

Decision of the European Ombudsman closing his inquiry into complaint 2954/2008/MF against the European Commission

Decision

Case 2954/2008/MF - Opened on 22/12/2008 - Decision on 15/12/2010

The background to the complaint

1. The complainant is a Commission official who suffers from an illness known as Chronic Fatigue Syndrome ('CFS'). In July 2003, the complainant had blood tests to prove that he suffered from CFS.
2. Before the date of the tests, he contacted the Commission's Medical Officer by letter dated 11 July 2003, to ask for a preliminary authorisation so that the blood tests related to the above illness, which were prescribed by a named doctor, would be reimbursed. He pointed out that CFS had been recognised as an illness by 'INAMI' [1] , the Belgian National Institute for Sickness and Disability, and the World Health Organisation.
3. On 25 July 2003, acting on the advice of the Commission's Medical Officer, the Settlement Office issued its decision under the heading "100% reimbursement", stating that the complainant's blood tests could not be fully covered by the Joint Sickness Insurance Scheme ('JSIS'), since CFS did not qualify for 100% reimbursement. It also stated that the complainant's medical costs " *will therefore only be reimbursed on the basis of the sickness insurance rules (with the application of a maximum amount for certain provisions).* " [2]
4. Subsequently, the complainant contacted the Commission's Medical Officer informally to ask for further explanations. According to the complainant, the Medical Officer stated during their meeting that the laboratory which had carried out the tests was not scientifically recognised and that, therefore, the costs which had been incurred could not be reimbursed at all.
5. The complainant did not appeal against the Settlement Office's decision of 25 July 2003. Furthermore, he decided not to submit the invoices to the JSIS until 2008, when he became aware of the judgment in *Patricia Botos v Commission of the European Communities* [3] . In the *Botos* case, the Civil Service Tribunal annulled the Appointing Authority's decision to refuse reimbursement of the blood tests for CFS, whereby the medical expenses for these blood tests



would not have been covered by the JSIS at the normal percentage. The blood tests at issue in the *Botos* case had been prescribed by the same doctor, and carried out by the same laboratories, as in the complainant's case.

6. The complainant was also aware that, under Article 13 of the JSIS Rules, the deadline for reimbursement was one year following the semester during which the treatment took place. The complainant's blood tests for CFS were carried out in 2003. On 18 January 2008, therefore, the complainant requested (i) an exemption from the deadline for the submission of the relevant invoices, in light of the judgment in *Botos*, and (ii) reimbursement of the costs of his blood tests. He submitted the relevant invoices which were issued in 2003.

7. On 25 February 2008, the Settlement Office decided not to grant the exemption, nor to reimburse the costs of the blood tests. It further informed the complainant that he had failed to lodge his request for reimbursement within the statutory time-limit, and that the judgment in *Botos* "did not apply to other cases".

8. On 31 March 2008, the complainant lodged a complaint against the above decision with the Appointing Authority under Article 90(2) of the Staff Regulations.

9. In accordance with Article 35 of the JSIS Rules, the matter was referred to the Committee for the Administration of Sickness Insurance ("Comité de Gestion assurance maladie") ('CGAM') for its opinion.

10. In its letter dated 16 July 2008, the CGAM referred to the complainant's statement that he had not requested reimbursement in 2003 because he had been influenced by the Commission's Medical Officer who, "had prevented him from sending the invoices ... because he would not be reimbursed at all" [4]. The CGAM recalled that, in its judgment in *Botos*, the Tribunal ruled that the applicant was to be reimbursed for the medical expenses incurred in connection with the blood tests carried out in connection with CFS. In view of this, the CGAM concluded that the Commission should examine whether the judgment in *Botos* constitutes a new fact which would allow the deadline for the request for reimbursement to be reopened.

11. On 23 July 2008, the Appointing Authority rejected the complaint lodged by the complainant under Article 90(2) of the Staff Regulations. It stated that the complainant should have lodged an Article 90(2) complaint within the statutory deadline in 2003, following the Settlement Office's decision of 25 July 2003. Moreover, the Medical officer who, according to the complainant, in 2003 refused to "take charge" of the complainant's expenses for the laboratory tests in question, explained to the Appointing Authority that he had indeed informed the complainant that the tests were not scientifically recognised by the Medical Council. The Appointing Authority took the view, however, that, since this information was given to the complainant orally, it did not constitute the Settlement Office's decision of 25 July 2003, but was to be considered as a "supplementary justification" for the said decision.

12. The Appointing Authority further stated that the legal effect of the judgment in *Botos* is limited to *inter partes* only. By analogy, it applied the judgment of the ECJ of 14 September



1999 in *Commission v AssiDoman Kraft products* [5] . In that case the Court ruled that (i) the Commission was not obliged to re-examine allegedly irregular and identical decisions addressed to persons other than the appellant; and (ii) a decision which was not appealed by the relevant person within the statutory time-limit became definitive. The *Botos* case could not, therefore, constitute new substantial facts which would enable the complainant to challenge the Settlement Office's decision of 25 July 2003. That decision was not appealed within the statutory time-limit and, therefore, became definitive.

13. The complainant turned to the European Ombudsman.

The subject matter of the inquiry

14. In his complaint, the complainant alleged that the Commission acted unfairly by not taking into account the Judgment of the Civil Service Tribunal of 18 September 2007 in *Patricia Botos v Commission of the European Communities* when dealing with his request for reimbursement of his medical expenses.

15. The complainant claimed that the Commission should reimburse him for the relevant medical expenses, namely, EUR 881.

The inquiry

16. On 22 December 2008, the Ombudsman opened an inquiry regarding the complainant's allegation and the above claim. In view of the Civil Service Tribunal's judgment of 18 September 2007 in the *Botos* case, the Ombudsman also asked the Commission to address, in its opinion on the allegation and claim, the question of whether it has meanwhile changed its previous policy of systematically refusing to reimburse the type of tests in question ("the Ombudsman's additional question").

17. On 4 March 2009, the Commission sent its opinion. The Ombudsman forwarded it to the complainant with an invitation to make observations, which he sent on 26 March 2009.

18. After a careful consideration of the opinion and observations, on 20 April 2010, the Ombudsman made a provisional finding of maladministration and, in accordance with Article 3(5) of his Statute, proposed a friendly solution to the Commission.

19. On 25 June 2010, the Commission sent its reply. The Ombudsman forwarded this reply to the complainant, with an invitation to submit observations. The complainant sent his observations on 12 July 2010.

The Ombudsman's analysis and conclusions



A. Alleged unfairness and related claim

Arguments presented to the Ombudsman

20. The complainant alleged that the Commission acted unfairly by not taking into account the Judgment of the Civil Service Tribunal of 18 September 2007 in *Patricia Botos v Commission of the European Communities* when dealing with his request for reimbursement of his medical expenses.

21. He argued that his case concerned the same laboratory tests and analyses as those which had been the subject of the judgment in the *Botos* case.

22. He also pointed out that he failed to ask, within the statutory deadline, for reimbursement for the costs of his blood tests in 2003, because he had been discouraged from doing so during the course of his conversation with the Medical Officer in 2003. The information he received from the Medical Officer convinced him that his tests could not be reimbursed at all, and it was for that reason that he had refrained from submitting the relevant invoices to the Settlement Office within the foreseen deadlines. It was only when he became aware of the judgment in the *Botos* case that he realised that he might be able to obtain reimbursement for his tests.

23. In its opinion, the Commission stated that it could only confirm the reply given by the Appointing Authority on 23 July 2008 in response to the Article 90(2) complaint lodged by the complainant. In summary, the Commission's reasons were the following. (i) In its decision dated 25 July 2003, the Settlement Office rejected, "at least implicitly", the complainant's request for reimbursement of the tests in question; (ii) The complainant did not appeal against this decision within the prescribed deadline. This decision therefore became definitive (iii) The information given to the complainant by the Medical Officer in 2003 did not constitute an administrative decision; and (iv) The judgment in the *Botos* case does not constitute a new fact which would enable the Commission to exempt the complainant from the deadline foreseen for the submission of the medical invoices.

24. The Commission pointed out, in particular, that the Medical Officer met the complainant because the latter had requested a meeting. During that meeting, the Medical Officer told the complainant that the laboratories which carried out the medical tests for which the reimbursement was refused were not "scientifically and medically" recognised. The Commission pointed out, however, that the above information was merely an explanation which complemented the decision of the Settlement Office and it could not be considered as a decision of the Settlement Office. Contrary to the complainant's statement in his complaint, the Medical Officer did not have the authority to prevent the complainant from submitting the relevant invoices, or to refuse their payment. The complainant had been entirely free to submit the relevant invoices.

25. As regards the Ombudsman's additional question, the Commission stated that, according to



the Medical Council, the tests in question were still considered to be non-scientifically proven. In 2007, the Medical Council decided that these analyses should be placed on the list of non-reimbursable analyses. This list was regularly updated on the CGAM's website.

26. In his observations, the complainant maintained his allegation and claims.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

27. Article 72 (1) of the Staff Regulations states that any official (including his/her spouse and any dependent person) is insured against sickness for up to 80% of the expenditure incurred, and up to 85% for reimbursement of, among other things, analyses [6] . It shall be increased to 100% in cases of certain illnesses (such as cancer or tuberculosis), or illnesses recognised by the Appointing Authority as being of comparable seriousness. According to Article 13 of the JSIS Rules, the deadline for reimbursement is **one year following the semester** during which the treatment takes place (that is to say, 18 months).

28. First, the Ombudsman pointed out that, on 11 July 2003, before submitting the invoices for his blood tests, the complainant asked the Medical Officer whether his tests could be reimbursed. He did not ask what the specific percentage of such reimbursement would be. In the reply containing the decision of the Settlement Office dated 25 July 2003, under a heading of "100% reimbursement", it was stated that 100% reimbursement could not be granted. However, it was also stated that "*only the normal reimbursement would be granted to the complainant*" (this quotation is taken from the Commission's opinion on the complaint).

29. In light of the above statement, the Ombudsman considered that the decision of 25 July 2003 did not constitute a negative decision in the sense that the complainant's tests would not be reimbursed at the normal percentage (85% but rather that it was a positive decision. The Ombudsman, therefore, found that the Commission was clearly wrong to consider that the Settlement Office's decision of 25 July 2003 rejected "*at least implicitly*" the complainant's request for reimbursement of the tests in question. The additional information given by the Medical Officer had no bearing on this decision, since, as the Commission rightly pointed out, the Medical Officer's view does not constitute an administrative decision. The Ombudsman considered, therefore, that, contrary to the Commission's view in its opinion, no definitive decision was made that the complainant would not be reimbursed for 80% of the costs incurred for the blood tests.

30. It was thus reasonable to believe that, in view of the "positive" decision of 25 July 2003, the complainant would have submitted his invoices to apply for normal (80%) reimbursement, if the conversation with the Medical Officer had not taken place. The Commission did not contest the fact the Medical Officer informed the complainant that the invoices could not be reimbursed *at all* , since the tests to which they were related were carried out by certain laboratories which were not scientifically recognised.



31. In its opinion, the Commission stated that the type of tests which were carried out for the complainant were, at that time, listed as non-reimbursable. On the basis of the positive decision of 25 July 2003, however, it would appear that they were reimbursable in 2003. It follows that the view expressed by the Medical Officer was not entirely correct, and his advice to the complainant cannot be considered to be merely supplementary information, since his comments appeared to challenge the Settlement Office's decision of 25 July 2003. In the Ombudsman's view, the Medical Officer appeared to have misled the complainant.

32. In addition, it was reasonable to consider that this view, expressed by a person whose functions involved issuing expert opinions on requests for reimbursement, had such an impact on the complainant that he abandoned his initial idea of submitting the invoices for reimbursement.

33. The complainant refrained from submitting the invoices until 2008, when he learned of the judgment in *Botos*. It was then that he became aware that the information provided by the Medical Officer was not entirely correct and that, in certain circumstances, reimbursement could not be ruled out for the type of tests which had been carried out in his case. The Ombudsman pointed out in this respect that, in its judgment in *Botos* [7], the Tribunal annulled the Appointing Authority's decision to reject the reimbursement of the CFS blood tests, which were carried out by the same laboratories as in the complainant's case, because the medical expenses for these blood tests should not be covered by the JSIS at the normal percentage. The Tribunal decided that the Appointing Authority's decision was tainted by manifest error because, in summary, (i) the refusal was justified by arguing that the laboratories which carried out the tests were not scientifically recognised. This contradicted the Settlement Office's earlier decision that the complainant was suffering from an illness which was confirmed by these tests (paragraph. 76), and (ii) the medical officer who made the relevant decision was not authorised to do so (paragraph 81 of the judgment).

34. The further question arose whether the judgment in the *Botos* case, in addition to the positive recommendation of the CGAM, could be considered as a new factor which would be sufficient to justify granting the exemption from the deadline established in Article 13 of the JSIS Rules. In this respect it should first be noted that the Commission did not rule out allowing an exemption from the said deadline, even after five years. Moreover, the CGAM found that such an exemption would be perfectly acceptable in the complainant's case.

35. In the Ombudsman's view, the judgment in *Botos* was relevant in the present case, regarding the exemption, in so far as it made the complainant aware that, contrary to the advice he was given by the Medical Officer in 2003, there might be a possibility for him to be reimbursed for the tests carried out by a specific laboratory. It would appear that the CGAM made its positive recommendation in this sense for the same reasons. The Ombudsman took the view, therefore, that by refusing to consider giving the complainant an exemption from the deadline to present a request for reimbursement, the Commission committed a *prima facie* instance of maladministration.

36. The Ombudsman also considered that, in order to remedy the situation which arose as a



result of the misleading information which the Medical Officer gave to the complainant, the Commission could now pay the complainant 80% of the costs he incurred for the blood tests in question, particularly in view of the fact that, according to the Commission's statement and decision of 25 July 2003, these costs were reimbursable in 2003. In this respect, it should be noted that it was never disputed by the Appointing Authority that the complainant suffered from CFS, neither in 2003, when the complainant did not submit any invoices, nor in 2008, when the complainant did submit the invoices dating from 2003).

37. The Ombudsman made the following preliminary conclusions:

- In 2003, the Commission did not refuse the normal reimbursement of 80% of the costs for this type of test. It only refused the extraordinary reimbursement to 100%.
- The information which the Medical Officer gave to the complainant was wrong and it discouraged him from submitting his claim for reimbursement in 2003.
- The complainant submitted his claim for reimbursement in 2008, after he became aware of the judgment in the *Botos* case. In light of that case, even if the complainant's claim was made almost five years after his tests had been carried out, the CGAM found that an exemption from the one year deadline established in Article 13 of the JSIS Rules would be perfectly acceptable in the complainant's case.
- Therefore, the Settlement Office could consider reimbursing the complainant for amounts invoiced in accordance with the rules for normal reimbursement.

38. For the reasons summarised above, the Ombudsman made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of his Statute:

"The Commission could consider the complainant's medical expenses which were incurred for blood tests carried out in July 2003, in accordance with the applicable rules for normal reimbursement."

The arguments presented to the Ombudsman after his proposal for a friendly solution

The Commission's reply

39. The complaint was the result of confusion which resulted, on the one hand, from the complainant's informal exchange of views with the Medical Officer, and, on the other hand, the Appointing Authority's decision of 23 July 2008, which was based on the Medical Officer's formal advice.

40. The Commission did not contest the fact that " *the Medical Officer informed the*



complainant that the invoices could not be reimbursed at all ". However, the Institution stated that, when making decisions on requests for reimbursements, it is only the Appointing Authority which can contest or approve the Medical Officer's advice.

41. The Commission clarified that the costs the complainant incurred for the relevant blood tests were *not* reimbursable in 2003 at all. In fact, they ceased being reimbursable as of 2001, two years, that is, before the complainant incurred the relevant expenses.

42. The Commission further stated that, since the complainant failed to ask for a reimbursement within the 18 month deadline foreseen by Article 13 of the JSIS Rules, the informal exchange of views between himself and the Medical Officer could not be considered as an act affecting him which could give him rights of appeal.

43. Furthermore, since the "Botos" case has no *erga omnes* effect, there can be no exemption from the deadline established in Article 13 of the JSIS Rules. An exemption from the deadline is only applicable in cases of *force majeure* , which was not the case in the complainant's situation. Furthermore, this ruling does not apply in the complainant's case, but only *inter partes* . It does not, therefore, constitute a new fact which could justify re-examining the decision not to reimburse the complainant. In this context, the Commission referred to its reply to the Ombudsman's Own-Initiative Inquiry OI/4/2010/ELB [8] .

44. The Commission repeated its view that the complainant (i) did not make a request for reimbursement for the expenses incurred for blood tests within the "18 months deadline" and, (ii) did not make an appeal under Article 90(2) of the Staff Regulations within the prescribed deadline against the decision dated 25 July 2003, in which the Settlement Office rejected his request for reimbursement of the tests in question.

45. The Commission went on to state that the administration replied to the complainant's request through the decision made by the Head of the Settlement Office dated 25 July 2003, which informed him that his illness did not meet the criteria of a serious illness and that, "*by consequent, only a reimbursement at "80%" of the medical costs incurred, on the basis of the current legislation would be possible* " [9] . The complainant was also informed that, in accordance with the Medical Officer's opinion, the medical condition known as CFS did not meet the criteria for reimbursement at 100%.

46. In the Commission's view, the Settlement Office's decision of 25 July 2003 only concerned the refusal to recognise CFS as a serious illness justifying a reimbursement at 100%. The Commission wrote the following: "*As regards the reference to a 85% reimbursement, this did not mean that the complainant would be reimbursed indeed at this rate, since a reimbursement implied that the medical costs incurred are eligible pursuant to the provisions of the Joint Sickness Insurance Scheme* " ('JSIS') [10]

47. The Commission further explained that, as stated by the Medical Officer, the laboratories which carried out the medical tests, for which reimbursement was refused, were not scientifically recognised. In December 2007, the Medical Council decided that such blood tests would



continue to be listed as medical costs which are not covered by the JSIS. The list containing such costs is regularly updated on the intranet website of the JSIS.

48. Finally, as regards the CGAM's positive recommendation that an exemption from the one year deadline established in Article 13 of the JSIS Rules would be perfectly acceptable in the complainant's case, the Commission considered that advice from this body is merely for consultation purposes only, and is meant to assist the Appointing Authority in dealing with requests and appeals in the framework of the Article 90 Staff Regulations procedure.

The complainant's further observations

49. In his observations, the complainant maintained his claim for reimbursement. He emphasised that his request of 11 July 2003, to which the decision of 25 July 2003 referred, was not for 100% reimbursement. The complainant also argued that he had been unable to verify on the Commission's intranet the amount of possible reimbursement for the analyses in question.

The Ombudsman's assessment after his friendly solution proposal

50. In its reply to the Ombudsman's proposal for a friendly solution, concerning the decision of 25 July 2003, the Commission presented diverging views. On the one hand, it stated that, in its decision of 25 July 2003, the Settlement Office declared that "*only the normal reimbursement would be granted to the complainant*", and not 100% reimbursement. On the other hand, as regards the reference to 85% reimbursement, the Commission stated that this did not mean that the complainant would actually be reimbursed at this rate, since reimbursement implied that the medical costs incurred are eligible pursuant to the provisions of the 'JSIS'.

51. It is, therefore, unclear whether the administrative decision of 25 July 2003 was positive, in the sense that the complainant was entitled to 85% reimbursement on the basis of the relevant receipts (it is worth noting that the complainant did not ask for a 100% reimbursement), or negative, in which case the complainant had three months within which to appeal against it under Article 90(2) of the Staff Regulations. Moreover, the Commission suggested that this "administrative decision" did not have any effect. According to the Commission, regardless of what the decision of 25 July 2003 meant, it was not relevant because reimbursement would only be made if the provisions of the JSIS Rules allowed it, which was not the case. The Ombudsman considers that the Commission's failure to provide a coherent explanation for its behaviour regarding the complainant's request for reimbursement, either at the time of the facts, or in its reply to the proposal for a friendly solution, constitutes an instance of maladministration.

52. The Ombudsman maintains that, on the basis of the decision of 25 July 2003, it would have been reasonable for the complainant to believe that he was entitled to 85% reimbursement, if the Medical Office had not informed him that he could not be covered at all. When the



complainant learnt about the judgment in *Botos*, he considered that the Medical Officer had misinformed him and that he might, in fact, have been entitled to reimbursement. The complainant, therefore, asked for an exemption from the deadline established in Article 13 of the JSIS Rules, in order to be able to make a request for reimbursement. The Ombudsman points out, in this respect, that the present case is not about the application *erga omnes*, and *ex tunc* effect of the judgment in the *Botos* case, but about the information the Commission gave the complainant in 2003, which, in light of the judgment in *Botos* in 2007, appeared to be wrong. In this respect, the complainant argued, in his observations, that he was unable to verify the amount which might be reimbursed for the analyses in question by consulting the Commission's intranet, since, contrary to the Commission's statement in its reply to the friendly solution, this information was not easily accessible.

53. The Ombudsman might agree that asking to be reimbursed for medical expenses five years after they were incurred cannot be considered as presenting a request within a reasonable time limit [11], unless someone was prevented from doing so within the legal deadline as a result of having been given the wrong information. On the other hand, the CGAM concluded in its letter dated 16 July 2008 that the Commission should examine whether the judgment in *Botos* constitutes a new fact which would allow the deadline for the request for reimbursement to be reopened. Even if the CGAM is only an advisory body, it certainly has wide experience in dealing with matters concerning the JSIS, a fact which the Ombudsman recognised in his proposal for a friendly solution.

54. Finally, the Ombudsman points out that the deadline established in Article 13 of the JSIS Rules is an *internal* administrative deadline, and not a legal deadline such as those foreseen in the Staff Regulations, and in court procedures. In this context, the Ombudsman does not understand why the Commission referred to its reply to the Ombudsman's Own-Initiative Inquiry OI/4/2010/ELB when it replied to the Ombudsman's proposal for a friendly solution concerning the existence or non-existence of legal deadlines.

55. Derogation from internal administrative deadlines is possible when there are good reasons. The Ombudsman considers that, since the Commission cannot provide a coherent explanation for the content of its decision of 25 July 2003, this could be considered to constitute a good reason for granting the complainant an exemption from the deadline to allow him to submit his request for reimbursement.

56. On the other hand, the Ombudsman notes that, however belatedly, the Commission, in its reply to the Ombudsman's proposal for a friendly solution, clarified that the information provided by the Medical Officer was, in fact, correct (and, by implication, that the decision of 25 July 2003 was wrong), because, according to the JSIS Rules, the analyses in question were not reimbursable at all in 2003, and they are still not reimbursable. The Ombudsman regrets that it took the Commission so long to clarify this aspect of the case and, albeit implicitly, to admit that its decision of 25 July 2003 was, in fact, wrong. However, he considers that, for this reason, there is no purpose at present in making a draft recommendation to the effect that the Commission should grant the complainant an exemption from the deadline to submit his request for reimbursement. Ultimately, the complainant's claim was that the Commission should



reimburse him for the relevant medical expenses, namely, for the sum of EUR 881. Under the relevant rules, this, as the Commission has explained, cannot be done.

57. In these circumstances, the Ombudsman will close the case with a critical remark below, based on his finding of maladministration formulated in paragraph 51 above.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission was not able to offer a coherent explanation concerning its decision of 25 July 2003, until it finally implicitly admitted that the said decision was wrong. This was an instance of maladministration.

P. Nikiforos Diamandouros

Done in Strasbourg on 15 December 2010

[1] "INAMI" stands for "*Institut national d'assurance maladie-invalidité*" located in Belgium.

[2] The Ombudsman's services translation from Dutch.

[3] Case F-10/07, "*Patricia Botos v Commission of the European Communities*" Judgment of the Civil Service Tribunal of 18 September 2007-not yet published in the ECR.

[4] French original version: "... le Médecin-Conseil, qui, aux dires du plaignant lui aurait "*interdit l'envoi de factures ... car elles ne seront en aucun cas prises en charge.*"

[5] Case C-310/97 *Commission v AssiDomän Kraft Products and others* [1999] ECR I-5363 paragraphs 55-57.

[6] Article 72 (1) of the Staff Regulations states the following: "*This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalisation, pharmaceutical products, radiology, **analyses**, laboratory tests and prostheses on medical prescription with the exception of dental prostheses.*" (Emphasis added)

[7] See footnote 3.

[8] On 22 March 2010, the European Ombudsman opened an own-initiative inquiry, addressed



to the Commission, regarding the way in which EU institutions deal with requests, made by officials and agents under Article 90(1) of the Staff Regulations, to replace decisions, for the future, in the light of evolving case-law.

In his letter, the Ombudsman requested the Commission to reply to the following questions: " (i) *Does the Commission consider that, as a general principle, it can replace administrative acts that it has previously adopted, with an eye to ensuring that it complies with evolving case law interpreting existing rules and regulations?* (ii) *If the answer to the first question is yes, does the Commission agree that an official or agent is entitled to introduce a request under Article 90(1) asking the Commission to adopt a new decision that replaces an earlier decision which has become definitive, in order to take account of the evolution of the case-law since the original decision was made?* "

In its reply, the Commission stated in summary that " *If "administrative acts" are understood as individual decisions made prior to a Court ruling, the general principle is that, if the persons concerned failed to make use of the appeals set forth by the Staff Regulations, the Commission will not replace these acts, granting them retroactive effect.* " The Commission further stated that " *a request under Article 90(1) of an official or agent asking the Commission to adopt a new decision that replaces an earlier decision which became final, on the grounds of the evolution of case-law, would not be admissible. According to consistent case law, the statutory deadline of Article 90(2) cannot be circumvented by introducing a request under Article 90(1)* ".

[9] See the French original version of the Commission's opinion: " (...) *par conséquent, seul un remboursement normal des frais encourus au titre de cette maladie, sur base de la réglementation en vigueur, pouvait lui être accordé* ".

[10] See the French original version of the Commission's opinion: " *Quant à la mention d'un éventuel remboursement dit normal (85%), elle ne préjuge pas que ce remboursement aura lieu pour les dits frais, car un remboursement est possible seulement si les frais exposés de l'affilié sont éligibles selon les dispositions prévues dans le cadre réglementaire du RCAM* ".

[11] Case T-45/01, *Stephen G. Sanders and Others v Commission of the European Communities* [2004] ECR-SC II-1183 paragraphs 59-60 and 67.