

Sprendimas byloje OI/12/2010/MMN - Atskaitomybė už netinkamą administravimą vykdant Bendros saugumo ir gynybos politikos misijas

Sprendimas

Byla OI/12/2010/MMN - **Atidaryta** 17/12/2010 - **Sprendimas** 30/08/2013 - **Susijusios įstaigos** Europos Sąjungos Taryba (Tolesnis tyrimas nėra pateisinamas) | Europos Komisija |

Ši byla susijusi su atskaitomybe už netinkamą administravimą vykdant civilines ir karines misijas pagal bendrą saugumo ir gynybos politiką (BSGP). Atsižvelgdamas į tai, kad nėra aišku, kuri institucija ar įstaiga yra kompetentinga ištaisyti galimus netinkamo administravimo atvejus, ombudsmanas pradėjo tyrimą savo iniciatyva.

Komisija pabrėžė, kad jos priežiūros vaidmuo apima tik civilinių misijų biudžeto vykdymą ir tinkamą finansų valdymą. Todėl ji negali būti laikoma atskaitinga daugiau nei už šią ribotą sritį.

Taryba teigė nesanti kompetentinga šiuo atžvilgiu ir kad tokius klausimus sprendžia vyriausiasis įgaliotinis.

Vyriausioji įgaliotinė nurodė, kad pačios BSGP misijos negali būti laikomos atskaitingomis dėl kelių priežasčių, įskaitant, be kita ko, tai, kad jos neturi teisinio subjektiškumo. Ji pridūrė, kad pati vyriausioji įgaliotinė negali būti laikoma teisiškai atsakinga, nes, kitaip nei ES delegacija, misijos nėra jai pavaldžios. Tačiau vyriausioji įgaliotinė pripažino, kad tai ji susipažįsta su atskirais ombudsmenui pateiktais skundais, prašo atitinkamų institucijų skyrių juos išnagrinėti ir pateikia ombudsmenui atitinkamus atsakymus.

Iš pradžių ombudsmanas apgailestaudamas pažymėjo, kad institucijų atsakymų nepakako minėtiems netikrumams pašalinti. Negalima sutikti su siūlymu, kad nė vienos ES institucijos nederėtų laikyti atskaitinga dėl netinkamo administravimo.

Tačiau ombudsmanas palankiai įvertino pragmatišką ir naudingą vyriausiosios įgaliotinės siūlymą išspręsti šią problemą.

Ombudsmanas padarė išvadą, kad, ateityje atlikdamas tyrimus, jis pats kreipsis: (i) į Komisiją klausimais, susijusiais su civilinių misijų biudžeto vykdymu ir (ii) į vyriausiąją įgaliotinę/EIVT dėl visų kitų įtarimų netinkamu administravimu, susijusių su BSGP misijomis.

Atrodė, kad nėra priežasties abejoti, jog minėta tvarka būtų užtikrintas Pagrindinių teisių



chartijos 43 straipsnyje numatytos pagrindinės teisės *skųstis ombudsmenui* veiksmingumas. Todėl šio tyrimo nebuvo būtina tęsti. Tačiau buvo neabejotinai akivaizdu, kad šios tvarkos pakaktų užtikrinti Chartijos 41 straipsnyje numatytą pagrindinę teisę į gerą administravimą. Jeigu paaiškėtų, kad minėta tvarka tinkamai neveikia kurios nors teisės atžvilgiu, ombudsmenui tektų pareiga iš naujo kelti šį principinį klausimą.

The background to the complaint

1. The present case concerns the issue of accountability for instances of maladministration in the activities of missions carried out within the context of the Common Security and Defence Policy ('CSDP').
2. In recent years, the Council, under the auspices of the CSDP, has established a number of military and civilian missions in third countries such as the EU Police Mission in the Palestinian Territories ('EUPOL COPPS'), the EU Police Mission in Bosnia and Herzegovina ('EUPM/BiH'), the EU Police Mission in Afghanistan ('EUPOL AFGHANISTAN'), the EU Rule of Law Mission in Kosovo ('EULEX'), and the EU military operation in Bosnia and Herzegovina ('EUFOR Althea').
3. A common feature of the *civilian* missions appears to be that the Head of Mission exercises operational control and day-to-day management. The Head of Mission, who enters into an employment contract with the European Commission ('Commission'), is supervised by the Commission. CSDP civilian missions employ staff seconded by the Member States and/or the EU institutions, and also international and local staff. As regards the latter category of mission staff, their conditions of employment and their rights and obligations are laid down in contracts between the Head of Mission and the staff members. Moreover, the Head of Mission also concludes employment contracts with staff members seconded by the Member States and/or the EU institutions. Furthermore, the Head of Mission is also responsible for disciplinary control over staff members.
4. As regards *military* missions, the Council appoints (i) Operation Commanders, who exercise military control at the strategic level and are in charge of managing the budget, as well as (ii) EU Force Commanders, who are responsible for the day-to-day running of the mission.
5. The daily operations of CSDP missions could give rise to instances of maladministration in staff matters and in relation to other matters as well. In fact, the Ombudsman has received a number of complaints concerning the activities of the CSDP missions in the past. [1]
6. However, the institutional setup briefly summarised above has given rise to uncertainties as to which institution or body would be competent to remedy possible instances of maladministration. Moreover, a further question is to what extent CSDP missions themselves could be held accountable for possible instances of maladministration.



The subject matter of the inquiry

7. In view of these uncertainties, the Ombudsman decided to open an own-initiative inquiry into the subject of accountability for instances of maladministration in the activities of CSDP missions.

The inquiry

8. On 17 December 2010, the Ombudsman requested the Commission and the Council of the EU to provide an opinion.

9. On 11 April 2011, the Council of the EU informed the Ombudsman that, since his letter related to issues pertaining to the CSDP, it had forwarded the letter to Mrs Ashton in her capacity as High Representative of the Union for Foreign Affairs and Security Policy ('High Representative'), in order for her to provide the relevant elements of answer.

10. On 4 May 2011, the High Representative provided the Ombudsman with an opinion in reply to the Ombudsman's letter to the Council of the EU.

11. On 8 June 2011, Mrs Ashton, in her capacity as Vice-President of the Commission, provided the Ombudsman with an opinion on behalf of the Commission.

12. On 7 November 2011, the Ombudsman sent a letter to the High Representative and Vice-President of the Commission requesting her to provide a further opinion. On 29 November 2011, the Ombudsman sent the same letter to the Commission.

13. On 29 February 2012, the Commission's Secretary-General sent a further opinion on behalf of the Commission.

14. On the same date, the European External Action Service ('EEAS') sent a further opinion on behalf of the High Representative, who is assisted by the EEAS in her duties.

15. On 12 December 2012, the Ombudsman informed the parties that, in accordance with his practice concerning systemic own-initiative inquiries, he intended to publish on his website a copy of all the correspondence exchanged so far, as well as any future correspondence in the context of this inquiry.

16. The Council, on 3 January 2013, the EEAS on behalf of the High Representative, on 11 January 2013, and the Commission, on 13 January 2013, expressed their opposition to the publication of the correspondence in almost identical terms. In particular, the institutions argued that, since the own-initiative inquiry was still pending, the publication of the correspondence would interfere with their right to defend their position, free from external influences.



The Ombudsman's analysis and conclusions

Preliminary remarks

17. As a preliminary matter, the Ombudsman recalls that, as indicated above, he has had the opportunity to examine allegations of instances of maladministration in the activities of CFDP missions on a number of occasions in the past, including namely the following cases.

18. Complaint 955/97/IJH against the Commission concerned the payment of allowances to an observer in a monitoring electoral mission in Palestine. The Commission initially declined responsibility in the matter on the grounds, *inter alia*, that it did not concern an EU activity conducted under the responsibility of the Commission but a joint action adopted by the Council in the context of the Common Foreign and Security Policy ('CFSP'). Ultimately, however, the Commission, encouraged by the Council, accepted a friendly solution proposal for this specific case and agreed to pay the sums claimed by the complainant.

19. In his decision on complaint 3008/2005/OV against the Commission, the Ombudsman analysed allegations of maladministration relating to a change in the conditions of employment of staff employed by the EU Police Mission in the Former Yugoslav Republic of Macedonia ('EUPOL Proxima'). In this case, the Commission argued, *inter alia*, that the Head of Mission remained the contracting authority and that no maladministration could be attributed to the Commission in this regard. The Ombudsman made two critical remarks directed at the Commission for failing to inform the complainants in good time of the change of their conditions of employment. In this respect, the Ombudsman took into account the fact that the Commission enters into a contract with the Head of Mission and that the Head of Mission subsequently enters into contracts with international staff, which are in line with the provisions of the Commission Communication on Specific Rules for Special Advisers. [2]

20. Complaint 3328/2008/ELB against the Commission concerned a dispute about the grading of a member of staff recruited for the monitoring mission in Georgia ('EUMM Georgia'). Although the Head of Mission initially offered the complainant a position with a given grade, the Commission afterwards recommended a lower grade, which the Head of Mission finally adopted. In his decision, the Ombudsman made a critical remark concluding that the Commission committed an instance of maladministration by adopting an overly formalistic approach in its review of the complainant's professional experience.

21. In the decision on complaint 3177/2008/(JDG)OV against the Commission, the Ombudsman analysed the early termination of the contract of a member of staff recruited for the EU Monitoring Mission in Former Yugoslavia ('EUMM in Former Yugoslavia'). In January 2008, when the complainant wrote to the Council to claim compensation for the allegedly wrongful early termination of his contract, he was informed that the mission had ceased to exist in December 2007. Moreover, the Council considered that the relationship between the complainant and the Head of Mission fell under the competence of the Commission, to which the Council transferred the letter. The Commission took the view that the Head of Mission



concluded contracts 'on his or her own behalf' and remained financially responsible for these contracts. Thus, the Commission suggested that the complainant could address himself to the former Head of Mission. The latter had in the meantime become the Ambassador of a Member State to another country. In view of the absence of a reply from the former Head of Mission, the complainant turned to the Ombudsman.

22. In that case, the Ombudsman considered that the fact that the Commission supervised the Head of Mission did not mean that it needed to carry out a minute review of each and every action undertaken by that person on the basis of his/her contract with the Commission. Nor did it mean that the Commission was necessarily liable for any claims that a member of staff might derive from his contract with the Head of Mission. The Ombudsman considered, however, that the Commission's supervisory role meant that it should properly examine any complaints that it received concerning the way in which the Head of Mission had performed his/her duties under the latter's contract with it. [3]

23. The Ombudsman further noted that there were two circumstances which were particularly relevant in the case at hand. First, after the end of the mission, the former Head of Mission, who had been subsequently appointed Ambassador of a Member State to a third country, did not react to the letters sent by the complainant and his lawyer. Second, and even more importantly, the complainant argued that his dismissal by the former Head of Mission was the result of having informed the Commission and OLAF about financial irregularities that, in his view, occurred in the mission. In the Ombudsman's opinion, this was a very serious matter. [4]

24. During the course of the Ombudsman's inquiry, the Commission suggested that the complainant should contact the EEAS. The Ombudsman took the view that the Commission thus appeared to be avoiding its responsibility in the matter. In view of the foregoing, the Ombudsman closed his inquiry with a critical remark to the effect that the Commission had failed to handle the matter appropriately. [5]

25. In his own-initiative inquiry OI/1/2010/(BEH)MMN, which concerned the recruitment of staff by EUPOL COPPS, the Ombudsman addressed himself directly at the mission as such. Although EUPOL COPPS expressed certain doubts about the admissibility of this inquiry, it provided, as a sign of good will and transparency, an opinion on the substance of the case. In his decision, the Ombudsman concluded that EUPOL COPPS committed an instance of maladministration in the recruitment procedure in question by failing to comply with the conditions it had laid down in its vacancy notice.

26. In his decision on complaint 1519/2011/AN against the Council, the Ombudsman examined the case of a complainant who used to work as a civilian member of staff for the EU military mission to Bosnia and Herzegovina ('EUFOR Althea') and had received a notice of termination of his employment contract while he was on sick leave. In its reply to the Ombudsman's friendly solution proposal, the Council stated that it was not competent to deal with the case and suggested that the proposal be addressed to the Operation Commander of the mission. The Operation Commander accepted the Ombudsman's friendly solution proposal.



27. Finally, in his decision on complaint 532/2011/(FOR)CK against the EEAS, the Ombudsman investigated allegations of age discrimination against a member of staff of EULEX whose contract was terminated when he reached the age of 65. In its reply, the EEAS enclosed the opinion of the Head of Mission, who argued that EULEX had a uniform policy of retirement at the age of 65. In his decision, the Ombudsman concluded that the EEAS had committed an instance of maladministration, *inter alia*, by failing to justify the difference in treatment on the grounds of age.

28. It appears from the above analysis of the Ombudsman's decision-making practice in this area prior to the present own-initiative inquiry that the situation was characterised by significant uncertainties as to which EU institution or body would be competent to remedy possible instances of maladministration in this type of situations (i.e., the Council, the Commission or the High Representative/EEAS). Indeed, it became apparent that often none of the EU institutions or bodies regarded themselves as responsible for such matters. Moreover, it was equally unclear to what extent the CSDP missions themselves could be held accountable for possible instances of maladministration. In this latter respect, the EU institutions and the missions themselves expressed diverging views in the course of the inquiries carried out by the Ombudsman.

A. The issue of accountability of CSDP missions

Arguments presented to the Ombudsman

29. In its reply, the **Council** pointed out that it had referred the matter to the High Representative, given that it was not competent to deal with issues of accountability for instances of maladministration in the activities of CSDP missions.

30. In her reply to the Ombudsman's letter to the Council, the **High Representative** stated that she understood the Ombudsman's inquiry to relate to civilian missions only.

31. As regards the substance of the inquiry, the High Representative referred to Article 41(2) of the Treaty on the European Union (Chapter 2, ' *Specific provisions on the Common Foreign and Security Policy* ') which provides that:

" Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise. "

32. The High Representative added that, until then, all civilian CSDP missions had been financed from the EU budget. Moreover, Article 317 of the Treaty on the Functioning of the EU ('TFEU') provided as follows:



" The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management [...]. "

33. Furthermore, the High Representative referred to Article 54(2)(d) of the Financial Regulation, which establishes that the Commission may delegate budget implementation tasks to *" persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on the European Union, and identified in the relevant basic act within the meaning of Article 49 of this Regulation "*. [6]

34. Moreover, the High Representative indicated that the Head of Mission is under the supervision of the Commission in his capacity as Special Adviser to the Commission, including in relation to employment contracts with international and local staff. In this respect, she referred to the Commission Communication on Specific Rules for Special Advisers of the Commission entrusted with the implementation of operational CFSP actions. The High Representative indicated that, although employment contracts with international or local staff are concluded between the Head of Mission and the staff, such contracts are based on models prepared by the Commission and follow the relevant provisions of the Specific Rules for Special Advisers (for instance, as regards disputes).

35. She added that it was her understanding that the Commission fully acknowledged its supervisory responsibility over Heads of Mission.

36. Finally, the High Representative submitted that the CSDP missions themselves could not be held accountable for possible instances of maladministration for several reasons. First, civilian CSDP missions are an operational action of the EU established by the Council. Second, CSDP missions do not fall within the scope of the notion of 'bodies, offices or agencies' whose acts can be reviewed by the Court of Justice. Third, CSDP missions do not have legal personality. Fourth, CSDP missions cannot be party to legal proceedings before any court.

37. In the opinion sent on behalf of the **Commission** , the Commission noted that, because of the rather unique structure, the precarious conditions in the field, the need for quick deployment and the limited duration of such operations, the EU entrusts the Head of Mission with the recruitment and employment of the staff needed to achieve the objectives set. The majority of staff in such missions is made up of seconded officials from the EU institutions and from Member States (e.g., police officers), who continue having employment relationships with the relevant EU institution or national authority rather than with the Head of Mission.

38. The Head of Mission concludes employment contracts on his own behalf only with local and international staff (who usually perform administrative or support functions), in conformity with the current version of the Specific Rules for Special Advisers. [7] As regards local staff, the employment contract is subject to the law applicable at the place of the mission. As regards international staff, the employment contract is subject to the law applicable in the country of origin of the staff member.



39. In view of the foregoing, the Commission concluded that it cannot be regarded as the employer of CSDP mission staff.

40. Moreover, the Commission stressed that its supervisory role as regards the Head of Mission is limited to the management of the budget entrusted to him/her by the Commission.

41. In that regard, the Commission referred to the Council decision establishing EUPOL COPPS, which provides that "*[t]he command and control structure of the Mission should be without prejudice to the contractual responsibilities of the Head of Mission towards the European Commission for implementing the budget of the Mission.*" [8] According to the Commission, each Council decision establishing a CSDP mission contains a similar provision.

42. The Commission argued that the Head of Mission exercises his or her operational functions without being under the Commission's authority. Thus, the Commission has no power to ensure that the Head of Mission modifies his/her decision relating to any operational activity to meet the Commission's concerns. Therefore, the Commission could not be held accountable for the exercise of responsibilities which are assigned to the Council of the EU, to the High Representative or to the Civilian Operation Commander. [9]

43. The further opinion sent on behalf of the **High Representative** by the **EEAS** noted that Member States have responsibilities in relation to financial matters concerning military missions, while the Commission has responsibilities in financial matters concerning civilian missions. In the opinion, the High Representative further noted that, leaving aside financial matters, the management of the missions falls upon the authorities in charge of conducting the missions, namely the Operation Commanders, the Force Commanders and the Heads of Mission concerned. Moreover, the conduct of missions is ultimately under the responsibility of the Council, as it is the Council that establishes each mission in the context of the CFSP which it defines and implements (Article 24(2) TEU).

44. According to the High Representative's opinion, it is the task of the High Representative to prepare, plan and oversee the correct implementation of the missions. However, the High Representative cannot be held legally responsible for instances of maladministration in the functioning of these missions since, unlike the EU Delegations, the former are not under the authority of the High Representative within the meaning of the Council decision establishing the EEAS. [10] It is for this reason that allegations of maladministration within a civilian or military mission are handled by the Head of Mission or the Operation Commander respectively.

45. Again according to the opinion, Heads of *civilian* missions are in charge of managing the budget under the terms of a contract signed with the Commission. Ultimately, the management of the budget is under the responsibility of the Commission. In this context, the relevant Commission departments act under the authority of the High Representative in her capacity as Vice-President of the Commission. Therefore, allegations of financial maladministration are dealt with either by the Head of Mission or by the Commission itself.



46. As regards *military* operations, Operation Commanders are in charge of managing the budget in their capacity as authorising officers for the budgets of the Athena Special Committee. [11] Ultimately, the management of the budget is under the responsibility of the Athena Special Committee. Therefore, allegations of financial maladministration are dealt with either by the operation commander or by the Athena Special Committee.

47. However, as part of the High Representative's political responsibility for implementing the Council's decisions on these missions, she will make sure at the planning and execution stages that all the conditions for the successful administration by Heads of Mission and Operation Commanders are in place. In this context, the High Representative may make proposals to the Council, the Commission or the Member States when these conditions are missing or need to be improved.

48. Moreover, the High Representative emphasised that she would pay particular attention to instances of maladministration pointed out by the Ombudsman as a means to improve the administration of missions and the implementation of the Council decisions setting them up under the High Representative's responsibility.

49. In conclusion, the High Representative stated that, apart from the complaints relating to the implementation of the budget of civilian missions which are forwarded to the Commission, it comes within the High Representative's competence to take cognisance of the individual complaints lodged with the Ombudsman, to request the relevant departments of the institutions to deal with them and to provide the Ombudsman with the relevant responses.

50. Finally, while recognising that the current legal situation may not be satisfactory, the High Representative stressed that she was committed to work closely with the Commission within the existing legal framework in order to ensure that the Ombudsman's inquiries are properly handled.

The Ombudsman's assessment

51. As a starting point, the Ombudsman notes with regret that the replies that he has received from the Council, the Commission and the High Representative (directly or through the EEAS) in the course of the present inquiry have not been sufficient to eliminate the above-mentioned uncertainties as regards the issue of accountability.

52. In essence, the thrust of the replies received can be summarised as follows.

53. The Council suggested that it was not competent to deal with issues of accountability involving instances of maladministration within the context of the activities of CSDP missions and that it was for the High Representative to deal with such matters.

54. The Commission, for its part, emphasised that its supervisory role is limited to the area of budget implementation and sound financial management of civilian missions only. Thus, it



considered that it cannot be held accountable for the exercise of responsibilities outside that limited area.

55. The High Representative submitted that the CSDP missions themselves could not be held accountable for several reasons, including, *inter alia*, the fact that they do not have legal personality. Moreover, although she initially argued that the Commission had supervisory responsibilities over a Head of a Mission, she subsequently contended that the Commission's supervisory role is limited to issues concerning the implementation of the budget of civilian missions. As far as the High Representative herself was concerned, she argued that she cannot be held legally responsible for instances of maladministration in the functioning of these missions since, unlike an EU Delegation, they are not under her authority. In her view, this conclusion was not affected by the fact that it is the task of the High Representative to prepare, plan and oversee the correct implementation of such missions. However, the High Representative acknowledged that it is for her to take cognisance of the individual complaints lodged with the Ombudsman, to request the relevant departments of the institutions to deal with them and to provide the Ombudsman with the relevant responses.

56. In view of the foregoing, the Ombudsman considers the current situation regarding the issue as to which of the EU institution or body should be held responsible and accountable for instances of maladministration occurring within the context of CSDP missions set up by the EU to be highly unsatisfactory. Indeed, with the exception of instances of maladministration relating to the implementation of the budget of civilian missions, for which the Commission acknowledges its supervisory role, the unavoidable conclusion from the above-mentioned replies is that there is no institution or body that has declared itself to be responsible and accountable for instances of maladministration occurring in CSDP missions, which are set-up, managed and funded by the EU.

57. In this context, the Ombudsman considers it appropriate to make the following observations.

58. The position of the Council, the Commission and the High Representative/EEAS cannot easily be reconciled with the principle established by the case-law that the EU is based on the rule of law in which none of the institutions and bodies can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty. [12]

59. It should further be noted that the right to good administration is a fundamental right. [13] It is therefore necessary to ensure that this right be protected also as regards the activities of CSDP missions.

60. In that respect, the Ombudsman recalls that Article 24 TFEU clearly states that the Common Foreign and Security Policy ('CFSP') shall be put into effect by the High Representative and by Member States, in accordance with the Treaties. According to Article 42 TFEU, the CSDP is a major component and an integral part of the CFSP. To date, the CSDP includes more than 20 civilian and military missions and operations in three continents.



61. Both civilian and military CSDP missions are set up by a legal act adopted by the Council (a decision or a joint action), in the context of the CFSP which is defined by the European Council and the Council (Article 26 TEU). The Council establishes the chain of command of military and civilian CSDP missions. Moreover, the Council exercises the political control and strategic direction of the missions. [14]

62. The High Representative ensures the implementation of the decisions adopted by the European Council and the Council (Article 27(1) TEU), including those relating to CSDP missions. In fulfilling her mandate, the High Representative is assisted by the EEAS (Article 27(3) TEU).

63. The Head of Mission, in the case of civilian missions, and the Operation Commander, in the case of military missions, are appointed by and remain under the ultimate authority of the Council. [15] The Head of Mission and the Operation Commander exercise command and control of the mission at operational level. [16] Moreover, the Head of Mission in civilian missions, and the Operation Commander in military missions, each manages the mission budget. In this respect, while civilian missions are financed from the EU budget, military missions are financed by the participating Member States. [17] The Commission has a supervisory role over the Head of Mission as regards budget implementation in civilian missions. [18] As regards military missions, *Athena*, a mechanism created by the Council, administers the financing of the common costs of the missions on behalf of the participating Member States. [19]

64. Furthermore, it is important to note that the Head of Mission in a civilian mission enters into a contract with the Commission [20] and is appointed as a Special Advisor of the Commission entrusted with the implementation of CFSP actions. [21] The Head of Mission is empowered to conclude contracts with international staff and local staff. [22] In addition, participating Member States and the EU institutions may second staff to the mission. [23] During the secondment, only the Head of Mission is responsible for the management of the staff member, to the exclusion of the Member State or EU institution in question. [24]

65. In light of the foregoing, it cannot be denied that the EU has a decisive involvement in the creation and running of both civilian and military CSDP missions.

66. Therefore, the proposition that no EU institution should be held accountable for instances of maladministration (other than maladministration linked to budget implementation in civilian CSDP missions) cannot be accepted.

67. In that regard, the Ombudsman considers it useful to refer to an order of the President of the General Court adopted in the context of interim measures proceedings concerning the EU Police Mission in Bosnia and Herzegovina ('EUPM/BiH'). In this case, the applicant, a member of staff seconded by one Member State, brought an action for annulment against a decision adopted by the Head of Mission concerning a staff matter. In his Order, the President of the General Court held as follows: [25]



" 24. In that regard, it must be borne in mind that it is the Council which created the EUPM and that, while the Head of the EUPM is responsible for the EUPM and issues instructions to all EUPM staff (Article 6(1) and (3) of Decision 2009/906/CFSP), the Council retains responsibility for the action of the EUPM in several respects (Article 9(2) and (4), Article 10(1) and (2) and Article 13(1) and (3) of Decision 2009/906/CFSP). As regards the Commission, it has a role for budgetary and financial purposes in the management of the EUPM (Article 6(4) and Article 12(3) of Decision 2009/906/CFSP). Moreover, in the present case, the applicant has asserted, and is not contradicted by the Council or the Commission, that the Head of the EUPM had been recruited by the Commission.

25. In those circumstances, it cannot be ruled out, at first glance, that the decision of 7 April 2010 and the decision of 30 April 2010, formally taken by the Head of the EUPM, are attributable to the Council or to the Commission to the extent that the Head of the EUPM legally acted on behalf of one of those institutions. On this view, it should be ensured that those institutions do not evade any review by the Courts of the European Union in respect of purely administrative decisions which are taken in relation to staff management within the EUPM, which would be clearly separable from the 'political' measures taken as part of the CFSP. Where such a decision adversely affects the person to whom it is addressed and significantly alters that person's legal position, it cannot be acceptable in a European Union based on the rule of law that such a decision escape any judicial review (see, by analogy, Case T-411/06 *Sogelma v EAR* [2008] ECR II-2771, paragraph 36). " [26]

68. In the light of the foregoing considerations, the Ombudsman considers it regrettable that the Council, the Commission and the High Representative/EEAS have not so far achieved clarity on the allocation of responsibility for possible instances of maladministration occurring within the activities of CSDP missions, with the exception of matters related to the budgetary aspects of civilian missions, for which the Commission has explicitly accepted responsibility.

69. At the same time, however, the Ombudsman notes that the High Representative has informed him through the EEAS that she will take cognisance of the individual complaints lodged with the Ombudsman, request the relevant departments of the EU institutions to deal with them and provide the Ombudsman with the relevant responses (see point 49 above). The Ombudsman very much welcomes this proposal, which is both pragmatic and helpful. He notes that, in fact, the High Representative would appear to be in a very good position to ensure that this arrangement will work, given her institutional links with both the Council and the Commission.

70. Since there seems to be no reason to doubt, at present, that the above arrangements will ensure the effectiveness of the fundamental right *to complain to the Ombudsman* contained in Article 43 of the Charter of Fundamental Rights, there is no need to prolong the present inquiry. That being said, it is by no means obvious that the said arrangements will prove sufficient to ensure the fundamental right *to good administration*, mentioned in point 59 above, which is contained in Article 41 of the Charter. If it were to become apparent that the said arrangements do not work in a satisfactory manner as regards either right, the Ombudsman would feel obliged to take up the issue of principle again.



B. Conclusions

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

On the basis of the results of his own-initiative inquiry into the present case, the Ombudsman will address himself, as regards future complaints and inquiries concerning the activities of EU missions, (i) to the Commission in so far as issues relating to budget implementation in civilian missions are concerned and (ii) to the High Representative/EEAS in so far as all other allegations of maladministration in relation to CSDP missions are concerned.

The Ombudsman considers that the above arrangements should be sufficient to ensure the effectiveness of the fundamental right *to complain to the Ombudsman* contained in Article 43 of the Charter of Fundamental Rights. There are therefore no grounds for further inquiries in the present case. However, it is by no means obvious that these arrangements are sufficient to ensure the fundamental right *to good administration* contained in Article 41 of the Charter. If it were to become apparent that the said arrangements do not work in a satisfactory manner as regards either right, the Ombudsman would feel obliged to take up the issue of principle again.

The Council of the EU, the Commission and the High Representative/EEAS will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 30 August 2013

[1] See, for instance, the decisions of the Ombudsman on complaint 955/97/IJH against the European Commission, complaint 3008/2005/OV against the European Commission, complaint 3328/2008/ELB against the European Commission, complaint 3177/2008/(JDG)OV against the European Commission, own-initiative OI/2010/(BEH)MMN concerning EUPOL COPPS, complaint 1519/2011/AN against the Council of the EU and complaint 532/2011/(FOR)CK against the European External Action Service.

[2] Commission Communication C(2007) 1746 of 21 December 2007 ('Specific Rules for Special Advisers').

[3] Ombudsman's decision on complaint 3177/2008/(JDG)OV against the Commission, point 31.



[4] *Ibid* ., points 34-37.

[5] *Ibid* ., points 69 *et seq* .

[6] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Regulation applicable to the general budget of the European Communities (the 'Financial Regulation'); OJ 2002 L 248 p.1. It should be noted that Regulation 1605/2002 has since been repealed by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, OJ 2012 L 298 p. 1. The relevant equivalent provision is now Article 58(1)(c)(viii).

[7] Commission Communication on Specific Rules for Special Advisers entrusted with the implementation of operational CFSP actions and contracted international staff (C(2009) 9502 of 30 November 2009).

[8] See, for instance, recital 4 of Council Decision 2010/784/CFSP of 17 December 2010 on the European Union Police Mission for the Palestinian Territories ('EUPOL COPPS'), OJ 2010 L 335 p. 60. Moreover, Article 6(4) of this decision provides: "*The Head of Mission shall be responsible for the implementation of the Mission's budget. For this purpose, the Head of Mission shall sign a contract with the Commission*". In addition, under Article 13(4), "*[t]he Head of Mission/Police Commissioner shall report fully to, and be supervised by, the Commission on the activities undertaken in the framework of his contract.*"

[9] In this respect, the Commission referred to Article 9 of the Council Decision establishing EUPOL COPPS:

" *Chain of Command*

1. *EUPOL COPPS shall have a unified chain of command, as a crisis management operation.*

2. *Under the responsibility of the Council and the HR, the PSC shall exercise political control and strategic direction of EUPOL COPPS.*

3. *The Civilian Operation Commander, under the political control and strategic direction of the PSC and the overall authority of the HR, shall be the commander of EUPOL COPPS at strategic level and, as such, shall issue instructions to the Head of Mission and provide him with advice and technical support.*

4. *The Civilian Operation Commander shall report to the Council through the HR.*

5. *The Head of Mission shall exercise command and control of EUPOL COPPS at theatre level and shall be directly responsible to the Civilian Operation Commander.*"

[10] Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service; OJ 2010 L201 p. 30.



[11] The Athena Special Committee is composed of one representative of each participating Member State and is chaired by the rotating Presidency of the Council of the European Union. The Commission attends the meetings without participating in the votes. See Article 6 of Council Decision 2004/197/CFSP of 23 February 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications, OJ 2004 L63 p. 68.

[12] See Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23. See also Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 281.

[13] Article 41 of the Charter of Fundamental Rights.

[14] As an example, see Article 6 of Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina (OJ 2004 L 252 p. 10) and Article 9 of Council Decision 2011/781/CFSP of 1 December 2011 on the European Union Police Mission in Bosnia and Herzegovina.

[15] As an example, see Article 6 of Council Joint Action 2004/570/CFSP and Article 6 of Council Decision 2011/781/CFSP.

[16] As an example, see Article 8 of Council Joint Action 2004/570/CFSP and Article 6 of Council Decision 2011/781/CFSP.

[17] Article 41 TEU.

[18] As an example, see Article 12 of Council Decision 2011/781/CFSP.

[19] See Council Decision 2011/871/CFSP of 19 December 2011 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), OJ 2011 L343 p. 35.

[20] See, for instance, Article 6 of Council Decision 2011/781/CFSP.

[21] See the Commission Communication on Specific rules for Special Advisers.

[22] See, for instance, Article 7 of Council Decision 2011/781/CFSP. More generally, see the Commission Communication on Specific rules for Special Advisers.

[23] *Ibid* .

[24] *Ibid* .

[25] Order of the President in Case T-271/10 R, *H v Council and Commission* , order of 22 July



2010, not yet published in full in the ECR, paragraphs 18-21.

[26] Order of the President in Case T-271/10 R, *H v Council and Commission*, order of 22 July 2010, not yet published in full in the ECR, paragraphs 24-25. Moreover, in Case T-411/06, *Sogelma v European Agency for Reconstruction* [2008] ECR II-2771, a case concerning an action for annulment against a decision by an agency to cancel a tender procedure, the then Court of First Instance held the following:

" 37. *The general principle to be elicited from that judgment is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review. It is true that Les Verts, paragraph 24, refers only to Community institutions and the EAR is not one of the institutions listed in Article 7 EC. None the less, the situation of Community bodies endowed with the power to take measures intended to produce legal effects vis-à-vis third parties is identical to the situation which led to the Les Verts judgment: it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review [...]*

40. Decisions which the Commission would have taken cannot cease to be acts open to challenge solely because the Commission has delegated powers to the EAR, otherwise there would be a legal vacuum. "