

Decision of the European Ombudsman on complaint 1273/2004/GG against the European Commission

Decision

Case 1273/2004/GG - Opened on 14/05/2004 - Decision on 29/06/2005

Strasbourg, 29 June 2005

Dear Mr C.,

On 29 April 2004, you made a complaint to the European Ombudsman concerning the way in which the European Commission had handled a complaint that had been submitted to it in relation to the alleged breach of Regulation 685/95 by Spain and the Commission's handling of queries concerning the entry into force of certain provisions of Regulation 1954/2003.

On 14 May 2004, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 2 August 2004. I forwarded it to you on 11 August 2004 with an invitation to make observations, which you sent on 20 September 2004.

On 15 December 2004, I wrote to the Commission in order to ask for further information in relation to your case. The Commission sent its reply on 9 March 2005. I forwarded it to you on 10 March 2005 with an invitation to make observations, which you sent on 12 April 2005.

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

THE COMPLAINT

Background

The present complaint concerns the extent to which fishing was permitted prior to 1 August 2004 in the waters surrounding the Azores, a group of islands in the Atlantic ocean belonging to Portugal. The relevant zones up to 200 nautical miles from the baseline of the Azores (the "Azorean waters") are classified in accordance with the nomenclature of the International Council for the Exploration of the Sea (ICES) and of the Committee for Eastern Central Atlantic Fisheries (CECAF). The Azorean waters are in ICES area X and in CECAF area 34.2.0.

The legislative background

Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 no. L 261, p. 1) set up certain rules for the monitoring of conservation and resource management measures in the fisheries sector.



Since the accession of Spain and Portugal to the Communities in 1986, certain transitional provisions were applicable to fisheries. Article 353 of the Treaty concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community (the "Act of Accession") provided that the transitional regime was to remain in force until 31 December 2002.

An adjusted transitional regime was adopted in the form of Council Regulation (EC) No 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ 1994 no. L 140, p. 1). This regulation laid down the institutional framework for the adoption of further measures by the Council. On this basis, the Council adopted Regulations 685/95 and 2027/95.

These two regulations adopted in 1995 governed access to waters under Portuguese jurisdiction, including Azorean waters. They laid down, inter alia, a limitation regime concerning fishing effort which specifically excluded access of foreign vessels to Azorean waters.

According to Article 8 of Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources (OJ 1995 No L 71, p. 5), the Member States were to take the measures referred to in Annex III ("Community criteria for the evaluation of fishing effort") of the regulation before 1 January 1996.

Annex III provided as follows:

"2. Surface longlines and troll line tuna fishing

The fishing activities of vessels flying the flag of Spain in continental waters under the sovereignty or jurisdiction of Portugal in ICES area IX and Cefac and the fishing activities of vessels flying the flag of Portugal in continental waters under the sovereignty or jurisdiction of Spain in ICES areas VIII and IX and Cefac are authorized in accordance with the Community provisions in force.

3. Tuna fishing

The access of Spanish vessels to island waters under the sovereignty or jurisdiction of Portugal in ICES area X and Cefac and that of Portuguese vessels to island waters under the sovereignty or jurisdiction of Spain in Cefac is excluded, except, where appropriate, in the case of vessels engaging in fishing activities which involve the use of traditional gear under a joint agreement between these two Member States."

Council Regulation (EC) No 2027/95 of 15 June 1995 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources (OJ 1995 no L 199, p. 1) sets out, in its Annex I, the maximum annual fishing effort for each Member State and for each fishery. In Azorean waters, the fishing effort was entirely allocated to Portugal in respect of demersal and deep-water species using fixed gear. In addition, the Annex allocates a zero quota for fishing with towed gear in Azorean waters and thus prohibits the use



of towed gear in Azorean waters.

Articles 1 and 2 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59) provide that the Common Fisheries Policy of the EU is to cover "conservation, management and exploitation of living aquatic resources" and that it shall "ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions". To achieve these objectives, Article 4 of the regulation empowers the Council to adopt measures governing access to waters and resources. These measures can target individual species or groups and can include measures "establishing targets", "limiting catches", "limiting fishing effort", "technical measures" and specific measures to reduce the impact of fishing activities on marine ecosystems and non-target species.

Regulation 2371/2002 contains provisions (Articles 7 and 8) which empower the Commission and Member States respectively to adopt emergency measures in cases of serious threat to the marine ecosystem or fish stock.

Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ 1998 L 125, p. 1) prescribes minimum mesh sizes for towed nets and applies, inter alia, to Azorean waters.

Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the Common Fisheries Policy (OJ 1993 L 261, p. 1) establishes a regime for the use of the so-called 'Vessel monitoring System' which obliges vessels to carry on board a functioning system allowing detection and identification of vessels.

Regulation 1954/2003

Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95 (OJ 2003 no. L 289, p. 1) effectively repealed the old system governing access to Azorean waters, as set out in Regulations 685/95 and 2027/95.

According to Article 3 of Regulation 1954/2003, Member States have to assess and allocate the levels of fishing effort exerted by vessels equal to or more than 15 metres in length in each of the ICES and CECAF zones. Article 4 of the Regulation contains special provisions for vessels that are less than 15 metres in length.

Pursuant to Articles 7 and 8 of Regulation 1954/2003, Member States have to establish a list of fishing vessels flying their flag which are authorised to carry out their fishing activities in the relevant fisheries and must take the necessary measures to regulate the fishing effort by monitoring the activity of their fleet.

Article 11 provides for the adoption of a Regulation ("the Article 11 Regulation") fixing the maximum annual fishing effort for each Member State and for each fishery as defined in Article 3 of the Regulation. A proposal for such a regulation was to be submitted to the Council by the



Commission by 29 February 2004. In case the Council failed to take a decision by 31 May 2004, the Commission was to adopt the regulation itself by 31 July 2004.

According to Article 13 of the Regulation, Articles 19a(3), 19b, 19c, 19d and 19e(3) of Regulation (EEC) No 2847/93 were no longer to apply to (inter alia) the Azorean waters.

Article 15 of Regulation 1954/2003 provided that Regulations 685/95 and 2027/95 were to be repealed with effect from the date of entry into force of the Article 11 Regulation or 1 August 2004, whichever was the earlier.

Article 16 stipulated that Regulation 1954/2003 was to enter into force on the seventh day following that of its publication in the Official Journal of the European Union. Given that Regulation 1954/2003 was published in the OJ of 7 November 2003, it entered into force on 14 November 2003.

Article 5 (1) of Regulation 1954/2003 provides as follows: "In the waters up to 100 nautical miles from the baselines of the Azores, Madeira and the Canary Islands, the Member States concerned may restrict fishing to vessels registered in the ports of these islands, except for Community vessels that traditionally fish in those waters in so far as these do not exceed the fishing effort traditionally exerted. (...)".

The issues in dispute in the present case

The present case concerns the question as to when Regulation 1954/2003 became effective, that is to say from which date it repealed Regulations 685/95 and 2027/95. The Kingdom of Spain assumed that the relevant date was 14 November 2003. The complainant contended that, as foreseen in Article 15 of Regulation 1954/2003, the relevant regulations would only be repealed with effect from the date of entry into force of the Article 11 Regulation or 1 August 2004, whichever was the earlier. It was the position the Commission took in this matter and the information that it provided in this context that gave rise to the present complaint.

Legal challenges against Regulation 1954/2003

In Case C-36/04, the Kingdom of Spain asked the Court of Justice to declare Articles 3, 4 and 6 of Regulation 1954/2003 void. This case is pending before the Court (1) .

The Autonomous Region of the Azores applied to the Court of First Instance for the annulment of Articles 3, 5 (1), 11, 13(b) and 15 and of the Annex to Regulation 1954/2003 in so far as they adversely affect Azorean waters (Case T-37/04) (2) . This case is pending before the Court of First Instance (3) .

In his complaint to the Ombudsman, the complainant stressed that neither of these cases concerned the two issues that were central to his present complaint.

The relevant facts

In January 2004, Spanish fishing vessels were detected in the zone between 100 and 200 miles off the Azores.

In a fax sent to (undisclosed) recipients on 12 January 2004, the Spanish Ministry for Agriculture, Fishery and Foodstuffs pointed out that fishing for swordfish and related species



was allowed in 2004 in the Azorean waters, with the exclusion of the waters up to 100 nautical miles from the Azores.

On 21 January 2004, Spain submitted to the Council a paper entitled “Application of Regulation (EC) No 1954/2003”. In this paper, the Spanish authorities expressed the view that apart from the provisions on the management of fishing effort that still needed to be implemented, Regulation 1954/2003 was already applicable. They further stated that Spain considered it crucial to seek the opinion of the Council’s Legal Service on this point and therefore asked for the matter to be put on the agenda of the Working Party on Internal and External Fisheries Policies on 29 January 2004.

On 3 February 2004, the Commission published its proposal for a Council Regulation amending Regulation (EC) No 850/98 as regards the protection of deep-water coral reefs from the effects of trawling in certain areas of the Atlantic Ocean (COM(2004) 58 final). The Explanatory Memorandum for this proposal contains the following passage:

“Moreover, the Community fishing zone around the Azores, Madeira and Canary Islands contains several known or potential deep water habitats that have so far been preserved from trawling due to the special access regime defined in Council Regulation (EC) No 2027/95. As this regime will cease to apply in 2004, it is now important [to] guarantee a continuity of the protection of these areas as part of Community legislation.”

This text is repeated in recital 5 of the proposed regulation where a footnote is added to provide the reference to Regulation 2027/95 in the Official Journal. This reference is completed by the phrase “Regulation as amended by Regulation (EC) No 1954/2003 (OJ L 289, 7.11.2003, p.1).”

Also on 3 February 2004, the Commission published a press release (IP/04/153) to announce its proposal to the public. This press release contained the following statement:

“Bottom trawling is currently banned in the areas concerned under the rules governing access to the so-called ‘western waters’, established during the process of integration of Portugal and Spain into the Common Fisheries Policy. As these rules will end this year, restrictions are needed to ensure continued protection for these habitats.”

On 6 February 2004, a member of the Commission’s Legal Service drew up a “Note for the file” concerning the entry into force of Articles 5 and 13 of Regulation 1954/2003. The author noted that these articles had set up a system that differed from the one that had applied under the previous legislation and that Article 16 provided that the Regulation was to enter into force on the seventh day after its publication. In these circumstances, the author of the note concluded that the rule “lex posterior derogat legi priori” was applicable and that Articles 5 and 13 of Regulation 1954/2003 had thus entered into force on 14 November 2003.

In a press release published on 9 February 2004, the Spanish Ministry for Agriculture, Fishery and Foodstuffs arrived at the conclusion that on 14 November 2003, the zone between 100 and 200 nautical miles from the Azores had been liberalised.



On 9 February 2004, the Regional Secretary in charge of Agriculture and Fishery of the Autonomous Region of the Azores submitted a complaint against Spain to the Commission in which he pointed out that Spanish fishing vessels had begun fishing in the Azorean waters. The Regional Secretary expressed the view that this activity was in breach of Regulations 685/95 and 2027/95 and presented a serious and imminent threat to living aquatic resources in Azorean waters. He therefore asked the Commission (1) to take urgent preventive measures under Regulation 2371/2002 and (2) to commence infringement proceedings against Spain under Article 226 of the EC Treaty.

On 13 February 2004, a report appeared in the Spanish press according to which the Legal Service of the Commission had confirmed that Spanish boats were authorised to fish in the waters between 100 and 200 nautical miles off the coasts of the Azores. The report referred to the Spanish Ministry for Agriculture, Fishery and Foodstuffs as its source.

On 16 February 2004, a further report appeared in the Spanish press. This report reproduced many of the points of the report of 13 February but also stated the following:

“This was also confirmed by the Legal Service of the Commission, which stated that when the same aspect is ruled by two provisions, the most recent applies (i.e. the 2003 Regulation) and that as Article 5 of Regulation 1954/2003 is fully in force, in consequence, Spain can grant licences to fish in the waters around the Azores and Madeira between 100 and 200 miles.”

In a letter of 18 February 2004 addressed to Mr Fischler, the Member of the Commission in charge of fisheries, the complainant asked the Commission to clarify matters. He specifically requested the Commission to confirm that (having regard to Articles 5 and/or 15 of Regulation 1954/2003) it was not entitled to abrogate Council Regulations in total or in part, that until the courts declared otherwise, Articles 5 and 15 of Regulation 1954/2003 were fully in force and that Regulations 685/95 and 2027/95 remained in force until the entry into force of a further regulation or until 1 August 2004, at the latest.

At a meeting of the Council's Working Party on Internal and External Fisheries Policies on 19 February 2004, the Commission confirmed that Articles 5 and 13 of Regulation 1954/2003 had entered into force on 14 November 2003. The "Speaking Note" distributed by the Commission representative reproduced the points that had been made in the "Note for the file" of 6 February 2004.

In a letter of 5 March 2004 to the complainant, Mr Fischler put forward the same views. Mr Fischler stressed that there was therefore no need for any emergency measures.

During oral questions in the European Parliament on 9 March 2004, Mr Fischler reiterated this view. He submitted that no emergency measures could be adopted regarding the presence of Spanish vessels outside the 100 nautical mile zone because these boats complied with the rules in force. Mr Fischler assured the complainant that the Commission's Legal Service had been consulted and that it shared this view.



In his reply of 11 March 2004 to a written question by Mr José Ribeiro e Castro MEP, Mr Fischler confirmed this position.

On 12 March 2004, Mr Fischler replied to the complainant's letter of 18 February 2004. In this letter, Mr Fischler pointed out that Regulation 1954/2003 had been in force since 14 November 2003 and that this meant "that the special conditions for fishing in the waters around the Azores, Madeira and the Canary Islands are applicable from that date onwards." Mr Fischler also stressed that Article 15 of Regulation 1954/2003 clearly stated that Regulations 685/95 and 2027/95 "are repealed with effect from either the date of entry into force of the Regulation mentioned in Article 11 of Regulation 1954/2003 or 1 August 2004, whichever is the earlier."

On 16 March 2004, the Spanish Ministry for Agriculture, Fishery and Foodstuffs sent a fax to the Commission's Directorate-General (DG) Fisheries in which it informed the Commission that a Spanish vessel which had been fishing in the zone between 100 and 200 nautical miles off the coast of the Azores had been detained by the authorities of the Azores.

This fax was forwarded to the Portuguese authorities the same day by the Commission, with a request to provide an opinion. On 17 March 2004, the Commission forwarded to the Portuguese authorities a copy of the "Speaking Note" distributed at the meeting on 19 February 2004.

In a letter of 17 March 2004, the complainant asked Mr Fischler to confirm that the restrictions contained in Regulations 685/95 and 2027/95 continued to apply in the waters of the Azores, until their repeal.

On 25 March 2004, the Regional Secretary in charge of Agriculture and Fishery of the Autonomous Region of the Azores submitted the reply of the Autonomous Region of the Azores to the Commission's letters of 16/17 March 2004.

In his reply of 13 April 2004 to the complainant's letter of 17 March 2004, Mr Fischler pointed out that Regulations 685/95 and 2027/95 were still in force and had not been repealed yet. He submitted, however, that the new regime for the zone between 100 and 200 nautical miles was in force since 14 November 2003 and prevailed over the 1995 Regulations.

The complaint to the Ombudsman

In his complaint to the Ombudsman, the complainant alleged that the Commission was guilty of maladministration in relation to its handling of a complaint that had been submitted to it in relation to the alleged breach of Regulation 685/95 by the Spanish authorities, together with its handling of queries concerning the entry into force of certain provisions of Regulation 1954/2003.

According to the complainant, this maladministration consisted of

- error in law as to the date of repeal of management measures contrary to the clear wording of Regulation 1954/2003;
- reliance on an informal note prepared by a member of the Commission's Legal Service, and holding it out as if it were a formal opinion of the Legal Service;



- inconsistency, contrary to Article 10 of the European Code of Good Administrative Behaviour;
- abuse of power leading to failure to comply with Article 211 of the EC Treaty;
- absence of impartiality, in breach of Article 8 of the European Code of Good Administrative Behaviour; and
- failure to notify the person concerned of the Commission's position whilst announcing that position publicly to third parties, contrary to Article 20 of the European Code of Good Administrative Behaviour.

In support of his allegations, the complainant submitted the following considerations:

1. Error in law

The previous regime provided for mutual access restrictions between Spanish and Portuguese vessels as regards certain types of fishing (Regulation 685/95) and for a maximum fishing effort regime for demersal and deep-sea species, albeit one which limited fishing for these species to vessels of the relevant Member State (Regulation 2027/95). These provisions did not conflict with the access restriction in Article 5 of Regulation 1954/2003 but rather complemented it, leading to: (1) an access restriction up to 100 nautical miles for all species; (2) an access restriction between 100 and 200 nautical miles for tuna and tuna-like species and for surface longline and troll line fishing (Regulation 685/95), and (3) a maximum annual fishing effort (Regulation 2027/95) which prevented fishing for demersal and deep-sea species by vessels from Member States other than Portugal.

The fishing effort limitation regime set down in Regulation 2027/95 could not be in conflict with Article 5, given that Article 11 provided for a similar fishing effort management regulation to be adopted for demersal species. The Commission had adopted a proposal for such a regulation (COM(2004) 166 final).

If the legislator had wished to repeal Regulations 685/95 and 2027/95 as from 14 November 2003, Regulation 1954/2003 would have said so. It should also be noted that the revocation of legislative acts was an exceptional measure and therefore needed to be done explicitly.

In his reply to written question P-0026/03 (4) , regarding the uncertainty as to the validity of Regulation 685/95 and Regulation 2027/95, Mr Fischler had stated the following:

"Until rules laid down in the Regulations are amended or repealed by the Community legislator they continue to apply, subject to a decision by the Court of Justice on the conformity of such rules with general principles of Community law."

As the above-mentioned document published on 3 February 2004 showed, the Commission itself had assumed until that day that the previous regime in the Azores was still in place.

2. Reliance on informal note

The "Speaking note" and the "Note for the file" were not a formal opinion of the Commission's Legal Service. However, they had been held out and relied upon as if they were.

3. Inconsistency

(As regards this issue, the complainant referred to the points he had made under 1 above.)

4. Abuse of power



The Commission had deliberately tried to avoid answering the question as to when the former regime ceased to apply until the issue became no longer relevant (i.e., after 1 August 2004). It had deliberately manipulated its responses to letters and Parliamentary questions so as to be as ambiguous as possible.

5. Absence of impartiality

The Commission had granted preferential treatment to the Spanish authorities whose complaint had been taken up the day on which it had been lodged (whereas the Azores had only received an acknowledgement of receipt regarding their complaint after having sent a reminder to the Commission).

6. Failure to notify the Azores of the decision

In its letter of 9 February 2004, the Regional Government of the Azores had called upon the Commission to take preventive measures under Article 26 (3) of Regulation 2371/2002. To this date, the Azores had not received a reply to their letter of 9 February 2004. However, in the European Parliament's oral questions on 9 March 2004, Mr Fischler had told the complainant that "the presence of Spanish vessels in the waters of the Azores outside the 100 nautical mile zone...does not justify emergency measures." Article 20 of the European Code of Good Administrative Behaviour stated that decisions should be communicated in writing to the persons concerned (paragraph 1) and should not be communicated to third parties "until the person or persons concerned have been informed". This had not happened in the present case.

Urgency

The complainant considered that the issue required *urgent* attention, given that it would cease to be relevant on 1 August 2004. In his view, it was therefore imperative that it be dealt with "properly as soon as possible".

The complainant therefore asked the Ombudsman to take steps to ensure that the complaint was dealt with as a matter of priority, in accordance with Article 10.2 of the Ombudsman's Implementing Provisions.

Confidentiality aspects

The complainant requested that his complaint should remain confidential and that his identity should not be disclosed. The complaint was therefore treated as confidential (16) .

THE INQUIRY

The Ombudsman's approach

The complaint, that had been received by the Ombudsman on 4 May 2004, was forwarded to the Commission for an opinion on 14 May 2004.

The Ombudsman noted that the complainant appeared to argue that the Commission's interpretation of the relevant legislation could result in a possible temporary gap as regards the protection of fish stocks between the date on which, according to the Commission, Regulations 685/95 and 2027/95 were effectively superseded by Regulation 1954/2003 (14 November 2003) and the date on which the Regulation to be adopted on the basis of Article 11 of Regulation 1954/2003 was to come into force (which could be as late as 1 August 2004). Seen from this perspective, time indeed appeared to be of the essence.



In these circumstances, the Ombudsman decided to accept the complainant's request to treat his complaint as being urgent and as meriting priority treatment. The Ombudsman therefore requested the Commission to submit its opinion as rapidly as possible and by 15 July 2004 at the latest.

The Commission's opinion

The Commission submitted the French original of its opinion to the Ombudsman on 28 July 2004. The translation into English (the language of the complaint) was forwarded to the Ombudsman on 2 August 2004.

In its opinion, the Commission made the following comments:

As regards the alleged *error in law*, the Commission had given its views on the entry into force of certain provisions of Regulation 1954/2003 (Articles 5 and 13), and of the implications of this, in a note that had been distributed to the Member States' Delegations in the Council's Working Party on Internal/External Fisheries Policy on 19 February 2004. The sixth and seventh paragraphs of this note set out the Commission's interpretation of the relevant articles. Reference should also be had to the "Note for the file" of 6 February 2004.

As regards the alleged *reliance on an informal note*, the note in question represented the official position of the Legal Service. It had been submitted to the Commission pursuant to internal Commission procedures which are used to obtain opinions from the Legal Service and which concern the question how these opinions are used. The points made by the complainant in this regard were therefore irrelevant.

There was no evidence for any *inconsistency* regarding the Commission's position. The Commission had set out its position in the note of 19 February 2004. The statements made by the Commission before Regulation 1954/2003 came into force (in particular, the answer to written question P-0026/2003) were a reflection of the legal situation that existed before the Regulation was adopted.

As regards the alleged *abuse of power*, the Commission had, in its "Speaking Note", adopted a clear position concerning the application of Article 5 of Regulation 1954/2003. All the positions it had adopted when replying to letters and when answering parliamentary questions had been based on this assessment.

In so far as the alleged *absence of impartiality* was concerned, the information provided by the Spanish authorities regarding the vessel inspected near the Azores (accusation of illegal fishing, detention of the vessel in port, obligation to appear before the competent court the following day) suggested to the Commission that the situation should be clarified as soon as possible. There were two main reasons for this: first, the detention of a vessel constituted a situation which could not be prolonged for an excessive length of time, and second, at the time when the events occurred (March 2004), the Commission was already in the position to adopt a consolidated approach regarding the application of Regulation 1954/2003.

However, the situation was very different as regards the complaint submitted by the Regional



Government of the Azores. The Secretariat-General of the Commission had acknowledged receipt by letter of 17 February 2004. It was regretted that this letter did not reach the addressee until 15 March 2004. However, this point was beyond the Commission's control. The Government had asked the Commission to adopt preventive measures within the meaning of Article 26 (3) of Regulation 2371/2002 and to launch infringement proceedings against Spain under Article 226 of the EC Treaty. The complaint was currently being examined in line with the procedural rules that apply and by virtue of the investigative powers granted to the Commission.

As regards the alleged *failure to notify the Azores of its position*, it could not be said at present that the Commission had no intention of taking measures. Given that the complaint was currently being examined, the comment that emergency measures were not justified did not mean that other possible courses of Community action could not be explored. There had been an exchange of correspondence on technical matters with the Spanish and the Portuguese authorities, since the Commission was not yet in possession of all the facts. The latest deadline for the provision of information by the Spanish authorities was 30 July 2004, and the file would then undergo a final examination by the Commission's Legal Service. The authorities of the Azores would be informed as soon as the examination of the complaint was completed.

The Commission concluded by expressing the view that no maladministration had therefore occurred.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

As regards the alleged *error in law*, the Commission had not even attempted to address the legal arguments presented in paragraph 17 of the complaint or to explain its diametrically opposing assessments of the legal situation as described in paragraphs 18 to 23 of the complaint. The Commission's position, as set out in the "Speaking Note", was plainly wrong. The President of the Court of First Instance, in paragraph 143 of his order of 7 July 2004 in Case T-37/04 R had considered that Regulation 1954/2003 had the effect that the 1995 Regulations would be repealed on 1 August 2004 at the latest and added: "This appears to be the most reasonable interpretation given that Article 15 is a specific provision governing the repeal of the 1995 Regulations."

In the explanatory memorandum accompanying its proposal for a ban on bottom trawling (COM(2004) 58 final) of 3 February 2004 the Commission had stated that the special access regime defined in Regulation 2027/95 "will cease to apply in 2004". The legislative process for this proposal was ongoing. On 16 August 2004, the Commission had therefore proposed an amendment to Community legislation in order to incorporate a temporary ban (COM(2004) 555 final). In its explanatory memorandum on this new proposal, the Commission stated that the special access regime defined in Regulation 2027/95 "has ceased to apply on 15 November 2003". This inconsistency was further evidence that the Commission's position constituted a manifest error in law.

The fishing effort limitation in Regulation 2027/95 could not be in conflict with Article 5 of



Regulation 1954/2003, given that Article 11 of that regulation provided for a similar fishing effort restriction regulation to be adopted. This new implementing regulation - Council Regulation (EC) No 1415/2004 of 19 July 2004 fixing the maximum annual fishing effort for certain fishing areas and fisheries (OJ 2004 L 258, p. 1) - performed the same role as Regulation 2027/95 and existed alongside Article 5 of Regulation 1954/2003. If there was no conflict between Regulation 1415/2004 and Article 5, then neither could there be any conflict between Regulation 2027/95 and Article 5. Therefore, even if the Commission's argument that in the event of a conflict the later provision prevailed were to be accepted, the fishing effort regime in Regulation 2027/95 could not have ceased to produce legal effects until 1 August 2004.

As regards the alleged *reliance on an informal note*, it was noted that the "Note for the file" represented the official position of the Commission

In so far as the *inconsistency* of the Commission's position was concerned, the statement made by Mr Fischler in reply to written question P-0026/2003 was a clear, unequivocal statement of the Commission's understanding of Community law. In any event, the Commission had omitted to comment on the view it had expressed in its proposal of 3 February 2004. This proposal had been made nearly three months after the adoption of Regulation 1954/2003.

As regards the alleged *abuse of power*, the Commission had deliberately tried to avoid answering the question as to when the former regime ceased to apply. Over a number of months, the Commission had simply reiterated the uncontroversial statement that Article 5 of Regulation 1954/2003 had entered into force on 14 November 2003 but failed to address the more fundamental question of what the implications of this were. It was not until Mr Fischler's letter of 13 April 2004 that it was expressly stated that the Commission's view was that the effect of the entry into force of Article 5 of Regulation 1954/2003 had been that Regulations 685/2003 and 2027/95 ceased to apply with effect from 14 November 2003. The comments made by the Commission in its opinion reinforced the view that there had been an abuse of power.

In so far as the alleged *absence of impartiality* was concerned, the urgency of the measures requested by the Regional Government of the Azores must have been obvious to the Commission, given that the subject-matter of this complaint was only an issue until 1 August 2004. The Commission was aware of the serious issues that were involved, given that it was at the same time involved in the legislative process for the adoption of legislation aimed at protecting the marine environment and fish stocks in Azorean waters.

The Commission had stated that at the time of the complaint lodged by Spain (in March 2004), it had already been in a position to adopt a consolidated approach. It could be reasonably inferred from this statement that the Commission meant that its being in a position to adopt a consolidated approach had been the result of its having formulated and distributed the "Speaking Note" of 19 February 2004. However, the "Speaking Note" reproduced in all material respects the text of the "Note for the file" of 6 February 2004. The Commission's legal position had therefore been formed on 6 February 2004. The complaint by the Regional Government of the Azores had been lodged on 9 February 2004. At the very latest, the Commission would



have been in a position to deal with this complaint on 19 February 2004.

If the Commission had acted impartially and without undue delay, it would have taken urgent steps to deal with the complaint of the Regional Government of the Azores and would have engaged in discussions with the latter. However, the Regional Government of the Azores had not received any correspondence from the Commission in relation to its complaint.

As regards the alleged *failure to notify the Azores of its position*, Mr Fischler had expressed the view, in his reply of 9 March 2004 to an oral question in the European Parliament, that the presence of Spanish vessels in Azorean waters outside the 100 nautical mile zone did not justify "any emergency measures". This statement was based on the view that the Commission did not consider that the Spanish vessels were acting illegally. It was therefore reasonable to infer that Mr Fischler had also been referring to the emergency measures requested by the Regional Government of the Azores.

Further inquiries

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

On 15 December 2004, the Ombudsman therefore asked the Commission (1) to address the legal arguments presented in paragraphs 17 to 23 of this complaint regarding the legal error the Commission had allegedly committed, (2) to comment on the view it had expressed in its explanatory memorandum accompanying its proposal for a ban on bottom trawling (COM(2004) 58 final) of 3 February 2004, according to which the special access regime defined in Regulation 2027/95 "will cease to apply in 2004", (3) to comment on the complainant's argument that the urgency of the measures requested by the Regional Government of the Azores must have been obvious to the Commission, (4) to comment on the complainant's argument that it was reasonable to infer from Mr Fischler's reply of 9 March 2004 to an oral question in the European Parliament that Mr Fischler had also been referring to the emergency measures requested by the Regional Government of the Azores and (5) to forward a copy of the letter by which it acknowledged receipt of the complaint lodged by the Regional Government of the Azores and of any further letters it might have sent concerning this complaint. The Ombudsman further asked the Commission to provide more specific information as to how this complaint was handled.

The Commission's reply

In its reply, the Commission made the following comments:

As regards the Ombudsman's *first* question, Article 5 of Regulation 1954/2003 laid down a fishing effort limitation regime that differed from the regime applying under Regulation 2027/95. Article 13 of Regulation 1954/2003 also modified the regime that had been laid down in the pertinent provisions of the control system. A change in regime had thus taken place and had become effective on 14 November 2003. The fact that the 1995 regulations had not been formally repealed in November 2003 had no effect on the application of the new provisions. Being different in nature, these new provisions had replaced the previous regime as from the entry into force of Regulation 1954/2003.



The press release concerning the publication of the proposal for a ban on bottom trawling had been prepared at the end of January 2004 and issued on 3 February 2004. The explanatory memorandum for this proposal had been drawn up at the beginning of November 2003 and sent for interdepartmental consultation on 7 November 2003. The opinion of the Commission's Legal Service had been received by the Directorate-General for Fisheries on 21 November 2003. This opinion had not explicitly covered the phrase emphasised by the complainant. At the start of the procedure, the entry into force of Regulation 1954/2003 had not been at issue. This issue had only arisen when the Regional Government of the Azores submitted its complaint on 9 February 2004.

The statement made by Mr Fischler in reply to written question P-0026/03 had been correct. However, the relevant consideration was that the provisions of Regulation 1954/2003 prevailed over the 1995 regime although the latter had not been formally repealed, in accordance with the interpretation set out in the "Speaking Note" of 19 February 2004.

As regards the Ombudsman's *second* question, this point was addressed in the reply to the first question.

As to the *third* question, the Commission had not considered that the fishing operations of non-Portuguese vessels in the zone between 100 and 200 nautical miles of the Azores following the entry into force on 14 November 2003 of Regulation 1954/2003 would justify taking the preventive measures sought by the Regional Government of the Azores. The protection of the Azores zone was effectively ensured by technical conservation measures or other measures under the Common Fisheries Policy, and not by restricting access to this zone. The Commission had therefore submitted a proposal for a Regulation in February 2004 specifically in order to address this situation.

As regards the Ombudsman's *fourth* question, Mr Fischler had, in his statement of 9 February 2004, replied to the complainant's request and not to that of the Regional Government of the Azores.

As to the *fifth* question, copies of all the correspondence the Commission had sent to the Portuguese and Spanish authorities in the process of examining the complaint were submitted to the Ombudsman. The complaint of the Regional Government of the Azores had sought preventive action by the Commission under Article 26 (3) of Regulation 2371/2002. The Commission's view was that the best response to any risks to the marine environment in the zone was to take measures under the Common Fisheries Policy (e.g., technical conservation measures or closed areas) and not to exclude all Community vessels apart from the Azores fleet. This approach was incompatible with taking preventive action intended solely to exclude Community vessels other than those under the Portuguese flag from the relevant zone. As regards a possible breach of Community law by Spain, it followed from Article 5 of Regulation 1954/2003 that non-Portuguese vessels could operate in the relevant zone as from the date on which this provision had entered into force (14 November 2003). Consequently, the Spanish vessels identified by the Regional Government of the Azores had not infringed Regulation 1954/2003. This conclusion followed from the Commission's view on interpreting the relevant



regulation that had been formulated in the "Speaking Note" of 19 February 2004.

From the documents enclosed with the Commission's reply, the following information could be deduced:

On 18 February 2004, the Commission asked the Regional Government of the Azores whether it agreed that its identity could be disclosed to the Spanish authorities. A reminder was sent on 4 March 2004. By letter of 12 March 2004, the Commission asked the Spanish authorities for its comments on the complaint. These comments were to be submitted within 30 days of receipt of this letter. On 15 April 2004, the Commission sent a reminder to the Spanish authorities. By letter of 4 June 2004, the Commission asked the Regional Government of the Azores for further information in relation to its complaint. On 9 July 2004, and on the basis of the reply to this request, the Commission asked the Spanish authorities for further information. This information was to be provided by 30 July 2004. On 4 August 2004, the Commission sent a reminder to the Spanish authorities. By letter of 12 October 2004, the Commission asked the Regional Government of the Azores for further information in relation to its complaint.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

The Commission had failed to reply to the first question put to it by the Ombudsman. As to the issue of the entry into force of Regulation 1954/2003, this issue had already been raised by the paper submitted to the Council by Spain on 21 January 2004 and not only by the complaint of the Regional Government of the Azores of 9 February 2004. Besides, the "Note for the file" on which the "Speaking Note" had been based was dated 6 February 2004, three days before the said complaint.

As to the urgency of the complaint of the Regional Government of the Azores, this complaint had only asked for the restrictions in Regulations 685/95 and 2027/95 to continue to be applied until their proper date of repeal. Moreover, if the Commission was so adamantly of the view that this complaint was unfounded, it was surprising that the Commission's consideration of the complaint appeared to be ongoing, with the most recent correspondence being dated 12 October 2004. If the complaint was clearly unfounded, the Commission should have closed the file immediately.

THE DECISION

1 The relevant elements of fact and law

1.1 The present complaint, which was lodged by a Member of the European Parliament, concerns the extent to which fishing was permitted prior to 1 August 2004 in the waters surrounding the Azores, a group of islands in the Atlantic ocean belonging to Portugal. The area concerned comprises the zones up to 200 nautical miles from the baseline of the Azores (the "Azorean waters").

1.2 Given that the legislative background is complicated and that the complainant and the



Commission have presented voluminous submissions in the context of the present inquiry, the Ombudsman considers it useful briefly to summarise the main elements of law and fact that are relevant for this case.

1.3 Since the accession of Portugal to the European Communities in 1986, certain transitional provisions were applicable to fisheries in the Azorean waters. Article 353 of the Treaty concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community (the "Act of Accession") provided that this transitional regime was to remain in force until 31 December 2002.

1.4 The most important rules regarding fishing activities in Azorean waters were laid down in Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources (5) and in Council Regulation (EC) No 2027/95 of 15 June 1995 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources (6) (the "1995 Regulations"). Regulation 685/95 excluded access by Spanish vessels fishing for tuna in Azorean waters. According to Regulation 2027/95, Portugal was the only Member State entitled to fish for deep-sea species in Azorean waters. In addition, Regulation 2027/95 established a zero quota for fishing with towed gear for demersal and deep-sea species in Azorean waters, thus effectively prohibiting the use of towed gear in Azorean waters (7) .

1.5 Three further regulations need to be mentioned here: Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (8) , which set up certain rules for the monitoring of conservation and resource management measures in the fisheries sector; Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (9) , which prescribes minimum mesh sizes for towed nets, and Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (10) , which empowers the Council to adopt measures governing access to waters and resources.

1.6 Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95 (11) effectively repealed the old system governing access to Azorean waters, as set out in Regulations 685/95 and 2027/95.

Article 11 provides for the adoption of a Regulation ("the Article 11 Regulation") fixing the maximum annual fishing effort for each Member State and for each fishery as defined in Article 3 of the Regulation. A proposal for such a regulation was to be submitted to the Council by the Commission by 29 February 2004. In case the Council should fail to take a decision by 31 May 2004, the Commission was to adopt the regulation itself by 31 July 2004.

According to Article 13 of the Regulation, certain provisions of Regulation 2847/93 were no



longer to apply to (inter alia) the Azorean waters.

Article 15 of Regulation 1954/2003 provided that Regulations 685/95 and 2027/95 were to be repealed with effect from the date of entry into force of the Article 11 Regulation or 1 August 2004, whichever was the earlier.

Article 16 stipulated that Regulation 1954/2003 was to enter into force on the seventh day following that of its publication in the Official Journal of the European Union. Given that Regulation 1954/2003 was published in the OJ of 7 November 2003, it entered into force on 14 November 2003.

Article 5 (1) of Regulation 1954/2003 provides as follows: "In the waters up to 100 nautical miles from the baselines of the Azores, Madeira and the Canary Islands, the Member States concerned may restrict fishing to vessels registered in the ports of these islands, except for Community vessels that traditionally fish in those waters in so far as these do not exceed the fishing effort traditionally exerted. (...)".

1.7 The present case concerns the question of the date from which Regulation 1954/2003 repealed Regulations 685/95 and 2027/95.

1.8 In January 2004, Spanish fishing vessels were detected in the zone between 100 and 200 miles off the Azores. On 21 January 2004, Spain submitted to the Council a paper entitled "Application of Regulation (EC) No 1954/2003". In this paper, the Spanish authorities expressed the view that apart from the provisions on the management of fishing effort that still needed to be implemented, Regulation 1954/2003 was already applicable.

1.9 On 3 February 2004, the Commission published its proposal for a Council Regulation amending Regulation (EC) No 850/98 as regards the protection of deep-water coral reefs from the effects of trawling in certain areas of the Atlantic Ocean (COM(2004) 58 final). The Explanatory Memorandum for this proposal contains the following passage:

"Moreover, the Community fishing zone around the Azores, Madeira and Canary Islands contains several known or potential deep water habitats that have so far been preserved from trawling due to the special access regime defined in Council Regulation (EC) No 2027/95. As this regime will cease to apply in 2004, it is now important [to] guarantee a continuity of the protection of these areas as part of Community legislation."

This text is repeated in recital 5 of the proposed regulation where a footnote is added to provide the reference to Regulation 2027/95 in the Official Journal. This reference is completed by the phrase "Regulation as amended by Regulation (EC) No 1954/2003 (OJ L 289, 7.11.2003, p.1)."

1.10 Also on 3 February 2004, the Commission published a press release (IP/04/153) to announce its proposal to the public. This press release contained the following statement:

"Bottom trawling is currently banned in the areas concerned under the rules governing access



to the so-called 'western waters', established during the process of integration of Portugal and Spain into the Common Fisheries Policy. As these rules will end this year, restrictions are needed to ensure continued protection for these habitats."

1.11 On 6 February 2004, a member of the Commission's Legal Service drew up a "Note for the file" concerning the entry into force of Articles 5 and 13 of Regulation 1954/2003. The author noted that these articles had set up a system that differed from the one that had applied under the previous legislation and that Article 16 provided that the Regulation was to enter into force on the seventh day after its publication. In these circumstances, the author of the note concluded that the rule "lex posterior derogat legi priori" was applicable and that Articles 5 and 13 of Regulation 1954/2003 had thus entered into force on 14 November 2003.

1.12 On 9 February 2004, the Regional Government of the Azores submitted a complaint against Spain to the Commission on the grounds that Spanish fishing vessels had begun fishing in Azorean waters. According to the Government, this activity was in breach of Regulations 685/95 and 2027/95 and presented a serious and imminent threat to living aquatic resources in Azorean waters. The Government therefore asked the Commission (1) to take urgent preventive measures under Regulation 2371/2002 and (2) to commence infringement proceedings against Spain under Article 226 of the EC Treaty.

1.13 In a letter of 18 February 2004 addressed to Mr Fischler, the Member of the Commission in charge of fisheries, the complainant asked the Commission to clarify matters. He specifically requested the Commission to confirm that (having regard to Articles 5 and/or 15 of Regulation 1954/2003) Regulations 685/95 and 2027/95 remained in force until the entry into force of a further regulation or until 1 August 2004, at the latest.

1.14 At a meeting of the Council's Working Party on Internal and External Fisheries Policies on 19 February 2004, the Commission confirmed that Articles 5 and 13 of Regulation 1954/2003 had entered into force on 14 November 2003. The "Speaking Note" distributed by the Commission representative reproduced the points that had been made in the "Note for the file" of 6 February 2004.

1.15 In a letter of 5 March 2004 to the complainant, Mr Fischler put forward the same views. Mr Fischler stressed that there was therefore no need for any emergency measures. During oral questions in the European Parliament on 9 March 2004, Mr Fischler reiterated this view. He submitted that no emergency measures could be adopted regarding the presence of Spanish vessels outside the 100 nautical mile zone because these boats complied with the rules in force. Mr Fischler assured the complainant that the Commission's Legal Service had been consulted and that it shared this view.

1.16 On 12 March 2004, Mr Fischler replied to the complainant's letter of 18 February 2004. In this letter, Mr Fischler pointed out that Regulation 1954/2003 had been in force since 14 November 2003 and that this meant "that the special conditions for fishing in the waters around the Azores, Madeira and the Canary Islands are applicable from that date onwards." Mr Fischler also stressed that Article 15 of Regulation 1954/2003 clearly stated that Regulations 685/95 and



2027/95 “are repealed with effect from either the date of entry into force of the Regulation mentioned in Article 11 of Regulation 1954/2003 or 1 August 2004, whichever is the earlier.”

1.17 On 16 March 2004, the Spanish authorities sent a fax to the Commission informing it that a Spanish vessel which had been fishing in the zone between 100 and 200 nautical miles off the coast of the Azores had been detained by the authorities of the Azores. This fax was forwarded to the Portuguese authorities the same day by the Commission, with a request to provide an opinion.

1.18 In a letter of 17 March 2004, the complainant asked Mr Fischler to confirm that the restrictions contained in Regulations 685/95 and 2027/95 continued to apply in the waters of the Azores, until their repeal.

1.19 In his reply of 13 April 2004, Mr Fischler pointed out that Regulations 685/95 and 2027/95 were still in force and had not been repealed yet. He submitted, however, that the new regime for the zone between 100 and 200 nautical miles was in force since 14 November 2003 and prevailed over the 1995 Regulations.

2 The complaint and its handling by the Ombudsman

2.1 On 29 April 2004, the complainant turned to the Ombudsman. In his complaint, the complainant submitted that the issue required *urgent* attention, given that it would cease to be relevant on 1 August 2004. He therefore asked the Ombudsman to take steps to ensure that the complaint was dealt with as a matter of priority, in accordance with Article 10.2 of the Ombudsman's Implementing Provisions (12) .

2.2 On 14 May 2004, the Ombudsman forwarded the complaint to the Commission for its opinion. In his letter forwarding the complaint, the Ombudsman noted that the Commission's interpretation of the relevant legislation could result in a possible temporary gap as regards the protection of fish stocks between the date on which, according to the Commission, Regulations 685/95 and 2027/95 were effectively superseded by Regulation 1954/2003 (14 November 2003) and the date on which the Regulation to be adopted on the basis of Article 11 of Regulation 1954/2003 was to come into force (which could be as late as 1 August 2004). Seen from this perspective, time indeed appeared to be of the essence. The Ombudsman therefore informed the Commission that he had decided to accept the complainant's request to treat his complaint as being urgent and as meriting priority treatment. He accordingly asked the Commission to submit its opinion as rapidly as possible and by 15 July 2004 at the latest.

2.3 The Commission submitted its opinion on 27 July 2004 in French. A translation into English (the language of the case) was forwarded to the Ombudsman on 2 August 2004.

2.4 It should be noted that the Ombudsman usually grants Community institutions and bodies a period of three months in order to provide their opinion on a complaint. In the present case, the Commission submitted its opinion in less than 2 and ½ months after having received the complaint. In its cover letter accompanying the opinion, the Commission furthermore expressed its regrets at the slight delay that had occurred. The Ombudsman considers that the Commission has thus made a genuine effort to comply with his request to handle the complaint



urgently.

2.5 In his complaint, the complainant made six allegations. However, two of them (according to which there was a legal error and an inconsistency as regards the Commission's position) appear to be closely linked. As a matter of fact, the complainant himself, in his complaint, referred to his comments on the first of these allegations when presenting the second one. The Ombudsman therefore considers that these two allegations should be examined together.

3 Alleged legal error and alleged inconsistency

3.1 The complainant alleged that the Commission had committed a legal error in holding that Regulations 685/95 and 2027/95 had effectively been repealed on 14 November 2003. According to the complainant, the regime set up by the 1995 Regulations did not conflict with the access restriction in Article 5 of Regulation 1954/2003 but rather complemented it. The complainant further argued that if the legislator had wished to repeal Regulations 685/95 and 2027/95 as from 14 November 2003, Regulation 1954/2003 would have said so. In this context, the complainant stressed that the revocation of legislative acts was an exceptional measure and therefore needed to be done explicitly. The complainant pointed out that Mr Fischler had himself made a statement to this effect in his reply to written question P-0026/03.

The complainant further argued that the Commission's position had been inconsistent, given that the documents the Commission had published on 3 February 2004 showed that the Commission itself had assumed until that day that the previous regime applicable to Azorean waters was still in place.

3.2 In its opinion, the Commission stressed that it had given its views on the entry into force of certain provisions of Regulation 1954/2003 (Articles 5 and 13), and of the implications of this, in a note that had been distributed to the Member States' Delegations in the Council's Working Party on Internal/External Fisheries Policy on 19 February 2004. The sixth and seventh paragraphs of this note set out the Commission's interpretation of the relevant articles. Reference should also be made to the "Note for the file" of 6 February 2004. The Commission further argued that there was no evidence for any inconsistency in its position. It stressed that it had set out its position in the note of 19 February 2004, whereas the statements it had made before Regulation 1954/2003 had come into force (in particular, the answer to written question P-0026/2003) had been a reflection of the legal situation that had existed before the Regulation was adopted.

3.3 In his observations, the complainant submitted that the Commission had not even attempted to address the legal arguments he had presented in his complaint. In the complainant's view, the Commission's position, as set out in the "Speaking Note", was plainly wrong. The complainant pointed out that the President of the Court of First Instance, in paragraph 143 of his order of 7 July 2004 in Case T-37/04 R, had considered that Regulation 1954/2003 had the effect that the 1995 Regulations would be repealed on 1 August 2004 at the latest and had added: "This appears to be the most reasonable interpretation given that Article 15 is a specific provision governing the repeal of the 1995 Regulations."

The complainant further submitted that in the explanatory memorandum accompanying its



proposal for a ban on bottom trawling (COM(2004) 58 final) of 3 February 2004, the Commission had stated that the special access regime defined in Regulation 2027/95 "will cease to apply in 2004".

In so far as the inconsistency of the Commission's position was concerned, the complainant pointed out that the Commission had omitted to comment on the view it had expressed in its proposal of 3 February 2004. This proposal had been made nearly three months after the adoption of Regulation 1954/2003.

3.4 In its reply to a request for further information made by the Ombudsman, the Commission stressed that Article 5 of Regulation 1954/2003 laid down a fishing effort limitation regime that differed from the regime applying under Regulation 2027/95. Article 13 of Regulation 1954/2003 also modified the regime that had been laid down in the pertinent provisions of the control system. In the Commission's view, a change in regime had thus taken place and had become effective on 14 November 2003. The Commission added that the fact that the 1995 Regulations had not been formally repealed in November 2003 had no effect on the application of the new provisions. Being different in nature, these new provisions had, according to the Commission, replaced the previous regime as from the entry into force of Regulation 1954/2003.

As regards the press release concerning the publication of the proposal for a ban on bottom trawling, the Commission pointed out that it had been prepared at the end of January 2004 and issued on 3 February 2004. The Commission further explained that the explanatory memorandum for this proposal had been drawn up at the beginning of November 2003 and sent for interdepartmental consultation on 7 November 2003. The opinion of the Commission's Legal Service had been received by the Directorate-General for Fisheries on 21 November 2003. The Commission submitted that this opinion had not explicitly covered the phrase emphasised by the complainant. According to the Commission, the issue of the entry into force of Regulation 1954/2003 had only arisen when the Regional Government of the Azores had submitted its complaint on 9 February 2004.

The Commission further submitted that the statement made by Mr Fischler in reply to written question P-0026/03 had been correct. In its view, however, the relevant consideration was that the provisions of Regulation 1954/2003 prevailed over the 1995 regime although the latter had not been formally repealed, in accordance with the interpretation set out in the "Speaking Note" of 19 February 2004.

3.5 In his observations on this reply, the complainant submitted that the Commission had failed to reply to the question put to it by the Ombudsman. As to the issue of the entry into force of Regulation 1954/2003, the complainant stressed that this issue had already been raised by the paper submitted to the Council by Spain on 21 January 2004. Besides, the "Note for the file" on which the "Speaking Note" had been based was dated 6 February 2004, three days before the said complaint.

3.6 The Ombudsman considers it useful to recall at the outset that the present case does not concern the merits of Regulation 1954/2003, but the interpretation of this regulation by the



Commission. It should be noted that Article 195 of the EC Treaty entrusts the European Ombudsman with the task of examining instances of maladministration. Complaints directed at the merits of Community legislation would therefore in any event not fall within the Ombudsman's mandate.

The Ombudsman further considers it useful to recall that the European Court of Justice is the highest authority as regards the interpretation of Community law. Moreover, the Ombudsman has no power to give binding interpretations of Community law. However, Article 195 of the EC Treaty entrusts the Ombudsman with the mission of examining instances of maladministration in the activities of the Community institutions and bodies. In the Ombudsman's view, such maladministration can exist where a Community institution or body makes public statements about the interpretation of Community law that are erroneous or inconsistent.

3.7 It is good administrative practice for the administration to avoid legal errors and inconsistencies in its public statements and to acknowledge and correct any errors that may occur. The Ombudsman notes that the Commission's interpretation of the relevant rules is based on the assumption that Article 5 of Regulation 1954/2003 was applicable as from 14 November 2003 and prevailed over Regulations 685/95 and 2027/95 on the basis of the rule *lex posterior derogat legi priori*. In the Ombudsman's view, the application of this legal maxim is justified if two conditions are fulfilled, namely (1) that the more recent act is incompatible with the older one and (2) that the issue of the relationship between the two acts has not been settled by the legislator in a different way.

3.8 As regards the first of these conditions, the Ombudsman considers that the Commission's view according to which the regime set up by Regulations 685/95 and 2027/95 is irreconcilable with the contents of Article 5 (1) of Regulation 1954/2003 does not appear to be unreasonable at first sight. On an admittedly simplistic interpretation, the 1995 Regulations basically excluded non-Portuguese vessels from fishing in Azorean waters, whereas Article 5 (1) of Regulation 1954/2003 limits this protection to the waters up to 100 nautical miles from the baseline of the Azores. It is undisputed that this means that such protection should no longer be available as regards the remainder of Azorean waters, i.e., the waters between 100 and 200 nautical miles, pursuant to Article 5 (1) of Regulation 1954/2003. If Regulations 685/95 and 2027/95 continued to be applicable even after 14 November 2003, the date of the entry into force of Regulation 1954/2003 and of its Article 5 (1), the opening up of the relevant part of Azorean waters (between 100 and 200 nautical miles) that this provision intended could hardly have been achieved with immediate effect.

3.9 It should however be noted that the *lex posterior* rule, as a rule of interpretation, can only be applied where the legislator has not himself settled the issue of the relationship between two acts of legislation.

3.10 Article 15 ("Repeal") of Regulation 1954/2003 is worded as follows:

"1. Regulations (EC) No 685/95 and (EC) No 2027/95 shall be repealed with effect from:



(a) the date of entry into force of the Regulation referred to in Article 11 (2) or (3);

(b) 1 August 2004,

whichever is the earlier.

2. (...) "

3.11 The Ombudsman notes that Regulation 1954/2003 thus contains an explicit provision concerning the date on which the repeal of the 1995 Regulations was to take effect. It is further clear that this date was *not* 14 November 2003, as the Commission argued, but a subsequent date that could be as late as 1 August 2004 (13). The Ombudsman considers that the most logical interpretation of this provision is that the legislator intended that the 1995 Regulations should not be repealed with immediate effect but only after the "Article 11 Regulation" had been adopted or after a period sufficient for its adoption had passed, a period the end of which the legislator fixed at 1 August 2004.

3.12 The Ombudsman considers that this interpretation is confirmed by Article 14 of Regulation 1954/2003 which laid down certain amendments to Regulation 2847/93. Both from the wording of this provision ("...is hereby amended") and the structure of the Regulation, it emerges that these amendments were to take effect with the entry into force of Regulation 1954/2003. In the Ombudsman's view, the fact that Article 15 of Regulation 1954/2003 established a different date as regards the repeal of Regulations 685/95 and 2027/95 must therefore be interpreted as a deliberate choice of the legislator.

3.13 The Ombudsman furthermore considers that this interpretation is also consistent with the purpose that Article 15 of Regulation 1954/2003 appears to have served. Recital 4 of Regulation 1954/2003 states that a new fishing effort management regime needed to be established "[i]n order to ensure that there is no increase in the overall levels of existing fishing effort". According to Recital 12, Regulations 685/95 and 2027/95 should be repealed "in order to ensure legal certainty, to avoid alterations in the current balance in the areas and resources involved and to guarantee that the fishing effort deployed is in balance with available sources". It is difficult to see how these aims could properly be achieved on the basis of the interpretation defended by the Commission. It should be recalled that the "Article 11 Regulation" fixing the maximum annual fishing effort for each Member State and for each area and fishery was only adopted in July 2004.

It should further be recalled that the regime established by Regulations 685/95 and 2027/95 prohibited the use of towed gear in Azorean waters. On 3 February 2004, the Commission published its proposal for a Council Regulation amending Regulation (EC) No 850/98 as regards the protection of deep-water coral reefs from the effects of trawling in certain areas of the Atlantic Ocean (COM(2004) 58 final). In this proposal, the Commission referred to the potentially damaging effects of trawling and submitted that a regulation should be adopted prohibiting the use of this fishing method in certain areas. In its proposal, the Commission explicitly referred to water habitats in Azorean waters as areas that needed to be protected. It



should further be noted that on 16 August 2004, the Commission submitted a further proposal for the adoption of such a ban (14) . In this proposal, the Commission submitted that the matter was urgent, that the European Parliament had not yet dealt with the proposal it had submitted in February 2004 and that the Council should therefore take the necessary measures itself (15) . If the Commission's interpretation of Regulation 1954/2003 were correct, the ban on trawling in Azorean waters was lifted with effect from 14 November 2003, only to be reintroduced nearly a year later and on the basis of two proposals made by the Commission in February 2004 and in July 2004. The Ombudsman considers that there is nothing in Regulation 1954/2003 to suggest that this is what the legislator intended by introducing Article 5 (1) in the said regulation.

3.14 Finally, the Ombudsman notes that the Commission itself, in its Explanatory Memorandum for the proposal that it submitted on 3 February 2004 (see point 3.13 above), confirmed that Regulations 685/95 and 2027/95 had not yet been abolished. In this text, the Commission pointed out that the existing regime had preserved Azorean waters from trawling, that "this regime will cease to apply in 2004" and that "it is now important [to] guarantee a continuity of the protection of these areas as part of Community legislation".

3.15 In these circumstances, the Ombudsman takes the view that the interpretation of Articles 5 (1) and 15 of Regulation 1954/2003 that the Commission defended in its statements was erroneous.

3.16 It should be noted that the Explanatory Memorandum for the proposal submitted on 3 February 2004 was based on the (correct) assumption that Regulations 685/95 and 2027/95 would only cease to apply "in 2004". However, the Commission subsequently took the view that these Regulations had already been repealed with effect from 14 November 2003. The Ombudsman considers that the explanations submitted by the Commission as regards this divergence are not convincing. Regardless of whether the relevant statement in the text of 3 February 2004 was or was not submitted to the Legal Service of the Commission previously, the fact remains that the Commission publicly let it be understood that it assumed that the 1995 Regulations had not yet been repealed. This position was made public nearly three months after the adoption of Regulation 1954/2003, which is furthermore referred to in a footnote of the proposed regulation.

In these circumstances, the Ombudsman considers that the position adopted by the Commission was inconsistent with the position in the Explanatory Memorandum of 3 February 2004.

3.17 The Ombudsman considers that this legal error and this inconsistency constitute maladministration. A critical remark will be made in this context.

4 Allegedly illegal reliance on an informal note

4.1 The complainant submitted that the "Speaking note" and the "Note for the file" were not a formal opinion of the Commission's Legal Service. He criticised the fact that they had nevertheless been held out and relied upon as if they were.

4.2 In its opinion, the Commission stressed that the note in question represented the official



position of the Legal Service and that it had been submitted to the Commission pursuant to internal Commission procedures which were used to obtain opinions from the Legal Service and which concern the question how these opinions are used.

4.3 In his observations, the complainant stated that he took note of the fact that "Note for the file" represented the official position of the Commission.

4.4 In view of the above, the Ombudsman considers that the complainant has not established his allegation that the "Speaking note" and the "Note for the file" were not a formal opinion of the Commission's Legal Service. No maladministration is thus found as regards this aspect of the complaint.

5 Alleged abuse of power

5.1 The complainant alleged that the Commission had deliberately tried to avoid answering the question as to when the former regime ceased to apply until the issue became no longer relevant (i.e., after 1 August 2004). In the complainant's view, the Commission had deliberately manipulated its responses to letters and parliamentary questions so as to be as ambiguous as possible.

5.2 In its opinion, the Commission submitted that it had adopted a clear position as regards the application of Article 5 of Regulation 1954/2003 in its "Speaking Note". According to the Commission, all the positions it had adopted when replying to letters and when answering parliamentary questions had been based on this assessment.

5.3 In his observations, the complainant took the view that the Commission had deliberately tried to avoid answering the question as to when the former regime ceased to apply. According to the complainant, the Commission had, over a number of months, simply reiterated the uncontroversial statement that Article 5 of Regulation 1954/2003 had entered into force on 14 November 2003 but failed to address the more fundamental question of what the implications of this were. In the complainant's view, it had not been until Mr Fischler's letter of 13 April 2004 that it had expressly stated that the Commission's view was that the effect of the entry into force of Article 5 of Regulation 1954/2003 had been that Regulations 685/2003 and 2027/95 had ceased to apply with effect from 14 November 2003.

5.4 In its "Speaking Note" of 19 February 2004, the Commission stated that Regulation 1954/2003 had entered into force on 14 November 2003. It then noted that certain doubts as to the applicability, as from that date, of Articles 5 and 13 of the regulation had been raised with reference to Article 15. The Commission submitted that this provision did not affect the entry into force of Regulation 1954/2003, pointing to the *lex posterior* rule, and continued as follows: "Tel est le cas en ce qui concerne l'article 5 du règlement n o 1954/2003. Cet article donne une exclusivité moins étendue aux navires espagnoles et portugais que le régime précédent formellement pas encore abrogé. Dans ce cas, c'est la règle postérieure, donc le règlement n o 1954/2003 qui prévaut." [This is the case as regards Article 5 of Regulation 1954/2003. This provision gives Spanish and Portuguese vessels less extensive exclusivity than the preceding scheme that has not yet formally been repealed. In this case, it is the later rule, i.e., Regulation 1954/2003, which prevails.]



5.5 The Ombudsman considers that it would have been useful if the Commission had from the very beginning clarified that this meant that, in its view, the restrictions on access to Azorean waters (as regards the zone between 100 and 200 nautical miles) that had been laid down in Regulations 685/95 and 2027/95 "no longer apply and have been replaced by the provisions of Article 5 of Council Regulation (EC) 1954/2003" (as Mr Fischler stated in his letter to the complainant of 13 April 2004). The Ombudsman considers, however, that it was not impossible to deduce from the "Speaking Note" that this was indeed the Commission's position. In the Ombudsman's view, there is furthermore not enough evidence to prove that the Commission had deliberately tried to avoid the issue or that it had deliberately manipulated its responses to letters and parliamentary questions so as to be as ambiguous as possible.

5.6 The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

6 Alleged absence of impartiality

6.1 The complainant alleged that the Commission had granted preferential treatment to the Spanish authorities whose complaint had been taken up the day on which it had been lodged (whereas the Azores had only received an acknowledgement of receipt regarding their complaint after having sent a reminder to the Commission).

6.2 In its opinion, the Commission submitted that the information provided by the Spanish authorities regarding the vessel inspected near the Azores (charge of illegal fishing, detention of the vessel in port, obligation to appear before the competent court the following day) had suggested to the Commission that the situation should be clarified as soon as possible. According to the Commission, there had been two main reasons for this: first, the detention of a vessel constituted a situation which could not be prolonged for an excessive length of time, and second, at the time when the events had occurred (March 2004), the Commission was already in a position to adopt a consolidated approach regarding the application of Regulation 1954/2003. The Commission submitted that the situation had been very different as regards the complaint submitted by the Regional Government of the Azores.

6.3 In his observations, the complainant submitted that the urgency of the measures requested by the Regional Government of the Azores must have been obvious to the Commission, given that the subject-matter of this complaint was only an issue until 1 August 2004. The complainant further argued that the "Speaking Note" reproduced in all material respects the text of the "Note for the file" of 6 February 2004. In his view, the Commission's legal position had therefore been formed on 6 February 2004. However, the complaint by the Regional Government of the Azores had been lodged on 9 February 2004. In the complainant's view, the Commission would thus have been in a position to deal with this complaint on 19 February 2004 at the very latest.

6.4 In its reply to a request for further information made by the Ombudsman, the Commission stressed that it had not considered that the fishing operations of non-Portuguese vessels in the zone between 100 and 200 nautical miles of Azorean waters following the entry into force of Regulation 1954/2003 on 14 November 2003 would justify taking the preventive measures sought by the Regional Government of the Azores. In its view, the protection of the Azores zone



was effectively ensured by technical conservation measures or other measures under the Common Fisheries Policy, and not by restricting access to this zone. The Commission noted that it had therefore submitted a proposal for a Regulation in February 2004 specifically in order to address this situation. It added that Mr Fischler had, in his statement of 9 February 2004, replied to the complainant's request and not to that of the Regional Government of the Azores.

6.5 In his observations, the complainant pointed out that the complaint of the Regional Government of the Azores had only asked for the restrictions in Regulations 685/95 and 2027/95 to continue to be applied until their proper date of repeal. The complainant further submitted that if the Commission was so adamantly of the view that this complaint was unfounded, it was surprising that its consideration of the complaint appeared to be ongoing. If the complaint was clearly unfounded, the Commission should have closed the file immediately.

6.6 The Ombudsman notes that the complainant argued that the Commission had granted preferential treatment to the letter submitted by the Spanish authorities as compared to the complaint of the Regional Government of the Azores. However, the only concrete information as to the handling of the letter of the Spanish authorities that was submitted to the Ombudsman concerns the fact that it appears to have been sent to the Portuguese authorities for its comments on the very day it was received by the Commission. It is thus in relation to this aspect that the complainant's submission needs to be assessed.

6.7 The Ombudsman notes that it emerges from the documents submitted to him by the Commission that on 18 February 2004, the Commission asked the Regional Government of the Azores whether it agreed that its identity could be disclosed to the Spanish authorities, that a reminder was sent on 4 March 2004 and that by letter of 12 March 2004, the Commission asked the Spanish authorities for their comments on the complaint (which were to be submitted within 30 days of receipt of this letter). It should further be noted that the complainant did not challenge the fact that the Commission considered it necessary to ask the Regional Government of the Azores for permission to disclose its identity before forwarding this complaint to the Spanish authorities. In view of these facts, the Ombudsman considers that the complainant has not substantiated his view that the Commission had awarded preferential treatment to the letter of the Spanish authorities.

6.8 No maladministration is thus found as regards this aspect of the case.

6.9 In his observations, the complainant submitted that the urgency of the measures requested by the Regional Government of the Azores must have been obvious to the Commission. The complainant thus seemed to argue that the Commission did not treat this complaint as urgently as it ought to have done.

6.10 The Ombudsman considers that it emerges from the Commission's submissions in this case that the Commission was of the view that the complaint of the Regional Government of the Azores was unfounded. It is therefore not obvious why the examination of this complaint appeared to be still pending at the time when the Commission replied, on 9 March 2005, to the Ombudsman's request for further information in this case. It should however be noted that the



question as to whether the Commission had handled the complaint by the Regional Government of the Azores properly is an issue that was not as such raised in the original complaint and that was therefore not submitted to the Commission for its opinion. The Ombudsman considers that extending the scope of his inquiry to this further issue would delay his decision on the original complaint and that this would not be in the complainant's interest. He therefore takes the view that this further issue should not be taken up for inquiry in the present case. The complainant remains however free to submit a new complaint to the Ombudsman on this subject.

7 Alleged failure to notify the Azores

7.1 The complainant alleged that the Regional Government of the Azores had still not received a reply to their letter of 9 February 2004. He further noted that, on 9 March 2004, Mr Fischler had told him in the European Parliament that the presence of Spanish vessels in the waters of the Azores outside the 100 nautical mile zone did not justify emergency measures. The complainant pointed out that Article 20 of the European Code of Good Administrative Behaviour stated that decisions should be communicated in writing to the persons concerned and should not be communicated to third parties "until the person or persons concerned have been informed". According to the complainant, this had not happened in the present case.

7.2 In its opinion, the Commission submitted that the complaint was currently being examined. According to the Commission, there had been an exchange of correspondence with the Spanish and the Portuguese authorities, since it had not yet been in possession of all the facts. The latest deadline for the provision of information by the Spanish authorities was 30 July 2004, and the file would then undergo a final examination by the Commission's Legal Service. The Commission added that the authorities of the Azores would be informed as soon as the examination of the complaint was completed.

7.3 In his observations, the complainant submitted the view that Mr Fischler's statement, in his reply of 9 March 2004 to an oral question in the European Parliament, that the presence of Spanish vessels in Azorean waters outside the 100 nautical mile zone did not justify "any emergency measures", could reasonably be understood as also referring to the emergency measures requested by the Regional Government of the Azores.

7.4 In reply to a request for further information made by the Ombudsman, the Commission submitted copies of the letters it had sent out in the context of its examination of the complaint submitted by the Regional Government of the Azores.

7.5 The complainant did not submit specific observations as regards these documents.

7.6 The Ombudsman considers that it emerges from the documents submitted by the Commission that the latter was actively pursuing its examination of the complaint submitted by the Regional Government of the Azores and that in the course of this examination, it addressed several letters to the latter (in February 2004, in March 2004, in June 2004 and in October 2004).

7.7 In view of the above, the Ombudsman considers that the complainant's allegation according



to which the Regional Government of the Azores had not received a reply to their letter of 9 February 2004 is not confirmed by the information that was submitted to him. The Ombudsman further notes that the Commission has declared that the authorities of the Azores would be informed as soon as the examination of the complaint was completed.

7.8 In these circumstances, no maladministration is found as regards this aspect of the complaint.

8 Conclusion

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

It is good administrative practice for the administration to avoid legal errors and inconsistencies in its public statements and to acknowledge and correct any error that may occur. Taking into account the wording, the structure and the purpose of the relevant rules in Regulation 1954/2003, the Ombudsman considers that the Commission's interpretation as to the date on which Article 5 (1) of this regulation became effective was erroneous. Furthermore, the position that the Commission adopted was inconsistent with a position it had taken in its Explanatory Memorandum concerning another draft regulation published on 3 February 2004. This legal error and inconsistency constitute 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.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) A summary of the action was published in OJ 2004 no. C 71, p. 15.

(2) Cf. the summary published in OJ 2004 no. C 94, p. 47.

(3) An application for interim measures (Case T-37/04 R) was rejected by an order of the President of the Court of First Instance of 7 July 2004.

(4) OJ 2003 C 222 E, p. 138.

(5) OJ 1995 L 71, p. 5.

(6) OJ 1995 L 199, p. 1.



(7) Cf. paragraphs 5 to 7 of the Order of the President of the Court of First Instance of 7 July 2004 in Case T-37/04 R).

(8) OJ 1993 L 261, p. 1.

(9) OJ 1998 L 125, p. 1.

(10) OJ 2002 L 358, p. 59.

(11) OJ 2003 L 289, p. 1.

(12) Available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(13) In the end, the "Article 11 Regulation" was adopted on 19 July 2004 (Council Regulation (EC) No 1415/2004 of 19 July 2004 fixing the maximum annual fishing effort for certain fishing areas and fisheries, OJ 2004 L 258, p. 1). This regulation entered into force on the 20th day after its publication in the OJ (which occurred on 5 August 2004).

(14) Proposal for a Council Regulation amending Regulation (EC) No 2287/2003 as concerns the number of days at sea for vessels fishing for haddock in the North Sea and the use of bottom trawls in waters around the Azores, the Canary Islands and Madeira (COM/2004/0555 final).

(15) The Council adopted the requested measure in October 2004 (Council Regulation (EC) No 1811/2004 of 18 October 2004, OJ 2004 L 319, p. 1).

(16) After having received the Ombudsman's decision in this case, the complainant informed the Ombudsman's Office that he no longer insisted on his complaint being dealt with confidentially.