

Draft recommendation of the European Ombudsman in his inquiry into complaint 2281/2011/OV against the European Commission

Recommendation

Case 2281/2011/OV - **Opened on** 02/12/2011 - **Recommendation on** 11/06/2013 - **Decision on** 16/12/2013 - **Institution concerned** European Commission (No maladministration found)

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

The background to the complaint

1. Staff members of the EU institutions receive certain family allowances if they have children. These are: i) a household allowance, ii) a dependent child allowance and iii) an education allowance. The present complaint concerns a dispute about the payment of such allowances.

2. The complainant was married to a Commission official (Mr X). The complainant and Mr X have two children. In 2009, the complainant and her husband separated. By order of 9 July 2009, the competent Belgian court required Mr X to pay the complainant (a) a subsistence and education allowance of EUR 400 per child, per month, as well as (b) a subsistence allowance of EUR 2 500 per month. The court also ordered that the custody of the children be provisionally shared between the parents.

3. In August 2009, the complainant sent a copy of the court order to the Commission's Office for the Administration and Payment of Individual Entitlement (the "PMO") and asked it to pay directly to her the family allowances which her husband was receiving from the Commission. By e-mail of 3 August 2009, the PMO informed Mr X and the complainant that, as the custody of the children was shared on an equal basis (50/50) between the parents, the family allowances as well had, according to the applicable rules, to be split in two. Thus, it added, Mr X had to transfer half of the allowances to the complainant.

4. By email of 3 December 2010, the complainant complained to the PMO that Mr X had not paid half of the family allowances to her since January 2009. On the same day, the PMO contacted Mr X, reminding him of the e-mail of 3 August 2009 and asking him for a reaction to the complainant's allegation. On 25 February 2011, the complainant sent a reminder to the



PMO.

5. On 28 February 2011, the PMO sent a reminder to Mr X. He replied on the same day and informed the PMO that there were developments in the judicial procedures concerning the divorce. According to him, an appeal procedure was pending which concerned, among other things, the subsistence allowance to be paid for the children, as well as the eventual sharing or transfer of the family allowances. He also stated that the complainant was attempting to block this procedure. He also informed the PMO that the expert appointed by the court had concluded that custody should be awarded to him rather than to the complainant. He also stated that, for several reasons, he had not transferred half of the family allowances to the complainant.

6. By e-mail of 29 March 2011, the PMO informed the complainant that it would soon take a decision as regards the direct payment of the allowances to her. However, it added that any such decision would only have effects for the future, and that the complainant would need to obtain a court order if she wanted to recover from Mr X the allowances already paid directly to him by the Commission. By e-mail of 6 April 2011, the PMO informed the complainant that, following the installation of a new informatics system, it could now split up the payment of the family allowances in two and start to pay the complainant directly in the future.

7. By note of 11 April 2011, the PMO informed Mr X that, from 1 May 2011 onwards, it would pay half of the family allowances directly to the complainant. On 2 May 2011, the PMO also sent a letter to the complainant informing her that, from 1 May 2011 onwards, it would pay directly to her, on behalf and in name of her ex-husband, half of the family allowances, namely, i) the household allowance, ii) the dependent child allowance and iii) the education allowance. It added that it would deduct from these amounts the family allowances received by her from other sources, if any.

8. On 7 June 2011, the complainant wrote to the PMO to inform it that, despite its letter of 2 May 2011, she had not received the payment of the allowances. The PMO replied on 8 June 2011 that, due to a technical problem, no payment had been made for the month of May 2011, but that the complainant would receive the payment of the allowances from June 2011 onwards, with retroactive effect from May 2011.

The subject matter of the inquiry

9. On 14 November 2011, the complainant complained to the Ombudsman alleging that, between January 2009 [2] and April 2011, the Commission had negligently failed to pay directly to her a half share of the family allowances. She claimed that the Commission should pay her the sums due since January 2009.

10. The Ombudsman informed the complainant and the Commission that, in so far as her allegation and claim concerned the period between January and July 2009, there were insufficient grounds to include them in the inquiry, because this period predated the order of the Tribunal of First Instance of Brussels of 9 July 2009 by which the custody over the children was



split between the parents. The Ombudsman therefore asked the Commission to submit an opinion on the following allegation and claim:

Allegation:

Between July 2009 and April 2011, the Commission negligently failed to pay directly to the complainant a half share of the family allowances (household allowance, dependent child allowance and education allowance).

Claim:

The Commission should pay directly to the complainant the complainant's half share of the allowances for the relevant period.

11. The Ombudsman also asked the Commission for its views as regards the possible application of Article 85 ("Recovery of undue payment") of the Staff Regulations as a legal basis to recover monies unduly paid to the complainant's ex-partner (that is, monies paid in contravention of Articles 1(5), 2(7) and Article 3(1) of Annex VII of the Staff Regulations which foresee that, in case the custody of a child is entrusted by an order of court to another person, the payment of the allowance is made directly to that person).

The inquiry

12. The complaint was forwarded to the Commission for an opinion. The Commission sent its opinion on 7 March 2012. The opinion was then forwarded to the complainant, who sent her observations on 25 March 2012. The Ombudsman's Office also replied to several e-mails the complainant sent and in which she asked about the status of her complaint. By letter of 10 April 2013, the complainant urged the Ombudsman to decide on the matter quickly. The complainant also had telephone conversations with the Ombudsman's Office on 14 March and 26 April 2013. On 29 April 2013, the Ombudsman's Office asked for updated information from the Commission concerning the court case to which it had referred. The Commission sent this information on 3 May 2013.

The Ombudsman's analysis and conclusions

A. Alleged Commission failure to pay half of the family allowances directly to the complainant and related claim

Arguments presented to the Ombudsman



13. The complainant alleged that, despite her constant requests, the Commission negligently failed to pay half of the family allowances (household allowance, dependent child allowance and education allowance) directly to her between July 2009 and April 2011. The complainant argued that the Commission's decision to pay half of the family allowances to her from May 2011 onwards did not repair the damage suffered since January 2009. The complainant argued that, because of the replies from the PMO, she was obliged to return to court to obtain payment of the allowances paid out to her ex-husband between January 2009 and April 2011.

14. In its opinion sent to the Ombudsman, the Commission first referred to the relevant provisions of the Staff Regulations:

- Article 1(5) of Annex VII ("Remuneration and reimbursement of expenses") of the Staff Regulations, which concerns the **household allowance** provides that: "*if ... a person other than the official has by law or by an order of the court ... been given custody of all his dependent children ..., the household allowance shall be paid to that other person in the name and on behalf of the official. ... If, however, the official's children are in the care of several different persons, the household allowance shall be divided among them according to the number of children in their care*". It added that Articles 2(7) and 3(1) of Annex VII concerning, respectively, the **dependent child allowance** and the **education allowance** provide that, if the custody of the (dependent) child has been entrusted by law or by an order of court or of the competent administrative authority to another person, the dependent child allowance and the education allowance shall be paid to that person in the name and on behalf of the official.

15. The Commission pointed out that Articles 2(7) and 3(1) of Annex VII do not foresee the division of the allowances, presumably because the situation of shared custody after divorce was not yet relevant in 1983 when these paragraphs were inserted into the Staff Regulations. However, the situation of shared custody is the subject of the [Commission decision on General Implementing Provisions for giving effect to Articles 67 and 68 of the Staff Regulations and Articles 1, 2 and 3 of Annex VII thereto \[Link\]](#) (C/2004/1364/4) ("the GIPs"). Article 3 and 4 of the GIPs provide the following:

" Article 3 - *Payment of family allowances shall automatically be made in the name and on behalf of the official to a person other than the official who has custody of the child; that other person may also assert his or her right to be paid the family allowances direct by producing appropriate documentary evidence.*

Where custody of the same child alternates between two persons and there is no court order or order of the competent administrative authority or, in the absence of such an order, no stable agreement between the persons concerned laying down the precise pro rata duration of the custody, half of the family allowances shall be paid to each person. Visiting rights shall not be regarded as custody.

Article 4 - *Family allowances shall be paid to a person other than the official irrespective of whether the official is required to pay maintenance.*



Where both family allowances and maintenance are paid to such a person, it shall be up to the official to take the requisite measures to ensure that account is taken of family allowances paid direct.

However, in paying family allowances to a person other than the official over a given period, the Institution shall take account of amounts which it is liable to pay or has paid to that person under a national attachment order pertaining to an obligation to make payments of the same nature ".

16. With regard to the *date* as of which payments to a third person can be made, the Commission pointed out that Articles 1, 2 and 3 of Annex VII of the Staff Regulations require, as a condition for paying the allowances to a third person, the existence of an order of a court or of a competent administrative authority whereby the custody of the children is entrusted to that person. If the court order does not foresee special provisions for the transfer of family allowances, the transfer to the third person can only start from the date of the order. Moreover, for reasons of legal certainty, the Commission proceeds to the direct payment to a third person from the moment that the court order or the decision of the administrative authority is communicated to its services.

17. If custody is shared, each party is paid only part of the family allowances. The Commission stated that, whereas the transfer of the entirety of the family allowances could be done automatically, the transfer of part of the allowances could, until recently, not be done automatically. It had to be made manually, every month. It added that, with about 500 divorce files to manage, the manual management of files of shared custody was physically impossible. Therefore, when the complainant informed the PMO in August 2009 of the court order, her file was dealt with like all other shared custody files: both the official and the third person were informed that it was up to the official to transfer part of the family allowances to the third person. However, with the introduction, at the end of 2010, of the Sysper2 informatics system for the management of individual files, the automatic division of the family allowances became possible. After some problems with launching the new system, the generalised automatic management of the shared custody files started in the second half of 2011.

18. The Commission pointed out that Mr X disagreed with the Commission's decision to pay half of the family allowances directly to the complainant. He argued that the situation of shared custody was not covered by Annex VII, that the GIPs were only applicable in the absence of a court order, and that he only had to pay his ex-wife the amounts mentioned in the court order. He also stated that the judgement in appeal, which was imminent, would also decide on the subsistence and the family allowances. He further indicated that the complainant tried to create *faits accomplis* rather than let the judicial authorities decide on the basis of the documents and the conclusions submitted by the parties.

19. The Commission also underlined that the management of situations resulting from a divorce or separation is very delicate and that, often, relations between the ex-spouses are very tense. The administration should not interfere in those relations and should stay as neutral as possible.



The administration should also not abuse its powers by taking measures which fall under the prerogatives of a court. Article 4 of the GIPs explicitly foresees that, when paying a person other than the official, the administration should take into consideration amounts already paid, such as a subsistence allowance. It indeed often happens that the judge orders the payment of an elevated subsistence allowance, without taking into account the EU family allowances, which generally are much higher than the national family allowances. Adding EU family allowances to the subsistence allowance already paid by the official could in certain cases lead to aberrant situations. In that case, the official should ask the judge to adapt the court order (Article 4, second paragraph, of the GIPS). The administration, however, has the obligation to take into consideration payments which have already been made (by the official to his ex-spouse), at least until the official obtains a modification of the judgement.

20. In the present case, the PMO based its decision to pay the allowances to the complainant directly for the future only, on the following considerations:

- The administration does not have the means to verify that the allegations of the complainant concerning the non-payment of the allowances are correct. Mr X, however, confirmed that he had not transferred half of the family allowances to the complainant;
- Mr X indicated that he correctly paid the subsistence allowance, corresponding to EUR 400 per child, for the two weeks per month that the children spent with the complainant. Very often no subsistence allowance needs to be paid in case of shared custody, where every parent takes care of the costs during the period that the children are with him/her. In those circumstances, an allowance of EUR 400 per half a month can be considered as high and, therefore, to be taken into consideration in accordance with Article 4, third paragraph, of the GIPs.
- Mr X announced that there would be a judgment in appeal on, among other things, the subsistence and the family allowances and that a reversal of the judgment on the custody was also possible. In those circumstances, a retroactive decision of the PMO could eventually jeopardise the judgment in appeal.

21. As regards the applicability of Article 85 of the Staff Regulations, the Commission stated that it should use this means with prudence, in the circumstances determined by the legislator. The recovery of sums from an official is only possible when there have been undue payments. In the present case, however, it is clear that Mr X is entitled to family allowances for his children: there has thus not been an undue payment. The payments to Mr X could only become undue if the Commission were to pay the complainant retroactively: in that case, there would be a double payment (at least for half the amount of the allowances). For the reasons mentioned above, the PMO has not (yet) paid retroactively half of the family allowances to the complainant. The PMO contacted Mr X again to verify whether the judgment in appeal had been rendered. As the latter indicated that the complainant was at the basis of the delay, the Commission assumed that the procedure was not terminated.

22. As regards the retroactivity of the payment, the Commission pointed out that the order of the Belgian court was from July 2009 and was communicated to the PMO in August 2009. The



payment of family allowances to the complainant can only be made on the basis of a court order on the custody of the children. Thus, as the order was communicated to the PMO in August 2009, the retroactivity should in any case be limited to August 2009.

23. The Commission concluded that the PMO's initial decision of August 2009 requiring Mr X to transfer half of the family allowances to the complainant was in conformity with the practice at the time. The PMO's subsequent decision of 2 May 2011, namely, to proceed to the direct payment to the complainant of half of the family allowances from May 2011 onwards, complied with Article 4 of the GIPs and took into account the elevated amount of the already paid subsistence allowance, as well as the fact that an appeal was pending. The Commission considered that it could envisage paying retroactively to the complainant half of the family allowances to which she was entitled before May 2011, after having recovered the relevant amounts from Mr X. It added, however, that it considered it appropriate to first wait for the judgment in appeal which would definitely decide on the economic consequences of the divorce before it proceeded to do so.

24. On 3 May 2013, the Commission informed the Ombudsman's Office that Mr X had informed it that the appeal against the order of 9 July 2009 of the Belgian court had been declared inadmissible. He also informed the Commission that, in February 2013, the complainant had started a new procedure before the Brussels *Tribunal de la jeunesse* concerning, among other things, the payment of the family allowances between 2009 and 2011 (the introductory hearing was foreseen for 5 June 2013). The Commission also indicated that it was for the complainant to inform the Ombudsman of the procedures she launched in parallel with the complaint before the Ombudsman.

25. In her observations, the complainant stated that she could not understand why the Commission could not pay her half of the allowances corresponding to the two years following the communication of the court order. The complainant also argued that the Commission's reasoning concerning the pecuniary value of the family allowances, in comparison with the subsistence allowances paid to her by Mr X, was not acceptable. The complainant underlined that there was no appeal pending on the family allowances and the subsistence allowance for the children. The complainant further argued that the reasoning for the non application of Article 85 of the Staff Regulations was not justified. The complainant maintained her claim that half of the allowances should be paid to her retroactively, from July 2009 to April 2011.

26. In a telephone conversation with the Ombudsman's Office on 14 March 2013, the complainant indicated that there was no appeal pending concerning the payment of the allowances.

The Ombudsman's preliminary assessment leading to a draft recommendation

27. The Ombudsman notes that Articles 1(5), 2(7) and 3(1) of Annex VII of the Staff Regulations foresee that, if custody of an official's child has been entrusted, by an order of a



court, to a person other than the official, the household allowance, dependent child allowance and education allowance shall be paid directly to that person in the name and on behalf of the official. Article 3 of the GIPS states that family allowances shall automatically be paid, in the name and on behalf of the official, to the person who has custody of the child.

28. By order of 9 July 2009, the Tribunal of First Instance of Brussels ordered that the custody of the children be equally (50/50) shared between the complainant and Mr X. Thus, in line with the above provisions, the Commission should have paid half of the family allowances directly to the complainant from the moment, that is, as of the beginning of August 2009, that it was informed of the order of the Tribunal. The Commission explained, in its opinion, that, for technical reasons, direct transfer of *half* of the allowances could not be made automatically until June 2011. Thanks to the introduction of the Sysper2 computer system, the Commission then started to pay directly half of the allowances to the complainant. The first direct payment was made in June 2011. That payment corresponded to the allowances due for May 2011.

29. In the Ombudsman's view, contrary to the provisions of the Staff Regulations and the GIPs, the Commission failed to pay half of the allowances directly to the complainant, for the period between August 2009 and April 2011. In its opinion, the Commission did not invoke any *legal* argument to justify why it could not do so. It merely referred to technical reasons which prevented it to transfer half of the allowances directly to the complainant. The Commission in this respect even indicated that, although the Sysper2 computer system for the management of individual files was introduced at the end of 2010, the generalised automatic management of the files of shared custody started only in the second half of 2011. This can obviously not constitute a valid reason for not paying directly to a third person amounts which need to be paid on the basis of the Staff Regulations. The fact that the Commission started to pay directly to the complainant half of these allowances from June 2011 onwards confirms that there was no legal obstacle to doing so. Indeed, the Commission's letter to the complainant of 2 May 2011, whereby it informed the complainant that it would pay directly to her half of the allowances, merely put in place what should already have been the correct application of the Staff Regulations.

30. The Ombudsman notes that, in its opinion, the Commission has explicitly indicated that it could envisage paying retroactively to the complainant half of the family allowances to which she was entitled before May 2011, after having recovered the relevant amounts from Mr X. The Commission, however, indicated that, before doing so, it first had to wait for the judgment in appeal which would definitively decide on the financial aspects of the divorce. From the information obtained from the Commission in May 2013, it now appears that the appeal was rejected as inadmissible. There is therefore no longer any legal obstacle preventing the Commission from effecting retroactive payments to the complainant for the relevant period.

31. As regards the amounts to be paid to the complainant by the Commission, the Ombudsman also notes that Article 4, second paragraph, of the GIPs states that "[w] *here both family allowances and maintenance are paid to [an ex-spouse], it shall be up to the official to take the requisite measures to ensure that account is taken of family allowances paid direct*". This rule implies that, if the Commission decides directly to pay to an ex-spouse, *on behalf of an official*,



half of the family allowances, it would be for the official to take the necessary measures to ensure that the maintenance and family allowances for the children ordered by the Belgium court to be paid by him/her directly to the ex-spouse are reduced, **in order to take due account of the family allowances which will be paid, on the official's behalf, by the Commission directly to the ex-spouse** . If the official were not allowed to do this, this would imply that the official would pay twice to cover the same children-related costs, and the ex-spouse would be paid twice for the same costs.

32. It was evidently possible for Mr X, once he had been informed by the Commission of the direct payments to be made by the Commission to his ex-spouse on his behalf, to take the necessary measures to ensure that the maintenance and family allowances for the children to be paid by him to his ex-spouse in the future were reduced **in order to take due account of the family allowances paid on his behalf by the Commission to the ex-spouse** . It is not, however, possible for him to ensure that there is no double payment in relation to the amounts **already paid** by him to his ex-spouse. In such circumstances, it would only be fair and correct that the amounts to be paid retroactively to the ex-spouse by the Commission are reduced to take due account of those payments **of the same nature** already paid directly to the ex-spouse by the official (that is, the 800 EUR per month to cover costs relating to the custody of the two children). The Ombudsman notes that the complainant is of the view that Mr X has not paid all the amounts due to her by him. In this context, the Commission should, before making any retroactive payments to the complainant for the relevant period, request Mr X to provide it with proof of the amounts transferred to his ex-spouse in terms of subsistence and education allowances for their children between the relevant dates in 2009 and 2011.

33. The Ombudsman also draws the Commission's attention to the fact that, if it concludes that it has to recover any amounts from Mr X under Article 85 of the Staff Regulations, it should ensure that his rights of defence are respected.

34. The Ombudsman further notes that, in case the procedure before the Brussels *Tribunal de jeunesse* were to lead to any change in the payment of the allowances between the parties, it is for Mr X and the complainant to contact the Commission to ensure that such modifications are duly taken account of.

35. In light of the above, the Ombudsman concludes that by failing to consider whether any retroactive payments should be made to the complainant, the Commission committed an instance of maladministration. He will thus make a corresponding Draft Recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The Draft Recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

Taking into account the Ombudsman's findings, the Commission should pay the



complainant half of the family allowances for the period between August 2009 and April 2011, and in doing so take due account of the amounts already paid by Mr X to the complainant in terms of subsistence and education allowances for their children for that period.

The Commission and the complainant will be informed of this draft recommendation. The Ombudsman trusts that the Commission will also inform the complainant's ex-husband of the present draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 August 2013. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 13 June 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Given that the order of the Tribunal of First Instance of Brussels was pronounced on 9 July 2009, it is unclear on what basis the complainant claimed that payments should have been made to her (with retroactive effect) from January 2009 onwards.