

Decision of the European Ombudsman on complaint 3175/2005/GG against the European Commission

Decision

**Case 3175/2005/GG - Opened on 10/10/2005 - Recommendation on 14/12/2006 -
Decision on 19/09/2007**

Strasbourg, 19 September 2007

Dear Dr K.,

On 28 September 2005, acting on behalf of Internationaler Hilfsfonds e.V., you submitted to me a complaint against the European Commission which concerned allegedly incorrect, misleading and defamatory statements made by the Commission.

On 10 October 2005, I forwarded the complaint to the President of the European Commission.

You subsequently forwarded to me copies of two letters that you had sent to the Commission concerning this case on 1 November and 12 December 2005 and of a letter addressed to you by the Commission on 9 December 2005.

The Commission sent its opinion on 17 January 2006. I forwarded it to you on 19 January 2006 with an invitation to make observations, which you sent on 14 February 2006.

On 3 May 2006, you forwarded to me a copy of an application that you had submitted to the Court of First Instance on 21 April 2006. This application appeared to cover the facts alleged in the present complaint. I therefore informed you, in a letter sent on 15 May 2006, that I would have to terminate the present inquiry. However, before doing so, I invited you to present observations on this issue. In your reply which was sent the same day, you informed me that you had withdrawn the said application and that the present inquiry should therefore continue.

On 14 December 2006, I addressed a draft recommendation to the Commission.

The Commission sent its detailed opinion on 26 March 2007, and I forwarded it to you on 29 March 2007, inviting you to submit observations by 30 April 2007.

On 30 April 2007, you asked for an extension of time. On 2 May 2007, my Office informed you that your observations were expected by 31 May 2007.



On 9 and 13 May 2007, you forwarded to me a copy of a letter you had addressed to the Commission on 9 May 2007.

On 31 May 2007, you sent me your observations on the Commission's detailed opinion. On 13 June, 23 June, 4 July and 5 July 2007, you sent further observations and information concerning this case.

On 2 August 2007, you forwarded to me a copy of a letter you had addressed to the President of the European Court of Justice in relation to a recent judgment rendered by the Court.

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

THE COMPLAINT

In the 1990s, the complainant, Internationaler Hilfsfonds e.V., a German NGO (1), made various requests for financial assistance to the European Commission, including an application to the Commission's Humanitarian Aid Department ("ECHO") to sign the Framework Partnership Agreement ("FPA"). These requests gave rise to a number of complaints to the European Ombudsman (e.g., complaints 745/2004/GG and 2862/2004/GG) and to litigation before the Community courts (e.g., Case T-372/02 and Case C-521/03 P).

In these cases, a letter addressed by the Auswärtiges Amt (the German Foreign Office) to ECHO on 15 March 1995 played a certain role. This letter (which was drafted in English) concerns the following comment with regard to the complainant:

"Their activities have given reasons for official prosecution, which are still under way."

In a letter addressed to ECHO on 15 November 2001, the German Foreign Office pointed out, with reference to its letter of 15 March 1995, "that according to data provided to us, the Public Prosecutors Office at the Regional Court in Gießen dropped the charges against Dr. [K.] and three other employees of the 'Internationaler Hilfsfonds e.V. on 30 April 1996."

In its submissions to the Ombudsman and the Community courts in the above-mentioned cases, the Commission referred to "criminal proceedings", a "prosecution" and "charges" that had been brought against the complainant, its chairman or other members of the complainant in Germany.

The relevant statements are the following (2) :

"It transpired from late correspondence that the charges had been brought against Dr. [K.] and three other employees of Internationaler Hilfsfonds (...)."

(Point 40 of the Commission's defence in Case T-372/02)

"In the light of the information received from the German Foreign Office, giving information



about an ongoing prosecution, ECHO decided to suspend the treatment of Internationaler Hilfsfonds' application pending further information on the ongoing prosecution."

(Point 45 of the Commission's defence in Case T-372/02)

"With regard to the question of the probity of the directors, the Commission was particularly concerned by the fact that, at the time when the application was presented, Mr. [K.] omitted to mention that criminal proceedings were open against him and three other members of the staff of Internationaler Hilfsfonds. Since this was undoubtedly a relevant fact which had been omitted in the application, the Commission would have been quite entitled, once this fact came to light, to reject the applicant's application *in limine*."

(Point 105 of the Commission's defence in Case T-372/02)

"...Dr. [K.](President of IH) was trying to gain access to documents in the Commission's possession in order to discover who in the Auswärtiges Amt had informed the Commission in 1995 that a prosecution was pending against Internationaler Hilfsfonds."

(Point 86 of the Commission's response in Case C-521/03 P)

"It should be noted that one purpose - however secondary - of the e-mail of 8.8.2001 was to request updated information on any developments in the judicial proceeding against IH in Germany."

(Commission's opinion of 24 June 2004 on complaint 745/2004/GG) (3)

"(...) the Commission is obliged to point out that at the time of presenting his application to sign the FPA [Framework Partnership Agreement], criminal procedures were open against Mr [K.] in Germany."

(Commission's opinion of 13 January 2005 on complaint 2862/2004/GG)

According to the complainant, the prosecutor's office at the Landgericht Gießen had merely conducted a preliminary investigation ("Ermittlungsverfahren") against Dr. K. and three other persons, and not itself (i.e., the complainant). Furthermore, this preliminary investigation had been terminated in the favour of the persons concerned on 30 April 1996. The complainant stressed that the Commission had been informed accordingly on various occasions, starting with a letter sent to the Commission on 21 May 1996.

In its complaint to the Ombudsman, the complainant therefore alleged that the Commission's references to "criminal proceedings", a "prosecution" and "charges" that had been brought against the complainant, its chairman or other members of the complainant were incorrect, deliberately misleading and defamatory. It claimed that the Commission should take the necessary corrective action, in particular by undertaking to refrain from making such statements in the future.



The complainant pointed out that, by letter of 5 August 2005, its lawyer had asked the Commission to sign such an undertaking by 19 August 2005. According to the complainant, no reply had been given to this letter by the time the present complaint was lodged in September 2005.

The complainant stressed that as a charitable organisation, it was particularly dependent on being trusted by the public. Spreading incorrect information, which was prone to undermine this trust, was therefore a very serious matter.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

In its reply in case 745/204/GG, the Commission had not referred to "criminal proceedings", "prosecution" or "charges", but instead used the term "judicial proceedings". The Commission had used the term "criminal procedure" in its opinion in case 2862/2004/GG. As regards the Commission's submission to the Court of First Instance in Case T-372/02, the Commission did make references to "criminal proceedings", "prosecution" and "charges".

However, any statement made in the Commission's submissions to the Court of First Instance or the Court of Justice in the course of legal proceedings such as Case T-372/02 was made exclusively for the purposes of the procedure and the information provided within the written procedure was only known by the parties and the Court. Third parties did not have access to it. Accordingly, the statements made to the Court were only open to review by the Court and were thus inadmissible for the purposes of the present complaint.

The Commission would nevertheless address the complainant's remarks, in a spirit of good cooperation with the Ombudsman.

Firstly, the references concerned were based on information received in a letter addressed to the Commission by the German Foreign Office on 15 March 1995. This letter states with regard to the complainant: "Their activities have given reasons for official prosecution, which are still under way."

The Court of First Instance could not have been and indeed was not misled by the Commission's statement in its defence as regards the terms used by the German authorities, since the Commission enclosed with its submission a copy of the above-mentioned letter of 15 March 1995. Furthermore, in the document lodged by the complainant to the Court of First Instance on 4 July 2003, it had replied to this specific passage of the Commission's defence, as well as other passages which the complainant considered to be based on a "series of misgivings, misunderstandings and even slanders".

This document had been included in the file of pleadings by the Court following an express



decision of its President. As a result, the Court of First Instance had had at its disposal all relevant elements. In its Order of 15 October 2003, the Court quoted the exact terms used by the German Foreign Office in its letter.

Given that the statements made in the Commission's submissions were only known by the parties and the Court and that no third party had access to them, they could not be considered defamatory.

Similarly, as regards the submissions in the cases before the Ombudsman, the references made by the Commission to "judicial proceedings" and "criminal procedure" were based on the wording of the letter of the German Foreign Office.

A copy of this letter had been provided to the Ombudsman. The reference to "judicial proceedings" made therein could therefore hardly have been misunderstood by the Ombudsman in the way alleged by the complainant.

The complainant's allegation that the Commission's references to "criminal proceedings", a "prosecution" and "charges" in its submissions to the Community courts and to the Ombudsman were incorrect, deliberately misleading and defamatory was thus inadmissible as regards the submissions made to the Community courts, and unfounded in both cases.

The complainant's observations

The complainant submitted detailed observations (37 pages and various enclosures), which can be summarised as follows:

- The Ombudsman could no longer avoid finding that the Commission had lied and had committed a deliberate fraud.
- Referring to "judicial proceedings" had the same serious meaning as the reference to "criminal proceedings".
- The Commission had intentionally and in bad faith brought to the attention of the Court of First Instance the incorrect information contained in the German Foreign Office's letter of 15 March 1995. By failing to submit the German Foreign Office's letter to the Commission of 15 November 2001, in which the letter of 15 March 1995 was corrected, the Commission had deliberately misguided, deceived and lied to the Court.
- The Court had fallen victim to this deceit, given that point 11 of its Order, which was to be found under the heading "Facts", read as follows: "On 15 March 1995 the Auswärtiges Amt told ECHO in response to that request that IH's activities had given reasons for official prosecution."
- The contents of complaint procedures were accessible to everybody over the internet. The Ombudsman had even presented the incorrect statements of the Commission in exaggerated detail.
- ECHO had spread its wrong accusations against the complainant to a whole series of Directorates-General within the Commission and thus damaged the complainant's reputation beyond what was tolerable.
- The Ombudsman had elevated the incorrect statements made by the Commission to the rank of facts.
- In view of the fact that the Commission had delayed the matter, an apology was now obligatory.



The complainant also made detailed comments on what it considered to be the discriminatory handling of its application by ECHO. It also made comments on issues relating to the Commission's handling of requests for access to documents.

THE OMBUDSMAN'S DRAFT RECOMMENDATION

The draft recommendation

On 14 December 2006, the Ombudsman addressed the following draft recommendation to the Commission:

The Commission should acknowledge that its references, in its submissions to the Community courts and to the Ombudsman, to "criminal proceedings", "judicial proceedings", a "criminal procedure" and "charges" that had been brought against the complainant, its chairman or other members of the complainant were incorrect. The Commission should further confirm that it will not use such incorrect references in the future.

This draft recommendation was based on the following reasons (4) :

1 Introductory remarks

1.1 In the opening letter, in which the Ombudsman informed the Commission about the scope of his inquiry, only the terms "criminal proceedings", "prosecution" and "charges" were mentioned. However, it was clear that the complainant also objected to the references made by the Commission to "judicial proceedings" and "criminal procedure". In its opinion, the Commission presented arguments to justify its usage of the said expressions, including the two terms that were not mentioned in the Ombudsman's opening letter. The Ombudsman considered it therefore both legitimate and appropriate to examine the Commission's usage of all five expressions in the present decision.

1.2 In his observations, the complainant raised three issues that clearly went beyond the scope of the inquiry, as it had been set out in the opening letter. These issues could be summarised as follows: (i) the Commission had lied and committed deliberate fraud; (ii) by failing to submit to the Court of First Instance the German Foreign Office's letter to the Commission of 15 November 2001, the Commission had deliberately misguided, deceived and lied to the Court; (iii) ECHO had spread its wrong accusations against the complainant to a whole series of Directorates-General within the Commission and had thus damaged the complainant's reputation beyond what was tolerable. The complainant also made detailed comments on what it considered to be the discriminatory handling of its application by ECHO and on issues relating to requests for access to documents.

1.3 The present inquiry was opened in order to examine the usage of certain expressions which the Commission made in its submissions to the Community courts and the Ombudsman. The complainant's observations concerned a wide range of further aspects. Dealing with these further issues would in effect have required a substantially new inquiry. The Ombudsman therefore considered that it would not be appropriate to extend the scope of the present inquiry so as to cover these additional aspects. Some of the issues to which the complainant had



referred in any event appeared to be covered by two further inquiries that were pending before the Ombudsman (complaint 2283/2004/GG and own-initiative inquiry OI/4/2005/GG).

1.4 In his observations, the complainant stated that it considered that an apology was due from the Commission in the present case. The complainant had thus raised a further claim. The Ombudsman considered that it would not be appropriate to delay the current inquiry by asking the Commission for an additional opinion on this new claim. The complainant remained free to submit a new complaint concerning this issue, after having made the appropriate prior approaches to the Commission. However, given the results of the Ombudsman's inquiry into the present case (see point 2 below), it appeared questionable whether an inquiry into any such new complaint would be justified.

1.5 The present inquiry concerned the behaviour of the Commission. In its opinion, the complainant also made comments on the approach of the Court of First Instance and on that of the Ombudsman himself. The Ombudsman therefore considered it useful to make a few comments in order to clarify certain issues.

1.6 As regards the Court of First Instance, the complainant appeared to object to the wording of the Order of 15 October 2003 by which it had rejected the application in Case T-372/02. According to Article 195 of the EC Treaty, the Ombudsman would not be able to deal with a complaint against a decision of the Court, given that such a complaint would concern the judicial activity of the Community courts.

However, it appeared useful to note that the complainant's assumption that the Court had made a mistake by inserting a certain sentence in that part of the Order which set out the relevant facts was in any event clearly erroneous. The relevant part of the Order read: "On 15 March 1995 the Auswärtiges Amt told ECHO in response to that request that IH's activities had given reasons for official prosecution." The relevant letter of the German Foreign Office was worded as follows: "Their [the complainant's] activities have given reasons for official prosecution, which are still under way." The Court had thus manifestly limited itself to stating what actually happened, i.e., that the German Foreign Office had provided such information to ECHO, without expressing any views as to whether the statement of the German Foreign Office was correct or not.

1.7 Similar considerations applied as regards the complainant's comments concerning the Ombudsman. It should be noted that already in a letter sent on 8 June 2005, the complainant had criticised, on the same grounds, two passages in the Ombudsman's decisions on complaints 745/2004/GG and 2862/2004/GG. In his reply of 17 June 2005, the Ombudsman had explained that these passages contained an account of what the Commission had said, and not the Ombudsman's appraisal of these statements. With a view to avoiding any potential misunderstanding, however remote such risk appeared to be, the Ombudsman had declared himself ready to amend the second passage so as to put matters even more clearly (5). The complainant's suggestion that the Ombudsman had elevated incorrect statements made by the Commission to the rank of facts was thus clearly unfounded.

2 Allegedly incorrect, deliberately misleading and defamatory references



2.1 The complainant alleged that the Commission's references, in its submissions to the Community courts and to the Ombudsman, to "criminal proceedings", "judicial proceedings", a "criminal procedure", a "prosecution" and "charges" that had been brought against the complainant, its chairman or other members of the complainant were incorrect, deliberately misleading and defamatory. It claimed that the Commission should take the necessary corrective action, in particular by undertaking to refrain from making such statements in the future.

2.2 In its opinion, the Commission took the view that the allegation was inadmissible as regards the submissions made to the Community courts. The Commission further submitted that the allegation was in any event unfounded.

2.3 In its observations, the complainant maintained its allegation.

As regards the admissibility of the allegation

2.4 In view of the position adopted by the Commission, it was therefore necessary to ascertain first of all whether the complaint was indeed inadmissible in so far as the Commission's submissions to the Community courts were concerned.

2.5 In its opinion, the Commission took the view that any statement made in its submissions to the Court of First Instance or the Court of Justice in the course of legal proceedings, such as Case T-372/02, was made exclusively for the purposes of the procedure and that the information provided within the written procedure was only known by the parties and the Court. Third parties did not have access to it. Accordingly, the statements made to the court were only open to review by the Court and were thus inadmissible for the purposes of the present complaint.

2.6 The Ombudsman noted that Article 195 of the EC Treaty empowers him to receive complaints "concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role." Given that the present complaint was directed at the Commission, and not at the Court of Justice or the Court of First Instance, the Ombudsman considered that the Commission had not established why he should be unable to deal with the present complaint as regards the submissions made by the Commission to the Community courts. The Ombudsman noted that he was of course mindful of the fact that his examination in such cases had to take into account the purpose of the above-mentioned provision and that it therefore could not extend to issues that had been dealt with by these courts themselves. However, it appeared that neither the Court of First Instance nor the Court of Justice had addressed the issue as to whether the submissions made to them by the Commission contained incorrect, deliberately misleading and defamatory statements. It was true that the Commission had submitted, without being challenged by the complainant on this point, that the complainant had argued before the Court of First Instance that certain passages of the Commission's defence were based on a "series of misgivings, misunderstandings and even slanders". However, even if one were to assume that the complainant had thus wished to submit to the Court the same objections that it had raised in the present case, regard had to be had to the fact that the Court had rejected the complainant's application as inadmissible. The Court had thus not dealt with



the substance of the case.

2.7 In light of the wording of the complaint, the Ombudsman considered that he needed to examine whether the expressions used by the Commission were (i) incorrect, (ii) deliberately misleading and (iii) defamatory.

Were the expressions used by the Commission incorrect?

2.8 The Ombudsman considered that it is good administrative practice for EU institutions and bodies to take care that their statements are accurate and to correct promptly any errors that may occur.

2.9 Before examining whether this was the case here, the Ombudsman considered it necessary to clarify the facts to which the relevant statements of the Commission referred.

2.10 From the evidence submitted to him, it emerged that the prosecutor's office at the Landgericht Gießen had conducted a preliminary investigation ("Ermittlungsverfahren") against Dr. K. and three other persons, and not against the complainant. It further emerged that this preliminary investigation had been terminated in favour of the persons concerned on 30 April 1996. Finally, the Ombudsman noted that it was abundantly clear that the Commission had been informed of these facts on various occasions, starting with a letter sent to the Commission on 21 May 1996.

2.11 Under German law, the public prosecutor's office has to investigate where it receives information which leads to the suspicion that a criminal offence may have been committed (§ 160 Strafprozeßordnung - Code of Criminal Procedure). Where this preliminary investigation ("Ermittlungsverfahren") confirms the said suspicion, the public prosecutor's office submits the case to a criminal court and requests the opening of a criminal procedure ("Strafverfahren").

2.12 In view of the above, the Ombudsman considered that none of the expressions used by the Commission had been correct. Where a preliminary investigation was conducted, it was not appropriate to refer to "criminal proceedings", "judicial proceedings", a "criminal procedure", a "prosecution" or "charges".

2.13 In view of the above, the statement made in the German Foreign Office's letter of 15 March 1995, according to which there was an "official prosecution", was thus not correct either. However, the fact remained that this statement had been made. If the Commission's statements had to be interpreted as merely referring to or quoting the (incorrect) statement of the German Foreign Office, they therefore could not be considered to be incorrect themselves.

2.14 The Ombudsman considered that this was indeed the case as regards the following two statements:

"In the light of the information received from the German Foreign Office, giving information about an ongoing prosecution, ECHO decided to suspend the treatment of Internationaler Hilfsfonds' application pending further information on the ongoing prosecution."



(Point 45 of the Commission's Defence in Case T-372/02)

"...Dr. [K.](President of IH) was trying to gain access to documents in the Commission's possession in order to discover who in the Auswärtiges Amt had informed the Commission in 1995 that a prosecution was pending against Internationaler Hilfsfonds."

(Point 86 of the Commission's Response in Case C-521/03 P)

These statements merely referred to the (undisputed) fact that the German Foreign Office had (incorrectly) informed the Commission that a prosecution was pending against the complainant. They thus could not be considered to be incorrect themselves.

2.15 However, the situation was different as regards the following three statements:

"It transpired from late correspondence that the charges had been brought against Dr. [K.] and three other employees of Internationaler Hilfsfonds (...)."

(Point 40 of the Commission's defence in Case T-372/02)

"With regard to the question of the probity of the directors, the Commission was particularly concerned by the fact that, at the time when the application was presented, Mr. [K.] omitted to mention that criminal proceedings were open against him and three other members of the staff of Internationaler Hilfsfonds. Since this was undoubtedly a relevant fact which had been omitted in the application, the Commission would have been quite entitled, once this fact came to light, to reject the applicant's application *in limine* ."

(Point 105 of the Commission's Defence in Case T-372/02)

"(...) the Commission is obliged to point out that at the time of presenting his application to sign the FPA [Framework Partnership Agreement], criminal procedures were open against Mr [K.] in Germany."

(Commission's opinion of 13 January 2005 on complaint 2862/2004/GG)

It was immediately apparent that these statements did not refer to any "prosecution" that was allegedly pending against the complainant (as the German Foreign Office had incorrectly claimed in its letter of 15 March 1995), but to "criminal proceedings", "criminal procedures" and "charges". Furthermore, these statements referred to Dr. K. and three other (unnamed) persons. However, the letter that the German Foreign Office had addressed to ECHO on 15 March 1995 had not mentioned any names of individuals. The relevant statements thus clearly went beyond merely referring to or citing the German Foreign Office's letter of 15 March 1995. The statements were also factually incorrect, since (as explained in point 2.12 above) there had been neither "criminal proceedings" nor "criminal procedures" pending against Dr. K., nor had "charges" been brought against him.



2.16 It could perhaps be argued that these statements merely reflected the position adopted by the Commission at the relevant time. Given that the Commission had been informed (incorrectly) that a "prosecution" was pending against the complainant, it could be argued that the relevant statements had been based on this (incorrect) information and that interpreting the reference to an "official prosecution" made in the German Foreign Office's letter as meaning "criminal proceedings" or a "criminal procedure" had thus not been unreasonable at the time.

However, the Ombudsman considered that such an interpretation was excluded for two reasons. First, the relevant statements had been made several years after the relevant events and did not make it clear (if that were indeed the case) that they were based on the Commission's knowledge and interpretation at the time. The use of the present tense in the second statement furthermore appeared to confirm that the Commission had made these statements on the basis of the knowledge of the facts that it possessed at the time of making its submissions to the Community courts and the Ombudsman (in the period between 2003 and 2005). However, at that time the Commission had long been informed that there had only been a preliminary investigation, not a "criminal proceeding" or a "criminal procedure". Second, the 'information' that there was a prosecution pending against the complainant was contained in the German Foreign Office's letter of 15 March 1995. However, the complainant's application to sign the FPA had formally been submitted to ECHO only on 20 March 1996 (6). Given that ECHO had not received any further information concerning the complainant from the German Foreign Office since 15 March 1995, the claim that "criminal proceedings" or "criminal procedures" had been pending against the complainant at the time when the application to sign the FPA was presented could not possibly be based on the 'information' provided by the German Foreign Office on 15 March 1995, i.e., more than a year earlier.

2.17 The situation was even more obvious as regards the last of the above-mentioned statements, which was worded as follows:

"It should be noted that one purpose - however secondary - of the e-mail of 8.8.2001 was to request updated information on any developments in the judicial proceeding against IH in Germany."

(Commission's opinion of 24 June 2004 on complaint 745/2004/GG)

Since by 2001 the Commission had long been informed that there was no "judicial proceeding" and that the preliminary investigation had been closed in April 1996, the Ombudsman failed to understand why the Commission had nevertheless referred to such a "judicial proceeding". This fact was all the more puzzling in view of the fact that even the preliminary investigation that had been carried out had only concerned Dr. K. and three other individuals, but not the complainant (IH) itself.

2.18 In view of the above, the Ombudsman considered that the Commission's references to "criminal proceedings", "judicial proceedings", "criminal procedures" and "charges" in its submissions to the Community courts and himself had been incorrect. This constituted an instance of maladministration.



Were the Commission's statements deliberately misleading?

2.19 As regards the complainant's argument that the relevant statements had been deliberately misleading, the Ombudsman took the view that only the four statements set out in point 2.15 and in point 2.17 needed to be considered here, since the statements mentioned in point 2.14 were not incorrect.

2.20 As regards these remaining statements, the Ombudsman considered it useful to point out that there was nothing to show that they had actually misled the Community courts. As regards the Ombudsman himself, he could assure the complainant that the Commission's statements had not caused any difficulties to ascertain the actual facts of the case. Moreover, although the relevant statements made by the Commission were incorrect, the Ombudsman did not consider that the complainant had established that the Commission had acted with the intention to mislead the Community courts and the Ombudsman when making them. No maladministration could therefore be found in this regard.

Were the Commission's statements defamatory?

2.21 As regards the complainant's argument that the relevant statements were defamatory, the Ombudsman considered that this would presuppose that they had been or could be brought to the attention of third parties.

2.22 Given that the pleadings in cases before the Community courts were not normally accessible to third parties, the Ombudsman considered that any statements made in such pleadings could only be likely to be defamatory if they had been repeated in a public hearing. The Ombudsman noted, however, that no oral hearing had taken place in either of the two court cases to which the complainant had referred.

2.23 As regards submissions to the Ombudsman, it was true that they were in principle accessible to third parties in cases for which (as in complaints 745/2004/GG and 2862/2004/GG) the complainant had not requested confidential treatment. However, regard had to be had to the fact that the Ombudsman rarely received requests for access to his file on a complaint. As a matter of fact, no such request appeared to have been received so far as regards the files on complaints 745/2004/GG and 2862/2004/GG. The Ombudsman therefore considered that any effect resulting in the possibility for third parties to gain access to the Commission's statements via a request for access to the Ombudsman's file was too remote and hypothetical to be relevant in the present context. As regards the possible disclosure of the contents of the Commission's statements through the Ombudsman's decisions, the Ombudsman referred to what had been said in this context above (see point 1.7).

2.24 The Ombudsman considered it useful to make one final remark. Given the importance that the complainant (understandably) attached to the need to protect its reputation against any damage possibly resulting from statements such as those made by the Commission, the Ombudsman found it surprising that the Commission's opinion had not even addressed the question as to whether these statements were correct. The Ombudsman also found it difficult to understand why the Commission had failed to react to the complainant's request of 5 August 2005, submitted via its lawyers, to confirm that it would no longer make such statements. In its opinion, the Commission submitted that this was the fifth time it had been asked to reply to



complaints from the complainant in connection with its handling of the application to sign the FPA. The Ombudsman expressed the view that the present inquiry could easily have been avoided if the Commission had accepted the complainant's request of 5 August 2005. The complainant had forwarded to the Ombudsman a copy of a letter addressed to it by the Commission on 9 December 2005. According to the Commission, this letter also replied to the said letter of 5 August 2005. The Ombudsman noted, however, that instead of dealing with the request made in this letter, the Commission simply confirmed the position it had adopted. He further noted that the Commission furthermore informed the complainant that any further letters concerning this issue would be considered as being repetitive and would thus not be answered.

The Commission's detailed opinion

In its detailed opinion, the Commission noted that it welcomed the Ombudsman's thorough and well-balanced draft recommendation. It stressed that it had never been its intention to mislead the Community courts or the Ombudsman. The Commission submitted that the complainant's letter of 21 May 1996 to its Directorate-General VIII ("DG VIII"), which was referred to in point 2.10 of the draft recommendation, had first come to ECHO's knowledge through the Ombudsman's draft recommendation. According to the Commission, all statements made by ECHO officials with regard to Dr. K. and the complainant had been made in good faith and on the basis of the information available to ECHO.

However, the Commission acknowledged that the relevant references had not always been correctly applied and apologised for this. The Commission added that these references would not be quoted any longer.

The complainant's observations

The complainant submitted its observations on the Commission's detailed opinion on 31 May 2007. A copy of these observations was also sent to an MEP. On 13 June, 23 June, 4 July and 5 July 2007, the complainant sent further observations and information concerning this case. The complainant also forwarded to the Ombudsman copies of letters concerning this case that it had addressed to the Commission on 9 May and 22 June 2007.

The contents of these observations and further letters (to the extent that the latter concern the Ombudsman) may be summarised as follows:

- The Commission had failed to deal with the main issues raised in the present complaint. Its detailed opinion thus appeared to constitute a mockery of the complainant. The Commission ought to have answered the questions the complainant had put forward concerning the way ECHO had treated the complainant as regards the latter's participation in the FPA.
- The Ombudsman had treated the complainant in a way that differed from that in which he had handled the case of a German journalist (complaint 2485/2004/GG). He steadfastly refused to examine why the Commission had discriminated against the complainant in 1995 when it had excluded the latter from the FPA on no other basis than that of defamatory, incorrect accusations made by the German Foreign Office. In view of the manifest infringements of its duties in that context, the Ombudsman's view that the Commission had not acted deliberately in the present case was far from reality.
- If the Commission had not intended to suggest that the complainant was the subject of "criminal proceedings", it had to be asked why the relevant statements had been made at all. The chronology of events showed beyond doubt that the Commission had made these



statements only so as to mislead the Community courts and the Ombudsman. The Commission had pursued the aim of discrediting the complainant before the Community courts so as to win their favour in the cases concerned. The Commission's tactic was to repeat incorrect statements long enough until they became 'facts'.

- This was confirmed by the fact that, in its detailed opinion, the Commission had alleged that the complainant's letter of 21 May 1996 to DG VIII had first come to ECHO's knowledge through the Ombudsman's draft recommendation. This was a further, clumsy lie that confirmed once more that the Commission intended to deceive the Ombudsman. The Commission had been represented before the Community courts by the same lawyers in both the cases concerning ECHO and those concerning DG VIII. Furthermore, already back in 1995 there had been links between DG VIII and ECHO. The Ombudsman should therefore make a critical remark concerning this issue.

- The 'centre' at the Commission where the actions to defame the complainant had been prepared was the Legal Service. In the context of its complaints against DG VIII, the complainant had been accused of a fraud that in reality did not exist. In the same infamous manner the Legal Service had suggested "criminal proceedings" against the complainant and its chairman that never existed. This parallel could only be ignored by someone who studiously closed his eyes and who had too much sympathy for the Commission.

- The Legal Service had pursued a strategy of damaging the complainant's reputation. The mere fact that the relevant statements had been made repeatedly showed that the Commission had acted deliberately. If the Ombudsman was not willing to acknowledge that the Commission was systematically discrediting the complainant this could only be interpreted as taking the Commission's side.

- The Commission had also misled, deceived and lied to the Ombudsman in its detailed opinion by submitting that all statements made by ECHO officials with regard to Dr. K. and the complainant had been made in good faith and on the basis of the information available to ECHO. In point 40 of its defence in Case T-372/02, the Commission had stated that it emerged from the "most recent" correspondence that charges had been brought against Dr. K. and three other members of the complainant. However, at the time when this statement was made the Commission was already in possession of the letter the German Foreign Office had addressed to it on 15 November 2001.

- The Ombudsman had stated that it is good administrative practice for EU institutions and bodies to take care that their statements are accurate and to correct promptly any errors that may occur. However, the situation had already been clarified by the letter from the German Foreign Office of 15 November 2001. The Commission should therefore never have made the relevant statements.

- The conclusion reached in point 2.13 of the draft recommendation was wrong and contradicted the Ombudsman's own approach. The relevant statements were wrong, regardless of whether they were made directly or by reference to statements made by the German Foreign Office. The Ombudsman was obviously trying to help and whitewash the Commission here, thus giving up the neutrality that he was obliged to maintain.

- ECHO had not been able to suspend the treatment of the complainant's application "pending further information on the ongoing prosecution", and that for the simple reason that there had been no such prosecution. The Ombudsman had thus accepted a lie and shown that he had fallen prey to the Commission's deceit.



- In the face of a number of lies that were detrimental to the reputation of the complainant and its chairman, the Ombudsman had granted the Commission a 'rebate'. However, each individual lie and deliberate deceit should be marked as maladministration.
- The Commission had deliberately deceived the Community courts by referring to the incorrect accusations made by the German Foreign Office in 1995 whilst omitting to present the latter's letter of 15 November 2001. The Ombudsman had disregarded this letter time and again so as to blur the fact that the Commission had deliberately deceived the Community courts.
- The Commission had presented the incorrect accusations to the Community courts so as to deceive and mislead them and to present a falsified, negative view of the complainant and its chairman.
- The Ombudsman had acted negligently. His draft recommendation contained a number of errors, which all worked in the Commission's favour. Although the Ombudsman had made numerous critical remarks with regard to the Commission in the context of the complainant's previous complaints, he had granted a special bonus to the Commission in the present case. This raised doubts as to the objectivity of the Ombudsman. For reasons that were inexplicable, the Ombudsman had failed to require the Commission to adopt a more serious, constructive and active approach as regards the examination of the present case.
- It was scandalous that the complainant had had to endure grievous defamation, damage to its reputation and discrimination for over 10 years. The Ombudsman had considered this to be a minor offence, had never asked who the culprits were and had never recommended disciplinary proceedings against these persons.
- Since 1993, the Commission had engaged in systematic mobbing against the chairman of the complainant. However, the Ombudsman had disregarded even most brutal violations of the personality of the complainant's chairman and thus proved that he was close to the Commission. It had to be asked why no critical remarks had been made in view of the fact that for more than 10 years the Commission had engaged in stark and impudent lies, deliberate deceit and incorrect accusations damaging the reputation of the complainant and its chairman.
- The complainant had provided a huge amount of evidence to prove its case, which had entirely been disregarded by the Ombudsman. It seemed as if a change in roles had taken place as if the Ombudsman ("Bürgerbeauftragter") had become the agent of the Commission ("Kommissionsbeauftragter"). The Commission had indubitably received preferential treatment by the Ombudsman.
- ECHO's e-mail to the German Foreign Office of 8 August 2001 contained a number of lies. The Ombudsman had never examined these issues. The alleged 'suspension' of the complainant's application to sign the FPA had been concealed from the complainant for more than 6 years and the latter had in the meantime nevertheless been encouraged to submit applications for specific projects. This was a clear indication that the Commission had deliberately deceived the complainant.
- The Commission had also deceived the German Foreign Office and lied to Mr Struan Stevenson MEP. A letter from ECHO of 19 July 2001 contained a number of lies.
- The Commission had deliberately criminalised and insulted the complainant's chairman in front of the Community courts and the Ombudsman. Its behaviour was also relevant from the point of view of criminal law.
- ECHO had carried the dispute with the complainant into the press. There was thus defamation. The former director of ECHO had made the following statement to the journal *European Voice* ,



in relation to an earlier decision of the Ombudsman: "The Ombudsman has thus recognised as entirely legitimate and non-discriminatory the procedure applied by ECHO vis-à-vis Internationaler Hilfsfonds." The Ombudsman was obliged to clarify this statement.

- The Ombudsman should withdraw his reproach that the complainant had unjustifiably criticised the Ombudsman in relation to his complaints 745/2004/GG and 2862/2004/GG. If, contrary to expectation, the Ombudsman should not be ready to do so, the complainant would be forced to resume these complaints.
- The Commission had infringed Articles 4, 6, 7, 8, 9, 11, 12, 16 and 18 of the European Code of Good Administrative Behaviour.
- The incorrect behaviour of the Commission towards the complainant was not at all unintended. The complainant had already on the occasion of previous complaints to the Ombudsman been accused of fraud by the Commission. Point 17 of the report for the hearing in Case C-331/05 P *Internationaler Hilfsfonds v Commission* pointed in that direction.
- The Commission should be obliged to withdraw, in their entirety, the incorrect allegations against the complainant that it had made before the Community courts. It should also acknowledge in writing to the Ombudsman and to Mr Struan Stevenson MEP that the allegations concerning "criminal proceedings", which it had levelled at the complainant and its chairman, were incorrect, that these allegations had been maintained without justification over 10 years and that the exclusion of the complainant from the FPA was therefore without any legal basis.

THE DECISION

1 The complainant's case

1.1 In the 1990s, the complainant, Internationaler Hilfsfonds e.V., a German NGO (7), made various requests for financial assistance to the European Commission, including an application to the Commission's Humanitarian Aid Department ("ECHO") to sign the Framework Partnership Agreement ("FPA"). These requests gave rise to a number of complaints to the European Ombudsman (e.g., complaints 745/2004/GG and 2862/2004/GG) and to litigation before the Community courts (e.g., Case T-372/02 and Case C-521/03 P). In its submissions to the Ombudsman and the Community courts, the Commission referred to "criminal proceedings", "judicial proceedings", a "criminal procedure", a "prosecution" and "charges" that had been brought against the complainant, its chairman (Dr. K.) or other members of the complainant in Germany.

In its complaint to the Ombudsman, the complainant alleged that these references were incorrect, deliberately misleading and defamatory. It claimed that the Commission should take the necessary corrective action, in particular by undertaking to refrain from making such statements in the future.

1.2 In its opinion, the Commission took the view that the allegation was inadmissible as regards the submissions made to the Community courts. The Commission further submitted that the allegation was in any event unfounded.

1.3 In its observations, the complainant maintained its allegation.



1.4 The Ombudsman considered that the Commission's plea that part of the complaint was inadmissible was unfounded. As regards substance, the Ombudsman took the view that the Commission's references to "criminal proceedings", "judicial proceedings", "criminal procedures" and "charges", contained in its submissions to the Community courts and himself, had been incorrect. The Ombudsman therefore considered that the usage of these expressions by the Commission, with the exception of two passages that merely referred to (incorrect) information provided by the German Foreign Office, constituted maladministration. He concluded, however, that the complainant had not established that the statements the Commission had made had been deliberately misleading or defamatory.

1.5 On 14 December 2006, the Ombudsman therefore addressed a draft recommendation to the Commission, inviting it (1) to acknowledge that the said references had been incorrect and (2) to confirm that it would not use such incorrect references in the future.

1.6 In its detailed opinion, the Commission welcomed what it referred to as the Ombudsman's thorough and well-balanced draft recommendation. It stressed that it had never been its intention to mislead the Community courts or the Ombudsman and that all statements made by ECHO officials with regard to Dr. K. and the complainant had been made in good faith and on the basis of the information available to ECHO. However, the Commission acknowledged that the relevant references had not always been correctly applied and apologised for this. The Commission added that these references would not be quoted any longer.

1.7 The complainant made detailed observations, in which it made it clear that it was not satisfied by the Commission's detailed opinion. In these observations, the complainant raised a large number of issues, in particular as regards the handling of its application to sign the FPA by ECHO.

1.8 The Ombudsman notes that in its observations on the Commission's detailed opinion, the complainant has also made a number of critical comments on the way he has handled the present case. The complainant submitted that the Ombudsman had acted negligently, had closed his eyes in front of serious instances of maladministration committed by the Commission, had failed to maintain the neutrality incumbent on him, had taken the Commission's side and had even been trying to help and whitewash the Commission. The Ombudsman would like to stress at the very outset that he is unable to accept any of these criticisms that go to the very core of his work. The present case concerns an allegation that the Commission made certain incorrect statements that were detrimental to the reputation of the complainant and its chairman. The Ombudsman understands that the complainant feels seriously offended by the way the Commission behaved. He therefore considers it understandable and acceptable that the complainant expresses its points of view in strong language. However, the Ombudsman is unable to understand why the complainant saw fit to accuse him of having failed to comply with his duties in the present case, and to suggest that the Ombudsman failed to respect the fundamental requirement of independence laid down in Article 195(3) of the EC Treaty. The Ombudsman notes that the complainant considered it appropriate to send a copy of its observations, in which these accusations were made, to a member of the European Parliament.



A copy of this decision will therefore be sent to this MEP to set the record straight.

1.9 The comments made by the complainant in its observations on the Commission's detailed opinion call for a clear and detailed answer. In providing this answer, it appears useful to try and distinguish between the various issues raised by the complainant.

As regards further allegations made by the complainant

1.10 The Ombudsman finds it important to stress that the present inquiry only concerned the six statements that were cited in the draft recommendation, i.e., points 40, 45 and 105 of the Commission's defence in Case T-372/02, point 86 of the Commission's response in Case C-521/03 P, a statement made in the Commission's opinion on complaint 745/2004/GG and another statement made in its opinion on complaint 2862/2004/GG.

1.11 In its observations on the Commission's detailed opinion, the complainant made a number of comments that would appear to constitute new allegations or to raise further issues.

1.12 *First*, the complainant alleged that two statements made by the Commission in its detailed opinion were lies, namely (1) the statement that the complainant's letter of 21 May 1996 to its Directorate-General VIII ("DG VIII") had first come to ECHO's knowledge through the Ombudsman's draft recommendation and (2) the submission that all statements made by ECHO officials with regard to Dr. K. and the complainant had been made in good faith and on the basis of the information available to ECHO.

The Ombudsman would like to recall that these further allegations were made in the observations on the institution's detailed opinion, that is to say, at an advanced stage of the procedure. Taking these further allegations up for examination in the present inquiry would thus (if at all) only be appropriate if there was a close link between these new allegations and the subject of the inquiry so far. It should be recalled that the present inquiry was opened in order to examine the complainant's allegation that the Commission had made incorrect statements damaging the reputation of both the complainant and its chairman. The Ombudsman is unable to see in what way the above-mentioned statements made by the Commission in its detailed opinion could affect the reputation of the complainant or its chairman. He therefore considers that these allegations should not be examined in the present inquiry.

The Ombudsman finds it useful to add that the correctness of the above-mentioned statements made by the Commission is indeed not beyond doubt. He considers, however, that the substance of the issues raised by the complainant in this context could, if necessary, be examined in his pending own-initiative inquiry OI/4/2005/GG, which concerns ECHO's handling of the complainant's application to sign the FPA.

1.13 *Second*, the complainant alleged that ECHO had lied when it stated that it had suspended the handling of its application to sign the FPA "pending further information on the ongoing prosecution", and that for the simple reason that there had been no such prosecution. The Ombudsman considers that this allegation concerns the subject of OI/4/2005/GG. The relevant issue will therefore be considered in the context of that inquiry.



1.14 *Third* , the complainant alleged that the Commission had failed to deal with what it considered to be the main issues raised by its complaint, namely the way in which ECHO had treated the complainant as regards the latter's participation in the FPA. This allegation also clearly concerns the subject of OI/4/2005/GG. The relevant issue will therefore be considered in the context of that inquiry.

1.15 *Fourth* , the complainant submitted that the alleged 'suspension' of its application to sign the FPA had been concealed from it for more than 6 years and that it had in the meantime nevertheless been encouraged to submit applications for specific projects. According to the complainant, this was a clear indication that the Commission had deliberately deceived it. The Ombudsman notes that this issue concerns the handling of the application to sign the FPA, which is the subject of OI/4/2005/GG and should thus be considered in the context of that inquiry.

1.16 *Fifth* , the complainant alleged that the Commission had also deceived the German Foreign Office and lied to Mr Struan Stevenson MEP. The Ombudsman considers that taking these further allegations up for examination at the present stage of the inquiry would not be appropriate, since doing so would delay the decision on the issue initially raised by the complainant. It furthermore appears that the issues underlying this further allegation concern the subject of OI/4/2005/GG, which is still pending before the Ombudsman.

1.17 *Sixth* , the complainant alleged that the Commission had deliberately insulted the complainant's chairman in front of the Community courts and the Ombudsman and that this behaviour was also relevant from the point of view of criminal law. The Ombudsman considers it useful to stress that his inquiry focused on ascertaining whether the Commission was guilty of maladministration in the present case. While insulting a citizen could clearly be considered to be maladministration, it is not clear to the Ombudsman to what possible insults the complainant wishes to refer in this context. If the reference should be to the statements mentioned in point 1.10 above, the present inquiry would appear to deal with the matter. As regards the further issue raised by the complainant, it should be noted that it is not the Ombudsman's task to assess whether criminal offences have been committed. If the complainant considers that this was indeed the case, it should address itself to the judicial authorities in charge of such matters.

1.18 *Seventh* , the complainant submitted that the Ombudsman should withdraw his reproach that the complainant had unjustifiably criticised the Ombudsman in relation to his complaints 745/2004/GG and 2862/2004/GG. It is obvious that this issue has nothing to do with the subject of the present inquiry, which is to examine whether the Commission committed maladministration.

1.19 *Eighth* , the complainant alleged that the Commission had infringed Articles 4, 6, 7, 8, 9, 11, 12, 16 and 18 of the European Code of Good Administrative Behaviour. The Ombudsman notes that the complainant's original allegation essentially concerned Article 9 (duty to act objectively), Article 11 (duty to act impartially, fairly and reasonably) and Article 12 (duty correct mistakes). In the Ombudsman's view, the complainant has not shown how the other provisions invoked by it could be relevant in the present case.



1.20 *Ninth* , the complainant pointed out that the former director of ECHO had made the following statement in relation to an earlier decision of the Ombudsman to the journal *European Voice* : "The Ombudsman has thus recognised as entirely legitimate and non-discriminatory the procedure applied by ECHO vis-à-vis Internationaler Hilfsfonds." The complainant submitted that the Ombudsman was obliged to clarify this statement. The Ombudsman considers that the above-mentioned statement does not correctly reflect the position he has taken in the relevant case. However, the Ombudsman's role is to examine instances of maladministration, and not to correct opinions expressed in newspapers. The complainant has failed to explain how the view expressed by the said Commission official could constitute maladministration. It should furthermore be recalled that freedom of expression is a fundamental right and that this right is also given to officials of the European Communities.

As regards the subject of the present inquiry

1.21 The present inquiry concerns the question whether the six statements referred to in point 1.10 were incorrect, deliberately misleading and defamatory.

1.22 In its observations on the Commission's detailed opinion, the complainant referred to a German version of one of these statements, i.e., point 40 of the Commission's defence in Case T-372/02. This version would appear to differ slightly from the English text that was cited in the Ombudsman's draft recommendation in that the German text has "most recent correspondence" where the English one has "late correspondence". It appears useful to note that the language of case T-372/02 was English. Only the English version will therefore be considered here. Besides, in his letter of 5 August 2005 asking the Commission to commit itself not to repeat the relevant statements in the future, the complainant's lawyer also referred to the English text of these statements, whereas the letter itself was written in German.

As regards the question whether the relevant statements were incorrect

1.23 In his draft recommendation, the Ombudsman pointed out that all the expressions used by the Commission had been incorrect, since the German prosecutor had only conducted a preliminary investigation with regard to Dr. K. and three other persons, which had been terminated in favour of the persons concerned on 30 April 1996. The Ombudsman took the view that where a preliminary investigation was conducted, it was not appropriate to refer to "criminal proceedings", "judicial proceedings", a "criminal procedure", a "prosecution" or "charges" (point 2.12 of the draft recommendation).

1.24 The complainant does not object to this conclusion. However, it takes the view that the Ombudsman made a mistake when considering that two of the relevant statements could not be considered as being incorrect on the grounds that they merely referred to (incorrect) information that had been provided by the German Foreign Office (point 2.14 of the draft recommendation).

1.25 The Ombudsman is unable to accept the complainant's logic. The fact that the information provided by the German Foreign Office (according to which there was a "prosecution" against the complainant) was wrong does not mean that a statement recalling the fact that such (incorrect) information was provided is itself wrong. The complainant is right in asking why the Commission still referred to an alleged "prosecution" at a time when it had already been informed that there was no such prosecution. However, this does not concern the accuracy of



the relevant statements, but the question as to whether the Commission, by making these statements, intended to mislead the Community courts and the Ombudsman and to damage the reputation of the complainant or its chairman. This question will be addressed in the next two sections.

As regards the question whether the Commission's statements were deliberately misleading and defamatory

1.26 In his draft recommendation, the Ombudsman took the view that, as regards the four remaining statements, the complainant had not established that the Commission had acted with the intention to mislead the Community courts and the Ombudsman and to defame the complainant when making them.

1.27 In its observations on the Commission's detailed opinion, the complainant submitted that the Ombudsman ought to have examined all six statements, i.e., including the ones that he considered to be correct. The Ombudsman accepts that the complainant's argument is not without merits. If a Community body makes a (correct) statement to the effect that it has been provided with certain (incorrect) information, the accuracy of this statement does not entirely exclude the possibility that the statement was made with the intention to mislead and to damage the reputation of the person concerned. However, even taking into account this possibility, the Ombudsman continues to believe that his conclusion that no maladministration had been established in this context was correct. This view is based on the reasons set out in the draft recommendation as regards the four statements that the Ombudsman identified as being incorrect, which will be set out in more detail in the followings considerations.

1.28 In its observations on the Commission's detailed opinion, the complainant stressed that the relevant statements had been made at a time when the Commission had already received the letter of 15 November 2001 in which the German Foreign Office set the facts straight. The complainant therefore submitted that the relevant statements should never have been made. The Ombudsman considers this to be correct. It was for this very reason that he reached the conclusion, in his draft recommendation, that the Commission had committed maladministration by making these statements (i.e., the four statements that the Ombudsman considered to be incorrect). However, the mere fact that the Commission made incorrect statements does not yet prove that it acted in a deliberately misleading and defamatory way.

1.29 In its observations on the Commission's detailed opinion, the complainant submitted that if the Commission had not intended to suggest that the complainant was the subject of "criminal proceedings", it had to be asked why the relevant statements had been made at all. In his draft recommendation, the Ombudsman noted that, when making the relevant statements, the Commission had long been informed that there was no "judicial proceeding" and that the preliminary investigation had been closed in April 1996. The Ombudsman pointed out that he therefore failed to understand why the Commission had nevertheless referred to such a "judicial proceeding". In the Ombudsman's view, this fact was all the more puzzling in view of the fact that even the preliminary investigation that had been carried out had only concerned Dr. K. and three other individuals, but not the complainant (IH) itself.

The question remains, however, whether the fact that these statements were nevertheless



made also proves that the Commission acted with the intention to mislead and to defame. In the absence of any other evidence, such a conclusion could only be based on the objective facts of the case.

It should be noted, however, that the relevant statements were made in the context of court proceedings and complaints brought against the Commission by the complainant. These cases concerned the way in which ECHO had handled the complainant's application to sign the FPA. It thus appears logical that the Commission considered it necessary to describe and explain the way ECHO had proceeded. Given that the German Foreign Office had indeed informed the Commission that there was a "prosecution" pending against the complainant, it is not surprising that the Commission referred to this information when describing and explaining the way ECHO had handled the complainant's application. In order to avoid any potential misunderstanding, the Ombudsman considers it useful to add that the question whether these explanations were correct is not beyond doubt and that this issue will be examined in OI/4/2005/GG. However, the question to be decided in the present case is not whether the Commission made incorrect and misleading statements as to how ECHO handled the complainant's application to sign the FPA, but whether its statements made to the Community courts and the Ombudsman suggested, in a misleading and defamatory manner, that there had been a prosecution against the complainant. As regards this question, the Ombudsman continues to consider that the mere fact that the relevant references were made on several occasions does not prove that the Commission acted in a deliberately misleading and defamatory manner. This conclusion is not affected by the fact that the Commission did not submit to the Community courts a copy of the letter of the Germany Foreign Office of 15 November 2001, which set the facts right. Although it would clearly have been useful if the Commission had provided a copy of this document to the Community courts, the fact that it did not do so does not prove its bad faith, since this letter as such could clearly not have been taken into account by ECHO when handling the complainant's application to sign the FPA.

1.30 The Ombudsman considers that a different conclusion would have had to be drawn if the relevant references had been without any foundation whatsoever. However, even though there was no "prosecution" against the complainant, a preliminary investigation had indeed been conducted with regard to Dr. K. and three other persons. This fact obviously did not entitle the Commission to use expressions that referred to a "prosecution". The Ombudsman therefore considers the Commission to have acted negligently in its choice of wording. However, the Ombudsman considers that nothing would have prevented the Commission from referring to the fact that there had been a preliminary investigation as regards the complainant's chairman and three other persons. In view of these circumstances, the Ombudsman is unable to conclude that an intention to mislead and to defame on the part of the Commission existed.

1.31 In its observations on the Commission's detailed opinion, the complainant referred to the background against which the present case should be seen. The complainant alleged that a huge amount of evidence supporting its case had been submitted to the Ombudsman but that the latter had disregarded this evidence. It further submitted that it had been accused of a fraud that in reality did not exist in the context of its complaints against DG VIII and that there was thus a clear parallel to what had happened as regards its dealings with ECHO. In this context,



the complainant referred to point 17 of the report for the hearing in Case C-331/05 P *Internationaler Hilfsfonds v Commission*. The complainant also alleged that the Commission had, since 1993, engaged in systematic mobbing against the chairman of the complainant. It further submitted that the chronology of events showed beyond doubt that the Commission had made these statements only so as to mislead the Community courts and the Ombudsman.

1.32 The Ombudsman has carefully examined the evidence and arguments submitted by the complainant. He considers, however, that none of these documents and arguments clearly establishes, either on its own or taking into account the whole background, that the complainant's allegation is well-founded. It is true that the Ombudsman has had occasion, over the years, to make a number of critical remarks against the Commission as regards the way in which it treated the complainant. However, the Ombudsman is unable to accept that this background creates a presumption that the Commission acted in a deliberately misleading and defamatory manner when making the relevant statements. It is obvious that each case ought to be judged on its own merits. It appears useful to add that, as regards point 17 of the hearing report (8) to which the complainant referred, this passage merely reflects the arguments of the complainant and does not set out the Court's views.

1.33 On a more fundamental level, it should be recalled that the complainant accuses the Commission of having acted in a deliberately misleading and defamatory manner. The Ombudsman considers that this constitutes a most serious allegation. It is obvious that an instance of maladministration can only be found where there is sufficient evidence for such a conclusion. In the Ombudsman's view, this principle has to be respected all the more strictly in the case of serious allegation such as was raised in the present case. As mentioned above, the Ombudsman has carefully examined the evidence and the arguments submitted to him. However, he has been unable to establish that the complainant's allegation is well-founded.

As regards the alleged defamation

1.34 The Ombudsman understood the complainant's allegation that the Commission had acted in a defamatory manner, when making the relevant statements, as meaning that by making these statements to the Community courts and to the Ombudsman, the Commission had damaged the complainant's (and Dr. K.'s) reputation in the eyes of third parties or had intended to do so. In his draft recommendation, the Ombudsman noted that there was no evidence that would clearly establish that this had been the Commission's intention. He further noted that there had been no oral hearing in the cases before the Community courts and that the possibility for third parties to gain access to the Commission's statements via a request for access to the Ombudsman's file was too remote and hypothetical to be relevant in the present context. In these circumstances, the Ombudsman considered that the complainant had not established its allegation.

1.35 The complainant objected to this conclusion, without however submitting any convincing arguments to call the Ombudsman's reasoning into doubt. It is true that the complainant submitted that ECHO had carried the dispute with the complainant into the press and that there had thus been defamation. In this context, the complainant referred to the statement of a former director of ECHO to the journal *European Voice* that has already been considered earlier in a different context (see point 1.20). The Ombudsman notes, however, that the citation provided by



the complainant does not confirm that ECHO had informed a wider public, though this article, that it considered that there had been a public prosecution against the complainant.

As regards the allegedly unequal treatment

1.36 In its observations on the Commission's detailed opinion, the complainant submitted that the Ombudsman had treated its case in a way that differed from that in which he had handled the case of a German journalist (complaint 2485/2004/GG).

1.37 It appears useful to point out that case 2485/2004/GG concerned a complaint against the European Anti-Fraud Office ("OLAF") that followed an earlier complaint by the same complainant against the same Community body (complaint 1840/2002/GG). The Ombudsman considers that the complainant in the present case may have intended to refer to both of these complaints.

Complaint 1840/2002/GG concerned a press release issued by OLAF in which a journalist had been accused of bribing a Commission official. Even though the press release did not indicate any name, the Ombudsman concluded that it was likely to be understood as referring to the complainant and his newspaper. The Ombudsman further considered that in the absence of a factual basis for this allegation that was both sufficient and available for public scrutiny, OLAF had gone beyond what was proportional to the purpose pursued by its action. He therefore concluded that there had been maladministration. The Ombudsman considers it clear that the publication of allegations detrimental to the reputation of a person via a press release is not the same as making such comments (on the assumption that their contents could be considered comparable) in submissions to the Community courts or the Ombudsman.

Complaint 2485/2004/GG concerned the question whether OLAF had, in the framework of the inquiry into complaint 1840/2002/GG, provided incorrect and misleading information to the Ombudsman. After a thorough inquiry, the Ombudsman came to the conclusion that this was indeed the case. The Ombudsman therefore made a draft recommendation to OLAF, urging it to acknowledge this fact. Since OLAF's detailed opinion did not appear to be satisfactory, the Ombudsman submitted a special report to Parliament. It should be noted, though, that in that case, the Ombudsman had been provided with evidence clearly establishing that OLAF's submissions to the Ombudsman had been misleading. As mentioned above, this is not the case as regards the present complaint.

1.38 In view of the above, the Ombudsman considers that there was no unjustified difference of treatment as regards the present case on the one hand and complaints 1840/2002/GG and 2485/2004/GG on the other hand.

As regards the outcome desired by the complainant

1.39 In its observations on the Commission's detailed opinion, the complainant queried why the Ombudsman had not made any critical remarks. It should be noted that where maladministration is found and where it still appears possible to remedy it, the Ombudsman either proposes a friendly solution or makes a draft recommendation. In the present case, a draft recommendation was made. The Ombudsman would only have needed to consider the need to make a critical remark if this draft recommendation had been rejected. However, this was not the case, given that the Commission accepted his draft recommendation.



1.40 In its observations on the Commission's detailed opinion, the complainant made what appear to be further claims as regards the consequences to be drawn by the Ombudsman. If the Ombudsman correctly understood these observations, the complainant suggested that he should (1) find out who the persons responsible for the maladministration were, (2) recommend disciplinary proceedings against these persons, (3) oblige the Commission to withdraw, in their entirety, the incorrect statements it had made before the Community courts and (4) make the Commission clarify in writing to the Ombudsman and to Mr Struan Stevenson MEP that its allegations concerning "criminal proceedings", which it had levelled at the complainant and its chairman, were incorrect, had been maintained without justification over 10 years and that the exclusion of the complainant from the FPA was therefore without any legal basis.

1.41 It should be recalled that, in its complaint, the complainant claimed that the Commission should take the necessary corrective action, in particular by undertaking to refrain from making such statements in the future. It should further be noted that the present complaint was preceded by a letter addressed to the Commission by the complainant's lawyer on 5 August 2005. In this letter, the Commission was invited to commit itself to abstaining from alleging that there had been a prosecution against the complainant or its chairman.

1.42 The Ombudsman recalls that his draft recommendation invited the Commission to confirm that it would no longer use the incorrect references he had identified. In its detailed opinion, the Commission accepted this draft recommendation and confirmed that these references would not be quoted any longer. It follows that the Commission has agreed to do what the complainant's lawyer had asked it for on 5 August 2005 and what the complainant had claimed in its complaint to the Ombudsman. In addition to that, the Commission presented an apology in its detailed opinion. In these circumstances, the Ombudsman sees no reason to consider the further claims that the complainant has submitted in its observations on the Commission's detailed opinion.

2 Conclusion

2.1 On the basis of the Ombudsman's inquiries into this complaint, it appears that the Commission has satisfactorily implemented the draft recommendation that was made in this case.

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

2.3 A copy of this decision will be sent to Mr Struan Stevenson MEP for his information.

2.4 I note that your last letter to me concerning this case, dated 4 July 2007, was also copied to Mr Pöttering, the President of the European Parliament, Mr Skouris, the President of the European Court of Justice, Mr Verheugen, Vice-President of the Commission and "Le canard enchainé". In my view, it does not appear necessary to forward a copy of this decision to them as well (9) .

2.5 I note that, in your letter of 4 July 2007, you stated that you consider the present case as being a sort of 'credibility test' for the Ombudsman. You further pointed out that you hoped it would not be necessary for you to have recourse to the services of OLAF as regards this case. On 2 August 2007, you forwarded to me a copy of a letter you had addressed to the President



of the European Court of Justice in relation to a recent judgment rendered by the Court. In this letter, which was also copied to Mr Struan Stevenson MEP, you suggested, with reference to the present case, that the notion that the Ombudsman would "assist the complainant" was far from reality. I take the view that there is no need for me to comment on these statements.

2.6 As regards my own-initiative inquiry OI/4/2005/GG, every effort will be undertaken to conclude my examination as rapidly as possible and by 31 October 2007 at the latest. The same applies to the two further cases concerning you that are still pending before me, i.e., complaint 2283/2004/GG and complaint 1434/2006/GG.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

- (1) The complainant is sometimes referred to as "IH" in the documents cited in this decision.
- (2) The Ombudsman has not received copies of the pleadings before the Community courts. The citations are thus taken from the submissions the complainant made to the Ombudsman in the present case. The Commission has not alleged that these submissions misrepresent what it had put forward in its pleadings.
- (3) As regards this last statement, cf. point 1.3 of the draft recommendation cited below.
- (4) The full text of the draft recommendation is available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).
- (5) The decisions are available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]). The passages concerned are point 2.2 of the decision on complaint 745/2004/GG and point 1.9 of the decision on complaint 2862/2004/GG.
- (6) See point 12 of the Order of the Court of First Instance of 15 October 2003 in Case T-372/02.
- (7) The complainant is sometimes referred to as "IH" in the documents cited in this decision.
- (8) A copy of the hearing report for Case C-331/05 P was submitted to the Ombudsman by the complainant. The relevant passage records the complainant's argument that it had been exposed to various allegations in the context of fraud.
- (9) However, on 11 October 2007 a copy of this decision was sent to the Presidents of the European Parliament and of the Court of Justice, following an express request to this effect made by the complainant.