

## **Draft recommendation to the European Commission in complaint 1435/2002/GG**

Recommendation

**Case 1435/2002/GG - Opened on 30/08/2002 - Recommendation on 17/10/2003 -  
Decision on 29/03/2004**

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

### **THE COMPLAINT**

The complainant, a Swedish citizen, successfully took part in competition COM/A/21/98, and in July 1999 his name was put on a reserve list that was to be valid until the end of that year. Favourable rules for the recruitment of candidates from the new member states (Austria, Finland and Sweden) were applicable temporarily (until the end of 1999) by virtue of Council Regulation (EC) no. 625/95 of 20 March 1995. These rules derogated from the normal rules, particularly in so far as the classification of candidates was concerned.

The validity of the reserve list for competition COM/A/21/98 was subsequently extended until the end of 2000. However, the validity of the above-mentioned derogation was not extended.

In December 1999, the complainant received two verbal offers for posts at the Commission, one in Luxembourg (Directorate-General Information Society) and one in Brussels (Directorate-General Internal Market). The complainant contended that he accepted the post in Luxembourg on the understanding that his Directorate-General (DG) and DG Personnel and Administration would arrange for the necessary written offer in time, i.e. before the end of the year. According to the complainant, however, this turned out not to be possible due to an internal misunderstanding as the post that had been offered was not a permanent post but a research post that still had to be transferred into a permanent post. The complainant was informed accordingly by e-mail on 21 December 1999. According to the complainant, it was then too late to take up the offer made by DG Internal Market. The written offer for the post at DG Information Society was finally made in May 2000 and the complainant started working for the Commission on 15 September 2000.

On 15 July 2001, the complainant was informed that the Commission had decided to classify him in grade A5 step 3. The complainant considered that in view of his 19 years of professional experience, he would have qualified for a classification in grade A4 step 4. An internal complaint against this decision lodged on 8 October 2001 was however rejected by the Commission on 27



February 2002.

In his complaint to the Ombudsman, the complainant alleged that this result was neither fair nor correct and should therefore be rectified. He argued that he had not had any possibility to protect himself against this outcome. The complainant noted that with hindsight, he might have done what people within the Commission had according to him advised him to do at the time, i.e. accept any post before the expiry of the validity of Regulation (EC) no. 625/95. Given that some persons from the relevant reserve list had actually been employed before the end of 1999, the complainant submitted that persons from the same reserve list should receive the same treatment. The complainant further alleged that offer letters "subject to final decision" could have been written and were commonly written before the final offer letter was issued. According to the complainant, this made it possible to fix the date of the offer prior to certain cut-off dates, in order to avoid situations like the one in the present case. The complainant criticised the fact that this possibility had not been used in his case. The complainant furthermore argued that he had been informed in December 1999 by his future head of unit that in case the classification procedure should not result in the expected (i.e. positive) outcome, he would have a good chance to obtain a change in this decision through lodging a complaint against it.

In the complainant's view, the Commission's approach was not in accordance with the statements contained in the 'White Paper' of 2000, particularly in relation to the need to give staff proper credit for prior periods of employment and the importance of transparency. The complainant argued in particular that a slow recruitment process created situations that were detrimental to the possibility to recruit externally.

## THE INQUIRY

### **The Commission's opinion**

In its opinion, the Commission made the following comments:

Competition COM/A/21/98 for Principal Administrators of Swedish nationality had been organised in the context of the accession of Austria, Finland and Sweden and had been subject to the special and exceptional measures concerning the recruitment of these nationals during the enlargement period provided for by Council Regulation (EC) no. 625/95 of 20 March 1995. This regulation had been valid until 31 December 1999. It had derogated from a number of articles in the Staff Regulations and allowed the organisation of competitions by nationality for the new member states, the recruitment of such nationals without the prior internal publication of the vacant post and classification in a higher grade without the limits imposed by Article 31 of the Staff Regulations.

At the end of the enlargement period (31 December 1999), it had been considered that the Commission could still make use of the successful candidates from the enlargement competitions but that the special and temporary measures for recruitment, including the specific classification criteria, would no longer be applicable and that the normal statutory rules would apply. It was in these circumstances that the validity of competition COM/A/21/98 had been



extended.

The complainant had been aware of the special and temporary rules applicable to recruitment and their time limit. If the validity of the competition had not been extended beyond 31 December 1999, it would not have been possible at all to recruit the complainant to the Commission. On a point of fact, if it had been possible to recruit the complainant in 1999, his classification under the specific criteria, on the basis of his 18-19 years of professional experience, would have been A4 step 1 and not A4 step 4 as he had claimed. The recruitment in 2000 had been carried out in accordance with the statutory and classification rules applicable to all Commission staff at that time. The complainant had been treated in exactly the same way as all other candidates of enlargement competitions that had been recruited after the end of the enlargement period.

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

In his observations, the complainant maintained his complaint. He accepted that he had been informed about the Commission's rules for newly recruited candidates but maintained that he had had no idea as to how these rules and regulations were to be applied. The complainant reiterated his view that the Commission could have issued a "lettre d'offre à titre indicatif" that would have made it possible to apply the exceptional criteria laid down in accordance with Council Regulation (EC) no. 625/95.

## **FURTHER INQUIRIES**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

#### **Request for further information**

The Ombudsman therefore asked the Commission to comment on the complainant's arguments (1) that there had been an internal misunderstanding on the part of DG Information Society in December 1999 regarding the availability of the post and that this might have made it impossible to recruit the complainant before the end of 1999 and (2) that the Commission could have issued a "lettre d'offre à titre indicatif" that would have made it possible to apply the exceptional criteria laid down in accordance with Council Regulation (EC) no. 625/95. The Ombudsman also forwarded a copy of the complainant's observations to the Commission.

#### **The Commission's reply**

In its reply, the Commission made the following comments:

In December 1999, the complainant had been in contact with the Commission in order to find a post for his recruitment. It had been suggested that he should contact DG Information Society which had invited him for an interview. It had transpired that the only post available was one on the research budget which would have allowed only for him to be recruited as a temporary agent, not as an official, and only to grade A6. In these circumstances, it had been impossible to recruit the complainant before 31 December 1999. A post that would permit his recruitment as an A5/A4 official had only become available in February 2000. After the completion of the statutory procedures, this post had been offered to the complainant in May 2000.



The Commission rarely made conditional offers of employment. An absolute prior condition to making such an offer was that the DG Personnel and Administration must have received a formal proposal for recruitment on an appropriate post and that the Appointing Authority had authorised the recruitment. In the complainant's case, there had been no such formal proposal for his recruitment and no conditional offer could therefore be made.

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

In his observations on this reply, the complainant accepted that the Commission had acted in accordance with the applicable rules and that it had thus not formally or legally committed any error. He argued however that the Commission could have issued a "lettre d'offre à titre indicatif", thereby creating a cut-off date before the deadline of 31 December 1999. The complainant added that according to information he had received from Commission officials, this possibility had been used in relation with the expiration of rules containing derogations on the occasion of previous accessions. He surmised that due to the upcoming holidays at the time, or maybe due to a lack of co-operation between DG Information Society and DG Personnel and Administration this possibility had been neglected in his case.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to all the complainant's allegations.

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

Article 3 (5) of the Statute of the Ombudsman (2) directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint.

The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

The European Commission should consider reviewing the classification of the complainant.

This proposal was based on the following considerations:

1 The complainant had made the following submissions: He accepted the post offered by DG Information Society on the understanding that his DG and DG Personnel and Administration would arrange for the necessary written offer in time, i.e. before the end of the year. However, this turned out not to be possible due to an internal misunderstanding as the post that had been offered was a research post that had to be transferred into a permanent post. He was informed accordingly by e-mail on 21 December 1999. It was then too late to take up another verbal offer he had received from another DG.

2 The Commission was expressly invited by the Ombudsman to comment on the complainant's allegation that there had been an internal misunderstanding at DG Information Society concerning the availability of the post foreseen for the complainant. In its reply, the Commission



did not object to the complainant's account of events.

3 It was good administrative practice to proceed fairly in recruitment procedures. In the present case, it appeared that the complainant had been led to believe that he would be recruited by DG Information Society and that it would be possible for his recruitment to benefit from the derogatory rules set out in Regulation (EC) no. 625/95 that were applicable until the end of 1999. It further appeared that the recruitment was delayed due to an internal misunderstanding on the part of the Commission's services. The Commission appeared to accept the complainant's argument that it would have been possible to avoid the negative consequences following from this misunderstanding by making the complainant a conditional offer of employment.

4 In these circumstances, the Ombudsman took the preliminary view that the Commission's decision on the classification of the complainant was unfair and that this could be an instance of maladministration.

#### **The Commission's opinion**

In its opinion, the Commission made the following comments:

The fact of being a successful candidate in an external competition did not give the person concerned the right to a recruitment. The Commission had already confirmed that there had been no post available in DG Information Society that would have permitted the complainant's recruitment as an official at the A5/A4 level.

The complainant's argument that a conditional offer of employment could have been made could not be accepted. Any offer of employment always had to be preceded by a formal proposal of recruitment to an appropriate vacant post by a Commission DG and by a formal decision of recruitment by the Appointing Authority. Neither of these conditions had been satisfied in the complainant's case and there had been no exceptions to these procedures.

In these circumstances, the Commission was unable to agree to the Ombudsman's request for a friendly solution. Furthermore, to agree to such a request would also call into question the treatment of other successful candidates from other enlargement competitions who had been unable for whatever reason to be recruited before the expiry of the enlargement period.

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

In his observations, the complainant maintained his complaint and made the following further comments:

It was with sadness and dismay that he had received the Commission's opinion. He had been directly informed by DG Personnel and Administration (Mrs R., Mr V. and Mr L.) of the possibility of issuing a "lettre d'offre à titre indicatif". It was his understanding, or maybe interpretation, that due to the upcoming holidays at the time, as well as a lack of co-operation between DG Information Society and DG Personnel and Administration this possibility had been ignored.

## **THE DECISION**



## **1 Allegedly unfair and incorrect classification**

1.1 The complainant, a Swedish citizen, successfully took part in competition COM/A/21/98, and in July 1999 his name was put on a reserve list. Favourable rules for the recruitment of candidates from the new member states (Austria, Finland and Sweden) that temporarily derogated from the normal rules, particularly in so far as the classification of the candidates was concerned, were applicable by virtue of Council Regulation (EC) no. 625/95. The validity of this regulation expired however on 31 December 1999. In December 1999, the complainant received a verbal offer for a post at the Commission's Directorate-General (DG) Information Society. However, the written offer was only made in May 2000, and the complainant started working for the Commission on 15 September 2000. He was classified in grade A5 step 3. In his complaint to the Ombudsman, the complainant alleged that in view of his 19 years of professional experience this result was neither fair nor correct and should therefore be rectified.

1.2 The Commission took the view that the complainant's recruitment had been carried out in accordance with the statutory and classification rules applicable to all Commission staff at that time. It submitted that the complainant had been treated in exactly the same way as all other candidates of enlargement competitions that had been recruited after the end of the enlargement period on 31 December 1999.

1.3 In his observations on the Commission's reply to a request for further information, the complainant accepted that the Commission acted in accordance with the applicable rules and that it thus did not formally or legally commit any error. The Ombudsman therefore took the view that it had not been established that the Commission infringed any legal rules binding on it when deciding on the complainant's classification.

1.4 As to the complainant's allegation that the Commission had acted unfairly, the Ombudsman noted that the complainant had made the following submissions: He had accepted the post offered by DG Information Society on the understanding that his DG and DG Personnel and Administration would arrange for the necessary written offer in time, i.e. before the end of the year. However, this had turned out not to be possible due to an internal misunderstanding as the post that had been offered had been a research post that had to be transferred into a permanent post. He had been informed accordingly by e-mail on 21 December 1999. It had then been too late to take up another verbal offer he had received from another DG.

1.5 The Commission was expressly invited by the Ombudsman to comment on the complainant's allegation that there had been an internal misunderstanding at DG Information Society concerning the availability of the post foreseen for the complainant. The Ombudsman notes that in its reply, the Commission did not object to the complainant's account of events.

1.6 The Ombudsman then made a proposal for a friendly solution that was based on the facts as described by the complainant. The Commission rejected this proposal. However, it did not call into question the complainant's account of events underlying the said proposal.

1.7 The Ombudsman considers that it is good administrative practice to proceed fairly in recruitment procedures. In the present case, it appears that the complainant was led to believe



that he would be recruited by DG Information Society and that it would be possible for his recruitment to benefit of the derogatory rules set out in Regulation (EC) no. 625/95 that were applicable until the end of 1999. It further appears that the recruitment was delayed due to an internal misunderstanding on the part of the Commission's services and that by the time the complainant was informed that no permanent post was yet available for him at DG Information Society, it was too late for the complainant to take up another verbal offer he had received from another DG.

1.8 In these circumstances, the Ombudsman takes the view that the Commission's decision on the classification of the complainant was unfair and that this is an instance of maladministration.

## **2 Conclusion**

In view of the above, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

### **The draft recommendation**

The Commission should consider reviewing the classification of the complainant.

The Commission and the complainant 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 by 31 January 2004. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 17 October 2003

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, page 15.

(2) 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.