

Decision of the European Ombudsman closing his inquiry into complaint 1068/2011/RT against the Council of the EU

Decision

Case 1068/2011/RT - **Opened on** 15/06/2011 - **Decision on** 21/03/2012 - **Institution concerned** Council of the European Union (No further inquiries justified) |

The background to the complaint

1. The complainant, a former European Commission official, started to receive an invalidity pension following an accident.
2. In May 2009, the complainant sent a letter to the President of the Council of the EU (the 'Council'), in which he invoked the provisions of Article 22b of the Staff Regulations [1] and, in substance, made allegations of irregularities in the Commission's handling of his medical file. The complainant further stated that he had informed the Commission's Secretary-General about the above-mentioned irregularities, in accordance with the provisions of Article 22a of the Staff Regulations [2] . The latter had brought the complainant's allegations to the attention of OLAF, which decided not to open an investigation.
3. The General Secretariat of the Council (namely, Unit II - 'Communication; Public Information Service') replied to the complainant's aforementioned letter. It stated that the issues raised in his correspondence were outside the mandate of the President of the Council and advised him to bring the matter before the Civil Service Tribunal, which is competent to handle disputes between the EU institutions and their staff.

The subject matter of the inquiry

4. In his complaint to the European Ombudsman, the complainant submitted the following allegation and claim.

Allegation:



The Council of the EU failed to respond adequately to the disclosure he made to its President under Article 22b of the Staff Regulations.

Claim:

The Council of the EU should fulfil its responsibilities to the complainant under Article 22b of the Staff Regulations.

5. In addition, the Ombudsman asked the Council to explain the general procedure which it follows to deal with correspondence from persons who invoke Article 22b of the Staff Regulations.

6. In his observations on the Council's reply, the complainant submitted the following new claim:

The provisions of Article 22b of the Staff Regulations should be revised in order to allow an appropriate response from the five office-holders mentioned therein to the disclosure of information concerning alleged wrongdoings within another EU institution.

7. The Ombudsman notes that the complainant's new claim does not concern a possible instance of maladministration, but the merits of Union legislation. In accordance with the provisions of Article 2(2) of his Statute [3] , the Ombudsman is therefore not empowered to deal with this claim.

The inquiry

8. In view of the fact that the Ombudsman considered that the complainant's complaint contained material to which Article 22b of the Staff Regulations applied, he decided to classify it as confidential [4] .

9. On 15 June 2011, the Ombudsman opened an inquiry and asked the Council to provide an opinion on the complaint by 30 September 2011. The Council's opinion was forwarded to the complainant with an invitation to submit observations.

10. On 13 October 2011, the complainant sent further correspondence in relation to the present complaint.

11. The complainant sent his observations on 30 November 2011.

The Ombudsman's analysis and conclusions



A. Alleged failure to respond adequately to the complainant's disclosure made under Article 22(b) of the Staff Regulations

Arguments presented to the Ombudsman

12. In support of his allegation, the complainant argued that: (i) the Council's reply of May 2009 was inadequate; and (ii) the Council failed to ensure his protection because his letter was handled by a service which deals with requests from the general public.

13. In its opinion, the Council regretted that its Registration Service incorrectly assigned the complainant's letter of May 2009 to the Public Information Service instead of the President's private office. It also regretted that the Public Information Service wrongly considered itself competent to respond to the complainant's letter and provided him with an inadequate reply. The Council further explained that the reason why the complainant's letter was incorrectly assigned was that there have only been a few cases of correspondence brought to the attention of the President of the Council under Article 22b of the Staff Regulations. The Council therefore assumed that the service handling the complainant's letter misunderstood its subject matter.

14. The Council pointed out that, although the complainant's letter was wrongly assigned, its content was handled in accordance with the relevant provisions of the Staff Regulations and the Code of good administrative behaviour [5] in a way which could not have caused any damage to him.

15. In September 2011, the Council addressed a letter to the complainant apologising for the handling of his correspondence of May 2009. As regards the substance of his allegations against the Commission, the Council noted that the complainant had previously approached OLAF about the matter and that OLAF decided not to open an inquiry. It also pointed out that the Council has no power to investigate allegations of irregularities falling within the Commission's sphere of activity. The Council suggested that the Ombudsman invite the complainant to contact OLAF again in order to inform it of the new arguments in support of his allegations against the Commission, submitted in his complaint to the Ombudsman.

16. Finally, the Council explained that correspondence addressed to the President and invoking Article 22b of the Staff Regulations is dealt with by the President's private office and the competent service of the Administration. As regards the procedure followed in order to deal with allegations of wrongdoings, the General Secretariat of the Council ('GSC') may, in accordance with Article 22a of the Staff Regulations, carry out internal administrative inquiries [6] . Furthermore, a specialised panel within the GSC is competent to investigate alleged financial irregularities [7] . In case of suspected misuse of the Council's financial means, OLAF is informed of this and is asked if it intends to conduct an inquiry. If OLAF does not carry out such an inquiry, the GSC may decide to conduct an internal inquiry. Finally, the Council mentioned that its internal rules [8] provide protection for members of staff who invoke Articles 22a and 22b of the Staff Regulations.



17. In his observations, the complainant noted with satisfaction that the Council apologised for the mishandling of his correspondence. However, he took the view that it is difficult to understand how such a mistake could have been committed because his letter was marked "*Restreint UE*". Therefore, although he did not suffer any damage, the errors committed in handling his correspondence could constitute an instance of maladministration.

18. The complainant also outlined that the Council does not seem to have a specific procedure for dealing with correspondence from officials who invoke Article 22b of the Staff Regulations concerning alleged irregularities within "other institutions" (emphasis by the complainant). Moreover, if, as stated in its opinion, the Council "*has no investigative power concerning alleged irregularities within the Commission's sphere of activity*", it follows that it cannot ensure any follow-up to a disclosure made in accordance with the provisions of Article 22b of the Staff Regulations.

19. Furthermore, if the Council considers that the new elements submitted in his complaint to the Ombudsman may give rise to a presumption of possible illegal activity, it must inform OLAF immediately of this, instead of suggesting to the Ombudsman that he invite the complainant to do so. In any event, the complainant pointed out that he did not wish to address OLAF about the matter, given the way in which both the Commission and OLAF handled the disclosures he made under Article 22a of the Staff Regulations.

The Ombudsman's assessment

20. The Ombudsman notes that the main issue in dispute is the way in which the Council handled the disclosure which the complainant made under Article 22b of the Staff Regulations. In this respect, the present complaint raises an important matter of principle concerning the interpretation and application of the above-mentioned provision of the Staff Regulations.

21. The Ombudsman is not aware of any case-law which clarifies the interpretation and application of the aforementioned provision of the Staff Regulations. In these circumstances, the Ombudsman considers it useful, on the basis of the information gathered in the course of the present inquiry and of his similar inquiries into complaints 1039/2011/RT and 1069/2011/RT, to present his own views on the matter, which are based on principles of good administration. The Ombudsman recalls, however, that the authoritative interpretation of EU law can only be established by the Court of Justice of the EU.

22. Articles 22a and 22b of the Staff Regulations are commonly referred to as the 'whistleblower provisions'. These provisions have a twofold structure consisting of (a) a duty to report serious wrongdoings to the whistleblower's own institution or, under certain conditions, to OLAF, and (b) a right also to report the matter to the office-holders of certain other EU institutions, provided that specific requirements are complied with [9] .

23. Articles 22a and 22b define the circumstances in which whistleblowers are protected



against retaliation by the institution they work for. According to Article 22a, the institution concerned is not permitted to take action to the detriment of the official who disclosed the information, if he or she has acted reasonably and honestly. Article 22b extends this protection to the official who further discloses information to one or more of five office-holders mentioned therein, that is, to the Presidents of the European Parliament, Commission, Council, Court of Auditors, or the European Ombudsman.

24. Under Article 22a, once the civil servant has complied with the obligation to report either by informing his or her superiors, or by disclosing the information directly to OLAF, the authorities informed are required to take appropriate action. However, if neither the whistleblower's superiors nor OLAF takes such action within a reasonable time, the official who reported the wrongdoing has the right to bring his or her concerns to the attention of one or more of the five office-holders listed in Article 22b.

25. The effective purpose (*effet utile*) of Article 22b is to make it possible for the whistleblower to have an external remedy if he or she does not find a responsive addressee within his or her institution or within OLAF following the procedure set out in Article 22a.

26. However, whilst Article 22a appears to offer some guidance as to the path which the concerned institution should follow once the information has been disclosed, namely, that the information disclosed should, without delay, be transmitted to OLAF and that the whistleblower should not suffer any prejudicial effects as a result of the disclosure, Article 22b of the Staff Regulations is silent about how the five office-holders mentioned therein should handle the information disclosed.

27. It is therefore reasonable to consider that the five office-holders mentioned in Article 22b are free to establish their own administrative procedure for handling information received from civil servants concerning alleged wrongdoings within another institution. Naturally, good administration requires that the basic principles which should guide any administrative procedure should also be applied by the said office-holders when dealing with information disclosed under Article 22b.

28. In this regard, the whistleblower's rights to privacy, data protection and confidentiality (unless he or she expressly requests public treatment of the disclosure) should be respected. As the European Data Protection Supervisor has underlined, the position of whistleblowers is a sensitive one. Persons who provide such information should receive guarantees that their identity will be kept confidential, in particular vis-à-vis the person about whom an alleged wrongdoing has been reported [10]. In addition, the whistleblower's right to present his or her views must be safeguarded when handling information disclosed under Article 22b. This is particularly important when the relevant office-holder does not have the means or the power properly to address the whistleblower's concerns and he or she decides to refer the issue to another body for further consideration. In such cases, the office-holder must ensure that, following such referral, the whistleblower may still properly exercise the rights he or she would have enjoyed if the case had not been referred.



29. Principles of good administration also require that the substantive assessment of the information disclosed under Article 22b be carried out carefully, impartially and objectively. The official who discloses such information obviously expects that the authorities informed take action. On the other hand, the primary obligation of these authorities is thoroughly to evaluate the information disclosed before deciding on the appropriate follow-up action. In some circumstances, it may be appropriate not to take any follow-up action at all. However, whatever the decision may be, the authority informed should give reasons for it. Doing so properly and explaining to the whistleblower the steps taken in the handling of his or her disclosure would avoid giving the impression that the authority approached on the basis of Article 22b of the Staff Regulations did not assess the file at all or that there was collusion between the said authority and the institution concerned by the disclosure.

30. In light of the above considerations, the Ombudsman's review in the present case is limited to ascertaining: (i) whether the Council followed its internal procedure correctly, when handling the disclosure the complainant made under Article 22b; and (ii) whether the decision it took following the complainant's disclosure was properly reasoned.

31. The Ombudsman notes that the Council initially failed to follow correctly its own procedure governing the handling of the complainant's correspondence. However, in the course of the present inquiry, the Council did apologise for these deficiencies. In addition, the complainant noted in his observations that he did not suffer any damage because of the improper handling of his correspondence. Therefore, the Ombudsman does not consider it useful to pursue this aspect of the inquiry any further.

32. As regards the assessment of the complainant's disclosure made under Article 22b, the Council emphasised that it lacked the power to investigate the alleged irregularities, which fall within the Commission's sphere of activity. The Ombudsman notes that the complainant did not provide convincing arguments that could put the Council's position into question.

33. Similarly, although the complainant had already approached OLAF before addressing the President of the Council, the Council's suggestion that the complainant contact OLAF again is reasonable in light of the "*new arguments*" he submitted in his complaint to the Ombudsman. In this respect, given that the new arguments refer to an alleged case of fraud, the best placed body to handle such information appears to be OLAF.

34. In light of the foregoing, the Ombudsman considers that no further inquiries into the complainant's allegation and claim against the Council are justified.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

No further inquiries are justified.



The complainant and the Council will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 21 March 2012

[1] Article 22b(1) of the Staff Regulations reads as follows: "*An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:*

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days. "

[2] Article 22a(1) of the Staff Regulations reads as follows: "*Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct. "*

[3] "*Any citizen of the Union ... may ... refer a complaint to the Ombudsman in respect of an instance of maladministration ...*".

[4] In accordance with the provisions of Article 10.1 of the Ombudsman's Implementing provisions, "*[i] f the complainant so requests, the Ombudsman classifies a complaint as confidential. If he considers that it is necessary to protect the interests of the complainant or of a third party, the Ombudsman may classify a complaint as confidential on his own initiative. "*

[5] The Council referred to the provisions of Article 17 of the Staff Regulations, which stipulate that officials shall refrain from any unauthorised disclosure of information received in the line of duty and to Article 11 of its Code of good administrative behaviour, according to which, all staff of the General Secretariat of the Council shall refrain from processing data for non-legitimate purposes or transmitting such data to unauthorised third parties.



[6] In accordance with the provisions of Annex IX to the Staff regulations and of the Deputy Secretary-General's Decision No 73/2006 on the conduct of and the procedure for administrative investigations and the Disciplinary Board.

[7] As provided by Article 66(4) of the Financial Regulation (Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1, as amended).

[8] The Council referred to a Staff Note of 11 December 2006, which establishes detailed rules for the application within the GSC of Articles 22a and 22b of the Staff Regulations.

[9] Namely, the official (a) honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) has previously disclosed the same information to OLAF or to his own institution and has allowed sufficient time for appropriate action.

[10] See Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999 (OJ 2011 C 279, p. 11), paragraph 45, available at <http://www.edps.europa.eu> [Link]