

## **Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1487/2005/GG**

Special Report

**Case 1487/2005/GG - Opened on 04/05/2005 - Recommendation on 14/03/2006 - Special report on 04/05/2005 - Decision on 07/12/2006**

(Made in accordance with Article 3(7) of the Statute of the European Ombudsman [1] )

### **Introduction**

The Ombudsman considers that the present case concerns two important issues of principle, namely, (1) the question as to the languages that should be used for the internet presentations of the Presidency of the EU and (2) the question whether the Council can be held responsible for the websites maintained by its Presidency. In view of the significance of the role played by the Presidency, the Ombudsman considers that it is important to ensure that the information published on its websites is accessible to as many citizens as possible. Ideally, this information should therefore be published in all official Community languages. However, if the number of languages for the presentation of the Presidency's websites is to be limited, the choice of the languages to be used must be based on objective and reasonable considerations. Given that the Council has so far refused to consider the issue at all, the Ombudsman is unable to ascertain whether the choice made by the Presidencies is in conformity with these conditions. The Ombudsman therefore considers that the matter should be put before the European Parliament.

It appears useful to note that after the draft recommendation that the Ombudsman made in the present case had been published, a number of Italian MEPs and a Spanish MEP asked the Ombudsman why his draft recommendation only concerned German and no other Community language. In his reply, the Ombudsman pointed out that the complainant's case only concerned the question as to whether the internet presentations of the Presidencies should be available in German. The Ombudsman explained that he therefore did not have to address the issue as to whether other or all of the official languages of the EU should also be used for that purpose.

In order to avoid any possibility for a misunderstanding, the Ombudsman also addressed



himself to the Presidency on 8 June 2006. In this letter, the Ombudsman explained that if the Council were to decide that Presidency websites will be available in all languages, he would regard that as the best possible response to the draft recommendation.

## The complaint

The following summary will be limited to the core issue raised by the complainant. Further details and background information are to be found in the draft recommendation made by the European Ombudsman in this case [2] .

During the course of 2004, the complainant (an association for the defence of the German language) wrote to the Dutch and the Luxembourg governments in order to ask them to offer the internet presentations they were to provide when holding the Presidency not only in English and French but also in German. The complainant pointed out that more EU citizens had German as their mother tongue than any other language and that, after the accession of the new Member States, German would rank second if one considered the number of EU citizens speaking a language as their mother tongue or as a foreign language. It stressed that, next to English, German was thus the language understood by most EU citizens. The complainant further submitted that communications by EU institutions that were mainly addressed to the European public should be accessible to as many EU citizens as possible. Where the number of languages used was limited, this choice should, in the complainant's view, be based on the demographic weight of these languages. The complainant therefore took the view that it was not comprehensible why the Presidency normally only used English and French, in addition to the language of the country concerned, for their internet presentations. In the complainant's view, its claim that German should be used as well was also supported by the need for democratic legitimization in the EU.

Both the Dutch and the Luxembourg governments rejected the complainant's request.

On 22 January 2005, the complainant wrote to the Council in order to request it to ensure that the internet presentations of the Presidency would also be available in German.

In its reply of 4 March 2005, the Council confirmed that the Presidency was functionally part of the Council. It submitted, however, that this did not mean that the website of the Presidency was subject to the same conditions as that of the Council. The Member State holding the Presidency was solely responsible for the information published on its website. According to the Council, Presidency websites only complemented the information that was made available to citizens by the Community institutions in all the official languages. In this context, the Council referred to its own website and to the number of documents available thereon. It also referred to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [3] ("Regulation 1049/2001") and the possibilities it offered.

The Council noted that the Ombudsman had already had occasion to deal with the linguistic



practice of the Presidency and of the Commission. Case 939/99/ME concerned the fact that the Commission's calendar on the "Europa" website was only available in French. The Commission had submitted that this document was only intended for the press. In his decision of 14 June 2000, the Ombudsman held as follows: "The Ombudsman notes that there are 11 official languages and 12 Treaty languages in the European Union. Certain documents must therefore be produced in all these languages. However, there is no obligation for the Commission to produce all documents in several languages when this does not appear necessary for the purpose of the document. The Ombudsman is not aware that the provisions of Community law concerning use of languages could prevent a Community institution or body from publishing on a website documents in the language in which they are drafted. Although it is essential that the Commission informs citizens of its work in all the languages, the Commission's practice in the present case has not revealed any failure by the Commission to fulfil this obligation."

In 2001, an Italian citizen complained about the fact that the contents of the internet presentation of the Belgian Presidency were only available in Dutch, English, French and German (case 1146/2001/IP). In his decision of 10 September 2002, the Ombudsman took the view that, as far as possible, the Union institutions and bodies should provide information to citizens in their own languages. He had added, however, that he was not aware of any rule or principle that forbade them to publish information on their websites in less than the full number of official languages.

The Council submitted that the relevant legal framework had not changed since the time when these decisions had been adopted but that the number of official languages had increased to 21, thus increasing the logistical problems as regards the language scheme. It added that both itself and the respective Presidencies were doing their best to ensure that citizens received as much information and in as many languages as possible. The Council stressed, however, that it did not have any influence on the choice of the languages in which the Presidency offered its own information.

On 1 April 2005, the complainant complained to the Ombudsman. The complainant alleged that the Council's failure to ensure that the internet presentations of the Presidency were also made available in German constituted maladministration. It claimed that the Council should see to it that the internet presentations of the Presidency were also made available in German henceforth.

## The inquiry

### The Council's opinion

In its opinion, the Council made the following comments:

Article 203 of the EC Treaty provides that "[t]he office of President shall be held in turn *by each Member State* in the Council for a term of six months in the order decided by the Council acting



unanimously" (emphasis added).

The Presidency's website was organised and run by the relevant ministry in the Member State concerned. This was clear from the websites themselves. Such websites did not aim to replace the Council's website and register of documents, but sought to complement them. They provided practical information on activities unique to each Presidency such as, for instance, informal meetings, cultural events and other Presidency activities and initiatives.

It was true that Presidency documents counted as Council documents for the purpose of applying Regulation 1049/2001. However, this was an entirely separate matter, which did not, in any way imply, that the Presidency's website was under the Council's control.

The complainant argued that there was nothing in the Council's Rules of Procedure that substantiated the view that the Presidency bore sole responsibility for the information on its website. This, however, turned things around: the Council simply had no power to order a Member State to organise its websites in a particular manner. It followed that, independently of the substantive question whether the Presidency's website ought to provide information in German (a matter of Member State law and practice to be decided on by the national institutions involved), there could be no maladministration on the part of the Council since that institution bore no responsibility for the Presidency's website.

For these reasons, the complaint was unfounded.

## The complainant's observations

In its observations, the complainant made the following comments:

The Presidency could not be a part of the Council without being responsible to the latter.

The contents of the Presidency's website did not only complement the Council's website, but went far beyond the contents of the latter.

The Council recognised that documents of the Presidency were documents of the Council within the meaning of Regulation 1049/2001. However, since the contents of the Presidency website were documents within the meaning of Article 3 lit. (a) of that Regulation and thus Council documents, the Council's position would mean that the Council did not have control over its own documents. This would be a manifestly absurd situation.

The present case did not concern a Member State and "its" (that is to say, national) websites, but the websites set up by a Member State in its capacity as the incumbent of the Presidency. The law and practice of the Member State could only be relevant as regards the activities that were not linked to the Presidency.

The Council's argument that it was unable to influence its Presidency, that is to say, part of



itself, appeared to be nonsensical. It defied any reasonable consideration that the Council should be unable to address, for example, a request or a recommendation to its own Presidency.

Article 195 of the EC Treaty provides that the mandate of the Ombudsman covers all Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance. Apart from this exception, no area should exist that could not be the subject of a complaint. It thus had to be possible to complain about the Presidency, either by way of a complaint against the Council or directly against the Presidency.

## **The Ombudsman's efforts to achieve a friendly solution**

After careful consideration of the opinion and of the observations, the Ombudsman was not satisfied that the Council had responded adequately to the complaint.

## **The proposal for a friendly solution**

On 20 October 2005, the Ombudsman therefore made the following proposal for a friendly solution to the Council:

The Council could consider the complainant's request that the internet presentations of the Presidencies should be made available in German as well.

### **The Council's opinion**

In its opinion, the Council made the following comments:

There could only be maladministration on the part of the Council if it had misapplied an existing EU rule. This could not be the case where the Council was not responsible for the action complained about.

The Ombudsman's reasoning was incorrect. Article 203 of the EC Treaty provided that Member States should take turns in holding the office of President. This obviously did not imply that the Member State in question became part of the Council any more than any other Member State. It merely implied that that *Member State* (as such, not as a member of the Council) was charged with the chairing of Council meetings and the activities that this entailed.

Over past decades, the practice had developed whereby Member States holding the Presidency used this period to promote themselves and organise other activities, which might or might not be related to the work of the Council. As one example, many Member States, when holding the Presidency, organised cultural activities. Such activities, and information pertaining to them, remained under the responsibility of the Member State as such (holding the Presidency). They could obviously not be regarded as Council activities.



Similarly, the websites run by that Member State and/or by its national ministries were set up, financed and managed under the responsibility of the Member State as such (holding the Presidency). They are neither financed nor managed by the Council. As the Council had already noted, this was indeed made clear by the disclaimers that are found on these websites.

The Ombudsman had stated in his proposal for a friendly solution that he was not aware of any rule or principle that could prevent the Council from discussing or agreeing on formal aspects of these websites. This could not be a legal observation, as it would reverse a fundamental principle of EU law. According to Article 7(1) of the EC Treaty, "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty." There was no rule that would enable the Council to act on the language regimes applied by a particular Member State. Indeed, the Ombudsman had identified none either. The Council's Rules of Procedure certainly comprised no such rules.

In summary, the fact that these websites were called "Presidency websites" did not put them under the Council's supervision in any way. The websites were not maintained by the Presidency but, in accordance with the terms of Article 203 of the EC Treaty, by the Member State holding the Presidency. There was no legal basis that allowed the Council to require Member States to apply a particular linguistic regime.

The Council concluded by saying that it was therefore unable to consider the Ombudsman's proposal for a friendly solution or to take a position on the substance of the matter, which fell outside its remit.

### **The complainant's observations**

In its observations, the complainant maintained its complaint.

### **The Ombudsman's appraisal**

On the basis of the Council's opinion and the complainant's observations thereon, the Ombudsman concluded that no friendly solution could be achieved.

## **The Ombudsman's draft recommendation**

### **The draft recommendation**

On 21 March 2006, the Ombudsman addressed the following draft recommendation to the Council, in accordance with Article 3(6) of his Statute:

"The Council should consider the complainant's request that the internet presentations of the Presidencies should be made available in German as well."



This draft recommendation was based on the following considerations:

1 The Ombudsman considers that the submissions of the parties in the present case make it necessary to address three different issues, namely, (1) the circumstances in which maladministration can be found, (2) whether the Council can be held responsible under any circumstances for the websites maintained by its Presidency, and (3) whether the choice of languages concerning these websites is compatible with principles of good administration.

2 As regards the *first* issue, the Ombudsman notes that the Council argues that maladministration could only be found if it had misapplied an existing rule. However, this interpretation is too narrow and does not do justice to the concept of "maladministration" laid down in Article 195 of the EC Treaty. The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle binding upon it [4] . This definition has been approved by the European Parliament [5] . Contrary to what the Council assumes, maladministration can thus not only be found in cases where a rule has been violated.

3 As regards the *second* issue, it should be noted that Article 203 of the EC Treaty provides that "[t]he office of President shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously". As the Council correctly observed in its opinion on the Ombudsman's proposal for a friendly solution, this does not mean that the Member State as such becomes part of the Council. When a Member State holds the Presidency that means that this Member State has, for a limited period of time, the office of presiding over the Council. In this sense, however, the Presidency is clearly part of the Council. The Ombudsman notes that the Council itself stated, in its letter to the complainant of 4 March 2005, that it was undisputed that the Presidency was functionally part of the Council.

4 The Ombudsman considers that, being functionally part of the Council, the Presidency ought to be subject to the same obligations as the latter, unless there are specific reasons why these obligations should not be applied to the Presidency.

5 It is obvious that this conclusion only applies *to the extent* that the Member State concerned is acting in its capacity as President of the Council. As the Council correctly observed in its opinion on the Ombudsman's proposal for a friendly solution, the fact that a Member State holding the Presidency organises cultural activities during the time of its Presidency does not allow these activities to be regarded as Council activities. Such activities indeed remain under the responsibility of the Member State as such.

6 The Ombudsman considers, however, that a different conclusion is justified in so far as the websites maintained by the Presidency are concerned.

7 The Council argues that the question as to what languages should be used for the websites of the Presidency is a matter to be determined by the law and practice of the Member State that holds the Presidency. According to the Council, the Presidency alone is responsible for the





information published on these websites.

8 Member States are obviously free to set up whatever websites they want, subject only to the limitations that may arise under national law. It should be noted, however, that the websites concerned by the present case are clearly marked and meant to serve as websites of the Presidency. These websites provide information about the work of the Presidency, in the capacity assigned to it by Community law. In the Ombudsman's view, these websites cannot therefore be considered to be 'national' websites outside the reach of Community law. This is particularly true in view of the importance that the Council itself ascribes to the work of the Presidency. On its own website ([www.consilium.europa.eu](http://www.consilium.europa.eu)), the Council makes the following statement under the heading "Presidency websites": "The Presidency of the Council plays a vital part in the organization of the work of the institution, notably as the driving force in the legislative and political decision-making process. It has to organize and chair all meetings and work out compromises capable of resolving difficulties."

9 The fact that these websites are maintained by the authorities of the Member State concerned and that they contain express references to this effect does not affect the above conclusion. Since Article 203 of the EC Treaty provides that individual Member States shall in turn hold the Presidency, it appears only natural that the websites of the Presidency are maintained by the authorities of the Member State holding the Presidency. Nor does the Ombudsman consider it relevant that the costs for these websites appear to be borne by the Member State concerned. This fact would not prove that the relevant activity cannot be regarded as an activity of the Presidency acting in its capacity as part of the Council. There is furthermore nothing to suggest that these costs necessarily have to be met by the individual Member States. Given that the Presidency is functionally part of the Council, it does not appear excluded to argue that the costs of the relevant websites could be charged to the Community budget.

10 The Council's main argument appears to be that in its view it has no power to order a Member State holding the Presidency to organise its websites in a particular manner and that it therefore does not bear any responsibility for these websites. In its opinion on the Ombudsman's proposal for a friendly solution, the Council even argued that the opposite view would reverse a fundamental principle of EU law, namely, that set out in Article 7(1) of the EC Treaty according to which "[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty."

11 The Ombudsman remains unconvinced by this argument. Where a Member State provides a website, in its capacity as the incumbent of the Presidency, it acts as part of the Council. Given that the issue raised in the present complaint thus concerns the relationship between the Council and its Presidency, that is to say, a part of that very same Council, the Ombudsman does not see how the position adopted by him could enter into conflict with the principle enunciated in Article 7(1) of the EC Treaty. The Ombudsman agrees that it is primarily for the Member State holding the Presidency to decide on the contents it wishes to provide on such a website. However, the Ombudsman is not aware of any rule or principle that could prevent the Council from discussing and agreeing on formal aspects of these internet presentations with a view to making the information thus provided as widely available as possible, for example, by





discussing and determining which languages should be used for these websites. Given that Article 203 of the EC Treaty provides for a rotating Presidency (among all the Member States), such formal aspects would not only concern a particular Member State but would be of relevance to all of them.

12 In view of the above, the Ombudsman continues to believe that the Council can in principle be held responsible as regards the websites maintained by its Presidency.

13 As regards the *third* of the above-mentioned issues, it should be noted that the Ombudsman has already had occasion to deal with the issue of the choice of languages as regards information published by Community institutions and bodies.

14 In his decision of 14 June 2000 in case 939/99/ME [6] , the Ombudsman stressed that it is essential that documents directed to persons outside the Community institutions should be available in as many languages as possible. One of the most important means of providing information to the public in modern times is the internet. In the Ombudsman's view, it is therefore particularly important to ensure that the public websites set up by the institutions and bodies of the Community are accessible to citizens in as many languages as possible.

15 In its opinion, the Council argued that the websites of the Presidency do not aim to replace the Council's website, which is available in all Community languages, and register of documents, but seek to complement them. It seems that the Council thus wished to suggest that there was no need to consider the substantive issue raised by the complainant.

16 Having visited some of the relevant websites, the Ombudsman considers that the complainant's argument according to which these websites do not only complement the Council's website, but go far beyond the contents of the latter, does not appear to be without merit. The Council itself noted in its opinion that these websites provide practical information on activities unique to each six-month period of the Presidency such as, for instance, informal meetings, cultural events and other Presidency activities and initiatives. Such information is not necessarily available on the Council's own website. However, even if the websites of the Presidency only provided additional information, this information would nevertheless be of interest to the public and should therefore be made available as widely and as well as possible.

In view of the significance of the role played by the Presidency, it would appear all the more important to ensure that the information published on its websites is accessible to as many citizens as possible. It is appropriate to underline once again that the present case does not concern the *contents* of these websites, that is to say, the issue as to what information the Presidency provides, but the *presentation* of this information, that is to say, the question as to whether the information should be made available in certain languages.

17 In his decision of 10 September 2002 in case 1146/2001/IP [7] , the Ombudsman expressed the view that, as far as possible, the institutions and bodies of the EU should provide information to citizens in their own languages. The Ombudsman added, however, that he was not aware "of any rule or principle that forbids them to publish information on their websites in



less than the full number of official languages". Particularly in view of the fact that the number of official languages in the EU has now increased to 20, there may indeed be legitimate reasons to limit the number of languages in which the websites provided by the Presidency are offered to the public.

18 The Ombudsman considers, however, that if the number of languages for the presentation of the Presidency's websites is to be limited, the choice of the languages to be used must be based on objective and reasonable considerations. It should be noted that, in its judgment in Case C-361/01 P *Kik v OHIM* (which concerned the languages to be used in proceedings before the Office for Harmonisation in the Internal Market), the Court of Justice pointed out that whilst the relevant regulation treated the official languages of the Community differently, the Council's choice "to limit the languages to those which are most widely known in the European Community is appropriate and proportionate." [8] The complainant has submitted what appear to be weighty arguments to establish its view that, after the enlargement of 2004, German has become the second most widely used language in the EU. In the complainant's view, the Presidency websites should therefore be made available in German as well. In the light of these arguments, the Ombudsman considers that the choice of languages for the websites of the Presidency should indeed be reconsidered.

19 The Ombudsman notes, however, that the Council has so far refrained from taking a position on the substance of the complainant's arguments.

20 In view of the above, the Ombudsman arrives at the conclusion that the Council's failure to consider the substance of the complainant's request that the websites of the Presidency should also be offered in German constitutes maladministration.

## The Council's detailed opinion

After having received the draft recommendation, and in accordance with Article 3(6) of the Statute of the European Ombudsman, the Council sent a detailed opinion on 7 June 2006.

In its detailed opinion, the Council made the following comments:

It was regrettable that the Ombudsman already appeared to have taken a final position on this matter by issuing a press release. By doing so, the detailed comments which the Council had been invited to submit, and which constituted a procedural guarantee laid down in Article 195(1) of the EC Treaty, largely lost their relevance.

As regards substance, the Council had already explained why it bore no responsibility for websites maintained under the authority of a Member State. Whilst the Council supported multilingualism as an important contribution to better communication with citizens, it stood ready to inform the relevant Member States of the Ombudsman's views on the matter. However, the



Council was not in a position to follow up the draft recommendation in any other meaningful way.

Lastly, in the absence of any maladministration by a Community institution or body, this issue fell outside the scope of the Ombudsman's competence.

## The complainant's observations

In its observations, the complainant maintained its complaint. It submitted that the choice of languages for the websites of the Presidency was not based on objective and reasonable considerations. The complainant argued that the communication potential (that is to say, the number of citizens that can be reached by using a certain language) constituted such an objective and reasonable criterion. The complainant submitted that German should therefore be used by the Presidency for the presentation of its websites in all cases where English was not used as the sole language.

In the complainant's view, the Council's approach to the present case was unacceptable.

## The Ombudsman's evaluation of the Council's detailed opinion

The Ombudsman considers that the Council's detailed opinion does not present any new arguments that could affect the appraisal that he undertook in his draft recommendation.

The only new argument that the Council put forward in its detailed opinion concerned what the Council appeared to regard as a breach of its procedural rights by the Ombudsman. The Council seems to take the view that, before the Ombudsman can take a final view on whether or not there is maladministration, he would need to await the detailed opinion in response to the Ombudsman's draft recommendation. In this context, the Council refers to Article 195(1) of the EC Treaty. However, Article 195(1) provides that, where the Ombudsman "establishes" an instance of maladministration, he shall refer the matter to the institution concerned, "which shall have a period of three months in which to inform him of its views". Likewise, Article 3(6) of the Ombudsman's Statute stipulates that, where the Ombudsman "finds" maladministration, he shall refer the matter to the institution concerned, "where appropriate making draft recommendations". It is thus abundantly clear that a draft recommendation can only be made *after* the Ombudsman has formed the view that there is maladministration.

The Ombudsman finds it useful to note that, before addressing a draft recommendation to the Council, he gave the Council two occasions to express its views on the matter, first when he sent the complaint to it for its opinion and then when he asked the Council to comment on his proposal for a friendly solution. The Council's suggestion that its right to be heard was violated in the present case is thus clearly unfounded.



It is not excluded that, after having arrived at a finding of maladministration in a draft recommendation, the Ombudsman could revise this view if the institution puts forward, in its detailed opinion, convincing reasons that would make such a reconsideration necessary. The Council is therefore right that the Ombudsman does not form a "final" view until he has received and examined the detailed opinion, or the deadline for submission of the detailed opinion has passed. The Ombudsman therefore carefully examines the comments submitted in such a detailed opinion before deciding on how to proceed in a given case. However, and as mentioned above, the Council has failed to provide any new arguments as to substance in its detailed opinion in the present case.

## **The Ombudsman's recommendation**

In view of the above, the Ombudsman arrives at the following conclusions:

- (i) the Council is responsible for the languages used on its Presidency websites;
- (ii) the information on the Council Presidency website should ideally be available in all official Community languages;
- (iii) if the number of languages used on the Council Presidency website is to be limited, the choice of the languages to be used must be based on objective and reasonable considerations; and
- (iv) the Council's refusal to deal with the substance of the case, i.e. the complainant's request that the internet presentations of the Presidencies should be made available in German as well, is therefore unjustified and constitutes maladministration.

The Ombudsman therefore re-states his draft recommendation as a recommendation to the Council as follows:

The Council should consider the complainant's request that the internet presentations of the Presidencies should be made available in German as well.

The European Parliament could consider adopting a resolution accordingly.

Strasbourg, 30 November 2006

P. Nikiforos DIAMANDOUROS



[1] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

[2] Available on the Ombudsman's website ( <http://www.ombudsman.europa.eu> [Link]).

[3] OJ 2001 L 145, p. 43.

[4] See Annual Report 1997, p. 22.

[5] See Annual Report 1998, p. 17.

[6] Available on the Ombudsman's website (<http://www.ombudsman.europa.eu>).

[7] Available on the Ombudsman's website (<http://www.ombudsman.europa.eu>).

[8] Case C-361/01 P *Kik v Office for Harmonisation in the Internal Market* [2003] ECR I-8283, paragraph 94.