

Decision of the European Ombudsman on complaint 2585/2006/BU against the Committee of the Regions

Decision

Case 2585/2006/BU - Opened on 06/11/2006 - Decision on 10/03/2008

Strasbourg, 10 March 2008

Dear Mr X,

On 1 August 2006, you submitted a complaint to the European Ombudsman against the Committee of the Regions (the "Committee") concerning its decision to stop transferring part of your remuneration abroad. On 19 September 2006, you sent an explanatory note summarising your complaint.

In accordance with your request, your complaint has been treated confidentially.

On 6 November 2006, I forwarded your complaint to the Secretary-General of the Committee and asked the Committee to submit an opinion.

On the same date, I requested your consent to my informing the European Data Protection Supervisor ("EDPS") of your complaint as well as of other documents that would enter the file in the future. You informed me of your consent by letter of 10 November 2006. I informed the EDPS accordingly by letter of 30 January 2007. By letter of 20 February 2007, the EDPS informed me of his preliminary comments on the two aspects of your complaint involving data protection issues.

The Committee sent its opinion on your complaint on 16 February 2007. On 27 February 2007, I forwarded it to you with an invitation to make observations. By e-mail of 30 March 2007, you requested an extension of the deadline for submitting your observations, which I granted. You sent your observations on 16 April 2007.

Following your e-mail of 23 May 2007, in which you asked about the state of progress of my inquiry into your complaint, my services informed you, by e-mail of 29 May 2007, that the file relating to your complaint was under examination and that you would be informed as soon as possible of the outcome of that examination.

By e-mail of 26 July 2007, you informed me that you had lodged an action before the European Union Civil Service Tribunal requesting the annulment of the Committee's two decisions



ordering the recovery, under Article 85 of the Staff Regulations, of unduly paid sums.

By letter of the same day, the Committee informed me that your action for annulment was registered with the Civil Service Tribunal as Case X and was based on the facts submitted for my examination in the framework of the present complaint.

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

THE COMPLAINT

The complainant is an official at the Committee of the Regions (the "Committee"). Until May 2005, he benefited from transfers to France of part of his remuneration, under Article 17(2)(b) of Annex VII of the old Staff Regulations (1) in conjunction with the final indent of the second paragraph of Article 2 of the *Rules laying down the procedure for the transfer of part of an official's emoluments* (the "Common Rules") (2) .

By note of 30 May 2005, the Committee's Director of Administration (the "Director") informed the complainant that, as from June 2005, the transfers which he had been making on the basis of a "home savings contract" (*contrat d'épargne logement*) containing a mere possibility (but not an obligation) to make payments would be no longer considered to be in line with the second paragraph of Article 2 of the Common Rules. Reference was made, in this regard, to a more thorough interpretation (*une interprétation plus poussée*) of the (French) word " *dues* " in the (French) term " *primes dues* " in the final indent of that provision (3) .

By e-mail of 30 August 2005 to the Director, the complainant claimed that his transfers were interrupted illegally and should be recommenced with retroactive effect, that is, so as to include the period from June to August 2005. The complainant stated that the above note confirmed that his file had always been in order and that he had scrupulously respected the applicable rules. He also pointed out that, each time the competent services requested documents necessary to justify the transfers, he supplied them in full, which also explained why the transfers had never been put into question until the payment of his salary of June 2005. The complainant also noted that the interpretation and application of the relevant rules were uniform within the other institutions.

By e-mail of 1 September 2005, the Director answered that, according to the internal auditor, who carried out a new verification of the complainant's file, the complainant still had to justify part of his 2004 transfers.

By e-mail of the same day of 1 September 2005, the complainant asked the Director to clarify which documents were missing from his file, and wondered why he was not informed of this earlier. He also asked whether the administration had the right to stop his transfers because of missing documents which it had never requested. The complainant reiterated the above request by e-mail of 22 September 2005.



By e-mail of 26 September 2005, the Director answered that the audit service verified the complainant's file with the help of the legal service and confirmed again that it was incomplete. The Director added that he instructed the personnel unit to draft a reply to the complainant's complaint of 30 August 2005 which would be sent to him as soon as possible.

By e-mail of 28 September 2005 to the Director, the complainant requested access to his file in order to verify whether it contained certain documents. By e-mail of the same day, the Director authorised the complainant to view his file in the presence of the head of the personnel unit and of the internal auditor. By another e-mail of the same day, the complainant expressed his surprise that his right to view his file was made conditional on the presence of the head of the personnel unit and of the internal auditor, and considered it to be a violation of Article 26 of the Staff Regulations (4) and of the case-law concerning the matter.

In note Ref. NI 1963/06 of 21 March 2006 (5) , addressed to the authorising officer by delegation (*l'ordonnateur délégué*), the Director announced his intention to recover overpaid sums from the complainant and from two other staff members: " (...) *conformément à vos instructions orales, nous allons déjà procéder à la répétition de l'indu à l'égard de MM. (...), [the complainant] et (...)* ".

On 24 March 2006, the complainant lodged a complaint under Article 90(2) of the Staff Regulations against the decision to seek recovery which, in his view, was made official by means of the above note Ref. NI 1963/06. This complaint remained unanswered, just like the complainant's three previous complaints against (i) the cessation of his transfers (6) , (ii) the restriction of his right to view his file (7) , and (iii) moral harassment (8) .

By note of 1 June 2006, received by the complainant on 6 June 2006, the Director informed him that " *l'analyse approfondie de votre dossier de transferts d'émoluments à l'étranger avec coefficient correcteur conclut à l'absence d'obligation de versement (...) et donc à l'irrégularité de votre dossier.* " The Director explained that:

" *[s]elon les documents qui figurent dans votre dossier, le montant du plafond contractuel de votre CEL a été atteint étant donné qu'il a été régulièrement vidé vers un compte sur livret. Les justificatifs bancaires du maintien sur un compte de tous les montants versés depuis longtemps sont tout à fait incomplets et insuffisants et ne peuvent être pris en considération dès lors que la réglementation commune se réfère aux comptes épargne logement (...)* ".

The Director also stated that " (...) *l'Institution est en droit au titre de l'article 85 du Statut - répétition de l'indu - de procéder au recouvrement des avantages indument perçus par l'application des coefficients correcteurs sur les montants qui ont été transférés sans justification conforme à la réglementation.* " (9)

In the note, the complainant was invited to supply additional explanations and supporting documents concerning his transfers.

The complainant replied by note of 7 July 2006, sent by internal post, in which he summarised



the facts giving rise to the present complaint, to which he attached documents supporting his explanations. Up to 31 June 2006, when the Director left for holiday, he had not provided the complainant with feedback other than the indication that he had been studying the material supplied.

By e-mail of 31 July 2006, a colleague of the Director informed the complainant that, because of the Director's vacation, the recovery of unduly paid sums would not be handled before September 2006. In his e-mail reply of the same day, the complainant asked how the colleague could speak about "*recoveries of unduly paid sums*" when the Director still had not examined the material which the complainant had supplied on 7 July 2006.

In his complaint to the European Ombudsman, the complainant stated that he had always supplied the documents necessary for justifying his transfers, and wondered why, had any documents been missing, the Committee had not informed him precisely of which documents he should supply.

With respect to the transfers, mentioned in the Director's note of 1 June 2006, from his home savings account to his deposit account, the complainant stated that those transfers concerned his private finances since they concerned monies which did not originate in the transfers mentioned in the final indent of the second paragraph of Article 2 of the Common Rules.

The complainant also referred to the practice of other institutions, such as the Economic and Social Committee, the Court of Auditors, and the Court of Justice, which accept as expenditure payments made on the basis of home savings contracts, in order to justify the transfers.

Finally, the complainant referred to an ongoing inquiry by the European Anti-Fraud Office ("OLAF") into certain administrative and financial practices at the Committee. In this regard, he wondered why his file, although not part of the OLAF inquiry, was subject to the envisaged recovery, whereas some other persons' files, which were part of the OLAF inquiry, were not the subject of a recovery procedure.

Therefore, the complainant alleged that:

- the Committee's decision to stop transfers abroad was unlawful;
- the Committee failed to provide him with accurate and timely information on the status of his file and on documents that may have been missing from it;
- the Committee had been unlawfully processing personal data concerning his private finances;
- and
- the Committee failed to answer his four complaints made under Article 90(2) of the Staff Regulations.

The complainant claimed that the Committee should:

- recommence the transfers, with retroactive effect;
- provide him with accurate and timely information on the status of his file and on documents that may have been missing from it;
- enable him to access his file so that he can request the erasure of personal data which the file



should not contain; and

- answer his four complaints made under Article 90(2) of the Staff Regulations.

THE INQUIRY

The Committee's opinion *The Committee's position on the first allegation and related claim*

In reply to the first allegation that its decision to stop the complainant's transfers was unlawful and the related claim that it should recommence the transfers, the Committee made the following comments:

The Committee first explained the legal framework governing the transfers of part of the officials' remuneration under the old Staff Regulations, as summarised in footnotes 1 and 2 above.

With respect to the payments in connection with the property transactions mentioned in the final indent of the second paragraph of Article 2 of the Common Rules, the Committee noted that the Common Rules had led to approaches which were not necessarily identical within all of the institutions, mainly as regards the proof of commitments regularly undertaken (*les charges régulières*). Besides the divergences of interpretation linked to the different linguistic versions (10) , the Committee also mentioned the diversity of the home savings contracts in the Member States. According to the Committee, in certain Member States, including France, some of these contracts do not require regular transfers. The institutions, including the Committee, thus faced problems of legal interpretation, and the practice had been to accept, as supporting documents for transfers, all home savings contracts or similar contracts, even when the national legislation and the banking practice did not impose a specific obligation with respect to regular payments.

The Committee went on to state that, following the entry into force of the new Staff Regulations, which introduced transitional measures (11) for transfers taking place before the 1 May 2004, it carried out an ex-post control of the entirety of the files concerning these transfers. In light of that control, its Secretary-General decided to adopt, in a communication to the staff dated April 2005 (12) , a more restrictive approach to the transfers justified by home savings contracts not containing an obligation of regular monthly payments. The complainant's case fell in this latter category.

Therefore, on 30 May 2005, the Director addressed a note to the persons concerned, including the complainant, in order to inform them of the above communication and suspend transfers that were no longer in line with the new provisions.

The Committee further referred to the complainant's e-mail of 30 August 2005 to the Director, which constituted the complainant's first complaint in the framework of the present case. In the said e-mail, the complainant contested the above decision of 30 May 2005 and claimed that the transfers should be recommenced with retroactive effect (13) .

The Committee also stated that, given that it did not provide the complainant with a reasoned reply to the above complaint within the statutory period of four months, that absence of a reply was to constitute an implied decision rejecting that complaint.



As regards the complainant's first claim, the Committee took the position that, since the complainant had not considered it useful to make use of his right to turn to the Civil Service Tribunal at that time, he was no longer in a position to initiate legal action designed to ensure the recommencement of his transfers.

The Committee's position on the second allegation and the related claim

In reply to the second allegation that it failed to provide the complainant with accurate and timely information on the status of his file and on documents missing from it and to the related claim, the Committee stated the following:

It first referred to the Director's note of 30 May 2005 in which the complainant was informed of the Committee's intention to establish a stricter interpretation of the (French) term "*primes dues*" for transfers effected with respect to home savings contracts. In the same note, the Director also stated that, with effect from June 2005, payments made on the basis of contracts that did not contain an obligation to make payments would no longer be considered to fulfil the conditions of the second paragraph of Article 2 of the Common Rules and could not, as a consequence, justify the continuation of the transfers.

The Committee noted that, in spite of the explanations provided in the above note, the complainant alleged that he did not receive enough information concerning his file. Nevertheless, besides the note, the complainant had numerous contacts with the Committee's administration in the course of the year 2005. This could be ascertained from the correspondence which he attached to his complaint. The Committee acknowledged that its administration had not gone so far as to provide the complainant with a list of documents which could be accepted as justifying his transfers, but took the view that it was not for the administration to do so in the present case. According to the Committee, the situation differed depending on the national legislation and it was not the responsibility of the administration to take all the steps in order to enable the officials to benefit from all the possibilities provided by the Staff Regulations. The Committee also recalled that the complainant was a former [...] as well as its former [...], which was why he could not be unaware of the supporting documents that were necessary in order to ensure that his file was in conformity with the new interpretation of the legal provisions.

Finally, the Committee stated that, in his notes of 1 June 2006 and 26 July 2006, the Director again confirmed to the complainant the reasons which had led the administration to stop his transfers (14) .

The Committee's position on the third allegation and the related claim

In reply to the third allegation that it had been unlawfully processing personal data concerning the complainant's private finances and the related claim that it should enable him to access his file so that he can request the erasure of personal data which the file should not contain, the Committee made the following comment:

The Committee stated that, contrary to what the complainant alleged, it had never refused him access to the file containing his personal data. According to the Committee, this was evidenced by the fact that, following the complainant's request of 28 September 2005, the Director



authorised him to view his file, accompanied by the head of the personnel unit and the internal auditor.

The Committee's position on the fourth allegation and the related claim

In reply to the fourth allegation that it failed to answer the complainant's four complaints made under Article 90(2) of the Staff Regulations and the related claim that it should answer them, the Committee stated the following:

With respect to the complainant's first complaint of 30 August 2005 (15) , the Committee stated that it always endeavoured to provide reasoned answers to complaints which it received. However, in the present case, taking account of the number of e-mail contacts between the Committee's administration and the complainant, which took place in the course of the statutory period for providing an answer, the situation became so confused for the administration that the latter believed that it had satisfied the complainant's requests for clarification, and had not drafted a formal answer to the complaint. The Committee expressed its regrets in this regard. The Committee also referred to the complainant's repeated e-mails requesting information on the state of progress of his complaint. The Committee pointed out that, in his e-mail of 22 September 2005, the complainant wrote to the Director: " *D'ailleurs, bien que vous avez répondu positivement à ma réclamation (...)* ". According to the Committee, this indicated that the complainant considered that he had received an answer to his complaint. The complainant thus could not now allege that he had not received an answer to his complaint. Moreover, the decision contested in the complaint had already been explained in the Director's note of 30 May 2005.

The Committee went on to state that, as far as two further complaints were concerned, these had not been forwarded to, and officially registered by, the Committee (*transmises et enregistrées officiellement par le Comité*) and, as a consequence, they had not been answered by the appointing authority.

As regards the fourth complaint of 24 March 2006 (16) , the Committee stated that the appointing authority answered that complaint on 17 July 2006 (17) .

The complainant's observations on the Committee's opinion

In his observations, the complainant reiterated that the Committee's change of its interpretation of the statutory provisions was " *brutal, unilateral, restrictive and retroactive* " and that it violated several principles of Community civil service law. He also emphasised that the Committee was now alone among the Community institutions in following a course of action which, by no means, took account of what had been adopted and applied at the inter-institutional level. This violated the principle of the unity of the Staff Regulations which should be interpreted and applied in the same way by Community institutions. In addition, the complainant made the following main observations:

On the Committee's comments on the first allegation and related claim

The complainant referred to the Committee's statements that its Secretary-General decided to adopt a more restrictive approach to the transfers justified by the home savings contracts and that the Director's note of 30 May 2005 informed the persons concerned of the suspension of transfers that were no longer in line with the new provisions. The complainant considered these statements to be contradictory, and pointed out that the provisions did not change for those who



had been making transfers before the entry of the new Staff Regulations into force. According to the complainant, the real reason for the change in the Committee's approach was its new interpretation of the Common Rules and not the new statutory provisions.

The complainant went on to state that the Committee did not explain why its services authorised, in January 2005, the continuation of his transfers, then decided to interrupt them in May 2005, and started to threaten him with a recovery procedure under Article 85 of the Staff Regulations in June 2006. The complainant added that the recovery had been carried out over a ten-month period, starting with his December 2006 salary.

The complainant also referred to the e-mail of 1 September 2005, in which the Director wrote that the complainant still had to justify part of his 2004 transfers. The complainant pointed out that this was no longer the same explanation as the one contained in the Director's note of 30 May 2005 or in the Committee's reply to the Ombudsman's request for an opinion.

On the Committee's comments on the second allegation and the related claim

With respect to the Committee's reference to the Director's note of 30 May 2005 informing him of the intention to establish a stricter interpretation of the term "*primes dues*" for transfers justified by home savings contracts and of the suspension, as of June 2005, of transfers made on the basis of contracts not containing an obligation to make payments, the complainant argued that he had an obligation to make payments, and referred to a statement from his bank in this regard, a copy of which he attached.

The complainant further stated that, given that the salaries of the officials were paid on the 15th day of each month for the current month, the related calculations necessitated a delay of around 10 to 15 working days. Therefore, he expressed the view that, at the time of the Director's note of 30 May 2005, the instruction to stop the transfers had already been given, and it was thus literally impossible to supply any complementary document before the June 2005 salaries had been processed. According to the complainant, the administration could have provided the officials concerned with a delay of a month or two in order to allow them to complete their files.

The complainant also expressed his astonishment at the Committee's statement that it was not for its administration to provide him with a list of documents which could be accepted as supporting documents justifying his transfers. He pointed out that the file, which he had sent to the administration by internal post on 7 July 2006, contained 14 pages of written explanations and no less than 60 pages of supporting documents, all of which had been considered insufficient by the administration, which however, did not provide him with the requested information.

Finally, the complainant stated that, even after he had submitted his complaint to the Ombudsman, he continued to approach the Committee in order to find out which documents he should still supply, without ever receiving an answer.

On the Committee's comments on the third allegation and the related claim

The complainant rejected the Committee's statement that it had never refused him access to the file containing his personal data. According to the complainant, the Director's e-mail of 28 September 2005, authorising the complainant to view his file accompanied by the head of the



personnel unit and the internal auditor , demonstrated the contrary.

The complainant noted that, following his e-mail of the same day, in which he contested this restriction of his right under Article 26 of the Staff Regulations, the Director never provided him with an answer authorising him to have " *normal* " access to his file.

On the Committee's comments on the fourth allegation and the related claim

The complainant pointed out that his first complaint of 30 August 2005 remained unanswered in spite of the fact that the Director had promised, by e-mail of 26 September 2005, to provide him with an answer.

The complainant further referred to the Committee's statement that the situation had become so confused for its administration that the latter believed that it had satisfied the complainant's requests for clarification. The complainant found this statement surprising in light of the numerous requests he sent to the administration, and pointed out that the above confusion did not prevent the administration from stopping his transfers, from failing to provide answers to his various letters, requests and complaints, and from initiating the recovery procedure with effect from December 2006.

As regards the Committee's statement that, in his e-mail of 22 September 2005, the complainant wrote to the Director: " *D'ailleurs, bien que vous avez répondu positivement à ma réclamation (...)* ", the complainant clarified that this statement was made with respect to the Director's positive reply that he would receive an answer to the complaint, which he never actually received.

Concerning the two further complaints allegedly not forwarded to, and officially registered by, the Committee, the complainant stated that he was prepared to show (18) , to any interested and authorised person, the entirety of the e-mails he had sent to the Director and his closest collaborators in charge of the transfers file, together with confirmations of delivery and reading.

As regards the Committee's answer of 17 July 2006 (19) to the complainant's fourth complaint of 24 March 2006 (20) , the complainant acknowledged that he received that answer, but only on 14 September 2006.

The EDPS' preliminary comments

The EDPS made the following preliminary comments on the data protection aspects of the present complaint:

As regards the allegation of unlawful processing of personal data concerning the complainants' private finances, the EDPS understood it to refer to the incorrect or incomplete nature of the data in violation of Article 4(1)(d) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (21) ("Regulation 45/2001"). The EDPS noted that, should the data referred to by the complainant prove to be inaccurate or incomplete, he should be able to obtain their rectification according to Article 14 of Regulation 45/2001.



As regards the refusal of access to the complainant's personal file, the EDPS noted that this could constitute a violation of Article 13 of Regulation 45/2001, which grants an unconditional right for the data subject to obtain communication, in an intelligible form, of data concerning him/her that were undergoing processing and any available information as to their source. The EDPS added that any restriction of this right would need to be justified on the basis of Article 20 of Regulation 45/2001.

Additional information on judicial proceedings

In his e-mail of 26 July 2007, the complainant informed the Ombudsman that, on DD.MM.YY, he lodged an action before the European Union Civil Service Tribunal for annulment of two decisions of the Committee with respect to the recovery, under Article 85 of the Staff Regulations, of unduly paid sums. He pointed out, however, that the action concerned an issue that was different from, and subsequent to, his complaint to the Ombudsman, which concerned the period before 1 August 2006, and, more precisely, the issues of maladministration, harassment, data protection and the stopping of the complainant's transfers. By contrast, the action before the Civil Service Tribunal concerned the period after 1 August 2006, and, more precisely, two recovery decisions which, according to the complainant, were by no means linked to the stopping of his transfers.

In its letter also dated 26 July 2007, the Committee informed the Ombudsman that the complainant's action for annulment dated DD.MM.YY was registered with the Civil Service Tribunal as Case X and was based on the facts submitted to the Ombudsman's examination in the framework of the present complaint. In this regard, the Committee noted that the complaint to the Ombudsman concerned mainly the Committee's decision to stop the transfers abroad of part of the complainant's remuneration, and the action before the Civil Service Tribunal was based on the facts which were submitted to the Ombudsman's examination in the framework of the present complaint.

THE DECISION

1 Alleged unlawful decision to stop transfers and related claim

1.1 The complainant, an official at the Committee of the Regions (the "Committee"), benefited from the transfers abroad of part of his remuneration under Article 17(2)(b) of Annex VII of the old Staff Regulations (22) in conjunction with the final indent in the second paragraph of Article 2 of the *Rules laying down the procedure for the transfer of part of an official's emoluments* (the "Common Rules") (23) .

By note of 30 May 2005, the Committee's Director of Administration (the "Director") informed the complainant that, as from June 2005, the transfers which he had been making on the basis of a "home savings contract" (*contrat d'épargne logement*) not containing an obligation to make payments would no longer be considered to be in line with the second paragraph of Article 2 of the Common Rules. Reference was made to a more thorough interpretation (*une interprétation plus poussée*) of the (French) word " *dues* " in the (French) term " *primes dues* " in the final indent of that provision.

By e-mail of 1 September 2005, the Director informed the complainant that, according to the



internal auditor, who carried out a new verification of the complainant's file, the complainant still had to justify part of his 2004 transfers.

By note of 1 June 2006 the Director informed the complainant that "*l'analyse approfondie de votre dossier de transferts d'émoluments à l'étranger avec coefficient correcteur conclut à l'absence d'obligation de versement (...) et donc à l'irrégularité de votre dossier.*" The Director explained that "*[s]elon les documents qui figurent dans votre dossier, le montant du plafond contractuel de votre CEL a été atteint étant donné qu'il a été régulièrement vidé vers un compte sur livret (...)*".

The Director also stated that "*(...) l'Institution est en droit au titre de l'article 85 du Statut - répétition de l'indu - de procéder au recouvrement des avantages indument perçus par l'application des coefficients correcteurs sur les montants qui ont été transférés sans justification conforme à la réglementation.*" (24)

In his complaint to the Ombudsman, the complainant alleged that the Committee's decision to stop transfers abroad was unlawful.

The complainant claimed that the Committee should recommence the transfers, with retroactive effect.

1.2 In its opinion, the Committee referred to an ex-post control of the transfers files which was carried out following the entry into force of the new Staff Regulations, as well as to the April 2005 communication from its Secretary-General to the staff, in which he decided to adopt a more restrictive approach to the transfers justified by home savings contracts not containing an obligation to make regular monthly payments. That approach was based on a more thorough interpretation of the (French) word "*dues*" in the (French) term "*primes dues*" in the final indent of the second paragraph of Article 2 of the Common Rules. The Committee went on to state that the complainant was informed of the decision to suspend his transfers by the Director's note of 30 May 2005, which he challenged by complaint of 30 August 2005. That complaint was deemed to have been rejected on the ground that the Committee had not sent a reasoned reply to it within the statutory period. As regards the complainant's claim, the Committee stated that, given that he had not, at that time, turned to the European Union Civil Service Tribunal, he was no longer in a position to initiate legal action designed to ensure the recommencement of his transfers.

1.3 In the course of the present inquiry, both the complainant and the Committee informed the Ombudsman of a legal action which the complainant had initiated before the European Union Civil Service Tribunal.

According to the complainant, the legal proceedings concern an aspect different from, and subsequent to, the facts which gave rise to his complaint to the Ombudsman, and, more precisely, two recovery decisions which, according to him, are by no means linked to the cessation of his transfers.



According to the Committee, the legal proceedings are based on the facts that were submitted for the Ombudsman's examination in the framework of the present complaint.

1.4 The Ombudsman has carefully studied the summary of the application which the complainant submitted to the Civil Service Tribunal (25) . According to that summary, the forms of order sought include the following:

- " - annul the decision of the Administration Director and the Secretary General of the [Committee] of 26 July 2006 to recover the amounts paid to the applicant in application of the correction coefficient for that part of his remuneration transferred to France between March 2003 and May 2005;*
- annul the decision of 4 December 2006 of the Administration Director of [Committee] fixing that amount at EUR 3 600,16;*
- order the [Committee] to repay to the applicant the sum of EUR 3 600,16, plus default interest at the rate of 8 % per annum from the date of the recovery until payment in full;*
- order the [Committee] to pay to the applicant the amount which should have been paid to him if the correct correction coefficient had been applied to the part of his remuneration which should have been transferred to France from June 2005 , plus default interest at the rate of 8 % per annum from the date of the recovery until payment in full;*
- order the [Committee] to resume , from the date of the future judgment, the transfer of part of the applicant's remuneration to France, with the correction coefficient applicable to that country;*
- order the [Committee] to pay the costs. " (Emphasis added).*

1.5 The Ombudsman further notes that, according to the same summary, the pleas in law and the main arguments put forward by the complainant before the Civil Service Tribunal are as follows:

" The first plea in law alleges infringement of (i) Article 85 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), (ii) the final indent of the second paragraph of Article 2 of the Rules laying down the procedure for the transfer of part of an official's emoluments ('the Common Rules') and (iii) paragraphs 2 and 4 of Conclusion No 204/92 of the Heads of Administration of 3 December 1992. According to the applicant, the [Committee] could not hold that he was not entitled, pursuant to Article 17(2) of Annex VII to the Staff Regulations, to have part of his remuneration transferred to his [home] savings account in France on the ground that he had, through transfers to a deposit account, brought his [home] savings account once more below the maximum amount which could be saved. In particular, he submits that (i) the Common Rules do not require that transfers correspond to obligatory payments and (ii) bringing the [home] savings account below the maximum limit in this way is an established banking practice which complies with French law on [home] savings accounts, as



referred to by the Conclusion of the Administrative Heads.

The second plea in law alleges infringement of Article 85 of the Staff Regulations inasmuch as the [Committee] found that the irregularity of the transfers at issue was so apparent that, in view of his [...] qualifications, the applicant was or, at the very least, ought to have been aware of it. In that respect, the applicant considers that: (i) in the light of the Conclusion of the Heads of Administration, the [home] savings account which he opened appeared to correspond to the concept of '[home] savings contract' for the purposes of the Common Rules; (ii) bringing the [home] savings account below the maximum limit in the way he did appeared to comply with those rules; (iii) following reviews in December 2003 and December 2004, his personnel file appeared to be complete and in order; (iv) having only restricted access to his personnel file, he was not in a position to consult the necessary documents in order to review whether the transfers were in order. " (Emphasis added).

1.6 It appears therefore that the complainant's first allegation and related claim are based on the facts which are now the subject of legal proceedings before the Civil Service Tribunal. In particular, it is obvious from the fourth indent in point 1.4 above that, contrary to the view which the complainant expressed in his e-mail of 26 July 2007, those legal proceedings do not only concern aspects different from, and subsequent to, the facts which gave rise to the present complaint.

1.7 The Ombudsman recalls that Article 195 of the Treaty establishing the European Community empowers him to receive complaints " (...) *concerning instances of maladministration in the activities of the Community institutions or bodies (...) except where the alleged facts are or have been the subject of legal proceedings.* "

Moreover, Article 2(7) of the European Ombudsman's Statute provides that " *when the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any inquiries he has carried out up to that point shall be filed without further action.* "

In light of his finding in point 1.6 above, the Ombudsman therefore terminates his consideration of the complaint as regards the first allegation and related claim and files the outcome of his inquiries carried out so far without further action.

2 Alleged failure to inform the complainant about the missing documents and related claim

2.1 The complainant alleged that the Committee failed to provide him with accurate and timely information with respect to the status of his file and to documents that may have been missing from it, and claimed that such information should be given to him.

2.2 The Committee acknowledged that its administration has not provided the complainant with a list of documents which could be accepted as justifying his transfers, but took the view that it is not for the administration to do so in the present case. The Committee added that the situation differs depending on the respective national legislation and it is not the administration's



responsibility to take all the steps in order to enable the officials to benefit from all the possibilities provided by the Staff Regulations. The Committee noted that the complainant, as a former [...] as well as its former [...], could not be unaware of the supporting documents necessary for making his file conform to the new interpretation of the legal provisions.

2.3 The Ombudsman does not find the Committee's above views to be entirely convincing. However, the Ombudsman also notes that the summary in point 1.5 above includes the following pleas in law and main arguments put forward by the complainant before the Civil Service Tribunal:

" The second plea in law alleges infringement of Article 85 of the Staff Regulations inasmuch as the [Committee] found that the irregularity of the transfers at issue was so apparent that, in view of his [...] qualifications, the applicant was or, at the very least, ought to have been aware of it . In that respect, the applicant considers that (...) having only restricted access to his personnel file, he was not in a position to consult the necessary documents in order to review whether the transfers were in order . " (Emphasis added).

2.4 It appears therefore that the complainant's allegation is based on the facts which are now the subject of legal proceedings before the Civil Service Tribunal.

Therefore, on the basis of Article 195 of the Treaty establishing the European Community and Article 2(7) of his Statute, the Ombudsman terminates his consideration of the complaint as regards the second allegation and files the outcome of his inquiries carried out so far without further action.

2.5 The Ombudsman considers that, given that the recovery of unduly paid sums has already been carried out, the complainant's related claim, designed to enable him to prevent the Committee from proceeding with that recovery, has become obsolete. Therefore, that claim cannot be sustained.

3 Alleged unlawful processing of personal data and related claim

3.1 The complainant alleged that the Committee has been unlawfully processing personal data concerning his private finances. He claimed that the Committee should enable him to access his file so that he can request the erasure of personal data which the file should not contain.

3.2 In its opinion, the Committee failed to comment on the above allegation. As regards the related claim, it stated that it had never refused the complainant access to his file containing his personal data. The Committee pointed out that, following the complainant's request of 28 September 2005, the Director authorised him to view his file, accompanied by the head of the personnel unit and the internal auditor.

3.3 The Ombudsman regrets that the Committee failed to answer the third allegation in its opinion.

In the Ombudsman's understanding, however, the issue of the alleged unlawful processing of personal data and the claim for access to the file in this regard constituted one of the procedural



and preparatory aspects related to the complainant's efforts to clarify his situation in the context of the Committee's decision to stop his transfers abroad.

The above decision to stop the complainant's transfers is now the subject of legal proceedings before the Civil Service Tribunal, and, as explained in point 1.7 above, the Ombudsman has decided to terminate his consideration of the complaint in that regard.

The Ombudsman considers therefore that all procedural aspects related to the above decision should not be dealt with, for the same reason.

4 Alleged failure to answer Article 90(2) complaints and related claim

4.1 The complainant alleged that the Committee failed to answer his four complaints made under Article 90(2) of the Staff Regulations. He claimed that the Committee should answer those complaints.

The complaints in question were: (i) the complaint of 30 August 2005 against the cessation of the complainant's transfers; (ii) a complaint concerning the restriction of his right to access his file; (iii) a complaint concerning moral harassment; and (iv) the complaint of 24 March 2006 against the decision on the recovery which, in the complainant's view, was made official by means of the Director's note Ref. NI 1963/06 of 21 March 2006.

4.2 The Committee stated that it has not drafted a formal answer to the complainant's first complaint of 30 August 2005 because, given the number of its e-mail contacts with the complainant, the situation became so confused that it believed that it had satisfied his requests for clarification. The Committee expressed its regrets for this. It added that it did not answer the two further complaints because they had not been forwarded to and officially registered by it (*transmises et enregistrées officiellement par le Comité*). As regards the fourth complaint of 24 March 2006, the Committee stated that it answered it on 17 July 2006, and provided a copy of that answer.

4.3 The Ombudsman recalls that, in his decision on complaint 2227/2004/MF (26) , he took the position that the failure to reply to a complaint made under Article 90(2) of the Staff Regulations within the period of time stipulated in that provision constitutes an instance of maladministration.

4.4 However, the Ombudsman notes that (i) the Committee expressed its regrets at not having answered the first complaint of 30 August 2005; (ii) in his observations, the complainant did not put forward any evidence contesting the Committee's statement that the two further complaints which it did not answer had not been forwarded to and officially registered by it; and (iii) the Committee answered the fourth complaint of 24 March 2006 on 17 July 2006.

4.5 In light of the above the Ombudsman considers that no further inquiry is justified as regards the fourth allegation and the related claim.

5 Conclusion

The Ombudsman terminates consideration of the complaint and files the outcome of his inquiries carried out so far without further action.



The Secretary-General of the Committee and the EDPS will be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Staff Regulations prior their amendment by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1).

According to the first paragraph of Article 17(2) of Annex VII of the (old) Staff Regulations, an official could, under the terms laid down in the rules drawn up by common agreement by the institutions, have regular transfers of part of his or her emoluments through the institution which he or she served, up to a maximum amount equal to his or her expatriation or foreign residence allowance.

According to Article 17(2)(b) of Annex VII of the (old) Staff Regulations, an official could, under the terms laid down in rules drawn up by common agreement by the institutions, have regular transfers made in excess of the above maximum, provided that they were intended to cover expenditure arising in particular out of commitments that were shown to be regularly undertaken outside the country where the institution had its seat or outside the country where the official carried out his or her duties.

Article 17(3) of Annex VII of the (old) Staff Regulations provided that the transfers were to be made at the exchange rate specified in the second paragraph of Article 63 of the old Staff Regulations and the amounts transferred were to be multiplied by a coefficient representing the relationship between the weighting for the country in the currency of which the transfer was made and the weighting for the country in which the official was employed.

(2) The Common Rules are available at the Intranet of the European Parliament (http://www.europarl.ep.ec/inside/Statut2004/commun_46_en.htm [Link]). According to Article 2 of the Common Rules, an official may also have part of his emoluments regularly transferred through the institution which he serves in excess of the amount of his expatriation or foreign residence allowance, provided that such transfers are intended to cover expenditure arising out of commitments proved to have been regularly undertaken by the official outside his country of employment. Among the expenditure regarded as justifying such transfers, the following are listed, in the final indent of the second paragraph:

" (...) upon presentation of the relevant contract, life and invalidity insurance premiums or building society payments in connection with the real estate transactions (...) "

(3) The Ombudsman notes that the English-language version of the Common Rules uses the



term " *payments in connection with* " in order to translate the French term " *primes dues* ".

(4) " (...) *An official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them. (...)* "

(5) This quotation from the Note was provided by the complainant. The Ombudsman did not receive a copy of the Note itself.

(6) The Ombudsman understands that the complainant refers to his e-mail of 30 August 2005 to the Director.

(7) The Ombudsman understands that the complainant refers to his e-mail of 28 September 2005 to the Director.

(8) The Ombudsman did not receive a copy of the complaint or an indication of the date on which it was made.

(9) A copy of the note was provided by the Committee as annex 5 to its opinion.

(10) The Ombudsman understands the Committee to refer to different linguistic versions of the Common Rules.

(11) See Article 17 of Annex VIII of the new Staff Regulations.

(12) The Committee attached a copy of the communication. It refers to a more thorough interpretation of the (French) word " *dues* " in the (French) term " *primes dues* " contained in the final indent of the second paragraph of Article 2 of the Common Rules. On the basis of this new interpretation, that provision cannot serve as a legal basis for transfers in the event that the contracts in question do not impose obligatory payments. According to the communication, many of the contracts of the Committee's officials foresee optional payments . Therefore, the staff concerned was informed that, with effect from June 2005, the payments made on the basis of contracts containing a mere possibility (but not an obligation) to make payments would no longer be considered as being in line with the second paragraph of Article 2 of the Common Rules and could not, as a consequence, justify the continuation of the transfers.

(13) The complainant's e-mail of 30 August 2005 is summarised in greater detail on page 3 above.

(14) The note of 1 June 2006 is summarised on page 4 above. In the note of 26 July 2006, the Director confirmed again that an in-depth analysis of the complainant's file showed the absence of an obligation to make payments. He also informed the complainant of the difference between the total amount corresponding to his transfers and the balance on his home savings account, and of the amount to be recovered from him corresponding to the bonus of the corrective coefficient.



- (15) The complainant's e-mail of 30 August 2005 is summarised on page 3 above.
- (16) This complaint was directed against the decision concerning recovery, which, in the complainant's view, was made official by means of the Director's note Ref. NI 1963/06 of 21 March 2006 to the authorising officer by delegation.
- (17) The Committee provided a copy of the answer, in which the Appointing Authority contested the existence of an act adversely affecting the complainant and rejected the complaint on that ground.
- (18) The complainant did not attach to his observations the relevant copies.
- (19) The Committee provided a copy of the answer, in which the Appointing Authority contested the existence of an act adversely affecting the complainant, and rejected the complaint on that ground.
- (20) This complaint was directed against the decision to seek recovery which, in the complainant's view, was made official by means of the Director's note Ref. NI 1963/06 of 21 March 2006 to the authorising officer by delegation.
- (21) OJ 2001 L 8, p. 1.
- (22) See note 1 above.
- (23) See note 2 above.
- (24) A copy of the note was provided by the Committee as annex 5 to its opinion.
- (25) [OJ reference]
- (26) The decision is available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).