

## Decision of the European Ombudsman on complaint 794/5.8.96/EAW/SW/VK against the European Commission

Decision

**Case 794/96/VK - Opened on 18/10/1996 - Decision on 05/11/1997**

Strasbourg, 5 November 1997 Dear Mr. W., On 30 July 1996 you made a complaint to the European Ombudsman concerning a letter sent by Mr Erkki LIIKANEN, the Member of the European Commission whose responsibilities include Personnel and Administration, to Mr Carl-Magnus LEMMEL, deputy Director-General of DG III of the Commission. On 18 October 1996, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 31 January 1997 and I forwarded it to you with an invitation to make observations, if you so wished. On 17 March 1997, I received your observations on the Commission's opinion. I am now writing to let you know the results of the inquiries that have been made.

### THE COMPLAINT

It appears from the file on the complaint that, on 5 July 1996, the Swedish newspaper *Dagens Politik* published remarks attributed to Carl-Magnus LEMMEL, deputy Director-General of DG III of the European Commission. The remarks were critical of the working methods of the Commission. Your complaint concerned the fact that, following the remarks published in *Dagens Politik*, Mr LIIKANEN wrote to Mr LEMMEL. With your letter of complaint, you sent a cutting from the Swedish newspaper *Aftonbladet*. The cutting consisted of an article which described the remarks attributed to Mr LEMMEL and the contents of Commissioner LIIKANEN's subsequent letter to him. I informed Mr. Lemmel of your complaint and of the Ombudsman's inquiry into it. Mr LEMMEL did not submit any views or information to the Ombudsman.

### THE INQUIRY

**The Commission's opinion** The Commission's opinion contained the following statements: The public expression of opinion by officials is governed by Article 12 of the Staff Regulations, which provides that "*an official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position*". Furthermore, Article 17 of the Staff Regulations provides that "*an official shall exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties*". In spite of these provisions of the Staff Regulations, the Commission decided in the case in question not to start disciplinary proceedings. It limited itself to sending a letter reminding, on the one hand, the official - who had just been recruited - of the



duty of reserve to which all officials are subject and, on the other hand, recalling that the Commission expects all its officials, and particularly officials in the higher grades, to be creative and attentive to improvements that could be made in the management and implementation of the tasks entrusted to the Institution. However, these initiatives should be examined and followed by appropriate means inside the Commission, so that they can give rise to proposals and be translated into concrete measures. **The complainant's observations** Your observations expressed indignation about the way the Commission deals with the freedom of expression of its officials. You stated that, in Sweden, freedom of expression is a constitutional right, enjoyed also by civil servants. You considered the severe restrictions on the freedom of expression imposed by the Commission to be inappropriate and stated that these restrictions have a negative impact on the free circulation of information in the European Union.

## THE DECISION

**1 The facts on which the Ombudsman's decision is based** 1.1 On the basis of the inquiries conducted by the European Ombudsman, the relevant facts appear to be as follows: (i) Remarks critical of the Commission's working procedures appeared in a Swedish newspaper and were attributed to Mr LEMMEL. (ii) No disciplinary proceedings against Mr LEMMEL were initiated. (iii) A letter was addressed to Mr LEMMEL by Commissioner LIIKANEN. According to the Commission's opinion on the complaint, the letter reminded Mr LEMMEL of the duty of reserve to which officials are subject. In this context, the Commission referred to Articles 12 and 17 of the Staff Regulations. **2 The Staff Regulations** 2.1 The first paragraph of Article 12 of the Staff Regulations provides that: *An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position* . In its opinion, the Commission also quoted from the first paragraph of Article 17 of the Staff Regulations: *An official shall exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties; ...* . 2.2 In considering the duty of allegiance owed to the Communities by officials, the Court of Justice stated in its decision in *Oyowe and Traore v Commission* (1) that: *"the Staff Regulations cannot be interpreted in such a way as to conflict with freedom of expression, a fundamental right which the Court must ensure is respected in Community law"* . 2.3 According to the case law of the Court of Justice, the European Convention on Human Rights, which is also mentioned in Article F (2) of the Treaty of the European Union, provides a basis for human rights as general principles of Community law. 2.4 Article 10 of the European Convention on Human Rights guarantees the freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Article 10 ' 2 of the Convention mentions that the exercise of these freedoms carries with it duties and responsibilities and envisages that, under certain conditions, limits on freedom of expression may be prescribed by law. 2.5 According to the decision of the European Court of Human Rights in *Vogt v Germany* (2) , although it is legitimate to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. The Court mentioned in the same case the need to ensure that a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic state in ensuring that its civil service properly furthers the purposes enumerated in Article 10 ' 2. In this context, the Court also remarked that, whenever civil servants' right to freedom of expression is in issue, the



"duties and responsibilities" referred to in Article 10 ' 2 assume a special significance. 2.6 The Commission did not take disciplinary proceedings against Mr LEMMEL, but confined its actions to sending a letter reminding him of his duties under the Staff Regulations. According to the Court of Justice of the European Communities, these duties cannot be interpreted in such a way as to conflict with freedom of expression. 2.7 On the basis of the Ombudsman's inquiries, therefore, there appears to be no evidence of an interference with freedom of expression in this case or, more generally, of any intention by the Commission not to strike a fair balance between the fundamental right of the individual to freedom of expression and the duties and responsibilities of officials. The Ombudsman's inquiries have therefore revealed no evidence of maladministration by the Commission and he has decided to close the case.

## FURTHER REMARKS

According to the Court of Justice, the Staff Regulations cannot be interpreted in such a way as to conflict with freedom of expression. The Commission's opinion on the complaint in this case focused on the restrictions which the Staff Regulations impose on the public expression of opinion by officials. It did not expressly acknowledge, however, that officials have a fundamental right to freedom of expression. As it appears in Article 10 of the European Convention on Human Rights, freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Article 10 ' 2 of the Convention envisages that, under certain conditions, limits on freedom of expression may be prescribed by law. In this context, it is also worth remarking that the Commission's opinion to the Ombudsman in this case quoted only the first part of the first paragraph of Article 17 of the Staff Regulations. The paragraph continues: (an official) *"shall not in any manner whatsoever disclose to any unauthorised person any document or information not already made public. He shall continue to be bound by this obligation after leaving the service."* If read literally, without regard to the statement by the Court of Justice that the Staff Regulations cannot be interpreted in such a way as to conflict with freedom of expression, this part of Article 17 could be thought to forbid officials from putting any information whatsoever into the public domain, thereby preventing them from engaging in any public discussion of their work. This interpretation, as stated above, is not correct. The Commission may wish to consider whether it could provide guidance to its officials on what it considers to be a fair balance between their individual right to freedom of expression, which includes the freedom to impart information and ideas, and their duties and responsibilities as officials, in particular under Articles 12 and 17 of the Staff Regulations. The issuing of such guidance could help ensure fulfilment of the requirement under Article 10 ' 2 of the European Convention on Human Rights that restrictions on freedom of expression be "prescribed by law", by putting officials in a position to foresee the risks that particular courses of action may involve. Publication of such guidance including, in particular, acknowledgment of the fact that officials have a fundamental right to freedom of expression, could also help enhance relations between the Commission and European citizens by avoiding possible confusion and misunderstandings on this question. Yours sincerely, Jacob SÖDERMAN

(1) Case C-100/88 [1989] ECR 4285 at 4309.

(2) Judgement of 26 September 1995, Series A no. 323.