Decision of the European Ombudsman on complaint 2235/2005/(TN)TS against the European Commission

Decision
Case 2235/2005/(TN)TS - **Opened on** 30/06/2005 - **Decision on** 16/07/2008

Strasbourg, 16 July 2008
Dear Mr G.,

On 26 April 2005, you made a complaint to the European Ombudsman against the European Commission concerning its handling of a pension insurance scheme for individual experts. You submitted further information on 2 June 2005.

On 30 June 2005, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 25 October 2005. I forwarded it to you with an invitation to make observations, which you sent on 28 November 2005.

On 31 May 2006, I wrote to the Commission requesting further information related to your observations. The Commission sent the information on 30 January 2007. I forwarded the said information to you with an invitation to make observations, which you sent on 25 March 2007.

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

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

THE COMPLAINT

In his complaint, the complainant made the following submissions.

In 1976 and 1992, the Commission took out a pension scheme with an insurer based in the Channel Islands, namely, Assicurazioni Generali SpA (hereinafter, Generali). The pension scheme was a group policy covering the Commission's individual experts. Some individual experts, including the complainant, continued to be covered by the pension scheme after their contracts with the Commission had expired. These are referred to as "deferred members".

The pension scheme had a guaranteed minimum annual interest rate of 5%. When the insurer was no longer in a position to guarantee the 5% interest rate, it notified the Commission that it

intended to terminate the contract as of 1 January 2004, unless an amendment was made to the clause governing the guaranteed minimum annual interest rate. The Commission, which had never monitored the scheme, was then faced with the need to find a provisional solution to ensure pension cover for individual experts. Had the Commission monitored the scheme, it would have known that a termination of the contract could be expected.

A pension scheme with a three-month termination notice by either party cannot be managed properly and the Commission should never have accepted such terms for a pension scheme. The Commission took over the scheme from the defunct European Association for Cooperation (hereinafter, EAC) and it was apparent that it did not realise the effects of the legal terms involved. As regards the Commission's lack of monitoring, the annual report for the pension scheme showed that the insurer invested 9% of its assets in A bonds, whereas the policy fund strategy required bonds with a minimum credit rating of AA. Furthermore, as for 2004, the Commission negotiated a provisional 3.75% minimum guaranteed interest rate replacing the 5% minimum guaranteed rate. It was not clear to what extent the Commission could renegotiate the minimum guaranteed rate, particularly on behalf of the deferred members. Yet, the Commission did not appear to have renegotiated Annexes 2 and 3 of the scheme, which stated that the provisional rate of interest payable in respect of each year should be 85% of the definitive rate of interest payable the preceding year. Moreover, it is normal practice in pension schemes to apply, in the event that the minimum guaranteed rate changes, this change to new contributions only, that is, to voluntary contributions from the deferred members and contributions paid by the Commission for active individual experts. However, in a letter to policyholders dated 20 December 2004, the insurer stated that the return on the fund was 4.03% in 2004. It was therefore questionable how the Commission could accept, for 2004, a minimum rate of 3.75%, which was neither 85% of the final rate of the preceding year, nor the return of the fund. In view of the above, it appeared that the Commission had not monitored the scheme, particularly since the return of the fund was consistently below benchmark and the guaranteed rate during the preceding five years.

Since the contract was terminated by the insurer as of 1 January 2004, the Commission started negotiating provisional arrangements with the insurer at the same time as launching a tender procedure in order to select a new insurer. However, it was inappropriate to keep the "old insurer", that is, the above-mentioned Channel Islands insurer, while launching tender procedures to select a new one. As explained above, the old insurer did not award its policy holders the correct interest rate for 2004. The question was how the Commission could expect an insurer to manage the pension scheme properly when there was an ongoing tender procedure to select a new insurer. Furthermore, it was apparent that any new insurer would not be willing to make a competitive bid when the old insurer was itself invited to bid or the Commission was negotiating new terms with it.

Two tender procedures were unsuccessful due to inappropriate Terms of Reference (hereinafter, the TOR). It was not appropriate to set up a new pension scheme for only two years. The Commission knew that contracts for individual experts normally do not last longer than two years. Under these circumstances, no insurer would be interested in, or could offer, good conditions for just two years. Furthermore, the TOR laying down the general conditions of

the policy were not in line with financial market products.

Finally, after a negotiated procedure, the Commission chose a successful tenderer to serve as a new insurer. On the basis of information provided by the old insurer and the Commission, the offer from the successful tenderer was not necessarily better than the old scheme. For instance, the guaranteed minimum annual interest rate was lower, while other financial criteria did not seem to have been assessed by the Commission when selecting the successful tenderer. In the information provided, the Commission gave only two reasons or criteria for selecting the new insurer, namely, the minimum guaranteed policy rate and the expected dividend or estimated total net rate (minimum plus bonus). However, the new insurer did not appear to be better than the second best tenderer or the old insurer as regards any of these two criteria. Any tender assessed on the basis of expected bonus must be based on criteria such as portfolio structure, credit rating, financial duration, fund manager strategy. Past performance is not a guarantee for the future. Since, in the new policy, the expected dividend did not appear to be guaranteed in terms of a percentage of the previous year's declared interest, it was not clear what other objective and financial criteria had been used to evaluate the new scheme. Taking a look at the market for pension funds and schemes, one could easily find policies offering better and more suitable conditions. The Commission thus did not know what kind of product it should launch a tender procedure for.

The Commission mismanaged the tender procedures, as far as transparency and prompt and correct information were concerned. The unsuccessful result of the tender procedures was only to be expected, since the procedures ran against both time and financial market conditions. A negotiated procedure should have been launched immediately after the first unsuccessful tender procedure. A tender procedure that is launched twice and ends up in a rushed negotiated procedure with an unclear final outcome is normally the result of a lack of fair competition and transparency.

The complainant alleged that the Commission had:
- Failed properly to monitor the pension insurance scheme; and
- Mismanaged the tender procedures launched in order to find a new insurer.

The Ombudsman opened an inquiry into the above allegations. In relation to the second allegation, the Ombudsman noted, in his opening letter, the following arguments made by the complainant: (a) it was inappropriate to keep the old insurer while launching tender procedures to select a new one; (b) inappropriate TOR were used in the tender procedures; (c) the successful tender did not provide a better insurance than the old one; (d) certain financial criteria were not taken into consideration when selecting the successful tender; (e) the tender procedures lacked transparency; (f) the Commission failed to provide prompt and correct information as regards the tender procedures; and (g) a negotiated procedure should have been launched immediately after the first unsuccessful tender procedure.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made, in summary, the following comments:
Background
The Commission used regularly to conclude fixed-term private law employment contracts, under Belgian law, with persons working outside the European Union (hereinafter, individual experts). Since they worked overseas, these employees could not be included in the Belgian social welfare system. Consequently, their employer - the Commission - was required to use private insurance companies on the international market for the individual experts' pension/life insurance cover.

Before May 1998, these contracts were concluded and managed by EAC, a Belgium-based non-profit association, which also provided the experts with the logistics for their missions. EAC concluded two pension fund contracts, in 1976 and 1992 respectively, with Generali, covering individual experts. These contracts foresaw a guaranteed minimum interest rate of 5% and contained an annual tacit renewal clause subject to termination by either party, by means of prior notice delivered OR issue three months before the end of the year.

In preparing the 1997 budget, it was decided that EAC should no longer be subsidised by the Commission. The Commission therefore took over, as of 30 July 1998, EAC's position in the pension fund contracts concluded with Generali with respect to "continuing agents". Continuing agents were defined in the relevant agreement as agents who had employment contracts with EAC prior to 31 December 1998. These contracts were replaced on, or prior to, 31 December 1998 with employment contracts with the Commission. The complainant's contract with EAC ended in 1994 and he was therefore not a continuing agent.

As from 31 December 1998, individual experts were recruited and employed directly by the Commission. However, the logistics of their missions and the management of the pension fund contracts were temporarily entrusted, from May 1998 until the end of December 2002, to the external contractors AGRER and GTZ. After January 2003, the Commission took over the management of the individual experts' contracts, as well as the supervision of the management of the pension insurance scheme by Generali.
The contract with Generali
The provisions of the Standard General Conditions governing employment contracts for the individual experts related to the insurance scheme were Articles 27.4, 27.5 and 46. The latter read:

" *The Commission has taken out group pension insurance in respect of its employees. The employees, unless expressly exempted by the Commission, shall be required to contribute to it. Each contributing employee shall be informed of the general and specific conditions governing the said insurance, the rules of which shall be supplied to him upon his appointment. The employee shall complete an application for cover under the said group insurance policy.* As the terms of the policy may be subject to amendment, the Commission reserves the right to amend the scope and conditions of the insurance cover in respect of all employees " (emphasis added).

The general principles of Generali's insurance were the following:
- The target was to constitute an individual pension account guaranteeing the scheme member

a capital, in the event that he/she still would be alive at retirement age. In the event that he/she died before his/her retirement, the priority would be to reimburse his/her beneficiaries the relevant payment, including interest.
- The insurance was constituted by a contribution from the Commission (13.5% of the basic salary of the expert) and by contribution from the expert (6.75% of his/her basic salary, deducted directly).
- The contributions were in their totality assigned to the funds at a guaranteed rate, which was fixed in euro.
- The funds entitled the experts to the capitalisation of a guaranteed minimum interest, free from all costs during the total duration of the contract, and to the payment of a dividend established at the end of each year and transferred within the first two months of the following year.

Pursuant to Article 9 of the insurance policy, the individual account was liquidated:
- When the expert retired - the capital constituted by the accumulated payments, interest and other benefits (dividend) belonged to the member, who could ask for it to be cashed in.
- In the event that the member's contract of employment with the Commission was terminated - after a 30-day waiting period, the member acquired the same right as upon retirement; members could also choose not to liquidate their accounts, in which case the insurer would continue to pay interest and dividends on the same conditions as for active members.
- If the member died - The funds on the individual account at the time of death were acquired by the member's designated beneficiaries or by his/her dependents.

At the time of retirement or termination of the employment contract, Generali offered members the following choices, in addition to liquidation of the account:
- Payment of a regular, monthly or annual pension (temporary or life annuity).
- Partial liquidation combined with payment of a pension.
- The possibility of continuing membership, in order to build up more capital or a larger pension.
The change of insurance provider
In 2003, Generali informed the Commission that it was no longer in a position to continue guaranteeing the initial interest rate of 5%. More precisely, in June 2003, Generali notified the Commission that, as of 1 January 2004, it intended not to continue with the contract's tacit annual renewal, unless the Commission agreed to the amendment of certain clauses, including the one concerning the minimum guaranteed annual rate of interest, which it proposed to reduce to 3%.

For this reason, and also because this was indeed a very old contract in need of reform, the Commission decided to launch a tender procedure. However, in the interest of continued cover for individual experts and in order to comply with the usual tendering requirements, the Commission had to negotiate a provisional extension of the contract. Generali agreed to 3.75%. This extension was made in accordance with the last sentence of the above-mentioned Article 46, which foresaw the possibility to amend the contract.

On 6 and 28 November 2003, the Commission sent a note to the individual experts, as beneficiaries of the pension scheme, informing them of the situation and specifying that the extension would be for a three-month period.

The first call for tenders was published on 3 March 2004. On 26 March 2004, the Commission issued a note addressed to all individual experts, informing them of the insurance contract's second quarterly extension with the same guaranteed minimum net rate of interest, as well as of a new contract which was foreseen to enter into force on 1 July 2004. This note also referred to the fact that, following the contract notice's publication in the Official Journal, 12 companies had expressed their interest in replying to the call for tenders.

Despite the apparently good reception of the TOR by the above companies, the Commission unfortunately had to take the decision not to award the contract, since the evaluation committee had found the only eligible tender to be unsatisfactory. Consequently, on 16 July 2004, just a few days after the authorising officer's final decision not to award the contract, the Commission informed the experts about the negative results of the first tender and the necessary continuation of the contract with Generali in order to launch a new call for tenders. The letter specified that an extension had been made for another nine months, that is, from July 2004 to the end of March 2005, adding that for the first six months, the net guaranteed minimum rate of interest would be 3.75%, whereas for the first term of 2005, the rate was still to be decided. Article 3 of the rider to the policy adopted on 30 June 2004 foresaw that, in the event of disagreement about the interest rate to be applied as of 1 January 2005, the contract would expire on 31 December 2004.

The second call for tender was published in the Official Journal on 29 July 2004. Unfortunately, no applications were received. Consequently, at the end of November 2004, the Commission decided to launch a negotiated procedure involving four international insurance companies specialising in the area of pensions/life insurance. The evaluation of the four submitted offers resulted in the selection of La Mondiale - Europartner ("La Mondiale"), which was better that the other three (including Generali), in terms of the financial return offered. In addition, the chosen offer did not require a lump sum payment at the time of inscription. This was duly reflected in an evaluation report.

On 20 December 2004, Generali sent a circular to all pension scheme members, informing them that the insurance contract was due to expire at the end of the year and would be transferred to another provider. Generali's letter encouraged deferred members to choose between the different available options: (a) to stay with the pension scheme (automatic transfer to the new provider); (b) to cash in the benefit; or (c) to transfer the benefit to a personal pension scheme with Generali. The letter also suggested, without the Commission's prior consent, to contact a Commission official for further information about the transfer of the pension scheme.

On 31 December 2004, the contract with Generali came to an end. A new contract with La Mondiale entered into force as from 1 January 2005 for an initial period of two years. The Commission communicated the result of the negotiated procedure by note of 3 January 2005, addressed to all individual experts. On 31 January 2005, the Commission issued an information note to former individual experts/members of the pension/life group policy.

The present complaint

The complainant was employed as a "young expert in Delegation" of the Commission (a training

programme between the Commission and the EU Member States), from 5 October 1992 to 4 October 1994, and had access to the pension contract concluded with Generali. As from October 1994, he became a "deferred member" of his insurance policy and was therefore entitled to choose between the options described above.

Since the complainant was a deferred member of Generali's pension scheme, he was not bound by the general conditions governing the contracts with the Commission. He therefore had the following choices: (a) to keep his personal fund with Generali, as advised by Generali in its letter of 20 December 2004; (b) to renegotiate the rate of interest and terms and conditions of a new contract with Generali; or (c) to cash in the capital constituted by the accumulated payments, interest and other benefits belonging to him. Accordingly, the complainant was not obliged to transfer his personal fund to the new insurer.

The allegation that the Commission failed properly to monitor the pension insurance scheme

The Commission directly managed the insurance scheme only as of January 2003. In any case, the Commission had, from 1998 to 2003, the right, and subsequently the obligation, to supervise the tasks performed by two contractors (AGRER and GTZ), which, as stipulated in Article 3 of their framework contracts, submitted regular reports on their work. As shown by the extensive exchange of correspondence between the Commission and Generali, the Commission constantly exercised a vigilant monitoring of Generali's contract, through regular contacts with managers of the pension scheme.

On 12 January 2005, in a letter addressed to Generali, the Commission reacted to an e-mail circulated by Generali on 20 December 2004, stressing that it was for the deferred members to decide about the transfer of funds. On 31 January 2005, the Commission addressed another letter to Generali, pointing out that it had, without the Commission's prior consent, issued and circulated the above-mentioned e-mail, in which it advised the experts to contact a Commission official to obtain more information. Nor was the Commission sent a copy of the e-mail. The Commission stressed that Generali had failed to respect its contractual obligations vis-à-vis the Commission and requested an immediate dissemination of the Commission's right of response. Moreover, the Commission reiterated that a written agreement from each of the deferred members was needed before any action could be undertaken and that Generali was bound to pay at least the legal minimum guaranteed rate of interest until the date of transfer of each personal fund. Generali was requested to send a prompt reply listing and describing all the measures undertaken to solve the matter.

The Commission received no reply from Generali by 1 March 2005 and therefore asked Generali to present a detailed final report describing and analysing the activities of its service throughout the period when the contract was in force. The report should include an explanation of the method of management of the members' funds; the results obtained; the performance of the fund; the method of reporting both to members and to the Commission; the administration of the members' files; the composition of the team devoted to the contract; the correspondence and contacts with experts; Generali's system of internal control; the presentation of any still on-going claims from, or disputes with, members; the measures undertaken by Generali to solve legal issues, and so on. The Commission also requested a detailed explanation concerning the arrangements envisaged OR made for transferring funds at the end of the contract, as well as

statistics and integrated financial data, in order to provide the Commission with all of the necessary information that would allow it to grant the requested discharge to Generali.

On 9 March 2005, a meeting was held between representatives of the Commission and Generali, with a view to clarifying the Commission's position and helping Generali to find urgent and adequate solutions. On 11 March 2005, the Commission reiterated the need to obtain, by 18 April 2005 at the latest, clarifications on certain issues, as well as the requested final report covering the reference period 2003-2004. In order to facilitate the task, the Commission sent Generali a financial template as well as a list of experts employed by the Commission during that period. Receipt of the requested information was set as a condition for granting Generali the requested discharge for the period.

Having received Generali's final report, the Commission informed it, by letter of 25 April 2005, that the report was not acceptable because it did not comply with the above-mentioned financial template and did not allow the Commission to trace the voluntary contributions made by the experts or by the Commission. The Commission urged Generali to send complementary detailed information and also informed Generali that an audit would be launched, aiming at a further specialist examination of the report. Based on the outcome of the audit, it would be decided either to terminate the contract, while granting Generali a limited discharge, or to consider taking legal action.

On 6 May 2005, Generali provided the Commission with some additional information and elements. However, the Commission was still unable to reconcile all the figures and understand how interest rates had been computed over the preceding two years.

Accordingly, the Commission made efforts to check (i) Generali's good management of the contract, according to its specifications, financial standards and deontological rules, and (ii) the traceability of funds - the guarantee of the transparency of contributions and the calculation of interests, before granting Generali a discharge.

As regards the complainant's argument pertaining to the level of uncertainty regarding interest rates, it should be noted that life insurance companies have faced both a sharp fall in interest rates and an increase in life expectancy. On the basis thereof, it was reasonable for Generali not to be able to maintain the rate that it had given for the previous 25 years and that it warned the Commission of this changer of circumstances, before the contract's tacit annual renewal took place. Given that the Commission could not reverse the market trends and considering the above-mentioned circumstances, the Commission undertook all the necessary measures to protect the interests of both its experts and former employees.
The allegation that the Commission mismanaged the tender procedures - On the argument that it was inappropriate to keep the old insurer while launching the tender procedures to select a new one:
As the direct employer of some 450 experts, the Commission had the obligation to provide them, without interruption, with a framework contract of pension insurance in accordance with Article 46 of their employment contracts. Since the second addendum to Generali's contract ended on 30 June 2004, the Commission had to provide, as a matter of urgency, all experts

with pension insurance as of 1 July 2004, in order to avoid legal actions either by the experts or by the Belgian authorities. Recourse to the OSSOM - the Belgian overseas social security office - was ruled out since that system only entitled members to liquidate the account when retiring after a minimum contribution period. Moreover, the OSSOM only allowed the payment of a monthly amount, and not the total amount of paid contributions plus interest. The use of the OSSOM would have substantially changed the independent experts' employment conditions.

It was therefore necessary to negotiate with Generali the precise terms of an addendum, namely, as regards its duration and the net minimum guaranteed rate of interest. The addendum had to last the span of time necessary to allow the re-definition and launching of a tender, as well as the award and signature of a contract. At least a 12-month period was considered necessary in order to conclude a new contract. For these reasons, and in order to comply with Article 91 of the Financial Regulation (1) and Article 126(1) of its Implementing Rules (2) , it was decided to launch negotiations with the previous insurance company in order both to adopt an addendum allowing the Commission to abide by its legal obligations after 1 July 2004, and to prepare the publication of a new open invitation to tender.

- On the argument that inappropriate TOR were used in the tender procedures:

The TOR were conscientiously prepared by a team composed of personnel from specialised services within the Commission, as well as of external consultants recruited on an *ad hoc* basis, who were specialised in the field.

The TOR were specifically established in order to obtain the maximum number of quality offers and to protect all scheme members to the greatest extent possible. Accordingly, the fulfilment of a number of conditions was requested, namely, specialisation in the field of life insurance; headquarters in a Member State and conformity with the EC *aquis* and existing legislation in that country; regulatory and financial guarantees; qualified and experienced staff in sufficient numbers; commitment to respecting the confidentiality clause and so on. These requirements proved to be useful during the negotiated procedure, when discussing and monitoring the implementation of the new scheme with the new insurer.

- On the argument that the successful tender did not provide a better insurance that the old one:

The general principles of the new insurance remained strictly the same as under the old one. Comparing the new scheme with the old one was irrelevant in the context of an open call for tender, particularly since Generali had decided not to continue with the contract's tacit annual renewal. In addition, the facts, in terms of financial return, contradicted the complainant's arguments since both the last interest rate offered by Generali (3.75% in 2004) and its offer from November 2004 were indeed inferior to the new insurer's scheme. The offer from La Mondiale consisted of a guaranteed minimum interest rate of 2% and the provision of a dividend, resulting in an estimated total net rate of 4.20% for 2005 (minimum guaranteed interest rate of 2% + dividend of 2.20%) and of 4.10% for 2006 (minimum guaranteed interest rate of 2% + dividend of 2.10%). By contrast, the second best acceptable offer made by Generali foresaw a minimum guaranteed interest rate of 3% in 2005 and of 2.25% in 2006, but without any guarantee of a dividend and with the payment of administrative costs. This information was provided by the Commission on 3 January 2005, and again in its right of response dated 31 January 2005.

Furthermore, it should be noted that, as a deferred member of Generali's pension scheme, the complainant was not obliged to transfer his personal fund to the new insurer.

- On the argument that certain financial criteria were not taken into consideration when selecting the successful tender:

The TOR of both open tenders were clear about the award criteria. The last paragraph of point 3.2 appearing in both texts read:

" *(...) Toutefois, la Commission ne veut pas que le niveau du TMGn [* the net minimum guaranteed rate of interest *] constitue l'unique critère d'attribution. D'autres critères dont l'importance est également jugée cruciale entreront en ligne de compte dans le processus d'attribution. Tous les critères applicable sont clairement définis aux sections 4, 5 et 6 de ce Cahier des charges (Conditions générales, de sélection et d'attribution)* ".

All financial criteria foreseen in the TOR, as published in July 2004, were taken into consideration in selecting the new insurer. These criteria concerned, *inter alia* , portfolio structure, information about fund plans managed and the amount of reserves. The evaluation report duly reflected these criteria.

- On the argument that the tender procedures lacked transparency:

Given the estimated amount of the tender, the future contract had to be the object of a public invitation to tender procedure. The complainant's argument that the procedure lacked transparency was surprising, especially since a forecast notice and two contract notices were published in the Official Journal (on 27 December 2003, 3 March 2004 and 29 July 2004, respectively).

As regards the outcome of the negotiated procedure, the complainant was informed by the Commission on 20 April 2005 about the internal nature of the report made by the Evaluation Committee. Public disclosure of such a document could be prejudicial to the commercial interests of the participating companies. The refusal to grant access to this document was justified by the corresponding exception foreseen in Article 4 of Regulation 1049/2001 (3) on access to documents.

- On the argument that the Commission failed to provide prompt and correct information as regards the tender procedures:

As the complainant acknowledged by submitting copies of these letters with his complaint, numerous letters containing information were sent by the Commission in both English and French to all experts and/or former employees of the Commission. The notes addressed to all independent experts were dated 6 and 28 November 2003, 26 March 2004, 16 July 2004, 26 November 2004, 3 and 31 January 2005. The last note was specifically addressed to former individual experts, that is, the deferred members of the pension insurance scheme. It had to be noted that retrieving the contact details of some 930 deferred members without even knowing whether they were concerned by the transfer of the pension contract involved a considerable effort. It should be recalled that once the employment contract with the Commission had come to an end, it was up to the expert to decide whether or not to keep the insurance. If the former expert decided to keep the insurance, it was the insurance company's duty to keep the former expert informed about policy changes and conditions.

The period of time which elapsed between the events to be reported or announced and the dates of the notes and letters of information should be considered to be prompt. The notes were correct, factual and detailed when it was possible for them to be so in order strictly to respect the rules governing public procurement. Also extensive correspondence with the complainant took place. From March 2004, the Commission sent the complainant numerous replies to his requests and even forwarded draft notes under preparation. The disclosure of preparatory documents was something exceptional and showed the Commission's willingness to providing information.

- On the argument that a negotiated procedure should have been launched immediately after the first unsuccessful tender procedure:

This argument cannot be reconciled with the argument that there was a lack of transparency. Publication of the tender twice before resorting to a negotiated procedure was necessary for transparency purposes but also in order to abide by the existing rules. The procedure in question was in accordance with Article 91 of the Financial Regulation. The use of the negotiated procedure is restricted to the cases laid down in Articles 126 and 127 of the Implementing Rules. Paragraph 1 of Article 127 reads:

" *contracting authorities may use the negotiated procedure after having published a contract notice in the following cases: (a) in the event of the submission of tenders which are irregular or unacceptable, by reference in particular to the selection or award criteria, in response to an open or restricted procedure which has been completed, provided that the original terms of the contract as specified in the documents relating to the invitation to tender referred to in Article 130 are not substantially altered* ".

In this context, it was necessary to launch a second open call for tenders, where the initial requirements could be adapted to the market, thus making the contract more appealing to insurance companies, before resorting to a negotiated procedure. The fact that the second invitation to tender was also unsuccessful did cause a significant delay. However, the delay was not unnecessary but justified by the need to guarantee both competition and transparency.

The complainant was informed, by e-mails of 29 March and 11 August 2004, that if he were not satisfied with the conditions, he could always cancel the insurance and receive the amount due to him under the former conditions. The same information was provided to him in Generali's circular of December 2004.

The Commission concluded by reiterating that the complainant was a deferred member of Generali's pension scheme and was therefore not bound by the general conditions governing the individual experts' contracts with the Commission. Therefore, he had the following options:

- to keep his personal fund with Generali, which, as advised by Generali's circular letter of 20 December 2004 and confirmed by the Commission's right of response of 31 January 2005, was one of the three choices made available to all deferred scheme members.. The transfer to the new insurer was only one choice as was also the possibility of winding up and finding a better contract himself;
- to (re-)negotiate with Generali the rate of interest and the terms and conditions of a new

contract;
- to cash in the capital constituted by the accumulated payments, interest and other benefits belonging to him.

The Commission considered that it had undertaken all necessary measures to protect the interests of its active experts, as well as of its former employees, and stated that it would continue to do so with the new insurer, for the benefit of the same groups.

The complainant's observations

In his observations, the complainant made, in summary, the following comments:

Although EAC, AGRER and GTZ were organisations that were legally independent from the Commission, the Commission always had the final responsibility for the management of the pension fund. In fact, the EAC management, which included Commission officials, was taken over by the Commission. However, the deferred members were never informed that EAC had terminated its activities or that the group pension insurance was the object of a novation contract in 1998. No legal document was sent to the policyholders to amend their initial contract.

The Commission's statement that the pension fund contract was, from May 1998 until the end of December 2002, temporarily entrusted to the external contractors AGRER and GTZ was self-explanatory as regards the Commission's level of accountability and would simply contradict the novation contract that was signed in 1998. AGRER and GTZ were only responsible for the administration of the deduction and payment of employees' and employers' contributions and the forwarding of such contributions to the insurer.

Moreover, Articles A, B and C of the novation contract referred to "certain agents", whereas the Group Policy Insurance (Policy No 37150) only referred to agents who were entitled to benefits under the policy. Upon the dissolution of EAC, it would have been improper only to uphold the rights, obligations and benefits of the Policy in respect of "certain agents". In addition, some of the benefits, as, for instance, the method of calculation of the payable definitive rate of interest, laid down in Annex 2 of the Policy, did not appear to have ever been amended.

Documents and statements sent to all agents, including deferred members, by the insurer referred to the Commission as the owner of the Policy. Since the Commission reserved the right to amend the scope and conditions of the insurance cover with respect to all employees, it either was not the owner of the Policy, or it could not amend the terms of the Policy in respect of deferred members who were not employees, including launching a tender procedure to select a new insurer to which the individual pension funds would be transferred.

Any decision to transfer a pension fund would affect the management and performance of that fund. Those having portfolio management knowledge should know that the decision by the Commission to transfer the fund to another insurer negatively affected the management, performance and payable interest rate both of the remaining funds and of the funds that were transferred.

In response to the first call for tender, the Commission did not receive only one eligible tender,

it only received a total of one tender. Moreover, from reading the notice, it appeared that the deferred members' funds were not included. It was also known that the contract in question did not involve several hundred employees. In addition, the old type of contracts for individual experts was being phased out and, now, the pension scheme of new contractual agents is provided for under the Staff Regulations. The reason why the Commission did not receive any applications at all in response to the second call for tender may very well have been that no one wanted to bid for something that was about to be phased out one or two years later.

The Commission incorrectly stated that the complainant was not bound by the general conditions, unless it was accepted that the Commission was not the owner of the Policy. In the worst of cases, the Commission deliberately excluded certain agents from the benefits and obligations of the Policy. The Commission contacted Generali also in relation to the funds of the deferred members, stating that " *as a contracting party to the group policy (...) former employer of the experts, bound by the duty of solicitude (...) the Commission is entitled to request from you (...)* ". The tone of the letters to Generali was quite different from the Commission's tone in its letter to him, in which it asked him to stop corresponding with it because it did not deal with deferred members' problems.

It was clear from the dates of the Commission's decision to wind up the Policy and of related correspondence that the deferred members were not in a position to make an " *informed and safe* " decision as to whether they should transfer their funds to the new insurer. Furthermore, as regards the Commission's statement that it did not take over EAC's previous legal commitments towards him, the complainant pointed out that the Ombudsman did not consider the complaint against the Commission to be inadmissible. He added that it was not clear under which contract the deferred members would constitute part of a Policy Group Insurance owned by the Commission.

The allegation that the Commission failed properly to monitor the pension insurance scheme

The Commission did not make any observations in this regard but merely summarised facts that occurred in 2005, and submitted some irrelevant annexes.

It was not correct to say that the Commission directly managed the insurance scheme only as of January 2003. Under the novation contract, the terms of the Policy remained, and the two contractors, AGRER and GTZ, were responsible only for the administration of the contributions made by the employees and employer.

The Commission's supervision and monitoring of the scheme appeared to have started only the day when Generali threatened to terminate the contract unless some conditions were amended. The report that the Commission requested from Generali on 1 March 2005 should have been requested every year. The fact that the Commission requested exact figures on the amounts to be transferred meant that it had never checked the portfolio amounts of the Policy fund and that it was not aware that the winding up of such a portfolio would entail some losses in assets such as bonds. Furthermore, the fact that, in its letter of 1 March 2005 to Generali, the Commission asked the latter for a final report with financial data covering the preceding five years, proves that the Commission had no access to any annual reports or consolidated data.

The Commission's comments on the uncertainty regarding interest rates did not address his concerns and constituted evidence of the Commission's lack of knowledge in the field.

The allegation that the Commission mismanaged the tender procedures

The Commission argued that its decision to launch a tender procedure was justified by the fact that Generali had decided to ask it to accept a lower interest rate. However, the Commission eventually awarded the contract to a tenderer which offered an even lower interest rate.

The Commission further stated that, in order to avoid legal actions taken either by the experts or by the Belgian authorities, it had, as a matter of urgency, to provide all experts with an insurance pension as of 1 July 2004. However, although declared to be under Belgian jurisdiction, there would be no risk of legal action since neither the Financial Ombudsman Service or the Pensions Ombudsman in the United Kingdom, nor the " *Ombudsdienst Pensionen* " or the Banking, Finance and Insurance Commission in Belgium could deal with the matter.

The publication of a new open tender, which included the old insurer Generali, while at the same time negotiating with Generali, could not but fail. No insurer would participate in a tender procedure with biased competition and transparency terms. The market is very competitive and it was basically impossible to offer and guarantee a return in excess of the one negotiated with Generali.

It was surprising to read that the Commission had engaged external consultants to draft the TOR, which could have been downloaded from the Internet and adapted to the Commission's requirements. The Commission's requirements were not different from the criteria provided for in other pension schemes.

Furthermore, the Commission's comment that it was irrelevant to compare the new scheme with the old one was not clear, particularly since the Commission also stated that the general principles of the new insurance remained strictly the same as before and on the basis of the fact that Generali was admitted to participate in the tender procedure, while it was negotiating the conditions of the old Policy.

In the notice, the Commission stated that the premiums received by the old insurer in 2003 amounted to EUR 6 483 200. However, in a letter sent by the Commission to Generali, non-audited figures of between EUR 7 million and EUR 10 million were mentioned as the total account balance for active members. The figure in the notice, referring to annual total contributions to be invested by the new insurer, appeared to be largely overestimated and misleading.

The first two award criteria in the notice were the minimum guaranteed net interest rate and financial returns obtained by the insurer over the preceding five years. As regards the first criterion, Generali offered 3% in 2005 and 2.25% in 2006 whereas La Mondiale offered 2% for 2005 and 2006, the rest being only the Commission's speculations on expected dividends. The expected dividend of 2.2% from La Mondiale in 2005 was not realistic since it was not consistent with the trends on the financial market and did not consider any benchmark index. As regards the second criterion, past performance is not a guarantee for the future and cannot be

considered as an objective and fair criterion for selecting a new insurer.

In the evaluation of the tenders, the Commission appeared to have confused the concept of guaranteed total net with that of estimated total net. The Commission stated that the estimated dividend of La Mondiale would be 2.20% in 2005 and 2.10% in 2006, but it neither substantiated the term "estimated", nor provided Generali's figures. In any case, an estimate is not a guarantee. If a provision with respect to dividends would be an award criterion, it was not clear why the provision in Annex 2 of the old Policy was not applied, that is, a yearly dividend of at least 85% of the definitive rate of the preceding year. Moreover, to introduce a provision on a dividend appeared to derogate from the award criteria mentioned in the notice.

It did not appear that the contract was awarded on the basis of the most advantageous tender in terms of the quality of the service, the price, adherence to specifications, supervision/management support and technical capabilities. Investment policy, portfolio structures, management team, risk control and interest rates were just another part of the evaluation and award criteria.

There was also the question of how the requirement that the tenderers had to have an office in Brussels or a site for performance of services in Brussels was respected or whether such requirement restricted the selection.

The request that tenders had to be maintained for eight months was not feasible due to changing market conditions.

Given the succinct information about the award criteria, the Ombudsman should inspect the file. It was not clear how the Commission assessed portfolio structures and fund plans, since the correspondence with Generali made it clear that it did not even know the total fund amount, let alone the portfolio structure.

It was not clear how the estimated amount of the tender, that is, the total accumulated contribution for those who would transfer their pension scheme to the new insurer plus new contributions from the employees and from the employer, would necessarily require the publication of an open tender. The contract to be concluded was for the administration and management of the pension fund, regardless of the portfolio amount, which by no means affected the contract value as the individual pension funds were the property of the agents. Instead, the general rule is that the contracting authority must take into account the estimated total remuneration for the service (excluding VAT). For certain types of service contracts, the Services Directive specifies certain items that constitute remuneration, notably: (i) the premium payable, in case of insurance services; and (ii) fees, commissions and interest, in case of banking and other financial services.

The fact that the notice was published twice was not at all an indication of transparency and fair competition in a public tender. It just demonstrated that matters were not right the first time. Nor was the choice between tender procedures a matter of transparency.

The Commission should have explored the following:

(i) The use of a negotiated procedure without prior publication of a contract notice, applying Article 126(1)(c), which states that:

" *in so far as is strictly necessary where, for reasons of extreme urgency brought about by unforeseeable events not attributable to the contracting authorities, it is impossible to comply with the time limits set for the other procedures and laid down in Articles (...)* ".

According to the Commission, Generali's termination of the contract was unforeseeable and not attributable to the Commission. Article 126(1)(c), as well as Article 126(1)(e), were therefore applicable.

(ii) The use of a negotiated procedure after prior publication of a contract notice, applying Article 127(1)(b), which states that:

" *[c]ontracting authorities may use the negotiated procedure after having published a contract notice, whatever the estimated value of the contract, in the following cases (...) in exceptional cases involving work, supplies or services where the nature or the risks do not permit prior overall pricing by the Tenderer* ".

It was clear that bidding on concepts like financial returns, expected dividend, risk control, reporting or portfolio management did not permit overall pricing by the tenderer.

(iii) The application of Article 127(1)(c) which concerns cases where the nature of the services to be procured, in particular in the case of financial services and intellectual services, is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender in accordance with the rules governing open or restricted procedures. A restricted procedure, including the competitive dialogue under Article 125(b) could also have been envisaged. This procedure was used in a disguised way by continuing to negotiate with the old insurer (Generali).

Further inquiries

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

On 31 May 2006, the Ombudsman therefore asked the Commission to provide some further information and a supplementary opinion in response to a series of questions (see below).

The Commission's response

The Commission's reply to the Ombudsman's request for further information and a supplementary opinion can be summarised as follows.

(1) Does the Commission argue that it procured the monitoring of the pension scheme from AGRER and GTZ?

The Commission did procure the monitoring of the pension scheme for the period 1998-2002. The relevant contracts with AGRER and GTZ (COOP/EXT/2-98), quoted in the previous Commission's reply, contained the following provision (under " *1.2.1 Gestion administrative et*

financière des contrats des experts, 1.2.1.1 Gestion des contrats d'emploi des experts "):

" *(...) Gestion des diverses assurances contractées par la Commission en faveur des experts, notamment: (...) contribution "pension". (...)* ".

This monitoring involved: (a) day-to-day management, (b) regular payments, (c) contacts with Generali, as well as with active scheme members.

All these tasks were then taken over by the Commission in 2003. The Commission did the monitoring throughout the years 2004 and 2005 and later took charge of the whole group policy liquidation and of the transfer to the new provider.

But monitoring investments made by Generali and its management of the Deposit Fund linked with the group policy is of course an entirely different matter. This was not part of the kind of monitoring referred to above (last three paragraphs) or in the Commission's previous Opinion. This kind of surveillance of Generali's actions, as of any other British life insurance company, came within the competence of the British national authorities. All legal requisites are described in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (4) . The Commission's role in the field was restricted to the usual passive role of policyholders. That is: since (a) customers (scheme members) were satisfied with the financial returns, (b) interest paid was, at all times, in accordance with the norms for this kind of policy, and (c) surveillance authorities did not detect any irregularities, the Commission did not find it necessary to perform a double check itself. Therefore, Generali was presumed to be acting with due competence and honesty and the fund's performance was deemed to be acceptable.
(2) What does the Commission mean by "subsequently" in its statement (in the previous Opinion) that it had "the right and subsequently the obligation of the supervision of the tasks performed by two contractors (AGRER and GTZ) (...)"?
The complete sentence of the Commission's previous reply (section III, point (a), last two lines of page 5) reads as follows:

" *In any case, the Commission had from 1998 till 2003, the right and subsequently the obligation of the supervision of the tasks performed by two contractors. (...)* ".

The word subsequently was not perhaps quite appropriate. It might have been better to write as well as instead. In any case, what was actually meant has hopefully been made clearer by the explanation supplied under 3.1 above, that is, that the Commission did perform its duty.
(3) What concrete correspondence does the Commission refer to in its statement (in the previous Opinion) that it "exercised vigilant monitoring (...) as shown by the extensive exchange of correspondence between the Commission and the company" (Generali)?
In trying to select some "concrete correspondence" supporting the statement about "vigilant monitoring", the most meaningful items or points could probably be said to be the following:
- The Commission's letter to Generali dated 30 June 2003, acknowledging Generali's refusal to continue paying at least the net minimum guaranteed interest rate of 5% as from 1 January 2004 and opening discussions of this and other related points.

- Regular exchanges (letters, e-mails, telephone calls and audio conferences, amounting to a total of more than 150 items) throughout 2003 and 2004, which did not result in a sudden end to the service provided; three subsequent temporary policy extensions for whole year 2004; the guaranteed interest rate was lowered only to 3.75% (instead of 3%, as initially proposed by Generali); and the payment of service fees was refused.

After the expiration of the policy on 31 December 2004, exchanges held in early 2005 involved:
- Urging Generali immediately to transfer final balances of all active members (Commission's letter of 12 January 2005).
- Underlining that Generali did not have the right to make decisions for deferred members (same letter of 12 January 2005).
- Making things clear for deferred members, who had received misleading information. Generali had sent them a circular letter (not copied to the Commission, whose consent had not been obtained beforehand) where some statements were not true. The Commission produced an information note for deferred members and asked Generali to circulate it. The request was accepted.
- A final meeting with Generali on 9 March 2005, in the course of which outstanding issues were reviewed.
- The Commission's request for a Final Report in its letter of 11 March 2005.
- The Commission's decision to ask for an external audit, after receipt and initial analysis of Final Report (cf. Commission's letter of 25 April 2005).
(4) Did Generali not provide EAC, and later the Commission, with yearly reports (...)?
Generali did not issue yearly reports on the Commission's policy. The policy contract did not contain an obligation to do so. Generali did, however, provide the following information:
- the yearly computation of payable rate of interest, which was linked to the performance of the Deposit Fund. This rate had always been higher than the guaranteed minimum (5%) until and including 1999, when the definitive rate was 5.59%. The Commission never had reason to refuse to believe the validity of Generali's computation nor did any of the individuals concerned;
- yearly individual statements for each scheme member. Those which concerned active members were sent to them by the Commission and no-one ever complained about this system of sending the yearly individual statements. The yearly individual statements that concerned deferred members were sent directly to them by Generali. If Generali's Final Report were to be trusted, it would appear that no significant complaints were received either; and
- occasional overall statistics, on demand.

Generali also provided the Final Report requested and fully co-operated with the auditors after the policy termination, allowing them to have access to all the relevant information and financial data.
(5) Explain the difference between EUR 6 483 200, quoted as premium paid in 2003 (in Terms of Reference for the Tender) and a figure in the range of EUR 7 million to EUR 10 million, as the total balance for active members (in correspondence with the pension scheme provider)
These figures concern two distinct items, almost totally unrelated to each other. The first figure, that is, EUR 6 483 200, is the sum total of payments made to the insurance company for salaries paid to the agents concerned in 2003. The figure was mentioned in the TOR for all three tenders, for the purpose of providing essential information to prospective tenderers. One

of the basic facts which the prospective tenderers were presumed to be interested in was, of course, the "size" of the contract. Even though the Commission was not prepared to accept a legal commitment for a minimum figure, it was willing to provide relevant information. Prospective tenderers could thus expect to be able to receive approximately that figure every year during the contractual four-year period.

The second figure (in the range of EUR 7 million to EUR 10 million) is the sum total of the final individual balances of all active members on the date the group policy was terminated (31 December 2004). This figure could be expected to be higher than payments made in a single year, for example, the sum of EUR 6 483 200 was paid in 2003, as the opening balances for any active members already employed before January (2004) would involve a supplementary amount. But it did not have to be much higher than the yearly figure, because all fee individuals whose employment contracts had ended in the same year would either become deferred members or wind up their personal funds. This is why the first and second figures are not related to each other, as stated above. The fact that all the employment contracts concerned were concluded for a short term gives inevitably an unusually high rotation, and this in turn means that there is no point in working on a comparison of the two figures in question, which would anyway be useless and irrelevant.

What was indeed useful and even necessary was a detailed check of the second figure (for active members), due to be transferred to the new insurance provider in January 2005. This task was performed with the utmost care and detail by Unit AIDCO/H2.

The width in the range of the second figure may look astonishing and deserves a separate comment. It is a wide range indeed, because obtaining a reliable final figure required a rather complex computation. All the following factors, among others, implied significant differences in the definitive result: (i) including or excluding payments made in late December, related to December salaries, after Generali had closed its ordinary accounting transactions on the 15th day; (ii) counting some individuals as being "active" or "deferred" (end of some employment contracts in late December 2004 or early January 2005); and (iii) minor discrepancies arising from the fact that each monthly payment was made for four different member groups (AIDCO-Commission, AIDCO-FED, ECHO, RELEX junior experts), which sometimes resulted in confusing records that had to be checked and updated.

First, Generali had advised the Commission that the initial transfer comprising final personal balances of all active members would amount to approximately EUR 10 679 000. Then, on 19 January 2005, only the amount of EUR 7 483 129.39 was initially transferred to the new insurer. This surprising difference had to be explained by Generali (see Commission's letter of 31 January 2005, attached as Annex 9 to the initial Opinion on the same complaint). Generali pointed out the factors listed in the previous paragraph and dealt with the Commission's request about omissions and errors (see Commission's letter of 1 March 2005, attached as Annex 10 to the first Opinion).

Generali's response was found to be both swift and satisfactory by the Commission's services.

All necessary checks were also performed throughout the first five months (January to May 2005) following the definitive expiration of the group policy at the end of December 2004. This work was validated by an external audit commissioned in September 2005, after Generali's Final Report of 18 April 2005 had been received and analysed. One year later the auditors' Final Report, dated 28 April 2006, contained the following relevant remark (under 7.1, among other Conclusions): "(...) *In our view the policy has been administered in accordance with the contract during 2003 and 2004.* "
(6) Explain how an estimated dividend could be taken into account in the assessment of tenders, when the awarding criterion was the minimum guaranteed net interest rate?
The net minimum guaranteed rate of interest ("NMGRI") was an essential award criterion (worth up to 50 points out of 100). It was not at all " the awarding criterion", as there were five further criteria, as seen in all subsequent versions of the TOR, including the last one.

The second most important award criterion was an estimated dividend (worth up to 40 points out of 100). The estimated dividend had to be computed by tenderers according to the instructions provided by the TOR, which were as precise as they could be.

This approach was deemed to be both possible and fair by the team of the TOR co-authors. The team consisted of five people (including three officials with specialised knowledge and experience in the field), assisted by two external consultants of Price Waterhouse Coopers Belgium. All seven team members agreed on the approach and the weight to be given to each criterion (and on having six criteria altogether).

The complainant might claim that the NMGRI should have been the only criterion or at least should have been given even greater weight. But the team of co-authors would disagree, because this would have been financially contrary to the scheme members' interests, and unfair vis-à-vis life insurance companies in different Member States.

It would have been unfair, because of different national regulations in the Member States. National control authorities protect customers of life insurance companies by fixing a maximum percentage for the guaranteed rate of interest, so that companies do not take unreasonable risks when trying to appeal to prospective customers. At the time of writing the TOR, the legal maximum rate of interest ranged from only 2% in Luxembourg and Denmark (where national authorities are extremely prudent) to the top figure of 3.5% in Belgium. So tenders from "prudent" countries could not have won, whereas Belgian companies would have had a decisive advantage.

On the other hand, the simplistic approach of comparing the guaranteed rates only would have been contrary to the scheme members' interests. For them what matters the most is how much they receive in terms of financial return, not just which part of it is guaranteed under any circumstances. So the team of authors focused on the definition of the percentage payable on top of the guaranteed rate. And it managed to provide a formula for computation of the estimated dividend which, as any other experts would confirm, was both reliable and valid. If a tenderer had tried to manipulate the data underlying the dividend simulation, this would have been noticed by the Commission. Before actually signing the new contract, the Commission

consulted the competent authorities. And an *ex-post* control can be imposed on the successful tenderer, who is required to justify its dividend computation in each yearly report. In case of non-compliance, the contract contains enough suitable measures to discourage and punish any form of cheating at any time.

One more argument supporting the approach selected is that private life insurance companies, like banks, have public trust as their most precious foundation. Therefore that trust must be really strong. The Commission asked whether anyone could expect a duly registered life insurance company to be willing to risk a strong blow to its public trust, as would happen if ever the Commission had to file a valid complaint against it.

But the validity of the approach is more than a reasonable hypothesis devised by competent experts. Time has proved that they were right. In early 2006 the current Contractor has been able to grant a net dividend of 1.9% for the year 2005. Therefore members will have earned: 2% NMGRI + 1.9 % dividend = 3.9%. The second best tender had been for: 3% NMGRI + no dividend = 3% (minus a flat amount fee of EUR 100 per member).
(7) Explain the reasons for including past performance as an awarding criterion
Actually past performance was not one of the award criteria. It was just an obvious requisite for a dividend simulation with respect to reliability. This is why it was inserted simply as a piece of data required for computation of Criterion "B", under subsection " *B1* " (intended to show the tenderer's recent record of competence and success), supplemented by " *B2. Simulation of the corresponding dividends* ". A simulation with no real background would have been unreliable and therefore irrelevant.

The Commission's approach is clearly presented in Section 6 of the TOR, where a particularly meaningful sentence (criterion B, second paragraph) can be found: " *The evaluators will [* first *] establish an arithmetical formula for obtaining a single figure to express the overall value of "B" as a whole:* the return made by each tenderer *("* BI *" below) combined with the dividend simulation (as requested in "* B2 *")* ".
(8) When determining which tender procedure to use, how did the Commission calculate the value of the contract? What were the relevant provisions for that computation?

Life insurance (combined with a pension scheme) is a rather special service where payments are not really a price for the service provided. All the amounts paid are invested, rather than kept by the insurer, and do not actually belong to the insurance company, whose role is restricted to the management of the personal funds owned by a third party (scheme members). So, one could argue that somehow no expenditure is involved, as no conventional "price" must necessarily be paid. Although it was indeed possible to agree to pay a price for the management performed, this was to be avoided, in principle. With Generali's policy the management services involved had been provided free of charge and the Commission's hope was that this would also be possible with the new insurer.

Should all this mean that the cost was non-existent and thus the Commission was left free to sign "a low-value contract" (below EUR 50 000), as foreseen by the Financial Regulation of

2002 (Article 91) and Article 129 of its Implementing Rules (Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002)?

Or should the contract value computation be related to the amounts transferred to the service provider, regardless of later ownership?

A careful check of all the relevant rules allowed the experts in charge of producing the TOR to find a sensible reply to the preceding questions. One specific provision, concerning " *Arrangements for estimating the value of certain contracts* ", under Article 156.2.a of the Implementing Rules (linked with Article 105 of the Financial Regulation) provided the unquestionably perfect answer: " *For service contracts, account shall be taken of: (a) in the case of insurance services, the premium payable (...)* ". Private sector pension schemes are actually "life insurance" policies, so payments into a scheme must be regarded as a "premium" payable to an insurance company, as unanimously agreed by the TOR's authors.

Having made that preliminary assumption, the key figures spoke for themselves.

On the one hand, when the tender was prepared, it was reasonable to expect the Contract to involve payments totalling approximately four times the 2003 figure: EUR 6 483 200 x 4 years = EUR 25 932 800. In this regard, the TOR provided that the contract could be awarded for a maximum of four years.

On the other hand, the Commission was told by Generali that the assets kept in the specific policy fund were close to EUR 40 million, consisting of EUR 30 million which belonged to deferred members and EUR 10 million which belonged to active members.

There was therefore absolutely no doubt that the huge amounts involved resulted in the legal need of resorting to an open procedure following the rules set up by the Financial Regulation and its Implementing Rules.
(9) Which particular point of Regulation 2342/2002 was the legal basis for the decision to use a negotiated procedure - Article 126.1.c, Article 126.1.e, Article 127.b, or Article 127.1.c?
The legal references supporting the choice made were: Articles 126.1.a and 126.1.c.

Only one non-eligible tender was received in response to the first Call, while no tenders were received for the second Call (following an open procedure announcement on both occasions). The problem arising from having received only one tender, following two Calls, was analysed in depth at a formal meeting held by a large group of officials, three of whom had been co-authors of the first two versions of the TOR. The conclusion of the meeting was a description of two choices, labelled "A" and "B", with all the relevant arguments for each. After further internal discussion it was agreed that choice "A", based on Articles 126.1.a and 126.1.c, was sound and must be preferred, as explained below.

Solution "A" was a competition of participants in a negotiated procedure: it must involve negotiating with a minimum of three companies, provided this number can be attained. Solution "B" was a negotiated procedure without competition (non-competitive): it would have also been

possible to undertake negotiation of a new extension with the previous insurer.

Each solution had its own advantages and disadvantages. Solution "A" was preferred after all, for it was regarded as the best possible way of implementing the principles of competitiveness and transparency (in spite of the difficulties encountered in the international public market), as well as of finding a final solution and of attaining legal security in the formal procedure.
(10) What were the contractual arrangements for the deferred members (...) after their employment with the Commission had become to an end?
The legal relationship with the Commission was discontinued. However, any outstanding financial matters, such as removal expenses, the cost of the return trip, and reinstallation allowance, could still be dealt with for some more time, usually not exceeding one year. As far as the pension scheme was concerned, employees had the right to wind up their personal pension funds but they were also allowed to leave it with Generali and thus earn interest and to continue capitalising. They could also make regular or occasional additional payments. These personal decisions did not have to be reported to the Commission, which refrained from any further action on this matter whereas Generali took over communication with its customers as well as the management of their final balances and of any subsequent payments into such personal funds.

For deferred scheme members, the right to wind up their personal funds when their employment contracts expired became a permanent right as from the date of expiry. Those who chose to leave their personal funds with Generali upon retirement or at the end of contract were not bound by a final decision and could change their minds at any later date.

If any deferred members were not satisfied with changes concerning the choice of contractor or the financial conditions, they were free to wind up their personal funds or to choose another provider at any given time. All they had to do was to instruct Generali to execute their personal decisions.

In any case, given the definitive cancellation of the group policy and subsequent lack of a legal relationship between the Commission and the deferred members, it would seem that the Commission cannot be the appropriate institution to deal with complaints from deferred members.
(11) What right did the Commission consider itself to have to make changes to the pension scheme in respect of deferred members?
The Commission's right to make changes (which could only be compulsory for active members, as explained below) had been provided for in the following standard General Rule (Article 46 of the latest version of this kind of employment contracts):

" *(...) As the terms, of the [* group pension *] policy may be subject to amendment, the Commission reserves the right to amend the scope and conditions of the insurance cover in respect of all Contractors [* scheme members *].* "

The Commission had never exercised this right before. On the other hand, it goes without saying that the Commission had never intended to use this right against the members' interests.

But, in 2005, it became inevitable that it would have to exercise this right, for reasons outlined elsewhere (Generali's refusal to keep the policy and the Commission's duty to launch an open call for tenders anyway) (5) .

However, what really matters is this decisive practical distinction: the changes, if any, could be imposed on active members but not on deferred members, such as the complainant. The latter group was allowed to withdraw at any time, if any of the changes were ever deemed to be unacceptable. For deferred members, any changes could be evaluated by each one personally before deciding whether to use his/her right to stay or not (they were under no obligation to make any particular change, as emphasised in the last paragraph of point 10 above). The group policy did comprise both active (while employed) and deferred (no longer employed) members, but they had, from the start, been placed in clearly distinct categories by the common set of Regulations (cf. Article 9.2, third paragraph, of the former policy Regulations).

Such Regulations made it absolutely clear that deferred members could cancel their membership at any time, without penalty. Given the absence of any right on the part of the Commission to make decisions on behalf of deferred members, the Commission is of the opinion that the policy change in question could not possibly have negatively affected a deferred member in any way, since it was for him/her alone to decide what to do. All deferred members had this entire range of free choices: winding up; transferring to another fund with the same insurance company; or transferring to the Commission's new pension scheme policy with another insurance provider.

Conclusion

Combining the Commission's initial reply of 25 October 2005 with the new detailed information supplied under Section 3 (concerning the exchange of correspondence between the Commission and Generali) above should make it clear that the complainant's allegations are completely unfounded. The Commission continued to claim that:

- Generali's scheme was properly monitored;
- tendering for a new group policy contract was the only feasible option and it was carried out according to the requirements of the current Financial Regulation, throughout the formal procedure (including the contract awarding decision);
- transition to the new pension scheme was implemented properly; and
- no alternative measures or solutions were available to the Commission at any given point.

The complainant's observations

The complainant maintained his complaint and made no further comments.

THE DECISION

1 Alleged failure to monitor properly the pension insurance scheme for individual experts

1.1 The complainant put forward a number of arguments in support of his above-mentioned allegation. In particular, the complainant argued that, prior to June 2003, when Assicurazioni Generali SpA (hereinafter, Generali) informed the Commission that it could no longer guarantee the annual interest rate of 5%, the Commission (i) did not properly monitor the investments made by Generali and its management of the deposit fund and (ii) did not properly monitor the yearly declared interest rate. In this regard, the complainant stated that Generali's inability to

guarantee the 5% interest rate and, thereby, the termination of the contract with Generali, would have been foreseeable to the Commission if it had properly monitored the pension insurance scheme. Moreover, the complainant stated that the fact that, on 1 March 2005, the Commission requested a final report from Generali covering financial data concerning the preceding five years proved that the Commission had no access to annual reports or other consolidated data concerning for the pension scheme.

1.2 The Commission argued, in essence, that, as shown by the extensive exchange of correspondence between the Commission and Generali, it constantly exercised vigilant monitoring of Generali's contract through regular contacts with managers of the pension scheme. In support of this argument, the Commission included in its opinion a description of the detailed monitoring activities it had taken since January 2005 and before granting discharge to Generali. Following the Ombudsman's request for further information concerning the monitoring, the Commission pointed out that it was, from 1998 to 2003, obliged to supervise and did, in fact, supervise the tasks performed by two contractors (AGRER and GTZ). AGRER and GTZ had been temporarily entrusted to manage and to monitor the pension scheme and, as stipulated in their framework contracts, submitted regular reports on their work to the Commission.. As to the nature of that monitoring, the Commission stated that the relevant contracts with AGRER and GTZ contained a provision, according to which the monitoring entrusted included " *[m]anagement of the diverse contracts concluded by the Commission in favour of the experts, in particular (...) pension contribution* " (6) . In detail, this monitoring covered the (a) day-to-day management; (b) regular payments; and (c) contacts with Generali and with active scheme members. Moreover, the Commission argued that it took over all these tasks in 2003 and that it thereby did the monitoring throughout the years 2004 and 2005 until it later took charge of the whole group policy liquidation and transfer to the new provider (7) .

In relation to the complainant's specific arguments mentioned in point 1.1, the Commission put forward the following points. First of all, it noted that monitoring of the investments made by Generali and its management of the deposit fund linked with the group policy was not part of the monitoring the Commission was obliged to do, because, under Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (8) , that monitoring belonged to the competence of the British national authorities. Furthermore, the Commission stated that, since (a) scheme members were satisfied with the financial returns; (b) the interest paid was, at all times, in accordance with the norms of this kind of policy; and (c) the surveillance authorities did not detect any irregularities, the Commission did not find it necessary to perform a double check itself.

With regard to the information on the basis of which the Commission's monitoring was carried out, the Commission noted that Generali did not issue yearly reports on the Commission's policy, nor did the policy contract contain an obligation to do so. However, Generali did provide the Commission with the following information:
- the yearly computation of payable rate of interest, linked to the Deposit Fund performance. The Commission stated that this rate was always greater than the guaranteed minimum (5%) until and including 1999, when the definite rate was 5.59%. Moreover, the Commission stated that it never had a reason to refuse to believe the validity of Generali's computation, nor had any

of the individuals concerned expressed doubts in that regard;
- yearly individual statements for each scheme member: (i) those which concerned active members were sent to them through the Commission, and none of them ever complained, and (ii) those concerning deferred members were sent directly to them by Generali. According to Generali's Final Report, no significant complaints were received either; and
- occasional overall statistics, on demand.

In addition, the Commission noted that Generali also provided the Final Report requested and fully co-operated with the auditors after the policy termination, allowing them to have access to all the relevant information and financial data.

1.3 The Ombudsman notes that, in the course of the present inquiry, the complainant has not made, in duly substantiated terms, reference to any specific applicable rules that were not respected by the Commission in order to support his allegation that the Commission failed to monitor properly the pension insurance scheme. Rather, he appears to have challenged the propriety of some aspects of the Commission's activity in the field here concerned. This activity involved assessments and choices mainly of an economic or technical nature, often also pertaining to the conditions and functioning of the relevant market. In this context, the Commission enjoyed, in general, a wide margin of discretion. It is not for the Ombudsman to substitute his judgment for the relevant assessments and choices made by the Commission. The Ombudsman's review is, thus, limited and concerns, essentially, the issue whether, in view of the arguments presented by the parties, the Commission clearly exceeded the bounds of its aforementioned discretion and acted in a manifestly unreasonable way, by doing or omitting to do something.

1.4 After taking into account the relevant arguments put forward by the parties and presented above, the Ombudsman concludes that it has not been established that the Commission clearly exceeded the bounds of its discretion in the field concerned and acted in a manifestly unreasonable way in monitoring the pension insurance scheme. He therefore finds no instance of maladministration corresponding to the complainant's first allegation.

2 Alleged mismanagement of tender procedures launched in order to find a new insurer

2.1 As indicated in the Ombudsman's letter opening the present inquiry, the complainant put forward the following arguments in support of his second allegation:
- it was inappropriate to keep the old insurer while launching tender procedures to select a new one;
- inappropriate terms of reference (hereinafter, the TOR) were used in the tender procedures;
- the successful tender did not provide a better insurance than the old one;
- certain financial criteria were not taken into consideration when selecting the successful tender;
- the tender procedures lacked transparency;
- the Commission failed to provide prompt and correct information as regards the tender procedures; and
- a negotiated procedure should have been launched immediately after the first unsuccessful tender procedure.

These arguments, and the Commission's replies to them, were presented, in detail, in the inquiry part above.

2.2 As regards the complainant's argument (i), the Ombudsman notes that, in its opinion, the Commission explained why it continued to have recourse to the old insurer while launching the tender procedures to select a new one. In so doing, it referred to its obligation to provide its 450 directly employed experts, without interruption, with a framework contract of pension insurance in accordance with Article 46 of their employment contracts. In this regard, the Commission stated that it was necessary to negotiate with Generali the precise terms of an addendum, namely, as regards its duration and the net minimum guaranteed rate of interest. The addendum had to last the span of time necessary to allow the re-definition and launching of a tender, as well as the award and signature of a contract. At least a 12-month period was considered necessary in order to conclude a new contract. For these reasons, and in order to comply with Article 91 of the Financial Regulation (9) and Article 126(1) of its Implementing Rules (10) , the Commission decided to launch negotiations with the old insurer. In so doing, the Commission expected both to adopt an addendum allowing it to abide by its legal obligations after 1 July 2004, and to prepare the publication of a new open invitation to tender.

The Ombudsman refers again, *mutatis mutandis* , to his remarks in point 1.3 above and concludes that the Commission has provided reasonable explanations in response to the complainant's argument (i).

2.3 As regards the complainant's argument (ii), the Ombudsman recalls that in the course of the present inquiry, the Commission gave the following reasoning for the TOR used in the tender procedures. First, as to the procedure for establishing the TOR, the Commission stated that the TOR were conscientiously prepared by a team composed of personnel from specialised services within the Commission, as well as external consultants recruited on an *ad hoc* basis, who were specialised in the field. Second, as to the substantial reasons for establishing the TOR used in the tender procedures, the Commission stated that the TOR were specifically established in order to obtain the maximum number of quality offers and to protect all scheme members to the greatest possible extent. Accordingly, the fulfilment of a number of conditions was required, namely, specialisation in the field of life insurance; headquarters in a Member State and conformity with the EC *acquis* and existing legislation in that country; regulatory and financial guarantees; qualified and experienced staff in sufficient numbers; commitment to respecting the confidentiality clause and so on. As to the pragmatic propriety of the TOR established, the Commission stated that the requirements established by them proved to be useful during the negotiated procedure, when discussing and monitoring the implementation of the new scheme with the new insurer.

In his observations, the complainant stated that the TOR used by the Commission were not different from the criteria provided for in other pension schemes. He appeared to be critical of the TOR used by the Commission, but did not define what would have been the appropriate TOR, or their scope. Taking into account point 1.3 above and the relevant arguments put forward by the parties, the Ombudsman finds that it has not been established that the Commission clearly exceeded the bounds of the wide margin of discretion it enjoyed when

formulating the terms of the tender notices here at issue.

2.4 As regards the complainant's argument (iii), the Ombudsman notes that, in its opinion, the Commission made the following remarks. The general principles of the new insurance remained strictly the same as those that applied under the old one. Comparing the new scheme with the old one was pointless in the context of an open call for tender, particularly since Generali had decided not to continue with the contract's tacit annual renewal. In addition, the facts, in terms of financial return, contradicted the complainant's arguments, since both the last interest rate offered by Generali (3.75% in 2004) and its offer from November 2004 were indeed inferior to the new insurer's scheme. The offer from La Mondiale consisted of a guaranteed minimum interest rate of 2% and the provision of a dividend, resulting in an estimated total net rate of 4.20% for 2005 (minimum guaranteed interest rate of 2% + dividend of 2.20%) and of 4.10% for 2006 (minimum guaranteed interest rate of 2% + dividend of 2.10%). By contrast, the second best acceptable offer made by Generali foresaw a minimum guaranteed interest rate of 3% in 2005 and of 2.25% in 2006, but without any guarantee of a dividend and with the payment of administrative costs. This information was provided by the Commission first on 3 January 2005, and again in its right of response dated 31 January 2005. Furthermore, the Commission noted that, as a deferred member of Generali's pension scheme, the complainant was not obliged to transfer his personal fund to the new insurer, but had the following options: (a) to keep his personal fund with Generali; (b) to make a new contract with Generali and to re-negotiate the new contract's rate of interest and terms and conditions; (c) to cash in the capital of the accumulated payments, interest and other benefits belonging to him. In light of the Ombudsman consideration point 1.3 and of the Commission's above explanation, the Ombudsman considers that the Commission has provided reasonable explanations in response to the complainant's argument (iii).

2.5 As regards argument (iv), the complainant stated that the guaranteed minimum annual interest rate of the selected insurer was lower than that of the old insurer. However, other financial criteria did not seem to have been assessed by the Commission when selecting the successful tenderer. Furthermore, according to the complainant, the Commission provided only two criteria for selecting the new insurer, namely, the minimum guaranteed policy rate and the expected dividend or estimated total net rate (minimum plus bonus). However, as regards these two criteria, the new insurer did not appear to be better than the second best tenderer or the old insurer. Since, in the new policy, the expected dividend did not appear to be guaranteed in terms of a percentage of the previous year's declared interest, it was not clear what other objective and financial criteria had been used to evaluate the new scheme. In this regard, the complainant also stated that any tender assessed on the basis of expected bonus must be based on criteria such as portfolio structure, credit rating, financial duration, and fund manager strategy.

In its opinion, the Commission stated that the TOR of both open tenders were clear with respect to the award criteria. The last paragraph of point 3.2, which appeared in both texts, read:

" *(...) In any case, the Commission does not want the level of the net minimum guaranteed rate of interest to constitute the sole criterion of award. Other criteria, the importance of which is*

deemed to be equally crucial, are taken into account in a similar way in the award process. All the applicable criteria are clearly defined in sections 4, 5 and 6 of the General conditions, Selection and Attribution " (11) .

Furthermore, the Commission stated that all financial criteria foreseen in the TOR, as published in July 2004, were taken into consideration in selecting the new insurer. These criteria concerned, *inter alia* , portfolio structure, information about fund plans managed and the amount of reserves. Moreover, the Commission noted that the evaluation report duly reflected these criteria.

In light of point 1.3 above, and taking into account the relevant arguments put forward by the parties, the Ombudsman concludes that it has not been established that the Commission acted in a clearly unreasonable manner, when deciding on the criteria it applied in the context of the selection of a new insurer, which were also laid down in the TOR.

2.6 The complainant's argument (v) does not seem to be well-founded. It is undisputed that the Commission published a forecast notice and two contract notices for the selection of a new insurer. It also explained why it did not accept public disclosure of the report of the Evaluation Committee in the framework the negotiated procedure. The complainant has not specifically contested these explanations. Relatedly, it is recalled that the present inquiry does not concern a specific allegation that the Commission violated Regulation 1049/2001 in connection with this matter (12) .

2.7 The complainant's argument (vi) was that the Commission failed to provide prompt and correct information as regards the tender procedures. In support of his above argument, the complainant stated the following in his complaint:

" *Because of the management and delays of this file, financial interests of active and deferred policy members were not adequately protected. Due to the lack of transparency and correct information, policy holders were compelled to take uninformed financial decisions, which normally can be translated in [* sic *] loss of money. The situation resulted in a foregone payable interest rate for 2004, compulsory surrending [* sic *] of policy certificate[s] (for those who did not agree with the negotiations outcome and the way they were conducted) or sudden change of insurer. In fact on 20 December 2004 the old insurer informed us that the Commission had notified [* Generali *] just 3 days before, the transfer of the pension scheme to another provider.* "

The Commission rejected the complainant's argument, by stating the following:

" *Numerous letters with information were sent in both English and French by the Commission to all experts and/or former employees of the Commission, as the complainant acknowledged by having submitted copies of these letters with his complaint. The notes addressed to all independent experts were dated 6 and 28 November 2003, 26 March 2004, 16 July 2004, 26 November 2004, 3 and 31 January 2005. The last note was specifically addressed to former individual experts, that is, the deferred members of the pension insurance scheme, which involved a considerable effort to retrieve the contact details of some 930 deferred members*

without even knowing if they were concerned by the transfer of the pension contract. It should be recalled that once the employment contract with the Commission had come to an end, it was up to the expert to decide whether or not to keep the insurance. If the former expert decided to keep the insurance, it was the insurance company's duty to keep the former expert informed about policy changes and conditions.

The period of time between the events to be reported or announced and the dates of the notes and letters of information should be considered as prompt. The notes were correct, factual and detailed when it was possible for them to be so in order to strictly respect the rules governing public procurement. Also extensive correspondence with the complainant took place. From March 2004, the Commission sent the complainant numerous replies to his requests and even forwarded draft notes under preparation. The disclosure of preparatory documents was something exceptional and showed the Commission's availability to providing information. "

In his observations, the complainant did not accept the Commission's argumentation. He made, in particular, the following comment: " *Just reading the decision and correspondence dates it's clear that deferred members could not take any informed and safe decision while millions of Euro are at stake.* "

The Ombudsman notes that it is not in dispute that the Commission sent a number of letters to the individual experts/members of the insurance policy concerning its (unsuccessful) tender procedures and its decision about the selection of a new insurer. What seems to be in dispute is whether the timing of the provision of this information and the kind of the information provided were such as to show that the Commission failed to take properly into account the legitimate interests of the members of the insurance policy, who would have to choose between (a) having their fund transferred to the new insurer; (b) continuing their insurance with Generali; or (c) cashing in their benefits. After having carefully examined the relevant documents provided to him in the context of his inquiry, in particular the content of the Commission's letters of 16 July 2004, 3 January 2005, and 31 January 2005 (this last letter relating to a letter sent by Generali to the members of the group policy on 20 December 2004), the Ombudsman finds that the complainant's argument does not seem to be well-founded. In this regard, he notes, in particular, that the Commission informed the members of the insurance policy of the new pension scheme and of its essential economic terms, immediately after its entry into force. The Commission also stated that more detailed explanations could be provided by the new policy insurer and gave the relevant contact references. It noted, *inter alia* , that an individual written decision from each member was needed before any action, such as the transfer of funds to the new insurer, could be undertaken. Moreover, it clarified that, since each member had a bilateral contractual relationship with Generali, the Commission could not be engaged in any kind of debate with the members about their individual situation.

2.8 As regards the complainant's argument (vii), the Ombudsman recalls that, according to Article 91 of the Financial Regulation (13) and Articles 126 and 127 of its Implementing Rules (14) , the Commission is not obliged to use, but, rather, may use, the negotiated procedure, in certain circumstances. Here, taking into account the relevant arguments put forward by the parties, the Ombudsman finds that it has not been established that the Commission abused its

above discretion by launching a second tender procedure, after the first unsuccessful one.

2.9 In light of the above, the Ombudsman finds no maladministration corresponding to the complainant's second allegation.

Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

(2) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357, p. 1.

(3) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

(4) OJ 2002 L 345, p. 1.

(5) By the above, the Commission apparently referred to the reasons it had stated in its opinion for launching a tender procedure for the pension insurance scheme for individual experts: namely, that, in June 2003, Generali notified the Commission that, as of 1 January 2004, it intended not to continue with the contract's tacit annual renewal, unless the Commission agreed to the amendment of certain clauses, including the one on the minimum guaranteed annual rate of interest, and that the contract with Generali was a very old contract in need of reform.

(6) " *Gestion des diverses assurances contractées par la Commission en faveur des experts, notamment: (...) contribution pension* ". The above-quoted provision is included in contract "COOP/EXT/2-98". The translation into English is made by the services of the Ombudsman.

(7) The Commission enclosed with its reply the following evidence concerning its vigilant monitoring of Generali:

- Commission's letter to Generali of 30 June 2003, acknowledging Generali's refusal to go on

paying at least the net minimum guaranteed interest rate of 5% as from 1 January 2004 and opening discussions of this and other related points.

- Regular exchanges (letters, e-mails, telephone calls and audio conferences, a sum of total of over 150 items) throughout 2003 and 2004, resulting in: no sudden end of the service provided; three subsequent temporary policy extensions for whole year 2004; guaranteed interest rate lowered only to 3.75% (instead of 3%, as initially proposed by Generali); and payment of service fees refused.

After the definite expiration of the policy on 31 December 2004, exchanges held in early 2005 involved the following items:

- Urging Generali to transfer right away final balances of all active members (Commission's letter of 12 January 2005);

- Underlining that Generali did not have the right of making decisions for deferred members (same letter as before).

- Making things clear for deferred members, who had received misleading information. Generali had sent them a circular letter (not copied to the Commission, whose consent had not been obtained beforehand) where some statements were not true. The Commission produced an information note for deferred members and asked Generali to circulate it. The request was accepted.

- Final meeting with Generali on 9 March 2005, where the pending issues were reviewed.

- Commission's request of a Final Report in its letter of 11 March 2005.

- Commission's decision to ask for an external audit, after receipt and initial analysis of Final Report (cf. Commission's letter of 25 April 2005).

(8) OJ 2002 L 345, p. 1.

(9) See footnote 1.

(10) See footnote 2.

(11) " *Toutefois, la Commission ne veut pas que le niveau du TMGn constitue l'unique critère d'attribution. D'autres critères dont l'importance est également jugée cruciale entreront en ligne de compte dans le processus d'attribution. Tous les critères applicable sont clairement définis aux sections 4, 5 et 6 de ce Cahier des charges (Conditions générales, de sélection et d'attribution)* ". The translation into English is made by the services of the Ombudsman.

(12) See footnote 3.

(13) See footnote 1.

(14) See footnote 2.