was concluded in 1998 between the Commission and the Council of European Municipalities and Regions (CEMR) and the Glasgow City Council (GCC) (the management organisations) who in turn had a contract with the Tartu project, also concluded in 1998.

The Commission points out that this complaint is the second one lodged about the project Tartu with a view to a contract concluded in 1995 between the same parties as above. In the first complaint, the Commission was accused of maladministration. The Ombudsman however considered that there was no maladministration.

Following the contract concluded in 1995, the Commission granted an extension to certain Energy projects that wished to continue (i.e. the Energy II contract). Tartu was one of the projects for which an extension was requested.

In this (second) complaint, the complainant argues that the European Commission has failed to pay the final section of the project, for an amount of € 2,749. Further to its request, the Commission already informed the complainant in detail about the reasons for the non-payment. The key elements indicated in the Commission's letter of 3 April 2001 are the following:

As already indicated above, the contract of the Commission with regard to the ECOS-Ouverture Energy II Programme has been concluded with CEMR and GCC. These bodies manage the programme according to the contractual rules. Payments from the Commission are made directly to these bodies and not to the individual promoters of projects. It is the task of CEMR and GCC to make the payments including the final one, if justified by incurred eligible expenditure, to project promoters.

It follows from there that the complainant cannot claim any payment directly from the Commission, but must claim payment from the management bodies.

### The complainant's observations

The complainant first observed that its first complaint to the Ombudsman was duly substantiated, because two Commissioners wrote letters of apology.

The complainant indicated that the project objectives had been maintained, but that the execution required a change in order to obtain good results. The Commission's letter of 3 April 2001 concerned the authorised modification of the title of the project, but not the objectives or results. The complainant also pointed out that the project was a success and that there was an excellent collaboration between the local authorities and the population.

The complainant indicated having received the information from Glasgow that the last section would finally be paid.

As regards the Commission's argument that the management of the project lay with CEMR and GCC and that the complainant must claim payment from them and not from the Commission, the complainant observed that this was not in line with the reality: both CEMR and GCC had indicated that they could not pay because "Brussels" had not provided the necessary means. The complainant referred more particularly to a letter of 11 April 2001 received from ECOS-Ouverture, according to which the non-payment was due to a € 2 million savings carried out by the Commission on the ECOS-Ouverture contracts. This was in contradiction with the statements of the Commission in its letter of 3 April 2001. Both CEMR and GCC have complained about the situation to the Commission. A German contractor even withdrew from the project because it was not possible to work with the Commission.

In a telephone conversation with the Ombudsman services on 26 October 2001, the complainant indicated that the amount of € 2,749 had finally been paid on 24 October 2001. The complainant was satisfied with this concrete result. However he insisted on the fact that he was very dissatisfied in general with the delays and the whole organisation of the programme by the responsible Commission services. He therefore indicated that the Ombudsman should investigate the way the programme is led by the Commission.

## *THE DECISION*

### 1 The claim for the payment of the final section of the project

1.1 The complainant claims that the Commission should pay the final section of the project, namely an amount of € 2,749 in accordance with the complainant's letter to the Commission dated 19 February 2001.

1.2 The Commission stated that the contract with regard to the ECOS-Ouverture Energy II Programme had been concluded with the Council of European Municipalities and Regions (CEMR) and the Glasgow City Council (GCC) and that it is these bodies that manage the programme and should make the payments to the complainant. The complainant cannot claim any direct payment from the Commission itself.

1.3 The Ombudsman notes that in the framework of the ECOS-Ouverture Programme, the financial contributions are first paid by the Commission to the bodies with whom the Commission concluded a contract further to the call for proposals. It is subsequently that these bodies – who in fact constitute the financial intermediaries – transfer the amounts to the final beneficiaries of the project. In the present case, the Commission had thus to pay the contributions to the CEMR and the GCC who in turn had to pay the sums to the complainant.

1.4 From the complainant's observations and the telephone conversation with the office of the European Ombudsman, it appears that the complainant has finally obtained, on 24 October 2001, the payment of the outstanding amount of € 2,749. The complainant indi-

cated that he was satisfied with this concrete result. It appears therefore that this claim has been settled to the satisfaction of the complainant.

**2 Conclusion**

It appears from the complainant's observations that the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case.

*FURTHER REMARK*

With regard to the complainant's allegation, raised in his observations, that he was very dissatisfied in general with the delays and the whole organisation of the ECOS-Ouverture programme by the responsible Commission services, the Ombudsman transfers the observations to the Commission for its information and consideration of possible further action.

## 3.2.2 The European Investment Bank

### THE INVESTMENT BANK'S ABOLITION OF THE SPECIAL CONVERSION RATES

*Decision on complaint 863/99/ME against the European Investment Bank*

*THE COMPLAINT*

The complainant, since 1986 a pensioner of the European Investment Bank, lodged a complaint with the European Ombudsman in June 1999 concerning the Bank's decision to abolish the special conversion rates and to pay his pension in Euro instead of in pound sterling.

The Bank had since 1982, applied a special conversion rate to allow for differences in living costs in different Member States. According to the complainant, the Bank had decided to abandon this system and to introduce a new system allowing for payments in Euro only. For pensioners, a transitional period of three years starting on 1 January 1999 was foreseen. The complainant stated that already in the first year, the system had resulted in a loss of 14% for UK pensioners. By 1 January 2001, the loss could be as much as 35%.

The complainant put forward that a similar living bonus based on location is paid to pensioners from other Community institutions. There were no proposals from any other institution to abolish the system, thus only pensioners from the Bank were affected. The complainant referred to the so-called "Vademecum for EIB Pensionholders" which stated that:

*"If you have chosen the currency of your country of residence, your pension will automatically be calculated on the basis of the special conversion rate decided by the Council of the European Communities whenever this is more favourable than the average in Brussels"*

The complainant therefore believed that the Bank was obliged to continue indemnifying its pensioners in accordance with its undertaking mentioned in the Vademecum. The complainant had tried for six months to convince the Bank of this without success.

In summary, the complainant thus alleged that the Bank decided to abolish the old pension system unilaterally, although all the other institutions continued their system of compensation. According to the complainant, this resulted in a loss for pensioners resident in the UK. The complainant also referred to the provisions in the so-called "Vademecum for EIB Pensionholders".

The complainant claimed that the decision resulting in the cut of pensions paid by the Bank should be reversed or at least suspended until an agreed solution had been found.

*THE INQUIRY*

### The European Investment Bank's opinion

The complaint was forwarded to the European Investment Bank. In its opinion, the Bank explained the abolition of the special conversion rates. Initially, the Bank pointed out that its staff are not civil servants but has an employment relationship with the Bank on a contractual basis. This has been recognised by the Court of Justice. The employment relationship between the Bank and its staff is thus subject to a different legal framework than that laid down by the Staff Regulations for Community officials. The Bank's Staff Regulations provides for a pension scheme for its staff. This system is governed by the staff pension scheme Regulation adopted by the Bank's Board of Directors. According to the Regulation, the pension scheme benefits are payable at the seat of the Bank and may be paid either in Euro or in a currency of one of the Member States at the beneficiary's choice. Where the benefits are paid in a currency other than that in which the Bank's salary scale is expressed, conversion shall be at the same rate as that applicable to the transfer of staff salaries.

In 1982, the Bank introduced a system under which active staff members were permitted to receive part of their salary in a currency other than BEF/LUF at a conversion rate more favourable than the market exchange rate. The special conversion rates were also applied to payments of benefits under the Bank's pension scheme when the beneficiary chose payment in the currency of his place of residence rather than in BEF/LUF.

The special conversion rates were calculated on the "weightings" established by the Community institutions for the conversion of the remuneration paid to Community officials assigned to serve in countries other than Belgium and Luxembourg. In 1982, members of the staff were permitted to receive up to 35% of their salary in a currency other than BEF/LUF. In 1996, the amount was reduced to 16% of the salary for transfers to the Member State of origin and up to 35% upon providing supporting documentation of eligible personal expenditure in another Member State.

Pensioners could benefit from the special conversion rates for the entire amount of their pensions and each month the more favourable of either the market rate or the special conversion rate was applied. The Bank underlined that both for active staff and for pensioners, the benefit of the special conversion rates was introduced and maintained by the Bank as a unilateral measure and was never incorporated in the Bank's Staff Regulations or in the individual employment contracts. The existence of the special conversion rates was mentioned in the "Vademecum for EIB Pensionholders", a purely informative and legally non-binding leaflet distributed to members of staff upon departure from the Bank.

In June 1998, after consultation with the College of Staff Representatives and with the Pensioners' Association, the Bank announced that the system of special conversion rates would be terminated as of 1 January 1999 following the introduction of the Euro, which would also be the currency in which the Bank would pay its staff. The decision to introduce the Euro as the currency of denomination and payment of staff salaries and pensions was taken by the Bank's Board of Directors in June 1998. At the same time, the Bank's Management Committee took the decision to terminate the system of special conversion rates since the conversion rates for the Member States participating in the Monetary Union were to be fixed by the Council on 31 December 1998 (Council Regulation 2866/98). The system could therefore not be applied to these currencies from 1 January 1999. On grounds of equal treatment and fairness towards all staff, the special conversion rates were also terminated in relation to the currencies of the Member States which were not part of the Monetary Union. This decision was endorsed by the Bank's Board of Directors in February 1999. The abolition of the special conversion rates was communicated to both active staff and pensioners through an information bulletin delivered individually to staff

members and pensioners in June 1998. Each pensioner received a personal letter explaining the impact of the decision on his or her personal situation.

As regards the pensioners, the Bank's Management Committee decided to phase out the benefit of the special conversion rates gradually over three years. Thus, the special conversion rate was to be applied to a maximum of 75% during 1999, 50% during 2000 and 25% during 2001.

The Bank underlined that in its view the contested decision did not abolish the old pension scheme unilaterally as claimed by the complainant but only changed an additional benefit granted by the Bank. The pension scheme and the legal framework governing it remained in place and unchanged.

The Bank then informed the Ombudsman that regarding the abolition of the special conversion rates for remuneration paid to active members of the Bank's staff –following a conciliation procedure as foreseen by the Bank's Staff Regulations– a group of three members of the Bank's staff had filed an action before the Court of First Instance on 31 August 1999. The members thereby challenged the legality of the Bank's decision. According to the Bank, since the special conversion rates for active staff and for pensioners are interlinked, the outcome of the pending court case may also have implications for the Bank's pensioners.

As regards the situation of the pensioners in particular, the Bank also informed the Ombudsman that a conciliation procedure was initiated by the complainant and some other pensioners from the United Kingdom. A Conciliation Board as foreseen by Article 41 (2) of the bank's Staff Regulations was formed and gave its recommendations on 30 July 1999. The Bank's Management Committee decided not to adopt the measures suggested by the Conciliation Board but instead offered two supplementary benefits to the pensionholders, namely to compensate to a certain limit for the impact of the unexpected sharp rise of certain currencies outside the Euro such as the British pound sterling against the Euro and, secondly, to offer a one-off lump sum of social contribution. The group of British pensioners did subsequently express their disappointment with the Management Committee's proposal. However, discussions were still ongoing in view of defining the additional benefits to be offered to the pensionholders.

### The complainant's observations

In his observations, the complainant put forward in summary the following:

For some pensioners, but not for all, the Bank had offered a one-off flat-rate "social" payment. A form of compensation which was however insufficient even to balance the losses incurred during the three-year transitional period. According to the complainant, the President of the Bank had stated on several occasions that the abolition of the special conversion rates was not intended to reduce pensioners' incomes and that these consequences were accidental.

The complainant further underlined that the Bank had presented the abolition of the special conversion rates as an inevitable change, compelled by force majeure following the introduction of the Euro. The complainant believed that they were misinformed, as other institutions presumably under the same pressure, reacted quite differently and are continuing to pay their pensioners with weightings according to their country of residence and therefore ensuring that pensioners maintain the same purchasing power as before the Euro. At least the Bank should ensure an alternative to the special conversion rates matching as far as possible the pension regime adopted by other institutions. Moreover, the rates were introduced to take into account the differences in the cost of living. There was no change in the cost of living on 1 January 1999.

The pension Regulation of the Bank was changed on 1 January 1999. Article 33 of the Regulation now stated that benefits shall be paid in Euro and Article 81 states that the "new" Regulation enters into force on 1 January 1999 however the entitlements of insured having left the Bank before the entry into force, shall be determined on the basis of the Regulation applicable at the time of their departure. The Bank has thus incorrectly treated the amendment as affecting all pensioners. The complainant also claimed that when the Board took the decision to change the Regulation in June 1998, the Bank's administration did not reveal to the Board that the essential consequence of the proposed decision was not the currency of denomination of pensions but the abolition of the special conversion rates.

When the Bank amended the system of special conversion rates in 1995 and 1996, the purpose was to bring them in line with the rules applicable to the other institutions. The Bank thus explicitly exercised its autonomy to align itself with the other Community institutions. In 1998, by abolishing the special conversion rates, the Bank departed from that policy of alignment.

It is a principle common to the laws of the Member States that unilateral staff benefits may become an acquired right. In order to withdraw such a right the withdrawal must be fair and just, i.e. there should be appropriate reasons, consultations, compensations and a period of transition.

As regards the admissibility of the complaint, the complainant claimed that the Statute of the Ombudsman does not preclude the Ombudsman from dealing with the case.

The complainant concluded that the causes of the complaint were the following: discontinuation on 1 January 1999 (after 16 years) of pension payments by the Bank in pound sterling; derogation after 16 years of a purchasing power formula using EU weightings; breach of promises made in the "Vademecum for EIB Pensionholders"; refusal by the Bank to recognise the decision of the Conciliation Board of 30 July 1999; and discrimination against the Bank's pensioners compared to retired staff from all the other Community institutions.

### Suspension of the inquiry

From the information available to the Ombudsman, it appeared that on 31 August 1999, three members of the Bank's staff lodged an appeal with the Court of First Instance against the Bank concerning the Bank's decision to abolish the special conversion rates, case T-192/99, *Dunnett and others v. European Investment Bank*.

The Statute of the European Ombudsman[22] excludes from the Ombudsman's mandate the consideration of complaints related to cases before courts, or to court's rulings (Article 1 (3)), or those activities of the Court of Justice and the Court of First Instance acting in their judicial role (Article 2 (2)). In the event that the facts of a complaint is the subject of legal proceedings in progress, the Ombudsman shall declare a complaint inadmissible or terminate consideration of it, having to file the outcome of any inquiries carried out in relation to the case up to that point (Article 2 (7)).

Taking into account that the merits of the complaint was closely related to those of the complaint pending before the Court of First Instance, the Ombudsman did not find it possible to continue the inquiries into the case without taking a stand on matters which are currently before the Court of First Instance. In order to avert any such possibility, and to respect the letter and spirit of the above provisions of the Statute of the European Ombudsman, the Ombudsman decided on 22 May 2000 to suspend the inquiries into the complaint until the related case pending before the Court of First Instance had been resolved.

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22 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.

### Judgement of the Court of First Instance

On 6 March 2001, the Court of First Instance passed its judgement in case T-192/99[23]. The Court of First Instance found the appeal admissible as far as the claim for annulment of the applicants' salary statements for January 1999 was concerned. It concluded that the Bank had breached a general principle of employment law in that it did not hold bona fide consultations with staff representatives before adopting the decision on 11 June 1998. The Court therefore declared the decision of 11 June 1998 to abolish the system of special conversion rates unlawful.

## *FURTHER INQUIRIES*

After careful consideration of the file of the complaint and the judgement of the Court of First Instance in case T-192/99, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Bank to inform him of any measures the Bank would take in the matter following the Court's judgement.

### The Bank's second opinion

In its reply to the Ombudsman's further inquiries, the Bank explained that the Court's ruling annulled the relevant payslips of the three applicants. Thus, they would be treated as if the decision of June 1998 to abolish the special conversion rates had never been taken.

The Bank's understanding of the ruling was not that it obliged it to extend the application to all other staff members or pensioners affected, nevertheless, to ensure equal treatment, the Bank had decided that all staff members entitled to the special conversion rates should be treated on the same basis and that the same principle be applied to pensioners from January 1999. The practical arrangements arising from this decision were presently being put in place.

The Bank also informed the Ombudsman that extensive consultations with pensioners were already ongoing before the case was lodged with the Court of First Instance. With a view to taking better account of the pensioners' situation, further consultations were ongoing with the Pensioners' Association which progressed satisfactorily. The Bank ensured the Ombudsman that the forthcoming decision on the matter would of course be taken with full regard to the Court's ruling and in a manner resulting in equal treatment of all concerned.

### The complainant's second observations

The complainant found it most satisfactory that the Court's ruling on the special conversion rates would be applied by the Bank to all staff including pensioners and welcomed the Bank's undertaking. The complainant was thus satisfied as regards the past pension payments but felt that the Bank's assurances with regard to future pension payments lacked in precision. The complainant admitted that there were ongoing consultations with the Pensioners' Association but put forward that not all pensioners were members. The complainant therefore required that any future decision of the Bank should be applied to all pensioners. Finally, the complainant asked for a clarification as to whether the Bank admitted the validity of its undertaking in its so-called "Vademecum for EIB Pensionholders" and further that the Bank circulated the Court's judgement to all staff and pensioners.

[23] Case T-192/99, *Dunnett and others v. European Investment Bank*, [2001] ECR-SC IA-65, II-313.

*THE DECISION*

## 1 The abolition of the special conversion rates

1.1 The complainant alleged that the Bank decided to abolish the old pension system unilaterally, although all the other institutions continued their system of compensation. According to the complainant, this resulted in a loss for pensioners resident in the UK. The complainant also referred to the provisions in the so-called "Vademecum for EIB Pensionholders". The complainant claimed that the decision resulting in the cut of pensions paid by the Bank should be reversed or at least suspended until an agreed solution had been found.

1.2 Since the Court of First Instance was dealing with a case which raised this legal issue, the Ombudsman decided on 22 May 2000 to suspend the inquiries into the complaint until judgement had been passed on the matter.

1.3 On 6 March 2001, the Court of First Instance passed its judgement in case T-192/99[24]. The Court of First Instance found the appeal admissible as far as the claim for annulment of the applicants' salary statements for January 1999 was concerned. It concluded that the Bank had breached a general principle of employment law in that it did not hold bona fide consultations with staff representatives before adopting the decision on 11 June 1998. The Court therefore declared the decision of 11 June 1998 to abolish the system of special conversion rates unlawful.

1.4 Following the judgement of the Court, the Bank stated that the judgement annulled the relevant payslips of the three applicants and they would be treated as if the decision of June 1998 to abolish the special conversion rates had never been taken. In order to ensure equal treatment, the Bank had decided that all staff members and pensioners entitled to the special conversion rates should be treated on the same basis and the practical arrangements arising from the Court's decision were being put in place. Further, consultations were ongoing with the Pensioners' Association. The Bank ensured the Ombudsman that the forthcoming decision on the matter would be taken with full regard to the Court's ruling and in a manner resulting in equal treatment of all concerned.

1.5 The complainant expressed his satisfaction that the Court's ruling on the special conversion rates would be applied by the Bank to all staff including pensioners and welcomed the Bank's undertaking. Although, he expressed some concern in relation to the Bank's assurances and concerning the fact of whether the Bank would apply its decision to all pensioners.

1.6 The Ombudsman notes that the Court of First Instance dealt with the question of the legality of the Bank's decision of 11 June 1998 to abolish the system of special conversion rates and that the Court declared the decision unlawful. The Ombudsman also notes that the Bank has undertaken to take full account of the Court's judgement. The Ombudsman's understanding is therefore that the Bank will take a new decision in accordance with the Court's judgement. The Ombudsman has also been informed by both the Bank and the complainant that consultations are ongoing between the Bank and the Pensioners' Association. The Ombudsman therefore finds that the Bank has met the complainant's claim.

1.7 As regards the complainant's concern in relation to the Bank's assurances and concerning the fact of whether the Bank would apply its decision to all pensioners, the Ombudsman notes that the Bank stated that it would ensure equal treatment of all concerned.

[24] Case T-192/99, *Dunnett and others v. European Investment Bank*, [2001] ECR-SC IA-65, II-313.

1.8 As regards the complainant's request for a clarification as to whether the Bank admitted the validity of its undertaking in its so called "Vademecum for EIB Pensionholders" and further that the Bank circulate the Court's judgement to all staff and pensioners, the Ombudsman does not find it justified under these circumstances to pursue inquiries into these points that were raised by the complainant in his observations to the Bank's second opinion.

**2 Conclusion**

It appears from the Bank's second opinion and the complainant's observations that the Bank has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes the case.

## 3.3 FRIENDLY SOLUTIONS ACHIEVED BY THE OMBUDSMAN

### COMPENSATION FOR THE LATE PAYMENT OF A GRANT

*Decision on complaint 860/99/(IJH)MM against the European Commission*

*THE COMPLAINT*

According to the complainant (a firm), it took part in the programme European Community Investment Partners (ECIP) in November 1995 and was awarded a grant from Community funds. The first part of the grant was paid by the Commission in due time. However, the complainant alleged that the final payment was only made two years later on 15 June 1998 and that the Commission had provided no explanation for the delay. Due to the delayed payment, the complainant was forced to take a bank loan in order to cover the costs.

In its complaint to the Ombudsman on 25 June 1999, the complainant claimed compensation for the delay in receiving the final payment from the Commission. The amount claimed was ECU 13 132, corresponding to the interest on the bank loan.

*THE INQUIRY*

**The Commission's opinion**

In its opinion, the Commission made the following comments:

In the framework of the ECIP-Programme, a grant was awarded to the complainant for organising an investment promotion meeting between Chilean and Argentinean business representations. Based on the complainant's budgetary estimates, the Commission agreed to pay "50% of the actual costs or ECU 92 080, of both amounts whichever is inferior".

As the complainant's final accounts differed substantially from the specified estimates, the Commission restricted payment to a total of ECU 78 541, thus applying the customary payment formula to each item of expenditure. Nonetheless, the complainant claimed the total amount of ECU 92 080, as the formula in question was – in its view - only applicable to the total project costs, which exceeded the initial budget.

The Commission considered that it did not owe any further payment. After a lengthy dispute about the interpretation of the contract, especially as the Commission made exceptions to the rule in the past, the Commission a further ECU 13 438 in order to settle the dispute, whilst underlining the exceptional character of the payment.

As a result, the Commission refused to pay the complainant the amount of ECU 13 132 as a compensation for the alleged late payment of the contested ECU 13 438. The Commission considered the claim for further compensation to be unfounded.

**The complainant's observations**

In its observations, the complainant elaborated further the allegation of undue delay and submitted additional information which may be summarised as follows:

(i) The complainant stressed that in a prior action subsidised by the ECIP programme, the Commission agreed to the formula "35% of actual costs or ECU 59 366 of both amounts whichever is inferior" and paid ECU 59 366 within a period of six months. The second action was based on the same contract with the Commission except for the clause "50% of the actual cost or ECU 92 080 of both amounts whichever is inferior". As 50% of the real costs amounted to ECU 95 392 the Commission would therefore be liable to pay ECU 92 080 . In the present case however, the Commission agreed to pay only ECU 78 541. The complainant deduced that the Commission had changed the procedures without informing him and considered the fact that the Commission paid less than ECU 92 080 as a breach of contract. The complainant criticised the justification given by the Commission to have made exceptions in applying its procedures in the past.

(ii) The complainant developed further the claim of undue delay by the Commission and the lack of explanations for the delay. The complainant specified that it sent the report to the Commission by courier service on 22 February 1996. The Commission did not reply until December 1996 when it asked again for the documents, that apparently had been lost. On 22 October 1997, the Commission informed the complainant about its disagreement concerning the invoices submitted. It was only then that the dispute started, which ended on 3 March 1998 with a first incomplete payment by the Commission. On 18 June 1998, the complainant received the remaining payment. According to the complainant, the Commission did not react during 20 months before the actual dispute started and it took a further eight months until the Commission paid the whole amount due.

## *THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

### The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman considered regarding the first claim regarding the Commission's failure to react and to give explanations, that the delay was rather based on the Institution's lack of reaction than on the dispute between the two parties.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the Commission's failure to react and to give explanations during 20 months might establish an instance of maladministration.

Thus, the second allegation with regard to a compensation for the late payment of the grant, raised the difficult issue to determine whether there has been a breach of contract by either party. Since this issue ultimately had to be determined by a court that had jurisdiction in the matter, the Ombudsman limited his inquiry to examine whether the Community institution or body has provided him with a coherent and reasonable account of the legal basis for its actions. Although the Commission accepted the complainant's claim and paid the difference of ECU 13 438, there was a delay of 28 months in the payment of this amount without any explanations provided by the Commission.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the decision of the Commission to refuse to pay interests in a case of late payment might establish an instance of maladministration.

### The possibility of a friendly solution

On 7 December 2000, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to consider to pay due interest for late payment to the complainant.

In its reply of 13 February 2001, the Commission did not dispute the delay as such, but gave the following reasons for it:

(i) the Commission lost the financial report, probably as a result of the removal;

(ii) the technical assistance office was late in processing the payment request.

Even if in the contract no provision in the event of late payment was foreseen, the Commission took notice of its Communication of 10 June 1997 (SEC(97)1205), which was extended to standard grant contracts for external assistance[25] which feature standard provisions applicable to contract coming under the ECIP rule. According to the Commission's calculations the interests to be paid amounted to € 3 541,45. On 3 April 2001, the complainant accepted the Commission's proposal.

*THE DECISION*

**1 Compensation for the late payment of the grant**

1.1 The complainant claimed in its observations that during 20 months the Commission did not react to the report of the ECIP action forwarded by the complainant and did not provide any explanation for the delay. The complainant required compensation for the delay in receiving the final payment of the grant from the Commission. Due to the delayed payment, the complainant was forced to take a bank loan in order to cover the costs. Therefore, it claimed the amount of ECU 13 132 corresponding to the interests accumulated on the bank loan.

1.2 In its opinion, the Commission did only allude to this allegation with the term "lengthy dispute". The Commission considered that it did not owe any further payment. The Commission put forward that, as a substantial difference existed between the estimates and the final accounts indicated by the complainant, the Commission applied the customary formula to each item of expenditure. Thus, the sum the Commission would agree to reimburse would amount to ECU 78 541. It followed a lengthy dispute with the complainant about the interpretation of the contract, especially as the Commission had made exceptions to the rule in the past. In order to settle this dispute, the Commission exceptionally conceded to pay further ECU 13 438 to the complainant, whilst underlining the exceptional character of the payment.

1.3 It appeared that the Commission did not react till December 1996 when it claimed the documents again, which were already delivered by the complainant on 22 February 1996. Merely on 22 October 1997, the Commission expressed its disapproval with the invoices. The real "dispute" only started then and ended eight months later with the payment of the final amount. Therefore, the delay seemed to be based rather on the Institution's lack of reaction than on the dispute between the two parties. The complainant further claimed the failure of the Commission to explain its behaviour.

1.4 In his proposal for a friendly solution, in accordance with Article 3(5) of his Statute, the Ombudsman suggested that the Commission should consider to pay due interest for late payment to the association. In its reply, the Commission accepted the Ombudsman's proposal and offered to pay as compensation for the late payment of the ECIP grant € 3 541,45. On 3 April 2001, the complainant accepted the Commission's proposal.

[25] *Annex II to the General conditions applicable to grant contracts awarded by the European Community in the case of external aid*, pp. 8-9.

### 2 Conclusion

On the basis of the Ombudsman's inquiries into the complaint, a friendly solution has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.

## COMMISSION PAYS AMOUNT DUE SINCE 1995

*Decision on complaint 780/2000/GG against the European Commission*

*THE COMPLAINT*

In 1994, a German consultancy firm represented by the complainant, a German national, entered into a contract with the Commission for the provision of consultancy services within the framework of the 'Force' Programme (Project D/93B/1/3120/Q-FPC). According to the contract, the total cost of the project was € 88 000 and the maximum Community contribution was € 65 000. The contract further provided that 80% of the Community contribution were to be paid within 30 days of the reception of the duly signed contract. The remaining 20% were to be paid after the Commission had received and accepted the report and the financial statement that were to be submitted by the contractor by 14 November 1994 at the latest.

The complainant claimed the Commission had failed to pay the last instalment due to her firm. She further claimed that the Commission had failed to react to various inquiries she had made by telephone, fax and registered letter. According to the complainant, she had been assured by Mr. P. Louis from the Commission's services, on the occasion of a visit to the Commission on 5 November 1999, that payment appeared to have been made, that this had to be ascertained by electronic means in the 'Force' files and that she would be informed. The complainant alleges, however, that she was subsequently only informed that the 'Force' files were not accessible by electronic means. She then asked for a copy of the transfer form. No reply was received by her.

In her complaint to the Ombudsman lodged in June 2000, the complainant made the following allegations:

– the Commission should send her a copy of the transfer form;

– the Commission should pay the relevant sum if it had yet not done so.

*THE INQUIRY*

**The opinion of the Commission**

In its opinion, the Commission made the following comments:

The 'Force' programme had officially terminated in 1995. The files relating to this programme had then been entrusted to S.A. Agenor, the technical assistance office of the Commission for the implementation of the 'Leonardo da Vinci' programme (1995-1999) with a view to closing the remaining projects. However, by the time this technical assistance office was closed in February 1999, a certain number of files including the complainant's had still not been closed.

Unfortunately the Commission was not in possession of the relevant files which had been sealed by the Belgian judiciary in February 1999 and had still not been returned. The Commission did thus not have access to these files at the moment and was therefore unable immediately to comply with the complainant's requests.

On 6 September 2000, the Commission had written to the Belgian *juge d'instruction* in order to ask for access to the files relating to the complainant's case. The Commission was

unable to give a real explanation as to what had happened in the present case before having had access to these files. The Commission had also written to the complainant, on 20 October 2000, in order to ask her to supply the Commission with a copy of her own documents relevant to the case.

### The complainant's observations

In her observations (which were addressed to the Ombudsman after the complainant had received the Commission's letter of 20 October 2000), the complainant claimed that she had already provided the Commission with copies of her documents on several occasions. She also claimed that on the occasion of her visit to the Commission in November 1999 she had found that the documents were with the Commission. In any event, documents relating to the payment should be in the Commission's service in charge of paying out such amounts.

## *FURTHER INQUIRIES*

### Request for further information

Having received the complainant's observations, the Ombudsman considered that he needed further information in order to deal with the complaint. He therefore asked the Commission to inform him (1) whether *all* the relevant documents were presently in the hands of the Belgian judiciary and (2) whether the Belgian judiciary had replied to its letter of 6 September 2000 and, if not, what measures the Commission proposed to take in order to deal with the complainant's case.

### The Commission's reply

In its reply, the Commission made the following comments:

The Commission had in the meantime re-established a copy of the relevant file in the archives of the Directorate-General Education and Culture. No proof of payment for the relevant sum had been found there. Neither was there any trace in the Commission's internal accounting system of a payment made by the technical assistance office. The Commission's services had thus proceeded to a new evaluation of the file. However, this evaluation had not permitted to close the file and it had turned out to be necessary to ask the complainant for further information notably in relation to questions raised by the auditors of the Commission as a result of a control mission concerning another 'Force' project for which the complainant had also been the co-ordinator. The Commission had therefore written to the complainant on 29 January 2001. The file would be dealt with on the basis of the supplementary information that had been requested. The Commission's services would give priority to this case.

The Belgian authorities had replied on 24 January 2001, allowing the Commission to have access to the files concerned. The Commission was actually in the process of cross-checking the information in its possession with that contained in the original file.

### The complainant's observations

In her observations, the complainant stressed that she had already sent her documents to Mr Louis on several occasions. Regarding the other project mentioned by the Commission (project E/92/2/1608), the complainant claimed that she had never received the evaluation report that the Commission had announced it would send to her.

The complainant submitted a copy of the Commission's letter to her of 29 January 2001 in which she was asked to provide various items of information within 30 days. She

pointed out that gathering this information would necessitate a lot of work, given the lapse of time that had occurred. The complainant therefore asked for an extension of time[26].

On 31 March 2001, the complainant informed the Ombudsman that she had provided the information that had been requested of her.

## *THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

### The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations and the results of the further inquiries, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman noted that according to Article 5.1 of the contract payment of the remaining 20% were to be made within 60 days of the submission of the report and the financial statement by the contractor "subject to acceptance" by the Commission. It appeared that in the present case the Commission had not yet been able to assure itself that the financial statement could be accepted. Since the complainant's claim for payment was subject to this acceptance, it appeared that the Commission was not yet bound to make a further payment.

However, according to the contract the contractor had to hand in the report and the financial statement by 14 November 1994 at the latest. The Commission had not claimed that this duty had not been complied with. It followed that more than six years after that date the Commission was still not able to deal with the complainant's claim. The Ombudsman considered that even taking into account the need to verify certain issues or ask for further information this delay was manifestly excessive. The fact that part of this delay might be due to a failure to proceed with the matter on the part of Agenor could not exonerate the Commission. The Ombudsman further noted that whilst the Commission had argued at the beginning that it was unable to deal with the case since the relevant documents had been sealed by the Belgian judiciary, in its reply to his request for further information it had stated that it had in the meantime re-established a copy of the relevant file in the archives of the Directorate-General Education and Culture.

The Ombudsman's provisional conclusion from these considerations, therefore, was that the failure by the Commission to deal with this matter within a reasonable period could be an instance of maladministration.

### The possibility of a friendly solution

On 10 April 2001, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman suggested that the Commission should finalise its assessment of the complainant's claim as quickly as possible and pay out the relevant amount (to the extent that it was finally recognised by the Commission).

In its reply of 28 June 2001, the Commission informed the Ombudsman that on the basis of the documents submitted by the complainant it appeared that the latter's claims in respect of staff costs were appropriate and conclusive. The Ombudsman would be informed when the balance due would be paid to the complainant. On 16 July 2001, the Commission informed the Ombudsman that a sum of € 7 403 had been paid to the complainant and that the complainant had been informed accordingly.

In her observations sent on 24 August 2001, the complainant informed the Ombudsman that she was satisfied with the payment made by the Commission. She took the view,

[26] In a telephone conversation with the Ombudsman's Office on 26 February 2001, the complainant was advised that any such request had to be addressed to the Commission.

however, that interest should be paid by the Commission on account of the delay in payment and of the costs she incurred pursuing her claim.

*THE ADDITIONAL INQUIRY*

The complainant's additional claim was submitted to the Commission for its opinion. On 12 November 2001, the Commission acknowledged that interest at a rate of 7.5% should be paid for the period from 27 February 1995 until 25 June 2001 (the date when payment had been made). The resulting sum of € 3 422,62 would be paid out to the complainant.

On 23 November 2001, the complainant informed the Ombudsman that the sum calculated by the Commission was acceptable. She insisted, however, that the Commission should pay out this sum before the end of the year.

*THE DECISION*

**1 Failure to pay the relevant sum**

1.1 The complainant claimed that the Commission should pay the balance due under the contract concluded in 1994 between a German consultancy firm represented by the complainant and the Commission for the provision of consultancy services within the framework of the 'Force' Programme (Project D/93B/1/3120/Q-FPC).

1.2 On 16 July 2001, the Commission informed the Ombudsman that a sum of € 7 403 had been paid to the complainant and that the complainant had been informed accordingly.

1.3 The complainant informed the Ombudsman that she was satisfied with the payment made by the Commission.

1.4 It appears from the Commission's comments and the complainant's observations that the Commission has taken steps to settle this aspect of the complaint and has thereby satisfied the complainant.

**2 Interest to be paid**

2.1 In her observations on the Commission's reply to the Ombudsman's proposal for a friendly solution, the complainant claimed that interest should be paid by the Commission on account of the delay in payment and of the costs she incurred pursuing her claim.

2.2 On 12 November 2001, the Commission acknowledged that interest amounting to € 3 422,62 would be paid out to the complainant.

2.3 On 23 November 2001, the complainant informed the Ombudsman that the sum calculated by the Commission was acceptable. She insisted, however, that the Commission should pay out this sum before the end of the year.

2.4 The Ombudsman trusts that the Commission will pay the relevant sum as quickly as possible.

2.5 It thus appears that the Commission has taken steps to settle this aspect of the complaint and has thereby satisfied the complainant.

**3 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears that the Commission has taken steps to settle the matter and has thereby satisfied the complainant. The Ombudsman therefore closes his file.

## 3.4 CASES CLOSED WITH A CRITICAL REMARK BY THE OMBUDSMAN

### 3.4.1 The European Parliament

#### WITHDRAWAL OF A FORMER MEP's ENTRY PASS

*Decision on complaint 1250/2000/(JSA)IJH against the European Parliament*

*THE COMPLAINT*

In October 2000, a lawyer complained against the European Parliament on behalf of a Member of the European Parliament, Mr Koldo GOROSTIAGA and a former MEP, Mr Karmelo LANDA.

According to the complaint, Mr GOROSTIAGA invited Mr LANDA to assist him in his work during the first part-session of the European Parliament in Strasbourg in October 2000. As a former MEP, Mr LANDA was in possession of an entry permit, which entitled him to have access to the premises of the European Parliament. The security service of the European Parliament had contacted Mr LANDA in order to deliver this entry permit to him in June 2000.

On Thursday 5 October 2000, two officers of the security services of the European Parliament came to the office of Mr GOROSTIAGA MEP, in order to carry out an order to expel Mr LANDA from the premises of the Parliament. The security officers said that the President of the European Parliament had made a decision to this effect. However, they were unable to produce a copy of the decision when requested to do so. The security officers made a telephone call to the services of the Presidency. Those services then faxed a decision of the Bureau of the Parliament, dated 14 July 1997, to withdraw all Mr LANDA's rights as a former MEP. This decision had never been notified to Mr LANDA, who was previously unaware of it.

Finally, two high officials of the European Parliament came to the office of Mr GOROSTIAGA. They took away Mr LANDA's entry permit as a former MEP, purportedly in application of the Bureau's decision of 14 July 1997. They provided Mr LANDA with a visitor's entry permit, valid for 5 October 2000.

On the basis of the above facts, the complaint is that:

- the Bureau's decision of 14 July 1997 is null and void for the following reasons: it lacks any legal basis, was neither signed nor notified to the person concerned; and was taken without respecting the rights of the defence since Mr LANDA had no opportunity to make oral or written observations;

- Mr LANDA was entitled to be on the premises of the European Parliament and the decision to expel him on 5 October 2000 was unsigned, gave no reasons and was not properly notified to him, since it was not even made in writing.

The complainants claim that:

- Mr LANDA should be re-established in all his rights as a former MEP

- the persons responsible for the incident should be subject to exemplary sanctions in order to prevent such actions in future.

*THE INQUIRY*

**The European Parliament's opinion**

The opinion of the European Parliament made, in summary, the following points.

*The decision to withdraw Mr LANDA's entry permit*

At its meeting of 16 July 1997, the College of Quaestors concluded that the rules and procedures applicable to honorary members should be extended to former MEPs, whose rights and privileges are essentially comparable to those accorded to honorary members. Article 4 of the rules concerning honorary members, adopted by the Bureau on 30 November 1988, provides that the title and privileges of an honorary member may be with-

drawn, in case of abuse, by decision of the President, on a proposal of the College of Quaestors, after consulting the Bureau.

At the meeting of the Bureau on 17 July 1997, Mr BALFE, a Quaestor, recalled that the rights accorded to former MEPs are in the nature of social facilities and in no way authorise them to pursue their political activities in Parliament. Mr GUTIÉRREZ DÍAZ, Vice-President, declared that Mr LANDA had acted as an apologist for murders carried out in the Spanish Basque country by a terrorist organisation. Mr VERDE I ALDEA, Vice-President, criticised Mr LANDA for pursuing anti-democratic activities from the Parliament. The Bureau then decided unanimously to withdraw the advantages accorded to Mr LANDA as a former MEP.

In accordance with normal practice, the minutes of the meeting of the Bureau of 14 July 1997 were communicated to the security service to be implemented. The minutes were probably not directly communicated to Mr LANDA.

The security service did not withdraw Mr LANDA's entry permit following the Bureau's decision since they did not have his address, nor did they note his presence on the premises of the Parliament. The security service made an error in agreeing to Mr LANDA's request for a new entry permit in June 2000.

*The mandate of the Ombudsman*

Contrary to what the complainants appear to believe, former MEPs have no right to enjoy the facilities that Parliament accords to them. These facilities are accorded to them in the exercise of Parliament's power of internal organisation.

From a legal perspective, the decision to withdraw privileges given to a former MEP and, in particular, the decision as to what constitutes an abuse of such privileges is a political activity of the European Parliament, dealt with by a political body according to political criteria.

Insofar as the complaint contests the validity of the decision made in 1997 to withdraw Mr LANDA's privileges as a former MEP, it is therefore outside the mandate of the Ombudsman.

*The validity of the decision of 14 July 1997*

The Community Courts recognise the rights of the defence as general principles of Community law. However they apply the right to be heard only in cases involving a legal relationship between a natural or legal person and the institution concerned. The present case merely concerns facilities that Mr LANDA wishes to enjoy.

Mr LANDA could not have challenged the Bureau's decision under Article 230 EC because it did not produce legal effects which are binding on him and capable of affecting his interests by bringing about a distinct change in his legal position.[27]

Furthermore, the Bureau cannot be assimilated to an administrative body applying rules that create rights and obligations. Nor was Mr LANDA gravely damaged in his interests, since on 5 October 2000 he was able to enter the European Parliament and remain there even after his entry permit as a former MEP had been removed.

As regards the duty to give reasons for decisions, Article 253 EC, which is cited as the source of the obligation in the Charter of Fundamental Rights of the European Union, applies only to acts having legal effects. According to the established case law, the purpose of the duty to give reasons is to allow the person concerned to ascertain whether the decision is vitiated by a defect which may permit its legality to be contested and to enable the

[27] Case 60/81 *IBM v Commission* 1981 ECR 2639 Para 9.

Court to review the legality of the decision. Since its decision could not have been legally challenged, the Bureau was under no obligation to give reasons.

As regards the complainants' argument that all decisions unfavourable to an individual should be signed and notified to the affected person, with reasons, no such general obligation exists in Community law. The normal practice in the European Parliament is that decisions of the Bureau are notified to MEPs through the minutes, of which every Member receives a copy.

In any event, the decision of the Bureau was adequately reasoned and the text of the decision was notified to the complainants on 5 October 2000. Hence, the complainants no longer have any legitimate interest in this aspect of the complaint.

If the Bureau were to adopt a similar decision today, it would be obliged, at least politically, to take account of the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union. This right includes the right of every person to be heard, before any individual measure which would affect him, as well as the obligation of the administration to give reasons for its decisions. However, the drafters of the Charter did not limit themselves to a codification of existing rights and the European Parliament cannot be criticised for failure to comply in 1997 with a provision which was drafted and proclaimed only in the year 2000.

### The complainants' observations

In his observations, the complainants' legal representative complained that he had received no reply from the European Parliament to his request that the complete file of material and documents concerning the adoption of the contested decisions should be communicated to him. He argued that the failure to reply violates Article 255 EC, the European Parliament Decision of 10 July 1997 on access to its documents as well as Articles 171 and 172 of the Parliament's Rules of Procedure.

The legal representative contested the European Parliament's legal argument that the Ombudsman has no mandate to deal with the complaint. He pointed out in particular that Articles 22 and 25 of the Rules of Procedure of the European Parliament refer to administrative functions of, respectively, the Bureau and the Quaestors. Furthermore, according to the legal representative, the European Parliament must, on request, recognise a former MEP as such and furnish him with an identity card and the rights attached thereto. This ensures that there can be no difference of treatment between former MEPs. Withdrawal of an entry permit from a former MEP is an administrative act, which the Ombudsman can supervise.

As regards the events of 5 October 2000, the legal representative argued that neither complainant had committed any abuse that morning and that the order for expulsion was therefore disproportionate and an abuse of power.

The legal representative also observed that the competent organ to decide on cases of abuse by a former MEP is the Presidency, acting on a proposal from the Quaestors, after consulting the Bureau. The Bureau had no competence to decide the matter itself. Furthermore, there were discrepancies in the dates, since the Bureau had apparently made a decision on 14 July 1997, which took account of a meeting of the Quaestors of 16 July 1997 and of allegations made on 17 July 1997.

The legal representative also repeated that the decision had not been communicated to Mr LANDA within a reasonable time and that he had not been heard. As regards the reasoning of the Bureau's decision, it was vague, uncertain and imprecise.

The legal representative concluded that the case should be dealt with through a friendly solution under Article 3 (5) of the Statute of the Ombudsman, leading to restoration of the former MEP's rights and to an apology from the Presidency to the complainants.

*THE DECISION*

**1 The Ombudsman's competence to deal with the complaint**

1.1 The European Parliament disputes the competence of the Ombudsman to deal with the complaint, insofar as the complaint contests the decision of the Bureau to withdraw the entry permit of a former MEP. According to Parliament, former MEPs have no right to enjoy the facilities that it accords to them in the exercise of its power of internal organisation. From a legal perspective, the decision to withdraw a privilege from a former MEP and, in particular, the decision as to what constitutes an abuse of privilege is a political activity, dealt with by a political body according to political criteria: the Ombudsman therefore has no competence in the matter.

1.2 According to the Court of Justice, the power of internal organisation authorises the institutions to take measures to ensure their internal operation, in conformity with the interests of good administration.[28] The Ombudsman therefore considers that he is competent to deal with a complaint which concerns possible maladministration by the European Parliament in the exercise of its power of internal organisation.

1.3 The Ombudsman notes that the power of internal organisation involves extensive discretionary powers and recalls that he does not question discretionary administrative decisions, provided that the institution has acted within the limits of its legal authority.

**2 The decision to withdraw the entry permit of a former MEP**

2.1. According to the complainants, the Bureau's decision to withdraw the entry permit of a former MEP is null and void. They argue that the decision lacks any legal basis; was neither signed nor notified to the person concerned; and was not made by the competent organ of Parliament. They claim that the former MEP's rights should be restored.

2.2 According to Parliament, former MEPs have no right to enjoy the facilities that Parliament accords to them. The Bureau cannot be assimilated to an administrative body applying rules that create rights and obligations. Its decision to withdraw a former MEP's entry permit does not produce legal effects which are binding on and capable of affecting the interests of the former MEP by bringing about a distinct change in his legal position.

2.3 The Ombudsman notes that the role of MEPs as democratically elected representatives of the peoples of the States is enshrined in the EC Treaty and in Article 39 of the Charter of Fundamental Rights of the European Union. In contrast, the status of former MEPs is recognised only in Parliament's measures of internal organisation. Those measures foresee the possibility of withdrawal of an entry permit in the case of abuse.

2.4 The Ombudsman is not aware of any rule or principle which could prevent Parliament from using normal administrative procedures to apply the measures which it has adopted concerning entry permits for former MEPs. Normal administrative procedures include the requirements considered in the next section of this decision. However, they do not necessarily involve all the formalities which attach to a decision concerning legal rights and obligations.

2.5 The Ombudsman's inquiry has revealed no evidence that could put in question Parliament's legal authority, as an Institution, to withdraw the former MEP's entry permit. The Ombudsman does not consider it necessary or appropriate, in this case, to inquire into

[28] Case C-58/94, *Netherlands v Council*, [1996] ECR I-2169, paragraph 37.

the allocation of competences between different organs of Parliament, or the precise dates on which those organs dealt with the case.

2.6 The Ombudsman's inquiry has therefore revealed no maladministration in relation to this aspect of the case.

## 3 The right to be heard and the duty to give reasons

3.1 The complainants allege that the Bureau's decision to withdraw the former MEP's entry permit was taken without respecting the rights of the defence, since he had no opportunity to make oral or written observations, nor was he notified of the decision or the reasons for it.

3.2 According to Parliament, the Community Courts apply the right to be heard only in cases involving a legal relationship between a natural or legal person and the institution concerned. The present case merely concerns facilities which the former MEP wishes to enjoy and no challenge to the Bureau's decision was possible under Article 230 EC.

3.3 Again according to Parliament, the duty to give reasons exists only in cases where the decision concerned could be challenged in Court. The decision of the Bureau in this case could not have been so challenged and the Bureau therefore had no obligation to give reasons. In any event, the decision of the Bureau was adequately reasoned and the text of the decision was notified to the complainants on 5 October 2000.

3.4 Parliament also acknowledged that if the Bureau were to adopt a similar decision today, it would be obliged, at least politically, to take account of the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union. However, Parliament considers that the drafters of the Charter did not limit themselves to a codification of existing rights and that it cannot be criticised for failure to comply in 1997 with a provision which was drafted and proclaimed only in the year 2000.

3.5 Parliament's argument therefore seems to be that the Charter of Fundamental Rights could be a purely political instrument, in which case citizens would have no right to be heard before an adverse decision, or to know the reasons for such a decision, unless they also have the right to challenge the decision in Court.

3.6 In the Ombudsman's view, Parliament's argument is wrong in law.

3.7 As regards the right to a hearing, the Court of Justice has stated that "In accordance with a general principle of good administration, an administration which has to take decisions, even legally, which cause serious detriment to the person concerned, must allow the latter to make known their point of view unless there is a serious reason for not doing so."[29] Furthermore, the case law of the European Court of Human Rights on Article 6 of the Convention considers that a fair hearing during an administrative procedure is more important, not less important, in cases where the decision is not subject to judicial review.

3.8 As regards the duty to give reasons, it is true that one of the purposes of this obligation is to enable the Community Courts to review the legality of the decision. This does not, however, justify the conclusion that the duty to give reasons exists only when judicial review is possible. The case law of the Courts also mentions another purpose served by the duty to give reasons, which is "*to make the persons concerned aware of the reasons for the measure.*"[30]

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29 Joined Cases 33 and 75/79, *R . Kuhner v Commission* 1980 ECR 1677 para. 25. See also Case 17/74 *Transocean Marine Paint* [1974] ECR 1063 at 1081: "a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known."

30 See for example *Case 108/81 Amylum v Council* [1982] ECR 3107, para 19.

3.9 The Ombudsman's view, therefore, is that every citizen has the right to know the reasons for an administrative decision which adversely affects his or her interests and to be heard before such a decision is made. Before taking away the former MEP's privileges, Parliament should therefore have told him what he had done wrong and given him the opportunity to put his side of the case. It should also have communicated its reasoned decision to him promptly. Its failure to do so was an instance of maladministration.

## 4 The complainants' other claims and allegations

4.1 In observations on Parliament's opinion, the complainants' legal representative argued that neither complainant had committed any abuse on the morning of 5 October 2000 and that the order for expulsion was therefore disproportionate and an abuse of power. He claimed that the Presidency should apologise to the complainants. The original complaint claimed that the persons responsible for the incident should be subject to exemplary sanctions in order to prevent such actions in future.

4.2 The evidence available to the Ombudsman is that neither complainant was expelled from the premises of the Parliament on 5 October 2000. Nor do there appear to be any grounds to call in question the conduct of members of the security service, or of the services of the Presidency, on that day.

4.3 In observations on Parliament's opinion, the complainants' legal representative complained that he had received no reply from the European Parliament to his request that the complete file of material and documents concerning the adoption of the contested decisions should be communicated to him.

4.4 The Ombudsman recalls that failure to reply to correspondence could be an instance of maladministration. However, the Ombudsman does not consider it necessary or appropriate to examine the complainants' new allegation in the framework of his inquiry into the present complaint. A new complaint could be lodged if necessary.

4.5 In observations on Parliament's opinion, the complainants' legal representative concluded that the case should be dealt with through a friendly solution under Article 3 (5) of the Statute of the Ombudsman, leading to restoration of the former MEP's rights.

4.6 Although the Ombudsman has made a finding of maladministration in paragraph 3.9 above, his inquiry has revealed no evidence that could put in question Parliament's legal authority, as an Institution, to withdraw the former MEP's entry permit. The finding of maladministration does not, therefore, provide a basis to seek a friendly solution that could satisfy the complaint in accordance with Article 3 (5) of the Statute of the Ombudsman.

## 5 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

*Every citizen has the right to know the reasons for an administrative decision which adversely affects his or her interests and to be heard before such a decision is made. Before taking away the former MEP's privileges, Parliament should therefore have told him what he had done wrong and given him the opportunity to put his side of the case. It should also have communicated its reasoned decision to him promptly. Its failure to do so was an instance of maladministration.*

For the reasons given in paragraph 4.6 of the decision, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.4.2 The Council of the European Union

**EXCLUSION OF APPLICANTS FROM CENTRAL AND EASTERN EUROPEAN COUNTRIES FROM AN ONGOING TRAINEE SELECTION PROCEDURE**

*Decision on complaint 206/2000/MM against the Council of the European Union*

*THE COMPLAINT*

In February 2000, Ms T., a Polish student, lodged a complaint with the European Ombudsman concerning the decision of the Council to exclude candidates from Central and Eastern European countries from the ongoing selection procedure for trainees in 2000.

*THE INQUIRY*

### The Council's opinion

The complaint was forwarded to the Council.

In its opinion, the Council referred to the rules regarding traineeships in force at the General Secretariat of the Council. Accordingly, candidates have to submit their application by 30 September in order to be eligible for a trainee post of three to four months in the following year. The results of the selection process are announced at the beginning of each year.

Concerning the allegation of discriminatory treatment of applicants from Central and Eastern European countries, the Council made clear, that according to its internal rules, in principle nationals of both EU Member States and applicant countries would be admitted to the traineeship programme. Nevertheless, the General Secretariat of the Council had the discretionary power to organise its trainee programme. In its view, the programme's primordial aim would be to enable EU-nationals to acquire professional experience within the institutions. Further, as the accession negotiations were conducted at the Council, it would refrain for security purposes from offering traineeships to candidates from applicant countries. On this basis, during ongoing accession negotiations, candidacies from applicant countries were only exceptionally taken into account and would require an agreement with the government of the applicant country in question, which guaranteed the respect of all security concerns.

The Council regretted the negative decision for the complainant and pledged to inform future candidates more promptly about the outcome of selection procedures.

### The complainant's observations

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

*THE DECISION*

### 1 The alleged discrimination of applicants from Central and Eastern Europe

1.1 The complainant considered the decision of the Council to exclude candidates from Central and Eastern European countries due to the high number of applications to be discriminating and unfair. In her view, the personal qualifications of the candidate should be taken into consideration, instead.

1.2 In its opinion, the Council explained that although the internal rules in force at the General Secretariat of the Council provide that nationals of EU Member States and applicant countries are both admitted to the traineeship programme, the General Secretariat has a wide discretionary power in organising this programme. The Council pointed out that accession negotiations were conducted within its premises. During ongoing accession negotiations, it is general policy at the Council to select trainees, for security purposes, primarily among EU-nationals. Candidates from applicant countries are only exceptionally considered. In such cases, an agreement with the government of the applicant country is required to guarantee the respect of all security concerns.

1.3 The Ombudsman noted that, according to the Council's internal rules governing traineeships, candidates from both EU Member States and applicant countries can apply for traineeships at the Council. In line with these rules, the Council admitted candidates from Central and Eastern European countries to apply for traineeships in the year 2000.

1.4 As the numbers of incoming applications (about 900 applications for the year 2000) exceeded the expectations, the Council decided to use its discretionary power by excluding the candidates from Central and Eastern European countries from the ongoing selection procedure.

1.5 It is good administrative behaviour for the administration to act in a consistent way. The fact to exclude applications from Central and Eastern European countries in the middle of an ongoing selection procedure, was inconsistent with the Council's policy to extend its trainee-programme also to candidates from Central and Eastern European countries. This constitutes an instance of maladministration.

1.6 The Ombudsman further considered that it was not appropriate for the Council to refer to security measures in this case with regard to candidates from applicant countries, as this reason was not communicated to the complainant when she was excluded from the procedure.

**2 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*It is good administrative behaviour for the administration to act in a consistent way. The fact to exclude applications from Central and Eastern European countries in the middle of an ongoing selection procedure, was inconsistent with the Council's policy to extend its trainee-programme also to candidates from Central and Eastern European countries. This constituted an instance of maladministration.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.4.3 The European Commission

### PRESUMPTION OF INNOCENCE AND PROPER RECORDS OF PROJECT REVISION

*Decision on complaint 960/98/PB (Confidential) against the European Commission*

*THE COMPLAINT*

In September 1998, the complainant submitted allegations relating to a review of a project funded by the European Commission.

In the light of the duration of the inquiry and the circumstances surrounding it, the following account of the background and main events was deemed appropriate.

In 1992 the Commission and the complainant's organisation concluded a contract concerning the development of a generator for the exploitation of wind energy. The contract period was 1 January 1993 to 29 February 1996.

In March 1996, the Commission informed the complainant that the work done by his organisation was inadequate. In April 1996, the Commission informed the complainant, in response to requests by him, that the contract could not be extended beyond the date foreseen in the contract.

In April 1996, the Commission received from the complainant a draft final report on the project, produced in accordance with the contract. The Commission acknowledged receipt of the report, and reminded the complainant that the contract would end at the date foreseen in the contract. Three months later the Commission sent the complainant a response to the draft final report.

On 26 May 1997, the Commission informed the complainant by letter that its anti-fraud unit (then 'UCLAF') would conduct an audit on the premises of the complainant's organisation. It appears that the Commission had also informed the complainant about the audit by telephone on 12 May 1997. On 26-28 May 1997, a financial and technical audit was carried out on the complainant's premises.

On 30 July 1997, the Commission sent the audit report to the complainant for comments. The audit report informed the complainant that on the basis of non-performance of the contract and false or incomplete statements, the Commission intended to recover the entire advanced financial contribution. The complainant sent the Commission his comments on the audit report on 11 September 1997. He received a letter from the Commission on 21 April 1998, which contained, amongst others, an acknowledgement of receipt of his comments of 11 September 1997.

The problems associated with this contract led the Commission to exclude, in April 1998, the complainant from the negotiations concerning two new projects. It was also decided not to mention the 1993-1996 project in a Commission research programme publication.

On 6 July 1998, UCLAF informed the national Public Prosecutor for Serious Fraud of its suspicions of fraud committed by the complainant in relation to the 1993-1996 contract. It appears that UCLAF held suspicions of serious fraud involving accomplices in other EU Member States. The Public Prosecutor for Serious Fraud started an inquiry into the case, which was frequently debated in the national press as well as in the parliament . The case also gave rise to a more general debate on whether the Member State has implemented adequate anti-fraud measures in respect of Community finances. The complainant's case was in several newspaper articles referred to as a recent source of strong disagreement between the Commission and the national authorities. Statements by Commission officials confirmed that the Commission's anti-fraud bodies (first UCLAF, later OLAF) were convinced that their suspicions of fraud by the complainant's organisation were correct. At one point the Commission entered into a direct dialogue with the national Ministry of Justice, which appears to have implemented new rules as a result. It furthermore became apparent from published articles that some national newspapers had gained access to a confidential report which UCLAF had sent to the Public Prosecutor for Serious Fraud.

On 20 December 1999, the national Public Prosecutor for Serious Fraud decided that there was no basis for prosecution. It appears that the Public Prosecutor considered the financial irregularities to primarily amount to bookkeeping errors.

On 5 January 2000, the Commission's new anti-fraud unit ('OLAF') submitted a formal complaint to the national Director of Public Prosecutions, requesting him to review the decision of the Public Prosecutor for Serious Fraud. The request was made in accordance with established procedures in national law. On the following day, OLAF's complaint was commented on in national newspapers. At least one newspaper article quoted or referred to statements by OLAF-officials as well as the complainant. An OLAF official confirmed the complaint and stated that OLAF did not consider the Public Prosecutor's decision to be well founded.

On 13 June 2000, the national Director of Public Prosecutions decided that he found no reason to overturn the decision of the Public Prosecutor for Serious Fraud. The decision of the Director of Public Prosecutions is, according to national law, final.

In mid-2000, OLAF officials confirmed to the press that the Commission intended, as previously decided, to recover EC financial contributions from the complainant. This would be done through civil action.

The complainant submitted his complaint to the Ombudsman almost the same time as a colleague of his submitted a very similar complaint. The Ombudsman decided to deal with the two complaints in a joint inquiry. In September 2000, the complaint submitted by the

complainant's colleague was withdrawn. The present inquiry and the final decision were largely unaffected by that withdrawal.

The allegations taken up for inquiry were, in summary, the following:

A) Essential allegations relating to the Commission's findings of fraudulent and non-contractual behaviour:

(i) The Commission's conclusions concerning non-compliance and fraud were wrong.

(ii) It was wrong of the Commission not to inform the complainant before reporting the organisation to the national Public Prosecutor for Serious Fraud in July 1998.

(iii) The Commission failed to secure the confidentiality of the report which UCLAF had sent to the national Public Prosecutor for Serious Fraud. Its failure to do so was evident from the fact that national newspapers had gained possession of the report.

(iv) It appeared wrong of the Commission's anti-fraud personnel to give interviews to national newspapers about their suspicions of fraud on the part of the complainant and his organisation. The complainant appeared to suspect that the Commission intended to create public pressure on the national prosecutors. (This fourth allegation was submitted after the original complaint, but taken up for inquiry and submitted to the Commission for comments.)

B) Other allegations were that:

(v) It was wrong of the Commission not to comment on the final draft report which was submitted end of April 1996. The contract required such comments to be made within two months.

(vi) The Commission's audit on 26 to 28 May 1997 was announced to be only a *financial* control. It was therefore wrong of the Commission to also conduct a technical audit.

(vii) The officials who conducted the audit in May 1997 acted offensively, e.g. making accusations directly against the complainant's employees.

(viii) The Commission did not reply within a reasonable period of time to the complainant's letter of 11 September 1997.

(ix) The Commission's decision in April 1998 to exclude the complainant's organisation from the negotiation of new projects should have been made earlier. The fact that it did not do so caused the complainant to spend time and energy on negotiating the new projects.

(x) The Commission's decision not to include the disputed project in the Commission's research publication was unjustified.

## *THE INQUIRY*

### The Commission's opinion(s)

In addition to its first opinion on the complaint, the Commission was later requested to submit further comments and information. This was primarily in response to the fourth allegation referred to above, which was raised subsequent to the complainant's original complaint.

As a preliminary point, the Commission drew the Ombudsman's attention to the fact that the national Public Prosecutor was investigating the question of fraud by the complainant's organisation. The Commission suggested that this might constitute a situation "sub judice" (*i.e.* a case not yet judicially decided) which the Ombudsman might like to consider as an aspect that could affect the admissibility of the complaint.

The Commission's substantive replies to the Ombudsman's requests for opinions and information can be summarised as follows (in the order of the allegations, set out above):

(i) The Commission maintained that the contract had not been complied with, describing in some detail the technical matters concerned. It also maintained that the audit in May 1997 had shown that false or incomplete statements had been made. It regarded the latter to constitute an adequate basis for referring the matter to the national prosecutors.

(ii) In complying with its duty to refer cases of potential fraud to national judicial authorities, the Commission did not have an obligation to inform the complainant beforehand.

(iii) As regards the leaking of UCLAF's report to the national press, the Commission stated that it had carefully been watching the rules of confidentiality and could therefore not be held responsible. Furthermore, at the time of the leak, the report (or copies of it) was in the possession of the Permanent Representation of the Member State in Brussels, the National Prosecutor and the complainant himself.

(iv) The statements made by its anti-fraud personnel to national newspapers had not been such as to endanger the complainant's rights of defence. Furthermore, the anti-fraud personnel had not informed the public actively, but had been contacted by journalists and responded to their questions in due course.

In regard to allegations (v) to (x), the Commission submitted that:

(v) Under normal circumstances, the draft final report would have to be expressly replied to within a period of two months, and a failure to do so would constitute an acceptance of the report. However, in this case the Commission only acknowledged receipt of the report without further comments within the period of two months since it had already indicated to the complainant that the work was not done in compliance with the terminated contract.

(vi) Article 5.1 of the general conditions of the contract gave the Commission the right to carry out both a technical and financial audit during or after the completion of the project. The organisation was informed by phone and by letter that an audit review and control would be carried out both by the financial auditor and the responsible scientific officer. The complainant did not object to this during the audit.

(vii) The officials who carried out the audit had not acted inappropriately.

(viii) The Commission had not initially considered it necessary to reply to the letter of 11 September 1997, given that the Commission did not find that the organisation's answer to the report contained any new elements.

(ix) Two new projects had been accepted during the scientific evaluation phase. However, during the subsequent financial and administrative evaluation, and further given the non-performance of the contractual obligations in the present contract, the Commission advised other contractual parties to either exclude or postpone contracting with the complainant's organisation.

(x) The research publication was aimed at presenting the results of projects funded by the Non-nuclear Energy program, which have been successfully completed. Given that the complainant's project did not meet these criteria, there was no reason for that project to appear in the publication.

### The complainant's observations

In his observations on the Commission's opinions, the complainant maintained his allegations.

*THE DECISION*

**1 The allegation of wrongful conclusions concerning breach of contract and fraud**

1.1 In regard to the allegations that the Commission wrongly concluded that the complainant's organisation had not complied with the contract, the Ombudsman pointed out that while maladministration may be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned, 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.

1.2 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.

1.3 The Commission stated that the project had not been carried out in accordance with the contract, referring to specific provisions of the contract. The Commission considered that this was confirmed at the on-site audit review in May 1997.

1.4 Without prejudice to the question of whether a breach of contract had occurred by either party, the Ombudsman found that the Commission had provided a sufficiently coherent account as to why it considered its actions to be justified. Therefore, the Ombudsman found that there was no instance of maladministration as regards this aspect of the case.

1.5 As regards the allegation that the Commission wrongfully concluded that the complainant and his organisation had acted fraudulently, that matter had been thoroughly investigated by two levels of specialised national instances, i.e. the national Public Prosecutor for Serious Fraud and the national Director of Public Prosecutions. Both prosecutors decided that there was no basis for initiating prosecution against the complainant or his organisation.

1.6 The fact that the Commission's suspicions of fraud were wrong in substance did not of itself imply that there was maladministration in the Commission's acting. The question to be asked was whether the Commission had acted with due diligence in reaching its conclusion that a reference to the national prosecutors was relevant.

1.7 The Ombudsman concludes that the Commission acted with a reasonable degree of due diligence in deciding that it was relevant to refer the matter to the national prosecutors for further investigation and final assessment of the matter. There is therefore no maladministration as regards this aspect of the case.

**2 The allegation concerning the Commission's reporting to the national prosecutor**

2.1 The complainant considered that the Commission should have informed his organisation before reporting it to the national Public Prosecutor for Serious Economic Fraud. The Commission stated that is has no obligation to inform individuals before making such reporting.

2.2 It appears that the Commission is under no specific duty to inform individuals whom it reports to a national authority for fraud-investigation. The Ombudsman therefore finds that the Commission, by reporting its suspicion of fraud to the national Federal Police without informing the complainant, did not violate any rule or principle binding upon it. There is therefore no maladministration as regards this aspect of the complaint.

## 3 The allegation that the Commission failed to secure confidentiality

3.1 The complainant claimed that the Commission failed to secure the confidentiality of the report which UCLAF had sent to the national Public Prosecutor for Serious Fraud. The Commission denied this allegation and stated that no leak was proven.

3.2 It appeared to be an established fact that newspapers did gain possession of the report. It also appeared that when this happened, the Commission, the national Public Prosecutor, the Permanent Representation of the Member State in Brussels and the complainant were in possession of the report.

3.3 Principles of good administration require that citizens must be able to trust that the Commission respects the confidentiality of sensitive information about them and thus takes all measures to ensure this confidentiality. In this case, the Ombudsman concludes that he has not been presented with evidence which clearly suggests that the leaking of the report was due to wrongful acting by the Commission. Thus, no maladministration is established in regard to the third allegation.

## 4 The allegation of inappropriate statements to national newspapers

4.1 The complainant alleged that it was wrong of the Commission's anti-fraud personnel to give interviews to national newspapers about their suspicions of fraud on the part of the complainant and his organisation. The Commission responded that the statements made by its anti-fraud personnel to national newspapers were not such as to endanger the complainant's rights of defence. It also stressed that the anti-fraud personnel had not informed the public actively, but had been contacted by journalists and responded to their questions in due course.

4.2 It appeared from the evidence provided to the Ombudsman that members of the Commission's anti-fraud personnel repeatedly made statements to the national press about their conviction that the complainant and his organisation had acted fraudulently. The complainant's organisation was mentioned as a recent source of the Commission's general dissatisfaction with the fraud-combating approach of national authorities in regard to Community finances. It appeared that the Commission's anti-fraud personnel insinuated to the national press that the national public prosecutors will often refrain from prosecuting even when it is evident that the individual in question is guilty of fraud.

4.3 The fundamental question raised here was whether the acting of the Commission's anti-fraud officials infringed the principle that any person shall be presumed innocent until proved guilty, a principle that may be infringed not only by a judge or court but also by other public authorities[31].

4.4 The Court of Human Rights has established that while public authorities may inform the public about criminal investigations, the principle of presumption of innocence requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected[32].

4.5 In the present case, the Ombudsman considered that the Commission's anti-fraud personnel failed to respect this requirement. The Commission personnel should have limited itself to only informing the press about the basic procedural steps that were taken

31 *Allenet de Ribemont v France*, Case 3/1994/450/529, para 36.

32 Ibid, para 38.

in the matter. This restraint was particularly important in the light of the fact that the matter had been referred to the national prosecution authorities for a final examination. Maladministration was accordingly established in regard to this aspect of the complaint, and a critical remark is made below.

### 5 The allegation concerning lack of comment on the final draft report

5.1 The complainant alleged that it was wrong of the Commission not to comment on the final draft report which was submitted end of April 1996. The Commission stated that it did not consider the comments necessary, given that it had already indicated to the complainant that the work had not been done in compliance with the contract, which was terminated.

5.2 It appeared a reasonable view that the Commission's duty was dependent on compliance with, and existence of, the contract. In the light of the finding on the complainant's first allegation, the Ombudsman concludes that there has been no maladministration by the Commission.

### 6 The inadequate announcement of the audit

6.1 The complainant put forward that it was wrong of the Commission to conduct a technical audit of the project, given that the Commission had announced it to be only a financial audit. The Commission stated that it had a contractual right to carry out both a technical and a financial audit during or after the completion of the project, and that the complainant had in any case been informed by phone and by letter that an audit review and control would be carried out by both the financial auditor and the responsible scientific officer. Furthermore, the complainant did not object to this during the audit.

6.2 The Ombudsman's inquiries confirmed the complainant's factual view that the letter in question only referred to a financial review. However, given the Commission's contractual right to carry out a technical audit the Ombudsman considers that no maladministration has been established.

### 7 The accusation of inappropriate behaviour by the Commission officials

7.1 The complainant alleged that the officials who conducted the audit in May 1997 acted offensively, e.g. making accusations directly against the complainant's employees. The Commission rejected the allegations.

7.2 The general principle of good administration that public officials should behave in a correct manner serves not only to avoid offence of individuals, but can also be important to avoid misunderstandings. To enable supervisory bodies to determine if this principle has been followed, the Commission should normally ensure that on-site audits are concluded with a record that contains an adequate account of what happened during the audit. The absence of such a record may create a presumption in favour of the complainant's own account of what was said during the audit. The Ombudsman concludes that the Commission's failure to ensure that an audit-record was produced constitutes an instance of maladministration. A critical remark is therefore made below.

### 8 The allegation of failure to reply within a reasonable time

8.1 The complainant alleged that the Commission did not reply within a reasonable period of time to the complainant's letter of 11 September 1997. The Commission replied that it had not initially considered it necessary to reply to the letter, given that the Commission did not find that the organisation's answer to the report contained any new elements.

8.2 Principles of good administration require that the Commission reply to letters from citizens within a reasonable time. In this case, the Commission did not reply to the letter

in question, because it considered that the contents of it did not require an answer. Having examined the letter of 11 September 1997, this view did not appear unreasonable. The Ombudsman also noted that at a later stage, the Commission did acknowledge receipt of the letter of 11 September 1997. Given these circumstances, the Ombudsman finds that the Commission has complied with the above requirement. There is therefore no maladministration in regard to this aspect of the complaint.

## 9 The Commission's decision to exclude the complainant from new projects

9.1 The complainant claimed that the Commission's decision in April 1998 to exclude the complainant's organisation from the negotiation of new projects should have been made earlier. The Commission rejected the allegation of delay.

9.2 It had to first be observed that an existing contractual dispute between a contractor and the Commission does not oblige the latter to refrain from starting new negotiations with the contractor. The administration must, however, avoid unreasonably delaying a decision to exclude a potential contractor when the relevant facts are known and have been evaluated. In the present case, the Commission entered into new contract negotiations in spring 1998. The decision to exclude the complainant's organisation from the new contracts was also taken in spring 1998. On this basis the Ombudsman finds that the Commission acted without undue delay. Therefore, there is no maladministration in this aspect of the complainant.

## 10 The decision not to mention the project in the research publication

10.1 The complainant alleged that the Commission's decision not to include the disputed project in the Commission's research publication was unjustified. The Commission replied that the research publication was aimed at presenting the results of projects funded by the Non-nuclear Energy program which had been successfully completed. Given that the complainant's project did not meet these criteria, there was no reason for that project to appear in the publication.

10.2 In the present case, the Commission had wide discretionary powers to decide what should be the policy line for the publication. It does not appear that the Commission has in this case failed to act within the limits of its legal authority in exercising those powers. There is therefore no maladministration in regard to the tenth allegation.

## 11 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

*1 The Court of Human Rights has established that while public authorities may inform the public about criminal investigations, the principle of presumption of innocence requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.*

*In the present case, the Ombudsman considered that the Commission's anti-fraud personnel failed to respect this requirement. The Commission personnel should have limited itself to only inform the press about the basic procedural steps that were taken in the matter. This restraint was particularly important in the light of the fact that the matter had been referred to the national prosecution authorities for final examination. Maladministration was accordingly established in regard to this aspect of the complaint.*

*2 The general principle of good administration that public officials should behave in a correct manner serves not only to avoid offence of individuals, but can also be important to avoid misunderstandings. To enable supervisory bodies to determine if this principle has been followed, the Commission should normally ensure that on-site audits are concluded with a record that contains an adequate account of what happened during the*

*audit. The absence of such a record may create a presumption in favour of the complainant's own account of what was said during the audit. The Ombudsman concluded that the Commission's failure to ensure that an audit-record was produced constituted an instance of maladministration.*

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

Note: On 27 April 2001, the Commission responded to the Ombudsman's critical remarks.

The Commission drew the Ombudsman's attention to the fact that an internal manual of procedure had been prepared to give concrete instructions for OLAF. This manual covers, amongst other things, the question of relations with the media. The Commission also expressed the view that the Ombudsman's first critical remark was not justified. In regard to the Ombudsman's second critical remark, the Commission stated that subsequent to the lodging of the complaint, the auditing procedures in the relevant Commission service had been revised in line with best international practice. The Commission gave examples of these improvements.

On 5 July 2001, the complainant responded to the Ombudsman's decision. He expressed satisfaction with the fact that the Ombudsman had criticised the Commission. The complainant would, however, have liked to obtain a public apology from the Commission.

## ARTICLE 226 INFRINGEMENT PROCEDURE: FAILURE TO STATE REASONS FOR THE CLOSURE OF THE FILE AND VIOLATION OF THE RIGHTS OF DEFENCE

*Decision on complaint 995/98/OV against the European Commission*

*THE COMPLAINT*

In September and November 1998, Mr E. made a complaint to the European Ombudsman on behalf of Macedonian Metro Joint Venture. The complaint concerned the European Commission's investigation and closure of a complaint lodged by the complainant with the Commission on 23 January 1997, on behalf of Macedonian Metro Joint Venture (No 97/4188 SG (97) A/3897). In his complaint to the Commission, Mr. E. had alleged violations of Community public procurement law by the Greek authorities with regard to their award of the Thessaloniki Metro project to Thessaloniki Metro Joint Venture, a competitor of Macedonian Metro Joint Venture.

According to the complainant, the relevant facts were as follows:

In June 1992, the Greek Ministry of Environment, Zoning and Public Works (ΥΠΕΧΩΔΕ) had announced an International Public Tender procedure for the award of the project "Design, construction, self-financing and exploitation of the Thessaloniki Metro". The complainant alleged that the technical and financial offer of his competitor "Thessaloniki Metro", which was finally retained by the contracting authority, deviated seriously from the compulsory specifications and conditions in the tender documents. The contracting authority had therefore breached the principle of equal treatment of competitors. By decision of the Minister of Public Works of 29 November 1996, the negotiations with the complainant (nominated as temporary contractor) were suddenly terminated and the Joint Venture "Thessaloniki Metro" was called for negotiations to conclude the final contract.

Against this background, "Macedonian Metro" lodged a complaint with the Commission on 23 January 1997, alleging that the procedure followed by the Greek authorities had infringed the provisions of Directives 93/37 and 89/665, as well as fundamental principles of the EC Treaty such as non-discrimination, transparency and proportionality. The complainant therefore requested the Commission immediately to start an infringement procedure against the Greek authorities.

Subsequently, Mr E. complained to the Ombudsman against the Commission's handling of his complaint against the Greek authorities. His allegations against the Commission, as they appeared from the initial complaint and following successive exchanges of opinions and observations during the Ombudsman's inquiry, can be summarised as follows:

1 According to the complainant, the services of the Commission responsible for the file on the case (DG XV, DG VII, DG XVI and the Legal Service) had concluded that there was a clear infringement of the provisions of Directive 93/37/EEC as well as of the principle of equality of treatment and therefore proposed to send a letter of formal notice to the Greek authorities. However, when the matter came before the college of Commissioners on 7 April 1998 there was a radical and unexplained change of position. The complainant therefore considered that the college of Commissioners had decided to close the case on the basis of political considerations that had no legal basis and were not motivated by public interest and had thereby improperly and abusively exercised its discretionary power in the framework of the Article 226 procedure.

2 By letter of 30 July 1998, the Commission informed the complainant of its intention to close the case, unless he could provide additional elements to demonstrate a clear infringement of EU law on public procurement. According to the complainant, this letter underlined that the tender documents were voluminous and drafted in an ambiguous manner, which could give rise to differing interpretations by tenderers as to their requirements. However, the letter went on to consider that it is just because of the complexity of the procedure and of the tender documents that it could not be maintained that the contracting authority had not allowed a genuinely competitive procedure or that the principle of equality of treatment had been violated. The complainant also observed that an additional reason invoked by the Commission to close the case, namely the assurances provided by the Greek government as to their future policy, in fact meant that the Greek authorities could escape from the consequences of past infringements by simply assuming the obligation to modify their behaviour for the future. The complainant therefore considered that the reasons that the Commission gave to explain its decision to close the file were inadequate and contradictory.

3 According to the complainant, he received the Commission's letter dated 30 July 1998 on 19 August 1998. He contested the proposal to close the case by submitting new evidence by letter of 10 September 1998 and sent additional letters on 7 and 21 October 1998 and 25 November 1998. However, the Commission had already definitely closed the case by its decision n° H/98/3262 of 27 August 1998. In these circumstances, the complainant alleged that the Commission had violated his right to be heard before the closure of the case.

4 The complainant alleged that he was not officially informed for 18 months about the outcome of his complaint and considered that this represented an excessive delay in providing him with information.

## *THE INQUIRY*

The Ombudsman forwarded the complaint to the Commission, which sent its opinion on 9 March 1999. On 19 April 1999, the complainant made his observations on the Commission's opinion. On 24 June, the Ombudsman's services inspected the Commission's file on the case in the DG XV premises in Brussels. The same day, they took oral evidence from three officials of DG XV. On 26 July 1999, the Ombudsman's services carried out a second inspection of the Commission's file in the DG XV premises in Brussels, during which they were provided with a copy of the file. On 14 September 1999, the complainant was provided with copies of the transcripts of the testimonies taken from the three witnesses on 24 June 1999. On 18 and 29 October 1999, the complainant sent additional observations on the Commission's handling of his case, as well as

comments on the three testimonies. On 18 November 1999, the Ombudsman asked the President of the Commission for an additional opinion on the complainant's observations. On 3 January 2000, the President of the Commission sent his opinion on the complainant's observations. On 11 January 2000, the Commission also sent the opinion of the three witnesses on the complainant's further observations. On 12 January 2000, the Ombudsman and his services took oral evidence from three officials of DG XV. On 27 March 2000, the complainant sent his final observations on the handling of his complaint by the Commission. On 7 June 2000, the Commission sent its final opinion on the matter.

Details of the parties' evidence and submissions are included in the full text of the decision, which is available in English on the Ombudsman's website: *http://www.euro-ombudsman.eu.int/decision/en/980995.htm.*

### *THE DECISION*

On the basis of his inquiries into this complaint, the Ombudsman made the following critical remarks:

*1 The Ombudsman considers that the Commission's letter to the complainant informing him that it had closed the file on his complaint, despite its complex drafting, is naturally to be understood as meaning that the Commission closed the case because it considered that there had been no infringement of Community law. The Ombudsman's finding is that this was not the reason for the Commission's decision to close the Thessaloniki Metro case. It appears that the Commission made a discretionary decision to close the case, despite the evidence of a possible infringement. The Commission therefore failed to provide the complainant with adequate reasons for its decision to close the file on the complaint. This constitutes an instance of maladministration.*

*2 The Ombudsman notes that an opportunity for a complainant to submit observations necessarily includes, amongst others, the following elements:*

*(i) sufficient time in which to prepare and submit any observations;*

*(ii) sufficient information as to the basis of the proposed closure decision, so that the complainant may address the relevant issues in his observations.*

*In the present case, the Commission sent a letter just before the normal summer holiday season, informing the complainant of the proposed closure of the file and inviting him to submit additional elements. The Ombudsman notes that the Commission's letter did not establish any deadline for such submission: a reasonable time should therefore have been allowed. Furthermore, if the Commission wished to act quickly it would have been appropriate both to establish a deadline and to inform the complainant by a modern method of communication, rather than relying on the post. In these circumstances, the closure of the file a mere eight days after the complainant received the Commission's letter did not give the complainant sufficient time to submit observations.*

*The Ombudsman also recalls that the Commission failed to provide the complainant with adequate reasons for its proposed decision to close the file. The Commission did not, therefore, give the complainant a genuine opportunity to address all the relevant issues in his observations.*

*In view of the above, the Commission denied the complainant a fair opportunity to be heard before it closed the file on his complaint. This constitutes an instance of maladministration.*

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

### *FURTHER REMARKS*

The Ombudsman noted that, if the letter by which the Commission informs a complainant of its decision to close the file on his complaint were considered as a decision addressed to the complainant, the Commission's failure to give the complainant a fair opportunity to be heard before it closed the file, as well as its failure to provide adequate reasons for the decision, could both provide grounds for annulment in this case.

The Ombudsman had, however, already mentioned the case law of the Court of Justice, which establishes that the Commission's discretionary power to decide whether or not to refer an infringement to the Court of Justice precludes the right of individuals to require the Commission to adopt a particular position and to bring an action for annulment against its refusal to take action.[33]

The Ombudsman pointed out that the above-mentioned case law does not prevent the Commission from taking steps to avoid possible future cases of maladministration in its handling of complaints under Article 226. Specifically, the Ombudsman suggested that the Commission consider establishing a clear procedural code for the treatment of such complaints, analogous to existing codes in relation to competition matters.

In the European Ombudsman's own initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law (303/97/PD[34]), the Commission already acknowledged that, in the period before judicial proceedings may begin, complainants enjoy procedural safeguards which the Commission has constantly developed and improved. The Commission also declared itself ready to continue along these lines.

In this respect, the Commission should particularly clarify the procedural aspects of the administrative stage preceding the eventual decision to issue the reasoned opinion, which concludes the pre-litigation procedure.

The establishment of such a code would mark an important step towards making a living reality of the citizen's right to good administration, as recognised in the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000.

### *FOLLOW-UP OF THE CASE BY THE COMMISSION*

On 15 May 2001, the Commission informed the Ombudsman of its follow-up to the critical remarks and further remark in this case.

The Commission observed that the practice which had given rise to criticism had already been largely amended by informing the public of new rules which are set out for their benefit in the explanatory note which accompanies its communication of 30 April 1999, entitled *"Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission"* (OJ 1999 C 119/5).

The Commission also informed the Ombudsman that its services are currently working on a consolidated version of its internal rules on the management of infringement procedures, and that, as soon as it is completed, this procedural code will be communicated to the Ombudsman and the European Parliament and made available to the public through the "Europa" website.

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33 Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case 87/89 *Sonito v Commission*, [1990] ECR-I-1981; Order of the Court of First Instance in Case T-182/97, *Hubert Ségaud and Monique Ségaud v Commission* 1998 ECR II-0271.

34 303/97/PD, reported in the European Ombudsman's Annual Report for 1997, pages 270-274.

## ABORTED FUNDING FOR DEVELOPMENT PROJECT

*Decision on complaint 511/99/GG against the European Commission*

### *THE COMPLAINT*

On 10 May 1999, a German foundation, lodged a complaint with the European Ombudsman concerning the way in which the European Commission had handled an application for funds for a development project in Chile.

In 1995, Sternenkinder e.V., a charitable association from Germany ("the association"), approached the European Commission with a view to obtaining co-funding for a development project in Chile (a centre for mentally handicapped children). In a hand-written note on that letter, the official in charge at the Commission pointed out that the association (which had been in existence for only a year) was not yet eligible for aid. He suggested, however, that the association might obtain a grant via another NGO that fulfilled the relevant criteria. The complainant subsequently accepted to step in and to submit the application in its own name. This application was sent to the Commission in July 1996. In June 1997, a contract was concluded between the Commission and the complainant in which the Commission agreed to contribute € 70 443 towards the costs of the project. On the basis of this contract, the association began to implement its project.

However, no payment was made by the Commission despite several reminders. The complainant subsequently turned to a Member of the European Parliament for help who wrote to the Commission. In its reply to the MEP of 17 June 1998, the Commission took the view that the relevant sum could not be released before the complainant had paid back various sums that the Commission had granted to the Verein der Freunde und Förderer [of the complainant] (the "Friends"). After having learnt of the Commission's attitude, the complainant contacted the Commission on several occasions in order to obtain the release of the funds. However, in a letter dated 15 December 1998, the Commission informed the complainant that it would not make the requested payment. The Commission confirmed that it did not have any objections against the project as such. It took the view, however, that it had itself claims against the complainant which could be set off against the relevant sum. According to the Commission, these claims resulted from contracts for other development projects which it had entered into with the Friends. The Commission considered that the complainant was liable for these debts of the Friends which appeared to be in liquidation or had already been wound up.

In these circumstances, the complainant turned to the European Ombudsman for help.

The complainant claimed that the Commission should release the funds concerned. In its view, the Commission had, in June 1997, given a binding promise to release the relevant amount of money. It also claimed that the Commission had known that it was only acting as a trustee for the association. The complainant took the view that claims against a third party could not therefore be set off against the sum at stake. In this context, the complainant claimed that it was not the legal successor of the Friends which in its view were a separate legal entity. The complainant further claimed that the refusal of the Commission to pay out the amount agreed on had brought the association to the brink of bankruptcy and, as a consequence, threatened the continuation of the project in Chile.

### *THE INQUIRY*

#### The Commission's opinion

In its opinion, the Commission made the following comments:

The Commission had claims for repayment amounting to a total of € 210 000 against the Friends due to the fact that two projects had not been properly accounted for by the latter. Both projects had originally been submitted to the Commission by the complainant itself acting on its own behalf, on the understanding however, that the yet to be established Friends would then be responsible for the implementation of these projects. Accordingly,

the grant agreements had later been concluded with the Friends, the same person acting for both the complainant and the Friends. Recovery orders for the sums to be retrieved which had been issued against the Friends in 1995 had been unsuccessful. It appeared that the Friends did not have any assets. The complainant itself refused to accept responsibility for the financial commitments of the Friends despite the fact that in accordance with its statutes, the proceeds of the activities of the Friends had been regularly transferred to the complainant. The complainant had established the Friends in order to assist it in its activities. Staff and members of both were interlinked, the Friends using the same business address as the complainant, including telephone number and logo.

### The complainant's observations

In its observations, the complainant maintained its complaint. It also submitted two new claims which may be summarised as follows:

*(1) The Commission should not have made a grant to the complainant (which was only acting for the association) in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant.*

*(2) The Commission should not have waited for 18 months before informing the complainant of the reasons for not releasing the funds which it had agreed to pay to the complainant.*

The complainant argued that it was the association which was faced with bankruptcy that now had to suffer for the claims which the Commission alleged to have against the complainant. It claimed that the Commission had knowingly let the association go towards its doom.

## *FURTHER INQUIRIES*

Having received the complainant's observations on the opinion of the Commission, the Ombudsman considered that it was appropriate to examine the new allegations put forward by the complainant in the context of the present investigation. The Ombudsman therefore wrote to the Commission on 3 December 1999 in order to ask the latter to submit an opinion on the complainant's new allegations.

In its opinion of 3 February 2000, the Commission made the following comments:

The Commission did not know the association and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant.

The Commission had refused from the start, in numerous contacts, to release the Chile grant, exactly because there had been an obvious link with the other projects. In fact, the parties had been discussing the litigious accounts since the fall of 1997. A joint meeting had been held on 1 July 1998. A subsequent request for information addressed to the complainant had been answered unsatisfactorily in November 1998. The Commission regretted that the association had fallen prey to the business morale of the complainant. However, the Commission had neither established nor favoured the association's contacts with the complainant.

In its observations on this opinion, the complainant claimed that the Commission had had knowledge of the fact that the application had been lodged in the interest of the associa-

tion. The complainant continued to believe that the Commission should either not have entered into the relevant obligation or release the funds since the claims against the Friends had nothing to do with the project concerned and had also been known when the Commission had agreed to make the grant for the project in Chile. It also insisted that it had only been 18 months after the contract had been signed that the Commission had explained its position to the complainant in writing.

## *THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

### The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations and the results of the further inquiries, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman acknowledged that the complainant's first claim according to which the Commission should have released the money it had agreed to provide raised the difficult issue as to whether the complainant was liable for the debts of the Friends. Since this issue ultimately had to be determined by a court that had jurisdiction in the matter, the Ombudsman came to the provisional conclusion that no maladministration appeared to exist in that regard.

However, the Ombudsman took a different view with regard to the second allegation of the complainant according to which the Commission should not have entered into the relevant contract if it believed that it had a claim for the repayment of certain sums against the complainant. The Ombudsman noted that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the Friends had incurred against the Commission appeared to have been known at the time when the contract was signed in June 1997. The Commission also knew at the time that the complainant refused to accept liability for these debts. Finally, the Commission knew or must have known that the financial assistance promised in the contract was to benefit not the complainant, but the association and its project in Chile.

The Ombudsman's provisional conclusion, therefore, was that in view of the circumstances, the decision of the Commission to enter into the contract could constitute an instance of maladministration.

With regard to the complainant's claim that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay, the Ombudsman noted that it appeared that the complainant was only informed in writing of these reasons in December 1998. The Ombudsman's provisional conclusion, therefore, was that the fact that the Commission only explained the reasons why it did not fulfil an obligation it had taken upon itself nearly a year (or even more) after the relevant contract had been concluded could constitute a further instance of maladministration.

### The possibility of a friendly solution

On 8 June 2000, Sternenkinder e.V. sent a letter to the Ombudsman in which it tried to describe and quantify the damage that it had suffered due to the Commission's behaviour.

On 5 July 2000, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to consider indemnifying the association for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997.

In its reply of 3 October 2000, the Commission took the view that the association had turned to the complainant as an intermediary on its own initiative, and without any instigation on the part of the Commission. The Commission claimed that at the time of the signature of the contract, it had still assumed that it would come to an honourable understanding with the complainant and had learnt only one year later that it had fallen prey to the complainant's dishonest business practices. According to the Commission, the real problem stemmed from the fact that the complainant had not transferred to the association "the funds received under the compensation". The Commission added that it could not accept to favour through taxpayer's money irregularities of the complainant and even increase the damage that it had suffered from the latter. In the view of the Commission, the result of the Ombudsman's proposal "to fully indemnify" the association would oblige the Commission to pay the subsidy a second time. This the Commission considered to be unacceptable.

In its observations, the complainant maintained its complaint and denied having engaged in dishonest business practices.

## *THE DRAFT RECOMMENDATION*

### The Ombudsman's letter of 26 October 2000

In these circumstances, the Ombudsman addressed a draft recommendation to the Commission on 26 October 2000 which was worded as follows:

*The European Commission should consider indemnifying the association Sternenkinder e.V. for the damages that the latter has suffered as a result of the Commission's refusal to release the sum of money it had agreed to provide for a development project in Chile in a contract which it had entered into with the complainant in June 1997.*

### The Commission's detailed opinion

In its detailed opinion of 19 January 2001, the Commission refused to accept the Ombudsman's draft recommendation. It made the following additional comments, some of which are important enough to be quoted literally:

*"The complainant criticises as maladministration that the Commission withholds payment of funds allocated to one of his projects in Chile, as long as he has not accounted for the use of other EC funds, which have disappeared from one of his other projects in Brazil. For its part, the [complainant] refuses to pay its sub-contractor, the Verein Sternenkinder, for its work on the Chile project. The European Ombudsman recognises in principle that the Commission has a valid claim against the [complainant], but refers its enforcement to the proper courts of law."*

Over the years, the complainant had received EC funding for several development projects, amongst them a project in Brazil which was never implemented. The Commission's advance payment of € 120 000 had been misappropriated, and the Commission had repeatedly asked the complainant to account for the use of this money. The complainant had refused to provide any information in this respect, declaring itself incapable of doing so because the grant contract, negotiated by its own representatives, had been signed by the "Friends". When the Commission had insisted nevertheless, the complainant had denied any responsibility and advised the Commission to sue the "Friends", now bankrupt, after the complainant had emptied its accounts of DM 120 000 and DM 170 000 in 1990 and 1991.

Neither the Commission nor the complainant had made the grant regarding the project in Chile dependent upon a settlement of the dispute regarding the Brazil project, "but the link

was inevitably made when the [complainant] later urged the release of the grant without offering any concession with respect to the Brazil project".

The Commission had not entered into any administrative or commercial relationship with the association nor had it made any representations from which any duty to protect the association's financial interest could be deduced as the source of eventual maladministration. The Ombudsman had taken the view that the Commission should nevertheless pay compensation to the association since it had known that the all or part of the grant money was ultimately destined for the latter. However, it was common practice for projects of this kind to use sub-contractors. Since the Commission had no direct relationship with these sub-contractors, it did not have to pay them directly if their contractor and debtor should fail to honour his commitments.

In the present case, the association had been the complainant's sub-contractor, and the complainant should be held to what it had said it would do: take full responsibility of the project as its own, committing itself to pay the sub-contractors.

To the Commission's knowledge, the association had taken no steps whatsoever to enforce its claims against the complainant in court.

### The complainant's observations

In its observations, the complainant maintained its complaint and made inter alia the following further comments:

The Commission had misrepresented the facts in its detailed opinion. The association had not been the complainant's sub-contractor. In so far as the Brazil project was concerned, a prosecutor in Germany had started an inquiry against the manager responsible. This inquiry had however been closed. The Federal Republic of Germany had further brought an action against the manager. However, this action had been rejected by the German courts. The complainant had not taken money out of the accounts of the "Friends". The relevant sums stemmed from charity events and had been collected by the "Friends" for the complainant.

## *THE DECISION*

### 1 Refusal to release the funds

1.1 The complainant, a German foundation, claimed that the Commission ought to release the sum of € 70 443 it had agreed to provide, in a contract concluded in June 1997, for a development project in Chile.

1.2 The Commission replied that it was entitled to withhold this payment since it had claims amounting to € 210 000 against the Verein der Freunde und Förderer of the complainant (the "Friends") arising from a project in Brazil for which the complainant was liable and against which the amount claimed by the complainant could be set off.

1.3 In order to support its view that the complainant may be held liable for the debts of the Friends, the Commission referred to several factors indicating a close relationship between the complainant and the Friends, for example the fact that staff and members of both were interlinked and that the Friends used the same business address as the complainant, including telephone number and logo.

1.4 The Ombudsman was not in a position to determine whether the complainant should indeed be regarded as liable for the claims of the Commission against the Friends. This issue could ultimately only be decided by a court that had jurisdiction in this matter. However, the arguments put forward by the Commission did not appear to be without

merit at first sight. No instance of maladministration could thus be found with regard to this aspect of the complaint.

### 2 Entering into contract despite the existence of claims against the complainant

2.1 The complainant claimed that it had only been acting for Sternenkinder e.V. (the "association"), a small German charity that had originally proposed the relevant project to the Commission and had been informed by the latter that it was not yet eligible for aid. The Commission had however suggested that the association might obtain a grant via another NGO that fulfilled the relevant criteria. The complainant had subsequently accepted to step in and to submit the application in its own name. The complainant claimed that in view of these circumstances the Commission should not have entered into the relevant contract with the complainant in 1997 if it believed that it had a claim for the repayment of certain sums against the complainant.

2.2 The Commission replied that it did not know the association and had neither negotiated the project with nor awarded the grant to it. All negotiations had been conducted with the complainant. In its relations with the complainant, the Commission had been guided by the principle that, by itself, the fact that the parties were in dispute over one project did not exclude continuing the ongoing business relationship in other cases, as long as the Commission could assume to deal with an honest business partner, with whom an acceptable understanding could be reached. The Commission had only hardened its stand once it had become clear that this trust had been misplaced in the case of the complainant.

2.3 The Ombudsman noted that all the facts on which the Commission relied in order to justify its position according to which the complainant was liable to pay the debts that the Friends had incurred against the Commission appeared to have been known at the time when the contract was signed in June 1997.

2.4 In the view of the Ombudsman, the Commission could not, at the time when the relevant contract was concluded in June 1997, have been under any doubt that the complainant did not accept the Commission's view that it was liable for the debts of the Friends. The Commission itself pointed out that recovery orders against the Friends had been issued already in October 1995 (i.e. long before the contract was concluded) but that it had not been possible to retrieve the amounts concerned. In addition to that, the complainant had clarified, in a letter to the Commission dated 28 February 1997, that the application for a grant had been submitted by itself and not by the Friends. In this letter, the complainant had also stressed that the Friends were in the process of being wound up and were "completely separate" from the complainant. It had furthermore urged the Commission clearly to distinguish between these two bodies. The Commission could thus hardly assume that the complainant would be ready to cover the debts incurred by the Friends.

2.5 In its opinion on the Ombudsman's draft recommendation in this case, the Commission acknowledged that neither itself nor the complainant had made the grant for the project in Chile dependent upon a settlement of the dispute regarding the project in Brazil but claimed that "the link was inevitably made when the [complainant] later urged the release of the grant without offering any concession with respect to the Brazil project". The Ombudsman was unable to accept this claim that was first raised at a very late stage in the procedure and that was not supported by any evidence.

2.6 Even more importantly, the documents submitted by the complainant showed that the Commission, contrary to what it claimed in the present proceedings, knew or must have known that the funds should ultimately benefit not the complainant but the association and its work. The latter had written to the Commission on 15 September 1995 in order to inquire whether it could submit an application for a grant for the project concerned. The Commission had replied that this was not possible but that the association might turn to another NGO that could submit the application. The complainant had then agreed to step in and submit the application in its own name. The documents submitted by the

complainant showed that this had been discussed with the Commission. Indeed, the name of the association is mentioned in both the application itself and the short cover letter sent by the complainant to the Commission on 17 July 1996.

2.7 The Ombudsman considered that the Commission thus knew or must have known that any decision on its part not to release the funds it had agreed to provide would affect the interests of the association. The Commission also knew or must have known that the complainant was not ready to pay the debts of the Friends. The Commission should therefore not have entered into the relevant contract if it did not have the intention of releasing the funds concerned. Besides, the same conclusion would have to be drawn if the Commission had entered into the contract without ascertaining the legal position beforehand. The Commission should in any event have avoided that its dispute with the complainant over the debts of the Friends could cause damage to the association and the project in Chile against which the Commission did not seem to have had any objections.

2.8 In its opinion on the Ombudsman's draft recommendation in this case, the Commission claimed that the association had acted as the complainant's sub-contractor and that it was therefore the complainant's responsibility to pay the association. The Ombudsman considered that this view (that had not been raised by the Commission before) failed to do justice to the particular circumstances of the present case. The complainant had not submitted its own project to the Commission but had only stepped in since the association itself was not yet eligible for aid.

2.9 The Ombudsman concluded from these considerations that in view of the circumstances of the present case the decision of the Commission to enter into the contract was not compatible with good administrative practice and thus constituted an instance of maladministration.

### 3 Delay in informing the complainant

3.1 The complainant claimed that the Commission should not have waited for 18 months before informing it of the reasons for not releasing the funds which it had agreed to pay.

3.2 The Commission replied that it had refused from the start, in numerous contacts, to release the Chile grant, and that the parties had been discussing the litigious accounts since the fall of 1997.

3.3 The Ombudsman noted that according to the evidence submitted to him it was only in its letter of 17 June 1998 to the MEP that the Commission first explained in writing that it did not intend to release the grant before the debts of the Friends had been paid. Moreover, the first document in which the complainant itself was informed of the Commission's position appeared to be the letter of 15 December 1998. The Commission did not produce any evidence that would have shown that the complainant had been informed of this position prior to those dates. In the Ombudsman's view, it could not be considered to be good administrative practice for the Commission to explain the reasons why it did not fulfil an obligation it had taken upon itself nearly a year after the relevant contract had been concluded. This fact therefore constituted a further instance of maladministration.

### 4 Conclusion

4.1 On the basis of the Ombudsman's inquiries into this complaint, it was necessary to make the following critical remarks:

*The Ombudsman considered that the Commission knew or must have known that any decision on its part not to release the funds it had agreed to provide would affect the interests of the association. The Commission also knew or must have known that the complainant was not ready to pay the debts of the Friends. It is a rule of good administrative practice*

*that the administration should act both consistently and fairly. The Commission should therefore not have entered into the relevant contract if it did not have the intention of releasing the funds concerned. It should in any event have avoided that its dispute with the complainant over the debts of the Friends could cause damage to the association and the project in Chile against which the Commission does not seem to have had any objections.*

*The Ombudsman noted that according to the evidence submitted to him it was only in its letter of 17 June 1998 to the MEP that the Commission first explained in writing that it did not intend to fulfil its obligations under the contract entered into in June 1997 before the debts of the Friends had been paid. Moreover, the first document in which the complainant itself was informed of the Commission's position appeared to be the letter of 15 December 1998. In the Ombudsman's view, it cannot be considered to be good administrative practice for the Commission to explain the reasons why it did not fulfil an obligation it had taken upon itself nearly a year after the relevant contract had been concluded. This fact therefore constituted a further instance of maladministration.*

4.2 In his proposal for a friendly solution, the Ombudsman had suggested that the Commission should consider indemnifying the association for the damage it had suffered. In its reply, the Commission rejected this proposal, arguing inter alia that this would oblige it to pay the full subsidy a second time. The Ombudsman then repeated his suggestion in the form of a draft recommendation to the Commission. He pointed out that the Commission's interpretation of his proposal had been erroneous, since he had only suggested that the association should be compensated for the damage it had actually suffered. In its detailed opinion, the Commission confirmed that it continued to reject this proposal. This time, the Commission appeared to argue that it had done nothing that could be interpreted as constituting maladministration towards the association. Again, the Ombudsman considered that such an interpretation would be erroneous. Having found that there was maladministration in the present case, the Ombudsman had to consider how this maladministration could be remedied. In view of the dispute between the Commission and the complainant and given that the Commission had not raised any objections to the way in which the project in Chile had been carried out, it appeared most appropriate to suggest that the Commission should consider indemnifying the party that stood to lose most in the present case, i.e. the association that had pre-financed the project.

4.3 The Ombudsman deplored that the Commission had not accepted this proposal. This decision of the Commission harmed the interests of a small charity and ultimately those of the beneficiaries of the project which the Commission itself agreed was worthy of the EU's assistance.

## 5 Report to the European Parliament

5.1 Article 3 (7) of the Statute of the European Ombudsman[35] provides that after having made a draft recommendation and after having received the detailed opinion of the institution or body concerned, the Ombudsman shall send a report to the European Parliament and to the institution or body concerned.

5.2 In his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament was of inestimable value for his work. He added that special reports should therefore not be presented too frequently, but only in relation to important matters where the Parliament was able to take action in order to assist the Ombudsman[36]. The Annual Report for 1998 was submitted to and approved by the European Parliament.

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35 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.

36 Annual Report for 1998, pages 27-28.

5.3 The Ombudsman considered that the present case which concerned the duties of the European Commission in relation to a specific contract, important as it may be for the parties concerned, did not raise issues of principle. Neither was it apparent which action the European Parliament could take in order to assist the Ombudsman in the present case. Given these circumstances, the Ombudsman concluded that it was not appropriate to submit a special report to the European Parliament.

5.4 The Ombudsman therefore decides to send a copy of this decision to the Commission and to include it in the annual report for 2001 that will be submitted to the European Parliament. The Ombudsman thus closes the case.

5.5 The complainant of course retains the right to submit his contractual claim against the Commission for the payment of the sum of € 70 443 to a court that has jurisdiction in this matter.

## TERMINATION OF AN EXPERT'S CONTRACT WITH ECHO ON THE BASIS OF OUTDATED MEDICAL TESTS

*Decision on complaint 1033/99/JMA (Confidential) against the European Commission*

*THE COMPLAINT*

The complainant began work as an expert for the European Community Humanitarian Office (ECHO), which is part of the Commission, in September 1997. From this date, he was employed as a consultant under four successive contracts. He was asked to undertake a medical examination before the first contract. On that occasion, the complainant had disclosed to the Commission services his medical problems, in particular his poor heart condition, and the treatment which had been prescribed.

At the end of March 1999, the complainant informed ECHO that he wished to leave his current assignment in Colombia and that he was willing to move to Africa. In April 1999, ECHO offered him a position in Kinshasa (RDC), which he accepted.

In July 1999, the complainant signed a new contract with ECHO and underwent a medical examination. The medical examination included an electrocardiogram analysis, which did not reveal any problem. The complainant informed the responsible doctor about his previous heart problems, and agreed to submit his latest echocardiogram which had been taken in February 1999 and which showed a complete recovery from his previous coronary condition.

By mistake, the complainant sent to the responsible doctor an earlier echocardiogram, which had been carried out in January 1999, immediately after he had suffered a coronary problem.

The complainant travelled to Kinshasa on 15 July 1999. The following day he received a telephone call from the Commission services in Brussels, requesting his immediate return. The complainant returned to Brussels, and was informed by ECHO that his contract had been annulled. This decision was formally notified to him by a letter from the Commission, which justified its action on medical grounds.

The complainant returned home where he found a letter dated 9 July 1999 from the responsible doctor. The letter informed the complainant that, on the basis of the echocardiogram of January 1999 which he had submitted, the doctor had concluded that the complainant's health condition was not adequate for the performance of his assigned tasks.

At the end of July, the complainant wrote to the Head of ECHO, Mr Alberto Navarro, to the responsible doctor, and to the Commission service responsible for aid to non-member states. His letters criticised the treatment he had received and requested a reconsideration of his medical condition in the light of his most recent medical tests. No reply was given to his request.

The complainant received an e-mail from the Commission service responsible for aid to non-member states dated 4 August 1999, which stated that the annulment of the contract for medical reasons was foreseen in the contract, and therefore he had no right to claim any compensation (Art. 22, General clauses of the contract).

On the basis of the above facts, the complainant alleged:

(i) that the Commission had abruptly ended his contract as an expert (Technical Assistant Correspondent) with ECHO on the basis of outdated medical tests, without notice or prior consultation and that by so doing, the Commission had not respected the rules of the contract, which stated that the contract could only take effect once the medical condition of the other party had been positively evaluated. The complainant also claimed that the institution should have known of his previous medical problems since he was already working for the institution.

(ii) the Commission had failed to reply to his letters about the matter.

## *THE INQUIRY*

### The Commission's opinion

The Commission explained that, as a general rule, medical examinations must be carried out prior to the signature of any contract. However, this rule cannot always be respected in case of missions involving urgent humanitarian aid. The contract, on the other hand, included a clause whereby the Commission could annul it if the medical condition of the contracting party renders him unsuitable for the assigned tasks.

In the present case, because of the urgency of the mission to be accomplished, the Commission recognised that it was not possible to proceed in due time with the medical examination prior to the signature of the contract.

When the doctor in charge of the medical examination found that the complainant was not suited to perform the tasks prescribed in the contract, the responsible Commission services had no reason to question his conclusion, and were therefore compelled to terminate the contract. This decision should by no means preclude the complainant from seeking future contracts with the institution if his medical condition so allowed.

As for the complainant's suggestion that the Commission should have carried out an additional medical examination before cancelling the contract, the institution did not consider it appropriate because of the short-term nature of the contract. The Commission added that its decisions in the context of a contract can always be contested by the other party before the competent jurisdiction.

The Commission recognised that not having had the medical opinion before the departure of the complainant was an unfortunate situation, and stated that it will seek to avoid similar cases in the future.

### The complainant's observations

In his observations, the complainant stated that the Commission had already agreed to post him to Africa well before the expiry of his former contract in Colombia, and therefore had ample time to perform a medical examination.

The complainant pointed out that the letter from the doctor in charge was dated 9 July 1999. Since the complainant was due to travel on 15 July 1999, the Commission, in the complainant's view, had not explained why it was not aware of the medical conclusions by then. He argued that the Commission should have allowed a new medical examination to

be carried out, once he had explained the reasons which led to the mistaken medical conclusion.

He repeated that the Commission did not respect the rules of the contract, which stated that it could only take effect once the medical condition of the other party had been positively evaluated.

Finally, the complainant stated that the Commission had refused to compensate him for the negative consequences resulting from its lack of diligence. He claimed to be entitled to such compensation.

*THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

After careful evaluation of the opinion and observations, the Ombudsman did not consider that the Commission had responded adequately to the complainant's claims.

1 In the Ombudsman's view, the Commission could obviously not be held responsible for the fact that the complainant submitted the wrong echocardiogram. However, the negative consequences of that error could have been minimised or avoided if the medical examination had taken place earlier. The Commission signed the new contract on 30 June 1999 and arranged the medical examination for the following day. However, its services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The medical examination therefore could have taken place before signature of the contract, if the Commission had acted more promptly. In this case, the complainant's error could have been discovered and corrected before the date scheduled for his departure to Africa.

2 The complainant claimed that he had suffered significant economic loss from the fact that he had already moved to Africa when the results of the medical examination became known. He also stated that the Commission had refused to compensate him. The Ombudsman therefore proposed that the Commission reconsider its position and compensate the complainant for the loss he had suffered as a result of the situation.

3 In its reply of October 2000, the Commission expressed its willingness to consider a potential compensation although subject to certain conditions, namely that such liability be established in accordance with the criteria set out in Art. 288 of the EC Treaty, as interpreted by the Community courts. The Commission added, however, that it did not consider it should bear any liability in this case since its services had strictly complied with the terms of the contract. It recalled in support of its arguments, the relevant contractual clauses and the events that led to its decision to annul the contract.

4 The Ombudsman forwarded the Commission's reply to the complainant, who then provided the Ombudsman with details of the damage he claimed to have suffered (unexpected redundancy, sudden repatriation, loss of medical coverage, move back home), which, in his view, amounted to a total of 19.567,41 €.

5 The Ombudsman forwarded the complainant's assessment of his entitlement to compensation to the Commission. In reply, the Commission repeated its willingness to consider paying compensation, but only where its liability had been clearly established and not where its services had acted correctly within its contractual rights and obligations. The Commission concluded by rejecting the complainant's claims for compensation.

6 In March 2001, the complainant sent his observations. He considered that the Commission's reasoning was shameful, and criticised the suggestion made by the institution to have the dispute solved by a judicial instance because of the high costs of such course of action. In view of the available evidence, he concluded that it was now up to the Ombudsman to take a stand on the matter.

*THE DECISION*

## 1 The termination of the complainant's contract with ECHO

1.1 The complainant had alleged that the Commission abruptly ended his contract as an expert (Technical Assistant Correspondent) with ECHO on the basis of outdated medical tests, without notice or prior consultation. By so doing, the Commission had not respected the rules of the contract which stated that the contract could only take effect once the medical condition of the other party had been positively evaluated. Moreover, the complainant claimed that the institution should have known of his previous medical problems since he was already working for the institution.

1.2 The Commission explained that exceptionally in this case, it was not possible to proceed in due time with the medical examination prior to the signature of the contract, due to the urgency of the mission to be accomplished. It justified its action on the grounds that the contract included a clause whereby the Commission could annul the contract if the medical condition of the contracting party renders him unsuitable for the assigned tasks. The institution regretted that it could not receive the medical opinion before the departure of the complainant, although it undertook to seek to avoid similar situations in the future.

1.3 The Ombudsman noted that the Commission had not responded to the complainant's claim that it should have known of his previous medical problems since he was already working for the institution.

1.4 As regards the facts, it appeared undisputed that, following the medical examination, the complainant submitted an outdated echocardiogram to the responsible doctor. On the basis of the incorrect information, the doctor formed the view that the complainant was not fit to perform his assigned tasks.

1.5 Although the complainant had been responsible for submitting the outdated echocardiogram, the Ombudsman considered that the negative consequences of his error could have been minimised or avoided if the medical examination had taken place earlier, or if the Commission had acted more promptly once the results were known. In either case, the complainant's error could have been discovered and corrected before the date scheduled for his departure to Africa.

1.6 The Ombudsman noted that the Commission's services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The Ombudsman therefore could not accept the Commission's claim that the urgency of the mission made it impossible to carry out the medical examination before signature of the contract on 30 June 1999. The failure to carry out the medical examination before signature of the contract, as foreseen by Art. 6 of Annex I of the contract, was, therefore, an instance of maladministration.

## 2 The complainant's claim for compensation

2.1 The complainant had claimed to have suffered significant economic loss as a result of the Commission's actions. In accordance with his statutory duties[37], the Ombudsman sought to reach a friendly solution to the complaint. The Ombudsman regretted the failure of the Commission to put forward any constructive proposal in response to the complainant's assessment of the nature and amount of the loss that he had suffered.

2.2 In view of the fact that the Commission disputed the nature and amount of any liability to compensate the complainant and had refused to negotiate towards a possible friendly solution, the Ombudsman considered that the complainant's claim for compensa-

[37] Art. 3 § 5 of the 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.

tion could best be dealt with by a court of competent jurisdiction, which would have the possibility to hear arguments concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact. The Ombudsman did not, therefore, consider that further inquiries into this claim were justified.

**3 Reply to the letters of the complainant**

3.1 The complainant had indicated that the Commission failed to reply to several of his letters to the institution dated 21 July 1999, and 5 August 1999. These letters made reference to the unfair treatment allegedly suffered, and requested a reconsideration of his medical condition in the light of his most recent medical tests. Although he received an e-mail from the Commission services dated 4 August 1999, this letter made no reference to the complainant's requests.

3.2 As the European Ombudsman had stated in similar cases, the Commission as a public administration has a duty to reply properly to correspondence from citizens.

3.3 The European Ombudsman noted, however, that in its opinion, the Commission had taken a stand on the substantive points raised by the complainant. No further inquiry by the Ombudsman in relation to this aspect of the complaint therefore seemed necessary.

**4 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

*The Ombudsman noted that the Commission's services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The Ombudsman therefore could not accept the Commission's claim that the urgency of the mission made it impossible to carry out the medical examination before signature of the contract on 30 June 1999. The failure to carry out the medical examination before signature of the contract, as foreseen by Art. 6 of Annex I of the contract was, therefore, an instance of maladministration.*

The Commission disputes the nature and amount of any liability to compensate the complainant and has refused to negotiate towards a possible friendly solution.

The Ombudsman thus considers that the complainant's claim for compensation could best be dealt with by a court of competent jurisdiction, which would have the possibility to hear arguments concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

The Ombudsman therefore closes the case.

## THE COMMISSION'S FAILURE TO REGISTER AN ARTICLE 226 COMPLAINT

*Decision on complaint 1267/99/ME against the European Commission*

*THE COMPLAINT*

In October 1999, the complainant lodged a complaint with the European Ombudsman on behalf of the association Fria Åland concerning a complaint it had submitted to the European Commission, DG XXI (now: Taxation and Customs Union DG), in March 1998.

In its complaint to the Commission, the complainant had alleged that trade between the Åland island and the Finnish mainland was favoured in an undue way compared to trade between Åland and other Member States. According to Article 3 of Protocol No 2 to the Act of accession of Finland, Åland is excluded from the territory of Finland as regards the application of Council Directive 77/388/EEC, which means that border tax has to be paid on trade between Åland and any Member State. The Finnish customs had issued a special simplified procedure for the trade between Åland and the Finnish mainland, which according to the complainant violated Articles 90 (former 95) and 12 (former 6) of the EC

Treaty in that it favoured trade from Finland and thus discriminated against trade from other Member States.

In its complaint to the Ombudsman, the complainant put forward that shortly after the complaint had been submitted to the Commission, the association received a phone call from a Commission official who tried to convince it to drop the complaint. Since then, the association has not heard anything from the Commission and suspected that the Commission was deliberately delaying the handling of the complaint or even that the Commission had destroyed the documents. The association alleged undue delay on behalf of the Commission in its handling of the complaint.

*THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that it had received a letter dated 6 March 1998 from the complainant concerning alleged infringement of Community law in relation to border tax formalities between the Åland island and the Finnish mainland. The letter was linked to a number of other issues concerning the fiscal frontier between the Finnish mainland and Åland. For various complaints concerning different aspects of the creation of the tax border between Åland and the Finnish mainland, file IN/P/95/4812 had served as the main file and the complainant's letter was joined to this file. This file had been closed on 15 October 1997. The letter was not registered as a separate complaint because an infringement of Community law was not apparent on the basis of the specific circumstances invoked in the letter.

The Commission regretted that no reply was sent to the complainant, however it stated that in a phone call on 9 October 1998, the complainant had been informed of the general legal framework and of the information needed to establish whether a breach of Community law existed. Following this phone call, no further information was received from the complainant and since it was not possible to establish an infringement of Community law on the basis of the information already given by the complainant, the particular aspect presented by the complainant was not pursued further.

Moreover, the Commission underlined that the letter from the complainant represented one aspect of a general question of setting up fiscal frontier between the Finnish mainland and Åland. On the basis of different complaints, the Commission has examined and is continuing to examine the different aspects of this matter. Since the purpose of the infringement procedure is to get a Member State to comply with Community law, the general procedure of examination continues irrespectively of the outcome of single complaints relating to it.

### The complainant's observations

In its observations, the complainant pointed out that the letter of 6 March 1998 showed a clear behaviour of the Finnish authorities, which the complainant considered to be in breach of Articles 12 and 90 of the EC Treaty and of Article 3 of Protocol No 2 to the Act of accession of Finland. It was thus remarkable that the letter had not been registered as a formal complaint. The Commission should at least register the letter as a complaint and treat the complainant equally to other complainants. If the Commission disagreed with the complainant's view as regards Finland's actions towards Åland, the complainant invited the Commission to send a reasoned opinion to that effect in due time. Finally, the complainant called upon the Ombudsman to ensure that the Commission act in accordance with principles of good administration and at least reply to the complaint's letter in due time.

*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 asked the Commission to specify in more detail why it did not consider it necessary to register the complainant's letter as a complaint and to deal with it in accordance with the principles set out in the Ombudsman's own initiative inquiry 303/97/PD concerning the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law.

**The Commission's further opinion**

In its further opinion, the Commission confirmed that in its comments to the own-initiative inquiry 303/97/PD, it stated that all complaints received by the Commission were registered, without exceptions. This did however not mean that all letters were registered as complaints but rather that the Commission, in accordance with its internal procedures, only registered those letters as complaints that are likely to be investigated as such. A thorough examination of the complainant's letter took place. However, no new circumstances were revealed compared to the investigation recently closed by the Commission in this matter (IN/P/95/4812). The criticism contained in the letter was therefore seen as manifestly unfounded and the Commission had therefore no intention to register the letter or to deal with it as a complaint. The Commission regretted the misunderstanding that had occurred in this case but concluded that it considered itself to have acted in accordance with principles of good administration.

**The complainant's further observations**

In its further observations, the complainant put forward that it found the Commission's statement that its criticism was manifestly unfounded to be negligent and underlined that the Commission had also avoided to state the reasons for its conclusion. As regards the substance of the letter, the complainant was surprised that the Commission raised no objections against the behaviour of the Finnish authorities in relation to tax border issues on Åland.

*THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

After careful consideration of the opinions and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claim.

The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

*The Commission should register the complainant's letter of 6 March 1998 as a complaint and deal with it in accordance with the safeguards set out in the Ombudsman's own-initiative inquiry 303/97/PD. If the Commission has a justified explanation for not registering the letter as a complaint, it should reply to the letter as normal correspondence, thereby stating the reasons for its decision.*

**The Commission's reply**

In its reply, the Commission underlined that it considered that it had acted in accordance with principles of good administration. Nevertheless, it was prepared to arrive at a friendly solution with the complainant. The Commission had therefore, on 28 March 2001, sent a letter to the complainant in which it explained its position.

The letter to the complainant identified the four main reasons which had led the Commission not to proceed formally with the complainant's letter of 6 March 1998. These related to the fact that (i) Åland, with respect to taxes, is situated outside the Community

territory, (ii) it could not be concluded that trade between Åland and Finland was favoured compared to trade between Åland and other Member States, (iii) it could not be concluded that goods from other Member States were subject to higher taxation compared to goods from Finland, and (iv) Article 3 of Protocol No 2 to the Act of accession of Finland relates to physical and juridical persons but not to goods. The Commission added that, it had since received a similar complaint which was being examined. The Commission undertook to inform the complainant if the examination would lead to a change of its position.

**The complainant's observations on the Commission's reply**

The complainant stated that it understood the Commission's reply to mean that it would not act upon its letter of 6 March 1998 for the reasons indicated. On the substance, the complainant put forward that it had provided information to the effect that trade between Åland and Finland was favoured compared to trade between Åland and other Member States, that goods from Åland were subject to lower taxation than goods from outside, and that the physical and juridical persons buying the goods were affected by the taxation. The complainant concluded that it was not satisfied with the Commission's reply and claimed that the Commission should act upon its complaint.

It therefore appeared that a friendly solution to the complaint could not be achieved.

*THE DECISION*

**1 Undue delay and failure to register the complainant's letter**

1.1 The complainant alleged undue delay on behalf of the Commission in its handling of the complaint it had submitted on 6 March 1998. When the complainant found out that the letter had not been registered as a complaint, it expressed the view that the Commission should register the letter as a complaint and at least reply to the letter in due time. The complainant also pointed out that the Commission had not given any reasons for its conclusion.

1.2 The Commission stated that the letter of 6 March 1998 had not been registered as a complaint but was joined to the closed complaint file IN/P/95/4812. The Commission had informed the complainant in a phone call of the general legal framework of infringement procedures. The letter had not been registered as a separate complaint as the examination of the letter revealed no new circumstances compared to the investigation recently closed by the Commission in this matter. The Commission also stated that in accordance with its internal procedures, it only registers those letters as complaints that are likely to be investigated as complaints. In reply to the Ombudsman's proposal for a friendly solution, the Commission provided the four main reasons why it had not proceeded formally with the complainant's letter of 6 March 1998.

1.3 In his proposal for a friendly solution, the Ombudsman stated that it is good administrative behaviour to reply to citizens' letters within due time and to state the reasons for a decision. The Ombudsman acknowledges that the Commission has now responded to the complainant's letter indicating the four main reasons which had led it not to proceed formally with the complainant's letter of 6 March 1998. The Ombudsman considers these reasons to relate to the substance of the complaint. Even if the reply was delayed, the Ombudsman recognises the good intention of the Commission to provide the complainant with a reply. The Ombudsman therefore finds that there is no maladministration as regards this part of the complaint.

1.4 As regards the fact that the Commission did not formally register the complainant's letter of 6 March 1998 as a complaint, the Ombudsman notes the following.

1.5 In his own-initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law (303/97/PD) which was closed on 13 October 1997, the Commission acknowledged that complainants have a place in infringement proceedings as complaints from individuals remain the most important source on which the Commission bases its task of monitoring the application of Community law. In the period before the judicial proceedings may begin, the complainants enjoy procedural safeguards which the Commission had constantly developed and improved. The Commission declared itself ready to continue along those lines. Furthermore, the Commission stated that all complaints which reach the Commission are registered and that no exceptions are made to this rule. Once the Commission receives a complaint, it acknowledges receipt by letter and once it has been registered, the complainant is informed of the action taken.

1.6 The Commission took the view that the complainant's letter was not a complaint. The Ombudsman agrees that the Commission enjoys some discretion in deciding what letters should be registered as complaints. However, the Ombudsman is not convinced that the Commission has explained why the letter was not registered either as a new complaint or under the present complaint file and further dealt with in accordance with the safeguards set out in the own-initiative inquiry 303/97/PD. In reply to the Ombudsman's proposal for a friendly solution, the Commission further failed to explain why it had not registered the letter as a complaint.

1.7 The complainant's letter of 6 March 1998 stated that it concerned breach of the EC-Treaty and Protocol No 2 to the Act of accession of Finland and it requested the Commission to act against Finland. It must therefore have been clear to the Commission that the complainant's intention was to lodge a formal complaint under Article 226 of the EC-Treaty. In this respect, it should be pointed out that a formal registration of the letter would not have prevented the Commission from drawing the conclusion that it would not investigate the matter further for the reasons mentioned in its letter of 28 March 2001 to the complainant.

1.8 The Commission shall act in accordance with its undertakings in the own-initiative inquiry 303/97/PD[38]. A failure to respect those safeguards constitutes an instance of maladministration. In the present complaint, the Commission failed to register the complainant's letter as a complaint, and thus failed to act in accordance with good administration. The Ombudsman will therefore address a critical remark to the Commission.

## 2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*The Commission shall act in accordance with its undertakings in the own-initiative inquiry 303/97/PD[39]. A failure to respect those safeguards constitutes an instance of maladministration. In the present complaint, the Commission failed to register the complainant's letter as a complaint, and thus failed to act in accordance with good administration.*

As regards this aspect of the case, the Ombudsman tried to pursue a friendly settlement of the matter. However, a friendly solution to the complaint could not be achieved. The Ombudsman therefore closes the case.

38 See also the European Ombudsman's Decision of 7 June 2001 on complaint 1194/2000/JMA against the European Commission. Available on the Ombudsman's Website: http://www.euro-ombudsman.eu.int

39 See also the European Ombudsman's Decision of 7 June 2001 on complaint 1194/2000/JMA against the European Commission. Available on the Ombudsman's Website: http://www.euro-ombudsman.eu.int

## REPAYMENT OF CUSTOMS DUTY

*Decision on complaint 1278/99/ME against the European Commission*

### *THE COMPLAINT*

The complainant, the Vice President of the British Importers Association, lodged a complaint with the European Ombudsman in September and October 1999 on behalf of one of the members of the Association, South Lodge (Imports) Ltd. The complaint concerned the customs duty in relation to the import of textile garments from Cambodia under the Generalised System of Preference (GSP). The GPS allowed a reduced rate of customs duty.

Between 23 August 1994 and 9 April 1996, South Lodge made 51 imports from four different suppliers in Cambodia. Each consignment was supported by a certificate of origin Form A, and was thus cleared at a zero rate of customs duty under the GSP.

In order to check that the origin rules were adhered to, South Lodge visited the suppliers in Cambodia who assured South Lodge that the garments they were making met the origin rules. In 1996, South Lodge was informed that textile garments supposedly originating in Cambodia did not in fact meet the required origin rules. South Lodge was subsequently brought to the UK VAT and Duties Tribunal by the Commissioners of Customs and Excise in the UK. In its judgement from 1999, the Tribunal found that the rules of origin had not been met and South Lodge had to pay duty and VAT amounting to £ 336 000.

According to the complainant, the Commission knew already in 1994 that textile garments could not originate in Cambodia and consequently did not meet the required origin rules. It appeared that this information was made available only to the Commission. The complainant stated that South Lodge would not have purchased garments from these suppliers if it had been aware of the information that was known to the Commission. South Lodge was informed only in 1996, following a visit by the Commission to Cambodia.

According to the complainant, the Commission had an obligation to notify economic operators in 1994 when it became aware of the fact that textile garments could not originate in Cambodia and consequently did not comply with the rules concerning required origin. The complainant alleged that the Commission failed to comply with this obligation.

### *THE INQUIRY*

#### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that in August 1994, it sent a message alerting the Member States to possible problems concerning importation of certain textile products from Cambodia. The message was issued under Regulation No 1468/81 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (later replaced by Regulation No 515/97).

Article 19[40] of Regulation No 1468/81 provides that "Any information communicated in whatever form pursuant to this Regulation shall be of a confidential nature. It shall be covered by the obligation of professional secrecy (…) may not in particular be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it." In the light of this provision, the Commission found that it could not send the Mutual Assistance message issued in 1994 to the complainant. In addition, the Commission stated that the message contained neither established facts nor an evaluation of the scale of possible irregularities. In the message, the

[40] Article 45 of Council Regulation (EC) No 515/97, currently in force.

Commission asked the Member States to begin inquiries aimed at establishing the true origin of the goods, which could have been Cambodia, until the opposite was proven.

Following the message and the Member States' investigations, the Commission sent a delegation to Cambodia in March 1996. The purpose of this mission was to check the validity of the certificates of origin. The mission showed that 1463 certificates of origin were forgeries and that 1716 certificates of origin had been wrongly issued.

The results were communicated to the Member States concerned in April 1996, in compliance with Regulation No 1468/81, so that the recovery procedures could be initiated. The Commission pointed out that the economic operators are informed in accordance with national legal provisions by the competent national authorities. The Commission also underlined that the complainant had been informed by the United Kingdom Customs and Excise in October 1995 and January and April 1996, prior to and following the communication of the results of the mission to Cambodia.

The Commission concluded that it had acted according to the legal framework in force.

### The complainant's observations

In his observations, the complainant maintained his complaint. He found the Commission's statement that its message from 1994 to the Member States was confidential and covered by the obligation of professional secrecy to be ludicrous. The complainant referred to warning notices published by the Commission in the Official Journal concerning certificates of origin from Israel and Bangladesh. The complainant also alleged that the Council had instructed the Commission in 1996 to urgently examine the GSP problem (Council Decision of 28 May 1996, OJ 1996 C 170/1), but so far the Commission had failed to act. Due to the failure by the Commission to inform South Lodge, the business had effectively closed down and 46 of the 50 employees were made redundant. The complainant concluded that the central point of the complaint was that the Commission knew there was a problem but did not advise the economic operators although the Commission had an obligation to do so.

### Additional information

In a further letter of 20 January 2000, the complainant referred to the fact that the Commission's Report on the mission to Cambodia of 28 March 1996 made reference to enquiries conducted by Member States in 1994. The complainant was of the view that these enquiries must have alerted the Commission to irregularities in the operation of the GSP system. The complainant also stated that after the Commission's findings in the 1996 Mission Report, it took the Commission another three months to inform the economic operators. The complainant referred to South Lodge's visit to Cambodia in 1995 were it met the Prime Minister and other high ranking Government officials and was assured that the garments qualified for GSP origin. Despite rigorous enquiries, South Lodge could not have established the true position.

In another letter of 2 August 2000, the complainant pointed out that in Bangladesh, invalid certificates of origin had been issued over the past years. The Bangladeshi authorities had refused to reply to verification enquiries. The UK Customs and Excise proposed not to collect any back duty which the complainant welcomed, as EU importers had no control over the validity of a Preference origin certificate. However, as regards the situation of the present complaint, because the Cambodian authorities co-operated with the Commission, South Lodge had to pay back duty and was completely ruined. Because Bangladeshi authorities did not co-operate with the Commission, EU importers have to pay no back duty at all. The complainant alleged that there was unfair treatment.

*FURTHER INQUIRIES*

After careful consideration of the Commission's opinion and the complainant's observations and further correspondence, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Commission to comment on the following three points:

1 The Ombudsman referred to the Council Decision of 28 May 1996 on the post-clearance recovery of the customs debt, according to which it is requested that a study should be carried out by the Commission with a view to finding a solution to the recovery problems and making a proposal covering past and future situations. The Ombudsman asked the Commission to inform him if any study was carried out and if so, of the results and the implication of the study for South Lodge. The Ombudsman also asked the Commission to inform him of any other development in this field which would have implications for South Lodge.

2 According to the Council Decision of 28 May 1996, the system and the rules in force in May 1996, were seen as unfair to Community traders. The Council Decision also stated that the Commission proposal should cover past situations. The Ombudsman asked the Commission to comment on these statements.

3 The Ombudsman finally asked the Commission to comment on the information contained in the complainant's letters of 20 January and 2 August 2000.

A copy of the complainant's observations was also sent to the Commission.

**The Commission's second opinion**

In its second opinion, the Commission put forward in summary the following:

Following the Council Decision of 28 May 1996 on post-clearance recovery of customs debt, the Commission adopted on 23 July 1997 a Communication on the management of preferential tariff arrangements, Document COM (97) 402 final. The Communication outlines the action that might be taken. As regards past situations, the Communication states that it will be necessary to settle previous cases on the basis of regulations existing at the time that the facts were established, in conformity with the legal precedent setting out that faith in the certificate of origin is not normally protected, but constitutes a "normal commercial risk".

The Commission explained that the Community Customs Code was amended to take account of the problems concerned with good faith[41]. Article 220(2)(b) was amended for the purpose of defining the concepts of error on the part of the customs authorities and of good faith on the part of the person liable for payment. Importers acting in good faith will in the future enjoy a higher level of protection and under certain circumstances, the duties will not be levied.

As regards the complainant's letters from January and August 2000, the Commission first pointed out that the economic operators benefiting from the preferential tariffs and the customs authorities in the Member States verifying imports and customs declarations are the ones involved in the handling of the preferential arrangements. The Commission is not directly involved in these operations but if it is notified of fraud or maladministration (by virtue of investigations carried out with customs officials of the Member States or via information from economic operators), there is nothing to prevent it from publishing a notice for importers in accordance with the Commission's Communication concerning information to economic operators and Member State administrations of cases of reasonable doubt as to the origin of goods, Document COM (2000) 550. In that context and also

41 Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ 2000 L 311/17.

with reference to the second point raised by the Ombudsman in his further inquiries, the Commission stated, as pointed out in the Commission Communication on the management of preferential tariff arrangements, that previous cases must be settled on the basis of the regulations existing at the time the customs debt in question was incurred.

The Commission concluded that the amendment to Article 220(2)(b) of the Community Customs Code came into force on 19 December 2000. Situations where the customs debt was incurred before 19 December 2000, will have to be dealt with in accordance with the old legislation, which has been interpreted on numerous occasions by the Court of Justice.

### The complainant's second observations

In the complainant's observations on the Commission's second opinion, he again underlined that it was outrageous that the Commission found the information it was in possession of in 1994 concerning problems with origin certificates issued in Cambodia to be confidential. The Commission has a duty of care to EU small and medium seized enterprises and should and must ensure that such issues are published to the business community. The complainant stated that nowhere in either of the Commission's opinions did he find a reference to its justification of lack of information to the business community. Moreover, the complainant had provided proof that the Commission knew about the problems already in 1994, but the Commission failed to comment on this.

The complainant referred to the letter from the Minister of Commerce in Cambodia to the President of the Commission in which the Cambodian authorities accept responsibility for the errors in the origin certificates. In the case of Bangladesh, because the authorities did not co-operate with the Commission, no back duty demand was issued. The complainant found this inequitable.

The complainant pointed out that the Commission's second opinion dealt with the question of future situations which had now been addressed in the Community Customs Code which came into force on 19 December 2000, four years after the Council instructed the Commission to deal with the issue. However, the Commission did not address the instruction that it should also find a solution to situations in the past.

The complainant also stated that the Commission did not comment on the fact that the situation that occurred for operators importing from Bangladesh was treated differently from the Cambodian situation.

The complainant concluded that the basic points of the complaint were firstly that the Commission knew in 1994 that there was a problem with origin certificates issued in Cambodia and secondly that the Council instructed the Commission to find a solution for both past and future problems.

## *THE DECISION*

### 1 The alleged failure by the Commission to inform the economic operators

1.1 According to the complainant, the Commission had an obligation to notify economic operators in 1994 when it became aware of the fact that textile garments could not originate in Cambodia and consequently did not comply with the rules concerning required origin. The complainant alleged that the Commission failed to comply with this obligation. In his observations, the complainant referred to warning notices published by the Commission in the Official Journal concerning certificates of origin from Israel and Bangladesh. The complainant alleged that South Lodge as economic operator suffered unfair treatment following the Commission's failure to publish a similar warning concerning textile garments from Cambodia.

1.2 The Commission stated that, in August 1994, it sent a message alerting the Member States to possible problems concerning imports of certain textile products from Cambodia. The message could not be sent to the complainant as it was issued under Regulation No 1468/81 which requires that such information shall be of a confidential nature and covered by the obligation of professional secrecy. After the Commission had sent a delegation to Cambodia and checked the validity of the certificates of origin it informed the Member States. According to the Commission, economic operators are informed by the competent national authorities in accordance with national legal provisions. The Commission did not comment specifically on the Bangladeshi and Israeli warnings but stated that there is nothing to prevent it from publishing a notice for importers in accordance with the Commission's Communication of 8 September 2000 concerning information to economic operators and Member State administrations concerning cases of reasonable doubt as to the origin of goods.

1.3 The Ombudsman notes that the relevant legal provisions contain a duty for the Commission to communicate information to the Member States. The legislation does not however, contain any express duty for the Commission to inform economic operators[42].

1.4 The Ombudsman also notes, however, that the Commission accepts that the secrecy foreseen in Regulation No 1468/81 does not prevent it from publishing warning notices to economic operators in accordance with the Commission's Communication on the subject, issued in the year 2000[43]. Since a Communication does not alter the law, the Commission could have published such warnings before, as it did in the cases of Bangladesh and Israel[44]. The Ombudsman also notes that the Council instructed the Commission to examine the problems in 1996, in order to seek a solution to the unfair treatment of Community traders who could not reasonably detect irregularities in the acts of third-country authorities[45]. Furthermore, the need to publish warnings was highlighted already in 1997 in the Commission's Communication on the management of preferential tariff arrangements[46], as well as in the Parliament's Resolution on that Communication[47].

1.5 It is good administrative behaviour to act consistently. During the Ombudsman's inquiry into this complaint, the Commission offered no explanation as to why it did not publish a warning notice in 1994 concerning imports of textile garments from Cambodia, although it did publish similar warnings to the benefit of importers of certain goods from Bangladesh and Israel in 1997. It would therefore have been proper for the Commission also to have published a warning concerning textile garments from Cambodia, in due time.

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42 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302/1, and Council Regulation (EEC) No 1468/81 of 19 May 1981 (as amended by Regulation (EEC) No 945/87, OJ 1987 L 90/3) on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1981 L 144/1. (The Regulation in force at the relevant time, however later replaced by Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L 82/1.)

43 Communication COM (2000) 550 of 8 September 2000 from the Commission to the Council and the European Parliament setting out conditions, in the context of preferential tariff arrangements, for informing economic operators and Member State administrations of cases of reasonable doubt as to the origin of goods, OJ 2000 C 348/4.

44 See: Commission Notice to importers - Textile products imported into the Community from Bangladesh under the generalized system of preferences (GSP), OJ 1997 C 107/16 and Notice to importers, Importations from Israel into the Community, OJ 1997 C 338/13.

45 Council Decision of 28 May 1996 on the post-clearance recovery of the customs debt, OJ 1996 C 170/1.

46 Document COM (97) 402 final.

47 Resolution on the Commission communication on the management of preferential tariff arrangements (COM(97)0402 C4-0447/97), OJ 1998 C 341/145.

## 2 The Council Decision requesting the Commission to carry out a study

2.1 The complainant alleged that the Council had instructed the Commission in 1996 to urgently examine the GSP problem (Council Decision of 28 May 1996, OJ 1996 C 170/1), but so far the Commission had failed to act.

2.2 The Commission stated that it had adopted a Communication on the management of preferential tariff arrangements, Document COM (97) 402 final. As regards previous cases, the communication states that these has to be settled on the basis of regulations existing at the time that the facts were established, in conformity with the legal precedent setting out that faith in the certificate of origin is not normally protected, but constitutes a "normal commercial risk".

2.3 The Ombudsman notes that, following the Council Decision on post-clearance recovery of customs debt[48], the Commission on 23 July 1997 adopted a Communication on the management of preferential tariff arrangements, Document COM (97) 402 final. The Ombudsman has noted the conclusion of that Communication and observes that the legal framework has been adapted to better deal with similar situations in the future. There appears to be no maladministration as regards this part of the complaint.

## 3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*It is good administrative behaviour to act consistently. During the Ombudsman's inquiry into this complaint, the Commission offered no explanation as to why it did not publish a warning notice in 1994 concerning imports of textile garments from Cambodia, although it did publish similar warnings to the benefit of importers of certain goods from Bangladesh and Israel in 1997. It would therefore have been proper for the Commission also to have published a warning concerning textile garments from Cambodia, in due time.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## FAILURE TO MOTIVATE A REFUSED ACCESS TO DOCUMENTS ON THE BASIS OF COMMISSION DECISION 94/90

*Decision on complaint 374/2000/ADB (Confidential) against the European Commission*

*THE COMPLAINT*

The complainant is a citizen of the European Union who regularly stays on a Caribbean island. He got to know about a project aiming at rehabilitating a road section on the island. Believing that the European Union planned to fund the rehabilitation, he contacted the European Commission to question the public interest of the project and to obtain some documents in relation to it.

The complainant considered that there was no need for this particular road in this area of the island, that it had other priorities, that the local parliament would not have the resources to maintain this road and finally that the whole project had a negative environmental and sociological impact. In summary, the complainant considered that the project should not be funded by the EU.

Considering that he was not given access to the documents he requested and that the project had not been properly assessed, the complainant lodged a complaint with the European Ombudsman.

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48 Council Decision of 28 May 1996 on the post-clearance recovery of the customs debt, OJ 1996 C 170/1.

## *THE INQUIRY*

### The European Commission's opinion

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

The rehabilitation of the road mentioned by the complainant had been identified by the local government as a possible candidate for EDF (European Development Fund) funding. It aimed at improving the economic activity in an attractive area of the island, which was disadvantaged by a difficult dirt road.

The complainant had been complaining about the project since late 1998. The points raised in his letters were answered on three occasions, i.e. 26 January, 15 February and 8 March 1999. Given the preparatory stage of the project, the complainant was provided with sufficient information.

According to the Commission: "*The documents requested by [the complainant] are all internal Commission documents meant to facilitate the identification and the instruction of the project. Documents referred to this project identification stage are preliminary documents dealing with different aspects of the project idea. Until a project reaches a certain maturity, it might be counter-productive and sometimes misleading to disclose any such documents.*"

The Commission declared that it was aware of the possible negative impact of the project and that it had no intention to fund the project under these conditions. Works, which had been carried out on the spot, must have been financed out of local funds.

### The complainant's observations

The complainant did not hand in any observations.

## *THE DECISION*

### 1 Information provided to the complainant

1.1 The complainant alleged that the Commission failed to disclose the documents he requested.

1.2 The Commission put forward that the complainant has been sufficiently informed and that it might be counterproductive and sometimes misleading to disclose preliminary documents.

1.3 With a decision of 8 February 1994, the Commission adopted a Code of conduct concerning public access to Commission and Council documents[49]. The aim of this Decision is to give effect to the principle of the largest possible access for citizens to information, with a view to strengthening the democratic nature of the institutions and the trust of the public in the administration. As the Community courts have held, Decision 94/90 is a measure conferring on citizens legal rights of access to documents held by the Commission[50], and is intended to apply generally to requests for access to documents[51].

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49 Commission Decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom), Official Journal L 046 , 18/02/1994 p. 0058 - 0061.

50 Case T-105/95, WWF UK v. Commission [1997] ECR-II-0313, par. 55.

51 Case T-124/96, Interporc v. Commission [1998] ECR-II-0231, par. 48.

1.4 The Code of conduct concerning public access to Commission and Council documents provides for a limited list of exceptions to the right of access to documents. The Commission did not rely on any of them to justify its refusal to disclose the documents requested by the complainant. In the absence of such justification the Ombudsman considered that the Commission had not considered the complainant's request under the light of its decision 94/90. This constituted an instance of maladministration.

**2 Suitability of the project and funding by the European Commission**

2.1 The complainant considered that the project had a negative impact and that it should not be financed out of EDF funds. The Commission informed the Ombudsman that it was aware of this situation and that the project had not been funded.

2.2 The Ombudsman has found no instance of maladministration in relation to these aspects of the case.

**3 Conclusion**

On the basis of the European Ombudsman's inquiries in this case, it appears necessary to make the following critical remark:

*The Code of conduct concerning public access to Commission and Council documents provides for a limited list of exceptions to the right of access to documents. The Commission did not rely on any of them to justify its refusal to disclose the documents requested by the complainant. In the absence of such justification the Ombudsman considered that the Commission had not considered the complainant's request in the light of its decision 94/90. This constituted an instance of maladministration.*

Given that the complainant, further to the information he received in the course of the present inquiry, does not appear to show any specific interest in obtaining the documents he had originally asked for, the Ombudsman decides to close the case.

## THE COMMISSION'S DUTY TO STATE REASONS IN AN ARTICLE 226 COMPLAINT

*Decision on complaint 493/2000/ME against the European Commission*

*THE COMPLAINT*

The complainant, the President of the association "Västkustbanans Framtid", complained to the Ombudsman in April 2000. The complainant had addressed a complaint to the European Commission concerning Sweden's compliance with Directive 85/337/EEC[52] and Directive 92/43/EEC[53] on the conservation of natural habitats and of wild fauna and flora. Her complaint to the Ombudsman concerned the Commission's handling of her complaint.

On 2 June 1997, the complainant addressed a complaint to the Commission concerning an Environmental Impact Assessment (EIA) carried out for the train connection Västkustbanan in the south of Sweden. Two EIAs had been carried out for the connection, (i) Västkustbanan Förslöv-Ängelholm, Miljökonsekvensbeskrivning för sträckan Förslöv-Norra delen av Skälderviken, dated 10 February 1995, and (ii) Västkustbanan Förslöv-Ängelholm, Miljökonsekvensbeskrivning för sträckan Lingvallen-Ängelholms stationsområde, dated 21 May 1996. The complaint related mainly to the second EIA. The complaint was registered by the Commission as complaint P-97/4837. By letters of 19 January and 9 February 1998, the complainant further complained about the classification

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

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

of the Skälderviken area, also in the south of Sweden, under the so-called Habitats Directive. This complaint was dealt with by the Commission together with that of 2 June 1997. From March to June 1998, the complainant sent further information to the Commission.

In a letter of 10 August 1998, the Commission concluded that there was no infringement of Community environmental legislation and proposed to close the matter within one month unless the complainant submitted fresh information.

In April 2000, the complainant lodged a complaint with the Ombudsman. In her complaint to the Ombudsman, she stated that the EIA made for the train connection Västkustbanan, section Lingvallen-Ängelholms stationsområde, was inadequate as the assessment did not cover all relevant factors. Thus, Sweden was in breach of Directive 85/337/EEC. Further, the EIA for the section Lingvallen-Ängelholms stationsområde, appeared to have been handed in too late by the Swedish authorities. The complainant alleged that the Commission should therefore not have accepted the EIA.

The complainant moreover claimed that the Commission should ensure the designation of the Skälderviken area as a Natura-site under Directive 92/43/EEC.

The complaint contained detailed descriptions of the environment and surroundings of the areas concerned.

## *THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the complaint submitted to it on 2 June 1997 had been acknowledged on 25 November 1997. The complainant had further been informed about the Commission's investigations and actions by letters of 9 and 23 February, 10 August, 3 and 10 September 1998, 15 February and 8 June 1999. The Commission also pointed out that whether or not to launch an infringement procedure against a Member State lies within the discretionary powers of the Commission and the complainant had been informed thereof. The Commission understood the complaint not to concern the handling of the complaint submitted to it, but rather the assessment made by the Commission.

As far as the EIAs carried out by the Swedish authorities, dated 10 February 1995 and 21 May 1996, were concerned, the Commission considered these to fulfil the requirements of Directive 85/337/EEC concerning the railway project in question. Moreover, subsequent submissions made by the complainant did not demonstrate that the assessments were inadequate. The Commission stated that, when examining the EIAs, it paid particular attention to the questions concerning the procedures, as Directive 85/337/EEC rather regulates the procedure than the substance or quality of the assessment.

As regards the classification of the Skälderviken area under Directive 92/43/EEC, the Commission considered that the information provided by the complainant did not constitute evidence of any infringement of the Directive.

On 10 August 1998, the Commission notified the complainant of its position in relation to both Directive 85/337/EEC and Directive 92/43/EEC and gave her the opportunity to submit new information before the closure of the case. In August, September and October 1998, the complainant sent further information to the Commission. On 15 February 1999, the Commission again notified the complainant of its position that there was no breach of Community law and invited the complainant to submit further evidence within one month. A subsequent letter from the complainant dated 12 March 1999 did not contain any new

evidence and on 8 June 1999, the Commission informed the complainant that it had closed the case.

The Commission therefore considered that it had fulfilled its duties with regard to informing the complainant.

The Commission finally referred to information contained in the complaint to the Ombudsman concerning certain background facts and descriptions of how the matter had been pursued before national authorities. The Commission stated that it would examine the additional information and inform the complainant if it revealed any elements that would alter the Commission's earlier conclusion.

**The complainant's observations**

In her observations, the complainant maintained her complaint and described in detail the environment of the area and identified to what extent Directive 85/337/EEC and Directive 92/43/EEC had not been respected by the Swedish authorities. The complainant stated that the identified infringements must have been detectable by the Commission through the answers it received from the Swedish authorities to its questions.

The complainant underlined the fact that the EIA carried out for the train connection Västkustbanan, section Lingvallen-Ängelholms stationsområde, was completed on 21 May 1996, whilst the decision to approve the construction of that connection was taken already on 15 May 1995 by the Swedish authorities. This alone constituted an infringement. If the authorities had respected Community legislation, the association Västkustbanans Framtid and others concerned, would have had the possibility to submit comments on the EIA carried out.

The complainant moreover stated that the Commission should have identified the legal basis on which it supported its view that there was no infringement.

*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 asked the Commission to comment firstly on the fact that the decision to approve the construction of the train connection Västkustbanan was taken by the Swedish authorities on 15 May 1995, whereas the EIA for the section Lingvallen-Ängelholms stationsområde was completed only on 21 May 1996. The complainant alleged that this was a breach of Community law (Directive 85/337/EEC). The Ombudsman asked the Commission to comment on this and to explain its conclusion that there had been no infringement. Secondly, as regards the allegations in connection with the classification of the Skälderviken area under Directive 92/43/EEC, the Ombudsman asked the Commission to inform him of any examinations carried out so far, as mentioned by the Commission in its opinion.

The Ombudsman also asked the Commission for a copy of the EIA performed for the section Lingvallen-Ängelholms stationsområde, and sent a copy of the complainant's observations to the Commission for possible comments.

**The Commission's second opinion**

As regards the fact that the decision to approve the construction of the train connection Västkustbanan was taken by the Swedish authorities on 15 May 1995 and that the EIA for the section Lingvallen-Ängelholms stationsområde was completed on 21 May 1996, the Commission stated that it had informed the complainant of its discretionary powers to initiate infringement procedures. After having received the relevant assessments from

Sweden and examined them, the Commission informed the complainant on 10 August 1998 and 15 February 1999, that no evidence had been submitted to show that the assessments performed did not fulfil the requirements of Directive 85/337/EEC.

As far as the classification of Skälderviken was concerned, the Commission stated that after having examined the information submitted via the complaint to the Ombudsman, as well as a specific complaint addressed to the Commission on 31 October 2000, the Commission had opened a new complaint file, Reference P-00/5160/Sweden. The new complaint concerned several issues, including the classification of the Skälderviken area as a Natura 2000-site under Directive 92/43/EEC. On 6 December 2000, the complainant submitted extensive new information and by letters of 29 November and 12 December 2000, the Commission informed the complainant about its examination of her submissions and that it had not yet finalised its assessment concerning the allegations put forward. The Commission stressed that after the information had been fully examined, it would inform the complainant of the action to be taken.

Moreover, as regards the general evaluation of the Swedish proposal for a list of Natura 2000-sites under the Habitat Directive, the Commission decided on 22 December 2000 to bring Sweden's failure to propose a complete list before the Court of Justice. The Commission had since received information that Sweden is currently preparing a new site designation and proposal of the Skälderviken area.

Copies of the two EIAs referred to in the complaint were enclosed to the opinion.

### The complainant's second observations

In her second observations, the complainant again put forward detailed information as to what extent the assessments fell short of the requirements of Directive 85/377/EEC, and moreover described some procedural contacts with the Swedish authorities as far as the classification of the Skälderviken area under the Habitat Directive was concerned.

## *THE DECISION*

### 1 The Commission's conclusion that there was no infringement of Directive 85/337/EEC

1.1 The complainant stated that the EIA made for the train connection Västkustbanan, section Lingvallen-Ängelholms stationsområde, was inadequate as the assessment did not cover all relevant factors. Thus, Sweden was in breach of Directive 85/337/EEC. Further, the EIA appeared to have been handed in too late by the Swedish authorities. The complainant alleged that the Commission should therefore not have accepted the EIA.

1.2 The Commission stated that as far as the two EIAs carried out by the Swedish authorities were concerned, the Commission considered these to fulfil the requirements of Directive 85/337/EEC concerning the railway project in question. According to the Commission, no evidence had been submitted to show the opposite. When the complainant pointed out that the decision to approve the construction of the train connection Västkustbanan was taken by the Swedish authorities on 15 May 1995 and the EIA for the section Lingvallen-Ängelholms stationsområde was completed only on 21 May 1996, the Commission replied by informing the complainant of its discretionary powers to initiate infringement procedures.

1.3 As regards the complainant's arguments concerning the adequacy of the EIA, the Ombudsman notes that Directive 85/337/EEC requires an exercise of judgement by the Member State as to what information is to be provided. In the present case, the Ombudsman's inquiry has not revealed evidence to show that the Commission was not

entitled to take the view that the Member State had complied with its obligation under Directive 85/337/EEC as regards the adequacy of the information provided in the EIA.

1.4 As regards the complainant's arguments concerning the date on which the EIA was prepared, the Ombudsman notes that the Commission referred to its discretionary powers to initiate infringement procedures. If the meaning was that the Commission had made a discretionary decision to close the case, despite evidence that an infringement had occurred, then the Commission should have said so in clear words. If on the other hand, the Commission considered that there was no infringement, no issue of discretion arises. It must be concluded that the reasons as to why the Commission closed the case were unclear.

1.5 It is good administrative behaviour to state the reasons for a decision. The reasons given should be adequate, clear and sufficient. In the present case, the Ombudsman finds that the Commission failed to state the reasons for its decision. The Ombudsman will therefore issue a critical remark to the Commission.

## 2 The classification of the Skälderviken area under Directive 92/43/EEC

2.1 The complainant claimed that the Commission should ensure that the Skälderviken area is designated as a Natura-site under Directive 92/43/EEC.

2.2 At first, the Commission explained that the information provided by the complainant did not constitute evidence of any infringement of Directive 92/43/EEC. However, on the basis of the information submitted via the complaint to the Ombudsman, as well as subsequent submissions, the Commission had opened a new complaint file concerning the classification of the Skälderviken area as a Natura 2000-site under Directive 92/43/EEC. The Commission had not yet finalised its assessment, but stressed that after the information had been fully examined, it would inform the complainant of the action to be taken.

2.3 The Ombudsman notes that this part of the complaint is still being assessed by the Commission on the basis of further information submitted by the complainant. The Commission has undertaken to inform the complainant of the outcome. There is therefore no maladministration as regards this part of the complaint.

## 3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*As regards the complainant's arguments concerning the date on which the EIA was prepared, the Ombudsman notes that the Commission referred to its discretionary powers to initiate infringement procedures. If the meaning was that the Commission had made a discretionary decision to close the case, despite evidence that an infringement had occurred, then the Commission should have said so in clear words. If on the other hand, the Commission considered that there was no infringement, no issue of discretion arises. It must be concluded that the reasons as to why the Commission closed the case were unclear.*

*It is good administrative behaviour to state the reasons for a decision. The reasons given should be adequate, clear and sufficient. In the present case, the Ombudsman finds that the Commission failed to state the reasons for its decision.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## FAILURE TO REPLY TO THE COMPLAINANT'S APPEAL

*Decision on complaint 729/2000/OV against the European Commission*

*THE COMPLAINT*

In May 2000, Mr J. made a complaint to the European Ombudsman against the European Commission concerning open competition COM/A/12/98 in which he took part. On 30 April 1999, the Head of the Competitions Unit informed the complainant that he only obtained 19.867/40 (minimum required 20/40) on test (a) and that he had therefore been excluded from the written tests. The complainant alleged that in order to guarantee equality between the candidates, the Commission neutralised certain questions (amongst which question 27) of test (a) which were not clear. The complainant observed that question 27 which was neutralised, but which he answered correctly, was completely clear and did not leave any room for ambiguity. He stated that it was not justified that because of the Commission's fault (the annulment of an unclear question), he was not admitted to the next stage of the competition. In a previous open competition the question was not annulled, but all the candidates were given one extra point.

On 13 July 1999, the complainant, an auxiliary agent in the Commission, made an appeal under 90 Staff Regulations (R 463/99) against the decision of the Commission to neutralise questions. Further to an inter-service consultation on 29 September 1999 in which he took part to express his point of view, the complainant clarified his original complaint in an additional letter dated 14 October 1999. The Appointing Authority rejected his appeal on 18 February 2000, which confirmed the complainant's exclusion from the competition. The complainant however alleged that the final decision of the Appointing Authority did not take into consideration the information from the inter-service consultation and from the complainant's last letter. Moreover, the Commission did not reply within 4 months.

The complainant therefore wrote to the Ombudsman alleging that 1) the Commission irregularly annulled question 27 from pre-selection test a) and should have given him a justification for it, especially with regard to the fact that a similar question was not annulled in a previous open competition, 2) the decision of the Appointing Authority of 18 February 2000 did not take into account the information from the inter-service consultation and the complainant's letter of 14 October 1999, and 3) the Commission did not reply within 4 months to the complainant's appeal of 13 July 1999.

*THE INQUIRY*

### The Commission's opinion

The complaint was forwarded to the Commission. As regards the first allegation concerning the alleged irregular annulment of question 27 from pre-selection test (a), the Commission referred to the decision of the European Ombudsman in complaint 761/99/BB against the Commission. This complaint from a candidate who participated in open competition COM/A/11/98 was similar to the one made by the present complainant. Therefore, the Commission drew the attention to point 2.3 of the decision of the Ombudsman that on basis of his inquiries into the complaint "there appears to have been no maladministration by the European Commission". The Commission observed that the Selection Board had decided to neutralise question 27 from pre-selection test (a) for all candidates since it had proved to be ambiguous. The Commission added that each Selection Board is independent.

As regards the second and third allegations, the Commission stated that under Article 90.2 of the Staff Regulations the complainant had submitted a complaint to the Appointing Authority. This complaint was registered by the Secretariat General on 23 July 1999. Article 90.2 of the Staff Regulations points out that "the authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been

received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under article 91".

The complainant was informed by letter of 30 November 1999 that his request had been rejected by implied decision on 23 November 1999 and that the official answer would follow. After having received this letter, the complainant could have decided to lodge an appeal with the Court of First Instance, a possibility which he mentioned himself in his letter of 14 October 1999.

Subsequently, the complaint was rejected by explicit decision of 18 February 2000. Following paragraph 3, second indent of Article 91, the period for lodging the appeal to the Court of First Instance started to run afresh from this date. Therefore, if the complainant had considered that the answer from the Appointing Authority was not satisfactory or incomplete, he could again have considered applying to the Court within three months from this date. The complainant again decided not to do so.

### The complainant's observations

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

## *THE DECISION*

### 1 The alleged irregular annulment of question 27 from pre-selection test a)

1.1 The complainant alleged that the Commission had irregularly annulled question 27 from pre-selection test (a) and should give the complainant a justification for it, especially with regard that the fact that a similar question was not annulled in a previous open competition. The Commission referred to the decision of the European Ombudsman in complaint 761/99/BB, concerning a similar case of a candidate who had participated in open competition COM/A/11/98, in which the Ombudsman had concluded that there was no maladministration.

1.2 In his decision on complaint 761/99/BB, the Ombudsman considered that, in the case where a question of a test proves to be ambiguous, the decision to eliminate this question from the test is reasonable, provided that this elimination is carried out in such a way as to ensure that the interests of candidates are not negatively affected. On the basis of the evidence submitted to him, the Ombudsman took the view that there was nothing to suggest that this condition was not complied with in the present case, given that the Commission appeared to have eliminated the relevant question for all candidates.

1.3 On the basis of the above, there appeared to be no maladministration on the part of the Commission in so far as the first allegation of the complainant was concerned.

### 2 The alleged failure to take into account the information from the inter-service consultation

2.1 The complainant alleged that the decision of the Appointing Authority of 18 February 2000 did not take into account the information from the inter-service consultation and the complainant's letter of 14 October 1999. The Commission observed that, if the complainant considered that the answer from the Appointing Authority was not satisfactory or incomplete, he could have opted to apply to the Court within three months.

2.2 From the documents in the file, it appeared that on 13 July 1999 the complainant has lodged an appeal under Article 90.2 of the Staff Regulations. His appeal was registered on 23 July 1999 (R/463/99). On 29 September 1999 the complainant participated in an inter-service consultation during which he was given the possibility to explain his point of view.

Further to this inter-service consultation, the complainant sent a new letter on 14 October 1999 clarifying his initial appeal.

2.3 The Ombudsman carefully analysed the decision of the Appointing Authority dated 18 February 2000. It was true that this decision neither referred to the inter-service consultation nor to the complainant's additional letter of 14 October 1999. However, the complainant's additional letter was sent 3 months after the lodging of the initial appeal.

2.4 The Ombudsman noted that the decision of the Appointing Authority first described in detail the facts at the root of the complaint. The decision then set out the complainant's allegations contained in his letter of 13 July 1999. The Appointing Authority finally made a two page legal assessment of the complainant's claims, before rejecting the appeal. The Ombudsman concluded from the above that the decision of the Appointing Authority provided the complainant with all the reasons necessary to understand the rejection of his appeal. No instance of maladministration was therefore found with regard to this aspect of the complaint.

## 3 The alleged failure to reply to the complainant's appeal of 13 July 1999

3.1 The complainant alleged that the Commission did not reply within 4 months to his appeal of 13 July 1999. The Commission observed that complainant was informed by letter of 30 November 1999 that his appeal had been rejected by implied decision of 23 November 1999 and that the official answer would follow. The Commission stated that, after receiving this letter, the complainant could have lodged an appeal to the Court of First Instance. The explicit rejection decision was sent to the complainant on 18 February 2000.

3.2 According to Article 90.2 of the Staff Regulations "(…) The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under article 91".

3.3 In his decision on complaint 1479/99/(OV)MM, the Ombudsman considered that, according to this provision, the Appointing Authority shall notify the person concerned of its reasoned decision within four months. This is in line with principles of good administration. If the Appointing Authority fails to act in this way, i.e. 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 the Appointing Authority does not follow its legal obligations. It does not in any way give the right to the Appointing Authority to omit from its obligation to follow a good administrative behaviour.

3.4 In the present case, the appeal was lodged on 13 July 1999. On 30 November 1999, i.e. two weeks after the expiry of the 4 months period indicated in Article 90.2 of the Staff Regulations, the Commission informed the complainant that it had implicitly rejected his appeal on 23 November 1999. The explicit decision was sent to the complainant only on 18 February 2000, i.e. more than 7 months after the lodging of the complaint and more than 3 months after the expiry of the deadline indicated in the Staff Regulations. The Ombudsman considered that this late reply constitutes an instance of maladministration and made the critical remark below.

## 4 Conclusion

On the basis of the European Ombudsman's inquiries into part 3 of this complaint, it appears necessary to make the following critical remark:

*According to Article 90.2 of the Staff Regulations, the Appointing Authority shall notify the person concerned of its reasoned decision within four months. This is in line with princi-*

*ples of good administration. If the Appointing Authority fails to act in this way, i.e. 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 the Appointing Authority does not follow its legal obligations. It does not in any way give the right to the Appointing Authority to omit from its obligation to follow a good administrative behaviour.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decides to close the case.

## FAILURE TO EXPLAIN REASONS IN WRITING

*Decision on complaint 821/2000/GG against the European Commission*

*THE COMPLAINT*

In January 1998, the complainant, a Portuguese company, entered into a contract for the supply of 1 800 metric tonnes of sunflower oil to Angola in the context of an EU food aid action. The materials had to be delivered to warehouses in Angola. To control the execution of the contract, the Commission nominated a company called Socotec as surveyor. Payment of the contract sum by the Commission was dependent on the presentation of a supply certificate issued by Socotec. According to the complainant, Socotec has to be considered as the Commission's representative or agent. To cover the risks of losses, the complainant had to take out an insurance.

The certificate subsequently issued by Socotec mentioned a shortage of 8 089 cartons of 12 litres (i.e., 97 068 bottles containing 1 litre each) equivalent to € 83 820 which the Commission therefore refused to pay. The Commission furthermore imposed a penalty of € 7 916 on account of the shortage.

The complainant claimed that it had sent all the quantities provided for by the contract. In this context, the complainant pointed out that it had received delivery bills issued by its freight forwarder in Angola and duly signed by "receiver's employees" in Luanda (where one of the warehouses was situated). The complainant furthermore claimed that the control carried out by Socotec had been defective. According to the complainant, Socotec only informed it of the shortages on 5 May 1998 (whereas delivery of the relevant containers had taken place by 5 April) and 19 May 1998 (whereas the bulk of the containers concerned had been delivered during April and the small remainder by 14 May). This meant that the insurance company was not able to investigate the causes of the shortage. As a result, the insurance company only accepted to pay an amount of € 30 510 on account of cartons missing in some containers that had been reported by Socotec as having been violated during transport. The complainant alleged that both Socotec and the EU's delegation in Luanda had been aware of the fact that it was crucial for Socotec to inform the complainant immediately.

The complainant claimed that the Commission should pay the amount still due, i.e. € 53 310, and reimburse the penalty it had been asked to pay. It further complained that the Commission had never explained in writing its reasons for refusing to pay, despite various reminders from the complainant.

In its complaint lodged with the Ombudsman in June 2000, the complainant made the following claims :

(1) The Commission should pay to it an amount of € 61 226 that was still outstanding on account of a contract for the supply of sunflower oil to Angola.

(2) The Commission had failed to explain in writing the reasons why it refused to pay the relevant amount.

*THE INQUIRY*

**The Commission's opinion**

In its opinion, the Commission made the following comments:

The question of whether or not and on what grounds the Commission effectively owed the complainant payment for any quantity of sunflower oil that was never delivered to the beneficiaries under the contract had eventually to be discussed and decided in the proper courts of law. The Commission therefore restricted its comments to the question of maladministration attributable to any of its services.

Socotec had controlled the shipments on arrival and had attested a shortage of some 102,5 tons that had either been damaged or lost during transport or had not been shipped in the first place. The complainant had been paid the full contract price for the supplies that had been delivered, minus a small contract penalty for late and incomplete delivery.

Socotec had been selected and paid for its services by the Commission but acted as an independent service provider that transacted business under its own professional responsibility and liability. Eventual errors and omissions of this company in the discharge of its duties were not attributable as administrative misconduct to the Commission.

The Commission's reaction to the complainant's claim for full payment formed the subject of an intensive correspondence between the parties. The Commission's point of view had also been discussed with the complainant's representative at a meeting on 25 November 1999 and had been confirmed in a fax dated 12 May 2000.

**The complainant's observations**

In its observations on the Commission's opinion, the complainant took the view that even if Socotec was to act independently under the terms of its contract with the Commission, it still had the obligation to fulfil its obligations as a surveyor. According to the complainant, the Commission entirely disregarded the fact that Socotec had failed to do so. The complainant also insisted that the Commission had never communicated in writing its position and the reasons for refusing to pay.

*THE DECISION*

**1 Failure to pay an amount of € 61 226**

1.1 The complainant, a Portuguese company, entered into a contract for the supply of 1 800 metric tonnes of sunflower oil to Angola in the context of an EU food aid action. The materials had to be delivered to warehouses in Angola. Payment of the contract sum by the Commission was dependent on the presentation of a supply certificate issued by Socotec, a surveyor nominated by the Commission. After Socotec had reported that there had been shortages, the Commission paid the complainant only for the quantities that had been delivered according to the surveyor's certificate, minus a penalty on account of the shortage. According to the complainant, Socotec informed it too late of the shortages, which meant that the complainant's insurance only paid for part of the shortage. The complainant claims that the Commission should pay it for the remainder of the shortage (€ 53 310) and reimburse the penalty that it had paid (€ 7 916).

1.2 The Commission claims that Socotec had been selected and paid for its services by the Commission but acted as an independent service provider that transacted business

under its own professional responsibility and liability. Eventual errors and omissions of this company in the discharge of its duties were thus not attributable as administrative misconduct to the Commission.

1.3 The present allegation essentially concerns the obligations arising under a contract concluded between the Commission and the complainant.

1.4 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[54]. Maladministration may thus, contrary to what the Commission appears to believe, also be found when the fulfilment of obligations arising from contracts concluded by the institutions or bodies of the Communities is concerned.

1.5 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.

1.6 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.

1.7 In the present case, the complainant argues that the surveyor appointed by the Commission failed to inform it in good time that there were shortages. However, the Commission takes the view that Socotec was an independent service provider that transacted business under its own professional responsibility and liability and that eventual errors and omissions on its part could not be attributed to the Commission.

1.8 The Ombudsman considers that the position taken by the Commission does not appear to be without merit.

1.9 In these circumstances, the Ombudsman is unable to establish an instance maladministration on the part of the Commission in so far as the first allegation is concerned.

## 2 Failure to provide explanations in writing

2.1 The complainant claims that the Commission failed to communicate its position and the reasons for refusing to pay in writing.

2.2 The Commission refers to the correspondence in relation to the complainant's claims. It also takes the view that its point of view had been discussed with the complainant's representative at a meeting on 25 November 1999 and had been confirmed in a fax dated 12 May 2000.

2.3 The Ombudsman notes that among the various documents submitted to him by the Commission there are only four letters sent by the latter to the complainant. The first of these (dated 22 October 1998) is a holding letter. The second (dated 1 March 1999) briefly

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

sets out the position taken by Socotec and requests the complainant to contact this company. The third one (dated 29 June 1999) is again a holding letter. The last letter of 12 May 2000 purports to be the Commission's answer to the complainant's letter of 8 May 2000 in which it asked to be sent the Commission's "written and final position". In its letter, the Commission limits itself to stating that the Commission's position had already been given at the meeting on 25 November 1999.

2.4 The Ombudsman concludes that despite various requests by the complainant, the Commission failed to provide a written account of the reasons why it rejected the complainant's claims. The Commission has given no explanations for this omission.

2.5 It is good administrative practice for the administration to provide written explanations where a citizen or company so requests. The Commission's failure to provide such explanations in writing in the present case thus constitutes an instance of maladministration. The Ombudsman therefore considers 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 is necessary to make the following critical remark:

*It is good administrative practice for the administration to provide written explanations where a citizen or company so requests. The Commission's failure to provide such explanations in writing in the present case thus constitutes an instance of maladministration.*

Given that this aspect of the case concerns procedures relating to specific events in the past and that the Commission has provided written explanations in its opinion, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## DISCRIMINATORY EXCLUSION FROM TENDER PROCEDURE

*Decision on complaint 1043/2000/GG against the European Commission*

*THE COMPLAINT*

### Background

The complainant is the managing director of a Dutch company active in the environmental field.

In 1996, the Commission invited tenders for a contract for the performance of consultancy services in the field of drinking water, particularly in relation to the Drinking Water Directive 80/778/EEC. In point 4 of the Technical Annex it was specified that the contractor to be chosen needed to have "a wide breadth of knowledge and expertise, and a proven track record in the field of water science, including microbiology, toxicology, water and sanitary engineering". An in-depth knowledge of the directive and the proposal for its revision was also required. One of the selection criteria set out at point 5 of the Technical Annex provided that tenderers had to show that they had "the necessary experience and record in the water research field". The complainant submitted a tender. On 7 January 1997, the Commission informed the complainant that his firm's proposal had not been accepted. In letters sent on 13 January, 31 January and 15 February 1997, the complainant asked for explanations.

On 13 March 1997 the Commission informed the complainant that his firm had not been awarded the contract because it lacked the necessary experience in the water research field. The Commission claimed that it had been particularly looking for a firm that had "experience of research and development and design of water treatment works". In a further letter of 10 April 1997, the Commission pointed out that it had been looking for a firm with "*hands-on experience of the design of water treatment works*".

In the meantime, the complainant had turned to the Ombudsman (complaint 199/97/PD). The complaint was sent to the Commission. In its opinion, the Commission claimed that it should have been clear that tenderers ought to have demonstrated the necessary technical experience in sanitary and water engineering related to the draft directive. According to the Commission, this meant that the tenderers for example had to show the level of expertise necessary to develop engineering-based standards for trihalomethanes in drinking water, which did not compromise disinfection.

In his decision of 3 December 1997, the Ombudsman dealt with three allegations that he had identified:

(1) *The Commission had misconstrued the selection criteria by taking into account experience in the field of water and sanitary engineering*: The Ombudsman considered that the Commission's interpretation of the selection criteria was acceptable.

(2) *The Commission had been wrong in assuming that the complainant did not have the necessary experience*: The Ombudsman held that there were no indications to show that the Commission's assessment had not been carried out properly.

(3) *The Commission had failed to observe the time-limit laid down by Directive 92/50*: The Ombudsman took the view that the directive was not applicable in the present case.

The complaint was therefore rejected.

On 7 December 1997 and 20 February 1998, the complainant wrote to ask the Ombudsman to review his position. In his reply of 24 March 1998, the Ombudsman rejected the complainant's arguments in relation to the interpretation of the selection criteria. He accepted, however, that Directive 92/50 did apply and that the Commission had failed to comply with the time-limit set by it. In his view, this did nevertheless not justify re-opening the case.

On 30 March 1998 and 12 January 1999, the complainant again wrote to ask the Ombudsman to review his position. The Ombudsman rejected this request on 6 May 1999.

### The complaint

In his new complaint lodged in July 2000, the complainant renewed his request that the Ombudsman should re-open the case. He made the following allegations:

(1) The application of the selection criteria by the Commission was illegal.

(2) The selection procedure was not transparent.

(3) Tenderers were treated unequally.

(4) The Commission failed to observe the time limit set out in Article 12 of Directive 92/50.

The complainant claimed that the relevant expert at the firm to which the contract had been awarded had a good personal relationship with at least one of the Commission officials responsible for the contract. He further took the view that the selection and award criteria used by the Commission for the award of such contracts were often insufficiently clear and transparent, and were moreover applied in an arbitrary and intransparent manner. The complainant also provided a copy of the tender that EDC, one of the competitors of his firm, had submitted to the Commission which had considered that this tender fulfilled the selection criteria. He claimed that the document showed that EDC did not have the experience the alleged absence of which had led to the exclusion of his own bid. The complainant further claimed that the same held true for another competitor, EUNICE and invited the Ombudsman to obtain a copy of the tender of this firm.

### The Ombudsman's approach

In his letter of 31 August 2000, the Ombudsman informed the complainant of the results of his preliminary examination of the complaint, which were as follows:

Allegation (1) had already been examined by the Ombudsman in the context of his inquiry into complaint 199/97/PD. In the Ombudsman's view the complainant had not put forward new evidence that would have forced him to review this position. There were therefore no grounds to re-examine this issue.

Allegation (4) had also been examined by the Ombudsman in his decision on complaint 199/97/PD. The Ombudsman had made further comments on this allegation in his letter to the complainant of 24 March 1998. He thus considered that there were no grounds to open an inquiry in so far as this allegation was concerned.

The Ombudsman did however consider an inquiry to be justified in so far as allegations (2) and (3) contained in the complaint were concerned.

## *THE INQUIRY*

### The Commission's opinion

In its opinion, the Commission took the view that the complainant had not submitted any evidence for his suggestion that the procedure had not been transparent. The Commission referred to the relevant sections in the Technical Annex and pointed out that its application of the selection criteria had been subject to scrutiny and approval by the ACPC (Advisory Committee on Procurements and Contracts). The Commission thus was of the opinion that it had acted in accordance with the criteria set out and within the limits of its discretion in assessing the relevant factors.

Regarding the complainant's claim that tenderers were treated unequally, the Commission claimed that the complainant had not submitted any evidence to support his allegation that there was a good personal relationship between persons working for the successful tenderer and Commission staff or to show the impact that this would have had on the equal treatment of tenderers. The Commission also specified the reasons why it had considered that the tender submitted by the complainant's firm did not fulfil the selection criteria.

With respect to the tender submitted by EDC, the Commission claimed that it had arrived at the conclusion that the expert proposed by this firm presented knowledge and experience across the range of items required, including the technical areas of water and sanitary engineering. According to the Commission, this conclusion had been based on the evaluation of the expert's knowledge, experience and professional career description. The Commission stressed that EDC's tender had to a distinctly greater extent referred to experience in technical areas such as water treatment including studies performed on river pollution and drinking water supplies taken from such rivers, evaluating the options of controlling the pollution sources and of more sophisticated water treatment technology.

It further claimed that this had led it, after carefully considering all parts of the tender, to conclude that EDC's tender would fulfil the requirements of the selection criteria.

The Commission stressed that the same conclusion applied in so far as the tender submitted by Eunice was concerned. The considerations submitted by the Commission in this regard were practically identical to those it provided with regard to EDC's tender.

### The complainant's observations

In his observations, the complainant took the view that the Commission's opinion showed that the selection criteria had not been applied in a transparent, uniform, consistent and

non-discriminatory manner. According to the complainant, it had been clearly stated in his firm's tender that during his 20 years experience as an expert on drinking water supply, he had had, inter alia, to judge and approve treatment systems, to audit drinking water suppliers etc. In the complainant's view, these were exactly the kind of activities that required technical and engineering experience and expertise.

The complainant further claimed that the Commission's argument according to which the qualifications of his firm did not match those of two other tenderers was flawed, given that the qualitative selection criteria were not meant to establish a ranking between tenderers but simply to establish minimum standards that had to be met in order to qualify for the contract.

In the complainant's view, it appeared from the tender submitted by EDC that the expert proposed by this firm did not have any engineering experience himself. The complainant argued that when one compared his experience and expertise to that of the said expert, one could not understand why the Commission had concluded that EDC's tender met the criteria whilst the bid lodged by the complainant's firm did not.

The complainant therefore asked the Ombudsman to reject the Commission's reply and to conclude that there had been maladministration. In the alternative, the complainant asked the Ombudsman to carry out an in-depth investigation into the way in which the Commission had assessed all the bids it had received, both from a procedural and a substantive point of view.

## *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 (1) to confirm that successful bidders had to have a "hands-on experience of the design of water treatment facilities" and (2) to specify, on the basis of precise references to the relevant parts of the tenders, the grounds which led it to believe that EDC and Eunice fulfilled this condition.

### The Commission's reply

In its reply, the Commission confirmed that successful bidders had to have a "hands-on experience of the design of water treatment facilities".

The Commission further quoted the parts of the tenders of EDC and Eunice on the basis of which it had considered that these two firms fulfilled the said condition. These read as follows:

***EDC***

- *"[person A] worked for 10 years in [company X] in research and technical liaison where food contamination and safety and raw material (including water) quality was a critical factor"*

- *"The laboratory also established an emergency service to provide advice to the water supply companies on contamination accidents"*

- *"[person A] also became familiar with the treatment processes used for drinking water …"*

- *"The technical feasibility of treating water to remove pesticides, …etc."*

***Eunice***

- *"Giving technical advice on the implementation of a number of water quality directives."*

- *"Assisting in the preparation of the Conference on Drinking Water held in Brussels on 23 and 24 September 1993, attending the conference and evaluating the proceedings."*

- *"Preparing the technical annexes for inclusion in a proposal to revise the drinking water Directive 80/778/EEC."*

- *"Providing scientific and technical advice during the presentation of that proposal to the ESC and CR."*

- *"Preparation of the technical negotiating brief for the 'Urban Waste Water' Directive 91/271/EEC"*

- *"Advising on autorizations for the discharge of sewage to surface water."*

The Commission informed the Ombudsman that having re-examined the complainant's curriculum vitae, it had found no evidence of a track record of experience relating specifically to water or sanitary engineering. Neither had it found any evidence confirming the claim that during his 20 years experience as an expert on drinking water supply, the complainant had had, inter alia, to judge and approve treatment systems, to audit drinking water suppliers etc. According to the Commission, the complainant's CV states as tasks the "national co-ordination and supervision on hygienic problems".

### The complainant's observations

In his observations, the complainant claimed that it was clear from the Commission's reply that neither EDC nor Eunice had any hands-on experience with the design of water treatment plants.

## *THE DECISION*

### 1 Scope of the decision

1.1 The complaint concerns the award of a contract for the performance of consultancy services in relation to the Drinking Water Directive 80/778/EEC for which the complainant's firm submitted an offer. However, the contract was finally awarded to a competitor of the complainant's firm. The Ombudsman already considered aspects of this case in his decision of 3 December 1997 on complaint 199/97/PD.

1.2 The complainant made the following allegations: (1) The application of the selection criteria by the Commission was illegal, (2) the selection procedure was not transparent, (3) tenderers were treated unequally and (4) the Commission failed to observe the time limit set out in Article 12 of Directive 92/50.

1.3 The Ombudsman considered that allegation (1) had already been examined by him in the context of his inquiry into complaint 199/97/PD. In the Ombudsman's view the complainant had not put forward new evidence that would have led him to review this position. There were therefore no grounds to re-examine this issue.

1.4 Allegation (4) had also been examined by the Ombudsman in his decision on complaint 199/97/PD. The Ombudsman had made further comments on this allegation in his letter to the complainant of 24 March 1998. He thus considered that there were no grounds to open an inquiry in so far as this allegation was concerned.

1.5 The present inquiry thus concerns only allegations (2) and (3) contained in the complaint.

## 2 Lack of transparency of selection procedure

2.1 The complainant claims that the selection procedure was not transparent, given that the selection criteria had required the applicant firms to have "the necessary experience and record in the water research field" whereas the bid lodged by the complainant's firm had been rejected by the Commission on the grounds that it did not have "hands-on experience of the design of water treatment facilities".

2.2 The Commission takes the view that it acted in accordance with the criteria set out and within the limits of its discretion in assessing the relevant factors.

2.3 Tender procedures need to be transparent. It is therefore good administrative practice in such procedures for the administration to set out the conditions that applicants have to fulfil as clearly as possible. In the present case, the decisive criterion was that applicants had to have "hands-on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants. By omitting clearly to spell out this criterion, the Commission has thus failed to render the selection procedure as transparent as it could and ought to have been. This constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

## 3 Unequal treatment of tenderers

3.1 The complainant claims that the Commission treated tenderers unequally. In this context, he puts forward three arguments: (1) The relevant expert at the firm to which the contract was awarded had a good personal relationship with at least one of the Commission officials responsible for the contract; (2) the complainant's firm did have the necessary experience to fulfil the Commission's requirement that applicants needed to have "hands-on experience of the design of water treatment facilities" and (3) neither EDC nor Eunice fulfilled the said requirement.

3.2 The Commission rejects these allegations. It takes the view that there is no evidence to support the complainant's first argument. The Commission further denies that the complainant's claim that his firm fulfilled the relevant criterion is correct. Finally, the Commission takes the view that both EDC and Eunice complied with that criterion. It also stresses that the contract was awarded to neither of these two firms.

3.3 It is good administrative practice for the administration to treat tenderers equally. The Ombudsman notes that the complainant has not put forward any evidence to support his claim that the relevant expert at the firm to which the contract was awarded had a good personal relationship with at least one of the Commission officials responsible for the contract. This allegation thus cannot be regarded as having been established.

3.4 The complainant's claim that his firm fulfilled the relevant criterion is based on a passage in the tender submitted by that firm in which it was said, according to him, that he had experience in judging and approving treatment systems. The Commission denies that the relevant passage shows that the complainant's firm fulfilled the requirement that firms had to have "hands-on experience of the design of water treatment facilities". The Ombudsman considers that the Commission's interpretation of the tender submitted by the complainant's firm does not appear to be unreasonable.

3.5 In so far as EDC and Eunice are concerned, it is true that the contract was not awarded to either of them. However, the offers of both firms were considered by the Commission as having fulfilled the relevant criterion. If this should not have been the case, the Commission would thus have treated tenderers unequally as the complainant claims.

3.6 It is of course in the first place for the administration organising a call for tenders to assess whether the applicants fulfil the conditions laid down in this call. The Ombudsman must not substitute this assessment by his own but only check whether the administration's assessment is manifestly unreasonable. However, the Ombudsman considers that this is indeed the case here. In the Ombudsman's view, none of the excerpts from the tenders submitted by EDC and Eunice shows that these firms had "hands-on experience of the design of water treatment facilities". The Ombudsman notes that the design of water treatment facilities is not even referred to in these excerpts. In these circumstances, the Ombudsman considers that the evidence on which the Commission relied manifestly does not warrant the conclusion that these two firms fulfilled the relevant condition. The Ombudsman thus concludes that the Commission appears to have treated tenderers unequally. This constitutes an instance of maladministration, and the Ombudsman considers it necessary to make a critical remark in this regard.

**4 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

*Tender procedures need to be transparent. It is therefore good administrative practice in such procedures for the administration to set out the conditions that applicants have to fulfil as clearly as possible. In the present case, the decisive criterion was that applicants had to have "hands-on experience of the design of water treatment facilities". This requirement is nowhere expressly mentioned in the invitation for tenders. Nor was it obvious that this was to be the decisive criterion for applicants. By omitting clearly to spell out this criterion, the Commission has thus failed to render the selection procedure as transparent as it could and ought to have been. This constitutes an instance of maladministration.*

*It is good administrative practice for the administration to treat tenderers equally. In the Ombudsman's view, none of the excerpts from the tenders submitted by EDC and Eunice shows that these firms had "hands-on experience of the design of water treatment facilities". In these circumstances, the Ombudsman considers that the evidence on which the Commission relied manifestly does not warrant the conclusion that these two firms fulfilled the relevant condition. The Ombudsman thus concludes that the Commission appears to have treated tenderers unequally. This constitutes an instance of maladministration.*

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## PROCEDURES TO BE FOLLOWED BY THE COMMISSION FOR THE HANDLING OF COMPLAINTS

*Decision on complaint 1194/2000/JMA against the European Commission*

*THE COMPLAINT*

The complainants, both attorneys in the law firm SJ Berwin & Co, acting on behalf of a group of French ship owners with a majority of Spanish capital, had submitted a formal complaint to the Commission in December 1999. Their complaint which referred to the role of the Commission under Art. 226 of the EC Treaty, argued that French legislation requiring the French nationality as a condition for potential applicants to the posts of captain or first official in a French fishing vessel was contrary to Community law.

The responsible Commission services (DG Employment and Social Affairs) replied in February 2000 indicating that the facts alleged in the complainants' letter did not constitute an infringement of Community law, and suggesting that they bring their query directly before the French courts. The complainants believed that the Commission had not given proper attention to their claims, and that the institution had not respected the procedure established for the handling of formal complaints. They contacted the responsible

Commission services again by letter of May 2000. In its reply of June 2000, the Commission confirmed its previous arguments.

In their letter to the Ombudsman, the complainants argued that the Commission's handling of their complaint was improper, both as regards (i) the procedure followed, and (ii) the reasoning employed.

As regards the procedure, the complainants pointed out that their letter to the Commission of December 1999, had been submitted to the Secretary General of the Commission as a formal complaint made on the basis of Art. 226 of the EC Treaty. They expected that their letter be registered as a complaint by the Commission's services, and accordingly follow the procedure reserved to complaints made by citizens. They pointed out that the Commission in its reply to the Ombudsman's own initiative on administrative procedures for dealing with complaints (OII 303/97/PD) had recognised that all complaints which reach the Commission are registered, with no exception to this rule. They alleged that these requirements had not been respected in their case. Moreover, the complainants considered that the Commission's Secretariat General, in addition to forwarding their letter to the DG responsible for Employment and Social Affairs, should have also consulted other relevant services such as DG Energy & Transport, or DG Fisheries.

As for the reasoning employed by the Commission not to start any inquiry into the subject-matter denounced in the letter, the complainants stated that the institution had ignored relevant case law of the Community courts. They added that the Commission's stand was in stark contrast to that adopted for pilots of air vessels. However, the complainants underlined that this aspect of the case was not the object of their complaint to the Ombudsman.

### *THE INQUIRY*

#### The Commission's opinion

The Commission first explained the background to the case. It referred to the two allegations made by the complainants, namely that its services had not properly handled their letter, both as regards the procedure followed and the reasoning given.

The Commission underlined that the arguments put forward by the DG Employment and Social Affairs in this case reflected the longstanding position of the institution on this matter. In a number of infringement cases against several Member States in the early 90s, the Commission had argued that any restriction based on nationality for the employment of sailors were incompatible with the principle of free movement of workers. The institution added, however, that in the course of the infringement proceedings it had instituted against different Member States, it always underlined that these arguments should not apply to the posts of captain and first official. Most of the related proceedings had been settled by the responsible Member States, except in the case of France, which had to be brought to the Court of Justice. The Court's ruling on this matter of 7 March 1996 allowed the Commission's arguments to be openly known.

As regards internal consultations with other services, the Commission considered that this matter falls within its exclusive powers. However, it added that other services, in particular those responsible for energy and transport, had been consulted on the institution's general position, as well as in the individual case submitted by the complainants.

Finally, the Commission explained that its services decided not to register the complainants' letter as a formal complaint in the view of the fact that the institution had taken an unequivocal and constant position on the subject matter denounced in the complainants' letter.

### The complainants' observations

In their observations to the Commission's opinion, the complainants pointed out that that the Commission had not addressed their allegation, namely its failure to register their formal complaint. They explained that such registration gives several procedural guarantees for the citizen, which in this case, had not been respected.

The complainants also contested the substantive arguments put forward by the Commission for not launching an inquiry into their complaint. They explained, that the institution has applied dissimilar criteria on admissible limitations to the free movement of workers, depending on the profession affected and the responsible Commission service involved. In their view, the institution has not fully assessed the application of the exceptions to the free movement of workers set out in Art. 39, par 3 and 4 of the EC Treaty to captains of vessels. They indicated, however, that their considerations on the reasoning of the Commission were only secondary and subsidiary to their sole claim to the Ombudsman, namely the improper handling of their letter of formal complaint by the Commission.

## *THE DECISION*

### 1 Procedures to be followed for the handling of complaints

1.1 The complainants claimed that the Commission did not respect established procedures for the handling of their complaint. The institution did not register it as a complaint, in breach of its public commitments following the Ombudsman's own initiative 303/97/PD, and there was no proper consultation among all concerned Commission services.

1.2 The Commission explained that its services decided not to register the complainant's letter as a formal complaint because they considered that its object did not constitute a breach of Community law. As for the lack of internal consultation, the Commission believed this matter falls within its exclusive powers. It added, however, that such consultation had in fact taken place.

1.3 One of the fundamental tasks of the Commission in its role of "Guardian of the Treaty" under Article 211 of the EC Treaty, is to ensure that Community law is correctly applied in all the Member States. In carrying out its duty, the Commission investigates possible infringements of Community law which come to its attention largely as a result of citizens' complaints.

If as a result of its inquiry, the Commission considers that a Member State has failed to fulfil its obligations under the Treaty, Article 226 gives it the power to start infringement proceedings against the responsible Member State, and if necessary, to bring the matter before the European Court of Justice.

The serious implications of this course of action makes it necessary that its implementation is fully respectful with the applicable substantive and procedural rules in order to preserve the rights of all concerned parties.

1.4 As regards the procedural rules to be followed by the Commission in its handling of citizens' formal complaints, the Ombudsman noted that the relevant criteria had been set out by the institution in its reply to the Ombudsman's own initiative on administrative procedures for dealing with complaints concerning member States' infringement of Community law[55], as well as in the annex attached to its standard complaint form[56].

[55] Decision in the own initiative inquiry 303/97/PD, European Ombudsman's Annual Report for 1997, pp. 271-272.

[56] Failure by a member State to comply with community law: standard form for complaints to be submitted to the European Commission; OJ C 119, 30.04.1999, p.5.

In its reply to the Ombudsman's own initiative, the Commission had made the following commitment:

*"[…] complaints from individuals […] enjoy procedural safeguards which the Commission has constantly developed and improved […].*

*[..A]ll complaints which reach the Commission are registered and [that] no exceptions are made to this rule. Once the Commission receives a complaint, it acknowledged receipt by letter to the complainant with an annex attached, explaining the details of the infringement proceeding".*

The annex attached to the Commission's complaint form explains in detail the procedural safeguards, which result from the registration of a letter as a complaint:

*"(a) Once it has been registered with the Commission's Secretary-General, any complaint […] will be assigned an official reference number. An acknowledgement bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant […].*

*(b) Where the Commission's services make representations to the authorities of the Member States against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 [confidentiality].*

*(c) The Commission will endeavour to take a decision on the substance […] within twelve months of registration of the complaint […].*

*(d) The complainant will be notified in advance by the relevant department if it plants to propose that the Commission close the case."*

1.5 These procedural guarantees, however, have no direct bearing on the nature of the actions to be taken by the institution in reply to the allegations made by the complaint.

As the institution itself pointed out in its annex to the complaint's standard form:

*"It should be born in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission."*

Regardless of the nature of the action to be undertaken by the Commission, the existence of some procedural safeguards guarantees that the handling of complaints is carried out properly.

1.6 The complainants lodged a formal complaint under Art. 226 of the EC Treaty with the Commission. In its reply to the Ombudsman's own initiative 303/97/PD on administrative procedures for dealing with complaints, the Commission had undertaken to register all complaints sent to the institution, without exception. Despite this public undertaking, the responsible services departed from that rule in the present case.

By not registering the complaint, the Commission ignored the procedural safeguards, which the institution itself set up to secure a proper procedure.

The Ombudsman therefore considered that such failure of the Commission constituted an instance of maladministration.

1.7 As regards the alleged lack of consultation among the different Commission services, the Ombudsman considered that matters such as the co-ordination of the different Commission departments and their degree of involvement in a particular decision, by their own nature, fall within the institution's powers of internal organisation.

Thus, in this type of cases, the Ombudsman was of the view that an inquiry could be justified only when these matters are the immediate and direct cause of the institution's failure to act in accordance with a binding rule or principle.

However, in this case it appeared that the Commission had in fact carried out an internal consultation among its services. The Ombudsman therefore concluded that there appeared to be no maladministration as regards this aspect of the case.

### 2 Consideration of the complainants' allegations

2.1 The complainants argued that the Commission had not thoroughly assessed the allegations made in their formal complaint, in particular by not taking proper account of existing case law. However in their observations, the complainants indicated that their opinion on the soundness of the Commission's arguments was not the object of their complaint to the Ombudsman, but merely secondary and subsidiary to their claim.

2.2 In view of the previous considerations, the Ombudsman was of the view that there were no grounds to pursue an inquiry as regards this aspect of the case.

### 3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark:

*The complainants lodged a formal complaint under Art. 226 of the EC Treaty with the Commission. In its reply to the Ombudsman's own initiative 303/97/PD on administrative procedures for dealing with complaints, the Commission undertook to register all complaints sent to the institution, without exception. Despite this public undertaking, the responsible services departed from that rule in the present case.*

*By not registering the complaint, the Commission ignored the procedural safeguards, which the institution itself set up to secure a proper procedure.*

*The Ombudsman therefore considered that such failure of the Commission constituted an instance of maladministration.*

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

## *FOLLOW-UP BY THE INSTITUTION*

In October 2001, the European Commission sent its comments on the Ombudsman's critical remark.

It first referred to the commitments undertaken in reply to the conclusions of the Ombudsman in decision 995/98/OV (Macedonian Metro Joint Venture case)[57]. The Commission had then committed itself to the drafting of consolidated rules regarding relations between the complainant and the Commission's services in Art. 226 pre-litigation proceedings.

The institution agreed to address the subject-matter of the critical remark in this case within the framework of the procedural code, which it is in the process of drafting.

[57] See second decision in the present section.

## NON-PAYMENT OF APPROVED GRANT WITHIN THE ECIP-PROGRAMME

*Decision on complaint 396/2001/ME against the European Commission*

### *THE COMPLAINT*

The complainant wrote to the Ombudsman in March 2001 on behalf of the Moroccan company Suède-Maroc Marzipan. The complaint related to the European Community Investment Partners (ECIP), a programme governed by the European Commission under Regulation 213/96[58]. On 20 March 1998, the complainant applied for an ECIP grant through its financial institution, the BMCE Bank in Morocco, for the establishment of textile industry in Morocco with Swedish technology. On 26 November 1998, a decision was taken to finance the complainant (ref. 3495) and on 15 December 1998, the Commission informed the financial institution, BMCE Bank, thereof.

According to the complainant, despite the Commission's decision of 26 November 1998, the grant was never paid. The establishment in Morocco should have commenced in June 1999, but was now faced with difficult delays. The complainant had tried to contact the Commission by phone, but did not receive any explanation. It contacted the Commission by letters of 27 January and 28 March 2000 which were not replied to. On 2 November 2000, Suède-Maroc Marzipan wrote again to the Commission. On 15 November 2000, the complainant turned to the Ombudsman concerning lack of reply by the Commission (complaint No. 1467/2000/ME). Following the Ombudsman's intervention in that case, the Commission sent a holding reply on 23 November and a substantive reply in French on 30 November 2000 and in Swedish on 21 December 2000. The Commission confirmed that the project was considered eligible for funding on 26 November 1998 but explained that the Commission could not proceed with the contract since the framework agreement between the Commission and the financial institution, the BMCE Bank, had expired in June 1997.

On 21 November and 4 December 2000, the Commission wrote to BMCE Bank to explain that there was no longer any framework agreement between the two. On 15 January 2001, BMCE Bank wrote to the Commission and stated that it was prepared to sign an agreement in order to allow the complainant's project to be financed. Further on 26 January 2001, the complainant wrote to the Commission to inform that BMCE Bank was prepared to sign an agreement. On 9 March 2001, the Commission wrote to both the complainant and to the BMCE Bank. It stressed the fact that the ECIP programme was based on Regulation 213/96 that expired on 31 December 1999. There was therefore no legal basis for the Commission to proceed with the financing of the complainant's project.

Against this background the complainant lodged a complaint with the Ombudsman. The complainant alleged (i) that the Commission failed to inform the financial institution, BMCE Bank, that an agreement between it and the Commission was necessary, (ii) that the Commission failed to send BMCE Bank a new agreement and, (iii) that the Commission failed to inform the complainant of the reasons for not paying the approved grant.

The complainant claimed that payment should be made.

### *THE INQUIRY*

#### The Commission's opinion

The complaint was forwarded to the European Commission. In its opinion, the Commission referred to Regulation 213/96 as the legal basis for ECIP and the fact that the Regulation expired on 31 December 1999. On 22 December 1999, the Commission decided not to suggest a prolongation of the Regulation to the European Parliament and

58 Council Regulation (EC) No 213/96 of 29 January 1996 on the implementation of the European Communities investment partners financial instrument for the countries of Latin America, Asia, the Mediterranean region and South Africa, OJ L [1996] 28/2.

the Council of the European Union, which meant that the programme ceased to exist. A new Regulation[59] was adopted in April 2001 but it only foresees the financing of the closure and liquidation of ongoing projects.

On 20 March 1998, Suède-Maroc Marzipan applied for a grant under the ECIP programme (Facility No 4) through the financial institution, BMCE Bank. Following the favourable opinion of the ECIP Steering Committee on 26 November 1998, the Commission notified the financial institution, the BMCE Bank on 15 December 1998 that it was in favour of granting the complainant's project € 150,000. The examination of the file revealed that the Commission could not proceed with the signing of the contract for the grant since the necessary framework agreement between the Commission and BMCE Bank had expired on 30 June 1997 and had not been renewed. The Commission could therefore neither sign the contract with BMCE Bank nor decide to finance the project presented by Suède-Maroc Marzipan. Moreover, since Regulation 213/96 had expired and no legal basis existed, no new financial commitment was possible which the Commission informed BMCE Bank and Suède-Maroc Marzipan of by letters of 21 and 30 November, 4 and 21 December 2000 and 9 March 2001.

The Commission pointed out that the framework agreement that was signed under Regulation 213/96 between the financial institution and itself did not create any legal link between the Commission and the final beneficiary, in this case the complainant. Moreover, the agreement did not create any rights, such as a right to receive a grant or compensation in case the application was turned down, for the final beneficiary. The letter of 15 December 1998 explicitly explained that it was without prejudice to the formal approval of the proposal by the Commission and as such the letter did not constitute any commitment on the Commission's part.

As regards the complainant's first allegation that the Commission failed to inform BMCE Bank that an agreement between it and the Commission was necessary, the Commission pointed out that an agreement did exist, however, it expired on 30 June 1997. The Commission referred to Article 13(4) of the agreement which stated *"After the termination of this Agreement, the FI* [Financial Institution] *shall no longer be entitled to present new actions"*. The Commission was therefore of the opinion that BMCE Bank, as the financial institution, knew that no project applications could be accepted without an agreement in force.

Regarding the second allegation that the Commission failed to send BMCE Bank a new agreement, the Commission referred to Article XI of the agreement, which stated *"This Agreement shall enter into force on the date of signature and shall remain in force until 30 June 1997. It can be renewed for successive periods of one year by an express exchange of letters between the parties to this Agreement"*. The Commission stated that BMCE Bank therefore knew when the agreement expired. BMCE Bank did not at any stage inform the Commission that it wished the agreement to be renewed. Since the Commission handled 150 similar agreements at the time, it did not itself take the initiative to renew the agreement but considered that such an initiative should naturally come from the financial institution.

In respect of the third allegation that the Commission failed to inform the complainant of the reasons for not paying the approved grant, the Commission stated that according to the framework agreement, its contacts were with the financial institution, in this case the BMCE Bank, and not with the complainant as the final beneficiary.

59 Regulation (EC) No 772/2001 of the European Parliament and the Council of 4 April 2001 regarding the closure and liquidation of projects adopted by the Commission under Council Regulation (EC) No 213/96 of 29 on the implementation of the European Communities investment partners financial instrument for the countries of Latin America, Asia, the Mediterranean region and South Africa, OJ L [2001] 112/1.

It followed from the Commission's opinion that it rejected the complainant's claim for payment.

### The complainant's observations

In its observations, the complainant maintained its complaint. It pointed out that the Commission's letter of 15 December 1998 approving the grant, did not mention the fact that the framework agreement had expired. According to the complainant, the Commission had a duty to immediately inform BMCE Bank when the application arrived that the agreement had expired. The complainant also referred to the fact that from January to September 2000 it tried to get in contact with the person responsible for the ECIP programme. Only when it contacted the Ombudsman did the Commission react. The complainant was of the view that the letter of 15 December 1998 was a legally binding contract that it expected the Commission to follow.

Moreover, in a telephone conversation with the Ombudsman's secretariat, the complainant proposed, in case of a negative decision, that the project could be funded through another Commission programme.

The Ombudsman notes that it is not the role of the Ombudsman to try to obtain funding for complainants for specific projects. The complainant itself is however free to apply for funding from the Commission.

## *THE DECISION*

### 1 The failure to inform about the necessity of the agreement

1.1 The complainant alleged that the Commission failed to inform the financial institution, BMCE Bank, that an agreement between it and the Commission was necessary.

1.2 The Commission pointed out that an agreement did exist, however, it expired on 30 June 1997. The Commission referred to Article 13(4) of the agreement which stated *"After the termination of this Agreement, the FI* [Financial Institution] *shall no longer be entitled to present new actions"*. The Commission was therefore of the opinion that BMCE Bank, as the financial institution, knew that no project applications could be accepted without an agreement in force.

1.3 The Ombudsman notes that according to Regulation 213/96[60] a framework agreement is signed by the Commission with the financial institution. An agreement was signed with BMCE Bank, and it expired on 30 June 1997. The mere signature of the agreement should have made BMCE Bank aware of the fact that it was needed, but also the agreement itself provides that it was requisite. Moreover, the Regulation does not lay down any duty for the Commission to inform about the necessity of an agreement.

1.4 The Ombudsman therefore considers that there was no maladministration by the Commission as regards this aspect of the complaint.

### 2 The failure to send a new agreement

2.1 The complainant alleged that the Commission failed to send BMCE Bank a new agreement.

60 Council Regulation (EC) No 213/96 of 29 January 1996 on the implementation of the European Communities investment partners financial instrument for the countries of Latin America, Asia, the Mediterranean region and South Africa, OJ L [1996] 28/2.

2.2 The Commission referred to Article XI of the agreement, which stated "This Agreement shall enter into force on the date of signature and shall remain in force until 30 June 1997. It can be renewed for successive periods of one year by an express exchange of letters between the parties to this Agreement". The Commission stated that BMCE Bank therefore knew when the agreement expired. BMCE Bank did not at any stage inform the Commission that it wished the agreement to be renewed.

2.3 The Ombudsman notes that neither Regulation 213/96 nor the framework agreement appear to oblige the Commission to renew the agreement. The agreement refers to *"an express exchange of letters between the parties"*. Under these circumstances, the Commission cannot be criticised for not having sent a new agreement to BMCE Bank.

2.4 The Ombudsman therefore considers that there was no maladministration by the Commission as regards this aspect of the complaint.

## 3 The failure to inform about the non-payment

3.1 The complainant alleged that the Commission failed to inform the complainant of the reasons for not paying the approved grant.

3.2 The Commission stated that according to the framework agreement, its contacts were with the financial institution, in this case BMCE Bank, and not with the complainant as the final beneficiary.

3.3 According to the Ombudsman, the Commission has a responsibility not only towards the financial institution but also vis-à-vis the complainant as the beneficiary[61]. In the present case, the Commission informed BMCE Bank on 15 December 1998 that the complainant's project could be funded following the signing of a contract. The complainant contacted the Commission by letters of 27 January and 28 March 2000. The Commission only replied in November and December 2000 following another letter from the complainant of 2 November 2000 and the intervention of the Ombudsman.

3.4 The Ombudsman acknowledges that the Commission has now informed the complainant, in its letters from November and December 2000 and March 2001, of the reasons for not paying the grant. This was however not done in due time.

3.5 Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case, the Commission did not reply to the complainant's letters and thereby failed to inform it in due time of major difficulties which were likely to affect its interests. This constitutes an instance of maladministration. The Ombudsman will therefore address a critical remark to the Commission.

3.6 It follows from this decision that the complainant's claim could not be met.

## 4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case, the Commission did not reply to the complainant's letters and thereby failed to inform it in due time of major difficulties which were likely to affect its interests. This constitutes an instance of maladministration.*

61 See the Further Remarks in the Decision of the European Ombudsman of 12 December 2000 on complaint 573/2000/GG against the European Commission. Available on the Ombudsman's Website: http://www.euro-ombudsman.eu.int.

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## MISLEADING WORDING OF CALL FOR TENDERS

*Decision on complaint 866/2001/GG against the European Commission*

### *THE COMPLAINT*

The complainant, a translator, had submitted an offer in reply to a call for tenders (reference 2000/S 144-094468 - Translations into German) published by the European Commission.

Point 2.1 of the 'Cahier des charges' required bidders to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. The complainant approached his tax consultant who advised him that he was unable to issue an "official" document. The complainant then turned to the tax authority at his place of residence in Germany, which informed him that it was unable to issue such documents to self-employed persons like the complainant. The tax authority did however provide the complainant with a document confirming this fact. The complainant submitted this document with his tender.

On 29 March 2001, the complainant was informed that his bid had been rejected since he had failed to submit the necessary document. On 4 April 2001, the complainant appealed against this decision, arguing that he had been unable to provide the official document required through no fault of his own, since the tax authority had been unable to issue such document and since there was no other authority that could issue such attestations. He declared on his honour that he had always complied with his obligations to pay taxes and social security contributions. The complainant further pointed out that he had been working for the Commission and the translation centre of the EU as a translator for a number of years. The Commission rejected the complaint on 30 May 2001, arguing that it had not insisted on a certificate from the tax authority 'but expressly pointed out that other documents (e g a declaration by your tax consultant) were possible'.

In his complaint to the Ombudsman lodged in June 2001, the complainant denied that such information had been given to him. He added that the relevant service had informed him over the telephone that the German translation of the call for tenders appeared to have been 'unfortunate' and had encouraged him to go to the Ombudsman.

The complainant claimed that he had been wrongly excluded from the tender.

### *THE INQUIRY*

The complaint was sent to the Commission for its opinion.

#### The Commission's opinion

In its opinion, the Commission made the following comments:

In July 2000, the Commission's translation service had launched a total of eleven tenders with a view to setting up new lists of external translators. The tender concerning the German language had been published in the Official Journal on 29 July 2000 under reference 2000/S 144-094468[62]. The relevant documentation – the call for tenders, the technical specifications ('Cahier des charges') and a draft contract – had been made available to the public in electronic form through the *Europa* server of the Commission. A letter inviting addressees to submit offers had furthermore been sent to those persons (including

62 OJ 2000 S 144.

the complainant) whose names had been registered in the database of free-lance translators working for the Commission. Offers had to be received by 2 October 2000.

A total of 117 offers were received in reply to the tender concerned. These offers were evaluated in a two-stage procedure. In a first stage, compliance with certain formal requirements was checked. The remaining applications were then examined by a selection board composed of experienced civil servants as to whether they fulfilled the criteria and conditions set out in the call for tenders and the 'Cahier des charges'.

Article 2 (1) of the 'Cahier des charges' set out the five criteria that led to the exclusion of applications. In respect of four of these criteria, it was sufficient for tenderers to provide a declaration. Regarding the fifth criterion, the 'Cahier des charges' provided that applicants had to submit an "official document" ("amtliche Bescheinigung") to show that they had complied with their obligations to pay taxes and social security contributions in the relevant member state. The expression "official document" thus had to be juxtaposed to the term "declaration". It signified that an attestation by a competent body was necessary to show that the relevant obligations had been fulfilled. There was however no precise indication as to which body was meant. Given that the call for tenders was addressed to applicants from 15 member states, it was necessary to leave some latitude to applicants in this regard.

The call for tenders published in the OJ, which was the only legally binding text in case of a dispute, furthermore added to the possibilities offered to applicants in this respect by providing that an applicant had "to submit proof to show that he had fulfilled his obligations regarding taxes and social security contributions in accordance with the legislation of the country where he is established" (point 14 b).

The selection board had considered that despite having addressed himself to the tax authority, the complainant had not submitted evidence to show that he had paid his taxes. The complainant had been informed on 29 March 2001 that his application had been rejected. At the same time, however, he had been advised that he could appeal against this decision until 30 April 2001.

The complainant had then telephoned the competent service of the Commission to ask for explanations and to mark his disagreement. The Commission's services had given him the information necessary for submitting a request to re-examine his application. The complainant subsequently lodged an appeal by letter dated 4 April 2001 that was rejected by the Commission.

The Commission took the view that the complainant had interpreted the expression "official document" too narrowly. The document emanating from the German tax authority that had been submitted to it by the complainant confirmed that this authority was unable to issue an "amtliche Bescheinigung". However, this did not mean that no other authority could have provided such a document. In the Commission's view, the complainant ought to have tried to obtain this document elsewhere. In this context, the Commission noted that a survey of 57 out of the 84 offers accepted by it showed that the successful applicants had produced an attestation of their tax consultant, an attestation of a lawyer or a "Lohnsteuerkarte" (tax sheet). The Commission also considered that the complainant had become active too late, given that he had addressed himself to the tax authority only on 2 October 2000, that is to say the closing day for applications. Furthermore, the Commission took the view that the complainant had failed to consult the relevant service that was best placed to help him. In this context, the Commission pointed out that the letter inviting addressees to submit offers had indicated that the service concerned was available to provide supplementary information on technical aspects of the tender.

### The complainant's observations

No observations were received from the complainant.

*THE DECISION*

### 1 Wrongful exclusion from tender

1.1 The complainant submitted an offer in reply to a call for tenders published by the Commission (reference 2000/S 144-094468 - Translations into German). Point 2.1 of the 'Cahier des charges' required bidders to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. The complainant approached his tax consultant who advised him that he was unable to issue an "official" document. The complainant then turned to the tax authority at his place of residence in Germany, which informed him that it was unable to issue such documents to self-employed persons like the complainant. The tax authority did however provide the complainant with a document confirming this fact. The complainant added this document to his application. The Commission rejected the application on the grounds that the complainant had failed to submit the necessary document. The complainant claims that his exclusion from the tender was incorrect.

1.2 The Commission takes the view that the complainant interpreted the expression "official document" too narrowly. It also considers that the complainant had become active too late, given that he addressed himself to the tax authority only on 2 October 2000, that is to say the closing day for applications. Furthermore, the Commission takes the view that the complainant had failed to consult the relevant service that was best placed to help him. In this context, the Commission points out that the letter inviting addressees to submit offers indicated that the service concerned was available to provide supplementary information on technical aspects of the tender.

1.3 The complainant did not comment on the Commission's opinion.

1.4 Before turning to the merits of the case, it should be noted that the Ombudsman had asked the Commission to submit an opinion on the complaint within a period of three months. The Commission's very detailed opinion was in effect already sent little more than a month after the Commission had received the complaint. A comprehensive set of all relevant documents was attached to this opinion. The Ombudsman would like to stress that he appreciates the considerable effort undertaken by the Commission to speed up the treatment of this complaint.

1.5 The Ombudsman notes that according to the 'Cahier des charges', applicants had to submit an "amtliche Bescheinigung" (official document) showing that they fulfilled the relevant obligations. Although the person or body who could issue such document was not specified, the expression used clearly implies that a public authority or a person or body vested with public authority was meant. The Commission appears to accept that the document emanating from the German tax authority that was submitted to it by the complainant confirms that this authority was unable to issue such an "amtliche Bescheinigung". It claims, however, that this did not mean that no other authority could have provided such a document. In the Commission's view, the complainant ought to have tried to obtain this document elsewhere. In this context, the Commission refers to other applicants who had produced an attestation of their tax consultant, an attestation of a lawyer or a "Lohnsteuerkarte" (tax sheet). However, neither an attestation by a tax consultant nor an attestation by a lawyer can be qualified as constituting an "amtliche Bescheinigung" within the accepted meaning of the expression in the German language. It appears, furthermore, that a "Lohnsteuerkarte" is only available to employed persons. However, the complainant is self-employed. The Ombudsman concludes, therefore, that the Commission has been unable to refute the complainant's allegation that he was unable to

provide an "amtliche Bescheinigung", as Article 2 (1) of the 'Cahier des charges' appeared to require.

1.6 It is true that the call for tenders published in the OJ, which was the only legally binding text in case of a dispute, did not require such document but only provided that an applicant had "to submit proof to show that he had fulfilled his obligations regarding taxes and social security contributions in accordance with the legislation of the country where he is established" (point 14 b) without specifying the type of evidence that was expected. However, in its letter of 29 March 2001 the Commission based the rejection of the complainant's application on the failure to submit the "amtliche Bescheinigung" foreseen in Article 2 (1) of the 'Cahier des charges'. For the sake of completeness, it should be added that there is nothing to confirm the Commission's claim, in its letter of 30 May 2001, that it had not insisted on a certificate from the tax authority 'but expressly pointed out that other documents (e g a declaration by your tax consultant) were possible'[63].

1.7 The Ombudsman notes that the complainant did not submit a document to show that he had complied with his obligations to pay taxes and social security contributions in his member state. However, the Ombudsman considers that this failure was due to the misleading wording of the relevant condition in Article 2 (1) of the 'Cahier des charges'. The Commission itself notes in its opinion that six applications (including the complainant's) were rejected for failure to provide the "amtliche Bescheinigung". It is therefore quite likely that the complainant was not the only applicant to whom the misleading wording of the relevant condition caused problems.

1.8 It is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil. In the present case, the Commission required applicants to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. It seems that for a person such as the complainant it was impossible to obtain such a document from a public authority or a person or body vested with public authority as the wording of the term implied. The Commission has failed to clarify that an attestation by other persons or bodies, e g a tax consultant or a lawyer, would be regarded as sufficient. The exclusion of the complainant for failure to submit such a document thus constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

## 2 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*It is good administrative practice in tender procedures for the administration clearly to set out the conditions that applicants have to fulfil. In the present case, the Commission required applicants to submit an "amtliche Bescheinigung" (official document) showing that they had paid their taxes and social security contributions in their member state. It seems that for the complainant it was impossible to obtain such a document from a public authority or a person or body vested with public authority as the wording of the term implied. The Commission has failed to clarify that an attestation by other persons or bodies, for example a tax consultant or a lawyer, would be regarded as sufficient. The exclusion of the complainant for failure to submit such a document thus constitutes an instance of maladministration.*

63 The Commission has also provided a French version of this letter in which the relevant passage reads as follows: "Cependant, nous ne demandions pas nécessairement un document délivré par le Finanzamt;d'autres moyens de preuve étaient possibles en ce qui concerne votre situation fiscale, et notamment une déclaration de votre Steuerberater." If the French version should be the original and the letter sent to the complainant a translation thereof, the Commission's efforts to set up a list of competent external translators is most understandable.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.4.4 The Committee of the Regions

### LACK OF INFORMATION REGARDING RESERVE LIST

*Decision on complaint 660/2000/GG against the Committee of the Regions*

*THE COMPLAINT*

In May 1996, the Committee of the Regions published a notice of vacancy for the post of an administrator who was to work under the authority of the President of the European Alliance Group. The notice specified that the successful candidate would be appointed as a temporary agent with grade A7 and continued: "Other candidates who have passed the selection examinations will be placed on a reserve list. Should further equivalent vacancies arise, these candidates will be taken into consideration." The complainant passed the competition but was not chosen for the post. Together with other successful candidates, she was put on the reserve list established in 1997. In its letter of 9 January 1997 informing the complainant of this decision, the Committee made the following statement: "However, we will certainly contact you as soon as a possibility for recruitment arises." The complainant was subsequently informed that there was no expiry date foreseen for this reserve list and that "her application would be reconsidered in the event that a new post is created for the European Alliance Group or in the event that [the] existing post becomes vacant." In this letter, the Committee referred to and confirmed its letter of 9 January 1997.

The complainant worked as an auxiliary agent for the Committee between October 1997 and October 1998.

In March 2000, the complainant learnt that the administrator who had been chosen had left her post. On 10 April 2000, she thus wrote to both the President of the European Alliance Group and to the Secretary-General of the Committee of Regions to express her interest in the post and to point out that she was on the reserve list. The complainant then discovered that the relevant post had been filled already by Mr O. whose name had not been on the reserve list.

On 19 May 2000, the complainant thereupon turned to the European Ombudsman who forwarded her complaint to the Committee of the Regions on 30 May 2000.

By letter dated 23 June 2000, the Secretary-General of the Committee of the Regions informed the complainant that the reserve list created in 1997 had expired on 20 June 2000 and that a new notice of vacancy had now been published with a view to occupying the position with effect from 16 October 2000. According to the new notice of vacancy (that was also dated 23 June 2000), applications had to be received by 12 July 2000 at the latest. The complainant submitted an application on 11 July 2000.

The complainant was invited for an interview on 25 July 2000. In a letter dated 3 August 2000, the Secretary-General of the Committee of the Regions informed the complainant that she had not been chosen for the post.

The complainant made the following allegations:

1) The Committee of the Regions should have informed the candidates whose names had been placed on the reserve list that the post had been vacated.

2) The Committee of the Regions should have chosen the person to fill this post from the candidates whose names had been put on the reserve list.

3) The Committee of the Regions' choice of date for the expiry of the reserve list was arbitrary.

4) The Committee of the Regions should have informed those persons whose names were on the reserve list before the latter expired.

*THE INQUIRY*

The complaint was sent to the Committee of the Regions.

**The opinion of the Committee of the Regions**

In its opinion, the Committee of the Regions made the following comments:

The Committee had not been under an obligation to inform the persons whose names were on the reserve list since the post had not been filled definitively but only on a provisional basis. Therefore the Committee had been free to choose a person whose name did not figure on the reserve list.

The choice of the date on which the reserve list was to expire belonged to the discretionary powers of the administration. The persons whose names had been on the reserve list could only be informed of the latter's expiry after the decision had been taken on 20 June 2000.

**The complainant's observations**

In her observations, the complainant expressed her surprise at the fact that the post had allegedly been filled only on a temporary basis. She further claimed that the Committee of the Regions had had ample time to consult the reserve list instead of appointing a person who had not passed the initial competition. The complainant pointed out that she would have been able to take up the post from the day it had been vacated. In her view, the Committee had acted arbitrarily when deciding to close the reserve list. The complainant claimed that since the list was still valid when the post had become vacant towards the end of March 2000, the Committee ought to have consulted it and informed the persons whose names were on it that a vacancy had arisen.

According to the complainant, the second recruitment procedure had been hastily organised following her objections to the appointment of Mr O. and had been perfunctory by comparison with the initial procedure, given that it was based on a single interview. The complainant's interview had taken place on 25 July 2000, and this had been the only day allocated for these interviews. However, in the afternoon of the same day interviews were held for another position with the European Alliance Group, and the person who had been appointed in March 2000 was a member of the appointing panel.

The complainant concluded that the second recruitment procedure had been artificially implemented in order to legitimise an appointment that had already been made some months previously.

*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 Committee of the Regions to explain the reasons why it had decided to fill the relevant post on a provisional basis, to specify how and when this appointment was actually carried out, to submit copies of the relevant documents and to inform the Ombudsman as to who had been appointed as a result of the vacancy notice published in June 2000.

**The Committee's reply**

In its reply, the Committee of the Regions provided the following information:

The relevant post had been filled on a provisional basis in response to the wishes of the President of the European Alliance Group. At the time, the group's needs had substantially increased in view of the lengthy gap between the drawing up of the reserve list (1997) and

the vacancy for the post of administrator (2000). The group had therefore decided to reappraise its administrative requirements and in the meanwhile to recruit on a short-term basis a staff member who would immediately be operational.

The administration of the Committee of the Regions was in no way entitled to interfere with the discretionary choices made by a political group for the purpose of recruiting an administrator solely on a contractual basis and for a fixed period.

The temporary staff member of the European Alliance group had been recruited for the period from 16 March until 15 October 2000 on the basis of a normal contract. Despite the speed of recruitment, the statutory procures had been scrupulously respected.

The person who had been appointed as a result of the vacancy notice published on 23 June 2000 was Mr O.

The Committee included copies of the documents requested by the Ombudsman. It emerged from these documents that an application to appoint Mr O. for the period between 16 March and 15 October 2000 had been made on 21 February 2000 and approved by the Committee on 23 February 2000, that the post had been offered to Mr O. on 1 March 2000 and that Mr O. had accepted this post on 7 March 2000.

### The complainant's observations

The Committee's reply to the Ombudsman's request for further information was forwarded to the complainant. In her observations, the complainant maintained her complaint. The complainant pointed out in particular that when Mr O. was appointed with effect from 16 October 2000, the President of the European Alliance Group had requested that his contract should be for an indefinite period, given that he had already completed a sufficient probationary period since 16 March 2000. In the complainant's view, this confirmed that Mr O. had been appointed as the temporary agent from that date.

## *THE DECISION*

### 1 Failure to inform about vacancy

1.1 In May 1996, the Committee of the Regions published a notice of vacancy for the post of an administrator who was to work under the authority of the President of the European Alliance Group. The notice specified that the successful candidate would be appointed as a temporary agent with grade A7 and continued: "Other candidates who have passed the selection examinations will be placed on a reserve list. Should further equivalent vacancies arise, these candidates will be taken into consideration." The complainant passed the competition but was not chosen for the post. Together with other successful candidates, she was put on the reserve list established in 1997. She was subsequently informed that the Committee would contact her "as soon as a possibility for recruitment arises". She was further informed that there was no expiry date foreseen for this reserve list and that "her application would be reconsidered in the event that a new post is created for the European Alliance Group or in the event that [the] existing post becomes vacant." However, when the same post became vacant again, the Committee appointed, in March 2000, Mr O. whose name had not been on the reserve list. The complainant claimed that the Committee had failed to inform her of the vacancy.

1.2 The Committee of the Regions claimed that there had been no obligation to inform the persons whose names were on the 1997 reserve list since it had only filled the post on a provisional basis in March 2000.

1.3 The Ombudsman notes that the Committee has informed the complainant that her application would be reconsidered if the relevant post should become vacant again and that she would be informed "as soon as a possibility for recruitment arises".

1.4 The Committee argued that it had not been obliged to inform the complainant since the appointment had only been made on a provisional basis. However, the Committee's letter of 9 January 1997 clearly stated that the Committee would "contact you as soon as a possibility for recruitment arises". The Ombudsman considers that such a possibility for recruitment also arose where a post was filled on a provisional basis. The possible urgency to fill the post should not have prevented the Committee from informing the complainant, given that the latter lived in Brussels and that her address was known to the Committee.

1.5 On the basis of the above, the Ombudsman concludes that by omitting to inform the complainant as soon as the post of administrator with the European Alliance Group became vacant, the Committee of the Regions failed to comply with a promise to that effect that it had made to the complainant. It is good administrative practice for the administration to comply with commitments it has taken upon itself vis-à-vis citizens. The Committee's failure to do so thus constitutes an instance of maladministration. The Ombudsman therefore considers it necessary to make a critical remark in this regard.

## 2 Failure to choose candidate from reserve list

2.1 The complainant claimed that the Committee ought to have chosen the person to fill the vacant post from the reserve list drawn up in 1997.

2.2 The Committee argued that the post had only been filled on a provisional basis in March 2000, that the reserve list had expired in June 2000 and that a new selection procedure had been carried out in July 2000 that had led to the definitive filling of the vacancy.

2.3 The Ombudsman considers that the appointing authority was entitled to fill a post on a provisional basis where there were good reasons for doing so. In the present case, the Committee argued that it had been urgent to fill the post and that the needs of the relevant group had substantially changed in the more than three years since the reserve list had been drawn up. In the Ombudsman's view, the Committee had thus put forward valid reasons for filling the relevant post on a provisional basis. Since this decision belongs to the discretionary powers of the administration, the Ombudsman is not entitled to substitute the latter's appraisal by his own.

2.4 The complainant argued that the first appointment had not merely been made on a provisional basis and that the second recruitment procedure had been artificially implemented in order to legitimise an appointment that had already been made some months previously. The Ombudsman considers, however, that his inquiries have not produced sufficient evidence that would have supported this claim. It has to be noted in particular that Mr O.'s contract of March 2000 had been limited to a duration of six months, a fact which was compatible with the Committee's claim that the appointment had been made on a provisional basis.

2.5 On the basis of the above, there appears to have been no maladministration on the part of the Committee in so far as the complainant's second allegation is concerned.

## 3 Choice of date for expiry of reserve list

3.1 The complainant claimed that the choice of date for the expiry of the reserve list established in 1997 had been arbitrary.

3.2 The Committee took the view that this decision belonged to the discretionary powers of the administration.

3.3 The Ombudsman considers that the choice of the date on which a reserve list is to expire is indeed a decision that belongs to the discretionary powers of the administration. The Committee would arguably have exceeded the limits of its discretion in the matter if its only purpose had been, as the complainant claimed, to proceed to a second recruitment procedure in order to legitimise an appointment that had already been made some months

previously. However, and as noted above, the Ombudsman considers that his inquiries have not produced sufficient evidence to support this claim.

3.4 On the basis of the above, there appears to have been no maladministration on the part of the Committee in so far as the complainant's third allegation is concerned.

**4 Failure to inform before expiry of reserve list**

4.1 The complainant claimed that the Committee ought to have informed the persons whose names were on the 1997 reserve list before deciding to let the list expire.

4.2 The Committee took the view that it could only inform these persons once the decision had been taken.

4.3 The Ombudsman is not aware of any obstacles that would have prevented the Committee from informing the persons concerned before deciding to let the reserve list expire, and it may well have been courteous to do so. However, the Ombudsman is not aware of any rule that would oblige the administration to inform the persons whose names are on a reserve list before letting this list expire.

**5 Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

*By omitting to inform the complainant as soon as the post of administrator with the European Alliance Group had become vacant, the Committee of the Regions had failed to comply with a promise to that effect that it had made to the complainant. It is good administrative practice for the administration to comply with commitments it has taken upon itself vis-à-vis citizens. The Committee's failure to do so thus constituted an instance of maladministration.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the file.

## APPOINTMENT TO A POST WITHOUT INFORMING THE PERSONS ON THE RESERVE LIST ESTABLISHED FOR THAT POST OF THE VACANCY

*Decision on complaint 1376/2000/OV against the Committee of the Regions*

*THE COMPLAINT*

In October 2000, Mr I. made a complaint to the European Ombudsman concerning the appointment in the Committee of the Regions of an administrator for the European Alliance Group. According to the complainant, the relevant facts were as follows:

On 10 April 2000, the Committee of the Regions' Website mentioned the appointment of an administrator (temporary agent) for the European Alliance Group. The complainant however alleges that the appointed administrator did not figure on the reserve list which had been established for that post on 9 January 1997 for an undetermined period. Moreover, the candidates on the reserve list were not informed about the vacancy.

On 14 May 2000, the complainant wrote to the Secretary General of the Committee of the Regions, but received no reply. On 23 June 2000, the Secretary General wrote a letter to the complainant which did not refer to the complainant's letter of 14 May 2000, but indicated that the reserve list for the post in question had expired on 20 June 2000.

On 9 July 2000, the complainant wrote back to the Committee of the Regions alleging that its letter of 23 June 2000 gave no answer to his allegations of irregularities in the recruitment procedure. The Committee of the Regions did not reply to the complainant's letter.

The complainant therefore wrote to the Ombudsman on 22 October 2000 alleging that:

1 The Committee of the Regions appointed in April 2000 to the post of administrator for the European Alliance Group a person who did not figure on the reserve list for that post which was established in January 1997.

2 The Committee of the Regions did not inform the complainant, who did figure on the reserve list (valid until 20 June 2000), of the said vacancy.

3 The Committee of the Regions did not reply to his letters of 14 May and 9 July 2000.

## *THE INQUIRY*

### The Committee of the Regions' opinion

The complaint was forwarded to the Committee of the Regions in November 2000. With regard to the first allegation, the Committee of the Regions stated that it was not obliged to inform the persons figuring on the reserve list of the said vacancy, because the post was not filled definitively, but only provisionally in the expectation of a definitive recruitment. Also, because it was not proceeding to a definitive filling of the post, the Committee was free to choose a person who did not figure on the reserve list.

With regard to the second allegation, the Committee observed that by letter of 9 January 1997 the complainant was informed that his name figured on the reserve list. The Committee secondly pointed out that its choice to close the reserve list was not an arbitrary measure, but fell within the discretionary power of the Appointing Authority which is recognised by both the Staff Regulations and the case law. The Committee also stated that the information concerning the expiry of the reserve list (dated 23 June 2000) could only be given once the decision dated 20 June 2000 had been taken. The letter to the complainant of 23 June 2000 also indicated the publication of a new vacancy dated 23 June 2000 for which the recruitment should take place from 16 October 2000 onwards.

As regards the third allegation, the Committee considered that the new recruitment procedure would give the complainant possibilities for obtaining satisfaction. Therefore it did not wish to react to the complainant's letters of 14 May and 9 July 2000.

### The complainant's observations

The complainant observed that the reasoning of the Committee concerning the fact that it was only a provisional recruitment was not convincing, as it was not reflected in the notice on the Website. The reasoning therefore rather seemed to be a post facto construction.

The complainant stated that, as the departure of the previous administrator was foreseeable, the vacancy was not an unexpected event. The Committee therefore had the necessary time to consult the reserve list and to respect the legitimate expectations of the persons on the reserve list. As regards the legitimate expectations, the complainant observed that in its letter of 9 January 1997, the Committee had stated that it would contact the complainant "as soon as a possibility for recruitment arises". The complainant also referred to similar legitimate expectations on basis of a letter from the Committee dated 17 July 1997 which stated that, as he figured on the reserve list, his application would be reconsidered in case a new post would be created or a vacancy would arise.

The complainant observed that, when the said post became vacant in March 2000, the reserve list was still valid and he should therefore have been consulted. The complainant concluded that the whole sequence of events showed that the Committee did not want to follow the normal procedure, because it wanted to give the post to someone who had not participated in the original selection procedure.

*THE DECISION*

**1 The alleged appointment of a candidate not figuring on the reserve list**

1.1 The complainant alleged that the Committee of the Regions appointed in April 2000 to the post of administrator for the European Alliance Group a person who did not figure on the reserve list for that post which was established in January 1997. In its opinion, the Committee of the Regions observed that the post was not filled definitively, but only provisionally in the expectation of a definitive recruitment. Because it was not proceeding to a definitive filling of the post, the Committee was thus free to choose a person who did not figure on the reserve list.

1.2 The Ombudsman considers that the Appointing Authority is entitled to fill a post on a provisional basis where there are good reasons for doing so. In the present case, the Committee argued that it was urgent to fill the post, and that, as it was not proceeding to a definitive filling of the post, the Committee was free to choose a person who did not figure on the reserve list. In the Ombudsman's view, the Committee has thus put forward a reasonable explanation for filling the relevant post on a provisional basis. Since this decision belongs to the discretionary powers of the administration, the Ombudsman is not entitled to substitute his own appraisal.

1.3 The complainant alleged that the whole sequence of events showed that the Committee did not want to follow the normal procedure, because it wanted to give the post to someone who had not participated in the original selection procedure. The Ombudsman considers, however, that the complainant has not produced evidence that would support this claim. On the basis of the above, there appears to have been no maladministration by the Committee of the Regions as regards this aspect of the case.

**2 The alleged failure to inform the persons figuring on the reserve list**

2.1 The complainant alleged that the Committee of the Regions did not inform him of the vacancy, although he figured on the reserve list (valid until 20 June 2000). In its opinion, the Committee stated that it was not obliged to inform the persons figuring on the reserve list of the said vacancy. The Committee secondly pointed out that its choice to close the reserve list was not an arbitrary measure, but fell within the discretionary power of the Appointing Authority which is recognised by both the Staff Regulations and the case law.

2.2 Principles of good administration require that the Community institutions and bodies respect the promises which they make to citizens. In the present case, the Committee informed the complainant in its letter of 9 January 1997 that it would contact him as soon as a possibility for recruitment would arise. In its letter of 17 July 1997 the Committee again stated that the complainant's application would be reconsidered in case a new post would be created or a vacancy would arise. Therefore, by not having informed the complainant of the vacancy, the Committee failed to comply with the promise it made. This constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

**3 The alleged failure to reply to the complainant's letter of 14 May and 9 July 2000**

3.1 The complainant alleged that the Committee of the Regions did not reply to his letters of 14 May and 9 July 2000. The Committee of the Regions, considering that the new recruitment procedure would give the complainant possibilities for obtaining satisfaction, did not wish to react to the complainant's letters of 14 May and 9 July 2000.

3.2 Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case, the Committee of the Regions did not reply to the complainant's letters of 14 May and 9 July 2000. The argument raised by the Committee about a possible satisfaction in a future recruitment procedure cannot justify

failure to reply to the complainant's letters. This failure to reply therefore constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

**4 Conclusion**

On the basis of the European Ombudsman's inquiries into parts 2 and 3 of this complaint, it appears necessary to make the following two critical remarks:

*Principles of good administration require that the Community institutions and bodies respect the promises which they make to citizens. In the present case, the Committee informed the complainant in its letter of 9 January 1997 that it would contact him as soon as a possibility for recruitment would arise. In its letter of 17 July 1997 the Committee again stated that the complainant's application would be reconsidered in case a new post would be created or a vacancy would arise. Therefore, by not having informed the complainant of the vacancy, the Committee failed to comply with the promise it made. This constitutes an instance of maladministration.*

*Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case the Committee of the Regions did not reply to the complainant's letters of 14 May and 9 July 2000. The argument raised by the Committee about a possible satisfaction in a future recruitment procedure cannot justify failure to reply to the complainant's letters. This failure to reply therefore constitutes an instance of maladministration.*

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.4.5 The European Centre for the Development of Vocational Training

### ALLEGED DISCRIMINATION IN THE ANNOUNCEMENT OF A VACANCY/ ALLEGED UNFAIR AND ARBITRARY ASSESSMENT

*Decision on complaint 705/2000/OV against CEDEFOP (European Centre for the Development of Vocational Training)*

*THE COMPLAINT*

In May 2000, Mr T. made a complaint to the European Ombudsman on behalf of Mrs M. (hereafter "the complainant"), concerning alleged discrimination and unfair treatment in the conduct of a recruitment procedure. According to the complainant, the relevant facts were as follows:

The complainant participated in a recruitment procedure for a post of female multilingual switchboard operator in CEDEFOP's offices in Thessaloniki, which was announced by CEDEFOP at the beginning of 2000. In the announcement of the post in the newspaper the Greek terms "*τηλεφωνήτρια*" and "*υποψήφιες*" were used, which in English correspond to the terms "female switchboard operator" and "female candidates". The complainant observed that such a restriction is against both Community and Greek law. The written tests took place on 27 March 2000 and despite the announcement there was also a man among the candidates.

In the final results, the complainant had come first in the written tests, while the male candidate had come first in the oral ones. It was however the male candidate who was finally recruited for the post.

According to the complainant, CEDEFOP's assessment of candidates was arbitrary and unfair: the candidate who was finally recruited for the post had achieved extremely low marks in the written tests (2/10 in French and 0/10 in English). The complainant observed that, as foreign languages were the main requirement for the post, it was not acceptable to recruit a person who had such low marks in the written tests in English and French.

As for the part of the tests concerning the assessment of candidates' previous professional experience, the complainant only obtained a 4/20 mark, despite the large number of refer-

ences that she had included in her file and her experience as an official translator for several companies. Moreover, during the oral examination, the complainant was assessed on questions irrelevant to the post (such as what movies she had seen recently).

Furthermore, the complainant pointed out that many mistakes of negligence were made. For instance, the date of CEDEFOP's note notifying the test results to the complainant was dated 14 March 2000, i.e. 13 days before the tests were actually held. According to the complainant, the explanations given by CEDEFOP to her questions concerning the final results of the tests were not satisfactory. She also alleges that in the telephone conversations she had with CEDEFOP's officials she received a very hostile reception and that the officials insisted that she should stop stirring up the case. On 10 May 2000 the complainant sent a written objection to CEDEFOP, but she never received an answer.

The complainant finally indicated that, in contacts with the central service of CEDEFOP in Brussels she had been warned that due to her conduct her name had been included in an unofficial blacklist of those who have appealed against Community bodies which will prevent her from being recruited to any EU institution in the future.

The complainant therefore wrote to the Ombudsman on 25 May 2000 and made the following allegations:

1 In the announcement of the post the terms "*τηλεφωνήτρια*" and "*υποψήφιες*" were used which in English correspond to "female switchboard operator" and "female candidates". This was against the provisions of both Community and Greek law, where any discrimination on basis of sex is prohibited.

2 CEDEFOP's assessment of candidates was arbitrary and unfair: The candidate who was finally selected for the post had extremely low marks in the written examination (2/10 in French and 0/10 in English), whereas the complainant was ranked in the first place in the written exams. As regards the assessment of candidates' previous professional experience, the complainant only obtained a 4/20 mark despite the large number of references that she included in her file and her experience as an official translator for several companies.

3 During the oral examination the complainant was assessed on questions irrelevant to the post in question.

4 CEDEFOP did not give satisfactory explanations to the complainant's questions about the final results of the exams and never answered the complainant's written objection of 10 May 2000.

5 The notification of the competition results was dated 14 March 2000 which is 13 days before the tests were actually held.

## *THE INQUIRY*

### CEDEFOP's opinion

The complaint was forwarded to CEDEFOP in June 2000. In its opinion, CEDEFOP confirmed that the vacancy published in the local newspapers did refer to a female switchboard operator, but explained that this was due to an error at its secretariat. It however observed that such an error can quite easily be made, because in Greek, for this specific word, only a few letters in the end change to indicate the sex of the person concerned (*τηλεφωνητ<u>ής</u>*/*τηλεφωνή<u>τρια</u>*). CEDEFOP also explained that, given that two female switchboard operators were previously employed in that post, this error was due to confusion and was certainly not made on an explicit, voluntary basis. As such a description was indeed in violation of both Community and Greek law, CEDEFOP was obliged to admit any male candidate to the competition.

CEDEFOP indicated that from the 41 candidates, 12 were admitted to the written tests which consisted of a dictation in Greek, English and French (with a maximum of 10 points per language, so a total of 30 points), whereas the oral test was marked out of 125 points, with a possibility of extra points for spoken languages additional to Greek, English and French. CEDEFOP indicated that the tests concerned the candidates' linguistic abilities, computer skills, fluency and facility in communication in the languages spoken. On the other hand, the weighting given to the oral component of the tests reflected the practical requirements that a switchboard operator should: 1) be able to communicate effectively in a maximum number of languages with Greek, English and French as a minimum, 2) possess a calm and diplomatic manner when dealing with callers, and 3) have some relevant professional experience.

According to CEDEFOP, during the oral test all the candidates were, in addition to the set of 5 standard questions, invited to talk about their interests (cinema, literature, sport) in languages other than their mother tongue. CEDEFOP underlined that the post of switchboard operator in any multicultural organisation requires the ability to understand and communicate with fluency and facility in a maximum of languages, as well as the possession of a diplomatic and non-confrontational manner when dealing with callers.

Following the tests the marks of the successful candidate and the complainant were respectively 132/155 and 82,5/155. CEDEFOP also pointed out there were two other candidates (with marks 120/155 and 115,5/155) who were placed on the reserve list for possible future vacancies. One of them had participated in a previous competition and had complained to the European Ombudsman. Despite that, the Centre did not adopt a hostile or revenge-seeking attitude towards her, but on the contrary registered her as third-best candidate for an employment as switchboard operator. CEDEFOP quoted this example as reply to the complainant's allegations of unfriendly and arrogant treatment of candidates.

CEDEFOP observed that experience in the various Community bodies demonstrates that numerous individuals can communicate orally in a highly effective manner and in a variety of languages without, however, mastering the written form of all these languages. As for the successful candidate's 0 mark in the written tests, CEDEFOP stated that the marking of these tests gave rise to 0 points for any word where a single misspelling, however minor, took place. CEDEFOP does not accept that high marks in an oral interview are not justified by virtue of low marks in a written examination, particularly in view of the scope of the oral tests in question.

CEDEFOP pointed out that this particular vacancy required an oral competence in a maximum number of languages, coupled with a pleasant and unflappable manner. In the present case, the interview with the successful candidate was much more satisfactory than the one with the complainant. The interview with the complainant led the members of the Selection Board to the unanimous conclusion that a) she has good knowledge of English and French, in addition to her mother tongue, b) all her previous, 3-year, professional experience has been in private firms exclusively as translator, c) her highly assertive manner might well be a disadvantage for the post concerned and d) that, at her own admission at the interview, the complainant's prime goal was to become a translator at CEDEFOP which left some doubt concerning her motivation for the post in question. The interview with the successful candidate demonstrated that a) he speaks very good French, English and Italian, in addition to his mother tongue, b) he speaks good Spanish and fair German, c) he worked in Community institutions in Luxembourg from 1991 to 1995 where he had experience in dealing with situations analogous to that of the post in question and that d) his manner is discrete, diplomatic and suitable for the post.

As regards the date of the document notifying the results to the complainant, CEDEFOP stated that it was due to computer problems. On 14 March 2000 the administration forwarded to the Selection Board the template for filling in the candidates' marks. After its

completion with the final marks, the template was returned by e-mail to the administration, but the computer failed to delete the date on the revised document.

CEDEFOP finally pointed out that both CEDEFOP's Head of Administration and the President of the Selection Board received the complainant with the requisite politeness and understanding whilst indicating the reasons for her lack of success in a calm and understanding manner. CEDEFOP referred to the "notes for the dossier" which attest the actual sequence of events. The mere fact that, even under these conditions, the complainant received from the Administration documents relating to the complete results of the competition (and not only of her own scores) clearly shows CEDEFOP's intention not to hide anything and to explain in a transparent and open way whatever might create doubts in the minds of unsuccessful candidates. CEDEFOP rejected the allegations according to which the complainant would be on a black list.

CEDEFOP also referred to interventions made before the tests by two Greek Ministries as well as by the office of Commissioner Diamantopoulou with a view to drawing the administration's attention to the application of the complainant. Similar interventions took also place after the competition was completed and its results were made known.

CEDEFOP regretted both the lapses which led to the inaccurate job description published in the press and to the mistake in the date of the notification of the results.

**The complainant's observations**

The complainant maintained her complaint. She observed that the mistake in the announcement of the post could have been easily corrected by simply publishing a new one and that, in any case, an institution such as CEDEFOP should not make mistakes of that kind. The complainant made the same comment with regard to the wrong date on the document notifying the results which CEDEFOP again explained as a mistake.

The complainant also observed that, if the written exams are not as important as the oral ones as suggested by CEDEFOP's opinion, then they should not have been organised. The complainant pointed out that the only candidate who failed the written exams was finally chosen for the post.

The complainant stated that CEDEFOP is a European Institution that should be objective and follow the law. Therefore, the fact that an ex-complainant to the European Ombudsman was treated equally with the rest of the candidates should not be put forward as an argument for its impartiality and its correct behaviour.

The complainant concluded that she was not satisfied or convinced by the explanations given by CEDEFOP.

*FURTHER INQUIRIES*

On 11 July 2001, the Ombudsman office contacted the complainant by phone asking for a copy of the competition notice. The complainant answered that the only text of reference she had was the little notice in the newspaper. The same day the Ombudsman office also contacted Mr John Young, the President of the Selection Board of the competition in question, with the same request for the competition notice. The competition notice which CEDEFOP sent was in fact the announcement in the newspaper.

*THE DECISION*

## 1 The alleged discrimination in the announcement of the post

1.1 The complainant alleged that in the announcement of the post the terms "*τηλεφωνήτρια*" and "*υποψήφιες*" were used which in English correspond to "female switchboard operator" and "female candidates". This was against the provisions of both Community and Greek law, where any discrimination on basis of sex is prohibited.

1.2 CEDEFOP confirmed that the vacancy published in the local newspapers did refer to a female switchboard operator, but explained that this was due to an error at its secretariat. It however observed that such an error can quite easily be made, because in Greek, for this specific word, only a few letters in the end change to indicate the sex of the person concerned (*τηλεφωνητής*/*τηλεφωνήτρια*). CEDEFOP also explained that, given that two female switchboard operators were previously employed in that post, this error was due to confusion and was certainly not made on an explicit, voluntary basis. CEDEFOP however regretted this error which led to the inaccurate job description published in the press.

1.3 The Ombudsman notes that Article 27 of the Staff Regulations provides that officials shall be selected without reference to race, creed or sex. Announcements of recruitment procedures organised by Community institutions and bodies shall therefore be made without any reference to sex.

1.4 In the present case, the announcement of the post referred to a "female switchboard operator" (*τηλεφωνήτρια*) and to "female candidates" (*υποψήφιες*). It appears therefore that CEDEFOP has infringed the principle of non-discrimination. Even if in its opinion it regretted this error, it appears that CEDEFOP has not corrected this mistake by publishing a new announcement. Notwithstanding the fact that a male candidate was finally recruited, the announcement published meant that only female candidates could reasonably apply for the said post. This constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

## 2 The alleged arbitrary and unfair assessment of the candidates

2.1 The complainant alleged that CEDEFOP's assessment of candidates was arbitrary and unfair: The candidate who was finally selected for the post had extremely low marks in the written examination (2/10 in French and 0/10 in English), whereas the complainant was ranked in the first place in the written exams. As regards the assessment of candidates' previous professional experience, the complainant only obtained a 4/20 mark despite the large number of references that she included in her file and her experience as an official translator for several companies.

2.2 CEDEFOP observed that the written tests were marked out of 30 whereas the oral tests were marked out of 125. It equally stated that the weighting given to the oral component of the tests reflected the practical requirements for a switchboard operator. As regards the written tests, CEDEFOP observed that the dictation test gave rise to 0 points for any word where a single misspelling, however minor, took place. CEDEFOP also explained the reasons why the oral exam led the Selection Board to the conclusion that the successful candidate was better than the complainant with regard to the languages, the appropriate professional experience, the motivation and the suitability for the post.

2.3 From the document containing the final assessment of the candidates, the Ombudsman notes that of the possible total of 155 points, 30 points were attributed to the dictation tests in respectively Greek, French and English (10 each), and 125 points were attributed to the oral test, with a subdivision of 20, 40, 20 and 45 points respectively for the 5 standard questions, the presentation, the professional experience and the three compulsory languages, with a possibility of extra points for additional spoken languages (5 for each). It therefore appears that the oral tests were relatively much more important

in the assessment. They in fact counted for about 80% in the evaluation of the candidates, whereas the written tests only counted for about 20% in the assessment.

2.4 The complainant obtained 18/30 on the dictation test and 64,5/125 on the oral test, whereas the successful candidate obtained 9/30 on the dictation and 123/125 on the oral test. Even if the complainant obtained the best result of all on the written test, it appears that 6 of the 10 candidates, amongst which the one finally retained for the post, obtained a better mark both in the oral test and in final assessment.

2.5 The complainant's allegation that the Selection Board's assessment was arbitrary and unfair does therefore not seem to be justified. No instance of maladministration was therefore found with regard to this aspect of the case.

### 3 The alleged irrelevant questions on the oral examination

3.1 The complainant alleged that during the oral examination she was assessed on questions irrelevant to the post and not on the questions provided for by the terms of the competition. As example she referred to a question concerning the movies she had recently seen. CEDEFOP observed that during the oral tests, all the candidates were, in addition to the set of 5 standard questions, invited to talk about their interests (cinema, literature, sport) in other languages than their mother tongue.

3.2 From the documents in the file concerning the oral exam, it appears that all candidates were first asked 5 standard questions, one concerning the reason why they applied for the post, one concerning the names of Community institutions and three concerning a hypothetical practical situation in which someone calls (20 points). Candidates were secondly questioned about their professional experience (20 points). Finally, the candidates were assessed on their presentation (40 points) on basis of questions concerning their general culture and interests. It appears therefore that the Selection Board was entitled to ask questions about the complainant's interests such as cinema for instance. No instance of maladministration was therefore found with regard to this aspect of the case.

### 4 The alleged failure to reply

4.1 The complainant alleged that CEDEFOP did not give satisfactory explanations to her questions about the final results of the competition and never answered her written objection of 10 May 2000. In its opinion CEDEFOP explained the reasons for the marks which were attributed to both the complainant and the successful candidate. As regards the failure to reply, CEDEFOP did not submit a comment.

4.2 Principles of good administration require that the Community institutions and bodies reply to the letters of citizens[64]. In the present case CEDEFOP did not reply to the complainant's letter of 10 May 2000. This failure to reply therefore constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

### 5 The wrong date in the notification of the results of the competition

5.1 The complainant alleged that the notification of the competition results was dated 14 March 2000 which is 13 days before the tests were actually held. In its opinion, CEDEFOP regretted this mistake which was due to a computer problem with the template. The complainant observed that an institution as CEDEFOP should not make mistakes of that kind.

5.2 The Ombudsman notes that CEDEFOP regretted that this mistake took place. Therefore no further inquiries into this aspect of the case appear to be necessary.

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64 See Article 13 of CEDEFOP's *Code of Good Administrative Behaviour* of 15 December 1999.

### 6 Conclusion

On the basis of the European Ombudsman's inquiries into part 1 and 4 of this complaint, it appears necessary to make the following critical remarks:

*Article 27 of the Staff Regulations provides that officials shall be selected without reference to race, creed or sex. Announcements of recruitment procedures organised by Community institutions and bodies shall therefore be made without any reference to sex.*

*In the present case, the announcement of the post referred to a "female switchboard operator" (τηλεφωνήτρια) and to "female candidates" (υποψήφιες). It appears therefore that CEDEFOP has infringed the principle of non-discrimination. Even if in its opinion it regretted this error, it appears that CEDEFOP has not corrected the mistake by publishing a new announcement. Notwithstanding the fact that a male candidate was finally recruited, the announcement published meant that only female candidates could reasonably apply for the said post. This constitutes an instance of maladministration*

*Principles of good administration require that the Community institutions and bodies reply to the letters of citizens. In the present case CEDEFOP did not reply to the complainant's letter of 10 May 2000. This failure to reply therefore constitutes an instance of maladministration*

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.4.6 The European Agency for Safety and Health at Work

### CONSIDERATION OF AGE FOR THE CLASSIFICATION OF A LOCAL AGENT

*Decision on complaint 1056/2000/JMA against the European Agency for Safety and Health at Work*

*THE COMPLAINT*

The complainant was engaged as a local agent by the European Agency for Safety and Health at Work (EASHW) in June 1998. Article 3 of the contract established that the rules of the Commission's regulation governing the conditions of employment of its local agents in Spain [local staff regulation], should be applicable. These regulations provide in Article 4.II.a. that the age of the local agent should be taken into account for his/her initial classification. The complainant alleged that the Agency had disregarded this criterion when deciding on his initial grade and step.

In December 1999, the complainant submitted, jointly with other local agents, a note to the Director of the Agency, requesting the effective application of Article 4.II.a of the local staff regulation for the classification of its local staff and accordingly, the revision of the decisions already taken in this regard. In his reply of March 2000, the Director of the Agency explained that age could not be taken into account for his initial classification since such practice would be contrary to the Spanish legal order.

The complainant then requested a meeting with the Agency's Resources Manager. Since the Agency refused to modify its position, the complainant submitted an internal administrative appeal as laid down in the local staff regulation. In a note dated 17 April 2000, the Director of the Agency turned down the complainant's request and made several considerations on the means of appeal available to local staff. The note also indicated that the Agency's Resource Manager had firmly dissuaded the complainant from lodging a complaint with the European Ombudsman since he considered that this procedure was completely inappropriate in this case.

In summary, the complainant alleged that his classification as a local agent by the Agency did not respect the local staff regulation, in particular Article 4. II .a whereby the age of the agent should be taken into account when establishing his initial grade and step.

*THE INQUIRY*

### The European Agency for Safety and Health at Work's opinion

The opinion first referred to the Agency's recruitment policy regarding local agents, as well as the applicable regulations. It explained that the Agency had been required to employ local agents since its budget establishment plan only foresaw a small number of C posts which were insufficient to meet the Agency's needs. The Agency argued that, in determining the conditions of employment of its local agents, its aims were to offer attractive conditions. For that purpose, it decided to apply the existing employment conditions of EU local staff in service in Spain, as laid down in the European Commission's regulation for local agents employed in its offices in Spain. These rules implemented Title IV (Arts. 79-81) of the Conditions of employment of other servants of the European Communities, which allow each institution to determine the conditions of employment of its local agents in accordance with current rules and practice in the place where the local staff perform their duties.

As regards the decisions of the Agency's appointing authority concerning the classification of local agents, the opinion explained that it did not consider it appropriate to take age into consideration since this practice would have been in conflict with the Spanish legal system. The Agency noted that the local staff regulation is subordinated to the Spanish legislation, in particular to the Spanish Statute of Workers, which enshrines the principle of equal treatment as one of its basic tenets. Accordingly, the application of different classification criteria on grounds of age would be discriminatory, and, as consistently held by Spanish courts, contrary to Spanish law. The Agency's opinion indicated that it should be borne in mind, that the Commission's regulation on local staff is currently being reviewed.

The Agency also explained its position on the appeals made by the complainant, and in particular on his complaint to the Ombudsman. It noted that the complainant had submitted a claim without respecting the appeals procedure referred to in Articles 29 and 31 of the local staff regulation. Under this procedure he should have submitted a complaint to the Agency's Director, through his immediate superior and within three months of the classification decision. Even though the deadline for the exercise of this internal procedure had expired, the Director decided to reply to the complainant's appeal and explain to him the Agency's viewpoint regarding its local staff recruitment policy. He also suggested in the reply that the legal procedure to be followed, should the complainant decide to pursue the matter further, was to lodge an appeal before the competent Spanish Court as laid down in Article 31 of the local staff regulation.

The Director of the Agency underlined in the opinion that he had tried to deal with the matter in a constructive way, by informing the complainant of the proper legal course of action, namely the competent Spanish labour jurisdiction, to have the dispute solved. In his view, *"[…] for the Agency, there was no maladministration case to be dealt before your [*the European Ombudsman*] high instance*".

The opinion concluded with some background information related to the relationship between the complainant and the Agency during the term of his employment. It also included a memorandum with a detailed legal analysis of the relevant Spanish labour legislation concerning discrimination on grounds of age.

### The complainant's observations

In his observations, the complainant thanked the Ombudsman for his inquiry, and expressed his disagreement with the statements made in the Agency's opinion.

He firstly considered it irregular that the Agency had been employing local agents for tasks which were not suited for this type of staff. He also pointed out that the temporary nature

of the contracts for local agents rendered them unwilling to confront their employer in case of disputes.

As regards the consideration of age for his initial classification, the complainant explained that the Agency had chosen to adopt the Commission's local staff regulation, which were annexed to each individual contract with a local agent. Whilst the Agency could have drafted its own regulation or modified the one from the Commission, it decided, however, not to do so. By acting in this fashion, the Agency, in the view of the complainant, had unilaterally breached its contractual obligations. He added that still today the Commission is applying its own regulation.

The complainant also rebutted the Agency's statements concerning his work performance. He considered that the negative assessment of his professional career by the Agency was aimed at diffusing the real problem.

*THE DECISION*

## 1 Admissibility of the case

1.1 In its opinion, the Agency stated that although the complainant had failed to respect the deadline for making an appeal under the appeals procedure referred to in Articles 29 and 31 of the local staff regulation it had replied to the complainant's appeal. As part of its reply, it advised the complainant to submit the dispute to the Spanish labour court. The Agency also informed the complainant that, in its view, it would be completely inappropriate for the complainant to address the European Ombudsman.

1.2 According to Article 2 (8) of the Statute of the Ombudsman, no complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints have been exhausted by the person concerned. It was therefore necessary for the complainant to use the appeals procedure under the local staff regulation before submitting a complaint to the Ombudsman. Although the Agency argues that the complainant did not respect the deadline under the appeals procedure, it dealt with the complainant's appeal. The Ombudsman therefore considers that the complaint meets the requirement of admissibility laid down in Article 2 (8) of the Statute.

1.3 The Ombudsman considers that it was reasonable for the Agency to advise the complainant to submit the dispute to the Spanish labour court once the internal appeals procedure had been exhausted. However, the Ombudsman regrets that the Agency appears to have attempted to dissuade the complainant from exercising his right to complain to the Ombudsman and that it should have described the exercise of this right as "completely inappropriate ".

## 2 Failure to respect the local staff regulation

2.1 The complainant alleged that the Agency did not respect Art. 4. II.a of the local staff regulation in deciding his classification as a local agent. Art. 4. II.a provides for the age of the agent to be taken into account when establishing the initial grade and step.

2.2 The Agency argues that the rules set out in the local staff regulation are subordinated to Spanish law. It also argues that Spanish law makes it unlawful to take age into account as a classification criterion.

2.3 The Ombudsman notes that the Agency adopted the Commission's local staff regulation governing the employment conditions of its local agents in Spain. It annexed the regulation, including Article 4.II a, to the complainant's contract.

2.4 Principles of good administration require the Agency to act lawfully and consistently. Before concluding its contract with the complainant, the Agency should have ensured that the contract was in accordance with Spanish labour law. By entering into a contract with the complainant and then denying him the benefit of one of its provisions, the Agency acted inconsistently. The Ombudsman therefore finds an instance of maladministration, and a critical remark will be addressed to the Agency.

2.5 The question of whether the complainant could enforce Art. 4. II.a of the local staff regulation against the Agency as a provision of his contract of employment 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 interpretation and application of Spanish law.

## 3 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

*Principles of good administration require the Agency to act lawfully and consistently. Before concluding its contract with the complainant, the Agency should have ensured that the contract was in accordance with Spanish labour law. By entering into a contract with the complainant and then denying him the benefit of one of its provisions, the Agency acted inconsistently.*

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

## 3.5 DRAFT RECOMMENDATIONS ACCEPTED BY THE INSTITUTION

### 3.5.1 The European Parliament

THE EUROPEAN PARLIAMENT ACCEPTS TO ALLOW CANDIDATES ACCESS TO THEIR OWN MARKED EXAMINATION PAPERS

*Decision on complaint 25/2000/IP against the European Parliament*

*Note : the Ombudsman reached the same conclusion in three other cases (457/99/IP, 610/99/IP and 1000/99/IP)*

*THE COMPLAINT*

On 7 January 2000, Ms L. lodged a complaint with the European Ombudsman against the European Parliament, about her participation in open competition EUR/C/135 organised by the European Parliament.

One of the complainant's allegations concerned the Selection Board's refusal to allow her access to a marked copy of her examination papers.

*THE DRAFT RECOMMENDATION*

On 27 July 2000, in accordance with Article 3 (6) of the Statute of the European Ombudsman[65], following an inquiry into the complaint in which he considered that the Parliament's refusal to give the complainant a copy of her own examination papers constituted an instance of maladministration, the Ombudsman addressed the following draft recommendation to the Parliament:

*The Parliament shall allow the complainant to have access to her own marked examination papers.254*

**The Parliament's detailed opinion**

The Ombudsman informed the Parliament that according to Article 3 (6) of the Statute, the institution should send a detailed opinion before 31 October 2000 and that the detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it would be implemented.

On 27 November 2000, the Parliament transmitted its detailed opinion to the Ombudsman. It explained that the institution has accepted the principle to allow candidates to have a copy of their own marked examination test and that it intends implementing it in the following stages:

*For all competitions published from 1 January 2001, candidates will receive a copy of their own multiple choice tests, upon written request.*

*For all competitions published from 1 July 2001, candidates who have failed a written test, will receive a copy of the correction grid of their exam elaborated by the Selection Board, upon request.*

*An evaluation of the practical impact of the new rules will be carried out at the end of 2001, and a possible third stage would be considered, if necessary.*

The Parliament's detailed opinion was forwarded to the complainant on 28 November 2000. The Ombudsman received no observations from the complainant.

65 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

*FURTHER INQUIRIES*

After examination of the Parliament's detailed opinion, the Ombudsman considered that it was necessary to recall the substantial part of the draft decision to the Parliament[66]. He therefore addressed a further letter to the institution on 8 February 2001. On the one hand, he welcomed the Parliament's decision to accept the principle to allow candidates to have access to their own marked examination paper. On the another hand, however, he noted that the Parliament had not dealt with the specific recommendation made by the Ombudsman to give a copy of her own marked papers to the complainant.

Since the Parliament failed to do so, and since the Ombudsman considered that it would be possible for the institution to comply with the recommendation, he asked the Parliament to deal with it, by accepting the complainant's request.

The Ombudsman recalled in his letter that, on 27 July 2000, the Parliament's Legal Service gave a legal opinion on certain matters relating to the open competition procedures of the Community institutions. It stressed that, in the absence of the arrangements concerning the competition procedures adopted by the Community institutions providing appropriate rules for access to marked scripts, it is not possible, in principle, to deny access to his/her own marked scripts to a candidate in a competition who requests such access.

Furthermore, the Ombudsman referred to the report drafted by MEP Herbert Bösch and adopted on 12 October 2000 by the European Parliament's Committee on Petitions, in which it endorsed his Special Report to the European Parliament, following the own initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures.

The Ombudsman finally pointed out that on 17 November 2000, the European Parliament voted to approve the resolution on the Ombudsman's Special Report of 18 October 1999, which included the recommendation that "in its future recruitment competitions and at the latest from 1 July 2000 onwards, the Commission should give candidates access to their own marked examination scripts upon request". In its resolution, the Parliament recommended that candidates should have access to their marked examination papers and called on all the institutions and bodies of the European Union to follow the example of the European Commission.

On the basis of these findings, the Ombudsman invited the Parliament to address the draft recommendation mentioned above.

On 5 April 2001, the Ombudsman received the Parliament's reply to his letter of 8 February 2001. The Parliament underlined that the Selection Board of the competition in question had concluded its work on 21 October 1999, and that the only available opinion was the one expressed in its final note. However, the institution informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and that it has instructed the competition services to forward a copy of her original examination papers to the complainant.

The Parliament also informed the Ombudsman that the competition services are ready to forward a copy of their own marked examination papers to any candidate upon request.

*THE DECISION*

On 27 July 2000, the Ombudsman addressed the following draft recommendation to the European Parliament:

66 "The Parliament shall allow the complainant to have access to her own examinations papers"

*The Parliament shall allow the complainant to have access to her own marked examination papers.*

On 5 April 2001, the Ombudsman received the Parliament's reply to his letter of 8 February 2001. The Parliament underlined that the Selection Board of the competition in question had concluded its work on 21 October 1999, and that the only available opinion was the one expressed in its final note. However, the institution informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and that it has instructed the competition services to forward a copy of her original examination papers to the complainant.

The Parliament also informed the Ombudsman that its competition services are ready to forward a copy of their own marked examination papers to candidates upon request.

The measures described by the Parliament appear to be satisfactory and the Ombudsman therefore closes the case.

## 3.5.2 The Council of the European Union

### ACCESS TO COUNCIL DOCUMENTS

*Decision on complaint 916/2000/GG against the Council of the European Union*

*THE COMPLAINT*

The complaint was lodged by Statewatch, a private organisation, in July 2000.

**Background**

The complainant had asked the Council for access to (inter alia) agendas of the "Senior level Group" and the "EU-US Task Force" already in 1997. The Council refused to grant this access, arguing that the documents concerned had been prepared jointly by the Council's Presidency, the Commission and US authorities and thus not under the sole responsibility of the Council. In the Council's view, Article 2 (2) of Council Decision 93/731/EC of 20 December 1993 on public access to documents[67] was thus applicable.

This provision is worded as follows:

*"Where the requested document was written by a natural or legal person, a member state, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author."*

The complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). During the inquiry, the Council expressly stated that it did not consider its Presidency to be "another institution or body" within the meaning of Article 2 (2) of Decision 93/731. In his decision of 30 June 1998[68], the Ombudsman expressed the view that neither the wording of this provision nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). The Ombudsman concluded that the Council's position appeared to be based on a misapplication of Decision 93/731 and made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied.

**The present complaint**

The complainant wrote to the Council to renew its request for access on 9 July 1998. The Council replied on 29 July 1998, pointing out that in view of the lapse of time it consid-

67 OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

68 Annual Report of the Ombudsman for 1998, p. 172.

ered this letter to be a new request. As to substance, it maintained its view that Article 2 (2) applied. The complainant sent a confirmatory application on 27 August 1998. In its decision of 28 September 1998 on this application, the Council noted that draft agendas for the meetings concerned were drawn up by the participating parties which remained drafts until they were agreed. According to the Council, the agendas were never considered by the Council as such and were therefore neither registered nor filed systematically in the Council's archives. The Council concluded that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731.

The complainant thereupon turned to the Ombudsman again, making the following allegations:

1) By introducing entirely new grounds for the refusal of access to the documents concerned, the Council failed to respect the decision of the European Ombudsman of 30 June 1998.

2) The Council erred when claiming that the General Secretariat was not part of the Council.

3) By failing systematically to register and file the documents concerned, the Council breached its duty to keep records.

4) The Council failed to give sufficient reasons for its decision.

### *THE INQUIRY*

The complaint was sent to the Council of the European Union for its comments.

#### The Council's opinion

In its opinion, the Council made the following comments:

1) The Council did not fail to respect the Ombudsman's decision of 30 June 1998

As the Ombudsman had pointed out himself, the only authority competent to give a final ruling on the interpretation of Community law was the Court of Justice. Certainly, the Ombudsman's views could provide useful guidance in this respect to the institution concerned which, in the light of the Ombudsman's views, would usually re-examine its position. In the present case, the Council did reconsider its first decision. While it left open its position as to the problem of documents of which the Council was one of the co-authors, it concluded, after careful consideration, that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision. This new decision could be the subject of a new complaint to the Ombudsman.

2) The General Secretariat was not "part of the Council"

This question was currently under examination by the Court of First Instance (in case T-205/00, Spa Renco v. Council). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

3) The obligation to register documents and the duty to keep records

For the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, the Council was not of the opinion that it was necessary or appropriate to keep a complete, centralised record and register of each paper which was held by one of its officials.

4) The Council gave sufficient reasons for its decision

The adequacy of the reasons given for a decision was a question that affected the legality of that decision, the review of which did not fall within the remit of the Ombudsman's competencies.

### The complainant's observations

In its observations, the complainant maintained its complaint and made the following further comments:

The Council's view that it was free to refuse access to the relevant documents on new grounds and that a complaint could then be brought against this new decision entailed the risk of a circular process that could go on for ever and that could potentially undermine the role of the Ombudsman. The complainant did not have any knowledge about case T-205/00. It was possible that the Council was simply making the same argument there that it had made in the present case. In any event, it was inconceivable that the Court would decide that the General Secretariat was not part of the Council. This argument of the Council could therefore only be viewed as an attempt to delay a decision.

Regarding the duty to give reasons, the issue at stake here was one of maladministration for which the Ombudsman was the statutory authority. In any event, it was necessary for an institution to provide sufficient reasoning to allow for judicial review. The Council had consistently failed to do so in the present case.

## *THE DRAFT RECOMMENDATION*

By decision dated 1 March 2001, the Ombudsman addressed a draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the European Ombudsman[69]. The basis of the draft recommendation was the following:

### 1 Failure to respect the decision of the Ombudsman of 30 June 1998

1.1 The complainant asked the Council of the European Union for access to certain documents (notably agendas of the "Senior level Group" and the "EU-US Task Force") under Council Decision 93/731/EC of 20 December 1993 on public access to documents[70]. The Council originally argued that the documents concerned had not been prepared under the sole responsibility of the Council and that Article 2 (2) of Council Decision 93/731 on access to documents was thus applicable. The complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). In his decision of 30 June 1998, the Ombudsman took the view that neither the wording of Article 2 (2) of Decision 93/731 nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). When the complainant subsequently renewed its application for access, the Council informed it that the relevant documents were never considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731. The complainant claimed that by introducing entirely new grounds for the refusal of access to the documents concerned, the Council had failed to respect the decision of the European Ombudsman of 30 June 1998.

1.2 The Council pointed out that while the Ombudsman's views could provide useful guidance, the only authority competent to give a final ruling on the interpretation of

69 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.

70 OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

Community law was the Court of Justice. The Council further claimed that it had indeed reconsidered its position in the light of the Ombudsman's decision of 30 June 1998 and arrived at the conclusion that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision.

1.3 In his decision of 30 June 1998 on complaint 1056/25.11.96/Statewatch/UK/IJH, the Ombudsman made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied. The Ombudsman considered that the Council had indeed, in its decision of 28 September 1998, reconsidered its position. Although Article 1 (2) of Decision 93/731 had not been invoked by the Council in reply to the complainant's first request for access to the documents concerned, the Ombudsman took the view that his decision of 30 June 1998 did not prevent the Council from subsequently relying on this provision if it arrived at the conclusion, upon having reconsidered its position in the light of the Ombudsman's comments, that it was applicable. The Ombudsman noted the complainant's concern that this might lead to a circular process that could go on forever. In his view, principles of good administration prevented an administration from arbitrarily substituting the reasons for its decision by new ones. The Ombudsman considered, however, that there was no evidence to show that this would have been the case here.

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

## 2 The General Secretariat as part of the Council

2.1 The Council claimed that the relevant documents had never been considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731. The complainant claimed that this was incorrect.

2.2 The Council claimed that the question as to whether the General Secretariat was an institution "different" from the Council was currently under examination by the Court of First Instance (in case T-205/00, Spa Renco v. Council). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

2.3 Article 1 (3) of the Statute of the European Ombudsman[71] provides that the Ombudsman may not intervene in cases before courts. This means that the Ombudsman is prevented from examining or continuing to examine a complaint where the relevant *facts* have also been submitted to a court[72]. The Ombudsman noted, however, that the case referred to by the Council concerned a different set of facts, as shown by the summary of case T-205/00 that was published in the Official Journal[73]. It was possible that in that case, the Council had made the same argument as in the present case, i.e. that a distinction should be made between the Council and its General Secretariat for the purposes of applying Decision 93/731. The Ombudsman did however not consider it necessary or appropriate to suspend his examination of this issue pending the proceedings before the Court.

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71 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.

72 Cf. Article 2 (7) of the Ombudsman's Statute which reads as follows: "When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action."

73 OJ 2000 C 285, p. 19.

2.4 Article 1 (1) of Decision 93/731 provides: "The public shall have access to Council documents under the conditions laid down in the Decision." The term 'Council document' is defined in Article 1 (2) as meaning "any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2 (2)."

2.5 Decision 93/731 had to be seen in the context of the Code of Conduct concerning public access to Council and Commission documents[74] adopted by the Council and the Commission on 6 December 1993 to which the recitals of Decision 93/731 referred. This Code of Conduct provides, inter alia: "The public will have the widest possible access to documents held by the Commission and the Council." On this basis, the Court of First Instance came to the following conclusion: "The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration"[75].

2.6 The Ombudsman considered that this objective would not be attained if it were to be accepted that documents of which the Council was the author (or co-author) should not be covered by Decision 93/731 for the simple reason that they were not held by the Council itself but its General Secretariat. According to Article 207 (2) of the EC Treaty, the Council shall be assisted by a General Secretariat. The Ombudsman was however not aware of any provision in the Treaty or in Community law acts that would suggest that the General Secretariat ought to be considered as an institution or body separate from the Council. Decision 93/731 itself attributed an important role to the General Secretariat in so far as access to documents was concerned by directing applicants to write to "the relevant departments of the General Secretariat" and by charging the latter with dealing with such requests in the first place (cf. Article 7 of Decision 93/731). In the view of the Ombudsman, there was thus nothing that would warrant the conclusion that the Council's General Secretariat should be considered as "another Community institution or body" within the meaning of Article 2 (2) of Decision 93/731. The Ombudsman thus took the view that documents held by the General Secretariat of the Council were documents "held by the Council" to which Decision 93/731 applied. It had to be recalled, however, that the highest authority on the interpretation of Community law is the Court of Justice.

## 3 Failure systematically to register and file the documents concerned

3.1 The complainant claimed that by failing systematically to register and file the documents concerned, the Council had breached its duty to keep records.

3.2 The Council replied that for the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, it was not of the opinion that it is necessary or appropriate to keep a complete, centralised record and register of each paper which is held by one of its officials.

3.3 The relevant issue had also been raised in complaint 917/2000/GG. Both the Council and the complainant had made detailed comments on that issue in this complaint, and the Ombudsman would consider these arguments when he dealt with complaint 917/2000/GG. The Ombudsman therefore took the view that there was no need further to examine this issue in the context of the present inquiry.

## 4 Failure to give reasons

4.1 The complainant claimed that the Council had failed to give sufficient reasons for its decision, given the way in which it had changed the justification for refusing access to the

74 OJ 1993 L 340, p. 41.

75 Case T-174/95, Svenska Journalistförbundet v Council [1998] ECR II-2289, paragraph 66.

documents concerned during the procedure and that the reasoning had been unacceptably vague and confusing.

4.2 The Council took the view that the adequacy of the reasons given for a decision is a question that affected the legality of that decision, the review of which did not fall within the remit of the Ombudsman's competencies.

4.3 Article 195 of the EC Treaty entrusts the Ombudsman with the task of examining possible instances of maladministration. The term "maladministration" is not defined in the EC Treaty or the Ombudsman's Statute. It was useful to recall that in his Annual Report for 1997[76], the Ombudsman had stated that he considered the following interpretation of the term "maladministration" to be appropriate: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." The Ombudsman added[77] that when investigating whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, the Ombudsman's *"first and most essential task must be to establish whether it has acted unlawfully"*. The European Parliament adopted a resolution on 16 July 1998 welcoming the definition of maladministration. The Ombudsman thus considered that his mandate allowed him to examine complaints in which it was alleged that an institution has failed to give sufficient reasons for its decision.

4.4 The Ombudsman took the view, however, that the reasons given by the Council in its decision of 28 September 1998 were sufficient since the Council had made it clear that the refusal of access to the relevant documents was based on Article 1 (2) of Decision 93/731. The question as to whether the Council had acted properly when changing the reasons on which it based its refusal during the procedure had already been considered (see point 1.3 above).

4.5 On the basis of the above, there appeared to have been no maladministration on the part of the Council in so far as the fourth allegation was concerned.

## 5 Conclusion

The Ombudsman therefore considered that the Council's approach in the present case gave rise to an instance of maladministration in so far as it had based its refusal to grant the complainant access to the relevant documents on Article 1 (2) of Decision 93/731.

The Ombudsman therefore made the following draft recommendation to the Council, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.

### *THE COUNCIL'S DETAILED OPINION*

The Ombudsman informed the Council that, according to Article 3 (6) of the Statute, it should send a detailed opinion by 30 June 2001 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it had been implemented.

In its detailed opinion, the Council made the following comments:

*"The Council takes note of the Ombudsman's decision concerning the first, third and fourth grounds of complaint (…).*

76 At page 23.

77 At page 24.

*As regards the Ombudsman's decision and draft recommendation on the second ground of complaint, which concerns the question of whether or not documents held by officials in the General Secretariat which have not been distributed to the members of the Council or their delegates in one of its preparatory bodies are to be considered as Council documents in the sense of Decision 93/731/EC, the Council decides to release the documents in question, as it appeared that their content is not covered by any of the exceptions laid down in Article 4 of Decision 93/731/EC."*

The Council's detailed opinion was forwarded to the complainant. In its observations, the complainant confirmed that he had received the documents in question. In its view, however, it was for the Ombudsman to decide whether the Council had met his recommendation, given that the latter had not replied directly to the third allegation. Regarding the second allegation, the complainant assumed that since the Council had applied Decision 93/731, it could be inferred that the Council accepted the recommendation although the Council did not expressly say so.

*THE DECISION*

1 On 1 March 2001, the Ombudsman addressed the following draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the Ombudsman:

*The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.*

2 On 28 May 2001, the Council informed the Ombudsman that it had decided to release the documents in question since it had come to the conclusion that their content was not covered by any of the exceptions laid down in Article 4 of Decision 93/731/EC. The Ombudsman considered that the Council had thus accepted his draft recommendation. The measures described by the Council in its letter of 28 May 2001 appear to be satisfactory and satisfy the complainant[78]. The Ombudsman therefore closes the case.

## 3.5.3 The European Commission

### SUPPLEMENTARY INSURANCE COVERAGE FOR LOCAL STAFF

*Decision on complaint 367/98/(VK)GG against the European Commission*

*THE COMPLAINT*

The complaint was lodged in April 1998 by two members of the local staff of the representation of the European Commission in Vienna (Austria). This representation is the successor of the delegation that the Commission maintained in Austria prior to the accession of this country to the European Communities on 1 January, 1995. The complainants claimed that the Commission had failed to set up supplementary insurance schemes for its local staff in Austria.

Article 14 of the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereinafter the "Framework Rules") that were circulated on 22 June 1990 provides as follows:

*"The Commission shall be responsible for the social security contributions payable by employers under the rules in force at the place where the member of local staff is to perform his duties.*

*The Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate.*

78 As mentioned above, the complainant's third allegation will be considered in the Ombudsman's decision on complaint 917/2000/GG lodged by the same complainant.

*The contributions payable by the Commission and the member of the local staff to meet the cost of any supplementary or independent schemes shall be determined by the authority empowered to conclude contracts of employment*."

On 26 April 1994, the Commission adopted the "Rules laying down the specific conditions of employment of local staff serving in Austria" (hereinafter the "Specific Conditions") which entered into force on 1 May 1994.

Article 25 (1) of these Specific Conditions provides that, without prejudice to the statutory insurance scheme applicable in Austria, a member of the local staff who is unable to work as a result of sickness or accident shall remain entitled to remuneration during the first 6, 8, 10 or 12 weeks, depending on how long they have been in service. From the 7th, 9th, 11th and 13th week of incapacity respectively, the member of the local staff is to receive an income of 50% of his or her remuneration during a supplementary period of four weeks. From the periods of intervention of the statutory insurance scheme and until the 180th day, the member of the local staff shall receive social security benefits entitling him or her to an income equal to 100% of the last basic monthly salary received before the time of incapacity. According to Article 25, the terms of compensation for loss of earnings from the periods of incapacity provided for by the statutory insurance scheme shall be established with an insurance company to which the member of the local staff is affiliated.

Article 27 of the Specific Conditions provides that in the event of permanent and total invalidity caused by sickness or accident at work, or in the event of death, members of the local staff shall be entitled to benefits in accordance with the insurance policy concluded for this purpose by the Commission.

According to Article 28 of the Specific Conditions, a member of the local staff shall receive a retirement pension in accordance with the insurance policy concluded for this purpose by the Commission.

The contributions to these insurance schemes are set out in Article 30 of the Specific Conditions. According to Article 30 (2), members of the local staff shall make a contribution amounting to one third of the costs of the insurance referred to in Article 25. Article 30 (3) provides that with respect to the risks referred to in Articles 27 and 28 of the Specific Conditions, the contribution for pension and invalidity-death shall amount to 60% for the Commission and 40% for the member of the local staff.

Article 38 of the Specific Conditions stipulates that the provisions of Articles 25, 27 and 28 "shall enter into force and take effect on the date on which the insurance policies referred to in these articles take effect."

According to the complainants, the subsequent developments may be summed up as follows:

Detailed offers from three insurance companies were submitted to the administration by the local staff on 5 May 1994. In December 1994, the unit in charge at the Commission's Directorate-General I.A[79] asked the Commission's delegation to forward declarations from the members of the local staff that were to be covered in which the latter agreed to be covered by the insurance "sickness-accident-incapacity to work" of Van Breda, an insurance company. Shortly afterwards, the members of the local staff signed the relevant forms in so far as the guarantee of revenues in case of incapacity to work was concerned and handed them over to the administrative assistant at the delegation in Vienna. The latter forwarded these forms to DG I.A on 1 June 1995.

In a note to the administrative assistant at the delegation dated 4 July 1995, DG I.A stated that the local staff working in Vienna was not to be covered by the insurance policy offered

[79] The Directorate-General that (together with DG I.B) used to be in charge of Foreign Relations.

by Van Breda. The delegation was invited to submit, together with DG X[80], new proposals to DG I.A and DG IX (the Directorate-General in charge of Administration and Personnel).

On the occasion of a meeting with all the local staff working in Vienna in early March 1996 and in the presence of the administrative assistant at the representation, Mr Walker, the head of personnel at DG X invited the members of the local staff to submit new proposals. These proposals should be based on two options, providing for retroactive effect as from 1 May 1994 and from 1 January 1996 respectively. In a note to the administrative assistant at the representation of 26 March 1996, Mr Walker expressed the view that the issue of the supplementary insurance policies had not been dealt with further by DG I.A in view of the fact that responsibility for local staff had been transferred to DG IX and DG X. Mr Walker asked the addressee of his note to grant priority to this matter.

In August 1996, the members of the local staff in Vienna submitted to the representation three updated proposals that took into account the two options mentioned above. In December 1996, the local staff presented a comparison between the services offered by the three insurance companies and expressed a preference for two of these offers. They again asked for the supplementary insurance policies to be set up rapidly. A further request in that sense was made in a note that the local staff submitted to the representation on 21 April 1997.

In a note of 21 April 1997, Mr Käfer, the head of administration at the representation, asked the local staff to provide him, by 28 April 1997, with the name of one single insurance company so that negotiations could be started. On 24 April 1997, the members of the local staff wrote to Mr Käfer and suggested that negotiations should be undertaken on the basis of the offers presented by two companies. The local staff felt that they were not in a position to decide which offer was to be chosen and considered that this decision should be left to the Commission's experts in the matter. Mr Käfer informed Mr Walker of the names of the two companies in a note of 13 May 1997. In his reply of 16 May 1997, Mr Walker stressed that a decision regarding the company to be chosen needed to be made by the representation in order to allow the procedure to continue.

In a note of 22 October 1997 to Mr Käfer, the members of the local staff submitted that negotiations should be entered into with an insurance company called BVP and that the Commission's services should give priority to this matter.

## *THE INQUIRY*

The complaint was sent to the Commission for its comments.

### The opinion of the Commission

In its opinion, the Commission made the following comments:

After the accession of Austria to the EU on 1 January 1995, the Commission's delegation became a representation which implied various changes regarding the rules to be applied. Within this framework, the Commission was in the process of revising the specific conditions of employment of local staff serving in Austria. The staff representatives and the administration were trying to find an agreement regarding all these problems within the framework of a joint study group. Until this revision was carried out, the Specific Conditions that had been adopted having regard to the situation of local staff in a non-member state, remained provisionally applicable.

80 The Directorate-General that used to be in charge of Information, Communication, Culture and Audiovisual Media.

It followed from Article 14 of the Framework Rules that the setting-up of supplementary insurance schemes depended on the inadequate coverage offered by the local scheme. On the basis of Article 14 of the Framework Rules, the Commission could therefore not be held responsible for the non-implementation of Articles 25, 27 and 28 of the Specific Conditions.

Account also had to be taken of the margin of interpretation of which the Commission disposed in the matter. Given that the setting-up of supplementary insurance schemes was linked to a negative appraisal of the local scheme, the Commission had to act prudently, particularly in the case of a country that had become a member state. The establishment of supplementary insurance schemes that were limited to certain members of staff (in the present case the local staff) was a cause of potential conflict between the beneficiaries and other staff and thus had to be handled with particular attention.

The Commission had to ensure a transition that was coherent with the regime applicable in all the other member states. For this reason and in order to procure its staff a high level of social protection, the Commission had manifested its intention to set up supplementary insurance schemes to an extent as wide as possible, provided that the homogeneity of the system was maintained. This intention was borne out by the steps by the Commission in this matter already since 1994. It had however not yet been possible to find an agreement regarding the technical and financial conditions in which such supplementary insurance schemes could function.

The Commission would ensure that the local staff in Vienna benefit from supplementary insurance schemes as soon as the new rules had been adopted. The question as to the date on which these should take effect and as to their financial implications was part of the discussions of the study group mentioned above.

**The complainants' observations**

In their observations, the complainants maintained their complaint and made the following further comments:

The Specific Conditions had entered into force at a time when it was clear to both the Commission and its local staff in Vienna that Austria would join the European Communities shortly. The accession of Austria had not changed the fact that the social protection offered by the statutory scheme was insufficient. In so far as the local staff in the delegations in Finland and Sweden were concerned, supplementary social benefits had been agreed shortly before the accession of these countries. These benefits were provided to the local staff of the representation in Stockholm since 1 January 1997. In the case of the representation in Helsinki, such insurance policies had not yet been concluded for the sole reason that the local staff there felt unable to provide the financial contribution that had been laid down in the Specific Conditions applicable to them. There was therefore clearly discrimination against the local staff of the Commission working in Vienna.

The award of supplementary benefits to local staff would not cause conflicts with the other agents of the Commission working in Vienna. These other agents were civil servants who enjoyed a degree of social protection that was far higher than that of local staff. It was surprising that the Commission had raised this and other arguments only now.

The delay was not due to technical problems but to the failure of the Commission's services to provide the necessary means in the budget. It was not appropriate to discuss new rules as long as the old ones were not applied properly.

## *THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION*

### The Ombudsman's analysis of the issues in dispute

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

### The possibility of a friendly solution

On 31 March 1999, the Ombudsman therefore submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to do its utmost to set up the supplementary insurance policies with retroactive effect.

In its reply of 1 June 1999, the Commission pointed out that the relevant issues had been discussed extensively with the members of the local staff on 16 and 17 March 1999. On that occasion, a formal decision had been taken to set up a supplementary insurance policy for temporary incapacity to work as provided in Article 25 of the Specific Conditions. In so far as the other supplementary insurance schemes were concerned, discussions continued to take place regarding the issue of retroactivity on the basis of concrete offers submitted by insurance companies. At the meeting in March, the administration had proposed to finalise this matter in July 1999 at the latest.

In their observations on this letter, the complainants informed the Ombudsman that on 4 September 1999, the representation in Vienna had addressed a note to its local staff in which it explained that no supplementary insurance policy for temporary incapacity to work had yet been concluded. According to this note, seven insurance companies had been asked to submit proposals. Six of these proposals had been unsuitable since they did not cover the benefits outlined in Article 25 of the Specific Conditions. The remaining offer did cover these benefits but did not meet with the representation's approval since it would have resulted in benefits that were higher than the basic monthly salary. According to the complainants, no progress appeared to have been made with regard to the other supplementary insurance schemes.

## *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 (1) to specify whether or not it considered that Article 14 of the Framework Rules, either on its own or in conjunction with Articles 25, 27 and 28 of the Specific Conditions, obliged it to provide supplementary insurance policies for its local staff in Austria, (2) to inform the Ombudsman as to what steps it had taken to implement the decision taken in March 1999 to conclude a supplementary insurance policy for incapacity to work as provided for in Article 25 of the Specific Conditions, (3) to provide information as to how the discussions relating to the supplementary benefits relating to retirement pensions, invalidity and death had developed since the Commission's letter of 1 June 1999 and (4) to provide a clear timetable for further action in the matter.

### The Commission's reply

In its reply, the Commission made the following comments:

Article 14 of the Framework Rules, even when considered in the light of Articles 25, 27 and 28 of the Specific Conditions, did not entail an automatic obligation, given that the setting-up of supplementary insurance schemes depended on the inadequate character of the coverage offered by the local scheme. The Commission reiterated its intention to set up supplementary insurance schemes for local staff to an extent as wide as possible,

provided that a certain homogeneity of the system in all the member states was maintained. In so far as the local staff in Vienna was concerned, the Commission had already decided that they should be able to benefit from supplementary insurance schemes.

In so far as the supplementary insurance policy for temporary incapacity to work was concerned, none of the main insurance companies that were present on the Austrian market had been able to offer benefits in conformity with the rules set out in Article 25 of the Specific Conditions. However, thanks to the repeated efforts of the administration the Merkur company had finally been able to submit a suitable offer that had been transmitted to the representation in Vienna on 8 March 2000 with a view to obtaining the preliminary agreement of the local staff. On 5 April 2000, ten of the eleven members of this local staff had marked their agreement with this proposal, subject to the provision of answers to the questions that were set out in the note by Mr Leicht dated 26 April 2000. The Merkur company had replied to all these questions on 16 May 2000, and the answers had been forwarded to the local staff the same day. Despite several reminders, however, the members of the local staff had not yet expressed their agreement with the offer submitted by the Merkur company.

Further to a new mission of the relevant services to Vienna on 16 and 17 May 2000, the local staff had expressed their wish that a new market study be carried out in order to identify the insurance companies that could offer supplementary insurance policies regarding invalidity, death and retirement which would be in conformity with the conditions laid down in the Specific Conditions. This proposal had been accepted. The market study would be carried out by the administration. It should be recalled that the local staff had been asked repeatedly to indicate their preference on the basis of a list of five companies. It had also been decided to allocate, subject to budgetary availability, a sum of € 1 500 in order to procure the services of an expert in insurance matters, as requested by the local staff in Vienna. On the basis of the results of this market study, a definitive proposal would be submitted to the local staff shortly. The Commission was however unable to provide precise dates for its future actions, given that some elements, like the replies from the insurance companies, were beyond its control.

### The complainants' observations

In their observations, the complainants pointed out that in so far as the supplementary insurance policy for temporary incapacity to work was concerned, the Commission had, in a note dated 8 June 2000, asked its representation in Vienna to confirm that the local staff approved the supplementary insurance offered by the Merkur company. The representation in Vienna had forwarded this note to the local staff on 15 June 2000. According to the complainants, the members of the local staff had thereupon confirmed in a note of 15 June 2000 that they agreed with the said offer. One of these members had given a conditional agreement whilst another one had declared that he wanted to do without this insurance.

As to the supplementary insurance policies regarding invalidity, death and retirement, the complainants pointed out that already in May 1994 the members of the local staff had submitted three detailed offers by insurance companies, and that already in their note of 22 October 1997 they had suggested the name of the insurance company that they preferred.

The complainants stressed that their foremost interest was that the supplementary insurance schemes should be set up as quickly as possible and that these schemes should enter into force retroactively.

## *THE DRAFT RECOMMENDATION*

On the basis of the evidence submitted to him, the Ombudsman arrived at the conclusion that the Commission's failure to set up supplementary insurance schemes for its local staff working in its delegation (from 1 January 1995: representation) in Austria, in conformity with the Specific Conditions, constituted an instance of maladministration. Since a friendly solution was not possible, the Ombudsman made the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

*The European Commission should do its utmost to ensure that supplementary insurance schemes for its local staff in Austria are set up as soon as possible in accordance with the "Rules laying down the specific conditions of employment of local staff serving in Austria" adopted by the Commission on 26 April 1994 and with retroactive effect.*

In its detailed opinion, the Commission referred to a decision which it had adopted in 2000. According to this decision, an insurance contract in accordance with Article 25 of the Specific Conditions was to be concluded with the Merkur company. Two thirds of the contributions were to be paid by the Commission and one third by the local agents. In its detailed opinion, the Commission stated that this contract had already been concluded and that given the nature of the risk insured there was no need to provide for retroactivity.

In so far as the supplementary insurance policies regarding invalidity, death and retirement were concerned, the Commission explained that offers from local insurance companies had been obtained. These offers would now be examined by an independent expert at the Commission's expense. On the basis of this examination, the most appropriate offer would be chosen and a draft contract for each of the relevant insurance policies would be submitted to the local staff for their approval. In accordance with the Ombudsman's draft recommendation, the insurance policies would have retroactive effect. The costs arising from making the insurance policies retroactive until 1 January 1995 would be shared by the Commission (60%) and the local staff (40%), in accordance with Article 30 (3) of the Specific Conditions. The practical modalities of paying these costs would be established in co-operation with the local staff and the insurance company chosen at the moment when the contracts were to be finalised.

In their observations, the complainants pointed out that to their knowledge, and contrary to what the Commission had claimed, no supplementary insurance policy for temporary incapacity to work had been set up yet. They expressed the hope, however, that this insurance would become effective as soon as possible.

In so far as the supplementary insurance policies regarding invalidity, death and retirement were concerned, the local staff had agreed on the insurance company to be chosen in February 2001. However, none of the complainants' written inquiries to the management of the representation in Vienna in respect of this issue had been answered to date. The complainants were therefore unable to make further comments regarding the present state of the matter. They anticipated, however, that the insurance schemes would not enter into force for several weeks or even months. The complainants therefore asked the Ombudsman to urge the Commission to set up these schemes as soon as possible.

## *THE DECISION*

### 1 Failure to set up supplementary insurance schemes

1.1 The complainants, two members of the local staff of the Commission's representation in Vienna, claimed that the Commission had failed to set up supplementary insurance schemes for its local staff working in its delegation (from 1 January 1995: representation) in Austria. They referred to the "Rules laying down the specific conditions of employment

of local staff serving in Austria" (hereinafter the "Specific Conditions") adopted by the Commission on 26 April 1994. According to these Specific Rules, supplementary insurance schemes were to be set up in respect of temporary incapacity to work (Article 25), invalidity and death (Article 27) as well as retirement (Article 28). According to the complainants, none of these supplementary insurance schemes had been set up yet.

1.2 The Commission claimed that Austria's accession to the EU implied various changes regarding the rules to be applied. According to the Commission, it was still engaged in the process of revising the specific conditions of employment of local staff serving in Austria. The Commission also referred to the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereinafter the "Framework Rules") on the basis of which the Specific Conditions were adopted. Article 14 of the Framework Rules provides that the Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate. The Commission argued that it could thus not be held responsible for the non-implementation of Articles 25, 27 and 28 of the Specific Conditions. It claimed that in view of the fact that the establishment of supplementary insurance schemes was linked to a negative appraisal of the national scheme, it had to act prudently, particularly in the case of a country that had subsequently joined the EU. The Commission pointed out, however, that it intended to set up supplementary insurance schemes to an extent as wide as possible, provided that the homogeneity of the system was maintained. It had however not yet been possible to find an agreement regarding the technical and financial conditions in which such supplementary insurance schemes could function. Finally, the Commission pointed at its margin of interpretation in the matter and claimed that the establishment of supplementary insurance schemes that were limited to certain members of staff was a cause of potential conflict between the beneficiaries and other staff.

1.3 The Ombudsman noted that the Commission agreed that the Specific Conditions continued to be applicable to the local staff in Vienna until they were replaced by new rules. It was thus *these* rules that fell to be examined here. The Ombudsman therefore considered that the Commission's statement in its opinion according to which it would ensure that the local staff in Vienna benefit from supplementary insurance schemes as soon as *new* rules had been adopted was of no relevance for the examination of the present complaint.

1.4 The Commission correctly pointed out that according to Article 14 of the Framework Rules, supplementary insurance schemes were to be set up where there was no local scheme or where the local scheme was judged to be inadequate. The Ombudsman also agreed with the Commission's view that it disposed of a margin of appreciation in this matter and that it needed to proceed prudently, particularly in the case of a country that had subsequently joined the EU. The Ombudsman took the view, however, that these arguments did not appear to be relevant in the present context. In the Specific Conditions adopted in 1994, the Commission accepted that its local staff in Austria should benefit from the supplementary insurance schemes set out at Articles 25, 27 and 28 of these rules. The discretion which the Commission enjoyed in this field under Article 14 of the Framework Rules thus appeared to have been exercised in the sense that the Commission had decided that it was necessary to set up supplementary insurance schemes. It was difficult to see why these provisions should have been established if the Commission had considered that the statutory scheme applicable in Austria was sufficient to grant the level of social protection that it deemed appropriate for its local staff. An examination of Article 25 of the Specific Conditions reinforced this conclusion. This provision clearly spelt out the details of the benefits that the Commission intended to confer on its local staff in the case of temporary incapacity to work without leaving any significant space for the exercise of discretion on the part of the Commission. Incidentally, from its reply to the

Ombudsman's request for further information it seemed to emerge that the Commission no longer denied that it was under an obligation to set up these supplementary insurance schemes.

1.5 Although the Commission did not directly rely on Article 38 of the Specific Conditions according to which the provisions of Articles 25, 27 and 28 "shall enter into force and take effect on the date on which the insurance policies referred to in these articles take effect", the Ombudsman considered it useful to point out that this article could not be interpreted in the sense that the Commission was free as to whether and when it set up the relevant insurance schemes. Such an interpretation would effectively deny any *effet utile* to Articles 25, 27 and 28. It had therefore to be assumed that this provision was meant to ensure that the Commission should have sufficient time within which to set up these supplementary insurance schemes.

1.6 The Ombudsman considered that the Commission had not shown why the establishment of supplementary insurance schemes for its local staff should be a cause of conflict with other agents. The complainants' argument that these other agents were civil servants who enjoyed a degree of social protection that was far higher than that of local staff was plausible and had not been refuted by the Commission.

1.7 The Ombudsman furthermore noted that the fact that the Commission's failure to set up the supplementary insurance schemes for its staff in Austria was not due to the accession of this country to the EU and the changes this necessitated appeared to be confirmed by the approach of the Commission towards its local staff in Sweden. The complainants explained, without being contradicted by the Commission, that supplementary social benefits for its local staff in the delegation in Stockholm had been agreed shortly before Sweden's accession to the EU and had been granted since 1 January 1997.

1.8 In these circumstances, the Ombudsman concluded that the Specific Conditions that entered into force on 1 May 1994 obliged the Commission to set up, within a reasonable time, supplementary insurance schemes for its local staff in Austria. The Ombudsman took the view that a period of more than six years by far exceeded what could be considered to be reasonable, unless there were special circumstances that would justify such a delay.

1.9 In its opinion, the Commission appeared to refer to technical and financial difficulties. The Ombudsman considered, however, that the Commission had not established that the excessive delay that had occurred was due to such difficulties. The only concrete example furnished by the Commission related to a note prepared by it in mid-1999 according to which the offers of six out of seven insurance companies had been unsuitable since they did not conform to the provisions of the Specific Conditions. It had to be pointed out, however, that this example related to only one of the supplementary insurance schemes concerned, i.e. the one provided for in Article 25 of the Specific Conditions. Given that the relevant offers appeared to have been obtained only in 1999, the Ombudsman further considered that the lack of suitability of these offers could not explain the delay that had occurred already prior to 1999.

1.10 The Commission also appeared to suggest that the delay in the establishment of the supplementary insurance schemes was, to some extent at least, due to the lack of co-operation on the part of the local staff in Austria. The Ombudsman considered that the Commission had not put forward any substantial evidence that would support such a conclusion. On the contrary, the Ombudsman noted that the local staff had not only called on the Commission, on various occasions, to treat the matter as a priority but had also made what appeared to be constructive proposals, notably in May 1994 (when specific offers from insurance companies were submitted) and in October 1997 (when the local staff informed the administration about the insurance company that they preferred).

1.11 The Ombudsman's conclusion was, therefore, that the Commission had failed to set up supplementary insurance schemes for its local staff working in its delegation (from

1 January 1995: representation) in Austria, in conformity with the Specific Conditions, and that this constituted an instance of maladministration.

## 2 Conclusion

2.1 On the basis of his inquiries, the Ombudsman made a draft recommendation in which he suggested that the Commission should do its utmost to set up the relevant insurance schemes and make them applicable with retroactive effect. In its detailed opinion, the Commission informed the Ombudsman that it had decided to conclude a contract providing for a supplementary insurance policy for temporary incapacity to work with the Merkur company, and that this contract had consequently been concluded. The Commission further informed the Ombudsman that supplementary insurance policies regarding invalidity, death and retirement were to be set up, and that these insurance policies were have retroactive effect as from 1 January 1995.

2.2 The Ombudsman considers that the Commission has thus accepted his draft recommendation and that the measures taken or to be taken by the Commission appear to be satisfactory. Whilst it appeared that the insurance policies regarding invalidity, death and retirement (and possibly also the supplementary insurance policy for temporary incapacity to work) were not yet in place in late March 2001 when the complainants submitted observations on the Commission's detailed opinion, the Ombudsman has no reason to assume that these insurance policies would not be set up in the very near future. The Ombudsman thus considers that it is justified to close the case. He stresses, however, that the complainants are free to renew their complaint if contrary to the Ombudsman's belief the Commission should fail to set up the relevant insurance schemes in the very near future.

2.3 The Ombudsman thus closes the case.

## COMMISSION'S REFUSAL TO GIVE FULL ACCESS TO TWO STUDIES RELATED TO INFRINGEMENT PROCEEDINGS

*Decision on complaints 271/2000/(IJH)JMA and 277/2000/(IJH)JMA against the European Commission*

*THE COMPLAINTS*

The complainant had asked the Commission to obtain copies of two different reports prepared by an independent consultant at the request of the Commission regarding compliance of the UK and Gibraltar with two Community Directives on waste (Directive 75/442/EEC) and hazardous waste (Directive 91/689/EEC), as well as with the Habitats Directive (92/43/EEC).

As regards the report on UK and Gibraltar's compliance with the Directives on waste and hazardous waste, the complainant wrote to the Commission services requesting a copy of the document in August 1998. In its reply of January 1999, the Commission services only agreed to release selected parts of the document on the grounds that some of the information contained in the report was covered by the exception involving the protection of public interest (inspections and investigations) provided for under the Code of Conduct concerning Public Access to Commission documents (Decision 94/90/EC). In the document forwarded to the complainant, the information which presumably fell under that exception had been deleted from the original report. The complainant lodged a confirmatory application in February 1999. In March 1999, the Commission's Secretary-General ratified the decision taken by the responsible services (DG ENV) on the grounds that the excluded information was part of the Commission's preliminary investigations into a Member State's compliance with Community law, and that it might therefore lead to infringement proceedings.

In January 1999, the complainant made a second request to the Commission services regarding access to the report on UK and Gibraltar's compliance with the Habitats Directive. The reply from DG ENV of March 1999, granted the request, although only in part. Some paragraphs of the released text had been deleted on the grounds that that information was covered by the exception involving the protection of public interest (inspec-

tions and investigations) of Decision 94/90/EC. In May 1999, Mr Trojan ratified the decision taken by the responsible services (DG ENV).

In his complaints to the Ombudsman, the complainant alleged therefore that the Commission's decisions to partly reject his requests for access to the two documents were unlawful.

He put forward the following reasons:

(i) The public interest exception should not apply to an independent and objective third party document. Independent reports cannot be considered as internal Commission documents, and therefore the exemptions provided for in Decision 94/90/EC should not apply to this type of documents. In order to hold the Commission accountable in its role as guardian of the Treaty, the public should have access to the independent advice which the Commission has received.

(ii) The requested documents did not concern a specific "investigation", but were at most a prelude to a possible investigation. Thus, the reports were not drawn up solely for the purpose of a specific investigation, neither were they internal documents concerning the investigation of a case before the court. In support of his position, the complainant relied on the Court of First Instance's ruling in caseT-92/98 (*Interporc Im- und Export GmbH v. Commission* [1999] ECR II-3521, par. 40), whereby the Court had restricted the notion of documents related to the exception of court proceedings, to those documents drawn up by the Commission solely for the purpose of specific court proceedings. By analogy, the complainant argued that a report to be covered by the investigation exemption should have been drawn by the Commission solely for the purpose of a specific investigation.

(iii) Taking into account the nature of the documents, the Commission could have sought to refuse access to parts of them only by reference to the exemption based on the need to protect the confidentiality of the institution's proceedings. In any such case, the Commission was under a duty to undertake a genuine balance of interest before taking a stand on the complainant's request.

(iv) The Commission failed to provide sufficient reasoning since it did not inform the complainant either of the reasons why the deleted material was related to the possible opening of an infringement procedure, or of the subject matter which the deleted material related to.

(v) The Commission acted in breach of the Aarhus Convention on Citizens' Environmental Rights, which had been signed by the institution in June 1998. Article 4 (4) (c) of the Convention contains a narrowly defined exemption relating to investigations by a public authority.

## *THE INQUIRY*

### The Commission's opinions

The Commission in its opinions first explained the background to both cases.

It justified its decisions to give only partial access to the two requested reports as follows:

(i) Applications of exceptions to an independent and objective third party document: The Commission considered that the requested documents had been commissioned and paid for by the Commission and as such, they should be considered documents drawn up by the Commission. If the institution had concluded that the documents were third party documents, access would have been denied in accordance with the provisions of Decision 94/90/EC.

(ii) The reports did not concern specific "investigations": The Commission insisted on the fact that the reports were related to specific investigations, namely the correct implementation by the UK and Gibraltar authorities of the Directives on waste and hazardous waste, as well as of the Habitats Directive. Following the conclusion of these documents, and largely as a result of them, the Commission's services launched three own initiative inquiries which could lead to the opening of infringement proceedings.

As regards the specific information deleted from the reports, the Commission stressed that it concerned a Member State's compliance with Community law. It pointed out that three own initiative cases (B-1998/2391, B-1998/2392 and B-1999/2119) had been opened to further assess the implementation of the Directives on waste and hazardous waste, and the Habitats Directive in the UK and Gibraltar. The reports were part of investigations which could lead to the opening of infringement proceedings under Article 226 of the EC Treaty.

The institution referred to the case law of Community courts in support of its position. It mentioned case T-105/95 (*WWF UK v. Commission*), in which the Court of First Instance considered that the confidentiality which the Member States are entitled to expect of the Commission in similar cases warrants, under the heading of the protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure. The Commission also mentioned case T-309/97 (*Bavarian Lager Co. v. Commission*), in which the Court considered that disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure. Hence in order to safeguard this objective, the Commission's view is that it has to refuse access to a preparatory document relating to the investigation stage of the procedure under Article 226 of the Treaty.

(iii) Need for a balancing of the interest: The decisions taken by the institution refusing full access to the requested documents were only based on the exception related to the protection of the public interest. The institution pointed out that the exception dealing with the protection of the confidentiality of the institution's proceedings was not invoked to refuse access to the requested documents.

(iv) Lack of sufficient reasoning: In the view of the Commission, to provide more detailed information on the deleted parts of each document would have required to reveal their contents, and by doing so the purpose of the institution's decisions would have been defeated.

(v) Breach of Article 4 of the Aarhus Convention: The Commission stressed that its refusal to grant full access to the reports had been taken on the basis of Decision 94/90/EC. It explained that the signature of the Aarhus Convention by the Commission in June 1998 was accompanied by a declaration in which the Community institutions agreed to apply the Convention within the framework of their existing and future rules on access to documents. Furthermore, the Commission indicated that the Convention does not grant an absolute right of access to environmental information, but foresees grounds of public and private interests on which requests for access to environmental information may be rejected. It finally pointed out that the Convention has not been ratified yet.

### The complainant's observations

In his observations, the complainant maintained the allegations made in the original complaints.

In his view, the Commission could not consider the study as part of an investigation, but at best, it might inform it. The complainant pointed to the Commission's failure to state the dates of the investigation, or to assert that the study formed the basis for such investigation. He considered that an investigation can only be subsequent to the findings of the study. By characterising everything done in the performance of its role as guardian of the

Treaty as an 'investigation', even when there was no Commission/Member State correspondence or negotiation involved, the institution sought to remove its performance from public scrutiny.

### *FURTHER INQUIRIES*

In order to verify the content of the reports, two staff members from the Ombudsman's Secretariat inspected the relevant documents at the Commission's premises in June 2000.

### *THE DRAFT RECOMMENDATION*

#### 1 Nature of the reports prepared by a third party

1.1 The complainant had asked the Commission to obtain copies of two different reports prepared by an independent consultant at the request of the Commission. The subject matter of these reports involved compliance of the UK and Gibraltar with two Community Directives on waste (Directive 75/442/EEC[81], as amended by Directive 91/156/EEC[82]) and hazardous waste (Directive 91/689/EEC[83]), as well as with the Habitats Directive (92/43/EEC[84]).

Since the requested documents had been drafted by a third party, the complainant contested the application of Decision 94/90/EC by the Commission. He considered that independent reports cannot be identified as internal Commission documents, and therefore that the exemptions provided for in Decision 94/90/EC should not apply to this type of document.

1.2 The Commission stressed that the requested documents were commissioned and paid for by the institution, and as such, they should be considered documents drawn up by the Commission. Moreover, the institution added that if it had concluded that the documents were third party documents, access would have been denied in accordance with the provisions of Decision 94/90/EC.

1.3 The Ombudsman noted that the Commission had a primary responsibility for the drafting, use, and evaluation of the requested documents. The institution had chosen the consultant and commissioned the reports. Its services were the exclusive recipients of the final work. It also appeared that the consultant firm which drafted the documents could not release the documents without the prior consent of the Commission.

Given the nature of the documents, and the role of the Commission, it was then reasonable to regard these reports as Commission documents, to which the rules of Decision 94/90/EC should apply[85].

1.4 The Ombudsman considered therefore that there was no maladministration as regards this aspect of the case.

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81 OJ L 194, 25.07.1975, p. 39.

82 OJ L 78, 26.03.1991, p.32.

83 OJ L 377, 31.12.1991, p. 20.

84 OJ L 206, 22.07.1992, p. 7.

85 The Ombudsman had expressed a similar position on the basis of the role played by the Commission in the preparation of a document in its Decision on complaint 1045/21.11.96/BH/IRL/JMA against the European Commission; Annual Report of the European Ombudsman for 1998, p. 156.

## 2 Refusal to give access on the basis of the protection of public interest

2.1 The complainant had contested the Commission's application of the exception involving the protection of public interest (inspections and investigations) as a justification for not disclosing parts of the reports. In his view, the requested documents did not concern a specific "investigation", but were at the most a prelude to a possible investigation.

2.2 The Commission believed that the deleted parts of the reports concerned a Member State's compliance with Community law, as illustrated by the fact that the Commission had started three own-initiative cases against the UK based on the findings of these reports. The institution stressed that the reports were part of an investigation which might lead to the opening of infringement proceedings.

2.3 In order to assess the scope of the exception based on the protection of public interest, it appeared first necessary to characterise the right of access to documents as enshrined in Decision 94/90/EC, and the nature of the possible exceptions for its exercise.

The aim of Decision 94/90/EC on public access to Commission documents, is to give effect to the principle of the largest possible access for citizens to information, with a view to strengthening the democratic nature of the institutions and the trust of the public in the administration. Decision 94/90/EC is a measure conferring on citizens legal rights of access to documents held by the Commission, and is intended to apply generally to requests for access to documents.

2.4 Access to a Commission document can only be refused by the institution on the basis of the exceptions listed in the Code of Conduct annexed to the Decision. These exceptions refer to the protection of public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), the individual and privacy, commercial and industrial secrecy, the Community's financial interests, and confidentiality.

As interpreted by the Community courts, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle of giving the public the "widest possible access to documents held by the Commission"[86].

2.5 In interpreting the notion of inspections and investigations, Community courts have warranted the use of this specific exception when the requested document pertains to investigations which may lead to an infringement procedure[87]. In these cases the investigation stage has been identified with the period of negotiations between the Commission and the Member State concerned[88]. Such exchange takes place once the Commission has first concluded that a Member State is not properly implementing Community law.

2.6 An interpretation of the scope of "inspections and investigations", as suggested by the Commission, could have precluded public disclosure of any document held by the institution which might be relevant for its role of guardian of the Treaty under Article 211 of the

86 Joined cases C-174/98P and C-189/98P, *Netherlands and Van der Wal v. Commission*, [2000] ECR I-1, par 27; case T-20/99, *Denkavit Nederland v. Commission* [2000] ECR II-301; par.45.

87 Case T-105/95, *WWF UK v. Commission* [1997] ECR II-0313, par. 63

88 Case T-309/97, Bavarian Lager Co. v. Commission [1999] ECR II-3217, par. 46. Community courts have resorted to different standards in order to assess whether a document triggers the application of one of the exceptions under public interest. Thus, the judicial standard applied to documents to be used in court proceedings is that the Commission must have drawn up the document solely for the purposes of specific court proceedings (see case T-92/98, Interporc Im- und Export GmbH v. Commission [1999] ECR-II-3521, par. 40).

EC Treaty[89]. Accordingly, whole categories of documents whose content relates to Member States' compliance with Community law, and hence which may give factual or legal elements to the Commission in order to consider instituting infringement proceedings in the future, could have been barred from public access.

It could also have called into question public access to one of the most effective tools for monitoring the application of EC environmental law: the Commission and Member States' reports on the implementation of certain Directives relating to the environment[90]. The publication and large distribution of these documents among the public had been widely praised by the Commission[91], even though their contents relate to the evaluation of Member States' compliance with Community law, and thus, could lead the Commission to institute infringement procedures.

2.7 The Ombudsman therefore considered that the exception based on inspections and investigations should only be applied when the requested documents have been drawn up in the course of an investigation connected to an infringement proceeding.

The two reports in this case had been commissioned prior to any investigation, and with a view to solely considering the options available to the Commission. Moreover, at the time when the complainant lodged his requests for access to the reports, it appeared as if the Commission had not instituted any infringement procedure under Article 226 of the Treaty, nor had it apparently started any of its preliminary stages.

2.8 The Ombudsman concluded that the Commission had wrongly refused access to Commission documents on the grounds that the documents in question were connected to inspections and investigations. Such action constituted an instance of maladministration.

2.9 In his letters to the Ombudsman, the complainant had also put forward a number of additional reasons. Since the Ombudsman concluded that the Commission wrongly refused access to the requested documents and that it should reconsider its decisions in this case, there was no need to further assess these reasons.

In view of the above, and in accordance with Article 3 (6) of the Statute of the European Ombudsman, the Ombudsman made the following draft recommendation to the Commission:

*The Commission should reconsider the complainant's applications dated 16 February 1999 and 17 May 1999, and give access to the documents requested, unless the exceptions contained in Decision 94/90/EC apply.*

The Commission and the complainant were informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission was requested to send a detailed opinion before 30 June 2001. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

89 The Ombudsman considered worth noting that the Commission has applied a different criterion in its Proposal for a Regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission Documents (Document COM (2000) 30 final/2). The proposed Regulation does not assimilate documents related to an infringement procedure to those produced in the course of inspections and investigations. Instead, it has defined two separate categories, within the exception concerning public interest, related respectively to inspections and investigations, and to infringement proceedings.

90 See Council Directive 91/692/EEC of 23 December 1991 standardizing and rationalizing reports on the implementation of certain Directives relating to the environment; OJ L 377, 31.12.1991, p.48.

91 13th annual report on monitoring application of Community law-1995; OJ C 303, 14.01.1996, p. 48.

### The Commission's detailed opinion

In May 2001, the Commission sent its detailed opinion to the Ombudsman. It explained that the Commission had accepted the Ombudsman's draft recommendations. Accordingly, the institution had written to the complainant, enclosing with its letter a full copy of the requested studies.

### The complainant's observations on the Commission's detailed opinion

In order to ensure that the complainant's request had been met by the Commission to his full satisfaction, the Secretariat of the Ombudsman contacted the complainant. He confirmed that the Commission had forwarded to him the requested studies in their entirety. The complainant also expressed his satisfaction for the effective action undertaken by the Ombudsman in this case.

## *THE DECISION*

1 On 12 March 2001, the Ombudsman addressed the following draft recommendation to the Commission:

*The Commission should reconsider the complainant's applications dated 16 February 1999 and 17 May 1999, and give access to the documents requested, unless the exceptions contained in Decision 94/90/EC apply.*

2 On 21 May 2001, 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 appear to be satisfactory and the Ombudsman therefore closes the case.

## 3.6 CASE CLOSED AFTER A SPECIAL REPORT

### ABUSE OF RULES ON DATA PROTECTION - THE EUROPEAN PARLIAMENT ADOPTS A RESOLUTION SUPPORTING THE OMBUDSMAN'S RECOMMENDATION

*Decision on complaint 713/98/(IJH)/GG against the European Commission*

In July 1998, a British citizen lodged a complaint against the European Commission which concerned the Commission's refusal to provide him with certain information in relation to complaint P/93/4490/UK that he had lodged with the Commission.

On 23 November 2000, and following an in-depth inquiry into the complaint, the Ombudsman submitted a special report to the European Parliament, in conformity with Article 3 (7) of the Statute of the European Ombudsman. A copy of this special report was sent to the Commission. In this special report the Ombudsman recommended that the Commission should inform the complainant of the names of the delegates of the *Confédération des brasseurs du marché commun* who had 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 had made submissions to the Commission under file reference P/93/4490/UK.

On 27 November 2001, the European Parliament's Committee on Petitions adopted a report (reference A5-0423/2001) in which it endorsed the Ombudsman's special report and submitted a draft resolution to that effect. The report was drafted by Jean Lambert MEP.

On 11 December 2001, the European Parliament voted to approve the resolution on the Ombudsman's Special Report. In its resolution, the European Parliament took the view that the Commission should provide the complainant with the information that he had requested. The EP also recommended some further measures, for example that model codes of conduct should be drawn up in order to set up standards with a view to preventing the abuse of data protection.

Given that the European Parliament has now completed its examination of his special report and endorsed its conclusions, the Ombudsman closes the file.

## 3.7 OWN INITIATIVE INQUIRIES BY THE OMBUDSMAN

### LATE PAYMENT

*Decision in the own-initiative inquiry OI/5/99/(IJH)/GG relating to the European Commission*

*THE BACKGROUND*

**The Commission's position**

The Commission has identified late payment of its creditors as a persistent problem. In May 1991, the Commission set an overall time limit of 60 days for payment to be made following receipt of an invoice. This period is composed of 40 days for the authorising officer to validate and order the payment and 20 days for approval by financial control and for the accounting department to check and execute the payment[92].

In June 1995, the Commission set a target that 95% of payments should be made within 60 days and that in principle, payment should never take more than 90 days. Furthermore, authorising officers were instructed to inform the beneficiary of the payment within 25 days if there was a risk that the 60-day time-limit would be exceeded for any reason[93].

The Commission returned to the issue of late payment in a communication dated 27 March 1996[94]. However, a further communication dated 10 June 1997 acknowledged that the situation had not improved. It also announced that, as from 1 October 1997, the Commission would pay interest in cases where the 60-day time limit was exceeded. The 60-day period is suspended if the Commission considers that the creditor has not produced the necessary documents, or that further checks are necessary. Furthermore, interest is only payable in the case of a contractual relationship where the contractor provides a clearly identifiable service[95].

92 SEC(91) 1172.

93 SEC (95) 1122.

94 SEC (96) 564.

95 SEC (97) 1205.

### Complaints to the Ombudsman

From the beginning of his first mandate, the European Ombudsman received complaints concerning late payment by the Commission. The complaints concerned not only fees and expenses but also other contractual payments, as well as grants and subsidies. The number of complaints, as well as other cases brought to the Ombudsman's attention by Members of the European Parliament, indicated that there was a widespread perception that late payment by the Commission remained a significant problem.

### The effects of late payment

Recital 7 of Directive 2000/35/EC of the European Parliament and the Council of 29 June 2000 on combating late payment in commercial transactions[96] describes the negative effects of late payment as follows:

*"Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvency threatening the survival of businesses and result in numerous job losses."*

These considerations also apply to the Commission. In addition, late payment by the Commission damages its reputation and, more generally, harms relations between citizens and the Union's institutions and bodies. These points apply not only to commercial transactions, but also to the payment of grants and subsidies[97].

The Ombudsman noted that since October 1997 the Commission has been prepared to pay interest to creditors when the 60-day time limit was exceeded, subject to certain conditions. This measure surely reduced the consequences of late payment for many contractors. However, some smaller businesses may not be able to survive cash-flow problems caused by late payment, whilst others may be able to do so only by borrowing at a higher rate of interest than that which is paid by the Commission. The Ombudsman also noted that the payment of interest transfers the financial burden of late payment from contractors to the Community budget and hence to taxpayers. It was not obvious, therefore, that the provision for interest created any incentive for the different Commission services to make payments in due time.

In general, therefore, it seemed that whilst interest can reduce - but not eliminate - the adverse consequences of late payment, it did nothing to identify or tackle the underlying cause or causes.

## *THE INQUIRY*

In December 1999, the Ombudsman therefore decided to open an own-initiative inquiry into the problem of late payment by the Commission.

He requested the Commission to inform him of the steps which it had taken to identify and deal with the causes of delay in making payments to contractors and to the beneficiaries of grants and subsidies. The Ombudsman also pointed out that it would be useful if the Commission could present an analysis of the continuing causes of the problem of late payment, together with an analysis of possible ways in which the problem could be dealt with. Finally, the Ombudsman requested the Commission to inform him of the procedures for redress open to contractors in case of a dispute with the Commission about the

96 OJ L 200, 08.08.2000 p. 35.

97 See the European Parliament Resolution on the damage caused by the Commission as a result of late payment, 1998 OJ C 341/379.

adequacy of the contractor's performance, or of the documentation supplied by the contractor. The Ombudsman also requested that the Commission state whether it considered that the procedures for redress are sufficiently rapid and effective and whether improvements could be envisaged.

### Observations from third parties

In reply to his invitation to make submissions regarding his decision to open an own-initiative inquiry, the Ombudsman received a considerable number of observations from third parties. The action undertaken by the Ombudsman was universally applauded, and many of the third parties who wrote supplied examples of cases where late payment by the Commission had caused problems. Some of the third parties pointed out that they considered legally binding rules to be necessary in order to combat the problem.

### The Commission's provisional opinion

In its provisional opinion, the Commission informed the Ombudsman that an outside study had been commissioned and that Grant Thornton, a firm of chartered accountants, had submitted a report in September 1998.

The study is available on the Ombudsman's website *(http://www.euro-ombudsman.eu.int)*. The main recommendations made by the consultants may be summarised as follows:

- requests for payment should be received and registered centrally in the financial units;

- checklists to examine payment requests should be revised and their use extended to operational and financial units in all Directorates-General (DGs);

- in each Directorate-General, a senior official should be given the responsibility to ensure that payment targets are met;

- a standard form listing the documents to be supplied with each payment request should be drawn up and introduced throughout the Commission and included in contracts and agreements;

- an independent computer application should be developed and used to track the progress of requests for payment from the time they are received up to the time they are paid by the bank;

- in the medium term, the current target for payments should be reduced from 60 days to 45 days.

The Commission also pointed out that in December 1999, an *ad hoc* group had been set up within the Commission with the following remit:

*"In the light of the recommendations made by Grant Thornton in their study on the Commission's payment delays, the group's objectives will be:*

- *to produce a typology of Commission payments with a view to identifying the categories of transactions to which the 60-day rule must apply;*

- *to define, in the handling of payment files, the specific responsibilities of the operational units and the financial units within authorising Directorates-General and to propose any changes which may be required to the contracts arrangements to reflect clearly this separation of responsibilities;*

- *to set, for all categories of payment where the deadline needs to be checked, a clear and indisputable date from which the payment delay is to run;*

- *to propose any measure concerned with administrative organisation or computer support which might help to shorten actual payment delays or facilitate monitoring;*

- *to draft a memorandum to the Commission setting out the conclusions of the group's work and making recommendations to departments."*

The Commission took the view that the group's findings, combined with the recommendations of the Grant Thornton study, should prompt an internal reorganisation according to a single set of guidelines. One of the measures would be the appointment in each Directorate-General of a "payment delays Officer" who would report regularly to the Director-General on the situation regarding payment delays. This person would also be responsible for dealing in the first instance with any complaints about excessive payment delays.

**The Commission's definitive opinion**

In its definitive opinion, the Commission referred to the Memorandum "Guidelines concerning Commission Payment Times" approved by the Commission at its meeting of 19 July 2000. This document is also available on the Ombudsman's website.

The Commission made the following comments regarding the issue of late payment:

*1 Steps taken by the Commission to identify and deal with the causes of delay in making payments to contractors and to the beneficiaries of grants and subsidies*

The Commission had considered the problem of payment times on several occasions.

In May 1991 it set itself the rule that payments should be made within 60 days of receiving an invoice (or any other equivalent request for payment).

In 1995 it decided that the target was to execute 95% of payments within 60 days and that in principle no operation should take longer than 90 days. The Commission also instructed authorising departments to inform the beneficiary within 25 days if for any reason payment was likely to take longer than 60 days. Directors-General were asked to check their payment times on a monthly basis to ensure that they were achieving the target times.

In June 1997 the Commission decided to amend its contract policy to include a clause formalising the requirement that payments be made within 60 days and providing for the possibility of interest being paid, at the creditor's request, where the payment period is exceeded, except where it has been suspended by the Commission.

In April 2000 the Commission included in the action plan contained in the White Paper on Reform a statement that "It is Commission policy that all valid invoices should be submitted within 60 days. For a variety of reasons, this timeframe is respected for only 60% of the current payments. The objective of the Reform is to raise this to 95% by 2002".

Finally in July 2000 the Commission included in its proposal for the recasting of the Financial Regulation (Article 77) the principle of time limits for payments and interest for late payment. The details will be specified in the implementing rules.

Two studies were made aiming at identifying and dealing with the causes of delay in making payments, one by Grant Thornton and the other by an *ad hoc* group within the Commission.

*2 Analysis of the continuing causes of the problem of late payment, together with an analysis of possible ways in which the problem could be dealt with*

The settlement of a payment request often consisted of a reimbursement of expenditure procedure that requires thorough examination and numerous supporting documents. It was now proposed to simplify the financial clauses in contracts and to reduce the number of supporting documents by setting standard amounts for certain categories of expenditure such as travel expenses.

Many payments depended upon the approval of a technical report or of a cost statement. This gave rise to complaints about late payment because it was not clear enough in the contracts what was the starting point for the payment time of 60 days and what the obligations for providing information were of the two parties.

It was now proposed:

- to incorporate separate concepts in the contracts for "time allowed for approving the report" and for the "payment time" (for the invoice) and to specify in contracts that the Commission departments must react quickly if the technical report is not satisfactory or the payment request not eligible; time limits for approving different types of reports have been set, after which payment requests are receivable unless the time allowed for approval in the contract has been suspended by the Commission by means of a formal message to the contractor;

- to ensure that the technical annexes to the contracts setting out what the contractor is to deliver to the Commission at each stage of the project are drawn up with precision and can be checked by both parties;

- to lay down in the contracts the particulars to be contained in the requests for payment.

The Commission's IT tools and procedures needed improvement. The Commission had set deadlines for the installation of tools that

- would allow services to monitor more rigorously their payment times;

- would provide services with a common system for recording and monitoring invoices.

It had also instructed its services to simplify the rules for the reimbursement of experts' meeting expenses and to improve the tools available to help authorising services manage the whole cycle of reimbursements. Further decentralisation to the operating DGs was aimed for.

DG Budget would take steps to advance the start of the financial year and reduce the time needed to take over commitments from the previous financial year.

All the above measures were of an administrative nature. The only measure requiring the intervention of the Community legislator was the proposal in the recasting of the Financial Regulation to fix payment times and the rights of creditors to interest in the case of late payment.

*3 Procedures for redress open to contractors in case of dispute with the Commission*

In the event of a disagreement on the quality of the contractors' services, they could in the first place contact the managers and afterwards present their claims to the Director-General. The contractors also had the possibility of informing the Commissioner responsible or even the President of the Commission. These different possibilities thus allowed contractors to have their claims examined at the highest level in the Institution. Finally, they could take legal action in the courts which the contracts state as being competent to decide on any disputes.

**Final observations from third parties**

The Ombudsman received three observations from third parties. Two of these welcomed the steps taken by the Commission. One of them pointed out, however, that it considered the implementation process for the proposed remedies to be lengthy and asked the Commission to consider setting up complaint and dispute settlement procedures. The same party also proposed that a joint working group should be set up by the Commission and the consulting industry in order to discuss possible measures to simplify procedures.

Finally, it was suggested that a simplification of the invoicing procedures, in particular those relating to reimbursable costs – for instance by resorting more to lump sum budgets – would lead to an alleviation of the administrative burden of processing invoices both for the Commission and the contractor. The remaining third party expressed doubts regarding the steps taken by the Commission, claiming that it had not been informed when payments due to it had been delayed or suspended.

*THE DECISION*

**1 Problem of late payment by the Commission**

1.1 The European Ombudsman opened an own-initiative inquiry into the problem of late payment by the European Commission. This step was taken since an increasing number of complaints in which this issue was raised and a consideration of the damaging effect of late payment notably on small- and medium sized firms led the Ombudsman to believe that an in-depth inquiry into this issue was appropriate and necessary. In the Ombudsman's view it was clear that there was maladministration where an administration, as a rule, did not manage to make payments on time. This view was supported by a considerable number of interested third parties who made observations.

1.2 The Ombudsman considered that it was desirable to let the public participate in this inquiry as far as possible. Representative organisations were thus informed of the inquiry that had been started. Furthermore, all the main documents exchanged between the Ombudsman and the Commission during this procedure was made available on the Ombudsman's website and third parties were invited to submit their observations to the Ombudsman.

1.3 The Commission presented a detailed opinion and supporting documents in which it acknowledged the problem and described the steps it had already taken or was in the process of taking in order to remedy it.

1.4 The most important of these steps appeared to consist in a simplification, clarification and general improvement of the Commission's procedures, aimed at ensuring that payments were made as quickly as possible.

1.5 The Ombudsman took the view that the steps proposed or already undertaken by the Commission, if properly implemented, were likely to represent a considerable progress towards combating the problem of late payment by the Commission. The Ombudsman therefore considered that his own-initiative inquiry had produced a satisfactory result.

1.6 The Ombudsman acknowledged that the views expressed by one of the third parties who made comments on the Commission's opinion were rather more critical. However, the Ombudsman noted that no other citizen or body had expressed similar views. The critical views of the party concerned furthermore seemed to relate to a specific case (which was being looked at by the Ombudsman in the context of a separate inquiry). However, as the Ombudsman indicated at the very beginning of this procedure, the present inquiry was meant to focus on the general problem of late payment without dealing with individual cases. The Ombudsman furthermore expected that the Commission would take into account the comments made by third parties regarding its definitive opinion in order to improve, where necessary, the measures already taken or to be taken. Finally, it had to be taken into account that it would inevitably take some time for the Commission's reforms to bear full fruit. The Ombudsman therefore took the view that it was justified to close the present own-initiative inquiry, given that the measures taken and to be taken by the Commission went in the right direction and looked likely to tackle the problem of late payment. If however it should prove in the future that notwithstanding these measures late payment by the Commission continued to pose serious problems, the Ombudsman would consider re-opening his inquiry.

### 2 Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, it appears that the European Commission has taken steps to tackle the problem of late payment that appear to be satisfactory. The Ombudsman's inquiries have thus revealed no maladministration in dealing with this initiative. The Ombudsman therefore closes the case.

## OWN-INITIATIVE INQUIRY INTO THE MANAGEMENT OF THE JRC IN ISPRA

*Decision closing own-initiative inquiry OI/3/2001/SM*

*THE REASONS FOR THE INQUIRY*

According to Article 195 of the Treaty Establishing the European Community, the European Ombudsman may conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of Community institutions and bodies.

The Joint Research Centre (JRC) is a Directorate General of the Commission. Its stated mission is to provide customer-driven scientific and technical support for the conception, development, implementation and monitoring of EU policies: in brief, to provide scientific support to policy-making.

The scientific activities of the JRC focus on three pillars: (i) food, chemical products and health; (ii) environment and sustainability; (iii) nuclear safety and security. These are supported by three horizontal complementary competences: science and technology foresight; reference materials and measurements; public security and antifraud. The JRC has 2100 staff, of whom 1500 scientists. The scientific work is carried out in seven Institutes, located on five different sites in Europe.[98]

The JRC's Directorate for Resources is based in Ispra, Italy. This Directorate is responsible for ensuring that the Institutes receive the logistical support required to carry out their tasks. The mission of the Directorate is to ensure sound and efficient management of the resources allocated to JRC and coherent and consistent application of the procedures necessary to achieve the objectives of the JRC.[99]

The European Ombudsman has dealt with a number of complaints against the JRC in Ispra and these inquiries led to six critical remarks.[100] The Ombudsman therefore decided to use his power to launch an own-initiative inquiry in order to find out whether there is a more general problem, and if there is, promote an effective solution.

*THE INQUIRY*

By letter of 25 June 2001, the Ombudsman informed the Commission of the own-initiative inquiry. He asked the Commission to examine whether there is a need for more effective advice and guidance to staff or changes to the administrative framework in order to avoid maladministration in the future.

#### The Commission's opinion

In its opinion, the Commission informed the Ombudsman of measures undertaken to improve the management of the JRC's Directorate for Resources in Ispra. According to the opinion, the six closed cases giving rise to critical remarks have been thoroughly examined by the JRC which has undertaken two corrective measures: (i) the clause concerning

98 Geel, Belgium (Institute for Reference Materials and Measurements); Ispra, Italy (Institute for the Protection and Security of the Citizen, Institute for Environment and Sustainability and Institute for Health and Consumer Protection); Karlsruhe, Germany (Institute for Transuranium Elements); Petten, the Netherlands (Institute for Energy); and Seville, Spain (Institute for Prospective Technological Studies).

99 See JCR website : http://www.jrc.cec.eu.int/index.asp.

100 Case 1479/99/(OV)MM; case 878/96/TT/it/PD and 905/96/AGS/it/PD (joint inquiry); case 1057/97/PD; case 855/97/PD; case 307/2000/IP; and case 922/2000/IP.

contractual revision in JRC's standard contract has been amended; and (ii) instructions have been given to avoid abusive delays when responding to candidates' submitted tender applications.
As regards the delays in replying, the JRC has installed an internal computerised system (Adonis) which keeps track of deadlines for replying to correspondence. Staff has moreover received instructions to follow strictly the Code of Good Conduct adopted by the Commission and internal seminars will take place to promote this. The mission of the newly appointed Director General, Mr Mc SWEENEY, is to adapt the activities of the JRC to the needs of its users. In this context and in light of Vice President Mr Kinnock's reform, the JRC plans to improve administrative procedures by implementing the Commission's Code of Good Conduct and the "Charte des ordonnateurs et des nouveaux circuits financiers". It introduced in 1998 the quality system "Total Quality Management" (TQM) which has been implemented since. Internal staff seminars take place in order to enhance efficiency of the JRC's activities in practice.

The JRC is moreover in the process of establishing a decentralised complaint procedure, which will be launched in autumn 2001. A compulsory register will be kept; the Director in charge of a particular subject matter will be informed; strict deadlines for replying will be respected; and finally the functioning of the procedure will be regularly reviewed.

### Visit to Ispra by staff of the Ombudsman's services

On 27 September 2001, two members of staff of the Ombudsman's services, Mr Ian HARDEN and Ms Ida PALUMBO visited the site of the JRC at Ispra, Italy, in response to an invitation addressed to the Ombudsman by the Director General of the JRC, Mr Barry Mc SWEENEY. During the visit they were informed of recent and on-going management changes at the JRC by responsible officials including Mr Mc SWEENEY; the Deputy Director-General of the JRC, Mr Hugh RICHARDSON; and the Head of Unit for internal audit, Mr F. DEZEURE. They also attended a management meeting during which the introduction of an internal complaints procedure and of the computerised system for managing documents and correspondence (Adonis) were presented to JRC heads of unit.

Since it appeared that the information obtained during the visit was useful for the own-initiative inquiry, the mission report and a number of internal JRC documents, including the Interim Report of the Director General dated 30 June 2001 were added to the file.
According to the information supplied by the JRC to the Ombudsman, the JRC's internal audit unit carried out an audit of financial circuits with a view to identifying ways to improve payments management in the JRC. By the end of October 2001, the JRC is to put in place a decentralised financial control system, including a structure of sub-delegations, thereby promoting empowerment of management. Correspondingly, the role of the Resources Directorate in Ispra is being re-focused on support; especially the establishment of clear written procedures and monitoring of their correct implementation. The JRC will carry out an audit of the financial system and its implementation immediately after the date of 1 October 2001. It will moreover review the financial circuits after six month's operation. The financial procedures as reviewed will be included in the JRC Management Manual.[101]

## *THE DECISION*

### 1 Information about management changes at the JRC

1.1 Following six cases in which the Ombudsman found maladministration by the Commission's Joint Research Centre (JRC), the Ombudsman launched an own-initiative inquiry in which he requested the Commission to examine whether there is a need for

[101] JRC Interim Report of the Director General, 30.6.2001, p. 8.

more effective advice and guidance to staff or changes to the administrative framework in order to avoid maladministration in the future.

1.2. In its opinion, the Commission informed the Ombudsman of two corrective actions taken in response to the Ombudsman's critical remarks: (i) a clause concerning contractual revision in the JRC's standard contract has been amended; (ii) instructions have been given to avoid abusive delays when responding to candidates' submitted tender applications.

1.3 Furthermore, according to the Commission's opinion and information supplied to the Ombudsman by the JRC, the JRC has installed an internal computerised system (Adonis) which keeps track of deadlines for replying to correspondence. The staff has also been instructed to follow the Code of Good Conduct adopted by the Commission. The JRC is also in the process of establishing a decentralised complaint procedure, which will be launched in Autumn 2001.

1.4 The Ombudsman notes that the complaints procedure and the Adonis system were presented to JRC heads of unit at a JRC management meeting on 27 September 2001.

1.5 The JRC has also informed the Ombudsman of the work of its internal audit unit and of its intention to put in place a decentralised financial control system, promoting empowerment of management. Correspondingly, the role of the Resources Directorate in Ispra is being re-focused on support; especially the establishment of clear written procedures and monitoring of their correct implementation.

## 2 The Ombudsman's evaluation of the management changes at the JRC

2.1 The Ombudsman welcomes the measures taken by the Commission and the JRC management and notes that the JRC's complaint procedure is expected to be operational in autumn 2001. The Ombudsman also notes that the Adonis system includes records of attribution of correspondence and an automatic system for warning of approaching and exceeded deadlines and takes into account the deadlines established in the Commission's Code of Good Administrative Behaviour.[102]

2.2 The Ombudsman also welcomes that fact that JRC management regard the introduction of the complaints procedure and of the Adonis system as key elements for achieving change in the culture of management of the JRC. The Ombudsman also considers that the introduction of a decentralised financial control system, by promoting empowerment of management, could promote and consolidate changes in the culture of management of the JRC, which could help prevent maladministration in the future.

2.3 In view of the above, the Ombudsman considers that the Commission and JRC management have made a positive and constructive response to the own-initiative inquiry and that the measures they have taken could help prevent maladministration in the future.

## 3 Conclusion

The Ombudsman's own-initiative inquiry has revealed no evidence of maladministration by the Commission in its response to the own-initiative inquiry. The Ombudsman therefore closes the case.

[102] See OJ L308/32 of 8.12.2000 and http://www.europa.eu.int/comm/secretariat_general/code/index_en.htm.

## 3.8 SPECIAL REPORTS PRESENTED TO THE EUROPEAN PARLIAMENT

### SEX DISCRIMINATION IN COMMISSION'S RULES FOR SECONDMENT OF NATIONAL OFFICIALS

*Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG*

The complainant, a UK civil servant, saw a notice of vacancy in which the European Commission was advertising posts of seconded national experts who were to work in the Commission's Directorate-General VII (Transport). Since the complainant had been working in the transport sector beforehand, she submitted an application. Her employer agreed to support her application and to pay her salary for the duration of her secondment.

The complainant has a son who was 11 months old at the time. She therefore wished to work part-time. However, Article 2 (1) of the European Commission's Rules applicable to national experts on detachment to the Commission provides that national experts on secondment to the Commission shall work "on a full-time basis throughout the period of detachment". The complainant therefore had to withdraw her application.

The complainant considered that the rule against part-time working was discriminatory on the grounds of sex since it was likely to affect a greater proportion of women than men as women generally have more childcare commitments than men.

The Ombudsman's carried out an in-depth inquiry into the matter, which led him to the conclusion that the relevant measure was indeed of a discriminatory nature.

On 31 January 2001, the Ombudsman therefore submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman suggested that the Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time. In its reply of 22 March 2001, the Commission informed the Ombudsman that it envisaged the abolition of the rule prohibiting national experts on secondment to the Commission from working part-time within the framework of its general reform process.

The Ombudsman noted that the Commission envisaged abolishing the rule prohibiting national experts on secondment to the Commission from working part-time. However, no concrete date was given. This meant that the Commission intended to continue applying the relevant rule without giving reasons as to why the change suggested by the Ombudsman needed to be delayed. The Ombudsman considered that this was not satisfactory. On 10 May 2001, he therefore addressed a draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the European Ombudsman, asking the Commission to abolish the relevant rule by 30 September 2001 at the latest.

Given that the Commission did not appear to have complied with this draft recommendation, the Ombudsman decided to submit the matter to the European Parliament. In his special report of 15 November 2001, he made the following recommendation:

The European Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time as quickly as possible.

## ACCESS TO COUNCIL DOCUMENTS - ONCE AGAIN

*Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 917/2000/GG*

The complainant, a private organisation (Statewatch) alleged that the Council of the European Union had failed (1) to grant access to certain documents that were put before various meetings of the Council in September 1998 and January 1999 and (2) to maintain a list of all the documents that are put before these meetings.

The Ombudsman took the view that the principle of openness obliged the Council to grant access to all the documents that are considered by it, unless one of the exceptions laid down in Decision 93/731 applies. However, such access was only possible if citizens know or are able to find out which documents have been considered by the Council. The Ombudsman thus considered that principles of good administration obliged the Council to maintain a list of all these documents. He also noted that there was evidence suggesting that the Council, when deciding on the complainant's request for access, had not considered all the relevant documents.

In these circumstances, the Ombudsman made a draft recommendation in which he asked the Council (1) to reconsider the complainant's application and (2) to establish a list of all the documents that are put before Council meetings and make this list or register available to citizens.

In its detailed opinion, the Council informed the Ombudsman that it accepted the two draft recommendations.

The Ombudsman considered, however, that it appeared that in practice the Council had not yet fully complied with his first draft recommendation to give the complainant access to the documents he had requested. He therefore decided to submit the matter to the European Parliament.

The Ombudsman welcomed the fact that the Council has accepted the second draft recommendation but noted that the considerations set out in the text of the Council's opinion raised doubts as to whether the draft recommendation would indeed be implemented. However, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[103] now obliges these three institutions to provide public access to a register of documents. In the Ombudsman's view, this regulation could be interpreted in the sense that access has to be given to all documents that have been put before the Council in order to be taken into account or dealt with by the latter. The Ombudsman therefore considered that it was not necessary or appropriate for him to pursue his inquiry into this aspect of the complaint.

On 30 November 2001, the Ombudsman submitted a special report to the European Parliament in which he made the following recommendation to the Council:

*The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.*

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

# 4 RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

# 4 RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

## 4.1 THE EUROPEAN PARLIAMENT

On 17 January, Mr SÖDERMAN met with Mr Enrico BOARETTO and Mr Heinz-Hermann ELTING, from the Secretariat of the Committee on Petitions. The meeting dealt with various aspects of the co-operation work between the Ombudsman and the Committee on Petitions.

On 12 February, Mr SÖDERMAN presented the Ombudsman's Code of Good Administrative Behaviour to the Committee on Legal Affairs and the Internal Market. Mr Roy PERRY, rapporteur on the same issue for the Committee on Petitions also addressed the meeting. Referring to his Special Report to the Parliament of April 2000, Mr SÖDERMAN explained why a uniform Code should be adopted by all Community institutions and bodies. Mr Jean-Maurice DEHOUSSE, draftsman of the Committee for the Special Report, Mrs Ana PALACIO, Chairman of the Committee and several other Committee members intervened in the extensive debate that followed the presentation.

On 10 April, Mr SÖDERMAN presented his Annual Report for 2000 to the Committee on Petitions.

On 5 May, Mr SÖDERMAN had a meeting concerning the Ombudsman's budget for 2002 with MEP Kathalijne Maria BUITENWEG, rapporteur for the 2002 Budget. Mr João SANT'ANNA, Head of the Administrative and Financial Department, also attended the meeting

*MEP Herbert Bösch and Mr Söderman discussing the Ombudsman's 2000 report.*

On 9 July, Mr SÖDERMAN attended a meeting of the Committee on Petitions in Brussels, chaired by Mr Nino GEMELLI, at which the Committee's draft report on the Ombudsman's Annual Report for 2000 was discussed. Mr SÖDERMAN exchanged views with members of the Committee, including the rapporteur for the Committee's report, Mr Herbert BÖSCH, and answered questions.

On 4 September, the Ombudsman invited the coordinators of the Committee on Petitions for a dinner on the occasion of the presentation of his Annual Report 2000. Mr Enrico BOARETTO, Head of the Secretariat of the Committee on Petitions, Mr Jean-Claude EECKHOUT, Director at the European Commission's Secretariat General and Messrs Ian HARDEN and João SANT'ANNA of the Ombudsman's office also attended the dinner.

On 2 October, Mr SÖDERMAN met with Mr Julian PRIESTLEY, Secretary General of the European Parliament. Amongst other subjects, they discussed the European Ombudsman's Statute and the Statute of the future Data Protection Supervisor.

On 4 October, Mr SÖDERMAN had a working lunch with MEP Michael CASHMAN, member of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. Mr Ian HARDEN also attended the meeting which dealt with matters concerning the enhancement of transparency, access to documents and the rights of European citizens.

On 24 October, Mr SÖDERMAN had an exchange of views with Mr Gregorio GARZÓN CLARIANA, Jurisconsult of the European Parliament.

## 4.2 THE EUROPEAN COMMISSION

On 9 July, Mr SÖDERMAN had a meeting in Brussels with Mr Michel PETITE, Director General of the Commission's legal service and Mr Allan ROSAS, Deputy Director General. Mr SÖDERMAN was accompanied by Mr HARDEN. Mr SÖDERMAN and Mr PETITE discussed possible ways to ensure more effective supervision of the implementation of Community law in the Member States, so as to make citizens' rights under Community law a living reality.

On 27 September, Mr SÖDERMAN met with the Secretary General of the European Commission, Mr David O'SULLIVAN. Mr SÖDERMAN thanked Mr O'SULLIVAN for the Commission's cooperation and emphasized that such cooperation is essential to enable the Ombudsman to deal with citizens' complaints in an effective and prompt way. Issues which were put forward by the Ombudsman and discussed with the Secretary General included the Ombudsman's own initiative inquiry on the use of age limits in recruitment, the Charter of Fundamental Rights and the Code of good administrative behaviour, the freedom of expression of officials, the citizens' right to legal protection under Community law and the draft Statute of the European Data Protection Supervisor.

On 27 September, Mr Ian HARDEN and Ms Ida PALUMBO visited the European Commission's Joint Research Centre (JRC) at Ispra, Italy and met responsible officials including Mr Barry Mc SWEENEY, Director General of the JRC, the Deputy Director-General Mr Hugh RICHARDSON and the Head of Unit internal audit Mr F. DEZEURE. They also attended a management meeting during which Mr Mc SWEENEY presented plans for management changes at the JRC, including the introduction of an internal complaints system and a computerised system for managing documents and correspondence (ADONIS). Mr HARDEN made a presentation of the role of the European Ombudsman and explained general principles of effective complaint handling. During their visit to the JRC, Mr HARDEN and Ms PALUMBO also received information from scientific staff of the three Institutes located at Ispra (Institute for the protection and Security of Citizen; Institute for Environment and Sustainability and Institute for Health and Consumer Protection), concerning five on-going projects.

On 24 October, Mr SÖDERMAN had a working dinner with Mr Jerôme VIGNON of the Secretariat General of the European Commission, temporarily in charge of the relations with the Ombudsman's office after the retirement of the former Director, Mr Jean-Claude EECKHOUT.

On 13 December, Mr Ian HARDEN and Mr João SANT'ANNA met with Mr Andrea PIERUCCI and Mr Philippe GODTS of the Secretariat General of the Commission. They discussed the procedures relating to the Commission's replies to the Ombudsman's inquiries.

# 5 RELATIONS WITH OMBUDSMEN AND SIMILAR BODIES

# 5 RELATIONS WITH OMBUDSMEN AND SIMILAR BODIES

## 5.1 RELATIONS WITH NATIONAL AND REGIONAL OMBUDSMEN

On 10 April, Mr SÖDERMAN, accompanied by Mr HARDEN and Mr VERHEECKE visited the office of the Belgian federal ombudsmen in Brussels and met the Flemish-speaking ombudsman Mr WUYTS, who was assisted by Ms Myriam FAGNOUL. Mr SÖDERMAN and Mr WUYTS discussed the seminar with national and regional ombudsmen foreseen for September 2001 and exchanged views and information on issues concerning cooperation between ombudsmen in Europe.

A seminar for national and regional Ombudsmen of the EU entitled "Ombudsmen against discrimination" organised jointly by the European Ombudsman and the federal and regional ombudsmen of Belgium took place in Brussels on 20 and 21 September (see section 6.1).

## 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.

Through seminars, newsletters and day-to-day contact, the liaison network has steadily developed itself into an effective collaboration tool for the national ombudsmen and their staff throughout the European Union. Experiences and best practice have been shared by the members of the network to enable a better service for the citizens. In particular, matters relating to the implementation of Community law at the Member State level have been discussed.

Towards the end of 2000, the online version of the liaison network, entitled EUOMB-National, was set up to further facilitate communication between members of the liaison network. EUOMB-National consists of a website and an Internet summit where interactive discussions and sharing of documents can take place.

In November 2001, a new section of the summit was created entitled 'Ombudsman Daily News'. This virtual newspaper has proved a very big success with the members of the liaison network and has made it possible for each to be kept informed of the activities of ombudsmen and similar bodies throughout the EU and beyond. Over half of the liaison network members now consult the Daily News on a regular basis and are thus kept informed about the ways that other bodies have dealt with matters that they too may be dealing with.

## 5.3 RELATIONS WITH LOCAL OMBUDSMEN

### *Calvià, Balearic Islands*

In the framework of a visit to the Balearic Islands (see 6.2), Mr SÖDERMAN was invited to visit the office of the Citizens' Ombudsman, Mr Antonio PALLICER, in the city of Calvià, located in the southwest of Mallorca, Spain. Mr SÖDERMAN had an interesting exchange of views with the local ombudsman.

## 5.4 RELATIONS WITH NATIONAL OMBUDSMEN IN THE ACCESSION STATES

### *Meeting between the Romanian Ombudsman's delegation and the European Ombudsman*

On 18 January, Mr Micea MOLDOVAN and Ms Lucia NEGOITA of the Romanian Ombudsman's office, visited the European Ombudsman in Strasbourg. The meeting was attended by Mr Jacob SÖDERMAN, by Mr João SANT'ANNA and by Ms Ida PALUMBO. Ms Astrid THORS, MEP and Chairman of the Delegation to the EU-Romania Joint Parliamentary Committee, participated in the final part of the meeting.

The main issue discussed during the meeting was the Programme of the Seminar of the Ombudsmen from the applicant countries to the EU, that would be organised by the Romanian Ombudsman's office, in cooperation with the Swedish Presidency, 23-24 April 2001.

*Meeting with a delegation from the Romanian Ombudsman's office and MEP Astrid Thors on 18 January.*

### *Meeting between the Polish Ombudsman's delegation and the European Ombudsman*

On 15 March, Mr Rafael PELC and Mrs Joanna PISARCZYK of the Polish Ombudsman's office, visited the European Ombudsman in Strasbourg. Mr Filip JASINSKI, of the Office of the Committee for European Integration was also part of the delegation. The meeting was attended by Mr SÖDERMAN, Mr SANT'ANNA, Mr Peter BONNOR and Ms Ida PALUMBO.

### *Seminar "The Ombudsmen and the Law of the European Union"*

On 23 and 24 April, Mr Jacob SÖDERMAN and Ms Ida PALUMBO participated in the Seminar "*The Ombudsmen and the Law of the European Union*" which took place in Bucharest, Romania. The event, a follow-up seminar of that held in Slovenia in 1999 for national Ombudsmen of candidate countries to the European Union, was organised by the Romanian Ombudsman's office, in co-operation with the European Ombudsman and the Swedish Presidency of the Union.

Participants included ombudsmen, representatives of ombudsmen's offices or Embassy officials from Cyprus, the Czech Republic, Estonia, Malta, Poland, Slovenia, Bulgaria, Hungary and Romania.

The seminar started on 23 April, at the International Conference Centre, in the Palace of Parliament, with an opening ceremony chaired by Mr Paul MITROI, Romanian Ombudsman, who welcomed all the participants. Mr Valer DORNEANU, President of the Chamber of Deputies, His Excellency, Mr Nils REVELIUS, Ambassador of Sweden to Romania, Ms Astrid THORS, Member of the European Parliament and Chairman of the Delegation to the EU-Romania Joint Parliamentary Committee, Ms Kristina RENNERSTEDT, State Secretary in the Swedish Ministry of Justice, Ms Kerstin ANDRÉ, Swedish Parliamentary Ombudsman, and Mr André LYS, Head of the European Commission delegation in Romania were also present.

*Seminar "The Ombudsmen and the Law of the European Union", Bucharest, 23 and 24 April. Mr Söderman, Mr Paul Mitroi, Romanian Ombudsman, Ms Lucia Negoita, Counsellor at the Romanian Ombudsman's office and Mr Joseph Sammut, Ombudsman of Malta.*

Ms RENNERSTEDT was the speaker of the first working session. Her intervention focused on “The Development of Justice and Home Affairs within the European Union”, and was followed by an open discussion. Later in the afternoon, Ms THORS spoke on “The Charter of Fundamental Rights of the European Union”.

On 24 April, Mr SÖDERMAN gave a speech on “What is Good Administration? The European Ombudsman’s Code of Good Administrative Behaviour”. He also explained his role and competence as European Ombudsman.

Later in the morning, the President of Romania, Mr Ion ILIESCU, received the participants for a meeting at the Presidential Palace.

The final session focused on “The Ombudsmen in candidate countries and their specific instruments to ensure Human rights protection” and Ms ANDRÉ presented a paper on this issue.

# 6 PUBLIC RELATIONS

# 6 PUBLIC RELATIONS

## 6.1 HIGHLIGHTS OF THE YEAR

### *AWARD OF THE ALEXIS DE TOCQUEVILLE PRIZE 2001 TO THE EUROPEAN OMBUDSMAN*

The Alexis de Tocqueville Prize 2001 was awarded to the European Ombudsman, Jacob SÖDERMAN.

The Prize, named after Count Alexis de Tocqueville (1805-1859), is awarded every two years by the European Institute of Public Administration (EIPA) to one or more persons whose work and commitment have made a considerable contribution to improving public administration in Europe. Previous recipients include the Italian Professor Sabino Cassese and the Spanish Professor Eduardo García de Enterría, two outstanding scholars in public and administrative law who were awarded the Prize in 1997 and 1999 respectively.

The decision to award the eighth Alexis de Tocqueville Prize to the European Ombudsman was made by EIPA's Scientific Council and Board of Governors. They cited *"his tireless work to improve access of European citizens to administrative documents and to increase transparency as regards the functioning of the European Union institutions. As European Ombudsman since 1995, he has helped to enhance the consideration given by the European public administration to people's rights. He has contributed to increasing knowledge of the EU administration. Furthermore, his reports are a major element of European administrative science."*

The award ceremony took place at the Provincial Government House in Maastricht on 21 November 2001.

Mr Jan VOSKAMP, Secretary-General of EIPA's Board of Governors and Master of Ceremonies welcomed the audience and gave the floor to the Queen's Commissioner for the Province of Limburg, Mr Berend-Jan baron VAN VOORST TOT VOORST who gave the opening speech. Professor Gérard DRUESNE, Director General of EIPA presented the eulogy of the laureate and Mr Henning CHRISTOPHERSEN, Chairman of EIPA's Board of Governors presented the prize to Mr SÖDERMAN.

In his expression of thanks, Mr SÖDERMAN congratulated EIPA on its 20th anniversary and for its work to promote good administrative values. In conclusion, Mr SÖDERMAN quoted de Tocqueville's analysis of the principle of equality, which he considered to express the essence of European citizenship:

"The gradual development of the principle of equality is, therefore, a providential fact. It has all chief characteristics of such a fact: it is universal, it is lasting, it constantly eludes all human interference, and all events as well as all men contribute to its progress".

### *EUROPEAN VOICE'S EV50*

On 4 December, Mr SÖDERMAN attended the EV 50 "Europeans of the Year" awards in Brussels. The Ombudsman was nominated in the "Campaigner of the Year" category for championing the cause of citizens vis-à-vis the EU institutions. UK Prime Minister Tony Blair and Commissioner for External Relations Chris Patten were also among the nominees for European of the Year. The event was organised by The European Voice and the award ceremony was followed by a gala dinner.

### *THE OPEN DAYS IN BRUSSELS AND STRASBOURG*

In the context of "Europe Day", the European Ombudsman's office participated in the annual Open Days organised by the European Parliament. This event took place in Brussels on 5 May and in Strasbourg on 8 and 9 May. A large number of persons visited the Ombudsman's stand, including President FONTAINE who took part in the event in

## AWARD OF THE ALEXIS DE TOCQUEVILLE PRIZE 2001 TO THE EUROPEAN OMBUDSMAN

(Photos: Henny Snijder, EIPA)

*Mr Henning Christophersen, Chairman of EIPA's Board of Governors presenting the Alexis de Tocqueville prize to Mr Söderman.*

*Mr Gérard Druesne, Director General of EIPA, Mr Söderman and Mr Jean-Claude Eeckhout, special adviser to the President of the European Commission at the reception which followed the Alexis de Tocqueville prize award ceremony.*

Strasbourg. Staff from the Ombudsman's Brussels and Strasbourg offices provided general information on the Ombudsman's work and handed out brochures as well as annual reports.

*Citizens visiting the Ombudsman's stand at the European Parliament's open days in Strasbourg, on 8 May.*

## *THE ANNUAL REPORT 2000*

The Annual Report of the European Ombudsman for the year 2000 was presented to the European Parliament at its plenary session on 6 September 2001. Two other reports were also discussed at the meeting, one concerned the special report of the European Ombudsman on the adoption by the EU institutions and bodies of a Code of Good Administrative Behaviour and the other concerned the amendment of Article 3 of the Ombudsman's statute. The session was chaired by Vice-President Renzo IMBENI.

In his speech to the plenary, Mr SÖDERMAN thanked the rapporteur, MEP Herbert BÖSCH for his work and acknowledged the need to deal with complaints as quickly as possible. Making reference to the problem raised in Mr BÖSCH's report concerning the committee on petitions' difficulty in obtaining the information needed to deal effectively with citizens' petitions, Mr SÖDERMAN offered to strengthen the cooperation with the committee on petitions especially in relation to petitions about infringements of Community Law by Member States. He further expressed the wish that the report prepared by MEP Roy PERRY on the Ombudsman's special report on the Code of Good Administrative Behaviour be rapidly followed by the adoption of a regulation. As to the

report on the amendment of Article 3 of his Statute, the Ombudsman thanked the rapporteur, Mrs ALMEIDA GARRETT for her work and stressed the need for more openness, so as to gain the confidence of the public and to promote a modern administrative culture at Community level.

Speaking on behalf of the committee on petitions, MEP Herbert BÖSCH, the rapporteur for the Ombudsman's Annual Report congratulated the Ombudsman and his staff for the work performed during the year 2000. Other speakers including MEP Roy PERRY, MEP Luciana SBARBATI, MEP Rainer WIELAND, MEP Proinsias DE ROSSA, MEP Andrew DUFF, MEP Heidi HAUTALA, MEP Laura GONZÁLEZ ÁLVAREZ, MEP Eurig WYN all commented on the Ombudsman's work and achievements. Ms Loyola de PALACIO, the responsible Member of the Commission expressed the Commission's views on the questions raised.

### *THE SEMINAR FOR NATIONAL AND REGIONAL OMBUDSMEN OF THE EU*

As a follow up to the meetings at national level in Strasbourg (1996) and Paris (1999) and at regional level in Barcelona (1997) and Florence (1999), the European, national and regional ombudsmen and similar bodies of the European Union gathered in Brussels, on 20 and 21 September 2001 in the framework of a seminar entitled "The Ombudsmen against discrimination". The seminar was organised under the Belgian presidency of the EU jointly by the regional and federal ombudsmen of Belgium and the European Ombudsman with the support of the European Commission.

Close to 100 participants including national and regional ombudsmen or chairpersons of committees on petitions from all the Member States took part in the meeting.

Opening speeches of the seminar were given by Mr Herman DE CROO, President of the Chamber of Representatives of Belgium, Mrs Loyola DE PALACIO, Vice-President of the European Commission and Mr Herman WUYTS, Belgian Federal Ombudsman and Regional Vice-President Europe of the International Ombudsman Institute (IOI).

*Opening session of the seminar for national and regional ombudsmen, on 20 September. Mr Herman De Croo, President of the Chamber of Representatives of Belgium, Mrs Loyola de Palacio, Vice-President of the European Commission and Mr Herman Wuyts, Belgian Federal Ombudsman and Regional Vice-President Europe of the International Ombudsman Institute (IOI). (Photo : European Commission)*

During the morning session of 20 September, Mr António CAVACO SERVINHO, Chief of Cabinet of Commissioner Vitorino gave a speech on *the Charter of Fundamental Rights* and Mr Bernard STASI, the French Ombudsman spoke about *the principle of non-discrimination*. In the afternoon, Mr Adam TYSON, Administrator, Unit Anti-discrimination, Fundamental Social Rights and Civil Society within DG Employment and Social Affairs of the European Commission gave a speech on *Community Directives on non-discrimination*.

On 21 September, the national and regional ombudsmen attended separate sessions. Speakers at the session for national ombudsmen included Mr Henrique NASCIMENTO RODRIGUES, Portuguese Ombudsman (*The Ombudsman and the Prisons)*, Mr Ewald STADLER, Austrian Ombudsman (*The Ombudsman and the Foreigners' Rights)* Mr Roel FERNHOUT, Dutch Ombudsman and Mr Giovanni BUTTARELLI, Secretary General of the Italian Data Protection Authority *(Openness and data protection)*.

Lectures at the session for regional ombudsmen were given by Mr Ian HARDEN, Head of the Legal Department, Office of the European Ombudsman *(Relationship between European law and regional law)*, Mr Anton CAÑELLAS, Ombudsman of Catalonia and President of the European Ombudsman Institute (EOI) *(Human Rights and non-discrimination and the Ombudsman)* and Mr Ullrich GALLE, Regional Ombudsman of the German Land of Rheinland-Pfalz *(The Social and Economic Rights and the Ombudsman)*.

*Participants at the seminar for national and regional ombudsmen.*
*(Photo : European Commission)*

All the participants gathered for the closing session at which Mr DIAMANDOUROS, the Greek Ombudsman reported on the works of the national ombudsmen and Mr GALLE reported on the works of the regional ombudsmen. Mr Pierre-Yves MONETTE, Federal Ombudsman of Belgium presented the final resolution of the seminar which was adopted by the ombudsmen. The closing speech of the seminar was given by Mr Jacob SÖDERMAN.

## 6.2 CONFERENCES AND MEETINGS

*FINLAND*

On 9 January, Mr Jacob SÖDERMAN gave a lecture on *how to achieve openness in the EU administration*, to Finnish information officers of all ministries. Held at the hall of the State Council of Finland in Helsinki, the meeting was organised by Mrs Sanna KANGASHARJU, EU Information Officer at the Prime Minister's Office. Information on

the European Ombudsman's activities and documents relating to his work were distributed to the participants.

On 12 January, Mr Jacob SÖDERMAN gave a lecture on Transparency in the EU Administration in the framework of the 33rd Annual Congress of the National Solicitors Association of Finland. Held in Aulanko, near the city of Hämeenlinna, Finland, the Congress was opened by the Association's President, Mr Thomas LINDHOLM. The Presidents of the Supreme Courts, the Chancellor of Justice and the Parliamentary Ombudsman were among the invited guests. The audience, composed of several hundred jurists and experts of the legal profession, also heard contributions from the President of the CCBE (Council of the Bars and Law Societies of the EU), Rupert WOLF, and MEP Matti WUORI.

On 3 September, Mr SÖDERMAN gave a lecture on Openness and the EU to the Nordic Meeting of the International Press Institute. Held in Sanomatalo, Helsinki, the lecture was introduced by Mr. Janne VIRKKUNEN, Chief Editor of the daily Helsingin Sanomat. Other speakers included Mr Per-Erik LÖNNFORS and Mr Jon BING. The participants, who represented almost 40 mainstream mass media, came from Denmark, Finland, Iceland, Norway and Sweden. The Director of International Press Institute, Mr. Johann P. FRITZ, also attended this event.

## *BELGIUM*

### *Brussels*

### *Colloquium "De Ombud - la Médiation publique"*

On 15 January, Mr Olivier VERHEECKE attended the Colloquium "De Ombud - la Médiation publique" organised jointly by the Flemish Association for Public Sciences and Administration, the Francophone Association of Administration and Public Management Sciences and the Belgian Institute of Administrative Sciences. The colloquium focused on various practical aspects of the functioning of the national, regional, local and sectorial Ombudsmen.

The Colloquium was officially opened by Mr Herman DE CROO, President of the Chamber of Representatives. Amongst the participants were Mr Herman WUYTS and Mr Pierre-Yves MONETTE from the College of Federal Ombudsmen, Mr Bernard HUBEAU, Flemish Ombudsman, and Mr Frédéric BOVESSE, Ombudsman of the Walloon Region. Other participants included the Telecommunications Ombudsman, the Ombudsman of the Post, the Pensions Ombudsman, the Railways Ombudsman as well as several municipal Ombudsmen. The colloquium was also attended by Mr V. DECROLY and Mr L. GOUTRY, respectively President and Vice-President of the Committee on Petitions, several Members of Parliament and various University professors.

The introduction speech of the Colloquium was addressed by Professor Geert BOUCKAERT from the University of Leuven. Professor Rudolf MAES from the same university gave a speech on the practical problems raised by the Ombudsman institution in Belgium. The presentations were followed by a debate between the various Ombudsmen. In the afternoon, Mr Olivier VERHEECKE gave a speech on the work and experiences of the European Ombudsman, focusing especially on the own initiative inquiries, the Code of good administrative behaviour and the Charter of Fundamental Rights. Professor William LAMBRECHTS from the University of Antwerp presented the final conclusions of the Colloquium.

### *Congress "Together again, Europe"*

On 1 March, Mrs BROMS participated in a Congress on Enlargement entitled Together again, Europe. The Congress was organised by the SME Union, Economic & Independent Business Association of the European People's Party. Speakers included Prime Minister of the Slovak Republic, Mr Mikulás DZURINDA, President of the Lithuanian Parliament, Mr Vytautas LANDSBERGIS and MEP, former President of the European Commission, Mr Jacques SANTER.

### *Public Hearing "European Governance: moving toward a better use of Subsidiarity and Proportionality"*

On 16 March, Mr Olivier VERHEECKE attended the Public hearing organised by the Commission on "European Governance: moving toward a better use of Subsidiarity and Proportionality". The hearing which took place in the Charlemagne building of the European Commission was attended by around 400 participants and included 3 roundtables: 1) The roles of political actors at different levels, 2) Regulating the exercise of roles and 3) Promoting better interaction amongst political actors at different government levels. At the hearing, Mr Olivier VERHEECKE distributed a paper containing the Ombudsman's point of view with regard to the position of citizens in the Article 226 EC procedure. Mr Jérôme VIGNON, Chief Advisor to President Prodi on European Governance, informed Mr VERHEECKE that the Commission would consider it in the framework of its White Book later in the year.

Amongst the speakers were Mr Frans ANDRIESSEN, former Commissioner and Vice-President of the Commission, Mr BOCKLET, Minister for European Affairs of Bavaria, Professor Kalypso NICOLAIDIS from Oxford University, Mr Jeremy SMITH, Director of Local Government International Bureau, Mr Andrew DUFF MEP, Professor Gráinne DE BÚRCA from the European University Institute, Florence, Mr Anntti PELTOMÄKI, under-secretary of state at the Finnish Prime Minister's Office, Mr Jack McCONNELL, Minister for Education, Europe and External Affairs of Scotland, Mr Jean-Louis QUERMONNE from the Institut d'Etudes Politiques of Grenoble, Mr Detlev SAMLAND, Minister for European Affairs of Nordrhein Westfalen, Professor Renaud DEHOUSSE of the Institut d'Etudes Politiques of Paris, Mr DELEBECQUE, Vice-President for European Affairs of the Communauté Urbaine de Lille. The roundtables were chaired by respectively Mr Jérôme VIGNON, Mr Philippe DE SCHOUTHEETE, Advisor to Commissioner Barnier and former Permanent Representative of Belgium to the EU and Mr Jean-Louis DEWOST, Director General of the Legal Service of the Commission.

### *ECAS 10th Anniversary Conference*

Mr Jacob SÖDERMAN gave a keynote speech "*The struggle for openness in the European Union*" at the 10th Anniversary Conference of ECAS held in Brussels on 21 March 2001. The Conference was attended by NGOs, local authority representatives, law firms and media experts. It focused on the three "Cs" for European Governance: consultation, communication and citizens complaints.

The event was opened by Mr Jérôme VIGNON, Chief Adviser for the White Paper on European Governance, European Commission and followed by a question time with Ms Mary BANOTTI, Mr Michael CASHMAN and Ms Heidi HAUTALA, Members of the European Parliament.

Panellists included, Mr Andrew CROOK, ECAS Executive, Mr Martin KRÖGER, Secretariat General of the European Commission, Ms Anne-Marie SIGMUND, Economic and Social Committee, Mr Richard UPSON, Consultant with ECAS, Ms Agnès HUBERT, European Commission, Mr Tony VENABLES and Mr Bernardus SMULDERS, Office of

President Prodi. The conclusions were given by Professor Deirdre CURTIN, University of Utrecht.

### *Workshop "European citizenship: beyond borders, across identities"*

On 24 April, Mr Ian HARDEN participated in a workshop entitled European citizenship: beyond borders, across identities, organised by the Research Directorate General of the European Commission in Brussels as part of the Commission's work programme on governance in the European Union. He explained the role of the European Ombudsman in promoting and protecting the rights of citizens of the Union. Other participants included Professor P. SCHMITTER of the European University Institute, Mr Haitze SIEMERS, of the European Commission, DG Trade and Ms Susannah VERNEY of the Greek Ombudsman's office.

### *Annual Conference of the European Environmental Bureau*

On 27 and 28 September, Mr MARTÍNEZ ARAGÓN from the Ombudsman's Secretariat, participated in the Annual Conference of the European Environmental Bureau (EEB). The EEB is the largest federation of environmental NGOs in Europe. Following the publication of the Commission's White Paper, the meeting was devoted to the subject of governance.

The session in which Mr MARTÍNEZ ARAGÓN intervened was devoted to the improvement of governance for effective environmental policies. He spoke about the role of the Ombudsman in monitoring the Commission's handling of environmental complaints with a view to improving good administration and transparency. The different interventions addressed the need to improve the Commission's monitoring of EC environmental directives, and whether other bodies at national or EU level could assist in that task. The panel's discussion focused on ways to give citizens a more relevant role in this procedure.

### *Europe 2004: Le Grand Débat: Setting the Agenda and Outlining the Options*

On 15 and 16 October, Mr José MARTÍNEZ ARAGÓN from the Ombudsman's Secretariat, attended the annual conference of Jean Monnet professors organised by the Commission's DG Education and Culture. The gathering which was held in Brussels, was devoted to the reform of the Treaties in 2004, and some connected issues. The need for a written constitution for the EU, the institutional structure and the distribution of powers, the status of the Charter of Fundamental Rights, and the Commission's White Paper on Governance were the topics for discussion.

Commissioner Vivian REDING and Mr José María GIL-ROBLES MEP opened the session, in which Mr Jacques DELORS, former President of the European Commission, gave the keynote speech. Other participants included Mr Giorgio NAPOLITANO MEP, Advocate General TIZZANO and Mr Michel PETITE, Head of the Commission's Legal Service.

### *Annual Conference on Advanced EC Competition Law*

On 15 and 16 November, Ms Sigyn MONKE attended the eight Annual Conference on Advanced EC Competition Law organised by IBC Global Conferences in Brussels. A panel of senior experts brought the participants up to date on the major developments in EC Competition Law over the last twelve months.

### *ECAS : Discussion on the Charter of Fundamental Rights*

On 29 November, Mr Ian HARDEN participated in a discussion on the Charter of Fundamental Rights of the European Union organised by the European Citizen Action Service (ECAS). Mr HARDEN explained the Ombudsman's initiatives to promote respect

for the rights contained in the Charter. Other speakers were Andrew DUFF, MEP and Mr Alain BRUN of the Justice and Home Affairs Directorate of the Commission.

## *FRANCE*

### *Nainville-Les-Roches*

On 7 and 8 March, Mr SÖDERMAN, accompanied by Mr Olivier VERHEECKE, participated in the seminar "L'avenir de l'Europe : L'Union européenne face à ses défis administratifs, institutionnels et citoyens" organised by the *Direction de la recherche et de la formation permanente* of the *Ecole Nationale d'Administration* (ENA). The seminar took place at the "Institut National d'Etudes de la Sécurité Civile" in Nainville-Les-Roches and was organised for the administrators of the external tour and the international students of the "Cycle de Promotion et de Réorientation des Fonctionnaires (CPRF 2000-2001)". The participants, from various continents, were sent by the administrations and ministries of their respective countries.

Mr SÖDERMAN gave a lecture on the "Fundamental Rights and the Administration in the Europe of Tomorrow". Other speakers included Mr Claude CHENE, Principal Advisor to the Vice-President of the European Commission, Responsible of the Task Force for Administrative Reforms, Mrs Simone VEIL, ex-Minister and ex-President of the European Parliament, Mr Yves-Thibault DE SILGUY, ex-European Commissioner, and Mr Luigi CARBONE, Member of the Italian State Council.

### *Strasbourg*

On 28 June, a training seminar was held in Strasbourg for the European Ombudsman's staff. During the morning session, Mr Piet VERLEYSEN and Mr Ives REMACLE of the Personnel and Administration DG of the European Commission made a presentation of the Community Health Insurance Scheme.

In the afternoon, staff of the administrative and legal departments participated in separate sessions.

Mr Carl Otto LENZ, former Advocate General of the Court of Justice spoke about the role and mission of the Advocate General at the Court of Justice and Mr Alfonso MATTERA, Deputy Director General of the Internal Market DG of the Commission gave a lecture concerning infringement procedures to the staff of the legal department.

Mr François-Xavier CAMENEN, Principal Administrator at DG Research of the European Parliament gave a lecture to the staff of the administrative department on Developments in the unification process of the European Union and Mrs Gerda POSTELMANS of the secretariat general of the Commission explained the Commission's administrative procedure in dealing with complaints forwarded by the Ombudsman.

### *Seminars for MEP assistants*

On 3 July, the Ombudsman held a reception and briefing for UK and Irish MEP assistants in his office in Strasbourg. Over forty assistants attended the event, where Mr SÖDERMAN outlined the work of the office and the link between his role, MEP assistants' work and the citizen. Mr PERRY, Vice-Chairman of the Petitions Committee, also gave a short presentation explaining the difference between the work of the Ombudsman and the Petitions Committee. Staff members present spoke with assistants, explaining the work of the Ombudsman, answering questions and discussing cases. Material was made available to assistants to be further distributed in Brussels and in their home constituencies.

On 13 November, the Ombudsman held a seminar for German and Austrian MEP assistants in Strasbourg. The purpose of the seminar was to inform assistants about the various channels available to deal with complaints from European citizens. The event started with a multi-media presentation by Mr Ben HAGARD, Internet Communications Officer for the European Ombudsman, highlighting the links between the European Ombudsman, the European Parliament Committee on Petitions and the national ombudsmen and similar bodies in Germany and Austria. This was followed by a presentation from Mr. Herbert BÖSCH on the role of the EP Committee on Petitions. Mr João SANT'ANNA presented the work of the European Ombudsman. Mr Ewald ZIMMERMANN outlined the role of the German Bundestag Petitions Committee, while the work of the Austrian ombudsmen was presented by Mr Michael MAUERER. Over twenty assistants attended the seminar that was followed by a buffet. The buffet allowed for an informal discussion between assistants, speakers and representatives from the Ombudsman's office. Material was made available to assistants to be further distributed in Brussels and in their home constituencies. An order form for documentation was sent to those assistants who did not make it to the seminar.

On 14 November, the Ombudsman held a similar seminar for French, Italian, Belgian and Luxembourg MEP assistants in Strasbourg. Mr Ian HARDEN presented the work of the European Ombudsman. The President of the European Parliament's Committee on Petitions, Mr Vitaliano GEMELLI, presented the work of his committee. Mr Philippe BARDIAUX explained the role of the French Ombudsman, while the work of the Belgian Federal ombudsmen was presented by Mr Philippe VAN DE CASTEELE. Finally, Ms Isabelle BARRA outlined the role of the Committee on Petitions in Luxembourg. Mr Jacques SANTER, MEP and former President of the European Commission, also attended the event. During the buffet, the assistants had the opportunity to ask questions and enter into further discussion with speakers and representatives of the European Ombudsman's office.

*Seminar for MEP assistants from France, Belgium, Luxembourg and Italy, on 14 November.*

## *AUSTRIA*

### *Vienna*

In the morning of 16 March, the European Ombudsman made an official visit to the European Parliament Information Office in Vienna. Mr SÖDERMAN was received by Ms

Monika STRASSER, Deputy Head of the office, with whom he had an exchange of information.

In the afternoon of 16 March, Mr SÖDERMAN met with the Director of the European Commission's Representation in Vienna, Mr Wolfgang STREITENBERGER.

On 17 March, Mr SÖDERMAN attended the 20th Anniversary Conference of the European Law Students Association (ELSA). The conference's general theme was "Visions of Europe", and it was attended by more than 600 lawyers. Mr SÖDERMAN's intervention was entitled "Promoting the Rule of Law for the European Citizens". Other key participants included Mr David IBOLYA, Minister of Justice of Hungary; Prof. Gorazd TRPIN, Public Administrative Law Department of the University of Ljubljana, Slovenia; Ms Christine MOSER, Deputy Head for General and Institutional Affairs, Austrian Foreign Affairs Ministry; Mr Jonathan FENBY, Editor of BusinessEurope.com and Mr Michael SULLIVAN, President of ELSA. Participants were distributed info-packs in various languages with background information on the European Ombudsman.

## *THE NETHERLANDS*

### *Eindhoven*

On 6 April, Mr Olivier VERHEECKE participated in the "European Week Eindhoven – Unity in diversity", an international conference organised by the students of the Technical University of Eindhoven from 2 to 6 April 2001. The conference was attended by 450 students from Eastern and Central Europe as well as from the EU Member States.

The debate of 6 April entitled "The influence of the stakeholders of the European Union" was chaired by Mr Henk BEEREBOOM, Director of the Commission Representation in The Hague. Mr Olivier VERHEECKE gave a speech on the tasks and experiences of the European Ombudsman. Other speakers included H.E. Mr B.R. BOT, Permanent Representative of the Netherlands to the EU, MEP Lousewies van der LAAN, Mrs Marijke KORTEWEG, principal administrator at the European Agency for the Evaluation of Medicinal Products (EMEA), Mr Patrizio FIORILLI, press officer at the Committee of the Regions and Mr Bart SCHELFHOUT, of the Philips company.

### *Maastricht*

#### *EIPA Conference on Transparency*

On 8 October, the Head of the Legal Department, Mr Ian HARDEN, spoke on "The Ombudsman of the European Union: Efforts to Increase Transparency" at the conference "Transparency on the Agenda: the Agenda of Transparency", organised by the European Institute of Public Administration in Maastricht, 8-9 October.

Ms Rosita AGNEW, Press Officer for the European Ombudsman, also participated in the conference.

Ms Veerle DECKMYN, Head of Information, Documentation and Publication Services at EIPA, officially opened the conference. Among the other speakers were Mr Steve PEERS from the Department of Law at the University of Essex, Mr Dennis ABBOTT, Chief Editor of European Voice, Ms Caroline NAÔME, Legal Secretary at the European Court of Justice and Mr Mark MAES, Principal Administrator in the Secretariat-General of the Commission (Unit: 'Openness, Access to Documents, Relations with Civil Society').

### Conference on European Information

On 19 and 20 November, Ms Rosita AGNEW, Press Officer for the European Ombudsman, participated in a conference entitled "Keep Ahead with European Information". The conference was organised by the European Institute of Public Administration and the European Information Association and was held in Maastricht.

Ms Veerle DECKMYN, Head of Information, Documentation and Publication Services at EIPA, officially opened the conference. Among the speakers were Mr Ian THOMSON, Manager, European Documentation Centre, Cardiff University (UK), Executive Editor, KnowEurope; President, European Information Association; Ms Lea VATANEN from the Unit Transparency, access to documents and relations with civil society, Secretariat-General, European Commission; Mr Tony VENABLES, Director, Euro Citizen Action Service, Brussels and Mr Philippe LEBAUBE, OPOCE.

## SWEDEN

### Lund

On 5 and 6 April, Mr Jacob SÖDERMAN and Ms Maria ENGLESON participated in the conference "Access to official documents and archives" which was arranged by the National Archives in Sweden and held at the University of Lund. Mr SÖDERMAN was the key note speaker at the conference. The first day of the conference focused on the democratic aspect of public access to documents and the second day on the cultural and research aspect. The conference was attended by some 200 participants from 23 European countries.

*The Swedish Minister for Culture, Ms Marita Ulvskog and Mr Söderman at a conference in Lund, on 5 April.*

At the opening ceremony on 5 April, speeches were given by Mr Erik NORBERG, Director General of the National Archives of Sweden, Ms Marita ULVSKOG, Swedish Minister of Culture and Mr Bernard SMITH, Head of Unit at the European Commission's Directorate General "Information Society".

At the plenary session on 5 April, which was chaired by Mr Erik NORBERG, Jacob SÖDERMAN gave a key note speech on access to documents in the European Union. It was followed by an intervention by Mr Hans-Eric HOLMQVIST, Under-secretary of State

of the Swedish Ministry of Justice who specifically thanked Mr SÖDERMAN for having carried forward the Swedish-Finnish tradition on openness in his important work.

On 5 April, three parallel sessions were held. Firstly, "Development of Administration in the ICT-age", chaired by Mr Peter ANDERSEN, National Archives of Scotland. The speaker was Mr Knut REXED, Director General of the Swedish Agency for Administrative Development. Secondly, "The Importance of Archival Activities for Democracy", chaired by Mr Claes GRÄNSTRÖM, National Archives of Sweden. The speaker was Mr Peter SEIPEL, Professor of Law at the Stockholm University. Finally, "Records Management, Its Importance for Transparency and Accountability in the Administration", chaired by Mr Lorenz MIKOLETZKY, National Archives of Austria. The speaker was Mr Philippe BARBAT, National Archives of France.

On 6 April, a plenary session was held and chaired by Mrs Daria NALECZ, National Archives of Poland. Key note speakers were Mr Richard J. EVANS, Professor of History at the Cambridge University and Mr Hartmut WEBER, Director General of the German *Bundesarchiv*.

On the same day, three parallel sessions were held. Firstly, "Presentation of European Union Archives Projects", chaired by Mr Josef ZWICKER, *Staatsarchiv* in Basel, Switzerland. Speakers were Mrs Inge SCHOUPS, City Archives of Antwerpen, Belgium and Mr Göran KRISTIANSSON, National Archives of Sweden. Secondly, "Ways of Dealing with the Problems of Registration and Description of Archives", chaired by Mr Raimo POHJOLA, National Archives of Finland. Speakers were Mr Alan BORTHWICK, Scottish Archives Network and Mr Per-Gunnar OTTOSSON, National Archives of Sweden. Finally, "Archival Co-operation with Libraries and Museums for Joint Solutions to Mutual Problems", chaired by Mr Björn LINDH, National Heritage Board. Speakers were Mr John HERSTAD, National Archives of Norway, Mr Justin FROST, RE:SOURCE London and Mrs Patricia MANSON, European Commission.

The conference was summed up by Mrs Trudy HUSKAMP PETERSON, UNHCR Geneva.

In the framework of his visit to Lund, Mr Jacob SÖDERMAN also lectured to students at the Raoul Wallenberg Institute of the Lund University following a post graduate programme on Human Rights on 6 April. Mr SÖDERMAN spoke about his work as European Ombudsman and the Charter of Fundamental Rights of the European Union.

On 6 December, Maria ENGLESON, gave a lecture on "The European Ombudsman at work" at the Raoul Wallenberg Institute, University of Lund, Sweden. The lecture was part of a programme entitled "The Role of National Independent Institutions in the Protection and Promotion of Human Rights", a Regional Training Programme for participants from Eastern Europe, Caucasus and Central Asia.

### *Malmö*

On 5 April, Mr Jacob SÖDERMAN gave a speech to the trade union "Statstjänstemannaförbundet" who was arranging special education days on openness. Mr SÖDERMAN'S speech was followed by a press conference.

### *Göteborg*

On 8 May, the European Ombudsman explained his tasks and activities in the Public Library in Angered, Göteborg.

On 9 May, Mr SÖDERMAN spoke about his role in the main public library in the centre of Göteborg. Citizens also had the opportunity to present questions to him in private about the possibilities to complain to the European Ombudsman. In the evening of 9 May, Mr

SÖDERMAN gave a speech at the Folkuniversitetet on the subject "European Union, friend or enemy?". The events were well covered in the regional press and on the radio.

### *European Law Conference, Stockholm*

On 12 June, Mr SÖDERMAN presented a paper entitled "The citizen, the rule of law and openness" at the European Law Conference held in Stockholm, from 10 to 12 June. The conference was organised by VJS, the Swedish Institute for Further Education of Lawyers, on behalf of the Swedish Parliament and Government. Other speakers at the conference included the Swedish Minister of Justice, Mr Thomas BODSTRÖM; the Speaker of the Swedish Parliament, Mrs Birgitta DAHL; the President of the Court of Justice of the European Communities, Mr Gil Carlos RODRÍGUEZ IGLESIAS; the President of the Court of First Instance, Mr Bo VESTERDORF; former President of the Court of Justice, Mr Ole DUE and former Commissioner, Ms Anita GRADIN. Mr SÖDERMAN was accompanied at the conference by Mr HARDEN and Mr SANT'ANNA.

## *GREECE*

### *Workshop on "The Role of the Ombudsman for the protection of the Environment"; Athens, 18-19 May 2001*

On 18-19 May, the Greek Ombudsman in co-operation with the European Commission, hosted a workshop in Athens with representatives from EU ombudsmen's offices, including those from six of the applicant countries, and the European Ombudsman. Mr MARTÍNEZ ARAGÓN participated in the meeting on behalf of the European Ombudsman. It was devoted to the exchange of experiences in dealing with environmental complaints, and possible means to improve it.

In the course of the workshop, the Commission's representative suggested that a network for the exchange of environmental information and complaints be established with the participation of the Commission, the European Ombudsman, and national ombudsmen or similar bodies. It was agreed to work on the proposal with a view to better defining its scope and making the necessary preparations for its future development.

### *IIAS Conference*

Ms Benita BROMS presented a working paper entitled A Code of Good Administrative Behaviour for the Community Officials in their Relations with the Public: a preventive mechanism at the Twenty-fifth International Congress of the International Institute of Administrative Sciences (IIAS) on Governance and Public Administration in the 21st Century: New Trends and New Techniques, held in Athens from 9 to 13 July. The Congress was officially opened by Mr Constantinos STEFANOPOULOS, President of the Hellenic Republic.

## *SPAIN*

### *Palma de Mallorca*

On 28 May, Mr Jacob SÖDERMAN gave a lecture on "The Fundamental Right to Good Administration", as a contribution to the goal of establishing a regional ombudsman in the Balearic Islands. Held at the main hall of the Balearic Islands' Regional Parliament, the lecture was introduced by Mr Maximilià MORALES, Speaker of the Regional Parliament. The participants included senior judges, staff and members of the regional parliament and government, as well as university students and citizens. The participants were provided with documents containing information on the activities of the European Ombudsman.

*Mr Maximilià Morales, Speaker of the Regional Parliament of the Balearic Islands introducing Mr Söderman's lecture on 28 May.*

## *Madrid*

### *Colloquium on the Spanish Ombudsman: past, present and future*

A colloquium to mark the twentieth anniversary of the creation of the Spanish Ombudsman organised jointly by the Spanish Ombudsman and the Spanish Centre for Constitutional and Political Studies was held in Madrid on 8 and 9 October 2001. Mr SÖDERMAN took part in the first round table devoted to the role of Ombudsmen as guarantors of Human Rights. The panel also included Mr Antón CAÑELLAS, Regional Ombudsman of Catalonia, and Mr Fernández MIRANDA, former Spanish Ombudsman. In his speech, Mr SÖDERMAN described the mandate of the European Ombudsman and outlined the importance of human rights as an essential part of his work.

In the framework of his mission, Mr SÖDERMAN also visited the office of the Spanish Ombudsman, where he was received by the Ombudsman Mr MÚGICA, his First and Second Deputies, Ms Cava de LLANO and Mr Aguilar BELDA, as well as the institution's secretary-general, Mr AZNAR. He also paid a visit to the representations of the European Parliament and the Commission in Spain.

## *GERMANY*

### *Magdeburg - Berlin*

The European Ombudsman, Jacob SÖDERMAN, visited Germany from 17 till 20 June 2001. He was accompanied by Mr Gerhard GRILL, Principal Legal Officer at the European Ombudsman's Office.

On 17 and 18 June, the Ombudsman attended the bi-annual meeting of the Chairmen and the Deputy Chairmen of the Committees on Petitions in Germany that was held in Magdeburg.

*Meeting of the Chairmen and the Deputy Chairmen of the Committees on Petitions in Germany held in Magdeburg on 17 and 18 June. First row (from left to right) Mr Heinz-Hermann Elting (Official of the Committee on Petitions of the European Parliament), MEP Nino Gemelli (Chairman of the Committee on Petitions of the European Parliament), Mr Gerhard Grill (Ombudsman's office) and Mr Söderman.*

On 19 June, the European Ombudsman attended the meeting of the committee on petitions of the *Abgeordnetenhaus* of Berlin and gave the members of the committee an overview of his work and mandate. In the evening of that day, the Ombudsman delivered a speech on *"Transparency as a fundamental principle of the European Union"* and answered to a considerable number of questions afterwards at the Humboldt University in Berlin. The Ombudsman had been invited by Professor Dr. Ingolf PERNICE, managing director of the Walter-Hallstein-Institute for European Constitutional Law there.

In the morning of 20 June, the European Ombudsman attended the regular meeting of the committee on petitions of the German Bundestag and informed the members of the committee of his work, stressing the importance of co-operation between the different ombudsmen and committees on petitions.

Later that morning, the European Ombudsman paid a courtesy visit to Dr. SEITERS, one of the Deputy Speakers of the Bundestag.

In the early afternoon, the European Ombudsman gave a press conference at the European Parliament's Information Office in Berlin. Journalists from six newspapers or press agencies were present.

The closing event of the Ombudsman's visit to Germany was a forum discussion with citizens. Together with the Ombudsman, Mrs Margot KESSLER, MEP and member of the Committee on Petitions of the European Parliament and Mrs Claudia KELLER, the European Commission's Citizen Advisor in Germany, spoke to an audience of more than 70 people.


*Forum discussion with citizens in Berlin, on 20 June. (Photo : Doriane Gaertner)*

### *Trier - European Academy of Law*

On 12 and 13 July, Ms Ida PALUMBO attended a seminar on "The citizen's right of access to documents in the EU" organised by the European Academy of Law (ERA). Participants to the seminar included representatives from EU institutions, the Council of Europe, EFTA Surveillance Authority, Universities as well as Ministries of Justice, of Education and of Foreign Affairs of different Member States.

Sub-topics of the seminar were: The new Code of Access: Institutional viewpoints; The European Union citizen and a New Code of Access: The view from Civil Society; Selected National Perspectives and Access to Documents as a Legal Principle.

The seminar was officially opened by Mr Wolfgang HEUSEL President of ERA. Amongst the speakers were Mr MAES (European Commission), Mr Jiménez FRAILE (Council of the EU), MEP Astrid THORS and MEP Heidi HAUTALA, Mr Pedro CABRAL (Court of Justice), Mr BUNYAN (Statewatch).

### *European Jurists Forum in Nuremberg*

Mr Gerhard Grill attended the 1st European Jurists Forum in Nuremberg from 13 till 15 September 2001.

The conference was opened by Professor Hans-Jürgen RABE, the organiser. Further speeches were given by Professor Dr. Herta DÄUBLER-GMELIN, the Federal Minister of Justice of Germany, Mrs Marylise LEBRANCHU, Minister of Justice of the French Republic, Dr. Edmund STOIBER, Prime Minister of Bavaria, Mr Ludwig SCHOLZ, Lord Mayor of Nuremberg, Professor Dr. Gil Carlos RODRÍGUEZ IGLESIAS, President of the European Court of Justice and Mr António VITORINO, Member of the European Commission.

Three different topics were discussed at the Conference: 1) The citizen in the Union; 2) Corporate activity in the Community and 3) Judicial co-operation in the Union.

The session dealing with the first topic was chaired by Professor Dr. Spiros SIMITIS from the University of Frankfurt. Professor Dr. Stefan RODOTÁ (Rome), one of the members of the Convention, discussed the Charter of fundamental rights. Professor Dr. Grainne DE BURCA (Florence) then spoke about the further development of citizenship in the EU. Mr

GRILL intervened during the discussion to give an overview of the Ombudsman's role and mandate. Professor Dr. Antoine LYON-CAEN (Paris), the General rapporteur, summarised the results of the discussion.

### Potsdam

On 8 and 9 October, Mr Gerhard GRILL and Mr Alessandro DEL BON, participated in a symposium on "Freedom of Information and Data Protection in the enlarged European Union". The conference was organised in Potsdam by Mr Alexander DIX, the Commissioner for Data Protection and Access to Information of the State of Brandenburg (Germany). Mr GRILL described the role of the Ombudsman under the heading: "Access to documents on the EU level - the European Ombudsman's Perspective".

### Saarbrücken

On 19 October, Mr Jacob SÖDERMAN, accompanied by Ms Maria ENGLESON, paid a visit to the European Information Centre in Saarbrücken, Germany, were he spoke to a group of students about his work as European Ombudsman.

Later that day, Mr SÖDERMAN was the main speaker at the conference "Transparency and Citizen Proximity in Europe - Ways towards this Goal" arranged by FIME (Fédération Internationale des Maisons de l'Europe) at the Europäische Akademie Otzenhausen, Germany. The President of FIME, Mr Arno KRAUSE chaired the session.

## THE UNITED KINGDOM

### University of Birmingham

Mr Gerhard GRILL from the Ombudsman's Office attended a seminar on *"Legitimacy and Accountability in the European Union after Nice"* organised by the Institute of European Law at the University of Birmingham that was held on 5 and 6 July 2001.

Speakers at the seminar included among others Mr Philippe ROLAND from the Belgian Embassy in London (who set out the priorities of the Belgian EU Presidency), Professor Alan DASHWOOD from the University of Cambridge (who discussed 'Decision-making in the EU after Nice: the legal framework'), Professor Jörg MONAR from the University of Leicester (who spoke on 'Decision-making in the area of freedom, security and justice'), Professor Anthony ARNULL from the University of Birmingham (who discussed the rule of law in the EU) and Professor Evelyn ELLIS from the University of Birmingham (who discussed the new anti-discrimination directives). One of the working sessions was chaired by Advocate-General Francis JACOBS from the Court of Justice of the European Communities.

### University College, London

On 11 October, the Head of the Legal Department, Mr Ian HARDEN delivered a public lecture at University College, London on the subject "What future for the centralised enforcement of Community law?" The lecture dealt with the Ombudsman's efforts to promote openness in the Article 226 procedure through which the Commission carries out its task as guardian of the Treaty as regards Member States. The lecture was chaired by Lord HOFFMANN, a law lord, and is to be published in the Current Legal Problems series, edited by Professor Michael FREEMAN.

### *CYPRUS*

From 12 to 16 September, Mr SÖDERMAN took part in the international Seminar on Ombudsmanship in Nicosia, Cyprus. The European Ombudsman spoke about "Prospects and Challenges for the 21st Century". Other speakers included Mr Michael BUCKLEY, Parliamentary Commissioner for Administration, UK, who spoke about "The Effectiveness of the Ombudsman in the Oversight of the Administrative Conduct of Public Bodies"; Mr Nikiforos DIAMANDOUROS, the Greek Ombudsman, who dealt with "Democracy, Accountability and the Institution of the Ombudsman"; Mr Pierre-Yves MONETTE, Federal Ombudsman of Belgium, who presented a paper on "Moving from Adversarial to Non-Adversarial Approaches - a contemporary Approach in Ombudsmanship". Mr Lauri LEHTIMAJA, the Parliamentary Ombudsman of Finland, spoke about "The Pro-active, preventive and educative role of the Ombudsman"; Ms Kertin ANDRÉ, Parliamentary Ombudsman of Sweden, presented a paper on "The Role of the Ombudsman in Balancing the Exercise of Governmental Power and its Accountability". Ombudsmen and experts from 15 EU, accession and other European countries attended the seminar which was organised by Mrs Eliana NICOLAU, Commissioner for Administration of Cyprus. Several social activities were hosted by the President of the Republic of Cyprus, the Ministers of Justice and Foreign Affairs, and the Mayor of Paphos. The European Ombudsman was accompanied by Mr Alexandros KAMANIS.

### *ANDORRA*

#### *Second Statutory Congress of the French-speaking Ombudsman's Association*

From 14 to 18 October, Mr Jacob SÖDERMAN, accompanied by Mr Olivier VERHEECKE, attended the "Second Statutory Congress of the French-speaking Ombudsman's Association" (2ème Congrès Statutaire de l'Association des Ombudsmans et Médiateurs de la Francophonie, "AOMF") in Andorra La Vella (Andorra). The Congress was entitled "Protection des Droits de l'Homme et proximité avec le citoyen : les prérogatives de l'Ombudsman et du Médiateur". (Protection of Human Rights and proximity with the citizen : the Ombudsman's prerogatives)

The Congress was officially opened in the morning of 16 October in the presence of the Andorran authorities. The day before, Mr Bernard STASI, French Ombudsman, and Mrs Maria Grazia VACCHINA, Ombudsman of the Region of Val d'Aosta, were respectively elected as President and Secretary General of the Association.

On 17 October, Mr SÖDERMAN delivered a lecture on the Charter of Fundamental Rights of the European Union and the most recent developments concerning the adoption by the Community institutions and bodies of a Code of Good Administrative Behaviour. On 15 October, Mr VERHEECKE attended the Training Seminar for Ombudsmen's collaborators.

The Congress delegation, consisting of 70 participants from 26 countries was received by the French Ambassador to Andorra, Mr Dominique LASSUS, by His Excellency the Episcopal Co-Prince, Monsignor Joan MARTÍ ALANÍS, by the Head of the Government, Mr Marc FORNÉ MOLNÉ and by the President of the Parliament, Mr Francesc ARENY CASAL.

The General Meeting of the AOMF decided on 6 new accessions, namely the Ombudsmen from the Republic of Congo, Catalunya, Moldavia, the municipality of Paris, the Czech Republic and the Canton of Vaud (Switzerland).

*SWITZERLAND*

On 7 November, Mr Ian HARDEN made a presentation on "European citizenship, the European Ombudsman and the right of access to documents" at the colloquium on European Integration: history and perspectives, organised by the Swiss Institute of Comparative Law and the Fondation Jean Monnet pour l'Europe in Lausanne, Switzerland. Other speakers at the colloquium included Professor J. F. AUBERT (Neuchâtel), Professor R. BIEBER (Lausanne), Professor V. CONSTANTINESCO (Strasbourg), Professor Th. COTTIER (Berne), Mr. P. DANKERT, former President of the European Parliament, Professor R. L. HOWSE (Michigan, USA), Mr E. LANDABURU, Director General of DG Enlargement of the Commission, Mr Ph. LÉGER, Advocate General at the Court of Justice, Professor J. NERGELIUS (Lund), Mr J. POOS MEP, Professor G. REICHELT (Vienna) and Professor H. RIEBEN (President of the Fondation Jean Monnet pour l'Europe). The speech closing the colloquium was given by Mr J. DELORS, former President of the European Commission.

*ITALY*

In the morning of 23 November, an academic thesis on the European Ombudsman was presented at the Faculty of Political Sciences of the LUISS University in Rome. The examination board was composed of the European Ombudsman, Mr Jacob SÖDERMAN; professors Angela DEL VECCHIO, President; Paolo DE CATERINI; Alfonso MATTERA; Ugo VILLANI; Jean CARLO; Antimo VERDE, Alfonso MASUCCI, Ermano BOCCHINI, and Roberto VIRZI. Ms Serena CINQUEGRANA presented her thesis entitled "The European Ombudsman as a Guarantee of the Rights of the Citizens and Against the Maladministration by Community Institutions and Bodies". The rapporteur was Prof. Alfonso MATTERA and Co-rapporteur was Prof. Alfonso MASUCCI.

In the afternoon of 23 November, a Round Table on *The Protection of Citizens and Economic Operators before Community Institutions* was jointly organised by the Public Administration Research Centre "Vittorio Bachelet" and the International and Community Institutions Observatory, of the LUISS University. The panel included the European Ombudsman Mr Jacob SÖDERMAN, Mr Alberto DE ROBERTO, President of the State Council, Mr. Vitaliano GEMELLI, President of the EP Petitions Committee, Mr Alfonso MATTERA, Deputy Director General of the Internal Market DG of the European Commission, as well as professors Gregorio ARENA, Trento University, Sabino CASSESE, La Sapienza University; Mario CHITI and Enzo CHELI, Florence University and Marcelo CLARICH, LUISS University. Files containing information on the activities and role of the European Ombudsman were distributed to the participants in both events.

## 6.3 OTHER EVENTS

On 16 January, a delegation of the Nordic Council headed by Mr Jesper T. SCHWARZ, Senior Advisor, and Ms Jonna SANDOE, Secretary paid a visit to Mr SÖDERMAN. Among other items, they discussed the meeting between the European Ombudsman and the European Committee of the Nordic Council scheduled to take place in Strasbourg in March.

On 17 January, José MARTÍNEZ ARAGÓN lectured to a group of students from the *Institut des Hautes Etudes Européennes* of the University Robert Schuman, in Strasbourg.

On 26 January, Maria ENGLESON attended a lecture given by Richard WHISH, Professor at King's College in London, on the subject: "EC-Competition Law: The Latest Trends and Developments". The meeting was arranged by the European Institute at the University of Zürich, Switzerland.

On 7 February, in the context of the European Parliament's European Week, José MARTÍNEZ ARAGÓN gave a lecture on the role of the European Ombudsman to a large group of international students from the *Institut d'Etudes Politiques* of the University Robert Schuman, in Strasbourg. Many of them were part of the Community *Erasmus* programme.

On 14 February, Mr Thierry CORNILLET MEP and Mr Claude BRULANT from the European Parliament's Committee on Citizens Freedoms and Rights, met with Mr SÖDERMAN and Ms Maria ENGLESON in the Ombudsman's premises in Strasbourg. They discussed issues of fundamental rights in Community law, especially the Charter of Fundamental Rights of the European Union which was proclaimed in Nice, the proposal for a Code of Good Administrative Behaviour and cases dealt with by the Ombudsman including alleged breaches of fundamental rights.

On 15 February, Mr Timo MÄKELÄ, head of the European Commission's representation in Helsinki paid a visit to the Ombudsman.

Also on 15 February, Mr SÖDERMAN gave a speech on his role as European Ombudsman to a group of students from the Danish University of Journalism. He was accompanied by Mr Peter BONNOR who also spoke to the group on the Ombudsman's role regarding openness and transparency in the European Union. After the presentations, Mr SÖDERMAN replied to several interesting questions.

On 15 February, Mr João SANT'ANNA participated in a seminar on the subject *"the importance of mediation"* organized for "DESS" students (diplôme d'études supérieures spécialisées) by the Marc Bloch University of Strasbourg. The meeting took place at the Palais Universitaire of Strasbourg. Besides Mr SANT'ANNA who represented the European Ombudsman, other speakers included Mr Gérard LINDBACHER, Mr Mohammed CHEHHAR, Ms Reine DANGEVILLE, Mr Jean-Louis KIEHL, Ms Marie-Reine MULLER and Ms Nadine REITER, delegates of the French Ombudsman.

On 26 February, Mrs BROMS gave a lecture on the role of the European Ombudsman to a group of legal researchers from the Research School of the Law Faculty of Turku, Finland (*Turun Oikeustieteen tutkijakoulu*).

On 8 March, Mrs BROMS gave a lecture on the role of the European Ombudsman in improving openness within the European Union Administration to a group of members of the Finnish Bar Association.

On 15 March, Mr SÖDERMAN gave a speech in Strasbourg to the European Committee of the Nordic Council consisting of Members of Parliament from Denmark, Finland, Iceland, Norway and Sweden. Mr SÖDERMAN explained his role as European Ombudsman and highlighted some questions concerning transparency, openness and access to documents. The speech was followed by questions from the members of the Nordic Council.

On 15 March, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of 30 students from the *Fremdspracheninstitut* of the *Landeshauptstadt* Munich under the guidance of Mr Klaus GLOCKZIN and Mrs Odile SCHINNER. This visit was organised by the *Bayerische Staatskanzlei* in Munich.

On 15 March, Mr Olivier VERHEECKE received Mrs Fotini AVARKIOTI, a student at the College of Europe, Bruges, writing a Master's Paper on the European Ombudsman.

On 20 March, Mr Olivier VERHEECKE received and explained the activities of the European Ombudsman to Mrs Kelly BROUGH, American Marshall Memorial fellow and Director of the Rocky Mountain leadership programme at the University of Colorado.

On 21 March, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of seven judges from the *Amtsgericht Bingen* under the guidance of Mr Dieter KERNCHEN, Director at the *Amtsgericht* (County court).

On 22 March, Mr SÖDERMAN met in Strasbourg with a group of Nordic Journalists under the guidance of Mr Geo STENIUS of the Finnish broadcasting company *YLE*. The visit was organised in the framework of a seminar arranged by *Nordisk Journalistcenter* in Århus, Denmark. Mr SÖDERMAN presented his work and answered the questions put to him by the journalists.

On 28 March, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of 20 pupils from the *Holbein-Gymnasium* in Augsburg under the guidance of Dr. Eva-Maria HEINLE. This visit was organised by the *Bayerische Staatskanzlei* in Munich.

On 4 April, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of 35 students and adults from the *Politischer Jugendring Dresden* under the guidance of Mr Michael HEIDRICH.

On 26 April, Ms Helle DEGN, Commissioner of the Council of the Baltic States paid a visit to Mr SÖDERMAN. They exchanged views on their respective role and discussed the possibilities of further cooperation.

On 26 April, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of 60 persons from some 12 European countries in the context of a seminar organised by the *International Kolping Society*. The seminar was presided by Mr Anton SALESNY, the person in charge of European affairs at the *International Kolping Society*.

On 15 May, the Ombudsman gave a lecture on his work to a group of Swedish visitors from the Östergötland Region.

*Mr Söderman speaking to visitors from the Östergötland Region, on 15 May.*

On 15 June, a delegation of senior lawyers from the Finnish Central Confederation of Labour paid a visit to Mr SÖDERMAN. The delegation composed of jurists representing several professional unions was headed by Mr Heikki SIPILÄINEN.

On 21 June, Mr Alessandro DEL BON gave a lecture on the role and the work of the European Ombudsman to a group of 43 German trainee school teachers participating in a Seminar on the European Union organised by the "Europäische Akademie Bayern". The Group was lead by Mr Rolf KIMBERGER.

On 2 July, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some 45 students from the university of Regensburg in Germany. The group had been invited at the request of the *Bayerische Staatskanzlei*.

On 5 July, Mr Peter BONNOR gave a lecture on the role and the work of the European Ombudsman to two German groups. One group consisted of 29 students from the *Erlangen-Nürnberg University*, and was accompanied my Mr FISCHER of the *Bayerische Staatskanzlei*, München. The other group consisted of 40 trainee school teachers, and was accompanied by Ms Alke BÜTTNER of the *Europäische Akademie Bayern.*

On 6 September, Mr SÖDERMAN met with the Vice-President of the Andean Parliament, Ms Jhannett MADRIZ in Strasbourg. The meeting dealt with various aspects of the European Ombudsman's activities, mandate, statute and other matters of interest to the parties. Ms MADRIZ travelled from Caracas on a mission which will lead to the establishment of an Ombudsman at the Andean Community level. She was accompanied by her assistant, Mr José GÓMEZ.

On 19 September, Ms Maria MADRID gave a talk on the role and functions of the European Ombudsman to a group of 19 officials participating in a seminar organised by the *Bundesakademie für öffentliche Verwaltung im Bundesministerium des Innern* (Brühl, Germany).

On 21 September, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some thirty students from the *Bosporus-Gesellschaft* in Bonn under the guidance of Mrs Sachka STEFANOVA, Project Manager.

On 27 September, Mr SÖDERMAN gave a lecture to Swedish Heads of Units and Advisors within the EU institutions in Brussels. Organized by Ms Anja EK, the meeting was well attended, and its participants were given background documents on the European Ombudsman's activities.

On 11 October, Ms Maria MADRID gave a talk on the role and activites of the European Ombudsman to a group of 29 social and public health students of the University of Magdeburg, Germany.

On 12 October, Mr Jacob SÖDERMAN, Ms Maria ENGLESON and Ms Sigyn MONKE met in Strasbourg with Mr Martin BRANDORF, Mr Roger J. KARLSSON and Mr Erik NORLANDER from the Research Service of the Swedish Parliament. Mr SÖDERMAN presented his work and latest developments and answered questions from the participants from the Swedish Parliament.

On 19 October, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some twenty civil servants from Germany. The visit was organised by the *Bundesakademie für öffentliche Verwaltung* in Brühl.

On 23 October, Mr Tony VENABLES, Director of ECAS (European Citizen Action Service) paid a visit to the Ombudsman. Items discussed included amongst others the providing of equal services to citizens, citizens' lobbying, and funding people's enhanced access to their rights. Held in Strasbourg, the meeting also considered Mr SÖDERMAN's participation at ECAS's European Citizens' Forum and Debate in Brussels on 29 November 2001.

On 21 November, Mr Gerhard GRILL gave a lecture on the role and the work of the European Ombudsman to a group of some thirty senior civil servants from France.

On 27 November, Mr Olivier VERHEECKE gave a lecture about the activities of the European Ombudsman and recent developments regarding the Code of Good Administrative Behaviour to the Representation of the Tirol Region in Brussels.

On 4 December, Mr Giovanni BUTTARELLI, Secretary General of the Italian Data Protection Authority paid a visit to the European Ombudsman. They discussed subjects of mutual interest.

## 6.4 MEDIA RELATIONS

On 23 January, Mr SÖDERMAN gave an interview to Ms Eva NYBERG for the Finnish *Ålands Radio*.

On 12 February, Mr SÖDERMAN and several other members of his staff were interviewed by Ms Anne PASTOR in the framework of a radio programme entitled *Les Bâtisseurs de l'Europe* which was broadcast on *France Inter* on 24 March.

On 13 February, Ms Kristina HELENIUS interviewed Mr SÖDERMAN for the Finnish Broadcasting Company *YLE - TV1*.

On 13 March, the European Ombudsman was interviewed by the German television *ARD* in relation to his own-initiative inquiry into the freedom of expression of EU civil servants. Excerpts of the interview were to be shown on the evening news that day.

On 16 March, in the framework of an official visit to Vienna, Mr SÖDERMAN was interviewed by Ms Margaretha KOPEINING for the Austrian daily *Kurier*.

On 17 March, Ms Inger ARENANDER and Mr Tomas RAMBERG interviewed Mr SÖDERMAN in Vienna for the *Sveriges Radio* programme *Ekots lördagsintervju*.

On 23 March, Mr SÖDERMAN gave an interview to Ms Metka CELIGOJ, producer of the Slovenian Programmes for the *BBC World Service*.

On 26 March, Ms Aija-Leena LUUKKANEN interviewed Mr SÖDERMAN for the magazine *Socius*, published by the Ministry of Health and Social Affairs of Finland.

On 30 March, Mr SÖDERMAN gave a telephone interview to Mr Lars STRÖMAN, editor of *Europa-Posten*, for the April issue of this publication of the European Commission Representation in Sweden which was devoted to openness.

On 2 April, Mr SÖDERMAN was interviewed by Ms Marja JOHANSSON for the Swedish newspaper *Nya Ludvika Tidning*.

On 3 April, Mr Joonas ROMPPANEN interviewed Mr SÖDERMAN for the Finnish newspaper *Keski-Uusimaa*.

On 4 April, Mr SÖDERMAN was interviewed by Mr Javier PASTORIZA for the Spanish newspaper *Faro de Vigo*.

On 5 April, in the framework of his visit to Sweden, Mr Jacob SÖDERMAN was interviewed by Mrs Matilda HANSSON for the Swedish daily newspaper *Sydsvenskan* and by Mr Niklas LINDSTEDT for the Swedish trade union paper *SKTF-tidningen*.

On 10 April, on the occasion of the European Ombudsman's presentation of his Annual Report for 2000 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 Anna KARISMO and another journalist of *Helsingin Sanomat*, Katja BOXBERG, *Kauppalehti*, Risto JUSSILA, *STT*, Marit INGVES-BACIA, *Hufvudstadsbladet*.

The press briefing was followed by a press lunch, at which Mr SÖDERMAN presented his Annual Report for 2000 to the following journalists: Olivier JÉHIN, *Agence Europe*, Brian BEARY, *European Report*, Denis MCGOWAN and Ben JONES, *Commission en Direct*, María GARCÍA BUSTELO, *Aquí Europa*, Paul HOFHEINZ, *The Wall Street Journal Europe*, Cornelia BOLESCH, *Süddeutsche Zeitung*, Erik RYDBERG, *Le Matin*, Marisandra OZOLINS, *Tageblatt*, Rolf FREDRIKSSON, *Sveriges Television* and David HOWARTH, *The Daily Telegraph*.

On 26 April, Mr Ian HARDEN addressed a group of Swedish journalists from the *Pressinstitutet* of Stockholm who were visiting Brussels, led by Mrs Ulla KINDENBERG. He explained the work of the European Ombudsman in dealing with citizens' complaints about maladministration in the activities of the Community institutions and bodies.

On 27 May, in the framework of his visit to Palma de Mallorca, Mr SÖDERMAN gave an interview to the newspaper *Ultima Hora*, a major paper in the Balearic Islands.

On 28 May, Mr SÖDERMAN gave a press conference in the Yellow Room of the Balearic Parliament. The European Ombudsman's visit was widely covered by the press.

On 26 June, Mr SÖDERMAN gave an interview to Ms Véronique LEBLANC for the Belgian daily *La Libre Belgique*.

On 4 September, the European Ombudsman gave a telephone interview to John SHELLEY of *European Voice*, expressing his reservations over the Commission's White Paper on Governance and outlining a number of areas where citizens' rights in the EU could be improved.

On 5 September, German south west regional television interviewed Mr SÖDERMAN on the subject of his Annual report 2000. Mr SÖDERMAN explained the progress made in 2000 in dealing with complaints and in improving the functioning of the institutions. The Ombudsman also gave an interview on the same subject to Ms Åsa NYLUND for the Swedish-language broadcasting TV1, Finland.

Also on 5 September, the European Ombudsman held a press dinner with journalists to underline the importance of the Code of Good Administrative Behaviour. Mr Roy PERRY (UK, EPP), the European Parliament's rapporteur on the Code, gave a detailed account of its content, while Mr Jean-Maurice DEHOUSSE (B, PES) explained the opinion of the EP Legal Affairs Committee. The journalists present at the dinner were Olivier JÉHIN (Agence Europe), Véronique LEBLANC (La Libre Belgique), Klaas BROEKHUIZEN (Het Financieele Dagblad), Pauliina PULKKINEN (Helsingin Sanomat), Elisabetta JUCCA (Reuters) and Denis ROUSSEAU (Agence France Presse).

On 6 September, Olivier VERHEECKE gave an interview to Elke MEEÙS from the Belgian press agency, Belga, explaining the role of the European Ombudsman and the nature of the complaints he deals with.

On 20 September, the European Ombudsman held an interview with Mr TALKE from the German paper, *Bocholter Borkener Volksblatt*. The interview focused on the role of the Ombudsman, particularly in the field of discrimination.

To conclude the seminar that took place in Brussels on September 20 and 21 entitled "The Ombudsmen against discrimination", Mr SÖDERMAN held a press conference alongside the Belgian parliamentary ombudsmen. The European Ombudsman explained the purpose of the seminar and delivered its conclusions. He then took questions from journalists on his role in fighting discrimination.

On 21 September, Mr SÖDERMAN had an interview with Eva BLÄSSAR, Editor-in-chief of *Eurolang*. The interview focused on the role of the European Ombudsman, and in

particular, on his work in the field of discrimination and the protection of minority languages in the EU.

On 26 September, Mr SÖDERMAN was interviewed by Mr Geo STENIUS for the Swedish-speaking programme OBS, TV1, Finland.

On 13 November, the European Ombudsman gave an interview to Mr Willy SILBERSTEIN for the Swedish TV.

On 14 November, Mr SÖDERMAN gave an interview to the Finnish-speaking channel of the Swedish TV. Issues including the Ombudsman's activities and the panorama of the European minorities inside the Union were touched upon during the interview, which took place at the EP TV studio in Strasbourg. The interviewer was Mr Veli RAASAKKA.

At the end of November 2001, the European Ombudsman gave an interview for the December edition of the magazine of the Spanish Federation of Provincial and Local authorities. The main themes covered included the role of the European Ombudsman, his work for transparency, and the recently approved European Code of Good Administrative Behaviour.

## 6.5 ONLINE COMMUNICATION

The year 2001 has seen the most significant growth yet in the European Ombudsman's Internet presence. Several new sections have been added to the Ombudsman's website and existing sections have been revamped and expanded.

### *Electronic complaint form*

Perhaps the single most significant development has been the addition of an electronically submittable version of the complaint form to the website. This was added in twelve languages in April 2001. Since then, an ever-increasing proportion of complaints has been submitted in this way. The main advantage of the electronic form over complaints submitted by post or as ordinary E-mails is that it can only be submitted if it has been completed correctly. If obligatory fields in the form are left blank, then the computer does not accept the form but instead advises the user of which sections still need to be completed. This means that the Ombudsman is much more likely to have the elements necessary to treat a complaint if it is submitted in this way.

With the growth in Internet use throughout Europe continuing unabated, it is no surprise that the number of citizens contacting the Ombudsman by E-mail has risen again in 2001. Complaints submitted over the Internet now make up over a third of all complaints received by the Ombudsman. This compares to a little under a quarter in 2000 and just a sixth in 1999. This growth is partly due to the addition of the electronically submittable complaint form to the website, but the number of complaints submitted in ordinary E-mails has also increased.

The most staggering growth however has been in the number of requests for information received by E-mail in 2001. In total, over 2335 such requests were received in the main E-mail account of the European Ombudsman in 2001, compared to 1260 in 2000.

### *New sections on the website*

Major new sections have been added to the euro-ombudsman website in 2001. A monthly statistics section giving details on the types of complaints received and the actions resulting from them was added in October. A bibliography section has been created listing theses, books and articles about the European Ombudsman. Links have been added to Regional Ombudsmen and similar bodies in the European Union, to National Ombudsmen and similar bodies in the Applicant Countries for European Union membership and to the

Committee on Petitions of the European Parliament. A regularly-updated calendar gives details of forthcoming events in which the Office of the European Ombudsman will be participating. General background information about the role of the Ombudsman is included in a new section entitled ‘at a glance’. Finally, prominence has been given to the two main publications produced by the European Ombudsman in 2001 -the Annual Report for 2000 and the European Code of Good Administrative Behaviour.

In October 2000, an E-mail campaign was initiated in eleven languages to inform citizens of the right to complain to the European Ombudsman. Over 2000 E-mails were sent from the Office of the European Ombudsman to interested recipients, with a request that they then in turn send the E-mail on to all those whom they knew who might find it of interest. In this way, it is hoped that the E-mail will have reached a wide range of people who follow EU affairs and might therefore have a complaint to make to the Ombudsman.

In order to ensure that the euro-ombudsman website stays at the forefront of EU websites, the Office of the European Ombudsman has participated throughout 2001 in the work of the Inter-Institutional Editorial Committee for Internet.

# 7 ANNEXES

# A STATISTICS CONCERNING THE WORK OF THE EUROPEAN OMBUDSMAN FROM 01.01.2001 TO 31.12.2001

## 1 CASES DEALT WITH DURING 2001

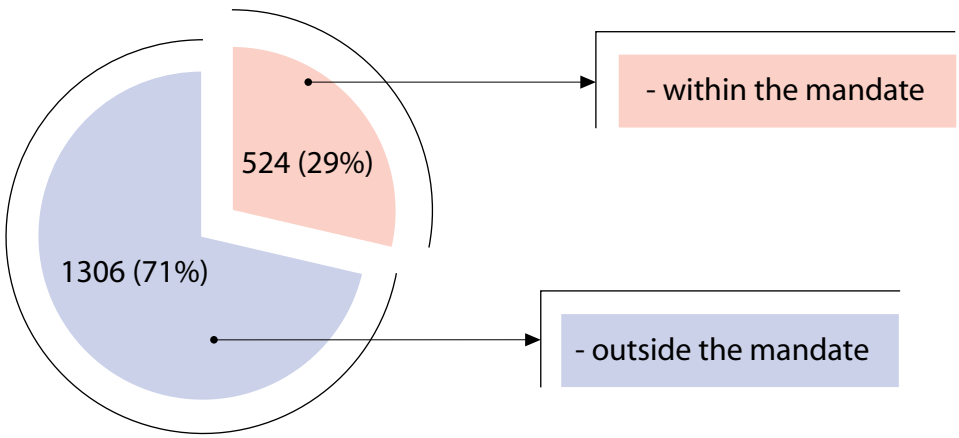
### 1.1 TOTAL CASELOAD IN 2001 2179

| | |
|---|---|
| - complaints and inquiries not closed on 31.12.2000 | 301[1] |
| - complaints received in 2001 | 1874 |
| - own initiatives of the European Ombudsman | 4 |

### 1.2 EXAMINATION OF ADMISSIBILITY/INADMISSIBILITY COMPLETED 92%

### 1.3 CLASSIFICATION OF THE COMPLAINTS

#### *1.3.1 According to the mandate of the European Ombudsman*

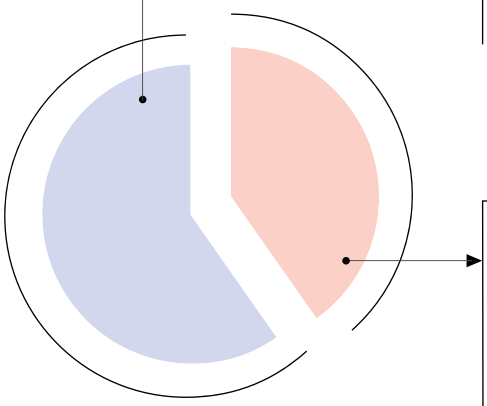



[1] Of which 3 own initiatives of the European Ombudsman and 177 admissible complaints.

### 1.3.2 Reasons for being outside the mandate

| | |
|---|---|
| - not an authorised complainant | 22 |
| - not against a Community institution or body | 1227 |
| - does not concern maladministration | 55 |
| - Court of Justice and Court of First Instance in their judicial role | 2 |

### 1.3.3 Analysis of complaints within the mandate



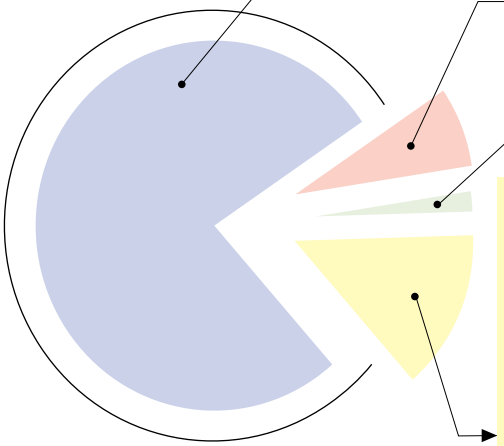
| | |
|---|---|
| Admissible complaints | 313 |
| - inquiries initiated | 204 |
| - no grounds for inquiry | 78 |
| dealt with or considered by Committee on Petitions: | 9 |
| others: | 69 |
| - no sufficient grounds for inquiry | 31 |
| aims too general in nature: | 11 |
| not enough supporting evidence supplied: | 20 |

| | |
|---|---|
| Inadmissible complaints | 211 |
| Inadmissible because | |
| - author/object not identified | 68 |
| - time limit exceeded | 7 |
| - prior administrative approaches not made | 102 |
| - internal remedies not exhausted in staff cases | 28 |
| - alleged facts are or have been the subject of legal proceedings | 6 |

## 2 INQUIRIES INITIATED IN 2001 208

(204 admissible complaints and 4 own initiatives of the Ombudsman)

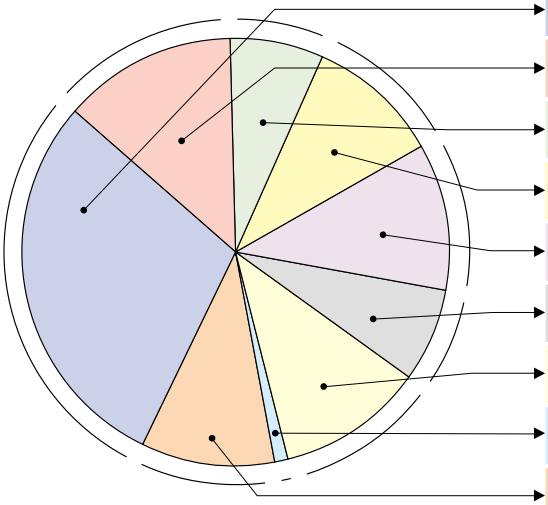
### 2.1 INSTITUTIONS AND BODIES SUBJECT TO INQUIRIES[2]



- European Commission 179 (77%)
- European Parliament 16 (7%)
- Council of the European Union 5 (2%)
- others 33 (14%)

| | |
|---|---|
| Court of Justice : | 4 |
| European Training Foundation : | 1 |
| European Agency for Safety and Health at Work : | 1 |
| OPOCE : | 1 |
| European Investment Bank : | 4 |
| European Central Bank : | 1 |
| European Court of Auditors : | 1 |
| Translation Centre for Bodies of the European Union : | 1 |
| Committee of the Regions | 3 |
| European Centre for the development of Vocational Training : | 1 |
| European Drugs and Drug Addiction Monitoring Centre : | 2 |
| Economic and Social Committee of the European Communities | 2 |
| Europol : | 3 |
| European Foundation for the Improvement of Living and Working Conditions : | 2 |
| European Environment Agency : | 1 |
| European Agency for the Evaluation of Medicinal Products : | 1 |
| Office for Harmonisation in the Internal Market : | 1 |
| Community Plant Variety Office : | 1 |
| European Monitoring Centre on Racism and Xenophobia : | 2 |

### 2.2 TYPE OF MALADMINISTRATION ALLEGED

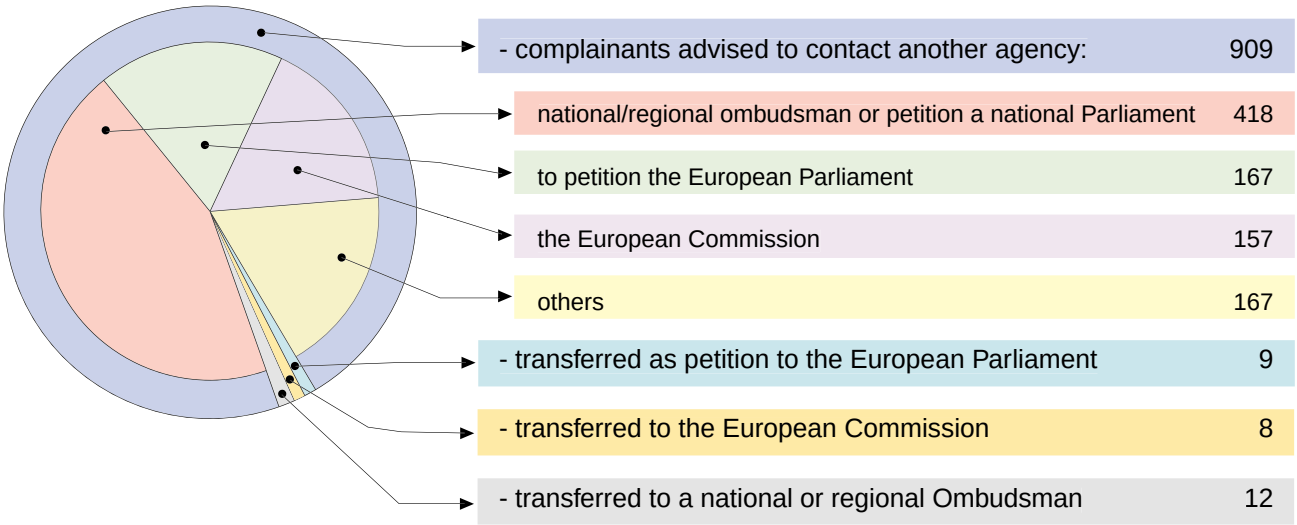


| | | |
|---|---|---|
| - lack or refusal of information, transparency | 84 | (29%) |
| - avoidable delay | 37 | (13%) |
| - discrimination | 19 | (7%) |
| - unfairness, abuse of power | 30 | (10%) |
| - procedural errors, infringements of rights of defence | 32 | (11%) |
| - legal error | 19 | (7%) |
| - negligence | 32 | (11%) |
| - failure to ensure fulfilment of obligations (Art. 226) | 3 | (1%) |
| - other maladministration | 30 | (10%) |

[2] Some cases concern 2 or more institutions or bodies.

## 3 DECISIONS CLOSING THE FILE ON A COMPLAINT OR CONCLUDING AN INQUIRY 1879

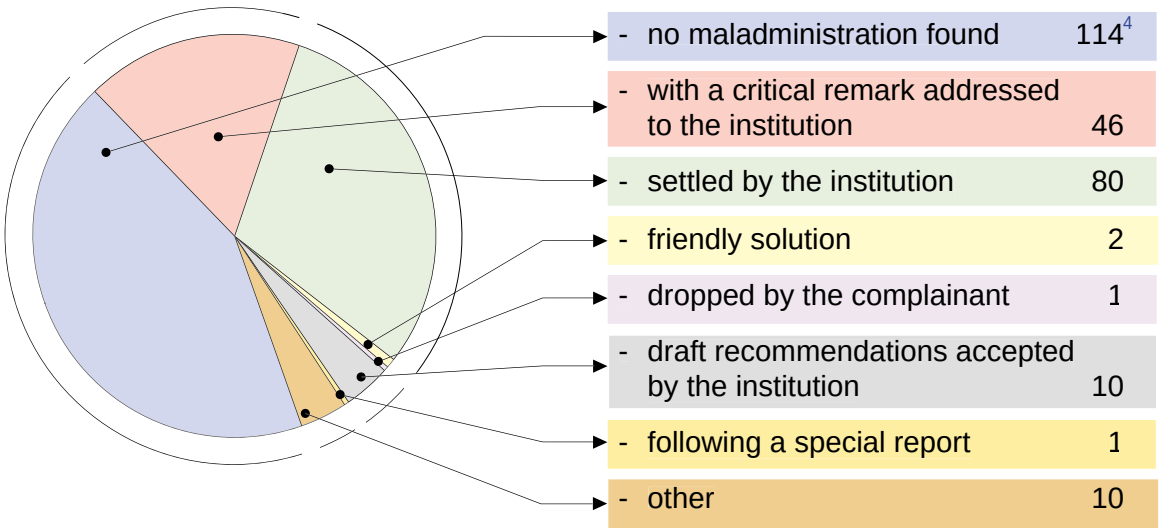
### 3.1 COMPLAINTS OUTSIDE THE MANDATE 1306




### 3.2 COMPLAINTS WITHIN THE MANDATE, BUT INADMISSIBLE 211

### 3.3 COMPLAINTS WITHIN THE MANDATE AND ADMISSIBLE, BUT NO GROUNDS FOR INQUIRY 109

### 3.4 INQUIRIES CLOSED WITH REASONED DECISION 253[3]




3 Of which 3 own initiatives of the Ombudsman.

4 Of which 3 own initiatives of the Ombudsman.

# 4 DRAFT RECOMMENDATIONS MADE IN 2001 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 |

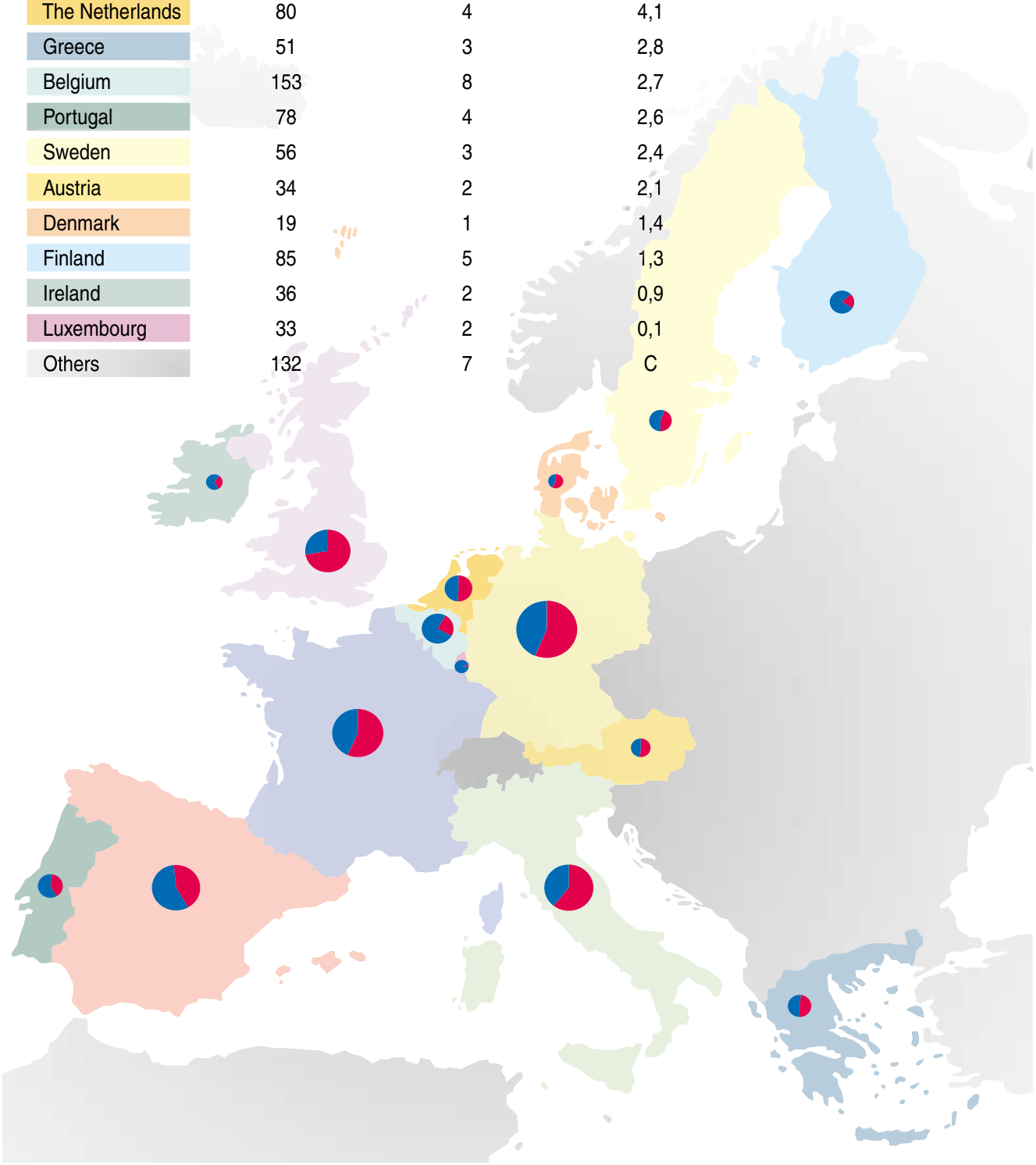
# 5 ORIGIN OF COMPLAINTS REGISTERED IN 2001

## 5.1 SOURCE OF COMPLAINTS

| | | | |
|---|---|---|---|
| - sent directly to the European Ombudsman | | | 1863 |
| by: | individual citizens | 1694 | |
| | companies | 86 | |
| | associations | 83 | |
| - transmitted by a Member of the European Parliament | | | 4 |
| - transmitted by a national or regional ombudsman | | | 5 |
| - petition transferred to the European Ombudsman | | | 2 |

## 5.2 GEOGRAPHICAL ORIGIN OF THE COMPLAINTS

| Country | Number of Complaints | % of Complaints | % of the EU Population |
|---|---|---|---|
| Germany | 323 | 17 | 21,9 |
| United Kingdom | 112 | 6 | 15,7 |
| France | 234 | 12 | 15,6 |
| Italy | 189 | 10 | 15,4 |
| Spain | 259 | 14 | 10,6 |
| The Netherlands | 80 | 4 | 4,1 |
| Greece | 51 | 3 | 2,8 |
| Belgium | 153 | 8 | 2,7 |
| Portugal | 78 | 4 | 2,6 |
| Sweden | 56 | 3 | 2,4 |
| Austria | 34 | 2 | 2,1 |
| Denmark | 19 | 1 | 1,4 |
| Finland | 85 | 5 | 1,3 |
| Ireland | 36 | 2 | 0,9 |
| Luxembourg | 33 | 2 | 0,1 |
| Others | 132 | 7 | 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[5]. 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 deleting articles 12 and 16 in his Statute that had become obsolete. The European Parliament adopted in a report the necessary changes which will enter into force when the Council expresses its agreement.

## 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 staff. 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 matters, 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 co-operation between the European Ombudsman and the European Parliament has allowed for considerable efficiency savings to the Community budget. The co-operation with the European Parliament has in fact allowed the administrative staff of the Ombudsman not to increase substantially. The services provided by Parliament and paid by the Ombudsman are estimated to be equivalent to those that would have to be performed by 5.5 additional posts in the Ombudsman's establishment plan.

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 2001 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.

5 Council Regulation 2673/1999 of 13 December 1999 OJ L 326/1.

The co-operation between the European Parliament and the European Ombudsman was initiated by a Framework Agreement dated 22 September 1995, completed by Agreements on Administrative Cooperation and on Budgetary and Financial Cooperation, signed on 12 October 1995. These agreements were due to expire at the end of the term of office of the Parliament elected in 1994.

In July 1999, the Ombudsman and the President of the European Parliament signed an agreement prolonging the original co-operation agreements until the end of 1999.

In December 1999, the Ombudsman and the President of the European Parliament signed an agreement renewing the co-operation agreements, with modifications, for the year 2000 and providing for automatic renewal thereafter.

### The 2001 Budget

In 1999, following an invitation by the President of the European Parliament, the Ombudsman had presented an action plan for restructuring the office, including separation of legal work from administrative work through the creation of two 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 in 2001 a total of 26 posts.

In 2001, during the procedure for adoption of the 2002 budget, the Ombudsman asked the budgetary authority to review its decision taken in 1999 concerning the action plan for the transformation of the temporary posts on the establishment plan into permanent posts. In December 2001, when the budget for 2002 was adopted, the budgetary authority accepted the Ombudsman's position that all A grade posts in the Legal Department should be temporary except for two senior posts at A4 level which will be permanent. On the other hand, posts in the Administration and Finance Department should in general be permanent.

The total amount of appropriations available in the Ombudsman's 2001 budget was 3.902.316 €. Title 1 (Expenditure relating to persons working with the Institution) amounted to 3.111.390 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounted to 787.926 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounted to 3.000 €.

The following table indicates expenditure in 2001 in terms of committed appropriations.

| | | |
|---|---|---|
| Title 1 | € | 2.965.799,50 |
| Title 2 | € | 647.340,12 |
| Title 3 | € | 1.336,53 |
| Total | € | 3.614.476,15 |

Revenue consists primarily of deductions from the remuneration of the Ombudsman and his staff. In terms of payments received, total revenue in 2001 was 362.475,25 €.

### The 2002 Budget

The 2002 budget, prepared during 2001, provides for an establishment plan of 27, representing an increase of one from the establishment plan for 2001.

Total appropriations for 2002 are 3.912.326 €. Title 1 (Expenditure relating to persons working with the Institution) amounts to 3.197.181 €. Title 2 (Buildings, equipment and miscellaneous operating expenditure) amounts to 712.145 €. Title 3 (Expenditure resulting from special functions carried out by the Institution) amounts to 3.000 €.

The 2002 budget provides for total revenue of 406.153 €.

# C PERSONNEL

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# D INDICES OF DECISIONS

## 1 BY CASE NUMBER

### 1998



### 1999



### 2000



### 2001

# 2 BY SUBJECT MATTER

# 3 BY TYPE OF MALADMINISTRATION ALLEGED

## Abuse of power



## Avoidable delay



## Infringement of rights of defence



## Discrimination



## Error in Article 226 procedure



## Lack or refusal of information



## Legal error



## Negligence



## Procedural errors



## Inadequate reasoning



## Lack of transparency

### Unfairness



### Other maladministration

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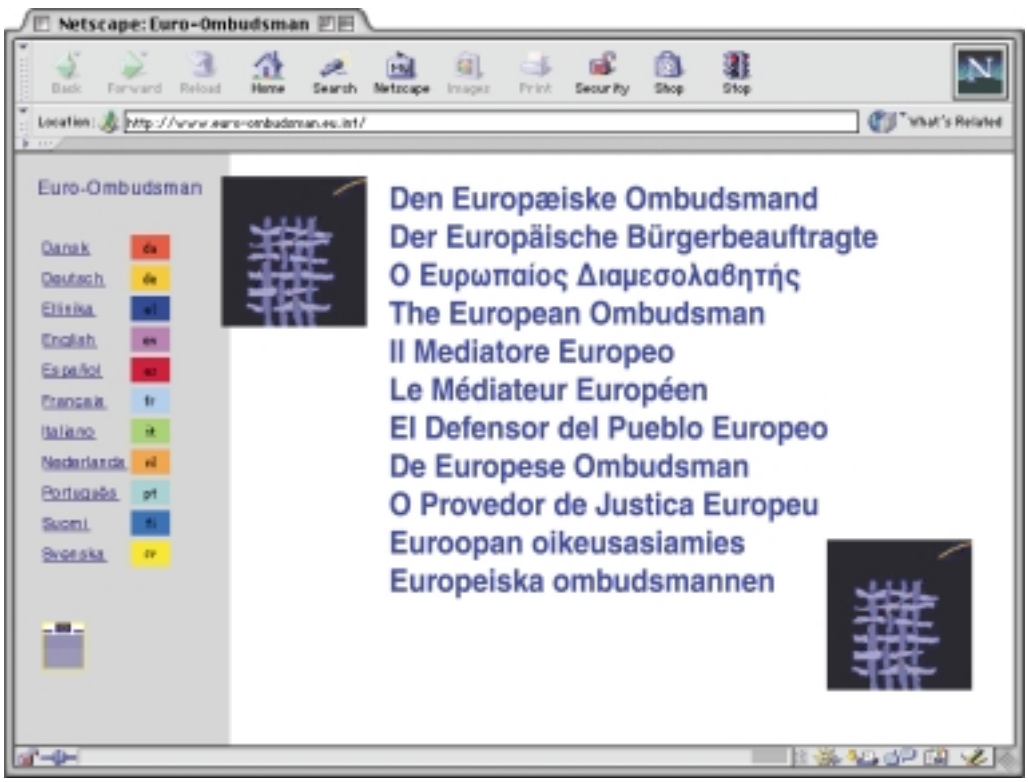

QK-AA-02-001-EN-C

Price (excluding VAT) in Luxembourg: EUR 10

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES
L-2985 LUXEMBOURG

ISBN 92-95010-19-1