Otsus juhtumi 603/2008/OV kohta - Väidetav suutmatus võtta järelmeetmeid arhitektuurikonkursiga seotud rikkumise osas

Otsus
Juhtum 603/2008/OV - **Alguskuupäev: {0}** 19/03/2008 - **Otsuse kuupäev: {0}** 15/02/2010

Kaebuse esitaja on arhitekt, kes 1997. aastal osales edutult Brüsseli Euroopa kvartaliga seotud rahvusvahelisel arhitektuurikonkursil. Tellija oli Pealinna Brüsseli piirkond, kes sõlmis lepingu konkursi võitjaga. Pärast kaebuse esitaja esimest rikkumiskaebust saatis komisjon 9. veebruaril 2001 Belgia ametivõimudele põhjendatud arvamuse, milles järeldas, et Pealinna Brüsseli piirkond oli rikkunud direktiivi 92/50/EMÜ (millega kooskõlastatakse riiklike teenuslepingute sõlmimise kord) muu hulgas projektide anonüümsuse ning žürii sõltumatuse tagamise kohustuse osas. 2001. aastal võtsid Belgia ametivõimud komisjoni ees mitu kohustust seoses kõnealuse lepingu lõpetamisega. Neid kohustusi arvesse võttes lõpetas komisjon rikkumiskaebuse menetlemise 2002. aasta aprillis.

2006. aasta detsembris esitas kaebuse esitaja komisjonile teise rikkumiskaebuse, milles väitis, et Belgia ametivõimud ei ole oma kohustusi täitnud. Eeskätt tõi ta välja asjaolu, et Belgia ametivõimud olid sõlminud lepingu järjekordse lisa (lisa nr 6).

2008. aasta veebruaris pöördus kaebuse esitaja ombudsmani poole ja väitis, et komisjon ei suutnud tagada, et Belgia ametivõimud täidaksid rangelt oma kohustust järgida komisjoni 9. veebruari 2001. aasta põhjendatud arvamust ning lepingu lõplikult tühistaksid. Oma arvamuses väitis komisjon, et tema uurimise põhjal ei olnud alust järeldada, nagu oleksid Belgia ametivõimud lisa nr 6 sõlmimisega jätnud oma kohustused täitmata.

Pärast komisjoni rikkumistoimikutega tutvumist jõudis ombudsman järeldusele, et asjaomane lisa ei toonud kaasa muudatusi, mis oleksid olnud vastuolus Belgia ametivõimude kohustustega. Seetõttu ei tuvastatud antud juhtumis haldusomavoli. Ombudsman märkis aga, et 2001. ja 2002. aastal kirjeldas komisjon kaebuse esitajale Belgia ametivõimude kohustusi ilmselt erinevalt kui uurimise käigus.

THE BACKGROUND TO THE COMPLAINT

1. In 1997, the complainant participated in the international architectural competition for the

European Quarter in Brussels entitled " *Concours international d'Architecture - Aménagement de l'espace public dans le Quartier Européen de Bruxelles* ". The competition was also referred to as " *Les sentiers de l'Europe* ". This international competition was organised at the initiative of the Minister of Public Works of the Brussels Capital Region, and of Mr Erkki Liikanen, who was European Commissioner at the time. The Brussels Capital Region and the European Union each contributed 50 % of the financing for the project. The Société Centrale d'Architecture de Belgique (SCAB) was entrusted with the overall organisation of the competition, which was organised in two stages. On 24 April 1998, SCAB announced the results of the competition, which led to a contract being signed with the winning bidder ('the winning laureate'). The complainant's proposal was ranked third. On 5 June, 16 June and 8 July 1998, the complainant wrote to Commissioner Liikanen concerning the result.

2. On 8 July 1998, the complainant submitted an infringement complaint to Directorate-General XV of the Commission (the predecessor of Directorate-General Internal Market, DG MARKT). One of the allegations he made was that the Belgian authorities infringed Council Directive 92/50/EEC governing the coordination of procedures for the award of public service contracts [1] ('the Directive'). The complainant's main argument was that the evaluation criteria and the composition of the competition jury ('the Jury') infringed the general rules of the competition.

3. On 21 September 1998, the complainant lodged a complaint with the European Ombudsman (1021/1998/OV) against the Council of the EU, the European Commission and the European Parliament. He alleged that the Directive and the general rules of the architectural competition were infringed by the European Union in its role as a Contracting Authority, and by members of the Jury. He further alleged that some members of the Jury were European institution representatives. The complainant claimed that the competition should be annulled and that he should be compensated. On 27 October 1998, the Ombudsman informed the complainant that his complaint was inadmissible because the appropriate prior administrative approaches had not been made. In addition, he explained that he could not deal with the complaint because the services of the Commission's DG XV were in the process of carrying out their investigation into his infringement complaint of 8 July 1998.

4. On 7 December 1998, the Commission acknowledged receipt of the complainant's complaint of 8 July 1998, and informed him that his complaint had been registered by its Secretariat-General under reference number 98/5025. The Commission opened an infringement procedure concerning the complainant's allegations. On 4 November 1999, the institution sent a letter of formal notice to the Belgian authorities on the basis of former Article 226 of the EC Treaty, now Article 258 of the Treaty on the Functioning of the European Union. The letter of formal notice concerned the alleged infringement of Article 13(6) [2] of the Directive, namely, that the anonymity of the participating candidates had been lifted in the second stage of the competition. On 4 February 2000, following a written parliamentary question concerning the independence and impartiality of the members of the Jury vis-à-vis the candidates, the Commission sent a further request for additional information to the Belgian authorities.

5. On 12 April 2000, the complainant lodged a second complaint with the Ombudsman (505/2000/(OV)SM). He alleged that (i) he had not received any information from the

Commission concerning the outcome of his infringement complaint of 8 July 1998; (ii) the Commission had not replied to four of his letters; and (iii) the Directive and the general rules of the competition were infringed by the Commission and the Brussels Capital Region in two respects. First, the members of the Jury had not been independent and impartial, and second, the decision awarding the contract was not communicated to him within 15 days of the Jury's decision. On 18 May 2000, the Ombudsman opened an inquiry with regard to the first two allegations. The Ombudsman further informed the complainant that, since the subject matter of his third allegation was being investigated by the Belgian Conseil d'Etat, he had no power to deal with it due to the fact that former Article 195 of the EC Treaty, now Article 228 of the Treaty on the Functioning of the European Union, provides that the Ombudsman shall conduct inquiries " *except where the alleged facts are or have been the subject of legal proceedings* ". On 30 August 2001, the Ombudsman closed his inquiry and informed the complainant of his decision that there had been no maladministration by the Commission concerning the complainant's first and second allegations.

6. By letter of 26 January 2001, the Commission informed the complainant that, on 21 December 2000, a decision was made to send a reasoned opinion to the Belgian authorities, since it considered that Article 13(6) of the Directive had been breached. In particular, the Commission pointed out that the Contracting Authority infringed the obligation to ensure the anonymity of the projects. Furthermore, the Jury failed to base its decision exclusively on the criteria set out in the notice (and the competition documents), and on the indicated weighting. In addition, the obligation to ensure the independence of the Jury was not respected. With regard to this last aspect, the Commission pointed out that there appeared to be direct economic links between the President of the Jury and the second laureate, as well as between another member of the Jury and the winning laureate. The Commission's reasoned opinion was sent to the Belgian authorities on 9 February 2001.

7. By letter of 12 April 2001, the Belgian authorities informed the Commission's services of the commitments they had undertaken in response to the Commission's reasoned opinion of 9 February 2001. On 14 June 2001, the Commission requested clarifications. By letter dated 24 September 2001, the Belgian authorities replied, further clarifying their commitments. On 12 October 2001, a meeting took place between the Commission's services and representatives from the Brussels Capital Region. On 6 November 2001, the Belgian authorities sent a further letter to the Commission concerning the follow-up of the reasoned opinion.

8. By letter of 6 November 2001, DG MARKT informed the complainant that, during the discussions held on 12 October 2001, the representatives of the Brussels Capital Region had explicitly acknowledged that the Commission's concerns, as expressed in its reasoned opinion of 9 February 2001, were well-founded. The letter further informed the complainant that " *the representatives of the Belgian authorities have also indicated that, following the Commission's reasoned opinion, the responsible ministers had decided to definitively terminate the contract in question and to no longer give any order for services in the framework of this contract* " [3] . DG MARKT explained that it did not, therefore, consider it appropriate to submit the case to the Court of Justice of the European Communities, and that it would thus propose to the Commission that the case should be closed. Following this pre-closure letter of 6 November

2001, the Commission closed the infringement procedure on 24 April 2002.

9. On 30 October 2002, the complainant wrote to the Commission arguing that the Belgian authorities had not respected the commitments they made in 2001. He pointed out that, on 22 March 2001, a fifth addendum to the contract in question had been concluded between the Brussels Capital Region and the winning laureate, involving a sum of approximately BEF 6 million. This addendum related to refurbishing works in Parc Léopold, which is situated in the European quarter of Brussels. The complainant pointed out that the works-site in Parc Léopold was surrounded by panels displaying the name of the winning laureate.

10. By letter of 21 November 2002, the Commission replied to the complainant. It stated that " *by letter of 12 April 2001, it had been informed of the Belgian authorities' intention to put an end to the contract in question* " [4] . Furthermore, in response to a clarification request made by the Commission's services, the Belgian authorities, by letter of 24 September 2001, effectively " *clarified that the responsible ministers had undertaken to no longer give new orders for services in the framework of the contract in question* " [5] . The Commission concluded that, in light of these circumstances, the Belgian authorities had effectively complied with the reasoned opinion even if, at first, they had not agreed with it. It further pointed out that panels displaying the name of the winning laureate at the works-site did not prove that the Belgian authorities had issued new orders for services after making their formal commitment to refrain from doing so in their letters of 12 April and 24 September 2001. The Commission concluded its letter by stating that the Belgian authorities had informed it that the mission entrusted to the winning laureate would be considered as completely terminated and closed, once the latter had assisted the Brussels Capital Region with the reception of the refurbishing works of Parc Léopold. Therefore, in the Commission's opinion, the signature of addendum no. 5 to the contract was not contrary to the commitments undertaken by the Belgian authorities.

11. Four years later, on 4 December 2006, the complainant lodged a new complaint with the Commission, alleging that the Belgian authorities had not respected the commitments they made in 2001. In particular, he alleged that the responsible ministers had failed to comply with the Commission's reasoned opinion of 9 February 2001 because, instead of interrupting the contract in question, they had actually increased its value by EUR 226 779.41, namely, from EUR 491 689.63 to EUR 718 469.05 (as a result of addenda nos. 1 to 6), representing a 45% increase in the value of the contract. The complainant further alleged that the Belgian authorities infringed Article 7(1) of the Directive [6] by awarding a contract which exceeded the threshold value of EUR 200 000, when they were supposed to refrain from issuing new orders connected with the contract. The complainant, therefore, asked the Commission to reopen his previous infringement complaint 98/5025, and bring the case before the Court of Justice. On 27 December 2006, the Commission acknowledged receipt of this letter.

12. On 19 January 2007, the Commission's services called the complainant to ask for more information. By letters of 8 and 15 February 2007, the complainant provided the Commission with further details. In his letter of 15 February 2007, he also stated that he found it impossible to believe that the Commission, in view of its discussions with the Belgian authorities, could accept that new orders for work, representing 45% of the contract's initial value, should be

issued in connection with that same contract.

13. By letter of 20 April 2007, the complainant asked the Commission to officially register his complaint and reply to his correspondence. On 12 June 2007, the Commission's Secretariat-General informed the complainant that his infringement complaint had been registered under reference number 2007/4421, and that he would be informed of the results of the investigation which would be carried out by the Commission's services.

14. By letter of 26 January 2008, the complainant asked the Commission to inform him of the state of play regarding his case.

15. On 23 February 2008, the complainant submitted the present complaint (603/2008/OV) to the Ombudsman.

16. By letter of 3 March 2008, DG MARKT informed the complainant that it had sent the Belgian authorities a pre-Article 226 letter on 18 February 2008. On 28 March 2008, the Belgian authorities replied, arguing that they had not infringed the commitments undertaken in 2001.

17. By letter of 27 March 2008, a copy of which was also sent to the Ombudsman, the complainant asked the Commission to compensate him for the damages he considered he had suffered. The Commission did not reply. On 23 May 2008, therefore, the complainant wrote to the Ombudsman, reiterating his claim for compensation. By letter of 23 May 2008, the Commission replied to the complainant's letter of 27 March 2008, rejecting his claim for compensation.

18. On 26 June 2008, DG MARKT sent a pre-closure letter to the complainant. It informed the complainant that, according to the preamble of addendum no. 6, its objective was to define the architect's (i.e., the winning laureate) mission in greater detail, or to extend it within certain limits. The Belgian authorities pointed out that the addendum did not prolong the contract in question, which would have been contrary to the commitments they had undertaken, but, rather, it set out how the rights and obligations of the parties were to be settled in view of the termination of the contract. DG MARKT submitted that addendum no. 6 did not introduce substantial modifications to the contract in question, and pointed out that the extension of the work concerning phase no. 8, which related to Parc Léopold, remained within the scope of addenda nos. 1 to 5, which were drawn up prior to the commitments undertaken by the Belgian authorities in 2001. It further pointed out that the total value of the contract, namely, EUR 869 347.58, did not exceed the maximum figure of EUR 870 612.17, a condition to which the Belgian authorities committed themselves in 2001. DG MARKT also stated that, according to its information, since entering into the commitments they made in 2001, the Belgian authorities had not awarded any public service contract with an estimated value which exceeded the threshold mentioned in the Directive. It further drew the complainant's attention to the fact that the contract in question appeared to have been completed. On the basis of the above, DG MARKT concluded that the information at its disposal was not sufficient to justify opening an infringement procedure, and that it would, therefore, propose that the Commission should close the infringement case, unless the complainant submitted new information within a period of four

weeks.

19. On 20 July 2008, the complainant responded in a letter, arguing that the Commission had not acted rapidly to correct the infringements of the Directive. On 13 August 2008, DG MARKT replied, stating that there were two reasons for closing infringement complaint no. 98/5025. First, the Belgian authorities had acknowledged the infringements, and second, they had decided to terminate the contract in question. It further pointed out that it had learnt about the conclusion of addendum no. 6 only through the complainant's new complaint, which was submitted on 4 December 2006. It stated that it had analysed this addendum and concluded that there were no elements to justify opening an infringement procedure. DG MARKT had, therefore, decided to propose that the case should be closed.

20. On 18 September 2008, the Commission closed the infringement case.

THE SUBJECT MATTER OF THE INQUIRY

21. On 23 February 2008 the complainant complained to the Ombudsman. He made the following allegations.
- The Commission failed to require from the Belgian authorities the strict and immediate implementation of its reasoned opinion of 9 February 2001. In this respect, the complainant pointed out that addendum n° 6, involving the sum of EUR 202 709.40, was concluded in December 2002, and, on 15 October 2003, work was still in progress in Parc Léopold.
- The Commission was wrong to accept that the Belgian authorities awarded the winning laureate supplementary fees in the amount of EUR 226 779.41.
- The Commission was wrong to accept that the Belgian authorities awarded the winning laureate the additional phase no. 8, (subject of addendum no. 6) for Parc Leopold, without launching any procedure.
- The Commission was wrong to consider that it was not necessary to pursue the Belgian State before the Court of Justice.
- The Commission approved an irregular competition, and co-financed it by paying 50% of the costs. The obligation to ensure anonymity of the projects was infringed.
- The Commission is judge and party in this matter and cannot, therefore, defend the complainant with fairness.
- The Commission failed to re-launch the international architectural competition.

22. In his complaint of 23 February 2008, the complainant also claimed that the Commission should pay him damages, but pointed out that he had not yet contacted the Commission in this respect.

23. In his letter of 19 March 2008, opening the present inquiry, the Ombudsman summarised the complainant's above grievances in the following single allegation, on which he asked the Commission to submit an opinion: " *The Commission has failed to ensure that the Belgian authorities strictly abide by their commitment to comply with its reasoned opinion of 9 February 2001 and to definitively terminate the litigious contract* ".

24. The Ombudsman informed the complainant that his claim for damages was inadmissible, since he had not made prior administrative approaches to the Commission with regard to this aspect of the case. On 23 May 2008, the complainant informed the Ombudsman that he had submitted his claim for damages to the Commission in a letter dated 27 March 2008, but that this letter remained unanswered. The Ombudsman, therefore, decided to include this claim in his inquiry and wrote to the Commission on 18 June 2008, asking it to submit an opinion also on the complainant's claim that " *the Commission should pay compensation for the damage he suffered which he indicated amounted to EUR 295 654* ".

THE INQUIRY

25. The complaint was forwarded to the Commission for an opinion. On 20 July and 1 September 2008, the complainant sent further correspondence to both the Commission and the Ombudsman. The Ombudsman replied to the complainant on 11 September 2008.

26. The Commission sent its opinion on 25 September 2008. The opinion was forwarded to the complainant, who sent his observations on 28 November and 9 December 2008.

27. On 18 June and 6 July 2009, the Ombudsman's services carried out an inspection of the relevant files at DG MARKT. On 20 July 2009, the Ombudsman sent a copy of the inspection report to the Commission and to the complainant. On 6 August 2009, the complainant sent his observations on the inspection report.

28. On 28 September, 13, 16 and 21 October 2009, telephone conversations took place between the Ombudsman's services and the complainant. On 7 and 13 October 2009, the complainant sent the Ombudsman further correspondence. On 14 October 2009, the complainant also wrote to the European Anti-Fraud Office (OLAF), stating that he had not received a reasoned reply from the Ombudsman concerning the complaint he submitted in 1998. On 12 November 2009, the Ombudsman replied to the complainant's letters of 7 and 13 October 2009. In this letter he also referred to the complainant's letter of 14 October 2009 to OLAF, and, therefore, also sent a copy of his reply to OLAF.

29. On 19 November 2009, the complainant replied to the Ombudsman's letter of 12 November 2009. The complainant enclosed with his letter of 6-page summary of the facts in which he set out the elements of the case dating from 1998 to 2001. On 21 November 2009, the complainant sent the Ombudsman a copy of a letter of the same date which he had sent to OLAF. On 10 December 2009, the Ombudsman replied to the complainant's letter of 19 November 2009. On 11 December 2009, the complainant sent a further letter to the Ombudsman, to which the latter replied on 21 December 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remarks

30. In his letter of 19 March 2008, opening the inquiry, the Ombudsman noted that point 8 of the *Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* [7] ('the Communication') provides that the Commission will investigate an infringement complaint with a view to arriving at a decision within not more than one year " *from the date of registration of the complaint by the Secretariat-General* ". He pointed out that the complainant's infringement complaint was registered in June 2007, and, therefore, this deadline had not expired in March 2008, when the complainant lodged his complaint with him. The Ombudsman pointed out, however, that the date on which the complainant actually lodged his infringement complaint was 4 December 2006. This date was also mentioned in the Commission's letter of 12 June 2007, informing the complainant that his complaint had been registered. In his letter, the Ombudsman drew the Commission's attention to point 4 of the Communication which provides that an acknowledgement of receipt shall be issued within 15 days of receipt, and that the registration of a complaint shall be acknowledged within one month of the initial acknowledgement.

31. In its opinion, the Commission apologised to the complainant for the undue delay in registering his infringement complaint in the present case. The complainant did not comment on this issue in his observations.

32. Given that the Commission acknowledged the undue delay with regard to the registration of the complainant's complaint, and that it apologised for this delay, the Ombudsman considers that no further inquiries are necessary as regards this aspect of the case.

33. The Ombudsman notes that the facts which form the basis of the present complaint date back to 1997 when the architectural competition was launched. In 1998 and 2000, the complainant submitted two complaints to the Ombudsman concerning the first infringement complaint, no. 98/5025, which was lodged with the Commission on 8 July 1998. The complainant submitted the present complaint to the Ombudsman after lodging his second infringement complaint with the Commission on 4 December 2006. The second infringement complaint concerned the Commission's alleged failure to require the Belgian authorities to comply with the commitments they undertook in 2001, following the reasoned opinion issued by the Commission in connection with the first infringement complaint. It is thus this allegation which is the subject of the present inquiry. In September and October 2009, in the course of telephone conversations with the Ombudsman's services, the complainant submitted that the Ombudsman should examine the entire case, including the points which he raised in his first infringement complaint. In this respect, the complainant, in his observations, also referred to his correspondence with the Commission from 1998 onwards. On 13 October 2009, the complainant sent a further letter to the Ombudsman in which he summarised the content of correspondence exchanged between himself and the Commission in the course of 2000 and 2001. The complainant also referred to the allegations he made in his two earlier complaints, nos. 1021/1998/OV and 505/2000/(OV)SM, and stated that his present complaint concerned the same dispute. On 19 November 2009, the complainant sent a further letter to the Ombudsman,

enclosing a 6-page summary of the facts. He again referred to the issues raised in complaints 1021/98/OV and 505/2000/(OV)SM, and to facts which arose between 1998 to 2001. He stated that, on the basis of these elements, he could not accept that the Commission had acted in line with good administration. In reply to the complainant's remarks, the Ombudsman points out that the present inquiry focuses on the allegation that " *the Commission has failed to ensure that the Belgian authorities strictly abide by their commitment to comply with its reasoned opinion of 9 February 2001 and to definitively terminate the litigious contract.* " In order to deal with this allegation, the Ombudsman obviously has to look at how the Belgian authorities reacted to the Commission's reasoned opinion of 9 February 2001, and how the Commission responded to the Belgian authorities' follow-up of the reasoned opinion. This analysis does not, however, require the Ombudsman to re-examine how the Commission dealt with the first infringement complaint, no. 98/5025, or to assess the contents of the complainant's correspondence with the Commission from 1998 onwards.

34. In his observations, the complainant underlined that the real problem in the present case concerned the fact that the Commission financed 50 % of the costs of an architectural competition which infringed Community law. This was one of the allegations the complainant made in his complaint of 23 February 2008 to the Ombudsman. In his observations on the inspection report, the complainant repeated that his complaint concerned not only the allegation identified by the Ombudsman, but also points 5 to 7 of his complaint of 23 February 2008, namely, his allegations that (i) the Commission had approved and co-financed the allegedly irregular competition, (ii) the Commission was judge and party in this affair and could not, therefore, fairly defend the complainant, and (iii) the Commission failed to re-launch the competition. When the present inquiry was opened, the Ombudsman summarised the complainant's grievances in one single allegation, and asked the Commission for its comments. The complainant did not object to the Ombudsman's approach at that time. Moreover, as regards the Commission's co-financing of the relevant competition, the Ombudsman notes that it was known already in 1997 that the EU was paying half the costs of the said competition, since this information was included in the competition documents. In particular, the foreword to the general rules of the competition, written by Mr Liikanen, who was a European Commissioner at that time, mentioned that the competition was " *financé à concurrence de 50% par les Institutions européennes au même titre que par la Région de Bruxelles-Capitale* ". The Ombudsman notes, however, that the complainant did not make any allegation with regard to this fact in either complaint no. 1021/1998/OV of 21 September 1998, or complaint no. 505/2000/(OV)SM of 12 April 2000. This issue was raised for the first time in the present complaint, which was submitted on 23 February 2008. However, by that date, more than two years had passed since the complainant became aware of the fact on which his allegation was based. This issue could not, therefore, in any event be included in the present inquiry, given that Article 2(4) of the Ombudsman's Statute provides that " *a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint.* "

35. On 9 December 2008, the complainant sent the Ombudsman a copy of a letter addressed to SCAB, dated 22 June 2000, from Mr B., an official of the Secretariat-General of the Council of the European Union, and a member of the Jury. In this letter, Mr B. affirmed that he had not

been manipulated and that he had acted in complete impartiality in his role as a member of the Jury. The complainant took the view that Mr B.'s assessment was unacceptable. The Ombudsman would like to point out that the present inquiry concerns the Commission, and not the Council. If the complainant wishes to make allegations against the Council, he could submit a new complaint, after having made appropriate prior approaches to that institution.

36. In his observations on the inspection report, the complainant criticised the fact that the Commission had not enclosed with the inspection report his correspondence with Commissioners Liikanen and Monti of June and July 1998, which, in his view, was essential for a full understanding of the present case. The Ombudsman would like to point out that the complainant's argument appears to be based on a misunderstanding, namely, that he believed that the inspection report was drawn up by the Commission services, and not by the Ombudsman.

37. In his observations, the complainant alleged that the Commission itself infringed EU law in this case, given that the Contracting Authority was the Brussels Capital Region *and* the European Union. The Commission, however, in its opinion on the complaint, stated that the Contracting Authority was the Brussels Capital Region. The Ombudsman notes that the Commission explained this to the complainant in a letter which it sent on 24 November 1998. In that letter, the Commission referred to Commissioner Liikanen's earlier letters to the complainant, according to which the role of the Commission, the Council and Parliament in this competition was limited to participating in its financing and acting as part of the Jury. The Ombudsman notes that the general rules for the competition (" *règlement du concours* ") in question are somewhat ambiguous concerning this issue. For example, while point 2.1.1 of the general rules suggests that the relevant competition was to be carried out by the Brussels Capital Region, it also mentions that, for this purpose, the Brussels Capital Region and the EU designated SCAB as consultant. Point 2.1.3 even mentions that both the Brussels Capital Region and the EU were to be the "pouvoir adjudicateur". [8] However, there is no doubt that the disputed contract was awarded by the Brussels Capital Region, and not the EU. The Ombudsman considers that the wording of the general rules cited above reflected the fact that the EU, through its representatives on the Jury, effectively participated in the decision as to which architect was to win the contract now in dispute. However, and as already mentioned, the EU was not a party to the contract which was awarded to the winning laureate. It should also be noted that the irregularities which led the Commission to conclude that there had been an infringement of EU law involved members of the Jury who were not representatives of EU institutions. On the basis of the above, there is nothing to suggest that the Commission itself infringed EU rules on public procurement in the present case.

B. Alleged failure of the Commission to ensure that the Belgian authorities strictly abide by their commitment to comply with the reasoned opinion of 9 February 2001

Arguments presented to the Ombudsman

38. In his complaint, the complainant alleged that the Commission failed to ensure that the Belgian authorities strictly abide by their commitment to comply with its reasoned opinion of 9 February 2001, and to definitively terminate the contract in question.

39. In its opinion, the Commission stated that its services investigated the complainant's new infringement complaint and verified certain issues with the Belgian authorities, but that this investigation had not given grounds to conclude that the Belgian authorities failed to abide by their commitments.

40. The Commission stated that the first infringement complaint, no. 98/5025, was closed because the Belgian authorities acknowledged the infringements of the Directive and undertook certain commitments. It pointed out that the exact content of the Belgian authorities' commitments was specified in their letters of 24 September and 6 November 2001. It stated that, in these letters, the Belgian authorities had " *promised that the litigious contract would be terminated and that no further contracts for services would be awarded under this contract. In these letters, the Belgian authorities also made clear to the services of the Commission that only after the architect had assisted the Brussels Capital Region with the reception of the works in the Parc Léopold, would the litigious contract be terminated definitively* ". The Commission went on to point out that, in addition to this, the Belgian authorities also mentioned the maximum sum which was to be spent under the contract, namely, BEF 35 120 401 (EUR 870 612.17), and that no new contracts would be awarded with a value exceeding this figure.

41. It subsequently emerged, however, that, after the Commission closed the original infringement procedure, a certain addendum, namely, addendum no. 6 to the contract, was concluded. The Commission pointed out that, according to the preamble of this addendum, its goal was to specify the content of the architect's tasks in relation to the refurbishing of Parc Léopold, which was already underway. According to the Commission, the addendum specified some of the architect's tasks in greater detail, or extended them within certain already foreseen limits. The Commission stated that, according to the Belgian authorities, this addendum was not an extension of the contract, which would have constituted a breach of their commitments, but rather the settlement of the rights and obligations of the parties in view of the termination of the contract.

42. The Commission further argued that the information received from the complainant, and from the Belgian authorities, showed that the total amount spent under the contract, namely, BEF 35 069 349, or EUR 869 347.58, was below the maximum amount mentioned in the commitments made by the Belgian authorities in 2001. It further pointed out that the Belgian authorities had emphasised that this amount was also well below the figure of BEF 100 million which the Brussels Capital Region originally intended to spend on the architectural competition.

43. The Commission underlined that the Belgian authorities made it clear that the contract would be terminated definitively only after the architect had assisted the Brussels Capital Region with the reception of the works in Parc Léopold. It submitted that the clarifications of the architect's tasks which were foreseen in addendum no. 6 did not substantially modify the contract, and that the extension of the tasks in phase no. 8, regarding Parc Léopold, remained

within the scope of what had already been included in the contract addenda nos. 1 and 5, which pre-dated the commitments made by the Belgian authorities.

44. The Commission concluded that it could not agree with the complainant's view that the Belgian authorities failed to abide by their 2001 commitments. As a result, the Commission was unable to identify any reasons for taking further action. In this respect, the Commission further pointed out that it has a discretionary power as to whether or not to initiate proceedings under former Article 226 of the EC Treaty, now Article 258 of the Treaty on the Functioning of the European Union.

45. In his observations, the complainant insisted that the relevant competition infringed the Directive and was thus illegal. He added that, if the Ombudsman did not endorse his position, he would turn to OLAF for arbitration.

46. On 18 June and 6 July 2009, the Ombudsman's representatives carried out an inspection of DG MARKT's files concerning infringement complaints nos. 98/5025 and 2007/4421. Among the documents inspected were the Commission's reasoned opinion of 9 February 2001, the letters of the Belgian authorities to the Commission of 12 April, 24 September and 6 November 2001, the contract addenda nos. 4, 5 and 6, the Commission's letter of 18 February 2008 to the Belgian authorities, and the latter's reply of 28 March 2008.

The Ombudsman's assessment

47. The Ombudsman asked the Commission to submit an opinion on the allegation that it failed to ensure that the Belgian authorities strictly abide by their commitment to comply with the institution's reasoned opinion of 9 February 2001, and to definitively terminate the contract in question.

48. In its opinion, the Commission described the commitments it received from the Belgian authorities. In the Ombudsman's view, this description can be summarised as follows. The Commission stated that the Belgian authorities promised that (i) the contract in question would be definitively terminated, (ii) termination would occur only after the architect (the winning laureate) had assisted the Brussels Capital Region with the reception of the works in Parc Léopold, (iii) no further contracts for services would be awarded under the contract, and (iv) no new contract would be awarded above the maximum value of the contract in question, which was EUR 870 612.17 (BEF 35 120 401). The Commission's opinion leaves some room for doubt as to the relationship between commitments (iii) and (iv) given by the Belgian authorities. However, the Ombudsman understands the Commission to be suggesting that the Belgian authorities promised not to ask the winning laureate to provide any additional services " *which were not in relation with the phases already ordered* " (the wording used in its letter of 26 June 2008), and that where additional services were required relating to the phases already ordered, the additional remuneration for these services would not exceed the threshold of EUR 870 612.17 (BEF 35 120 401).

49. Having inspected the documents on the Commission's file, the Ombudsman concludes that

the commitments given by the Belgian authorities could indeed reasonably be interpreted in the above way.

50. Before dealing with the allegation outlined in paragraph 47, the Ombudsman considers it appropriate to point out that the way in which the Commission presented the Belgian authorities' commitments to the complainant in 2001 and 2002 would appear to differ from the description it provided in the course of the present inquiry. In its letter of 6 November 2001, the Commission informed the complainant that the Belgian authorities had " *decided to definitively terminate the contract in question and to no longer give any order for services in the framework of this contract* ". In its letter of 21 November 2002, the Commission informed the complainant of " *the Belgian authorities' intention to put an end to the contract in question* " and of the fact " *that the responsible ministers had undertaken to no longer give new orders for services in the framework of the contract in question* ". The Ombudsman notes, however, that this issue does not fall within the scope of the present inquiry and, therefore, does not need to be examined here.

51. It remains to be ascertained whether the Commission ensured that the Belgian authorities respected the commitments described in the Commission's opinion, and thus complied with the reasoned opinion. In particular, the Ombudsman needs to verify whether the Commission was right to adopt the view that the conclusion of addendum no. 6 was in line with these commitments.

52. The Ombudsman concluded that the results of the inspection of the Commission's file confirm the Commission's position.

53. During their inspection, the Ombudsman's representatives examined with particular attention the content of addendum no. 6. On the basis of this inspection, it appeared that the addendum did not introduce changes which went against the commitments outlined in paragraph 48. It appeared rather to be the case that the further order for services contained in addendum no. 6 i) concerned the ongoing refurbishing works of Parc Léopold, and thus related to the phases that had previously been ordered, and (ii) the maximum value of the contract, namely, EUR 870 612.17, was not exceeded.

54. The Ombudsman notes that, in its opinion, and in its letter to the complainant of 26 June 2008, the Commission also argued that addendum no. 6 did not introduce any "substantial" modifications to the contract in question. However, and as noted above, the Commission's explanations concerning the commitments given by the Belgian authorities did not refer to any commitment not to introduce "substantial" modifications to the contract. The Ombudsman, therefore, finds it difficult to understand why the Commission nevertheless referred to this concept of "substantial" modifications. In the Ombudsman's view, what the Commission may have wished to convey in this context was that the additional orders placed by the Belgian authorities, within the limits of the commitments they had entered into, did not in any event constitute a substantial change as compared to the contract as it stood when these commitments were given.

55. In view of the above, no instance of maladministration was found with regard to the

allegation examined here.

56. It is useful to add that the complainant appears to question whether the Commission was wise to close the infringement complaint on 24 April 2002 on the basis of the commitments described in its opinion in the present case. This question touches upon the discretionary powers the Commission can exercise when it finds that there has been an infringement of EU law. In any event, it should be noted that this issue is not covered by the present inquiry.

C. The claim for compensation

Arguments presented to the Ombudsman

57. The complainant claimed that the Commission should compensate him for the damages he suffered as a result of this case. According to the complainant, his damages amounted to EUR 295 654.

58. In its opinion, the Commission referred to its letter of 23 May 2008 to the complainant regarding his claim for damages. In that letter, referring to the case-law of the Court of First Instance of the EU, the Commission explained that its decision not to institute an infringement procedure under former Article 226 of the EC Treaty, now Article 258 of the Treaty on the Functioning of the European Union, cannot give rise to non-contractual liability on the part of the EU.

59. In his observations, the complainant submitted that he had worked and participated in this competition in vain, and that he had suffered a specific prejudice. He therefore maintained his claim for compensation.

The Ombudsman's assessment

60. The Ombudsman first notes that, on the basis of the relevant case-law of the EU courts, the Commission's argument as regards non-contractual liability is correct. The Ombudsman also takes the view that the complainant, in any event, did not substantiate his claim for compensation against the Commission. In particular, the complainant did not explain how, as a result of the Commission's action, he could have suffered damage, and how such damage could lead to a claim for damages amounting to EUR 295 654.

D. Conclusions

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

There has been no maladministration by the Commission.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 15 February 2010

[1] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209, p. 1.

[2] " *The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of its members must have the same qualification or its equivalent.*

The jury shall be autonomous in its decisions or opinions. These shall be reached on the basis of projects submitted anonymously and solely on the grounds of the criteria indicated in the notice within the meaning of Article 15 (3) ".

[3] In the French original: " *Les représentants des autorités belges ont également indiqué que les ministres compétents avaient décidé, suite à l'avis motivé de la Commission, de mettre définitivement fin au contrat litigieux et de ne plus donner aucun ordre de service dans le cadre de ce contrat* ".

[4] In the French original: " *... la Commission a été informée de l'intention des autorités belges de mettre fin au contrat litigieux par lettre du 12 avril 2001* ".

[5] In the French original: " *... que les dites autorités ont effectivement précisé que les ministres compétents s'étaient engagés à ne pas donner de nouveaux ordres de services dans le cadre du contrat litigieux* ".

[6] " *This Directive shall apply to public service contracts, the estimated value of which, net of VAT, is not less than ECU 200000* ".

[7] COM (2002) 141 final, OJ 2002 C 242, p. 5.

[8] Point 2.1.1 of the general rules of the competition: " *Pouvoir organisateur*

Afin d'organiser le Concours d'architecture qu'elle met sur pied, la Région de Bruxelles-Capitale et l'Union européenne ont désigné *pour consultant la Société Centrale d'Architecture de Belgique....* ".

Point 2.1.3: " *Type de concours*

... Le présent règlement fait foi entre le pouvoir adjudicateur (Région de Bruxelles-Capitale et Union européenne) *et les concurrents* " (emphasis added).