European Ombudsman

Decision of the European Ombudsman closing his own-initiative inquiry OI/4/2005/GG concerning the European Commission

Decision
Case OI/4/2005/GG - **Opened on** 07/09/2005 - **Recommendation on** 14/11/2007 - **Decision on** 20/01/2009

In 1996, a German NGO which supports refugees and victims of war requested the Commission that it be allowed to sign the Framework Partnership Agreement (FPA) with a view to carrying out humanitarian work in co-operation with the Commission. In 2001, the Commission rejected the NGO's application. Following the Commission's decision, the NGO submitted a number of complaints to the Ombudsman.

In a letter of 6 July 2005, the NGO submitted that the Commission had disadvantaged it deliberately and acted fraudulently as regards the way it handled its application. Following this letter, the Ombudsman opened an own-initiative inquiry.

The Commission took the view that the complainant's submissions were unfounded. The Ombudsman identified a number of serious instances of maladministration in this case. In addition to the deficiencies he had already identified in previous decisions (notably, concerning complaints 1702/2001/GG and 2862/2004/GG), he took the view that the Commission had deliberately concealed the truth and thus misled the NGO. The way in which the Commission handled the NGO's application had moreover seriously disadvantaged the complainant.

Therefore, in a draft recommendation, the Ombudsman asked the Commission to apologise to the NGO and to consider whether there were further possibilities to make amends to it. The Ombudsman further urged the Commission to consider whether further action needed to be taken to prevent such maladministration from arising again.

The Commission admitted that it should have handled the application with more diligence. It did not, however, apologise to the NGO. The Commission also pointed out that the relevant procedures had been improved considerably in the meanwhile.

The Ombudsman considered that the Commission's admission was not sufficient to address the serious concerns raised in his draft recommendation. He noted the Commission's continued refusal to take any concrete steps as regards the NGO's case and observed that this approach could only be interpreted as a deliberate refusal to co-operate with him. However, given that the

maladministration had taken place a long time ago and that a new FPA was now in force, the Ombudsman considered that it would not be appropriate to submit a special report to Parliament in this case. He thus closed the case with a critical remark.

THE BACKGROUND TO THE OWN-INITIATIVE INQUIRY

Factual background

1. On 20 March 1996, Internationaler Hilfsfonds e.V. ("IH", a German NGO) applied to the European Commission's Directorate-General for Humanitarian Aid ("ECHO"), requesting to be allowed to sign the 'Framework Partnership Agreement' ("FPA"). As a general rule, ECHO carries out its humanitarian work with partner agencies that have signed the FPA, which defines the roles, the rights and obligations of the partners and the legal provisions that are applicable. This allows ECHO to proceed quickly without having to verify each time the eligibility of an implementing organisation.

2. In a letter dated 1 June 1999, ECHO informed IH that a new FPA had entered into force on 1 January 1999. ECHO pointed out that the eligibility criteria which applicants had to fulfil had been laid down in Article 7 of Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid [1] . It added that the compliance with these criteria by NGOs like IH would be checked in the third part of a three-stage procedure.

3. On 14 December 2000, ECHO informed IH that after having signed the new agreement with the signatory organisations of the previous FPA, it was now able to analyse the 400 NGO applications it had received, including IH's. ECHO noted that IH could, in the meantime, submit proposals for operational projects that could be "accepted exceptionally, provided that your national authorities confirm the eligibility of your organisation in accordance with Article 7 § 1 and 2 of the above-mentioned regulation and to implement special operations in regions not covered by existing ECHO partners".

4. By fax dated 23 January 2001, ECHO contacted IH proposing to carry out an audit to verify the latter's compliance with the requirements of Article 7 of Regulation 1257/96. In the end, no such audit was carried out.

5. In a letter of 1 February 2001, ECHO informed IH that, upon receiving its application in 1995 it had, "[i]n line with the normal conditions for signing the Framework Partnership Agreement (FPA)", asked the German national authorities for confirmation of IH's suitability and that they had failed to provide such confirmation.

6. On 19 July 2001, IH was informed that its application had been rejected.

7. In its letter of 19 July 2001 and a subsequent letter of 27 August 2001, the Commission noted that ECHO had written to the German Foreign Office on 16 February 1995 (after IH had, in a

letter of 9 February 1995, requested a copy of the FPA), asking for a reference for IH. The Commission submitted that, in the absence of a positive reply from the German authorities, ECHO had decided to suspend IH's application.

8. The following facts subsequently emerged:

9. On 15 March 1995, the Foreign Office had forwarded the following reply:

"According to our informations [sic] this NGO works also under the name of Welthilfe e.V. Their activities have given reasons for official prosecution, which are still under way. Therefore, you please allow me to refrain from any recommendation at this stage. As far as we are informed, the DG 8 would be able to add to your informations."

10. In October 1995, ECHO reiterated its request for information to the German authorities. In an internal note dated 17 November 1995, ECHO's adviser for institutional relations, Mr C., informed the ECHO official in charge of the file that his contact person at the German authorities was unable to give any reference concerning IH for the following reason:

"Son bureau ne travaille pas avec cette organisation et donc ne les connait pas."

Complaint 1702/2001/GG

11. In September 2001, IH submitted a first complaint concerning this case to the Ombudsman (complaint 1702/2001/GG). In this complaint, IH made the following allegations:
- ECHO's failure to react to its original application lodged in 1995 was an instance of discrimination and maladministration;
- ECHO had failed to give it the opportunity to be heard regarding the information provided by the German Foreign Office in 1995;
- No potential partner could be expected to submit proposals on the basis of such vague information as was contained in ECHO's letter of 14 December 2000. It thus appeared that ECHO wished to protect its existing partners from undesirable competition from other NGOs;
- ECHO's insistence that IH's compliance with the eligibility criteria be checked by means of an audit was an instance of discrimination and maladministration, given that ECHO had signed the new FPA "with NGOs who have already obtained several operational contracts with ECHO but were not able to sign the [previous] FPA" (see ECHO's letter of 1 February 2001); and
- ECHO refused to grant full access to its file.

12. IH asked the Ombudsman (a) to find that there was maladministration, (b) to correct the misinformation damaging its reputation in ECHO's files, (c) to instruct ECHO to grant full access to its file and (d) to re-open this file.

13. In his decision on this case, the Ombudsman made the following critical remarks:

It is good administrative practice that applications should be examined in the light of the requirements to which they are subjected by the rules in force. In the present case, the

Commission considered that IH's application could not be handled in the absence of a reference from the German authorities. However, neither of the provisions relevant for this case contained a condition to the effect that such a reference was needed before an application could be approved. ECHO's decision not to deal with the application on the grounds that a reference from national authorities was missing thus constitutes an instance of maladministration.

Principles of good administration require that applicants are kept informed about the decisions the administration adopts in their regard, all the more so if such information is requested by applicants [2] . In the present case, the Commission alleged that, in the absence of a reference from the national authorities, it decided to 'suspend' the treatment of the application. The Ombudsman notes than this decision (if it was indeed taken) was never brought to IH's attention, although the latter had inquired about the state of the procedure at least once. ECHO's failure to keep IH informed about this decision thus constitutes a further instance of maladministration.

It is good administrative practice to deal with applications within a reasonable time. In the present case, no decision was taken and communicated to IH on the application lodged in March 1996 before the expiry of the first FPA at the end of 1998. As a matter of fact, it took the Commission more than three years before it informed IH, in its letter of 1 June 1999, about the approach it intended to pursue in its regard. No valid explanation was presented by the Commission for this delay. The Ombudsman thus concludes that ECHO's failure to deal with the application within a reasonable period constitutes a third instance of maladministration.

Principles of good administrative practice require that an applicant has the right, in cases where a decision affecting his rights or interests is taken, to submit comments before the decision is taken. In the present case, ECHO decided to 'suspend' IH's application on the basis of information received from the German authorities without giving IH the chance to comment on this information. This constitutes a further instance of maladministration.

14. As regards the allegation that ECHO's failure to deal with IH's application also constituted discrimination, the Ombudsman considered that IH had not put forward sufficient evidence to support this allegation. Likewise, the Ombudsman took the view that IH had not established its allegation that NGOs could not be expected to submit proposals for operational projects before having signed the FPA and its allegation that it had been discriminated on the grounds that ECHO had insisted on an audit in the present case.

Complaint 2862/2004/GG

15. In September 2004, IH requested the Ombudsman to open a new inquiry.

16. In its opinion in case 1702/2001/GG, ECHO had pointed at its correspondence with the German Foreign Office in 1995 and had submitted that, despite continuous contacts between its services and the German Foreign Office, no further information concerning IH had been provided by the German authorities until 15 November 2001. In its new complaint, IH referred to information that it had received from the German Foreign Office. According to this information,

which was contained in a letter dated 4 July 2002, the German Foreign Office had not felt obliged to provide ECHO with further information regarding IH after its letter of 15 March 1995, and ECHO had never asked it about the state of the proceedings to which it had referred in this letter. In the light of these circumstances, IH alleged that ECHO had, contrary to its own statements, never tried to obtain up-to-date, relevant and ascertainably correct information on it, and had lied to the Ombudsman in its opinion in case 1702/2001/GG.

17. IH further alleged that ECHO's handling of its application showed that ECHO had acted in a deliberately fraudulent way. It also alleged that ECHO's reproach according to which IH had not declared itself willing to be subjected to an audit was incorrect.

18. In his decision on this complaint, the Ombudsman made the following critical remark:

In its opinion in case 1702/2001/GG, the Commission submitted that "despite continuous contacts between ECHO and the German Foreign Office" no further information concerning IH had been provided by the German authorities until 15 November 2001. In the Ombudsman's view, this statement was bound to be understood as referring to contacts concerning IH's case (and not to contacts concerning other German NGOs). It appeared, however, that no such contacts were made after the one described in the Commission's internal note dated 17 November 1995. In these circumstances, the Ombudsman considers that the Commission's statement was misleading. This constitutes an instance of maladministration.

19. The Ombudsman noted that, although the relevant statement had certainly been misleading, there was not enough evidence to show that it constituted a deliberate lie. He also considered that, whilst the Commission's way of handling IH's application to sign the FPA had been incorrect and deficient in several respects (that had been summarised in the critical remarks made by the Ombudsman in his decision closing the inquiry into complaint 1702/2001/GG), IH had not been able to substantiate its allegation that the Commission had acted in a deliberately fraudulent way when handling its application. Furthermore, the Ombudsman took the view that no maladministration could be found as regards the allegation that ECHO's reproach according to which IH had not declared itself willing to be subjected to an audit was incorrect.

THE SUBJECT MATTER OF THE INQUIRY

IH's letter of 6 July 2005

20. In a letter of 6 July 2005, IH submitted detailed comments and provided a considerable number of documents in order to support its allegation that ECHO had disadvantaged it deliberately and had acted fraudulently as regards the way it had handled IH's application of 20 March 1996 to join the FPA. IH also made numerous further allegations.

The Ombudsman's approach

21. Having examined this material, the Ombudsman took the view that the arguments put

forward by IH merited a closer examination. The Ombudsman considered that the best way to do so was by opening an own-initiative inquiry into the main allegation submitted by IH.

22. As regards the additional allegations set out in IH's letter of 6 July 2005, it appeared that a great part thereof was linked to the main allegation mentioned above. In the Ombudsman's view, there was thus no reason to deal with all these allegations one by one. The remainder of these allegations appeared to concern procedural issues that had already been dealt with in the Ombudsman's decisions on complaints 1702/2001/GG and 2862/2004/GG. The Ombudsman therefore took the view that no further inquiry was thus needed in that regard, either.

The information requested in the own-initiative inquiry

23. Given that IH's letter of 8 July 2005 comprised 44 pages of text and well over a hundred pages of enclosures, the Ombudsman considered it useful to focus the inquiry by summarising the issues that needed to be dealt with by the Commission.

24. In his letter opening the new inquiry, the Ombudsman therefore requested the Commission to provide him with an opinion on the allegation that ECHO had disadvantaged IH deliberately and acted fraudulently as regards IH's application of 20 March 1996 to join the FPA.

25. The Ombudsman set out the following summary of the most important arguments raised by IH in this context:
- ECHO's decision to suspend IH's application had been based on the 'information' provided by the German Foreign Office on 15 March 1995. However, even though the latter had, later that year, informed ECHO that it did not know IH, ECHO had failed to cancel the suspension.
- ECHO had suspended IH's application before the latter had even been submitted to ECHO.
- Prior to its letter of 27 August 2001, ECHO had never informed IH that its application had been suspended.
- ECHO had never looked for other sources of information on IH although it could have done so:

* In its application to sign the FPA submitted on 20 March 1996, IH had referred to its experience regarding the provision of emergency aid, particularly its contribution to UNESCO's Chernobyl programme that had also received financial support from the Commission's DG I. Together with its application or afterwards, IH had also submitted various positive references. ECHO had nevertheless refrained from turning to UNESCO or DG I in order to obtain a view on IH's performance. According to IH, ECHO had done all it could to avoid obtaining information from neutral sources.

* On 25 June 1996, IH had informed ECHO that it had received an honorary diploma from the Ukraine in recognition of its work and that it had been accepted as a member by the "Deutscher Spendenrat", an association of German NGOs. ECHO could thus have obtained information on IH from this source but had chosen not to do so.

* In a letter sent on 3 September 1997, IH had informed ECHO that its emergency aid for countries of the former USSR and Eastern Europe now amounted to more than DM 27 million.

IH had also informed ECHO that it had been accepted as a member of the "Verband Entwicklungspolitik deutscher Nichtregierungsorganisationen" ('VENRO'). ECHO would thus have had another source from which to obtain updated information on IH.
- On 17 October 1995, ECHO had informed IH that a proposal for a project that it had submitted had, for certain reasons relating to substance, not been selected for funding. ECHO had thus deceived IH by leading it to believe that its proposal had been considered, without mentioning that its application to sign the FPA had been suspended. The closing formula of ECHO's letter, according to which ECHO was looking forward to "continued cooperation in the future", could only be considered to be a deliberately fraudulent deception in IH's view.
- On 11 July 1996, IH had asked ECHO what had become of its application to sign the FPA. According to IH, no reply was given to this letter.
- In its letter of 12 July 1996, by which it replied to IH's letter of 25 June 1996, ECHO stated that it had "noted" IH's request to sign the FPA and that it would keep IH informed of further developments. According to IH, ECHO had thus again created the impression that IH was a serious applicant for signing the FPA.
- By letter of 6 August 1996, ECHO informed IH that another proposal for a project that it had submitted had not been selected for financing on account of budgetary restrictions. According to IH, it had thus again been deceived into believing that it was a serious candidate for signing the FPA.
- In a letter sent on 3 September 1997, IH again asked for information on progress regarding its application, expressing the hope that it would not be kept waiting any longer. However, the "early reply" for which IH had asked in this letter was, according to IH, not given by ECHO.
- In a letter of 19 January 1998 that appears to have followed a telephone conversation, IH again referred to its application of 20 March 1996 and asked what steps it had to take in order to obtain co-financing for humanitarian aid projects from ECHO. IH also submitted further information on its work. According to IH, this letter was not replied to.
- On 20 January 1999, IH informed ECHO that its emergency aid for countries of the former USSR and Eastern Europe now amounted to more than DM 32 million. According to IH, hardly any of the NGOs that had signed the FPA could show similar results. In its reply of 26 January 1999, ECHO pointed out that, as a general rule, it carried out its humanitarian work with partner agencies that had previously signed the FPA. ECHO suggested that IH could contact Mr G. for general questions regarding the FPA.
- In its reply of 18 February 1999, IH stressed that it had already applied for permission to sign the FPA in 1996. IH therefore queried whether some NGOs were 'more equal' than others. According to IH, no reply was given to this letter.
- On 19 May 1999, IH again reminded ECHO that its application of 1996 had not been dealt with yet. In its reply of 1 June 1999, ECHO noted that a new FPA had entered into force on 1 January 1999, that it was currently organising meetings in order to sign this FPA with its existing partners and that requests for partnership from NGOs that had obtained contracts from ECHO in the past would be examined next. ECHO further explained that the last step would be to check compliance with the eligibility criteria by those NGOs that had never worked with ECHO and that IH belonged to this third category. According to IH, it had thus been deceived again.
- In its reply of 23 June 1999, IH objected to ECHO's approach and claimed that it should have been allowed to sign the FPA well before the new one had entered into force. IH also asked whether it could already now submit proposals for projects to ECHO. According to IH, no reply

was given to this letter.
- On 17 May 2000, IH again asked for information on when it could sign the FPA. In its reply of 22 May 2000, ECHO apologised for the delay, pointing to its heavy workload. ECHO stressed that it would inform IH in due course about the result of its application.
- In a letter sent on 14 December 2000, ECHO again apologised for the delay and stated that, after having signed the new FPA with the previous signatories, it was now able to deal with the applications of the 400 other NGOs, including that of IH.
- On 1 February 2001, and in reply to telephone calls IH had made, ECHO informed IH that it was true that it had already applied for permission to sign the previous FPA but went on to add: "In line with the normal conditions for signing the Framework Partnership Agreement (FPA), the German national authorities were asked for confirmation of your suitability. They failed to provide it." ECHO stressed that new rules had since been adopted, that the FPA had had to be amended accordingly and that the new FPA had entered into force on 1 January 1999.
- In its letter of 19 July 2001 (replying to a letter addressed to it by IH on 6 July 2001), ECHO stated inter alia the following:

"As you are well aware, the German authority responsible for providing information concerning humanitarian organisations in Germany is the *Auswärtiges Amt* . ECHO duly consulted it for this purpose in 1995, after receiving your application to sign the FPA. In the absence of a positive response from the German authorities, the application could not be treated.

In 1999, with the entry into force of a new FPA, ECHO re-opened your application file and decided to proceed to an eligibility audit, which is the normal procedure adopted with all applicants when the national authorities do not confirm their compliance with art. 7 [of Regulation 1257/96]".

According to IH, these statements constituted deliberate lies.
- IH took the view that ECHO had never examined its application between 1996 and 2001, that it had been brutally discriminated against over 6 years, that ECHO had acted arbitrarily and unfairly by boycotting it and that ECHO had, on the basis of incorrect and unchecked information, deliberately and fraudulently excluded it from the FPA procedure.

THE INQUIRY

26. On 7 September 2005, the Ombudsman asked the Commission for an opinion on this case. The Commission sent its opinion on 19 December 2005. The opinion was forwarded to IH, which presented its observations on 3 April 2006.

27. On 3 May 2006, IH forwarded to the Ombudsman a copy of an application that it had submitted to the Court of First Instance on 21 April 2006. This application appeared to relate to the facts covered by the present inquiry. In a letter sent on 15 May 2006, the Ombudsman informed IH that he might have to terminate the present inquiry in light of the case that had been brought before the Court of First Instance. However, before doing so, he invited IH to present observations on this issue. In its reply, which was sent the same day, IH informed the

Ombudsman that it had withdrawn the said application and that the present inquiry should therefore continue.

28. On 16 June, 28 August, 10 and 12 September 2006, IH provided further information to the Ombudsman.

29. On 14 November 2007, the Ombudsman addressed a draft recommendation to the Commission.

30. On 27 November 2007, IH wrote to the Ombudsman in order to express its gratitude for the approach adopted by him.

31. On 11 December 2007, the Ombudsman informed IH that, further to its requests to that effect, a copy of the draft recommendation had been forwarded to the Presidents of the European Court of Justice and of the European Parliament.

32. The Commission sent its detailed opinion on 30 April 2008. This opinion was forwarded to IH for its observations, which it sent on 9 May, 28 July, 4, 9 and 12 December 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remarks

33. Before addressing the substance of the present complaint, two preliminary issues should be considered.

34. First, it should be noted that the present inquiry, comprehensive though its coverage may otherwise be, only concerns the handling of IH's application to sign the FPA until its rejection on 19 July 2001. In its observations on the Commission's opinion and in other correspondence, IH also referred to a note drawn up by ECHO on 11 September 2001 that, in IH's view, blacklists it on the grounds that it had raised allegations of maladministration against the Commission. This is a further, serious allegation. However, given that the issue thus raised is not inextricably linked to the subject of the present own-initiative inquiry, the Ombudsman considered it preferable to register it as a separate complaint (1434/2006/GG). The issue raised in this complaint has since been taken up in an own-initiative inquiry opened by the Ombudsman (OI/3/2007/GG).

35. Second, in its opinion, the Commission has stressed that ECHO's mandate is primarily to save and preserve lives through the most reliable implementing partners available and that the NGOs it uses for this purpose deliver the aid, but are not the final beneficiaries of the funds. The Ombudsman entirely agrees with these remarks. However, the fact that ECHO's main duty is towards the recipients of the EU's humanitarian aid does not exonerate it from the duty to comply with principles of good administration in its relations with partner organisations. The

Ombudsman is pleased to note that the Commission has itself pointed out that it is always committed to a serious and fair assessment of all applications based on the applicable rules.

B. The handling of IH's application by the Commission

Arguments presented to the Ombudsman

36. In its opinion, the Commission made the following comments:

37. The Commission identified the following new elements as compared to previous complaints already examined and closed by the Ombudsman:
- According to IH, the Commission did not take into consideration the references provided by IH in the framework of its application and therefore did not turn either to UNESCO or to DG I in order to obtain a view of IH's operational performance;
- IH alleged that the Commission did not pay due attention to the honorary diploma received by IH from the Ukraine in recognition of its work and did not turn to Deutscher Spendenrat to obtain information about IH; and
- IH further alleged that the Commission did not address VENRO in order to get a source of updated information on IH.

38. The Commission confirmed that it did not use the above-mentioned sources of information as this did not constitute a normal administrative practice at that moment in time; nor was it standard practice under the current selection procedure. For information about FPA applicants, the Commission mainly relied on the analysis of the documents received from the applicants themselves as well as on references from the relevant national authorities (i.e., those chosen by the Member States as their representatives in the Humanitarian Aid Committee). The Commission reserved the right to check and, if applicable, to override any of these references by carrying out direct verifications on applicants (see Article 9.4 of the FPA).

39. What might appear as an additional new element brought forward by IH, namely the allegation that the Commission on several occasions deceived IH in its legitimate expectations, was not a fact but a personal interpretation of the facts. According to IH, these alleged deceptions were of two kinds: those related to the signature of the FPA and those related to the signature of individual funding agreements for humanitarian operations. As regards the signature of the FPA, IH invoked the letter of 12 July 1996 in which the Commission had stated that it would keep IH informed of further developments. This was actually the case. Indeed, for the Commission, at that moment, the application file of IH was not yet closed. As regards the individual funding agreements, IH made an arbitrary link between the justifications given by the Commission for the rejection of two project proposals made by IH and the status of IH's application to sign the FPA. The Commission could therefore not agree with IH's allegations that it had deceived the latter in its legitimate hopes.

40. The remaining allegations brought forward by IH seemed, once more, to concern the same facts that happened between 1996 and 1999 and to convey the same suspicions that had

already been repeatedly and thoroughly examined by the Ombudsman in his previous inquiries. To these allegations, the Commission could only reply by confirming its previous statements and its good faith in the handling of the application. IH's application had been left pending on the basis of serious concerns. It suffered an administrative delay with scarce information being given to IH, which the Ombudsman had already criticised in his previous decisions. However, IH's application had in no way been subject to any discrimination whatsoever. The fact that from 1996 until 1999 the Commission adopted a stand-by position (pending new information from the national authorities that was not received) rather than a pro-active attitude vis-à-vis those same national authorities (the sole entities entitled to provide admissible references on the applicant) had already been put into question by the Ombudsman on previous occasions.

41. It was true that the Commission could have expeditiously processed the application and rejected it on the basis of the information provided to it in 1995 by the German Foreign Office, bearing in mind that the moral integrity of applicant organisations is an unquestionable criterion of eligibility, as is their transparency in providing all the relevant information in this respect. However, the Commission's failure to do so could not be seen as evidence of a prejudicially negative attitude towards IH. Instead, the Commission left the door open for further developments in the case. It did not actively seek to obtain conclusive evidence of ineligibility.

42. In IH's presentation of the events between 1999 and 2001, the Commission had not found any new elements compared to IH's earlier complaints. On 1 June 1999, IH was informed of the entry into force of a new FPA. The processing of applications was carried out in batches, as announced in the letter of 1 June 1999. As was the case for all other applicants, an eligibility audit was proposed to IH, which the latter refused. The Ombudsman, in his decision on complaint 2862/2004/GG, acknowledged that it appeared "undisputed that the complainant [IH] had not accepted this particular request for an audit". This refusal led the Commission to send IH the rejection letter of 19 July 2001, in which no false statements can be identified.

43. IH's conclusion that the treatment of its application was "discriminatory", "arbitrary", "unfair" and fraudulent" was therefore not only based on the absence of any evidence, but also defamatory for the Commission. In the Commission's view, all that IH was able to establish with its further recollection of events was that the Commission did not expeditiously process its application to sign the FPA in 1996. It appears that the Commission was invited to prove that its attitude was not motivated by a deliberate 'conventio ad excludendum' or intention to discriminate against IH. The Commission reiterated that it had treated IH's application fairly and without any instance of discrimination. IH had failed to prove otherwise.

44. It should once more be underlined that the length of time it took to handle IH's application between 1999 and 2001 could be explained by a number of administrative reasons. These included (i) the imbalance between the number of files to be processed and the resources available at the time of the facts; (ii) the objective concerns about the merits of IH's application, which were based on official and documented information obtained through a customary procedure; and (iii) the Commission's assessment as regards the cost-effectiveness of conducting an *ad-hoc* , labour-intensive investigation into IH's application, in derogation from the customary assessment procedure.

45. In its observations, IH submitted detailed comments covering a whole range of issues. IH's most important comments may be summarised as follows:

46. The Commission's position concerning the references provided by IH was incomprehensible. Point 6 of the Commission's own "Critères operationnels" for the handling of FPA applications explicitly referred to the need to obtain references concerning the applicant. The same was true as regards point 10 of these criteria. IH had provided the Commission with a substantial number of relevant references. The Commission's submission that it did not use the above-mentioned sources of information as this did not constitute a normal administrative practice at that moment in time was simply untrue and a blatant lie. It was rather to be assumed that these references were disregarded since they did not fit in with the negative view of IH that ECHO had already formed.

47. The Commission had referred to the German Foreign Office as the relevant national authority on whose references it relied. However, the German Foreign Office had confirmed, in a letter to IH's lawyer dated 25 November 1996, that it was not competent to assess German NGOs.

48. As regards the letter of 12 July 1996, the Commission had submitted, in its opinion, that the file concerning IH's application had not been complete at that point in time [3] . It was to be asked why ECHO had not simply asked IH to provide the missing information.

49. IH clearly possessed the requisite moral integrity, as was shown by the numerous references that it had submitted to the Commission.

50. The Commission submitted that it could have expeditiously processed the application and rejected it on the basis of the information provided to it in 1995 from the German Foreign Office. In fact, it had been under an obligation to deal with the application expeditiously. However, before rejecting the application on the basis of the said information, IH would have had to be heard.

51. In his note of 17 November 1995, Mr C. had added the following:

"Il paraît que la personne qui a quelques informations précises à propos de cette organisation, est un certain M. [S.] qui est à la DG VIII/B/2. Je pense que tu pourrais t'informer d'une manière plus satisfaisante auprès de M. [S.]."

This confirmed that there had indeed been a link between ECHO and DG VIII, as IH had always suspected.

52. It was clear that the Commission had acted deliberately. Its illegal approach culminated in the decision of 2001 rejecting IH's application. This decision was also illegal, since IH had not been heard beforehand.

53. The Commission failed to admit that it had addressed itself to no one in Germany in order to obtain information on IH after the application had been submitted on 20 March 1996.

54. No other NGO had been treated by ECHO as IH had been.

55. Since 1996, IH had more than a dozen times proposed to DG VIII that it be subjected to a neutral audit. IH had also undergone voluntary audits in Germany, fulfilled the conditions set by VENRO and was subject to a yearly control by the German tax authorities. The leading force in preventing such an audit from being carried out had been the Commission's Legal Service. It was possible that audits were undertaken in 2001 for NGOs that had only recently submitted their applications. However, no NGO that had already applied in 1996 was subjected to an audit. In the circumstances of the case, IH could not be expected to undergo an audit without having previously received clarifications concerning the suspension of its application. By postponing its audit from 1996 to 2001, ECHO had clearly infringed its duty to act fairly.

56. There was no legal basis for an audit by ECHO. Regulation 1257/96 only envisaged audits in the context of financing contracts that had already been concluded.

57. Already in the spring of 1996, the Commission had been informed that the preliminary investigation concerning persons responsible at IH had been closed on 30 April 1996. There was no rule that would have obliged IH to draw ECHO's attention to the fact that a preliminary investigation had been pending. In 1996, ECHO knew that this investigation had been closed.

58. It was clear that the national authorities decided on whether or not an application to sign the FPA was successful. Only NGOs that were agreeable to national authorities could thus be successful. ECHO limited itself to a subservient position and thus omitted to handle applications independently and neutrally. The Ombudsman would act in an inconsistent way if he accorded ECHO the right to insist on an audit that the latter had justified with reference to the information provided to it by the German Foreign Office. It should again be stressed that, in its letter of 14 December 2001, ECHO had indicated that proposals for projects could "exceptionally" be accepted even before the FPA had been signed by IH, "provided that your national authorities confirm the eligibility of your organisation in accordance with article 7 § 1 and 2 of the above-mentioned regulation [Regulation 1257/96]".

59. In its letter of 15 March 1995, the German Foreign Office did not provide any information that was relevant for ascertaining whether IH fulfilled the requisite criteria, but limited itself to stating (incorrectly) that there was an "official prosecution".

60. As an NGO, IH was not obliged to co-operate with the government. The only relevant authorities for it were the German tax authorities. However, the documents concerning these authorities had been submitted together with the application made on 20 March 1996.

The Ombudsman's assessment leading to the draft recommendation

61. The Ombudsman noted that IH basically argued that the handling of its application by the

Commission was not only marked by the individual instances of maladministration that the Ombudsman had already identified but that it was fundamentally flawed. As mentioned above, IH took the view that it had been disadvantaged deliberately by ECHO and that the latter acted fraudulently According to IH, this conclusion imposes itself when one looks at all the relevant facts of the present case in their entirety.

62. In order to ascertain whether this serious allegation is justified, the Ombudsman had to examine all the relevant facts and arguments with a view to assessing whether they support IH's position. In doing so, it appeared appropriate to proceed in a basically chronological manner, starting with IH's first contacts with ECHO concerning the FPA.

63. The Ombudsman considered that the following stages concerning the handling of IH's application can be distinguished: (i) ECHO's contacts with the German Foreign Office in 1995; (ii) IH's application of 20 March 1996; (iii) ECHO's reaction to the two proposals for specific projects submitted by IH; (iv) ECHO's letter of 12 July 1996; (v) IH's letters of 3 September 1997 and 19 January 1998; (vi) ECHO's letter of 26 January 1999; (vii) IH's letters of 18 February and 19 May 1999 and ECHO's letter of 1 June 1999; (viii) ECHO's rejection of IH's application.

(i) ECHO's contacts with the German Foreign Office in 1995

64. The Ombudsman noted that, on 9 February 1995, IH asked ECHO for a copy of the FPA and provided certain information on itself. On 16 February 1995, ECHO wrote to the German Foreign Office, asking for the latter's views on IH's "work and experience". In its reply of 15 March 1995, the German Foreign Office pointed out that IH's activities had given rise to "official prosecution" that was still ongoing and that it therefore wished to refrain from making any recommendations at this stage. The German Foreign Office added, however, that the Commission's Directorate-General ("DG") VIII would appear to be able to provide further information.

65. On 26 October 1995, ECHO repeated its request to the German authorities for information on IH. According to an internal note dated 17 November 1995 and written by Mr C., ECHO's adviser for institutional relations, his contact person at the German authorities was unable to give any reference concerning IH for the following reason: "Son bureau ne travaille pas avec cette organisation et donc ne les connait pas." However, Mr C. added: "Il paraît que la personne qui a quelques informations précises à propos de cette organisation, est un certain M. [S.] qui est à la DG VIII/B/2. Je pense que tu pourrais t'informer d'une manière plus satisfaisante auprès de M. [S.]." Mr C.'s note does not specify the identity of the German authority that he had contacted. However, the Commission has consistently submitted that, as it explained, for example, in its letter to IH of 19 July 2001, "the German authority responsible for providing information concerning humanitarian organisations in Germany is the *Auswärtiges Amt* ." It is thus clear that Mr C.'s note of 17 November 1995 refers to contacts with the German Foreign Office. Besides, the Commission has never disputed this fact.

66. In its letter to IH of 19 July 2001, ECHO took the view that, in the absence of a positive response from the German authorities, it had not been possible for it to treat IH's application. In

its opinion on complaint 1702/2001/GG, the Commission submitted that, in light of the negative, but not definitive, responses by the German authorities, ECHO had suspended the treatment of IH's application.

67. In its letter to the Ombudsman of 6 July 2005, IH criticised the fact that ECHO had suspended its application before the latter had even been submitted to ECHO.

68. This submission was included in the summary that the Ombudsman forwarded to the Commission when asking for an opinion on the present case. The Ombudsman therefore found it regrettable that the Commission did not address this issue in its opinion. In the absence of any documentary evidence concerning this issue, it would clearly have been useful to know when exactly the Commission decided to suspend dealing with IH's application. However, regard should be had to the fact that any such suspension would have remained theoretical and would not have affected IH's rights until the date when IH's application was effectively submitted to ECHO on 20 March 1996. It appeared, therefore, that no further inquiries concerning the exact date of the suspension were necessary. The question whether the information provided by the German Foreign Office had an effect on ECHO's decision of 17 October 1995, by which a proposal for a specific project submitted by IH was rejected, will be examined below.

69. Both the note of 15 March 1995 from the German Foreign Office and ECHO's internal note of 17 November 1995 referred to DG VIII as a possible source of information on IH. The last-mentioned note even provided the name of an official in DG VIII who could provide such information. In view of these circumstances, it appeared very likely that ECHO did indeed contact DG VIII in order to obtain further information on IH. In its observations, IH pointed out that the note of 17 November 1995 confirmed the existence of a link between ECHO and DG VIII, which it had always suspected. The Ombudsman considered that nothing prevented ECHO from using sources of information that were available in other departments of the Commission. It should be noted that IH itself had informed ECHO of the positive appraisal of its work by DG I. The situation would be different if ECHO had, through such internal contacts, obtained information that was detrimental for IH and if ECHO had used this information when dealing with IH's application. However, the Commission has never referred to any such information as having been given or used. Although the Ombudsman accepted that this did not exclude the possibility that such information was nevertheless taken into consideration by ECHO, he considered that his examination must, in the absence of clear evidence for the above-mentioned scenario, focus on the information that ECHO admittedly used, i.e., the information provided by the German Foreign Office.

(ii) IH's application of 20 March 1996

70. Both the Commission and IH agree that the latter's formal application to sign the FPA was lodged on 20 March 1996.

71. In order to justify its position regarding this application, the Commission has put forward a number of considerations. It appears that these considerations can be summarised as follows: (1) In the absence of a positive reference from the German Foreign Office, IH's application

could not be treated; (2) using other sources of information on IH such as UNESCO, DG I, Deutscher Spendenrat (as association of German NGOs) or VENRO did not constitute normal administrative practice at that time; (3) the handling of IH's application was suspended in light of the negative, but not definitive, responses from the German authorities; and (4) there had been serious concerns as regards the moral integrity of IH.

72. As regards the *first* of these reasons, the Ombudsman considered that he could be brief, given that this issue was already examined in his decision on complaint 1702/2001/GG. In this decision, the Ombudsman found that neither of the provisions that were relevant for IH's application contained a condition to the effect that a positive reference from a national authority was needed for ECHO to be able to approve an application to sign the FPA. This finding continued to be valid, and the Commission had not put forward any arguments to call it into question.

73. The Ombudsman considered, however, that the observations made by IH on the relevant parts of the Commission's opinion called for further comments in this respect. In these observations, IH pointed out that as an NGO, i.e., a non-governmental organisation, it is under no obligation to co-operate with the German government. IH further submitted that it was clear that it was the national authorities that decided on whether or not an application to sign the FPA was successful. In IH's view, only NGOs that were agreeable to national authorities could thus be successful. The Ombudsman considers that these comments are pertinent indeed. As the Ombudsman has already mentioned in his decision on complaint 1702/2001/GG, comments or references from national authorities may well be useful for ECHO when deciding on whether or not an NGO fulfils the conditions necessary for the signature of the FPA. The Ombudsman took the view, however, that it would not be acceptable if ECHO simply relied on the presence or absence of a positive reference from a national authority in order to decide whether an application to sign the FPA can be accepted [4] . In such a case, the decision on the eligibility of an NGO would indeed effectively be taken by national authorities, and not by ECHO itself.

In its opinion, the Commission has pointed out that it reserves the right to check and, if applicable, to override any of these references by carrying out direct verifications on applicants. It is obvious, however, that the possibility of such checks was not even considered in the present case, at least not before ECHO's proposal of January 2001 to carry out an audit. As already mentioned above, the letter of 19 July 2001 unequivocally stated that the German authorities had been "duly consulted" and that "[i]n the absence of a positive response from the German authorities, the application could not be treated."

74. As regards the *second* of the above-mentioned reasons, IH pointed out that, in its application of 20 March 1996, it had provided the Commission with information on its previous work, including work for UNESCO and DG I, and included various positive references. In addition to that, IH had subsequently provided ECHO with further information and references concerning its work, including information that it had been accepted as a member by the "Deutscher Spendenrat" and by VENRO. In its opinion, the Commission submitted that it had not used the above-mentioned sources of information as this did not constitute a normal administrative practice at that moment in time; nor was it standard practice under the current

selection procedure. The Commission further submitted that, for information about FPA applicants, it mainly relied on the analysis of the documents received from the applicants themselves as well as on references from the relevant national authorities. The Ombudsman noted, however, that in its letter of 19 July 2001 the Commission only referred to the absence of a positive reference from the German authorities, without mentioning any analysis of the documents that had been submitted by IH. The fact that ECHO did not rely on an analysis of the documents received from IH is confirmed by the fact that it consulted the German Foreign Office before even having received IH's formal application to sign the FPA. It would thus appear to be clear that ECHO did not apply what the Commission in its opinion referred to as its standard practice, unless one were to assume that this practice consisted in relying *either* on an analysis of the documents submitted by an applicant *or* references from national authorities. In any event, the Ombudsman took the view that the Commission cannot be allowed to invoke its 'standard practice' in order to justify why it disregarded evidence that would appear to have been perfectly relevant in the context of ECHO's assessment whether or not to allow IH to sign the FPA. It should also be noted that IH had *inter alia* referred to DG I and that ECHO could thus easily have obtained further information from this fellow service. The Ombudsman noted that Mr C.'s note of 17 November 1995 clearly suggests that trying to obtain information from other Commission services was not incompatible with ECHO's 'standard practice'.

75. As regards the *third* of the above-mentioned reasons, the Commission's suggestion that the information provided by the German Foreign Office was not definitive and that ECHO was still waiting for further information from that body is simply not credible. It is true that in its note of 15 March 1995 the German Foreign Office stated that it did not wish to make any recommendations "at this stage". It should be noted, however, that ECHO subsequently contacted the German Foreign Office again and was informed that the relevant service was unable to provide information on IH since it did not know this NGO. It should further be noted that, on both of the occasions when the German Foreign Office had expressed its views concerning IH, this had happened at the express request of ECHO. If ECHO had indeed considered that the response from the German Foreign Office was not definitive, one would therefore have expected that it would have asked this authority for a definitive answer. However, no such efforts were made. In his inquiry into complaint 2862/2004/GG, IH produced a copy of a letter from the German Foreign Office dated 4 July 2002. In this letter, the contents of which were not challenged by the Commission, the German Foreign Office confirmed that no further contacts concerning IH had taken place between itself and ECHO after the two contacts in 1995 that are described above. In his decision on complaint 2862/2004/GG, the Ombudsman made the following further findings: "It should further be noted that the note of 17 November 1995 states that the German Foreign Office did not know [IH] and that further information on [IH] might be available from a Commission official in Directorate-General VIII. In this note, there is no reference to any 'definitive' answer that was still due from the German Foreign Office. Besides, it is difficult to see what kind of definitive answer could still be expected from an institution that had declared that it did not know the complainant." [5]

76. Furthermore, and as IH has correctly pointed out, the Commission has never explained on what legal basis its decision to 'suspend' the treatment of IH's application was taken. The 'suspension' had the result that a decision on the application was in the end taken only more

than 5 years after the latter had been submitted. In his decision on complaint 1702/2001/GG, the Ombudsman has already criticised the Commission's manifest failure to deal with the application within a reasonable period of time and marked it as an instance of maladministration.

77. As regards the *fourth* of the above-mentioned reasons, the Commission appears to consider that IH's application to sign the FPA raised "serious concerns". It further appears that, in the Commission's view, these concerns are based on the information provided in the note dated 15 March 1995 from the German Foreign Office. As a matter of fact, in its opinion in the present case the Commission submitted that it could have expeditiously dealt with the application and rejected it on the basis of this information, which, according to the Commission, concerned the "moral integrity" and the "transparency" of IH. The Commission further referred to "objective concerns" about IH's application that were based "on official and documented information obtained through a customary procedure".

78. The Ombudsman found himself unable to accept this position.

79. First and foremost it should be noted that the 'information' provided by the German Foreign Office in its note of 15 March 1995 was incorrect. In his recent decision on complaint 3175/2005/GG, which also concerns IH, the Ombudsman pointed out that it emerged from the evidence that had been submitted to him that the prosecutor's office at the Landgericht Gießen had conducted a preliminary investigation ("Ermittlungsverfahren") against the chairman of IH and three other persons. 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") [6] . Only in the latter case can there be talk of an "official prosecution". In case 3175/2005/GG, the Ombudsman made a draft recommendation to the Commission concerning the usage of expressions such as "official prosecution" in relation to the above-mentioned preliminary investigation. In its reply, 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.

80. Second, and as the complainant correctly observed, the fact that the relevant service of the German Foreign Office, in its reply to the second approach made by ECHO, made it clear that it did not know IH should clearly have led ECHO to check and review the 'information' it had previously received from the German Foreign Office.

81. Third, the Ombudsman had serious doubts as regards the Commission's insinuations that the preliminary investigation, which was in fact pending at the time when IH's application to sign the FPA was lodged, or the fact that IH did not mention it in its application, would have entitled ECHO to reject this application. In its observations, IH took the view that there was no rule that would have obliged it to draw ECHO's attention to the fact that a preliminary investigation had been pending. Even though the relevant facts have given rise to several inquiries by the

Ombudsman, the Commission has never explained the legal basis for its suggestion that the relevant investigation and the fact that IH had not mentioned it in its application of 20 March 1996 rendered IH ineligible.

82. This omission is all the more astonishing if one looks at the conditions that IH had to fulfil in that respect. Together with its opinion on complaint 1702/2001/GG, the Commission submitted a copy of the "Critères operationnels" that is used with regard to FPA applications. The third of these criteria ("Intégrité du comité de direction") provides that the governing board of the NGO needs to be composed of capable and irreproachable persons who do not have a criminal record ("ayant un casier judiciaire vierge") and who have never been declared bankrupt. The Ombudsman considered it important to stress that the relevant preliminary investigation never led to a prosecution or a judgment of a court but was closed in favour of the persons concerned on 30 April 1996. It should also be noted that DG VIII, which had been mentioned as a possible source of information on IH in ECHO's internal note of 17 November 1995, had already in 1996 been informed of the outcome of this investigation.

83. In its opinion on complaint 2862/2004/GG, which was submitted in early 2005, the Commission felt obliged "[o]nce again" to stress that at the time when IH's application was lodged "criminal procedures" had been pending against IH's chairman. The Commission considered it inexplicable why "this vital point" had not been considered relevant by the Ombudsman. It is remarkable that even nearly 9 years after the preliminary investigation had been closed, the Commission thus still appeared to believe that there had been a "criminal procedure" or an "official prosecution", as the German Foreign Office had put it.

84. It may be worthwhile to point out that, according to the information available on ECHO's website, applicants for the current FPA (the FPA 2004) have to provide a formal declaration signed by the chairman that neither the NGO nor any of its board members are or have been in one of the exclusion categories described in Article 93 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [7] (the "Financial Regulation"). It is interesting to note that this provision of the Financial Regulation refers (to the extent that it is relevant here) to persons who (b) have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata* ; (c) have been guilty of grave professional misconduct proven by any means which the contracting authority can justify; and (e) have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests. It should be noted that this provision thus requires that the relevant facts have given rise to judgment having acquired the force of *res judicata* or that there has been grave professional misconduct and that this misconduct has been clearly established.

85. The Ombudsman therefore had serious doubts whether an applicant could automatically be excluded from signing the FPA on the sole ground that a preliminary investigation was pending before a prosecutor or that it has failed to mention such an investigation in its application. It is true that the existence of such an investigation could raise doubts as to the probity of the members of the board of an NGO. However, it would be incompatible with fair process and the

presumption of innocence if an administration considered such doubts as sufficient to exclude an application submitted by such an NGO. ECHO would clearly have been entitled to examine the issue in order to ascertain whether the concerns it may have had were justified or not. The easiest way to clarify this issue would have been by asking the NGO that had submitted the application for an explanation. The Ombudsman noted, however, that no such efforts were undertaken in the present case.

86. Even if one were to assume that the existence of a preliminary investigation could be an important issue when assessing whether an NGO can be allowed to sign the FPA, it is abundantly clear that, before rejecting the application on that ground, ECHO would have had to give IH the possibility to express its views on the issue concerned. The Commission's decision to 'suspend' the treatment of IH's application (if such decision was indeed taken) thus blatantly infringed IH's right to be heard. This violation of a fundamental principle of due process was criticised by the Ombudsman in the fourth critical remark made in his decision on complaint 1702/2001/GG. The Ombudsman therefore found it difficult to understand how the Commission, in its opinion in the present case, felt able to assume that his critical remarks only concerned the issues of delay and of lack of information.

In its opinion, the Commission stressed that it had not sought to obtain conclusive evidence of ineligibility as regards IH in the present case. However, the Commission's attitude had the result that the treatment of IH's application remained suspended on the basis of incorrect, unverified information, without giving IH any chance to comment on the reason for this suspension. The Ombudsman found the approach thus adopted by the Commission position unacceptable.

87. In his decision on complaint 1702/2001/GG, the Ombudsman only had to consider the Commission's position from the angle of the protection of IH's right to be heard. However, it is obvious that ECHO's way of 'handling' IH's application was also clearly unfair. The Ombudsman therefore noted with surprise that, in its opinion in the present case, the Commission claimed that it had treated IH's application fairly.

88. To sum up the results of the examination so far, the Ombudsman could not but confirm the conclusion he already reached in his decision on complaint 1702/2001/GG, that is to say, that the Commission's handling of IH's application to sign the FPA gave rise to a number of instances of maladministration. However, the evidence concerning the way in which ECHO initially handled this application when it was lodged on 20 March 1996 did not yet allow the conclusion to be drawn that the Commission acted with the intention to disadvantage and to deceive IH.

(iii) ECHO's reaction to the two proposals for specific projects submitted by IH

89. On 17 October 1995, ECHO informed IH that a proposal for a specific project that it had submitted had not been selected for funding for certain reasons relating to substance. By letter of 6 August 1996, ECHO informed IH that another proposal for a project that it had submitted had not been selected for financing on account of budgetary restrictions. According to IH, ECHO had not considered its proposals at all and had deceived it, so as to make it believe that

it was a valid candidate for signing the FPA.

90. In its opinion, the Commission submitted that IH had made an arbitrary link between the justifications given by ECHO for the rejection of the two project proposals made by IH and the status of IH's application to sign the FPA. The Commission stressed that ECHO had a well-established legal, administrative and operational practice clearly to distinguish between FPA applications and project proposals for specific humanitarian aid operations. Project proposals were examined by the relevant geographic units on their own merits and judged exclusively on operational grounds. The Commission added that this is what allows ECHO to fund organisations that are not signatories of the FPA for the implementation of specific humanitarian operations. For obvious reasons, the availability of funds to respond to each humanitarian crisis was limited. According to the Commission, the rejection of the two proposals submitted by IH was therefore based on objective reasons unrelated to the application to sign the FPA. The Commission took the view that these decisions did not deceive IH in any regard.

91. The Ombudsman noted that, in its letter of 14 December 2000, ECHO informed IH of the possibility to submit proposals for operational projects even before it had signed the FPA. However, ECHO added that these proposals could be "accepted exceptionally, provided that your national authorities confirm the eligibility of your organisation in accordance with Article 7 § 1 and 2 of the above-mentioned regulation and to implement special operations in regions not covered by existing ECHO partners". The Ombudsman considered that this letter, even though it was written several years after the decisions on the proposals concerned, calls into doubt the Commission's argument that ECHO clearly distinguishes between FPA applications and project proposals for specific humanitarian aid operations and that the latter were only assessed according to their merits. If, as the letter of 14 December 2000 suggests, proposals for specific projects could only be accepted if the national authorities confirmed IH's eligibility, this would clearly have meant that no such proposals could be accepted from IH, given that the German Foreign Office had (as discussed above) not confirmed IH's eligibility.

92. The Ombudsman noted, however, that both the decisions of 17 October 1995 and of 6 August 1996 refer to reasons that are unrelated to IH's application to sign the FPA and the absence of a positive reference from the German Foreign Office. Although the Ombudsman understood IH's suspicions in this regard, he could not exclude that the two specific proposals submitted by IH were thus indeed rejected on grounds unrelated to its application to sign the FPA. In these circumstances, the Ombudsman therefore had to conclude that it has not been established that these decisions have to be considered as deceiving IH into believing that it was a valid candidate for signing the FPA.

(iv) ECHO's letter of 12 July 1996

93. On 25 June 1996, IH wrote to the official in charge of the matter at ECHO. IH pointed out that its application to sign the FPA had been submitted more than two months previously and submitted further information to support this application. In conclusion, IH stated that it was looking forward to hearing from ECHO as to when it could sign the FPA. A further request for information (which was marked "urgent") was addressed by IH to ECHO on 11 July 1996.

94. In its reply of 12 July 1996 to IH's letter of 25 June 1996, ECHO explained that it was currently reviewing plans for expanding its network of partners and that it was working on a new system for assessing likely NGO partners. ECHO also noted that the FPA was being reviewed to pinpoint any improvements and amendments needed in light of Regulation 1257/96. The letter concluded as follows: "We have, however, noted your request and will keep you informed of further developments."

95. IH submitted that ECHO had thus created the impression that IH was a serious applicant for signing the FPA.

96. In its opinion, the Commission submitted that its letter had stated that it would keep IH informed of further developments. According to the Commission, this had actually been the case. The Commission added that, indeed, for it, and at that moment, the application file of IH was not yet closed.

97. It should first be noted that the German translation of the Commission's opinion differs from the English original as regards this last statement. According to the German text, IH's application had not been "complete" at that time. The Ombudsman considered that this is due to a translation error. He therefore based his analysis on the English original.

98. As discussed above, the Commission submitted a number of considerations to justify the way it had handled IH's application. These considerations can be summarised into two main arguments based (i) on the absence of a positive reference from the German Foreign Office and (ii) on the concerns relating to IH's eligibility. These considerations were obviously known to ECHO when it answered IH's letter of 25 June 1996. ECHO also knew that the treatment of IH's application had been 'suspended'. The Ombudsman noted that none of these factors, which were highly relevant for IH's application, was mentioned in the letter of 12 July 1996. The Ombudsman considered that the explanation of this letter that the Commission had provided in its opinion was singularly unconvincing. It should be noted that no further concrete and written information concerning its application to sign the FPA was provided to IH until 1 June 1999. It should further be noted that even this letter did nothing more than explain that IH's application would be considered at a later stage. At the time when it sent the letter of 12 July 1996, the Commission clearly considered that IH was not eligible to sign the FPA. If this letter nevertheless informed IH that its application had been "noted" and that it would be kept informed of "further developments", it most certainly created the impression that the examination of IH's application was ongoing. ECHO cannot have been unaware of the fact that this was the effect its letter would have on IH.

99. In his decision on complaint 1702/2001/GG, the Ombudsman took the view that ECHO's failure to inform IH about its decision to 'suspend' the treatment of the latter's application, even though IH had inquired about the state of the procedure, constituted maladministration. The Ombudsman considered that this conclusion was still valid.

100. However, the Ombudsman considered that his initial view that this omission constituted

what may be called a simple instance of maladministration needed to be revised. The Ombudsman's analysis in his decision on complaint 1702/2001/GG was based on the assumption that the Commission had acted incorrectly, but not deliberately. However, and upon having examined all the relevant evidence again, the Ombudsman considered that it is not possible to uphold this assumption. In the Ombudsman's view, the fact that the letter of 12 July 1996 failed to disclose the true state of things, even though IH had asked ECHO when it could sign the FPA, can only mean that ECHO did not wish to inform IH of the position it had taken and the reasons on which this position was based. In the Ombudsman's view, ECHO's letter of 12 July 1996 thus indeed constituted evidence to show that ECHO deliberately concealed the truth and thus misled IH.

(v) IH's letters of 3 September 1997 and 19 January 1998

101. On 3 September 1997, IH again wrote to ECHO in order to ask for information on progress regarding its application, asking for an "early reply". According to IH, no prompt reply was given to this letter. In a letter addressed to another ECHO official of 19 January 1998, IH again pointed out that its application to sign the FPA had been lodged in March 1996. According to IH, this letter was not answered.

102. In his letter opening the present inquiry, the Ombudsman included the above information in the summary on which he asked the Commission to comment. The Ombudsman regretted that the Commission had failed to do so in its opinion.

103. In view of the conclusions that the Ombudsman reached in relation to the letter of 12 July 1996, it appeared that the failure promptly to reply to IH's letters of 3 September 1997 and 19 January 1998 did not only constitute maladministration, but confirmed that there was something fundamentally wrong as regards ECHO's handling of IH's application.

(vi) ECHO's letter of 26 January 1999

104. On 20 January 1999, IH wrote to ECHO concerning the latter's plans to grant emergency aid to Russia. In this letter, IH informed ECHO that its emergency aid for countries of the former USSR and Eastern Europe now amounted to more than DM 32 million. In its reply of 26 January 1999, ECHO pointed out that, as a general rule, it carried out its humanitarian work with partner agencies that had previously signed the FPA. The ECHO official who wrote the letter of 26 January 1999 suggested that IH could contact Mr G. (another ECHO official) for general questions regarding the FPA.

105. In its reply of 18 February 1999, IH stressed that it had already applied for permission to sign the FPA in 1996. In this letter, IH submitted that Mr G. had informed it over the telephone that NGOs wishing to co-operate with ECHO would be treated in the same way as those that had already signed the FPA. According to IH, however, the reality was different. IH therefore queried whether some NGOs were 'more equal' than others. According to IH, no reply was given to this letter.

In his letter opening the present inquiry, the Ombudsman included the above information in the summary on which he asked the Commission to comment. The Ombudsman regretted that the Commission had failed to do so in its opinion

106. The Ombudsman took the view that the reference concerning the possibility of signing the FPA, which was set out in the letter of 20 January 1999, may perhaps be explained by the fact that the official writing this letter did not know of IH's application of 20 March 1996. However, he failed to understand why IH's letter of 18 February 1999 and the serious allegation it raised were not answered. This fact confirmed the conclusion that there was something fundamentally wrong as regards ECHO's handling of IH's application.

(vii) IH's letters of 18 February and 19 May 1999 and ECHO's letter of 1 June 1999

107. On 19 May 1999, IH again reminded ECHO that its application of 1996 had not been dealt with yet. In its reply of 1 June 1999, ECHO noted that a new FPA had entered into force on 1 January 1999, that it was currently organising meetings in order to sign this FPA with its existing partners and that requests for partnership from NGOs that had obtained contracts from ECHO in the past would be examined next. ECHO further explained that the last step would be to check compliance with the eligibility criteria by those NGOs that had never worked with ECHO and that IH belonged to this third category. According to IH, it had thus been deceived again.

108. In its opinion, the Commission submitted that it had decided at that time to consider applications under the previous FPA as automatically renewed for the new FPA, instead of considering these applications as *caduque* . This meant that the Commission assumed the responsibility for its administrative delays and tried not to penalise any of the previous applicants (including IH) on which a conclusive opinion could not be reached under the old FPA.

109. The Ombudsman was somewhat surprised to note that the Commission appeared to wish to take credit for the fact that it did not simply declare IH's application as no longer valid when the new FPA entered into force. It should be noted that IH's application had been in ECHO's possession for nearly three years when the new FPA entered into force, that IH was informed of this change only 5 months after it had taken place and that instead of apologizing for the delay that had occurred, ECHO took the view that IH's application should be examined in the last of three phases, that is to say, that the final decision should again be delayed. The Ombudsman considered this approach to be incompatible with principles of good administration.

110. As it turned out, it was only on 14 December 2000 that ECHO informed IH that it was now able to deal with the applications, such as IH's, falling under the third phase.

111. In its opinion, the Commission explained that the further delay since 1999 could be explained by a number of administrative reasons. These included (i) the imbalance between the number of files to be processed and the resources available at the time of the facts; (ii) the objective concerns about the merits of IH's application, based on official and documented information obtained through a customary procedure; and (iii) the Commission's assessment as regards the cost-effectiveness of conducting an *ad-hoc* , labour-intensive investigation into IH's

application, in derogation from the customary assessment procedure.

112. The Ombudsman was not convinced by these reasons. Even if there was a lack of resources, nothing prevented ECHO from informing IH already in 1999 of the concerns it had as regards the latter's application, thus finally disclosing the true state of affairs. However, and once more, ECHO omitted to do so. Given the background of the matter, the Ombudsman was unable to believe that this failure was coincidental [8] . The Ombudsman further noted that the letter of 1 June 1999 informed IH that the NGOs whose applications were subject to the last phase would be allowed to sign the FPA "after reception of a positive answer from the national authorities". However, when this letter was written, ECHO knew that no such positive answer had been received from the German Foreign Office as regards IH and that ECHO had undertaken no further attempts to obtain such a reference.

(viii) ECHO's rejection of IH's application

113. The Ombudsman noted that when, on 17 May 2000, IH again asked for information on when it could sign the FPA, ECHO replied rapidly (on 22 May 2000) and apologised for the delay, pointing to its heavy workload. He further noted that, in its letter sent of 14 December 2000, ECHO again apologised for the delay that had occurred. It would thus appear possible that a certain change of mind had set in at ECHO as regards the way IH's application was to be handled.

114. By fax dated 23 January 2001, ECHO contacted IH proposing to carry out an audit to verify the latter's compliance with the requirements of Article 7 of Regulation 1257/96. In the end, no such audit was carried out.

115. On 19 July 2001, ECHO informed IH that its application had been rejected. In this letter, ECHO provided the following explanations:

"As you are well aware, the German authority responsible for providing information concerning humanitarian organisations in Germany is the *Auswärtiges Amt* . ECHO duly consulted it for this purpose in 1995, after receiving your application to sign the FPA. In the absence of a positive response from the German authorities, the application could not be treated.

In 1999, with the entry into force of a new FPA, ECHO re-opened your application file and decided to proceed to an eligibility audit, which is the normal procedure adopted with all applicants when the national authorities do not confirm their compliance with art. 7 [of Regulation 1257/96]".

116. According to IH, these statements constituted deliberate lies.

117. In its opinion, the Commission made no specific comments concerning this issue.

118. In its observations, IH submitted that the decision rejecting its application was illegal, since IH had not been heard beforehand. IH stressed that since 1996, it had more than a dozen times

proposed to DG VIII that it be subjected to a neutral audit. The leading force in preventing such an audit from being carried out had been the Commission's Legal Service. IH had also undergone voluntary audits in Germany, fulfilled the conditions set by VENRO and was subject to a yearly control by the German tax authorities. IH admitted that it was possible that audits were undertaken in 2001 for NGOs that had only recently submitted their applications. However, no NGO that had already applied in 1996 was submitted to an audit in its view. In the circumstances of the case, IH could not be expected to undergo an audit without having previously received clarifications concerning the suspension of its application. By postponing its audit from 1996 to 2001, ECHO had clearly infringed its duty to act fairly. IH added that there was no legal basis for an audit by ECHO. Regulation 1257/96 only envisaged audits in the context of financing contracts that had already been concluded.

119. The Ombudsman considered that ECHO's letter of 19 July 2001 indeed contained a number of incorrect statements. First, ECHO had consulted the German authorities before, not after, receiving IH's application. Second, ECHO's view that it could not treat the application in the absence of a positive response from the German authorities was unfounded. Third, there was nothing to suggest that ECHO 're-opened' the file and decided to proceed to an audit following the entry into force of the new FPA. The new FPA entered into force at the beginning of 1999. However, it was only at the end of 2000 that ECHO appears to have begun in earnest to consider IH's application. The Ombudsman considered, however, that it could not be shown that these inaccuracies constituted deliberate lies, as IH alleged. It should be noted that in its letter of 19 July 2001, ECHO finally disclosed what had really happened as regards its handling of IH's application.

120. As regards ECHO's decision as such, the Ombudsman continued to believe that an audit is an appropriate way of ascertaining that an NGO meets the criteria of eligibility for signing the FPA. It was true that the term audit normally refers to checks carried out with regard to a contract that has already been concluded and implemented. In the Ombudsman's view, it would therefore have been more appropriate to refer to an on-site verification in the present case. However, these semantic subtleties did not alter the fact that the Commission needs to be in a position to check an applicant's eligibility, if need be by way of an audit/verification. The Ombudsman did not share IH's view that there was no legal basis for such controls. Besides, IH itself accepted, in its observations, the principle that such audits could be carried out for other NGOs (even though insisting that this did not apply to itself).

121. It was true that IH appeared to have offered to DG VIII, on numerous occasions, to be subjected to an audit. The Ombudsman considered, however, that the fact that these offers do not appear to have been accepted did not mean that ECHO should be prevented from insisting on an audit for its own purposes.

122. The Ombudsman perfectly understood IH's reluctance to submit to an audit that was proposed by ECHO in January 2001, given the blatantly deficient way in which the latter had handled IH's application previously. However, the Ombudsman considered that the fact that ECHO failed to deal with IH's application properly for several years did not mean that ECHO should *subsequently* be relieved of its duty to examine such an application properly or

prevented from doing so. As already mentioned above, it appeared possible that a certain change of mind set in at ECHO during the course of 2000 as regards the way IH's application was to be handled. In his decision on complaint 1702/2001/GG, the Ombudsman arrived at the conclusion that it had not been shown that by insisting on an audit in the present case, ECHO had exceeded the margin of discretion that it has in such cases. Even though the Ombudsman acknowledged that IH had already been submitted to controls by other bodies (such as the German tax authorities) and had provided ECHO with a substantial amount of evidence in support of its application, he considered that this assessment was still valid. The Ombudsman noted that, in its letter of 23 January 2001, ECHO had proposed an audit by two persons that would last two days. In the Ombudsman's view, the extra burden that such an audit would have put on IH would thus not appear to have been excessive.

123. As regards the alleged failure to hear IH before deciding on its application, the Ombudsman considered that IH could not have been unaware of the fact that its refusal to accept ECHO's proposal to carry out an audit would be likely to have negative consequences. Since ECHO had made it clear that the audit was, in its view, necessary in order to deal with IH's application, IH needed to contemplate the possibility that ECHO would reject this application once it turned out that IH did not wish ECHO to carry out such an audit. In these circumstances, the Ombudsman took the view that it had not been established that ECHO infringed IH's right to be heard by proceeding to reject the latter's application without previously alerting IH to its intention of doing so.

C. The draft recommendation

124. In view of his inquiries into the present case, the Ombudsman arrived at the conclusion that the Commission had committed serious instances of maladministration when handling IH's application to sign the FPA. In addition to those deficiencies that the Ombudsman had already identified in his decisions on complaints 1702/2001/GG and 2862/2004/GG, the present inquiry led to the conclusion that there was evidence to show that ECHO deliberately concealed the truth and thus misled IH. This conclusion applied in particular to ECHO's letter of 12 July 1996. It was also clear that the way in which ECHO handled this application seriously disadvantaged IH.

125. In view of the above finding, the Ombudsman considered that there was no need to examine whether ECHO's behaviour could also be considered to have been fraudulent or whether IH was discriminated against by ECHO. In any event, in order to arrive at a firm conclusion as regards the allegation of discrimination, the Ombudsman would need to compare how ECHO had handled all the other applications to sign the FPA that it had received. In the Ombudsman's view, the thorough further inquiries that doing so would entail were not justified, since the result of these inquiries would not affect the conclusion that he had already reached on the basis of the evidence that had been submitted to him and according to which the present case had given rise to maladministration of a most serious nature. In any event, the Ombudsman could only hope that no other NGO had been treated by ECHO as IH was.

126. The above conclusions concerned the period until early 2000 or the middle of 2000. The Ombudsman found no conclusive evidence to show that the maladministration he had identified continued beyond that point in time.

127. In its opinion, the Commission submitted that the accusations made against it by IH were defamatory. The Ombudsman found it useful to stress that even if not all of IH's allegations proved to be well-founded, there could certainly be no question of any defamation of the Commission by IH.

128. In its letter to the Ombudsman of 6 July 2005 and in its observations, IH did not raise any precise claims. Nor did it indicate whether it was still interested in signing the FPA. What was clear, however, was that IH at the very least wished the Commission to take appropriate action to restore the damage to its reputation that the Commission's handling of its application had provoked. In the Ombudsman's view, a formal apology was the minimum that could be expected in such circumstances of an administration that wished to make it clear that it regretted the maladministration that had occurred. The Ombudsman considered, however, that the Commission would be well-advised to explore further possibilities to provide satisfaction to IH. Quite clearly the Commission should also consider taking any further action that might be needed in order to ensure that such cases do not occur again.

129. In view of the above, the Ombudsman made the following draft recommendation to the Commission:

The Commission should apologize for the serious instances of maladministration that it committed when dealing with IH's application to sign the FPA and consider whether there are further possibilities to make amends to IH. It should also consider taking any further action that may be needed in order to ensure that such cases do not occur again.

D. The Commission's reaction to the draft recommendation, IH's comments thereon and the Ombudsman's assessment thereof

Arguments presented to the Ombudsman after the draft recommendation

130. In its detailed opinion, the Commission made the following comments:

131. The Commission admitted that IH's FPA application should have been handled with more diligence. It submitted, however, that this subject-matter had by now been subject to numerous inquiries by the Ombudsman and Court cases [9] . In light of this, and the fact that the object of these inquiries had in the meantime been succeeded by two new FPAs, the Commission was of the opinion that there were now grounds for considering the subject-matter exhausted.

132. A new FPA entered into force on 1 January 2008. The Commission wished to underline that, should IH wish to apply for this FPA and submit the required information, it would assess

its application without any reference to the above-mentioned cases.

133. Finally, the Commission assured the Ombudsman that the system existing at the time of the criticized facts had been modified considerably in order to ensure transparency and the widest possible participation.

134. In its observations, IH made comments both on the draft recommendation and the Commission's detailed opinion. These comments therefore need to be addressed.

The assessment of IH's comments on the draft recommendation

135. IH submitted that the slanderous character of the information forwarded to the Commission by the German Foreign Office, which aimed at discrediting IH, was obvious. This information was factually incorrect also as regards the seat of IH and its relations with another NGO, Welthilfe e.V. IH further submitted that the German Foreign Office ought to have informed ECHO about the fact that a preliminary investigation, which had been carried out by a German prosecutor and which concerned IH's chairman and three other persons working for IH, had been closed on 30 April 1996.

136. IH further stated that it had been the Deutsches Institut für Sozialfragen ("DZI") that made the German Foreign Office provide ECHO with a negative assessment of IH. According to IH, this negative assessment then allowed the DZI to make the own incorrect information about the IH which it had fed to DG VIII appear more credible.

137. It should be recalled that Article 195 of the EC Treaty empowers the Ombudsman to examine maladministration in the activities of Community institutions and bodies. The Ombudsman is not entitled to examine the actions of any other institution or body. For this reason, the Ombudsman is clearly not in a position to express any views on the behaviour of the DZI or of the German Foreign Office.

138. IH further submitted that ECHO ought to have checked the veracity of the information provided by the German Foreign Office. In IH's view, the Ombudsman deliberately omitted to mention this in his draft recommendation.

139. The Ombudsman agrees that ECHO should have checked the correctness of the information provided by the German Foreign Office, if this information was the reason for 'suspending' IH's application. However, IH's reproach that the Ombudsman deliberately omitted to mention this is clearly unfounded. During the course of the Ombudsman's inquiries, ECHO had informed him that it was unable to deal with IH's application in the absence of a positive reference from the German Foreign Office. In his critical remarks in case 1702/2001/GG and in his draft recommendation in the present case, the Ombudsman severely criticized ECHO's approach. However, since ECHO had invoked the absence of a positive reference, and not the actual, negative contents of the information provided by the German Foreign Office, the Ombudsman had no reason to consider the contents of this information and ECHO's duty to check these contents.

140. IH further argued that ECHO had claimed that it had been in continuous contact with the German Foreign Office even though this had not been the case. In IH's view, ECHO had thus, acting in bad faith, deceived the Ombudsman as regards what had really happened.

141. It suffices to recall that this issue has already been examined in the Ombudsman's inquiry into complaint 2862/2004/GG, where a critical remark was made (see point 18 above).

142. According to IH, there were tremendous gaps in the Ombudsman's analysis, given that he had not even asked who at ECHO was responsible for the illegal exclusion of IH. In IH's view, the Ombudsman should therefore pursue his inquiry.

143. It appears useful to note that Article 195 of the EC Treaty entrusts the Ombudsman with the mission of examining maladministration on the part of the institutions and bodies of the EU. This is exactly what the Ombudsman has done in the present case. The Ombudsman considers, however, that he does not need to identify personal responsibility for any maladministration he finds, unless doing so is exceptionally necessary to arrive at clear conclusions. It should be noted that the Ombudsman is not a criminal court, which needs to identify the persons who are responsible for a crime or misdemeanour.

144. IH also submitted that the Commission refused to grant it full access to its file. By refusing to disclose documents necessary for IH to defend its rights, the Commission in general, and ECHO in particular, were guilty of an offence under Section 274 of the German Criminal Code, that is to say, a suppression of evidence.

145. The Ombudsman considers it useful to underline that the present inquiry concerns the handling of IH's application to sign the FPA, and not any issues concerning access to documents. Besides, the Ombudsman has already had to deal with complaints submitted by IH concerning the handling of requests for access it had submitted to the Commission. The inquiries concerning these complaints have long been closed. As regards IH's further argument, the Ombudsman finds it simply puzzling. It is obvious that it is not the Ombudsman's task to ascertain whether any breach of German criminal law has been committed in the present case. IH remains free to turn to the prosecutor in charge if it wishes this allegation to be investigated.

146. IH further submitted that ECHO denounced it to DG I, DG VIII, DG XII and AIDCO. As a result, all applications for co-financing submitted by IH were, according to IH, rejected by the Commission.

147. The Ombudsman considers it useful to stress that this is a further allegation on which the Commission has not yet been given the possibility to comment. Given the conclusions at which he arrives in the present case, the Ombudsman does not consider it appropriate to extend the scope of the present inquiry so as to cover this further allegation. Besides, and as the facts underlying complaint 2283/2004/GG show, the first decision rejecting applications submitted by IH to the Commission was adopted on 12 October 1993, i.e., long before IH had turned to ECHO and long before ECHO had consulted the German Foreign Office.

148. IH submitted that the DZI, the German Foreign Office and the Commission had deliberately and fraudulently conspired behind IH's back with a view to excluding IH. This had served the purpose of granting financial advantages to certain NGOs agreeable to these bodies whilst excluding others such as IH. According to IH, the deliberate efforts at damaging IH's reputation which were carried out by the DZI, with the help of the German Foreign Office and ECHO, and their equally systematic mobbing of the IH's chairman, had easily been intelligible to the Commission. In IH's view, the Ombudsman disregarded all the evidence submitted to him when holding that IH had not established that there had been fraud on the part of ECHO and the Commission. Every neutral Ombudsman would have asked himself why ECHO had stuck to a negative assessment of IH for so long. Given the factual background, the Ombudsman's finding that there had been no fraud could no longer be upheld. IH further submitted that the Ombudsman had blurred the chronology of events, always in favour of the Commission. According to IH, the Ombudsman 'whitewashed' ECHO of any guilt.

149. The Ombudsman can only regret that IH has thus made entirely unwarranted allegations against him. Article 195(3) of the EC Treaty stipulates that the Ombudsman shall be completely independent in the performance of his duties. In the Ombudsman's view, the approach he has adopted in the present case shows beyond reasonable doubt that he strictly abides by this duty. The Ombudsman must therefore resolutely reject IH's suggestions that he was biased when dealing with its complaints or that he otherwise failed to comply with his duties. In case IH should wish to maintain these accusations, the Ombudsman could only recommend that they be submitted to the European Parliament, to which the Ombudsman reports, or to the Community courts. The Ombudsman is confident that his work on the inquiries concerning IH will withstand scrutiny by either of these institutions and by the public at large.

150. As regards the substance of IH's attacks, it should be recalled that the Ombudsman explained in his draft recommendation that, in view of the conclusions at which he had arrived concerning the issues examined by him, he considered that there was no need to examine whether ECHO's behaviour could also be considered to have been fraudulent. The Ombudsman continues to believe that this approach is justified. As a matter of fact, the Ombudsman concluded that there had been maladministration of a most serious nature. Given these findings, the Ombudsman is unable to see what use the examination of the further issue raised by IH could serve. In this context, it should again be recalled that the Ombudsman is not a criminal court, which needs to ascertain whether a crime or misdemeanour has been committed; rather, he has to examine whether maladministration has occurred. This is precisely what the Ombudsman has done in the present case.

151. In a letter sent on 12 December 2008, IH asked the Ombudsman to suggest to the Commission that it grant financial compensation to IH for the damage resulting from its maladministration.

152. The Ombudsman considers it appropriate to underline that no clear and precise claim for compensation has been submitted to him so far. It was for this reason that this issue was not examined in the present inquiry. In the Ombudsman's view, the possibility of enlarging the

scope of an inquiry so as to cover further claims after a draft recommendation has already been made should only be considered in exceptional cases. In the present case, however, the complainant was clearly in a position to raise a claim for compensation at an earlier stage, if it had so wished. It is not even clear to the Ombudsman whether the complainant has already submitted to the Commission a clear and precise claim for compensation arising from the facts examined in the present case. In any event, the complainant is free to consider submitting any such claim to the Community courts.

The assessment of the Commission's detailed opinion and IH's comments thereon

153. The Ombudsman appreciates the fact that, in its detailed opinion, the Commission accepted that IH's application should have been handled with more diligence. It is clear, however, that this simple admission is not sufficient to address the serious concerns to which the Ombudsman pointed in his draft recommendation.

154. As regards the Commission's reference to the new FPA, the Ombudsman is happy to hear that the relevant procedures have, in the Commission's view, been considerably improved. However, the Commission has not provided any details to specify what action it has taken in order to ensure that cases like the present one do not occur again. Moreover, the credibility of the Commission's argument is undermined by the institution's continued refusal to take any concrete steps as regards IH's case. It is true that the Commission has offered to examine any new application to sign the FPA IH may wish to submit. It appears obvious to the Ombudsman, however, that IH cannot reasonably be expected to make any further application to sign the FPA as long as the Commission has not shown that it sincerely regrets the maladministration that has occurred.

155. The Commission further appeared to argue that no further action was needed since the relevant facts had already been considered by the Ombudsman. The Ombudsman finds this argument surprising. With the exception of the above-mentioned admission, the Commission has so far not accepted that it committed maladministration in the present case, let alone taken any action to remedy the failures that have occurred. It should furthermore be noted that the Ombudsman explicitly recommended that the Commission should apologize to IH. In his draft recommendation, the Ombudsman stressed that a formal apology was the minimum that could be expected in such circumstances of an administration that wished to make it clear that it regretted the maladministration that had occurred. The Ombudsman added, however, that the Commission would be well-advised to explore further possibilities to provide satisfaction to IH.

156. In its observations, IH argued that the Commission's refusal to apologize confirmed that it acted deliberately, given that numerous services needed to be consulted before the Commission could adopt an official decision. The Ombudsman is not convinced that this conclusion is correct. However, and seen against the background set out above (in points 153 to 155), the position adopted by the Commission can only be interpreted as a deliberate refusal to co-operate with the Ombudsman.

E. Conclusions

157. On the basis of his inquiries into this case, the Ombudsman makes the following critical remark:

It is good administrative practice to handle applications received from NGOs properly. In view of his inquiries into case OI/4/2005/GG, the Ombudsman arrived at the conclusion that this had not been the case here. In addition to those deficiencies that the Ombudsman already identified in his previous inquiries, the present inquiry led to the conclusion that there was evidence to show that ECHO deliberately concealed the truth and thus misled IH. This conclusion applied in particular to ECHO's letter of 12 July 1996. It was also clear that the way in which ECHO handled this application seriously disadvantaged IH. The Commission thus committed serious instances of maladministration when handling IH's application to sign the FPA.

158. Article 3(7) of the Statute of the European Ombudsman provides that after having made a draft recommendation and after having received the detailed opinion of the institution or body concerned, the Ombudsman shall send a report to the European Parliament and to the institution or body concerned.

159. IH has called upon the Ombudsman to submit its case to the European Parliament.

160. In his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament is of inestimable value for his work. He added that special reports should therefore not be presented too frequently, but only in relation to important matters where the Parliament is able to take action in order to assist the Ombudsman [10] . The Annual Report for 1998 was submitted to and approved by the European Parliament.

161. The Ombudsman considers that the present case concerns serious issues. However, the relevant maladministration took place a long time ago, and a new FPA is now in force. In these circumstances, the Ombudsman takes the view that it would not be appropriate to submit to Parliament a special report in this case.

162. However, the Ombudsman will send a copy of this decision and a short summary thereof to the European Parliament and include this summary in the annual report for 2008 that will be submitted to Parliament. The complainant will also be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 20 January 2009

[1] OJ 1996 L 163, p. 1.

[2] Cf. Articles 20 and 22 of the European Code of Good Administrative Behaviour, which is available on the Ombudsman's website (http://www.ombudsman.europa.eu [Link]).

[3] This comment appears to be based on the wording of the German translation of the Commission's opinion, which differs from the English original on this point. This issue will be dealt with subsequently.

[4] In its observations, IH relied on a letter addressed to its lawyer by the German Foreign Office on 25 November 1996, a copy of which it submitted. IH stated that this letter confirmed that the German Foreign Office was not competent to assess German NGOs. The Ombudsman notes that in this letter, the German Foreign Office indeed admitted that it was neither competent nor in a position to assess humanitarian organisations active in Germany and that it therefore had to rely on the expertise of other bodies in this context, such as the Deutsches Institut für Sozialfragen ("DZI"). In the Ombudsman's view, this fact does not necessarily call into question the usefulness of the information the German Foreign Office forwards to ECHO. It is clear, however, that it confirms that ECHO needs to assess this information very carefully before drawing any conclusions from it that would be negative for an applicant.

[5] Cf. point 2.5 of the Decision, which is available on the Ombudsman's website (http://www.ombudsman.europa.eu [Link]).

[6] Cf. points 2.10 and 2.11 the Decision, which is also available on the Ombudsman's website (http://www.ombudsman.europa.eu/ [Link]).

[7] OJ 2002 L 248, p. 1.

[8] The complainant has provided a copy of ECHO's letter of 1 June 1999, which it appears to have obtained when it was given access to ECHO's file. The relevant copy includes the text of what appears to be a post-it added to this letter, which reads as follows: "! avant d'entamer toute procédure avec cette ONG, en parler avec GG pour background !". The initials mentioned in this message appear to be those of the person who signed the letter of 1 June 1999. The Ombudsman considers that this message is open to interpretation.

[9] It appears that the Commission thus wished to refer to Case T-372/02 *Internationaler Hilfsfonds v Commission* [2003] ECR II-4389, which concerned (*inter alia*) an action against what IH considered to be a decision adopted by the Commission on 22 October 2002. The Court of First Instance held that the relevant letter merely confirmed the decision taken on 19 July 2001 and that the action was thus inadmissible. This order was confirmed on appeal by the Court of Justice in Case C-521/03 P *Internationaler Hilfsfonds v Commission* (order of 7 December 2004, not reported in ECR). In the Ombudsman's view, it is clear that these cases, which do not examine the procedure followed by the Commission and the substance of its decision of 19 July 2001, have no relevance for the present decision.

[10] Annual Report for 1998, pages 27-28.