

Decision of the European Ombudsman on complaint 620/2004/PB against the European Commission

Decision

Case 620/2004/PB - Opened on 05/04/2004 - Decision on 14/12/2005

A Commission official had lodged a complaint alleging moral harassment against the complainant, also a Commission official. The Commission conducted an *administrative inquiry* into these allegations. The inquiry took place at a time when it appears that there were no written rules regarding the conducting of such an inquiry.

In his complaint to the Ombudsman, the complainant alleged, among other things, that the team conducting the administrative enquiry had breached his rights of defence.

In his decision, the Ombudsman noted that purpose of administrative inquiries may vary widely, and may give rise to a recommendation as to the need for disciplinary proceedings against individual officials.

The Ombudsman pointed out that respect for the rights of defence constitutes a general principle of Community law which must be observed even in the absence of an express provision, and that the principle applies to any procedure that may result in a decision perceptibly affecting in an adverse way a person's interests.

In the present case, a complaint had been made specifically against the complainant. The complaint contained allegations of the serious wrongdoing of harassment on the complainant's part. The Commission decided to open an administrative inquiry specifically in order to examine those allegations against the complainant. In doing so, the Commission set up a team of investigators, which took testimonies from a large number of witnesses and also heard the complainant. As pointed out in the Commission's opinion in the present case, the investigating team concluded in the inquiry report that there was evidence indicating moral harassment by the complainant. Following this report, a proposal was made for the issuance of an "admonition" to the complainant - that is, a kind of warning - that would, had it been issued, have formed part of the complainant's file. Moreover, it emerged from the Commission's opinion that the findings in the inquiry report would be, and were, in fact, taken into account by the relevant director general for his decision as to whether disciplinary proceedings should be initiated against the complainant.

The Ombudsman found that the principle of the right to a prior hearing required that the



complainant should have been informed of the preliminary findings of the team that conducted the administrative inquiry, and of the substance of the evidence relied upon *before* the inquiry report was finalised. It appeared that the investigating team in this case had effectively finalised the contested administrative inquiry report and forwarded it to the relevant director general without informing the complainant of, and without giving him a reasonable opportunity to comment on, its preliminary findings and the evidence relied upon. In the Ombudsman's view, this amounted to a failure to respect the complainant's right of defence, and therefore to an instance of maladministration.

Strasbourg, 14 December 2005

Dear Mr X.,

On 25 February 2004, you made a complaint to the European Ombudsman concerning Commission inquiries originating in a harassment claim made against yourself. On 17 March 2004, I received your addendum.

On 5 April 2004, I forwarded the complaint to the President of the European Commission, and informed you accordingly. In an e-mail dated 12 April 2004, you clarified your allegations. On 6 May 2004, I informed the Commission of your clarifications.

The Commission sent its opinion on 22 June 2004. I forwarded it to you with an invitation to make observations, which you sent on 23 July 2004.

On 17 November 2004, I sent the Commission a letter of further inquiries, and informed you accordingly on the same date. The Commission sent its reply on 28 January 2005, and I forwarded it to you for observations. You sent your observations on 28 February 2005.

I am writing now to let you know the results of the inquiries that have been made.

I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

The complaint was submitted by a Commission official, who had been accused of moral harassment by another official, Mr A (1) . The complaint concerned the Commission's administrative inquiry into the complaint of moral harassment and its response to the complainant's subsequent requests for an examination of that inquiry.

On 12 October 2001, Mr A. had lodged a request for assistance pursuant to Article 24 of the Staff Regulations of Officials of the European Communities ("the Staff Regulations"), alleging moral harassment by the complainant. On 17 October 2001, Mr B., Head of Unit within Directorate-General Personnel and Administration of the European Commission ("DG ADMIN"), assisted by Mr C., were asked to conduct an administrative inquiry into these allegations. The complainant, accompanied by his lawyer, was heard by Mr B. and Mr C. on 27 November 2001.



On 26 March 2002, the complainant and his lawyer were given the opportunity to examine Mr B.'s and Mr C.'s inquiry report, apart from the annexes, on the Commission's premises. The report concluded that there was evidence indicating that the complainant had morally harassed Mr A. and other officials. The complainant submitted his comments on the report on 30 March 2002.

On 16 April 2003, the complainant made a request under Article 90(1) of the Staff Regulations ("Article 90(1) request") and a request for assistance under Article 24 of those regulations. He sought protection and assistance in relation to the actions of the two officials who had conducted the administrative inquiry, and made a claim for compensation for their alleged wrongdoings. His grievances may be summarised as follows:

- The complainant had not been given full access to all relevant documents of the inquiry, including the complaint by Mr A., the mandate of Mr B. and Mr C., the statements made by other officials, and the full report drawn up by Mr B. and Mr C.
- The complainant had been intimidated and put under pressure. At the hearing on 27 November 2001, Mr C. had been introduced to him as "Dr" C., the reason for which the complainant assumed to be that he "*should view [Dr C.] as someone to confide in as a Doctor rather than as an investigator into my conduct*"; Mr C. had raised his voice during the hearing of the complainant on 27 November 2001; the summary report of the hearing given to the complainant had been signed; and the complainant had been allowed only two days to submit his comments on that summary.
- Damaging statements had been made in connection with the inquiry. According to the complainant, the inquiry report contained a statement by Mr B. and Mr C., which was not shown to the complainant, to the effect that he was "*probably not a good '...' as two other officials stated, in audition statements unseen, that I was arrogant*". Furthermore, the complainant suspected that Mr B. and Mr C. might, while the inquiry was ongoing, have contacted his head of service and his future head of unit in order to inform them about their findings.
- The complainant suspected that Mr B. had asked the complainant's superior to issue an "admonition" against him, based on the findings that he and Mr C. had made. The complainant appeared to consider that this was unlawful, an "admonition" being a sanction not mentioned in the Staff Regulations.

The complainant asked the Commission for financial compensation for stress, suffering, and damage to his reputation, and requested the Commission to pay his legal expenses incurred in relation to the inquiry.

Following the complainant's Article 90(1) request, DG ADMIN opened an administrative verification (2) . The complainant was heard by the designated investigator, Mr D., on 3 June 2003. On the same date, he was informed by DG ADMIN that no disciplinary measures would be taken against him on the basis of Mr A.'s harassment complaint, and that the administrative inquiry had been closed.

The four-month deadline stipulated in Article 90(1) of the Staff Regulations passed without a decision being communicated to the complainant. On 29 September 2003, the complainant therefore made a complaint, under Article 90(2) of the Staff Regulations ("Article 90(2)



complaint"), against the Commission's implicit rejection of his Article 90(1) request. On 4 March 2004, the Commission rejected the complaint.

It appeared from the Commission's decision that the investigator in charge had interviewed Mr B., Mr C., and Mr E., a staff representative who had been present at the hearing of the complainant held on 27 November 2001. The Commission rejected the complainant's grievances as being unfounded or lending themselves to diverging interpretations of the events and facts concerned.

The Commission in particular emphasised that the team conducting the administrative inquiry had not been obliged to give the complainant the whole file of the inquiry. It stated that, " *to satisfy the principle of confidentiality* ", the complainant could not have been given a copy of the inquiry report the said team had prepared. It furthermore pointed out that a Commission decision laying down rules for administrative inquiries had been adopted subsequent to the inquiry here concerned, and stated that "[i] t is important to note in this context that [that Decision] offers new procedural options that did not previously exist. Before that Decision, [the Commission] allowed [an] official subject to an administrative inquiry to read the inquiry report but not take a copy of it, so as to protect confidentiality and the need for discretion since this was not a disciplinary procedure. Only since the adoption of the above Decision does the official concerned have access to the inquiry conclusions before the final report is drawn up. So, in the absence of a legal basis, the appointing authority is of the opinion that [the Commission] did not have to provide the inquiry report to [the complainant]".

The Commission also pointed out that the complainant had in fact been promoted to grade A* in 2002, and that the inquiry had therefore not resulted in any concrete professional detriment to the complainant.

In his complaint to the Ombudsman, the complainant appeared to allege that the Commission had failed to adequately examine the actions that he had contested in his Article 90(1) request and in his Article 90(2) complaint. He referred to the Commission's handling of the matter generally, and in particular to the fact that the Commission had, in his view, failed to call additional witnesses, and that it had given Mr B. and Mr C. access to Mr D.'s administrative verification report before that report was sent to the Appointing Authority.

In his complaint to the Ombudsman, the complainant made, in summary, the following allegations:

- His rights of defence had not been respected in the handling of an administrative inquiry of which he had been the subject.
- There had been an attempt to apply a sanction against him which was not provided for in the Staff Regulations.
- The Commission had failed adequately to examine the actions that he had contested in his Article 90(1) request and in his Article 90(2) complaint.
- The Commission's decision following his Article 90(1) request and his Article 90(2) complaint had been unreasonably delayed.



He made the following claims:

- The Commission should compensate him for the behaviour of the officials whose actions he had contested in his Article 90(1) request and in his Article 90(2) complaint.
- The Commission should pay his legal expenses.

THE INQUIRY

The Commission's opinion

The Commission submitted, in summary, the following opinion:

Background

Following the hearing of 19 officials, Mr B. and Mr C. had concluded in their inquiry report that there was evidence indicating moral harassment by the complainant. However, "[b] *ecause there was no precedent* ", the Director General of Directorate-General Personnel and Administration of the European Commission ("DG ADMIN") had decided not to open disciplinary proceedings on the basis of Annex IX of the Staff Regulations until the outcome of other inquiries became known. By doing so, DG ADMIN had " *expected to better ascertain the relative gravity of different sets of facts* ".

The Commission emphasised that the administrative and legal context concerning administrative inquiries had evolved significantly since the administrative inquiry carried out by Mr B. and Mr C. When the administrative inquiry had been opened on 17 October 2001, the Commission did not have a disciplinary office, and inquiries were largely conducted on the basis of past practice. On 19 February 2002, that is, after the completion of the investigation report drawn up by Mr B. and Mr C., Commission Decision C(2002)540 had entered into force. This decision created the Commission's disciplinary office ("IDOC") and defined precise rules for the conduct of administrative inquiries, including rules aimed at protecting the persons subject to such inquiries. The decision applied to pending inquiries. Commission Decision C(2002)540 was replaced on 1 May 2004 by Commission Decision C(2004)1588 on the general implementing provisions on the conduct of administrative inquiries and disciplinary procedures. Annex IX of the amended Staff Regulations furthermore contains new rules for administrative inquiries.

The complaint

With regard to the allegation that the complainant's rights of defence had not been respected, the Commission stated that there is a " *radical distinction* " between two procedural stages: *disciplinary proceedings* , where officials must clearly have the means to defend themselves because a decision affecting their rights might be taken; and, *administrative inquiries* , which are part of a preparatory procedure aimed at establishing facts and possible individual responsibilities.

During the administrative inquiry, the investigating officials of DG ADMIN (now IDOC) did not disclose complaints from alleged victims of harassment. This was due to a need to protect the investigation and the confidentiality of the person having made the harassment complaint. In the present case, the complainant and his lawyer (a) had nevertheless been informed in general terms about the harassment complaint, through the complainant's superior; (b) had, contrary to what had been claimed by the complainant, seen the mandate of the administrative inquiry; (c)



had had access to the investigation report drawn up by Mr B. and Mr C., apart from the annexes.

Commission Decision C(2002)540 did not give the persons subject to an administrative inquiry any right of access to all the documents concerning them. At the end of the administrative inquiry, the official concerned was offered the opportunity to comment on the conclusions before a report was finalised. However, the official would not be given access to a copy of the complaint nor to the full inquiry report.

According to the Commission, the rule that, at the stage of the administrative inquiry, access to the investigation file was limited to the "*conclusions of the report in so far as they mention facts that concern him*" (Article 5(5) of Commission Decision C(2002)540), and not the entire file, had been confirmed in the amended Staff Regulations. Article 2(2) of Annex IX of the Staff Regulations, as amended, provided that "[t]he Appointing Authority shall inform the person concerned when the investigation ends, and shall communicate to him the conclusions of the investigation report and, on request and subject to the protection of the legitimate interests of third parties, all documents directly related to the allegations made against him." The third parties to be protected include the alleged victims of harassment.

The Commission stated that the situation was entirely different when the Appointing Authority opened disciplinary proceedings. In that case, a decision affecting the rights of the individual concerned might be adopted, and therefore the Staff Regulations (in their previous as well as in their new versions) provided for full access to the file.

With regard to the actions of Mr B. and Mr C. in relation to the hearing of the complainant on 27 November 2001, the Commission submitted that the complainant's allegations were unfounded. It thus confirmed the finding of the Appointing Authority, according to which introducing Mr C. as "Dr" C. was not intended to disconcert the complainant. It also confirmed the finding that the question as to whether Mr C. had raised his voice during the hearing had proved impossible to clarify, due to divergent statements by the persons present at the hearing as to what had really happened. With regard to the signed summary report of the hearing of 27 November 2001, the Commission stated that it was normal practice to agree on the summary report immediately after the hearing, regardless of how much time this could take, before the person heard had left the investigating authority's premises. The investigating officials accepted not to follow this normal practice at the complainant's request, in light of his assurance that he would submit his comments within two days. As for the signing of the summary report, the purpose of providing a signed draft was merely to show that the investigating officials considered that the summary report accurately reflected the statements made during the hearing. It was clearly not the case that it was presented to the complainant signed in order to put pressure on him. In any event, the summary report had no standing whatsoever without the complainant's signature.

Concerning the allegedly damaging statements made during the inquiry, the Commission first stated that it was unclear why Mr B. and Mr C. made the statement that the complainant was probably not a 'good ... ' in a report aimed at establishing the facts concerning alleged moral harassment. The investigator in charge of the administrative verification procedure, Mr D., had



asked Mr B. and Mr C. about this. Both had replied that they understood the complainant to have a reputation as a good "..." and added that they were not in a position to make their own, let alone a negative, judgment. With regard to the contacts made to the complainant's director and his future head of unit, the Commission stated that alerting the complainant's future head of unit to a situation, of which everyone in the complainant's service was aware and which he would invariably have to address once he took up his new functions, seemed only reasonable.

In relation to the allegation of an allegedly unlawful sanction having been proposed against the complainant, the Commission stated that the Appointing Authority had asked the complainant's director to send him an "admonition". The Commission furthermore stated that Article 86 of the Staff Regulations (now Article 9 of Annex IX of the amended Staff Regulations) set out a comprehensive list of disciplinary actions (written warning, reprimand etc.) which did not include an "admonition". An "admonition" was therefore clearly not a disciplinary sanction. Rather, an "admonition" was close to the "warning" recently introduced by the amended Staff Regulations, which is expressly defined as not being a disciplinary sanction (Article 3(b) of Annex IX). The Commission stated that this issue was in any event a moot point since no such "admonition" had ever been issued. The Commission stressed that the complainant had obtained a promotion to grade A* in 2002.

With regard to the allegedly inadequate examination of his Article 90(1) request and his Article 90(2) complaint, the Commission emphasised that the administrative verification procedure was aimed at establishing facts. It was not a fully-fledged administrative inquiry into the earlier allegations against the complainant. The investigator in charge had concluded that it sufficed to hear the complainant, Mr B., Mr C., and Mr E., the staff representative present at the hearing of the complainant on 27 November 2001.

With regard to the allegedly unreasonable delays, the Commission referred to its administrative verification carried out in response to the complainant's Article 90(1) request, the results of which had been available on 5 August 2003, and the fact that the complainant's request had been implicitly rejected when the Commission did not provide him with an express decision on that request within the four-month deadline in Article 90(1). With regard to the complainant's Article 90(2) complaint of 29 September 2003, the Commission stated that the complainant, Mr B. and Mr C. had been invited to submit their comments on the report drawn up by Mr B. following his administrative verification procedure. It was not until the Commission had received those comments, on 16 December 2003 and 12 January 2004, that the Commission had had the necessary elements to take a decision on the Article 90(2) complaint. The Commission stated that *"considering in particular the complexity of the complaint, the Commission believes that it has handled this case very carefully. It was this very complexity and care that impaired the Appointing Authority's ability to provide a reasoned reply to the complainant more quickly"*.

With regard to the allegation that the Commission had failed to adequately examine the actions that he had contested in his Article 90(1) request and in his Article 90(2) complaint, the Commission rejected the allegation, giving a general outline of its handling of the matter. Regarding the alleged failure to call witnesses, it stated that Mr D. had decided that it would suffice to hear the two officials who conducted the administrative inquiry, a staff representative



and the complainant. It stressed that on the basis of the witnesses' statements, the Appointing Authority had had no doubt that the complainant's allegations regarding Mr B. and Mr C. were unfounded. As regards Mr B.'s and Mr C.'s access to the verification report, the Commission explained that the purpose of giving access had been to make sure that the facts had been correctly established.

It followed from the Commission's rejection of the complainant's allegations that it did not intend to meet the complainant's claims.

The complainant's observations

In his observations, the complainant maintained his allegations and claims and made a number of detailed remarks related thereto. Regarding the question of access to the file, he pointed out that the Memorandum to Commission Decision C(2002)540 stated that "[o]fficials are entitled to be given copies of all documents relating to them". He argued that the Commission's position in the present case was not consistent with this statement.

The complainant furthermore emphasised that he hoped that the outcome of the Ombudsman's inquiry would result in more clarity and transparency in the conducting of inquiries carried out by DG ADMIN, and that, in particular, the rights of defence would be better respected in the future.

Further inquiries *The further inquiries*

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Commission to submit additional information on the following matters: (1) the legal basis for asking the complainant's superior to issue an "admonition"; (2) when and how the Commission had sent the complainant a copy of the inquiry report; (3) when and how the Commission had allowed the complainant to see the mandate of Mr B. and Mr C.; and (4) the extent to which the Commission's position was consistent with the Memorandum published together with Commission Decision C(2002)540.

The Commission's reply

(1) In its reply, the Commission referred to its earlier remarks and stated that " *the fact that a superior has authority over his subordinates unquestionably entitles him to give them an immediate informal warning, either orally or in writing, without reporting the matter for possible disciplinary proceedings* ".

(2) The Commission stated that following adoption of Commission Decision C(2002)540 of 19 February 2002, its practice was to allow the official concerned to comment on the conclusions of the administrative inquiry report before the finalisation of the report. In the present case, the head of the investigating team informed the complainant on 14 March 2002 that he had sent the report to the Director-General of DG ADMIN, but that, in light of the Commission decision referred to above, he had decided to allow him access to the inquiry report and to comment on it. The complainant and his lawyer were given access to the full report on 26 March 2002 (apart from the annexes). Thus, the complainant was not given access only to the conclusions of the report. On 30 April 2004, the complainant submitted his comments on the report, challenging its findings.

(3) The Commission did not have any written evidence that the complainant had actually read



the mandate of Mr B. and Mr C. However, the minutes of the hearing held on 27 November 2001, signed by the complainant, showed that he had been made aware of the subject of the administrative inquiry.

(4) It is stated in the Memorandum to Commission Decision C(2002)540 that "[o] fficials are entitled to be given copies of all documents relating to them ". However, this must be interpreted in light of the Decision itself, namely Article 5(5) which provided that "[a] t the end of the enquiry, and before a report is finalised an official has the right to comment on the conclusions in so far as they mention facts that concern him ". The Commission noted that Article 7(3) of Commission Decision C(2002)540 provided that "[o] n receipt of the report and on request of the official concerned, the appointing authority shall provide the official with copies of all documents directly related to the allegations made against him or her. " However, Article 7(3) appeared under Chapter III of the Decision, "Article 87 hearing" (referring to Article 87 of the Staff Regulations at the time (3)). Administrative inquiries, on the other hand, were regulated under Chapter II of the Decision. The Commission concluded that Article 7(3) would evidently have been unnecessary in Chapter III of the Decision if the official concerned had already received copies of all documents during the administrative inquiry.

The complainant's observations

In his observations, the complainant maintained his allegations and claims.

THE DECISION

1 Alleged failure to respect rights of defence

1.1 The complaint was submitted by a Commission official, an "...". On 12 October 2001, Mr A., another Commission official, had lodged a request for assistance pursuant to Article 24 of the Staff Regulations of Officials of the European Communities ("the Staff Regulations"), alleging moral harassment by the complainant. On 17 October 2001, Mr B., Head of Unit of Directorate General for Personnel and Administration of the European Commission ("DG ADMIN"), assisted by Mr C., received a mandate to conduct an administrative inquiry into these allegations. The complainant, accompanied by his lawyer, was heard by Mr B. and Mr C. on 27 November 2001. On 26 March 2002, the complainant and his lawyer were given the opportunity to examine Mr B.'s and Mr C.'s inquiry report at the Commission's premises. The complainant submitted his comments on the report on 30 March 2002. It was concluded in the report that there was evidence to indicate that the complainant had morally harassed Mr A. and other officials. It was decided, however, not to open disciplinary proceedings. In the meantime, the Appointing Authority asked the complainant's director to send him an admonition ("*admonestation*" in French). On 16 April 2003, the complainant made a request under Article 90(1) of the Staff Regulations ("Article 90(1) request") and a request for assistance under Article 24 of the Staff Regulations. He sought protection and assistance in relation to the actions of Mr B. and Mr C., and made a claim for compensation for their alleged wrongdoings. He also asked for an administrative inquiry to be opened. DG ADMIN opened an administrative verification, designating Mr D. as the official in charge. Mr D. interviewed Mr B., Mr C. and the staff representative who had been present at the hearing on 27 November 2001, and conducted a formal hearing of the complainant on 3 June 2003. On that same date, he was informed by DG ADMIN that no disciplinary measures would be taken against him on the basis of Mr A.'s



harassment complaint, and that the administrative inquiry had been closed. Not having received a decision in response to his Article 90(1) request within the stipulated four-month deadline, the complainant submitted a complaint under Article 90(2) of the Staff Regulations ("Article 90(2) complaint"). On 4 March 2004, the Appointing Authority adopted a decision rejecting the complainant's Article 90(2) complaint.

1.2 In his complaint to the Ombudsman, the complainant alleged that his rights of defence had not been respected in the handling of the administrative inquiry of which he had been the subject. He raised a number of points:

- The complainant had not been given full access to all relevant documents of the inquiry, including the complaint by Mr A.; the mandate of Mr B. and Mr C.; the statements made by other officials; and the full report drawn up by Mr B. and Mr C.
- The complainant had been intimidated and put under pressure. At the hearing of 27 November 2001, Mr C. had been introduced to him as "Dr" C., the reason for which the complainant assumed to be that he "*should view [Dr C.] as someone to confide in as a Doctor rather than as an investigator into my conduct*". Mr C. had raised his voice during the hearing of the complainant on 27 November 2001; the summary report of the hearing given to the complainant had been signed, and the complainant had been allowed only two days to submit his comments on that summary.
- Damaging statements had been made in connection with the inquiry. According to the complainant, the inquiry report contained a statement by Mr B. and Mr C., which was not shown to the complainant, to the effect that the complainant was "*probably not a good ... as two other officials stated, in audition statements unseen, that I was arrogant*". Furthermore, the complainant suspected that Mr B. and Mr C. might, while the inquiry was ongoing, have contacted his head of service and his future head of unit in order to inform them about their findings.

1.3 In its opinion, the Commission first explained that the administrative and legal context concerning administrative inquiries had evolved significantly since the administrative inquiry carried out by Mr B. and Mr C. When the administrative inquiry had been opened on 17 October 2001, the Commission did not have a disciplinary office, and inquiries were largely conducted on the basis of past practice. On 19 February 2002, that is, after the completion of the investigation report drawn up by Mr B. and Mr C., Commission Decision C(2002)540 had entered into force. This decision had created the Commission's disciplinary office ("IDOC") and defined precise rules for the conduct of administrative inquiries, including rules protecting the persons subject to such inquiries. The decision applied to pending inquiries. Commission Decision C(2002)540 had been replaced on 1 May 2004 by Commission Decision C(2004)1588 *on the general implementing provisions on the conduct of administrative inquiries and disciplinary procedures*. Annex IX of the amended Staff Regulations furthermore contains new rules for administrative inquiries.

1.4 With regard to the alleged failure to respect the complainant's rights of defence during the administrative inquiry, the Commission rejected the complainant's allegation. It emphasised the distinction between *administrative* and *disciplinary* inquiries. According to the Commission, the former are merely part of a preparatory procedure aimed at establishing facts and possible



individual responsibilities; disciplinary proceedings, on the other hand, may result in a decision being taken against the official concerned, who should therefore clearly be in a position to establish a defence. Commission Decision C(2002)540 gave the person subject to an administrative inquiry the right to see only the *conclusions* of the report drawn up on the basis of the inquiry. This reflected the established administrative practice in place before the adoption of that decision. Furthermore, the rule that, at the stage of the administrative inquiry, access to the investigation file was limited to the conclusions of the report had, according to the Commission, been recently confirmed in the amended Staff Regulations, Article 2(2) of Annex IX ("*the Appointing Authority shall inform the person concerned when the investigation ends, and shall communicate to him the conclusions of the investigation report and, on request and subject to the protection of the legitimate interests of third parties, all documents directly related to the allegations made against him* "). According to the Commission, the third parties to be protected included the alleged victims of harassment. The Commission also noted, however, that the complainant had in fact been allowed access to the text of the inquiry report, apart from the annexes.

1.5 In their replies made in the context of further inquiries conducted by the Ombudsman, the Commission and the complainant confirmed their positions.

1.6 The Ombudsman first observes that the Commission stated in its 2002 consultative document "The Reform of Disciplinary Proceedings" (4) that "[...] *the Commission may organise an administrative enquiry although these are not explicitly foreseen by the Staff Regulations. The scope and purpose of administrative enquiries vary widely. The object may be to elucidate a particular situation without focussing on individuals. Equally, however, an enquiry may be organised in order to clarify individual responsibilities for suspected wrong-doing. In both cases, officials can be mandated by the Director General of DG ADMIN to produce a report, including, if appropriate, a recommendation as to the need for disciplinary proceedings against any individual* " (p. 5).

1.7 According to settled case-law of the Community Courts, respect for the rights of defence constitutes a general principle of Community law which must be observed even in the absence of an express provision (5) . This principle applies to any procedure which may result in a decision perceptibly affecting in an adverse way a person's interests (6) .

1.8 In the present case, a complaint had been made by Mr A. to the Commission, specifically against the complainant. The complaint contained allegations of the serious wrongdoing of *harassment* on the complainant's part. The Commission decided to open an administrative inquiry specifically in order to examine those allegations against the complainant. In doing so, the Commission set up a team of investigators, which took testimonies from 19 witnesses and also heard the complainant. As pointed out in the Commission's opinion in the present case, the investigating team concluded in the inquiry report that there was evidence indicating moral harassment by the complainant. Following this report, a proposal was made for the issuance of an "admonition" to the complainant - that is, a kind of warning - that would, had it been issued, have formed part of the complainant's file (7) . Moreover, as it emerges from the Commission's opinion, the findings in the inquiry report would be, and were, in fact, taken into account by the



Director General of DG ADMIN in taking a decision as to whether disciplinary proceedings should be initiated against the complainant.

1.9 Thus, although the conclusions in the inquiry report did not amount to an administrative decision directly affecting the rights and interests of the complainant, they were capable of having negative consequences for the complainant and might result in a decision perceptibly affecting in an adverse way his legitimate interests. The Ombudsman therefore takes the view that although, at the time of the administrative inquiry here concerned, it appears that there were no written rules regarding the right to a hearing in the context of such an inquiry, the contested inquiry report, which completed the administrative inquiry procedure, could not be finalised without due respect for the rights of defence (8) .

1.10 Furthermore, the Ombudsman considers that observance of the right to a prior hearing in the context of an administrative inquiry such as the one at issue, requires, as a matter of principle, that the person concerned should be given notice of the preliminary factual findings made by the investigators and of the substance of the relevant supporting evidence. Any decision not to communicate such information to the person concerned should be based on specific considerations relevant to the facts of the administrative inquiry concerned. Such considerations could include third party interests, such as highly sensitive privacy issues (9) . Moreover, in applying the rights of defence in the context of an administrative inquiry such as the one at issue, regard must be had to the fact that the potential negative impact of the inquiry on the rights and interests of the person concerned is less significant than in the case of disciplinary proceedings. In the same context, due consideration must also be given to the Administration's legitimate interests, such as preserving the confidentiality of its investigations in order to minimise disruption in the workplace. Taking into consideration these factors, the Ombudsman finds that the right to a prior hearing in the present case did not require all the materials included in, or annexed to, the inquiry report, or the full file of the administrative inquiry, including Mr A's complaint or the mandate of the investigators, or the statements made by other officials, to be communicated to the complainant. Relatedly, the Ombudsman notes that the complainant could exercise his rights of defence in a meaningful way, without being granted access to the foregoing documents, provided that he had been notified of the preliminary factual findings made by the investigators and of the substance of the relevant supporting evidence. The Ombudsman further finds that the principle of the right to a prior hearing did, however, require that the complainant should be informed of those preliminary findings and of the substance of the evidence relied upon *before* the inquiry report was finalised. It appears from the Commission's opinion in this case that the head of the investigating team informed the complainant on 14 March 2002 that he had already sent the inquiry report to the Director-General of DG ADMIN. Although Mr B. subsequently decided to allow the complainant access to the inquiry report (without the annexes) and to comment on it, it appears that the investigating team had effectively finalised the contested administrative inquiry report, and forwarded it to the Director-General of DG ADMIN, without informing the complainant of, and without giving him a reasonable opportunity to comment on, its preliminary findings and the evidence relied upon. In the Ombudsman's view, this amounted to a failure to respect the complainant's right of defence, and therefore to an instance of maladministration. A critical remark is made below.



1.11 The complainant also alleged that he had been intimidated and put under pressure. More specifically, the complainant stated that Mr C. had been introduced to him as "Dr" C., which made him assume that he " *should view [Dr C.] as someone to confide in as a Doctor rather than as an investigator into my conduct* ". He also argued that Mr C. had raised his voice during the hearing of the complainant on 27 November 2001. And he pointed out that the summary report of this hearing given to him had been signed, and that he had been allowed only two days to submit his comments on that summary.

1.12 In its opinion, the Commission essentially confirmed its previous position that introducing Mr C. as "Dr" C. was not intended to disconcert the complainant. It also confirmed that the question as to whether Mr C. had raised his voice during the hearing had proved impossible to clarify due to divergent statements of the persons who had been present at the hearing as to what had happened. With regard to the signed summary report of the hearing of 27 November 2001, the Commission explained that the purpose of providing a signed draft was merely to show that the investigating officials considered that the summary report accurately reflected the statements made during the hearing. It was thus not presented to the complainant signed in order to put pressure on him. In any event, the summary report had no standing whatsoever without the complainant's signature, as is shown by the fact that the investigating officials awaited his comments and accepted to include most of them in the final summary report of the hearing. The Commission furthermore stated that such summary reports are normally finalised and signed by all the parties concerned on the same day. The complainant had exceptionally been allowed to take the summary report with him.

1.13 The Ombudsman notes that the complainant, in essence, alleges that the investigators acted in a misleading, abusive and oppressive manner in the context of the hearing that took place on 27 November 2001 and in the context of the adoption of the relevant summary report. As to the complainant's first argument, the Ombudsman cannot exclude that introducing an investigating officer during a hearing as "Dr" may amount to an intimidating or misleading action, taking into consideration the totality of the surrounding circumstances. However, in the present case, the mere fact that the complainant assumed that he " *should view [Dr C.] as someone to confide in as a Doctor rather than as an investigator into my conduct* " is not sufficient to establish such reprehensible conduct on the part of the investigators. Hence, the Ombudsman cannot find maladministration as regards this aspect of the case.

1.14 As regards Mr C.'s alleged raising of his voice during the hearing, the Ombudsman notes that the Commission concluded, following its administrative verification, that there were divergent recollections regarding this matter. Since no conclusive evidence was submitted to the Ombudsman on this matter, the Ombudsman considers that the complainant's allegation has not been substantiated. Hence, the Ombudsman cannot find maladministration as regards this aspect of the case.

1.15 With regard to the fact that the complainant received a signed summary report of the hearing, the Ombudsman notes the Commission's statement that the purpose of providing a signed draft was merely to show that the investigating officials considered that the summary



report accurately reflected the statements made during the hearing. The Ombudsman considers that the Commission's explanation is reasonable and adequate. Furthermore, since the Ombudsman has not been provided with any evidence casting doubt on the truthfulness of this explanation, the Ombudsman finds no maladministration regarding this aspect of the case. With regard to the complainant's allegation that he was given only two days to submit his comments on the summary report of the hearing, the Ombudsman notes that the complainant has not established that the two-day deadline for checking, and commenting on, the factual accuracy and the adequacy of the contents of the summary report, was unreasonably short. Hence, the Ombudsman cannot find maladministration as regards this aspect of the case.

1.16 With regard to the complainant's view that damaging statements had been made in connection with the inquiry, the Ombudsman refers to his finding in point 3 below.

1.17 With regard to the information conveyed to the complainant's superiors, the Commission has stated that alerting the complainant's future head of unit to a situation of which everyone in the complainant's service was aware and which he would invariably have to address once he took up his new functions seemed only reasonable. In light of the facts of the present case, the Ombudsman does not consider that the Commission's position in this respect is unreasonable. There has therefore been no maladministration regarding this aspect of the case.

2 Sanction not provided for in the Staff Regulations

2.1 The complainant alleged that there had been an attempt to apply a sanction against him which was not provided for in the Staff Regulations. He referred to a proposal that an "admonition" should be issued against him. The complainant considered that the attempt to have an "admonition" issued against him was unlawful.

2.2 In its opinion, the Commission stated that Article 86 of the Staff Regulations (now Article 9 of Annex IX of the amended Staff Regulations) set out a comprehensive list of disciplinary actions (written warning, reprimand etc.) which did not include the possibility of giving an "admonition". It stated that an "admonition" was therefore clearly not a disciplinary sanction. Rather, an "admonition" was, according to the Commission, close to the "warning" recently introduced by the amended Staff Regulations, which is expressly defined as not being a disciplinary sanction (Article 3(b) of Annex IX of the Staff Regulations). In its reply to the Ombudsman's further inquiries, the Commission added that "*the fact that a superior has authority over his subordinates unquestionably entitles him to give them an immediate informal warning, either orally or in writing, without reporting the matter for possible disciplinary proceedings*". In its reply to the Ombudsman's further inquiries, the Commission emphasised that "administrative inquiries" were regulated under Chapter II of Commission Decision C(2002)540, and that the Decision's rules relevant to "Article 87 hearings" (10) were set out in Chapter III.

2.3 The Commission's power to issue warnings to its staff was laid down in Article 87 of the Staff Regulations in force at the time the relevant facts of the present case took place. However, it appears from the Commission's reply to the Ombudsman's further inquiries that it did not consider the administrative inquiry to have been an "Article 87 hearing". In the same reply, the Commission pointed out that a superior's "*authority over its subordinates*", entitles him to give



them " *an immediate informal warning* ".

2.4 In the Ombudsman's view, an "admonition" issued after the completion of the administrative inquiry here concerned, could not have been tantamount to an "immediate informal warning". In light of the above, the Ombudsman finds that the Commission has failed to invoke valid legal grounds in support of its position that the issuance of the proposed admonition would have been a lawful measure. However, since no admonition was issued against the complainant, the Ombudsman concludes that no further inquiry into, and consideration of, this part of the complaint is justified.

3 Failure adequately to examine Article 90 request and complaint

3.1 The complainant alleged that the Commission had failed to adequately examine the actions that he had contested in his Article 90(1) request and in his Article 90(2) complaint. In this regard, the complainant stated that the Commission had wrongly failed to call additional witnesses in the administrative verification procedure. He also appeared to consider that the team that had conducted the administrative inquiry had wrongly been allowed access to Mr D.'s administrative verification report before that report was sent to the Appointing Authority. He furthermore considered that the Commission should have more thoroughly examined why the administrative inquiry report sent to the Appointing Authority had contained the statement that he was "probably not a good ..." ". He referred to page 3 of the Appointing Authority's decision on his Article 90(2) complaint, which denied that such a statement had been made.

3.2 In its opinion, the Commission rejected the allegation, giving an outline of its handling of the matter. Regarding the alleged failure to call witnesses for the administrative verification procedure, it stated that Mr D. had decided that it would suffice to hear the two officials who conducted the administrative inquiry, the staff representative who had been present at the hearing of 27 November 2001, and the complainant. As regards Mr B.'s and Mr C.'s access to the verification report, the Commission explained that the purpose of giving access had been to make sure that the facts had been correctly established. With regard to the disputed statement contained in the administrative inquiry report initially sent to the Appointing Authority, the Commission stated that it was unclear why Mr B. and Mr C. had made the statement that the complainant was probably not a "good ..." " in a report aimed at establishing the facts concerning alleged moral harassment. The investigator in charge of the administrative verification procedure, Mr D., had asked Mr B. and Mr C. about this. Both had replied that they understood the complainant to have a reputation as a good "..." and added that they were not in a position to make their own, let alone a negative, judgment.

3.3 In his observations, the complainant maintained his allegation.

3.4 With regard to the calling of witnesses, the Ombudsman points out that the Administration has a certain margin of discretion as to which witnesses it considers necessary to call for the purpose of an administrative verification procedure. The Ombudsman does not consider that he has been given any evidence suggesting that Mr D. manifestly exceeded the limits of this discretion by failing to call the three additional witnesses proposed by the complainant.

3.5 With regard to Mr B.'s and Mr C.'s access to the verification report drawn up by Mr D., the



Ombudsman points out that the verification procedure was essentially initiated in order to examine the complainant's allegations of errors in the way that Mr B. and Mr C. had conducted the administrative inquiry into Mr A.'s complaint against the complainant. Taking into account the principles referred to in points 1.7 - 1.10 above, the Ombudsman considers that it does not appear to have been unreasonable to give Mr B. and Mr C. access to the verification report before it was sent to the Appointing Authority.

3.6 With regard to the statement in the administrative inquiry report that was sent to the Appointing Authority - that is, that the complainant was "probably not a good ..." - it appears from the facts of the case and the Commission's opinion that the Appointing Authority's decision on the complainant's Article 90(2) complaint denied that any such statement had been made, whereas the Commission in its opinion in the present case recognised that such a statement had in fact been made, and that the reasons for such a statement having been made could not be explained. It therefore appears that, in respect to this point, there was a failure to adequately examine the complainant's Article 90(2) complaint. This constituted an instance of maladministration, and a critical remark is made below.

4 Alleged delay

4.1 The complainant alleged that the Commission's decision following his Article 90(1) request and his Article 90(2) complaint had been unreasonably delayed.

4.2 In its opinion, the Commission rejected the allegation. It referred to its administrative verification procedure carried out in response to the complainant's Article 90(1) request, the results of which had been available on 5 August 2003, and to the fact that the complainant's request had been implicitly rejected when the Commission did not provide him with an express decision on that request within the four-month deadline provided for in Article 90(1). With regard to the complainant's Article 90(2) complaint of 29 September 2003, the Commission stated that the complainant and the team that had been responsible for conducting the administrative inquiry had been invited to submit their comments on the report that had been drawn up following the administrative verification procedure. It was not until the Commission had received those comments, on 16 December 2003 and 12 January 2004, that the Commission had had the necessary elements to take a decision on the Article 90(2) complaint. The Commission stated that *"considering in particular the complexity of the complaint, the Commission believes that it has handled this case very carefully. It was this very complexity and care that impaired the Appointing Authority's ability to provide a reasoned reply to the complainant more quickly"*.

4.3 The complainant maintained his allegation.

4.4 On 16 April 2003, the complainant made his Article 90(1) request. Article 90(1) of the Staff Regulations in force at the time provided (as do the amended Staff Regulations) that

"Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the



following paragraph. "

In order to examine the complainant's request, the Appointing Authority had asked an official to carry out an administrative verification. According to the Commission, the results of this verification were available on 5 August 2003. The Commission did not, however, send the complainant an explicit, reasoned decision on his Article 90(1) request. The complainant's request was therefore implicitly rejected on 16 August 2003. The complainant then made an Article 90(2) complaint on 29 September 2003, the terms of which were those of his Article 90(1) request. Article 90(2) of the Staff Regulations in force at the time provided (as do the amended Staff Regulations) that "*[t]he authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged.*" (Emphasis added.)

4.5 According to Article 90(1) of the Staff Regulations, the Appointing Authority "*shall*" notify the person concerned of its reasoned decision within four months. As pointed out by the Ombudsman in his decisions on complaint 1479/99/(OV)MM and 729/2000/OV, this implies that the Appointing Authority has an obligation to communicate a decision to the person concerned within that four-month deadline. The rule that a lack of reply shall "*be deemed to constitute an implied decision*" is meant to establish a possibility of a legal remedy for the person concerned when the Appointing Authority does not respect this obligation. It does not give the Appointing Authority a right not to communicate a decision within the four-month deadline. In the present case, the Commission failed to communicate an explicit, reasoned decision to the complainant within the four-month deadline, and has not provided any explanation for this failure. The Ombudsman therefore takes the view that the Commission's failure to communicate an explicit, reasoned decision to the complainant within the four-month deadline constituted an instance of maladministration, and a critical remark is made below.

4.6 With regard to the Commission's decision on the complainant's Article 90(2) complaint, which was lodged on 29 September 2003, the Commission rendered its decision on 4 March 2004, that is, with a delay of little over five months from the date the complaint was made and a little over one month after the expiry of the four-month deadline. In order to explain this delay, the Commission has made a broad reference to the "complexity of the complaint", and the fact that it was only on 12 January 2004 that it had received all the interested parties' comments on the verification report made on the basis of the verification procedure carried out in relation to the complainant's Article 90(1) request. However, the Ombudsman notes that the terms of the complainant's Article 90(2) were the same as those of his Article 90(1) request, which had been implicitly rejected, and that, in respect of the latter, the Appointing Authority had ordered an administrative verification procedure to be carried out, the results of which had been made available on 5 August 2003. In the Ombudsman's view, the fact that the parties concerned by that administrative verification procedure were asked to submit their comments on the verification report cannot satisfactorily explain the Commission's failure to decide, within the four-month deadline, on a matter that had already been dealt with in the course of the examination of the complainant's Article 90(1) request. Therefore, and without excluding that special circumstances may justify non-observance of the four-month deadline provided for in Article 90 (1) and (2) of the Staff Regulations, the Ombudsman considers that the Commission



has not given adequate explanations for the delay in adopting a decision on the complainant's Article 90(2) complaint. The Ombudsman therefore takes the view that the Commission's failure to observe the four-month deadline in Article 90(2) of the Staff Regulations was an instance of maladministration, and a critical remark is made below.

5 Claim for compensation and legal expenses

5.1 The complainant claimed that the Commission should compensate him for the behaviour of the officials whose actions he had contested in his Article 90(1) request and in his Article 90(2) complaint, and that it should pay his legal expenses. As regards the claim for compensation, the complainant stated that this was related to the stress caused by the manner in which the inquiry had been conducted (see the issues referred to in point 1 above), and to the damage caused to his reputation as a consequence of the testifying officials having been made aware of the complaint against him.

5.2 According to settled case-law, for the Communities to be rendered liable it must be proved that the alleged conduct of the institution is illegal, that the damage is genuine and that there is a causal link between the conduct in question and the damage alleged (11) .

5.3 With regard to the claim for legal expenses, the Ombudsman notes that the complainant has not alleged that the Commission's decision to conduct an inquiry into Mr A.'s complaint against him was in itself illegal. The Ombudsman furthermore notes that there appears to be no causal link between the claim here concerned and the maladministration found in respect to the allegation of a breach of the rights of defence (cf. points 1.7 - 1.10 above). Finally, the Staff Regulations do not provide for any express right to be reimbursed for legal expenses incurred in the course of the kind of inquiry here concerned.

5.4 In light of the foregoing, the Ombudsman does not consider that the claim for payment of the legal expenses can be accepted.

5.5 With regard to the non-material damage, the Ombudsman notes that he has made findings of maladministration in respect to (a) the failure to give the complainant a reasonable opportunity to comment on the preliminary findings of the administrative inquiry team, and on the evidence that it had relied upon, and (b) the Commission's failure to adequately examine one of the issues raised in the complainant's Article 90(2) complaint (see point 3.6 above). However, the Ombudsman considers that the relevant critical remarks made below provide adequate redress in respect to those instances of maladministration. Regarding the remainder of the issues referred to by the complainant, the Ombudsman has made no findings of maladministration, and the claim for damages can therefore not be accepted in those respects. With regard to the complainant's reputation, the Ombudsman notes that the complainant has not alleged that it was illegal for the Commission to call witnesses in the course of the administrative inquiry. The Ombudsman furthermore considers that calling witnesses in the course of that inquiry does not appear to have been unreasonable.

5.6 In light of the foregoing, the Ombudsman cannot accept the complainant's claim for compensation for non-material damage.

6 Conclusion



On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

1. The Ombudsman finds that the principle of the right to a prior hearing required that the complainant should be informed of the preliminary findings of the team conducting the administrative inquiry and of the substance of the evidence relied upon *before* the inquiry report was finalised. It appears from the Commission's opinion in this case that the head of the investigating team informed the complainant on 14 March 2002 that he had already sent the inquiry report to the Director-General of DG ADMIN. Although Mr B. subsequently decided to allow the complainant access to the inquiry report (without the annexes) and to comment on it, it appears that the investigating team had effectively finalised the contested administrative inquiry report, and forwarded it to the Director-General of DG ADMIN, without informing the complainant of, and without giving him a reasonable opportunity to comment on, its preliminary findings and the evidence relied upon. In the Ombudsman's view, this amounted to a failure to respect the complainant's right of defence, and therefore to an instance of maladministration.

2. It appears that the Appointing Authority's decision on the complainant's Article 90(2) complaint denied that the statement that the complainant was "probably not a good ..." had been made, whereas the Commission in its opinion in the present case recognised that such a statement had in fact been made by the investigating team in its administrative inquiry report, and that the reasons for such a statement having been made could not be explained. It therefore appears that, in respect to this point, there was a failure to adequately examine the complainant's Article 90(2) complaint. This constituted an instance of maladministration.

3. According to Article 90(1) of the Staff Regulations, the Appointing Authority "shall" notify the person concerned of its reasoned decision within four months. As pointed out by the Ombudsman in his decisions on complaint 1479/99/(OV)MM and 729/2000/OV, this implies that the Appointing Authority has an obligation to communicate a decision to the person concerned within that four-month deadline. The rule that a lack of reply shall "be deemed to constitute an implied decision" is meant to establish a possibility of a legal remedy for the person concerned when the Appointing Authority does not respect this obligation. It does not give the Appointing Authority a right not to communicate a decision within the four-month deadline. In the present case, the Commission failed to communicate an explicit, reasoned decision to the complainant within the four-month deadline, and has not provided any explanation for this failure. The Ombudsman therefore takes the view that its failure to communicate an explicit, reasoned decision to the complainant within the four-month deadline constituted an instance of maladministration.

4. With regard to the Commission's decision on the complainant's Article 90(2) complaint, the Commission rendered its decision on 4 March 2004, that is, a little over one month after the expiration of the four-month deadline laid down in Article 90(2). In order to explain this delay, the Commission has made a broad reference to the "complexity of the complaint", and the fact that it was only on 12 January 2004 that it had received all the interested parties' comments on the verification report made on the basis of the verification procedure carried out in relation to the complainant's Article 90(1) request. However, the Ombudsman notes that the terms of the



complainant's Article 90(2) complaint were the same as those of his Article 90(1) request, which had been implicitly rejected, and that, in respect of the latter, the Appointing Authority had ordered an administrative verification procedure to be carried out, the results of which had been made available on 5 August 2003. In the Ombudsman's view, the fact that the parties concerned by that administrative verification procedure were asked to submit their comments on the verification report cannot satisfactorily explain the Commission's failure to decide, within the four-month deadline, on a matter that had already been dealt with in the course of the examination of the complainant's Article 90(1) request. Therefore, and without excluding that special circumstances may justify non-observance of the four-month deadline in Articles 90 (1) and (2) of the Staff Regulations, the Ombudsman considers that the Commission has not given adequate explanations for the delay in adopting a decision on the complainant's Article 90(2) complaint. The Ombudsman therefore takes the view that the Commission's failure to observe the four-month deadline in Article 90(2) of the Staff Regulations was an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case. Specifically with regard to the second critical remark, the Ombudsman notes that the Commission, in its opinion in the present case, has effectively denied that the disputed statement is in any way true. Finally, the Ombudsman cannot accept the complainant's claim for compensation and for payment of his legal expenses.

With regard to the complainant's other grievances, the Ombudsman has concluded that there has been no maladministration, or that further inquiries are not justified. The Ombudsman draws attention, however, to his further remark below.

The President of the European Commission will also be informed of this decision.

FURTHER REMARK

As noted above, the complainant alleged that there had been an attempt to apply a sanction against him that was not provided for in the Staff Regulations. He referred to a proposal that an "admonition" should be issued against him. The complainant considered that the attempt to have an "admonition" issued against him was unlawful.

While concluding that no further inquiry into, and consideration of, this part of the complaint was justified, since no such "admonition" was in fact issued against the complainant, the Ombudsman has found that the Commission failed to invoke valid legal grounds in support of its position that the issuance of the proposed admonition would have been a lawful measure.

In light of this finding, the Ombudsman encourages the Commission to thoroughly examine the lawfulness of any such proposed "admonitions" in future similar cases.

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) The references to officials do not contain the initials of their real name. The fictive initials are made in a chronological alphabetical order according to their mentioning in the decision.

(2) It appears from the Commission's opinion that an "administrative verification" is an inquiry conducted in order to examine whether a broader inquiry should be opened.

(3) This article provided as follows: "The appointing authority shall have the right to issue a written warning or a reprimand without consulting the Disciplinary Board, on a proposal from the official's immediate superior or on its own initiative. The official concerned shall be heard before such action is taken.

Other measures shall be ordered by the appointing authority after the disciplinary procedure provided for in Annex IX has been completed. This procedure shall be initiated by the appointing authority after hearing the official concerned."

(4) SEC (2000) 2079/5.

(5) See, e.g., Case T-11/03 *Elizabeth Afari v. European Central Bank*, judgment of 16 March 2004 (not yet reported), paragraph 49.

(6) See Case C-315/99 P *Ismeri Europa v Court of Auditors* [2001] ECR I-5281, paragraph 28.

(7) Regarding the complainant's allegation that the issuance of such an admonestation would have been unlawful, cf. point 2 below.

(8) Cf. Case C-315/99 P *Ismeri Europa v. Court of Auditors* [2001] ECR I-5281, paragraphs 29-30.

(9) Cf. Article 2(2) of Annex IX of the Staff Regulations (2004).

(10) "Article 87 hearing" refers to Article 87 of the former Staff Regulations. This article provided as follows: "The appointing authority shall have the right to issue a written warning or a reprimand without consulting the Disciplinary Board, on a proposal from the official's immediate superior or on its own initiative. The official concerned shall be heard before such action is taken.

Other measures shall be ordered by the appointing authority after the disciplinary procedure provided for in Annex IX has been completed. This procedure shall be initiated by the appointing authority after hearing the official concerned."



(11) Case T-307/01 *Jean-Paul François v Commission* , judgment of 10 June 2004 (not yet reported).