
P. NIKIFOROS DIAMANDOUROS

Mr Paul van Buitenen
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Strasbourg, 09 -06- 2008

Your reference: Allegations Mr Strack

Dear Mr van Buitenen,

Thank you for your letter of 5 May 2008, in which you pose a number of questions relating to complaints submitted to the European Ombudsman by Mr Guido Strack.

Before I address the specific questions and issues that you raise in your letter, I would first of all like to provide you with the following relevant background information.

As you indicate in your letter, the background to the disputes here concerned is a whistle-blowing action that Mr Strack made (in 2002) against the European Commission. Mr Strack contacted OLAF, which conducted an investigation into his allegations. Mr Strack took the view that OLAF's investigation was unsatisfactory, and made a complaint to the Ombudsman (complaint 140/2004/(BB)PB). During my inquiry into his complaint, Mr Strack went to court on the issue of the quality of OLAF's above-mentioned investigation (Case T-4/05). I therefore ended my examination of that issue, while proceeding to assess procedural issues that were not covered by the court action.

The Court of First Instance declared Mr Strack's action inadmissible, a decision which was subsequently confirmed by the Court of Justice (C-237/06 P). Mr Strack subsequently asked me to inquire into the above-mentioned issue, considering that since the Community Courts had dismissed his action as inadmissible, the European Ombudsman would be competent to make an assessment of OLAF's investigation. I informed Mr Strack that in light of certain specific findings set out in the Order of the Court of First Instance, I did not consider it possible to open an inquiry. The Court of First Instance had made the following findings regarding OLAF's challenged investigation (there is no official English version of the Court's Order):

"40 Il convient d'ailleurs de relever que, contrairement à ce que soutient le requérant, le rapport final d'enquête du 5 février 2004 a été réalisé à l'issue d'une enquête approfondie et d'une analyse détaillée des faits en cause. Ainsi, ce rapport expose clairement les différentes allégations présentées à l'OLAF par le requérant et détaille les mesures adoptées par l'OLAF pour instruire cette affaire pendant la période allant du 18 octobre 2002 au 5 février 2004. Dans le cadre de cette instruction, l'OLAF a utilisé la base de données Sysper pour recueillir des informations sur les fonctionnaires visés, organisé plusieurs entretiens – en novembre 2002, puis en septembre et en décembre 2003 – réunissant le requérant et des membres de l'OLAF ou son directeur général, et examiné les documents relatifs au contrat litigieux. À l'issue de cet examen détaillé, l'OLAF a conclu que les agissements faisant l'objet de l'enquête visaient à régulariser les relations contractuelles entre l'Office des publications et son prestataire extérieur, qu'il n'y avait aucune irrégularité de la part des fonctionnaires de l'Office des publications et, partant, qu'il y avait lieu de clore l'enquête.

41 Dès lors, c'est à tort et contrairement à ce que révèlent les faits de l'espèce que le requérant reproche à l'OLAF de ne pas avoir rempli ses obligations en matière d'enquête, qu'il soutient que les informations qu'il a fournies n'ont pas donné lieu à des suites régulières, mais ont été escamotées, et qu'il allègue que la Commission a agi de manière abusive et arbitraire. La thèse du requérant, selon laquelle la réalisation régulière de l'enquête aurait permis de constater une grave violation du droit, est dépourvue de tout fondement et de toute rationalité. Cela équivaldrait à préjuger du résultat de l'enquête en admettant comme fondées les allégations du requérant, et ce sans tenir compte des pouvoirs d'appréciation de l'OLAF dans le cadre de l'enquête interne."

Thus, none of my decisions on complaints by Mr Strack contain any findings on whether Mr Strack's whistle-blowing action was justified in the first place.

Furthermore, none of the inquiries that I have conducted so far have specifically concerned the issue of whistle-blower protection as now dealt with in Article 22a of the Staff Regulations¹. Instead, they have concerned concrete issues and disputes that I have had to examine in light of provisions or principles not related to whistle-blowing. More specifically, none of the complaints submitted by Mr Strack have given rise to

¹ "Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct."

an inquiry into a broader allegation of "harassment" being pursued against him because of his whistle-blowing action.

Turning now to the specific questions you raise, I would like to note the following:

You refer to my decisions on complaints 1434/2004/PB, 3402/2004/PB, 144/2005/PB and 3002/2005/PB, pointing out that my inquiries into these complaints were ended at a moment when "Mr Strack had neither got hold of the documents nor a legally valid reply by the Commission and/or OLAF". You furthermore appear to essentially ask me to comment on the legitimacy of my decision to close the above inquiries - in which I had made proposals for friendly solutions - without making draft recommendations and a special report to the European Parliament.

Let me first emphasise that, as European Ombudsman, I have no power to order the Administration to disclose documents to complainants, nor do I have the power to order the Administration to adopt and issue replies that, in my view, would be legally correct. This reflects a general and common feature of parliamentary ombudsmen, i.e., the lack of any power to annul administrative decisions or to issue binding instructions to the Administration.

Instead, the Statute governing the Ombudsman's duties contains an obligation to "seek a solution". Article 3(5) of the Ombudsman's Statute provides as follows:

"As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."

This provision contains one of the basic aims to be pursued by my institution, i.e., to seek a solution whenever maladministration is found. This is what I did in the above cases, following thorough inquiries into allegations and claims raised by Mr Strack.

In all cases where a proposal for a friendly solution is not accepted by the Administration, I have to reflect on the appropriateness and usefulness of taking the case further. If I arrive at the conclusion that the institution concerned is clearly not going to give in and satisfy the complainant, my decision whether to take the case further, or close the case with a critical remark, is taken in light of this conclusion and other factors, pertaining, in particular, to procedural economy and the specific facts and circumstances of the case. With regard to the possibility of making a special report to Parliament, please note that, in his Annual Report for 1998, the Ombudsman pointed out that the possibility for him to present a special report to the European Parliament was of inestimable value for his work. He added that special reports should therefore not be presented too frequently, but only in relation to important matters where the Parliament was able to take action in order to assist the Ombudsman. The Annual Report for 1998 was submitted to and approved by the European Parliament.

Applying the above considerations, and given that the Commission and OLAF would clearly not change their positions, I decided to close the cases with critical remarks.

With regard to complaint 1116/2008/PB, please note that I rejected this complaint on the basis of Article 195 of the EC Treaty, which provides as follows:

"In accordance with his duties, the European Ombudsman shall conduct inquiries for which he finds grounds (...)"

This provision lays down the very broad discretion that the European Ombudsman, like most of his national counterparts, enjoys when deciding whether to take a complaint up for inquiry. The reasons why I did not find 'grounds' in this case are set out in my relevant letter to the complainant.

If I understand you correctly, you furthermore wish to know whether my rejection of complaint 1116/2008/PB implies a decision on my part not to investigate any more complaints from Mr Strack, including the ones already taken up for inquiry.

I would like to emphasise that my decision on complaint 1116/2008/PB was limited to the specific facts and circumstances relating to that complaint. It was clear that the Commission's challenged decision was based, in essence, on decisions of non-disclosure which have already been the object of inquiries by the European Ombudsman (cf. above), and which resulted in relevant friendly solution proposals and critical remarks about how the Commission had handled, both from a procedural and substantive point of view, access applications made by the complainant.

I would like to emphasise that my decision on complaint 1116/2008/PB by no means implies a decision of the kind that you seem to refer to.

You furthermore state, in relation to complaint 1116/2008/PB, that I could have made some suggestions on how best to pursue the matter, for instance, by stating whether I consider his access request to the Commission inadmissible, and by explaining whether I would support a relevant action if Mr Strack were to bring it to court.

First, please note that my letter rejecting the said complaint contained a reference to the possibility of going to court. I did not consider it pertinent, in a case on access to specific documents, to remind the complainant about the possibility of petitioning the European Parliament.

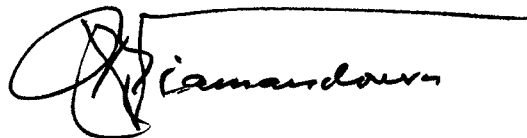
Second, I would like to point out that the European Ombudsman's legal bases do not empower the Ombudsman to support individuals who go to court.

With regard to the last case that you refer to, that is, complaint 723/2006/(WP)PB, I would like to inform you that Mr Strack has asked me, by e-mail of 2 May 2008, to consider opening an inquiry that, if undertaken, would inevitably include the issues that you mention. I have not yet taken a decision on his request, but

expect to do so in the very near future. I will inform you in due course of my reply to Mr Strack. In the meantime, I consider it appropriate not to elaborate on the issues involved outside the context of my correspondence with Mr Strack.

I hope the above responses to the various points raised in your letter adequately address your concerns. Naturally, I remain at your disposal, should you require any additional information or clarification.

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized initial 'P' followed by the name 'Diamandouros' in a cursive script. A long horizontal line extends from the top of the signature to the right.

P. Nikiforos DIAMANDOUROS