European Ombudsman

Draft recommendation to the European Commission in complaint 367/98/(VK)/GG

Recommendation

Case 367/98/GG - **Opened on** 15/06/1998 - **Recommendation on** 22/11/2000 - **Decision on** 26/04/2001

(Made in accordance with Article 3 (6) of the Statute of the Ombudsman. (1))

SUMMARY

The complaint in this case concerns the failure by the European Commission to set up supplementary insurance schemes for its local staff working in its delegation (from 1 January 1995: representation) in Austria. Article 14 of the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" provides that the Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate. On 26 April 1994, the Commission adopted the "Rules laying down the specific conditions of employment of local staff serving in Austria". In the absence of new rules, these provisions continue to be applicable to the staff working in the Commission's representation in Vienna. According to these Specific Rules, supplementary insurance schemes were to be set up in respect of temporary incapacity to work (Article 25), invalidity and death (Article 28) as well as retirement (Article 29). None of these schemes had been set up when the complainants turned to the Ombudsman in 1998. The Ombudsman proposed, as a friendly solution, that the Commission should do its utmost to set up the supplementary insurance policies with retroactive effect. In its reply, the Commission informed the Ombudsman that a formal decision had been taken to set up a supplementary insurance policy for temporary incapacity to work as provided in Article 25 of the Specific Conditions. In so far as the other supplementary insurance schemes were concerned, discussions continued to take place regarding the issue of retroactivity on the basis of concrete offers submitted by insurance companies. According to the Commission, it was envisaged to finalise this matter by July 1999 at the latest. It appears that at the time when the complainant lodged their last observations with the Ombudsman towards the end of September 2000, the Commission still had not concluded these supplementary insurance policies. The Ombudsman therefore makes a draft recommendation that the Commission should do its utmost to set up the supplementary insurance policies as quickly as possible.

THE COMPLAINT

The complaint was lodged by two members of the local staff of the representation of the

European Commission in Vienna (Austria). This representation is the successor of the delegation that the Commission maintained in Austria prior to the accession of this country to the European Communities on 1 January, 1995. Article 14 of the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereinafter the "Framework Rules") that were circulated on 22 June 1990 provides as follows: *"The Commission shall be responsible for the social security contributions payable by employers under the rules in force at the place where the member of local staff is to perform his duties. The Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate. The contributions payable by the Commission and the member of the local staff to meet the cost of any supplementary or independent schemes shall be determined by the authority empowered to conclude contracts of employment."* On 26 April 1994, the Commission adopted the "Rules laying down the specific conditions of employment of local staff serving in Austria" (hereinafter the "Specific Conditions") which entered into force on 1 May 1994. Article 25 (1) of these Specific Conditions provides that, without prejudice to the statutory insurance scheme applicable in Austria, a member of the local staff who is unable to work as a result of sickness or accident shall remain entitled to remuneration during the first 6, 8, 10 or 12 weeks, depending on how long they have been in service. From the 7th, 9th, 11th and 13th week of incapacity respectively, the member of the local staff is to receive an income of 50 % of his or her remuneration during a supplementary period of four weeks. From the periods of intervention of the statutory insurance scheme and until the 180th day, the member of the local staff shall receive social security benefits entitling him or her to an income equal to 100 % of the last basic monthly salary received before the time of incapacity. According to Article 25, the terms of compensation for loss of earnings from the periods of incapacity provided for by the statutory insurance scheme shall be established with an insurance company to which the member of the local staff is affiliated. Article 27 of the Specific Conditions provides that in the event of permanent and total invalidity caused by sickness or accident at work, or in the event of death, members of the local staff shall be entitled to benefits in accordance with the insurance policy concluded for this purpose by the Commission. According to Article 28 of the Specific Conditions, a member of the local staff shall receive a retirement pension in accordance with the insurance policy concluded for this purpose by the Commission. The contributions to these insurance schemes are set out in Article 30 of the Specific Conditions. According to Article 30 (2), members of the local staff shall make a contribution amounting to one third of the costs of the insurance referred to in Article 25. Article 30 (3) provides that with respect to the risks referred to in Articles 27 and 28 of the Specific Conditions, the contribution for pension and invalidity-death shall amount to 60 % for the Commission and 40 % for the member of the local staff. Article 38 of the Specific Conditions stipulates that the provisions of Articles 25, 27 and 28 "shall enter into force and take effect on the date on which the insurance policies referred to in these articles take effect." According to the complainants, the subsequent developments may be summed up as follows: Detailed offers from three insurance companies were submitted to the administration by the local staff on 5 May 1994. In December 1994, the unit in charge at the Commission's Directorate-General I.A (2) asked the Commission's delegation to forward declarations from the members of the local staff that were to be covered in which the latter agreed to be covered by the insurance "sickness-accident-incapacity to work" of Van Breda, an insurance company.

Shortly afterwards, the members of the local staff signed the relevant forms in so far as the guarantee of revenues in case of incapacity to work was concerned and handed them over to the administrative assistant at the delegation in Vienna. The latter forwarded these forms to DG I.A on 1 June 1995. In a note to the administrative assistant at the delegation dated 4 July 1995, DG I.A stated that the local staff working in Vienna was not to be covered by the insurance policy offered by Van Breda. The delegation was invited to submit, together with DG X (3) , new proposals to DG I.A and DG IX (the Directorate-General in charge of Administration and Personnel). On the occasion of a meeting with all the local staff working in Vienna in early March 1996 and in the presence of the administrative assistant at the representation, Mr Walker, the head of personnel at DG X invited the members of the local staff to submit new proposals. These proposals should be based on two options, providing for retroactive effect as from 1 May 1994 and from 1 January 1996 respectively. In a note to the administrative assistant at the representation of 26 March 1996, Mr Walker expressed the view that the issue of the supplementary insurance policies had not been dealt with further by DG I.A in view of the fact that responsibility for local staff had been transferred to DG IX and DG X. Mr Walker asked the addressee of his note to grant priority to this matter. In August 1996, the members of the local staff in Vienna submitted to the representation three updated proposals that took into account the two options mentioned above. In December 1996, the local staff presented a comparison between the services offered by the three insurance companies and expressed a preference for two of these offers. They again asked for the supplementary insurance policies to be set up rapidly. A further request in that sense was made in a note that the local staff submitted to the representation on 21 April 1997. In a note of 21 April 1997, Mr Käfer, the head of administration at the representation, asked the local staff to provide him, by 28 April 1997, with the name of one single insurance company so that negotiations could be started. On 24 April 1997, the members of the local staff wrote to Mr Käfer and suggested that negotiations should be undertaken on the basis of the offers presented by two companies. The local staff felt that they were not in a position to decide which offer was to be chosen and considered that this decision should be left to the Commission's experts in the matter. Mr Käfer informed Mr Walker of the names of the two companies in a note of 13 May 1997. In his reply of 16 May 1997, Mr Walker stressed that a decision regarding the company to be chosen needed to be made by the representation in order to allow the procedure to continue. In a note of 22 October 1997 to Mr Käfer, the members of the local staff submitted that negotiations should be entered into with an insurance company called BVP and that the Commission's services should give priority to this matter.

THE INQUIRY

The Commission's opinion In its opinion, the Commission made the following comments: After the accession of Austria to the EU on 1 January 1995, the Commission's delegation became a representation which implied various changes regarding the rules to be applied. Within this framework, the Commission was in the process of revising the specific conditions of employment of local staff serving in Austria. The staff representatives and the administration were trying to find an agreement regarding all these problems within the framework of a joint study group. Until this revision was carried out, the Specific Conditions that had been adopted having regard to the situation of local staff in a non-member state, remained provisionally applicable. It followed from Article 14 of the Framework Rules that the setting-up of

supplementary insurance schemes depended on the inadequate coverage offered by the local scheme. On the basis of Article 14 of the Framework Rules, the Commission could therefore not be held responsible for the non-implementation of Articles 25, 27 and 28 of the Specific Conditions. Account also had to be taken of the margin of interpretation of which the Commission disposed in the matter. Given that the setting-up of supplementary insurance schemes was linked to a negative appraisal of the local scheme, the Commission had to act prudently, particularly in the case of a country that had become a member state. The establishment of supplementary insurance schemes that were limited to certain members of staff (in the present case the local staff) was a cause of potential conflict between the beneficiaries and other staff and thus had to be handled with particular attention. The Commission had to ensure a transition that was coherent with the regime applicable in all the other member states. For this reason and in order to procure its staff a high level of social protection, the Commission had manifested its intention to set up supplementary insurance schemes to an extent as wide as possible, provided that the homogeneity of the system was maintained. This intention was borne out by the steps by the Commission in this matter already since 1994. It had however not yet been possible to find an agreement regarding the technical and financial conditions in which such supplementary insurance schemes could function. The Commission would ensure that the local staff in Vienna benefit from supplementary insurance schemes as soon as the new rules had been adopted. The question as to the date on which these should take effect and as to their financial implications was part of the discussions of the study group mentioned above. **The complainants' observations** In their observations, the complainants maintained their complaint and made the following further comments: The Specific Conditions had entered into force at a time when it was clear to both the Commission and its local staff in Vienna that Austria would join the European Communities shortly. The accession of Austria had not changed the fact that the social protection offered by the statutory scheme was insufficient. In so far as the local staff in the delegations in Finland and Sweden were concerned, supplementary social benefits had been agreed shortly before the accession of these countries. These benefits were provided to the local staff of the representation in Stockholm since 1 January 1997. In the case of the representation in Helsinki, such insurance policies had not yet been concluded for the sole reason that the local staff there felt unable to provide the financial contribution that had been laid down in the Specific Conditions applicable to them. There was therefore clearly discrimination against the local staff of the Commission working in Vienna. The award of supplementary benefits to local staff would not cause conflicts with the other agents of the Commission working in Vienna. These other agents were civil servants who enjoyed a degree of social protection that was far higher than that of local staff. It was surprising that the Commission had raised this and other arguments only now. The delay was not due to technical problems but to the failure of the Commission's services to provide the necessary means in the budget. It was not appropriate to discuss new rules as long as the old ones were not applied properly.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's analysis of the issues in dispute After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims. **The possibility of a friendly solution** On

31 March 1999, the Ombudsman therefore submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman invited the Commission to do its utmost to set up the supplementary insurance policies with retroactive effect. In its reply of 1 June 1999, the Commission pointed out that the relevant issues had been discussed extensively with the members of the local staff on 16 and 17 March 1999. On that occasion, a formal decision had been taken to set up a supplementary insurance policy for temporary incapacity to work as provided in Article 25 of the Specific Conditions. In so far as the other supplementary insurance schemes were concerned, discussions continued to take place regarding the issue of retroactivity on the basis of concrete offers submitted by insurance companies. At the meeting in March, the administration had proposed to finalise this matter in July 1999 at the latest. In their observations on this letter, the complainants informed the Ombudsman that on 4 September 1999, the representation in Vienna had addressed a note to its local staff in which it explained that no supplementary insurance policy for temporary incapacity to work had yet been concluded. According to this note, seven insurance companies had been asked to submit proposals. Six of these proposals had been unsuitable since they did not cover the benefits outlined in Article 25 of the Specific Conditions. The remaining offer did cover these benefits but did not meet with the representation's approval since it would have resulted in benefits that were higher than the basic monthly salary. According to the complainants, no progress appeared to have been made with regard to the other supplementary insurance schemes.

FURTHER INQUIRIES

Request for further information In view of the above, the Ombudsman concluded that he needed further information in order to deal with the complaint. He therefore asked the Commission (1) to specify whether or not it considered that Article 14 of the Framework Rules, either on its own or in conjunction with Articles 25, 27 and 28 of the Specific Conditions, obliged it to provide supplementary insurance policies for its local staff in Austria, (2) to inform the Ombudsman as to what steps it had taken to implement the decision taken in March 1999 to conclude a supplementary insurance policy for incapacity to work as provided for in Article 25 of the Specific Conditions, (3) to provide information as to how the discussions relating to the supplementary benefits relating to retirement pensions, invalidity and death had developed since the Commission's letter of 1 June 1999 and (4) to provide a clear timetable for further action in the matter. **The Commission's reply** In its reply, the Commission made the following comments: Article 14 of the Framework Rules, even when considered in the light of Articles 25, 27 and 28 of the Specific Conditions, did not entail an automatic obligation, given that the setting-up of supplementary insurance schemes depended on the inadequate character of the coverage offered by the local scheme. The Commission reiterated its intention to set up supplementary insurance schemes for local staff to an extent as wide as possible, provided that a certain homogeneity of the system in all the member states was maintained. In so far as the local staff in Vienna was concerned, the Commission had already decided that they should be able to benefit from supplementary insurance schemes. In so far as the supplementary insurance policy for temporary incapacity to work was concerned, none of the main insurance companies that were present on the Austrian market had been able to offer benefits in conformity with the rules set out in Article 25 of the Specific Conditions. However, thanks to the repeated efforts of the administration the Merkur company had finally been able to submit a suitable offer that had been transmitted to the representation in Vienna on 8 March 2000 with a

view to obtaining the preliminary agreement of the local staff. On 5 April 2000, ten of the eleven members of this local staff had marked their agreement with this proposal, subject to the provision of answers to the questions that were set out in the note by Mr L. dated 26 April 2000. The Merkur company had replied to all these questions on 16 May 2000, and the answers had been forwarded to the local staff the same day. Despite several reminders, however, the members of the local staff had not yet expressed their agreement with the offer submitted by the Merkur company. Further to a new mission of the relevant services to Vienna on 16 and 17 May 2000, the local staff had expressed their wish that a new market study be carried out in order to identify the insurance companies that could offer supplementary insurance policies regarding invalidity, death and retirement which would be in conformity with the conditions laid down in the Specific Conditions. This proposal had been accepted. The market study would be carried out by the administration. It should be recalled that the local staff had been asked repeatedly to indicate their preference on the basis of a list of five companies. It had also been decided to allocate, subject to budgetary availability, a sum of € 1 500 in order to procure the services of an expert in insurance matters, as requested by the local staff in Vienna. On the basis of the results of this market study, a definitive proposal would be submitted to the local staff shortly. The Commission was however unable to provide precise dates for its future actions, given that some elements, like the replies from the insurance companies, were beyond its control. **The complainants' observations** In their observations, the complainants pointed out that in so far as the supplementary insurance policy for temporary incapacity to work was concerned, the Commission had, in a note dated 8 June 2000, asked its representation in Vienna to confirm that the local staff approved the supplementary insurance offered by the Merkur company. The representation in Vienna had forwarded this note to the local staff on 15 June 2000. According to the complainants, the members of the local staff had thereupon confirmed in a note of 15 June 2000 that they agreed with the said offer. One of these members had given a conditional agreement whilst another one had declared that he wanted to do without this insurance. As to the supplementary insurance policies regarding invalidity, death and retirement, the complainants pointed out that already in May 1994 the members of the local staff had submitted three detailed offers by insurance companies, and that already in their note of 22 October 1997 they had suggested the name of the insurance company that they preferred. The complainants stressed that their foremost interest was that the supplementary insurance schemes should be set up as quickly as possible and that these schemes should enter into force retroactively.

THE DECISION

1 Failure to set up supplementary insurance schemes 1.1 The complainants, two members of the local staff of the Commission's representation in Vienna, claim that the Commission has failed to set up supplementary insurance schemes for its local staff working in its delegation (from 1 January 1995: representation) in Austria. They refer to the "Rules laying down the specific conditions of employment of local staff serving in Austria" (hereinafter the "Specific Conditions") adopted by the Commission on 26 April 1994. According to these Specific Rules, supplementary insurance schemes were to be set up in respect of temporary incapacity to work (Article 25), invalidity and death (Article 28) as well as retirement (Article 29). According to the complainants, none of these supplementary insurance schemes has been set up yet. 1.2 The Commission claims that Austria's accession to the EU implied various changes regarding the

rules to be applied. According to the Commission, it is still engaged in the process of revising the specific conditions of employment of local staff serving in Austria. The Commission also refers to the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereinafter the "Framework Rules") on the basis of which the Specific Conditions were adopted. Article 14 of the Framework Rules provides that the Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate. The Commission argues that it can thus not be held responsible for the non-implementation of Articles 25, 27 and 28 of the Specific Conditions. It claims that in view of the fact that the establishment of supplementary insurance schemes is linked to a negative appraisal of the national scheme, it had to act prudently, particularly in the case of a country that had subsequently joined the EU. The Commission points out, however, that it intends to set up supplementary insurance schemes to an extent as wide as possible, provided that the homogeneity of the system is maintained. It had however not yet been possible to find an agreement regarding the technical and financial conditions in which such supplementary insurance schemes could function. Finally, the Commission points at its margin of interpretation in the matter and claims that the establishment of supplementary insurance schemes that are limited to certain members of staff is a cause of potential conflict between the beneficiaries and other staff. 1.3 The Ombudsman notes that the Commission agrees that the Specific Conditions continue to be applicable to the local staff in Vienna until they are replaced by new rules. It is thus *these* rules that fall to be examined here. The Ombudsman therefore considers that the Commission's statement in its opinion according to which it would ensure that the local staff in Vienna benefit from supplementary insurance schemes as soon as *new* rules had been adopted is of no relevance for the examination of the present complaint. 1.4 The Commission correctly points out that according to Article 14 of the Framework Rules, supplementary insurance schemes are to be set up where there is no local scheme or where the local scheme is judged to be inadequate. The Ombudsman also agrees with the Commission's view that it disposes of a margin of appreciation in this matter and that it needs to proceed prudently, particularly in the case of a country that has subsequently joined the EU. The Ombudsman takes the view, however, that these arguments do not appear to be relevant in the present context. In the Specific Conditions adopted in 1994, the Commission accepted that its local staff in Austria should benefit from the supplementary insurance schemes set out at Articles 25, 27 and 28 of these rules. The discretion which the Commission enjoyed in this field under Article 14 of the Framework Rules thus appears to have been exercised in the sense that the Commission decided that it was necessary to set up supplementary insurance schemes. It is difficult to see why these provisions should have been established if the Commission had considered that the statutory scheme applicable in Austria was sufficient to grant the level of social protection that it deemed appropriate for its local staff. An examination of Article 25 of the Specific Conditions reinforces this conclusion. This provision clearly spells out the details of the benefits that the Commission intended to confer on its local staff in the case of temporary incapacity to work without leaving any significant space for the exercise of discretion on the part of the Commission. Incidentally, from its reply to the Ombudsman's request for further information it would seem to emerge that the Commission no longer denies that it is under an obligation to set up these supplementary insurance schemes. 1.5 Although the Commission does not directly rely on Article 38 of the Specific Conditions according to

which the provisions of Articles 25, 27 and 28 "shall enter into force and take effect on the date on which the insurance policies referred to in these articles take effect", the Ombudsman considers it useful to point out that this article cannot be interpreted in the sense that the Commission is free as to whether and when it sets up the relevant insurance schemes. Such an interpretation would effectively deny any *effet utile* to Articles 25, 27 and 28. It must therefore be assumed that this provision was meant to ensure that the Commission should have sufficient time within which to set up these supplementary insurance schemes. 1.6 The Ombudsman considers that the Commission has not shown why the establishment of supplementary insurance schemes for its local staff should be a cause of conflict with other agents. The complainants' argument that these other agents are civil servants who enjoy a degree of social protection that is far higher than that of local staff is plausible and has not been refuted by the Commission. 1.7 The Ombudsman furthermore notes that the fact that the Commission's failure to set up the supplementary insurance schemes for its staff in Austria is not due to the accession of this country to the EU and the changes this necessitated would appear to be confirmed by the approach of the Commission towards its local staff in Sweden. The complainants explain, without being contradicted by the Commission, that supplementary social benefits for its local staff in the delegation in Stockholm had been agreed shortly before Sweden's accession to the EU and have been granted since 1 January 1997. 1.8 In these circumstances, the Ombudsman concludes that the Specific Conditions that entered into force on 1 May 1994 obliged the Commission to set up, within a reasonable time, supplementary insurance schemes for its local staff in Austria. The Ombudsman takes the view that a period of more than six years by far exceeds what can be considered to be reasonable, unless there are special circumstances that would justify such a delay. 1.9 In its opinion, the Commission appears to refer to technical and financial difficulties. The Ombudsman considers, however, that the Commission has not established that the excessive delay that has occurred is due to such difficulties. The only concrete example furnished by the Commission relates to a note prepared by it in mid-1999 according to which the offers of six out of seven insurance companies had been unsuitable since they did not conform to the provisions of the Specific Conditions. It has to be pointed out, however, that this example relates to only one of the supplementary insurance schemes concerned, i.e. the one provided for in Article 25 of the Specific Conditions. Given that the relevant offers appear to have been obtained only in 1999, the Ombudsman further considers that the lack of suitability of these offers cannot explain the delay that had occurred already prior to 1999. 1.10 The Commission also appears to suggest that the delay in the establishment of the supplementary insurance schemes is, to some extent at least, due to the lack of co-operation on the part of the local staff in Austria. The Ombudsman considers that the Commission has not put forward any substantial evidence that would support such a conclusion. On the contrary, the Ombudsman notes that the local staff have not only called on the Commission, on various occasions, to treat the matter as a priority but have also made what appear to be constructive proposals, notably in May 1994 (when specific offers from insurance companies were submitted) and in October 1997 (when the local staff informed the administration about the insurance company that they preferred). 1.11 The Ombudsman's conclusion is, therefore, that the Commission has failed to set up supplementary insurance schemes for its local staff working in its delegation (from 1 January 1995: representation) in Austria, in conformity with the Specific Conditions, and that this constitutes an instance of maladministration. **2 Conclusion** The Ombudsman therefore considers that the Commission's

approach in the present case gave rise to an instance of maladministration. Since a friendly solution is not possible, the Ombudsman makes a draft recommendation to the Commission. In doing so, account needs to be taken of the fact that the belated setting-up of the relevant supplementary insurance schemes as such will not necessarily remedy all the negative consequences of the Commission's delay. It is therefore appropriate to ask the Commission to do its utmost to make these schemes applicable with retroactive effect. The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman: **The draft recommendation** The European Commission should do its utmost to ensure that supplementary insurance schemes for its local staff in Austria are set up as soon as possible in accordance with the "Rules laying down the specific conditions of employment of local staff serving in Austria" adopted by the Commission on 26 April 1994 and with retroactive effect. The Commission and the complainants will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion before 28 February 2001. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented. Strasbourg, 22 November 2000 Jacob SÖDERMAN

(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, page 15.

(2) The Directorate-General that (together with DG I.B) used to be in charge of Foreign Relations.

(3) The Directorate-General that used to be in charge of Information, Communication, Culture and Audiovisual Media.