

Decision in case 163/2020/NH on the failure by the European External Action Service (EEAS) to reply to correspondence concerning alleged irregularities in a disciplinary investigation in an EU civilian mission

Decision

Case 163/2020/NH - Opened on 17/02/2020 - Decision on 04/06/2021 - Institutions concerned European External Action Service (No further inquiries justified) | European External Action Service (Maladministration found) |

The case concerned the failure by the European External Action Service (EEAS) to reply to a letter concerning a disciplinary investigation that had taken place in 2017 in an EU civilian mission.

The Ombudsman found that the EEAS had repeatedly failed to reply to the complainant's letters. Even if the EEAS considered that it could not reply on the substance, due to ongoing legal proceedings, it should have replied and explained this to the complainant. The failure to do so was maladministration.

Since, in the context of the inquiry, the EEAS explained why it believes it cannot give a substantive reply to the complainant, the Ombudsman did not make a recommendation to this end. She trusts, however, that the EEAS will take this finding on board going forward.

Background to the complaint

1. The complainant is a lawyer who represents four former staff members of an EU civilian mission. [1]
2. In 2017, the European External Action Service (EEAS), which is the EU institution responsible for the mission, decided to launch a disciplinary investigation against the four staff members. The purpose of the disciplinary investigation was to obtain all relevant facts concerning allegations of abuse of authority, inappropriate behaviour, misconduct and harassment by the four staff members. Following the investigation, the EEAS closed the case without imposing disciplinary measures against the staff members. The investigation did point out some shortcomings and errors in the management practices of two of the staff members concerned.



3. In the course of the following months, the mission did not renew the work contracts of two of the staff members concerned. The other two left the mission on their own initiative.

4. On 24 November 2017, the complainant sent a letter to the EEAS in which she described irregularities during and after the disciplinary investigation at the mission. She argued that the disciplinary investigation had been motivated by personal rivalries, that it had been based on false testimonies and that it had not been carried out impartially. She also argued that the disciplinary investigation had had an impact on the decision not to renew the contracts of two of the staff members. The complainant asked that the EEAS investigate her claims and requested that it recognise the four staff members as whistleblowers in order to give them protection.

5. Having not received any reply from the EEAS, the complainant turned to the European Ombudsman, who opened an inquiry and asked the EEAS to reply to the complainant's letter. The inquiry concerned the EEAS's failure to reply only, and not the substance of the case.

6. The EEAS replied on 15 May 2018. The reply, signed by the 'Deputy Civilian Operations Commander' at the EEAS, [2] said that the EEAS had analysed the complainant's allegations in detail and concluded that the disciplinary investigation had been conducted in compliance with the rules in place. [3] Since the EEAS had replied to the complainant, the Ombudsman closed the inquiry with the conclusion that the matter had been settled by the EEAS.

7. The complainant was not satisfied with the EEAS's reply. In particular, she took issue with the fact that the person who had signed the reply (the Deputy Civilian Operations Commander) had been directly involved in the disciplinary investigation. As such, she considered that he had a conflict of interest, which undermined his conclusion that the investigation had been carried out properly. On 6 February 2019, she wrote to the EEAS to express her concerns about the alleged conflict of interest. She also asked the EEAS to follow up on the concerns she had already expressed in her letter of 24 November 2017.

8. After she failed to receive a reply, the complainant again turned to the Ombudsman on 24 January 2020.

The inquiry

9. The Ombudsman opened an inquiry into the EEAS's failure to reply to the complainant's concerns.

10. In the course of the inquiry, the Ombudsman received the EEAS's replies and the complainant's comments on those replies.

Arguments presented to the Ombudsman



11. In its first reply to the Ombudsman (dated 25 March 2020), the EEAS said that it had become aware that two staff members represented by the complainant had turned to national courts about the matter. Since legal proceedings were ongoing on the subject matter of the complaint to the Ombudsman, the EEAS was not in a position to respond to the complainant. The EEAS argued that, in line with the EU Treaties [4], the Ombudsman should not conduct an inquiry because the matter had become the subject of legal proceedings.

12. The complainant disagreed with the EEAS's arguments. On 14 April 2020, she wrote a letter addressed both to the Ombudsman and to the EEAS. She argued that the legal proceedings concerned exclusively the decision by the mission not to renew the work contracts of the staff members concerned. The disciplinary investigation was mentioned in the legal proceedings merely to provide context to the judges. In addition, the legal proceedings were against the mission (which has legal personality when it comes to work contracts) and not against the EEAS. The disciplinary investigation had been carried out by the EEAS, over which national courts have no competence.

13. As the EEAS had still not replied to the complainant by July 2020, the Ombudsman sent a further letter to the EEAS, asking it to reply. The Ombudsman also sent the EEAS a preliminary assessment of the case, which stated that the EEAS had failed to reply to the complainant on two occasions, and did so only after the Ombudsman's intervention.

14. The EEAS replied to the Ombudsman on 2 October 2020. It maintained its position that any information it were to provide in the context of the Ombudsman's inquiry could be used by the two former staff members in the course of the ongoing legal proceedings. The former staff members had invoked the disciplinary procedure as a reason for the decision not to renew their contracts, and it could thus not be excluded that the national courts would assess the disciplinary investigation as part of the legal proceedings.

15. The EEAS maintained that the disciplinary investigation in 2017 had been conducted in compliance with the applicable rules.

16. The complainant maintained that the EEAS kept refusing to give its view on the issue of the disciplinary investigation, and was using the court proceedings as an excuse. The complainant argued that the EEAS failed to adequately explain why it was refusing to give its view, in particular on the conflict of interest issue.

The Ombudsman's assessment

17. The Ombudsman's inquiry concerns the EEAS's *failure to reply* to the complainant on more than one occasion. The ongoing legal proceedings are not about the EEAS's failure to reply to the complainant. The Ombudsman thus disagrees with the EEAS's position that she should not be conducting her inquiry along the lines set out above.

18. The Ombudsman finds that the EEAS failed to reply to the complainant's letters on two



occasions (the letters of 6 February 2019 and of 14 April 2020) and that it replied only following the Ombudsman's intervention. Taking into account that a previous inquiry by the Ombudsman related to the same matter also concerned the EEAS's failure to reply to the complainant, the EEAS has refused to reply to the complainant on three occasions.

19. The Ombudsman appreciates that the EEAS wants to proceed cautiously given that the matter is now before the courts. However, the fact that there are ongoing legal proceedings related to a certain subject matter does not give an EU institution the right not to reply to letters sent to it on that matter. If the EU institution concerned considers that it cannot reply on the substance, it should explain why in its reply.

20. In light of the above, the Ombudsman finds that the EEAS's repeated failure to reply to the complainant's letters constitutes maladministration. Given that, in the context of the inquiry, the EEAS has explained why it believes it cannot give a substantive reply to the complainant, the Ombudsman no longer needs to make a recommendation to address this. She trusts, however, that the EEAS will take this finding on board going forward.

21. The complainant also wanted the Ombudsman to inquire into the substantive concerns put forward in the letters to the EEAS, that is, the alleged irregularities in the 2017 disciplinary investigation. However, the Ombudsman finds convincing the EEAS's argument that the substantive concern is covered by the ongoing legal proceedings. The complainant's main grievance before the courts is that the disciplinary investigation had a negative impact on the mission's decision not to renew the work contracts. The Ombudsman thus finds that the two topics are inextricably linked. The Ombudsman therefore cannot inquire into the substance of the complainant's concerns because of the ongoing legal proceedings.

22. The Ombudsman finds it regrettable that the EEAS failed to address the complainant's concern about a potential conflict of interest in its reply of 15 May 2018, despite several reminders from the complainant over three years. However, as the EEAS has now maintained, in a letter signed by another staff member, that the disciplinary investigation was carried out in line with the applicable rules, the Ombudsman finds that no further inquiries are necessary on this aspect of the complaint.

Conclusions

Based on the inquiry, the Ombudsman closes this case with the following findings:

There was maladministration by the EEAS when it failed to reply to the complainant's letters.

No further inquiries are justified regarding the complainant's argument that the EEAS's reply of 15 May 2018 was undermined by a conflict of interest.

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



Emily O'Reilly European Ombudsman

Strasbourg, 04/06/2021

[1] The European Union undertakes overseas operations in the form of “EU missions”, using civilian and military instruments in several countries in three continents (Europe, Africa and Asia), as part of its Common Security and Defence Policy. The European External Action Service (EEAS) is responsible for such missions.

[2] The Deputy Civilian Operations Commander assists and, when necessary, replaces the Civilian Operations Commander, who is the head of the Civilian Planning and Conduct Capability (CPCC), which is the EEAS Directorate serving as the operational headquarters for the EU civilian missions.

[3] The Code of Conduct and Discipline for EU Civilian CSDP Missions, available at:

<https://eeas.europa.eu/headquarters/headquarters-homepage/15558/code-conduct-and-discipline-eu-civilian-csdp-r>
[Link]

[4] Article 228 of the Treaty on the Functioning of the EU sets out that “ *In accordance with his duties, the Ombudsman shall conduct inquiries (...) except where the alleged facts are or have been the subject of legal proceedings .*”