http://www.ombudsman.europa.eu/de/cases/decision.faces/en/10708/html.bookmark

Decision of the European Ombudsman closing his inquiry into own-initiative inquiry OI/4/2009/PB concerning the European Commission

Verfügbare Sprachen : **en**

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Geöffnet am **03.11.2009** - Empfehlungsentscheidung vom **09.11.2010** - Entscheidung vom **05.07.2011**

- Betroffene Einrichtung(en) : **Kommission der Europäischen Gemeinschaften**
- Rechtsgebiet(e) : **Allgemeine, institutionelle und finanzielle Fragen**
- Art der beklagten Missstände – (1) Verletzung von oder (2) Verletzung von Pflichten in Bezug auf : **Recht auf Anhörung und Abgabe von Erklärungen [Artikel 16 EKGV]**
- Betreff : **Verwaltung und Personalstatut**

The background to the complaint

1. This inquiry concerned the right of officials to be heard when the Commission decides to recover 'undue payments'.
2. During his handling of a complaint, the Ombudsman became aware of possible shortcomings in the Commission's practices for issuing recovery measures under Article 85 of the Staff Regulations. This Article provides as follows:
"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it. The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Appointing Authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed."

The subject matter of the inquiry

3. In light of information contained in a complaint, the European Ombudsman decided to open the present own-initiative inquiry. The inquiry concerns possible shortcomings in the Commission's practices when issuing recovery measures under the above-quoted provision. The Ombudsman was concerned that, when the Commission recovers sums under Article 85 of the Staff Regulations, it may not adequately respect the right of individuals to be heard and to receive reasons.

The inquiry

4. On 3 November 2009, the Ombudsman asked for information on the subject matter of the inquiry. The Commission replied on 3 March 2010. It informed the Ombudsman that, following the opening of the present inquiry, it had decided to adopt new and improved procedures relevant to the object of the inquiry. On 3 June 2010, the Commission sent the Ombudsman a copy of an internal note of 23 April 2010, which set out the new procedures. It included a letter template that will be used by the service in question when the latter informs a current or former member of staff of its decision to recover sums. The note outlined that the new rules would be published on the Commission's intranet[1].

5. On 9 November 2010, the Ombudsman made a draft recommendation. The Commission replied on 21 January 2011. Following an additional communication from the Ombudsman dated 2 February 2011, the Commission sent the Ombudsman its final reply on 20 May 2011.

The Ombudsman's analysis and conclusions

The Ombudsman's assessment leading to a draft recommendation

6. The Ombudsman made the following draft recommendation:

The Commission should ensure that its services fully respect the fundamental right to be heard in relation to recovery measures that they adopt against present or former staff. Specifically, the Commission should lay down a general rule that, unless exceptional circumstances require otherwise, the relevant service must grant the individual concerned the opportunity to state his or her views on the substance before it decides to adopt the recovery measure. The procedure should be in writing, unless an oral hearing would be more appropriate in light of the circumstances of the case.

7. The draft recommendation was based on the following findings.

8. From the content of its replies, the Commission appeared to accept that measures should be taken better to ensure an individual's rights of defence when its services intend to recover sums under Article 85 of the Staff Regulations.

9. The Commission's above-mentioned internal note of 23 April 2010, which was addressed to the relevant management staff, ends with following statement: "[j]*e vous remercie d'appliquer dorénavant rigoureusement cette nouvelle procédure et d'être particulièrement attentif aux droits de défense des collègues qui font l'objet d'une mesure de récupération*" [Please make sure strictly to follow this new procedure from now on, and to be particularly attentive to the rights of defence of colleagues who are the object of a recovery measure].

10. The rights to be heard and to receive a reasoned decision are mentioned in Article 41 of the European Union's Charter of Fundamental Rights, which is legally binding following the entry into force of the Treaty on the Functioning of the European Union[2].

11. The two rights normally play a role at different stages of a procedure. The right to be heard grants an individual the possibility to comment on factual and legal issues before a possible future decision is taken. The right to receive a reasoned decision enables an individual better to understand why a decision has been taken. Both rights will often help to avoid court cases because the individual concerned will be likely to feel that the procedure was fair and that he/she was adequately informed of the background to the measure.

12. The Commission's above-mentioned internal note of 23 April 2010 adequately reminds the management staff concerned that reasons must be given. It goes without saying that the level of reason-giving depends on the circumstances of the specific case.

13. It is not, however, obvious that the right to be heard is adequately protected.

14. In its decision in Case F-51/07 *Phillippe Bui Van v Commission*[3], the Civil Service Tribunal noted the following:

"72 Finally, according to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see, in particular, Case 234/84 Belgium v Commission [1986] ECR 2263, paragraph 27; Case C-288/96 Germany v Commission [2000] ECR I-8237, paragraph 99;

Case C-344/05 P Commission v De Bry [2006] ECR I-10915, paragraph 37; Case T-277/03 Vlachaki v Commission [2005] ECR-SC I-A-57 and II-243, paragraph 64).
73 That principle, which reflects the requirements of good administration, demands that the person concerned should have been afforded the opportunity to effectively make known his views on any matters which might be taken into account to his detriment in the measure to be taken (see, to that effect, Case 234/84 Belgium v Commission, paragraph 27; Case C-458/98 P Industrie des poudres sphériques v Council [2000] ECR I-8147, paragraph 99; Commission v De Bry, paragraph 38; Case T-372/00 Campolargo v Commission [2002] ECR-SC I-A-49 and II-223, paragraph 31; and Vlachaki v Commission, paragraph 64).
74 In that regard, Article 41(2) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), provides that the right to good administration 'includes:
– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
[…]
75 The principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice ... and of the European Court of Human Rights' (see, to that effect, Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 38).
76 Moreover, by solemnly proclaiming the Charter of Fundamental Rights of the European Union, the European Parliament, the Council and the Commission necessarily intended to give it particular significance, account of which must be taken in this case in interpreting the provisions of the Staff Regulations and the Conditions of Employment of other servants of the European Communities (Case F-1/05 Landgren v ETF [2006] ECR-SC I-A-1-123 and II-A-1-459, paragraph 72, which is the subject of an appeal pending before the Court of First Instance in Case T-404/06 P)."
15. A recovery measure is, by its very nature and in many cases also by its financial impact, of a serious nature. Additionally, the Commission itself, in its first reply to this inquiry, noted that the case-law on the application of Article 85 of the Staff Regulations is extensive ("*L'application de l'article 85 a fait l'object d'une jurisprudence très large*"). It can only be in the institution's own interest to take steps to avoid further court cases.
16. The Commission's aforementioned internal note of 23 April 2010 does not provide for a hearing of the official before the Commission adopts a recovery measure. It merely stipulates that the Commission shall grant the official the possibility to state his/her views on the *implementation* of the recovery measure ("*L'AIPN informe le fonctionnaire/l'agent de la possibilité de faire des commentaires sur l'exécution de la récupération dans un délai d'un mois.*" (emphasis added)
17. This is also reflected in the letter template attached to the note. Although the template carries the heading "NOTE A L'ATTENTION DE", the document is clearly intended to contain a formal administrative decision. It merely informs the official concerned *how* the Commission intends to implement the recovery measure. It ends by recalling the right to submit a formal complaint against the "*decision*" ("[l]*a présente décision*") under Article 90 of the Staff Regulations.
18. It is not clear why the Commission hesitated and chose not provide formally for such a hearing. As noted above, it appears to accept that measures should be taken better to ensure the individual's rights of defence. Additionally, it pointed out that the possibility to state views includes the possibility to state views on the substance ("[i]*l a également la possibilité de donner des commentaires sur le fond de la récuperation*"). If this is the intention, it would appear more logical simply to formalise this possibility by creating a proper hearing stage in the procedure.
19. As an aside, the Ombudsman notes that such a right to be heard would not prevent the Commission from adequately addressing exceptional cases where it believes that the official may quickly destroy relevant evidence or somehow abscond. The present inquiry concerns the Commission's normal procedures, and not cases of serious fraud or the like.
The arguments presented to the Ombudsman after his draft recommendation

20. The Commission sent the Ombudsman a reply which could be understood to mean that an official's right to be heard cannot fully be respected for practical reasons relating to the Commission's IT-situation. The Ombudsman asked the Commission for clarifications in this respect.

The Commission's additional comments on the draft recommendation

21. In its comments on the draft recommendation, the Commission explained the steps it had already taken to adapt and improve recovery procedures. The Commission also explained that further adjustments were required to the technical set up of the pay system (NAP) for it to be able effectively to guarantee the right to be heard. The Commission committed itself to implementing these technical modifications to NAP by June 2011.

22. The Ombudsman subsequently commented (in his letter dated 2 February) that the Commission's reply appeared in substance to reject his draft recommendation as regards the right to be heard because of certain limitations in its available IT software.

23. The Commission emphasised that this was not the intended message. In explaining, in its earlier comments, that the change in the recovery procedure would not in itself resolve the problem raised by the Ombudsman, the Commission did not intend to reject the recommendation. It was rather explaining that additional actions over and above that procedure were necessary in order for the recommendation fully to be implemented. These additional actions do indeed involve adjustments to NAP, which is an inter-institutional payroll system, administered by the Commission.

24. As explained in the Commission's previous comments, the set-up of NAP has the practical effect of limiting the possibilities for a formal right to be heard. This is because the time allowed between, on the one hand, the encoding of an entitlement and the subsequent communication of the corresponding decision to the staff member and, on the other hand, the actual execution of the change by NAP, was too short to guarantee an effective right to be heard.

25. The Commission fully accepts that a solution needs to be found to this problem.

26. At the same time, for reasons of administrative efficiency, the automatic processing of salaries, which lies at the heart of NAP, must be maintained. Handling the management of statutory rights and the payment of salaries for 40,000 staff, on a monthly basis, is obviously only possible through a large-scale automation process.

27. In order to respect the principle of segregation of duties, the Commission has separate teams for the administration of statutory rights and for the administration of salaries. Salaries are handled by 44 agents working in three different units of the Commission's Paymaster Office (PMO) in Brussels, Ispra and Luxembourg. These agents follow up on the statutory rights encoded both by DG HR (career rights) and PMO (individual entitlements).

28. As a result of these different encodings, an average of 300 recovery notes are sent out per month. There are essentially three different situations that lead to a "*negative encoding*":

- recoveries that originate in a request from staff members themselves (for instance, relating to part-time work);
- formal decisions on entitlements that have been communicated to the staff member, often following direct contacts between the staff member and the desk officer (for instance, concerning the end of an education allowance); and
- technical adaptations on which general information is provided (for instance, reductions to the correction coefficient).

29. Once the encoding of a statutory right is completed, it automatically feeds into the salary system.

30. However, in many cases, the agents handling the statutory rights will contact the staff member concerned before closing the file and encoding it into the system. Most staff members are therefore already well aware and/or informed before the encoding and before the recovery order is actually implemented.

31. Nonetheless, the Commission accepted that this is not always the case. Taking these factors into account, the Commission therefore concluded that the best way to guarantee an effective right to be heard in all cases would be to extend the period between the calculation of a recovery in NAP (the encoding) and its execution.

32. The Commission's initial view was that this should be done through a change of the basic set up of NAP in all EU institutions and bodies. However, since this idea did not win the support of all other institutions, with which the Commission discussed the issue at the Inter-institutional NAP Forum of 16 December 2010, the Commission subsequently decided to make the technical adaptations that allow

this change to be made for its services only. This change will become operational as of the May payroll.
33. As a result, by June 2011 the execution of a recovery will automatically commence in month N+2 rather than in month N+1 as is the case at present. This will always leave the staff member a full month to contact their salary officer before the recovery starts (as opposed to a far shorter period - often little over a week - when the recovery started in month N+1 under the previous set up of NAP).
34. This will have the effect of fully guaranteeing the right of every person to be heard before the implementation of any individual measure which would affect them adversely, while at the same time ensuring that the practical implications for the management of statutory rights and the payment of salaries remain under control.

The Ombudsman's assessment after his draft recommendation

35. In response to the present own initiative inquiry, the Commission made an unequivocal commitment to ensuring that the fundamental right to be heard will be respected in relation to recovery orders issued to its staff. The Ombudsman warmly welcomes the Commission's positive response, and in particular the time efforts it has invested and the efforts it has undertaken to examine how this important fundamental right could be respected in practice.
36. The practical solution proposed by the Commission contains a compromise from the point of view of principle. For reasons of procedure and logic, the right to be heard should normally be granted before the administrative decision is taken, and not only before the decision is implemented. In its last response, the Commission appears fully to be aware of this aspect of its proposal. It explained in some detail the technical, administrative and inter-institutional context of the issues involved, which essentially led it to carry out a balancing of interests.
37. It goes without saying that a compromise of this sort must be carefully considered in its specific context. It would normally not be acceptable if the administrative measure in question is of primary importance to the official's professional career or personal situation. It would also not be acceptable if the addressees of the administrative decision cannot be expected fully to understand the nature of the decision and the related procedures. Finally, it would normally not be acceptable unless the relevant procedural safeguards are in place.
38. The subject matter of the present case concerned the recovery of money which the institution considered to have been unduly paid to the official. This is not an issue that would normally concern a possible dispute relating to the official's career as such. It is moreover a kind of decision that is communicated to individuals who operate in a highly professional and informed environment. Finally, the Ombudsman understands that the Commission is actively examining the adequacy of its decision templates. It goes without saying that these will ultimately have to contain the following elements:
(a) sufficient factual information and specific reasons to enable the officials to effectively exercise their right to be heard;
(b) information that the officials are granted the *right* to express their views regarding the *substance* of the decisions to make the recovery (and not, that is, only regarding the modalities for how to implement the recovery); and
(c) the decisions must clearly indicate *how* the right to be heard can be exercised before the recovery order is executed.
39. The above-mentioned three requirements are entirely rudimentary, and the Ombudsman trusts that the Commission will implement them swiftly. He considers, therefore, that the present inquiry can be closed with the finding that the Commission has accepted that the fundamental right to be heard must be accepted in relation to the issuing of recovery orders addressed to its staff.

C. Conclusions

The Ombudsman closes his own-initiative inquiry with the following conclusions:
The Ombudsman welcomes the Commission's unequivocal commitment to ensuring that the fundamental right to be heard will be respected in relation to recovery orders issued to its staff.
The Ombudsman considers that, subject to the rudimentary requirements referred to in paragraph 38 of the present decision, the Commission's proposal regarding how this right can be effectively implemented is satisfactory.
A copy of this decision will be sent to all EU institutions, bodies, offices and agencies.

P. Nikiforos Diamandouros
Done in Strasbourg on 5 July 2011

[1] At the time of drafting the present decision, the rules did not yet appear to have been published on the Commission's intranet.
[2] Article 6 of the Treaty on the Functioning of the European Union. The Charter is available online under the following link:http://europa.eu/documentation/legislation/index_en.htm - see 'Treaties'.
[3] Case C-122/04 *Philippe Bui Van v Commission*, judgment of 11 September 2008, not yet published in the ECR. The Tribunal's finding of a breach of the right to be heard in that case was subsequently upheld by the General Court on appeal in Case T-491/08 P *Philippe Bui Van v Commission*, judgment of 12 May 2010, not yet published in the ECR, paragraph 80.