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(Information)

THE EUROPEAN OMBUDSMAN

ANNUAL REPORT 1998

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Strasbourg, February 1999

Mr JOSÉ MARÍA GIL-ROBLES GIL-DELGADO

President
European Parliament
Rue Wiertz
B-1047 Bruxelles

Mr President,

In accordance with Article 138e(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 1998.

Jacob SÖDERMAN
Ombudsman of the European Union

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1. **FOREWORD**

Establishing the office of European Ombudsman was one of the most important achievements of the Maastricht Treaty in relation to the citizenship of the Union. The possibility to apply to the Ombudsman is one of the rights of European citizenship, guaranteed by Community law. In my first Annual Report (1995), I announced that I would propose possible reforms and changes in the mandate, powers or procedures of the European Ombudsman's office in the Annual Report for 1998, in the light of the experience gained since the office began work in September 1995. A large part of this foreword is therefore dedicated to fulfilment of that undertaking. The purpose is to ponder what is still needed to establish fully the Ombudsman's office, so that it may serve the European citizens as effectively as possible.

Firstly, I would like to inform readers that the structure of this Annual Report is the same as that for the two previous full years of activity, 1996 and 1997. A significant change has been made, however, in the selection of cases for presentation in the Report. The previous Annual Reports included all cases closed after an inquiry. In the early years of the office, this was useful in order to give a complete picture of the Ombudsman's work. The growing number of cases means that to include them all is no longer defensible from the point of view of the citizens' needs, as many cases are in fact repetitions of earlier ones and not really of significant public interest. In this report, therefore, I adopt the normal practice of national ombudsman offices by including only a selection of cases, so as to keep the length of the report within reasonable limits and ensure that it remains clear and readable.

All cases which raise significant issues of principle are of course included, as well as those raising new issues about the competence or procedures of the Ombudsman, and those which contain findings of general interest. For those who wish to study all cases closed after an inquiry, the website has provided this information in a fresh and comprehensive form since July 1998 by publishing all decisions in English and in the language of the complainant. A paper copy of any decision may also be obtained from the Ombudsman's office.

RESULTS

When the 1997 Annual Report was dealt with by the European Parliament, certain critical voices suggested that the Ombudsman had success in only a small percentage of cases. This view was reached on the basis of all received complaints, including those which are outside the mandate. I do not believe that this way of judging the results of an Ombudsman's activities is really fair. There is not much that can be done about a complaint which is outside the mandate, other than to try to advise the complainant or to transfer the complaint to a competent body. We have managed to do this in almost 80 % of such cases.

During 1998, the Ombudsman's office handled a total of 1 617 cases. Of these, 1 372 were new complaints received in 1998. One own-initiative inquiry was launched during the year, and 185 inquiries were closed with a reasoned decision. In 45 % of these cases, either the institution settled the matter, a friendly solution was found, or the case was closed with a critical remark. In 1997 and 1996, the equivalent figures were 40 % and 35 % respectively. During 1998, in 52 % of cases, no maladministration was found. A finding of no maladministration is not always negative for the citizen. The process of inquiry requires that the institution explain to the complainant what it has done and why. In some cases, it even convinces the complainant that it has acted properly.

It is always necessary for an Ombudsman office to keep close watch over its results from the point of view of the citizen. There is still much to be done in this field, but we should not forget that there has been a continual improvement in the outcome of the cases and the number of cases dealt with. The main aim should be that the time taken to deal with a case be shortened during the next year. The target of

one month to decide on admissibility and one year to close a case after an inquiry has not yet been fully reached, but should become a reality during the years to come.

Positive results can often be achieved through own-initiative inquiries conducted by the Ombudsman. The day to day handling of complaints from citizens may bring particular problems or recurring issues to the Ombudsman's attention. In such cases, a positive initiative by the Ombudsman to address the matter in question may be necessary. In November 1998, I launched an inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a code of good administrative behaviour for officials in their relations with the public.

The idea of such a code has had the consistent support of the European Parliament, where Mr Roy Perry MEP, rapporteur for the report of the Committee on Petitions on its own activities in 1996 to 1997, called for a code of good administrative behaviour to be established for Community institutions and bodies. The Parliament has stressed 'the importance for such a code to be, for reasons of public accessibility and understanding, as identical as possible for all European institutions and bodies'.

More details of the own-initiative inquiry can be found in Chapter 2 (Section 2.2.2). I hope that it will be possible to announce positive results from this initiative in a future Annual Report.

FREEDOM OF MOVEMENT

In the original Spanish proposal to establish a European Ombudsman office, the idea was that the Ombudsman should supervise the rights of the European citizens under Community law at all levels in the European Union, even at the national, regional or municipal level. The high number of complaints which are outside the mandate, still about 70% of complaints received, indicates that the European citizens do not understand that the mandate of the European Ombudsman is limited only to the activities of the Community institutions and bodies.

An analysis of complaints outside the mandate but concerning Community law, made by José Martínez Aragón, Principal Legal Advisor in my Secretariat, and presented in Chapter 2 of this Annual Report, shows that many such complaints concern the right to freedom of movement within the Union. Freedom of movement is one of the rights of Union citizenship guaranteed by Article 8a of the Treaty. Would it not be appropriate for the European Ombudsman to be able to assist the European citizens, in order that they benefit from this fundamental right conferred upon them?

To me it seems totally proper to believe in the principle of subsidiarity and to try consistently to promote the idea that national ombudsmen and similar bodies be encouraged and assisted in dealing with complaints from European citizens concerning Community law. This will be even more relevant when the Treaty of Amsterdam enters into force, bringing questions of visa, asylum and foreigners' rights, which are classic complaints issues for ombudsmen and similar bodies at a national level, into the domain of Community law. The right to petition the European Parliament should also be made better known, especially in matters of principle or with more political significance.

As our cooperation with the national and regional bodies has been developing so positively, I am not prepared to propose any change at this point concerning the mandate of the European Ombudsman as laid down in the Treaty, but undertake to increase my efforts in this field.

What really could help the citizen would be that all remedies under Community law be clearly mentioned in the Treaty, in order properly to inform the European citizens of their rights in this respect. In a society governed by the rule of law, the courts constitute the main system through which the rule of law is upheld. At the moment, however, there is no provision which informs the citizen of the vital role played by national courts in ensuring respect for Community law. Furthermore, the right to complain to national

ombudsmen and to petition parliaments in cases of conflicts with the administration involving Community law should also be mentioned in the Treaty. Each Member State should have an obligation to ensure that its legal structure includes an effective and appropriate non-judicial body to which citizens may apply for this purpose.

I also wish to underline that the right for a European citizen to complain to the European Commission about a possible breach of Community law of a Member State should be included in the Treaty. This seems to be the only way to guarantee the status of the citizens as a party in this process, and to ensure proper and transparent dealing with their complaints in the future.

THE NEED TO CHANGE THE OMBUDSMAN'S STATUTE

The European Parliament has taken an initiative to change the Financial Regulation in order to establish an independent budget for the European Ombudsman. This initiative is to be welcomed if our office is given the necessary time to adjust, so that the dealing with complaints is not hampered. An independent budget from the year 2001 would be realistic in this respect. This timetable would also give the time necessary to make the required amendment to the Ombudsman's Statute.

Another issue concerning the Statute is of more substantial importance. It concerns the limitations for inquiries set out in Article 3(2), according to which access to a file can be refused on *'duly substantiated grounds of secrecy'* and officials and other servants of Community institutions and bodies, when testifying at the request of the Ombudsman, *'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'*.

I believe these limitations are unnecessary and inappropriate. The whole idea of an Ombudsman inquiry is that the citizens can expect that all relevant facts and documents are available to the Ombudsman, even when the information cannot be fully released to the public because it is classified. In every case, the citizens should know that the Ombudsman's inquiries are not restricted, and that he can inspect all necessary files and take all needed testimonies.

The limitations laid down on the hearing of witnesses are unacceptable because, if understood literally, they could even oblige a witness to lie (for example to cover up a fraud case) if instructed to do so by superiors in the administration. To make a reliable inquiry possible, witnesses should only be required to speak the truth and release all relevant facts during an inquiry. The reasoning behind the present provision in the Statute is in fact an obstacle to dealing properly with cases of corruption and fraud within the European administration. If the aim is that the Ombudsman's inquiries should contribute to fighting possible corruption and fraud in the administration on the basis of complaints or initiatives, these inappropriate limitations should be removed.

In practice, the Ombudsman has not yet been refused access to a file, although conversations and disputes have arisen due to the abovementioned limitation. The process of taking testimony has not so far been initiated. To avoid doubt, it would be better for the Treaty to make clear that the Ombudsman has full access, for the purposes of his inquiries, to the files and documents held by Community institutions and bodies and that officials must give full and truthful testimony to the Ombudsman. Naturally, the requirement in Article 4(1) of the Statute that the Ombudsman and his staff must not disclose documents or reveal information obtained in the course of inquiries should remain in force.

FRUITFUL COOPERATION

The Rules of the European Parliament concerning the European Ombudsman have recently been renewed and are almost up to date. It seems necessary however to insert a provision concerning how Parliament

deals with the Annual Report and with possible special reports of the Ombudsman, in order to ensure that the main responsibilities in this respect be conferred on one responsible committee within the Parliament, which when appropriate could request expert opinions from other committees depending on the substance of the report. There is already a draft report ready about this issue and most likely the matter will be settled before the end of this legislature, which would mean that all the needed procedures will have been established when the new Parliament takes over in the second half of 1999.

There might be discussion about further rules regarding cooperation between the European Parliament, its responsible committee and the Ombudsman, but to me this does not seem necessary. The goodwill so far demonstrated in the cooperation has produced positive results and most likely the constructive and flexible cooperation will continue and produce ever better results. Such a positive attitude and atmosphere can never be successfully replaced by even the most detailed and sophisticated rules.

Finally, I would like to thank all Community institutions and bodies for their cooperative and constructive attitude towards the Ombudsman's office. I would especially like to mention in this regard the European Parliament and its responsible committee, the Committee on Petitions, for their profound efforts and consistent assistance in the establishing of the European Ombudsman's office, in order that it might serve and support the citizens of Europe, and thus enhance the relations between those citizens, the European Union and its administration.

Jacob SÖDERMAN

31 December 1998

2. COMPLAINTS TO THE OMBUDSMAN

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

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

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

During 1998, the Ombudsman dealt with 1 617 cases. 1 372 of these were new complaints received in 1998. 1 237 of these were sent directly by individual citizens, 63 came from associations and 60 from companies. Nine complaints were transmitted by Members of the European Parliament. 244 cases were brought forward from the year 1997. The Ombudsman also began one own-initiative inquiry.

As first noted in the Ombudsman's Annual Report for 1995, there is an agreement between the committee and the Ombudsman concerning the mutual transfer of complaints and petitions in appropriate cases. During 1998, three petitions were transferred to the Ombudsman, with the consent of the petitioner, to be dealt with as complaints. 10 complaints were transferred, with the consent of the complainant, to the European Parliament to be dealt with as petitions. Additionally, there were 80 cases in which the Ombudsman advised a complainant to petition the European Parliament. (See Annex A, Statistics, p. 310)

2.1. THE LEGAL BASIS OF THE OMBUDSMAN'S WORK

The Ombudsman's work is carried out in accordance with Article 138e 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, in all official languages, is published on the Ombudsman's website *(http://www.euro-ombudsman.eu.int)*. The text is also available from the Ombudsman's office.

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.

Article 13 of the implementing provisions contains the rules governing public access to documents held by the European Ombudsman.

The Rules of Procedure of the European Parliament contain a number of provisions (Rules 159 to 161) about the Parliament's relationship with the European Ombudsman. In July 1998, the Parliament adopted changes to Rule 161 which were proposed by its Committee on the Rules of Procedure (*rapporteur* Mr Brian Crowley [2]). A draft report proposing a further amendment of Rule 161 is under consideration by the Committee on the Rules of Procedure (*rapporteur* Mr Johannes Voggenhuber). The proposed amendment would make clear that the Ombudsman's Annual and Special reports are dealt with by the same responsible Committee (in practice the Committee on Petitions).

2.2. THE MANDATE OF THE EUROPEAN OMBUDSMAN

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

The mandate of the Ombudsman, established by Article 138e 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] European Parliament Decision 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, (OJ L 113, 4.5.1994, p. 15).

[2] A4-0416/97 (OJ C 292, 21.9.1998, p. 116).

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.

Who is entitled to complain?

In April 1998, the 'Association of persons with nationalised real property', with its seat in Romania, complained to the Ombudsman.

The complaint concerned a Romanian Law that dealt with restitution of real estate which had been nationalised under the Communist regime. In the complainant's view, the Law legalised the nationalisation to a large extent and was therefore in contravention of the Romanian constitution as well as the European Convention on Human Rights, which was ratified by Romania in 1994. The complainant asked the Ombudsman to persuade the Romanian authorities to modify the contested legislation, in order to provide for a more extensive restitution of property.

The Ombudsman informed the complaining association that the complaint was outside his mandate because its seat was not within a Member State of the European Union.

As the Council of Europe had already adopted a resolution on the subject-matter of the complaint, and the complainant was aware of this, it did not appear necessary to inform the complainant of the possibility to contact the European Commission of Human Rights.

Note: In cases where a complaint is made by a non-authorised complainant the Ombudsman has the possibility to deal with the matter as an own-initiative inquiry. In this case, however, no question of an own-initiative inquiry could arise because the subject matter did not involve a possible instance of maladministration in the activities of a Community institution or body.

(Case 398/98/HL)

An example of a complaint which was not against a Community institution or body

In February 1998, Mr D. an employee of the Technical Centre for Agricultural and Rural Cooperation (CTA) complained to the Ombudsman because his employment contract at the Centre had been terminated. Given that the complainant observed that he could no longer rely on the Staff Committee within the CTA, he particularly wanted to know from the Ombudsman which forms of legal redress were open to him.

The Ombudsman considered that the complaint fell outside his mandate, because it did not concern a Community institution or body (Article 2(1) of the Statute). Indeed, the CTA has been set up in the framework of the ACP (African Caribbean and Pacific States) — EC Lomé Convention, which is an international agreement, and is governed by the ACP-EC Committee of Ambassadors (see Article 53 of the Fourth Lomé Convention). The Ombudsman informed Mr D. accordingly.

(Case 218/98/OV)

When do the Court of Justice and the Court of First Instance act 'in their judicial role'?

According to Article 138e(1) of the EC Treaty, the European Ombudsman is empowered to receive complaints concerning instances of 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.'*

In February 1997 Hartmut Nassauer MEP forwarded to the Ombudsman a complaint from Mr L., who alleged maladministration by the Registrars of the Court of Justice and the Court of First Instance in dealing with his requests for access to the files of proceedings which he had initiated before the Courts. Mr L. claimed that the Registrars act in an administrative capacity and that such decisions are not, therefore, decisions of the Courts acting in their judicial role. He also claimed that citizens' access to their files at Court is a fundamental right, enshrined in national constitutions and the European Convention of Human Rights and that failure to respect this right infringes the constitutions of the Member States and in particular Article 103 of the German Constitution.

The question of whether such a complaint involves the Court of Justice and the Court of First Instance acting in their judicial role is a question of Community law, on which the highest authority is the Court of Justice.

In reply to the Ombudsman's inquiries in this case, the Presidents of the Court of Justice and the Court of First Instance stated that the Courts act in their judicial role when dealing with requests for access to case-files. Consequently, the Ombudsman should not continue his inquiry into the possible instances of maladministration in this case. The Ombudsman therefore closed the case.

(Case 126/97/VK)

2.2.1. 'MALADMINISTRATION'

The Ombudsman's Annual Report for 1995 gave a non-exhaustive list of examples of maladministration. In response to a call from the European Parliament for a clear definition of the term, 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 dealing with the Annual Report for 1997 the European Parliament considered that this definition, together with the further explanation provided in the Annual Report gives a clear picture of what lies within the remit of the Ombudsman. Following Mr Newman's proposal on behalf of the Committee on Petitions [1], it adopted a resolution welcoming the definition.

To apply the above definition, it is necessary to identify the rules and principles which are binding. A very useful contribution to making the rules and principles concrete can be made by a code of good administrative behaviour.

2.2.2. A CODE OF GOOD ADMINISTRATIVE BEHAVIOUR

A code of good administrative behaviour would be very helpful for the staff of Community institutions and bodies when they deal with requests or complaints from citizens. Furthermore, if the code is easily accessible to the public (for instance in the form of a decision published in the *Official Journal of the European Communities*), it would provide citizens with information about their rights and the standards of administration they may expect.

In the last few years there has been a general tendency to set up codes and checklists of good administrative behaviour both in the Member States and through international organisations. The Ombudsman referred for instance to the recommendation of 23 April 1998 of the Council of the OECD on improving ethical conduct in the public service. The International Ombudsman Institute published in 1993 a useful Administrative Fairness Checklist. In the law of the Member States, the Ombudsman drew attention to a recent French draft law on the improvement of the relations between the administrations and the public [2], an administrative ethics checklist established by the Ombudsman of Ireland in 1996, and some administrative procedure laws (Belgium, Denmark, Finland, Portugal).

As regards Community institutions and bodies, the only initiative of which the Ombudsman is aware is that of the European Commission. In December 1997, the Secretary General of the Commission sent to the Ombudsman a first draft of a *Code of Conduct for European Commission Officials in their relations with the public*. In January 1998, the Ombudsman sent his remarks on the contents and the form of this draft code and provided the Commission with national examples of codes of good administrative behaviour.

On the basis of Article C of the Treaty on European Union, European citizens are entitled to expect a consistent approach to the matter, which presupposes that arbitrary differences between institutions and bodies as regards the existence and the public accessibility of such codes should be avoided.

In November 1998, the Ombudsman therefore 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. He asked the different Community institutions, bodies and decentralised agencies to inform him whether they had already adopted, or would agree to adopt, a code of good administrative behaviour for their officials in their relations with the public, which is easily accessible to the citizens.

As to the contents of a code of good administrative behaviour, the Ombudsman observed that it could include general rules on both substantive and procedural principles. As regards *substantive principles* a code could include, for instance, the obligation to:

— apply the law and the established rules and procedures (principle of lawfulness),

— avoid discrimination (principle of equality of treatment),

— take measures which are proportional to the aim pursued (principle of proportionality),

— avoid abuse of power,

— ensure objectivity and impartiality (including abstention in cases of personal interest),

— respect legitimate expectations (principle of legal certainty),

— act fairly,

— act consistently.

[1] A4-0258/98 (OJ C 292, 21.9.1998, p. 168).

[2] Projet de loi relatif aux droits des citoyens dans leurs relations avec les administrations, Assemblée Nationale, 1997-1998, No 900.

As regards *procedural principles*, a code could include the obligation to:

— reply to correspondence in the language of the citizen (see Article 8d of the EC Treaty, as amended by the Treaty of Amsterdam),

— send an acknowledgment of receipt if an immediate reply is not possible, and indicate the official in charge of the file (name and telephone number),

— transfer a letter/file to the competent service,

— respect the right to be heard and to make statements before a decision is taken (the rights of defence),

— reply/take a decision within a reasonable time limit (including implied rejection decision),

— take into account all relevant considerations and exclude irrelevant ones,

— state reasons for (individual) decisions, particularly for negative decisions,

— notify the decision to the persons concerned,

— indicate the possibilities of remedy/appeal for negative individual decisions,

— maintain adequate records.

A code could also contain some *obligations in dealing directly with the citizens* such as duties to:

— provide clear and understandable information/give correct advice,

— deal correctly with telephone calls,

— act with courtesy,

— apologise for errors,

— promote public access to the code (by distributing a leaflet for the citizens).

The own-initiative inquiry is addressed to 19 Community institutions and bodies, which are due to reply to the Ombudsman by 28 February 1999.

2.3. FREEDOM OF MOVEMENT AND THE MANDATE OF THE OMBUDSMAN

The Ombudsman has received an increasing number of complaints about the obstacles encountered by many citizens in exercising their right to move freely across the Union's internal frontiers. The problems most frequently raised range from the existence of border controls, the difficulties encountered in establishment in another Member State and the exercise there of an economic activity, to problems in the delivery of residence permits for students, retired and non-working persons, and the application of discriminatory practices on the grounds of nationality. These problems appear to create confusion and disappointment among citizens.

Some examples of complaints made in 1998 concerning freedom of movement

Entry and residence

Mr K. is a German citizen who complained that he did not obtain enough assistance from the German administration when he wished to move from Germany to Ireland.

(Case 295/98/VK)

The complainant states that he is a German citizen living in France who is unable to obtain a residence permit because the French administration claims that it has not been proved that he actually lives in the country.

(Case 420/98/ADB)

Mrs V. R. lives in Germany and her husband in Italy. She complains that every time she, or her friends or relatives intend to visit her husband, the visit has to be reported to the police.

(Case 512/98/ADB)

Study and employment

Mrs. F. C., a French national, complained of discrimination against her daughter who was studying in the Netherlands. As a foreigner, she was not offered the same facilities as Dutch students, such as free public transport, and had been placed under a separate social insurance scheme.

(Case 869/98/ADB)

The complainant is a French citizen, who qualified as a primary school teacher in Belgium. After moving back to France, the complainant was only allowed to work for three years, in private schools, with a temporary contract that had to be renewed each year. In order to be authorised to work like

any other French teacher, the complainant was required to pass an examination and become a civil servant, and also attend a course of one year.

(Case 5/98/XD)

The complainant is a Dutch dietician who wanted to practice in France, but was unable to obtain recognition of the relevant diploma. Both the French Ministry of Employment and the Ministry of Education claimed not to have power to deal with the matter.

(Case 121/98/OV)

Mrs S. is a qualified and experienced physiotherapist. She was offered a job in the United Kingdom provided she obtained the recognition of her Spanish diploma. The Council for Professions Supplementary to Medicine in the United Kingdom refused to recognise her diploma, on the grounds that there are major differences between Spain and the United Kingdom regarding this particular profession.

(Case 298/98/XD)

Taxation and administrative formalities

Mr P. is a Finnish citizen who worked in Sweden. He complains that his Swedish pension is taxed both in Sweden and in Finland.

(Case 97/98/BB)

The complainant moved from Germany to the Netherlands. He claims that, in order to register a car in the Netherlands, he had to provide all the relevant papers as well as the licence plates of the car to the Dutch authorities. He complains that this process took several weeks during which it was not possible to use the car.

(Case 291/98/VK)

Mr C. A. is a Portuguese national who worked in France. Having been made redundant, he decided to go back to Portugal and receive his unemployment benefits there. He complained of great difficulties in obtaining the relevant documents in France.

(Case 393/98/ADB)

Mr A., a Spanish citizen, worked in France and in Switzerland. Having been made redundant in 1996 he decided to return to Spain with his parents. To obtain social security benefits in Spain, he was asked to produce a document (E 301) which can only be delivered to workers who had their last activity in a Member State of the Union.

(Case 436/98/ADB)

Obstacles to the exercise of the right to free movement of persons often result from the incorrect implementation and application of Community law by national, regional and local administrations.

In evaluating the problems unveiled by these complaints and looking for potential solutions, the Ombudsman has taken account of work undertaken in recent years by other Community institutions; in particular the proposals made by the 'High-Level Panel on the Free Movement of Persons [1]', a group of experts gathered by the Commission in January 1996 — and the report prepared by the European Parliament on these proposals [2]. The Ombudsman's experience supports the conclusions akin to those reached by the High-Level Panel and the Parliament's Report.

The European Ombudsman cannot open an inquiry into complaints against national, regional or local administrations of the Member States, since Article 2(1) of the Statute provides:

> *'Within the framework of the Treaties (…) the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies (…). No action by any other authority or person may be the subject of a complaint to the Ombudsman'.*

In accordance with this provision, the Ombudsman has had to declare most of the complaints relating to the free movement of persons within the Union which he has received to be outside his mandate.

The practice, however, has been to suggest that the complaints be forwarded to other institutions able to deal with Member States' failure to comply with Community law. Alternatively, the complaint itself has been directly transferred to these institutions, provided that there had been a previous agreement by the complainant to such a course of action. Depending on the situation at stake and its most effective solution, the Ombudsman has passed the case on to other Community institution such as the Commission, as the guardian of the Treaty, or the Committee on Petitions of the European Parliament; or alternatively to similar institutions in the Member States, such as national and regional ombudsmen.

This type of response has not always been entirely satisfactory, since most often the problems require a speedy and concerted action at both Community and national levels. Whereas Community institutions generally lack the resources and also the means to tackle case-by-case problems resulting from

[1] Report of the High Level Panel on the free movement of persons, chaired by Mrs Simone Veil; submitted to the Commission on 18 March 1997 (C4-181/97).

[2] Report of Mrs Schaffner on the report of the High Level Panel on the free movement of persons, chaired by Mrs Simone Veil; Committee on Civil Liberties and Internal Affairs; 19.3.1998 (A4-0108/98).

occasional administrative decisions, recourse to national bodies is usually limited when difficult Community considerations arise.

It would be desirable to design new mechanisms to better cope with these problems whereby both Community and national bodies could combine their efforts towards a rapid solution of individual problems. In this respect, the Ombudsman shares the point of view put forward by the High Level Panel, which concluded that 'satisfactory application of the right of free movement requires the involvement of all those concerned [1]', including as the report itself recognises, both the European Ombudsman and national Ombudsmen.

A closer cooperation between the European Ombudsman and similar institutions in the Member States, either at national, regional or local level, should facilitate a better exchange of information on specific problems concerning free circulation of persons in Europe, and ultimately, a more effective pressure on the responsible administrative authorities. Such cooperation could also involve the European Commission and the Committee on Petitions of the European Parliament.

The definition of existing rights under Community law — in particular the scope of the right to the free movement of persons — as well as the means available for their protection and defence appears also necessary. It would be desirable that individuals can easily know what are the means to protect the rights vested in them as European citizens, maybe even through a new Treaty provision.

The Ombudsman intends to pursue his review of these complaints relating to the free movement of persons in the Union, and to monitor developments in this area with a view to making more specific proposals in the future.

2.4. **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 (Article 2(3) of the Statute);

2. the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling (Article 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 (Article 2(4));

4. the complaint must have been preceded by appropriate administrative approaches to the institution or body concerned (Article 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 (Article 2(8)).

An example of inadmissibility of a complaint because of Court proceedings

In February 1998, Mr S., a lawyer, wrote to the Ombudsman concerning legal proceedings begun by a client company PO. PO had complained to the Commission in March 1997 about a proposed merger between two other companies. The Commission refused to open an examination of the merger. PO brought proceedings in the Court of First Instance to challenge the refusal.

Mr S. requested that the Ombudsman:

(i) intervene in the proceedings before the Court of First Instance;

(ii) examine whether the Commission had acted fairly in refusing to investigate PO's complaint.

In relation to the first request, Article 1(3) of the Statute of the Ombudsman provides that *'The Ombudsman may not intervene in cases before courts …'.*

In relation to the second request, Article 138e of the EC Treaty provides for the Ombudsman to conduct inquiries: *'except where the alleged facts are or have been the subject of legal proceedings.'*

The Ombudsman therefore informed Mr S. that he could not intervene in the proceedings before the Court of First Instance, nor inquire into the question of whether the Commission may have acted unfairly in dealing with PO's complaint.

(Case 223/98/IJH)

2.5. **GROUNDS FOR INQUIRIES**

The Ombudsman can deal with complaints that are within his mandate and which meet the criteria of admissibility. Article 138e of the EC Treaty provides for him to 'conduct inquiries for which he finds grounds'. In some cases, there may not be

[1] Report of the High Level Panel on the free movement of persons, pages 80 to 83.

sufficient grounds for the Ombudsman to begin an inquiry, even though the complaint is technically admissible. Where a complaint has already been dealt with as a petition by the Committee on Petitions of the European Parliament the Ombudsman normally considers that there are no grounds for him to open an inquiry, unless new evidence is presented.

An example of a complaint that provided no grounds for an inquiry

In February 1998 Mrs B., an official of the European Commission, complained to the Ombudsman because the Commission had not started an infringement procedure against France, further to her complaint in which she alleged that the French social security authorities had refused to reimburse the costs of three months of convalescence that her father had spent in Belgium. According to the complainant this refusal was contrary to the provisions of Regulation (EEC) No 1408/71.

It appeared from the documents transmitted by the complainant that the Commission had decided to suspend the investigation of the complaint of Mrs B., given that it was waiting for two judgments of the Court of Justice (Cases C-120/95 and C-160/96), in which the question of the prior authorisation foreseen by Article 22 of Regulation (EEC) No 1408/71, which conditioned also the issue of the complaint by Mrs B., had to be resolved.

It appeared from the complaint that the Commission had started to examine the complaint, had asked for information from the French authorities and had informed the complainant in a detailed manner about the legal questions raised by her complaint. The Commission had decided to suspend its investigations until the Court had given its judgments. Therefore, the Ombudsman decided that there were no grounds for him to inquire into the complaint and Mrs B. was informed accordingly.

(Case 283/98/OV)

2.6. ANALYSIS OF THE COMPLAINTS

Of the 3 693 complaints registered from the beginning of the activity of the Ombudsman, 15% originated from France, 13% from Germany, 14% from Spain, 11% from the United Kingdom, and 12% from Italy. A full analysis of the geographical origin of complaints is provided in Annex A, Statistics.

During 1998, the process of examining complaints to see if they are within the mandate, meet the criteria of admissibility and provide grounds to open an inquiry was completed in 93% of the cases. 31% of the complaints examined appeared to be within the mandate of the Ombudsman. Of these, 212 met the criteria of admissibility, but 42 did not appear to provide grounds for an inquiry. Inquiries were therefore begun in 170 cases.

Most of the complaints that led to an inquiry were against the European Commission (75%). 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 27 complaints against the European Parliament and seven complaints against the Council of the European Union.

The main types of maladministration alleged were lack of transparency (69 cases), discrimination (21 cases), unsatisfactory procedures or failure to respect rights of defence (25 cases), unfairness or abuse of power (29 cases), avoidable delay (17 cases) negligence (38 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 (11 cases) and legal error (seven cases).

2.7. ADVICE TO CONTACT OTHER AGENCIES AND TRANSFERS

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

During 1998, advice was given in 600 cases, most of which involved issues of Community law. In 259 cases the complainant was advised to take the complaint to a national or regional Ombudsmen or similar body. In addition, with the consent of the complainant seven complaints were transferred directly to a national Ombudsman. 80 complainants were advised to petition the European Parliament and, additionally, 10 complaints were transferred to the European Parliament, with the consent of the complainant, to be dealt with as petitions. In 154 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 107 cases the complainant was advised to contact other agencies.

2.8. DECISIONS FOLLOWING AN INQUIRY BY THE OMBUDSMAN

When the Ombudsman decides to start an inquiry into a complaint, the first step is to send the complaint and any annexes to the Community institution or body concerned for an opinion. When the opinion is received, it is sent to the complainant for observations. As explained in Section 2.10, the Ombudsman cannot take into account information

supplied by one of the parties unless the other party has the opportunity to comment on it.

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

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

If the Ombudsman's inquiries reveal an instance of maladministration, if possible he seeks a friendly solution to eliminate it and satisfy the complainant. At a meeting held in Strasbourg on 21 October 1997, the Ombudsman and the Secretary-General of the Commission, Mr Carlo Trojan agreed that an informal meeting could, in some cases, provide an appropriate way to pursue a friendly solution in cases involving the Commission. One such meeting took place in 1998, leading to a friendly solution.

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. The possibility for the European Ombudsman to present such a Special Report to the Parliament is of inestimable value for his work. Some national Ombudsmen have had a long struggle to obtain a comparable possibility. Special Reports should not therefore be presented too frequently, but only in relation to important matters when the Parliament can take action to assist the Ombudsman in accordance with the Statute of the Ombudsman.

The Ombudsman's first Special Report, made on 15 December 1997, concerned the Ombudsman's own initiative inquiry into public access to documents. The Report was discussed by the Parliament at the plenary session in July 1998 on the basis of the report on it by the Committee on Petitions (*rapporteur* Astrid Thors) ([1]).

In 1998 the Ombudsman began 171 inquiries, 170 in relation to complaints and one own-initiative.

51 cases were settled by the institution or body itself. (As explained in section 2.9, some cases have been classified in this category in 1998 which were not so classified in previous years). In 96 cases, the Ombudsman's inquiries revealed no instance of maladministration.

A critical remark was addressed to the institution in 29 cases. A friendly solution was reached in four cases. One draft recommendation to the institutions and bodies concerned was made. (For further details, see Appendix A, Statistics).

2.9. CASES INVOLVING FAILURE TO REPLY TO CORRESPONDENCE

A common type of complaint concerns failure to reply to correspondence. Soon after the beginning of the Ombudsman's activity, it became clear that a telephone call from the Ombudsman's office to the responsible service often results in an immediate reply to the citizen. In such cases, there is normally no point pursuing the inquiry further.

The former practice of the Ombudsman in cases in which his intervention succeeded in obtaining a reply to unanswered correspondence was to inform the complainant that there no longer appeared to be grounds to conduct an inquiry into the complaint under Article 138e of the EC Treaty (see section 2.5). For statistical purposes, such cases were included in the category 'no grounds for inquiry' in both the 1996 and 1997 Annual Reports. In March 1998, this practice was reviewed, following a query from Mr Edward Newman (*rapporteur* for the Committee on Petitions' report on the 1997 Annual Report) about the cases classified as 'no grounds for inquiry'. It was concluded that, in future, such cases should be classified as 'settled by the institution'. There were 32 decisions of this kind in 1998.

([1]) A4-0265/98 (OJ C 292, 21.9.1998, p. 170).

Complaints about unanswered correspondence: examples of cases settled by the institution

On 3 March 1998, Mr B. complained to the Ombudsman that the Commission had failed to reply to his letter of 2 December 1996 in which he asked for information about the introduction of the euro. The Ombudsman contacted the responsible service of the Commission to request that they reply to the complainant and send him the information which he had requested. Further to this intervention, the Commission replied to the complainant on 18 March 1998. Since this step appeared adequate to settle the matter, the Ombudsman closed the case.

(Case 269/98/ADB)

In June 1998, Ms V. complained on behalf of the County Administrative Court of Uusimaa that the Office for Official Publications of the European Communities (OPOCE) had failed to reply to two letters. The Court had written to OPOCE in Finnish on 10 June 1996 to inquire why it had not received the 1994 Special Edition of the *Official Journal of the European Communities*. A reminder letter was sent on 14 April 1997 in English. No reply was received to either letter.

The Ombudsman contacted OPOCE by telephone to request that a reply be sent to the County Administrative Court of Uusimaa. Further to this intervention, OPOCE contacted the Court and forwarded to it the missing volumes of the *Official Journal of the European Communities* in Finnish and Swedish. Since this step appeared adequate to settle the matter, the Ombudsman closed the case.

(Case 615/98/BB)

Naturally not every complaint about unanswered correspondence can be resolved satisfactorily by telephone enquiries. If the responsible service of the institution concerned cannot identify the correspondence, or if no-one is willing to accept responsibility for preparing a rapid reply, the Ombudsman writes to the President of the institution concerned to request an opinion on the complaint. The Ombudsman would also follow this course of action if there were reason to suspect that the original failure to reply was anything other than an isolated administrative oversight, or if the substance of the complaint is an allegation of unjustified delay in replying to correspondence.

2.10. **SOME ISSUES CONCERNING ACCESS TO DOCUMENTS**

During the course of the year, the Ombudsman considered a number of different questions concerning access to documents. Since it appears that the relevant rules and principles are not always fully understood by the Community institutions and bodies, this section of the Report explains the different questions that arise and how they are dealt with under the Treaty and the Statute of the Ombudsman.

2.10.1. COMPLAINTS ABOUT REFUSAL OF ACCESS TO DOCUMENTS

Most of the Community institutions and bodies have rules on public access to the documents that they hold. In 1993, the Commission and the Council adopted a joint Code of Conduct about access to their documents. The Code was implemented through separate Decisions of the two institutions [1]. Following an own-initiative inquiry by the Ombudsman in 1996, other Community institutions and bodies have also adopted rules on public access, most of which are similar to those of the Council and Commission.

If a request for access to documents is refused, the Council and Commission rules allow the citizen to make a confirmatory application. The citizen whose confirmatory application is rejected has the possibility either to complain to the Ombudsman, or to bring proceedings in the Court of First Instance.

In the case of a complaint to the Ombudsman, the issue is whether the refusal of access constitutes maladministration. The question for any inquiry, therefore, is whether the institution concerned has properly applied its rules on public access, and whether it has acted within the limits of its legal authority in exercising any discretionary power.

During 1998, the question arose of what should happen if the Ombudsman considers that an institution has wrongly applied its own rules. The appropriate course of action is for the institution concerned to reconsider the matter, this time applying the rules correctly. Of course, the Ombudsman cannot order the institution to do this, nor can he annul the relevant decision. However, by explaining his views in a critical remark, he gives the institution itself the possibility to take the necessary action.

2.10.2. FAIR PROCEDURE IN THE OMBUDSMAN'S INQUIRIES

Another question which arose during 1998 concerns the documents which the institution or body concerned sends to the Ombudsman as part of its opinion on the complaint. In some cases the institution concerned has forwarded documents to the Ombudsman containing information which could be

[1] Code of Conduct (OJ L 340, 31.12.1993, p. 41); Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ L 340, 31.12.1993, p. 43); Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ L 46, 18.2.1994, p. 58).

relevant to the Ombudsman's decision on the case, but has asked the Ombudsman to keep the documents confidential vis-à-vis the complainant.

In these cases the Ombudsman has explained to the institution concerned that it is a basic principle of fair procedure that the Ombudsman's decision on a complaint cannot take into account information contained in documents provided by one party, unless the other party has had the chance to respond. The Ombudsman's decision on a complaint cannot, therefore, take into account information contained in documents supplied by the institution or body concerned, unless the complainant has had a chance to make observations on the documents.

2.10.3. THE OMBUDSMAN'S POWER TO INSPECT FILES

A third issue which arose during 1998 concerns the Ombudsman's power to inspect files held by Community institutions and bodies. The relevant part of Article 3(2) of the Statute of the Ombudsman is as follows:

> *'The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.*
>
> *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 normal principle in Member States with a national Ombudsman system is that the Ombudsman can inspect any document held by the administration, if he considers it necessary to do so as part of an inquiry, including documents to which citizens cannot have access.

This power is of fundamental importance, since it is a guarantee for the citizen that the Ombudsman can make an independent check on the accuracy and completeness of the answers given by the administration. For as long as Article 3(2) continues to restrict the Ombudsman's access to documents, therefore, it is important that the restrictions should be interpreted narrowly and that the burden of proof should be on the institution or body which seeks to deny access.

The question of whether restrictions on the European Ombudsman's access to files are appropriate in a European Union which is committed to democracy, transparency and to efficient and honest administration could be considered by the three institutions (European Parliament, Council and Commission) involved in the procedure for amendment of the Statute of the Ombudsman.

Naturally, the Ombudsman's power of inspection is complemented by a duty of confidentiality. Article 4 of the Statute of the Ombudsman makes clear that when the Ombudsman or his staff inspect documents held by the administration, they are bound by the same duty of confidentiality as the administration itself. Inspection of documents by the Ombudsman does not therefore result in release of the documents to the complainant, or to anyone else.

It is therefore a mistake to suggest that the rules on public access to documents which Community institutions and bodies have adopted can be used to restrict the Ombudsman's access to documents. This suggestion appears to be based on a fundamental misunderstanding of the nature of the Ombudsman's power of inspection, which is used to verify the truth and completeness of the administration's answers to a complaint and which does not result in public access to the documents concerned.

3. DECISIONS FOLLOWING AN INQUIRY

3.1. CASES WHERE NO MALADMINISTRATION WAS FOUND

3.1.1. THE EUROPEAN PARLIAMENT

RECOVERY OF MEDICAL EXPENSES

Decision on complaint 1044/20.11.96/KP/JMA against the European Parliament

The complaint

In November 1996 X. complained to the Ombudsman concerning the refusal of the European Parliament to reimburse the cost of a cure for delicate children for her daughter.

The European Parliament rejected her request on the grounds that the medical centre concerned 'was not considered a competent medical or paramedical institute'. A second request was rejected on the basis that the treatment in question did not seem to correspond to the requirements of a cure for delicate children.

In December 1994 the complainant appealed unsuccessfully to the Secretary-General of the Parliament. The Secretary-General's response indicated that the complainant had a right to recover specific medical expenses incurred during the cure.

In the complaint to the Ombudsman, X. claimed that:

(i) the European Parliament had not followed proper procedures, since the Management Committee of the Health Insurance Scheme had not given its advice on the matter;

(ii) the treatment should have been considered as the most appropriate for her daughter;

(iii) her request for reimbursement of specific medical expenses had been rejected on the grounds that it had not stipulated the price and the date of every medical visit and the name and the quality of doctors.

The complainant asked the Ombudsman to take the necessary steps to compel the European Parliament to pay all the expenses for the cure, including travel costs.

The inquiry

The Parliament's opinion

The complaint was forwarded to the European Parliament. The Parliament's opinion stated that the normal procedure in a case of this type would be appeal to the Court of First Instance.

On the substance of the complaint the opinion included, in summary, the following points:

(i) in reaching its decision, the appointing authority took due account of the opinion given by the Management Committee of the Health Insurance Scheme;

(ii) treatment in the selected centre was usually given to children under 16 years of age, whereas the complainant's daughter was already 17 when she started her treatment;

(iii) X.'s request for reimbursement for individual medical expenses incurred during the cure was not in conformity with the relevant rules, since it was too general and included costs which could not be reimbursed. Furthermore, the relevant rules provide that travel costs cannot be reimbursed.

The complainant's observations

In her observations, X. stated that she had decided not to appeal to the Court of First Instance.

She claimed that the bill from the medical centre was correctly filled out and stated that the price of the treatment had been calculated on a package basis, from which medical costs could not be separately identified. She considered that the Parliament's refusal to reimburse her showed lack of flexibility and good will.

X. also commented on the procedure followed by the Ombudsman in dealing with complaints. She considered that it was not appropriate to begin the procedure by forwarding the complaint to the institution concerned for an opinion.

The Decision

1. ***Powers of the European Ombudsman to make inquiries into the case***

1.1. The European Parliament stated that the normal procedure in a case of this type would be to make an application to the Court of First Instance.

1.2. Within the constitutional framework of the Treaties, the Court of Justice is the highest authority on the interpretation and application of Community law. However, the Ombudsman makes inquiries to help uncover instances of maladministration in the activities of Community institutions and bodies.

1.3. To be admissible, a complaint to the Ombudsman must have been preceded by the appropriate administrative approaches to the institution concerned. Similarly, if the complaint concerns work relationships between the Community institutions and bodies and their officials and other servants, no complaint can be made to the Ombudsman unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90(1) and (2) of the Staff Regulations, have been exhausted by the person concerned ([1]).

1.4. Once these internal procedures have been exhausted, Community officials or other servants have the possibility either to appeal to the Court of First Instance, or alternatively, to complain to the Ombudsman.

2. ***The Ombudsman's procedures***

2.1. In her observations, the complainant considered that it was not appropriate for the Ombudsman to begin an inquiry by forwarding the complaint to the institution concerned for an opinion.

2.2. Article 3(1) of the Statute of the Ombudsman, requires that the Ombudsman shall inform the institution or body concerned of his inquiries into any suspected instance of maladministration, so that they can submit any useful comment to him.

3. ***Medical considerations on the type of cure to be followed***

3.1. Annex I, Title XI of the Rules governing the reimbursement of medical expenses provides that cures at a health resort must be recognised as strictly necessary by the medical officer responsible for settling claims.

3.2. In the present case the responsible medical officer, having reviewed the case, concluded that the cure did not meet the necessary medical requirements. There was no evidence that in reaching this decision, the medical officer had not properly followed the relevant criteria.

4. ***Reimbursement of expenses***

4.1. Although the Parliament refused to reimburse the whole cost of the cure for delicate children, it agreed to cover specific medical expenses. However, the Parliament rejected the bill submitted by the complainant on the grounds that it did not identify these costs separately, but referred only to a general sum corresponding to the medical centre's daily charges.

4.2. The applicable Rules provide only for reimbursement of medical expenses. The Parliament therefore acted properly in requiring separate identification of medical expenses as a condition of reimbursement.

4.3. Annex I, Title XI of the Rules governing the reimbursement of medical expenses do not provide for reimbursement of travel costs.

Conclusion

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

RULES FOR JOINING EUROPEAN PARLIAMENT PENSION SCHEME

Decision on joined complaints 74/97/PD and 85/97/PD against the European Parliament

The complaints

In January 1997, Mr M., MEP, complained to the Ombudsman against the European Parliament, alleging maladministration in relation to the additional pension scheme for Members of Parliament. Also in January 1997 Mr B., a former MEP, informed the Ombudsman that he would like to associate himself with Mr M.'s complaint.

The background to the complaints was that, by decision of 12 June 1990, the Bureau of the Parliament set up an additional (voluntary) pension scheme for Members. The rules governing the pension scheme constitute Annex IX (formerly Annex X) to the Rules governing the payment of expenses and allowances to Members. In the autumn of 1992, a time limit of six months was laid down for joining the pension scheme. Neither Mr M. nor Mr B. joined the scheme at that time; they claimed that they were not informed about the introduction of the time limit.

Having been re-elected to the European Parliament in 1994, Mr M. was allowed to join for the period 1994 to 1999, but not for the previous period. As Mr B. was no longer an MEP, he could not apply to join for the period 1994 to 1999, and he was not allowed to join for the previous period.

Mr M. contacted different instances within the Parliament with a view to being allowed to join the scheme retroactively, for the period before 1994. He argued that he had not been

([1]) Article 2(8), Statute of the European Ombudsman.

informed about the time limit introduced in 1992 and that Parliament had applied the time limit in an unfair and discriminatory way. On 24 July 1995, the Chairman of the Pension Fund set up under the scheme, who was also Member of the College of Quaestors of the Parliament, replied. The letter drew Mr M's attention to the cut-off date for joining the scheme, and informed him that the possibility of backdated contributions had been considered. It had been concluded, however, that such backdating was neither practical nor legal. The letter added:

'May I also correct an error you have made concerning the College of Quaestors' discussion on 24 April concerning Mr L. As you will see from the enclosed extract of the minutes of that meeting that matter concerned the French and Italian pension schemes administered by the European Parliament on behalf of the French and Italian Governments. Thus it refers to Annex III of the Rules on Members' Expenses and Allowances rather than Annex X (now Annex IX) which actually contains the rules of MEPs' additional voluntary pension scheme. In addition to this, the request by Mr L. was to receive a pension from, rather than join, that particular pension scheme.'

The abovementioned extract of the minutes of the meeting of the College of Quaestors read:

'… under the rules governing the pensions for Members of the French National Assembly, which applied by analogy to French Members of the European Parliament, applications to receive a pension must be made in writing within six months of the date on which a Member or former Member becomes eligible. A former French Member, who was unaware of this provision, had made his application to the European Parliament seven months after becoming eligible. After a brief discussion, the College:

authorised an exception to the current Rules in favour of Mr L. in order to enable him to receive the pension notwithstanding his failure to apply within the six-month time limit;

instructed the Administration to submit a draft amendment with the aim of clarifying the time limits applicable to Annex III to the Rules on Members' Expenses and Allowances.'

In their complaints to the Ombudsman, the complainants alleged in substance that:

(i) the time limit for joining the pension scheme was not properly advertised;

(ii) it was unfair and discriminatory not to allow the complainants to join the scheme with retroactive effect.

The inquiry

The European Parliament's opinion

The complaints were forwarded to the European Parliament. In its opinion, the Parliament stated that it had examined the complaints on the basis of an opinion from its Legal Service, and adopted a decision which rejected the complainants' allegations. It enclosed a copy of the opinion from its Legal Service.

In substance, the opinion from the Legal Service concluded that the complainants' claim not to have been properly informed of the changes was unfounded. Mr M. had been given written notice at the Parliament and his home address. In addition, the minutes of the decisions by the Bureau were circulated to all MEPs who, moreover, again had six months to join the pension scheme following their re-election. As for Mr B., the Legal Service had not been given any evidence to prove that he had not been aware of the time limit for joining the scheme. The Legal Service also did not have any evidence that Mr B. asked to join the scheme prior to the contested decision by the College of Quaestors or the modifications of the regulations by the Bureau.

As for the decision of 28 October to fix a time limit of six months, the Legal Service considered that the College was bound to respect a general rule set up by itself. To do otherwise would infringe the principle of equal treatment. Accordingly, membership was refused to all MEPs who applied after 15 December 1992, with one exception. That exception, however, was specific. It had been based on an agreement of the College of Quaestors made before the question arose of limiting membership of the pension scheme in the middle of a parliamentary term of office. It could not, therefore, be applied, in the present case, as a general exception to the rule.

Finally, the opinion of the Legal Service put forward the following additional three points as a basis for their conclusion that the contested decision was not arbitrary:

1. *to ensure a healthy financial management and restore a financial balance in the pension fund which according to a report by Coopers and Lybrand of 4 August 1992 was deficient at that moment;*

2. *to allow the accountants to carry out reliable actuarial calculations necessary within the framework of financial management, and to allow the budgetary authorities to make more detailed budgetary forecasts;*

3. *not to discriminate against the members who had joined the scheme at its very beginning and whose financial situation would in fact be less favourable than the 'new members' who would be able to make back payments.*

The complainants' observations

In their observations the complainants maintained their complaints.

The Decision

1. ***The allegation that the deadline for joining the pension scheme was not properly advertised***

1.1. It appears that there are no regulatory rules governing the question of what should be considered to be proper advertisement to MEPs. In particular, the European Parliament's Rules of Procedure do not contain any relevant rules.

1.2. In relation to Article 173 of the Treaty and Articles 90 and 91 of the Staff Regulations, the Community Courts have ruled that the notification of a measure normally occurs when the measure is communicated to the addressee and he is able to take knowledge of it [1]. The Courts have also ruled that the burden of proof of due notification lies with the administration. However, this case-law does not appear to be transposable to this case. The case-law concerns individual acts which adversely affect the addressee, where the exact definition of the moment of notification is of utmost importance for the calculation of the time limit within which judicial proceedings can be brought. This case concerns communication of general information concerning an offer, of which the addressee can choose to make use or not. In case the addressee applies and his application is refused, it is that refusal to which the time limit for bringing judicial proceedings applies [2].

1.3. As for the Community institutions' administrative practices, it appears that frequent use is made of general communications to make possible rights known to servants for which they may have to apply [3].

1.4. On this basis, it must be concluded that the question of proper communication of information to MEPs is a question that lies within the Parliament's powers of internal organisation. In exercising these powers, the Parliament shall, according to the case-law of the Community Courts, act in conformity with the interests of good administration [4]. The question is thus whether Parliament acted accordingly.

It appeared that in this case, Parliament sent out a communication to the Members concerning the time limit introduced in the pension scheme through the internal distribution system of Parliament. As a supplementary way of ensuring the communication to MEPs, the Parliament also sent it by ordinary mail to each MEP's home address. Thus, the individual Member had at least two occasions to get knowledge of the time limit introduced. This did not appear to constitute an instance of maladministration.

2. ***Unfair and discriminatory treatment***

2.1. As for the question whether the refusal to admit the complainants to the scheme with retroactive effect was unfair and discriminatory, it appeared that this question covered two issues. The first issue is whether it was unfair that the Regulation in general did not provide for joining with retroactive effect. The second issue is whether the time limit for joining the pension scheme in the complainants' case should have been waived. In this context, it seemed to be common ground between the complainants and Parliament that waiving the time limit in their case would entail joining with retroactive effect. Thus, it was clear that if the first question was answered to the effect that there should be a general possibility for joining with retroactive effect, the second question was made redundant.

2.2. As concerned the first question, it was common ground between the complainants and Parliament that the

[1] See among others, judgment of 9 June 1994 in Case T-94/92, X v Commission, [1994] ECR for Staff law II-481, judgment of 20 March 1991 in Case T-1/90, Casariego v Commission, [1991] ECR II-143, judgment of 13 July 1989 in Case 58/88, Olbrechts v Commission, [1989] ECR 2643 and judgment of 11 May 1989 in Joined Cases 193/87 and 194/87, Maurissen and Union Syndicale v Court of Auditors, [1989] ECR 1045.

[2] It is established case-law of the Community Courts that individual measures which affect the financial situation of individual Members may be subject to legal review, judgment of 23 March 1993 in Case C-314/91, Weber v Parliament, [1993] ECR I-1093.

[3] See for instance, the Commission's comments to the Ombudsman on joined complaints 669/17.6.96/ND/L/VK, 670/27.6.96/KM/L/VK and 679/1.7.96/CS/L/VK, as reported in the Ombudsman's Annual Report for 1997, p. 118, and the Commission's pleadings in Case 159/86, Canters v Commission; judgment of 22 September 1988, ECR 4859.

[4] See judgment of 30 April 1996 in Case C-58/94, Netherlands, supported by the Parliament, v Council, supported by the Commission and France, [1996] ECR I-2169, at paragraph 37.

Regulation did not contain any provision to the effect that the scheme could be joined retroactively. The question was thus whether it was fair that Parliament had not introduced such a provision. It appeared that Parliament had not done so for reasons of sound financial management of the scheme. Furthermore, it shall be noticed that it was within Parliament's powers not to set up a scheme at all. Thus, the Parliament must also be entitled to lay down limitations on the scheme for the said reasons.

Therefore, the Ombudsman found that the fact that the Parliament had not provided for a general possibility for joining the scheme with retroactive effect did not constitute an instance of maladministration.

2.3. As concerned the question whether the time limit for joining the scheme in the complainants' case should have been waived, the examination of this question fell into various parts. Firstly it had to be examined whether the refusal to waive the time limit was unfair and subsequently whether it was discriminatory.

2.4. As for the fairness, it shall firstly be observed that the Regulation governing the pension scheme does not contain any provision allowing for waiving the time limit on grounds of equity. The relevant provision of the Regulation simply provides that Members shall have a 'maximum period of six months following their election or re-election' for joining the scheme.

2.5. In the absence of an explicit provision allowing for waiving the time limit, the question was whether under Community law there exists a general principle to the effect that a time limit shall be waived on grounds of equity. There appears to be no such general principle.

2.6. Against this background and taking into account the reasons of sound financial management indicated by the Parliament, it could not be considered unfair that the time limit was applied strictly to the complainants.

2.7. As for the allegation about discrimination, it shall be recalled that the principle of equal treatment requires that identical situations are treated identically and that different situations are not treated identically.

2.8. It was put forward that another MEP was allowed to join the scheme in spite of being outside the time limit. It appeared from the Parliament's opinion that this Member, prior to the introduction of the time limit, received assurances that she could join the scheme. Thus, her situation was not identical to the one in this case.

2.9. Secondly, it was put forward that Parliament under the retirement pension scheme — the scheme in Annex III — had waived the time limit in one case, i.e. the case mentioned in the letter of 24 July 1995 quoted above. In this regard, it shall be noticed that the demand concerned was presented one month after the expiration of the time limit concerned, that it was presented under another scheme in a different financial situation and that the demand concerned entitlement to a pension to which the Member concerned had already contributed. Furthermore, it appeared from the amendment to the rules, for which the administration was requested to submit a proposal in the quoted minutes of the meeting of the College of Questors, that demands presented outside time limit have no retroactive effect. The situation thus appeared to be different from the one in this case.

2.10. Consequently, the principle of equal treatment did not appear to have been violated. However, the question whether the principle of equal treatment had been violated is a question of law and therefore, it shall be recalled that the Court of Justice is the highest authority on questions of Community law.

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

3.1.2. THE COUNCIL OF THE EUROPEAN UNION

INSPECTION TO CHECK REASONS FOR REFUSAL OF ACCESS TO DOCUMENTS

Decision on complaint 1087/10.12.96/Statewatch/UK/IJH against the Council

The complaint

The complaint concerns four requests for documents which the complainant addressed to the Council in July and August 1996. His applications were made under the Council Decision on public access to Council documents [1] (hereafter 'Decision 93/731/EC').

On 30 July 1996, he requested copies of 71 reports considered at meetings of the 'K4' Committee held in September, October and November 1994. On 31 July 1996 he requested six documents dating from 1992 and 1993. On 13 August 1996 he sent two letters to the Council. The first requested a copy of a single report produced in 1992. The second requested copies of 26 reports considered at the JHA Council held in Luxembourg on 4 June 1996, 23 of which had been produced in 1996 and three of which bore earlier dates.

[1] Council Decision 93/731/EC (OJ L 340, 31.12.1993, p. 43).

On 26 September 1996, the Council's General Secretariat replied to the complainant. The reply stated that his requests *'in this regard are repeat applications which equally relate to a very large number of documents'* and that the General Secretariat had found a fair solution under Article 3(2) of Decision 93/731/EEC by considering only the documents produced in 1996 (i.e. 23 of the 26 documents requested in the second letter dated 13 August 1996). The General Secretariat provided the complainant with 16 of the 23 documents, but denied access to the seven others.

On 10 October 1996, the complainant made a confirmatory application for all the documents to which he had been refused access. On 20 November 1996, the Presidency of the Council replied upholding the original decision to apply a 'fair solution' and therefore considering only the seven documents produced in 1996.

In relation to these seven documents, the Council stated that it had carefully balanced the complainant's interest in seeking access against the interest of the Council in keeping its deliberations confidential and that the latter interest outweighed the former. It gave further details as follows:

'Documents 7574/96, 6982/2/96 and 7753/96 contain detailed national positions on a Convention on external frontiers, on a recommendation on illegal employment of third-country nationals and on a Convention of extradition, respectively. These issues are still under discussion or have been adopted only very recently.

Documents 7717/1/96 and 7718/1/96 contain detailed national positions on the budget of the Europol Drugs Unit and the Europol computer system.

Finally, documents 7788/96 and 7791/96 contain references to opinions of the Council Legal Services on the issue of judicial interpretation of the Europol Convention, as well as comments made by some delegations on this matter.'

In his complaint to the Ombudsman, the complainant claimed that the Council's treatment of his requests for access to documents was unfair and possibly unlawful.

The inquiry

The Council's opinion

The complaint was forwarded to the Council, together with five other complaints made by the same complainant. In March 1997, the Council sent a reply which contested the competence of the Ombudsman to deal with the complaints. On 15 April 1997, the Ombudsman wrote to the Council confirming his original decision that the complaints were within his mandate and renewing his request for an opinion on the substance of the complaints.

On 20 June 1997 the Council complied with the Ombudsman's request. As regards the application of a 'fair solution', the Council remarked that its opinion on another complaint by the same complainant (1053/25.11.96/Statewatch/UK/IJH) also applied in this case.

The complainant's observations

In his observations, the complainant claimed that:

— the Council was not entitled to apply a 'fair solution' to his four requests for documents,

— the Council is not entitled to refuse access to documents on the grounds that they have been recently adopted, or that they include the views of Member States.

The Ombudsman's inspection of documents

The Ombudsman considered it necessary to inspect the seven documents to which the Council had refused access under Article 4(2) of Decision 93/731/EC.

The Ombudsman informed the complainant of the inspection which, in conformity with Article 4(1) of the Statute of the Ombudsman, could not involve release to the complainant of the documents themselves, or any information contained in them.

The inspection was carried out in the Justus Lipsius building of the Council in Brussels on 2 October 1998. As well as providing access to the documents, the Council services offered to supply copies to the Ombudsman's services if required. After inspection of the documents, the Ombudsman's services considered that it was unnecessary to take copies.

The Decision

1. ***The jurisdictional point***

1.1. The Council's objection to the Ombudsman's competence appeared to be based on two propositions:

(a) the competence of the Ombudsman does not extend to actions taken by the Council in relation to cooperation in the fields of Justice and Home Affairs (the 'third pillar'); and

(b) the subject matter of the complaints concerns action taken by the Council under the third pillar.

1.2. The Ombudsman's decision that he can deal with the complaints is based on his view that the second of these propositions is mistaken. It is therefore unnecessary for him to take a position on the first proposition.

1.3. The subject matter of the complaints concerns the Council's response to requests for access to documents. The requests were made under Decision 93/731/EC and were dealt with by the Council accordingly. Decision 93/731/EC was made under Article 151 of the EC Treaty. In its judgement in Netherlands v Council [1], the Court of Justice confirmed that the Decision has legal effects vis-à-vis third parties as a matter of Community law.

1.4. The Decision was interpreted and applied by the Court of First Instance in Carvel and Guardian Newspapers v Council [2], a case which also involved access to third pillar documents. Given the limitations on the jurisdiction of the Court of Justice imposed by Article L of the Treaty on European Union, the Court of First Instance would have had no jurisdiction to deal with this aspect of the Carvel case if access to third pillar documents was itself a third pillar matter.

1.5. From the above, it appears that the correct interpretation and application of Decision 93/731/EC on public access to documents is a matter of Community law and not a third pillar matter, even if the documents in question concern actions under the third pillar. The Ombudsman informed the Council of this decision on 15 April 1997. (*NB:* In its judgment of 17 June 1998, the Court of First Instance rejected, on similar grounds, the Council's objection to the jurisdiction of the Court in the Tidningen Journalisten case [3]).

2. ***The application of a 'fair solution'***

2.1. The complainant has claimed that Article 3(2) of Decision 93/731/EC does not entitle the Council to apply a 'fair solution' to his four applications for documents.

2.2. As the Council noted in its opinion, the issue in relation to this aspect of the complaint is identical to that raised in another complaint by the same complainant: 1053/25.11.96/Statewatch/UK/IJH. The Ombudsman's decision of 28 July 1998 in the above case therefore also applies to the present case.

2.3. Applying the above decision, in particular as regards the meaning of the terms *'repeat applications'* and *'very large documents'*, it is clear that the Council was not entitled to apply a 'fair solution' under Article 3(2) of Decision 93/731/EC to the four requests for documents in this case.

3. ***The refusal of access under Article 4(2)***

3.1. The Council refused access to seven documents under Article 4(2) of Decision 93/731/EC, which reads as follows:

> *'Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.'*

According to the established case-law, the application of this provision requires the Council to strike a genuine balance between, on the one hand, the interest of the citizen in obtaining access to documents and, on the other, any interest of its own in maintaining the confidentiality of its deliberations.

3.2. The complainant claims that, in applying Article 4(2), the Council is not entitled to refuse access to documents on the grounds that they have been recently adopted, or that they include the views of Member States. The Ombudsman is not aware of any legal rule or principle which would require the Council, when balancing the interests under Article 4(2), to exclude either of these elements from consideration.

3.3. The Ombudsman's inspection of documents confirmed that the contents of the documents in question correspond to the reasons given by the Council.

3.4. There appears, therefore, to be no maladministration by the Council in relation to this aspect of the case.

Conclusion

As regards the application by the Council of a 'fair solution', the Ombudsman's critical remark in 1053/25.11.96/Statewatch/UK/IJH (decision of 28 July 1998) applies also to the complainant's requests for documents in the present case.

As regards the refusal of access to seven documents under Article 4(2) of Decision 93/731/EC, on the basis of the Ombudsman's inquiries, there appears to be no maladministration by the Council.

The Ombudsman therefore closed the case.

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[1] Case C-58/94 [1996] ECR I-2169.
[2] Case T-194/94 [1995] ECR II-2765.
[3] Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998, (see paragraphs 70—87 of the judgment).

3.1.3. THE EUROPEAN COMMISSION

COMPETITION: REPLY TO A SUBMISSION — OMBUDSMAN'S COMPETENCE

Decision on complaint 449/96/20.02.96/HKC/PD against the European Commission

The complaint

In February 1996, HKC, a Danish law firm, complained to the Ombudsman on behalf of LF, a Danish trade union. The complaint concerned the Commission's decision to grant an exemption from the competition rules for an alliance agreement between two airlines, whose employees were members of LF. In the complainant's view, the agreement would lead to job losses amongst LF members. According to LF, the Commission had an obligation to take effects on unemployment into account when considering whether to grant competition exemptions. The complaint also concerned the fact that LF's observations, which the Commission had invited LF to submit to it under the applicable exemption Regulation, were neither acknowledged nor replied to.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission claimed that the Ombudsman was not competent to take a stand on the question of whether effects on unemployment should be taken into account when a competition exemption was granted, as the matter concerned an alleged failure in applying the law, as opposed to maladministration. The Commission furthermore contended that it was not obliged to reply to observations which it had invited third parties, such as LF, to submit, as the observations were merely intended to assist the Commission in its analysis.

The complainant's observations

In its observations, the complainant maintained the complaint and considered the Ombudsman competent to deal with all its aspects.

The Decision

1. The Ombudsman considered that he was competent to deal with the question of whether the Commission was obliged to take effects on unemployment into account when considering whether to grant competition exemptions. Further remarks on this issue were made in a letter to the President of the Commission, the contents of which are summarised in the section on further remarks below.

2. On the substantive issue the Ombudsman found that, on the basis of the applicable rules and the case-law of the Court of Justice, there appeared to be no obligation upon the Commission to take such considerations into account.

3. As for the Commission's failure to acknowledge and reply to LF's observations, the Ombudsman observed that the applicable Regulation contained no such obligation. However, by inviting third parties to submit observations, intended to assist it in its analysis, the Commission had placed itself in a situation where the citizens could reasonably expect a reaction from it: all the more so in this case, as LF had an interest in the decision by virtue of the fact that its members were possibly affected by it. The Commission's failure to give a reaction to LF had been, therefore, an instance of maladministration.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

Further remarks

In a letter to the President of the Commission, which accompanied the Decision, the Ombudsman made, in summary, the following further remarks:

The Commission is always welcome to give its views on the admissibility of a complaint, whilst acknowledging that it is for the Ombudsman to decide the question. In this case, however, a fundamental misunderstanding should be corrected. The service responsible for drafting the Commission's replies to the Ombudsman in this case appeared to have assumed that 'wrong application of the law' cannot be 'maladministration'. In fact, the opposite is true: it can never be good administration to fail to act in accordance with the law. The first and most essential task of the Ombudsman when conducting inquiries into possible instances of maladministration in the activities of a Community institution or body is to establish whether the institution concerned has acted lawfully. In carrying out this task, the Ombudsman is always mindful of the fact that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

In other cases in which a complaint has expressly raised a question concerning the interpretation or application of the law, the Commission has supplied an opinion on the matter, which has been forwarded to the complainant. It is normal that the Commission should respond in this way and the Ombudsman trusts that it will continue to do so. The office of the European Ombudsman was set up in order to enhance relations between the Community institutions and bodies and European citizens. This is impossible if an institution does not give its opinion on all the issues presented by a complainant.

In cases where the institution explains that it has acted correctly in accordance with the rules and principles that are binding upon it, the citizen is sometimes satisfied with the explanation, or at least has a better understanding of the institution's actions. More generally, it is always helpful for the Commission's opinions to explain its position on the legal elements in a case, in order to ensure that its views can be taken into account in the Ombudsman's inquiry.

The Ombudsman concluded by requesting the President of the Commission to ensure that responsible Commission services take these further remarks into account when preparing the Commission's replies to the Ombudsman.

COMMISSIONERS' SALARIES: REQUEST FOR INFORMATION

Decision on complaint 586/3.5.96/MCA/ES/JMA against the European Commission

The complaint

On behalf of the 'Asociación Amigos de Benalmádena', Mrs A. lodged a complaint with the Ombudsman in April 1996, concerning the failure of the European Commission to reply to its requests for information on the salaries and other emoluments of two members of the Commission in 1993 and 1994.

The complainant stated that the Commission had failed to reply to two previous letters sent to its Madrid office, on 17 October and 17 December 1995 respectively. In these letters, she requested information on the income (salary plus allowances) earned in 1993 and 1994 by the Spanish members of the Commission, at the time, Messrs Marín and Matutes.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission apologised for its failure to answer the original letters, and indicated that salaries for Commissioners are governed in all cases by Council Regulations No 422/67/EEC, No 5/67/Euratom of 25 July 1967, as amended on a number of occasions.

With regard to mission and travel expenses, it stated that the total amount paid to all Commissioners for this type of expenses in 1994 was ECU 1 300 000. In addition, Commissioners are entitled to the reimbursement of representation expenses, the corresponding sums being ECU 341 000 in 1993 and ECU 335 000 in 1994.

Finally, the Commission stated that all those sums were subject to the internal financial monitoring by the institution itself, and also by the external control of the Court of Auditors.

The complainant's observations

In her observations, Mrs A. stated that her requests were still unanswered. In her view, the Commission had merely referred to a Regulation which was unknown to her. Those comments also referred to a total amount of ECU 1 300 000 paid in expenses to all members of the Commission, but without any indication related to the two Commissioners mentioned in the request.

The Ombudsman's efforts to achieve a friendly solution

In accordance with Article 3(5) of the Statute and with a view of seeking a friendly solution to the case, the Ombudsman wrote again to the Commission. He referred to the fact that the reply given by the institution was still unsatisfactory for the complainant.

He also suggested that the Commission's answer would have to be reviewed in the light of the European Union's commitment towards transparency and public access to information. In view of those principles, he proposed that a satisfactory solution could be found if the Commission, after balancing the interests at stake, were to provide some clearer and more precise information, thereby justifying a clear conclusion as to the information which could be made available.

In its reply, the Commission indicated that it had tried to strike a balance between the need for transparency and the protection of privacy. In order to reach this compromise, it had disclosed information on salaries and other allowances related to the whole of the Commission rather than that concerning specifically two of its members.

Then, the Commission stated that its members' monthly salaries plus other allowances were last established by the Council on December 1996, and explained how they were calculated. As regards representation expenses, they were reimbursed after the invoice had been issued. They were reimbursed up to a maximum of ECU 11 347 per year (for the Commissioner responsible for foreign affairs, the sum is ECU 17 023). Officials who have to travel, in compliance with their duties, receive a reimbursement for travel expenses and daily subsistence allowances which are related to the country in which the mission takes place.

The reply of the Commission was forwarded to the complainant with an invitation to consider the solution proposed by the Commission. In the reply, the complainant expressed her satisfaction with the efforts undertaken by the European Ombudsman to find a friendly settlement of this matter. Nevertheless, she still believed that the reply of the Commission had not answered her questions clearly and specifically. In her view, the control of public expenditure is a paramount objective which should take precedence over any privacy right.

The Decision

1. *Right to the Community's information*

The requests for information sent by the complainant to the Commission in her letters of 17 October and 17 December 1995 raise questions relating to the right of all Community citizens to be informed on important aspects of the administrative workings of the Commission.

In order to weigh up the legal implications of this request, it is necessary to start out from the European Union's undertaking to make the workings of the Community institutions and bodies more transparent and more open to the public. This commitment was spelt out in the Final Act of the Treaty on European Union, which includes Declaration No 17 on the right of access to information. Similarly, it was reaffirmed in a number of European Councils, such as those at Birmingham and Edinburgh.

At present, there are only rules to foster greater public access to information as regards access to documents. In relation to the Commission, this institution adopted on 2 June 1993 communication 93/C 166/04 on transparency in the Community [1], and, on the basis of the guidelines set out in that text, on 8 February 1994 it adopted Decision 94/90/ECSC/EC/Euratom on public access to Commission documents [2]. In the absence of more general rules concerning general information, existing rules on access to documents could provide an appropriate surrogate to decide on citizen's requests for information sent to the institutions.

2. *Conflict between transparency and privacy rights*

The Commission has stated in its comments that specific information on the salaries and other emoluments, mainly travel allowances, concerning individual members of the Commission could impinge on their privacy rights. Accordingly the information which this institution has made public in this case referred only to the entire Commission.

Public release of information could come into conflict with other important values, such as the right of privacy. In the context of the Commission Decision on public access to Commission documents, protection of the individual or privacy is considered a mandatory exception which bars the disclosure of the requested document by the institution. In interpreting this provision, the Court of First Instance has stated that: '[…] *the Commission is obliged to refuse access to a document falling under any one of the exceptions contained in this category once the relevant circumstances are shown to exist*' [3]. In view of the circumstances of the case, the European Ombudsman does not consider that the Commission violated principles of good administration when it disclosed only information related to the whole of the Commission.

3. *Failure to answer correspondence*

The Commission acknowledged that there was a failure to deal promptly with the request for information sent by the complainant to its Madrid office. However, the institution has offered an explanation for the long delay and apologised for it. Since a reply has also been given, there were no grounds for the European Ombudsman to pursue this aspect of the case further.

4. *Control of public expenditure*

In the complainant's view, the failure of the Commission to respond to her questions on the salaries and other emoluments of two Commissioners, made evident the lack of control on this type of expenditure.

All Community accounts, including its personnel and functioning expenditures, are periodically audited by the Court of Auditors. As established in Article 188c of the Treaty, this institution 'shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound'.

The European Ombudsman, noted that there were no indications in the 1993 and 1994 Reports by the Court of Auditors [4] that irregularities might have taken place as regards salaries or other allowances received during those periods by the members of the Commission.

In view of these findings, there appeared to be no maladministration and the Ombudsman therefore closed the case.

DANISH TAXATION ON IMPORTED SECOND-HAND CARS

Decision on complaint 764/9.7.96/TH/DK/PD against the European Commission

The complaint

Mr H., a Danish citizen lodged a complaint with the European Ombudsman in July 1996 concerning the Commission's dealing with and assessment of a complaint that he had lodged with the Commission, alleging that Denmark had failed to fulfil its obligations under Community law.

In his complaint Mr H. stated that for years he had been corresponding with the Commission concerning the

[1] OJ C 166, 17.6.1993, p. 4.
[2] OJ L 46, 18.2.1994, p. 58.
[3] Case T-105/95, WWF UK v Commission [1997], ECR II-313, paragraph 58.
[4] OJ C 327, 24.11.1994, p. 1.
OJ C 303, 14.11.1995, p. 1.

calculation of VAT on second-hand cars imported to Denmark from another Member State (hereinafter just: imported second-hand cars). He put forward that the answers that he had received from the Commission were untrue. From the Annexes to the complaint it appeared that this correspondence also related to Danish registration fees on imported second-hand cars. Consequently, the Ombudsman asked the Commission to address both questions when giving its comments on the complaint.

As for the complainant's grievance concerning VAT, it appeared that he considered that Danish VAT rules on imported second-hand cars were discriminatory to Danish dealers like him. He stated that the Danish rules imply that a private person residing in Denmark can import a second-hand car from Germany without paying VAT in Denmark, if VAT has been paid in Germany on the profit margin of the dealer. On the other hand, the Danish dealer who imports the same car will have to pay Danish VAT on the full price of the same car and can get the German residual VAT reimbursed. The consequence is that the price that the Danish dealer can offer the private person on the same car will be significantly higher than the price the German dealer can offer. Therefore the complainant considered that the rules led to a discriminatory distortion of competition and were contrary to Directive 94/5/EC concerning VAT on second-hand goods, the fundamental principle of which is that VAT shall be paid on the dealer's profit margin.

Mr H. addressed the Commission on this question, and as he was not satisfied with the Commission's initial response, he had his lawyer and a Danish Member of the European Parliament pursue the matter vis-à-vis the Commission. In its answer to the lawyer of 3 March 1995 as well as in its answer of 23 October 1995 to the MEP, the Commission maintained that the Danish rules were not contrary to the Community Directives in this field. In his letter of 23 October 1995 the Commissioner responsible stated:

'You (your MEP) point out the distortions of competition that seem to exist against the Danish dealers of second-hand cars because of the different regimes applicable in Denmark and Germany.

At this stage of the harmonisation of national laws, I am afraid there is no way, in legal terms, to cope with that inconvenience. As a matter of fact, Article 28o(2) of Directive 94/5/EC concerning special arrangements applicable inter alia *to second-hand goods, expressly allows Denmark to derogate from the margin scheme.*

Should you however still have comments or new information, please do not hesitate to contact the services of DG XXI — unit 01.'

As for the complainant's other grievance concerning registration fees, the background was, in summary, the following: By judgment of 11 December 1990 in Case C-47/88 (ECR I-4509), the Court of Justice ruled on the question whether Danish registration fees for imported second-hand cars amounted to discriminatory taxation, prohibited by Article 95 of the EC Treaty. The Danish tax system implied that imported second-hand cars were subject to a motor vehicle registration fee of 90% of their value as new cars, while second-hand cars originating in Denmark were not subject to a registration fee. In order to justify this, Denmark argued that, as it has no car industry, all second-hand cars originating in Denmark had, at a certain moment, been imported as new cars. New cars were submitted to a registration fee of 105% of their price, including VAT, up to the price of DKK 19 750,00 and 180% of the rest of the price. Thus, a considerable part of the price of second-hand cars originating in Denmark would consist of a residual registration fee. Consequently, registration fees for imported second-hand cars should be fixed at a level to take account of the residual registration fee in second-hand cars originating in Denmark. Although the Court of Justice accepted this consideration in principle, it found that generally, the Danish system led to a manifestly excessive taxation of imported second-hand cars. The system was therefore contrary to Article 95 of the EC Treaty. After the Court's ruling, the Danish authorities established a system which in principle aims at ensuring that imported second-hand cars are not submitted to registration fees to a further extent so that the total value of the car will equal the value of an identical second-hand car originating in Denmark. The system is administered so that before the import of a second-hand car, the importer, whether private or professional, can obtain a provisional indication of what the registration fee will be. After import, the authorities fix the final registration fee to be paid, possibly after inspecting the imported second-hand car.

Mr H. considered that the new system operated in a way which continued to be contrary to Article 95 of the Treaty. According to him, the final registration fees fixed after import of the car could be so high that the car could not be sold; the fees were not fixed in an objective way; and there was considerable delay involved in the procedures one had to go through in the context of importing a second-hand car.

Against this background Mr H. lodged a complaint with the Commission. By letter of 29 November 1994 the Commission replied to his complaint in the following terms:

'With reference to the complaint you lodged with the Commission on 28 October 1993 and your telex of 24 February 1994, the Commission's stance is as follows:

You state that the Danish system of VAT and registration duty makes it difficult to import used cars from another Member State into Denmark for the purpose of selling them since the duty on imported used cars is so high that they cannot compete with used cars originally registered in Denmark; you allege that this practice conflicts with Article 95 of the Treaty.

As regards registration duty on used cars imported into Denmark, the Danish rules on used cars were amended following the judgment of the European Court of Justice of 11 December 1990 in Case 47/88. The Court found then that the duty on imported used cars was discriminatory and conflicted with Article 95 of the Treaty.

Even though you may be acquainted with the new Danish rules on the registration of used cars, I would point out that they can be found in the Regulation pursuant to law No 665 of 16 August l993 on registration duty for motor vehicles which states that the basis for calculating the fee is assessed by three assessors appointed by the Minister for Inland Revenue. The assessors include a technical expert and a trade expert appointed on the recommendation of the main organisations of car owners. Complaints about the dutiable value set by the customs and excise authorities may be lodged with the assessors.

The abovementioned Regulation contains a detailed description of the procedure, and indicates that the duty on an imported used car is based on its real value. On the basis of the information provided, the Commission is of the view that this is not a duty that in general is higher than what corresponds to the residual value of the duty involved in the value of a used car of the same type and age registered in Denmark when new. The basis for assessing a vehicle is the normal price of a similar vehicle or a vehicle that, so far as possible, is a similar make and model in a normal state of repair at the time of registration. Deductions are made or extra charges added for mileage, state of repair, improvements and other characteristics. The final price may thus differ from the various trade lists depending on the individual assessment. The estimated dutiable value of used cars may not lead to deviations from the list prices officially applied to cars originally registered in Denmark if it is proved that they are identical in all respects.

If you find that the dutiable value finally established is too high compared with the residual dutiable value for similar vehicles registered for the first time in Denmark, I urge you to contact my department again with details of the assessment.'

As Mr H. was not satisfied by either answer from the Commission, he lodged the complaint with the Ombudsman, alleging that the Commission's answers were untrue and contrary to Community law.

The inquiry

The Commission's opinion

In its comments the Commission put forward that it had dealt appropriately with Mr H.'s case and it maintained its analysis of the case, set out in the letters quoted above. Furthermore, it stated that it was still studying Mr H.'s allegation that the Danish rules, although in compliance with Article 28o of Directive 94/5/EC, were contrary to Article 95. The Commission stated that this argument concerning a Directive's incompatibility with the EC Treaty raised problems that it would have to analyse in detail. By letter of 26 June 1997 the Commission informed the Ombudsman about the results of its analysis. It stated:

'1. *First of all, we find that, in cases where the "special tax arrangements" referred to in Article 28o of the sixth VAT Directive apply (notably in Denmark pursuant to the option granted it by paragraph 2 of the said Article) by way of derogation from the normal system of taxing the resale of second-hand goods introduced by Directive 94/5/EC the difference in the tax charge stems from the differences which exist between the rate of VAT in force in Denmark (25%) and those in force in other Member States. It can even be stated that pursuant to the deduction mechanism laid down, or even imposed by Article 28o(1)(b) and the third indent of (c), the difference in the tax charged on second-hand vehicles resold in Denmark and which varies on the basis of the vehicles' Member State of origin, is a direct consequence of the difference in the rates of VAT applied by the various Member States. It may even be noted in passing that this difference in VAT rates is the result of a deliberate choice by the Community legislator who, within a broadly harmonised system of taxation such as the VAT system, confined himself to laying down, in Article 12(2)(a) of the sixth Directive, a minimum rate of 15%, thus implicitly leaving the Member States free to set VAT rates which are higher than the said floor "rate."*

2. *The situation consisting of a difference of treatment between products or traders of different Member States — a difference which is entirely attributable to differences between national laws which are not (or not completely) harmonised — was very recently dealt with by the Court in its Perfili judgment of 1 February 1996* ([1]), *in which it stated (paragraph 17 of the judgment):*

> *"However, the Court has consistently held that, in prohibiting every Member State from applying its law differently on the ground of nationality, within the field of application of the Treaty, Articles 6, 52 and 59 are not concerned with any disparities in treatment which may result, between Member States, from differences existing between the laws of the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality (see, to that effect, the judgments in Case 1/78 Kenny v Insurance Officer [1978] ECR 1489, paragraph 18; Joined Cases C-251/90 and 252/90 Wood and Cowie [1992] ECR I-2873,*

([1]) Case C-177/94, Criminal proceedings against Gianfranco Perfili [1996] ECR I-161.

paragraph 19; and Joined Cases 185/78 to 204/78 Van Dam en Zonen and others (1979) ECR 2345, paragraph 10)."

3. *We consider that the very general interpretative principle expressed by the Court in the abovementioned Perfili judgment and in many earlier judgments may be applied, while adapting it to the circumstances of the case, to the problem in question, which comes under a non-discrimination rule — Article 95 — broadly similar in spirit to the Articles 6, 52 and 59 of the Treaty explicitly mentioned by the Court. If the rate of VAT was directly set by the Community legislator at a uniform percentage of the price of the goods supplied throughout the Community, the disadvantages indicated by certain Danish dealers would automatically disappear.*

It should also be noted that even at the present time the problem of a heavier tax charge in respect of second-hand vehicles resold in Denmark and purchased in other Member States arises only in respect of vehicles coming from Member States which apply a rate of VAT which is lower than the Danish rate, whereas no difference in taxation could affect second-hand vehicles purchased in a Member State which applies the same rate of VAT as Denmark (e.g. Sweden). A vehicle coming from a Member State which, for argument's sake, had set its rate of VAT at more than 25% would actually receive more advantageous tax treatment than the same second-hand vehicle purchased within Denmark.

4. *In the light of the foregoing considerations, we are of the opinion that the difference in the tax charge which, in Denmark, stems from the different rates of VAT which the dealer has to deduct as "input tax" from the "output tax" for which he is liable pursuant to Article 28o(1) of the sixth Directive, "results"— to use the same words as the Court — "from differences existing between the laws of the various Member States".*

It would also appear that "input VAT" is deducted in accordance with an objective criterion, namely, "the rate applicable in the Member State within which the place of the supply to the taxable dealer, determined in accordance with Article 8, is deemed to be situated", a criterion which has no regard to the origin of the product and is applied without distinction to all dealers subject to Danish VAT legislation and to all used vehicles resold in Denmark.

In these circumstances, we conclude that Denmark is not in infringement of Article 95 of the Treaty.'

The complainant's observations

In his observations Mr H. maintained that the Commission had not dealt with his case. Furthermore, as for his grievance related to registration fees, he put forward that in some cases the Danish authorities' establishment of the final fee varied considerably from the provisional fee and that the staff in charge of the evaluation of imported second-hand cars was not competent. He furthermore stated that before importing a second-hand car, one was required to produce the registration papers of the car in order to know the provisional fee and that this requirement implied in practice that one had to buy the car without knowing the amount of the final fee, the reason being that no car dealer would hand out registration papers without first having sold the car in question. He furthermore stated that the Danish rules entailed a problem in the leasing of imported second-hand cars and that imported second-hand taxis were not put on an equal footing with second-hand taxis originating in Denmark. Furthermore, he stated and evidenced that a person resident in Denmark who worked for a German company in Germany could not fully use the company car in Denmark that the company put at his disposal.

The Decision

As for both grievances, it has to be recalled that the European Ombudsman cannot inquire into the activities of national authorities. The Ombudsman can therefore only inquire into Mr H.'s original allegation that the Commission had not dealt with and properly assessed the case that he had brought forward.

As for his grievance concerning registration fees, it appeared that the Commission had dealt with it and assessed it. The outstanding question was thus whether the Commission's assessment was right. The system that the Danish authorities set up after the abovementioned ruling of the Court of Justice, was aimed at ensuring that the registration fees were set so that the total value of the imported second-hand car, including registration fee, did not exceed that of a second-hand car originating in Denmark, including the residual registration fee paid when the car was new. The Commission found that this system as such complied with the Court's ruling. If Mr H. had proof of the contrary, the Commission invited him to submit that proof. There were no elements at hand which indicated that this assessment was wrong. However, it shall be recalled that the Court of Justice is the highest authority on questions of Community law.

As for the complainant's grievance concerning VAT, it appeared that the Commission had dealt with it and assessed it. The crucial question was thus equally whether the Commission's assessment was right. It appeared to be established and uncontested between Mr H. and the Commission that the rules in question could lead to a competitive disadvantage in certain situations between Danish dealers and German dealers. Furthermore, there appeared to be agreement between Mr H. and the Commission that the Danish rules were allowed under Directive 94/5/EC. The question was thus whether the regime allowed under Directive 94/5/EC was contrary to the Treaty. The Commission had found that the said disadvantages stemmed from the differences in the rate of VAT which are allowed under Community law as it stands. It appeared that the disadvantages

would in fact disappear if the same VAT rate was applicable in Germany and Denmark. The Commission's assessment therefore appeared to be right. However, it shall be recalled that the Court of Justice is the highest authority on questions of Community law.

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

TENDERING PROCEDURE FOR SUPPLY OF TECHNICAL SERVICES TO THE COMMISSION

Decision on complaint 817/19.8.96/0KA/NL-EN/IJH against the European Commission

The complaint

In August 1996, Dr. O. d. K complained to the Ombudsman about a call for tenders organised by the Commission. His consultancy company submitted a tender to supply technical assistance to the Directorate for Public Health and Health and Safety at Work (DG V F). The Commission then informed him that it had cancelled the call for tenders because of translation errors in the tender documents and that it intended to proceed with a new limited accelerated procedure. He participated unsuccessfully in the new procedure.

He claimed that the Commission had violated procedural requirements of the Services Directive [1] by failing to:

(i) supply documents for the second tender by the most rapid means, as required by Article 20(3) of the Directive;

(ii) respond to his faxed requests for clarifications within four days of the closing date for tenders, as required by Article 20(2) of the Directive;

(iii) respond to his request for negotiations, as foreseen by Article 11(2) of the Directive.

He also claimed:

(iv) that the real reason for cancelling the first tender was not translation errors, but an illegitimate purpose. Specifically, the requirements for quality of personnel specified in the first procedure were rendered inoperative in the second procedure. The consequence was to give an advantage to firms with lower quality personnel and in particular to the current contractor.

[1] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. As regards the alleged procedural errors, the Commission's opinion included in summary the following points:

(i) the Commission sent the tender documents to all the companies selected to tender at the same time and by registered post;

(ii) the closing date for the receipt of tenders was 14 June 1996. The Commission replied to the faxed queries from the complainant by telephone on 10 June 1996, one and a half working days following receipt of the fax. The Commission acknowledged that it did not reply in writing;

(iii) Article 11(2) of the Services Directive is relevant only where a contract is awarded using the negotiated procedure. In this case, the accelerated restricted procedure was used.

The Commission's response to point (iv) of the complaint was, in summary, as follows:

(a) when the bids from the first call for tenders were opened it was discovered that there were differences in the tenderers' interpretation of the specifications for human resources because, as the result of a translation error, the French version of the specifications referred to 'man/months' whereas the German and English versions referred to 'hours/month'. Since the bids were not comparable, the Commission cancelled the procedure;

(b) in view of the urgency, the Commission organised a new call for tender using the restricted accelerated procedure;

(c) apart from adapting the invitation to tender to the new procedure and correcting the translation error, the technical specifications in the second invitation to tender were identical to those in the first;

(d) unlike the open procedure, the restricted procedure comprises two distinct stages: selection of participating firms, followed by award of the contract. Requirements for quality of personnel were applied at the selection stage;

(e) the procedure was properly followed and the award report showed that the accusation that the previous contractor was given preference is quite unfounded. The various lots were awarded to the companies that put in the lowest bids.

The complainant's observations

In his observations, the complainant made detailed criticism of the Commission's opinion, and gave further detail of his claims. The observations included, in summary, the following additional points:

(i) use of the negotiated procedure under the Directive would have been appropriate given the irregularities in the bids made under the original procedure, including differences in interpretation of the amount of translation work to be tendered for;

(ii) the complainant questioned whether the Commission had actually used the criteria for quality of personnel contained in the tender documents in comparing the bids received and whether the Commission could demonstrate that the successful tenderer actually met the criteria.

Further inquiries

In view of the fact that the complainant's observations made new claims, they were forwarded to the Commission with a request for a further opinion.

The Commission's reply

The Commission's reply included, in summary, the following points:

(i) the complainant had no reason to request a negotiated procedure because there were no irregularities, only at most an error of textual interpretation. As regards translation costs, the Commission carefully compared the tenders relating to this item in order not to discriminate against any tenderer in spite of the differences in the tenders received;

(ii) at the selection stage of the restricted accelerated procedure, the Commission checked the quality and qualifications of the personnel proposed on the basis of the details provided by the various tenderers. Only those tenderers who satisfied the selection criteria were sent the specifications to enable them to submit a tender.

The complainant's complementary observations

In his observations, the complainant made a detailed criticism of the Commission's reply and insisted that the Commission had violated the rules of public procurement and practised maladministration.

He claimed that the Commission should prove that the criteria for quality of personnel were actually applied by providing him with detailed information and documents concerning the successful tenderer's bid and the quality of his personnel.

The Decision

1. ***The allegations of procedural violations of the Services Directive***

1.1. Article 56 of the Financial Regulation [1] requires Community institutions to comply with the obligations of the Services Directive when concluding service contracts for which the amount involved is equal to or greater than a threshold. The Commission has not contested the complainant's assertion that the Directive applied to the tenders in question.

1.2. The complainant claimed that the Commission breached Article 20(3) of the Directive by failing to supply the tender documents by the most rapid means. According to evidence supplied by the Commission, which the complainant has not contradicted, documents were sent to all the companies selected to tender at the same time and by registered post. Furthermore, it is not obvious that the Article of the Directive cited by the complainant is intended to impose obligations on the contracting authority as well as the tenderer.

1.3. The complainant claimed that the Commission breached Article 20(2) of the Directive by failing to supply additional information within the period prescribed. The Commission acknowledged that it did not reply in writing to the complainant's request for additional information. However, it is common ground that there was communication by telephone. Furthermore, Article 20(2) only applies when additional information has been requested by the tenderer 'in good time'. On the basis of the factual circumstances of this case as they appeared from the Ombudsman's inquiry, therefore, it was questionable whether any breach of the requirements of Article 20(2) occurred.

[1] As amended by Council Regulation (EC, Euratom, ECSC) No 2333/95 (OJ L 240, 7.10.1995. p. 1).

1.4. The complainant claimed that the Commission should have used the negotiated procedure. The choice of procedure is a matter for the contracting authority, subject to the requirements of the Services Directive. Apart from the claims which are considered in Section 3 of this decision, no argument has been presented to the Ombudsman that the requirements of the Directive were breached by use of the accelerated restricted procedure instead of the negotiated procedure.

1.5. The Ombudsman's inquiries therefore revealed no maladministration in relation to this aspect of the case.

2. ***The allegation of an illegitimate purpose***

2.1. The Commission denied the allegation that translation errors were not the real reason for the cancellation of the first tender procedure. Comparison of the different language versions of the *Official Journal of the European Communities* confirms that the differences identified by the Commission exist.

2.2. The Commission denied that the previous contractor was given preference and asserted that the various lots involved in the tender were awarded to the companies that put in the lowest bids. Furthermore, the Commission insisted that the criteria for quality of personnel were applied at the selection stage of the accelerated restricted procedure. This account of events is coherent and consistent with the documentary evidence which the Commission has supplied and on which the complainant has had the opportunity to make observations. Although the complainant disputes the accuracy of the Commission's account, he has not provided evidence to substantiate his allegations.

2.3. The Ombudsman's inquiries therefore revealed no maladministration in relation to this aspect of the case.

3. ***The claims for information and documents***

3.1. The complainant claimed that the Commission should supply him with information and documents to prove that it applied the quality criteria.

3.2. Article 12 of the Services Directive makes specific provision for the supply of information and reasons to unsuccessful tenderers. Public access to Commission documents is governed by Commission Decision 94/90/ECSC, EC, Euratom [1]. The complainant has made no allegation of violation of the relevant provisions either of the Directive, or of the Decision.

3.3. In view of the findings in Section 2 of this decision, the Ombudsman did not consider it necessary to ask the Commission to supply further information or documents as part of his inquiry into this case.

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

ALLEGED INFRINGEMENT OF COMPETITION RULES

Decision on complaint 829/22.8.96/FDR/D/PD against the European Commission

The complaint

In July 1996, Mr R. petitioned the European Parliament about the Commission's handling of his complaints concerning alleged infringements of Community competition rules by certain car manufacturers and car importers.

In August 1996, Mr R. made a complaint to the Ombudsman about the same matter. In September 1996, the European Parliament took the view that Mr R.'s petition concerned an alleged instance of maladministration in the activities of the Commission. It therefore transferred it to the Ombudsman, to be dealt with as a complaint.

According to the complainant, cars produced by German manufacturers are often more expensive in Germany than in some other Member States, for example Denmark, the Netherlands and Finland. Given this fact, some consumers living in Germany address car dealers in other Member States in order to buy their car there. When they do so, they sometimes run into problems such as for example refusal to sell to consumers resident in Germany, excessive delivery times or artificially increased prices.

On a number of occasions, Mr R., who lives in Germany, addressed individual car dealers in other Member States, with a view to buying a car. It appeared that he met with some problems of the kind mentioned. Considering that refusals or reluctance to sell cars to consumers on the grounds that they live in another Member State are contrary to the Community competition rules, Mr R. addressed the Commission. Subsequently, there was considerable correspondence between him and the Commission, from which it appeared that the Commission did not in principle contest the complainant's perception of law that the reported instances were contrary to the competition rules, including Commission Regulation (EC)

[1] Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ L 46, 18.2.1994, p. 58).

No 1475/95 [1]. However, Mr R. considered that the Commission had not taken steps to enforce the competition rules. He expressed in particular discontent with a letter that the Commission had addressed to him on 28 June 1996. In the letter, the Commission referred to the exchange of correspondence between Mr R. and the Commission and sought to explain its policy on the matter. The relevant paragraphs read as follows:

'… The Commission, as the responsible administrative authority acting in the public interest, is required to ensure compliance with EC competition policy and, when infringements occur, take the requisite organisational measures and, in particular, determine priorities. In making that choice the Commission gives precedence to those cases which are particularly significant from the political, economic or legal point of view. This principle also applies, of course, to the receipt and handling of complaints. In this connection I must point out, however, that the European competition rules do not enable the Commission to help private persons to enforce their subjective rights. This is basically the function of national courts which — unlike the Commission — are also able to determine entitlement to damages …

… The Commission is aware that in individual cases there may be difficulties with purchasing a car in Finland or Denmark, the possible reasons for which have already been explained to you in writing by the relevant department. The fairly comprehensive exchange of correspondence to date arising from your case shows that the Commission has taken action within the sphere of its responsibilities. In view of the understandable desire of millions of drivers in the European Union to buy their cars as cheaply as possible, and also in view of the difficulties that sometimes occur when they do so, the Commission cannot take action in each individual case involving a personal interest …'.

The complainant considered the Commission's reference to cases of personal interest inappropriate, as he pursued this matter in the interest of the general public.

Against this background, Mr R. put forward six grievances in his complaint:

(i) the Commission was inactive in pending procedures;

(ii) the Commission tolerated illegal practices and continuous and systematic violation of Regulation (EC) No 1475/95;

(iii) the Commission failed to monitor the applicable rules;

(iv) the Commission did not take seriously proven violations of the law;

(v) the Commission wrongly assessed whether procedures should be initiated against the car manufacturers who allegedly violate the relevant competition rules;

(vi) the Commission ignored the citizen's right to complain.

In brief, the complaint was to the effect that the Commission had been passive in the matter complained of or that the course of action taken by the Commission had been inappropriate.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission explained that the overall issue concerns alleged obstacles to parallel exports of new motor vehicles from certain Member States. It is implied in Commission Regulation (EC) No 1475/95 that a dealer may not reject a consumer's offer to buy, or ask for a higher price, simply because the consumer is a resident of another Member State.

As regards the present complaint, the Commission submitted a thorough account of its correspondence with Mr R. Mr R. had addressed 30 letters to the Commission since 1994, in which he complains about the conduct of six main German car manufacturers. He also complained about the conduct of the importers of these manufacturers in five other Member States. The Commission investigated all Mr R.'s complaints about these allegedly unlawful practices. At the same time, the Commission repeatedly explained to Mr R. its attitude towards the issue under consideration. In one letter from the Commissioner for Competition Mr R. was informed that in cases of infringements the Commission would not hesitate to take the necessary organisational measures, though it would have to do so in accordance with its priorities. However, the Commissioner also informed Mr R. that it could not be the Commission's duty to help private persons in enforcing their subjective rights (or their so-called 'Partikularinteresse') which is a task for the national jurisdictions. The Commission's comments also stated that the approach chosen by the Commission corresponds to the principles confirmed by the Court of First Instance. The Commission explained that the judgment in question confirmed that the Commission has a duty to act in the public interest. This implies, among other things, that the Commission should take into account its administrative resources when prioritising complaints about infringements of Community law. The Commissioner also emphasised that it is for the Commission to assess whether there is evidence on the basis of which an infringement of competition can be stipulated.

[1] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25), which replaces an earlier Regulation on the matter, Commission Regulation (EEC) No 123/85 (OJ L 15, 18.1.1985, p. 16).

Finally the Commission observed that the issue is of a general nature. Many complaints about car distribution in the European Union are submitted to the Commission which devotes considerable time and resources to the follow-up and investigation of these complaints, among which have been the complaints by Mr R.

In light of these circumstances, the Commission considered Mr R.'s allegations to be unfounded.

The complainant's observations

In his observations, the complainant emphasised that he had a right to complain and that he not only represented his own personal interest; that the Commission was not replying to his correspondence nor acknowledging receipt of his letters; that infringements were taking place and that both the Commission and the European Parliament could easily establish them through investigations; that the Commission however was not investigating the infringements but rather displaying almost complete inactivity; that the free movement of goods in fact was not protected anywhere in the Union; and finally, he specified various actions that the Commission, in his opinion, should be obliged to take.

The complainant further recalled his allegations concerning the Commission's inactivity and tolerance towards the alleged infringements of the competition rules, and the ways in which the institution, in his opinion, evaded its responsibility, to some extent even by means of fraud, for the upholding of competition rules. According to Mr R., the Commission supported the infringements and was completely biased in favour of the car industry. Furthermore, he attached material, mainly newspaper articles and price lists from some of the companies complained of, which in his opinion show that infringements are taking place.

Mr R. also asked the Ombudsman to investigate directly the car manufacturers and car importers and complained to the Ombudsman of Regulation (EC) No 1475/95 as such.

Subsequent developments

After lodging his complaint with the Ombudsman, Mr R. continued to address the Commission directly. On 16 December 1997 the Commission addressed a letter to Mr R. under Article 6 of Regulation (EEC) No 99/63, informing him that it did not intend to open formal investigations with regard to four of the files concerning his complaints, as the matters complained of were not of sufficient Community interest to merit such investigations. Mr R. was invited to submit observations on this preliminary conclusion of the Commission within a time limit of six weeks, if he so wished. The letter was divided into two titles, the first one called 'Your submissions' and the second one 'The Commission's opinion'. The latter read as follows:

'Pursuant to Article 3(2) of Regulation No 17, natural or legal persons who claim a legitimate interest may submit complaints.

Even on the assumption that you have a legitimate interest, the points set out below need to be borne in mind.

The opening of a formal investigation by the Commission would entail disproportionate expenditure in relation to the limited significance of the case. As the Community authority responsible for implementing the Community's competition policy, the Commission must serve the general interest. It has only limited administrative resources at its disposal to carry out its function, and it cannot deploy them in every case that is brought to its notice.

In your letters to the Commission you complain about the alleged general refusal of dealers authorised by various car manufacturers in the Community Member States referred to sell you a car for the purpose of immediate re-export, or about the fact that they were only prepared to do so at an allegedly excessive price.

In your letters you claim that your subjective rights have been violated. You are free to bring an action claiming violation of those rights before the national courts of the Member States. The national courts can apply the European competition rules and — unlike the Commission — may award damages.

In addition, since 1985 the sale of motor vehicles has been subject to a group exemption Regulation. Commission Regulation (EEC) No 123/85 of 12 December 1984 was in force from 1 July 1985 to 30 June 1995. It was replaced on 1 July 1995 by Commission Regulation (EC) No 1475/95 of 28 June 1995. The purpose — and one advantage — of group exemption Regulations is, in part, to enable national courts to apply European competition law. Article 6(1)(7) of Regulation (EC) No 1475/95, for instance, provides that the benefit of exemption automatically lapses where the freedom of final consumers, authorised intermediaries or dealers to buy a motor vehicle from an undertaking belonging to the network of their choice within the common market is indirectly or directly restricted.

Consequently, there is insufficient Community interest to warrant the Commission opening an investigation.'

In reply to this letter, Mr R. submitted observations to the Commission to the effect that it was wrong to consider that the complaints represented insufficient Community interest, and he submitted observations to the same effect to the Ombudsman. In his observations, Mr R. repeatedly stated that by this letter, the Commission had rejected all his complaints.

However, it appeared that the letter only concerned four of the files which the Commission had opened pursuant to his complaints. Following Mr R.'s observations, the Commission was to reach a final conclusion whether to close those four files. Furthermore, it appeared that the Commission was still investigating two other files that it had opened pursuant to Mr R.'s complaints.

Other facts

It shall be recalled that the Commission publishes a yearly report on competition policy. In its report for 1996, the Commission stated in paragraphs 54 to 55, concerning the car sector that it received numerous complaints from consumers who experience major problems in buying a car outside their Member State.

In accordance with normal practice, the European Parliament adopted a resolution on the Commission's report, in which it:

'deplores the lack of a genuine internal market relating to the distribution and servicing of motor vehicles, as numerous complaints from consumers prove; calls on the Commission to ensure once and for all a free market where consumers can without any problems buy a car outside their own Member State and where no obstacles to parallel trade exist.' ([1])

Furthermore, it shall be noted that in January 1998, the Commission adopted a Decision ([2]) establishing infringement of the competition rules, committed by Volkswagen and imposing a fine of ECU 102 million on the company. In the press release that the Commission issued, when adopting the decision, it was stated:

'Commenting on the Decision, Mr Van Miert said that the Commission would not hesitate to take the necessary measures against motor manufacturers who did not comply with the Regulation (EC) No 1475/95 governing motor trade …

The size of the fine is an indication that the Commission will not tolerate practices of this kind and will act with similar determination against other manufacturers who set out to partition the market.'

The Decision

The Ombudsman's competence

In his observations, Mr R. asked the Ombudsman to investigate directly the car manufacturers and car importers concerned and to scrutinise the merits of Regulation (EC) No 1475/95. According to Article 2(1) of the Statute of the Ombudsman:

'Within the framework of the Treaties (…) the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies (…). No action by any other authority or person may be subject of a complaint to the Ombudsman.'

Thus, the Ombudsman cannot inquire into infringements allegedly committed by the car manufacturers and importers, but only into the Commission's investigations of those infringements.

Furthermore, Article 2(2) of the Statute provides:

'Any citizen of the Union (…) may (…) refer a complaint to the Ombudsman in respect of an instance of maladministration …'.

As stated in the European Ombudsman's report for 1995, this means that is it not the task of the Ombudsman to examine the merits of legislative acts of the Communities such as Regulations and Directives. Thus, the Ombudsman could not deal with Mr R.'s allegation concerning the merits of Regulation (EC) No 1475/95.

The Commission's alleged passivity and the adopted course of action

1. Firstly, it was necessary to recall the legal framework within which Mr R.'s complaint was to be assessed.

2. As for the substantive law, Article 85(1) of the Treaty prohibits anti-competitive agreements and behaviour which can affect trade between the Member States. Article 85(3) provides that under certain circumstances, Article 85(1) can be declared inapplicable. Under Council Regulation (EEC) No 19/65, the Commission is empowered to make such a declaration of inapplicability by means of a general Regulation, a so-called exemption Regulation. The effect of such a general Regulation is thus that agreements that meet the conditions laid down by the Regulation, are not prohibited by Article 85(1) of the Treaty. On the contrary, if an agreement does not meet the conditions or violates these, it is in principle caught by the prohibition in Article 85(1). As concerns the motor vehicle sector, the Commission has, under Regulation (EEC) No 19/65, adopted Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. Article 6 of Regulation (EC) No 1475/95 entails that it does not apply where a manufacturer, the supplier or another undertaking directly or indirectly seeks to restrict the freedom of final consumers to obtain a new motor vehicle from whichever authorised dealer they choose within the Community. Thus, such a behaviour is in principle prohibited by Article 85(1) of the Treaty.

3. As for the procedural law laid down to make the substantive law operational, it shall be recalled that Article 85(1) can be applied both by the Commission and national authorities, including national jurisdictions. On the contrary, Article 85(3) can only be applied by the Commission. The relation between the Commission and

([1]) OJ C 358, 24.11.1997, p. 55.
([2]) OJ L 124, 25.4.1998, p. 60.

national authorities is the object of a Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty, which has been published in the *Official Journal of the European Communities*, (OJ C 313, 15.10.1997, p. 3) and the cooperation with national courts is likewise the object of a Commission notice, published in (OJ C 39, 13.2.1993, p. 6). As for the Commission's procedures, the main provisions are to be found in Council Regulation No 17 and under Article 24 of this Regulation, the Commission has adopted more detailed Regulations, among others Regulation No 99/63/EEC. Article 3 in Regulation No 17 provides:

'1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. *Those entitled to make application are:*

(a) *Member States;*

(b) *natural or legal persons who claim a legitimate interest.'*

Article 6 of Regulation No 99/63/EEC is related to this provision. Article 6 provides:

'Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing.'

Thus, it is clear that persons who have a legitimate interest may lodge a complaint with the Commission about supposed infringements of Article 85 of the Treaty. Bearing in mind that the Court of Justice has held that the complainant is not entitled to request the Commission to reach a final decision whether there is an infringement or not, the procedure following a complaint can roughly be summed up like this:

If, after initial investigations, the Commission finds the complaint justified and the undertaking concerned is not disposed to resolve the matter, the Commission may start a formal infringement procedure, which involves strict observance of the rights of defence of the undertaking concerned.

If, after initial investigations, the Commission considers the complaint unjustified, the complainant is informed under Article 6 of Regulation No 99/63/EEC — a so-called Article 6 letter — and has the right to submit observations but cannot challenge the letter before the Community Courts. If the Commission, after considering the observations, persists in its view, it takes a definitive stand which the complainant may challenge ([1]).

It shall be noted that in case the complainant considers that the Commission fails to act on his complaint, it follows from the case-law that the Article 6 letter brings this failure to an end ([2]).

4. However, this briefly described system is complemented by the case-law of the Community Courts, according to which the Commission may abstain from pursuing a complaint on the ground that it lacks sufficient Community interest ([3]). The reasoning of the Courts is that the Commission's responsibilities in competition matters form part of its general obligation, as the guardian of the Treaty, to monitor the application of Community law; in discharging this obligation, the Commission is obliged and entitled to give different degrees of priority to the matters before it; within the field of competition, the criterion 'Community interest' is a relevant and lawful criterion. There appears to be a general understanding that in case the Commission rejects a complaint because of lack of Community interest, the rights of defence of the undertaking complained of bar the Commission from taking a stand on whether there is an infringement or not.

5. Thus, in summary, the Commission has to act upon a complaint lodged by a person having a legitimate interest. It may find that the complaint shall be dismissed on the grounds that it lacks sufficient 'Community interest' and shall then inform the complainant in a so-called Article 6 letter. This letter puts to an end a possible failure to act on the complaint. The complainant may submit observations on the Article 6 letter, maintaining the complaint. If the Commission persists in its view that the complaint lacks 'Community interest', it shall adopt a final stand to that effect. When assessing the 'Community interest', the Commission shall act within the limits of its legal authority. The Commission's final stand may be challenged by the complainant.

6. Hereafter, Mr R.'s complaint could be assessed.

7. It is common ground that over some years, Mr R. brought suspected infringements to the Commission's attention. It appeared that the Commission considered

([1]) See judgment of the Court of Justice of 18 March 1997 in Case C-282/95 P, Guerin Automobiles, [1997] ECR I-1503.

([2]) See among others judgment of the Court of Justice of 18 October 1979 in Case 125/78, GEMA v Commission [1979] ECR 3173.

([3]) See judgment of the Court of First Instance of 18 September 1992 in Case T-24/90, Automec II, [1992] ECR II-2223.

that Mr R. qualified as a person with a legitimate interest in lodging complaints within the meaning of Article 3(2) of Regulation No 17.

It appeared that one of the alleged infringements was resolved pursuant to the Commission's intervention and that the other ones were investigated.

8. During the investigations, the Commission addressed the abovementioned letter of 1996 to Mr R., in which it referred to cases of personal interest. This letter appeared to be in line with the Commission's general policy as it is among others described in the abovementioned quote from its annual report on competition policy, which in turn rests upon the case-law of the Community Courts. The claim that it constitutes maladministration did therefore not appear warranted.

9. The investigations initiated in some of Mr R.'s complaints were still on-going. For the time being, there were no elements at hand indicating that the Commission should not be investigating these complaints with due care, in accordance with principles of good administration.

10. In four of the files opened by the Commission pursuant to Mr R.'s complaints, the investigations initiated led the Commission to the provisional conclusion that his complaints did not represent sufficient Community interest, and it informed him correspondingly in the so-called Article 6 letter of 16 December 1997. As stated above, it follows from the case-law of the Court that such a letter puts an end to a possible failure to act on a complaint. It remained still to be seen which final conclusion the Commission was going to reach in due course, after having studied the complainant's extensive observations. Under these circumstances, it would not have been appropriate for the Ombudsman to enter into an assessment of the merits of the letter. However, the letter led the Ombudsman to formulate below further remarks to the attention of the Commission.

11. Thus, as things stood, the Ombudsman found that it was not justified to claim that the Commission had been passive or taken an inappropriate course of action. Although Mr R. may have wanted the Commission to deploy more resources to this matter, which was of high concern to him, there appeared to be no grounds for the claim that the Commission had been inactive or taken an inappropriate course of action.

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

Further remarks

1. The European Ombudsman was created among others to enhance relations between the European institutions and the European citizens. This task implies that the Ombudsman should also help secure the position of citizens by promoting good administrative practices and encourage administrative authorities to seek solutions that will improve their relations with citizens. Against that background, the European Ombudsman shall make the following suggestions:

2. Without prejudice to the non-binding nature of the so-called Article 6 letter, the Commission could on its own initiative seek to give comprehensive and adequate reasons for its intention to close the file on a complaint in the letter, thus enabling the citizen to fully comprehend the position of the Commission and to lodge adequate observations. This would appear to be in accordance with principles of good administration.

3. Furthermore, in matters which may be of general interest, the Commission could take account of the fact that European citizens may only have limited time and resources for bringing court proceedings in defence of their rights, and this even more when proceedings would have to be brought in another Member State than the one where the citizen lives.

SELECTION OF CANDIDATES FOR A TRAINEESHIP

Decision on complaint 846/29.8.96/AISR/ES/JMA against the European Commission

The complaint

In August 1996, Ms S. made a complaint to the Ombudsman concerning the alleged failure of the Commission to reply to her letters.

Not having been selected after a first application in 1995, Ms S. applied again in March 1996 for a training period with the Commission. In spite of her high academic and professional qualifications, mostly related to the work of the European Union, Ms S.'s application was excluded at the first stage of the selection procedure. She wrote to the Commission in May and July 1996 asking both for the reasons for her exclusion at the first stage and for information about the general criteria used in the selection procedure.

Since Ms S. received no reply to her letters, she lodged a formal complaint with the Ombudsman.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission firstly apologised for the failure to

reply to Ms S.'s letters. It also stated that the letter of July 1996 had not been received by the Training Office.

According to the Commission, 936 applications from Spanish candidates had been received by the Commission for the training period beginning in October 1996. After the first stage of the procedure, 157 of them had been included in the pre-selection list ('Blue Book').

The Commission stated that all the applications had been examined on the basis of objective criteria laid down in the applicable rules.

The Commission agreed that Ms S.'s qualifications were extremely good and equivalent to those of candidates who had been selected. However, no candidate had the right to obtain a traineeship and because of the high number of applicants, it was unavoidable that some very good candidates could not be chosen.

The Commission stated that in order to minimise the exclusion of very valuable candidates for traineeships, it had recently introduced a more rigorous and systematic procedure for checking applications.

The complainant's observations

In her observations, Ms S. pointed out that the system adopted by the Commission for the selection procedure of candidates was very unclear. The complainant was still unsatisfied with the Commission's reply which, in her opinion, was too general.

Further inquiries

Since some important aspects of the complaint were not sufficiently dealt with in the Commission's opinion, the Ombudsman requested further details of the new selection procedure. Moreover, in order to review the correctness of the selection procedure for trainees in which Ms S. had participated, the Ombudsman requested some further elements, such as the applications of the selected Spanish candidates.

In reply, the Commission explained that the new selection procedure involved the creation of pre-selection groups of Commission officials for each nationality. These groups were a mixture of Commission staff with experience in personnel and recruitment matters, as well as recently recruited civil servants. Their task is to screen applications on the basis of the criteria laid down in the applicable rules, and the preferences indicated by the candidates.

The Ombudsman forwarded the documents submitted by the Commission related to the new selection process to the complainant with an invitation to comment on the initiatives taken by the institution. There was no reply to this letter.

The Commission's reply also included a number of confidential documents to be inspected by the Ombudsman, namely the applications of the candidates chosen in the October 1996 training period. These documents had been used by the Commission as the basis for its final selection.

The Decision

On the basis of Articles 15 and 16 of the rules governing in-service training with the Commission of the European Communities (Decision of the Commission of 16 March 1976), applicants are to be selected on the basis of the qualifications obtained during their studies, provided that an appropriate geographical balance is maintained. Priority in the selection process is to be given to applicants who have undertaken studies in, or have some professional knowledge of, European integration.

Because of the nature of this selection procedure, the appointing authority enjoys a margin of discretion. In using its discretion, the Commission has to consider the merits of the candidates as set out in the above rules.

In order to ensure that the exercise of the Commission's discretion in this process had followed principles of good administration, the Ombudsman inspected the applications of the successful Spanish candidates for the October 1996 training period. In view of the high professional experience and good qualifications of all the selected candidates, the Ombudsman considered that there was no instance of maladministration.

As regards the general criteria employed by the Commission services for the vetting of candidates, the Ombudsman noted that the institution had implemented a new procedure to ensure a more efficient and objective selection.

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

FRAUD INVOLVING THE EUROPEAN SOCIAL FUND: ALLEGED FAILURE TO ACT BY UCLAF

Decision on complaint 943/14.10.96/Open Line/GR/BB/OV against the European Commission

The complaint

In October 1996, Mr I. complained to the Ombudsman against the Commission's anti-fraud unit UCLAF, alleging lack or refusal of information relating to allegations of fraud in the administration of European Social Fund (ESF) programmes in Greece. Mr I. complained on behalf of a Greek initiative group which has its seat in Athens.

Between September 1995 and June 1996 the complainant wrote three letters to the UCLAF Directorate alleging irregularities in the management of ESF resources in Greece from between 1994 to 1996. He asked for immediate action by the Community authorities. In reply to his first letter, he received a standard reply from the UCLAF Directorate, thanking him for his interest and stating in general terms that investigations would be carried out.

Mr I. wrote a second letter to UCLAF providing additional detailed information. This letter received no reply. Mr I. therefore sent a third letter to UCLAF in which he repeated the information in the second letter and added new information concerning the alleged irregularities. In reply to this third letter, the complainant received a new standard letter from the UCLAF Directorate dated 7 August 1996 stating that it was investigating the case and would take the appropriate measures.

In his complaint to the Ombudsman, Mr I. asked the Ombudsman to put an end to the alleged mismanagement of ESF activities in Greece. He also complained that his letters had not received an adequate response.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission first observed that a first and later a second acknowledgment receipt had been sent to the complainant and that the information received from the complainant had immediately been examined within the UCLAF Directorate. The Commission further stated that, in November 1995, its services asked the Greek authorities for information concerning the ESF projects in which irregularities had been alleged. The Greek authorities provided this information in March 1996.

On the basis of this information, the Commission carried out an on-the-spot investigation from 29 to 31 October 1996, which also took account of the additional information forwarded by the complainant. A visit to one of organisations named by the complainant was organised in order to evaluate the role of this body in the management and the follow-up of ESF projects and to check the allegations made by the complainant.

The investigation revealed some non-eligible expenditures for the projects checked. The national authorities agreed with the results of this investigation and promised to proceed to the necessary corrections and to extend their control to all the programmes of the beneficiary concerned.

The Commission further observed that its services carried out a series of controls in Greece during the years 1995 to 1996 with, as a result, the rejection of the totality of the certifications of the Greek centres for professional training (KEK) and a demand to reform the Greek certification system.

On basis of the above information the Commission concluded that it had not been inactive further to the information received from the complainant, but that the mission and the tasks of the UCLAF Directorate did not permit a disclosure of details of its activities.

The complainant's observations

In his observations, the complainant stated that the Commission had not taken into account all his allegations and that its conclusions were incomplete. More particularly, the complainant observed that the audit carried out by the UCLAF Directorate had failed to examine all the cases for which he had made allegations. He enclosed a memorandum concerning all his allegations.

The Decision

1. *Request to the Ombudsman to put an end to the alleged mismanagement of ESF funds*

1.1. The responsibility to counter fraud affecting the financial interests of the Community falls primarily to the Member States, which, according to Article 209a of the EC Treaty, shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. This responsibility of the Member States is shared with the Commission in the framework of its general task of ensuring that the Community budget is properly implemented. As regards more particularly the operations financed by the Structural Funds, the responsibilities of both the Member States and the Commission with regard to the financial control are set out in Article 23 of Council Regulation (EEC) No 2082/93 ([1]).

1.2. The final financial control of operations financed by the Structural Funds falls to the Court of Auditors which, according to Article 188c(2) of the EC Treaty, examines whether all revenue has been received and all expenditure of the Community has been incurred in a lawful and regular manner and whether the financial management has been sound. In this context, Article 188c(3) of the EC Treaty particularly empowers the Court of Auditors to carry out audits on the spot in the Member States. According to Article 188c(4) the Court

([1]) Council Regulation (EEC) No 2082/93 (OJ L 193, 31.7.1993, p. 20).

of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions.

1.3. The EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Ombudsman has no mandate to inquire into possible instances of maladministration by national authorities, such as the Greek public and private bodies involved in the present case.

1.4. For the above reasons, as regards the request of the complainant to put an end to the alleged mismanagement of ESF funds in Greece, the Ombudsman has no power to inquire into a possible instance of maladministration at the national level.

2. ***The alleged failure of adequate response from the UCLAF Directorate***

2.1. The complainant sent three letters to UCLAF between September 1995 and June 1996: the first and third letter were acknowledged by letters thanking the complainant for his interest and stating in general terms that investigations were going on and that appropriate measures would be taken. The complainant considered that his letters had not received an adequate response.

2.2. The Commission observed that a first acknowledgment receipt had been sent for the letter dated 6 September 1995 and a second acknowledgment receipt for the two other letters. It also indicated that, upon receipt of the allegations, the UCLAF Directorate immediately started to investigate the information received from the complainant. But the Commission concluded that the mission and the tasks of the UCLAF Directorate did not permit a disclosure of information concerning the actions it had undertaken.

2.3. The Ombudsman noted that the information which the Commission obtained in the context of investigations into fraud with regard to operations financed by the Structural Funds is covered by professional confidentiality. Reference can be made, in particular, to Article 10 of the UCLAF Regulation [1], which deals with the exchange of information between the Member States and the Commission. This provision foresees that Member States and the Commission shall take all necessary precautions to ensure that the information which they exchange remains confidential. Article 10(2) stipulates that this information may not 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.

2.4. It appeared from the above provision that the UCLAF Directorate was entitled not to disclose the results of its investigations to the complainant, because of the requirements of its mission and tasks. It appeared to the Ombudsman that providing information to third parties about ongoing Commission investigations into alleged fraud in a Member State and the results thereof might jeopardise ongoing investigations of the UCLAF Directorate.

2.5. For those reasons, the fact that the UCLAF Directorate, in its response to the complainant, informed only in general terms about the ongoing investigations and gave no details concerning its inquiries into the alleged mismanagement of the funds did not constitute an instance of maladministration.

3. ***The alleged failure of UCLAF to act on the complainant's allegations***

3.1. It appeared from the information presented in the Commission's opinion that, upon receipt of the allegations of mismanagement of ESF funds contained in the complainant's first letter, UCLAF immediately started to examine those allegations. It also appeared that UCLAF investigated the matter and carried out an on the spot investigation and a series of other controls. In observations on the Commission's opinion, the complainant claimed that the audit carried out by the UCLAF Directorate had been incomplete and had failed to examine all the allegations.

3.2. The Ombudsman's services contacted the UCLAF Directorate and were informed that the complainant had sent new allegations of mismanagement to be investigated, which were currently being dealt with by UCLAF. In this context, the Ombudsman also sent to the UCLAF Directorate a copy of the memorandum which the complainant had attached to his observations. On the basis of the above information, there appeared to be no evidence of an instance of maladministration in the way that UCLAF had dealt with the complainant's allegations.

3.3. The Ombudsman however wished to draw the attention of the complainant to the fact that the final financial control of the operations financed by the Structural Funds would fall within the competence of the Court of Auditors. According to Article 188c(2) of the EC Treaty, the Court of Auditors examines whether all revenue has been received and all expenditure of the Community has been incurred in a lawful and regular manner and whether the financial management has been sound.

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

[1] Commission Regulation (EC) No 1681/94 (OJ L 178, 12.7.1994, p. 43).

TENDER PROCEDURE

Decision on complaint 1040/21.11.96/Hydroplan/D/VK against the European Commission

The complaint

On 18 November 1996, Mr F. made a complaint to the European Ombudsman concerning a call for tender for service contracts of the Commission (94/C 173/17) in which Mr F. had applied for participation. This call for service contracts included studies, consultancy work and technical assistance to be carried out mainly in non-member countries.

On 29 March 1995, Mr F. received an invitation to participate in a restricted tender. He sent an offer to the Commission, for which he received an acknowledgement on 15 May 1995. Mr F. stated that the elaboration of his offer had involved considerable costs as well as extensive cooperation with no less than 13 companies in eight Member States.

By letter of 15 February 1996, Mr F. was informed that the selection procedure had been unfruitful, but the standard letter did not give any reasons for this.

On 26 August 1996, Mr F. asked DG I of the Commission for the reasons for the closure of the procedure. In its reply of 28 October 1996, the Commission stated that the procedure was closed because none of the bids complied with the tender requirements.

Mr F. complained to the Ombudsman that:

(i) the reasons which he was eventually given were insufficient;

(ii) his expenses should be reimbursed by the Commission.

The inquiry

The Commission's opinion

In relation to the relevant points, the Commission stated the following:

The complainant was informed on 15 February 1996 that the selection board had examined all offers received and that it had decided to close the procedure because it was unsuccessful.

Annex II, Article 8 of the description of the services provides that according to the provisions for tenders in non-public procedures the Commission is not obliged to offer a contract at the end of the tender procedure. The Commission is neither obliged to reimburse unsuccessful participants in the procedure when it decides not to offer any contracts. (Annex III, No 7).

The complainant's observations

In summary, the complainant made the following main points:

The Commission is not obliged to award contracts. In view of careful public spending, the sudden interruption of the procedure does however not seem logical. There were 157 bidders of 1 570 enterprises and 16 560 experts involved. The interruption after the assessment of the bids appeared to cause avoidable economic damage. The action of the selection board became even less understandable as the Commission had afterwards decided to offer contracts in a direct negotiation procedure.

The Decision

1. It is good administrative behaviour to inform the tenderers about the procedure within an appropriate time limit. On 15 February 1996, all tenderers were informed that the selection procedure had been unfruitful and therefore would be closed. Mr F. then contacted the relevant Commission services by telephone in order to receive further information on the matter. He stated that the Commission had failed to provide him with an appropriate reply.

   In his letter of 26 August 1996, Mr F. requested to be fully informed about the reasons for the closure. The Commission replied on 28 October 1996 that the procedure was closed and declared fruitless because none of the bids complied with the tender requirements. The letter also emphasised that a written notification had been sent to all bidders. It appeared therefore, that the Commission had appropriately replied to Mr F.'s written request. From the information given to the Ombudsman, it seemed that the Commission had complied with the principles of good administrative behaviour by notifying the tenderers and by explaining the reasons to those who requested it in writing.

2. From the information given to the Ombudsman, it appeared that the Commission was neither obliged to offer contracts nor did it have to reimburse the unsuccessful participants.

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

FINANCIAL SUPPORT TO SPANISH CUSTOM AGENTS AFTER ENTRY INTO FORCE OF THE INTERNAL MARKET

Decision on complaint 1048/21.11.96/FPR/ES/JMA against the European Commission

The complaint

In November 1996, Mr P. complained to the Ombudsman concerning the implementation by the Commission of Council Regulation (EEC) No 3904/92 [1] on measures to adapt the profession of customs agent to the internal market.

Mr P.'s firm of customs agents suffered large losses as a result of the entry into force of the internal market on 1 January 1993 and the consequent removal of border controls. He therefore submitted an application to the Spanish authorities responsible for the vetting and selection of projects to be funded in the framework of Regulation (EEC) No 3904/92.

In the course of the proceedings, Mr P. had some correspondence with members of the Spanish Parliament and with the cabinet of the then Spanish Commissioner, Mr Matutes. A letter from a member of Mr Matutes' Cabinet to a Spanish parliamentarian, dated 24 February 1994, indicated that Mr P.'s project was likely to obtain a grant of ECU 100 000. Otherwise, in the complainant's view, the information being forwarded to him by the Commission was generally unclear and insufficient.

He alleged that application of Regulation (EEC) No 3904/92 by the Commission had been deficient and that this constituted an instance of maladministration.

The inquiry

The Commission's opinion

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

(i) Whilst recognising the negative consequences of the completion of the internal market for customs and commission agents, of whom more than 25% had lost their jobs after 1993, the Commission considered that the restructuring of this sector was a responsibility of the Member States, in accordance with the principle of subsidiarity. Because of the importance of the problem, however, the Commission decided to support the efforts of Member States through accompanying measures:

(a) those financed through the European Social Fund;

(b) actions from the Regional Development Funds, in particular Interreg;

(c) other initiatives contained in Regulation (EEC) No 3904/92, with a budget of ECU 30 million, of which ECU 3 516 991 was allocated to Spain.

(ii) Proposals to assist Spanish enterprises and services affected by the entry into force of the internal market had to be submitted by the Spanish agency responsible for the implementation of Regulation (EEC) No 3904/92, namely the Internal Revenue Service (*'Agencia Tributaria'*).

(iii) Following the technical evaluation of 82 Spanish proposals by a committee of the *Agencia Tributaria*, 20 projects were accepted. The evaluation was carried out in full independence by the evaluators, and was based on the objective criteria laid down in the Regulation and in the relevant budgetary provisions.

(iv) By fax of 16 December 1994, the *Agencia Tributaria* requested further information from the complainant regarding his project. No further information was received and the project was not selected because its definition was vague and imprecise and its cost amounted to the whole Spanish allocation of funds under Regulation (EEC) No 3904/92.

(v) As for the correspondence with the cabinet of Commissioner Matutes, there could have been a misunderstanding in the letter of 24 February 1994 between two firms with identical names ('C.'), one located in Spain and the other in France. The latter had obtained some Community funding. The misunderstanding was created by the fact that the President and Director-General of the French company 'C.' was also a business partner of the complainant. The Commission had written to Mr P. apologising for the confusion.

(vi) The Commission denied that there had been deficiencies in the application of Regulation (EEC) No 3904/92, which had been monitored by both its own financial services and the Court of Auditors.

The complainant's observations

In summary, Mr P. made the following observations:

(i) Although Regulation (EEC) No 3904/92 was published on 31 December 1992, the Commission communicated with him for the first time only 22 days before the deadline of 31 March 1993 for the presentation of proposals.

(ii) As regards the failure to reply to the request for further information of December 1994, the complainant indicated that he did not understand the aim of such a request since a decision had been taken in February 1994 and his project had already been excluded.

[1] OJ L 394, 31.12.1992, p. 1.

(iii) As for the sum requested, when he submitted his application he had no information about the total amount of European Community funds to be granted to Spain within this particular programme.

(iv) The Commission should have disclosed the name of the customs agents whose projects had been selected.

The Decision

1. ***Allegedly deficient measures adopted by the Commission***

1.1. The allegedly deficient response by the Community to the situation of customs and commission agents following the entry into force of the internal market, had already been the subject-matter of several complaints addressed to the European Ombudsman [1].

1.2. Articles 7b and 7c of the Treaty required a number of actions to be taken by the Commission and the Council to ensure a balanced progress of all sectors affected by the entry into force of the internal market. Although the Commission considered that assistance for the sector was primarily a responsibility of the Member States, it undertook several initiatives contained in a 1992 vade-mecum on the restructuring of the customs sector. Specific measures of assistance were also contained in Regulation (EEC) No 3904/92.

1.3. It is not the task of the Ombudsman to examine the merits of legislative acts or legislative proposals of the Communities. This type of judgment goes beyond the boundaries of maladministration, and instead concerns considerations of a political nature. In this context, it should be recalled that the European Parliament has adopted several very critical resolutions on this matter, such as those of 17 September and 20 November 1992 as well as the Jackson Report of 4 November 1992.

2. ***Project selection***

2.1. The complainant criticised the selection of the projects made jointly by the Commission and the Spanish *Agencia Tributaria*, and the exclusion of his project from the 20 finally selected. In his view, the time period for the submission of proposals had been unduly short; and the request for further information at a late stage of the selection procedure had been inappropriate.

2.2. Although the complainant only received information about the possibilities of Community assistance on 8 March 1993, the contents of the programme and its time schedule were set out in Regulation (EEC) No 3904/92 which was published in the *Official Journal of the European Communities* of 31 December 1992. A reasonable amount of time had therefore been given for the presentation of projects. Consequently, there appeared to be no grounds to justify the claim of an unduly short deadline.

2.3. The Commission justified the exclusion of the complainant's project on the grounds of its vagueness and its excessive financial request. The complainant had not responded to a request for further information since he believed that the decision had already been taken in February 1994.

2.4. In assessing the relevant factors to be taken into account for the purpose of deciding to award a contract following an invitation to third parties, Community institutions enjoy a large degree of discretion [2]. That discretion cannot justify, however, any misuse of powers or serious and manifest errors in the selection procedure [3].

2.5. From the information available to the Ombudsman, there appeared to be no evidence to suggest that the Commission did not act within the limits of its legal authority in adopting its decision on the applications for assistance to be funded under Regulation (EEC) No 3904/92. There was therefore no evidence of maladministration in relation to this aspect of the case.

3. ***Allegedly misleading information from the Commission's services***

3.1. It appeared that the Cabinet of former Commissioner Matutes indicated in a letter that the complainant's project would receive a Community grant. This communication could have been misleading for the complainant.

3.2. The Commission explained that there could have been a misunderstanding between two firms with the same name. The Commission sent to the complainant a letter in which it apologised. Since the Commission recognised the mistake and apologised for the potential misunderstanding, it appeared that there was no evidence of maladministration in relation to this aspect of the case.

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

[1] Complaints 189/18.10.95/SP/GR/KT and 262/27.11.95/APF/PO/EF-po.

[2] Case T-19/95 Adia Interim SA v Commission [1996] ECR II-321, paragraph 49.

[3] Case 56/77 Agence Européenne d'Interims v Commission [1978] ECR 2215, paragraph 20.

GERMAN STATE AID FOR RENEWABLE ENERGIES

Decision on joined complaints 1086/11.12.96/HK/D/VK, 1092/11.12.96/JS/D/VK, 1095/12.12.96/FS/D/VK, 1097/12.12.96/KS/D/VK, 1104/16.12.96/FP/D/VK, 1112/31.12.96/SB/D/VK, 1113/31.12.96/GS/D/VK, 1124/31.12.96/KPS/D/VK, 1134/31.12.96/HS/D/VK, 1135/31.12.96/AD/D/VK, 1139/31.12.96/MS/D/VK, 1/97/VK, 4/97/VK, 9/97/VK, 12/97/VK, 13/97/VK, 28/97/VK, 34/97/VK, 43/97/VK, 58/97/VK, 72/97/VK, 88/97/VK, 161/97/VK against the European Commission

The complaints

Between December 1996 and January 1997 the Ombudsman received a total of 23 complaints from German citizens, concerning a letter which Commissioner Karel Van Miert had addressed to the German Minister of Economic Affairs, Mr Rexrodt, concerning the German law in favour of the production of renewable energies *(Stromeinspeisegesetz)*. In order to deal with the complaints as effectively and promptly as possible, the Ombudsman decided to treat them jointly.

The *Stromeinspeisegesetz* was also the subject of petitions to the European Parliament. The Ombudsman does not usually deal with a matter pending before the Committee on Petitions of the European Parliament unless, with the consent of the petitioner, that committee transfers it to the Ombudsman to be dealt with as a complaint. In this case, however, the Ombudsman also received many complaints from citizens who had not addressed petitions to the Parliament.

The *Stromeinspeisegesetz* entered into force on 1 January 1991. It imposes on electricity supply companies an obligation to purchase electricity generated from renewable energy sources and to pay a guaranteed minimum price depending on the nature of the renewable source. Article 3(2) of the law prescribes the minimum price of electricity generated from wind power to be 90% of the average revenue per kWh of electricity which the supply companies generated by sale of electricity in the penultimate calendar year.

The German authorities notified the *Stromeinspeisegesetz* to the Commission in 1990 as a State aid, in accordance with Article 93(3) of the EC Teaty. The Commission decided that the law was compatible with the common market under Article 92(3)(c).

On 25 October 1996, Commissioner Van Miert wrote to Minister Rexrodt proposing the reduction of the minimum price for wind power energy from 90% per kWh to 75% per kWh.

Taking the complaints sent to the Ombudsman as a whole, there were in substance two allegations:

(i) Commissioner Van Miert was not entitled to send the letter in question, because the *Stromeinspeisegesetz* had been approved by the Commission in a binding Decision under Article 92(3)(c) of the EC Treaty. The complainants considered that the contents of the letter amounted to an alteration of the Commission Decision which may only be made by way of another Commission decision.

(ii) Commissioner Van Miert had wrongly assessed the legal and economic situation of wind energy producers in Germany because the Commissioner had apparently based his position only on data and figures provided by the German electricity suppliers, without verifying whether these figures were correct. According to the complainants, the effects of the Commissioner's proposal would be disastrous for the wind energy producers, as the reduction of the remuneration level would jeopardise wind energy plants and with them, the current employment situation. Research in this field would also suffer and this would consequently have a negative impact on the environmental and technical developments. Competition in fact would be distorted and a monopolistic structure would arise.

The inquiry

The Commission's opinion

The complaints were forwarded to the Commission. In summary the Commission's opinion made the following points:

(i) As from July 1995 the Commission started receiving several complaints from German electricity suppliers concerning the support for wind energy. The complainants claimed that the guaranteed price for wind energy was no longer justified and that they would face considerable losses, if the guaranteed price for wind energy remained the same, and if the plans of the German *Länder* to extend wind power capacity up to 4 000 MW in the year 2000 were to be pursued. The Commission considered it necessary to reassess the situation after it had received these complaints.

(ii) In November 1995 the Commission asked the German Government for its comments on the matter. After a hearing in the German Parliament to discuss whether or not amendments to the law were necessary, the Commission had received the comments of all participants, among them representatives of the governments of the German *Länder*, of energy supply companies and of associations in favour of renewable energies. In addition to this, several meetings with all concerned parties, including representatives of wind energy producers, had taken place.

(iii) It appeared that both the real and the legal conditions had changed between 1990, the time of approval of the *Stromeinspeisegesetz* by the Commission, and October 1996. The support mechanism for wind energy in the *Stromeinspeisegesetz* had led to a very considerable increase of wind energy production, particularly in the coastal regions of Germany. Since the enactment of the *Stromeinspeisegesetz* the amount of plants as well as their capacity had considerably increased, thus raising costs for

energy suppliers. Another factor for the Commission's reassessment was that the technology for new wind power plants had been improved. New plants were therefore more efficient and the production of wind power was less costly.

(iv) It was against this background that Commissioner Van Miert sent a letter to Minister Rexrodt asking him to examine whether the support mechanism in favour of wind energy in the *Stromeinspeisegesetz* should be amended in a way which would, on the one hand, consider the still existing need of wind energy producers to receive support, but on the other hand be less trade distortive. Among other things, he proposed the reduction of the remuneration for wind power from 90% per kWh to 75% per kWh as a relatively simple and quick change of the present situation.

(v) The letter in question did not have any legal consequences for the German Government. It was a non-binding recommendation to modify the law. It was considered that a non-legal action would be the best solution since it would allow the German Government to solve the problem of competition internally. The letter was fully within the measures that the Commission may take pursuant to Article 93 of the EC Treaty.

(vi) The data concerning the number of wind power stations, their capacity and their production used by DG IV were based on the information provided to the Commission by the German Government. Furthermore, the Commission received information from a hearing held in the German *Bundestag* with representatives from both sides, the wind energy producers as well as the main energy suppliers. In addition to this, several extra meetings with all parties concerned were held. The Commission took the opinions of all parties into account.

The complainants' observations

Taking the observations sent to the Ombudsman as a whole, the complaints were maintained. The complainants expressed dissatisfaction with the Commission's observations.

The Decision

1. ***The complainants' first claim***

1.1. The complainants' first claim, in substance, was that the Commission had infringed the Treaty by using the wrong procedure. According to the complainants, the letter to the German Government amounted to an alteration of the Commission's Decision, made under Article 92(3)(c) of the EC Treaty, that the *Stromeinspeisegesetz* is compatible with the common market. They claimed that such an alteration could only validly be made by way of a further Commission Decision.

1.2. The provisions of the EC Treaty concerning State aids require a Member State which proposes to grant a *new* aid, to give prior notification to the Commission, which then makes a decision as to whether it considers the aid to be compatible with the common market. The *Stromeinspeisegesetz* received approval through this procedure in 1990 and thus became an *existing* system of aid.

1.3. Article 93 of the EC Treaty provides two procedures through which the Commission may seek modification of an existing scheme of aid. The first procedure is by proposing measures to the Member State concerned under Article 93(1). Such proposals have no binding force. The second procedure is to address a binding decision to the Member State concerned, requiring it to abolish or alter the aid, following the procedure of Article 93(2).

1.4. There is no legal basis for considering that the Article 93(1) procedure cannot be used in cases where the Commission has previously approved aid under Article 92(3).

1.5. The letter in question did not purport to be binding on the Member State, nor did it purport to alter the Commission's 1990 decision concerning the *Stromeinspeisegesetz*. The letter did not therefore appear to contain any element which exceeded the competence of the Commission under Article 93(1).

1.6. The Ombudsman's inquiry into the complainants' first claim did, therefore, reveal no maladministration.

2. ***The complainants' second claim***

2.1. The complainants' second claim was, in substance, that the Commission had wrongly assessed the legal and economic situation of wind energy producers because it relied on unverified data supplied by the German electricity industry.

2.2. Article 93(1) does not lay down specific requirements concerning the Commission's cooperation with Member States to keep under review existing systems of aid. However, as a matter of good administrative practice, the Commission should base its technical and economic assessments on accurate information and ensure, when appropriate, that there is opportunity for critical appraisal of relevant data and that different opinions are heard.

2.3. In its opinion the Commission had provided an account of its activities which was not contradicted by the complainants. According to the Commission, it had informed the German Government about complaints it had received concerning the system of aid for wind energy and had asked for its comments. After a hearing

in the German Parliament to discuss whether or not amendments to the law were necessary, the Commission had received the comments of all participants, among them representatives of the governments of the German *Länder*, of energy supply companies and of associations in favour of renewable energies. In addition to this, several meetings with all concerned parties, including representatives of wind energy producers, had taken place.

2.4. On the basis of the above, it appeared that the Commission had taken reasonable steps to ensure that its technical and economic assessments were based on accurate information and that there was opportunity for critical appraisal of relevant data and that different opinions were heard. The Ombudsman's inquiry into the complainants' second claim did, therefore, reveal no maladministration.

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

DEADLINE FOR THE PRESENTATION OF PROPOSALS IN A CALL FOR TENDERS

Decision on complaint 1101/16.12.96/CFUI/IT/JMA against the European Commission

The complaint

In December 1996, the Association CFUI complained to the Ombudsman concerning the short deadline for the submission of proposals in a call for tenders.

The Commission published a notice on 29 October 1996 ([1]) inviting the presentation of proposals to be funded through the European Social Fund (ESF) concerning innovatory actions for the creation of jobs. Submission of applications in 1996 had to be postmarked by 30 November 1996.

Because of the usual delay in the post, CFUI received the *Official Journal of the European Communities* only on 15 November 1996. It immediately requested the necessary application forms from the Commission services (DG V).

Since the documents had not arrived by 26 November 1996, CFUI asked the Commission to send the forms by fax. This was done on 27 November 1996. However, CFUI was unable to submit an application to the Commission in due time.

In its complaint, CFUI claimed that the time limit was too short, and that it appeared that not all the potential tenderers had received the application forms at the same time.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission explained the different steps involved in the selection procedure of this call for tenders, and its timetable, as well as the exchanges with the complainant.

As regards the launching of this initiative, since the process required the agreement of the ESF Committee, the first step could only be taken after the meeting of the committee at the end of September 1996. Thereafter, the Commission had to conclude its internal consultations before any proposal could appear in the *Official Journal of the European Communities*. As a result, the call for tenders was published only on 29 October 1996.

As for the setting of the deadline for the submissions of proposals, the Commission stated that because of budgetary reasons, it was imperative to have the process concluded by the end of 1996. Because the evaluation of proposals would take several weeks, the Commission services fixed 30 November 1996 as the deadline.

The Commission also indicated that the only request for application forms which it had received from the complainant was the fax dated 26 November 1996. The Commission also pointed out that its services had replied expeditiously to this fax.

The Ombudsman forwarded the Commission's opinion to the complainant with an invitation to make observations. No reply was received.

The Decision

In accordance with Article 102 of the Regulation which implements the Financial Regulation, the deadline for the submission of tenders *'shall be fixed according to the nature of the contract and shall be dependent on the length of time necessary for the preparation of the reply to the invitation to tender'* ([2]).

On 29 October 1996, the Commission published a deadline for the submissions of proposals of 30 November 1996. In its opinion, the Commission gave several reasons for the short time limit, in particular: the need to consult the ESF Committee at the end of September 1996; the length of the subsequent internal Commission procedures and the need to

([1]) OJ C 323, 29.10.1996, p. 13.

([2]) Commission Regulation (Euratom, ECSC, EC) 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ L 315, 16.12.1993, p. 1).

commit expenditure before the end of 1996. This reasoning did not appear to contradict the criteria laid down in the above Regulation.

The Ombudsman stated in a previous case (complaint 154/02.10.95/SF/IT) that where a short deadline is established for the submission of applications, it is a good administrative practice to consider whether the postal services alone are an adequate means of communication to inform interested parties.

In the context of that case, the Commission had acknowledged that, in the future, deadlines should be longer and that, if this was not possible, telefax ought to be used as a complementary means of communication. This procedure was used in the present case.

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

PROTECTION AGAINST FOREST FIRES: INTERPRETATION OF REGULATION (EEC) No 3529/86

Decision on complaint 26/97/VK against the European Commission

The complaint

In January 1997, Mr L. complained to the Ombudsman that the Commission had failed to ensure that Italian authorities comply with the Regulation on protection of the Community's forests against fire ([1]).

According to the complaint, the Italian authorities have made contracts with companies to fight forest fires in Calabria. Mr L. considered the companies' equipment to be insufficient and complained about this to the Italian authorities, without success.

He then complained to the Commission, claiming that the Commission had a duty to ensure the adequacy of the equipment of the companies. The Commission replied, that under the Regulation, it did not have competence as to the adequacy of equipment. According to the Commission, this question lies entirely within the competences of the Member States.

Against this background, Mr L. complained to the Ombudsman. He alleged that the Commission had failed to ensure the application of the Regulation.

([1]) Council Regulation (EEC) No 3529/86 (OJ L 326, 21.11.1986, p. 5).

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In summary, the Commission's opinion stated that it had dealt at great length with Mr L.'s complaint about the protection of forests in Italy. It decided to close the file because Regulation (EEC) No 3529/86 does not provide any specification as to the equipment to be used by fire-fighters and the choice of equipment is therefore a question which falls within the remit of the Member States.

The complainant's observations

In his observations, Mr L. maintained his complaint.

The Decision

1. The question raised by the complaint was whether the Commission's interpretation of Regulation (EEC) No 3529/86 was correct. The content of the Regulation is mainly as follows: According to Article 1, the Regulation is aimed at setting up a Community scheme for protection against forest fires. According to Article 2, the scheme shall mostly concern preventive measures, such as for instance 'the provision of forest roads' and 'the organisation of information campaigns'. Article 3 provides that Member States shall inform the Commission of any programme or project they may have to increase forest protection. Article 4 describes the role to be played by a consultative committee on Forest Protection. Articles 5 and 6 concern the Community financial contribution to measures involved in the scheme. Articles 7 and 8 provide that Member States shall designate bodies for the purposes of the Regulation and adopt the measures necessary to ensure that Community funding is correctly applied. Article 9 obliges the Commission to submit an annual report and Article 10 provides the date of entry into force of the Regulation. Thus, there appeared to be no provision concerning control of the adequacy of equipment. Therefore, there appeared to be no element at hand indicating that the Commission's interpretation of the Regulation was wrong. However, it must be recalled that the highest authority on questions of Community law is the Court of Justice.

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

CANCELLATION OF FINANCIAL ASSISTANCE TO A PROJECT

Decision on complaint 120/97/JMA against the European Commission

The complaint

In February 1997, Mr C. complained to the Ombudsman on behalf of the firm C., concerning the Commission's decision to cancel its financial assistance to a project.

The firm C. responded to the Commission's call for proposals for projects of a transnational character in December 1995. In order to qualify, C. set up a transnational partnership including a number of firms from different Member States. The Commission (DG XXIII) agreed to bear half the total costs of the project (ECU 159 000). One of the partner firms later withdrew from the project. The Commission then informed Mr C. that it had decided to cancel its financial assistance, because there had been substantial modifications of the original proposal.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the call for proposals was concerned only with projects of a transnational character. In August 1996, the Commission had agreed to contribute to the firm C.'s project on the basis that it had a balanced participation of Greek, Spanish and Portuguese partners. In October 1996, the Commission learnt that there had been fundamental changes in the scope and conditions of the original proposals. In particular, following the withdrawal of the Spanish partner in July 1996, changes had been made in the role and financial participation of the remaining partners.

After seeking further information from Mr C., the Commission took the view that the departure of the Spanish partner had reduced the transnational character of the proposal, limiting the scope of the project to the region of Calabria. As a consequence of the substantive changes to the original project and the failure of the firm to notify them, the Commission considered that the basis of the contract had not been respected by the firm C. which had modified unilaterally the proposal without its consent. Accordingly, the Commission had decided to cancel all its financial participation in the project.

The complainant's observations

In his observations, Mr C. claimed that the firm C. had acted in good faith. It could not have informed the Commission of the withdrawal of the Spanish partner, since it was unaware of it. Mr C. claimed that no other changes had been made to the original proposal. In his view, the Commission could not cancel its financial contribution, but only reject changes to the project.

The Decision

According to the case-law of the Court of First Instance, the obligation to comply with the conditions attached to a Decision granting Community financial assistance constitutes an essential duty for the beneficiary. Their fulfilment is therefore a condition for the award of Community aid [1].

In the present case, the call for proposals stated that:

> *'[…] the actions shall be of an innovative and transnational nature'.*

Following the withdrawal of the Spanish partner, the transnational aspect of the project was substantially affected.

Clause 10 of the Declaration signed by the complainant established that the:

> *'beneficiary undertakes to notify any project change (object, contents, partners, budget, funding …) to the Commission to obtain the authorisation to proceed'.*

Although the contract was signed in August 1996, changes involving the partners and their participation in the project had already taken place in July 1996. Those changes were communicated to the Commission only three and half months later and after the institution had requested further information on the implementation of the project. The failure of the contractor to communicate those changes promptly to the Commission and obtain its previous authorisation do not correspond with the obligations laid down in clause 10 of the Declaration of the beneficiary.

On the basis of the above facts, the Ombudsman considered that the Commission had acted reasonably when it decided that the conditions governing its financial participation in the complainant's project had not been complied with, and accordingly cancelled its support of the project. There appeared therefore to have been no maladministration and the Ombudsman closed the case.

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[1] Case T-331/94, IPK-München GmbH v Commission, 15.10.1997, paragraph 38; Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94, Industrias Pesqueras Campos and Others v Commission [1996] ECR II-247, paragraph 160.

TARIFF ON DEER MEAT

Decision on complaint 133/97/VK against the European Commission

The complaint

In February 1997, Mr R. complained to the Ombudsman on behalf of the Federation of European Deer Farmers Associations. The complaint concerned Mr R.'s correspondence with the Commission about the customs tariff applied to deer meat imported into the European Union.

According to the complaint, the low rate of import duty makes imported deer meat from agricultural production comparatively cheap and this competition created difficulties for European deer farmers. The complainant had therefore asked the Commission to recognise deer meat from agricultural production as domestic animal meat, which would imply a much higher rate of import duty. The complainant claimed that deer meat from agricultural production should be considered as meat from domestic animals, because the deer are kept like domestic animals as regards food, breeding and the treatment of the meat. The complainant also claimed that this would be in line with a decision of the Court of Justice where it held: *'The expression "game" as it appears at subheading 02.04-B of the Common Customs Tariff 1970 is to be interpreted as applying to animals living in the wild state which are hunted'* ([1]). As the deer in question are not hunted, but brought to the slaughterhouse like sheep or cattle, the complainant considered it to be fair that they would be treated for customs purposes as domestic animals. Thereafter there was an exchange of correspondence between the complainant and the Commission, from which it emerged that the Commission did not share the complainant's point of view.

Against this background, the complainant complained to the Ombudsman. He alleged that the Commission had wrongly interpreted the current provisions on the customs tariff applicable to deer meat.

The inquiry

The Commission's opinion

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

The Commission assessed the complainant's grievance which he had stated in several letters and came to the following conclusion: it is necessary to obey the instructions given in the Common Customs Tariff which states that meat of animals which are normally hunted (like deer), remains classified as meat of game, even when such animals have been raised in captivity ([2]). This argumentation is in line with the explanations which Commissioner Monti gave to the complainant.

Furthermore, point 3 of the judgment of the Court of Justice cited by the complainant states that the expression 'game' in its ordinary meaning designates those categories of animals living in the wild and which are hunted. Deer are undoubtedly included in this description.

Finally, it has to be recalled that the protection which is granted to different agricultural products is principally decided by political and not administrative action.

The Commission was of the opinion that, after thorough assessment, the complainant had been informed correctly and sufficiently about the matter.

The complainant's observations

In his observations, the complainant maintained his complaint.

The Decision

The question raised by the complaint was whether the Commission had wrongly interpreted the provisions governing the tariff applicable to deer meat.

The relevant Common Customs Tariff states that deer meat, even when it is not hunted can be declared as 'game'. It appeared therefore that the Commission had rightly assessed the relevant provisions and that deer meat of animals which remain in captivity can be imported into the Union as game. However, it shall be recalled that the Court of Justice is the highest authority on questions of Community law.

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

([1]) Judgment of 12 December 1973 in Case C-149/73, Otto Witt KG v Hauptzollamt Hamburg-Ericus [1973] ECR 1587.

([2]) OJ C 342, 5.12.1994, p. 23.

COMMISSION DECISION NOT TO INITIATE INFRINGEMENT OF THE PROCEEDINGS UNDER ARTICLE 169 OF THE EC TREATY

Decision on complaint 175/97/JMA against the European Commission

The complaint

In February 1997, Mr D. complained to the Ombudsman on behalf of his client Mr P., alleging that the Commission had failed to ensure the correct application of Directive 91/533/EEC in Portugal.

Mr P. had been working for the firm 'Casinos do Algarve', which was taken over by an Administrative Commission set up by the Portuguese authorities. Following a labour-related dispute, Mr P. brought a legal action against his employer. However, the administrative agency in charge of Casinos declared in Court that it was not responsible for the firm's management. The situation appeared to contravene the criteria laid down in Directive 91/533/EEC, which regulates the employer's obligation to inform employees of the conditions applicable to the contract or to the employment relationship.

Mr P. took the case to the Portuguese courts. Since the case was related to the application of a Community Directive by the Portuguese authorities, he also sent a complaint and several letters to the Commission. Mr P. complained that none of his letters had received a reply from the Commission.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the first letter from Mr P. had been registered by its Secretariat-General. On the basis of the facts as presented in the letter, the Commission concluded that the Portuguese authorities might not be correctly applying Directive 91/533/EEC as well as Directive 77/187/EEC concerning the safeguarding of employees' rights in the event of transfers of undertakings.

However, the Commission deemed it inappropriate to carry out an inquiry into the matter, in view of the fact that the assessment of the case was dependent on the interpretation of Portuguese law, and also that the facts in dispute were already the object of two legal proceedings before the national courts. Nevertheless, the Commission had requested further information from the Portuguese authorities in May 1997.

The Commission also made reference to its discretionary powers to start infringement proceedings against a Member State, as recognised by the Court of Justice.

The complainant's observations

In his observations, Mr P. stated that the case was still on appeal before the Portuguese courts, and thus far from being settled. There had even been a divergent interpretation of Directive 91/533/EEC between the judge who dealt originally with the case, and the Supreme Court of Portugal. In the complainant's view, since the national authorities had not respected Community law, the Commission ought to have intervened. By not using its powers under the Treaty, the Commission had failed to act as the guardian of the Treaty and had allowed the violation of a European citizen's rights by a Member State.

The Decision

1. ***Decision not to take up a complaint***

Under Article 155 of the Treaty, the Commission's duty as the 'guardian of the Treaty' is to ensure that Community law is applied.

In carrying out its duty as guardian of the Treaty, the Commission investigates possible infringements of Community law which come to its attention as a result of complaints, or at its own initiative. The investigation may lead to the sending of a letter of formal notice to the Member State concerned, which has the opportunity to submit its observations. If the Commission then considers that the Member State has failed to fulfill an obligation under the Treaty, Article 169 provides for it to deliver a reasoned opinion on the matter.

If the Commission chooses not to pursue an inquiry into the matter, there must be some reasoning supporting this course of action. Those reasons should provide the basis for any potential inquiry by the Ombudsman in order to ensure that no maladministration has taken place.

The Commission justified its inaction in Mr P.'s case on the grounds that the assessment of the complaint was dependent on the interpretation of Portuguese law and that the facts in dispute were already the object of two legal proceedings before the national courts.

National courts could handle cases involving the incorrect application of Community law in an expeditious way, and the preliminary reference procedure of Article 177 allows for questions of Community law to be referred to the Court of Justice.

In reviewing the course of action chosen by the Commission, the Ombudsman found that the institution had acted within the limits of its legal authority and therefore that no instance of maladministration had been established.

2. ***Prompt reply to letters from complainants***

The Commission stated in its opinion that Mr P.'s complaint to the Commission had been registered as such. However, Mr P. was never informed in writing of the registration.

As the Ombudsman has stated in similar cases, the Commission as a public administration has the duty properly to reply to the queries of citizens. By not doing so in the present case, the Commission had not abided by principles of good administrative behaviour [1].

The European Ombudsman noted, however, that the Commission had recognised this failure and apologised to the complainant. No further remark by the Ombudsman therefore appeared to be necessary.

On the basis of the inquiries of the European Ombudsman into this complaint, it appeared that the Commission chose not to take any action against a Member State following the complaint sent by Mr P., taking into account that the assessment of the complaint was dependent on the interpretation of Portuguese law, and also that the facts in dispute were already the object of two legal proceedings before the national courts. In reviewing the course of action chosen by the Commission, the European Ombudsman found that the institution had acted within the limits of its legal authority and therefore no instance of maladministration was established.

The Ombudsman therefore closed the case.

REFUSAL BY A NATIONAL COURT TO REQUEST A PRELIMINARY RULING: COMMISSION'S DECISION NOT TO PURSUE A RELATED COMPLAINT

Decision on complaint 176/97/JMA against the European Commission

The complaint

In February 1997, Mr D. complained to the Ombudsman on behalf of his client, Mr K. The complaint concerned the Commission's failure to reply to letters which he had addressed to it on 7 August 1996 and 11 December 1996.

These letters had been sent to the Commission as formal complaints against alleged infringements of Community law by the Portuguese authorities.

In his first letter to the Commission, the complainant explained that his client Mr K., originally a national of Finland, had been arrested by the Portuguese authorities following an extradition request from the Finnish authorities. However, in the course of the legal process, it was revealed that Mr K. had also taken the nationality of the Dominican Republic. The competent Portuguese judicial authorities considered that, by taking the nationality of the Dominican Republic, Mr K. had lost his original Finnish nationality, and accordingly applied the rules concerning third country nationals, rather than those for European Union citizens. This approach was confirmed by the Portuguese Supreme Court. The complainant considered that this legal interpretation breached Article 8 and 8A of the Treaty. Furthermore he claimed that the Portuguese Supreme Court had a duty to refer the matter to Court of Justice for a preliminary ruling, in accordance with Article 177 of the Treaty.

Mr D. therefore asked the Commission to intervene, in its role of guardian of the Treaty, to ensure that the Portuguese authorities properly applied Community law.

In his second letter to the Commission of 11 December 1996, Mr D. provided additional documentation to his complaint.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that it was only after a thorough evaluation of the documents submitted in the complainant's letters that the Commission was able to draft a reply in June 1997. The Commission recognised the long delay, and apologised for not having replied to the letters in a more reasonable time.

As regards the factual situation, the Commission confirmed the position as described by the complainant. However, it considered that no infringement of Community law had occurred. Since none of the documents forwarded in the complainant's letters proved that Mr K. still held Finnish nationality, the Commission considered the approach taken by the Portuguese Supreme Court was justified. Furthermore the Commission stated that, until now, it had not used infringement proceedings under Article 169 of the Treaty against any ruling rendered by a national court.

The Ombudsman forwarded the Commission's comments to the complainant with an invitation to make observations. No observations were received.

[1] See *Commission Manual of Operational Procedures* (Section 15(4), p. 45).

The Decision

1. ***Failure to answer correspondence***

1.1. The Commission acknowledged that there was a failure to deal promptly with the letters sent by the complainant. It offered an explanation and apologised for the delay.

1.2. In view of these facts, it appeared that there were no grounds for the European Ombudsman to pursue further this aspect of the case.

2. ***Decision not to take up a complaint***

2.1. Under Article 155 of the Treaty, the Commission's duty as the 'guardian of the Treaty' is to ensure that Community law is applied.

2.2. In carrying out its duty as guardian of the Treaty, the Commission investigates possible infringements of Community law which come to its attention as a result of complaints, or at its own initiative. The investigation may lead to the sending of a letter of formal notice to the Member State concerned, which has the opportunity to submit its observations. If the Commission then considers that the Member State has failed to fulfill an obligation under the Treaty, Article 169 provides for it to deliver a reasoned opinion on the matter.

2.3. If the Commission chooses not to pursue an inquiry into the matter, there must be some reasoning supporting such course of action. Those reasons should provide the basis for any potential inquiry by the European Ombudsman in order to ensure that no maladministration has taken place.

2.4. The Commission justified its inaction in this case on the grounds that the approach taken by the Portuguese Supreme Court was justified because none of the documents forwarded by the complainant proved that his client still held Finnish nationality.

The Commission also pointed out that until now it had not used infringement proceedings under Article 169 of the Treaty against any ruling rendered by a national court.

2.5. In reviewing the course of action chosen by the Commission, the Ombudsman found that the institution had acted within the limits of its legal authority and therefore no instance of maladministration had been established as regards this aspect of the case.

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

MUTUAL ACCEPTANCE OF CIVIL AVIATION LICENCES

Decision on complaint 260/97/JMA against the European Commission

The complaint

In April 1997, Mr M. complained to the Ombudsman about the alleged failure of the Commission to ensure the proper application by the British authorities of Council Directive 91/670/EEC [1] on the mutual acceptance of civil aviation licences.

According to the complainant, the competent British authorities did not recognise pilot licences, such as the one that he had obtained in Spain. They explained their refusal on the basis that some additional requirements had to be satisfied before mutual recognition could be granted. The complainant also claimed that his practical experience had not been taken into account.

In the belief that the British authorities were breaching Directive 91/670/EEC, Mr M. sent letters about the matter to the Commission Representation in Madrid in February and March 1997.

In his complaint to the Ombudsman, Mr M. claimed that the Commission was not ensuring the proper application of Directive 91/670/EEC in the United Kingdom, and had not given any reply to his letters to its Representation in Madrid.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission apologised for the failure of its Representation in Madrid to answer the complainant's letters in a timely fashion. The Commission explained that a recent change in staff had taken place in its 'Eurojus' section in Madrid. As a result, the dispatching of its correspondence had suffered some delays.

[1] Council Directive 91/670/EEC of 16 December 1991 on mutual acceptance of personnel licences for the exercise of functions in civil aviation (OJ L 373, 31.12.1991, p. 21).

The Commission also stated that it had given clear instructions to its Representations in all Member States to avoid any similar delay occurring in the future.

As regards the application of Directive 91/670/EEC in the United Kingdom, the Commission stated that in order to clarify the situation, its services had contacted the United Kingdom Civil Aviation Authority. The complainant had been informed of this initiative and had been asked by the Commission services to forward to them details concerning his licence and experience.

The Ombudsman forwarded the Commission's comments to the complainant with an invitation to make observations. No observations were received.

The Decision

1. ***Failure to answer correspondence***

1.1. The Commission acknowledged that there was a failure to deal promptly with the letters sent by the complainant to its Representation in Madrid. It offered an explanation and apologised for the delay.

1.2. Furthermore, the Commission had instructed its Representations in the Member States to take all necessary measures to avoid such delays occurring in the future.

1.3. Since it appeared that a reply to the complainant's letters had been given, and that measures had been taken to avoid a similar situation, there were no grounds for the Ombudsman to pursue further this aspect of the case.

2. ***Due diligence in ensuring compliance with Community law***

2.1. In ensuring that Member States comply fully with Community law, the Commission should work in accordance with principles of good administration, and act with due diligence. This implies that the Commission, as the guardian of the Treaty, should actively seek that the concerned Member State puts an end to the alleged infringement and duly inform the complainant of its actions.

2.2. Following the letters of the complainant, the Commission services contacted the responsible national authorities in order to ensure proper application of Directive 91/670/EEC by the responsible British authorities. The Commission also requested more information on the complainant's problem, in particular as regards his pilot licence and professional experience.

2.3. From the available information, it appears that the Commission had acted with due diligence in the handling of this complaint. The Ombudsman therefore found no evidence of maladministration in relation to this aspect of the case.

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

PRICE OF COMMISSION PUBLICATIONS

Decision on complaint 269/97/PD against the European Commission

The complaint

In March 1997, Mr B., a Member of the European Parliament, complained on behalf of Mr K., a Greek scientist. Mr B. stated that for some European Union citizens, European Commission publications are very expensive. In his opinion, some citizens are almost excluded from access to these publications, something which he considers problematic from the perspective of transparency.

Annexed to Mr B.'s complaint was a letter which he had received from Mr K. In his letter, Mr K. stated that some Commission publications were almost unaffordable for Greek nationals. He stated as an example that a publication of 300 to 400 pages might cost the equivalent of five days pay for a Greek scientist.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission described the criteria used for the pricing of documents:

> *'The pricing policy of the Office for Official Publications of the European Communities is based on principles established by all the Institutions. Institutional authors decide the price of a publication following the recommendation of the Office, by taking into consideration the policy objectives, the production costs and the minimum prices required by the sales networks. Very often, particularly for small print runs in some languages, the price does not even cover the costs incurred. Following the principle of non-discrimination, prices are in* ECU *and are the same in all member countries.'*

The Commission further pointed out that it operated several networks, such as the European documentation centres, which provide

free access to its publications and that the Community institutions were currently making a considerable amount of free information available on the Internet.

No observations on the Commission's opinion were received from the complainant.

The Decision

An exorbitant or arbitrary pricing policy could be inconsistent with the principle of transparency, by preventing European citizens from having access to information published by Community Institutions. However, it appears that the current pricing policy as described by the Commission is based on objective criteria with the legitimate aim of covering the costs of the production and distribution of publications. Thus, the policy does not constitute maladministration.

The pricing policy should also be considered in relation to the principle of equal treatment. According to the case law of the Court of Justice, this principle implies that identical situations shall not be treated differently and different situations shall not be treated identically. The crucial question in applying this principle is to establish what is an identical or a different situation.

On the one hand, the Commission could take into account differences in income distribution in the Community in establishing its pricing policy. This could lead to a situation where the same publication appeared with different prices in different Member States. On the other hand, one could consider that the same publication should have substantially the same price wherever it is offered for sale. It appears that the Commission considers the second option to be appropriate. It appeared to be entitled to do so. Thus, the fact that the Commission considered that the same publication should in principle have the same price did not infringe the principle of equal treatment. Consequently there appeared to be no instance of maladministration. The Ombudsman therefore closed the case.

(See also decision on complaint 1077/4.12.96/WG/D/VK/OV against the Office for Official Publications of the European Communities).

COMMISSION FELLOWSHIP: SOCIAL SECURITY CONTRIBUTIONS

Decision on complaint 340/97/JMA against the European Commission

The complaint

In March 1997, Mrs L. complained to the Ombudsman that the Commission had failed to reply to a request for information concerning problems in the payment of her unemployment benefits in Switzerland.

The complainant was the recipient of a fellowship from the Community RTD 'Human capital and mobility' programme. She moved to Duebendorf, Switzerland in December 1994 in order to complete scientific research for a 20-month period.

Beneficiaries of this type of assistance were required to ensure their own social security scheme. Accordingly, the complainant paid her unemployment insurance during all that period. After completing her research in July 1996, she moved to Zurich where she could not find employment. The complainant requested then the payment of unemployment benefits from the Swiss Social Security office in that city. She did not obtain, however, any positive response from the Swiss authorities to her request.

On 23 October 1996, she wrote to, among others, the Commission, requesting information but received no reply to her query.

In her complaint, Mrs L. asked the Ombudsman to make the necessary inquiries to ensure that the Commission clarify the situation.

The inquiry

The Commission's opinion

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

Despite a careful investigation in the various registration systems for incoming mail, there was no trace of the complainant's letter dated 23 October 1996 in the files of the Commission. The letter, the Commission pointed out, was not addressed to any specific person or institution, but only indicated that it was to be copied, among others, to 'Commission Européenne (Directorat Général)'.

On the substance of the case, the Commission explained that under the general conditions governing research training fellowships applicable to this case, social security contributions and taxes had to be paid by the researcher out of the fellowship. The complainant had been duly informed of this condition by the host institution. Moreover, the researcher in this type of grant is solely responsible to ensure compliance with the national tax provisions.

The Commission also explained that there was no EC legislation applicable to this case, since the relevant rules,

namely Regulation (EEC) No 1408/71, extend their application only to the European Economic Area, and therefore not to Switzerland which is not part of the EEA.

In order to help the complainant, the Commission stated that it would rapidly contact the relevant national authorities to seek additional information towards a possible resolution of this case and that the complainant would be kept informed of the results.

Additional information from the complainant

Before the Ombudsman had received the Commission's opinion, the complainant sent additional information by letter of 10 June 1997. In the letter, the complainant explained that she had been informed of a bilateral agreement on recognition of unemployment rights between France and Switzerland. On the basis of its provisions she had been able to have her unemployment contributions recognised as of October 1996. Nevertheless she claimed that her first social security payments dated back to August 1996.

Without any information on this bilateral agreement, the complainant had lost the opportunity to take advantage of a minimum salary for reintegration in the labour market. In summary, she claimed that the failure of the Commission to fully explain the consequences of her fellowship had cost her a substantial amount of money.

As they were not presented in the original complaint, the Ombudsman did not pursue these questions further.

The Ombudsman forwarded the Commission's opinion to the complainant, who did not make any observations.

The Decision

1. As the Ombudsman has stated in similar cases, the Commission as a public administration is under a duty to properly reply to the queries of citizens.

2. In this case, however, the Commission had justified its failure to reply to the complainant's request on the grounds that no trace of her letter was found in any of the various registration systems of the institution. Since the letter had merely been copied to the Commission, and no address had been included, it is conceivable that the postal services were not able to deliver the letter.

3. In its opinion, the Commission gave a thorough reply to the problems posed by the complainant, and also the means to find a potential solution.

4. Since it appeared that a reply to the complainant's request had been given, there were no grounds for the Ombudsman to pursue this case further.

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

FAILED RECRUITMENT OF AN EXPERT

Decision on complaint 376/97/PD against the European Commission

The complaint

In May 1997, X made a complaint to the Ombudsman against the Commission, holding it responsible for the fact that he was not recruited for a post as executive director of a development project which concerned three countries.

The Commission funded the post in question and provided financial assistance for the recruitment. The Commission enlisted the help of a specialist consultant for the recruitment procedure. In May 1996 the consultant notified X that he should meet the managing body of the project, composed of representatives from the countries concerned. Subsequently X was informed that he had been selected for the post. He was called to Brussels in July 1996 to attend a meeting as future executive director of the project with Commission officials and the Ambassadors of the countries concerned. He was supposed to take up his duties as executive director on 1 November 1996.

However, by November 1996 X's contract had still not been signed. X stated that every time he contacted the Commission about the matter he was told that he had to wait because there were problems with the signature of the funding agreement between the European Union and the managing body.

On 15 December 1996, X received a draft contract from the managing body. He was informed at the same time that the draft had been approved by the Commission. On 16 December 1996, X proposed a number of amendments to the draft contract. On 6 February 1997, he received a letter from the managing body stating that it could not accept the amendments and that it wanted to break off negotiations with him.

After addressing the Commission on this issue without success, X complained to the Ombudsman. The substance of the complaint was that the Commission, given its role as intermediary, was responsible for the fact that the recruitment procedure came to nothing and consequently the complainant demanded compensation.

The inquiry

The EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman's inquiries into X's complaint were therefore directed towards examining whether there had been maladministration in the activities of the Commission.

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that in March 1995, the managing body addressed the Commission seeking Community financing. The Commission agreed to fund the selection procedure for the post of executive director of the project and to fund the post.

The Commission submitted a short list of four candidates to the managing body, which selected X. Afterwards, the managing body addressed the Commission with a view to securing its approval of the appointment and asking it to act as an intermediary in agreeing the remuneration terms with the successful candidate. The Directorate-General concerned approved the appointment and forwarded the terms and conditions to be included in the contract to the managing body.

The Commission stated that the managing body decided to break off negotiations because X's demands were in excess of what had been agreed and because he had called into question terms that had already been agreed.

Finally, the Commission stated that the financial assistance by the European Communities to the project did not constitute any commitment on the part of the Commission vis-à-vis the candidates, given that it was the managing body which was the contracting institution, and not the Commission.

The complainant's observations

In his observations, the complainant claimed that there was a contractual link between himself and the Commission arising from the fact that the Commission contracted the selection of candidates to a European company and that candidates were also interviewed by European Community officials. The fact that the Commission approved the final choice also made it liable.

X contested the Commission's claim that any terms of the contract had already been agreed.

The Decision

The question raised by this complaint was whether the complainant's non-recruitment to the post of executive director of the project constituted an instance of maladministration attributable to the Commission. It appeared that the Commission assisted the managing body in finding candidates for the post and in funding the recruitment procedure and that the Commission never concluded a contract with the complainant. It also appeared that the procedure was set in motion on the initiative of the managing body, that the final choice of the successful candidate was made by it without any intervention by the Commission and that the contract to be signed was to be concluded between the complainant and the managing body. The decision whether to sign the contract or to break off negotiations was thus its responsibility.

The fact that the managing body asked the Commission to approve the appointment of X — which the Commission did immediately — did not alter this responsibility. There were no elements at hand indicating that the Commission unduly took measures to incite the managing body to break off negotiations with X. Nor were there any elements at hand indicating that the Commission at any moment assumed legal responsibility for the actions of the managing body, or that the Commission behaved in such a way towards the complainant that he could legitimately consider himself to be under a contract with the Commission.

Thus, it appeared that the fact that the complainant was not recruited to the post as executive director of the project did not constitute an instance of maladministration in the activities of the Commission. The Ombudsman therefore closed the case.

RESERVE LIST FOR RECRUITMENT

Decision on complaint 385/97/PD against the European Commission

The complaint

In May 1997, Mr G. made a complaint to the Ombudsman alleging that the Commission's recruitment policy constituted an instance of maladministration. In 1993 the Commission organised two general competitions for nationals of all Member States, COM/A/764 and COM/A/770, with a view to establishing reserve lists for administrators. Mr G. applied under the latter competition and passed the examinations

successfully. His name was therefore entered on the reserve list established in the autumn of 1994. In June 1995, Mr G. was invited to Brussels by the Commission in order to undergo a medical examination and to be interviewed by those Commission services which might possibly be interested in recruiting him. However, after having passed the medical tests and having been interviewed, Mr G. did not receive a job offer. Meanwhile, he obtained knowledge of the fact that the Commission recruits as temporary agents persons who have never passed a general competition. Mr G. considered it to be an instance of maladministration that persons who had passed a competition were not offered jobs, while persons who had never passed a competition were recruited.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission firstly pointed out that it follows from the Staff Regulations and the case-law of the Court of Justice that persons who have passed a competition do not have an automatic right to be offered a job. The Commission also indicated that the notice of competition clearly explained this situation. The notice in fact stated that the number of names on the reserve list would be around 50% more than the number of available posts.

The Commission then explained how it normally proceeded with reserve lists. It transmits the reserve lists with the *curriculum vitae* of each applicant to the Commission services, which can then request the recruitment of an applicant when they have a vacant permanent post. However, in the case of this specific competition, on the initiative of the Commission's staff department applicants were invited to Brussels for interviews and for an information meeting about the recruitment procedure. Following the interviews that Mr G. had, the staff department did not receive any requests for his recruitment.

As concerned the recruitment of temporary staff, the Commission observed that sometimes it happens that the profiles of the applicants on the reserve list do not fit the needs of the service concerned. Furthermore, the Commission is subject to budgetary constraints which may lead to a situation where it has appropriations available for employment of temporary agents or external services, but none for recruiting staff to permanent posts. Thirdly, the Commission observed that since 1995 it had to assign a large part of its recruitment to nationals of the new Member States.

The Decision

The question that the complaint raised was whether it can be considered to be an instance of maladministration that the Commission in general allows for the recruitment of staff other than permanent staff, while persons on a reserve list are not offered a permanent job. In this respect it shall firstly be observed that the Commission is not legally obliged to recruit a person whose name is on a reserve list. Secondly, as was apparent from the explanation given in the Commission's opinion, the Commission carries out a wide variety of functions and acts under the budgetary constraints that the budgetary authority imposes upon it. Some functions may by their very nature be temporary, while others may require a specific expertise which nobody on the reserve list possesses. Therefore, the mere fact that the Commission proceeded to the recruitment of staff other than permanent staff during a time when it had not exhausted existing reserve lists did not constitute an instance of maladministration.

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

ALLEGED DISCRIMINATION IN CALL FOR TENDER

Decision on complaint 564/97/PD against the European Commission

The complaint

In June 1997, Mr D. made a complaint to the Ombudsman concerning the Commission's handling of a restricted call for tender for translation into French, 97/S36-18547/FR, published by the Commission on 20 February 1997. Point 6 of the tender notice stated that the number of applicants invited to bid would be between 5 and 30, so as to cover the operational needs of the contracting authority and to ensure genuine competition. Point 13 in the call for tender laid down the conditions that the applicants had to comply with. Point 14 provided that the contracting authority would select the applicants who would be invited to bid on the basis of the information they had submitted in relation to point 13.

Mr D. applied under this call for tender. On 29 May 1997 the Commission informed him that he would not be invited to bid, although his application was in conformity with the tender notice. By letter of 2 June 1997, Mr D. asked the Commission to review this decision, but without success.

Against this background, Mr D. complained that the Commission had discriminated against his company and, with

a view to supporting this allegation, he asked the Ombudsman to request the Commission's reply to the following questions:

1. Which criteria did the Commission use in order to select the number of candidates invited to bid under point 6 of the tender notice?

2. What does the Commission understand by 'genuine competition'?

3. What advantage does the Commission gain from excluding candidates which fulfilled the conditions in the tender notice, in particular in point 13?

Finally, Mr D. claimed that the fact that, under other calls for tender, his company was invited to bid for translation into English and German was inconsistent with the decision concerning the call for tender for translation into French.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission explained the procedure followed in selecting applicants who would be invited to bid. In particular, the Commission called attention to the fact that the procedure in question was a so-called restricted procedure, governed by the provisions of Article 27 of Council Directive 92/50/EEC [1]. Under such a procedure, the contracting authority has a right and even an obligation to select between the applicants who fulfil the criteria laid down in the tender notice.

In reply to the first question, the Commission indicated that this selection of applicants was made by comparing their respective merits. The Commission annexed evidence to its opinion from which it appears that in the past, the quality of the translations provided by Mr D.'s company had not been considered sufficient.

As concerned the second question, the Commission explained that under a previous tendering procedure, 307 companies had been retained for translation into French of which 147 afterwards never received any work to do and 117 translated less than 400 pages each. By the term 'ensure genuine competition' the Commission thus understood to limit the number of companies, so as to ensure that there was real competition among them.

As concerned the third question, the Commission explained that a restricted procedure represented an advantage to the Commission in the sense that only the best companies were retained, which implied that the Commission services had to do less revision of the translations received.

Against this background the Commission concluded that it had operated properly and that there had been no discrimination against Mr D.'s company.

The complainant's observations

In his observations Mr D. maintained his complaint. In particular he referred to documentation showing that Commission services other than the ones in charge of this tendering procedure had been pleased with his work.

The Decision

The principle of non-discrimination implies that identical situations cannot be treated differently and that different situations cannot be treated identically. There is no element at hand indicating that the Commission had engaged in discrimination in this matter. The distinguishing element among the applications which were in conformity with the tender notice was the quality of the applicants' work, which in Mr D.'s case was seen as a weak point by the selection committee of the Commission. It appeared from the Commission's opinion that the Commission had complied properly with the provisions governing the procedure. The fact that under other calls for tender, Mr D.'s company had been successful, did not have any bearing on this finding. Neither did the fact that, on some occasions, the Commission had found the complainant's work of good quality invalidate the fact that, on other occasions, the Commission had found the quality to be insufficient. Therefore the Ombudsman found that there were no grounds for the claim that the Commission's decision not to invite Mr D. to bid constituted an instance of maladministration in the activities of the Commission.

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

ARTICLE 169: FAILURE TO DELIVER REASONED OPINION AND EXCLUSION OF THE COMPLAINANT FROM A MEETING

Decision on complaint 651/97/IJH against the European Commission

The complaint

In July 1997, Mr R. complained to the Ombudsman on behalf of his company BLC Limited, which imported beer produced by a German brewery into the United Kingdom market. The following is a summary of the facts as presented in the complaint:

[1] OJ L 209, 24.7.1992 p. 1.

On 3 April 1993, Mr R. complained to the Commission about a new United Kingdom law known as the 'Guest Beer Provision' (GBP). This allowed the tenants of large United Kingdom brewers, who are subject to exclusive purchase agreements, also to buy one cask-conditioned beer of their choice. Mr R. claimed that the GBP discriminated against beer produced in other Member States and so infringed Article 30 of the EC Treaty.

On 30 June 1993, the Commission informed Mr R. that his complaint had been registered and that the GBP was being examined by the Commission's staff from the standpoint of the free movement of goods. On 28 September 1995, the Commission informed Mr R. that, on 15 September 1995, it had sent to the United Kingdom authorities a letter of formal notice, in accordance with the procedure laid down in Article 169 of the EC Treaty.

On 7 February 1996, the Commission informed Mr R. of the substance of the United Kingdom's reply to the letter of formal notice and invited him to make observations on the arguments which the United Kingdom had put forward.

On 5 August 1996, a Commission press release (IP/96/774) announced that the Commission had decided to send a reasoned opinion to the United Kingdom, in accordance with the procedure laid down in Article 169 of the EC Treaty.

On 22 August 1996, Mr R. learnt from a press release issued by the United Kingdom Department of Trade and Industry that a tripartite meeting was scheduled to take place in October 1996 between the Commission, the United Kingdom authorities and a trade association, the *Confédération des Brasseurs du Marché commun* (CBMC). On 27 August 1996, he wrote to the Commission asking to be allowed to attend the meeting, but the Commission refused his request. However, he was invited to attend a separate meeting with the Commission services a few days later.

On 1 November 1996 Mr R. wrote to the Commission concerning the tripartite meeting and raised questions concerning the accuracy of information provided by the CBMC.

Mr R. subsequently initiated numerous contacts with the responsible Commission services who advised him on 16 December 1996 that the reasoned opinion was ready to be sent.

In March 1997, the United Kingdom government announced that it proposed to amend the GBP to include also bottle-conditioned fermenting beers; that the Commission was satisfied with the terms of the proposed amendment and no longer intended to issue the reasoned opinion. Mr R. considered that the proposed amendment was not adequate to bring the infringement of Article 30 to an end.

In his complaint to the Ombudsman Mr R. alleged that:

(i) the Commission's failure to send the reasoned opinion to the United Kingdom authorities after it had announced its decision to do so on 5 August 1996 was maladministration;

(ii) the Article 169 procedure was improperly conducted after 5 August 1996; in particular, his exclusion from the tripartite meeting in October 1996 was unreasonable.

Mr R. also requested the Ombudsman to ask the Commission not to terminate the Article 169 procedure until his inquiries were completed.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission made, in summary, the following points:

(i) Article 169 gives the Commission the power to bring a Member State before the Court of Justice when it considers that it has failed to fulfil an obligation under the Treaty. The Commission has a discretion as to whether it seizes the Court, even if a Member State does not comply with a reasoned opinion. Individuals and, in particular, complainants have no right to require the Commission to adopt a specific position.

(ii) The Commission encourages individuals to make complaints so that its services become aware of violations of Community law. The Commission has considered that the complainant should be informed of the outcome and of the action it decides to take.

(iii) The GBP allowed only draught cask-conditioned beer to be bought and this kind of beer corresponds to a typical British traditional product. The Commission considered this as *de facto* discrimination in breach of Articles 30 to 36 of the EC Treaty. However, the Commission considered that the objectives of the GBP, in particular to guarantee a better choice for consumers and to give a market opportunity to traditional beers mostly produced by small and medium size breweries, could be legitimate.

(iv) After sending the letter of formal notice and having decided to send the reasoned opinion, the Commission, taking into account the openness of the United Kingdom authorities to finding a solution in conformity with Community law, decided to discuss possible alternatives

with them. Several meetings were organised, including a tripartite meeting between the Commission, the United Kingdom authorities and the beer industry represented by the CBMC.

(v) At the beginning of March 1997, the United Kingdom authorities proposed an amendment to the GBP allowing the tenants of the large national breweries to buy one brand of bottle-conditioned beer in addition to cask-conditioned beer. For the Commission, the solution is satisfactory because most of the traditional beers produced in other Member States are bottle-conditioned. Consequently the Commission decided to suspend the procedure and not send the reasoned opinion. The amendment was passed on 22 July 1997 by the United Kingdom Parliament.

(vi) Mr R. was kept informed, at each stage, of the action taken by the Commission. In particular, after the Press Release of 5 August 1996 stating that the Commission had decided to send a reasoned opinion to the United Kingdom, he was informed by telephone of the stage reached in the procedure and received three times in the Commission's offices. Although he was not invited to the tripartite meeting held on 11 October 1996, he was received three days later by DG XV and informed of non-confidential elements discussed during this meeting. On 21 April 1997, he was informed by letter that the Commission considered that the extension of the GBP to traditional bottle-conditioned beers was satisfactory.

The complainant's observations

Mr R.'s observations included, in summary, the following points:

(i) The Commission's failure to send the reasoned opinion to the United Kingdom authorities was a breach of its legal obligations under Articles 155 and 169 of the EC Treaty.

(ii) The Commission's decision to support the amendment to the GBP in 1997 failed to deal with the crucial legal issue of what was necessary in 1990 when the provision was first introduced.

(iii) The Commission's decision was legally unsustainable and ignored the evidence that he had supplied. Its reasoning concerning 'traditional' beer was an excuse for having negotiated a political settlement of the Article 169 procedure.

The Decision

1. ***The request to ask the Commission not to terminate the Article 169 procedure until the Ombudsman's inquiries were completed***

1.1. Neither the Treaty nor the Statute of the Ombudsman provides for a complaint to the Ombudsman to have a suspensive effect on administrative procedures. The normal principle applied at national level is that a complaint to an ombudsman does not have such an effect.

1.2. In the present case, there appeared to be no special factors that could justify the Ombudsman proposing to the Commission not to terminate the Article 169 procedure in question, which also affected the interests of other parties.

2. ***The Commission's failure to send the reasoned opinion to the United Kingdom***

2.1. Article 155 of the EC Treaty establishes the role of the Commission as the 'guardian of the Treaty'. As guardian of the Treaty, its duty is to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied.

2.2. Article 169 of the Treaty provides that:

> *If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.*

2.3. The evidence available to the Ombudsman is that, having given the United Kingdom the opportunity to submit its observations, the Commission considered that the Guest Beer Provision infringed the provisions of the Treaty concerning free movement of goods. However, the Commission decided not to send the reasoned opinion immediately because the United Kingdom authorities were willing to discuss finding a solution in conformity with Community law.

2.4. According to the case-law of the Court of Justice, the enforcement procedure involves a power on the part of the Commission to consider the most appropriate means and time limits for the purposes of putting an end to any contraventions of the Treaty [1].

2.5. No evidence has been presented to the Ombudsman to show that this power was abused in the present case. In particular, there is no evidence of unnecessary delay by the Commission during its discussions with the United Kingdom authorities between August 1996 and March 1997 when the United Kingdom authorities proposed an

[1] Commission v France Case 7/71 [1971] ECR 1003.

amendment to the GBP, which the Commission considered would be satisfactory to bring the infringement to an end.

2.6. The complainant also claimed in his observations that, in considering the 1997 amendments to the GBP to be satisfactory, the Commission failed to deal with what was necessary in 1990 when the GBP was first introduced.

2.7. Article 169 provides for a reasoned opinion to contain a time limit within which the State must comply with the opinion. The Commission may only bring the matter before the Court of Justice if the State does not comply within the period laid down. It is clear, therefore, that in carrying out its functions under Article 169, the relevant question for the Commission to consider when the United Kingdom proposed amendment of the GBP in 1997 was whether the proposal was satisfactory to put an end to the infringement.

3. ***The Commission's procedural treatment of the complaint***

3.1. In carrying out its functions as guardian of the Treaty, the Commission has a duty to act in accordance with the principles of good administrative behaviour. In responding to the Ombudsman's inquiries in 'Article 169' cases, the Commission has consistently acknowledged this duty.

3.2. It is common ground that the Commission registered the complaint concerning the GBP, that it informed the complainant of the sending of a letter of formal notice and that it gave him an opportunity to comment on the substance of the reply received from the United Kingdom. The Commission then publicly announced its view that an infringement existed.

3.3. On the basis of the evidence available to the Ombudsman, it appears that the complainant was also informed of the Commission's subsequent decision to engage in discussions with the United Kingdom authorities about possible alternative ways to bring the infringement to an end.

3.4. The Commission informed the complainant on 21 April 1997 of its view that the extension of the GBP to traditional bottle-conditioned beers would be satisfactory to bring the infringement to an end. The evidence supplied by both parties to the Ombudsman shows that the complainant knew of the Commission's reasoning for this conclusion and had the opportunity to submit further evidence and counter-arguments. The complainant therefore appears to have enjoyed the procedural possibility accepted by the Commission in response to the Ombudsman's own initiative inquiry into the Commission's administrative procedures in relation to citizens' complaints about national authorities [1].

3.5. As regards the tripartite meeting, the exclusion of a complainant from a meeting intended to discuss a solution to the complaint would be *prima facie* unreasonable in a normal administrative procedure in which the complainant is a party. However, the choice between different courses of action which are compatible with Community law is a matter for the Member State concerned. Therefore, in the present state of Community law, there appears to be no legal basis for the claim that it was unreasonable to exclude the complainant from a meeting organised in that context, provided that he had the procedural possibility to comment on the compatibility with Community law of the course of action finally selected and accepted as satisfactory by the Commission. As noted in paragraph 3.4, this appears to have been the case.

3.6. The Ombudsman's inquiries have not, therefore, revealed evidence of failure by the Commission to observe the principles of good administrative behaviour in relation to the procedural matters dealt with in this section of the decision.

4. ***Matters raised in the complainant's observations***

4.1. In his observations on the Commission's opinion, the complainant argued that the Commission's decision to support the amendment to the GBP was legally unsustainable and ignored the evidence that he had supplied. He also claimed that the Commission's reasoning concerning 'traditional' beer was an excuse for having negotiated a political settlement of the Article 169 procedure.

4.2. The original complaint focused on the procedural questions dealt with in Sections 2 and 3. The observations did not appear to provide grounds for the Ombudsman to conduct inquiries into these new allegations.

4.3. The Ombudsman notes that the complainant has the possibility to contest the compatibility of the amended Guest Beer Provision with Article 30 of the EC Treaty by initiating proceedings in the United Kingdom courts.

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

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[1] 303/97/PD, decision of 13 October 1997.

TRANSFER OF PENSION RIGHTS

Decision on complaint 733/97/PD against the European Commission

The complaint

In August 1997, the Petitions Committee of the German Bundestag transferred a petition lodged by Mr L. to the European Ombudsman to be dealt with as a complaint.

Mr L. had worked for the European Commission from 16 May 1960 until he resigned on 1 May 1970. In accordance with the applicable provisions of the Staff Regulations, he was paid a severance grant.

In December 1994 and in April 1995 Mr L. asked the Commission to allow him to repay the severance grant and transfer his pension rights to the German pension system. The complainant alleged that the Commission did not properly deal with his request.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that, in accordance with the applicable provisions of the Staff Regulations, Mr L. had not been entitled to a pension. Therefore a severance grant had been paid to him. Furthermore the opinion stated that the Commision had replied to the complainant's inquiries of 23 December 1994 and 7 April 1995 on 13 June 1995, as follows:

— that on the one hand the reimbursement of the severance grant was not possible (Article 4 of Annex VIII of the Staff Regulations provides for such a possibility only if the person concerned resumes active employment with a Community institution),

— that on the other hand the transfer of pension rights could only be taken into consideration for those officials and temporary agents who are still in active service, or else for those who, when leaving the service of an Community institution can prove an immediate entitlement to pension or an entitlement which takes effect after a certain period; this was however not the case with the complainant.

The opinion also stated that through the payment of the severance grant the Commission had fullfilled its obligations towards the complainant since he had no claim to a pension; that the Commission had answered all the complainant's questions; and no other measures would be considered.

No observations were received from the complainant.

The Decision

It appeared that in its reply to Mr L.'s inquiries, the Commission gave adequate reasons why it could not meet his request. Therefore, the Ombudsman found no justification for the claim that the Commission had dealt with Mr L.'s request improperly.

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

PACKAGE HOLIDAYS DIRECTIVE: ALLEGED FAILURE BY COMMISSION TO DEAL PROPERLY WITH A COMPLAINT

Decision on complaint 1075/97/IJH against the European Commission

The complaint

In November 1997, Mr D. made a complaint to the Ombudsman concerning the way in which the Commission had dealt with a complaint which he had made against the United Kingdom authorities in August 1995.

Mr D.'s complaint to the Commission concerned the alleged failure of the United Kingdom Government properly to implement and enforce the provisions relating to surcharges contained both in Directive 90/314/EEC and in the national legislation through which the Directive was transposed into domestic law [1]. The Commission registered the complaint as No 95/4883.

In February 1996, DG XXIV of the Commission informed the complainant that the Directive appeared to have been properly transposed into domestic law, but that the Commission had requested information from the United Kingdom authorities concerning a guidance booklet about the law published by the United Kingdom Department of Trade and Industry (DTI) and that Article 169 infringement proceedings might commence if the reply from the United Kingdom authorities were not satisfactory.

On 7 October 1997, DG XXIV informed the complainant that his complaint had resulted in a change of wording in the DTI's

[1] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours 1990 (OJ L 158, 23.6.1990, p. 61); the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992 3288.

guidance booklet and that the Commission had decided not to go further in the matter. The letter also explained that the Directive in question did not require that injunctive powers should be available to national authorities to deal with possible infringements of national provisions transposing Community law, but that a proposal for a Directive containing such injunctive powers was being considered.

In summary, Mr D.'s complaint to the Ombudsman made three allegations:

(i) The time taken to deal with the complaint to the Commission was excessive.

(ii) The Commission's letter dated 7 October 1997 contained irrelevant information.

(iii) The Commission had failed to deal properly with the issues raised in the complaint and by approving the revised wording of the DTI's guidance booklet the Commission had colluded with the United Kingdom Government's failure to implement Directive 90/314/EEC properly and effectively.

As regards the third allegation, the complainant referred to the fact that the guidance booklet omits key words that appear both in the Directive and in the Regulations through which the Directive was transposed into domestic law. Firstly, the law provides that a surcharge may be imposed only 'if *the contract states precisely how the revised price is to be calculated,*' whereas the booklet omits the words *'precisely'* and *'to be'*. According to the complaint, package tour companies do not, in practice, explain in their contracts the method by which surcharges will be calculated. Secondly, the law provides that surcharges may be imposed only in respect of a limited range of items including *'fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports or airports'*. However, the booklet refers only to *'fees chargeable for services'* and, in practice, package tour companies frequently add amounts in respect of administration charges and agents' commissions, which they are not entitled to charge. According to the complainant, the consumer protection which the Directive aims to provide is thereby negated.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. The Commission's opinion included, in summary, the following points:

The complainant had complained to the Commission about both the text of the guidance booklet and the absence of an enforcement mechanism in case a package travel contract does not *'state precisely how the revised price is to be calculated'*. The Commission informed the United Kingdom authorities of the complaint on 6 December 1995. In a letter of 7 March 1996 the United Kingdom authorities took the view that the guidance booklet was not misleading. However, in a meeting with officials of DG XXIV on 26 July 1996, the United Kingdom authorities showed their readiness to modify the text of the booklet. Taking into account the new text, which was communicated on 10 October 1996, the Commission decided to close the file on 19 March 1997 because it considered that the United Kingdom was not in breach of Community law. The complainant was informed of this decision and the reasons for it by letter of 7 October 1997. That letter also contained clear and detailed information on the questions raised by the complainant concerning the issue of enforcement.

The Commission's opinion also expressed regret for the delay between closing the file (19 March 1997) and informing the complainant of this decision (7 October 1997).

The complainant's observations

In his observations, the complainant maintained the allegations of excessive delay, irrelevant information and collusion in misrepresenting the meaning of the Directive. He repeated his view that the Commission had ignored his main point about the importance of the precise wording of the Directive. In this respect, he considered the revised wording of the DTI guidance booklet to be no better than the original.

The Decision

1. *Preliminary remarks concerning the Commission's procedures for dealing with complaints concerning infringements of Community law by Member States*

1.1. The Commission closed its file on the complaint in this case in March 1997. In April 1997 the Ombudsman began an own initiative inquiry into the possibilities for improving the quality of the Commission's administrative procedures for dealing with complaints concerning infringements of Community law by Member States [1]. During the own-initiative inquiry the Commission indicated that it had adopted an internal rule of procedure that a decision either to close a file without taking any action, or to initiate official infringement proceedings, must be taken on every complaint within a maximum period of one year from the date on which it was registered, except in special cases, the reasons for which must be stated.

[1] 303/97/PD, reported in the European Ombudsman's Annual Report for 1997 pp. 270-274 and see the Commission's 15th Annual Report on Monitoring the Application of Community law (1997), Introduction pp. III-IV (COM(1998) 317 final).

1.2. Furthermore, the Commission undertook that, apart from cases where a complaint is obviously without foundation and cases where nothing further is heard from the complainant, the Commission will ensure that a complainant is informed of its intention to close a case. It appears, therefore, that in cases such as the present, in which the Commission finds that there is no infringement of Community law, complainants should have the possibility to put forward views and criticisms concerning the Commission's point of view before the Commission commits itself to a final conclusion that there is no infringement.

2. ***The complaint of excessive delay***

2.1. In the present case, the delay between registration of the complaint and the Commission's decision to close the file was over two years. In its opinion, the Commission apologised for the further delay (nearly seven months) before the complainant was informed of this decision.

2.2. The Commission's adoption of the internal rule referred to in paragraph 1.1 and the commitment referred to in paragraph 1.2 should prevent unnecessary delay in dealing with future complaints. It therefore appears that the Commission has already acted to ensure that future cases are dealt with in approximately half the time taken to deal with the present case. In view of this commitment and of the Commission's apology referred to in paragraph 2.1, no further action by the Ombudsman appears necessary.

3. ***The allegation that the Commission's letter dated 7 October 1997 contained irrelevant information***

3.1. The Commission's letter to the complainant dated 7 October 1997 informed him of the Commission's view that the modified text of the DTI guidance booklet met the necessary demands for clarification and that the Commission had decided not to go further into the matter. As noted in paragraph 1.2, complainants should, in future, have the opportunity to put forward views and criticisms concerning the Commission's point of view before the decision to close a case is made.

3.2. According to the complainant, the Commission included irrelevant material in its letter: in particular, the additional explanation concerning the absence of a requirement of injunctive provisions to enforce Directive 90/314/EEC and the information about a proposal for a new Directive which would require such provisions.

3.3. The complaint to the Commission dated 15 August 1995 expressly raised the issue of the absence of any means of enforcement of the Directive. The Ombudsman therefore considers that it was correct for the Commission to deal with this matter in its letter to the complainant. Furthermore, it does not appear inappropriate for the Commission also to volunteer information about legislative proposals relating to enforcement.

3.4. There appears, therefore, to be no maladministration in relation to this aspect of the complaint.

4. ***The allegation that the Commission failed to deal properly with the issues raised by the complaint and colluded with a failure by the United Kingdom Government to implement Directive 90/314/EEC properly and effectively***

4.1. The complainant's main claim in relation to this aspect of the case concerns the fact that the DTI guidance booklet does not reproduce exactly the wording of the Directive and transposing Regulations. He alleges that, as a result, package tour operators regularly include in their contracts provisions which are void according to the Directive and transposing Regulations and that the consumer protection which the Directive aims to provide is thereby negated. According to the complainant, the Commission has failed to deal satisfactorily with this complaint and by approving the revised wording of the DTI guidance booklet has colluded with a failure by the United Kingdom Government to implement Directive 90/314/EEC properly and effectively.

4.2. In its opinion, the Commission refers to its letter to the complainant dated 21 January 1998 in reply to the complainant's letter dated 25 November 1997. The complainant's letter explained why he considered the revised wording of the guidance booklet to be unacceptable. The Commission's reply stated that Member States are obliged only to transpose and implement Directive 90/134/EEC and that they have no obligation to publish and distribute information on the measures taken to comply with the Directive. Consequently the guidance booklet could be judged to infringe the Directive only if it gravely endangered its aim, which did not seem to be the case. The Commission's reply also expressed the view that enforcement provisions do not seem to be necessary, because if a package travel contract fails to state precisely how the revised price is to be calculated, the sanction is simply that the organiser will not be entitled to any additional payment and that this is in full compliance with Article 4(4)(a) of the Directive.

4.3. The Commission has therefore responded to the arguments presented by the complainant. It has made

clear what it considers the Member State's legal obligations to be and why it considers that there is no infringement of Community law by the Member State. There is no evidence available to the Ombudsman to suggest maladministration by the Commission in its assessment of these matters.

4.4. The correspondence between the complainant and the Commission (referred to in paragraph 4.2) took place after the Commission had already closed the file on the complaint. As noted in paragraph 1.2, in future, complainants should have the possibility to put forward views and criticisms concerning the Commission's point of view before the Commission commits itself to a final conclusion that there is no infringement.

4.5. In view of the above, there appears to be no maladministration in relation to this aspect of the complaint.

Conclusion

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

RECRUITMENT PROCEDURES: DECISION TO NOMINATE ANOTHER CANDIDATE

Decision on complaint 1116/97/BB against the European Commission

The complaint

In November 1997, Mr K. made a complaint to the Ombudsman concerning the Selection Procedure COM/R/A/183 and the Selection Board's decision to nominate another applicant to the position despite the fact that the complainant was on the reserve list.

The complainant was a candidate in the Selection Procedure COM/R/A/183. On 3 March 1997, the Commission informed him that he was on a reserve list valid until 31 December 1997. In his complaint, Mr K. alleged that the position had in fact been created for a Mr H., although according to the complainant Mr H. did not comply with the requirements of the vacancy notice, that he neither had 15 years of work experience in the field nor was he the best qualified candidate.

The complainant claimed that he sent a fax to the Commission on 15 August 1997, asking about the filling of the vacancy. He also claimed that in order to eliminate possible candidates from other Member States, Finnish citizenship was required in the notice. Therefore, nobody except Mr H. stood a real chance of being recruited. Finally, he claimed that he was not informed of the nomination made pursuant to the Selection Procedure COM/R/A/183.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. The Commission's opinion can be summarised as follows:

The Selection Procedure COM/R/A/183, which aimed at constituting a reserve list for a position of Head of Unit at the Joint Research Centre in Petten, was totally transparent, objective and fair.

The abovementioned reserve list was established by the Selection Board acting within its margin of discretion. On the basis of that list, and by applying its discretionary powers, the Appointing Authority had to select the applicants fulfilling the required qualifications of the notice.

Five applications were presented. After having examined the files the Selection Board established that two applicants did not fulfill the criteria described in the notice. Three applicants were invited to interviews and the Board unanimously decided to propose to put Mr H. and Mr K. on the reserve list.

On 9 April 1997, the Selection Board met in Ispra in order to examine the two applications. The Board declared both applicants suitable for the position, underlining that Mr H. was better qualified in the marketing and administration of research projects for industry. This qualification figured on the vacancy notice.

The Appointing Authority, within its margin of discretion, nominated Mr H. for the position. It legitimately applied its choice between the two applicants.

All three candidates invited to the interview fulfilled the formal criteria required in the vacancy notice. Contrary to what was alleged, Mr H. fulfilled the required 15 years of work experience.

The fact that Finnish nationality was required was not an element which proved that the position was created for Mr H. Council Regulation (EC) No 626/95 established special measures by which open competitions can be organised until 31 December 1999, in order to recruit citizens from the three new Member States.

The Secretariat of the Selection Board claimed to have no knowledge of a fax sent by the complainant of 15 August 1997.

The Commission regretted the fact that the complainant was not notified of the nomination of another candidate to the position in question and said that it would take the necessary measures to ensure that this situation did not occur in the future.

The complainant's observations

In his observations, the complainant maintained his complaint. As regards the selection procedure, the complainant stated that there were no grounds to the claim that Mr H. was better qualified in the marketing and administration of research projects for industry.

As to the formal criteria, he alleged that Mr H. did not have 15 years of work experience in all the required fields whereas he, the complainant, did.

The complainant did not contest the policy to recruit citizens from the three new Member States, but he alleged that he knew many European citizens were better qualified for the position than the selected candidate.

The complainant also maintained his claim that he had sent a fax to the Commission, but never received any information on the results of the selection.

The Decision

1. ***Selection procedure and formal criteria in COM/R/A/183***

1.1. Article 29(2) of the Staff Regulations provides that a procedure other than the competition procedure may be adopted by the Appointing Authority for recruitment to posts which require special qualifications.

1.2. According to the established case-law of the Court of Justice, it is for the Appointing Authority to assess whether a candidate fulfils the conditions required by the vacancy notice, and that assessment may be questioned only in the event of manifest error.

1.3. As regards the selection procedure and the formal criteria applied in COM/R/A/183, the Ombudsman's inquiries into this complaint indicated that the Selection Board had acted in accordance with the vacancy notice.

1.4. Therefore, the Ombudsman found no instance of maladministration regarding the selection procedure and formal criteria applied by the Selection Board.

2. ***Nationality requirement***

The Selection Board was entitled to impose a nationality requirement in accordance with Council Regulation (EC) No 626/95 and there appeared to be no evidence to support the allegation that this possibility had been abused in order to benefit a particular candidate. The Ombudsman's inquiries, therefore, did not reveal an instance of maladministration in this aspect of the case.

3. ***Alleged loss of a candidate's fax***

3.1. The Ombudsman underlined that principles of good administrative conduct demand that requests for information shall be replied to without undue delay.

3.2. The complainant alleged that he had sent a fax to the European Commission Secretariat of the Research Selection Committees on 15 August 1997, requesting information regarding the filling of the position concerned. The Commission explained in its first opinion that it had not found the fax dated 15 August 1997. In his observations, the complainant maintained his allegation.

3.3. The Ombudsman found that there appeared to be no evidence to contradict the Commission's claim that it did not receive the fax. Therefore, the Ombudsman's inquiries did not reveal an instance of maladministration in relation to this aspect of the complaint.

4. ***Lack of information on the filling of a position***

4.1. The Ombudsman noted that principles of good administration require that a candidate to a selection procedure whose name is on a reserve list receives a notification of the filling of the position. He also took note of the fact that the Commission regretted that the complainant had not been notified of the nomination of another candidate to the position in question and that it would take the necessary measures to ensure that this situation did not occur in the future.

4.2. In view of these findings and taking into account that the Commission had regretted its failure to notify the complainant and that it would take the necessary measures to ensure that such failure did not occur in the future, the Ombudsman's inquiries did not reveal any instance of maladministration.

Conclusion

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

ALLEGED FAILURE TO PREVENT DISCRIMINATION IN ACCESS TO PUBLIC EMPLOYMENT

Decision on complaint 272/98/VK against the European Commission

The complaint

In March 1997, Mr P. made a complaint to the Ombudsman against the Commission. He claimed that the Commission had failed to ensure that the Italian authorities did not discriminate against non-Italian citizens who were seeking employment as teachers in South Tyrol and had failed to reply to him about this matter.

At the beginning of 1996, the complainant, who is an Austrian citizen, had asked the Euro-Jus officer in the Commission's Austrian representation for advice on a matter of discrimination in access to public employment as a teacher in the Northern Italian region of South Tyrol. From the information given, it appeared that German mother tongue was a requirement for the employment but that due to a complex points system, non-Italian applicants did not have an equal chance to get posts.

The Euro-Jus officer investigated the matter and informed the complainant that his request had been transferred to the Legal Service of the Commission for further investigation and that he would receive a reply from the Commission services in Brussels. However, the complainant did not receive a reply and complained to the Ombudsman.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that due to the high number of complaints received by its services on issues related to access to the public service in the Member States, the complainant's letter had not been answered in due time. This delay was regretted by the Commission. A detailed letter was sent to the complainant on 27 June 1997.

Furthermore, the Commission stated that it is fully aware of the specific problems for access to employment in the Province of Bolzano in South Tyrol. The Commission officially contacted the Italian authorities on 30 August 1996 on this topic. In its reply, Italy informed the Commission that the authorities of Bolzano had undertaken to remove all obstacles for European Union nationals for access to public employment.

In addition, the Commission undertook to bring the complainant's specific case to the attention of the Italian authorities and remind them about their commitment.

The Decision

The EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman's inquiries into this complaint were therefore directed towards examining whether there was maladministration in the activities of the European Commission.

1. As regards the failure to reply, it appeared that the Commission had sent a detailed letter of reply to the complainant on 27 June 1997. The Commission admitted that the complainant's letter should have been answered earlier and it regretted the delay. This aspect of the complaint appeared therefore to be settled.

2. As concerned the requirements for access to public employment in the Province of Bolzano, the Commission appeared to be aware of the issue and to have contacted the relevant national authorities. The Italian authorities replied to the Commission announcing their formal commitment to remove all obstacles for European Union nationals as regards access to public employment. Furthermore the Commission undertook to bring the complainant's individual case to their attention. It appeared therefore, that the Commission had actively taken measures to improve the current situation of access to public employment in general and also in particular, by making the complainant's case directly known to the relevant authorities.

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

3.1.4. THE OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES

OPOCE: DISTRIBUTION SYSTEM AND PRICING POLICY

Decision on complaint 1077/4.12.96/WG/D/VK/OV against the Office for Official Publications of the European Communities

The complaint

In November 1996, Mr G. complained to the Ombudsman about the distribution system of the Office for Official Publications of the European Communities (OPOCE).

The complainant is a supplier of EC documentation in Germany and receives material from OPOCE through the central German supplier, Bundesanzeiger. His main claim is that, as compared to the former situation in which citizens could order EC material directly from OPOCE, the present distribution system in which he can order only from Bundesanzeiger does not function efficiently. In particular, he alleged that documentation was sometimes not available and also that prices were too high. He also criticised the access to documents by Internet, which is not available to all citizens.

The inquiry

OPOCE's opinion

The complainant sent his complaint, addressed to the Ombudsman, to OPOCE. OPOCE transmitted the complaint to the Ombudsman, together with its opinion on the complaint.

In its opinion, OPOCE stated that it was necessary to supply publications and documents through a network of national distributors, since OPOCE itself could not possibly deal with all orders. This system is also intended to be closer to the citizens. OPOCE also pointed out that, given the large number of publications (15 000 current titles and 700 new publications every year), it was impossible for all titles to be available at all times at all the national sales points. Therefore it was understandable that some of the publications the complainant wanted to order were not available. However, OPOCE underlined that it constantly promoted a quick client service.

As regards the cost of documents such as COM documents, OPOCE observed that prices differ from country to country due to the different costs of living in the Member States and the different means used by the national offices. OPOCE added that, in the debate between sale and free distribution of documents, the present policy of the institutions and of most of the Member States was based on sale. It also observed that it would soon make available a service of 'document delivery' centralised by EUDOR, comprising the *Official Journal of the European Communities*, COM documents and other collections, which will apply the same charges for services to citizens in all the Member States.

As regards access through Internet, OPOCE stated that Internet access was parallel to, not exclusive of, other means of access to documents.

The complainant's observations

In his observations, the complainant repeated his criticisms concerning the difficulties to obtain certain European Community information and the fact that the present supply system was not close to the citizen. The complainant further criticised the fact that information was sold for profit. According to him, the European institutions act as commercial organisations by selling their information, and this is contrary to the philosophy of a public institution.

The Decision

1. ***The allegations concerning the supply system and the problems to obtain certain documents***

OPOCE justified the system of distribution through national offices supplying the documentation by the necessity of decentralisation given the impossibility for the OPOCE to deal alone with all demands. It equally underlined that it constantly promoted a quick client service. It admitted however that it was impossible for all documents to be at all times available at all the national offices because of the large number of publications. It appeared to the Ombudsman that the number of publications of the OPOCE constituted a valid reason for certain titles being temporarily unavailable. Therefore, the fact that certain publications asked for by the complainant were not immediately available in Germany could not be considered as an instance of maladministration.

2. ***The allegations concerning the price of documents and the practice of sale of the OPOCE***

2.1. The complainant criticised the prices of documents and the fact that OPOCE sells documents instead of providing them for free. OPOCE observed that it was the current policy of the institutions to sell the documents and not to provide them for free. The Ombudsman noted that the OPOCE was aware that prices may vary from Member State to Member State due to the different costs of living and that it would soon make available a 'document delivery' service which will guarantee the same charge for all citizens.

2.2. Taking into account the aim of covering the costs of the production and distribution of the documents, it did not appear that OPOCE's pricing policy was based on arbitrary or unreasonable criteria. Therefore it could not be considered as an instance of maladministration.

In view of these findings, there appeared to be no maladministration by OPOCE. The Ombudsman therefore closed the case.

(See also Decision on complaint 269/97/PD against the European Commission)

3.2. **CASES CLOSED FOR OTHER REASONS**

3.2.1. THE EUROPEAN PARLIAMENT

ALLOWANCE SYSTEM FOR MEMBERS OF THE EUROPEAN PARLIAMENT

Decision on joined complaints 971/24.10.96/UK/PD, 1039/22.11.96/SW/PD, 1111/31.12.96/DK/PD and 48/97/PD against the European Parliament

The complaints

Between October 1996 and January 1997, the Ombudsman received four different complaints concerning the allowances regime that the European Parliament applies to its Members. In February 1997, the Ombudsman informed the complainants that their complaints would be dealt with jointly and that the inquiry would not involve any examination of matters relating to individual Members of the European Parliament, as the mandate of the European Ombudsman is limited to Community institutions and bodies.

The general background to the complaints were reports in the media about the Parliament's allowances system. It was reported that public funds were being spent irregularly.

Against this background, the complainants put forward in substance two grievances which were closely linked. The first grievance was to the effect that the allowances system set up by the Parliament was illegal and against principles of sound financial management. It was argued in more detail that the system set up by the Parliament was meant to circumvent the rules governing the payment of Members of Parliament. According to the complainants, it follows *ex contrario* from Articles 21 and 22 of the Protocol on the privileges and immunities of the European Communities and the ensuing Council Regulation that Members of Parliament shall not be paid by the Community. The Members are meant to be paid by the Member State in which they are elected. Again according to the complainants, as this remuneration system appeared to be unsatisfactory, the Parliament set up the generous allowances system which served as a hidden form of pay, because the rules did not make the payment of allowances conditional on the presentation of supporting documents.

The second grievance was to the effect that the existing rules were not properly enforced, so that Members of Parliament received allowances without being requested to justify the work or the expense that the allowance was meant to cover.

The inquiry

The Parliament's opinion

The complaint was forwarded to the European Parliament. In its opinion, the Parliament stated that on 10 July 1997 the Bureau of the Parliament adopted the following decisions:

'— *the setting up of a system for the permanent control of travel allowances through the production of supporting documents, to cover all means of transport and all members without distinction; the proposed modalities of this system would be established by the Quaestors and submitted to the Bureau for approval,*

— *as regards entitlement to subsistence allowances in Brussels to provide henceforth for the signing of a single central register,*

— *with regard to subsistence allowances during plenary sessions in Strasbourg, the principle of linking entitlement to these allowances with participation in roll-call votes; the Quaestors would submit to the Bureau a proposal for precise modalities,*

— *agreed in principle to review all aspects of the method of calculation of the kilometre allowance, including through the possible introduction of a third band, on the basis of a proposal to be submitted to the Bureau by the Quaestors.'*

Furthermore, the Parliament stated that on 15 September 1997 the Bureau had adopted the following implementing provision:

'In the case of Members who have undertaken at least part of the journey by public transport, the supporting document to be submitted is, for journeys by plane, the boarding card. Should no boarding card have been issued, the document to be submitted is the air ticket or a copy thereof. In the case of journeys by train, the document to be submitted is the rail ticket or, should that ticket be required for further journey, a copy of the ticket verified by the Cash Office.

In the case of journeys undertaken by private car, the Member must submit a personal declaration including the registration number of his or her car, the kilometre reading at the beginning and end of the journey, the route taken and the precise location where the car is parked at Parliament's place of work.'

On 23 October 1997 the President of the Parliament addressed a note to each individual Member of the Parliament, explaining the implications of the provision of 15 September 1997. The note stated *inter alia*:

'I am confident that Members will take the view that the European Parliament has every interest in demonstrating to the

citizens of the European Union that the amounts payable to Members in respect of their allowances are subject to adequate checks and transparency, in line with the resolutions on its own budget adopted by the Parliament in December 1996 and June 1997.

In practical terms, the new system will come into effect as from 3 November 1997. It will require each Member (including the President) to submit to the Members' Cash Office proof that each journey claimed for was actually undertaken. This documentary proof should cover the major part of journeys actually made. It will take the form of airline boarding passes for each individual journey by air, railway tickets for rail travel or a personal declaration when the journey is undertaken by private car or other means of transport. The personal declaration for journeys has been drawn up in such a way as to enable it to be checked. In the very rare cases where it is not normal practice for an airline to issue boarding passes, a copy of the relevant airline ticket must be submitted.'

Finally, on 15 and 16 December 1997 the Bureau of the Parliament established the following provision concerning Members' entitlement to daily allowances:

'The daily allowances of Members absent for more than half of all the roll-call votes taken on the Tuesdays, Wednesdays and Thursdays of part-sessions held in Strasbourg and on the Thursdays of part-sessions held in Brussels will be reduced by 50%. Members are entitled to signify that they were present in the event that they did not wish to participate in a roll-call vote.'

It shall be noted that the mentioned week days are the days when legislative matters are discussed. In addition, Members who are present for only half the plenary session will lose 50% of their general expenses. According to the Parliament, the result of these measures is that the European Parliament will become the most demanding parliament in the European Union as regards the attendance of its Members at plenary sessions.

The complainants' observations

The observations lodged were to the effect that it was good that the Parliament had adopted new rules on the subject matter. However, concern was expressed to the effect that the new rules apparently do not contain sanctions to be imposed on Members who do not comply with the rules.

The Decision

1. It appeared that in the light of the public criticism and the complaints lodged, the European Parliament proceeded to a reform of the relevant rules as indicated above. The complainants, who had lodged observations, appeared happy about that. Such reforms appear to be in accordance with good administrative behaviour.

   The Ombudsman also took note of the fact that within the Parliament, there is a Financial Controller whose task it is, in accordance with the Community's Financial Regulations, to ensure that principles of sound financial management are observed.

2. In most national Ombudsmen's offices it is provided or an established practice that the Ombudsman does not inquire further when it appears that a specialised control instance is inquiring into the same matter, the reasoning being that the instance with a general remit should give way before the specialised instance.

   It appeared that the Court of Auditors was conducting an audit of the Parliament 's expenses and allowances system.

   It is worth recalling briefly the characteristics of this Community institution, set up by the Treaty establishing the European Community.

   According to Article 188a of the Treaty the Court of Auditors is responsible for carrying out audits of the Community finances, and Article 188b provides that:

   'The Members of the Court of Auditors shall, in the general interest of the Community, be completely independent in the performance of their duties.

   In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties.'

   Thus, the Court of Auditors is fully independent in carrying out its task. Article 188c of the Treaty specifies in more detail the task and the powers of inquiry which the Court has. Article 188c provides *inter alia*:

   '1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Community …

   2. The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound …

   3. The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Community and in the Member States …'
   (The Ombudsman's underlining).

Thus, as to the questions of regular spending of public funds and principles of sound financial management, the Court of Auditors must be considered a specialised instance. According to the information available, the audit that the Court of Auditors was conducting at the time, concentrated on an evaluation of the allowances and expenses system, including an examination of the system's conformity with the Parliament's relevant Regulation, with Community Financial Regulations and with principles of sound financial management. The results of the audit were to be laid down in a report which would be made public in due course.

Against this background, the European Ombudsman did not consider any further inquiries justified. The Ombudsman therefore closed the case.

3.3. **CASES SETTLED BY THE INSTITUTION**

3.3.1. THE EUROPEAN PARLIAMENT

RECRUITMENT: NEGATIVE RESULTS OF THE MEDICAL EXAMINATION

Decision on complaint 1021/14.11.96/NLP/ES/JMA against the European Parliament

The complaint

In November 1996, Ms L. C. complained to the Ombudsman concerning the decision of the European Parliament not to appoint her to a vacant post on the basis of negative medical advice.

The complainant took part in inter-institutional competition EUR/B/27 in 1993 and was placed on a reserve list. In September 1994, the European Commission services responsible for Personnel and Administration (DG IX) invited her to undergo a medical examination in Brussels. The results of the medical examination were never forwarded to the complainant. In February 1996, Ms L. C. was interviewed by the European Parliament with a view to filling a vacancy. Soon after, the Parliament's recruitment service made an offer of employment to the complainant by telephone.

Not having received any further written communication, Ms L. C. contacted the Parliament in April 1996. She was informed that the vacancy had been offered to another candidate. The decision had been taken on the basis of the negative results of the medical examination Ms L. C. had undergone.

The complaint to the Ombudsman alleged that the institutions concerned did not comply with the provisions of Article 33 of the Staff Regulations [1]; that her rights as a candidate for a post in the EC institutions had not been respected; and that the decision taken by the Parliament was apparently based on the results of a medical test performed in 1994, therefore well beyond the validity period (six months) established in the Parliament's recruitment policy for this type of procedure.

The inquiry

The Parliament's opinion

The complaint was forwarded to the Parliament. In its opinion, the Parliament pointed out that the decision not to select the complainant for the vacancy was based on the negative results of the medical examination carried out by the Commission's Medical Service.

The Parliament expressed regret that the results of that medical examination were not forwarded to the complainant. As a result she did not have the opportunity to contest the negative results as required by Article 33 of Staff Regulations. The Parliament, however, considered that it had no responsibility in that failure.

In a covering letter to the opinion, the President of the European Parliament indicated that although no vacancies were available at the moment, the complainant would be invited to undergo a new medical examination to be carried out by the medical services of the European Parliament.

The complainant's observations

In her observations, Ms L. C. agreed to the solution proposed in the President's letter that she should undergo a new medical examination. Since the Parliament had indicated that the examination should be carried out 'with all necessary guarantees', the complainant made some further requests as regards some particular aspects of the examination.

The Decision

It appeared from the Ombudsman's inquiry, that the European Parliament had taken steps to settle the matter to the satisfaction of the complainant. The Ombudsman therefore closed the case.

[1] 'Before appointment, a successful candidate shall be medically examined by one of the institution's medical officers […]. Where a negative medical opinion is given as a result of the medical examination […], the candidate may, within 20 days of being notified of this opinion by the institution, request that his case be submitted for the opinion of a medical committee […]'.

FAILURE TO PROVIDE CONTRACT DOCUMENTS IN THE LANGUAGE OF THE TENDERER

Decision on complaint 606/97/VK/OV against the European Parliament

The complaint

In June 1997 Mr Z. complained to the Ombudsman on behalf of a Dutch carpentry firm. Mr Z. read an official notice published in a Dutch newspaper of a call for tenders to provide furniture to the European Parliament for the conference rooms of the Leopold building in Brussels. He asked for the contract documents which were sent to him in French not Dutch. He contacted the Parliament's services which confirmed that the contract documents existed only in French. In his complaint to the Ombudsman, Mr Z. alleged that, in order to guarantee equality between them, tenderers should receive the contract documents in their own language.

The inquiry

The Parliament's opinion

The complaint was forwarded to the Parliament. In its opinion, the Parliament first observed that the call for tenders had been published in the *Official Journal of the European Communities* of 27 May 1997, as well as in national newspapers including a Dutch newspaper.

As regards the linguistic requirements of the notices of the call for tenders, the Parliament referred to Article 9 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1]. This Article provides that the tender notice by which a contracting authority wishes to award a public supply contract shall be published in full in the *Official Journal of the European Communities* in its original language, and a summary of the important elements of each notice shall be published in the official languages of the Communities, the text in the original language alone being authentic. The Parliament concluded therefore that the tender notice in the present case, which had been published in all the official languages of the Union, had respected those requirements.

As regards the contract documents, the Parliament observed that the national contracting authorities have no obligation under Community law to translate them, and that, as regards public procurement by the Community institutions where the contract documents are often voluminous, the practice of the Parliament and of other institutions had also been not to translate the contract documents. Therefore the contract documents in the present case were only available in French.

The Parliament observed, however that it was aware that this pragmatic approach did not allow the Community institutions to respect the principle of equality of treatment between the Community languages. For this reason, the Advisory Committee on Purchases and Tenders adopted on 27 November 1997 a recommendation (CCAM No 4 — 1997) on the use of the official languages for its own tenders. The Parliament concluded that, in conformity with this recommendation, it will take all the necessary measures in order to ensure that, in future, the essential parts of the contract documents will be available in all the official languages of the Union. It finally observed that the tenderers can always submit their tenders in the official language of their choice.

The complainant's observations

No written observations were received from the complainant. However, he informed the office of the Ombudsman in a telephone conversation that, given that the contract documents were not available in Dutch, he had been unable to submit a tender. He nevertheless observed that his complaint had led to a positive result, given that the Parliament had announced it would change its practice for the future.

The Decision

The failure of the Parliament to provide the complainant with contract documents in the Dutch language

1. In the field of tenders by Community institutions, the general principle of non-discrimination on the basis of nationality, set out in Article 6 of the EC Treaty, is repeated in Article 62 of the Financial Regulation, which provides that 'in respect of contracts entered into by the Communities, there shall be no discrimination between nationals of Member States on grounds of nationality'.

2. As regards the principle of non-discrimination, the Ombudsman noted that the Parliament expressed its awareness of the fact that its practice not to translate contract documents did not allow it to respect this principle. Therefore the Ombudsman welcomed the initiative of the Parliament which led on 27 November 1997 to the adoption by the Advisory Committee on Purchases and Tenders of the recommendation (CCAM No 4 — 1997) on the use of the official languages for its own tenders. For the European citizens, it contains the valuable recommendation that the contract documents sent by the institution to a person or company subject to the jurisdiction of a Member State shall in principle be drafted in the language of that State, or in the language used in the request.

3. It was regrettable that the complainant could not take part in the tender because he did not get the contract documents in his own language, which might constitute an infringement of the principle of non-discrimination on the basis of nationality. However, it appeared from the above

[1] OJ L 199, 9.8.1993, p. 1.

that the Parliament had reacted positively and promptly to this complaint and was going to change its practice as regards the contract documents. This will enable the complainant, like other tenderers, to participate under equal conditions in future tenders organised by the Parliament.

Therefore, it appeared from the European Parliament's opinion and the complainant's observations that the Parliament had taken steps to settle the matter and satisfy the complaint. The Ombudsman therefore closed the case.

3.3.2. THE EUROPEAN COMMISSION

STATE AIDS: ENFORCEMENT OF COMMUNITY LAW BY THE COMMISSION

Decision on complaint 852/3.9.96/SJB/UK/IJH against the European Commission

The complaint

In August 1996, S. J. B. — a firm of solicitors — made a complaint to the Ombudsman against the Commission on behalf of their clients Ladbroke. The complaint concerned the Commission's dealings in relation to alleged State aid granted by the French authorities to undertakings in the French racing and betting industries.

S. J. B. originally asked for the complaint to be treated confidentially, but later wrote to confirm that Ladbroke's name could be disclosed in the Ombudsman's decision closing the case.

According to the complainant, Ladbroke made a number of complaints to the Commission between 1989 and 1995 about alleged State aids granted by the French authorities to French racing associations and to the *Pari Mutuel Urbain* (PMU). Ladbroke considered that, according to Article 93(3) of the EC Treaty, these State aids should have been notified to the Commission before implementation, leading to a decision by the Commission, under either Article 93(2) or (3), as to their compatibility with the common market.

The complaint to the Ombudsman referred specifically to three complaints which S. J. B. had made to the Commission on behalf of Ladbroke:

(a) A complaint made by fax dated 23 December 1992, concerning a grant of FRF 600 million which had not been notified to the Commission by the French Government as a State aid. By letter dated 12 May 1993, the Commission (DG IV) informed S. J. B. that the complaint would be dealt with under the number NN 35/93. S. J. B. received no further response from the Commission during the next three years.

(b) A complaint made by letter dated 25 August 1994, concerning a further FRF 1 500 million of aid which, according to press reports, the PMU was to receive over five years. S. J. B. received no response from the Commission to this complaint.

(c) A complaint made by letter dated 27 March 1995, concerning a further grant of FRF 450 million to the French racing associations and the PMU which had been reported in the press. S. J. B. received no response from the Commission to this complaint.

S. J. B. claimed that the Commission had failed both to investigate Ladbroke's complaints and to enforce the obligation imposed on Member States by Article 93(3) of the EC Treaty to notify all new State aids to the Commission.

S. J. B. also informed the Ombudsman of certain other complaints that it had made to the Commission concerning other incidents of alleged State aid granted by the French authorities to French racing and betting undertakings. These complaints were the subject of judicial proceedings before the Court of First Instance, or in national courts. S. J. B. made no complaint to the Ombudsman in respect of the Commission's handling of these complaints and, in accordance with Article 138e of the EC Treaty and Article 1(3) of the Statute of the Ombudsman, they did not form part of the Ombudsman's inquiry.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission which sent its opinion on 28 November 1996. In summary the opinion made the following points:

(i) The subject-matter of the complaint concerned French tax legislation in relation to racing betting levies, which was amended by five Decrees issued between March 1993 and December 1995. Six requests for information to clarify the matter were sent to the French authorities between January 1993 and November 1995.

(ii) Before taking a formal decision on Ladbroke's complaint it was first necessary to:

— review the successive amendments to the French legislation,

— ensure consistency in the Commission's response by considering other State aid cases of a comparable nature,

— verify whether the measures complained of are in fact State aids, or a more general form of economic regulation through taxation.

The complaint required in depth examination and the Commission's staff were engaged in that operation.

(iii) Contrary to the situation where aids have been notified, the Commission is under no obligation to respond within a predetermined time. Moreover the complainant is not without redress since he can proceed in the national courts.

The complainant's observations

The observations referred to a press release (IP/97/40) issued by the Commission on 22 January 1997, which mentioned the complaint by Ladbroke and indicated that the Commission had decided to seek explanations from the French authorities concerning the nature of French horserace betting measures.

S. J. B. understood from this press release that the Commission had decided to open a formal procedure under Article 93(2) of the EC Treaty to investigate whether the measures constitute unlawful state aid. However, they queried whether the Commission's procedure took into account only Ladbroke's complaint dated 23 December 1992 or whether it also took into account the complaints dated 25 August 1994 and 27 March 1995.

The observations also made, in substance, the following points:

(i) Although certain of the Treaty provisions concerning State aids have direct effect and thus can be enforced in national courts, the Commission has exclusive jurisdiction to determine whether an aid is compatible with the common market,

(ii) The Commission maintained that it was actively investigating Ladbroke's complaints, but it had last communicated with the French authorities on 21 November 1995, more than a year prior to its decision to institute formal proceedings.

Further inquiries

In response to a request from the Ombudsman to clarify which of Ladbroke's complaints were covered by the formal investigation, the Commission forwarded a copy of its letter to the French authorities setting out its decision to open the procedure under Article 93(2). This letter, dated 4 February 1997, was published in the *Official Journal of the European Communities* (1997 C 163/5).

The Commission subsequently provided further clarification to the Ombudsman. This was to the effect that the letter to the French authorities mentioned not only the Decrees relevant to Ladbroke's complaint dated 23 December 1992, but also those relating to its complaints dated 25 August 1994 and 27 March 1995. Furthermore, the letter also covered aid, referred to in a press release dated 10 December 1992 issued by the French Ministry of Agriculture.

It appeared from the complainant's observations on this further information from the Commission that they accepted that the concerns about possible maladministration expressed in his original complaint had been satisfied by the opening of a formal investigation under Article 93(2).

However, they expressed concern that the progress of the formal investigation should not be allowed to drift indefinitely, particularly in view of the absence of any binding time limits in the Commission's procedures. They stated that a further complaint to the Ombudsman might be made in case of excessive delay by the Commission in concluding its investigation under Article 93(2).

The Decision

1. Article 155 of the EC Treaty establishes the role of the Commission as the 'guardian of the Treaty'. As guardian of the Treaty, its duty is to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. In the case of a new State aid which has not been notified in accordance with Article 93(3) of the EC Treaty, the Commission is empowered to apply the procedure of Article 93(2) ([1]).

2. In dealing with a complaint in the field of State aids, the Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint ([2]).

3. On 4 February 1997, the Commission began a formal investigation under Article 93(2) of Ladbroke's complaints concerning State aids to the French racing and betting industries. The investigation appeared to cover all the matters which were the subject of the complaint to the Ombudsman.

4. The Ombudsman understood that the complainant accepted that the concerns about possible maladministration expressed in the original complaint to the Ombudsman were satisfied by the opening of the formal investigation under Article 93(2) on 4 February 1997.

5. It appeared from the European Commission's comments and the complainant's observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

([1]) Case 173/73 Italy v Commission [1974] ECR 717.

([2]) Case C-367/95 P, Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL, judgment of 2 April 1998, paragraph 62.

ALLEGED LACK OF INFORMATION FURTHER TO TELEPHONE CONVERSATIONS

Decision on complaint 1128/31.12.96/MH/L/(VK)OV against the European Commission

The complaint

In December 1996, Mr H., a journalist, complained to the Ombudsman concerning an alleged lack of information from the Commission. Mr H. tried on several occasions to obtain from the Commission information about 1. BADGE, a dangerous substance in tinned food; 2. import, trade and consumption of crocodile meat from South Africa; and 3. new regulations on kitchen equipment for restaurants. The complainant claimed that, in a series of telephone conversations, he had been transferred from one Commission official to another, without receiving any concrete information. Mr H. did not indicate which services of the Commission he had contacted in order to obtain this information.

The inquiry

The Commission's opinion

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

In principle, journalists should address requests for information to the Spokesman's Service, which is the Commission service responsible for giving information or interviews to journalists. The Commission also commented that it could not verify which steps the complainant had taken in order to obtain the requested information, given that it was impossible to identify the telephone conversations the complainant had had with its services.

However, the Commission observed that it was prepared to provide the requested information to the complainant. Therefore it indicated that, in order to obtain general information, the complainant could contact the Spokesman's Service, for which it gave the telephone number. As concerns access to specific documents, the Commission referred to the rules laid down in Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents [1] and indicated, for the three different topics on which the complainant requested information, the names and telephone numbers of the officials in Directorates III, VIII and XI respectively responsible for those matters.

The Commission's opinion also provided some basic information on 1. BADGE in tinned food; 2. import of crocodile meat from South Africa; and 3. regulations on kitchen equipment for restaurants. As regards the first topic, the Commission also enclosed the Opinion of the Scientific Committee for Food expressed on 7 June 1996 and indicated that after a telephone conversation between an official of DG III and the complainant, documentation on this matter had been sent to the latter on 29 April 1997.

The complainant's observations

No observations on the Commission's opinion were received from the complainant. However, in a telephone conversation the complainant declared that he was satisfied with the final response of the Commission and the documentation that had been sent to him.

The Decision

1. ***Alleged lack of information further to the initial telephone conversations***

1.1. According to the information contained in the complaint, Mr H. had been transferred, in a series of telephone conversations, from one Commission official to another without receiving any concrete information. In its opinion, the Commission observed that journalists should make their requests for information to the Spokesman's Service, which is the service responsible for giving information and interviews to journalists.

1.2. As a matter of good administrative behaviour, the Commission should ensure that its officials deal properly with requests for information by telephone from citizens, i.e. by indicating the procedures to follow and the responsible services to contact. The Commission should in particular avoid that the citizen remains without an answer to his/her request. However, given that in the present case the Commission indicated in its comments the possibility for the complainant to contact the Spokesman's Service for general information, and gave the names of the officials to be contacted in the different Directorates-General for specific information, no further actions by the Ombudsman seemed necessary.

2. ***Positive response from the Commission to provide the requested information***

2.1. In its opinion, the Commission declared that it was prepared to provide the information requested to the complainant and supplied some basic information concerning the three subjects (1. BADGE in tinned food; 2. import of crocodile meat from South Africa; and 3. regulation on kitchen equipment for restaurants). The Commission suggested to the complainant that he could

[1] OJ L 46, 18.2.1994, p. 58.

contact the Spokesman's Service and several officials, respectively for general or specific information.

It appeared from the Commission's comments and the complainant's observations that the Commission had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

LATE PAYMENT OF COMMISSION'S CONTRIBUTION TO A PROJECT

Decision on complaint 384/97/JMA against the European Commission

The complaint

In May 1997, Mr M. and Mrs. H. complained to the Ombudsman on behalf of the European Nature Heritage Fund (ENHF). The complaint alleged unjustified delay by DG VI of the Commission in paying its contribution to a project carried out by ENHF.

In June 1993, DG VI granted an amount of ECU 660 473 to ENHF to carry out one particular aspect of the Project 'Article 8 93.ES.06.002' in relation to 'Proyecto piloto y de demostración de aprovechamiento duradero de pastizales arbolados en el oeste de España' ([1]).

ENHF completed the project at the end of March 1996 and submitted the necessary technical and financial reports to the Commission in May 1996, in order to obtain the final payment. (The Commission had already paid ESP 73 755 269.)

In June 1996, an official from DG VI requested some changes in the presentation of the project's final reports, which were forwarded by the complainants in June 1996. Thereafter the complainants contacted the Commission on several occasions to request that the final payment be made.

The Commission replied in February 1997 requesting a modification of the project's financial report. Although they considered that the original report was in conformity with the guidelines for the completion of the project, the complainants forwarded a new financial report to the Commission in April 1997.

([1]) Commission Decision C(93) 1605.

At the time of the complaint to the Ombudsman in May 1997, the complainants had received no further payments from the Commission, more than a year after the project had been completed and stated that their financial situation was becoming desperate. They asked the Ombudsman whether the Commission had any deadline for late payments, and requested his intervention to ensure that the final payment was promptly made.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that it had co-financed the complainants' project on the basis of Article 8 of Regulation (EEC) No 4256/88. Payments for the project had been made in three instalments: in August 1993, May 1995 and July 1997. The final payment had been delayed because of the need to check some financial information concerning the project. Decision C(93) 1605, which set out the rules governing the project, established that final payments can only be made once the competent Commission services have approved the technical and financial reports submitted by the contractor. Annex II to the Decision authorises the Commission to request all relevant information from the contractor. In this particular case, the Commission services had to request additional information from the complainants on different occasions.

However, the length of the delay in making the final payment was the consequence of a review carried out by the Commission of all projects financed under Article 8 of Regulation (EEC) No 4256/88, following critical remarks made by the Court of Auditors. This review entailed a substantive increase in the workload of the Commission's services.

The Commission underlined that once it had received the new report from the complainants in April 1997, drawn up in line with its new guidelines, it had cleared the final payment within two months.

Additional information sent by the complainants

Before the Ombudsman received the Commission's opinion, the complainants sent additional information by letters dated June and July 1997. The first letter referred to their contacts with different services of the Commission with a view to finding out the situation of the final payment for their project. Although final payment seemed to be on its way, the Commission had also pointed out to the complainants that it was within their power to block payments in case of doubt. In view of this statement, the complainants questioned in their letter to the Ombudsman whether there should be a deadline to limit that power.

In their letter of July 1997, the complainants stated that they had now received the final payment. They also stated that unless the Commission modifies its way of dealing with non-governmental organisations, they would be unable to participate in any other project. The complainants also thanked the Ombudsman for his efforts to achieve a successful solution to their problem.

The Ombudsman forwarded the Commission's opinion to the complainants with an invitation to make observations, but none were received.

The Decision

On the basis of the information provided by the complainants and the Commission, the Ombudsman concluded that the case had been settled by the Commission. The Ombudsman therefore closed the case.

FAILURE TO KEEP A COMPLAINANT INFORMED OF DEVELOPMENTS CONCERNING HIS COMPLAINT

Decision on complaint 596/97/JMA against the European Commission

The complaint

In June 1997, Mr D. M. complained to the Ombudsman on behalf of an environmental group, CER. He alleged that the Commission had failed to inform CER of any developments concerning a complaint which it sent to the Commission in May 1996.

CER's complaint to the Commission concerned the authorisation granted by the Spanish authorities for mining exploitation in Montes Obarenes-Toloño, La Rioja. This area had been classified by the Spanish authorities as a Special Protection Area (SPA) for the protection of birds. On 5 June 1996, the Commission informed CER that the complaint had been registered under file number 96/4370 SG(96)A/8475, but had not subsequently forwarded any further information.

The inquiry

The Commission's opinion

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

As a preliminary aspect, the Commission claimed that the complaint had not been preceded by appropriate administrative approaches, as required by Article 2(4) of the Statute of the Ombudsman. The Commission considered that the complainant had not taken any initiative to contact its services after having lodged his initial complaint.

As regards the substantial aspects of the case, the Commission referred to its general obligations towards complainants, as set out in the standard complaint form [1]. These obligations involve: (i) sending an acknowledgement of receipt once the complaint is received; (ii) informing the complainant of any action taken in relation to the complaint; as well as (iii) of the decision to launch infringement proceedings against the responsible Member State.

In relation to this particular case, the Commission explained that the complainant's letter of 3 May 1996 had been registered as a complaint on 10 May 1996 (complaint file 96/4370). Since the provisions of Council Directive 79/409/EEC of 2 April 1979 on the protection of wild birds [2], and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora [3] could be relevant to the case, a request for comments was sent to the Spanish authorities on 25 July 1996. The Commission explained that, in cases in which the information submitted by the complainant is sparse, any further assessment of the case is undertaken in the light of the information submitted by the national authorities.

In the absence of any reply by the Spanish authorities within the established two-month period, a first reminder was sent on 25 October 1996, and a second one on 12 February 1997. Not having received any reply, Commissioner Bjerregaard wrote to Ms Tocino, Spanish Minister for the Environment on 18 March 1997. The reply from the Spanish authorities was finally received by the Commission on 2 June 1997.

On the basis of the explanation given by the Spanish authorities, the Commission reviewed the case and then asked the complainant for observations in a letter of 7 July 1997. In his reply of 25 August 1997, the complainant agreed with the assessment carried out by the Commission, and explained that the project at the origin of his complaint had been suspended as a consequence of the Commission intervention.

The complainant's observations

The Ombudsman forwarded the Commission's comments to the complainant with an invitation to make observations. The reply from the complainant indicated that the project had been suspended, and that the Spanish authorities had ordered that a new environmental impact assessment of the project be undertaken. In view of this, the complainant believed that his position had been correct all along, and that the authorisation given to the project was illegal.

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[1] OJ C 26, 1.2.1989, p. 6.
[2] OJ L 103, 25.4.1979, p. 1.
[3] OJ L 206, 22.7.1992, p. 7.

The complainant asked the Ombudsman not to close the case until the procedure for the authorisation of the project has been completed by the Spanish authorities, so that full compliance with European Community law could be ensured.

The Decision

1. *Admissibility of the case*

1.1. As regards the Commission's argument that the complainant had not previously complained to the institution, it must be stressed that it is for the Ombudsman to decide whether a complaint is admissible or not. Community institutions and bodies are naturally welcome to make their views on the subject known to the Ombudsman.

1.2. In order to be admissible, a complaint must be preceded by the appropriate administrative approaches to the institutions and bodies concerned (Article 2(4) of the Statute). In view of the different linguistic versions of this text [1], and taking into account the objective of the provision, the practice of the Ombudsman has been to evaluate whether suitable administrative approaches have been made depending on the circumstances of each case.

1.3. In view of the fact that the case related to the failure of the Commission to keep a complainant informed for more than a year of developments relating to his case, and since it would be reasonable to expect that such information was forwarded to complainants without a prior request, the Ombudsman considered that the criteria for the admissibility of the complaint had been met, without further administrative approaches.

2. *Failure of the Commission to keep the complainant informed*

2.1. The Commission had justified its failure to forward any information to the complainant from May 1996 to July 1997 on the grounds that the Spanish authorities had not replied to the letters and reminders sent by the institution requesting their comments on the matter.

2.2. In the context of the Ombudsman's own initiative inquiry 303/97/PD [2], the Commission described in detail its policy on informing the complainant of the action taken in response to his complaint. It explained that: '*Once the complaint has been registered, the complainant is informed of the action taken in response to his complaint, including representations made to the national authorities concerned*'.

2.3. On the basis of that commitment, it would have been proper for the Commission to inform the complainant of its numerous approaches towards the authorities concerned. The Ombudsman noted, however, that as a result of all these approaches — including a personal letter from the Commissioner in charge of the environmental portfolio to the responsible national Minister — the allegedly illegal project was cancelled, and thus the problem had been solved.

It had to be concluded therefore that the Commission took the necessary steps to settle the matter to the complainant's full satisfaction.

3. *Complainant's request to keep the case open*

3.1. The Ombudsman is empowered to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the Ombudsman specifically provides in Article 2(1), that no action by any other authority or person may be the subject of a complaint to the Ombudsman [3].

3.2. The Ombudsman's inquiries into this complaint were therefore directed towards examining whether there had been maladministration in the activities of the Commission. It was not within the remit of the Ombudsman to assess compliance with Community law of on-going activities undertaken by the Spanish authorities.

Conclusion

On the basis of the information provided by the complainant and the observations submitted by the Commission, the Ombudsman concluded that the case had been settled by the Commission to the complainant's full satisfaction. The Ombudsman therefore closed the case.

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[1] As stated in the Ombudsman's previous decision on Complaint 45/26.7.95/JPB/PD/B-dk: '*There seems to be a slight discrepancy between the different language versions of this provision. The Danish version quite rightly uses the term "fornødne" and gives the impression that such administrative approaches are necessary. On the other hand, for instance the English, French, German, Spanish and Swedish versions use the terms "appropriate", "appropriées", "geeigneten", "adecuadas" and "lämpliga" respectively which seems to imply that suitable administrative approaches must be made*'. (European Ombudsman, Annual Report 1996, page 45).

[2] Own initiative inquiry into the Commission's administrative procedures in relation to citizen's complaints about national authorities (see European Ombudsman, Annual Report 1997, p. 270).

[3] Statute of the European Ombudsman, Article 2(1): '*Within the framework of the aforementioned Treaties (…) the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies (…). No action by any other authority or person may be the subject of a complaint to the Ombudsman.*'

3.3.3. THE OFFICE FOR HARMONISATION IN THE INTERNAL MARKET

COMPETITION FOR TEMPORARY AGENTS: NO SELECTION OF A CANDIDATE

Decision on complaint 1016/13.11.96/ALG-PL/ES/JMA against the Office for Harmonisation in the Internal Market

The complaint

In November 1996, Mr P. L. made a complaint alleging lack of transparency in the way the Office for Harmonisation in the Internal Market (OHIM) had conducted open competition AT/C, and the failure to provide any explanation to candidates who had not been selected.

Mr P. L. initially complained to the Regional Ombudsman of Valencia ('Sindic de Greuges de la Comunitat Valenciana'), who transmitted the complaint to the European Ombudsman.

Mr P. L. took part in a competition for temporary agents organised by the OHIM in November 1995. After a preliminary screening of all the applications, the Selection Board did not admit him to the oral tests, informing him of this in a standard letter.

In April 1996, Mr P. L. wrote to the OHIM, underlining that he was not complaining against the decision taken by the Selection Board, but rather requesting further information on the selection process and the reasons for his exclusion.

The reply from OHIM was considered by the complainant to be very general and to lack any clear reasoning.

The inquiry

The OHIM's opinion

The complaint was forwarded to the OHIM. In its opinion, the OHIM pointed out that the competition was not a general competition for the recruitment of EC officials, but only a selection of temporary agents for secretarial posts (C grade). Accordingly, there are no general rules governing the organisation of this type of special competition for temporary agents. According to the OHIM, the selection process was carried out with due respect for the principles of equal treatment, transparency and geographical balance.

There were four stages in the process: (a) the OHIM sent an application form to all those who expressed their interest to participate; (b) out of 726 applications forms sent, 393 replies were received and registered. Out of those applications, 255 dossiers were considered admissible; (c) the Selection Board then carried out a comparative analysis of the candidates' merits and their experience. Only 75 candidates were included in the final list; (d) the last stage consisted of an oral test.

The complainant was not selected for the oral tests because of his limited professional experience, since he had only worked for the Spanish local administration.

Having completed the recruitment procedure, the Selection Board sent a letter to all candidates informing them of the outcome. Non-selected applicants who had submitted formal complaints were informed of the reasons for their exclusion.

The Office also stressed that the complainant did not contest his exclusion by the Selection Board, but merely inquired about the reasons for the decision. Consequently, his letter had not been considered as a complaint.

The Ombudsman forwarded the OHIM's opinion to the complainant, who did not make any observations.

The Decision

On the basis of the information provided by the complainant and the observations submitted by the Office for Harmonisation in the Internal Market, the Ombudsman reached these conclusions:

1. ***Concerning the need to give reasons***

In his letter of April 1996, the complainant had expressly requested the Office for Harmonisation in the Internal Market to inform him of the reasons for his exclusion from the competition. The OHIM's reply merely stated that after a stage in which the personal files of the candidates were compared, the complainant had not been selected for the oral tests.

In the context of competitions, decisions by a Selection Board to reject a candidate must state the conditions of the notice of competition which have not been fulfilled [1]. If there are a large number of candidates, the Selection Board may initially confine itself to stating the reasons for the refusal in a summary manner and informing the candidates only of the criteria and the result of the selection [2]. Nevertheless, the Selection Board must give subsequently an individual explanation to those candidates who expressly ask for it [3].

The reply by the OHIM to the complainant did not contain sufficient details to enable the complainant to understand

[1] Joined Cases 4, 19, and 28/78 Salerno v Commission [1978] ECR 2403.
[2] Case 225/82 Verzyck v Commission [1983] ECR 1991.
[3] Case T-55/91 Olivier Fascilla v Parliament [1992] ECR II-1757, paragraphs 34 to 35.

the factors on which the Selection Board's decision in relation to him had been based, and to allow for a potential review of the grounds on which the decision had been taken. The reply failed therefore to give him adequate reasons for the rejection of his application.

The OHIM justified its failure to give reasons on the fact that Mr P. L. did not submit a formal appeal to the decision of the Selection Board, but rather a mere request for further information.

This additional requirement does not derive from the relevant case-law of the Court of Justice on this matter. The Court has underlined that the duty of the institution to give reasons is triggered when the candidate to a competition expressly requests an individual explanation.

2. ***Concerning the substantive decision***

In its opinion to the Ombudsman, the OHIM indicated that the Selection Board had carried out a comparative analysis of the candidates' merits and taken into account the type of tasks to be undertaken, geographical balance, and international experience. Preference was given to candidates who had acquired their experience in an international environment. In the light of these criteria, the complainant had not been selected since his professional experience and practical knowledge of foreign languages appeared limited.

The Ombudsman considered that these aspects of the reply gave a thorough explanation of the individual reasons for which the Selection Board did not select the complainant for the oral tests. The OHIM had thereby responded properly to the requests of the complainant.

It therefore appeared from the opinion of the OHIM and the information submitted by the complainant, that the Office had taken steps to settle the matter and had thereby satisfied the complainant. The Ombudsman therefore closed the case.

3.4. **FRIENDLY SOLUTIONS ACHIEVED BY THE OMBUDSMAN**

3.4.1. THE EUROPEAN PARLIAMENT

TRAVEL EXPENSES FOR AN OFFICIAL VISIT BY AN MEP

Decision on complaint 760/24.7.96/JC/UK/IJH against the European Parliament

The complaint

In July 1996, Mr C. MEP made a complaint to the Ombudsman. According to the complaint, the relevant facts were as follows:

Mr C. was a member of the Committee on Development and Cooperation of the European Parliament. At the time of the events which gave rise to the complaint he was the Committee's rapporteur for the Lomé Convention. The committee instructed him and another MEP to travel to Paris for a meeting with the French foreign minister on 26 January 1995. They did so and Mr C.'s expenses for the mission were subsequently paid by the Parliament. Some weeks later, Mr C. was informed that the committee had not advised the Bureau of the Parliament of the mission in time and he was instructed to repay the expenses.

Mr C. took the matter to the Quaestors and to the President of the Parliament who confirmed that the expenses must be repaid.

In his complaint to the Ombudsman, Mr C. claimed that it was unfair that an MEP who was officially instructed to undertake a mission should be expected to pay his own fare and expenses because of someone else's mistake.

The inquiry

The Parliament's opinion

The complaint and annexed documents were forwarded to the European Parliament. The Parliament's opinion included the following remarks:

'It would hardly seem in keeping with the Ombudsman's competences and responsibilities for him to be obliged to act as an ad hoc *arbitration or appeal authority for Members whose requests are turned down by the competent parliamentary bodies (the Bureau and the Quaestors).*

(…)

I regret that the Ombudsman has been involved in an unfounded individual grievance of this nature, and trust that any future such cases may be declared inadmissible.'

As regards the substance of the complaint, the opinion contained two points:

(i) Despite the stipulation in Parliament's rules that prior authorisation is required for attendance at such meetings, Mr C. had neither received nor sought such authorisation.

(ii) MEPs are entitled to an allowance of ECU 3 000 per year to meet the costs of travel undertaken in the performance of their duties outside the country in which they were elected. Mr C. would have been entitled, by submitting a request in due time and on the basis of supporting documents, to reimbursement of his travelling expenses for the visit to Paris from this allowance.

The complainant's observations

In his observations, Mr C. stated that he deeply resented the remarks which are quoted in italics above. He further stated that he was not interested in the financial aspects of the matter, but wished to clear his name which he felt had been 'blackened' by the Parliament's approach to the matter.

The Ombudsman's efforts to achieve a friendly solution

After examining the Parliament's opinion and Mr C.'s observations, the Ombudsman considered that there was *prima facie* evidence of maladministration because the statement in the Parliament's opinion that no request for prior authorisation had been made for the visit to Paris appeared not to accord with the documentary evidence annexed to Mr C.'s complaint.

In accordance with Article 3(5) of the Statute, the Ombudsman therefore proposed a meeting between his services and those of the Parliament to discuss the possibility of a friendly solution.

By letter dated 16 January 1998, the current President of the European Parliament sent the Ombudsman a letter which included the following remarks:

'In accordance with Rules 22(8) and 139(5) of Parliament's Rules of Procedure, Members must request the Bureau's authorisation to take part in meetings outside Parliament's usual places of work.

On 18 January 1995 Lord Plumb, Co-President of the ACP-EU Joint Assembly, sent a request for authorisation for Mr C. to take part in a mission to Paris. However, the late submission of this request meant that the Bureau did not have enough time to consider it and the mission went ahead without the required authorisation.

Parliament's Rules of Procedure are clear on this point and establish without any room for doubt that the request must be submitted in advance, and there is no provision for authorisation after the event. Under these circumstances I do not think that Parliament can pay the allowances and travel expenses to which Mr C. would have been entitled if the mission had been authorised by the Bureau.

None of this calls into question Mr C.'s good faith. I am sure that he only wanted to carry out his job as rapporteur to the best of his ability.'

At a meeting with the Ombudsman's services, Mr C. confirmed that, as stated in his observations, he was not interested in the financial aspect of the matter. He indicated that his complaint was satisfied by the European Parliament placing on the public record that he had acted in good faith and that prior authorisation of the mission to Paris was indeed sought.

The Decision

1. The European Parliament placed on the public record its acceptance that the complainant acted in good faith and that prior authorisation of the mission to Paris was indeed sought. The complainant for his part made clear that he did not seek to reclaim the expenses which the Parliament had required to be repaid on the basis of Rules 22(8) and 139(5) of Parliament's Rules of Procedure [1].

2. It appeared from the above that, following the Ombudsman's initiative to seek a friendly solution, no issues remained in dispute between the complainant and the European Parliament. The Ombudsman therefore closed the case.

Further remarks

1. The European Parliament did not formally contest the competence of the Ombudsman to deal with this complaint. However, it envisaged that future cases of this kind might be declared inadmissible and considered that the Ombudsman should not act as an '*arbitration or appeal authority for Members whose requests are turned down by the competent parliamentary bodies.*'

2. As explained in the Annual Report for 1997, the Ombudsman does not supervise the political work of the European Parliament. However, in the absence of any express provision in the Treaty or the Statute of the Ombudsman [2], there is no legal basis for the Ombudsman to consider that complaints concerning the Parliament's administrative work are inadmissible.

3. Similarly, although the European Ombudsman does not seek a situation in which he is to be considered as a means

[1] Rule 22(8): '*The Bureau shall be the authority responsible for authorising meetings of committees away from the usual places of work, hearings and study and fact-finding journeys by rapporteurs.*' Rule 139(5): '*Any committee may, with the agreement of the Bureau of Parliament, instruct one or more of its members to undertake a study or fact-finding mission.*'

[2] Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113, 4.5.1994, p. 15).

of redress in cases of this kind, there is no legal basis for the Ombudsman to consider that complaints made by MEPs on their own behalf are inadmissible, provided that all the conditions of admissibility laid down by the Statute are fulfilled. Article 2(4) of the Statute requires a complaint to be preceded by the appropriate administrative approaches which, in a case of this kind, include application to the competent authorities of the Parliament. Such cases could normally be solved by these authorities in a way that does not provide reason for further complaint.

4. In accordance with Article 138e of the EC Treaty, the Ombudsman's inquiries concern possible instances of maladministration. In every inquiry by the Ombudsman, the institution concerned has the opportunity to demonstrate that no maladministration has occurred by giving an opinion which deals carefully and correctly with the relevant issues, to secure that the complaint is dealt with promptly and properly by the Ombudsman.

3.4.2. THE EUROPEAN COMMISSION

ACCESS TO COMMISSION'S DOCUMENTS

Decision on complaint 1045/21.11.96/BH/IRL/JMA against the European Commission

The complaint

In November 1996 Mr H. complained to the Ombudsman concerning the refusal of the Commission to give him access to a document which concerned policies against poverty in the European Union.

The inquiry

The Commission's opinion

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

In the Commission's medium-term social action programme for 1995 to 1997, it had been announced that a report on all relevant Community actions on poverty and social exclusion would be prepared. Accordingly, the Commission started working with representatives from Member States in the context of a High Level Group on Social Exclusion. Following a request from the Commission in 1996, each Member State made available to the group information on its national criteria to define poverty and social exclusion, including an outline on how its policies were organised and determined. The complainant's request concerned this compilation of documents from the Member States. The Commission decided not to forward a copy of these contributions to him since the document in question was not a Commission document, but rather some material originally produced by different Member States that the Institution had merely put together.

On the basis of the Commission Decision of 8 February 1994 on public access to Commission documents, the Commission concluded that the requested material could not be considered to be a Commission document. The Commission was of the view that the request should have been made to the authors of these different documents, namely the Member States. Since the Commission's policy on public access to Commission documents relates only to its own documents, it does not foresee that the Commission should give access to documents produced by other bodies. The Commission pointed out, however, that it would make the final report available to the complainant once it had been completed.

The Commission suggested that the complainant liaise with the Irish Department of Social Welfare regarding the information he was seeking.

The complainant's observations

In his observations Mr H. pointed out that:

in his view, there was no confusion as to the type of document he had asked for. His request referred to a Commission document, and not to a number of different documents produced by the Member States. Since these materials had been partially translated and circulated with a Commission cover page, the document should have been considered a Commission document.

Mr H. added that the document had been circulated in Ireland as a Commission document in the summer of 1996. Although he had asked the Irish Department of Social Welfare for a copy of the document, his request had been refused on the grounds that it referred to a Commission document, and therefore the decision to make it available rested entirely with the Commission.

Mr H. disagreed with the point of view taken by the Commission. In so far as the document had been compiled and circulated under the authority of the institution, it should be seen as a Commission document.

Lastly, the complainant stressed that the Commission's reasoning could have negative consequences for transparency in the European Union. Hence, the document should be made available to him in the interests of transparency.

Further inquiries

Given the nature of the dispute, and in order to reach a satisfactory solution to the problem, the Ombudsman decided that the document in question should be inspected by officials from his secretariat. The inspection aimed at assessing whether or not the document was simply a compilation of different contributions from Member States, and accordingly excluded from public access.

A meeting to carry out the inspection took place in the Commission premises in Brussels on 10 October 1997. The Commission had given notice of the inspection beforehand to all members of the High Level Group.

In the course of the meeting, the Commission officials present explained that the document had been originally conceived in 1995 as a means to improve mutual understanding among Member States on their national policies on social exclusion and poverty. To that end a High Level Group was set up by the Commission with the participation of national experts from all Member States. In the context of that High Level Group and in order to prepare discussions, the Commission distributed a questionnaire among all Member States towards the end of 1995. All responses received from Member States were collated by the Commission's services into a single document which was distributed during the meeting of the High Level Group in June 1996.

The Ombudsman's efforts to achieve a friendly solution

Following the inspection, the Ombudsman wrote to the Commission in accordance with Article 3(5) of the Statute, with a view to seeking a friendly solution to the complaint. The Ombudsman referred in his letter to the role of the Commission in the preparation of the document in question, and the fact that a Member State had rejected the complainant on the grounds that he should address the request to the Commission. It was therefore regrettable that the complainant's attempts to obtain the document had met with a negative response both from a Member State and the Commission. Furthermore, the Ombudsman considered that the lack of transparency in this particular case could undermine public confidence in the Community administration, and frustrate the aims of Declaration 17 attached to the Treaty on European Union, concerning the right of access to information. In view of these considerations, the Ombudsman proposed a friendly solution by which the Commission would agree to give the complainant access to the requested documents.

In its reply of 3 February 1998 the Commission reaffirmed its opinion about the nature of the document. However, it agreed to the Ombudsman's proposal to reach an *ad hoc* solution for this particular case. To that end, it had requested authorisation from all Member States to have their contributions released.

On 13 May and on 14 July 1998 the Ombudsman received further information from the Commission concerning the replies received to his request. It appeared that all Member States had agreed to forward their documents to the complainant, and that some of them had done so under certain restrictions regarding reproduction and copyright. Furthermore, the Commission had even agreed to send Mr H. a copy of the notes taken by its services during the meeting of the High Level Group on Social Exclusion in June 1996.

In two letters to the Ombudsman of 20 May and 24 July 1998, Mr H. indicated that all the documents initially requested had already been forwarded to him, as proposed in the Ombudsman's initiative for a friendly solution. The complainant thanked the Ombudsman for the work undertaken and acknowledged the significant progress which had been made. In his view, the Ombudsman had done all that was within his powers and authority, and therefore he agreed to the closing of the case. Nonetheless, the complainant expressed some general concern as to the use of the documents which he had received, and more generally, to the procedure for public access to documents in the European Union.

The Decision

Following the Ombudsman's initiative, a friendly solution had been agreed between the institution and the complainant. The Ombudsman therefore closed the case.

TENDER EXERCISE FOR A POST OF FINANCE MANAGER UNDER THE PHARE PROGRAMME

Decision on complaint 1109/18.12.96/IGL/UK/IJH against the European Commission

The complaint

In December 1996, X made a complaint to the Ombudsman concerning a tender exercise for a post of finance manager under the Phare programme, carried out by DG 1A of the Commission. In accordance with Article 2(3) of the Statute of the Ombudsman, X requested that the complaint should be treated confidentially.

In summary, the relevant facts as presented in the complaint were that X was employed in Brussels as finance manager in a

Phare programme coordination unit. In August 1994, the post was relocated to another country. After receiving informal assurances about the length of the prospective period of employment, X moved to the other country with his family. After approximately one year, the post of finance manager was subject to a tender exercise, in which X was unsuccessful.

In the complaint to the Ombudsman, X claimed that:

(i) the tender exercise was not conducted in accordance with Phare regulations;

(ii) the successful tenderer did not even closely comply with the terms of reference for the post;

(iii) the successful tenderer had been in a position to know the level of the fees which X had previously received as finance manager.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission provided information about the organisational and contractual framework of the Phare programme.

In relation to the specific case, the opinion made a number of points. In particular it stated that there had not been a call for tenders for the post of finance officer, but a comparative evaluation of the qualifications of two candidates, of whom X was one. The opinion also included several annexed documents concerning the selection process.

The complainant's observations

The observations contested several of the points made by the Commission. In particular, they referred to a letter dated 22 December 1995 which was addressed to X by an official of DG 1A of the Commission. This letter, a copy of which X supplied to the Ombudsman, began as follows:

> *'I regret to inform you that the final choice made by the Evaluation Committee, responsible for the call for tender (…) did not retain your offer as most advantageous.'*

X also remarked that the Commission had not responded to points (ii) and (iii) of the complaint.

The Ombudsman's efforts to achieve a friendly solution

After examining the Commission's opinion and the complainant's observations, the Ombudsman considered that there was *prima facie* evidence of maladministration in the discrepancy between the Commission's opinion, which stated that no call for tenders had taken place, and the letter addressed to X by DG 1A, which referred to the outcome of a tender exercise.

In accordance with Article 3(5) of the Statute, therefore, the Ombudsman wrote to the Secretariat-General of the Commission to propose an informal meeting between the Commission services and the Ombudsman's services to discuss the possibility of a friendly solution to the complaint.

Following the meeting, the Commission informed the Ombudsman that discussions between the Commission services and X were taking place. Subsequently X informed the Ombudsman by fax that he had reached agreement with the Commission on the terms of a financial settlement of the complaint. The Commission also informed the Ombudsman that a friendly settlement had been reached.

The Decision

The Ombudsman's inquiries into this case appeared to reveal *prima facie* evidence of maladministration.

In accordance with Article 3(5) of the Statute [1], the Ombudsman therefore proposed an informal meeting between the Commission's services and the Ombudsman's services [2].

Following this initiative by the Ombudsman, the Commission and the complainant have reached a friendly settlement of the complaint. The Ombudsman therefore closed the case.

NON-RENEWAL OF AN EXTERNAL CONTRACT: ALLEGED FAILURE TO INFORM IN DUE TIME

Decision on complaint 485/97/OV against the European Commission

The complaint

In June 1997, Mr V. a journalist working as a correspondent in the European Commission Representation in The Hague, complained to the Ombudsman about the non-renewal of his contract. Firstly, he complained that the Head of the

[1] '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'.

[2] On 22 October 1997, the European Ombudsman and the Secretary-General of the Commission agreed that an informal meeting could, in some cases, provide an appropriate way to pursue a friendly solution to a complaint, in accordance with Article 3(5) of the Statute.

Commission Representation refused to sign the last renewal of his three years contract, because he thought the function to be superficial. This happened on 1 April 1997, i.e. one month after the expiration date of the contract, and without any consultation of the audiovisual unit of DG X (Information, Communication, Culture and Audiovisual Media) of the Commission. Secondly, the complainant who had worked normally for the whole month of March, was informed that he would not be paid for that month.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. As regards the non-renewal of the contract, the Commission observed in its opinion that the initial duration of the contract, signed on 25 April 1996 by the outgoing Head of the Commission Representation in the Hague, was one year, renewable for a further year. Given that the new Head of Representation only took up his duties on 3 March 1997, the decision whether to renew the complainant's contract was postponed until his arrival. The Head of the Representation decided that it was inappropriate to prolong the contract. The complainant was orally informed of this decision in meetings with the Head of Representation on 11 March and 1 April 1997. Further to a written note dated 3 April 1997 in which the complainant criticised the decision, the Head of Representation informed him in a letter of 7 April 1997 that there were no grounds to review the decision.

The complainant finally introduced a request for payment for the month of March 1997 to the amount of ECU 2 500, which corresponded to one twelfth of the payment due for the initial period. This request was refused.

The Commission finally observed that there was some confusion as regards the exact nature of the complainant's contractual rights. The Commission declared that it was prepared to try to find a friendly solution with the complainant. The Commission subsequently informed the Ombudsman that a friendly solution had been reached and that the complainant would be paid the ECU 2 500 which he claimed for his activities during the month of March 1997.

The complainant's observations

No written observations were received from the complainant. However, on 6 July 1998 the complainant informed the office of the Ombudsman by telephone that he was satisfied with the friendly solution. He thanked the Ombudsman for his intervention.

The Decision

1. ***The alleged failure to inform the complainant in due time about the non-renewal of the contract***

1.1. The complainant claimed that he was not informed in due time of the non-renewal of the contract. More particularly he alleged that he had been informed of it only one month after the expiration date of the contract.

1.2. The Ombudsman deals with complaints of maladministration that arise from contractual relationships. He does not, however, seek to determine whether there has been a breach of contract by either party. This question could be dealt with effectively only by Netherlands courts which, according to Article 7 of the contract, are competent for litigations between the parties, and 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.

1.3. As regards the obligation to inform in due time, it appeared that the expiration date of the initial contract was 25 April 1997 and not 1 March 1997 as indicated by the complainant. It further appeared that the complainant was informed of the non-renewal 25 days before the expiration date of the contract, and not one month after it as indicated by the complainant. Therefore, as regards the obligation to inform in due time, there appeared to be no instance of maladministration by the Commission.

2. ***The friendly solution with regard to the payment of ECU 2 500 for the month of March 1997***

2.1. Given that the complainant had worked normally for the whole month of March 1997, he introduced a request for payment for this month to the amount of ECU 2 500, which was refused by the Commission Representation. However, in its comments, the Commission observed that there had been some confusion about the exact nature of the complainant's contractual rights. Therefore, further to the Ombudsman's request, the Commission was prepared to find a friendly solution with the complainant and agreed to pay ECU 2 500 for the complainant's activities during the month of March 1997. The complainant informed the Ombudsman that he was satisfied with the agreement which had been reached.

2.2. The Ombudsman took note of the fact that this agreement eliminated the possible instance of maladministration and that the complainant expressed his satisfaction with the agreement.

On the basis of the Ombudsman's inquiries into point 1 of the complaint, there appeared to have been no maladministration by the Commission. As regards point 2 of the complaint, a friendly solution had been agreed between the institution and the complainant. The Ombudsman therefore closed the case.

3.5. CASES CLOSED WITH A CRITICAL REMARK BY THE EUROPEAN OMBUDSMAN

3.5.1. THE EUROPEAN PARLIAMENT

STAFF: RECOGNITION OF AN OCCUPATIONAL DISEASE

Decision on complaint 977/28.10.96/ST/L/BB/(XD-ADB) against the European Parliament

The complaint

The complainant has been employed by the European Parliament in the framework of a policy to recruit disabled people. He claimed to be suffering from an occupational disease due to hard work he had to carry out during a parliamentary session in Strasbourg in 1984. He alleged that his superior gave tasks to him which were not compatible with his disability.

In 1990, he introduced a declaration to the European Parliament on the basis of Article 17 of the rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease. The complainant's aim was to obtain the recognition of the deterioration of his health as an occupational disease.

The European Parliament started an inquiry. In 1994, the complainant asked for the setting up of a Medical Committee under Article 19 of the rules mentioned above. In 1996, the European Parliament rejected the request of recognition of occupational disease on the basis of the report made by the Medical Committee which considered that the disease was the result of an evolution of the complainant's previous health condition.

The complainant appealed against this decision but the European Parliament rejected his request in 1996. He then decided to lodge a complaint with the European Ombudsman.

The complainant made four allegations:

(i) the European Parliament did not make an objective inquiry in collecting documents that were not related to the case;

(ii) the European Parliament failed to transmit some documents to the Medical Committee;

(iii) the whole procedure was characterised by avoidable delays;

(iv) the superior misused his power in giving the complainant tasks that were incompatible with his disability.

On the basis of the above items, the complainant wanted the European Parliament to recognise the occupational character of his disease and claimed compensation.

The inquiry

The European Parliament's opinion

The European Parliament pointed out that all the documents forwarded by the complainant were transmitted to the Medical Committee with the exception of five documents because these were not received by the Parliament or were not sent by the complainant.

The Parliament could recognise some delay at certain stages of the procedure. However, it explained this delay by the complexity of the case, the permanent steps the complainant undertook, the difficulties to analyse a set of medical documents, some written in German, the writing of the very detailed mandate for the Medical Committee and also by the simultaneous management of three other files related to the complainant.

The Parliament enclosed a chronological summary of the procedure to its opinion.

The complainant's observations

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

(i) four of the five documents the European Parliament alleged not to have received were either mentioned in the conclusions of the Medical Committee or were stamped by the European Parliament;

(ii) the Parliament did not conduct an objective administrative inquiry and did not transmit the relevant documents to the Medical Committee. The complainant drew the conclusion that the Medical Committee could not work on a proper basis and that its reasoning was vitiated;

(iii) the inquiry of the Parliament lacked transparency.

As a conclusion, the complainant asked for a friendly solution.

The Decision

1. ***Lack of objectivity in the inquiry***

Article 17(2) of the rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease specifies that 'The Administration shall hold an inquiry in order to obtain all the particulars necessary to determine the nature of the disease, …'. The Ombudsman noted that the European Parliament collected a large number of documents, mainly transmitted by the complainant, which permitted the writing of the very detailed mandate of the Medical Committee. He considered that there was no clear evidence that the inquiry made by the European Parliament lacked objectivity and aimed at prejudicing the complainant. There appeared, therefore, to be no maladministration by the Parliament in relation to this aspect of the complaint.

2. ***Failure to transmit some documents to the Medical Committee***

2.1. After a careful examination of the material at the disposal of the Ombudsman, there appeared that some missing documents mentioned by the Parliament had in fact been stamped by the institution. The Ombudsman pointed out that it was good administrative behaviour for an institution to keep a clear registration of the documents it received. By not doing so, he considered that the European Parliament had failed in this principle.

2.2. The Ombudsman therefore examined the complainant's allegations that the failure of the European Parliament to transmit some documents to the Medical Committee obstructed the Committee from having a clear reasoning in writing its report. He first noted that some missing documents had in fact been transmitted to the Medical Committee given that they were mentioned in the Committee's report. He also noted that one of the members of the Medical Committee had been appointed by the complainant and, as it has been held by the European Court of Justice, 'the interests of the official are safeguarded by the presence in the Medical Committee of a member enjoying his confidence and by the appointment of the third member of the Committee by agreement between the two other members appointed by the parties …' ([1]).

2.3. On the basis of the above elements, it did not appear that the reasoning of the Medical Committee could have been vitiated and that the conclusion of its report would have been different. Therefore, the Ombudsman considered that there was no ground for a friendly settlement of the matter.

([1]) Case 2/87 Biedermann v Court of Auditors [1988] ECR 143.

3. ***Avoidable administrative delay by the European Parliament***

The Ombudsman carefully analysed the chronological summary of the facts and the arguments put forward by the European Parliament. He found no evidence of maladministration in relation to this aspect of the complaint.

4. ***Misuse of power by a superior***

The Ombudsman pointed out that, on the basis of his mandate, he could not deal with this allegation because the claim was made more than two years after the date on which the facts came to the attention of the complainant.

Conclusion

On the basis of the above findings, the Ombudsman made the following critical remark:

It is good administrative behaviour for an institution to keep a clear registration of the documents it receives. By not doing so, the European Parliament failed in this principle.

The Ombudsman considered that there was no ground to pursue a friendly settlement of the matter and therefore closed the case.

COMPETITION: FAILURE TO PROVIDE ACCURATE INFORMATION

Decision on complaint 1051/25.11.96/AF/B/VK against the European Parliament

The complaint

By letters dated November 1996 and January 1997, Mrs F. complained to the Ombudsman, alleging that the European Parliament had wrongly refused to admit her to the written tests in competition PE/80/A, organised by the Parliament. The refusal was made on the grounds that the complainant had not submittted documentation to prove that she had a very good knowledge of a second Community language as required by the notice of competition.

The publication of the competition in the *Official Journal of the European Communities* fell into three parts: (i) general provisions applicable to open competitions, (ii) guidelines for participants in open competitions organised by the Parliament and (iii) the notice concerning the specific competition.

As regards documentation, the guidelines provided under the heading 'Documentation' that 'The applicants must provide documentation for any request for exemption from the age limits as well as for the information given under point 9 "education" and under point 12 "professional experience" together with their application form'. The guidelines did not specify that documentation should be provided to prove the knowledge of a second Community language.

The notice of competition provided in Title III. A. 2. that 'the Selection Board examines the documentation and establishes the list of applicants which comply with the specific conditions under Title II B. The Selection Board bases its decision entirely on the information given in the application form, which is backed by accompanying documentation'. The condition under Title II B of the notice fell into two parts; the first required applicants to possess a university diploma or equivalent professional experience; the second required applicants to possess a very good knowledge of a second Community language.

The application form contained several headings. Documentation was requested only for headings 9 'education' and 12 'professional experience'. Heading 7 was entitled 'knowledge of languages' and was divided into two sub-categories: (a) mother tongue and (b) other languages. There was no indication that the applicant should provide documentation for the information under heading 7.

In August 1996, Mrs F. was informed that she could not be admitted to the tests because 'from the documents you submitted, it did not appear that you had the required very good knowledge of an additional Community language as laid down in Title II, point B.2 of the announcement for the selection procedure PE/80/A'.

Mrs F. appealed against this decision, claiming that the text of the *Official Journal of the European Communities* did not explicitly request documents to prove the knowledge of a second Community language. On 3 October 1996, her appeal was rejected on the grounds that the Selection Board could base its findings only on the application and annexed documents, and that the documents she had submitted did not prove that she had very good knowledge of a second Community language.

Against this background, Mrs F. complained to the Ombudsman. In substance, she put forward three arguments.

1. The information given to applicants concerning the documentation was confusing and misleading. The guidelines which did not request documentation for the knowledge of languages should prevail over the notice of the competition.

2. The Selection Board should have concluded that she fulfilled the language requirements as it appeared from her application form that she had been working as an assistant to a Member of the European Parliament; it should therefore be obvious that she fulfilled the language requirements.

3. The Selection Board infringed the principle of equal treatment of applicants, as another applicant in a similar situation to hers had been admitted, on appeal, to the competition.

The inquiry

Parliament's opinion

The complaint was forwarded to the European Parliament. In its opinion, Parliament claimed that its decision to exclude Mrs F. was based on the wording of the notice of competition, which it considered to take precedence over the guidelines.

The complainant's observations

In her observations, Mrs F. maintained her complaint.

The Decision

1. ***Failure to provide accurate information***

1.1. It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post to enable the applicant to judge whether to apply for it, and what supporting documents are important for the proceedings and therefore must be enclosed with the application form [1]. According to the guidelines for participants, documentation was only necessary to give proof of points 9 and 12 of the application form, 'education' and 'professional experience'; whereas the Notice of competition stipulated that applicants had to hand in copies of diplomas, work references and 'all other documents' proving the information given in the application form. The information given in the guidelines and the notice appeared contradictory as regards the requirement of documents. Without prejudice to the legal value of the texts, it appeared clear that both texts served the function of properly informing the applicant in a particular competition and therefore, they should not have differed from each other. Parliament therefore failed to provide the complainant with clear and accurate information about the fact that it considered that knowledge of languages should be supported by evidence. It should have ensured that applicants were given instruction about the requirements for the competition.

[1] Case T-158/89, Judgment of 28 November 1991, van Hecken v Economic and Social Committee [1991] ECR II-1341.

2. ***Work experience as proof for language qualifications***

Even when one considers the multilingual environment of the place of work and the position of assistant in the European Parliament, the fact that one works there is, in itself, not proof of the sufficient knowledge of another Community language.

3. ***Equal treatment of candidates by the Selection Board***

In support of her allegation Mrs F. put forward that another candidate, who had been rejected for the same reasons, was admitted to the procedure after he had appealed by arguing that the strict interpretation of the wording of the Notice of competition did not automatically lead to the assumption that documents proving the knowledge of a second Community language were required. Given in particular the lack of any indication as to the identity of this person, the Ombudsman was not able to look further into the matter.

Conclusion

On the basis of Ombudsman's inquiry into this complaint, it appeared necessary to make the following critical remark.

It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post to enable the applicant to judge whether to apply for it, and what supporting documents are important for the proceedings and therefore must be enclosed with the application form [1]. According to the guidelines for participants, documentation was only necessary to give proof of points 9 and 12 of the application form, 'education' and 'professional experience'; whereas the Notice of competition stipulated that applicants had to provide copies of diplomas, work references and 'all other documents' proving the information given in the application form. The information given in the guidelines and the notice appeared contradictory as regards the requirement of documents. Without prejudice to the legal value of the texts, it appeared clear that both texts served the function of properly informing the applicant in a particular competition and therefore, they should not have differed from each other. Parliament therefore failed to provide the complainant with clear and accurate information about the fact that it considered that knowledge of languages should be supported by evidence. It should have ensured that applicants were given instruction about the requirements for the competition.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

[1] Case T-158/89, Judgment of 28 November 1991, van Hecken v Economic and Social Committee [1991] ECR II-1341.

3.5.2. THE COUNCIL OF THE EUROPEAN UNION

COUNCIL DECISION 93/731/EC — MEANING OF 'REPEAT APPLICATIONS' AND 'VERY LARGE DOCUMENTS'

Decision on complaint 1053/25.11.96/Statewatch/UK/IJH against the Council

The complaint

In February 1996, Mr B. wrote to the Council requesting copies of the minutes of 14 meetings of the 'K4' committee, which comes under the Council of Justice and Home Affairs ministers. His application was made under the Council Decision on public access to Council documents [2] (hereafter Decision 93/731/EC).

In April 1996, the General Secretariat of the Council replied to the application. The reply referred to Article 3(2) of Decision 93/731/EC which reads as follows:

'The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents'.

The reply went on to state that the request was 'a repeat application which relates as well to a very large number of documents' and that, as a 'fair solution', the General Secretariat was providing five of the 14 documents requested.

Mr B. made a confirmatory application for the other nine documents, but the Presidency of the Council upheld the original decision.

In his complaint to the Ombudsman, Mr B. claimed that the Council was not entitled to rely on Article 3(2) of Decision 93/731/EC as a reason to reject part of his application for documents because:

(i) he had never applied for the documents in question before; in his view, the term 'repeat applications' refers to a situation in which a person applies for the same document again and again;

(ii) Article 3(2) refers to 'very large documents', not 'a very large number of documents' as mentioned in the reply from the General Secretariat. Furthermore, in February 1996 the Council introduced a system of charging for documents supplied. Mr B. suggested that the size or number of documents requested had therefore become irrelevant.

[2] Council Decision 93/731/EC of 20 December 1993 (OJ L 340, 31.12.1993, p. 43).

The inquiry

The Council's opinion

The Council's opinion included, in summary, the following points.

The complainant uses a systematic technique to obtain access to all Council JHA documents. That technique consists of initially requesting the agendas of all the Council bodies dealing with JHA matters and subsequently requesting all the documents included on those agendas.

Article 3(2) must be interpreted in a way which gives it practical effect. If a person continues to request access to a document which has already been refused and the circumstances which motivated that refusal have remained unchanged, the General Secretariat is not obliged to find a fair solution but may adopt an identical solution, i.e. may withhold that document again. To restrict the concept of 'repeat applications' to applications referring to the same document would therefore divest Article 3(2) of practical effect.

In the Council's view, the concept of a 'repeat application' includes cases in which a person regularly and systematically requests over a long period of time access to a large number of documents of the same type, not necessarily identical. It is in this context that the number of documents requested is one of the criteria to be taken into consideration; as is clearly shown by the wording of Article 3(2) of Decision 93/731/EC, the volume of documents requested is a separate criterion which may justify the application of a fair solution, even if the request is not a repeat one.

The French version of Article 3(2), which formed the basis for translation into all the other language versions, refers to a 'demande répétitive', a term which has negative and pejorative connotations.

In the Council's view, Article 3(2) of Decision 93/731/EC is aimed at safeguarding efficiency in its administration in exceptional cases. It has been applied only to a limited extent to date.

The charging of fees for the supply of documents is based on Article 3(1) of Decision 93/731/EC. It does not affect the rule of principle provided for in Article 3(2).

The complainant's observations

In his observations, Mr B. criticised the Council's opinion in detail and maintained his view that the Council was not entitled to rely on Article 3(2) of Decision 93/731/EC as a reason to reject part of the application for documents.

The Decision

1. ***Decision 93/731/EC***

1.1. Decision 93/731/EC implements principles laid down in the joint Code of Conduct concerning access to Council and Commission documents ([1]). The objective of the Decision 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 ([2]).

1.2. The procedure to be followed by the Council in dealing with applications for access to documents is laid down by Articles 3, 5, 6 and 7 of Decision 93/731/EC. A two-stage procedure is foreseen. At the first stage, applications are dealt with by the General Secretariat and the Secretary General replies to the applicant. In the case of a negative reply, the applicant has the opportunity to initiate a second stage by making a confirmatory application. If the confirmatory application is rejected, the reply to the applicant comes from the Council.

2. ***The disputed provision: Article 3(2)***

2.1. According to Article 3(2) of Decision 93/731/EC:

> *'The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents'.*

The reference to the General Secretariat indicates that the possibility of a fair solution is envisaged at the stage of the initial application, as is also the case for the corresponding provision of the Code of Conduct which, moreover, foresees that a fair solution will be found 'in consultation with the applicants' ([3]).

2.2. Neither Article 3(2) nor the corresponding provision of the Code of Conduct expressly provides an exception to the general rule of public access which could be used as a reason for rejecting any part of an application for access to documents. In this case, however, the Council cited

([1]) OJ L 340, 31.12.1993, p. 41.
([2]) Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998, paragraph 66.
([3]) 'In consultation with the applicants, the institution concerned will find a fair solution to comply with repeat applications and/or those which relate to very large documents.'

Article 3(2) as the reason for rejecting the complainant's confirmatory application for the nine documents which the General Secretariat had failed to provide to him.

2.3. The complainant contests the Council's interpretation of the term 'repeat application.' He also claims that the General Secretariat's reply to his initial application was wrong to consider that Article 3(2) also applies to applications for a very large number of documents.

2.4. According to the Council's opinion to the Ombudsman:

> *'the concept of a "repeat application" refers* inter alia *to cases in which a person regularly and systematically requests over a long period of time access to a large number of documents of the same type, not necessarily identical'.*

The Council's opinion also claims that 'the volume of documents requested is a separate criterion which may justify the application of a fair solution, even if the request is not a repeat one'.

2.5. It appears therefore that the issue in dispute between the complainant and the Council is the interpretation of the terms 'repeat applications' and 'very large documents' as used in Article 3(2) of Decision 93/731/EC. Neither term is defined by the Decision itself, or by the Code of Conduct.

3. ***The meaning of the terms 'repeat applications' and 'very large documents'***

3.1. If and to the extent that Article 3(2) may lawfully be used by the Council as a reason for rejecting any part of an application for access to documents, the provision operates as an exception to the general rule contained in Decision 93/731/EC. According to the case-law of the Court of First Instance, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule [1].

3.2. Decision 93/731/EC confers on citizens rights of access to documents held by the Council. Any person is entitled to ask for access to any Council document without being obliged to put forward reasons for the request [2]. Access to documents cannot therefore legitimately be blocked by the Council because of a possible negative attitude towards the purposes for which a request has been made, or the person who has made it.

3.3. The term 'repeat application' appears naturally to refer to applications for the same document. On this interpretation, the practical effects of Article 3(2) include the possibility of a fair solution to allow the Council services to deal efficiently with cases in which the same person makes repeated applications for the same document, hoping or claiming that the circumstances which motivated previous refusals may have changed.

3.4. To extend the meaning of 'repeat applications' so as to include applications by the same person for different documents could defeat the application of the general rule: Decision 93/731/EC does not impose any limit on the number of documents for which a citizen may apply as of right. In the absence of such a limit, moreover, the Council's interpretation could infringe the principle of legal certainty, because it would not be possible to know in advance how many different documents could be requested before the Council would consider the application to be a 'repeat application.'

3.5. To interpret Article 3(2) so as to bring all applications for a very large number of documents within its scope leads to the same practical result as interpreting 'repeat application' to include applications by the same person for different documents. Similar arguments against such an interpretation therefore apply.

3.6. The Ombudsman therefore considers that the Council has wrongly interpreted Article 3(2) of Decision 93/731/EC and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term 'repeat applications' in Article 3(2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large number of documents within its scope. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

[1] Cases T-194/94, John Carvel and Guardian Newspapers v Council, [1995] ECR II-2765; T-105/95, World Wide Fund for Nature (WWF) v Commission, [1997] ECR II-313; Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998.

[2] Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998, paragraph 109.

The Ombudsman considers that the Council has wrongly interpreted Article 3(2) of Decision 93/731/EC and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term 'repeat applications' in Article 3(2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large number of documents within its scope. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

Article 7(3) of Council Decision 93/731/EC expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implies that the Council should reconsider the complainant's confirmatory application dated 17 April 1996 and give access to the documents requested, unless one of the exceptions contained in Article 4 of Decision 93/731/EC applies. Since it was for the Council to carry out this reconsideration and communicate the result to the complainant, the Ombudsman closed the case.

Further remarks

The Council's opinion in this case referred to the introduction of a system of charging fees for documents supplied under Council Decision 93/731/EC. The Ombudsman agreed with the Council's view that the system of charging was legally irrelevant to the interpretation of Article 3(2) of Decision 93/731/EC.

However, the Council's opinion also expressed a legitimate concern to safeguard the efficiency of its administration. In this context, the Ombudsman noted that Member States which have long experience of administering a right of public access to documents often rely on the system of charging as a safeguard in dealing with requests for documents which impose a heavy administrative burden.

COUNCIL: PUBLIC ACCESS TO DOCUMENTS

Decision on complaint 1056/25.11.96/Statewatch/UK/IJH against the Council

The complaint

In July 1996, Mr B. wrote to the General Secretariat of the Council requesting a copy of the calendar of meetings of Council steering groups and working parties in the field of Justice and Home Affairs for the period of the Irish presidency (July to December 1996). His request was made under the Council Decision on public access to Council documents [1] (hereafter 'Decision 93/731/EC').

By letter dated 29 July 1996, the General Secretariat of the Council rejected the request. Its letter referred to Article 2(2) of Decision 93/731/EC which reads 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 letter stated that the responsibility for the calendar of meetings lies with the presidency and not with the Council's General Secretariat, and that Mr B. must therefore ask the Irish presidency directly. On 15 August 1996, he wrote to the Irish Permanent Representation to the European Union requesting the calendar of meetings. The request was refused on the grounds that 'it is not proposed to make publicly available the information in question'.

Mr B. claimed that the General Secretariat was wrong to refuse his request by reference to Article 2(2) of Decision 93/731/EC because the Presidency is not 'another Community institution or body' but rather a function or office of the Council itself.

The inquiry

The Council's opinion

The complaint was forwarded to the Council. The Council's opinion on the complaint included the following:

> *'In this case, the General Secretariat considered that the detailed timetable was only an informal tool for organising the Council's proceedings, being constantly updated by the Presidency and neither systematically distributed nor filed by the Secretariat. The dates of meetings scheduled in the timetables are provisional and are formalised only by convening the meeting officially by telex.*
>
> *As the General Secretariat was therefore unable to determine precisely whether the version of the timetable for meetings in its possession was the final version of that document, it asked Mr B. to address himself directly to the Presidency which alone is able to provide precise information concerning the current state of its planning.*

[1] Council Decision 93/731/EC of 20 December 1993 (OJ L 340, 31.12.1993, p. 43).

In the light of Mr B.'s arguments, the Secretary-General is now reconsidering its practice and its interpretation of Article 2(2) of Decision 93/731/EC with regard to requests for access to documents of this kind'.

In reply to a request from the Ombudsman for further information, the Council confirmed that it had already changed its practice and that the General Secretariat had granted access to the calendars circulated by the Luxembourg presidency. It also stated its intention to follow the same policy in similar cases in the future.

The Council also made clear that these calendars have no official and binding character and are subject to modifications throughout the term of the presidency and that the official convocation of meetings is done by means of telexes setting out the dates and agendas.

The complainant's observations

In his observations, Mr B. made in summary the following points.

(i) The Council's response had clarified that the Council is now supplying copies of the timetables of justice and home affairs meetings held under each presidency. This element of the complaint was therefore satisfied.

(ii) The Council had failed to respond to the claim that the Presidency is not 'another Community institution or body' within the meaning of Article 2(2) of Decision 93/731/EC.

(iii) The Council was continuing to refuse access to certain documents on this ground. Mr B. referred in particular to the agendas of the 'Senior level group' and the 'EU-US Task Force'. His confirmatory application for access to these documents, dated 28 July 1997, had been refused by the Council on the grounds that the agendas in question were established jointly by the presidency, the Commission and the United States authorities and that Article 2(2) of Decision 93/731/EC applied because the agendas in question were not prepared under the sole responsibility of the Council or its Presidency.

Further inquiries

After careful consideration of the Council's opinion and the complainant's observations, it appeared that further inquiries were necessary: firstly, in order to clarify the Council's position concerning the status of its presidency within the meaning of Article 2(2) of the Decision on public access to documents and, secondly, because the complainant's observations had raised a new issue; i.e. the refusal of the confirmatory application of 28 July 1997 for access to the agendas of the 'Senior level Group' and the 'EU-US Task Force'.

The Council's response

In its response to the Ombudsman's request for further information about these matters, the Council stated that it does not consider its presidency to be 'another institution', separate from the Council, within the meaning of Article 2(2) of Decision 93/731/EC. The Council went on to state that a distinction should be drawn between:

'documents written by the Member State holding the presidency in its capacity as presidency of the Council and

documents written by that Member State not relating to its role as presidency of the Council'.

The Council also expressed the view that Article 2(2) of Decision 93/731/EC is applicable to the second category of documents.

As regards the agendas of the 'Senior level group' and the 'EU-US Task Force', the Council stated as follows:

'The negative response to Mr B.'s request dated 28 July 1997 … was not motivated by the fact that the presidency, which contributed to the establishment of the document, was considered as "another institution" within the meaning of Article 2(2) of Decision 93/731/EC. In this particular case the agendas in question were not prepared under the sole responsibility of the presidency, but jointly by the presidency, the Commission and the United States authorities'.

The complainant's complementary observations

In observations on the Council's response, Mr B. stated that he was pleased that the Council no longer considered its presidency to be another institution separate from the Council. He also made, in summary, the following points:

(i) a document written by a Member State which is put on the formal agenda of a justice and home affairs Council and which is subsequently agreed or adopted thereby becomes part of the justice and home affairs 'acquis' and should be open to an application under Decision 93/731/EC; a document which is not subsequently agreed or adopted but which forms part of the process of making or implementing policies should also be open to such an application;

(ii) the Council's reasoning of its refusal of access to agendas of the Senior level group and the EU-US Task Force was unacceptable: European citizens should be able to apply to the Council under Decision 93/731/EC for access to documents of which the Council Presidency is a joint author.

The Decision

1. ***Access to calendars of Council meetings***

1.1. The original complaint concerned a refusal of access to the calendars of Council meetings planned for the Ireland presidency (July to December 1996).

1.2. The Ombudsman's inquiry established that the Council had changed its practice and granted access to the calendars circulated by the Luxembourg presidency. The Council also stated its intention to follow the same policy in similar cases in the future. The complainant declared that he was satisfied with this response.

1.3. The Council has therefore taken steps to settle this aspect of the complaint and has thereby satisfied the complainant.

2. ***The status of the Presidency***

2.1. The Council's refusal of the complainant's request for access to calendars of Council meetings referred to Article 2(2) of Council Decision 93/731/EC on public access to Council documents. The complainant claimed that the Council's reasoning was wrong, because the presidency is not 'another institution or body' within the meaning of Article 2(2).

2.2. During the Ombudsman's inquiry, the Council expressly stated that it does not consider its presidency to be 'another institution' within the meaning of Article 2(2) of Decision 93/731/EC. The complainant stated that he was pleased by this response.

2.3. The Council has therefore taken steps to settle this aspect of the complaint and has thereby satisfied the complainant.

2.4. In its response to the Ombudsman's request for further information, the Council drew a distinction between documents written by a Member State in its capacity as presidency of the Council and other documents written by that Member State. The complainant also made observations concerning the status of documents written by a Member State and placed on the formal agenda of justice and home affairs meetings. Both the Council's distinction and the complainant's observations appear to refer to hypothetical cases rather than to the documents which were the subject of the complaint. It is not appropriate, therefore, for the Ombudsman to take a position on the matter in this decision.

3. ***The refusal of access to documents of which the Council is a joint author***

3.1. The complainant's application, dated 28 July 1997, for access to agendas of the Senior level group and the EU-US Task Force was rejected by the Council on the grounds that the agendas in question were established jointly by the Council's presidency, the Commission and the United States authorities and that Article 2(2) of Decision 93/731/EC applied because the agendas in question were not prepared under the sole responsibility of the Council or its presidency.

3.2. The objective of Decision 93/731/EC 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 ([1]).

3.3. Article 2(2) is not presented in the form of an exception to the general rule of public access. In practice, however, it functions as an exception, since its consequence is that incoming documents are completely excluded from the range of application of the general rule. To include documents of which the Council is a joint author within the scope of Article 2(2) would considerably broaden the scope of this de facto exception.

3.4. According to the case-law of the Court of First Instance, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule ([2]).

3.5. Neither the express wording of Article 2(2) nor the abovementioned case-law supports the Council's position that documents of which it is a joint author fall within the scope of Article 2(2). It appears therefore that the Council's rejection of the complainant's application for

([1]) Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998, paragraph 66.

([2]) See cases T-194/94, John Carvel and the Guardian Newspapers v Council [1995] ECR II-2765; T-105/95, World Wide Fund for Nature (WWF) v Commission [1997] ECR II-313; T-174/95 (note 1 above).

access to agendas of the Senior level group and the EU-US Task Force was based on a misapplication of Decision 93/731/EC. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

Conclusion

The Council has taken steps to settle the aspects of the complaint dealt with in parts 1 and 2 of this Decision and has thereby satisfied the complainant.

As regards the aspect of the case dealt with in part 3 of this Decision, it appears necessary to make the following critical remark.

Neither the express wording of Article 2(2) nor the case-law of the Court of First Instance supports the Council's position that documents of which it is a joint author fall within the scope of Article 2(2). It appears therefore that the Council's rejection of the complainant's application for access to agendas of the Senior level group and the EU-US Task Force was based on a misapplication of Decision 93/731/EC. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

Article 7(3) of Council Decision 93/731/EC expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implies that the Council should reconsider the complainant's confirmatory application dated 28 July 1997 and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731/EC applies.

Since it was for the Council to carry out this reconsideration and communicate the result thereof to the complainant, the Ombudsman closed the case.

REFUSAL OF ACCESS TO DOCUMENTS: INADEQUATE REASONING

Decision on complaint 1057/25.11.96/Statewatch/UK/IJH against the Council

The complaint

In February 1996, Mr B. wrote to the Council requesting copies of 24 reports considered at the meeting of the Council of Justice and Home Affairs held on 9 and 10 March 1994 and of 17 reports considered at the meeting of the K4 Committee held on 3 and 4 March 1994. The application was made under the Council Decision on public access to Council documents [1] (hereafter Decision 93/731/EC).

The General Secretariat of the Council gave access to 17 of 41 documents requested and refused access to the 24 others. The complainant made a confirmatory application for 23 of the documents to which access had been refused. The presidency of the Council replied granting access to a further seven documents, but confirming the refusal of access to the other 16 documents.

The complaint to the Ombudsman concerned 15 of the documents to which access was refused by the reply to the confirmatory application. The Council explained the refusal of access to these documents as follows.

'With regard to documents 5375/95; 5406/95+COR1, 5405/95; 5354/95; 5319/95; 11020/93; 11565/93; 11151/93; 10448/93; SN 1100/94, consideration of your request involved balancing your interest in gaining access to these particular documents against the interest of the Council in maintaining the confidentiality of its deliberations. The Council concluded that the latter interest outweighed the former in this case, particularly since the documents in question record detailed national positions with regard to Conventions which have only recently been established or other legal instruments still under discussion or very recently adopted. They also contain internal information on procedures for the recruitment of staff to the institutions and the choice of consultants in the JHA field. Moreover, one of these documents is a working document for internal organisation purposes on protection of classified information, and others contain opinions of the Council Legal Service, which are for the exclusive use of the Council in its deliberations although they are not binding on it.

With regard to the other documents, the relevant considerations under Article 4(1) of Council Decision 93/731/EC are the following:

— *protection of the public interest (public security) Docs. 12247/1/94; SN 1053/94; 10166/4/94; 9908/2/93+ ADD 1,*

— *protection of the public interest (international relations) Doc. 5121/95.*

The nature of the information contained in these documents, particularly with regard to the fight against organised crime within and outside the European Union, has led the Council to the conclusion that access to these documents must not be allowed'.

The complaint to the Ombudsman was that the Council's reasoning, quoted above, was inadequate. Specifically, the

[1] Council Decision 93/731/EC of 20 December 1993 (OJ L 340, 31.12.1993, p. 43).

complainant mentioned that the terms 'only recently been established' and 'very recently adopted' have no basis in Decision 93/731/EC.

The inquiry

The Council's opinion

In summary, the Council claimed in its opinion that it had respected the obligation to give reasons for refusal of access to the documents in question, in accordance with the principles laid down by established case law.

> *'Access to a clearly identified set of documents was refused to protect the confidentiality of the Council's proceedings pursuant to Article 4(2) of Decision 93/731/EC, while access to another clearly identified set of documents was refused for reasons of public interest (public security and international relations) pursuant to Article 4(1) of Decision 93/731/EC.*
>
> *(…)*
>
> *With regard to documents to which access was refused pursuant to Article 4(1) of Decision 93/731/EC, the letter of 2 May 1996 adduces sufficient imperative reasons justifying application of the exception on grounds of protection of the public interest.*
>
> *With regard to documents to which access was refused pursuant to Article 4(2) of Decision 93/731/EC, it should be noted that the Council did not refuse access to the documents on the grounds that they "had only recently been established", as Mr B. claims in his complaint. The justification for the refusal of access to the documents resides in the fact that they contain detailed national positions and that the Council's interest in protecting the confidentiality of its proceedings therefore outweighed Mr B's interest in obtaining access to those documents.'*

The complainant's observations

The complainant's observations on the Council's opinion accepted that access to some of the documents could properly be refused. However, he maintained the complaint in relation to documents 10448/93, 5354/95, 5319/95, SN 1053/94 and 5121/95 and asked the Ombudsman to examine whether refusal of access to these documents was justified.

The Decision

1. *The complainant's claims*

1.1. The complainant claimed that the Council's reasoning for refusing access to some of the documents which were the subject of a confirmatory application dated 2 April 1996 was inadequate. In his observations, the complainant accepted the refusal of access to certain documents but maintained his claims in relation to others.

2. *The legal principles*

2.1. Article 4 of Decision 93/731/EC provides for two categories of exception to the principle of general access for citizens to Council documents.

2.2. Article 4(1) provides that access to a Council document cannot be granted if its disclosure could undermine the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations). In order to demonstrate that the disclosure of particular documents could undermine the protection of the public interest, the Council is obliged to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected. If that is the case, the Council is obliged to refuse access to the documents in question [1].

2.3. Article 4(2) provides that the Council may also refuse access in order to protect the confidentiality of its proceedings. The Council must exercise the margin of discretion it enjoys in applying Article 4(2) by striking a genuine balance between on the one hand, the interest of the citizen in obtaining access to the documents and, on the other, any interest of its own in maintaining the confidentiality of its deliberations [2].

2.4. According to established case-law, the statement of reasons for a decision refusing access to a document must contain, at least for each category of documents concerned, the particular reasons for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Decision 93/731/EC.

3. *The refusal of access under Article 4(1)*

3.1. Access to two of the documents in dispute was refused under Article 4(1). In reply to the confirmatory application, the Council explained that:

> *'The nature of the information contained in these documents, particularly with regard to the fight against*

[1] Case T-124/96 Interporc v Commission, judgment of 6 February 1998, paragraph 52; Case T-83/96, Gerard van der Wal v Commission, judgment of 19 March 1998, paragraph 43; Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998.

[2] Case T-194/94 John Carvel and Guardian Newspapers v Council [1995] ECR II-2765, paragraphs 64 and 65.

organised crime within and outside the European Union, has led the Council to the conclusion that access to these documents must not be allowed.'

3.2. According to the Court of First Instance, the concept of public security could encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities [1]. The Council's reference to the fight against organised crime is therefore relevant to one of the facets of the public interest protected by Article 4(1).

3.3. In its reply to the complainant's confirmatory application, the Council mentioned 'the fight against organised crime' but provided no further explanation of its reference to the 'nature of the information' contained in the documents. The Ombudsman therefore considers that the Council failed to comply with the requirement to provide the complainant with the particular reasons which led it to consider that disclosure of the documents came within the scope of Article 4(1).

4. ***The refusal of access under Article 4(2)***

4.1. In its reply to the confirmatory application, the Council referred to several different factors to justify its refusal of access to 10 documents under Article 4(2). However, in its opinion to the Ombudsman the Council stated that:

'The justification for the refusal of access to the documents resides in the fact that they contain detailed national positions and that the Council's interest in protecting the confidentiality of its proceedings therefore outweighed Mr B.'s interest in obtaining access to those documents'.

4.2. The Council's justification of its refusal of access to documents under Article 4(2), in particular the use of the word 'therefore', implies that access should be refused to every document which contains detailed national positions, regardless of how insignificant a proportion of the document this element may constitute, or of what the other contents of the document may be. The Ombudsman does not consider that this reasoning allows it to be confirmed that the Council complied with the obligation to strike a genuine balance between the interests involved.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks.

In its reply to the complainant's confirmatory application, the Council mentioned the fight against organised crime but provided no further explanation of its reference to the nature of the information contained in the documents. The Ombudsman therefore considers that the Council failed to comply with the requirement to provide the complainant with the particular reasons which led it to consider that disclosure of the requested documents came within the scope of Article 4(1).

The Council's justification of its refusal of access to documents under Article 4(2), in particular the use of the word 'therefore', implies that access should be refused to every document which contains detailed national positions, regardless of how insignificant a proportion of the document this element may constitute, or of what the other contents of the document may be. The Ombudsman does not consider that this reasoning allows it to be confirmed that the Council complied with the obligation to strike a genuine balance between the interests involved.

In relation to both the above critical remarks, it must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

Article 7(3) of Council Decision 93/731/EC expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implies that the Council should reconsider the complainant's confirmatory application dated 2 April 1996 and give access to the documents requested, unless one of the exceptions contained in Article 4 of Decision 93/731/EC applies. Since it is for the Council to carry out this reconsideration and communicate the result to the complainant, the Ombudsman closes the case.

OPEN COMPETITION: FAILURE TO PROVIDE INFORMATION ON POSSIBLE MEANS OF APPEAL

Decision on complaint 16/97/JMA against the Council of the European Union

The complaint

In January 1997, Mr B.S. complained to the Ombudsman about the decision of the selection board of open competition Council/C/374, to reject his application.

The selection board justified its decision on the grounds that the complainant had not forwarded documentary evidence of his knowledge of a second Community language. Neither the letter of the selection board, nor the notice of the competition indicated any potential means to appeal against the board's decision.

[1] Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998.

In his complaint to the Ombudsman Mr B.S. claimed the right, as a citizen, to contest a decision taken by the Community public administration. He further claimed and that he was not able to exercise this right because he had not received proper information about it from the Council.

The inquiry

The Council's opinion

The complaint was forwarded to the Council. The Council's opinion first pointed out that the complainant had not previously sent any complaint to the institution before seeking redress from the Ombudsman.

As regards the alleged lack of means to contest the decision of the selection board, the Council referred to a number of possible options which the complainant could have used. First, he could have appealed to the Court of First Instance under Article 91 of the Staff Regulations within three months of the notification of the board's decision, without making any previous appeal under Article 90(2).

Alternatively, he could have submitted a complaint under Article 90(2) of the Staff Regulations within three months of the notification of the board's decision. 86 candidates whose application had been rejected had followed this course and had lodged a complaint with the Council's Secretary-General. In order to ensure a proper consideration of these appeals, the written tests of the competition were scheduled for 26 April 1997, several months after the selection board had taken its decision on admission to the written tests.

The Council also stated that according to the relevant case-law of the Court of Justice, in order not to overburden the organisation of competitions with a high number of candidates, the General Secretariat was not obliged to draw the attention of candidates whose candidature was rejected to the existing means of appeal.

Nevertheless, the Council added that in more recent competitions and in order to give candidates an informal means of appeal, the General Secretariat expressly included a provision in the notice of open competitions, informing rejected applicants that they may request the re-examination of their applications by the selection board within a brief period.

The complainant's observations

In his observations, the complainant indicated first that not having been informed by the Council of his rights to appeal, he did not know whether any application to the Court of First Instance required a previous appeal to the selection board. The fact that 86 other candidates had contested the decision of the selection board could not justify the failure of the board to inform him of his rights to appeal, as well as the relevant formalities.

The complainant referred also to the regulation of similar situations by Spanish law, explaining that in accordance with the Spanish Law of Administrative Procedure, the public administration concerned is obliged to inform the recipient of a decision of the means to appeal against it as an essential requirement for the validity of the administrative act.

The Decision

1. ***Admissibility of the case***

1.1. Under the scheme established by the Treaty and the Statute of the Ombudsman, the admissibility of complaints is determined by the Ombudsman in accordance with Community law. Community institutions and bodies are naturally welcome to make their views on the subject known to the Ombudsman.

1.2. In order to be admissible, a complaint must be preceded by the appropriate administrative approaches to the institutions and bodies concerned (Article 2(4) Statute). In view of the different linguistic versions of this text [1], and taking into account the purpose of the provision, the Ombudsman evaluates whether suitable administrative approaches have been made depending on the circumstances of each specific case.

1.3. Since this case involves a decision taken by a selection board of an open competition, against which the complainant might have directly appealed to the Court of First Instance, the Ombudsman considers that the criteria for the admissibility of the complaint were met, without further requirements.

2. ***Information to be given to the complainant***

2.1. In the view of the complainant, his right to contest a negative decision by the selection board could not be exercised because he had not been informed of the existence of such a right, let alone of the means for its

[1] As stated in the Ombudsman's previous decision on Complaint 45/26.7.95/JPB/PD/B-dk: 'There seems to be a slight discrepancy between the different language versions of this provision. The Danish version quite rightly uses the term "fornødne" and gives the impression that such administrative approaches are necessary. On the other hand, for instance the English, French, German, Spanish and Swedish versions use the terms "appropriate", "appropriées", "geeigneten", "adecuadas" and "lämpliga" respectively which seems to imply that suitable administrative approaches must be made'. (European Ombudsman, Annual Report 1996, page 45).

exercise. The Council argued, however, that by informing candidates of their means to appeal, the organisation of competitions with a large number of candidates would be overburdened.

2.2. In evaluating the decisions taken by a selection board, due consideration has to be given to the need to ensure an orderly development of the competition, especially in competitions with a large number of candidates. The Court of Justice has taken into account this factor in defining the duty of selection boards to give reasons to rejected candidates. Hence, in established case-law, the Court has stated that it may be acceptable in competitions with a large number of candidates that selection boards initially send to (rejected) candidates merely information on the criteria for selection and the result thereof, and not give individual explanations until later [1].

2.3. However, the organisation of open competitions should not necessarily be disrupted or unduly overburdened by the fact that the selection board gives general information on the means for a potential appeal to rejected candidates through a standard form. Adequate information on the rights vested by Community law on citizens and on the means to protect them is a basic condition for the proper exercise of those rights, and ultimately for their respect. Therefore, in order to follow principles of good administration, the Council should ensure that in its dealings with citizens, they are properly informed of their rights and obligations. Particularly so in cases in which the Council takes the initiative to invite individual applications for open competitions aimed at the recruitment of its civil servants.

2.4. The European Ombudsman took note, however, of the new policy adopted by the Council in more recent competitions, whereby the notice of the competition published in the *Official Journal of the European Communities* now includes a provision stating that rejected candidates may request, within a short period of time, that the selection board re-examine their application.

In view of this change of policy by the Council, there were no grounds for the Ombudsman to further pursue this aspect of the case.

3. ***Failure to provide accurate information on the notice of the competition***

3.1. The selection board based its rejection of the complainant's application on the grounds that he had not provided evidence of his knowledge of a second Community language.

3.2. According to the Specific conditions for the admission to the competition (point B of the notice of competition), documentation was necessary in relation to education (point a), professional experience (point b), typing skills (point c) and age (point e). Only for these aspects, the notice of the competition specifically required some type of accreditation by means of certificates or any other written evidence.

3.3. It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post. This information should enable the applicant to judge whether he should apply for it, what supporting documents are important for the proceedings, and must therefore be enclosed with the application form [2]. The notice of competition serves the function of properly informing the applicant in that competition of the requirements and conditions to be fulfilled. In the present case, the notice of competition did not explicitly state the requirement of submitting documents certifying the knowledge of a second Community language. Under these circumstances, the complainant could not reasonably be expected to forward these documents. The Council therefore failed to provide the complainant with clear and accurate information regarding the fact that knowledge of a second Community language had to be supported by written evidence.

Conclusion

On the basis of the Ombudsman's inquiries into the complaint, it appeared necessary to make the following critical remark.

It is good administrative behaviour to provide the most accurate information possible about the conditions of eligibility for a post. This information should enable the applicant to judge whether he should apply for it, what supporting documents are important for the proceedings, and must therefore be enclosed with the application form. The notice of competition serves the function of properly informing the applicant in that competition of the requirements and conditions to be fulfilled. In this case, the notice of competition did not explicitly state the requirement of submitting documents certifying the knowledge of a second Community language. Under these circumstances, the complainant could not reasonably be expected to forward these documents. The Council therefore failed to provide the complainant with clear and accurate information regarding the fact that knowledge of a second Community language had to be supported by written evidence.

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.

[1] Case 225/82 Verzyck v Commission [1983] ECR 1991, paragraph 16.

[2] Case T-158/89, Van Hecken v ESC [1991] ECR II-1341.

ACCESS TO DOCUMENTS

Decision on complaint 634/97/PD against the Council

The complaint

In July 1997, Mr P. made a complaint to the Ombudsman against the Council. By letter of 19 February 1997 to the Council, the complainant had requested copies of various agendas of Council committees and other documents. The Council rejected parts of the complainant's application, relying on the rules of its Decision 93/731/EC on public access to Council documents ([1]).

As regards the agendas, the Council informed the complainant that it had decided to provide him with copies of agendas covering a period of six months instead of two and a half years as requested by the complainant. This decision was reached on the basis of Article 3(2) of Decision 93/731/EC which provides that the Council shall find a 'fair solution' to deal with repeat applications and/or those which relate to very large documents. The complainant contested the legality of that decision, arguing that Article 3(2) could not apply to a large number of documents, but could only be applicable in respect of separate documents which were 'large'; according to the complainant, none of the separate agendas would be longer than about three pages.

As regards the other documents, the Council refused access to the following:

— 'Schoolchildren/5143', a document compiling Member States' replies to a questionnaire on the application of a Joint Action of 1994 on 'travel facilities within the EU for schoolchildren who are third-country nationals',

— 'CIREA/1452', a draft report with detailed information on CIREA's activities 1994 to 1996 ([2]),

— 'Asylum/8418', consisting of two documents containing detailed answers from Member States to a questionnaire on asylum principles and practices,

— 'Racism/7141', a note on racist crimes from a Council working group on terrorism.

In refusing access, the Council had communicated the following statements of reasoning to the complainant.

As concerned 'Schoolchildren/5143', the Council stated:

'Document 5143/1/97 is a note from the General Secretariat containing a compilation of replies of the Member States to a questionnaire on the implementation of the aforementioned Joint Action. This compilation has not yet been examined by the relevant working party, and the report mentioned in the Joint Action has not yet been drawn up.

Having balanced your interest in gaining access to the document against the interest of the Council in maintaining confidentiality of its deliberations, the Council has concluded that the latter interest outweighed the former in this particular case, in accordance with Article 4(2) of the Decision.

Indeed, disclosure of this document at this stage could hamper the scheduled discussions of the matter and could have negative effects on the functioning of the exchange of such information in the future'.

As regards 'CIREA/1452', the Council stated:

'Having balanced your interest in gaining access to this particular document against the interest of the Council in maintaining the confidentiality of its proceedings, the Council has concluded that the latter interest outweighed the former, in accordance with Article 4(2) of Decision 93/731/EC.

This document, which contains detailed information about the functioning of CIREA, has not yet been examined nor approved by the Council. The Council considers that disclosure of this document at this stage could hamper the planned discussions on this matter'.

As regards 'Asylum/8418' and 'Racism/7141', the Council stated that disclosure of the two documents would undermine the protection of public interest under Article 4(1) of Decision 93/731/EC.

In his complaint to the Ombudsman, the complainant claimed that the above reasoning was inadequate.

Furthermore, as a separate allegation he claimed that in reply to the initial application for documents, the Council had failed to balance the interests of citizens in openness against the Council's interest in imposing confidentiality. The complainant submitted that under Decision 93/731/EC this balancing, which is required by the case law of the Community courts, must take place in the reply to the initial application for access to documents as well as in the reply to the confirmatory application which may be submitted following an initial rejection.

Finally, the complainant claimed that the Council's failure to set up a document register amounted to maladministration. Although Decision 93/731/EC does not impose an obligation in this respect, the lack of a document register made it, in the complainant's opinion, exceptionally difficult for applicants to know which internal documents exist.

([1]) Council Decision 93/731/EC of 20 December 1993 (OJ L 340, 31.12.1993, p. 43).

([2]) CIREA stands for 'Centre for information, discussion and exchange on asylum'.

The inquiry

The Council's opinion

The complaint was forwarded to the Council. Concerning Article 3(2) of Decision 93/731/EC, the Council in its opinion made the following remarks.

Article 3(2) of Decision 93/731/EC is aimed at safeguarding efficiency in the institution's administration in exceptional cases. In accordance with the general rules of legal interpretation, the Article must be interpreted in its context and in a way which gives it practical effect.

In this light, application of a fair solution within Article 3(2) to deal with repeat applications cannot be confined to referring only to identical documents. The concept of 'repeat application' refers to, *inter alia*, cases in which a person regularly and systematically requests over a long period of time access to a large number of, or even all, the documents of the same type, not necessarily identical. In this context, the number of documents requested is one of the criteria to be taken into account.

As concerned the documents to which access was refused, the Council contested that the statements of reason quoted above were inadequate. However, as concerns the use made of Article 4(1), the Council stated that it had taken note of the arguments put forward by the complainant, and considered that it would have been more correct to apply the exception in Article 4(2) when refusing access to 'Asylum/8418' and 'Racism/7141'.

Concerning the alleged failure to balance the interests in its reply to the complainant's initial application, the Council stated that this requirement had in fact been observed. Furthermore, it considered that its replies to the complainant in this respect had made it clear that the relevant exceptions would be relied on, and on what grounds. The Council conceded, though, that it had not explicitly stated that the balancing had been carried out. It would therefore in future cases make sure that the initial statements of grounds would state that the balancing of interests had in fact taken place.

Concerning the lack of a central document register of Council documents, the Council informed the Ombudsman that the setting up of such a register was currently under examination. The difficulties to be overcome concerned the need to ensure that such a register was reliable and exhaustive.

The complainant's observations

The complainant maintained his complaint in substance.

The Decision

The objective of Council Decision 93/731/EC is to give effect to 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 [1].

1. ***As concerns Article 3(2)***

   The issue raised by the complaint was identical to the one in complaint 1053/25.11.1996/Statewatch/UK/IJH against the Council. The reader is therefore referred to the decision of the Ombudsman, dated 28 July 1998, in relation to that complaint.

2. ***As concerns the statement of reasons***

2.1. According to established case-law, the statement of reasons for a decision refusing access to a document must contain the particular reasons for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Decision 93/731/EC.

2.2. As concerned the documents 'Schoolchildren/5143' and 'CIREA/1452', access was refused on basis of Article 4(2) which provides that the Council may refuse access in order to protect its interest in the confidentiality of its proceedings. The Council's statements of reason were based on the consideration that the documents related to subject matters which were still being discussed in the Council and that the future exchange of information between the Council and the Member States could be harmed by disclosure.

2.3. The Ombudsman observed that in public access regimes, it was commonly considered important that the disclosure of documents which relate to ongoing discussions could hamper such discussions. However, if the Council's public access regime is to attain its objective of strengthening the democratic character and the public trust in the institutions, such a consideration should be applied with prudence. In its statement, the Council referred to this broad consideration, without specifying why it was relevant in relation to the documents in question. Thus the Council's statement of reasons does not enable the Ombudsman to ascertain whether it has correctly applied Article 4(2). The Ombudsman therefore finds that the complainant rightly alleged that the Council's reasoning was inadequate.

[1] Case T-174/95, Svenska Journalistförbundet (Tidningen Journalisten) v Council, judgment of 17 June 1998, paragraph 66.

2.4. As concerns the documents 'Asylum/8418' and 'Racism/7141', the Council stated in its opinion that its reliance on Article 4(1) was incorrect, and that Article 4(2) should have been applied instead. The Council will therefore have to reconsider its refusal of access under Article 4(2) in the light of the Ombudsman's findings above.

3. ***As concerns the obligation to balance interests under Article 4(2) in reply to the initial application for documents***

The Ombudsman noted that the Council had acknowledged that it should also balance the relevant interests at the initial stage of a public access application when relying on Article 4(2). The Council had also recognised a duty to make it clear in its initial statement of reason that such balancing had in fact been carried out. The Ombudsman therefore did not consider it justified to inquire further into this grievance.

4. ***As concerns a Council register of documents***

As it appeared that the Council was setting up a register of documents, the Ombudsman did not consider it justified to inquire further into this grievance.

Conclusion

On basis of the Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remarks.

1. The Ombudsman considered that the Council had wrongly interpreted Article 3(2) of Decision 93/731/EC and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term 'repeat applications' in Article 3(2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large number of documents within its scope. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice.

2. In refusing access to *'Schoolchildren/5143'* and *'CIREA/1452'* under Article 4(2) of Decision 93/731/EC, the Council had referred to a broad consideration according to which disclosure of the documents would hamper discussions on the subject-matters of these documents. This broad reasoning did not enable the Ombudsman to ascertain whether the Council had correctly applied Article 4(2). The Ombudsman therefore considered that the Council had failed to comply with the requirement to provide the complainant with the particular reasons which led it to consider that disclosure would hamper its proceedings.

Article 7(3) of Council Decision 93/731/EC expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implied that the Council should reconsider the complainant's confirmatory applications and give access to the documents requested, unless one of the exceptions contained in Article 4 of Decision 93/731/EC applied. Since it was for the Council to carry out this reconsideration and communicate the result to the complainant, the Ombudsman closed the case.

3.5.3. THE EUROPEAN COMMISSION

ITOIZ DAM: COMMISSION'S INABILITY TO GIVE ADEQUATE REASONS FOR CONSIDERING THERE TO BE NO INFRINGEMENT

Decision on complaint 472/6.3.96/XP/ES/PD against the European Commission

The complaint

In March 1996, Greenpeace España and the association Cordinadora de Itoiz made a complaint to the Ombudsman against the Commission. In later correspondence, Mr B. was designated the representative of the complainants. In the complaint it was put forward that the Commission had failed to ensure that the Spanish authorities' decision to build a water reservoir at Itoiz, Navarre, was in conformity with Directive 85/337/EEC and Directive 79/409/EEC. The complaint concerned both the Commission's dealings with a complaint Mr B. had made to the Commission about the matter, and the Commission's assessment of the complaint.

In 1990 the Spanish Minister for Public Works approved the construction of a water reservoir at Itoiz, Navarre. It appeared that the project was very large, as 11 500 000 m^2 would be inundated entailing a water storage capacity of 418 hm^3.

The complainants considered that, in the procedures which led to approval of the construction plan, the Spanish authorities had not complied with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1]. Furthermore, the associations considered that the project infringed Council Directive 79/409/EEC of 2 April 1979 on the protection of wild birds [2].

In relation to the first Directive, the complainants considered that the Spanish authorities had not made a proper environmental assessment. In relation to the second Directive,

[1] OJ L 175, 5.7.1985, p. 40.
[2] OJ L 103, 25.4.1979, p. 1.

the associations put forward the following: Directive 79/409/EEC aims at protecting wild birds and Article 4 provides that Member States shall establish special protection areas. Article 4(4) provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats'.

The complaining associations considered that the Spanish authorities had violated this provision as it has been interpreted in the case-law of the Court of Justice, in particular the Court's judgment of 28 February 1991 in Case C-57/89, Commission v Germany [1]. In that judgment the Court ruled on the possibility of reducing a special protection area under Article 4(4) of the Directive. In the words of the Court:

'[The] interpretation of [Article 4(4) of the Directive] is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the Directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power to reduce the extent of a special protection area can be justified only on exceptional grounds.

Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive. In that context the interests referred to in Article 2 of the Directive, namely economic and recreational requirements, do not enter into consideration.'

According to the associations, the reservoir would reduce special protection areas and the Spanish authorities would build the reservoir only for economic reasons. Thus, they considered the construction of the reservoir to be contrary to the case-law of the Court.

Against this background, the associations, together with a number of municipalities affected by the construction of the reservoir, lodged a complaint with the European Commission, whose duty it is, under Article 155 of the EC Treaty, to ensure compliance with Community law. The complainants produced considerable documentation to the Commission in support of their view.

By letter of 21 December 1994, the Commission informed the complainants about its decision on the complaint. The letter reads:

'Dear Sirs,

Hereby I inform you that the Commission decided in its meeting of 30 November 1994 to close the complaint that you have made against the project of a reservoir in Itoiz. The complaint was registered in the official complaint register of the Commission under number P/4758/92.

I enclose the Spanish version of the press release that the Commission has deemed necessary to publish, explaining the decision to close the case.

I shall observe that after considering the documentation provided by you as well as by the competent authorities, the Commission's services could not establish an infringement of environmental Community law, as it could not be proved, on the base of the existing knowledge that the project would have a significant impact on the environment in the meaning of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

In this situation, the Commission could only decide to close the case.

I thank you for the interest that you and the bodies you represent, the Navarre municipalities of Valle de Lónguida, Aoiz, Valle de Artze, Oroz-Beztelu, the Junta General del Valle de Aezcoa and the Coordinadora de Itoiz, have shown in the conservation and protection of the environment.

Yours faithfully, …'.

The press release referred to above stated the following concering the Commission's reasoning for closing the case:

'The Commission has just discontinued a procedure for looking at a possible infringement of legislation for the wild birds in the Navarre region of Spain …

The Commission intervened following a complaint asserting that the project would affect two areas, namely Sierra de Artxuba y Zariquieta and Montes de Areta, which were initially protected under Council Directive 79/409/EEC on the conservation of wild birds. For the most part, the Commission looked at the complaint on the basis of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, which with effect from 5 June 1994 replaced the initial provisions of the 1979 Directive.

The Commission has investigated this matter in a spirit of dialogue and partnership with both the Spanish authorities on the one hand and the complainants and ecology groups on the other. The departments of the Commission looked at several studies concerning the impact of the project, and visited the areas affected. All interested parties were given an opportunity to express their views at a hearing in Madrid on 25 October 1994.

The investigation enabled the effects of the dam on the environment to be ascertained and it to be established that these effects are not of significance within the meaning of the 1992 Directive. Given that there is no evidence of any infringement of Community law, the Commission has closed the matter'.

[1] [1991] ECR I-883 (the Leybucht case). Subsequently, the complainants also referred in particular to the judgment of 2 August 1993 in Case C-355/90, Commission v Spain, [1993] ECR I-4221 (the Santoña case).

Taking into account the efforts made and the considerable documentation provided to the Commission, the associations found this decision unsatisfactory. In particular, they considered that the Commission had failed to address their grievances as concerned Directives 85/337/EEC and 79/409/EEC and that the Commission's referral to Directive 92/43/EEC was faulty, as this Directive had not entered into force at the time of the project. Against this background, the complainants lodged the complaint with the Ombudsman. Attached to the complaint was considerable documentation, among which reports established by the Spanish Society of Ornithologists which concluded that the Itoiz project would seriously affect the bird life in the area concerned.

The inquiry

The Commission's opinion

As concerned the Commission's dealing with the complaint, the Commission stated in summary the following. The complaint was lodged in July 1992 and an acknowledgment of receipt was sent in September 1992. At the same time, the Commission requested further information from the complainants. On 26 November 1992, the Commission requested information from the Spanish authorities. In the absence of an answer from the Spanish authorities, the Commission sent a reminder on 4 February 1993. On 14 May 1993 the Spanish authorities answered the request. The case was thereafter discussed in depth at a meeting held in Madrid on 3 March 1994 between representatives from the Commission and the Spanish authorities. Following those discussions, complementary information was sent to the Commission by the Spanish authorities on 21 April 1994.

The case was discussed at political level in Luxembourg on 8 June 1994 between Commissioner Mr Paleokrassas, Spanish Minister Mr Borrell, Spanish Secretary of State Mrs Narbona and the President of the Government of Navarre Mr Alli. During this meeting, the Spanish authorities stressed the public interest of the project and offered compensation under Article 6(4) of Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora.

An on-site visit to Itoiz by representatives of the services of the Commission took place on 23 June 1994. At the conclusion of the visit, the Commission representatives requested information and documents from Spanish local and central authorities; specifically, they requested justification of the overriding public interest of the project, analyses of alternative sites and locations considered before the decision to build the Itoiz reservoir, information on the irrigation projects, a formal promise that these projects would be subject to a full impact assessment procedure, and a debate open to all relevant interested parties where the compensation areas would be discussed.

In July 1994, the Spanish authorities presented a first set of documents concerning the hydrology of Navarre and a timetable for submission of the rest of the information requested. On 25 July 1994, Commissioner Mr Paleokrassas asked Minister Mr Borrell to postpone the execution of permanent works at Itoiz until the matter was settled. This request was accepted by the Minister by letter of 3 August 1994, and this standstill situation continued until the file was closed on 30 November 1994. On 21 September 1994 the Spanish authorities submitted a full set of documents concerning the overriding public interest of the project, the alternatives examined and the effect of the project on wild birds. On 4 October 1994 the Spanish authorities submitted a document on the compensation offered under Directive 92/43/EEC.

On 25 October 1994, at the Commission's initiative, the Spanish authorities organised a hearing on the Itoiz project in Madrid. All relevant interested parties were allowed to participate and actively defend their reasons in favour or against the project. TV, press and other media covered the event. The complaining association 'Coordinadora de Itoiz' and its representatives were also present and participated in the debate. After the hearing, the Commission's services established a final report.

As concerned the complainants' allegation about an infringement of Directive 85/337/EEC, the Commission stated that an environmental impact assessment had been carried out by the Spanish authorities.

As concerned the allegation related to Directive 79/409/EEC, the Commission stated that it had examined the complaint from the point of view of Article 4(4) of the Directive. However, the obligations imposed on Member States by that provision have been replaced since 5 June 1994 by the provisions of Directive 92/43/EEC. Article 6(2) of Directive 92/43/EEC provides that Member States shall take appropriate steps to avoid, in special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbances of species for which the areas have been designated, in so far as such disturbances could be significant.

Article 6(3) states that there shall be an assessment of any project which is not directly linked with or necessary for the management of the area but likely to have a significant impact thereon, either individually or in combination with other plans or projects.

Article 6(4) states that if, in spite of a negative assessment, a project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social and economic nature, the Member State concerned shall take all compensatory measures to ensure protection of overall coherence of the ecological network of special areas of conservation, set up by Article 3 of the Directive and called 'Natura 2000'.

On the basis of these provisions, the Commission had found that the inundation of around 6% of one of the special areas concerned by the Itoiz project should be assessed as negative. However, according to a technical report made by the Commission services, it was hard to determine whether this could be regarded as 'significant' within the meaning of Directive 92/43/EEC. Therefore, the Commission decided not to open infringement procedures against Spain.

The complainants' observations

In their observations, the complainants put forward that the Commission had still not provided them with an adequate explanation why the Commission had found that Spain had properly complied with its obligations under Directives 85/337/EEC and 79/409/EEC. According to the complainants, the Commission was not entitled to assess the project in the light of Directive 92/43/EEC, as this Directive was not in force, when the project was begun. In their view, it was clear that the project was contrary to Directive 79/409/EEC. It was established that there would be a reduction of at least one special protection area and that this would not occur on grounds which 'correspond to a general interest which is superior to the general interest represented by the ecological objective of the Directive', see the Court's ruling in the abovementioned Leybucht case. To their observations, the complainants annexed documents which showed that Commission services had at a certain moment considered the project to be contrary to Directive 79/409/EEC.

Further inquiries

After consideration of the Commission's opinion and the complainants' observations, the Ombudsman addressed the Commission. In his letter, the Ombudsman asked the Commission to provide a more detailed explanation for its finding that the Spanish authorities had complied with their obligations under Directives 85/337/EEC and 79/409/EEC.

In its second opinion, the Commission stated in substance the following.

As concerned Directive 85/337/EEC, the Spanish Ministry of Public Works approved the irrigation project called 'Canal of Navarre' in December 1961. A first project on the Itoiz reservoir was approved in 1977. The implementation of the Itoiz project was approved in 1985. Both projects were modified at later dates to take into account the results of public consultation and new assessments on the needs for water. Under the circumstances, it would be difficult to justify that Directive 85/337/EEC, which had to be implemented before 3 July 1988, applied to the case, see the judgment of the Court of Justice in the 'Grosskrotzenburg' case [1].

However, in 1989 an impact assessment procedure for the Itoiz project was launched and finished in 1990, after a public consultation period. In 1992 the final decision on the implementation of the project was taken and in 1993, the preliminary works started. Therefore, in the Commission's view, an impact assessment was made and evidence provided proved that the impact of the project on the environment, including protected birds, was adequately assessed.

As concerns Directive 79/409/EEC, the Commission services considered, at the beginning of the investigation, that the effects of the Itoiz project on birds and habitats could be significant and therefore contrary to Article 4(4) of the Directive. However, their conclusions changed when the services assessed the information received from the Spanish authorities and the additional information collected during the hearing held in Madrid. The case was subsequently assessed in the light of Directive 92/43/EEC as the provisions of this Directive replaced Article 4(4) of Directive 79/409/EEC as from 5 June 1994.

In their observations on the Commission's second opinion, the complainants maintained their complaint.

The Decision

1. The complaint raises the question whether the Commission's dealing with the complainants' original complaint to the Commission has been adequate.

2. As concerns the Commission's examination of the original complaint, there appears, on the basis of the Commission's account and the documentation forwarded by the complainants, to be no elements to the effect that the instruction has been faulty.

3. As concerns the reasoning, the Commission has given for its conclusions, it appears that one principal point of dispute remains between the Commission and the complainants. That is whether the Commission has given adequate reasoning in relation to the complainants' grievance that the Itoiz project was contrary to Directive 79/409/EEC and that this infringement could not be remedied through Directive 92/43/EEC which was not in force at the relevant moment.

[1] Judgment of 11 August 1995 in Case C-431/92 [1995] ECR I-2189.

4. Principles of good administration require that the administration gives adequate reasoning towards the citizens for the decisions it takes. In reply to the own-initiative inquiry that the European Ombudsman made in 1997 of the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law, the Commission undertook to provide complainants with statements of reason when concluding that no infringement had occurred ([1]).

5. In this case it appears that the complainants have persistently put forward that the Itoiz project was contrary to Directive 79/409/EEC and that this infringement could not be remedied through Directive 92/43/EEC which was not in force at the relevant moment. It also appears that the Commission failed to address this grievance in its original decision, which was accordingly insufficient in its reasoning. That decision was taken before the Commission's undertaking in Case 303/97/PD, as referred to above. However, the Commission has also failed properly to address the grievance in its opinions on the present complaint; thus, it appears that the Commission is unable to give adequate reasons, and this establishes an instance of maladministration.

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 Commission to give adequate reasons for the decisions it takes towards the citizens. In this case it appears that the complainants have persistently put forward that the Itoiz project was contrary to Directive 79/409/EEC and that this infringement could not be remedied through Directive 92/43/EEC which was not in force at the relevant moment. It also appears that the Commission failed to address this grievance in its original decision, which was accordingly insufficient in its reasoning. That decision was taken before the Commission undertook to provide complainants with statements of reasons when concluding that no infringement had occurred. However, the Commission has also failed properly to address the grievance in its opinions on the present complaint; thus, it appears that the Commission is unable to give adequate reasons, and this establishes 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 closed the case.

([1]) Case 303/97/PD, reported in the Annual report 1997, Section 3.7.

Note: *Following the Ombudsman's decision, it was reported in the Spanish press that the Commission decided to reopen its investigation of the Itoiz dam.*

DISPUTE OVER A RESEARCH CONTRACT

Decision on complaint 768/26.7.96/CP/UK/IJH against the European Commission

The complaint

In July 1996, Mr P. complained to the Ombudsman about a research contract between his company LW Limited (LWL), two partner companies (one Portuguese, the other Greek) and the Commission. The complaint was that DG VI of the Commission:

(i) deliberately set out to destroy the project by spreading false information about it;

(ii) wrongly withheld the final payment due under the contract;

(iii) used unfair accounting treatment of costs to reduce the amount of the final payment due.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that, under the contract, the Commission was to pay half of the eligible expenditure, up to a maximum of ECU 1 050 000. LWL was responsible for the submission of all documentation to the Commission on behalf of all contractors. The opinion continued:

> *Any final balance due could only be paid within two months of the date of approval of the consolidated cost statement and the last technical report, documentation and any other deliverable required by the contract (Article 21(2)(c) of Annex II).*

> *The contract should therefore remain in force until submission of the information required by the Commission in accordance with the contract (Article 13 of Annex II), or the last payment by the Commission, whichever is the later date. During this period, as well as during the two years after expiry of the contract, the*

Commission is entitled for audit purposes to have access to all relevant book-keeping material and where necessary to require the submission of such documentary evidence (Article 39 of Annex II).

Under the terms of Article 6(1)(c) and (5) of the 'General conditions' set out in Annex II of the contract …, the coordinating partner can then consider itself discharged from its obligations if the Commission has not made any comments on the last draft reports within two months of receiving them.

However, Article 6 of Annex II to the contract does not oblige the Commission to make payments within a certain deadline. Article 6 comes in Part A of Annex II, which concerns only the implementation of the work and applies to the contractors' obligations in respect of the technical performance of the work. In this connection the Commission staff concluded that they had no reason to question the conformity of the work done with the objectives of the project.

The Commission's opinion also included, in summary, the following points:

(i) Four payments were made to LWL, which was instructed to pass on the correct amounts to the other partners.

(ii) On the basis of the statements of eligible expenditure submitted there remains a balance of ECU 47 967 to be paid, of which 14 370 is owing to LWL.

(iii) LWL informed the Commission on 17 August 1995 that, in May 1994, the Tenerife authorities had decided that the project structure was illegal.

(iv) The Portuguese partner informed the Commission on 31 August 1995 that it had not received from LWL the sum of ECU 16 088 in respect of the second year's work. The Portuguese partner also mentioned differences of scientific opinion with LWL as well as technical alterations to the project which they considered major.

(v) The Commission organised a meeting on 27 November 1995 with all three partners, which confirmed that LWL was to continue in its role as scientific coordinator of the project.

(vi) After commissioning an independent expert report and receiving the expert's opinion in July 1996, the Commission accepted the scientific reports that had been submitted for the project.

(vii) In November 1995, LWL sent to the Commission financial reports and statements of expenditure for the third year of the project and for the whole project period. After the Commission had made several requests for additional information, a corrected version of its consolidated expenditure statements was sent in mid-May 1996. However, by that date the consolidated reports of the Portuguese and Greek partners had still not been sent to the Commission.

(viii) In view of points (iii) and (iv), the Commission decided that the project should henceforth be considered a 'doubtful' project which warranted closer scrutiny. The Commission therefore took a prudent stance and decided it was not appropriate to make a further payment.

(ix) An on-the-spot audit control took place at the headquarters of LWL on 5 July 1996, at which LWL was unable to produce adequate documents, in particular wageslips proving expenditure on personnel.

(x) The Commission invited the Portuguese partner and LWL to a meeting on 11 July 1996 to clarify the situation. The Portuguese partner was unable to attend. At the meeting, the Commission repeatedly requested LWL to supply the missing documentary financial evidence. LWL, however, took the position that Article 6(1c) and (5) of the contract meant that it was discharged from its obligations under the contract and insisted that the Commission should make the final payment.

(xi) The Commission's anti-fraud unit UCLAF had begun an investigation because LWL had not been able to supply bookkeeping evidence to support its expenditure claims.

The complainant's observations

The observations included, in summary, the following points:

(i) The periodic progress reports and final report required by the contract were submitted by LWL in due time. The Commission never submitted observations on the reports or notified the need for a longer period to submit observations. Therefore, in accordance with Article 6(1b) and (1c) of the contract the Commission is deemed to have approved the reports and LWL is discharged from its obligations under the contract in accordance with Article 6(5).

(ii) The third year and consolidated financial reports were submitted to the Commission in November and December 1995 respectively. A faxed letter from the

Commission dated 18 April 1996 requested that a specific correction be made to the consolidated cost statement and stated that the Commission had examined and approved the financial report and that payment would follow as soon as the scientific reports were approved.

(iii) The Commission was in breach of contract by failing to make the final payment due under Article 21(2)(c) of the contract within two months of the deemed approval.

(iv) The first time the Commission sought clarification on the progress reports was on 24 May 1996. This clarification was supplied on 25 May 1996 but not acknowledged by the Commission.

(v) The Commission refused, without explanation or advice, to allow LWL to make use of possibilities provided by the contract to transfer costs between categories. In particular the Commission refused to accept a proposal from LWL that costs originally estimated under the heading 'durable equipment' be treated as 'consumable equipment' to reflect their true nature as costs written off during the course of the project.

(vi) By the end of the second year of the project, it was clear that the Portuguese partner had no intention of carrying out their responsibilities. LWL informed the Commission of this orally and was orally advised that its primary responsibility was 'to deliver the results', in accordance with Article 2 of the contract which provides for contractors to 'discharge the responsibilities of defaulting contractors'.

(vii) At the meeting on 27 November 1995 (see Commission opinion point (v)) it was agreed that each partner would henceforth send reports directly to the Commission and that remaining payments would be made to each partner directly by the Commission without passing through LWL as intermediary.

(viii) The Commission description of the audit on 5 July 1996 grossly misrepresented the event. The auditors identified three minor items which they considered ineligible. In two cases, LWL considered that the items were eligible and sought clarification from the Commission on 8 July 1996. No reply was received. The third item was an invoice for guaranteed next-day delivery of the signed contract to the Commission in Brussels which was ineligible because the invoice was dated one day before the beginning of the contract.

(ix) The auditors also asked to see daily time sheets for personnel working on the project signed and certified at least monthly by the project manager. It was not practical or appropriate for such records to be kept for a small team working in two, and sometimes three or four countries at any one time. Working diaries were produced which contained daily records of individual attendance and other details.

(x) The meeting on 11 July 1996 was attended by eight Commission officials and Mr P. Questions raised about the Commission's handling of the contract were not answered.

Further inquiries

After examination of the file, the Ombudsman considered that it was necessary to conduct further inquiries. He wrote to the Commission asking to be informed of:

1. (a) the reasons why the Commission refused to accept the proposals made by LWL that certain costs should be treated as allowable under the contract and (b) whether these reasons were communicated to LWL;

2. the legal basis for the Commission's position that no further progress could be made on financial aspects of the dossier until specified information was supplied by the complainant and the other contractors. In this connection the Ombudsman referred to the Commission's letter to the complainant dated 18 April 1996;

3. whether inquiries by UCLAF had been completed and, if so, their outcome.

The Commission's reply

In reply to question 1(a) the Commission referred to its request for further documentation from LWL. As regards question 1(b) it stated that the reasons were communicated to Mr P. both during the audit and at the meeting held in Brussels on 11 July 1996.

In reply to question 2, the Commission stated that the consolidated cost statement of the Portuguese partner, which was the last document required by Article 21(2)(c) of the contract, was received on 25 November 1996. On the basis of Article 21(2)(c) alone, payment should have been made at the latest in January 1997. However, this was not the case because there was a request of the Commission for further information, made in July 1996, which was still outstanding.

Furthermore, the Commission had asked Mr P. to show evidence of the amounts he alleged to have transferred to his

partners but he had failed to do so. The Commission also referred to the 'prudent stance' mentioned in point (viii) of its opinion.

In reply to question 3, the Commission stated that the UCLAF's inquiries were continuing.

The complainant's complementary observations

In summary, Mr P. noted that the Commission had failed to answer question 1(a) and he asserted that its answer to 1(b) was untrue. As regards the answer to question 2, Mr P. claimed that all documents were delivered separately on the instructions of the Commission following the meeting of 27 November 1995. Mr P. also enclosed copies of bank transfers to the Portuguese partner which he had already copied to the Commission on 24 May 1996.

As regards UCLAF, Mr P. referred to correspondence which he had forwarded to the Ombudsman in July 1997. UCLAF had requested him to supply copies of all the project's financial and administrative records. He had informed UCLAF that he considered the requirement to copy thousands of documents to be unreasonable, since LWL had no paid staff to undertake the work, and proposed instead a further on-the-spot audit in accordance with Article 39 of the contract.

The Ombudsman's attempt to achieve a friendly solution

On 8 September 1997, the Ombudsman wrote to the Commission with a view to seeking a friendly solution of the complaint.

The Ombudsman pointed out that, on the basis of the evidence in the file, the complainant did not appear to have received a reply to his claim that UCLAF's requirement that he supply copies of the records was unreasonable and his proposal that UCLAF perform an on-the-spot audit as an alternative. The Ombudsman suggested to the Commission that it either modify the requirement, or give reasons why it was necessary to insist on the copying of all documentation.

The Ombudsman's letter also drew attention to the fact that the Commission had not supplied to the Ombudsman the information requested concerning the reasons for non-eligibility of costs. Furthermore, the Ombudsman's inquiries had not yet convinced him that the Commission could provide a coherent account of why it believed that its view of the contractual position was justified. He suggested that, depending on the outcome of UCLAF's inquiries, the Commission might consider revising its stance in relation to the amount and payment of the final balance due under the contract.

In its reply of 12 November 1997, the Commission informed the Ombudsman that UCLAF was no longer demanding that LWL supply copies of the documents; that an on-the-spot inspection was to take place and that Mr P. had been informed accordingly. In relation to the contractual dispute, the Commission's reply stated that, for each periodic payment, the Commission had sent to LWL a letter including a financial table presenting both expenditure claimed and eligible expenditure, with the explanation of any difference. The Commission also stated that the legal basis for not having paid the final balance was that the Commission had not yet approved the final cost statement of LWL.

The Commission's letter was forwarded to the complainant, who contested the points made by the Commission in relation to the contractual dispute and insisted that the Commission had set out to destroy the project by informing other interested parties that it was a technical and economic failure.

It therefore appeared that a friendly solution to the complaint could not be achieved.

The Decision

1. ***Scope of the Ombudsman's inquiries and of the decision***

1.1. The UCLAF investigation

1.1.1. In his attempt to achieve a friendly solution to the complaint, the Ombudsman pointed out to the Commission that the complainant did not appear to have received a reply to his claim that UCLAF's requirement that he supply copies of the records was unreasonable and his proposal that UCLAF perform an on-the-spot audit as an alternative.

1.1.2. In its reply, the Commission informed the Ombudsman that UCLAF was no longer insisting that LWL supply copies of the documents before an on-the-spot inspection. The Commission therefore appeared to have dealt satisfactorily with the specific issue raised by the Ombudsman.

1.2. The contractual context of the complaint

1.2.1. According to Article 11(1) of the contract from which the complaint arose, the contract is governed by the law of England and Wales.

1.2.2. Many ombudsmen at national level in the Member States do not deal with contractual disputes, either because of the general characteristics of contracts under national law, or because the law establishing the ombudsman's mandate expressly excludes contractual matters.

1.2.3. As stated in the Annual Report for 1995, part of the mission of the European Ombudsman is to help relieve the burdens of litigation, by promoting friendly solutions and by making recommendations that avoid the need for proceedings in courts. The European Ombudsman, therefore, deals with complaints of maladministration that arise from contractual relationships.

1.2.4. He does not, however, seek to determine whether there has been a breach of contract by either party. 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.

1.2.5. However, as a matter of good administration, a public authority engaged in a contractual dispute with a private party should always be able to provide the Ombudsman with a coherent account of the legal basis for its actions and why it believes that its view of the contractual position is justified.

2. ***The substantive issues***

2.1. The allegation that DG VI deliberately set out to destroy the project

2.1.1. The complainant alleged that DG VI deliberately set out to destroy the project by spreading false information about it. Although this allegation was not expressly contradicted by the Commission, its opinion and in particular its explanation of why it classified the project as 'doubtful' denied the allegation in substance.

2.1.2. According to the Commission's opinion, after considering information supplied by the Portuguese partner, it sought the opinion of an independent expert. After receiving the expert's opinion in July 1996, the Commission felt able to accept the scientific reports which had been submitted to it under the contract. The Commission also stated that the Commission's staff concluded that they had no reason to question the conformity of the work done with the objectives of the project.

2.1.3. On the basis of the Ombudsman's inquiries there appears to be no evidence that, subsequent to the independent expert's report which removed its doubts concerning the scientific aspects of the project, Commission officials have made statements inconsistent with the report.

2.1.4. The Ombudsman, therefore, found no maladministration by the Commission in relation to this aspect of the complaint.

2.2. Withholding of the final payment due under the contract

2.2.1. LWL consistently made clear to the Commission its view that it is discharged from its obligations under the contract and that the Commission should have made the final payment in accordance with Article 21(2)(c) of the contract.

2.2.2. In its opinion and its reply to the Ombudsman's request for further information, the Commission did not clearly express its view of the contractual position. In its response to the Ombudsman's attempt to achieve a friendly solution the Commission explained that the legal basis for not having paid the final balance was that the Commission had not yet approved the final cost statement of LWL. As its reason for withholding approval, the Commission stated that the complainant had not produced the financial information which it requested on July 1996.

2.2.3. In view of its present stance, it was misleading for the Commission to send a letter to the complainant dated 18 April 1996 requesting that a specific correction be made to the consolidated cost statement and stating that payment would follow as soon as the scientific reports were approved. Such a letter could be understood to imply approval of the consolidated cost statement, subject to the specific correction being made.

2.3. Accounting treatment of costs to reduce the final payment due

2.3.1. The complainant claimed that the Commission had refused, without explanation or advice, to allow transfer of costs between categories in accordance with the contract. In the complainant's observations on the Commission's opinion, it was alleged, in particular, that the Commission had refused to accept a proposal that costs originally estimated under the heading 'durable equipment' be treated as 'consumable equipment'.

2.3.2. According to the Commission's reply to the Ombudsman's request for further information, the reasons for non eligibility of certain costs were communicated to the complainant during the audit and at the meeting held in Brussels on 11 July 1996. The complainant specifically denied this claim. His observations on the Commission's opinion contained an account of the audit and he annexed his minutes of the meeting of 11 July 1996. Both these documents were forwarded to the Commission, which supplied no evidence in rebuttal.

2.3.3. In the attempt to achieve a friendly solution, the Ombudsman drew attention to the fact that the Commission had not supplied to the Ombudsman the information he had requested concerning the reasons for non-eligibility of costs. In its response, the Commission stated that, for each periodic payment, the Commission sent to LWL a letter including a financial table presenting both expenditure claimed and eligible expenditure, with the explanation of any difference. The Commission annexed to its response copies of letters to the complainant from the Commission dated 4 July 1994, 14 March 1995 and 8 August 1995. However, the financial tables to which the letters referred were not copied to the Ombudsman.

2.3.4. The effect of the Commission's refusal of the complainant's request to transfer costs between categories was to reduce the proportion of total expenditure that was eligible and thereby reduce the Commission's contribution to below 50% of the total. In these circumstances, the Commission should have given the complainant reasons for the refusal. The reasoning should also have been provided to the Ombudsman on request. Despite a repeated request, the Commission did not provide the reasoning to the Ombudsman. The Ombudsman therefore concluded that the Commission failed to supply the complainant with reasons for refusing his proposal that costs originally estimated under the heading 'durable equipment' be treated as 'consumable equipment'.

Conclusion

On the basis of the Ombudsman's inquiries, there appeared to be no evidence that, subsequent to the independent expert's report which removed its doubts concerning the scientific aspects of the project, Commission officials had made statements inconsistent with the report.

It appeared necessary however, to make the following critical remarks.

1. In view of its present stance, it was misleading for the Commission to send a letter to the complainant dated 18 April 1996 requesting that a specific correction be made to the consolidated cost statement and stating that payment would follow as soon as the scientific reports were approved. Such a letter could be understood to imply approval of the consolidated cost statement, subject to the specific correction being made.

2. The effect of the Commission's refusal of the complainant's request to transfer costs between categories was to reduce the proportion of total expenditure that was eligible and thereby reduce the Commission's contribution to below 50% of the total. In these circumstances, the Commission should have given the complainant reasons for the refusal. The reasoning should also have been provided to the Ombudsman on request. Despite a repeated request, the Commission did not provide the reasoning to the Ombudsman. The Ombudsman therefore concluded that the Commission failed to supply the complainant with reasons for refusing his proposal that costs originally estimated under the heading 'durable equipment' be treated as 'consumable equipment'.

3. The substantive issues in dispute between the complainant and the Commission concern their contractual obligations. The Ombudsman cannot determine whether there has been a breach of contract by either party. It was not therefore appropriate for the Ombudsman to make draft recommendations in this case, despite the fact that efforts to achieve a friendly solution were unsuccessful. The Ombudsman noted that the contract in question is governed by the law of England and Wales and that the Court of Justice has sole jurisdiction in respect of any dispute concerning the contract (Article 11(1); Annex II, Article 12). It was therefore open to either of the parties to bring the issues in dispute before the Community judicature.

The Ombudsman therefore closed the case.

COMPETITION LAW: ALLEGED FAILURE TO TAKE ACTION AND TO REPLY TO CORRESPONDENCE

Decision on complaint 774/29.7.96/ELR/UK/IJH/OV against the European Commission

The complaint

Mr R. complained in July 1996 to the European Ombudsman of alleged failure by the Commission (Directorate-General IV) to deal properly with his complaint alleging restriction of competition by sole agency agreements of German and Austrian model railway manufacturers.

The complainant wrote on behalf of a retailer in model railways (toys) established in North Wales and specialising in the supply of manufactured goods originating from sources in Germany, Austria, France and Italy. On 3 August 1994 the complainant wrote to Mr Joe Wilson MEP who forwarded the complaint to the Commission (DG IV) alleging restriction of competition by German and Austrian model railway manufacturers through sole agency agreements. He complained in particular that the German and Austrian manufacturers appoint a sole importer/distributor to supply the United Kingdom market and that therefore trade prices to United Kingdom dealers are considerably higher than those enjoyed by, for example, German counterparts.

The Commission replied on 12 January 1995, with an apology for the delay, that on the basis of the contents of the complainant's letter, it did not appear necessary to take any action under competition law. Not satisfied with the Commission's reply, the complainant wrote again on 23 January 1995 and received a similar reply on 1 February 1995. He wrote again on 28 April and 31 October 1995 and got an answer on 9 November 1995. In its replies, the Commission asked the complainant to provide more detailed information about the alleged violation of competition rules, and in particular indications on the companies involved in the alleged improper competition activities. The complainant finally sent three other letters on 21 November 1995, 29 March and 23 May 1996, but received no reply. In his letter of 21 November 1995 and further to the Commission's request for more detailed information, the complainant included a list with names and addresses of German and Austrian manufacturers practising sole agency agreements.

Given that the complainant received no reply to those last letters, he complained in July 1996 to the Ombudsman that the Commission:

1. failed to take action further to his complaint alleging restriction of competition by German and Austrian model railway manufacturers;

2. failed to answer his correspondence.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission in November 1996. In summary, the Commission made the following comments.

As regards the alleged failure to reply to the letters of the complainant, the Commission observed that it had recently replied to the letter of 23 May 1996. It annexed to its observations a copy of this reply dated 28 November 1996 and of the answer of the complainant.

As regards the alleged failure to take action because of violation of competition rules, the Commission observed that DG IV only initiates investigations when duly substantiated complaints on a specific subject involving points of Community law are lodged. The Commission maintained that the circumstances which the complainant described did not indicate that any violation of competition rules had taken place and did not identify the companies involved, but contained only statements of a general political nature. However, the Commission added that, should the complainant submit a formal complaint identifying an infringement of the competition rules, it would deal with it in accordance with the procedures established by Regulations No 17 and No 99.

The Commission observed that there were several reasons why DG IV could not provide further assistance to the complainant. Given that the complainant had failed to provide details which might have led to discovering the existence of any restrictive agreements, the Commission stated that there would be no infringement of the competition rules, since all suppliers are fully entitled to employ exclusive distributors, in the United Kingdom or elsewhere. The Commission further commented that, in the absence of detailed information, it could not take a decision to carry out *in situ* inspections, and that a systematic investigation through formal requests for information to all manufacturers and wholesalers of model railways in the Community was not justified by the economic impact of the case, which the complainant admitted was small. The Commission particularly drew the attention to the fact that, attached to his complaint, the complainant had sent a copy of the Commission notice of 3 September 1986 on agreements of minor importance, which showed that he was aware that the Commission did not normally intervene in such cases. Finally the Commission observed that, since the case appeared to concern trade in model railways at retail level, an effect on trade between Member States was in any event improbable.

The complainant's observations

The complainant rejected the Commission's statement and asked for a full investigation of the matters raised in his complaint, which he declared are facts and not general observations. He more particularly observed that there exists no alternative source of supply, that a monopoly is created and repeated that United Kingdom retailers have to pay excessive prices as opposed to other countries. He also commented that he could not furnish proof of restrictive trade arrangements without breaking into premises of suppliers/manufacturers to obtain such information.

The Decision

1. ***Alleged failure to take action further to the complaint***

1.1. According to the complainant the Commission should have taken action further to his complaint alleging restriction of competition by the German and Austrian model railway manufacturers. In summary, the Commission observed that the complainant did not furnish enough detailed information in order to enable it to initiate investigations.

1.2. The alleged failure of the Commission to take action under competition law has to be considered in the frame of the administrative procedure which the Commission follows in order to bring to light infringements of Articles 85 and 86 of the EC Treaty. This administrative procedure is regulated by Council Regulation No 17 ([1]) which confers on the Commission wide powers to make investigations and to obtain information.

1.3. According to the case-law of the Court of Justice ([2]), it is for the Commission itself, and not for a third party, to decide, for the purposes of an investigation under Article 14 of Regulation No 17, whether particular information is necessary to enable it to bring to light an infringement of the competition rules. The Court of Justice has in particular stated that, even if it already has evidence, or indeed proof, of the existence of an infringement, the Commission may take the view that it is necessary to request further information to enable it to define more accurately the scope of the infringement, to determine its duration or to identify the circle of undertakings involved. The fact that the Commission requested more information from the complainant in the present case seemed reasonable and not excessive. Therefore there appeared to have been no maladministration by the European Commission in deciding that it was still unable to take action on basis of the information provided by the complainant.

2. ***Alleged failure to reply to the letters of the complainant***

2.1. The complainant alleged that the Commission failed to reply to his letters of 21 November 1995, 29 March and 23 May 1996. In his letter of 21 November 1995, the complainant provided the Commission, further to its request for more detailed information, with a list of manufacturers supposed to use sole agency agreements. Given that the complainant received no answer from the Commission by March 1996, he wrote the two other letters in which he asked for the courtesy of a reply to his first letter dated 21 November 1995. The Commission answered that it replied to those letters on 28 November 1996.

2.2. Principles of good administrative behaviour require that letters from complainants to the Commission administration receive a reply within a reasonable time limit. This requirement is even more necessary when a letter from a complainant contains new information compared to his previous letters, for example in correspondence asking the Commission to take action because of violation of competition rules.

2.3. It appeared from the information given by the Commission that the letter of 21 November 1995 was only answered on 28 November 1996, i.e. one year later. Even if the Commission had replied to all the other correspondence from the complainant referred to in the facts of the complaint under point 2, it should also have answered the letter of 21 November 1995 within a reasonable time limit.

2.4. The necessity of a reply in the present case became urgent, given that the complainant, further to the Commission's request for more detailed information, finally provided the Commission with new details in the form of a list of German and Austrian manufacturers supposed to practice sole agency agreements. This information which was new with regard to his previous correspondence and which the complainant reasonably could have considered as an answer to the Commission's request for more details, was an additional argument for the complainant to be entitled to receive a reasoned answer from the Commission within a reasonable time limit. Therefore, the fact that the Commission replied one year later to the complainant's letter of 21 November 1995 which contained new information with regard to his original complaint, constituted an instance of maladministration.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark.

The principles of good administrative behaviour require that letters from complainants to the Commission administration receive a reply within a reasonable time limit. The fact that the Commission only replied after one year to the complainant's letter of 21 November 1995 which contained new information with regard to his original complaint constituted therefore an instance of maladministration.

([1]) Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ English Special Edition, Series-I (59–62), p. 87).

([2]) Case 155/79, AM & S v Commission, ECR [1982] 1575; Case 374/87, Orkem v Commission, ECR [1989] 3283.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

RECOGNITION OF CERTIFICATES OF DENTISTRY FROM NON-MEMBER COUNTRIES

Decision on complaint 783/01.08.96/LBR/ES/KH(JMA) against the European Commission

The complaint

In July 1996, Mr B. complained to the Ombudsman on behalf of the 'Colegio de Odontólogos y Estomatólogos' of Vizcaya. The complaint concerned the alleged failure of the Commission to ensure that the Spanish authorities correctly applied Directive 78/686/EEC on mutual recognition of certificates of dentistry.

In his complaint Mr B. alleged that Spain was not complying with the Directive since its authorities were recognising odontologist degrees obtained in Latin American countries, which did not meet the requirements set by the Directive.

Having received several complaints concerning the same situation, the Commission initiated the infringement procedure under Article 169 of the EC Treaty. A letter of formal notice was sent to the Spanish authorities in October 1990, followed by a reasoned opinion in August 1992. The Spanish authorities replied to the reasoned opinion in March 1993.

Mr B. had complained to the Commission in 1992. Since then, he wrote to and visited the services responsible on several occasions in order to receive information on the development of the Article 169 proceedings. He had asked the Commission to speed up the process and to have access to information concerning the relevant files, in particular to obtain copies of the exchanges between the Commission and the Spanish authorities. The Commission, however, rejected his requests to see the files on the grounds that the proceedings are confidential.

In all contacts and letters with the complainant, the Commission insisted that the procedure was following its course and that the Commission's services were reviewing the documents sent by the Spanish authorities. The complainant considered that those replies were too general and unsatisfactory.

The inquiry

The Commission's opinion

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

In 1990, the Commission initiated the infringement procedure under Article 169 against Spain for its failure to follow the criteria set out in Council Directives 78/686/EEC [1] and 78/687/EEC [2] for the recognition of dental degrees.

Article 1(4) of Directive 78/687/EEC establishes that 'nothing shall prejudice any facility which may be granted in accordance with their own rules by Member States in respect of their own territory to authorise holders of diplomas, […] which have not been obtained in a Member State to take up and pursue the activities of dental practitioner'.

However, in doing so, the Member State had been limited by the basic criteria laid down by both Directives, and which should be met by any practitioner of specialised dentistry. The Commission considered that, in order to be recognised in the Community, an odontologist degree delivered by a non-member State must guarantee these minimum criteria.

In spite of the above obligations, Spain automatically recognised dental degrees obtained in Latin American countries and which did not meet the Directive's minimum criteria. The recognition of these degrees was based on the provisions of bilateral international agreements concluded by Spain before its accession to the European Communities.

Although the Spanish administration sought to comply with the provisions of the above Directives, its decisions were reversed on appeal by different administrative courts. As a result the provisions of the relevant Directives were still not respected.

The Commission also explained that in view of the fact that Spain was in the process of renegotiating its bilateral agreements with third countries, it had decided not bring the matter before the European Court of Justice, in the exercise of its discretion, as recognised by the case-law of the European Court of Justice.

As regards the length of time involved in the development of this infringement proceeding under Article 169, the Commission justified it on the basis of its complexity, both from a legal and a political point of view.

After receiving the reply to its reasoned opinion, the Commission asked for further information from the Spanish authorities in October 1994 and in July 1995. The Spanish authorities replied to these requests in December 1994 and October 1995 respectively.

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[1] Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercice of the right of establishment and freedom to provide services (OJ L 233, 24.8.1978, p. 1).

[2] Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ L 233, 24.8.1978, p. 10).

At the date of the opinion (20 December 1996) the Commission was still waiting for a reply from the Spanish authorities to a new request for information.

As for the alleged failure of transparency of the proceedings and the refusal to disclose the correspondence between the Commission and the Spanish Government, the Commission insisted that the letters and other documents exchanged with a Member State in the context of Article 169 were of a confidential nature. On that basis, there was no obligation to share with or to pass the information on to third parties.

The Commission stressed that in its handling of this proceeding it had always followed principles of good administration, and its services had replied in time and properly to the letters of the complainant, with whom they had also had a meeting in Brussels.

The complainant's observations

In his observations, Mr B. made in summary the following points.

The Commission's interpretation of Directives 78/686/EEC and 78/687/EEC was, in his view, adequate, and he had always made all possible efforts to guarantee the proper application of these Directives in Spain.

He did not accept the Commission's justification for the lengthy period of time taken for the handling of the case. He considered that since the Commission is a technical body, its primary task is to ensure the proper application of Community law by all Member States. Consequently, the Commission could not possibly justify the long time elapsed in this action on the basis of political reasons.

He asked the Ombudsman to make the necessary inquiries to verify whether all the parties involved in the case acted in accordance with Community law.

On April 1997 he forwarded to the Ombudsman a copy of a letter which he had received from the Commission. This letter informed him of the decision adopted by the Commission on December 1996 to refer the matter to the Court of Justice, although it also added that the case had not yet been materially lodged. The Commission had adopted this decision in view of the unsatisfactory reply given by the Spanish authorities to the Commission's reasoned opinion.

Further inquiries

In May 1997, the European Ombudsman wrote again to the Commission requesting further information in relation to the complaint. The Ombudsman suggested that the Commission should provide more clear, precise and transparent information concerning the contents of the negotiations between the Commission and the Spanish authorities and on the development of the proceedings which had taken place since 1990.

In reply, the Commission confirmed its previous opinion and informed the Ombudsman that it was reviewing the new information submitted by the Spanish authorities in June 1997.

In February 1998, the Commission informed the Ombudsman that it had decided not to bring the matter before the Court of Justice. In the Commission' view the Spanish authorities were tackling the relevant problem in accordance with Community law. Furthermore, the Spanish Supreme Court had changed its interpretation of existing national rules, in order to make them conform to the requirements of Directives 78/686/EEC and 78/687/EEC.

The Commission pointed out that the fact that the Ombudsman had received several complaints (531/97/PD and 535/97/PD) from citizens who had obtained their dental degrees in Latin American countries, but who had not obtained the recognition of their dental degrees by the Spanish authorities, was proof of the change in the situation.

The Commission intended to close the infringement proceeding as soon as Spain ceased to be a party to all the international agreements which could be contrary to Community law.

The Decision

1. ***Decision of the Commission not to bring the case before the Court of Justice***

1.1. Under Article 155 of the Treaty, the Commission's duty as 'guardian of the Treaty' is to ensure that Community law is applied. In this role, the main legal instrument available to the Commission to compel compliance by Member States is the procedure set out in Article 169.

1.2. Accordingly, when the Commission considers that a Member State has failed to fulfil a Community obligation, it delivers a reasoned opinion. If the State concerned does not comply with the opinion, the Commission may bring the matter before the Court of Justice.

As the Court of Justice has repeatedly stated [1], the Commission has a discretionary power whether or not to apply to the Court of Justice for a declaration establishing the failure of the Member State concerned.

1.3. In the exercise of discretion a normal practice for most public administrations is to explain the reasons which justify the choice of a particular course of action. Therefore, if the Commission chooses not to pursue an infringement procedure, there should be some reasoning supporting this particular option. These reasons should provide the basis for any potential inquiry by the Ombudsman in order to ensure that no maladministration has taken place.

1.4. On the basis of the latest information submitted by the Spanish authorities, the Commission decided not to bring the matter before the European Court of Justice. This decision was prompted by the fact that the Spanish authorities had denounced several international treaties on recognition of degrees signed with some Latin American countries, and by the new position taken by the Spanish Supreme Court.

1.5. In reviewing the reasons given by the Commission to justify its position, the Ombudsman found that the institution had acted within the limits of its legal authority and therefore no instance of maladministration had been established.

2. ***Due diligence in ensuring compliance with Community law***

2.1. In the context of the Ombudsman's own initiative inquiry into the Commission's administrative procedures in relation to citizens' complaints (303/97/PD), the Commission committed itself to adopt a decision on a complaint within a year from its registration. As it was noted at the time, the observance of this rule appeared to be an adequate means for ensuring that the complaint is processed without undue delay.

However, this general aim could be frustrated if, once a complaint had resulted in the opening of an infringement procedure, the latter lingered on for many years with no satisfactory solution to the problem.

2.2. In ensuring as guardian of the Treaty that Member States fully comply with Community law, the Commission should work in accordance with principles of good administration and act with due diligence. This implies that the Commission should actively seek to make the Member State concerned put an end to the infringement, and also inform the complainant of its actions.

2.3. In the process of compelling the Spanish authorities to comply with Directive 78/686/EEC, formal action by the Commission was first undertaken in October 1990 with the dispatching of a letter of formal notice. In December 1996 the institution decided to apply to the Court of Justice, although it suspended this decision in December 1997, in view of the positive results of its negotiations with Spain.

This process, still being reviewed by the Commission, had taken seven years. During this long period, the Commission had indicated it sent a reasoned opinion to the Spanish authorities in August 1992, and also requested additional information on this matter in March and July 1993, October 1994, July 1995, and April 1996.

2.4. In its replies to the Ombudsman, the Commission had claimed that its attitude has been very active in relation to the complaint during the seven years that have elapsed since infringement proceedings begun. However, despite a request from the Ombudsman, it had failed to provide clear, precise and transparent information to support this claim and thereby demonstrate that it had acted with due diligence throughout this long period of time.

3. ***Request by the complainant to have access to certain documents***

3.1. In order to clarify the evolution of the proceedings, the complainant had requested on several occasions information concerning the exchanges between the Commission and the Spanish authorities. The Commission replied to such requests by refusing to release those letters on the basis of the confidentiality of the infringement proceedings.

3.2. The Commission indicated in its replies to this inquiry that, in its role of guardian of the Treaty, the institution has to ensure an atmosphere of mutual trust with Member States. This aim could not be achieved but for the confidential character of the contacts between the institution and the Member State concerned.

3.3. Requests for access to documents held by the Commission are to be dealt with in accordance with Commission Decision 94/90/ECSC, EC, Euratom, which gives effect to the Code of Conduct adopted by the Council and Commission. Those measures place a legal

[1] See, most recently Case T-182/97, Order of the Court of First Instance (Second Chamber) of 16 February 1998. Smanor SA, Hubert Ségaud and Monique Ségaud v Commission of the European Communities [1998] ECT II-0271.

obligation on the Commission to give the public the widest possible access to documents held by it. The exceptions to the right of access to documents should be interpreted strictly in order not to frustrate this specific aim of the Code of Conduct ([1]).

3.4. In the present case, the documents concerned were admittedly related to the possible opening of an infringement procedure under Article 169. In the present state of Community law, the Commission has the possibility to refuse access to documents relating to investigations which may lead to an infringement procedure under the heading of protection of the public interest ([2]). It did not appear, therefore, that the refusal of access to documents on these grounds constituted an instance of maladministration.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark.

In ensuring as guardian of the Treaty that Member States fully comply with Community law, the Commission should work in accordance with principles of good administration and act with due diligence. This implies that the Commission should actively seek to make the Member State concerned put an end to the infringement, and also inform the complainant of its actions.

In its replies to the Ombudsman in this case, the Commission claimed that its attitude had been very active in relation to the complaint during the seven years that had elapsed since the sending of the reasoned opinion. However, despite a request from the Ombudsman, it had failed to provide clear, precise and transparent information to support this claim and thereby demonstrate that it had acted with due diligence throughout this long period of time.

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.

([1]) Case T-124/96. Judgment of 6 February 1998 Interporc Im- und Export GmbH v Commission [1998] ECR II-0231, paragraphs 48 and 49.

([2]) Case T-105/95, WWF UK v Commission [1997] ECR II-313, paragraph 63.

CONFIDENTIALITY OF DOCTOR-PATIENT RELATIONSHIP

Decision on complaint 819/19.8.96/GV/I/VK against the European Commission

The complaint

In August 1996, X complained to the Ombudsman about the behaviour of a Commission official during his traineeship at the Translation Service of the Commission in Luxembourg. In 1994, the complainant was awarded a traineeship at the Commission. Right at the beginning of his traineeship, he fell ill. He forwarded the necessary medical certificates to the Commission. In January 1995, his head of service telephoned X's doctor in Italy, who had issued the certificates, and inquired about his situation. X considered that the head of service had behaved incorrectly and wrote a letter of complaint to the Commission. He received no reply to this letter.

In the complaint to the Ombudsman X claimed:

(i) the behaviour of the head of service concerned was incorrect. In substance, X alleged that the head of service warned the doctor not to issue unfounded medical certificates;

(ii) the Commission should have replied to his letter.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission recognised that the head of service contacted the complainant's doctor in January 1995 in order to 'clarify the situation'. According to the Commission, the intervention of the head of service was purely limited to questions necessary for this purpose and he did not attempt to influence the doctor's judgement. He merely reminded her that medical certificates were required to justify all absences. The Commission also recognised that the head of service informed the doctor about the complainant's accommodation situation in Luxembourg. According to the Commission, this information was relevant to the discussion with the doctor and contained no elements of defamation. Therefore, the Commission concluded that at all times, the head of service behaved in accordance with normal practice and professional ethics.

As concerns the complainant's second grievance, the Commission's opinion stated that a reply to the letter was drafted but was not sent due to an administrative oversight.

The complainant's observations

In his observations, the complainant maintained his complaint.

The Decision

1. ***The claim that the head of service should not have contacted the complainant's doctor***

1.1. The rules governing in-service training at the Commission make provision for the procedure to follow in case of absence due to sickness [1]. Article 33 of the rules appears to provide the administration with adequate safeguards for its interests. A trainee who is ill for more than three days, must be able to prove this by a medical certificate; if he is incapable of producing such evidence, the administration may disregard the illness. If a certificate leaves the Commission with unanswered questions, a specific procedure is provided: i.e. the trainee may be required to undergo a medical examination.

1.2. As recognised by the Court of Justice, a confidential relationship is formed between a patient seeking treatment and his or her doctor [2], which it is important to safeguard. Principles of good administration require the Commission to respect the confidentiality of the doctor-patient relationship.

1.3. In the present case, the complainant's head of service contacted directly and without the complainant's permission, the doctor who had issued a medical certificate to the complainant. Whatever the precise nature of the information sought or provided about the complainant's situation, it is obvious that this action risked damaging the confidentiality of the doctor-patient relationship. If the Commission considered that it was necessary to clarify the situation, the procedure expressly foreseen by Article 33 of the rules governing in-service training could have been used.

2. ***Failure to reply to the complainant's letter***

2.1. According to the Commission, a reply to the complainant's letter was drafted but was not sent because of an administrative oversight. It would have been appropriate for the Commission also to express regret for this oversight.

[1] *'In case of sickness trainees must notify their advisers immediately; if absent for more than three days they must produce a medical certificate, indicating the probable length of absence, which the adviser will forward to the Training Division. They may be required to undergo a medical examination in the interest of the service'.*

[2] Case 155/78 M. v Commission [1980] ECR 1797.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks.

1. As recognised by the Court of Justice, a confidential relationship is formed between a patient seeking treatment and his or her doctor, which it is important to safeguard. Principles of good administration require the Commission to respect the confidentiality of the doctor-patient relationship. In the present case, the complainant's head of service contacted directly and without the complainant's permission, the doctor who had issued a medical certificate to the complainant. Whatever the precise nature of the information sought or provided about the complainant's situation, it is obvious that this action risked damaging the confidentiality of the doctor-patient relationship. If the Commission considered that it was necessary to clarify the situation, the procedure expressly foreseen by Article 33 of the rules governing in-service training could have been used.

2. According to the Commission, a reply to the complainant's letter was drafted but not sent because of an administrative oversight. It would have been appropriate for the Commission also to express regret for this oversight.

Given that both 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 closed the case.

REASONS FOR REJECTION OF CANDIDATE

Decision on complaint 825/20.8.96/SH/SW/VK against the European Commission

The complaint

In August 1996, X. complained to the Ombudsman concerning his exclusion from the Commission's open competition COM/A/972, in which he was a candidate. This open competition was based on qualifications and an oral test to constitute a reserve list of medical advisers of grade A 5/A 4 of Austrian, Finnish or Swedish nationality.

On request, X. provided the Commission with a curriculum vitae which gave details about his education and experience in the required fields.

By letter of 29 May 1996, X. was informed that his candidature had been rejected by the selection board. The

standard letter of rejection mentioned as alternatives both that X. lacked a medical qualification and that he failed to provide proof of studies in the field of occupational medicine (ett utbildningsbevis efter specialstudier i arbetsmedicin).

By letter of 8 June 1996, X. asked the selection board to reconsider his application. In its reply, the selection board stated that X. did not have sufficient professional experience in the fields of tropical medicine and radiation safety.

In his complaint to the Ombudsman X. claimed that:

(i) his qualifications met the requirements for the open competition. In particular, he emphasised that he did have professional experience in the field of radiation safety and that this was not taken into account;

(ii) the Commission had given two different reasons for rejecting his application and that he had not therefore received an appropriate answer to his request for reconsideration of his case;

(iii) the Commission's faulty reasoning could indicate discrimination against candidates with Swedish medical qualifications.

The inquiry

The Commission's opinion

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

(i) The selection board examined the complainant's application form and decided not to admit him to the competition because it considered that he did not possess a diploma in occupational health medicine.

'The decision was notified to X. by a letter dated 29 May 1996. The board recognised that the letter was not absolutely clear on the motivation for this decision'.

(ii) On request, the slection board re-examined the complainant's application and came to the conclusion that he did not have sufficient experience compared with the other candidates, neither in tropical medicine nor in radiation safety.

'The board can assure [X.] that its decision was not influenced by the timing of his studies in the Swedish education system but only by the need to ensure that only the most qualified candidates were invited to the interview'.

The complainant's observations

In his observations, the complainant claimed that the Commission's explanations were still not entirely clear. He also pointed out that the Commission admitted that it had given two different reasons.

Finally, X. expressed his satisfaction about the board's assurance that its decision was not influenced by the timing of his studies in the Swedish education system.

The Decision

1. *The Selection Board's reasoning*

1.1. Competition COM/A/972 was organised to constitute a reserve list of grade A 5/A 4 medical advisers on occupational health in the Commission's Medical Service. Point III.B.2 of the notice of competition required candidates to be holders of a higher university degree in medicine and a certificate of specialised occupational health studies. Furthermore, candidates were required to have professional experience of, among other things, tropical medicine and radiation safety.

1.2. In its first letter to the complainant, the selection board gave as the reasons for rejecting his candidature either the fact that he lacked a medical qualification or that he had failed to provide proof of studies in the field of occupational medicine (ett utbildningsbevis efter specialstudier i arbetsmedicin). In its second letter, the selection board gave a different reason: that he lacked sufficient experience compared with the other candidates in both the tropical medicine and the radiation safety fields.

1.3. It is a fundamental principle of good administrative behaviour that decisions should be reasoned, as required for example, by Article 190 of the EC Treaty. The reasoning should enable the affected party to know why a particular measure has been taken. In its comments to the Ombudsman, the Commission recognised that the selection board's first letter to the complainant was not absolutely clear on the motivation for this decision. In fact, it appears that the reasoning was not only unclear, but also wrong.

1.4. In its second letter, the selection board considered the complainant's experience insufficient compared with other candidates in both the tropical medicine and the radiation safety fields.

1.5. Article 27 of the Staff Regulations of the European Communities provides that recruitment shall be directed to securing for the institution the services of officials of

the highest standard of ability and efficiency. In applying the criteria laid down in the notice of competition, the selection board was entitled to make a comparative evaluation of the candidates in order to ensure that the most suitable candidates were chosen for interview.

1.6. Taken by themselves, the reasons given in the second letter appeared adequate to enable the candidate to understand the reasons for his rejection. Furthermore the reasons were consistent with the proper exercise of judgement by the selection board. However, the second letter did not acknowledge that the reasons given in the first letter were wrong. Taken together therefore, the first and second letters were inadequate to explain the reasons for the candidate's rejection.

2. ***Alleged discrimination against candidates with Swedish medical qualifications***

2.1. In its opinion, the Commission stated that its decision was not influenced by the timing of the complainant's studies in the Swedish education system but only by the need to ensure that only the most qualified candidates were invited to the interview. In his observations the complainant expressed satisfaction with this response.

2.2. The Ombudsman's inquiries therefore revealed no evidence of maladministration in relation to this aspect of the complaint.

On the basis of the Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remarks:

It is a fundamental principle of good administrative behaviour that decisions should be reasoned, as required for example, by Article 190 of the EC Treaty. The reasoning should enable the affected party to know why a particular measure has been taken. In its comments to the Ombudsman, the Commission recognised that the selection board's first letter to the complainant 'was not absolutely clear on the motivation for this decision'. In fact, it appeared that the reasoning was not only unclear, but also wrong.

Taken by themselves, the reasons given in the second letter appeared adequate to enable the candidate to understand the reasons for his rejection. Furthermore the reasons were consistent with the proper exercise of judgment by the selection board. However, the second letter did not acknowledge that reasons given in the first letter were wrong. Taken together therefore, the first and second letters were inadequate to explain the reasons for the candidate's rejection.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly solution in the matter. The Ombudsman therefore closed the case.

MODIFICATION OF GRANTS FOR RESEARCH

Decision on complaints 878/13.9.96/TT/IT/PD and 905/26.9.96/AGS/IT/PD against the European Commission

The complaint

In September 1996, the Grant Holders Association complained to the Ombudsman about a reduction in the grants which its members received from the Commission and about the way in which the Commision had made the reduction.

In 1994, the Council and the European Parliament adopted Decision No 1110/94/EC [1] concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration. Under the Euratom Treaty, the Council adopted a parallel decision, Decision 94/268/Euratom [2] concerning a framework of Community activities in the field of research and training for the European Atomic Energy Community.

According to the recitals to the two Decisions, the Communities' actions within the framework programmes shall, among other objectives, aim at stimulating and promoting the training and mobility of researchers, particularly young researchers. Furthermore, the Joint Research Centre of the Communities shall contribute to the implementation of the framework programmes.

The role of the Joint Research Centre is laid down in more detail by Council Decision 94/918/EC adopting a specific programme for research and technological development, including demonstration, to be carried out for the European Community, on the one hand, by the Joint Research Centre and, on the other hand, by means of activities within the framework of a competitive approach and intended for scientific and technical support to Community policies [3] and by Council Decision 94/919/Euratom adopting a specific programme of research and technological development, including demonstration, to be implemented by the Joint Research Centre for the European Atomic Energy Community [4].

It appears from the recitals to these two Decisions that the Joint Research Centre, with its laboratories and installations, shall make an effective contribution to the training and mobility of researchers.

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[1] OJ L 126, 18.5.1994, p. 1.
[2] OJ L 115, 6.5.1994, p. 31.
[3] OJ L 361, 31.12.1994, p. 114.
[4] OJ L 361, 31.12.1994, p. 132.

Under these acts, the Joint Research Centre entered into contracts with researchers from the different Member States of the Community. The individual contract is a standard form to be filled in with the individual elements of each case and is entitled 'Individual fellowship contract between the European Community and (X)'. An Annex containing general conditions applicable is attached to the contract. Both documents are drafted by Commission services. The standard form provides for the duration of the fellowship at the Joint Research Centre which normally is two years. During the fellowship, the researcher receives a monthly grant from the Community.

In all contracts concerned in this case, Article 4(1) of the standard form used provided:

'The Commission shall pay the contractor, throughout the duration of the fellowship, a monthly amount of ECU …. This sum will be modified, either up or down, following approval by the European Commission of the new general conditions governing research training fellowships. This modification will not be backdated'.

Article 9 of the standard form established that the general conditions attached form an integral part of the contract and that

'These general conditions will be replaced, following approval of the new general conditions governing research training fellowships. The replacement will not be backdated'.

On 29 July 1996, the Commission adopted a decision establishing new standard contract forms, new amounts of grants and new general conditions. The Commission also decided that the decision should be applied to all existing contracts containing the above quoted clauses. According to the decision, it should take effect as from 1 August 1996. It is established that as a result of this decision, the current grants of roughly 50 grant holders suffered a reduction of 30%.

By letters of 6 August 1996 the individual grant-holders were informed about the decision and that it became effective as from 1 August 1996. The letter was drafted in French. Attached to the letter were the new general conditions in French as well as an unofficial translation of them into English. The letter ended by asking the individual grant holder to contact the Commission services for the signing of new contracts, but not until 9 September 1996, given the summer holidays. Thereafter, the grant-holders undertook considerable activity, consulting lawyers and contacting Commissioners and Commission services with a view to making the Commission refrain from reducing the current grants and in order to seek clarification on some clauses in the new general conditions. Apart from this last aspect, these contacts were apparently fruitless.

Against this background, the researchers assembled in the Grant Holders Association decided to lodge the complaint with the Ombudsman. In the complaint it was stated that the decision taken completely upset the basis on which individual grant holders had entered the research programme, in particular for researchers with a family. Furthermore, it was stated that the decision taken made it materially very difficult for the researchers to continue to stay at the Joint Research Centre. The Association's allegations were in substance that:

1. the Commission should have informed the grant holders in advance about the possible forthcoming reduction of grants, before making its decision;

2. the letter of 6 August 1996 should have been addressed to each individual grant-holder in his own language;

3. the clauses in the contracts allowing for the reduction of grants were illegal and unfair and ran against the spirit of the mobility programmes.

The inquiry

The Commission's opinion

As concerned the Association's first grievance, the Commission stated that the administration of the Joint Research Centre kept the grant-holders informed, either directly or via the Association, of the progress of discussion on the new grant amounts. The Commission stressed in particular that a meeting took place on 11 July 1996 at the Ispra site of the Joint Research Centre, during which grant-holders were informed about the forthcoming Commission decision.

As concerned the letter of 6 August 1996, the Commission recognised that it was wrong to send only a French version of the letter to the grant-holders and undertook not to repeat the error in future. It also undertook to have contracts translated into the other Community languages.

As concerned the Association's third grievance, the Commission stated that the new amounts of grants were adopted for the sake of coherence and uniformity, so that the amount of the grants would be identical to the ones used in training through research contracts under other programmes of the fourth framework programme established by the above quoted Decisions. The Commission furthermore stated that new amounts were determined after close consultation with representatives of the Member States; they were calculated in

such a way as to ensure, as far as possible, that grant holders received a net amount comparable to what a researcher of an equivalent level would earn in the host country.

It was decided that the new amounts should also be applied to current contracts which contained the above quoted clauses. However, in order to allow the 47 grant-holders at the Ispra site and the four grant-holders at the Seville site of the Joint Research Centre to prepare for the substantial reduction in their grants, the Commission decided on 16 December 1996 to suspend the application of the Decision until 31 March 1997. Thus, until that date, there was no reduction of the current grants.

The Association's observations

As concerned the first grievance, the Association stated that the local administration at the Ispra site of the Joint Research Centre did everything in its power to keep grant-holders informed about developments concerning them. However, the Association stated that the local administration was faced with a lack of information from the Commission's services in Brussels. In any case, it was not until the meeting of 11 July 1996 that the grant-holders were informed about the forthcoming reduction of their grants.

As concerned the second grievance, the Association stated that it accepted the Commission's apology for sending only a French version of the letter of 6 August 1996 to the individual grant-holders.

As concerned the new amounts of grants, the Association stated that it did not question the Commission's entitlement to establish new amounts. It was even prepared to accept the considerations underlying the new amounts and the aim purported by the new amounts, i.e. amounts comparable to what a researcher of an equivalent level would earn in the same country. However, the Association strongly questioned why new amounts had to be applied to running contracts. In this context, it was underlined that the reduction of grants in running contracts was not aimed at compensating for, for example lower living costs or lower taxes; in that case, the reduction of the grant would not imply a net reduction of the grant. The Commission Decision adopted did not refer to such possibly justifiable circumstances. The Decision, on the contrary, implied a 30% net reduction of grants in running contracts. In some cases, the reduction completely frustrated the conditions underlying the researcher's taking up of the research programme. As for the suspension that the Commission adopted on 16 December 1996 of the Decision taken, the Association welcomed this but stated that those researchers, whose contracts would not terminate until the end of 1997, would still suffer severe negative effects of the Decision taken.

Further inquiries

After due consideration of the Commission's opinion and the Association's observations, the Ombudsman addressed the Commission. In his letter, the Ombudsman stated that while the general aim pursued by the establishment of new grant amounts appeared understandable, the Commission had not specified why its Decision had to be applied to current grants. The Ombudsman furthermore stated that researchers could reasonably expect the Commission not to make such a drastic use of the quoted contract clauses, and that a 30% reduction in the current grants had made it materially very difficult for a number of researchers to continue their work and in any case threatened their motivation. Finally, the Ombudsman stated that it could not be excluded that in future, researchers would refrain from joining the research schemes, if it became known that grants may be drastically reduced during the course of a contract. The Ombudsman concluded by suggesting that the Commission review its position in the light of these considerations.

In its answer to this letter, the Commission stated that it had very often been criticised on the grounds of the high amounts it allocated to grant-holders and for failing to fully consider the existing conditions of the country where the research was carried out. According to the Commission, these issues had been discussed in the relevant programme committee, and taking into consideration the points raised by several delegations, the Commission decided the new amounts. The Commission pointed out that the new amounts were intended to provide coherence and equity with respect to grants used in other specific programmes of the fourth framework programme.

Other facts

It appeared from a complaint lodged with the Ombudsman on 23 September 1997, (complaint 855/97/PD) that given the drastic reductions of the current grants, one researcher had to abandon his research programme and return to his home country with his family.

The Decision

1. As concerned the first grievance about lack of information and communication with the grant-holders prior to the Commission's Decision, it shall firstly be observed that principles of good administration require that the administration shall deal with citizens in a fair and just way. This implies, among other things, that when the administration intends to take measures towards a limited

and clearly identified number of citizens, the administration shall establish suitable contacts with the citizens concerned, making it possible for them to voice their opinion. It also implies that citizens shall be informed with due notice about the measures taken, so they can take adequate steps to adapt themselves to the changed situation.

In this case it appeared that there were no contacts between the Commission services responsible and the grant-holders. At the meeting of 11 July 1996 the grant-holders were simply informed about the possible reduction of their grants before the Commission actually took its Decision to that effect on 29 July 1996. When the grant holders were informed about the actual reduction that the Decision implied by the letters of 6 August 1996, the reduction had already taken effect. This way of proceeding appeared high-handed and arrogant and thus did not comply with principles of good administration.

2. As concerned the letter of 6 August 1996, the Commission acknowledged that the letter should have been sent to the individual grant holder in his language and apologised for this. Therefore, the Ombudsman did not find that there were grounds for pursuing the inquiry into this aspect of the complaint.

3. As concerned the allegation that the clauses which allowed for the drastic reduction of grants to take place were illegal, it shall be observed that this question must be assessed in the light of the applicable national law, which must be done by the competent national authorities. The Ombudsman did therefore not examine this question. However, the administration must always be accountable to the Ombudsman for its observance of principles of good administration and thus be able to provide the Ombudsman with a coherent account of its actions and why it believes them to be justified. Principles of good administration require among other things that the Commission deals with citizens in a fair and just way.

In this case it was established that the clauses which the Commission had inserted in the standard contract allowed for reduction of current grants without any limitations and without giving any indication as to the parameters that would underlie a reduction. The clauses must be deemed to make the taking up of a research traineeship very precarious and make abuses possible. They cannot be qualified as fair. Considering this, there must at least be overriding reasons for resorting to the clauses. The Commission was not able to indicate such overriding reasons.

Against this background, the Ombudsman found that by using unfair contract clauses, the Commission had failed to act in accordance with principles of good administration.

Conclusion

On the basis of the Ombudsman's inquiries into these complaints, it appeared necessary to make the following critical remark.

Principles of good administration require that the Commission deals with citizens in a fair and just way. By failing to establish suitable contacts with the grant-holders concerned by a substantial reduction that the Commission envisaged making of their grants and by failing to inform them with due notice about the reduction, the Commission failed to meet this requirement. The Commission also failed to meet the requirement by using unfair contract clauses.

Given that these aspects of the case concerned procedures relating to specific events in the past, the grant-holders concerned having ended their fellowship with the Joint Research Centre, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

SUBSIDY FOR A FILM FESTIVAL: INADEQUATE REASONING

Decision on complaint 23/97/KH against the European Commission

The complaint

By letters dated in December 1996 and January 1997, Mr M. complained on behalf of the Stichting Nederlands Film Festival (NFF) against the Commission. He alleged incomprehensible treatment by Commission Directorate-General XIII, bad functioning and shortage of information.

The background to the complaint can be summarised as follows. In 1995, NFF organised a day of scientific films for which it received a subsidy from the Commission. Apparently, both NFF and the Commission services involved considered the event to be a success. NFF then took the decision to organise another day of scientific films in 1996, for which it also applied for a Commission subsidy. However, the subsidy was not obtained.

NFF made the application for the subsidy for the 1996 day of scientific films in May 1996. The Commission replied by letters of 18 June 1996 and 28 June 1996.

The first letter indicated that the complainant's project was of a nature which could receive a subsidy. However, the

complainant would have to rearrange the budget so as to bring it within the ECU 12 000 [1] limit which, according to the rules of the relevant Commission programme could not be exceeded. An application form was enclosed with the letter.

The second letter contained an additional application form, and stated what documents should be attached to it. It also informed the complainant that the application had to be sent as soon as possible.

On 1 July 1996 the NFF replied stating:

'Hereby you receive the specified budget of the Day of the Scientific Film and the Masterclass and the Seminar. We kindly request you for an EC financial support of ECU 12 000 and participation of EC representatives at the events (DG XIII D/2)'.

By letter of 11 September 1996 the Commission replied, stating:

'I regret to inform you that your application for the subsidy has been rejected. I apologise for the trouble this decision may cause to you. The final report from the 1995 event has not yet been presented to the Commission in the form as requested in the contract. It is being seen as a violation of the contractual obligations'.

Thereafter, a meeting took place between the responsible Commission services and NFF on 23 September 1996. After the meeting, NFF addressed a letter to the Commission on 27 November 1996. In the letter, NFF informed the Commission that the Film Festival had been a great success. The letter also stated that, 'After Mr [M's] visit to your office and our telephone call you promised to contact me after the festival about the procedure concerning the ECU 25 000 subsidy for the Second Day of the Scientific Film. I tried to get in touch with you by phone but I could not get hold of you. I would be grateful if you could contact me about the project mentioned above'.

Following this letter, NFF informed the Commission services on 29 November 1996 that it had decided to continue the subsidy procedures as quickly as possible via diplomatic channels. On 9 January 1997 the Commission addressed the following letter to NFF:

'I am happy to inform you that the payment of our financial contribution to the NFF 1995 has been finally approved by our financial authorities. The subsidy of ECU 12 000 should be credited to your bank account within the next few days.

We have carefully examined the possibility of granting financial aid also to the 16th edition of the Dutch Film Festival. I regret to inform you that the application was not accepted by our financial authorities, considering that at that moment the report of the previous event was not yet satisfactorily done.

I am sorry not to have been able to help you on this occasion'.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its first opinion, the Commission stated that, in respect of the 1995 subsidy, NFF had failed to fulfil one of its basic obligations by submitting its report for the assistance too late. The payment had, however, been approved.

The Commission also referred to the complainant's correspondence regarding the 1996 project. With reference to its letter of 18 June 1996, the Commission stated that NFF had been duly informed of the ECU 12 000 limit for such subsidies, and that NFF was asked to submit a new application.

Regarding subsequent applications from NFF, the Commission stated that a search of the document registration system of the relevant Directorate-General showed no entries referring to an application or to correspondence in this respect. NFF later inquired about the subsidy. The Commission conceded that the reply, informing NFF that their application had been formally rejected, was mistaken. In a subsequent telephone conversation the Commission informed NFF that no application had actually been received and that it had become too late to make such application. On 23 September 1996, NFF enquired anew whether a subsidy for the 1996 project could still be given. They were informed that there was no possibility to fund the 1996 event.

The complainant's observations

In its observations, NFF maintained the complaint. Due to the Commission's letter of 9 January 1997 mentioning NFF's failure to account adequately for the spending of the subsidy in 1995, NFF extensively documented the way in which it accounted for the spending of the 1995 subsidy.

Further inquiries

In view of the different reasons given by the Commission for not granting the 1996 subsidy, the Ombudsman asked the Commission for further information.

[1] *Innovation*, The third activity of the fourth framework programme for research and technological development, dissemination and optimisation of results.

In its second opinion the Commission stated that the question of whether to grant a subsidy or not was never considered, because no duly completed application forms were ever sent to the Commission.

The Commission added that, following NFF's complaint, the services responsible had reviewed their internal procedure in order to make it more formal, particularly as regards communication with applicants for subsidies.

In its observations on the Commission's second opinion, NFF maintained its complaint.

The Decision

1. The Commission in its two opinions did not maintain that a subsidy for the 1996 event was refused because of NFF's failure to account properly for the spending of the 1995 subsidy. The Ombudsman did therefore not inquire into the correctness of the Commission's view that NFF's accounting was faulty.

2. The Commission maintained that NFF did not receive a subsidy for the 1996 event because no formal application was ever received. No conclusive evidence had been produced to the effect that the Commission did indeed receive the formal applications. Therefore, the Ombudsman could not inquire further into the question whether the Commission had dealt improperly with NFF's application.

3. The case-law of the Court of Justice and principles of good administration require that the administration gives adequate and coherent reasons for the measures it takes towards the citizens [1]. In this case, it appeared that the Commission at first, gave no reasoning for rejecting the complainant's application for a subsidy; thereafter it motivated the rejection by referring to the complainant's alleged failure to comply with accounting requirements for the spending of a previous subsidy; and finally the Commission indicated that had it never received the application. Thereby the Commission had failed to meet the requirement of adequate and coherent reasons.

4. The Ombudsman welcomed the Commission's initiative to review its procedures.

[1] See among other judgment of 7 November 1997 in case T-218/95, Azienda Agricola 'Le Canne' v Commission, [1997] ECR II-2055 (paragraph 65). See also for the administration's liability to explain itself, J. A. Usher, 'The good administration of Community law', in *Current legal problems* (1985) p. 278.

Conclusion

On the basis of the inquiries into this complaint, it appeared necessary to make the following critical remark.

The case-law of the Court of Justice and principles of good administration require that the administration gives adequate and coherent reasons for the measures it takes towards the citizens. In this case, it appeared that the Commission at first, gave no reasoning for rejecting the complainant's application for a subsidy; thereafter it motivated the rejection by referring to the complainant's alleged failure to comply with accounting requirements for the spending of a previous subsidy; and finally the Commission indicated that had it never received the application. Thereby the Commission had failed to meet the requirement of adequate and coherent reasons.

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.

MUTUAL RECOGNITION OF HELICOPTER LICENCES

Decision on complaint 121/97/VK against the European Commission

The complaint

In February 1997, Mr B. made a complaint to the Ombudsman against the Commission. He alleged that the Commission had failed to ensure that the German authorities complied with a Directive on mutual acceptance of personnel licences for the exercise of functions in civil aviation [2]. He also alleged that the Commission had failed to act in accordance with its own obligations under the Directive.

Mr B. had asked the German authorities for the recognition of his Austrian professional helicopter licence. The German authorities considered that his licence was not equivalent to a German one and therefore, they would not grant recognition unless Mr B. complied with additional conditions. Mr B. considered this to be discriminatory and complained to the Commission. After an exchange of correspondence, Mr B. was

[2] Council Directive 91/670/EEC of 16 December 1991 (OJ L 373, 31.12.1994, p. 21).

dissatisfied with the Commission's stand and complained to the Ombudsman. He alleged that the Commission had failed:

1. to make the comparison of requirements applied in each Member State for issuing helicopter licences, which is foreseen by Article 4 of the Directive;

2. to ensure that the German authorities do not impose discriminatory conditions for the recognition of Austrian helicopter licences;

3. to establish the proposal for a Council act on full mutual recognition of licences, foreseen by the recitals to the Directive;

4. to reply to a letter that Mr B. addressed to Mr Probst of Commission Directorate-General VII, on 9 September 1996.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission in substance stated the following.

As concerned the first grievance, it is true that, the Commission has not yet made the comparison of requirements for helicopter licences applied in each Member State, which according to Article 4(1) of the Directive should have been made before 1 January 1992. However, the failure to provide the comparison does not have any bearing on Mr B.'s individual situation.

The Commission was duly informed by the German authorities about the additional conditions they established for recognition of Austrian helicopter licences. After due consideration, the Commission accepted these. Mr B. was informed about this.

As concerned the third grievance, the Commission relies for its proposal on technical work carried out by the Joint Aviation Authority which is an associated body of the European Civil Aviation Conference. At the time of the Ombudsman's inquiry, the Authority had just finished its work concerning helicopter licences which the Commission will examine in due course with a view to establishing its proposal for a Council act.

As concerns Mr B.'s letter of 9 September 1996, the Commission considered that a fax sent to him by the Bonn Representation on 7 November 1996 made a reply superfluous.

The complainant's observations

In his observations Mr B. maintained his complaint.

The Decision

1. As concerned the first grievance, Article 4(1) of the Directive states that the Commission, 'shall make, and forward to all the Member States before 1 January 1992, a comparison of the requirements applied in each Member States for issuing licences for the same functions'. The Commission admitted that it had not yet made such a comparison for helicopter licences. It lies within the Commission's powers to propose an amendment to the Directive if it cannot meet the deadline laid down by the Directive. Principles of good administration require that the Commission complies with the rules and principles which are binding on it. As the Commission did not comply with Article 4(1) of the Directive as concerns helicopter licences, the Commission had not complied with that requirement.

2. As regards the Commission's assessment of the additional conditions, established by the German authorities for recognition of Austrian helicopter licences, there were no elements at hand which indicate this assessment to be wrong.

3. As concerned the third grievance, the last recital of the Directive states that with a view to full mutual recognition of licences, the Commission shall submit a proposal to the Council before 1 July 1992. The Commission acknowledged that it had not yet provided such a proposal. It lies within the Commission's powers to propose an amendment to the Directive if it cannot meet the deadline indicated by the Directive. Principles of good administration require that the Commission complies with clear, unambiguous and publicly made statements about when to submit legislative proposals. As the Commission had not yet acted in conformity with the said recital, the Commission had not met that requirement.

4. As concerned the fourth grievance, it shall be noted that the fax of the Bonn Representation of 7 November 1996, which the Commission considered to be a reply to Mr B.'s letter of 9 September 1996, did not refer to the letter. The contents of the fax did not appear to answer the important questions raised in Mr B.'s letter. On the contrary, the fax ended by stating that the Representation would contact the Commission services in Brussels so that they addressed Mr B. Principles of good administration require that the Commission replies to letters addressed to it. As the Commission did not reply to Mr B.'s letter of 9 September 1996, the Commission had not met that requirement.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remarks.

(i) Principles of good administration require that the Commission complies with the rules and principles binding on it. Given that as concerns helicopter licences, the Commission has not yet complied with the obligation laid down by Article 4(1) of Directive 91/670/EEC, the Commission failed to meet that requirement.

(ii) Principles of good administration require that the Commission complies with clear, unambiguous and publicly made statements about when to submit legislative proposals. As the Commission has not yet made the proposal, foreseen by the last recital of Directive 91/670/EEC before 1 July 1992, the Commission has failed to meet that requirement.

(iii) Principles of good administration require that the Commission replies to letters addressed to it. As the Commission did not reply to Mr B.'s letter of 9 September 1996, it failed to meet that requirement.

Given that these aspects of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

FAILURE TO INFORM ABOUT THE OUTCOME OF A COMPLAINT

Decision on complaint 250/97/OV against the European Commission

The complaint

In March 1997, Mr S. complained to the Ombudsman, on behalf of an association, alleging lack or refusal of information by the Commission (DG XVI. E. 3). He more particularly made the following claims.

(i) When the association learnt about the decision of the Commission to co-finance the project 'Draining and biological cleaning system' in Preveza, Greece from the Cohesion Fund, it asked DG XVI (Regional Policy and Cohesion) by telephone for a copy of the decision, but the request was refused.

(ii) The decision to co-finance the project had not been appropriately published in the *Official Journal of the European Communities*.

(iii) On 8 January 1996, using the Commission's standard complaint form (OJ C 26, 1.2.1989, p. 6) the association made, together with the community of Mytika, a complaint alleging non-compliance with Community law by the Greek Ministry of Environment, Regional Planning and Public Works. The complaint concerned the Ministry's joint decision No 30146/94 of 11 July 1995 to discharge processed sewage into the Ionian sea at Kalamitsi. According to the complainant, this decision was contrary to Community and national environmental law. The association also asked the Commission to suspend its funding of the project mentioned under (i). The association also sent to the Commission five other letters on 7 February 1996, 8 March 1996, 6 May 1996, 15 July 1996, and 8 January 1997, in which it provided new information as regards its original complaint. DG XVI never answered those letters and did not inform the association about the progress of its complaint.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission in June 1997. As regards the first allegation, the Commission's opinion stated that the competent service informed the complainant that, according to Article 2(1) of the Commission Decision of 8 February 1994 on public access to Commission documents, the application should be made in writing. The Commission observed that, on receipt of a written demand, it would see no obstacle to sending the Decision to the complainant, but such a request had not been received.

As regards the second allegation, the Commission observed that, according to Article 10(7) of Council Regulation (EC) No 1164/94 [1], only the key details of the Commission's decisions have to be published in the *Official Journal of the European Communities*. For the present project the key details had been published in *Official Journal of the European Communities* C 122 of 19 April 1997. However, the Commission explained the delay between the adoption of the decision and its publication in the *Official Journal of the European Communities* by referring to the size and the nature of the publication which grouped together 66 projects adopted on different days. Given that, once adopted, the decisions are notified to the Member States, the key details are only published for transparency reasons. Therefore the Commission prefers to group together the information related to different projects instead of publishing it in separate parts of the *Official Journal of the European Communities*.

[1] Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (OJ L 130, 25.5.1994, p. 1).

With regard to the third allegation, the Commission first observed that its services had concluded that the project did not violate Community law, and that, therefore, the complaint did not need to be registered. More particularly, there was no violation of Council Directive 85/337/EEC [1], which entered into force after the project had started in 1985.

It was only after a preliminary decision of the Greek Council of State, and after an environmental impact assessment decided by the Minister of Environment, that the Commission decided on 5 November 1996 to co-finance the project. This decision had been taken in conformity with the decision of the Greek Council of State.

The Commission observed that, further to his complaint dated 8 January 1996, two acknowledgement receipts had been sent to the complainant on 17 January and 19 February 1996, by respectively the Regional Fund and the Cohesion Fund Divisions, but that it was not necessary to answer all the other letters which the association had sent to the Commission. However, on 23 July 1997, the Cohesion Fund Division sent a letter to the complainant in which it answered all previous letters.

The complainant's observations

The complainant maintained his allegation that the publication of the decision five months after its adoption constituted an irregularity and that the association had received no information about it. The complainant further observed that the Commission's assertion that there was no violation of Community law was wrong and that the Commission never informed the association about the fact that the complaint had been rejected. The complainant concluded that for a whole year he received no reply at all to his letters which had been ignored by the Commission.

The Decision

1. ***The alleged failure to send a copy of the decision granting financial support***

The Ombudsman noted that, as regards a request for a copy of a Commission decision to co-finance a project, Article 2(1) of the Commission Decision of 8 February 1994 on public access to Commission documents provides that all applications for access to documents shall be made in writing to the relevant Commission department. The complainant was informed by the competent Commission service of this formality in order to obtain the requested document. However, it appeared that the complainant did not produce such a written demand to DG XVI. Under these circumstances, the fact that the Commission did not send him a copy of the decision did not constitute an instance of maladministration.

2. ***The alleged failure of appropriate publication of the decision in the Official Journal of the European Communities***

2.1. The complainant alleged that the decision to co-finance the project had not been appropriately published in the *Official Journal of the European Communities* and that five months passed between the adoption of the decision and its publication. The Commission replied that the key details of the present decision were published in the *Official Journal of the European Communities* C 122 of 19 April 1997.

2.2. Article 10(7) of Council Regulation (EC) No 1164/94 provides that only the key details of decisions of the Commission approving projects and granting financial support from the Cohesion Fund shall be published in the *Official Journal of the European Communities*. The Regulation does not foresee a time limit for this publication. In the present case the decision was taken on 5 November 1996 and its key details were published on 19 April 1997. The Commission explained this five months delay by referring to the size and the nature of the publication which grouped together 66 projects adopted on different days. It pointed out that its services prefer to group this information in one Official Journal instead of publishing it separately. This explanation for the delay between the adoption and the publication of the decision appeared to be reasonable. Therefore the fact that the decision was only published on 19 April 1997 did not constitute an instance of maladministration.

3. ***The alleged failure to inform the complainant about the outcome of his complaint concerning non-compliance with Community law (Article 169 procedure)***

3.1. This part of the complaint concerned alleged maladministration in the administrative procedure for dealing with a complaint for infringement of Community law by a Member State. As regards this administrative procedure, the Commission had, in its comments in the framework of the Ombudsman's own initiative inquiry 303/97/PD [2], observed that all complaints which reached the Commission were registered and that no exceptions

[1] 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 L 175, 5.7.1985, p. 40).

[2] 303/97/PD, reported in the European Ombudsman's Annual report for 1997 pp. 270 to 274 and see the Commission's 15th Annual report on monitoring the application of Community law (1997), Introduction pp. III-IV (COM (1998) 317 final).

were made to this rule, that it acknowledged receipt of the complaint, and that the complainant was kept informed about the action taken by the Commission in response to the complaint, or whether no action had been taken on it. The Commission also observed that a decision to close a file without taking any action must be taken on every complaint within a maximum period of one year of the date on which it was registered.

3.2. In the present case it appeared that two acknowledgement receipts were sent to the complainant in January and February 1996. The Commission then decided not to register the complaint because it concluded that there was no violation of Community law. However, the Commission did not inform the complainant about the fact and the reasons why the complaint had not been registered. The Commission left the complainant without any written information about the outcome of his complaint until July 1997, i.e. 17 months after the acknowledgement receipts. More particularly, during this period of 17 months in which the complainant had sent five letters asking for information on the progress of his complaint, the Commission did not inform him why it found that there was no infringement of Community law. The Ombudsman noted that, according to the Commission's own observations in the framework of his own initiative inquiry, no exceptions were made to the rule that all complaints received by the Commission were registered, and a decision to close a file without taking any action must be taken within a maximum period of one year from the date when the complaint was registered.

3.3. Even if the commitments which the Commission undertook in the framework of the own initiative inquiry dated from after the lodging of the present complaint, the principles of good administrative behaviour require that the Commission should have informed the complainant adequately and as soon as possible about the outcome of his complaint. Therefore, the fact that in the present case the Commission did not inform the complainant about the fact and the reasons why it did not register the complaint, and even left the complainant during 17 months without any written information about the outcome of his complaint, constituted an instance of maladministration.

Conclusion

On the basis of the Ombudsman's inquiries into parts 1 and 2 of this complaint, there appeared to have been no maladministration by the Commission.

On the basis of the Ombudsman's inquiries into part 3 of this complaint, it appeared necessary to make the following critical remark.

According to the Commission's own observations in the framework of the Ombudsman's own initiative inquiry 303/97/PD, no exceptions are made to the rule that all complaints received by the Commission are registered, and a decision to close a file without taking any action must be taken within a maximum period of one year from the date when the complaint was registered. Even if the commitments which the Commission undertook in the framework of this own initiative inquiry date from after the lodging of the present complaint, the principles of good administrative behaviour require that the Commission should have informed the complainant adequately and as soon as possible about the outcome of his complaint. Therefore, the fact that in the present case the Commission did not inform the complainant about the fact and the reasons why it did not register the complaint, and even left the complainant during 17 months without any written information about the outcome of his complaint, 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.

CHANGE OF RECRUITMENT POLICY

Decision on complaint 320/97/PD against the European Commission

The complaint

In April 1997, Mr R. complained to the Ombudsman that the way in which the Commission had dealt with his recruitment constituted maladministration.

In June 1994, Mr R. had passed a selection procedure organised by the Commission for establishing a reserve list for the recruitment of temporary posts in grades A 7/6, 65T/XXIII/93. In September 1996, while he was working in Peru, Mr R. was called by a Commission official from DG IB, who wanted to know if he would be interested in a post concerning Latin America. Mr R. confirmed his interest.

In November 1996, Mr R. received a letter from Directorate General IX inviting him to an interview in Brussels and to the necessary medical examinations in case he was offered the post. The interview and the medical examinations took place later the same month.

On 6 December 1996 Mr R. was informed orally by DG IB that he was offered the post in question. By note of 16 December 1996, DG IB asked DG IX to put the recruitment procedure in motion as soon as possible.

On 13 January 1997 Mr R. contacted DG IX. He was told that his recruitment was certain and that he would receive a fax to that effect within a week. On 16 January 1997, DG IX informed Mr R. that the recruitment procedure was blocked by a decision to close the relevant reserve list, and therefore he could not be recruited. Mr R. was never informed in writing that the reserve list had been closed.

By letter of 15 March 1997, Mr R. informed the Commission that he did not find this way of proceeding appropriate.

In his complaint to the Ombudsman, Mr R. claimed that the Commission's way of proceeding constituted maladministration. In his view, it showed faulty procedures, lack of professional conscience within the Commission's services, disrespect for the citizen as well as bad financial management, as Mr R.'s return ticket Lima-Brussels had been paid by the Commission.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that on 13 November 1996 it adopted a new decision concerning its policy towards temporary agents governed by Article 2a of the Rules applicable to other agents (hereinafter: 'the new decision'). Detailed consultation with services and staff representation had preceded the adoption of the new decision, which entered into force on 1 December 1996. The new rules were much stricter than the old ones, because they limited the recruitment of temporary agents in grade A 7/6 to applicants who were on a reserve list established under an external competition or to applicants who had passed a selection procedure for specific professions. In fact, according to the new decision, recruitment of temporary agents was mainly to take place in the grade A 5/4 so as to enable the institution to dispose of specialised knowledge. Furthermore, the Commission administration decided that all reserve lists, established under selection procedures for temporary posts, should be closed as from 1 December 1996, so as to relaunch the policy towards temporary agents on the basis of the new decision. General Directors and Heads of Service were informed of the new decision on 3 December 1996.

The Commission further stated that it was true that during the process leading to the adoption of the new decision, DG IB was in contact with Mr R. and that he had an interview for a post with DG IB. However, as DG IB's request for recruiting Mr R. was not made until 16 December 1996, DG IX until had to apply the new rules and therefore reject the request.

The Commission furthermore stated that it found it regrettable that Mr R. received contradictory information concerning a possible job offer, but it considered it necessary to underline the following points.

1. When Mr R. was asked to come to Brussels, the new decision had not yet been adopted and therefore DG IX could not refuse DG IB's request to invite Mr R. for an interview.

2. The fact of being on a reserve list does not confer any right to a post on the person concerned. In fact only the Director-General of DG IX is authorised to decide on the recruitment of temporary agents and only the services of DG IX are empowered to address job offers in the name of the Commission. It is established that Mr R. never received such a letter.

3. Mr R.'s letter of 15 March 1997 received a reply from the Commission.

The complainant's observations

In his observations, Mr R. maintained his complaint. In particular he emphasised that he considered the Commission's way of proceeding contrary to the principle of legitimate expectations. He considered that the fact that the Commission services both in December and in January confirmed orally the job offer that he was about to have, i.e. after the new decision came into force, confirmed his view that the Commission's procedures were faulty.

Further inquiries

After due consideration of the Commission's opinion and the complainant's observations, the Ombudsman asked the Commission to forward to him a copy of the decision of 13 November 1996 and to inform him about the following points.

1. Did the abovementioned decision provide for any transitional measures for ongoing recruitment procedures? If the decision did not provide for any such measures, what were the reasons for that?

2. Did the intensive consultation with services involve DG IB? When was the work on the decision finalised, and when was the procedure for submitting the new decision for the Commission's approval set in motion?

3. How were the Commission's services informed about the new decision after its adoption?

In its reply, the Commission forwarded the decision of 13 November 1996 as well as a note from DG IX addressed to the Directors-General and Heads of services of the Commission, dated 3 December 1996, concerning the decision. Furthermore the Commission forwarded a copy of Mr R's curriculum vitae.

According to the Commission, the decision contained transitional measures as the abovementioned note of 3 December 1996 stated that existing reserve lists could be kept open in order to allow for recruitment in conformity with the new decision.

The Commission further stated that it was not possible to consider Mr R's education in political science as a specific profession under the new decision. Finally the Commission stated that the procedure leading to the adoption of the new decision had taken place in all transparency and that all the Commission services had been regularly informed of the ongoing work, e.g. during the weekly meetings of assistants, as well as by the note of 3 December 1996.

In observations on the second opinion of the Commission, Mr R. maintained his complaint.

The Decision

Principles of good administration require that the administration deals with citizens in a fair and just way. It falls on the Commission to organise its procedures so as to comply with that requirement.

In this case, it was established that the new decision concerning recruitment of temporary agents came into force on 1 December 1996 and that the new decision laid down the requirement that applicants have a specialised profession. It was also established that Mr R. did not fulfil that requirement and therefore was not recruited.

Furthermore, it was established that, under the old rules, Mr R. had undergone interviews and medical examinations successfully and had been retained by the service responsible. It appeared that if the old rules had continued in force after 30 November 1996, Mr R. would have been recruited.

Thus, the question was whether it was fair to apply to Mr R's case a new requirement which was not in force at the moment when he was successful in the recruitment procedure. The Commission had not indicated any overriding interest in doing so. The Ombudsman found that it could not be considered fair to apply to Mr R. a requirement which was not in force at the moment when he was successful in the recruitment procedure. Thus, it appeared that the Commission had not met the requirement to organise its procedures so as to deal with the citizen in a fair and just way.

Conclusion

On the basis of the inquiries into this complaint, it appeared necessary to make the following critical remark.

Principles of good administration require that the administration deals with citizens in a fair and just way. In this case it appeared that an applicant, who had successfully undergone interviews for a job and medical examinations and had been retained by the service responsible, was not recruited. The reason for this was that the Commission subjected the recruitment to a requirement which was not in force at the moment when the applicant was successful. By proceeding in this way, the Commission committed an instance of maladministration.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore decided to close the case.

RECRUITMENT PROCEDURES

Decision on complaint 588/97/PD against the European Commission

The complaint

In June 1997, Mr S. made a complaint to the Ombudsman concerning the Commission's failure to offer him a post after he had succeeded in a general competition for administrators, COM/A/720, organised by the Commission in 1992. Subsequently, Mr S. applied for jobs at the Commission on several occasions and had interviews with different heads of service. In spite of the fact that his qualifications were generally recognised, he had not yet been offered a job. According to what he was told at the Commission, the reasons for this were, firstly, that vacant posts were to be filled with candidates from the new Member States, i.e. Austria, Finland and Sweden, which joined the European Union on 1 January 1995, and secondly that there were already many officials of Belgian nationality.

The complainant considered these reasons, of which he learned orally in his contacts with the Commission, to be contrary to fundamental rights as established by the European Convention

on Human Rights and to Article 27 of the Staff Regulations which establishes that no posts can be reserved for a particular nationality. Furthermore, the complainant considered it paradoxical that tasks within the Commission were given to different kinds of temporary staff, i.e providers of services, auxiliary and temporary agents, while there was no recruitment of applicants who had passed a competition.

Mr S. asked the Ombudsman to intervene so that his application for a job would be duly examined.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. In its opinion, the Commission stated that the validity of the reserve list in question was prolonged twice and finally expired on 30 June 1995. It was thus no longer possible to recruit Mr S., as the reserve list, on which he was placed, was no longer valid. The Commission furthermore recalled that according to the case-law of the Court of Justice, the fact that a person is on a reserve list does not entail an entitlement to a job with the Community institutions.

As for the complainant's allegation about a violation of fundamental rights, i.e. discrimination on grounds of nationality, the Commission firstly stated that the general rule, established by Article 27 of the Staff Regulations, is that no post can be reserved for a particular nationality. On the basis of reserve lists, the Commission services select those applicants whose professional profile appears to match the needs of the service, after which they make the corresponding proposal for recruitment to the relevant Directorate-General, DG IX. The Commission stressed that DG IX had not received any proposal concerning Mr S. Furthermore, the Commission referred to the fact that out of eight Belgians on the reserve list in question, four had been recruited.

Secondly, the Commission stated that in the context of the accession of the three mentioned Member States, the Council adopted Regulation (EC) No 626/95 to the effect that certain posts should be reserved for the holders of one of the three nationalities concerned. This Regulation thus constitutes a lawful derogatory measure to the general rule that no post is reserved for a particular nationality.

Concerning the use of temporary staff, the Commission stated that the budgetary authorities allocate permanent and temporary posts to the Commission and appropriations to employ auxiliary agents and service providers. Consequently, the use of this kind of staff does not affect the possibilities for recruiting civil servants to permanent posts.

The complainant's observations

In his observations on the Commission's comments, Mr S. in substance maintained his complaint. Furthermore, he raised a number of new questions such as the average period of validity of reserve lists, the reasons for the Commission to decide not to prolong the validity of a reserve list, the cost involved in organising a competition and the reasons for which the Commission decided to publish a post, for which he considered himself qualified, after the expiration of the reserve list.

In a further letter, Mr S. asked to be informed about the action undertaken by the Ombudsman with a view to finding a friendly solution to his complaint, facilitating in due course his employment with the Commission.

The Decision

Firstly, it should be noted that the Ombudsman did not find it justified to start inquiries into the new questions raised in the complainant's observations as they went beyond the scope of his original complaint. It should also be remarked that the question of finding a friendly solution to a complaint only arises when the Ombudsman has established an instance of maladministration.

Thereafter, it should be noted that the Commission was not entitled to offer the complainant a permanent post, as the validity of the reserve list had expired, and that the fact of being on a reserve list does not give candidates a right to employment with the Community institutions.

Mr S.'s complaint raised in substance the question whether he was exposed to unlawful discrimination on grounds of nationality. The Commission's use of external and/or temporary staff did not appear to be relevant for the assessment of this question. The examination of the question fell in two parts; firstly, discrimination as to posts to which the general rule in Article 27 of the Staff Regulations applied and secondly discrimination as to posts to which the general rule did not apply by virtue of Regulation (EC) No 626/95.

As concerns the first part, the wording of Article 27 shall be recalled:

> *Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.*
>
> *Officials shall be selected without reference to race, creed or sex.*
>
> *No posts shall be reserved for nationals of any specific Member State.*

This provision seeks to strike a balance between the need for recruiting qualified staff and the need that an international organisation has for ensuring staff from the different States that have founded the organisation. According to the case-law of the Court of Justice, the provision implies

> '*… that when any Community institution recruits, promotes or assigns its officials to posts, it must be guided on the one hand of the interests of the service without regard to nationality and on the other hand must ensure that they are recruited on the widest possible geographical basis from among nationals of the Member States of the Communities. The institution reconciles those requirements, as the Court declared in particular in its judgment of 6 May 1969 (Case 17/68, Reinarz, [1969] ECR 61), when, in those cases where the qualifications of the various candidates are substantially the same, it makes nationality the overriding criterion in order to maintain or re-establish a geographical balance among its staff*' ([1]).

It appeared that the Commission Directorate-General responsible for recruitment had never received any proposal for the complainant's recruitment and thus, that no proposal had been turned down on the grounds of his Belgian nationality. Furthermore, given the fact that four of the eight Belgians on the reserve list had received employment with the Commission, it appeared difficult to give credit to the claim that there was a general bar on recruitment of Belgians. Thus, it was not established that the Commission engaged in unlawful discrimination against Belgian applicants.

However, as concerned the oral declarations of Commission officials to which Mr S. referred and which the Commission did not contest, it was true that these declarations could give the impression that the officials concerned were not aware of their obligations under Article 27 of the Staff Regulations. Principles of good administration require that the administration in its dealings with citizens comply with the rules that are binding on it. As the declarations to which Mr S. referred could easily be misunderstood to the effect that the officials concerned did not respect their obligations under Article 27 of the Staff Regulations, the Ombudsman addressed a critical remark to the Commission to the effect that it should ensure that, in dealing with applicants, its staff respect Article 27 of the Staff Regulations.

As concerns the posts reserved for nationals of Austria, Finland or Sweden, Article 1 of Regulation (EC) No 626/95 provides:

> '*Notwithstanding … the third paragraph of Article 27 … of the Staff Regulations of Officials of the European Communities, provision may be made until 31 December 1999 for vacant posts to be filled by Austrian, Finnish and Swedish nationals up to the limit set in the context of budgetary discussions within the institution responsible*'.

It appeared clearly that this Regulation established a derogation from the general rule in the third paragraph of Article 27 of the Staff Regulations. As the Regulation had not been contested, the Commission was bound to apply it. Thus, it appeared that the Commission was fully entitled to reserve posts to be filled for nationals from one of the three countries.

Thus, as concerned both the complainant's grievances, it appeared that the Commission had not engaged in unlawful discrimination. The provisions of the European Convention on Human Rights did not appear to have any bearing on this result.

On the basis of the European Ombudsman's inquiries into this complaint, it appeared necessary to make the following critical remark.

The Commission shall ensure that, in its dealings with applicants, its staff is aware of its obligations under Article 27 of the Staff Regulations.

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.

UNDUE DELAY IN REPLYING TO CORRESPONDENCE

Decision on complaint 1087/97/OV against the European Commission

The complaint

In November 1997, Mr G., director of a non-governmental organisation offering medical care to seriously injured children from war and crisis areas, complained to the Ombudsman about the rejection of his application for funding by DG VIII (Development) of the Commission. The project concerned was intended to integrate homeless children into selected new families, given that orphanages would not give them the family structure necessary for their emotional development. The project had been conceived by AAD (Angolan action for development, Luanda) and approved by the relevant Angolan Ministry. However, given the absence of adequate financial resources, on 30 August 1996 the complainant made an application to DG VIII for funding the project under the budget heading B7-7 0 2 0 (Promotion of human rights and democracy in the developing countries).

On 3 December 1996, the complainant was informed that his application had been rejected because of the limited resources of budget line B7-7 0 2 0 and because his project did not fit exactly into the criteria of the budget line. DG VIII equally informed the complainant that it doubted that the new families which already faced enormous daily problems could be the ideal home for these vulnerable children.

([1]) Judgment of 30 June 1983 in Case 85/82, Schloh v Council, [1983] ECR 2105, see paragraph 26.

Finding the rejection decision unclear and not sufficiently motivated, the complainant wrote four times between December 1996 and September 1997 to the Commission asking for more explanations for the rejection of his application, in order to eventually reformulate the concept of the project. He received no reply until November 1997 when, further to a telephone request from the Ombudsman's office, the Commission answered his correspondence. However, the complainant was still unsatisfied with the reasoning of the rejection decision, which he considered contradictory, not objective and not clear enough. He therefore complained to the Ombudsman alleging that the Commission had failed:

(i) to give him adequate reasons for the rejection decision, and

(ii) to reply during several months to his correspondence.

The inquiry

The Commission's opinion

The complaint was forwarded to the Commission. As regards the reasoning of the rejection decision, the Commission observed that, given the limited financial resources (ECU 17 million for use in around 100 countries), a strict selection procedure was necessary, and that the projects selected were those which were likely to have the maximum impact on strengthening democracy, the rule of law and respect for human rights in the country. The Commission further stated that the present project was dealt with under the same procedure and in the same objective manner as the others. The Commission also considered that the reasons given for the rejection decision were not contradictory, given that it first informed the complainant that the project did not fulfil the selection criteria for the budget heading and later informed him that the main obstacle was that only projects which contributed to the democratic development of the country could be funded.

With regard to the failure to reply to the complainant's correspondence asking for explanations, the Commission stated that the periods for answering the complainant (three weeks for the letter of 8 April 1997 and eight weeks for the letter of 12 November 1997) were reasonable considering the workload and the human resources available.

The complainant's observations

The complainant observed that the Commission ignored the approval of the project by the Angolan Government. As regards more particularly the reasoning of the rejection decision, the complainant stated that the Commission never informed him of the exact selection criteria and why his project did not fulfil those criteria. Therefore the complainant asked the Ombudsman to continue his investigation.

As regards the failure to reply, the complainant observed that the Commission's reply of 8 April 1997 was in fact an answer to the letter of 6 March 1997 which was already a reminder of the letter of 27 December 1996. Therefore the observation of the Commission that it replied within three weeks was not correct.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary, more particularly in order to determine which selection criteria for the funding under budget heading B7-7 0 2 0 had not been fulfilled by the complainant.

The Commission observed that the complainant had been informed of the selection criteria (impact on strengthening democracy, the rule of law and respect for human rights in the country), having received the general conditions governing the budget heading B7-7 0 2 0 and having completed the standard form attached to them.

The Commission stated however that, in view of the large number of funding applications received (over 300 a year, only 20% of which can be met), it was difficult to give a detailed explanation for each refusal.

In the present case, the Commission stated that the project was primarily socially and medically oriented (psychological care of children), and therefore not covered by the direct priorities of the budget line. The rejection decision was thus rather based on the nature of the project.

The complainant admitted having received the general conditions governing the budget heading. However, he observed that those conditions were very extensive and subject to interpretation. He also stated that he was still missing a clear argumentation of why his project did not fit exactly into the selection criteria.

The Decision

1. ***The alleged failure to state reasons for the rejection decision***

1.1. The complainant alleged that the decision of 3 December 1996 by which the Commission rejected his funding application was unclear and failed to state sufficient reasons. The Commission observed that it had informed

the complainant about the selection criteria and that only projects which contributed to the democratic development of the country could be funded. In its additional comments, the Commission stated that, in view of the large number of applications, it was difficult to give a detailed explanation for each refusal.

1.2. According to the case-law of the Court of Justice, the reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights, and, on the other, to enable the Court to exercise its supervisory jurisdiction ([1]).

1.3. By its letter of 3 December 1996, the Commission rejected the application in the following terms:

'(…) After having examined your abovementioned proposal together with our Delegation in Angola and with the geographical service responsible for Angola, I regret to inform you that the Commission is not able to take your project into consideration.

In fact, the limited resources of budget line B7-7 0 2 0 in relation with the numerous countries and fields of activities covered, impose the setting up of priorities, in order to ensure a geographic and thematic balance in the allocation of subventions. Your project, although centred on a very opportune and important problem, does not fit exactly in the criteria of budget line B7-2 0 7 0.

Moreover, as far as the content of this project is concerned, we doubt that the "new families" which already face enormous daily problems could be the ideal home for these vulnerable children (…)'.

In the letter of 12 November 1997, the Commission replied in the following terms:

'(…) As already mentioned, I regret to confirm that the Commission is not able to take the funding of your project into consideration.

First of all, I would like to inform you that the number of project proposals received here are such that a strict selection has to be operated in order to ensure a geographic and thematic balance in the allocation of our limited financial resources (ECU 17 million/year for about 100 countries).

Your project proposal, together with the others we have received, has been examined by our geographical services, in Brussels and in Luanda, in the global framework of the priorities to be addressed by the EC in the present Angolan conditions.

To fulfil with the criteria of our budget line, only the projects which could best foster democratic development of the country have been selected (…)'.

1.4. The Ombudsman first noted that, in his additional observations, the complainant admitted that he had been informed about the selection criteria (projects with the maximum impact on strengthening democracy, the rule of law and respect for human rights in the country). In this regard, it then appeared from the above correspondence that the Commission did provide sufficient reasons for the rejection of the complainant's application, because he was informed that his project did not fulfil those selection criteria and that only projects which could best promote the democratic development of the country had been selected. Given that the complainant's project concerned mainly social and medical aid, the Commission's explanation appeared to be reasonable.

2. ***The alleged undue delay in replying to correspondence***

2.1. The complainant alleged that the Commission failed to reply to four letters dated 27 December 1996, 6 March, 3 April and 3 September 1997, in which he asked for more explanations for the rejection of his application. The Commission observed that it replied to those letters respectively within three weeks (fax of 8 April 1997) and eight weeks (reply of 12 November 1997), which it considered as reasonable periods, given the workload and the human resources available.

2.2. The principles of good administrative behaviour require that letters from complainants to the Commission receive a reply within a reasonable time.

2.3. The Ombudsman notes that the fax from DG VIII of 8 April 1997 was a reply to the complainant's letter asking for the names of the Commission representatives in Angola, and did not provide additional information as regards the reasoning of the rejection decision. It was only on 12 November 1997, after a telephone request by the Ombudsman's office, that DG VIII replied to the complainant's request for additional information. This cannot be considered as a reasonable time period for replying to correspondence. Therefore, the fact that the Commission only replied on 12 November 1997 to the complainant's correspondence starting from December 1996 constitutes an instance of maladministration.

Conclusion

On the basis of the Ombudsman's inquiries into this aspect of the complaint, it appeared necessary to make the following critical remark.

([1]) Case T-166/94, Koyo Seiko v Council [1995] ECR II-2129, paragraph 103.

The principles of good administrative behaviour require that letters from complainants to the Commission administration receive a reply within a reasonable time. Therefore, the fact that the Commission only replied on 12 November 1997 to the complainant's correspondence starting from December 1996 constitutes 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.

3.5.4. THE COURT OF AUDITORS

REIMBURSEMENT OF COSTS FOR APPLICANTS IN A COMPETITION

Decision on complaint 928/7.10.96/LL-JP/FIN/PD against the Court of Auditors

The complaint

In October 1996, Mr L. and Mr P. complained to the Ombudsman, alleging that the Court of Auditors had treated them in an unjust and discriminatory way by offering them a very limited reimbursement of the travel expenses they would have incurred in participating in a competition organised by the Court of Auditors. The complainants also forwarded a copy of their complaint directly to the Court of Auditors.

The competition in question was internal and interinstitutional, so that civil servants and agents in service in all Community institutions could apply. The complainants applied for this competition. At that time they were both agents at the Commission's representation in Finland. By letter of 9 August 1996 from the Court of Auditors the complainants were informed that they were admitted to the written tests. According to the letter, these would take place on 17 October 1996 in Brussels. The complainants were asked to be present at 8.30 a.m. Annexed to the letter was a sheet setting out the applicable rules for reimbursement of travel expenses. According to Article 2 of these rules, there would be no reimbursement if the distance between the applicant's residence and the place of the competition was inferior or equal to 300 km. Article 3 provided that if the distance was superior to 300 km, the applicants would be entitled to a sum calculated on the basis of kilometres as follows:

'— a maximum sum of ECU 60 where the distance is superior to 300 km and inferior to 800 km,

— a maximum sum of ECU 120 where the distance is superior or equal to 800 km and inferior to 1 500 km,

— a maximum sum of ECU 180 where the distance is superior or equal to 1 500 km'.

The complainants considered that the level of reimbursement that these rules would imply for them was insufficient. In order to attend the tests, which took place on a Thursday, they would have had to take an ordinary return air ticket from Helsinki-Brussels, costing approximately ECU 1 212. Accommodation expenses for one night in Brussels at approximately ECU 63 would bring the cost to the complainants of participation in the written tests to ECU 1 275, while they would only be entitled to a reimbursement of ECU 180. Given that the amount of costs that they would have to bear themselves amounted to more than one month of net salary, the complainants refrained from taking part in the competition.

In their complaint to the Ombudsman the complainants claimed that the rules concerning the reimbursement of travel costs had in this case privileged agents who were working in Luxemburg and Brussels, contrary to the principle of equal treatment. The complainants also considered the effect of the rules to be contrary to the principle enshrined in Article 27 of the Staff Regulations according to which

'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities'.

The inquiry

The opinion of the Court of Auditors

The complaint was forwarded to the Court of Auditors. In its opinion, the Court stated that it had limited itself to applying the rules laid down in conclusion 211/95, adopted by the College of Heads of Administration. According to its wording, the conclusion is only applicable to general competitions organised by the institutions but by an internal decision of the Court of Auditors, the same rules were made applicable to competitions as the one in question.

Further inquiries

The Ombudsman requested the Court of Auditors to submit the documents underlying the adoption of conclusion 211/95. It appeared from the documents received that the conclusion aimed at reducing the costs incurred by the institutions in reimbursing travel expenses and at simplifying the reimbursement system. However, it also appeared that fears

had been voiced to the effect that the conclusion did not take into account the heavy financial burden it would put on applicants coming from far away and therefore had a doubtful relation to the principle that applicants should have equal opportunities for participating in competitions. These fears were dealt with by statements to the effect that the number of places of competition would be increased and decentralised.

Against this background, the Ombudsman addressed a letter to the Court of Auditors. In his letter, the Ombudsman noted that the tests in question had not been organised on another weekday, for example a Saturday, so as to enable applicants to benefit from cheaper air fares. The Ombudsman also noted that where there was only one place of competition, for instance Brussels, the average costs to be borne by an applicant (after deduction of travel reimbursement), travelling by train, second class and coming:

— from Luxemburg, would be ECU 43,

— from Strasbourg, would be ECU 29, and

— from Athens, would be ECU 330.

Noting that it appeared that applicants from distant locations had to bear disproportionate costs, the Ombudsman asked the Court of Auditors whether it would envisage taking measures so that a similar situation would not arise again.

After having submitted this question to the committee for the preparation of statutory questions, a body depending on the College of Heads of Administration, the Court of Auditors informed the Ombudsman that the institutions in the committee had pointed out that the reimbursement of travel expenses was in itself a financial benefit for the applicants which was not provided for by the Staff Regulations and that the institutions, when adopting the conclusion, had agreed to multiply the places of competition in order to shorten distances for applicants. As regards this last aspect, the Court of Auditors added that its decision only to organise written tests in Luxemburg and in Brussels was reasonable given the circumstances and the interest of the service. According to the Court, organising written tests in other places such as in places of Community representations would have involved disproportionate costs.

The Decision

1. The Ombudsman took notice of the fact that the institutions assembled in the committee for the preparation of statutory questions stated that reimbursement of travel costs was a financial contribution, not provided by the Staff Regulations. The Ombudsman observed that in case the administration takes actions not foreseen by the Staff Regulations, the administration shall still comply with the rules and principles which are binding on it.

2. The Ombudsman also took notice of the fact that the committee stated that, when adopting the rules, the institutions had agreed to multiply the places of competition in order to shorten travel distances for applicants. The Ombudsman observed that the Court of Auditors had not acted in conformity with that agreement.

3. The Court of Auditors sought to justify its departure from that agreement by referring to the disproportionate costs of also holding tests in Finland. The Ombudsman observed that the organisation of the competition lay with the Court of Auditors which could have exercised its powers so as to reduce costs for itself and applicants. There was no evidence to the effect that the competition could not have been organised on another weekday nor to the effect that providing for another place of competition, for instance by asking the Commission or the Parliament Representations for assistance, would have entailed disproportionate costs.

4. It was uncontested that the application of the rules in this case resulted in excessive costs for a limited number of potential participants in the written tests of the competition in question. Principles of good administration require that the administration proceed in a fair and just way towards all applicants in a competition. Organising a competition in a way which entails excessive costs for a limited number of applicants cannot be deemed to meet that requirement.

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 administration to proceed in a fair and just way towards all applicants under competitions. In this case it appears that the Court of Auditors organised a competition in such a way that it entailed excessive costs for two applicants from one Member State (return air ticket of approximately ECU 1 212). Therefore, by organising the competition in such a way, the Court of Auditors committed an instance of maladministration. It fell to the Court of Auditors to organise competitions so as to meet the requirement, for instance by organising more places of competition in order to shorten travel distances.

Given that this aspect of the case concerned procedures relating to specific events in the past, it was not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closed the case.

3.6. **DRAFT RECOMMENDATIONS BY THE OMBUDSMAN**

3.6.1. THE COUNCIL OF THE EUROPEAN UNION

AN UP-TO-DATE LIST OF MEASURES ADOPTED IN THE FIELD OF JUSTICE AND HOME AFFAIRS

Draft recommendation in complaint 1055/25.11.96/Statewatch/UK/IJH against the Council

The complaint

In November 1996, Mr B. complained to the Ombudsman that the Council does not maintain and make available to the public an up-to-date list of the measures which it adopts in the field of Justice and Home Affairs [1]. The complainant claimed that in the interests of informing citizens and conforming to democratic standards the Council should maintain such a list and make it available on request.

The inquiry

The Council's opinion

The complaint was forwarded to the Council. In its opinion, the Council referred to the considerable efforts that it has made to improve the transparency of its proceedings in this context. In particular:

a summary of Council decisions taken under Title VI of the Treaty on European Union is produced once a year and has been published as an Annex to the annual Review of the Council's Work from the 1995 edition onwards;

decisions taken by the Council both under Title VI and in other areas are announced in press releases issued by the General Secretariat including, in principle, acts adopted by the written procedure. Decisions formally taken by compositions of the Council which do not correspond to the subject matter concerned appear in a separate heading which can be easily identified in press releases;

a computer search of the content of Council press releases can be made using the 'Rapid' base which is accessible via the Internet using the 'Europa' server;

the General Secretariat of the Council is working on setting up its own databases which will also be accessible via the Internet. Among other things they will present Council Decisions in the areas both of Justice and Home Affairs and common foreign and security policy [2].

The complainant's observations

In his observations, the complainant acknowledged the Council's efforts to provide more information. However, he considered that it is a sign of inefficiency if the Council does not itself have an up-to-date list of measures adopted in each area. He also repeated his claim that it is unacceptable that citizens cannot obtain on request an up-to-date list of the measures which have been adopted.

The Ombudsman's attempt to achieve a friendly solution

After careful consideration of the complaint, the opinion and the observations, the Ombudsman wrote to the Council on 15 December 1997 in order to seek a friendly solution to the complaint, in accordance with Article 3(5) of the Statute of the Ombudsman.

He informed the Council that he considered that failure to maintain an up-to-date list of measures adopted by the Council could constitute an instance of maladministration because:

(i) a basic principle of good administrative behaviour is that a public authority should maintain adequate records. Such records help ensure the consistency and continuity of activities, mentioned in Article C of the Treaty on European Union. Inadequate records could make it difficult to locate relevant documents accurately and quickly;

(ii) the Council publishes a summary of decisions taken under Title VI of the Treaty on European Union once a year. For the Council's secretariat to produce such a list only at the end of each year could lead to errors and omissions. A more effective administrative technique would be for the secretariat to maintain an up-to-date list during the year;

(iii) there appears to be no legal reason for the present position. The Council could maintain a list by virtue of its power of internal organisation, which authorises it to take appropriate measures in order to ensure its internal operation in conformity with the interests of good administration [3].

The Ombudsman suggested that the Council could respond by agreeing to maintain an up-to-date list of measures which it adopts in the field of Justice and Home Affairs. The Ombudsman also stated that making such a list available to the public would enhance transparency and strengthen the democratic nature of the Council and the public's confidence in its administration, as foreseen by Declaration 17 attached to the Treaty on European Union.

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[1] Title VI of the Treaty on European Union; the 'third pillar'.

[2] Title V of the Treaty on European Union; the 'second pillar'.

[3] See, for example Case C-58/94, Netherlands v Council, [1996] ECR-I 2169.

The Council's response

By letter dated 26 February 1998 the Council replied to the Ombudsman as follows.

'Thank you for your letter of 15 December 1997 concerning the complaint by Mr B. and his wish that the Council maintain an up-to-date list of measures agreed in the field of Justice and Home Affairs and make this list accessible to the public.

I am pleased to be able to confirm that the General Secretariat does indeed maintain a list of all such measures. The question of how and in what form this information might be made available to the public is currently being considered.

Moreover, the Justice and Home Affairs Council on 19 March 1998 will look at the overall issue of transparency in the third pillar'.

By letter dated 13 July 1998, the Council provided additional information, including the following points.

(i) The General Secretariat is to make a database on Council activities in the JHA field accessible through the Internet. This will provide, among other things, lists of instruments adopted by date and subject and the possibility of access to the full texts in the official languages.

(ii) As regards publication of the list of measures taken by the Council in the JHA field, in addition to the facilities offered by the database, such information is contained in the annual review of the Council's work.

The Council's letter also contained the conclusions adopted by the JHA Council at its meeting on 19 March 1998 concerning transparency in the JHA field and information on the follow-up to the conclusions.

The complainant's response

The Council's letters of 26 February 1998 and 13 July 1998 were forwarded to the complainant, who replied by letters dated 9 March 1998 and 18 September 1998. The complainant welcomed the new initiatives concerning transparency in the JHA field, which were mentioned by the Council in its letter of 13 July 1998. However, he maintained his complaint, pointing out in particular, that the list of instruments mentioned by the Council was not the same as a list of measures and that his complaint related to the latter. Furthermore, the complainant stated that the publication of a list of measures in the Council's annual review was not sufficient to meet democratic standards, which require that citizens should be able to obtain, on request, an up-to-date list of the measures at any point during the year.

In the light of the above, it appeared that the Ombudsman's search for a friendly solution to the complaint had been unsuccessful.

Draft recommendation

After considering the Council's response to the points made in his letter of 15 December 1997, the Ombudsman reached the following conclusions.

(i) The Council has stated that its General Secretariat maintains a list of all measures approved in the field of Justice and Home Affairs.

(ii) Article 1(2) of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents [1], defines 'Council document' as 'any written text, whatever its medium, containing existing data and held by the Council'.

(iii) The list of all measures approved in the field of Justice and Home Affairs, which the Council has stated is maintained by its General Secretariat, appears to be a 'Council document' within the meaning of Article 1(2) of Decision 93/731/EC.

In accordance with Article 3(6) of the Statute of the Ombudsman, the Ombudsman therefore makes the following draft recommendation to the Council.

The Council should make available to the public on request, in accordance with the provisions of Council Decision 93/731/EC, the list of all measures approved in the field of Justice and Home Affairs which is maintained by its General Secretariat.

The Council and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Council shall send a detailed opinion before 31 January 1999. The detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

[1] OJ L 340, 31.12.1993, p. 43.

3.7. **OWN INITIATIVE INQUIRIES BY THE OMBUDSMAN**

3.7.1. THE EUROPEAN COMMISSION

AGE LIMITS FOR RECRUITMENT

Decision in own initiative inquiry 626/97/BB

The issues

In July 1997, the Ombudsman began an own-initiative inquiry into the use of age limits for recruitment to the Community institutions, following a significant number of complaints which mainly related to the exclusion of candidates from specific competitions organised by various Community institutions.

In substance, the claims put forward in the complaints included the following: age limits are against the fundamental rights of the citizen and are discriminatory (1042/25.11.96/SKTOL/FIN/BB, 479/11.3.96/MCHP/ES/KT, 850/3.9.96/JIA/FR/KT, 851/3.9.96/ALC/ES/PD, 300/97/BB, 725/97/BB, 277/98/IP). They breach the principle of equality between candidates (529/98/XD). They do not concern those who have already been employed by the institutions for one year (325/8.1.96/ML/L/PD, 529/98/XD). Age limits are not applied to candidates for political posts (479/11.3.96/MCHP/ES/KT). The legal basis for setting the current age limits for candidates is not clear (695/5.7.96/RW/UK/KT). The date of birth is a non-objective criterion laid down in the competition notices and is in contradiction with objective criteria such as professional experience and medical examination (529/98/XD). Some complainants referred to the fact that in certain Member States age limits are prohibited by constitutional or legislative provisions.

The research note on the application of age limits in the Member States of the European Communities

The Ombudsman considered that research was needed in order to be able to fully evaluate the current situation in the various Member States. For that purpose, the Ombudsman contacted the Court of Justice, which agreed as a measure of cooperation to allow its Research and Documentation Division to prepare a research note for the Ombudsman.

This research note indicated that there is no common constitutional or legal principle in the Member States either allowing or prohibiting age limits. An age limit is imposed in the public sector in more than half of the Member States. However, this age limit is, in general, higher than 35 years and the reasons for use differ from one Member State to another. Furthermore, it was noted that there is a tendency in some Member States towards treating age limits as unjustified discrimination and therefore abandoning their use.

The inquiry

The Commission's opinion

The opinion of the Commission can be summarised as follows.

The Commission decided as a matter of policy to abandon the use of age limits in the notices of competitions.

The Commission recognised the need to implement this principle with the common agreement of the institutions. For this reason, it decided as a temporary measure to raise the age limit to 45 years for forthcoming competitions for the starting grades, in line with the decision taken by the European Parliament on 20 October 1997.

The Commission stated that the necessary delay in obtaining common agreement between the institutions would allow the appreciation of possible measures to be taken into consideration for the administration of careers.

The Council's opinion

The opinion of the Council can be summarised as follows.

The institutions not only enjoy discretion in their choice of the most appropriate means of meeting their personnel requirements, but also broad discretion in drawing up the requirements of a competition.

Age does not appear among the criteria on the basis of which any distinction made at the time of recruitment is prohibited by the Staff Regulations.

Under Article 1(g) of Annex III to the Staff Regulations, one of the conditions which may, where appropriate, be legitimately determined by the appointing authority is an age limit.

It remains to be seen whether the Staff Regulations comply in this respect with the general principles of Community law, particularly with respect for fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The Council noted that the Treaty of Amsterdam has not yet entered into force.

At the beginning of the 1990s, the question of whether age should play any part as a selection criterion was examined. After noting the undesirable consequences for the institution of abolishing all age limits, such as successful candidates

reaching retirement age, the age limit was set at 50 for a whole series of competitions.

After 1995, arrangements for the joint organisation of competitions were made and harmonised conditions of access thereto, which included setting an age limit of 35 for candidates for posts at starting grades, taking into account the problems of unemployment of young people living in the European Union.

As regards the most recent competitions concerning the new Member States, the age limits were set at 55 and 45 to take account of the experience required for such posts.

Recently launched notices of competition provide for the possibility of extending the age limit for a maximum of six years in certain cases.

Rules governing age limits are not laid down automatically, but vary according to the nature of the department's needs, in accordance with the requirements of Article 27 of the Staff Regulations, and allow a distinction to be made between candidates to take account of their respective situations.

The General Secretariat of the Council considers that the application of age limits on the basis of the posts to be filled by successful candidates of a competition, as provided by the Staff Regulations, particularly Article 1(g) of Annex III, together with the possibility of an extension to take account of specific situations, is not a 'discriminatory' measure in the sense given to this concept by the European Court of Human Rights and the Court of Justice.

For information, the General Secretariat added that it is currently in the process of discussing a proposal for an amendment to the Staff Regulations in respect of equal treatment ([1]).

Complainants' observations

The Ombudsman sent the Commission's opinion to seven complainants and the Council's opinion to one complainant for their observations. He received observations from three complainants. Two of them claimed that since the Commission has now acknowledged that the use of age limit is wrong and has made a policy decision in principle to abolish the age limits, the intermediate solution of raising the age limits to 45 years is in contradiction with this principle, and therefore unacceptable.

One complainant stated that he was not satisfied with the position of the Council. According to the complainant, Article 27 of the Staff Regulations provides in fact a legitimate basis for age discrimination. The complainant claimed that the Council imposed age limits arbitrarily and that this should be stopped. He hoped that the Ombudsman would not close his investigation until the institutions had changed their policies relating to this matter and until all age limits had been abolished.

The Decision

1. ***Age limits and human rights***

1.1. Article F(2) of the Treaty on European Union provides that:

> *'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.*

1.2. As regards the human rights provisions on non-discrimination, Article 14 of the European Convention on Human Rights provides as follows:

> *'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.*

Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence, since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions.

According to the case-law of the European Court of Human Rights concerning Article 14 of the Convention, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' ([2]).

([1]) Amended proposal for a Council Regulation (Euratom, ECSC, EC) amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment, COM(96) 77 final, 4 March 1996.

([2]) Case of Gaygusuz v Austria (39/1995/545/631) judgment of 16 September 1996.

The prohibition of discrimination in the United Nations International Covenant on Civil and Political Rights [1] is stated in Article 2 of the Covenant:

'Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

1.3. Although neither Article 14 of the European Convention on Human Rights nor Article 2 of the Covenant of Civil and Political Rights explicitly prohibit discrimination on the grounds of age, the scope of application of both the abovementioned discrimination clauses is extremely broad. It cannot be excluded that this scope of application could also cover discrimination on the grounds of age in cases where there exists no objective and reasonable justification for such discrimination.

1.4. In July 1997, the European Union took steps to combat age discrimination. The Treaty of Amsterdam introduced a new Article 13 in the EC Treaty, in which age is mentioned as one form of discrimination. This Article reads as follows:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

1.5. Although the Treaty of Amsterdam has not yet entered into force, by planning the introduction of the new Article, the European Union has recognised age as a possible cause of unjustified discrimination. Moreover, as the new Article 13 on non-discrimination affirms, the Community institutions should not hesitate actively to enhance the respect of human rights provisions on their own-initiative.

1.6. The Court of Justice of the European Communities has recognised that Community recruitment must respect the principle of equality. It must not discriminate by treating candidates in similar situations differently, if there are no justifiable grounds for doing so.

1.7. According to the Court's consistent case-law, the general principle of equality is one of the fundamental principles of the law of the Community civil service. That principle requires that comparable situations shall not be treated differently unless such differentiation is objectively justified [2].

2. *Application of age limits in the Member States*

The Ombudsman's inquiries revealed that, currently, there is no common constitutional or legal principle in the Member States either allowing or prohibiting age limits. An age limit is imposed on the public sector in more than half of the Member States. However, this age limit is, in general, higher than 35 years. Furthermore, a tendency towards abandoning age limits as discriminatory is apparent in some Member States.

3. *Application of age limits within the Community institutions*

3.1. All Community institutions apply age limits for the admission of candidates to competitions. This possibility is mentioned in Article 1(g), of Annex III to the Staff Regulations which provides that the notice of competition must specify:

'where appropriate, the age limit and any extension of the age limit in the case of servants of the Communities who have completed not less than one year's service'.

3.2. Article 27(2), of the Staff Regulations provides that:

'Officials shall be selected without reference to race, creed or sex'.

3.3. The Ombudsman understood that, based on Article 1(g) of Annex III to the Staff Regulations, the Appointing Authority may specify an age limit in notices of competition.

3.4. However, the Ombudsman found that taking into account the principle that decisions must be reasoned and the provision laid down in Article 27 of the Staff Regulations, the wording of Article 1(g), of Annex III of the Staff Regulations, in particular, the phrase 'where appropriate' and the Court's consistent case-law on the general principle of equality, these seemed to suggest that age limits cannot be imposed arbitrarily and that there should be reasoning to support why a specific age limit is considered appropriate for a particular competition.

[1] International Covenant on Civil and Political Rights, adopted on 16 December 1966.

[2] Judgment of 14 July 1983 in Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 and 186/81 W. Ferrario and Others v Commission of the European Communities [1983] ECR 2357, p. 2367.

3.5. The developed practice indicates that the Appointing Authorities have applied various age limits differing from one institution to another. Article 31 of the Staff Regulations lays down a principle according to which candidates are to be recruited at the basic grade. Therefore, in general, an age limit of under 35 years has been set on the grounds that the basic grades are only suitable for young graduates who, in time, can establish careers as European civil servants.

3.6. According to the Commission, other age limits have been set, for example, for heads of unit an age limit of 55 years, for principal translators a limit of 50 years and for translators a limit of 40 years with the possibility to raise them in certain cases ([1]). The Council is setting age limits at 35, 45, 50 and 55 with the possibility to raise them for a maximum of six years ([2]).

4. ***Grounds for the setting of age limits according to the Community institutions***

4.1. The grounds for setting age limits have varied according to the different Community institutions. The institutions presented to the Ombudsman a number of different grounds in connection with the individual complaints on the use of age limits. The grounds put forward can be summarised as follows:

— there is a need for a balanced management of human resources and, in particular, the career structure,

— the system is not suited for the recruitment of older persons with a wealth of experience gained through a long career,

— the problems for new officials of adapting to the multicultural and multilingual environment may increase with age,

— institutions are bound by the requirement to recruit on the broadest possible geographical basis without recourse to national quotas,

— the possibility of mobility decreases both with age and in relation to the candidate's place of work and place of residence,

— recruitment of younger candidates makes it easier to achieve a reasonable geographical balance, and a better ratio of male and female employees,

— the setting of an age limit of 35 for candidates for posts at starting grades takes into account the problems of unemployment of young people living in the European Union,

— experience shows that female participation is higher in competitions at A 8 level than at A 7/6 level. Therefore, age limits also enhance the gender balance,

— abolishing age limits would be counter-productive as it would increase the number of applications from men while doing little to remove the obstacles for women,

— there is a need to ensure the best possible conditions for a balanced administration of careers,

— highly experienced people recruited in the lower career brackets disrupt the staff structure,

— hypothetically, if the institutions abandoned the general principle of recruiting personnel at the basic grade, recruitment on a more appropriate grade might not be justified, and, therefore might create distortions within the personnel with negative effects on motivation and good management,

— it can be envisaged that older A 8 and A 7 officials more rapidly request promotions in order to obtain a grade which would suit their experience,

— rules governing age limits are not laid down mechanically, but vary according to the nature of the department's needs and allow a distinction to be made between candidates to take account of their respective situations,

— unofficially, it has often been mentioned that the use of an age limit is a means of limiting the number of candidates, and therefore in practice age limits enable the organising of 'manageable' competitions.

([1]) For candidates who have performed compulsory military service or any other form of compulsory service, for candidates who at any time have been out of paid employment for at least one year without interruption in order to look after a dependent child under compulsory school age or certified as suffering from a severe mental or physical handicap and for candidates with a physical handicap, the age limit may be raised. Furthermore, age limits are not applied to candidates who, on the closing date for the submission of applications, will have been serving continuously as officials or other servants of the European Communities for at least one year.

([2]) Age limits have been raised for candidates who have given up paid employment for at least one year in order to look after a child under 16 years of age who is living with them. In this case, the age limit will be raised by the period outside paid employment, allowing three years per child, up to a maximum of six years. For candidates who have done their compulsory military service or any other form of compulsory service which they are required to do by their country of origin, the age limit will be raised by the duration of the service done. Periods of voluntary service over and above the period of compulsory service will not be taken into account. For candidates who have a physical handicap which is compatible with the duties to be performed and which has been duly recognised by the competent national authority, the age limit may be raised by three years.

4.2. The Ombudsman was concerned that the grounds for the setting of age limits put forward by the different Community institutions appeared not to be objectively justified in order to eliminate the possibility of arbitrariness. Therefore, without sufficient justification, the setting of age limits could constitute discrimination.

5. ***Union citizens' possibility to seek employment within the European Union administration***

5.1. The Ombudsman is of the view that each Union citizen should have the possibility to seek employment within the European Union administration. If it is considered appropriate to limit this possibility, this needs to be carried out with sufficient justification, avoiding in the recruitment procedures any elements which might be considered discriminatory or arbitrary.

5.2. The Ombudsman's own initiative inquiry into age limits, as well as individual complaints, have clearly indicated that the Community institutions have applied various age limits without a common justification, either in their practice or in the provision of the Staff Regulations governing the setting of an age limit.

6. ***Correct application of age limits***

6.1. The Ombudsman noted that Article F of the Treaty of the European Union sets a duty to all Community institutions to respect human rights provisions as they are guaranteed in the European Convention of Human Rights and result from the constitutional traditions of the Member States. It seems pertinent to the Community institutions to apply these provisions on their own-initiative enhancing the respect of human rights and fundamental freedoms, as they appear to have done by the introduction of new Article 13 in the EC Treaty.

6.2. The Ombudsman found that age is to be regarded as a possible cause of discrimination. As regards the European Union, this has been particularly clarified by the Treaty of Amsterdam and, therefore, the need to combat age discrimination will only culminate by its entry into force.

6.3. The Ombudsman is of the view that the current practice within the Community institutions of setting various age limits with differing grounds and without sufficient justification cannot be considered as correct application of age limits.

6.4. However, the Ombudsman's inquiries appeared to indicate that the Community institutions could envisage the setting of one common age limit with appropriate reasoning and sufficient justification. If the Community institutions are not able to abandon the use of age limits, it would be preferable to clarify the relevant provision of the Staff Regulations in order to guarantee that age limits are not applied in a discriminatory or arbitrary manner.

7. ***The actions taken by the Community institutions concerning age limits***

7.1. The European Parliament decided on 20 October 1997 to raise the age limits to 45 years for the upcoming competitions for the starting grades, with a review after two years on the basis of a report to be submitted by the personnel service to the Secretary-General of the Parliament.

7.2. The Commission decided on 21 January 1998 on a policy principle to abandon age limits in its recruitment policy. In its comments, the Commission considered it necessary to put its decision into practice in common agreement with other institutions and that, in the meantime, the Commission will apply an age limit of 45.

7.3. In view of the above developments, the Ombudsman recognised that there is indeed a need for a common interinstitutional agreement.

Conclusion

On the basis of the Ombudsman's own-initiative inquiry and taking into account the Commission's announcement of a policy principle to abandon the use of age limits with a possible interinstitutional agreement, the Ombudsman found no grounds to further pursue his own-initiative inquiry into the use of age limits and, therefore, decided to close the inquiry. The Ombudsman kindly requested that the Commission keep him informed about the action undertaken in order to obtain a common interinstitutional agreement to abolish age limits.

PENSION RIGHTS OF LOCAL AGENTS OF THE COMMISSION

Own initiative inquiry 1150/97/OI/JMA

The complaint

In November 1997, the European Parliament transferred to the Ombudsman petition No L-35/96 which had been addressed to it by Mrs A.V., a Chilean citizen. The petition referred to the refusal of the Commission to recognise her retirement rights during the period 1977 to 1978 in which she worked as a local agent at the Latin American Delegation of the Commission.

The petition was registered as a complaint, but had to be declared inadmissible since the complainant was neither a citizen of the Union nor a resident of one of the Member States, and accordingly she did not meet the criteria set out in Article 138e of the EC Treaty and Article 2(2) of the Statue of the Ombudsman.

In view of the circumstances of the case, however, the Ombudsman decided to open an own-initiative inquiry into the matter, on the basis of Article 138e of the EC Treaty. It was registered under file number 1150/97/OI/JMA.

The inquiry

The Commission's opinion

In December 1997 the Ombudsman informed both the President of the Committee on Petitions of the European Parliament and the President of the European Commission of the own-initiative inquiry, and requested an opinion from the Commission before the end of March 1998.

In reply, the Commission informed the Ombudsman that, following this intervention, its services responsible for pensions had started to evaluate the situation as regards pension rights of its local staff.

The Commission subsequently explained that Mrs A.V. had worked for its Latin American Delegation from 1 January 1977 to 30 September 1978. On the basis of Article 80 of the Conditions of Employment of other servants of the European Communities, the Commission covers the social security charges of its local agents, in line with local regulations. However, because of the high rate of inflation which prevailed in Chile in the 1970s, the Commission arranged for its local agents employed in Santiago to join a special social security scheme, the 'Office de sécurité sociale d'outre-mer' (OSSOM), in Brussels. With the change of economic conditions in Chile, the Commission's local agents there were progressively incorporated into the national Chilean social security system.

As regards the pension rights of Mrs A.V., the Commission contacted OSSOM and was informed that she had been registered there during her period of work with the Latin American Delegation. The social security contributions paid during that period should therefore be taken into account for the calculation of her pension rights, as from the age of 55.

The Commission also informed the Ombudsman that it had sent this information to the complainant with reference to his intervention.

The Ombudsman forwarded the letter of the Commission to Mrs A.V. in June 1998, but no observations were received from her.

The Decision

In the light of the information contained in the Commission's opinion and that supplied by the complainant, the Ombudsman concluded that the problem had been settled by the Commission and therefore closed the case.

4. RELATIONS WITH OTHER INSTITUTIONS OF THE EUROPEAN UNION

4.1. THE EUROPEAN PARLIAMENT AND THE COMMITTEE ON PETITIONS

On 19 January, Mr Söderman presented his first Special Report following the own initiative inquiry into public access to documents, to the Committee on Petitions.

On 20 January, Mr Söderman and Mr Ian Harden, Head of the Secretariat, had a meeting in Luxembourg with the jurisconsult, Mr Garzón Clariana and members of the Parliament's legal service.

On 20 April 1998, Mr Söderman presented his Annual Report for 1997 to the Committee on Petitions of the European Parliament presided by Mr Edward Newman. Mr Söderman's speech was followed by a lively discussion. The press conference after the meeting was attended by a large number of journalists.

On 25 June, Mr Söderman gave a speech to the Committee on Institutional Affairs in Brussels in the framework of its hearing on openness. The rapporteur was MEP Maj-Lis Lööw. Other speakers included Professor Deirdre Curtin of the University of Utrecht, Ms Kristina Rennerstedt, State Secretary in the Swedish Department of Justice and Mr Hans Brunmayr of the Council.

On 25 June, Mr Söderman also met with the President of the European Parliament, Mr Gil Robles and with the Secretary General, Mr Julian Priestley. They discussed open issues related to the establishment of the Ombudsman's office as well as the draft budget for 1999.

On 7 July, Mr Söderman and Mr Ian Harden met Mr Garzón Clariana, jurisconsult in Luxembourg to discuss legal issues related to the budget.

On 23 November, Mr Söderman exchanged views with the Committee on Petitions in Brussels.

4.2. THE EUROPEAN COMMISSION

On 2 February, Ian Harden and Peter Dyrberg had a meeting with the Commission services in view of finding a friendly solution in Case 1109/96.

On 20 April, Mr Söderman and Mr Dyrberg met with Mr Jean-Claude Eeckhout, Director at the Secretariat-General of the Commission and Mr Philippe Godts. They discussed the possibility of organising a joint seminar for liaison officers and Euro-Jus representatives in the Member States to take place in Brussels in November.

On 21 April, Mr Söderman met with Mr Santiago Gómez-Reino Lecoq, Deputy Director-General, Directorate General I B — External Relations: Southern Mediterranean, Middle East, Latin America, South and South-East Asia and North-South cooperation. They discussed the possibilities of the Union to assist and cooperate with the national Ombudsmen in Central America.

On 7 May, Mr Söderman had a meeting with Mr Alfonso Mattera Recigliano, Director, Directorate XV B — Free movement of goods and public procurement. They discussed the Article 169 procedure.

On 8 July, Mr Söderman met with Ambassador Christoffersen, Permanent Representation of Denmark in Brussels. In the afternoon he met Commissioner Anita Gradin for an exchange of views.

On 29 September 1998 Mr Söderman met with Mr Mattera Recigliano, Director in DG XV of the European Commission and a number of his collaborators to tell in general about the Ombudsman's procedures in dealing with complaints related to the Commission's Article 169 procedures.

On 30 September 1998 Mr Söderman gave a speech 'Is the customer always right?' at the European Commission's premises in Brussels. The conference was attended by a large number of staff from all Community institutions and bodies. The meeting was chaired by the Director General of DG IX, Mr Steffen Smidt.

5. RELATIONS WITH THE NATIONAL OMBUDSMEN AND SIMILAR BODIES

To safeguard the rights of European citizens, a flexible system of cooperation is being developed between the European Ombudsman and ombudsmen and similar bodies in the Member States.

The implementation of many aspects of Community law is the responsibility of national, regional or local administrations in the Member States. Complaints from citizens who consider that such authorities have infringed their rights under Community law are outside the mandate of the European Ombudsman, even when a right of Union citizenship is involved, such as the freedom of movement guaranteed by Article 8a of the EC Treaty. In many cases, such complaints could be dealt with effectively by national Ombudsmen or similar bodies (such as petitions committees), who are increasingly involved with matters that concern the implementation of Community law by national administrations.

5.1. THE LIAISON NETWORK

In 1998, the cooperation between the national ombudsmen and similar bodies and the European Ombudsman continued. A second liaison letter was published in May 1998 and the third was produced in the late autumn.

A seminar was held together with the liaison officers of the national ombudsman offices and Euro-Jus officers on 23 and 24 November 1998 in Brussels, dealing with the fields of Community law, standards of good administrative behaviour and the work of the national ombudsmen and similar bodies in relation to judicial review and concrete cases related to Community law. The speakers included Mr Söderman, Mrs Anita Gradin, Commissioner and Mr Edward Newman, Vice-President of the Petitions Committee in the European Parliament, Mr Leif Sevón Judge of the Court of Justice of the European Community, Mr David O'Keeffe, Professor of Law, University College London, Mr De Brouwer, European Commission, Mr Brophy, Irish Ombudsman Office, Mr Ebermann, European Commission, Mr Palacio González, Administrator, Court of First Instance, Mr Philippe Bardiaux, French Ombudsman Office, Mr Ribeiro, Portuguese Ombudsman Office, Mrs Gerstberger, Secretariat of the Petitions Committee of the German Bundestag, Mr Andersen, Danish Ombudsman Office, Mr Tate, UK Ombudsman Office, Mr Gasparinetti, European Commission and Mr Stoodley, European Commission. The sessions were chaired by Mr Söderman, Mr Bermejo from the Spanish Ombudsman Office, Mrs Riitta Länsisyrjä from the Finnish Ombudsman Office and Mr Bardiaux from the French Ombudsman Office.

5.2. COOPERATION IN DEALING WITH COMPLAINTS

At the seminar held in Strasbourg in September 1996 with the national Ombudsmen and similar bodies and the European Ombudsman it was agreed that the European Ombudsman would be willing to receive queries from national Ombudsmen and similar bodies about Community law and either provide replies directly or channel the query to an appropriate Union institution or body for a response.

During year 1998, five queries were dealt with in this way.

5.3. COOPERATION WITH REGIONAL OMBUDSMEN AND SIMILAR BODIES

In May 1997, the European Ombudsman received an inquiry from the Andalusian regional Ombudsman, Mr Chamizo de la Rubia. He complained about the allegedly passive attitude of the French authorities towards the attacks suffered by Spanish truck drivers in France, and the destruction of their agricultural goods. In his view, that attitude was contrary to one of the basic principles of the European Community, namely the free circulation of goods, and in particular contravened Articles 38, 39 and 74 of the EC Treaty. Mr Chamizo stressed the very negative consequences of these actions for the agricultural Spanish exports, and in particular for farmers in Andalusia. (Complaint 478/97/JMA).

He called on the European Ombudsman to launch an own-initiative inquiry into this matter, in order to make the Commission, as the guardian of the Treaty, take action against the French Government.

Having examined the arguments put forward in the complaint, the Ombudsman concluded that it could not be declared admissible since no prior administrative approaches towards the responsible EC institution had been undertaken, as required by Article 2(4) of the Statute of the European Ombudsman and decided to transfer the complaint to the European Commission. In his letter to Mr Chamizo of June 1997, the Ombudsman explained that this transfer would allow the Commission to take appropriate measures.

The Commission informed the Andalusian ombudsman that his letter had been registered as a complaint. In August 1997, DGVI's Director-General, Mr Legras, updated Mr Chamizo on the latest developments regarding the situation. The Commission explained that it had monitored the situation, and considered that it was contrary to Article 30 of the Treaty. Accordingly, after having started an infringement proceeding, the Commission had brought the matter before the Court of Justice (Case C-265/95). As regards the latest events, the Commission had sent several letters to the French authorities accordingly. An additional letter from Mr Legras was sent to Mr Chamizo in March 1998, informing of the ruling of the Court of Justice against France. Mr Legras also explained that, following the Amsterdam Summit in June 1997, the Commission had been working on a draft regulation which has already been submitted to the Council. This Regulation would enable the Commission to take action against Member States which do not adopt all necessary measures to avoid attacks on the free circulation of goods.

In view of those explanations, Mr Chamizo wrote to the Ombudsman in May 1998, expressing his satisfaction for the actions which had been undertaken by the Commission, and thanked the Ombudsman for his cooperation in seeking a solution to the problem.

On 17 July 1998, Mr Romano Fantappie, the Regional Ombudsman of Tuscany, accompanied by his collaborators, paid a visit to the European Ombudsman's office and invited the Ombudsman to visit Tuscany.

On 12 October 1998, Mr Söderman met with the Petitions Committee of the Sächsischer Landtag, headed by Mr Thomas Mädler, President of the Committee. After the speech Mr Söderman gave about his work as European Ombudsman, an exchange of views followed concerning future cooperation between the two bodies.

6. PUBLIC RELATIONS

6.1. HIGHLIGHTS OF THE YEAR

1998 FIDE CONGRESS

The European Ombudsman was general rapporteur for the theme 'The citizen, the administration and Community law' at the XVIII FIDE Congress, held in Stockholm, Sweden, 3 to 6 June 1998. He was accompanied by Ian Harden, Peter Dyrberg and José Martínez Aragón.

The working sessions for the theme were chaired by Ms Elisabeth Palm, President of the Administrative Court of Appeal of Gothenburg and Dr Hans Ragnemalm, judge at the Court of Justice of the European Communities.

The FIDE Congress was attended by over 500 delegates, from the European Institutions, all Member States of the Union and from Cyprus, Malta, Norway and Switzerland.

At the opening plenary session of the Congress, the Swedish Minister of Justice Ms Laila Freivalds gave a speech on 'the rule of law and the enlargement of the European Union' and the President of the Court of Justice Dr Gil Carlos Rodríguez Iglesias gave the opening lecture 'la Cour de justice des Communautés européennes et l'interaction entre le droit européen et le droit national'.

The Ombudsman's general report on the theme 'the citizen, the administration and community law', together with his final report to the plenary session are available on the website, in English and French.

THE ANNUAL REPORT 1997

The European Ombudsman presented his annual report for 1997 to the European Parliament at a plenary session in Strasbourg on 16 July 1998.

Reporting on behalf of the Committee on Petitions of the Parliament, Mr Edward Newman (MEP) welcomed the Ombudsman's definition of 'maladministration'. The previous year, the European Parliament had encouraged the Ombudsman to make full use of his mandate to deal with maladministration in the activities of Community institutions and bodies and noted the importance of a clear definition of the term 'maladministration'.

Based on information supplied by national Ombudsmen and similar bodies, the European Ombudsman offered the following definition in his annual report: 'Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding on it'.

Parliament considered that this definition, together with the examples mentioned in the annual report, gives a clear picture as to what lies within the remit of the Ombudsman. Following Mr Newman's proposal on behalf of the Committee on Petitions ([1]), it adopted a resolution welcoming the definition.

THE SPECIAL REPORT OF THE EUROPEAN OMBUDSMAN

The Special Report of the Ombudsman concerning the Ombudsman's own-initiative into public access to documents, which he presented to the President of the European Parliament on 15 December 1997, was discussed by Parliament at the plenary session of July on the basis of the report on it by the Committee on Petitions (rapporteur Astrid Thors) ([2]). In its resolution on the Special Report, Parliament welcomed the action of the Ombudsman towards transparency in the Union. It noted that increasing transparency and improving public access to documents are closely linked with the code of good administrative behaviour suggested by the Ombudsman in his annual report 1997.

A EUROPEAN HUMAN RIGHTS AGENDA FOR THE YEAR 2000

On 9 and 10 October 1998, Mr Jacob Söderman, accompanied by Mr Peter Dyrberg, participated in a conference in Vienna, the theme of which was 'The EU and human rights: Towards an agenda for the year 2000'. The conference was organised by the European University Institute in cooperation with the Austrian Ministry for Foreign Affairs. Mr Söderman gave a speech on the European Ombudsman and human rights, including suggestions on how to improve the protection of human rights within the Union.

([1]) A4-0258/98 (OJ C 292, 21.9.1998, p. 168).
([2]) A4-0265/98 (OJ C 292, 21.9.1998, p.170).

6.2. **CONFERENCES AND MEETINGS**

GERMANY

On 10 May, Mr Söderman was invited by MEP Karl von Wogau to speak about 'the rights of European citizens' in the framework of the 'European day' celebration, in Bad Krozingen.

Over 1 000 people from the surrounding area as well as from France and Switzerland took part in the festivities and visited the various stands. Brochures on the European Ombudsman were displayed and distributed on the EU stand.

Mr Söderman had the opportunity to meet Mrs Gerdi Staiblin, Minister for Agriculture of Baden Württemberg as well as the Mayor of Bad Krozingen, Mr Ekkehart Meroth.

On 27 June, Mr Söderman was invited to participate in a panel with the theme 'Europe today — Its institutions and its people' organised by Professor Dr Hönnighausen of the University of Bonn in the framework of the Transatlantic summer academy (TASA) 1998. The panel was chaired by Mr Matt Marshall, journalist for the Wall Street Journal Europe. Other speakers included Dr Eckhard Lübkemeier, Head of the Foreign Policy Studies of the Friedrich Ebert Foundation as well as Professor Hella Mandt, Professor of Political Science of the University of Trier. The audience consisted of 32 students from various Universities in the United States, Canada, Russia, Italy, The Netherlands, Former Yugoslav Republic of Macedonia, Great Britain, Ukraine, Yugoslavia, Ireland, Lithuania and Estonia.

On 22 and 23 October, Ms Vicky Kloppenburg and Mr Martínez Aragón took part in a seminar on 'Cooperation in the field of justice and home affairs, and Schengen after Amsterdam', organised by the Academy of European Law in Trier. The course sought to evaluate the changes introduced by the Treaty of Amsterdam as regards judicial and police cooperation in the European Union, and the consequences of the new Community provisions on common rules of asylum, immigration and border controls.

The powers given by the Treaty to the Ombudsman in order to monitor the application of these provisions were discussed, taking into account the limitations placed on other Community institutions, particularly on the Court of Justice, and their impact to citizens' rights. It was generally agreed that the implementation of those new provisions will raise important legal problems, which should require a cooperative effort among national and Community institutions.

On 5 November 1998 Peter Dyrberg met with Mrs Knöfler, Chairman of the Petitions Committee of the Parliament of the German *Land* Saxony-Anhalt, and Mr Schäfer, the Administrator of the Committee.

On 6 November 1998 Peter Dyrberg gave a speech on 'The European Ombudsman and transparency and democracy' at a conference entitled 'Transparency and democracy', organised in Magdeburg by the association 'Europa-Forum Magdeburger Börde e.V.'

Invited by Professor Dr Jürgen Schwarze, Mr Söderman gave a lecture on 2 December at the University of Freiburg.

SPAIN

On the occasion of the 50th anniversary of the UN Declaration of Human Rights, the Catalonian Institute for Human Rights invited Mr Söderman to participate together with Mr Cañellas, regional Ombudsman of Catalonia, and Mr Álvarez de Miranda y Torres, Spanish Ombudsman in a conference in Barcelona on 6 March 1998. The round table revolved around the role of human rights in the work of Ombudsmen. The speech was attended by a diverse audience of lawyers and law students. Mr Söderman was accompanied by Mr José Martínez Aragón.

As part of the initiatives of the Ibero-American Federation of Ombudsmen (FIO), the University of Alcalá de Henares in Madrid organised a 'Course to strengthen the institution of Ombudsman in Latin America' from March to December 1998. The aim of the course is to give practical training to officials from the different Ombudsmen offices in Latin America. Mr Söderman was invited to speak at the opening ceremony on 9 March 1998. In reviewing the evolution of the Union's citizenship in the past years, he drew some conclusions of interest for the Latin American audience.

Other participants in this event included Mr Gala, Provost of the University, Mr Pimentel, Portuguese Ombudsman, Mr Álvarez de Miranda y Torres, Spanish Ombudsman, Mr Cañellas, regional Ombudsman of Catalonia, and Mr Chamizo, regional Ombudsman of Andalusia.

The University of Complutense organised '1as jornadas sobre derecho interno y derecho comunitario europeo' with the theme 'armonización e integración de los ordenamientos jurídicos de los Estados miembros en el derecho de la Unión Europea' in Madrid on 27 to 29 April 1998.

Mr Söderman was invited to speak at the closing ceremony on 29 April. He gave a talk entitled 'La figura del Defensor del Pueblo Europeo: Funciones y perspectivas de actuación'.

Mr Söderman also visited the European Parliament office in Madrid.

On the occasion of the Human Rights' Declaration, Mr Söderman was invited to give a speech about EU and human rights at the Universidad Complutense Madrid on 9 December.

On 10 and 11 December, Mr Söderman accompanied by Mr Martínez Aragón participated in a seminar 'Jornadas sobre 'Educación en Derechos humanos" organised in Seville by the Andalusian Ombudsman. Mr Söderman gave the opening lecture.

FRANCE

On 5 and 6 February, Mr Söderman was invited to participate in a colloquium organised by the French Ombudsman, Mr Jacques Pelletier, on the occasion of the 25th anniversary of the French institution. Among other participants, Mr Jacques Chirac, President of France, gave the opening speech and Mr Lionel Jospin, Prime Minister, participated in the closing ceremony. Mr Söderman spoke about the origins and the development of the Ombudsman institution in the world. He was accompanied by Mr Olivier Verheecke.

Legal Officer Benita Broms participated in a colloquy 'In our hands — The effectiveness of human rights protection 50 years after the Universal Declaration'. The colloquy was organised in Strasbourg, 2 to 4 September 1998 by the Council of Europe as a contribution to the commemoration of the 50th anniversary of the Universal Declaration of Human Rights and the 1998 review of the implementation of the Vienna Declaration and action programme.

The opening statement was made by Ms Mary Robinson, United Nations High Commissioner for Human Rights. The themes discussed included the following: prevention of and responses to structural or large-scale human rights violations, rapporteur Mr Vojin Dimitrijevic; Social rights: the challenge of indivisibility and interdependence, rapporteur Mr Aalt-Willem Heringa; effective implementation of women's rights, rapporteur Ms Katarina Tomasevski; protection: effective action at the national level, rapporteur Mr Régis De Gouttes; protection: effective action at the international level, rapporteur Mr Jeremy McBride; the promotion of human rights: information, education and training, rapporteur Ms Kaija Gertnere. Parallel discussion groups on the various themes were chaired by prominent persons in the field of human rights.

Mr Peter Dyrberg participated in the 24th International Congress of Administrative Sciences, organised by the International Institute of Administrative Sciences in Paris on 7 to 11 September.

On 20 October, Mr Bernard Stasi, Médiateur de la République, paid a visit to the European Ombudsman together with Mr

Vincent Bouvier, Délégué Général, Mr Philippe Bardiaux, Conseiller pour les relations extérieures, Mme Anne Morrier, Chargée de mission pour la Communication, and Mr Jean-François Leroy, Chargé de mission pour les Délégués départementaux.

During the discussions, a seminar was agreed to be organised in September 1999 in Paris. After the meeting, Mr Stasi and Mr Söderman gave a joint press conference.

IRELAND

On 4 and 5 November, Mr Ian Harden presented the work of the European Ombudsman at seminars on transparency and democracy in Europe in Dungarvan, County Waterford and in Killarney, County Kerry, organised respectively by the South East European Centre and the South-west Ireland Rural Carrefour of the South Kerry Development Partnership. Other speakers included Michael Brophy of the Irish Ombudsman's Office, Siobhan Duffy, the Euro-Jus representative in Ireland, Paul Gormley of the Commission representation and Jim O'Brien from the European Parliament representation.

ITALY

Mr. Söderman paid an official visit to Italy on 23 to 26 September 1998. During his visit to Florence, he first had a meeting with the Regional Ombudsman of Tuscany, Mr Romano Fantappie, and his staff. Mr Söderman was informed of various projects conceived by the office of the Regional Ombudsman, such as the creation of an electronic network to link all the ombudsmen in Tuscany, and the organisation of an international meeting of regional ombudsmen in the EU.

This meeting was followed by a meeting with Professor Angelo Passaleva, President of the Regional Council of Tuscany. The President expressed his happiness to welcome Mr Söderman to Tuscany, the first region in Italy to have a regional ombudsman. Professor Passaleva and Mr Söderman exchanged views about the work of the European Ombudsman, as well as on the importance of relations between ombudsmen of all local, regional and national levels. As to his work, Professor Passaleva said that in Italy, questions relating to public health constitute a major part of the regional ombudsmen's work, and that this issue is of particular concern to him. Professor Passaleva and Mr Söderman agreed that the forthcoming vote on a bill organising the ombudsmanship in Italy is an important issue for European citizenship. Mr Söderman emphasised that, although Italy has active local and regional ombudsmen, often responsible for regions which are bigger than some Member States of the European Union, it remains among the few countries in the Union without a national ombudsman.

The European Ombudsman met also Mr Paolo Giannarelli, Minister of the Regional Government of Tuscany in charge of community politics. Mr Giannarelli mentioned the importance of the European Ombudsman's activities, which in his view are essential to make the Italian citizen aware of his European citizenship. Mr Söderman expressed his wish to create strong relations with Italian ombudsmen at all levels. The project presented by the Regional Ombudsman of Tuscany would be an excellent way to achieve this cooperation. During this meeting, the European Ombudsman was presented two specific cases opposing the European Commission and Tuscany (cases relating to wine production and livestock farming).

Mr Fantappie invited the local ombudsmen of Tuscany, 30 in all, to a meeting with the European Ombudsman. This offered an opportunity to discuss the problems raised by a very heterogeneous organisation of the Italian ombudsmanship. Unifying the rules in this domain and promoting cooperation between ombudsmen appeared to be extremely necessary.

Mr Söderman also paid a visit to the European University Institute in Fiesole meeting with Professor Masterson, President of the Institute, Professor Meny, Director of the Institute, Professor Dehousse and Professor Ziller. Mr Söderman spoke about his work and the notion of maladministration. Further there was an exchange of views about the relations between the European Ombudsman and other Community institutions, as well as with some national courts or ombudsmen. Finally Mr Söderman underlined the importance of creating a network between the European Ombudsman and national, regional and local ombudsmen, especially from the perspective of the Treaty of Amsterdam.

On 26 September, a conference was organised in Verona by the Local Ombudsman, Mr Giovanni Fraizzoli. Mr Söderman was invited to deliver a speech about the 'Cooperation with national, regional and local ombudsmen to protect and promote the European citizenship'. Mr Anton Cañellas, Regional Ombudsman of Catalonia presented the regional ombudsmanship from a Spanish point of view, highlighting his own experiences. Mr Paolo Cavaleri, Professor of Public Law in Verona, and professor Lucio Strumendo, Regional Ombudsman of Veneto, were invited to present the Italian issues relating to ombudsmanship, in particular in the perspective of the forthcoming vote of the Italian Parliament.

The conference was followed by a debate involving regional and local ombudsmen from various parts of Italy, as well as some citizens of Verona.

THE NETHERLANDS

From 8 to 10 May 1998, Mr Olivier Verheecke and Mr Ben Hagard attended the Congress of Europe held in The Hague (Let's build Europe of the 21st century area of solidarity and freedom) on the occasion of the 50th anniversary of the first Congress of Europe. The congress was organised by the International European Movement, presided by Mr Mario Soares who gave the welcoming speech. The congress was solemnly opened on 9 May 1998 by her Majesty the Queen of the Netherlands. Interventions followed by Mr José Maria Gil-Robles, President of the European Parliament, Mr Peter Mandelson, Minister without Portfolio (United Kingdom), Mr Jacques Santer, President of the European Commission, Mr Gil Carlos Rodriguez Iglesias, President of the Court of Justice of the European Communities, and Mrs Leni Fischer, President of the Parliamentary Assembly of the Council of Europe.

During the congress, Mr Verheecke and Mr Hagard managed a stand about the European Ombudsman at the 'Expo Europe' and informed participants to the congress about the role and activities of the European Ombudsman. Of the 3 000 congress participants, over 700 visited the Ombudsman's stand to ask questions and to take material.

Mr Verheecke attended the workshop 'Democracy, citizenship and human rights', chaired by Mr P. J. G. Kapteyn, Judge at the Court of Justice of the European Communities. Among the speakers at the workshop were Mr Jean-Victor Louis, Professor at the European Studies Institute (Brussels) and President of the Initiative Committee of the International European Movement, Mr Pier Virgilio Dastoli, General Secretary of the International European Movement, and Mr Andreas Gross, Member of the Parliamentary Assembly of the Council of Europe. The debates were based on the introductory text 'Democracy and citizenship in Europe' presented by Mr Jo Leinen, President of the Union of European Federalists (UEF). One of the main subjects of the debates concerned the drawing up of a European constitution. The three other workshops were 'The economic and social dimension of Europe', 'The multicultural dimension of Europe' and 'Europe in the world'.

PORTUGAL

Mr Jacob Söderman made an official visit to Portugal from 13 to 15 April 1998. The visit was organised by both Mr José Meneres Pimentel, Portuguese National Ombudsman and Mr Nuno Antas de Campos, Head of the European Parliament Information Office in Lisbon. The European Ombudsman paid a visit to the Portuguese National Ombudsman Office. He also visited the European Parliament Information Office and the European Commission Representation in Lisbon.

Meetings with high Portuguese officials were also part of the programme, they included Mr Seixas da Costa, Secretary General for European Affairs in the Foreign Ministry, Mr Cardoso da Costa, President of the Constitutional Court, Mr Santos, President of the Portuguese Parliament and Mr Martins, President of the Commission of the Portuguese Parliament dealing with Constitutional affairs, rights, freedoms and guarantees to citizens. Mr Söderman also had the opportunity to meet Mr Soares, former President of the Portuguese Republic and current President of the European Movement.

Mr Söderman also met with Mr Freitas do Amaral, Professor of administrative law at the University of Lisbon and President of the Portuguese branch of the European Movement.

FINLAND

On 14 March, Mr Söderman gave a lecture entitled 'Citizens' Europe' in Tampere, Finland. The meeting was attended by about 150 jurors of the Courts of First Instance.

Mr Söderman participated in a seminar on ethics organised by the Archbishop of Turku on 20 May 1998. He gave a speech on 'European values'.

Mr Söderman accompanied by Mrs Benita Broms, Legal Officer, attended the 'Nordic Conference on Community law' on 6 to 8 November in Helsinki. Mr Söderman gave a speech about European citizens and the Community institutions.

Mr Söderman also presented his work in Kajaani, Seinäjoki, and Imatra on 11, 12 and 15 November.

SWEDEN

On the occasion of the 1998 FIDE Congress (3 to 6 June 1998), the European Ombudsman visited the Swedish Parliament and presented his work to the Committee on European Affairs on 2 June.

On 16 October, Mr Söderman visited Göteborg, Sweden and gave a lecture in a seminar 'Demokrati och transparens I vårt Europa'. The seminar is part of the Carrefour West Europe sponsored by the Commission. Mrs Linda Steneberg, Head of the Commission's representation in Sweden, made a speech about access to EU related information and Mr Ivar Virgin and Mrs Anneli Hulthén, MEPs, about their work at the European Parliament.

UNITED KINGDOM

On 23 January, Mr Söderman made an official visit to Scotland where he visited the Commissioner for local Administration, Mr Frederick Marks. He also paid a visit to the Commission

Representation in Edinburgh and was invited to give a lecture on the role of the European Ombudsman at the University of Edinburgh by Professor John Usher.

Mr Söderman, accompanied by Internet Communications Officer Ben Hagard, visited the United Kingdom on 28 and 29 May. On 28 May, Mr Söderman gave a seminar about the role of the European Ombudsman at the University of Reading's Centre for Ombudsman Studies. Before the meeting, Mr Söderman met with Professor Roy Gregory, the Director of the Centre, who then chaired the seminar. A lively discussion followed the speech by Mr Söderman. Participants included Professor Roy Gregory and Dr Philip Giddings from the Centre for Ombudsman Studies, Professor Peter Woodward and Dr Alex Warleigh from the University of Reading's Department of Politics, the Head of the Department of Politics Professor Richard Bellamy, the Dean of the University's Faculty of Letters Professor Tony Downs, and Professor Gavin Drewry from the Royal Holloway College, University of London.

Articles about the visit of Mr Söderman later appeared in the *Reading evening post* and the *Reading chronicle*, as well as in the University of Reading's *Bulletin*.

After the seminar, the Vice-chancellor of the University of Reading, Professor Roger Williams, hosted a dinner in honour of Mr Söderman.

On 29 May, Mr Söderman addressed the 'Focus Europe' briefing of the Civil Service College in London. Mr Michael Duggett, Principal Lecturer in Policy, Government and Europe at the College, chaired the briefing. In the question-and-answer session following the speech of Mr Söderman, participants included Mr Michael Duggett, Mr John Tate from the office of the UK Parliamentary Commissioner, the UK Pensions Ombudsman Mr Julian Parry, Mrs Margaret Batty from the Civil Service College, Mr Nick O'Brien from the office of the UK Legal Services Ombudsman, and Mr Keith Finch from the Ministry of Agriculture.

On 6 November, Mr Ian Harden presented the work of the European Ombudsman at a conference organised by the community Council of Lancashire. Other speakers included Mr Tony Cunningham MEP, Mr Alan Watson from the office of the Parliamentary Commissioner for Administration and Ms Alison Hook from the Commission representation. The conference was chaired by Mrs Patricia Thomas Commissioner for Local Administration in England.

6.3. **OTHER EVENTS**

On 9 February, Mr Söderman gave a lecture on his role as European Ombudsman to approximately 400 students from the Université Robert Schuman of Strasbourg. This event was organised by the European Parliament in the framework of the 'European Week' and took place in the hemicycle in Strasbourg.

On 12 February, Mrs Sandra Piszk, Ombudsman of Costa Rica paid a visit to the European Ombudsman in Strasbourg.

The Peruvian Ombudsman, Mr Jorge Santistevan de Noriega, visited the Brussels antenna of the European Ombudsman's office and met with Mr Peter Dyrberg, senior legal officer, on 12 February.

On 19 February, Mr Söderman and Mr Harden met Mr Gérard Beliard, Head of the International Relations' Department of the City of Strasbourg.

Mr Söderman gave a lecture on his role as European Ombudsman to about 50 members of the EU Committee of the American Chamber of Commerce in Belgium. The meeting took place in Strasbourg, on 11 March.

The Australian Ambassador in France, Mr John Michael Spender visited the European Ombudsman in Strasbourg, on 11 March.

Mr Söderman met with Mr Jan Grevstad, Counsellor at the Mission of Norway to the European Union on 12 March, in Strasbourg.

On 17 March, Ian Harden gave a talk to the Centre for European Policy Studies in Brussels entitled 'The work of the European Ombudsman's office'.

On 18 March, Mr Peter Dyrberg gave a talk on the role of the European Ombudsman to 20 students from Saxony-Anhalt.

On 23 March, Mr Fahri Ozturk, President of the Conseil de supervision d'État à la Présidence of Turkey and Mr Nuri Tortop, member of the same council paid a visit to the European Ombudsman. This visit was organised by the French Ministry of Foreign Affairs as part of an official trip to France.

Dr Gökhan Çapoglu, Chairman of the Party of Changing Turkey and Member of the Turkish Parliament visited the European Ombudsman on 1 April.

On 6 April 1998, Mr Olivier Verheecke received a group of students and professors from the Scuola Media Statale of Belluno (Italy) and gave a presentation on the work of the European Ombudsman.

On 7 April, Mr Söderman gave a lecture to 12 students of political science from the Strasbourg Centre of Syracuse University (New York, USA).

On 21 April, Mr Peter Dyrberg gave a talk on the work of the European Ombudsman to 35 teachers from Saxony-Anhalt. He also received a group of 20 Danish journalists and spoke about the Ombudsman's latest achievements.

On 23 April, Mr Söderman made a presentation of his work as European Ombudsman to a group of 60 members of the association 'Internationales Kolpingwerk'. The audience included German, Swiss, Austrian, Hungarian, Czech, Polish and Slovak nationals. The meeting took place in the framework of an annual visit to the European Parliament in Strasbourg.

On 28 April, Mr Söderman gave a lecture to a group of 50 students of the University of Bayreuth, Germany.

On 7 May, Mr Peter Dyrberg gave a talk on 'Open government and the need for transparency' at a seminar on 'Parliaments on the net', organised by the European centre for Parliamentary Research and Documentation, in Brussels.

On 7 May, Mr Söderman presented his work to a group of 20 students of the University of Jyväskylä, Finland who were visiting Brussels.

In the context of the European Day, the European Parliament organised an open day both in Brussels and Strasbourg on 9 May. Among the estimated 9 000 visitors in Brussels and 5 000 in Strasbourg, a large number visited the Ombudsman's stands in the new Leopold building in Brussels and in IPE1 in Strasbourg. General information was provided by the Ombudsman's staff present on the stands and information material was distributed.

On 11 May 1998, 20 members of the European Information Association from the United Kingdom, Estonia, Austria and Italy were given a report by Mr Söderman on the work of the Ombudsman and on the future of the Ombudsman's website.

On 11 May, Mr Söderman also gave an insight of his work to 20 members of the EU Committee of the Finnish Parliament.

Mr Söderman was further invited to give a lecture to 12 Finnish high officials participating in a training session at the Centre des études européennes in Strasbourg on 11 May.

The Secretary-General of the Chilean Communist Party, Ms Gladys Marin, who was visiting the European Parliament, paid a visit to Mr Söderman on 13 May.

Ian Harden gave a lecture on the role of the European Ombudsman to members of the Finnish Association of Auditors for the State Administration, in Strasbourg on 14 May.

Peter Dyrberg gave a talk to members of the Danish union HK-Handel from Århus, in Brussels on 19 May.

Also on 19 May, Ms Vicky Kloppenburg gave a presentation of the work of the European Ombudsman to a group of journalists from Finland who were visiting the European Parliament in Brussels at the invitation of MEP Astrid Thors.

On 25 May, Mr Jukka Pasanen, Vice-chancellor of Justice of Finland and Mr Jukka Okko Referendary counsellor at the office of the Chancellor of Justice paid a visit to the Ombudsman.

On 28 and 29 May, Peter Dyrberg attended a conference organised by the European University Institute (Florence) on the theme 'An EU human rights agenda for the year 2000'.

Ian Harden gave a lecture on the role of the European Ombudsman to a group of students of the Leiden Law Faculty, led by Professor Dr H. G. Schermers on 11 June 1998.

On 15 June, Mr Söderman presented his work to a group of 38 members of the National Centre of Culture of Lisbon that were invited to visit the European Parliament by MEP Vaz da Silva.

Ian Harden gave a lecture on the role of the European Ombudsman to a group of stagiaires from the Centre des études supérieures de la fonction publique territoriale, on 17 June 1998.

On 18 June, the Catalonian Ombudsman, Mr Anton Cañellas i Balcells, visited the Brussels antenna of the Ombudsman's office. He was accompanied by Mr Jan Goorden, Ombudsman of the Flemish community of Belgium. They both had an exchange of views with Peter Dyrberg.

At the request of The Montgelas society for the promotion of franco-bavarian cooperation, a group of 20 high officials from Bavaria were given a lecture by Mr Söderman on 2 July.

On 6 July, Mr Söderman received a group of students from the 'Gymnasium Geretsried', Germany who were visiting the European Parliament. He gave them a lecture on his role and activities.

Professor Roy Gregory of the Centre for Ombudsman Studies at the University of Reading visited the Ombudsman's office on 6 July. He had an exchange of views with Mr Söderman and Mr Harden.

Mr Ian Harden gave a lecture on the role of the European Ombudsman to a group of journalists from Pakistan and Bangladesh, visiting the European Journalism Centre on 15 September 1998.

On 24 September 1998, Mr Peter Dyrberg gave a speech to a Finnish group of University students on the work of the Ombudsman and the citizens' access to information.

On 23 October, Mr Söderman met with a group of Leiden's Student Association giving them a review of the European Ombudsman's role and duties.

Mr Ian Harden gave a presentation on the right to complain to the European Ombudsman in a seminar organised by L'institut des hautes études européennes on 17 and 18 November in Strasbourg.

On 20 November, Mr Söderman received a Danish group of students from Handelssolen I Ballerup in Strasbourg.

On 23 November, Mrs Benita Broms gave an overview of the role of the European Ombudsman to a group of Finnish judges and lawyers visiting Strasbourg.

Mr Söderman lectured about 'Le médiateur dans le système communautaire, rôle de la Commission des affaires juridiques' to l'Union des avocats européens on 27 November in Strasbourg.

Lectures about the role of the European Ombudsman were given by Mr Olivier Verheecke on 2 December in Wageningen, Netherlands and by Mr Xavier Denoël on 10 December in Midi Pyrénées, France, to conferences organised by the 'Carrefour' network of the rural information centres.

6.4. **MEDIA RELATIONS**

On 6 January, Mr Söderman was interviewed by Anna Paljakka, journalist for the Finnish newspaper Helsingin Sanomat.

Ms Frances Horsburgh of the *Glasgow Herald* interviewed Mr Söderman on 23 January on the occasion of his visit to Edinburgh, Scotland.

On 27 January, Ian Harden gave an interview to Mr Claude Keiflin on behalf of La Croix about the work of the European Ombudsman.

Mrs Eva Spira interviewed Mr Söderman for a Swedish paper *Statstjänstemannen*.

Journalists of the Swedish newspaper *Dagens industri* and of the Finnish *Kauppalehti* interviewed the Ombudsman in Strasbourg, on 17 February.

On 18 February, Mr Söderman gave a briefing to a delegation of 15 Danish journalists who were attending a seminar in Strasbourg.

Ms Zornitza Venkova, a Bulgarian journalist working for Bulgarian National Television interviewed Mr Söderman for a quarterly publication entitled *Europ magazine*, on 19 February.

On 10 March, Mrs Päivi Palm interviewed Mr Söderman for the newspaper *Turun Sanomat*.

Mrs Terttu Levonen interviewed Mr Söderman on 11 March for the newspaper *Aamulehti*.

The European Ombudsman's visit to Portugal (13 to 15 April) received a broad media coverage, especially from the Television SIC and the Portuguese newspaper *Diário de Notícias*.

A press conference was organised in Brussels on 21 April following the presentation of the 1997 Annual Report to the Committee on Petitions. Mr Edward Newman, Vice-chairman of the Committee on Petitions participated in the press conference.

On 27 April, Mr Söderman gave a telephone interview to Mr Seznec for the French publication *7 jours Europe*.

On 29 April, Mr Söderman was interviewed by Ms Berna G. Harbour, journalist of the national newspaper *El País* while he was visiting the information office of the European Parliament in Madrid.

Pedro, a Danish journalist interviewed Mr Söderman for the Danish paper *Ekstra Bladet* in Strasbourg on 12 May.

On 27 May, Mr Gilles Bessec interviewed Mr Ian Harden for Radio France Internationale's programme 'Accents d'Europe'.

On 29 May, the journalist Ms Jill Morrell, who was present at the 'Focus Europe' hearing of the Civil Service College in London interviewed Mr Söderman for British Satellite News. The interview, together with film footage from the briefing, was then circulated throughout the world for the UK Foreign and Commonwealth Office.

On 2 June 1998, Mr Söderman was interviewed by the newspaper *Dagens Nyheter* and the news agency TT, in Stockholm.

On 17 June, a German journalist Mr Michale Kalz interviewed Mr Söderman.

Mr Söderman gave an interview on his role and activities to Mrs Diane Klein for Radio Television Luxembourg, on 2 July.

On 3 July, Mr Söderman gave a telephone interview to Mr Jouni Tanninen for the Finnish YLE Radio.

On 9 July Mr Söderman attended a press lunch in the EP Information Office, London.

On 15 July, a press conference was arranged in Strasbourg after the presentation of the annual report of the Ombudsman to the European Parliament. The same day, Mr Söderman gave an interview to Mr Björn Månsson from the Finnish-Swedish paper *Hufvudstadsbladet*.

On 17 July, Mr Söderman was interviewed by Mr Roland Krimm for the Le Temps/Suisse and the Radio Suisse Romande.

Mr Jesper Vind Jensen, from a Danish paper *Søndagsavisen*, interviewed Mr Söderman on 22 July. The same day Mr Söderman was interviewed by Ms Tiziana Di Simone, RAI/Radio/Roma.

On 27 July, Mrs Christine Holzbauer-Madison interviewed the Ombudsman for the French yearly magazine *L'Année européenne*.

On 29 July, Mr Söderman gave an interview to Mr Alfredo Sotillo, ABC/España.

Lars Ströman, journalist from the Danish paper *Europe-Posten* interviewed Mr Söderman on 27 August.

Mr Söderman gave an interview to Mr Markku Möttönen, journalist for the Finnish radio YLE, on 19 October.

On 20 October, Mr Bernard Stasi, Médiateur de la République, and Mr Söderman gave a joint press conference on the occasion of the visit to Strasbourg of the French Ombudsman.

On 20 October, Mr Olivier Verheecke gave an interview to the Belgian radio RTBF for the programme 'Radio 21'.

On 21 October, Mr Söderman gave an interview to Greek TV for a programme 'European Parliament and the citizen'. The same day, he was interviewed by Mrs Muller for the German radio iAD.

Mr Mauro Bellabarba from the Italian Rai Radio interviewed Mr Söderman for a daily programme concerning the European Institutions on 22 October.

Mr Söderman gave an interview to the Finnish-Swedish paper *Hufvudstadsbladet* on 22 October.

La télévision suisse romande made a programme about the work of the European Ombudsman, interviewing Mr Söderman on 5 November in Strasbourg.

On 10 November, Mr Söderman gave an interview to the Finnish TV YLE about 'Citizen's Europe'.

On 18 November, Mr Söderman was interviewed for the French *Investir Magazine*.

Mr Jakob Vinde Larsen interviewed Mr Söderman for the Commission's monthly paper *Europa* on 19 November.

On 20 November, Mr Söderman gave an interview to Mr Brandon Mitchener for the *Wall Street Journal*.

ANNEXES

ANNEX A

STATISTICS CONCERNING THE WORK OF THE EUROPEAN OMBUDSMAN COVERING THE PERIOD FROM 1 JANUARY TO 31 DECEMBER 1998

1. CASES DEALT WITH DURING 1998

1.1.	**Total caseload in 1998**	**1 617**
	— complaints and inquiries not closed on 31 December 1997	244 [1]
	— complaints received in 1998	1 372
	— own initiative of the European Ombudsman	1
1.2.	**Examination of admissibility/inadmissibility completed**	**93%**
1.3.	**Classification of the complaints**	
1.3.1.	*According to the mandate of the European Ombudsman*	
	— within the mandate:	411 (31%)
	— outside the mandate:	911 (69%)
1.3.2.	*Reasons for being outside the mandate*	
	— not an authorised complainant	18
	— not against a Community institution or body	844
	— does not concern maladministration	46
	— against Court of Justice or Court of First Instance in judicial role	3
1.3.3.	*Analysis of complaints within the mandate*	
	Admissible complaints	**212**
	— inquiries initiated	170
	— no grounds for inquiry	42
	— dealt with or being considered by Committee on Petitions: 9	
	— others: 33	
	Inadmissible complaints	**199**
	— author/object not identified	67
	— time limit exceeded	6

[1] Of which three own initiatives of the European Ombudsman and 199 admissible complaints.

— prior administrative approaches not made 97

— being dealt with or settled by a Court 17

— internal remedies not exhausted in staff cases 12

2. INQUIRIES INITIATED IN 1998 **171**

(170 admissible complaints and one own initiative of the European Ombudsman)

2.1. **Institutions and bodies subject to inquiries** [1]

— European Commission 129 (75 %)

— European Parliament 27 (16 %)

— Council of the European Union 7 (4 %)

— others 9 (5 %)

— European Agency for the Evaluation of Medicinal Products: 1

— Court of Justice: 1

— Court of Auditors: 1

— Translation Centre for the bodies of the European Union: 1

— European Environment Agency: 2

— Committee of the Regions of the European Union: 1

— Office for Official Publications of the European Communities: 2

2.2. **Type of maladministration alleged**

(In some cases, two types of maladministration are alleged)

— lack or refusal of information, transparency 69 (30 %)

— negligence 38 (16 %)

— unfairness, abuse of power 29 (13 %)

— procedures, rights of defence 25 (11 %)

— discrimination 21 (9 %)

— avoidable delay 17 (7 %)

— failure to ensure fulfilment of obligations (Article 169) 11 (5 %)

— legal error 7 (3 %)

— other maladministration 14 (6 %)

[1] Some cases concern two or more institutions or bodies. The following institutions and bodies are the subject of the own-initiative inquiry concerning a code of good administrative behaviour: European Parliament, Council of the European Union, European Commission, European Court of Auditors, Economic and Social Committee, Committee of the Regions of the European Union, European Investment Bank, European Central Bank, European Centre for the Development of Vocational Training, European Foundation for the Improvement of Living and Working Conditions, European Environment Agency, European Agency for the Evaluation of Medicinal Products, Office for Harmonisation in the Internal Market, European Training Foundation, European Drugs and Drug Addiction Monitoring Centre, Translation Centre for bodies of the European Union, European Agency for Safety and Health at Work, Community Plant Variety Office, Office for Official Publications of the European Communities.

3.	DECISIONS CLOSING THE FILE ON A COMPLAINT OR CONCLUDING AN INQUIRY	**1 337**
3.1.	**Complaints outside the mandate**	**911**
	— transferred	
	— as petition to the European Parliament	10
	— to national Ombudsmen	7
	— 600 complainants have been advised to contact another agency:	
	— national/regional ombudsman or petition a national parliament	259
	— to petition the European Parliament	80
	— the European Commission	154
	— Court of Justice	1
	— others	106
3.2.	**Complaints within the mandate, but inadmissible**	**199**
3.3.	**Complaints within the mandate and admissible, but no grounds for inquiry**	**42**
3.4.	**Inquiries closed with reasoned decision**	**185** [1]
	(An inquiry can be closed for one or more of the following reasons)	
	— no maladministration found	96 [2]
	— with a critical remark addressed to the institution	29
	— settled by the institution	51 [2]
	— friendly solution	4
	— finding of maladministration with draft recommendation	1
	— other	9 [3]
4.	ORIGIN OF COMPLAINTS REGISTERED IN 1998	
4.1.	**Source of complaints**	
	— sent directly to the European Ombudsman by:	1 360
	— individual citizens: 1 237	
	— companies: 60	
	— associations: 63	
	— transmitted by a Member of the European Parliament	9
	— petitions transferred to the European Ombudsman	3

[1] Of which two own initiatives from the Ombudsman.
[2] Of which one own initiative from the Ombudsman.
[3] In for cases, the Ombudsman terminated his inquiry because the subject matter of the complaints also came within the competence of the Court of Auditors, which was dealing with the matter. In two cases, the Ombudsman terminated his inquiry because the Committee on Petitions of the European Parliament was dealing with the matter. In two cases, the Ombudsman terminated his inquiry in accordance with Article 2(7) of the Statute, because of legal proceedings in progress. In one case, the Ombudsman terminated his inquiry because the Court of Justice and the Court of First Instance considered they were acting in their judicial role.

4.2. **Geographical origin of the complaints**

Country	Number of complaints	Number of complaints in %	Population in EU in %
Germany	148	11	21,9
United Kingdom	111	8	15,7
France	196	14	15,6
Italy	188	14	15,4
Spain	197	14	10,6
The Netherlands	61	4	4,1
Greece	45	3	2,8
Belgium	105	8	2,7
Portugal	69	5	2,6
Sweden	28	2	2,4
Austria	18	1	2,1
Denmark	23	2	1,4
Finland	52	4	1,3
Ireland	35	3	0,9
Luxembourg	19	1	0,1
Others	77	6	—

ANNEX B

THE OMBUDSMAN'S BUDGET

Article 12 of the Financial Regulation of the European Communities provides for the Ombudsman to transmit to the European Parliament before 1 May each year an estimate of his revenue and expenditure for the following year.

The Statute of the European Ombudsman provides for the Ombudsman's budget to be annexed to Section 1 (European Parliament) of the general budget of the European Communities, which is published in the *Official Journal of the European Communities*.

Salaries, allowances and other costs related to employment are contained in Title 1 of the budget. This title also includes the cost of missions. Title 2 of the budget covers buildings, equipment and miscellaneous operating expenditure. Title 3 contains a single chapter, containing ECU 2 000, from which subscriptions to international Ombudsman organisations are paid.

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 under the terms of a framework agreement on cooperation between the European Parliament and the European Ombudsman, dated 22 October 1995. The framework agreement was completed by agreements on administrative cooperation and on budgetary and financial cooperation, signed on 12 October 1995.

Where the services provided to the Ombudsman involved additional direct expenditure by the Parliament a charge was normally made during 1998, with payment being effected through the liaison account. Rental of offices and translation services are the largest items of expenditure dealt with in this way.

From the beginning of 1998, the establishment plan of the Ombudsman consisted of 17 posts, one more than at the end of 1997. All the posts are temporary.

The total amount of appropriations available in the Ombudsman's budget for 1998 was ECU 2 777 178. Title 1 (salaries, allowances and other costs related to employment) amounted to ECU 2 003 178. Title 2 (buildings, equipment and miscellaneous operating expenditure) amounted to ECU 772 000. Additional appropriations of ECU 201 000 were transferred during the year from the contingency reserve of the European Parliament. Thus, the final figure for appropriations available in 1998 was ECU 2 978 178.

The following table indicates expenditure in 1998 in terms of available appropriations committed.

Title 1	ECU 2 081 548
Title 2	ECU 657 224
Title 3	ECU 888
Total	ECU 2 739 660

Revenue consists of deductions from the remuneration of the Ombudsman and his staff. The amount budgeted for receipts in 1998 was ECU 264 421.

The 1999 budget

The 1999 budget, prepared during 1998, provides for an establishment plan of 23, representing an increase of six from the establishment plan for 1998. Appropriations for three of the posts have been entered in the reserve.

Total appropriations for 1999 are ECU 3 474 797. Title 1 (salaries, allowances and other costs related to employment) amounts to ECU 2 665 797. Title 2 (buildings, equipment and miscellaneous operating expenditure) contains ECU 807 000. Title 3 contains ECU 2 000.

The 1999 budget provides for total revenue (deductions from the remuneration of the Ombudsman and his staff) of ECU 357 140.

In agreement with the competent services of the Parliament, the 1999 budget estimates were prepared on the assumption that the existing agreements on cooperation would continue in operation for the whole of 1999. The 1999 budget also includes a 'management fee' of ECU 156 000 to cover the costs to the European Parliament of providing services which consist solely of staff time, such as administration of contracts, salaries and

allowances and a range of computing services. The inclusion of the management fee is a further improvement in transparency of the budget, but does not represent any additional costs in 1999 as compared to 1998.

The 1999 budget, like those for previous years, has been prepared in the form of an Annex to the budget of the European Parliament, in accordance with the legal provisions in force. The budget does not therefore contain a separate contingency reserve on the basis that, if necessary, the Ombudsman can request a transfer from the Parliament's contingency reserve as in 1996 and 1998.

ANNEX C

PERSONNEL

EUROPEAN OMBUDSMAN

Jacob Söderman

SECRETARIAT OF THE EUROPEAN OMBUDSMAN

Ian Harden
Head of Secretariat
Tel. (33-3) 88 17 2384

Peter Dyrberg
Principal Legal Adviser
Brussels Antenna — EAS/104
Tel. (32-2) 284 2003

José Martínez Aragón
Principal Legal Adviser
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Olivier Verheecke
Legal officer
Tel. (33-3) 88 17 5346

Vicky Kloppenburg
Legal officer
Brussels Antenna — EAS/124 (from 1.4.1998)
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Benita Broms
Legal officer
Tel. (33-3) 88 17 2423

Xavier Denoël
Trainee (until 31.1.1998)
Auxiliary legal officer (from 1.2.1998)
Tel. (33-3) 88 17 2422

Ida Palumbo
Trainee (until 31.1.1998)
Auxiliary legal officer (from 1.2.1998)
Temporary agent (from 23.5.1998)
Tel. (33-3) 88 17 2385

Alessandro Del Bon
Trainee (from 1.3.1998)
Auxiliary legal officer (from 1.10.1998)
Tel. (33-3) 88 17 2382

Ilta Helkama
Press officer
Tel. (33-3) 88 17 2398

Ben Hagard
Internet communications officer (from 16.2.1998)
Tel. (33-3) 88 17 2424

Panayotis Thanou
Finance officer (until 15.4.1998)

Alexandros Kamanis
Finance officer (from 1.9.1998)
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Daniela Tirelli
Assistant (until 31.3.1998)

Nathalie Christmann
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Anna Ruscitti
Secretary
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Murielle Richardson
Secretary of the European Ombudsman
(on leave 14.7.1998 to 4.1.1999)
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Isabelle Foucaud
Secretary
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Stephanie Kunze
Secretary
Acting secretary to the European Ombudsman
(from 14.7.1998)
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Isabelle Lecestre
Auxiliary secretary (from 1.3.1998)
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Usher (on leave from 1.8.1998)

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Usher (from 1.9.1998)
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Hanna-Mari Anttilainen
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Henrik Leffler
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HOW TO CONTACT THE EUROPEAN OMBUDSMAN

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