

Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/4/2009/PB concerning the European Commission

Recommendation

Case OI/4/2009/PB - **Opened on** 03/11/2009 - **Recommendation on** 12/07/2011 - **Decision on** 05/07/2011

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the inquiry

This inquiry concerns the protection of the rights of defence when the European Commission recovers sums overpaid to members of its present or former staff.

Article 85 of the Staff Regulations provides as follows:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.

The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Appointing Authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed."

The subject matter of the inquiry

In light of information contained in a complaint, the European Ombudsman decided to open the present own-initiative inquiry. The inquiry concerns possible shortcomings in the Commission's practices when implementing recovery measures under the above-quoted provision. The Ombudsman was concerned that the Commission, when it recovers sums under Article 85 of the Staff Regulations, may not adequately respect the right of individuals to be heard and to receive reasons.



The inquiry

1. On 3 November 2009, the Ombudsman asked the Commission to inform him about its rules and practices for recovery measures. On 3 March 2010, the Commission provided a detailed and most useful account of its recovery practices and the relevant rules.
2. The Commission informed the Ombudsman that, following the opening of the present inquiry, it had decided to adopt new and improved procedures relevant to the object of the inquiry. On 3 June 2010, the Commission sent the Ombudsman a copy of an internal note of 23 April 2010, which sets out the new procedures. It included a letter template that shall be used by the service in question when the latter informs a present or former member of staff of its decision to recover sums. The note outlined that the new rules would be published on the Commission's intranet [2] .

The Ombudsman's analysis and conclusions

A. The right to receive reasons and the right to be heard

The Ombudsman's assessment

3. From the content of its replies, the Commission appears to accept that measures should be taken to better ensure an individual's rights of defence when its services intend to recover sums under Article 85 of the Staff Regulations.
4. The Commission's above-mentioned internal note of 23 April 2010, which was addressed to the relevant management staff, ends with following statement: "[j] e vous remercie d'appliquer dorénavant rigoureusement cette nouvelle procédure et d'être particulièrement attentif aux droits de défense des collègues qui font l'objet d'une mesure de récupération " (Please make sure to strictly follow this new procedure from now on, and to be particularly attentive to the rights of defence of colleagues who are the object of a recovery measure).
5. The rights to be heard and to receive a reasoned decision are mentioned in Article 41 of the European Union's Charter of Fundamental Rights, which is legally binding following the entry into force of the Treaty on the Functioning of the European Union [3] .
6. The two rights normally play a role at different stages of a procedure. The right to be heard grants an individual the possibility to comment on factual and legal issues before a possible future decision is taken. The right to receive a reasoned decision enables an individual to understand better why a decision has been taken. Both rights will often help to avoid court cases because the individual concerned will feel that the procedure was fair and that he/she was adequately informed of the background to the measure.



7. The Commission's above-mentioned internal note of 23 April 2010 adequately reminds the management staff concerned that reasons must be given. It goes without saying that the level of reason-giving depends on the circumstances of the specific case.

8. It is not, however, obvious that the right to be heard is adequately protected.

9. In its decision in Case F-51/07 *Phillippe Bui Van v Commission* [4] , the Civil Service Tribunal noted the following:

72 Finally, according to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see, in particular, Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 27; Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 99; Case C-344/05 P *Commission v De Bry* [2006] ECR I-10915, paragraph 37; Case T-277/03 *Vlachaki v Commission* [2005] ECR-SC I-A-57 and II-243, paragraph 64).

73 That principle, which reflects the requirements of good administration, demands that the person concerned should have been afforded the opportunity to effectively make known his views on any matters which might be taken into account to his detriment in the measure to be taken (see, to that effect, Case 234/84 *Belgium v Commission*, paragraph 27; Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147, paragraph 99; *Commission v De Bry*, paragraph 38; Case T-372/00 *Campolargo v Commission* [2002] ECR-SC I-A-49 and II-223, paragraph 31; and *Vlachaki v Commission*, paragraph 64).

74 In that regard, Article 41(2) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), provides that the right to good administration 'includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

[...]

75 The principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice ... and of the European Court of Human Rights' (see, to that effect, Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 38).

76 Moreover, by solemnly proclaiming the Charter of Fundamental Rights of the European



Union, the European Parliament, the Council and the Commission necessarily intended to give it particular significance, account of which must be taken in this case in interpreting the provisions of the Staff Regulations and the Conditions of Employment of other servants of the European Communities (Case F-1/05 Landgren v ETF [2006] ECR-SC I-A-1-123 and II-A-1-459, paragraph 72, which is the subject of an appeal pending before the Court of First Instance in Case T-404/06 P).

10. A recovery measure is, by its very nature and in many cases also by its financial impact, of a serious nature. Additionally, the Commission itself, in its first reply to this inquiry, noted that the case-law on the application of Article 85 of the Staff Regulations is extensive ("*L'application de l'article 85 a fait l'objet d'une jurisprudence très large*"). It can only be in the institution's own interest to take steps that may avoid further court cases.

11. The Commission's aforementioned internal note of 23 April 2010 does not provide for a hearing of the official before the Commission adopts a recovery measure. It merely stipulates that the Commission shall grant the official the possibility to state his/her views on the *implementation* of the recovery measure ("*L'AIPN informe le fonctionnaire/l'agent de la possibilité de faire des commentaires sur l'exécution de la récupération dans un délai d'un mois*", (emphasis added).

12. This is also reflected in the letter template attached to the note. Although the template carries the heading "NOTE A L'ATTENTION DE", the document is clearly intended to contain a formal administrative decision. It merely informs the official concerned *how* the Commission intends to implement the recovery measure. It ends by recalling the right to submit a formal complaint against the "*decision*" ("*[l] a présente décision*") under Article 90 of the Staff Regulations.

13. It is not clear why the Commission hesitated to formally provide for such a hearing. As noted above, it appears to accept that measures should be taken to better ensure the individual's rights of defence. Additionally, it pointed out that the possibility to state views, referred to in paragraph 14 above, includes the possibility to state views on the substance ("*[i] / a également la possibilité de donner des commentaires sur le fond de la récupération*"). If this is the intention, it would appear more logical to simply formalise this possibility through the creation of a proper hearing stage in the procedure.

14. Parenthetically, the Ombudsman notes that such a right to be heard would not prevent the Commission from adequately addressing exceptional cases where it believes that the official may quickly destroy relevant evidence or somehow abscond. The present inquiry concerns the Commission's normal procedures, and not cases of serious fraud or the like.

15. In light of the above considerations, the Ombudsman makes the following draft recommendation.

B. The draft recommendation



On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Institution:

The Commission should ensure that its services fully respect the fundamental right to be heard in relation to recovery measures that they adopt against present or former staff. Specifically, the Commission should lay down a general rule that, unless exceptional circumstances require otherwise, the relevant service must grant the individual concerned the opportunity to state his or her views on the substance before it decides to adopt the recovery measure. The procedure should be in writing, unless an oral hearing would be more appropriate in light of the circumstances of the case.

The institution and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 January 2011. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 9 November 2010

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] At the date of drafting the present draft recommendation, the rules do not yet appear to have been published on the Commission's intranet.

[3] Article 6 of the Treaty on the Functioning of the European Union. The Charter is available online through the following link: http://europa.eu/documentation/legislation/index_en.htm [Link] - see 'Treaties'.

[4] Case C-122/04 Philippe Bui Van v Commission, judgment of 11 September 2008, not yet published in the ECR. The Tribunal's finding of a breach of the right to be heard in that case was subsequently upheld by the General Court on appeal in Case T-491/08 P Philippe Bui Van v Commission, judgment of 12 May 2010, not yet published in the ECR, paragraph 80.