

Decision of the European Ombudsman on complaint OI/1/2003/ELB against the European Commission

Decision

Case OI/1/2003/ELB - **Opened on** 31/10/2003 - **Recommendation on** 24/05/2004 -
Decision on 11/11/2004

Strasbourg, 11 November 2004

Mr President,

According to Article 195 of the Treaty establishing the European Community, the European Ombudsman is empowered to conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of Community institutions and bodies.

On 31 October 2003, I informed you that I had decided to open an inquiry, by virtue of the above provision, into the internal dispute resolution procedures available to national experts who are seconded to the Commission.

The Commission sent its reply on 26 January 2004.

On 24 May 2004, I made a draft recommendation to the Commission. On 30 July 2004, the Commission sent me its detailed opinion concerning this draft recommendation.

I am writing now to let you know the results of the own-initiative inquiry.

THE INQUIRY

The reasons for the inquiry

According to Article 195 of the Treaty establishing the European Community, the European Ombudsman is empowered to conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of Community institutions and bodies. By virtue of this provision, on 31 October 2003, I opened an inquiry into the internal dispute resolution procedures available to national experts who are seconded to the Commission. The reasons for the inquiry are as follows.

Internal dispute resolution procedures and complaints to the European Ombudsman

Articles 2.4 and 2.8 of the Statute of the Ombudsman require that a complaint to the Ombudsman must be preceded by appropriate administrative approaches and that no complaint may be made to the Ombudsman that concerns work relationships between the Community



institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90 (1) and (2) of the Staff Regulations, have been exhausted by the person concerned and the time limits for replies by the authority thus petitioned have expired.

The purpose of these provisions is to give the Community institution or body concerned the opportunity to resolve problems itself, before the European Ombudsman becomes involved.

Seconded national experts

Seconded national experts are national or international civil servants or persons employed in the private sector who are working temporarily for the European institutions. According to the rules applicable to seconded national experts, adopted by the Commission (1), they shall remain in the service of their employer throughout the period of secondment and shall continue to be paid by that employer. Nonetheless, they receive from the Commission allowances covering their expatriation expenses.

Two seconded national experts lodged a complaint with the European Ombudsman (complaint 495/2003/ELB). As part of checking whether the complaint met the conditions of admissibility laid down by the Statute of the Ombudsman, the Ombudsman examined the rules applicable to seconded national experts, but did not discover any provision therein concerning the resolution of possible disputes. The question of whether use of such a procedure might be an "appropriate administrative approach" for the purposes of Article 2.4 of the Statute of the Ombudsman did not, therefore, arise.

The Ombudsman also examined the possible relevance of Article 90 of the Staff Regulations. The Ombudsman recalls that, as regards officials and other servants of the European Communities, Article 90 of the Staff Regulations states that any person to whom the Staff Regulations apply may request that the Appointing Authority take a decision relating to him. It also states that any person to whom these Staff Regulations apply may submit to the Appointing Authority a complaint against an act adversely affecting him. The Ombudsman's preliminary conclusion was that Article 90 is not applicable to seconded national experts.

The Ombudsman therefore opened an inquiry and informed the Commission of the complaint and of his preliminary conclusion concerning Article 90. In its opinion on the complaint, the Commission did not comment on the preliminary conclusion, nor did it inform the Ombudsman of any other procedure that the complainants could have invoked in relation to the matters of which they had complained to the Ombudsman.

In view of the above, the Ombudsman is not aware that any internal procedure exists for the resolution of possible disputes between seconded national experts and the Commission.

The potential value of an internal dispute resolution procedure

The experience of ombudsmen in the Member States and more generally is that an effective internal dispute resolution procedure enables a public body to resolve a high proportion of problems itself, either by taking remedial action if necessary, or by explaining its position to the complainant.



In the case of seconded national experts, such a procedure could benefit the experts themselves by:

- providing a quick, easy, and cost-effective means of resolving difficulties and obtaining redress where necessary;
- fostering a greater sense of inclusiveness;
- promoting a sense of empowerment; and
- giving individuals the assurance that their complaints are being taken seriously and that they are being treated properly, fairly and impartially.

The Commission would also benefit from a procedure that could:

- serve as a quick and efficient means of resolving difficulties;
- promote good internal relations and communications;
- encourage a positive attitude towards the administration; and
- highlight shortcomings and areas which could be improved.

The information requested in the own-initiative inquiry

The Ombudsman therefore kindly requested the Commission to inform him:

- whether it receives complaints from seconded national experts concerning matters related to their secondment and how any such complaints are dealt with;
- whether it would be willing to introduce, in the rules applicable to seconded national experts, a suitable provision for the resolution of possible disputes.

The Ombudsman's inquiry into complaint 495/2003/ELB continues separately.

The Commission's opinion

The Commission's opinion can be summarised as follows:

Article 90 of the Staff Regulations states that any person to whom the Staff Regulations apply may request that the Appointing Authority take a decision relating to him/her. It also states that any person, to whom these Staff Regulations apply, may submit to the Appointing Authority a complaint against an act adversely affecting him/her. As already concluded by the Ombudsman, Article 90 of the Staff Regulations is not applicable to seconded national experts because the Staff Regulations are not applicable to them and the allowances they receive are not based on the Staff Regulations.

The Commission's decision of 30 April 2002 (C(2002)1559), amended by the Commission's decision of 31 January 2003 (C(2003)406), sets out the rules applicable to national experts seconded to the Commission.

Article 1, paragraph 2 of the above-mentioned decision establishes that national experts seconded to the Commission remain in the service of their employer throughout the period of secondment and must continue to be paid by that employer. As a consequence, no statutory or other employment relationship exists between the Commission and seconded national experts. Nevertheless, the Commission's decision lays down rights and duties of seconded national experts, including the right to receive certain allowances.



As regards the first question of the Ombudsman

The Commission receives complaints and inquiries from seconded national experts concerning matters related to their secondment. The Commission's services have followed informal ways of settling possible disputes and answering inquiries in order to avoid potential disputes being amplified and aggravated.

The Commission ensures that seconded national experts have access to:

- 1) the hierarchy of the service to which they are seconded;
- 2) the service within the Directorate-General for Personnel and Administration (DG ADMIN) responsible for seconded national experts. The service manages all national experts seconded to the Commission's services and deals with the general problems experienced by seconded national experts.

In addition, the Commission has established a good relationship with CLENAD, which is the representative association of seconded national experts. CLENAD has regular meetings with the competent services of the Commission where questions are raised and problems are examined.

When necessary, the responsible service of DG ADMIN contacts other departments of the Commission in order to find a solution to the problems encountered.

In view of these various channels of communication and the informal character of the mechanisms to solve possible disputes, there is no record of the number of complaints.

As regards the scope, steps and channels for dispute settlement, the legal situation is, at present, not fully clear, particularly since the above-mentioned Commission's decision of 30 April 2002 does not provide for a complaints procedure.

As regards the second question of the Ombudsman

The Commission considers that it acts in full respect of the existing Commission's decision applicable to national experts seconded to the Commission.

Nevertheless, considering the arguments brought forward by the Ombudsman, the Commission is prepared to introduce, in the context of the next substantial revision of this decision, a suitable provision for the resolution of possible disputes. Considering Articles 2.4 and 2.8 of the Statute of the Ombudsman, such provision should also prevent complaints reaching the Ombudsman before all possibilities for solving the problem by internal administrative means have been exhausted.

THE DRAFT RECOMMENDATION

On 24 May 2004, the Ombudsman addressed the following draft recommendation to the Commission in accordance with Article 3 (6) of the Statute of the Ombudsman:



The Commission should adopt a complaints procedure for the resolution of possible disputes between seconded national experts and the Commission.

This draft recommendation was based on the following considerations:

Complaints procedure for seconded national experts

1 Seconded national experts are national or international civil servants, or persons employed in the private sector, who are working temporarily for the European institutions. According to the rules adopted by the Commission in a decision of 30 April 2002 (2) , seconded national experts remain in the service of their employer throughout the period of secondment and continue to be paid by that employer. Nonetheless, they receive from the Commission allowances covering their expatriation expenses.

During an inquiry into a complaint lodged by two seconded national experts (complaint 495/2003/ELB), the Ombudsman examined the applicable rules, but did not discover any provision therein concerning the resolution of possible disputes. The Ombudsman therefore kindly requested the Commission to inform him:

- whether it receives complaints from seconded national experts concerning matters related to their secondment and how any such complaints were dealt with;
- whether it would be willing to introduce, in the rules applicable to seconded national experts, a suitable provision for the resolution of possible disputes.

2 The Commission confirms that Article 90 of the Staff Regulations is not applicable to seconded national experts because the Staff Regulations are not applicable to them and the allowances they receive are not based on the Staff Regulations.

According to the Commission, its services have followed informal ways of settling possible disputes and answering inquiries in order to avoid potential disputes being amplified and aggravated.

The Commission acknowledges that, as regards the scope, steps and channels for dispute settlement, the legal situation is, at present, not fully clear, particularly since the Commission's decision of 30 April 2002 does not provide for a complaints procedure.

The Commission states that it is prepared to introduce, in the context of the next substantial revision of the above-mentioned decision, a suitable provision for the resolution of possible disputes.

3 The Ombudsman notes that the Commission acknowledges that the legal situation, as regards the scope, steps and channels for settling disputes is not fully clear. The Ombudsman points out that such lack of clarity could make it more difficult to secure the full and correct application of the right to good administration, as provided for by Article 41 of the Charter of Fundamental Rights, in the case of seconded national experts. In this context, the Ombudsman



also points out that the availability of a clear procedure established by law should complement, not replace, informal ways of settling possible disputes and answering inquiries in order to avoid potential disputes being amplified and aggravated.

4 The Ombudsman further notes that the Commission itself envisages corrective action and that it is prepared to introduce, in the context of the next substantial revision of its decision of 30 April 2002, a suitable provision for the resolution of possible disputes.

5 The Ombudsman welcomes the Commission's positive attitude in this regard, but notes that the Commission has not established a definite timetable for action. The Ombudsman recalls that, according to Article 17 of the Code of Good Administrative Behaviour, failure to act within a reasonable time is a form of maladministration. In these circumstances, the Ombudsman considers that there are grounds to make a draft recommendation to the Commission that it should adopt a complaints procedure for the resolution of possible disputes between seconded national experts and the Commission.

The Commission's detailed opinion

The Commission's detailed opinion can be summarised as follows:

The Commission accepts the Ombudsman's draft recommendation.

The Commission's Directorate-General for Personnel and Administration (DG ADMIN) has already started the revision of the Decision (3) laying down rules on the secondment of National Experts to the Commission services.

The Commission is assessing which provisions of the existing Commission's decision need to be modified in order to assure coherence of certain provisions with the revised Staff Regulations which entered into force on 1 May 2004. This assessment raises complex legal questions in particular as regards the possible adaptations of seconded national experts' rights and obligations to provisions contained e.g. in Articles 11 to 26 of the revised Staff Regulations. In this overall context, a complaints procedure for the resolution of possible disputes between seconded national experts and the Commission will be proposed for adoption.

The possible budgetary impact of the amending decision will carefully be assessed.

When preparation within DG ADMIN is completed, this exercise requires in subsequent steps consultations with the Liaison Committee for National Experts (CLENAD), extensive consultations with all Directorates-General of the Commission and information to Member States in order to achieve the necessary maturity of the document before the College takes the final decision.

These necessary preparatory steps prior to adoption of the amending decision are expected to take 8 months. The Commission draws attention to the fact that this timetable could be modified according to the priorities of the new Commission. At this juncture, it is estimated that the complaints procedure could be adopted by March 2005.



THE DECISION

1 Complaints procedure for seconded national experts

1.1 Seconded national experts are national or international civil servants, or persons employed in the private sector, who are working temporarily for the European institutions. According to the rules adopted by the Commission in a decision of 30 April 2002 (4) , seconded national experts remain in the service of their employer throughout the period of secondment and continue to be paid by that employer. Nonetheless, they receive from the Commission allowances covering their expatriation expenses.

During an inquiry into a complaint lodged by two seconded national experts (complaint 495/2003/ELB), the Ombudsman examined the applicable rules, but did not discover any provision therein concerning the resolution of possible disputes. The Ombudsman therefore kindly requested the Commission to inform him:

- whether it receives complaints from seconded national experts concerning matters related to their secondment and how any such complaints were dealt with;
- whether it would be willing to introduce, in the rules applicable to seconded national experts, a suitable provision for the resolution of possible disputes.

1.2 The Commission confirms that Article 90 of the Staff Regulations is not applicable to seconded national experts because the Staff Regulations are not applicable to them and the allowances they receive are not based on the Staff Regulations.

According to the Commission, its services have followed informal ways of settling possible disputes and answering inquiries in order to avoid potential disputes being amplified and aggravated.

The Commission acknowledges that, as regards the scope, steps and channels for dispute settlement, the legal situation is, at present, not fully clear, particularly since the Commission's decision of 30 April 2002 does not provide for a complaints procedure.

The Commission states that it is prepared to introduce, in the context of the next substantial revision of the above-mentioned decision, a suitable provision for the resolution of possible disputes.

1.3 The Ombudsman welcomed the Commission's positive response, but noted that the Commission had not established a definite timetable for action. Recalling that failure to act within a reasonable time is a form of maladministration, the Ombudsman addressed a draft recommendation to the Commission on 24 May 2004, in accordance with Article 3 (6) of the Statute of the Ombudsman. The draft recommendation was that the Commission should adopt a complaints procedure for the resolution of possible disputes between seconded national experts and the Commission.



1.4 In its detailed opinion, the Commission informed the Ombudsman that it accepted his draft recommendation and indicated that a complaints procedure for seconded national experts could be adopted by March 2005.

2 Conclusion

2.1 On the basis of his inquiries, the Ombudsman concludes that the Commission has accepted the Ombudsman's draft recommendation and that the measures taken by the Commission to implement it are satisfactory, since the Commission has now adopted a timetable for action, which appears reasonable.

2.2 The Ombudsman therefore closes the case.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Commission's decision of 30 April 2002 (C(2002)1559), modified by Commission's decision of 31 January 2003 (C(2003)406).

(2) Commission's decision of 30 April 2002 (C(2002)1559), modified by Commission's decision of 31 January 2003 (C(2003)406).

(3) Commission's decision of 27 February 2004 concerning the amendment of decision C(2002)1559 of 30 April 2002 amended by decision C(2003) 406 of 31 January 2003 laying down rules on secondment of National Experts to the Commission.

(4) Commission's decision of 30 April 2002 (C(2002)1559), modified by Commission's decision of 31 January 2003 (C(2003)406).