Decision of the European Ombudsman on complaint 756/2004/PB against the European Commission

Decision
Case 756/2004/(OV)/PB - **Opened on** 03/05/2004 - **Decision on** 10/12/2007

Strasbourg, 10 December 2007
Dear Mr M.,

On 14 March 2004, you made a complaint to the European Ombudsman concerning the reduction of daily allowances paid in the context of a twinning programme financed by the European Commission.

On 3 May 2004, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 8 June 2004. I forwarded it to you with an invitation to make observations. Following requests for extension of the deadline for submission of observations, which I granted, you submitted your observations on 20 December 2004.

On 17 May 2005, I made further inquiries into your case, and informed you accordingly. On 5 July 2005, the Commission sent me its reply. I forwarded it to your with an invitation to make observations, which you submitted on 2 September 2005.

On 19 October 2005, I made further inquiries into your case, and informed you accordingly. The Commission sent its reply on 31 January 2006. I forwarded it to you with an invitation to make observations, which you submitted, following requests for extension of the initial deadline, on 24 April 2006.

On 27 November 2006, I made a proposal for a friendly solution to your case, and informed you accordingly. On 8 March 2007, the Commission replied, in a negative way, to the said proposal. I forwarded the Commission's reply to you with an invitation to make observations. You initially requested an extension of the deadline for submission of your observations. My services contacted you regarding this. Following the end of the relevant deadline, you submitted, on 15 November 2007, your observations.

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

THE COMPLAINT

The facts, arguments, allegations and claims submitted by the complainant were, in summary, the following:

From 1 March 2003 to 31 August 2004, the complainant was working as a pre-accession adviser ('PAA') at the Ministry of Environment and Water in Sofia, Bulgaria, in the context of an EU Twinning Project (BG2001/IB/EN/01 - entitled 'Implementing the Seveso Directive'). The Twinning Covenant had been signed by the Bulgarian and the Austrian authorities, the latter being the complainant's employer, and endorsed by the European Commission.

The Covenant foresaw a subsistence allowance of EUR 97.50 for each day of the complainant's assignment. On 7 July 2003, the Commission reduced this allowance by more than one third to EUR 62. It did so in order to ensure 'adaptation'. However, any such adaptation had to correspond to real changes in subsistence costs, which in Bulgaria are, and were at the time, steadily rising. There was therefore no material basis for the reduction, and the Commission was accordingly in material breach of contract with regard to the Twinning Covenant, on the basis of which the complainant had taken up his duties in Bulgaria.

Since July 2003, the PAAs stationed in Bulgaria addressed a series of written complaints at different levels to the Commission's Directorate-General for Enlargement ('DG Enlargement'). Following discussion of various solutions, the Commission finally decided, in December 2003, to foresee, in the future, a stable subsistence allowance for PAAs during their assignment, and introduced, for ongoing projects, a procedure for paying the original subsistence allowance for the remaining project time. However, the Commission refused to correct the reduction for the period between 7 July and the date of its correcting decision, invoking the need to avoid 'retroactivity' of its decision. This, however, is not acceptable, since a corrective action should always go back to the starting point of a problem.

The complainant alleged that the Commission's reduction of the per diem rates was unjustified and constituted a breach of contract.

He claimed that DG Enlargement should authorise the relevant Member State institution to pay the PAAs, for the entire duration of the project, the subsistence allowance of EUR 97.50 per day, as fixed in the original budget of the signed and endorsed Twinning Covenant. In case that such an authorisation could not be given before the end of the project, the Commission should provide for an alternative procedure to allow the PAAs to receive the difference between the subsistence allowance received and the subsistence allowance fixed in the covenant.

The Ombudsman opened an inquiry into the above allegations and claims.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

Background

Twinning is an instrument for administrative co-operation to assist acceding and candidate countries to strengthen their administrative and judicial capacity to implement Community legislation as future Member States of the European Union. Twinning projects encompass the secondment of long-term experts from the Member States to the acceding and candidate countries. These long-term experts are called pre-accession advisers ('PAAs'). The PAAs' remuneration includes a subsistence allowance for every day of the secondment, based on 50% of the per diem rates which are periodically updated by the Commission's EuropeAid Co-operation Office ('EuropeAid').

On 11 July 2003, DG Enlargement informed the national contact points for twinning in the Member States that a new periodical adjustment of per diem rates had been published by EuropeAid on 7 July 2004, and that the new rate would, from that date, be applied in all ongoing twinning projects, in accordance with the rules in the Twinning Manual. The latter provides in section 5.6.2 that the date when the twinning activities are carried out determines the rate of per diems applicable, which can therefore vary over the lifetime of a twinning project.

Further to this adjustment, DG Enlargement received complaints from several PAAs, in particular from PAAs working in Bulgaria. The PAAs pointed out the substantial reduction of the per diem rates published on 7 July 2003 in comparison to the rates in effect before that date. DG Enlargement replied to these complaints, recalling the above-mentioned rules. At the same time, it announced that it would assess the current system regarding, more specifically, the flat-rate subsistence allowance for PAAs. The assessment took place during the autumn of 2003.

On 16 December 2003, EuropeAid published the new periodical list with applicable per diem rates. DG Enlargement informed the national contact points for twinning in the Member States on 22 December 2003 about this new periodical adjustment but announced in the same letter the outcome of the above-mentioned assessment regarding the flat-rate subsistence allowance for PAAs in twinning projects. In this letter, the Commission acknowledged that the commitment of the PAAs was vital for the success of the twinning projects and that they had to be able to make stable arrangements for the entire period of their secondment. The Commission therefore accepted that, as from 1 January 2004, the amount of the flat-rate subsistence allowance for PAAs would no longer be subject to variations during the twinning secondment but would, on the contrary, be defined at the time of the signature of the twinning covenant for its entire duration. In the same letter, the Commission moreover accepted that, for the twinning projects governed by covenants signed before 1 January 2004, the reserve adjustment of estimated costs could exceptionally be used to mitigate the detrimental consequences of the per diem adjustments of 7 July 2003 and 15 December 2003.

A Commission official from DG Enlargement met with PAAs working in Bulgaria on 15 January 2004 to present and discuss the above-mentioned adjustment of the rules governing the subsistence allowance. During that meeting, no complaint was formulated by any of the PAAs present, and it appeared that the new arrangement to stabilise the PAA subsistence allowance was well received.

The complainant's observations

The complainant submitted observations on 27 July 2004, and subsequently asked for permission, in separate requests, to submit additional observations by 15 October 2004, 15 November 2004 and 20 December 2004. He stated that he was trying to reach a settlement with the Commission. The permissions were granted.

In his observations, the complainant submitted, in summary, the following information and arguments:

On 8 January 2004, addendum number 1 to the Twinning Covenant entered into force. This addendum, which had been drafted according to the instructions in the Commission's letter of 22 December 2003, reinstated the original contractual subsistence allowance for the remaining time of the project. The addendum was implemented correctly by the Member State administration until the end date of the project (which, by amendment nr. 2 of the Twinning Covenant, was extended from the original end date of 31 August to 15 August 2004). In October 2004, the Member State administration submitted a final audited invoice in which the 'contractual difference' corresponding to the complainant's original complaint was contained as a separate item.

At the end of October 2003, the Central Financing and Contracting Unit ('CFCU') at the Bulgarian Ministry of Finance (which is in charge of administering the EU project funds under the Decentralised Implementation System) informed the complainant that he would receive a lower subsistence allowance for the period after 7 July 2003, when EuropeAid had published new per diem rates. The complainant protested in e-mails sent to both the CFCU and the Commission Delegation in Bulgaria ('the Delegation'), stating that such a reduction would contradict the signed and endorsed Addendum 1 to the Covenant. The CFCU confirmed that the reduced rate had been applied in agreement with the Delegation. The Twinning task manager at the Delegation advised the complainant to contact the Twinning Co-ordinator at the Commission Headquarters. The complainant contacted this co-ordinator. The co-ordinator confirmed the interpretation applied by the CFCU and the Delegation, stating that " *the system spelled out in the letter of 22 December 2003 [referred to above] was intended to provide a transitional and conditional relief for all resident twinning advisors working under Twinning contracts endorsed before 1 January 2004 in the beneficiary country for which the per diems had been reduced in July-December 2003. This scheme, as you know, was conditional upon the submission of an amendment tapping the reserve without jeopardising essential project activities. I understand that you have called on this scheme for the period between January 2004 until July 2004 when the per diem for Bulgaria was again raised from EUR 123 to EUR 181. At that time, the Delegation, which had to approve the maintenance of the provisional relief scheme, has indicated that the new level of the per diem no longer justified maintaining the relief scheme and has indicated that as from 7 July 2004, the subsistence allowance for PAA's working under Twining contracts notified before 1 January 2004 would be adjusted to EUR 90.50.* "

The complainant informed the Twinning Co-ordinator that, in his view, the amendment to the Covenant applied to the entire remaining duration of the project, and did not depend on further changes made by the Commission to the per diem rates. In his reply, the Twinning Co-ordinator

maintained his view of the contractual situation stated above.

In his observations, the complainant furthermore stated that the per diem for Bulgaria granted by the Commission to its own officials is much higher than the per diems for the contractual Twinning project.

With regard to the actual figures and methods applied in respect of the reduction of the subsistence allowance, the complainant emphasised that, since subsistence costs in Bulgaria are steadily rising (with annual inflation rates of 5 to 10%), and since the Bulgarian levy is closely linked to the euro, the PAAs were entitled to expect either a moderately *increasing* , or at least a *stable* , subsistence allowance in euro during their stay in Bulgaria. The decrease experienced by the complainant was, therefore, a breach of contract imposed by the Commission. In fact, it was the Commission itself that had created the problem when it calculated the variable per diem rates in euro for European countries by converting the figures of unsystematic US dollar surveys, which may produce figures unrelated to real living costs in European countries. The complainant enclosed an annex that contained detailed information as to how the Commission had calculated the per diem rates. It appeared from this that the Commission had used data provided by the United Nations, and that the latter's figures had been expressed in US dollars. It was indicated that currency fluctuations had significantly influenced the sharp reduction in the per diem rates.

The complainant stated that his loss amounted to almost EUR 7 000.

Finally, the complainant made various suggestions as to how the Ombudsman could technically proceed in order to settle the case.

Further inquiries (1)

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman's further inquiries

On 17 May 2005, the Ombudsman asked the Commission to reply to the following:

- Were there any other legal bases than the Twinning Manual for the adjustments of the per diem rates?
- On the basis of what information and calculations did the adjustments take place?
- What was the purpose of the adjustments of the per diem rates?

The Commission was given copies of the complainant's observations, on which it was invited to submit comments.

The Commission's replies - *reply to question 1*

(i) Within the framework of twinning projects, DG Enlargement follows the overall applicable maximum per diem rates (and their adjustments) set by EuropeAid for the reimbursement of expert missions in third countries. These general *per diem* rates are regularly adjusted and published on EuropeAid's website. The introductory sentence to the updated tables reads as follows: " *In the framework of external aid contracts and in case of missions requiring an overnight stay away from the base of operations, the applicable rates to the per diems must not exceed the scales approved by the European Commission* ".

(ii) This general application principle is reflected in Article 14.2 of the General Conditions defined for grant agreements, which provides as follows: " *Any flat rate reimbursements must not exceed the scales approved annually by the European Commission* ". Twinning contracts can be defined as grant agreements.

(iii) In line with this general policy, Section 5.6.2 of the Twinning Manual provides as follows:

" *MS experts are entitled to an allowance (per diem) when operating in the CC. It is intended to cover hotel, food and local (city and airport transfer) operation costs. The current rate published by the European Aid Co-operation Office on their web site [reference] at the time of the mission applies. The rate can therefore vary over a lifetime of the project. The basis for calculation of* [the] *number of per diems is the number of nights spent away from the home base (no half per diems).*

CC staff travelling to a MS in the framework of a twining project are entitled to per diems according to the same rules.

PAAs receive an allowance for every day of their secondment, based on 50% of the current per diem rates. The allowance is adapted if there is a change in per diem rates in the course of the lifetime of the project. "

- reply to question 2

For the implementation of Twinning projects, the periodical adjustments are made whenever the per diem rates defined by EuropeAid are adjusted. The Commission can provide the following background information on the revision of per diem rates:

The per diem rates are based on United Nations rates, which are set in accordance with annual country survey missions conducted by the International Civil Service Commission (ICSC). The UN data are derived from price surveys of good commercial hotels and meal costs for the respective third countries, which are bolstered by an additional amount of 15% for incidental expenses. As these UN rates are expressed in US dollars, the maximum per diem rates are the result of a conversion of these US dollar-based rates into euro.

Exchange rate fluctuations between US dollar and the euro during the period from the global revision in June 2001 to the revision in June 2003 have had a substantial impact on the per diem rates, which, as a matter of fact, resulted in steep adjustments for expert missions in some of the then Candidate Countries.

- reply to question 3

Adjustments to the per diems are, in general, aimed at keeping up with fluctuations in livings costs in the countries in which the external actions financed out of the Community budget take place. This is reflected in the second sentence of the introductory statement which accompanies the list of per diems: " *Per diems cover all living expenses of the experts, including accommodation, meals, travelling expenses on the spot (taxi and/or public transport) and sundry expenses* ".

The complainant's observations - *regarding the reply to question 1*

The complainant explained, first, that the Twinning Manual is not a legal document. It is a useful compilation of practical administrative rules and procedures developed by the Commission services and designed to ensure a reasonably uniform implementation of twinning projects. The Commission is the sole author of the Twinning Manual, which is not formally or informally agreed to by the Member States. Accordingly, the publishing of the per diem rates on the Commission's website is a unilateral administrative action of the same nature and legal quality.

With regard to the Commission's comment that Twinning Agreements " can " be interpreted as 'Grant Agreements', it should be noted that Twinning has only very recently been implemented with 'grant type' contracts. In these contracts, depending on the specific arrangements, the Commission, or at least one of its agents, is a signatory and thus a formal contract partner.

The document used in the present case was a 'Twinning Covenant' concluded between the administrative authorities of the EU Member States and the Beneficiary Country. The Commission and its financial agent were not partners to the covenant.

In light of the foregoing, EU legislation on grant contracts does not apply.

From a legal point of view, it was a clear abuse of power by the Commission to impose upon the national contracting authorities and the implementing institutions a formal breach of their bilateral contract.

- regarding the reply to question 2

The Commission converts at semi-annual intervals US dollar-based UN rates into euro. This works typically quite well for countries in the US dollar zone but produces sometimes strange results - in fact a semi-annual currency lottery - for European countries close to the euro zone, where prices do not follow the US dollar-euro exchange relations.

- regarding the reply to question 3

The complainant's financial claim included, at this point, the work done until 15 October 2004. It amounted to EUR 7 572.50.

Further inquiries (2)

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman's further inquiries

On 19 October 2005, the Ombudsman made the following further inquiries:

(1) He asked the Commission to provide information on the nature of the covenant for the project here concerned, including information on the roles of, and the relationship between, the contracting parties and the Commission, in particular as concerned the payment of the per diems. In this respect, the Commission was asked to provide references to any decisions or Community legislation governing Twinning projects specifically, as well as a copy of the covenant that the Commission endorsed in this case.

(2) He asked the Commission to submit an opinion on the complainant's additional allegation that using a US dollar-based UN-rate system to calculate the per diem rates was unreasonable.

In relation to this, the Commission was requested to submit information as to the purpose of the UN-rate system, and to enclose copies of relevant written UN information. The Ombudsman also asked the Commission to submit information as to whether the per diems paid to the Commission's own officials in Bulgaria were higher than the per diems paid under the Twinning programme here concerned, and, if so, on the basis of what data and calculation such payments were effected.

(3) He asked the Commission to clarify the legal basis for its application of the US dollar-based UN-rate system when calculating the per diem rates in this case. In this respect, the Ombudsman requested information on the specific method of calculation of the per diem rates in the present case, as well as on the specific data used to calculate the rates on the basis of which the per diems paid to the complainant were determine. The Commission was also asked to submit evidence as to the development of the living costs in Bulgaria for the period of the project here concerned.

(4) It emerged from the complainant's observations that he considered it an illicit interference on the part of the Commission to have caused a reduction of the per diems when the covenant for the project here concerned contained a fixed minimum daily allowance. The Ombudsman therefore asked the Commission to submit an opinion on this additional allegation. The Commission's opinion was to contain information as to any basis on which the Commission's adjustment of the per diem rates could cause a reduction in any minimum daily allowance fixed in the covenant.
The Commission's replies - *reply to part 1 of the further inquiry letter*
The Twinning covenants are contractual agreements between a Member State administration and a Candidate Country administration. Such agreements are made with a view to informing the latter of expertise held by the Member State administration, in order to ensure the proper alignment with the Community *acquis* in the Candidate Country. Both administrations are fully responsible for the implementation of the covenant. The Commission provides the funds through the Financing Memorandum with the respective Candidate Countries and sets the procedural rules through the Twinning Manual (1) . Twinning covenants have been governed by the provisions of the 2002 Twinning Manual.

In so far as the per diems are concerned, the Commission sets and updates the applicable per diem rates for all " *missions in the framework of the EC-funded external aid contracts requiring an overnight stay away from the base of operations* " (2) .
- reply to part 2 of the further inquiry letter
The Commission maintains in general that the linkage to the periodically revised per diem allowances of the daily subsistence allowance awarded by the Twinning Manual to the Twinning pre-accession advisors was not unreasonable but, on the contrary, logical and coherent with standard Commission guidelines and policies because:

(i) The per diem allowances are defined as valid for all expert missions conducted in the framework of external assistance contracts financed with Community funds. Since Twinning contracts are (specific) grant contracts for assistance to the Candidate Countries, it was logical for the Twinning manual to use these per diem rates as an overall point of reference for the

definition and periodical revision of the above-mentioned subsistence allowance.

(ii) The subsistence allowance awarded to PAAs is, exactly like the Commission general per diem rate, meant to cover the living expenses of the long-term Twinning advisors, incurred in the relevant country.

Regarding the definition and periodic revision of the general per diem rates, the Commission can provide the following additional information concerning the use of the US dollar/UN rate system. The Commission per diem rates are indeed based on United Nations rates, which are set in accordance with annual country survey missions conducted by the UN's International Civil Service Commission (ICSC). The UN data are derived from price surveys of good commercial hotels and meal costs for the respective third countries, which are bolstered by an additional amount of 15% for incidental expenses. As these United Nations rates are expressed in US dollars, the Commission maximum per diem rates are the result of a conversion of these US dollar based rates into euro. Exchange rate fluctuations between US dollar and the euro during the period from the revision in June 2001 to the next revision in June 2003 have had a substantial impact on the per diem rates. The very long interval between this 2001 revision and the revision published on 7 July 2003 has, as a matter, of fact resulted in steep adjustments for expert missions in some of the then candidate countries.

It is mainly the combination of these two factors - namely, exchange rate fluctuations and delayed global revision - which has very substantially affected the Commission per diem rates in some of those countries.

A revision of the Commission per diem rates is henceforth carried out on a semi-annual basis and converted into euro in accordance with the InforEuro exchange rates applicable on the same date. This should in general minimise the adverse effects of the revision of the US dollar-based rates which had unfortunately been delayed between June 2001 and June 2003. The Commission cannot be held responsible for the negative effect of the exchange rates.

The mission allowances for Commission officials are, on the other hand, set in the Mission guide. The EC daily subsistence allowance applicable to officials on mission in third countries is calculated on the basis of average hotel costs. At the time of the facts covered by the present complaint, the rates were those applicable since 24 January 2002. These per diem rates are payable upon provision of supporting documents or on a lump sum basis. In the latter case, the amount for hotel expenses is limited to 30% of the maximum payable for hotel costs. The daily subsistence allowances for countries outside the European Union were revised for the last time following a Commission decision dated 24 January 2002. With regard to the calculation, the daily subsistence allowance was split between a daily allowance and a hotel ceiling. The daily allowance was based on UN figures excluding hotel costs. The hotel ceiling was based on expenses reimbursed by the Commission to officials, or on UN figures for the countries where no data were available.

- reply to part 3 of the further inquiry letter

The Commission underlines that the observations of the complainant regarding the merits of the present reference system for the definition of the per diem rates and the legal basis for the

Commission's of the US dollar/UN rate system are not pertinent for solving the concrete issues at stake. It was the signatory parties of the Twinning covenant - that is, the Member State and the Candidate Country in question - which agreed to apply the mentioned reference system for the definition of the per diems to be awarded to PAAs when signing the contract.

The Commission also noted that none of the other (more than 800) PAAs have questioned the overall soundness of this reference system in order to challenge the allowances that have been paid out to them.

- reply to part 4 of the further inquiry letter

The Commission has not illicitly interfered in the definition of the daily subsistence allowance of the Twinning pre-accession advisors, since it limited itself to applying the revised Commission per diem rates (set for all expert missions undertaken in the framework of external assistance contracts financed with Community funds) to the ongoing Twinning contracts. Such revision was, at the time, clearly set out in the Twinning Manual (section 5.6.2). This revision could not be ignored by the complainant. The Commission moreover disputes the allegation that this revision jeopardised his 'fixed minimum daily allowance'. First, the daily subsistence allowance which the Twinning Manual awards to all Twinning pre-accession advisors is clearly linked to the above-mentioned daily allowance (valid for all Commission external assistance contracts), which is defined as a maximum allowance and not as a minimum allowance. Second, the daily subsistence allowance for pre-accession advisors was, because of its linkage with the regularly revised general Commission per diem rates, surely never conceived as a fixed allowance, but in essence as a variable allowance. This inherent variability of the Commission per diem system implies that the reduction in the subsistence allowance of the Twinning pre-accession advisors was not at all the result of an illicit intervention by the Commission but should clearly be understood as the normal consequence of the periodic revision of the per diem. Such periodic adjustment indeed entailed a possible reduction, of which the Twinning pre-accession advisors had to be well aware.

The complainant's observations - *regarding the reply to part 1 of the further inquiry letter*

The Twinning Covenant in the present case, signed by the Austrian and Bulgarian administrations, is a sovereign administrative agreement between those administrations. Neither the Commission nor any of its agents are formal contracting partners, and cannot require the contracting partners to do what is not laid down in the contract or, following a common-sense interpretation of the Covenant, reasonable.

The signed Covenant and all its annexes do not mention any potential change of this rate during the implementation of the project, nor do they make any reference to the Twinning Manual itself. The Twinning Manual is therefore *not* part of the contractual agreement.

Following the initial phase of the Twinning programme, the Twinning Manual has been developed on the basis of various procedural guides to assist preparation and implementation. It has as such been welcomed by the Member States. Although the latter have never formally endorsed the Manual, it can be assumed that the Commission has been given a tacit informal mandate to establish such procedural guidance. But such guidance is evidently based on the assumption that any compiled guidance would be useful, reasonable, fact-based and, above all, procedural only; and *not* that the Manual would interfere with the wording and the substance of

a signed agreement.

The 'General Conditions' for grant contracts referred to by the Commission do not apply since the Covenant is *not* a grant agreement under the new EC Financial Regulations.

- regarding the reply to point 2 of the further inquiry letter

The Commission staff concerned has correctly and clearly applied the rules adopted by the Commission itself. However, the present case is about the soundness of the per diem system adopted by the Commission. As previously noted, this system creates a currency lottery without any link to real developments in actual living costs. An extreme example of diverging EC per diems in countries with comparable real costs for travel missions are Romania and Turkey. In Romania, the EuropeAid per diem is set at EUR 354, this figure being based on the UN special rate for the Marriott hotel in Bucharest. In Turkey, the EuropeAid per diem is EUR 105. The rate for Turkey seems to be still linked to the former exchange problems between the Turkish lira and the US dollar at the time of hyperinflation in Turkey.

As a reaction to problems and protests after the July 2003 'adaptation', the Commission decided to recalculate the per diems every six months (instead of the two-year interval between 2001 - 2003). The declared intention of the Commission was to avoid major unexpected changes in the future which were based on the wrong assumption that the per diem changes were reflecting real developments in subsistence costs that would be more gradual in case of more frequent calculations. But repeating the above described conversion exercise every six months instead of every two years does not improve the situation. It simply converts the biennial per diem lottery into a semi-annual one, and complicates further the administration of Twinning projects because of frequent changes of the per diem. As a result, this 'corrective' action makes things worse instead of improving them, and the next major crisis of the system is assured when US dollar/euro exchange rates again fluctuate substantially.

A more sensible option would be to introduce stable per diems for European countries, without any link to the US dollar-based system. In practice, the Commission is moving in this direction and has already stopped applying the semi-annual US dollar-based recalculation in the EU Member States.

The simplest solution would evidently be to fix one standard per diem of EUR 200-220 for all non-EU countries in the PHARE, CARDS, TACIS and MEDA areas, and to moderately increase it at fixed intervals according to average consumer price indices.

Finally, regarding the rates applied to Commission officials, the information provided by the Commission shows that, while on 7 July 2003 the per diem for Bulgaria was reduced from EUR 197 to EUR 124, the hotel ceiling alone for a Commission official sent to Bulgaria remained stable at EUR 205, plus an additional amount of EUR 70 for other expenses. This is a clear case of double standards.

- regarding the reply to point 3 of the further inquiry letter

The Commission's comments must be rejected. The present complaint has arisen due to the overall lack of soundness of the per diem system, and not due to the behaviour of individual Commission officials. It is therefore the system as such that requires attention.

Furthermore, it is not astonishing that the complainant (3) is the only Twinning Adviser to address the problem at a more general level. As international co-ordinator of the Austrian Federal Environment Agency, the complainant has been responsible, since 1998, for around 30 successfully implemented Twinning projects. The complainant can accordingly claim to have at least the equivalent practical experience in Twinning issues as any Commission official, and in fact has a more general professional interest in the overall soundness of administrative arrangements in this area.

For both political and practical reasons, it is unthinkable that an implementing Member State would have intentionally and knowingly mandated the European Commission to introduce and apply for European countries a US dollar-based system of frequently changing subsistence allowances without an identifiable link to real developments in subsistence costs, and depending on the applicable US dollar exchange rate.
- regarding the reply to point 4 of the further inquiry letter
The complainant agreed with the Commission that any 'adaptation' of subsistence allowance may "entail a possible reduction" as a "normal consequence of the periodical revision of the per diem". However, this can only be valid if the revision is linked to a demonstrable reduction of real living costs - which was not the case for the per diem reduction of 7 July 2003 enforced upon the Covenant partners by the Commission unilaterally and without a legal basis.

THE OMBUDSMAN'S ATTEMPT TO FIND A FRIENDLY SOLUTION

1. After careful consideration of the opinions and observations, the Ombudsman was not satisfied that the Commission has responded adequately to the complainant's allegation. He therefore made the following proposal for a friendly solution:

The Commission could consider offering the complainant reasonable compensation for the financial loss he has suffered following the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of a per diem rate significantly lower than the one specified in the Twinning Covenant.

This proposal was based on the following considerations:

2. The case concerns the Commission's funding of a Twinning Project (BG2001/IB/EN/01) entitled 'Implementing the Seveso Directive'. As the Commission has noted, t winning is an instrument for administrative co-operation designed to assist acceding and candidate countries to strengthen their administrative and judicial capacity to implement Community legislation as future Member States of the European Union. Twinning projects encompass the secondment of long-term experts from the Member States to the acceding and candidate countries. Such an expert is called a pre-accession adviser ('PAA').

3. The project here concerned was realised on the basis of a 'Twinning Covenant' concluded

between a Member State (Austria) and Bulgaria and endorsed by the Commission. Article 7 of the Covenant provided, inter alia, for a subsistence allowance (per diem) of EUR 97.50 for each day of the complainant's assignment as PAA in Sofia. The Commission undertook to finance the project, in accordance with the detailed budget contained in Article 7 of the Covenant (see Article 1 of Annex A to the Covenant).

4. In July 2003, the Commission proceeded to an adjustment of per diem rates for PAAs. In the complainant's case, this adjustment resulted in a sharp reduction of his subsistence allowance provided for in the Covenant, since its amount was fixed at EUR 62, for the period July-December 2003. The complainant has alleged that this decrease was unjustified and constituted a breach of contract. This allegation consists, in essence, of two parts: (i) the Commission should make payments for subsistence allowance on the basis of the per diem rate defined in the Covenant; (ii) the method the Commission used to calculate the new rate was not reasonable.

5. With regard to the first part of the complainant's allegation, the Ombudsman makes the following remarks, after taking into consideration the arguments and information submitted by the complainant and the Commission. As the complainant has correctly pointed out, the Twinning Covenant did not (explicitly) state that the per diem rate at issue might be changed during the implementation of the project. Moreover, the Covenant did not refer to the relevant 'Twinning Manual' (of 2002), which provided for such a possibility. Nevertheless, these elements, taken alone or together, do not necessarily imply what the complainant argues. It is uncontested that the per diems were intended to cover the complainant's living expenses in Sofia (such as accommodation, meals and travelling expenses on the spot), during his 18-month (March 2003 – August 2004) stay there. As a matter of experience, living costs might change (even considerably) during such a period of time. Accordingly, adjustment of the relevant per diems would appear to constitute a reasonable, financially fair, measure. Such an adjustment was not precluded by the Covenant. Moreover, it was explicitly provided for in the 'Twinning Manual', which (as the complainant has admitted) was known to the Austrian Government as containing, at least, essential practical information and guidelines regarding the implementation of the Covenant. In light of the above, the Ombudsman concludes that the Commission's decision not to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of the per diem rate defined in the Covenant was not, *per se* , unjustified or violative of the Commission's obligation to fund the execution of the Covenant, in accordance with its budget.

6. With regard to the second part of the complainant's allegation, the Ombudsman makes the following remarks, after taking into consideration the arguments and information submitted by the complainant and the Commission. The per diems at issue were destined to cover the complainant's living expenses in Sofia. In this regard, the Commission has stated that adjustments to the per diems are, in general, aimed at keeping up with the fluctuations of living costs in the countries in which the external actions financed out of the Community budget take place. Hence, the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) based on a per diem rate significantly lower than the one defined in the Covenant should reflect corresponding changes in

the living expenses in Sofia. In the context of the present inquiry, the Commission has stated that its per diem rates were based on United Nations rates, which were set in accordance with annual country survey missions conducted by the UN's International Civil Service Commission (ICSC). The UN data were derived from price surveys of good commercial hotels and meal costs for the respective third countries, bolstered by an additional amount of 15% for incidental expenses. The Commission's per diem rates were the result of a conversion of these US dollar-based rates into euro. Exchange rate fluctuations between the US dollar and the euro during the period from the revision in June 2001 to the next revision in June 2003 (on the basis of which the Commission took its above-mentioned decision regarding payments for the complainant's subsistence allowance at issue) had a substantial impact on the per diem rates. It was mainly the combination of these two factors - namely exchange rate fluctuations and delayed global revision - which substantially affected the Commission per diem rates for certain countries (4) . In addition, the Commission, which has referred to "the Commission per diem system", has failed to substantiate its argument that the above method which it applied when revising the per diem rates in June 2003, had been agreed to by the signatory parties of the Twinning covenant - that is, Austria and Bulgaria. In light of the above, it appears that the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of a per diem rate, defined by the Commission at a level significantly lower than the one specified in the Twinning Covenant, did not mirror, in essence, corresponding changes in the living expenses in Sofia, but, mainly, exchange rate fluctuations between the US dollar and the euro during the period June 2001 – June 2003. The Ombudsman, thus, considered that the above-mentioned decision could constitute an instance of maladministration and made the friendly solution proposal mentioned above.

The Commission's response to the proposal for a friendly solution

The Commission submitted the following response:

Background and the Ombudsman's analysis

Following a thorough analysis of both the complaint and the arguments respectively put forward by the Commission and the complainants, the Ombudsman noted that (quoting the Ombudsman's proposal for a friendly solution):

" *1. 'the Commission's decision not to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of the per diem rate defined in the covenant was not, per se, unjustified or violative of the Commission's obligation to fund the execution of the covenant, in accordance with its budget.* "

But he indicated at the same time that:

2. "the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering July -December 2003) on the basis of a per diem rate, defined by the Commission at a level significantly lower than the one defined in the Twinning contract, did not mirror, in essence, corresponding changes in the living expenses in Sofia, but, mainly exchange rate fluctuations between the US dollar and the euro during the period June 2001-June 2003. "

The Ombudsman therefore recommended a friendly solution whereby the Commission would

offer the complainant reasonable compensation for the financial loss suffered following the contested reduction of the per diem rate for Sofia which served as the basis for the reduced subsistence allowance paid out to the complainant during the period July-December 2003.

The Commission's position

With respect to the first part of the Ombudsman's concluding reasoning, the Commission notes the following:

The Commission takes note of the first part of the Ombudsman's reasoning quoted above whereby the Ombudsman acknowledged that the Commission's adjusted payment of the complainant's subsistence allowance made with reference to the redefined per diem rate for Bulgaria was not in itself unjustified.

A. The Commission emphasises in this respect once more that at the time of the Twinning projects under review, the standard annex 2 to the Financing Memorandum with the respective beneficiary countries provided that "[t] *he amounts earmarked for Twinning projects will cover the eligible costs (as set down in the DIS instructions) for implementing the work plan agreed between the Member State and the applicant country. The eligible costs may include costs incurred by the selected Member State during the preparation of the Twinning covenant in the period between signature of the financing memorandum and the final notification of the financing approval of the covenant.* "

The Commission adds that the DIS instructions indeed generally referred to the Twinning Manual. This further confirms that the Commission was legally bound to apply the 2002 Twinning Manual (including its section 5.6.2 providing for the application of the periodically adjusted per diem rates as the basis of the subsistence allowance of the complainant) to Twinning Covenant BG 01 IB EN 01 - Implementing the Seveso environment directive.

B. The Commission confirms that the application of the UN - linked system of per diems was compulsory at the time of the complaint and still is under the present Financial Regulation for all expert missions taking place under external assistance contracts (see *inter alia* article 181 of the Implementing Rules).

With respect to the second part of the Ombudsman's concluding reasoning, the Commission notes the following:

The Commission notes that the Ombudsman's criticism concentrates on the fact that the contested payments effected on the basis of the aforementioned mandatory per diem rates did not mirror the corresponding changes in living expenses in Sofia but, mainly, reflected exchange rate fluctuations between the US dollar and the euro during the period June 2001 and June 2003.

The Commission understands that this criticism is more directed at the general set-up of the UN - linked per diem rate system retained by the Commission for all its external assistance contracts than a criticism of its concrete (and lawful) application of that system to the Twinning Covenant at issue.

However, the Commission submits that its services, contrary to the allegations of the complainant, have made every effort and used all means legally available under the 2002 Twinning Manual to mitigate the detrimental consequences thereof for the Resident Twinning advisors (at that time called pre-Accession advisors):

A) As from the end of July 2003 the Commission consistently engaged in a dialogue with the complainants on this issue, (see E. below).

B) Further to the complaints raised by several pre - accession advisors (PAAs) and other Twinning stakeholders, the Commission immediately investigated the matter and issued a first letter on 14 October 2003, whereby it explained the basis of the then per diem system and its intention to assess this system notably with regard to the subsistence allowance for PAAs (Annex 1 to the present comments).

C) In its subsequent letter of 22 December 2003, the Commission announced the outcome of the above-mentioned assessment regarding the future flat rate subsistence allowance for pre-accession advisors in Twinning projects.

The Commission therefore accepted that as from 1 January 2004 the amount of the flat rate subsistence allowance for pre-accession advisors would no longer be subject to variations during the Twinning secondment but would be defined at the time of the signature of the Twinning covenant and for its entire duration.

In the same letter, the Commission moreover accepted that, for Twinning C ovenants signed before 1 January 2004 *[as was the case for the Twinning Covenant at stake]* , the reserve for adjustment of estimated costs which amounts to maximum 2.5% of the total twinning budget could exceptionally be mobilised to mitigate the consequences of the lower per diem rates set on 7 July and 15 December 2003. Thus, PAAs working with covenants signed before 1 January 2004 were entitled, exceptionally and under certain conditions spelled out in the attached letter, to call on the Twinning reserve to compensate for the decline of the per diem rates for Bulgaria set as from 7 July 2003.

The Commission notes that the complainant indeed admits that he has called upon this alleviation mechanism in January 2004 and consequently obtained an extra payment of EUR 8,769. The Commission regrets that the complainant wants to stretch the mechanism beyond the limits set out in the aforementioned letter of 22 December 2003 by requesting an additional and retroactive payment covering the period before 22 December 2003.

D) A Commission official from DG Enlargement went on mission to Sofia and met with the PAAs working in Bulgaria during a meeting especially arranged on 15 January 2004. The objective of this meeting was to discuss the above-mentioned adjustment of the rules governing the subsistence allowance. The official clarified to the PAAs working with covenants signed before 1 January 2004 that they could exceptionally call on the Twinning budget reserve. During that meeting, no complaint was formulated by way of the present PAAs and it appeared that the new

arrangement (including the exceptional alleviation mechanism) to stabilise the PAA subsistence allowance was well received. It should be noted that only one of the complainants was present at that meeting.

E) The Commission recalls that the 2002 Twinning manual generally provided for a flat rate compensation fee which was at the disposal of the Member State Twinning Project leader for each Twinning Covenant in order to ensure the flexible and effective implementation of each Twinning project.

Section 5.8 of the 2002 Twinning Manual indeed provided as follows: " *The breakdown of costs (article 7 of the standard format for Twinning Covenants) may not include expert fees for work performed outside the CC* [Candidate Country] *, no matter what its nature (e.g. preparation or follow-up of mission, accompaniment of study visit, delivery of seminar in MS, co-ordination, logistical management [accounts, organisation] overheads and other incidental costs).*

In its place, and as a global contribution to the costs arising from the responsibility of preparing and implementing a Twinning project, the compensation for short and medium-term expertise of any kind (including the Project Leader) delivered in the CC is increased by a flat rate of 150%. This amount is added to expert fees for each activity in the CC. The MS organisation in charge of the Twinning project may dispose of it for any costs arising in the MS in connection with the project and overhead costs. "

As stated, this general flat rate compensation fee is budgeted with reference to the total amount of the expert fees for all short term experts involved in the implementation of each Twinning Covenant. In each Twinning project, this general flat rate compensation can be used by the Member State Twinning project leader for the efficient implementation of the Twinning project in so far as compliance is guaranteed with the principle of sound financial management and with the non-profit principle which is generally applicable to grants.

In Twinning Covenant BG 01 IB EN 01, the budget for this general flat rate compensation amounted to EUR 161.777 out of a total Twinning budget of EUR 700.000. It was therefore fully legal and even advisable for the Project Leader of this concrete Twinning project to use part of this flat rate compensation to mitigate the consequences of the reduction of the per diem rate for Bulgaria on the subsistence allowance of the PAA. The Commission recalls in this respect that the complainant himself estimates the financial damage at around EUR 7,000. This amount could easily be paid out of the aforementioned general flat rate compensation of EUR 161,777.

This possibility was already mentioned to the complainant on 5 August 2003 . It was again mentioned in the Commission's letter of 22 December 2003 and it was explicitly explained during the meeting in Bulgaria on 15 January 2004.

Concluding remarks

1. The Commission notes that the complainant obtained a payment of EUR 8,769 from the Twinning reserve budget to compensate for the decline of the per diem rates for Bulgaria set as from 7 July 2003.

2. The Commission has not only acted in line with the applicable regulatory framework (i.e., the 2002 Twinning Manual and the other rules deriving from the Financial Regulation) in applying the reduced per diem rates for the definition of the complainant's subsistence fee as PAA during the period under review (first part of the Ombudsman's reasoning).

3. The Commission has also acted with all necessary diligence and good will to follow up on the numerous complaints arising out of the reduction of the per diem rates set for Bulgaria in July 2003.

It is therefore difficult for the Commission to accept that its course of action as explained above could be labelled as a possible instance of maladministration as stated in the Ombudsman's proposal.

The Commission submits that the acceptance to award a further financial compensation to the complainant would in fact undermine

- the principle of equality between all Twinning stakeholders and more especially between all PAAs at that time since most of them have not contested the then normal and expected application of the fluctuating per diem rates on their subsistence allowance and have not even called on the temporary relief mechanism proposed in the Commission's letter of 22 December 2003; and

- the principle of transparency, which is crucial for the correct implementation of Twinning projects involving competing Member State administrations, since the award of financial compensation in this instance would undermine the legitimate expectations in the overall and even handed application of the regulatory framework as set out in the Twinning Manual and the other applicable rules.

The Commission therefore submits with regret that it will not propose to offer financial compensation to the complainant.

The Commission's position applies to cases 240/2004/PB and /2004/PB since the complainants in those cases also applied for and received an additional compensation of respectively EUR 4,218 (case 240/2004/PB) and EUR 9,324 (case 242/2004/PB) as foreseen in the Commission's letter of 22 December 2003.

The complainant's observations

On 22 April 2007, the complainant asked the Ombudsman for an extension of the deadline for submission of observations (which was 30 April 2007). In his request, the complainant made the following remarks:

The complainant stated that, on the positive side, the case had certainly increased awareness among Commission officials "on the missing soundness" of the current EC per diem system, which causes easily avoidable administrative problems for Member State administrations involved in the implementation of around 1000 EC-funded twinning projects. He pointed out that Austria had taken the initiative to raise the issue with the Commission. He stated that the

"obvious reform needs" would be discussed with the Commission at the next regular meeting, which was scheduled for June 2007.

The Ombudsman's services subsequently contacted the complainant, informing him at that point that he was welcome to submit his observations until 15 October 2007. On 15 November 2007, the complainant submitted observations in which he essentially encouraged the Ombudsman to attempt a new friendly solution proposal. The complainant also forwarded his observations to the Commission.

THE DECISION

1 Allegation that the Commission's reduction of the per diem rates was unjustified and relevant claims

1.1 The case concerns the Commission's funding of a Twinning Project (BG2001/IB/EN/01) entitled 'Implementing the Seveso Directive'. 'T winning' is an instrument for administrative co-operation designed to assist acceding and candidate countries to strengthen their administrative and judicial capacity to implement Community legislation as future Member States of the European Union. Twinning projects encompass the secondment of long-term experts from the Member States to the acceding and candidate countries. Such an expert is called a pre-accession adviser ('PAA').

The project here concerned was realised on the basis of a 'Twinning Covenant' concluded between a Member State (Austria) and Bulgaria and endorsed by the Commission. Article 7 of the Covenant provided, inter alia, for a subsistence allowance (per diem) of EUR 97.50 for each day of the complainant's assignment as PAA in Sofia. The Commission undertook to finance the project, in accordance with the detailed budget contained in Article 7 of the Covenant (Article 1 of Annex A to the Covenant).

1.2 In July 2003, the Commission proceeded to an adjustment of per diem rates for PAAs. In the complainant's case, this adjustment resulted in a sharp reduction of his subsistence allowance provided for in the Covenant. The complainant has alleged that this decrease was unjustified and constituted a breach of contract (5) . This allegation consists, in essence, of two parts: (i) the Commission should make payments for subsistence allowance on the basis of the per diem rate defined in the Covenant; (ii) the method the Commission used to calculate the new rate was not reasonable.

1.3 On 27 November 2006, the Ombudsman made a proposal, under Article 3(5) of the European Ombudsman' Statue, with a view to finding a friendly solution to the case. The main findings in the Ombudsman's proposal were, in summary, the following.

1.4 With regard to the first part of the complainant's above-stated allegation, the Ombudsman found that the Commission's decision not to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of the per diem rate defined in the Covenant was not, *per se* , unjustified or violative of the Commission's obligation to fund the execution of the Covenant, in accordance with its budget.

1.5 However, with regard to the second part of the complainant's allegation, the Ombudsman made the following findings, after taking into consideration the arguments and information submitted by the complainant and the Commission. The per diems at issue were destined to cover the complainant's living expenses in Sofia. In this regard, the Commission had stated that adjustments to the per diems are, in general, aimed at keeping up with the fluctuations of living costs in the countries in which the external actions financed out of the Community budget take place. Hence, the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) based on a per diem rate significantly lower than the one defined in the Covenant should reflect corresponding changes in the living expenses in Sofia. In the context of the present inquiry, the Commission stated that its per diem rates were based on United Nations rates, which were set in accordance with annual country survey missions conducted by the UN's International Civil Service Commission (ICSC). The UN data were derived from price surveys of good commercial hotels and meal costs for the respective third countries, bolstered by an additional amount of 15% for incidental expenses. The Commission's per diem rates were the result of a conversion of these US dollar-based rates into euro. Exchange rate fluctuations between the US dollar and the euro during the period from the revision in June 2001 to the next revision in June 2003 (on the basis of which the Commission took its above-mentioned decision regarding payments for the complainant's subsistence allowance at issue) had a substantial impact on the per diem rates. It was mainly the combination of these two factors - namely exchange rate fluctuations and delayed global revision - which substantially affected the Commission per diem rates for certain countries. In addition, the Commission, which has referred to "the Commission per diem system", has failed to substantiate its argument that the above method which it applied when revising the per diem rates in June 2003, had been agreed to by the signatory parties of the Twinning covenant - that is, Austria and Bulgaria. In light of the foregoing, the Ombudsman found that the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of a per diem rate, defined by the Commission at a level significantly lower than the one specified in the Twinning Covenant, did not mirror, in essence, corresponding changes in the living expenses in Sofia, but, mainly, exchange rate fluctuations between the US dollar and the euro during the period June 2001 – June 2003. The Ombudsman, thus, considered that the above-mentioned decision could constitute an instance of maladministration and made the following proposal for a friendly solution:

The Commission could consider offering the complainant reasonable compensation for the financial loss he has suffered following the Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of a per diem rate significantly lower than the one specified in the Twinning Covenant.

1.6 In its reply to the Ombudsman's proposal for a friendly solution, the Commission did not make any cogent arguments, refuting the above findings. The Commission basically argued that, under the Financial Regulation, the application of the UN-linked system of per diems was compulsory at the time of the complaint, and still is for all expert missions taking place under external assistance contracts (the Commission referred to " *inter alia Article 181 of the Implementing Rules* "). In this regard, it must, first, be recalled that the Ombudsman had

expressly asked the Commission, in the context of his further inquiries, to " *clarify the legal basis for* [its] *application of the USD-based UN-rate system for calculating the per diem rates...* ". In its response, the Commission did not invoke any specific legal basis and considered that the issue of legal basis " *is not pertinent for solving the concrete issues at stake* ". The Commission's reply to the Ombudsman's proposal for a friendly solution referred to a legal obligation to apply the above system, provided for in the Financial Regulation. In support of this position, the Commission did not invoke any specific provisions, apart from article 181 of the Implementing Rules. However, the Ombudsman notes that Article 181 (6) does not make an explicit or implicit reference to any USD-based UN system of per diems. Hence, the Commission failed to substantiate its foregoing argument (7) .

In light of the above, the Ombudsman concludes that the Commission has failed to provide valid and adequate justifications for its decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) on the basis of a per diem rate defined by the Commission at a level significantly lower than the one specified in the Twinning Covenant. This decision, thus, constituted an instance of maladministration.

1.7 The complainant has claimed that the Commission should authorise the relevant Member State institution to pay the PAAs, for the entire duration of the project, the subsistence allowance of EUR 97.50 per day, as fixed in the original budget of the signed and endorsed Twinning Covenant. In case that such an authorisation could not be given before the end of the project, the Commission should provide for an alternative procedure to allow the PAAs to receive the difference between the subsistence allowance received and the subsistence allowance fixed in the covenant.

1.8 In its reply to the Ombudsman's proposal for a friendly solution, namely, for reasonable compensation to the complainant, the Commission presented the actions it had taken following the establishment of lower per diem rates in 2003, with a view to mitigating the adverse economic effects of these rates on PAAs and avoiding similar problems in the future. It emphasised that, in this context, the complainant obtained an extra payment of EUR 8 769, but he wanted to stretch the alleviation mechanism beyond its limits and obtain additional sums for the period before 22 December 2003. It stated that it could not accept something like that, because awarding a further financial compensation to the complainant would undermine
- the principle of equality between PAAs, since most of them had not contested the new per diem rates and had not even called on the temporary relief mechanism set up by the Commission;
- the principle of transparency, since the award of financial compensation in the complainant's case would undermine the legitimate expectations in the overall and even handed application of the regulatory framework as set out in the Twinning manual and the other applicable rules.

1.9 The Ombudsman considers that the Commission's above arguments are not convincing. As regards the argument concerning the principle of transparency, it suffices to note that the Commission has failed to show that its application of the USD-based UN system for establishing the per diem rates in question was provided for in the relevant Twinning Manual and legal framework. As regards the argument about the principle of equality between PAAs, it suffices to

note that this principle cannot be considered as implying that the Community Administration cannot take appropriate action to remedy an instance of maladministration in the way it treated a complainant because other persons, who might have been treated in a similar way, did not complain to the Administration or to the Ombudsman. It is rather evident that the acceptance of such an argument would lead to unreasonable results as regards the discharge of the Community Administration's duty to take appropriate remedial action in relation to instances of maladministration in its activities.

1.10 Nevertheless, the Ombudsman notes that the complainant did not have a contractual/employment relationship with the Community, but rather with the Member State which had signed the Twinning Covenant in question, also endorsed by the Commission. The complainant has not presented any specific, duly substantiated arguments to the effect that this Member State could not pay him, without the Commission's permission or other action, the amount of money he seeks as subsistence allowance or even that the Member State had submitted relevant payment requests to the Commission, pursuant to the Twinning Covenant. In this regard, the Commission, in its reply to the Ombudsman's friendly solution proposal, made the point that, under the Twinning Manual, the Member State had at its disposal a flat rate compensation fee which could have been used for the purpose of paying the sum sought by the complainant. The complainant has not contested that. In light of the above, the Ombudsman considers that the causal link between the instance of maladministration identified in point 1.5 of the present decision and the financial loss suffered by the complainant, following the Commission's contested decision, appears to be too attenuated to trigger the Community's non-contractual liability. Also taking into account the fact that the Commission did not respond positively to his friendly solution proposal for compensation, the Ombudsman does not find it justified to further pursue the complainant's claims (8) .

1.11 Finally, the Ombudsman takes note of the Commission's statement, made in its reply to his friendly solution proposal, that, as from 1 January 2004, the amount of the flat rate subsistence allowance for PAAs is no longer subject to variations during the Twinning secondment but is defined at the time of the signature of the Twinning covenant and for its entire duration.

1.12 In light of the above, the Ombudsman will close the case with a critical remark.

2 Conclusion

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

The Commission's decision to make payments for the complainant's subsistence allowance at issue (covering the period July-December 2003) basis on a per diem rate significantly lower than the one defined in the Covenant did not reflect, as it should, corresponding changes in the living expenses in Sofia, but rather exchange rate fluctuations between the US dollar and the euro during the period June 2001 – June 2003. This decision, thus, amounted to an instance of maladministration.

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

FURTHER REMARK

The Commission has stated that, under the present Financial Regulation, the application of the USD-based UN system of calculation of per diems was compulsory at the time of the complaint and still is for all expert missions taking place under external assistance contracts. However, the Commission has failed to substantiate its above argument. In support of its position, the Commission did not invoke any specific provisions, apart from article 181 of the above-mentioned Implementing Rules, which does not make an explicit or implicit reference to any USD-based UN system of per diems. The Commission is, thus, invited to examine the matter more closely.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Here the Commission's reply contained the following footnote: " *At the time of the Twining projects under review, the standard annex 2 of the Financing Memorandum with the respective beneficiary countries provided that 'The amounts earmarked for Twinning projects will cover the eligible costs (as set down in the DIS instructions) for implementing the work plan agreed between the Member State and the applicant country. The eligible costs may include costs incurred by the selected Member State during the preparation of the Twinning covenant in the period between signature of the financing memorandum and the final notification of the financing approval of the covenant'* ".

(2) Updated per diem rates are available on the Commission's EuropeAid's website (http://ec.europa.eu/comm/europeaid/perdiem/index_en.htm [Link]).

(3) In order to ensure consistency in the language used for the summary of the complainant's observations, "the complainant" is used instead of the first person ("I").

(4) Apparently in view of this information, the Commission did not reply to the Ombudsman's requests (i) for the specific data used to define the rates on the basis of which the per diems paid for the complainant were calculated; or (ii) for evidence as to the development of the living costs in Bulgaria for the period of the project here concerned.

(5) During the present inquiry, it has become clear that there was no contract, as such, between the complainant and the Commission, but only between the complainant and his Member State. This part of the complainant's allegation is therefore merely understood as here set out and examined.

(6) " *Flat-rate financing*

(Article 117 of the Financial Regulation)

1. In addition to cases of scholarships and prizes, the basic act may authorise flat-rate financing for contributions of less then EUR 5000 or the use of scales of unit costs.

In order to ensure compliance with the principles of co-financing, no-profit and sound financial management, those flat-rate amounts and scales shall be reviewed at least every two years by the authorising officer responsible. The amounts shall be approved by the Commission.

2. The grant agreement may authorise flat-rate cover:

(a) of the beneficiary's overheads up to a maximum of 7 % of total eligible costs for the action, save where the beneficiary is in receipt of an operating grant financed from the Community budget;

(b) of certain mission expenses on the basis of a per diem scale approved annually by the Commission.

The ceiling provided for in point (a) of the first subparagraph may be exceeded by reasoned decision of the Commission. "

(7) The Ombudsman will make a relevant further remark below.

(8) This also responds to the complainant's suggestions in his observations of 15 November 2007 that the Ombudsman could attempt finding a new friendly solution proposal.