

Proposal of the European Ombudsman for a friendly solution in his inquiry into complaint 362/2011/KM against the European Commission

Solution - 11/03/2011

Case 362/2011/KM - **Opened on** 11/03/2011 - **Decision on** 22/12/2015 - **Institution concerned** European Commission (No maladministration found) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant is a former Commission official. In January 2010, he turned to the European Anti-Fraud Office (OLAF) to ask whether the Commission had opened or would open disciplinary proceedings against another (now also former) Commission official ("official X"). The latter had, as first revealed by the UK newspaper *The Sunday Times*, and as he admitted [2] in the course of an internal investigation, dined with journalists who posed as representatives of Chinese businesses and provided them with information on ongoing antidumping investigations. In February 2010, OLAF informed the complainant that it had opened an internal investigation in another matter involving the same person, partially based on the complainant's complaint, and that the opening of disciplinary proceedings would "*depend on the outcome of [OLAF's] procedure and our recommendation*" in that other investigation [3].

2. In March 2010, the complainant turned to the Commission to submit a complaint pursuant to Article 90(2) of the Staff Regulation. He criticised the Commission for not having commenced disciplinary proceedings, following the revelations in *The Sunday Times* against official X. He claimed that it should do so, or appoint a committee of independent experts to look into the matter.

3. In July 2010, the Commission rejected the complaint as inadmissible, and the complainant turned to the Ombudsman. That complaint was registered as complaint 1757/2010/KM. The Ombudsman informed the complainant that there were no grounds for an inquiry into that complaint because the complainant had expressly objected to an anonymised version of a potential Ombudsman decision being communicated to the Commission. The Ombudsman also pointed out that the complainant was free to address the Commission as any normal citizen could do to enquire about the situation. The complainant therefore wrote to the President of the



Commission in October 2010, and again in January 2011, asking him whether he was going to open disciplinary proceedings against official X. In case the Commission did not intend to open disciplinary proceedings, the complainant wanted to know the reasons for this decision and why the cases mentioned in the activity report of the Investigation and Disciplinary Office of the Commission (IDOC) were more serious than the matter at hand.

4. The Commission replied in November 2010. However, the complainant only received this letter in January 2011. In this reply, the Commission stated that " *the responsible services had taken all the necessary measures to deal with the situation* ". However, it could not give the complainant any more information because the case was " *a confidential personal matter that cannot be divulged to third persons* ".

5. The complainant was not satisfied with this reply. He thus turned to the Ombudsman.

The subject matter of the inquiry

6. The Ombudsman opened an inquiry into the following allegation and claim identified in the complaint.

Allegation

The Commission failed to provide a satisfactory reply to his e-mail to President Barroso.

Claim

In the event that the Commission does not intend to commence disciplinary proceedings against official X, it should explain the reasoning behind this decision.

7. The Ombudsman decided not to include the claims that the Commission should (a) commence disciplinary proceedings against official X and (b) appoint a committee of independent experts from outside the Community institutions to (i) investigate the outcome of all complaints concerning official X submitted before the publication of the *Sunday Times* article of 7 September 2008; (ii) determine why disciplinary proceedings were not opened immediately after the Commission's decision to suspend official X; and (iii) recommend opening any disciplinary proceedings that the committee may consider to be appropriate in his inquiry.

8. In his letter opening the present inquiry, the Ombudsman explained that this was because (i) the Commission, when acting as an appointing authority, has a wide margin of discretion when it comes to deciding whether or not to open disciplinary proceedings against its staff, and (ii) the Ombudsman cannot adopt the role of a disciplinary board, nor act as a preliminary disciplinary board.

The inquiry



9. The complainant submitted his complaint in February 2011. In March 2011, the Ombudsman opened an inquiry by asking the Commission to submit an opinion on the complaint.

10. In his opening letter, the Ombudsman asked the Commission, should it consider that its reasoning in this matter cannot be disclosed to third persons, to make the necessary arrangements for an inspection of the file. In July 2011, the Ombudsman's services inspected the Commission's file. A report on the inspection was forwarded to the complainant for his observations.

11. The Commission submitted its opinion in July 2011. The Ombudsman forwarded it to the complainant with an invitation to submit observations.

12. The complainant submitted his observations in September 2011.

The Ombudsman's analysis and provisional conclusions

Preliminary remarks

13. In his observations, the complainant asked the Ombudsman to revise the decision not to include the claim that the Commission should commence disciplinary proceedings against the official in his inquiry. He considered that this decision "*lack [ed] a legal basis*", and that it rendered absurd the provision made in Article 4(2) of the Ombudsman's statute according to which the Ombudsman may inform institutions of "*facts calling into question the conduct of a member of their staff from a disciplinary point of view*", and even more Article 10(4) of the Implementing Provisions, which states that the Ombudsman may inform an institution of "*facts which, in his view, could justify disciplinary proceedings*".

14. The complainant's interpretation of the Ombudsman's Statute and Implementing Provisions cannot be accepted. As stated in the Ombudsman's opening letter (see above, paragraph 8), institutions have a wide margin of discretion when deciding whether or not to open disciplinary proceedings against a member of their staff. Article 4(2) of the Ombudsman's Statute and Article 10(4) of his Implementing Provisions relate merely to the transmission to the institutions concerned of certain facts which have come to the Ombudsman's knowledge in the course of an inquiry, and which might lead them to commence disciplinary proceedings. None of these provisions gives the Ombudsman the power to conduct an inquiry into the conduct of an official with the aim of establishing whether disciplinary measures could be justified. The Ombudsman further notes that the very subject matter of the present complaint shows that the Commission has already been informed, by the complainant, of all the relevant facts and information that could, according to the complainant, give rise to disciplinary proceedings against official X. In that sense, there is nothing new revealed by the inquiry carried out by the Ombudsman into the complaint against the Commission that could be brought to the attention of the Commission pursuant to Article 4(2) of the Statute and Article 10(4) of the Implementing Provisions.



15. In his observations on the Commission's opinion, the complainant called on the Ombudsman to publish the Final Case Report on OLAF's investigation. The complainant added that he had already requested the Commission to "send [him] the inquiry finished by OLAF" in this matter, namely, in his letter sent in October 2010 which was the basis of the present inquiry. He considered that this OLAF report was relevant to the present case because it most likely contained serious charges against official X, and would show that the Commission was protecting that official even though it had enough evidence to open disciplinary proceedings.

16. In this regard, it is true that the above-mentioned request was contained in the complainant's e-mail sent in October 2010 and that the Commission did not address this request in its reply. The Ombudsman recalls, however, that in a letter that he sent to the complainant in the context of a related inquiry, he reminded the complainant that he could only include in his inquiries allegations and claims in relation to which appropriate prior administrative approaches had been made. In relation to the present issue, which concerns access to a document, it has to be stressed that Regulation 1049/2001 [4] foresees the possibility of making a confirmatory application when an institution rejects a request for access, and that the rejection of such a confirmatory application opens the way to bringing court proceedings or submitting a complaint to the Ombudsman. However, the complainant has not furnished any evidence that he has made a confirmatory application in relation to the above-mentioned request for access. This aspect of the complaint is therefore inadmissible and cannot be included in the present inquiry.

A. Allegation of failure to provide a satisfactory reply to the complainant's e-mail and claim that the Commission should, if it did not intend to open disciplinary proceedings, explain its reasons

Arguments presented to the Ombudsman

17. The complainant considered the statements contained in the Commission's reply to his letter to be "*farical*". He noted that the Commission was much more secretive about the case than the Civil Service Tribunal. The latter had already dealt with an action for annulment brought by official X against the Commission decision suspending him, without deleting references to his name or identity. In his view, the Commission's "*policy of zero tolerance vis-à-vis unethical and illegal behaviour*", which it announced in a press release following the *Sunday Times* article, did not amount to anything substantial, as the Commission appeared to be content with official X having in the meantime retired quietly, and to hope that the case would soon be forgotten.

18. In its opinion, the Commission explained that the information which the complainant requested in his e-mail to the President of the Commission involved personal data within the meaning of Regulation 45/2001 [5]. This meant that data could only be transferred if the recipient had established the need for the transfer, and if there was no reason to assume that



the transfer might prejudice the legitimate interest of the person whose data was at issue. The complainant had not established that necessity, and the Commission could not exclude that the legitimate interests of the person concerned might be prejudiced. It could therefore not transfer the personal data.

19. The Commission added that the complainant had no direct personal interest in the opening of disciplinary proceedings against another official. In fact, the only person that could be affected by a decision in this regard was the person concerned by it. The Commission was therefore not obliged to explain the reasoning for its decision.

20. At the inspection of the Commission's file, the Commission's representatives explained to the Ombudsman's representatives how the Commission had dealt with the case which gave rise to the present complaint. The Ombudsman's representatives also examined the file and took a copy of a confidential two-page document setting out the chronology of the Commission's actions.

21. In his observations, the complainant rejected the Commission's reliance on Regulation 45/2001 on the grounds that the issues at stake had already been treated publicly in the Civil Service Tribunal judgments, and in the article published by *The Sunday Times*. Moreover, the Commission itself had admitted that the acts of official X revealed by *The Sunday Times* amounted to a serious professional misconduct, as it had caused reputational damage to the Commission, given in particular the latter's high rank.

22. The complainant further noted that, although the Civil Service Tribunal annulled the Commission's decision to suspend official X, it did so on purely formal grounds and qualified the said decision as being justified from a substantive point of view ("*justifié sur le fond*") [6]. Finally, OLAF had also transmitted the conclusions of a related investigation to the Belgian authorities for further action.

23. Therefore, according to the complainant, every European citizen was entitled to ask the Commission to explain why, if that was indeed its view, it did not consider these facts sufficient to warrant disciplinary proceedings against official X. He noted that the Ombudsman had included a claim to this effect in his inquiry and that, before opening the present inquiry, he had advised the complainant to address his concerns to the Commission as any normal citizen could do, and to resubmit his complaint if he was not satisfied with the reply he received. He considered that since he had not been satisfied with the reply and thus had to resubmit his complaint, the Ombudsman should not accept the Commission's position. Otherwise he would have wasted his and the complainant's time. Since the Ombudsman had sworn to undertake his duties independently and impartially, he would be guilty of serious misconduct if he accepted the Commission's attitude, and should be dismissed.

24. The complainant added that the Commission had avoided replying to this question when he raised it under Article 90 of the Staff Regulation, on the grounds that his complaint was inadmissible. However, the complainant referred to the fact that the Ombudsman had informed the Commission, in the framework of another inquiry, that the question whether a complaint



made under the Staff Regulations in relation to a particular matter was admissible was not relevant to the question whether there had been maladministration in relation to the substance of the matter raised. Therefore, the Commission could not hide behind this reasoning in the present case and avoid providing answer.

25. He also argued that, in a press release of 5 September 2008, the Commission had "meant to convey the idea" that it would commence disciplinary proceedings and that it had "*opened an investigation to establish the facts and the appropriate consequences*".

26. The complainant further noted that the statement made by the Commission in the above mentioned press release that it could not comment any further "*pending further investigation*" was no longer valid as, in fact, the Commission had already decided "years ago" to suspend official X. Since most of the relevant facts surrounding the acts of official X were already in the public domain, having been mentioned by the Civil Service Tribunal, the Commission's own press release, and the *Sunday Times* article, the Commission should now be able to explain to the public why these facts were not sufficient for it to commence disciplinary proceedings.

27. As regards the inspection, it did not matter to the complainant whether the Ombudsman had, as noted in his report on the inspection, the impression that the Commission had "*carefully considered which steps to take*". What mattered to him was that the Ombudsman deals with his claim. The complainant also noted that the inspection report did not mention a report on an investigation relating to official X which OLAF forwarded to the Belgian authorities in February 2009.

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

28. The Commission argued that it could not provide any substantive answer to the complainant because to do so would breach the applicable data protection rules.

29. Regulation 45/2001 defines "personal data" as follows:

" 'personal data' shall mean any information relating to an identified or identifiable natural person hereinafter referred to as 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. "

30. The EU Courts have held that a leak about OLAF's intention to recommend to an institution that it commence an action against a named member of staff constituted processing of personal data within the meaning of Regulation 45/2001, since this notion included "*disclosure by transmission, dissemination or otherwise making available*", according to Article 2 (b) of the Regulation [7] . Moreover, according to the jurisprudence, the unlawful disclosure of the name of an applicant as being the subject of disciplinary proceedings was also a breach of the



relevant provisions of 45/2001 [8] .

31. Thus, against this background, the statement in the Commission's letter that it could not provide to the complainant any information as to whether it had commenced disciplinary proceedings against official X, unless the complainant established that the data transfer to him was necessary, appears to be in accordance with the case-law cited above.

32. However, the particular circumstances that have given rise to the present complaint call for a more nuanced approach.

33. First, the case is undoubtedly special given that there has been ample publicity about it not only through the revelations and information published by *The Sunday Times* , but also through two cases brought before the EU courts by the official in question, under his full name, i.e. without any special confidentiality, even though Article 44 of the Rules of Procedure of the Civil Service Tribunal allows the Tribunal to decide, on its own motion or on application from one of the parties, not to include the name of a party in the published judgement, if it finds that there are legitimate reasons for confidentiality. In those two court cases, the facts revealed by *The Sunday Times* are set out and discussed at length, as are the steps involved in and the outcome of the Commission's investigation of this matter. It results from a reading of the facts in those two cases that official X admitted that he had met the journalists whom he thought were representatives of Chinese businesses, and had provided them with information about ongoing trade-related EU proceedings. The said official also admitted that he had not informed his superiors of these meetings but argued that the information he had provided had been "semi-public", a claim which the Court however rejected [9] . It also follows from Case F-80/08 that the Commission had decided to suspend the official in question and to reduce his salary, a decision which the Court annulled on procedural grounds even though it described it, in another judgment (Case F-75/09) in a closely related matter, as being justified from a substantive point of view [10] .

34. In the light of the above findings made public by the above mentioned two judgments of the EU Courts, it is not clear what further damage any information released by the Commission on any potential ongoing procedures could do to the reputation or privacy of the official concerned.

35. Second, the Ombudsman considers that regard should be had to the reasoning of the Civil Service Tribunal which, in *Giraudy* [11] , recalled that the confidentiality of OLAF proceedings was designed, ultimately, to safeguard the presumption of innocence and the reputation of officials under investigation. In that judgment, the Tribunal stressed that the duty of the administration to have regard to the welfare of its officials meant that the latter could not give more information than necessary. However, as the Tribunal pointed out,

" That being said, it has to be recognised that a culture of accountability has grown up within the Community institutions, responding in particular to the concern of the public to be informed and assured that malfunctions and frauds are identified and, as appropriate, duly eliminated and punished. The consequence of that requirement is that officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account



the possible existence of a justified need to communicate a degree of information to the public. "
[12]

36. In the particular circumstances of that case, which involved the Head of a Delegation who had been summoned back to Brussels while his Delegation was under investigation in order to ensure that the investigation could run its course, and who was later cleared of any wrongdoing, the Civil Service Tribunal also ruled that "*neither the disclosure to the press that there was an OLAF investigation nor the disclosure that the two officials concerned had been reassigned could, in themselves, be regarded as infringing the mandatory requirements of confidentiality appropriate to OLAF investigations*".

37. The Ombudsman is of the view that this logic applies to OLAF investigations as well as to investigations and disciplinary proceedings conducted by the Commission.

38. Third, the obligation to protect the reputation of members of staff and the presumption of innocence only applies while investigations are ongoing and have not yet come to a conclusion. In this regard, the Ombudsman notes that, IDOC investigations take, on average, 10 [13] to 14 [14] months to complete. It would therefore seem that, if the Commission had opened disciplinary proceedings in relation to the facts at issue back in 2008, and not simply started an investigation as stated in its press release published on 5 September 2008 (see paragraph 25 above), one would expect that such proceedings would by now have been concluded, in which case, as the above mentioned jurisprudence implies, any disclosure by the Commission of an investigation against official X would not breach the "*confidentiality appropriate to OLAF investigations*". Even in case no disciplinary proceedings were initiated, the Ombudsman considers that the logic that may have prevented the Commission from saying so back in 2010 may no longer apply to date.

39. In that regard, in the context of the growing culture of accountability evoked by the Court, it is of fundamental importance for the Commission to show that it diligently investigates allegations of serious breaches of statutory duties by members of its staff, especially when they have already been in the public domain. In the Ombudsman's view, in order to reinforce the public's belief in the principle of accountability of the EU public service and strengthen further the culture of transparency that should permeate the latter, the Commission or any other institutions concerned should be forthcoming and inform the public in a timely manner about the results of their internal investigations, be they that an official was indeed found to have breached his duties (in which case the public has an interest in knowing that this was followed up with the appropriate and foreseen sanctions), or that there was insufficient evidence, that the official in question may have been cleared of any wrongdoings, or that no further steps were taken for whatever other reason the administration relied upon. Particularly in cases where the facts are widely known, and to some extent not even contested, silence on the part of the administration concerned as to how it has reacted to or dealt with (serious) allegations of misconduct by one of its officials does not appear to satisfy the principles of transparency, accountability and good administration vis-à-vis citizens. Such an attitude is unlikely to reinforce public trust towards the EU administration's stated objectives to combat cases of fraud and mismanagement and protect the interests of the Union.



40. The Ombudsman will therefore make a proposal for a friendly solution, calling upon the Commission to give the complainant a more substantive reply to his e-mail sent in October 2010.

B. The proposal for a friendly solution

Taking into account the Ombudsman's above findings, the Commission should reconsider its initial refusal to provide any kind of information in reply to the complainant's question whether a disciplinary action had been taken against official X.

P. Nikiforos Diamandouros

Done in Strasbourg on 28/06/2013

[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] Case F-80/08, *Wenig v Commission*, judgment of the Civil Service Tribunal of 30 November 2009, not

yet reported, paragraph 11 et seq.

[3] In relation to that investigation, OLAF later informed the complainant that it closed the case without recommending any further follow-up.

[4] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001

regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[5] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p. 1.

[6] This is how the Civil Service Tribunal described the decision in Case F-80/08 in its decision in case F-75/09, *Wenig v Commission*, not yet reported, in paragraph 23.

[7] Case T-259/03, *Kalliopi Nikolaou v Commission*, [2007] ECR 11-99, paragraphs 203 and following.



[8] Case F-30/08, *Nanopoulos v European Commission* , paragraph 171.

[9] Case F-80/08, *Wenig v Commission* , paragraph 69.

[10] F-75/09, cited above, paragraph 23.

[11] F-23/05 *Giraudy v Commission* [2007] FP-1-A-1 p. 121; FP-11-A-1 p. 657.

[12] paragraph 157.

[13] in 2012, according to IDOC's 2012 annual report.

[14] figure taken from IDOC3s 2011 annual report.