

Draft recommendation to the Council of the European Union in complaint 2395/2003/GG

Recommendation

Case 2395/2003/GG - Opened on 18/12/2003 - Recommendation on 09/11/2004 - Special report on 18/12/2003 - Decision on 17/10/2005

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

THE COMPLAINT

The complainants' case

In December 2003, the complainants, an MEP belonging to the CDU ("Christlich Demokratische Union Deutschlands") and a representative of the youth group of the same party, complained to the Ombudsman about the fact that the meetings of the Council acting in its legislative capacity were only public to the extent foreseen by Articles 8 and 9 of the Council's Rules of Procedure of 22 July 2002 (OJ 2002 no L 230, p. 7).

The relevant provisions

Articles 8 and 9 of the Council's Rules of Procedure are worded as follows:

" Article 8 Council deliberations open to the public and public debates

1. Council deliberations on acts to be adopted in accordance with the co-decision procedure under Article 251 of the EC Treaty shall be open to the public as follows:

(a) the presentation by the Commission of its most important legislative proposals and the ensuing debate in the Council shall be open to the public. The list of such proposals shall be adopted at the beginning of each six-month period by the General Affairs and External Relations Council convened in a meeting as referred to in Article 2(2)(a), on a recommendation from the Presidency, after consulting the Commission;

(b) the vote on legislative acts shall be open to the public, as well as the final Council deliberations leading to that vote and the explanations of voting accompanying it.

In such cases, Council deliberations shall be open to the public through transmission of the Council meeting by audiovisual means, notably in an overflow room. The outcome of voting shall be indicated by visual means.

The General Secretariat shall as far as possible inform the public in advance of the dates and approximate time on which such audiovisual transmissions will take place and shall take all practical measures to ensure proper implementation of this paragraph.



2. The General Affairs and External Relations Council convened in a meeting as referred to in Article 2(2)(a) shall hold a public policy debate every year on the Council's annual operational programme and, if appropriate, on the Commission's annual work programme. This annual policy debate shall be the subject of public transmission by audiovisual means.

3. On a decision taken by the Council or by Coreper, acting by a qualified majority, the Council shall hold at least one public debate on important new legislative proposals other than those referred to in paragraph 1.

The Council or Coreper may decide by a qualified majority on a case-by-case basis that other public debates are to be held on important issues affecting the interests of the Union.

It shall be for the Presidency, any member of the Council, or the Commission to propose issues or specific subjects for such debates.

Such debates shall be the subject of public transmission by audiovisual means.

Article 9 Making public votes, explanations of votes and minutes

1. In addition to cases where Council deliberations are open to the public under Article 8(1), where the Council acts in its legislative capacity within the meaning of Article 7, the results of votes and explanations of votes by Council members, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of legislative acts, shall be made public.

The same rule shall apply for:

(a) results of votes and explanations of votes, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of a common position pursuant to Article 251 or 252 of the EC Treaty;

(b) results of votes and explanations of votes by members of the Council or their representatives on the Conciliation Committee set up by Article 251 of the EC Treaty, as well as the statements in the Council minutes and the items in those minutes relating to the Conciliation Committee meeting;

(c) results of votes and explanations of votes, as well as the statements in the Council minutes and the items in those minutes relating to the establishment by the Council of a convention on the basis of Title VI of the Treaty on European Union.

2. Moreover, the results of votes shall be made public:

(a) when the Council acts pursuant to Title V of the Treaty on European Union, by a unanimous Council or Coreper decision taken at the request of one of their members;

(b) when the Council adopts a common position within the meaning of Title VI of the Treaty on



European Union, by a unanimous Council or Coreper decision taken at the request of one of their members;

(c) in other cases, by Council or Coreper decision taken at the request of one of their members.

When the result of a vote in the Council is made public in accordance with subparagraphs (a), (b) and (c), the explanations of votes made when the vote was taken shall also be made public at the request of the Council members concerned, with due regard for these Rules of Procedure, legal certainty and the interests of the Council.

Statements entered in the Council minutes and items in those minutes relating to the adoption of the acts referred to in subparagraphs (a), (b) and (c) shall be made public by Council or Coreper decision taken at the request of one of their members.

3. Votes shall not be made public in the case of discussions leading to indicative votes or the adoption of preparatory acts.”

The complainants' arguments

The complainants pointed out that the Council was, together with the European Parliament, the legislative body of the European Union. They submitted that the decisions taken by the Council affected the lives of citizens of Europe. Notwithstanding this central importance that the Council had, the Council only met in public in exceptional cases and to a limited extent.

The complainants noted that Article 49 (2) of the Draft Constitutional Treaty for the EU that had been prepared by the Convention in 2003 was worded as follows:

“The European Parliament shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal.”

The complainants pointed out, however, that this provision could only enter into force after the Draft Constitutional Treaty had been accepted by the Member States and after this treaty had subsequently been ratified by all these Member States.

In the complainants' view, a considerable number of legal and political reasons argue in favour of making it possible that the Council meet in public as of now.

The complainants pointed out that public sessions of the Council when it acted as a legislator would in any event become practice when the new constitution entered into force. They submitted that the result achieved by the Convention and the reactions on a European and on a national level left no doubt that a conviction had formed in Europe according to which it was right that the Council should meet in public, since this would strengthen citizens' confidence in the decisions that are taken in Brussels.

They further argued that the Council's current practice was not in conformity with the aim laid down in Article 1 (2) of the Treaty on European Union according to which decisions in the EU “are taken as openly as possible and as closely as possible to the citizen”. According to the



complainants, the transparency of the activity of the EU nowadays had to be considered as a general principle of law which should be fully reflected by the Rules of Procedure of the Council.

The complainants further argued that the exclusion of the public did not serve any aims of a higher rank. According to them, the exclusion of the public only protected the governments in Member States from close scrutiny by the European public, and this had but negative effects for European integration and for citizens.

The complainants took the view that the proposed change to the Rules of Procedure of the Council would send a clear signal to citizens who would be more closely associated with the EU.

According to the complainants, the Council's Rules of Procedure should therefore be amended so as to foresee that the Council acting in its legislative capacity should always meet in public.

The complainants' approaches to the Council

On 18 September 2003, the complainants addressed an open letter to the Council and to the Ombudsman (who received the letter on 17 October 2003) concerning this issue.

In his reply of 20 October 2003, the Ombudsman informed the complainants that any possible complaint would have to be preceded by the appropriate prior approaches to the Council.

On 19 November 2003, the Council replied to the complainants' open letter. Mr Solana pointed out that Article 8 of the Council's Rules of Procedure reflected the compromise that had been reached at the European Council in Sevilla. He added that the Council deliberations preceding a vote on legislative acts were already public and were made available to the interested public by audiovisual means. Mr Solana noted that the same applied to the presentation by the Commission of its most important legislative proposals and the ensuing debate in the Council. In Mr Solana's view, a substantial part of the Council's legislative activity was thus in practice already public. In addition to that, nearly all documents relating to the Council's legislative activity were accessible on the basis of Regulation No 1049/2001. Mr Solana added that opening the legislative deliberations of the Council to the public was (as evidenced by the deliberations of the Convention) an issue that found widest-reaching support and that the complainants' proposal should therefore be discussed again in the context of preparing to implement the new treaty.

THE INQUIRY

The Council's opinion

In its opinion, the Council made the following comments:

The principle of openness laid down inter alia in Article 1 (2) of the Treaty on European Union had great importance. However, this provision was phrased in general terms that suggested more an aim than an absolute rule. The language of this provision was programmatic, as was clear from the phrase "marks a new stage in the process of creating an ever closer union".



The Council's current practice concerning the publicity of its meetings was in accordance with its Rules of Procedure. The complainants appeared to argue that the Rules of Procedure themselves were an instance of maladministration. However, the adoption of the Rules of Procedure (which had their legal basis directly in Article 207 (3) of the EC Treaty) was a political and institutional matter. Articles 8 and 9 of the Rules of Procedure had been amended following a compromise between the Member States at the Seville European Council in June 2002.

The draft Treaty establishing a Constitution for Europe drawn up by the Convention provided for the Council to meet in public when examining and adopting legislative proposals. It would seem that the very fact that any such provision had been included in a (draft) constitution confirmed that the matter was not one of maladministration or administrative practice, but a legal and political question outside the scope of the Ombudsman's mandate.

The Council furthermore pointed to the existing arrangements for informing the public of the Council's legislative activities, including the possibility to obtain access to documents under Regulation 1049/2001.

In the light of the above, the Council submitted that no maladministration had occurred and that the issue raised by the complainants reached beyond the Ombudsman's mandate.

The complainants' observations

In their observations, the complainants maintained their complaint. They submitted that the fact that Article 1 (2) of the Treaty on European Union established a generally phrased aim and not an absolute rule did not stand in the way of their demand that the meetings of the Council should be public. The complainants argued that on the contrary it followed from the programmatic meaning of this provision and the aim of taking decisions as openly "as possible" that it was mandatory to further this principle in practice. For a legislative body like the Council or the European Parliament, meeting publicly was the classic form of the openness of decision-making, as practised by the legislative bodies of all Member States of the Union.

The power to organise its internal matters did not free the Council from its duty to respect and further the principles of the Union. The actual contents of the Rules of Procedure and their implementation could therefore collide with principles of superior rank and thus constitute an instance of maladministration.

According to the complainants, the conclusion of the work on the Draft Constitutional Treaty in July 2003 marked a qualitatively new development regarding the principle of the public character of the Council's meetings when acting as a legislator. This principle would become a general principle of law at the latest with the adoption of the constitution by the heads of state and government of the Member States.

Further inquiries

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

Request for further information

The Ombudsman therefore wrote to the Council at the end of June 2004. In this letter, the Ombudsman noted that Article 49 (2) of the Draft Constitutional Treaty for the EU had also been



included in the Constitutional Treaty that had been agreed at the European Council held in Brussels a few days beforehand. The Ombudsman pointed out that although this treaty had not yet been ratified by Member States, it had been accepted by all Member States. He also noted that the Council's Rules of Procedure were adopted by the Council, that is to say by the representatives of the Member States.

In view of the above, the Ombudsman asked the Council to inform him as to what obstacles, if any, it saw to the implementation of the change of its Rules of Procedure requested by the complainants, now that the Constitutional Treaty, including the above-mentioned provision, had been accepted by Member States.

The Council's reply

In its reply, the Council again stressed the importance it attached to the issue of transparency. The Council noted that the Constitutional Treaty still had to be ratified by the Member States. It added that the mere fact that Article 49 had been added to Part I of the Constitutional Treaty illustrated that the matter raised by the complainants was a political and constitutional question rather than one of maladministration.

In conclusion, the Council reiterated its view that there was no maladministration since it had acted in full conformity with the pertinent rules in force.

The complainants' observations

No observations were received from the complainants.

THE DECISION

1 The scope of the Ombudsman's mandate

1.1 In December 2003, the complainants, an MEP belonging to the CDU and a representative of the youth group of the same party, complained to the Ombudsman about the fact that the meetings of the Council acting in its legislative capacity were only public to the extent foreseen by Articles 8 and 9 of the Council's Rules of Procedure of 22 July 2002 (OJ 2002 no L 230, p. 7). The complainants basically argued that the Council's current practice was not in conformity with the aim laid down in Article 1 (2) of the Treaty on European Union according to which decisions in the EU "are taken as openly as possible and as closely as possible to the citizen".

1.2 In its opinion, the Council submitted that the matter raised by the complainants was not one of maladministration or administrative practice, but a legal and political question outside the scope of the Ombudsman's mandate. The Council also took the view that there was no maladministration since it had acted in full conformity with the pertinent rules in force.

1.3 Article 195 of the EC Treaty entrusts the Ombudsman with the task of examining cases of maladministration in the activity of the Community institutions and bodies. The Treaty does not contain a definition of the term 'maladministration'. In his Annual Report for 1997 (2), and in response to a call for clarification by the European Parliament, the Ombudsman proposed the following definition: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." This definition was subsequently welcomed by the European Parliament (3).



1.4 On the basis of the above, the Ombudsman considers that the fact that the Council's present practice is in conformity with the rules in force, which the Council itself has adopted, does not mean that there cannot be maladministration. A measure adopted by a Community institution or body can still constitute an instance of maladministration if it fails to be in accordance with a principle that is binding upon the institution or body.

1.5 The Council appears to argue that the extent to which it opens the meetings that it holds in its legislative capacity to the public is a political decision that is beyond the mandate of the Ombudsman. The Ombudsman accepts that the adoption of the Council's Rules of Procedure on the basis of Article 207 (3) of the EC Treaty is a political and institutional matter to be decided upon by the Council itself. However, the present complaint does not concern the way in which the Council organises its internal procedures but the question as to whether the public can be excluded from the Council's meetings in its legislative capacity. As the complainants correctly noted, it appears that the legislative bodies in all the Member States of the European Union meet publicly. Article 1 (2) of the Treaty on European Union stipulates that decisions in the Union should be taken "as openly as possible". In these circumstances, the Ombudsman considers that the Council has not established that the issue of the access of the public to its meetings is a purely political one that should therefore not be subject to any scrutiny.

1.6 The Council further argued that the very fact that a provision like Article 49 (2) had been added to Part I of the Draft Constitutional Treaty illustrated that the matter raised by the complainants was a political and constitutional question rather than one of maladministration. The Ombudsman is not convinced by this argument. It is of fundamental importance for citizens to be able to inform themselves about the activity of the legislative bodies. The best way to achieve this is indubitably to open the debates of these legislative bodies to the public. In the light of the importance of the principle of openness in this area, it is not surprising that a provision enshrining it was included first in the Draft Constitutional Treaty and subsequently in the Treaty establishing a Constitution for Europe that was adopted by Member States at the European Council in Brussels in June 2004 (4) .

1.7 In order to avoid any possible misunderstanding, it appears useful to add that the present complaint does not concern the legislative activity of the Council as such, but the question as to whether the meetings of the Council acting in its legislative capacity should be public.

1.8 On the basis of the above, the Ombudsman takes the view that the issue raised in the present complaint falls within the mandate that has been conferred upon him by Article 195 of the EC Treaty.

2 The lack of openness of the meetings of the Council when acting as a legislator

2.1 The complainants basically allege that the Council's current practice of not opening all the meetings it holds in its legislative capacity is not in conformity with the aim laid down in Article 1 (2) of the Treaty on European Union according to which decisions in the EU "are taken as openly as possible and as closely as possible to the citizen".

2.2 The Council agrees that the principle of openness laid down inter alia in Article 1 (2) of the



Treaty on European Union has great importance. It submits, however, that this provision is phrased in general terms that suggest more an aim than an absolute rule and that the language of this provision is programmatic. The Council therefore takes the view that its current practice as laid down in Articles 8 and 9 of its Rules of Procedure does not constitute maladministration.

2.3 The Ombudsman agrees that Article 1 (2) of the Treaty on European Union does not contain a precise rule but rather a general principle. The fact remains, however, that this provision clearly directs the institutions and bodies to see to it that all decisions at the level of the EU are taken as openly "as possible". The Ombudsman therefore considers that it should be ascertained whether opening all the meetings of the Council acting in its legislative capacity would be possible and, if so, whether there are nevertheless good reasons for not doing so.

2.4 The Ombudsman notes that, as the Council itself has stressed, some of the meetings of the Council acting in its legislative capacity are already public by virtue of the rules that are laid down in Articles 8 and 9 of the Council's Rules of Procedure. These Rules of Procedure are adopted by the Council itself, that is to say a body composed of a representative of each Member State (Article 203 of the EC Treaty). The Ombudsman notes that in October 2004, the Member States of the EU signed the Treaty establishing a Constitution for Europe that contains an express provision to the effect that the Council shall meet in public when considering and voting on a draft legislative act. Although this treaty has not yet been ratified by the Member States in accordance with their respective constitutional requirements, the Ombudsman considers that the very fact that the representatives of the Member States felt able to agree on such a provision would appear to indicate that it would be possible to open the relevant meetings of the public already now. Mindful of the possibility that he might have overlooked considerations that could be relevant in this context, the Ombudsman nevertheless wrote to the Council in June 2004 in order to ask it to inform him as to what obstacles, if any, it saw to the implementation of the change of its Rules of Procedure requested by the complainants, now that the Constitutional Treaty, including the above-mentioned provision, had been accepted by Member States. In its reply, the Council did not refer to any such obstacle. The Ombudsman therefore considers that it would be possible for the Council to decide that the public should be admitted to its meetings in a legislative capacity, unless there are good reasons for not doing so.

2.5 The Ombudsman has carefully examined the arguments submitted by the Council. However, the Council did not refer to any principles or aims of a higher rank that could entitle it to refuse to open its meetings in a legislative capacity to the public. On the contrary, the Ombudsman notes that the Council has stressed the great importance it attaches to the issue of transparency. In its letter to the complainants of 19 November 2003, the Secretary General of the Council accepted that opening the legislative deliberations of the Council to the public was (as evidenced by the deliberations of the Convention) an issue that found widest-reaching support.

2.6 In its opinion, the Council referred to the existing arrangements for informing the public of the Council's legislative activities, including the possibility to obtain access to documents under Regulation 1049/2001. The Ombudsman considers that these arrangements, important and



commendable though they may be, are not relevant for the present inquiry which concerns access to the meetings of the Council, and not information about these meetings.

3 Conclusion

In view of the above, the Ombudsman concludes that the fact that the Council refuses to decide to meet publicly whenever it is acting in its legislative capacity without giving good reasons for this refusal is an instance of maladministration.

The Ombudsman therefore makes the following draft recommendation to the Council, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation

The Council of the European Union should review its refusal to decide to meet publicly whenever it is acting in its legislative capacity.

The Council and the complainants will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Council shall send a detailed opinion by 28 February 2005. 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, 9 November 2004

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) In pages 22-23.

(3) See Annual Report for 2002, p. 18.

(4) It may be useful to point out that Article 49 (2) of the Draft Constitutional Treaty became Article 50 (2) of the Treaty establishing a Constitution for Europe and was slightly reworded. The provision is now phrased as follows: "The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act."