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06.05.2009

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Ref: Observations on the opinion of the European Commission concerning my Complaint 2851/2008/TN (your letter No S2009-103695 of 29.04.2009)

Dear Mr. Ombudsman,

Thank you for the opportunity to make observations on the opinion of the European Commission on Complaint 2851/2008/TN pursuant to Article 4 (6) of Decision of the European Ombudsman adopting implementing provisions. Herewith I would like to make the following observations:

I. BACKGROUND

On 14.07.2008, after having duly contacted the institution concerned as required by Article 2 (4) of Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties as subsequently amended and not having received a reply in more than two months upon the institution's receipt of my communication despite a reminder sent to it, I submitted a complaint to the European the Ombudsman about maladministration by the European Commission. The complaint was registered by the Ombudsman's office on 15.07.2008 under number 2000/2008/TN.

The Ombudsman decided to deal with the complaint by way of a simplified procedure and closed the case as settled with his letter No 059060 of 16.10.2008. Not being satisfied with the outcomes of the simplified procedure, on 20.10.2008 I requested the Ombudsman to proceed with the remaining maladministration issues. At that time my complaint was re-registered under number 2851/2008/TN and contained the following maladministration issues:

- “1) substitution of the Financial Identification form's strict requirements for unjustified requests.
- 2) lack of information.
- 3) refusal of information.
- 4) unnecessary delay in the reimbursement process (over 10 months altogether).
- 5) different employees of the EC supply me with contradictory information.
- 6) failure to reply within the deadlines set by the Code of Good Administrative Behaviour.”

On 15.12.2008 the Ombudsman informed me that he had asked the Commission to submit by 31.03.2009 an opinion on the following aspects of my complaint 2851/2008/TN:

- “1. *made unjustified requests for additional information, substituting the requirements stipulated on the financial identification form;*
2. *unnecessarily delayed the reimbursement process;*
3. *provided contradictory information; and*
4. *failed to reply to [my] complaint of 29 April 2008 within the deadlines set out by the Code of Good Administrative Behaviour.”*

The Commission submitted its opinion on 16.04.2009.

The Ombudsman forwarded the opinion to me for observations on 29.04.2009, asking that my observations be submitted before 31.05.2009.

II. THE COMPLAINANT’S OBSERVATIONS ON THE COMMISSION’S OPINION

1. *As regarding the Commission’s observation on my first statement that you submitted to it, namely that the Commission made unjustified requests for additional information, substituting the requirements stipulated on the financial identification form*

a) The Commission quotes Article 64 of the rules for implementation of the Financial Regulation referring to Legal Entities Files.

However, at the time of my application no such reference was made in the invitation letter (Appendix 1 hereto), the respective form (Appendix 2 – the form as of 08.11.2007), the Privacy Statement for Legal Entity and Bank Account Validation (Appendix 3 – the statement as of 08.11.2007) published on the Commission’s respective website or on the website itself.

Furthermore, neither the quoted rules nor the Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities were communicated to me along with the interview invitation or separately.

When applying, I filled in the respective form and completed it with all supporting documents as requested at the time.

In view of the above, the Commission’s *post factum* argument is manifestly irrelevant and inadmissible.

b) The Commission further states that “[t]o be able to validate the complainant’s request, the Commission needed to have a duly completed financial identification form.” and specifies information to be contained by the supporting documents.

I claim that the financial identification form I submitted to the Commission (Appendix 4 hereto) was duly completed for the following reasons:

1. The Financial Identification form itself states in relation to the bank stamp and the signature of a bank representative and the alternative copy of a bank statement:

It is preferable to attach a copy of recent bank statement, in which event the stamp of the bank and the signature of the bank’s representative are not required. (excerpt from footnote number 3 of the submitted by me Financial Identification form).

By using the phrase "It is preferable", the footnote clearly **encourages** the submission of a bank statement copy, **favouring** it to the bank stamp and representative's signature. Moreover, the footnote **indisputably states** that a bank statement copy **replaces** the bank stamp and representative's signature.

2. Further to that, the Financial Identification form **itself does not at all pose** any specific requirements to the form or the contents of the bank statement – it simply reads “a copy of recent bank statement”. Moreover, **the form does not refer to any additional requirements** either as to how it should be filled in or to the supplementary documents.

In addition to the above two points, here I must also point out that the Financial Identification form explicitly states that the name filled in under “Account name” must be “**the name or title under which the account has been opened and not the name of the authorized agent**” (footnote number 1 of the submitted by me Financial Identification form).

Despite the fact that I have a full authorization to operate this account (which is our family account), in view of the requirement set by footnote number 1 of the Financial Identification form, I entered my spouse’s details in the Financial Identification form.

The Commission’s *post factum* explanation of what it would like the supplementary documents to contain (i) was not provided to the candidates and (ii) cannot be applied retroactively and is, therefore, manifestly inappropriate, irrelevant and inadmissible to this case.

c) The Commission states that “*not to delay validation unnecessarily, the official responsible ... contacted the complainant’s wife ... directly by telephone in order to check with her the exact account name for the bank account in question and its connection to the complainant.*”

In that relation I must point out that:

- this check was unnecessary as the exact account name was specified on the respective blank (see Appendix 4).
- the telephone conversation in question took place on 10 (or 09 at the earliest) January 2008 (see Appendix 5), whereas already on 02.01.2008 I myself had confirmed to the Commission’s PMO – Office for administration and payment of individual entitlements (hereafter referred to as “the PMO”) that the information on the financial identification form is correct (see Appendix 6).

d) The Commission also states that:

“*... on 20 December 2007, DG Budget’s validation team noticed that the form they had received had not been stamped by the bank/was not accompanied by a copy of a bank statement and therefore did not meet the quality criteria for validation. It ... asked the PMO to send the validation department the missing document... the PMO sent DG Budget a bank statement on 8 January 2008.*”

Having in mind that my documents were received by the PMO on 04.12.2007 (admitted also by the Commission in its opinion, section 3(3)), and that I received the partial reimbursement on 24.01.2008, thus the Commission *de facto* acknowledges that more than one and a half month of delay in the reimbursement process is due only to its internal failure.

2. *As regarding the Commission's observation on my second statement that you submitted to it, namely that it delayed unnecessarily the reimbursement process*

The Commission admits that over a month and a half of this delay has been due to its internal failure. However, it informs that steps have been taken to solve this particular problem. Since avoiding the same maladministration issues in the future was one of the expected outcomes of my complaint, I am satisfied with the outcome regarding this particular part of the delay.

The Commission has not provided any explanation why, having received a copy of my return ticket for a part of the road, which I was forced by the circumstances to buy on my way back (for details see complaint 2851/2008/TN), first as an electronic copy on 29.01.2008 and then as a hard copy on 05.05.2008, the reimbursement was delayed until 05.09.2008 (see also your letter 059060 of 16.10.2008).

In relation to this section of the Commission's opinion I would like to remind you that the wrongly withheld subsistence expenses reimbursement was not at all a subject of Complaint 2851/2008/TN and, respectively, of the request for opinion you submitted to the Commission.

Since the Commission raised the issue of this particular payment, however, and especially in view of the Commission's repeated allegation that "[t]he payment lacked any legal basis and was an exceptional payment" (section 1 of the opinion) and that "there was ... no legal basis for that payment" (section 2(2) of the opinion), I would like to bring up the following facts:

The "Rules for the reimbursement of travel and subsistence expenses for persons outside the Commission invited to attend a competition, interview or medical examination" (hereunder "Rules"), sent to me along with the invitation to the interview (see Appendix 8 for a copy of the Rules), in Article 8 on the subsistence expenses set explicitly "*the distance between the place of residence and the place where the competition, interview or medical examination is held*" as the eligibility criterion for the eligibility for subsistence expenses. The article further divides the above criterion into three categories and sets the amount of the subsistence expenses proportionally to the distance as follows (see also Art. 8 (1), (2) and the first paragraph from (3)):

- 1) The first category includes distances ranging from 0 km to 50 km from "*the place of residence and the place where the competition, interview or medical examination is held*". Applicants falling within this category receive "*no contribution to subsistence expenses*" (in other words, EUR 0).
- 2) The second category includes distances from 50 km + 1 to 150 km. Applicants falling within this category receive "*a flat-rate contribution of EUR 25*".
- 3) The third category includes distances exceeding 150 km. Applicants falling within this category receive "*a flat-rate contribution of EUR 50*".

As it can be seen from the above, the integrated eligibility-amount criterion sets no requirement or statement as of the duration of the competition, interview or medical examination as such.

The above principles of eligibility for and proportioning of the amount of the subsistence expenses are illustrated in Figure 1 on the next page.

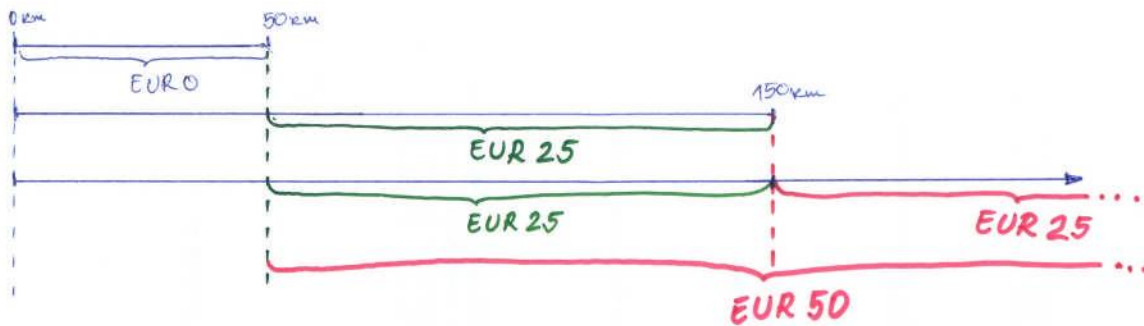


Figure 1. Principles of eligibility for and proportioning of the amount of the subsistence expenses.

Having made the above clear and in view of the Commission’s interpretation of the Rules regarding the daily allowance that “*The rules provide for a payment of €50 for each period of 24 hours covered by the trip*” (section 3(2) of the Commission’s opinion), thus referring to the provision of the second paragraph of Art. 8 (3) of the Rules, please note the following:

- a) The **paragraph itself does not refer to a period of 24 hours in relation to the hypothesis of a single day** taken up by the competition, interview or medical examination.
- b) The paragraph itself puts the cited by the Commission periods of 24 hours in brackets after the word “days”, thus making sure that **this clarification applies only to the hypothesis of a competition, interview or medical examination that takes more than a single day**. I claim that the legislator included this clarification for the following two reasons:
 - First and most, as a prerequisite to limit the payment of daily allowance only to the minimal number of days actually needed by the candidate to finish the competition, etc., and no more days (e.g., no allowance will be paid to the candidate to stay additional couple of days for sightseeing, etc.).
 - Second, in view of the fact that, unlike in other languages (e.g., in Bulgarian: *денонощие*, in Russian: *сутки*), in the English language there is no word describing specifically a complete day-night cycle (24-hr cycle), and in English the word “day” may be used to describe several very different concepts according to the context – for an example see the word’s definition in the Merriam-Webster Online Dictionary:

“**day**

1 a: the time of light between one night and the next **b:** daylight **1 c:** daytime;

2: the period of rotation of a planet (as earth) or a moon on its axis;

3: the mean solar day of 24 hours beginning at mean midnight;

4: a specified day or date.”

(Merriam-Webster Online Dictionary: <http://www.merriam-webster.com/dictionary/day>).

- c) The above claims are further confirmed by the following provision of the Rules:

“*Candidates who, after the competition, interview or medical examination, cannot return to the place specified in the invitation before midnight shall be entitled to an additional allowance of EUR 50.*” The following major conclusions can be drawn from this provision:

- midnight is the borderline of the day of the competition, etc., for which the flat-rate contribution of EUR 50 is due;
- based on the above conclusion and taking into consideration the second paragraph of Art. 8 (3) and the meanings of the word “day” it can be further concluded that **for the purpose of**

the Rules a “day” means “the mean solar day of 24 hours beginning at mean midnight” (as defined by the Merriam-Webster Online Dictionary);

- candidates can be able to return to the place specified in the invitation **before midnight** after the competition, etc. (e.g., at 23:59), which **can also involve night travelling**;
- **an additional daily allowance of EUR 50 shall be paid to those candidates who cannot return to the place specified in the invitation before midnight** after the event, i.e. to those candidates who, for some reasons (e.g., logistical – no train or plane connection to the place specified in someone’s invitation after the competition, etc., or the respective transportations means arrives at its final destination after midnight), cannot arrive back at the specified location on the day of the competition, etc., and begin a new day away from the place specified in the invitation.

The described cumulative effect is illustrated in the following figure:

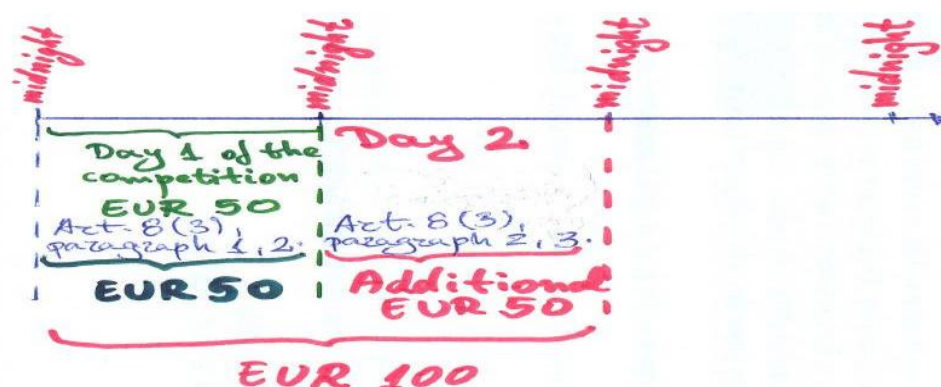


Figure 2. Cumulative effect of the number of days on the daily allowance.

As it is clear from the above analysis, the paragraph in question is not a formal requirement that the competition, etc., take at least 24 hours in order for the applicant to be eligible for reimbursement of the EUR 50 daily allowance.

Furthermore, it is also not a formal requirement that the applicant stays at a hotel in order to receive either the single or the double daily allowance – the only eligibility criterion is midnight after the competition, etc.

Therefore, the Commission’s interpretation of this article is manifestly incorrect and inadmissible.

A further analysis of Article 8 (3) of the Rules reveals that the article itself states **that the daily allowance shall ALSO cover expenses incurred as a result of the need to spend a night** at the place where the competition, etc., is held. I argue that the legislator included this statement in order **to make certain that it is in fact NOT the daily allowance’s main objective (purpose) to cover hotel accommodation** while at the same time providing for limited financial support to those candidates who would need to spend a night at the place where the competition, etc., is held.

The above argument is further supported by the fact that the legislator has provided candidates who would need to spend a night at a place that is not the place specified in the invitation with an **additional allowance of EUR 50** in order to cover for their associated expenses.

The above analysis confirms my claim that the flat-rate allowance of EUR 50 per day is due for the day or, in the case of more than one day, for every day spent on the competition, etc., and related travel

from the day of the candidate's departure for the competition, etc., until the day that the candidate has returned to the place specified in the invitation, where for the purpose of the Rules a "day" means "the mean solar day of 24 hours beginning at mean midnight" (see bullet c) above).

Further to the above and having in mind that the logic of legal acts follows the structure of the act (unless stated otherwise), it should be concluded that, since the eligibility-amount criterion, which, as already mentioned, does not itself set any requirement as of the duration of the competition, etc., is set out in a separate paragraph that precedes the paragraph treating the additional allowance criterion, the first criterion outweighs the second one and the EUR 50 daily allowance is due in all cases.

For the purpose of an academic exercise aimed to demonstrate in a different way the incorrectness of the Commission's interpretation of the Rules, I will accept purely hypothetically that there is some dependence of the flat-rate contribution from the third category listed above on (i) the duration of the competition, etc., and (ii) the need for an applicant to spend a night at the place where the event is held. However, even if that would have been the case, as Figure 1 above clearly shows, applicants falling within this category who have been able to return to the place specified in the invitation before midnight within a single day should have the right to receive at least EUR 25 – the amount to which applicant from the second category, for whom no spending of the night away from the place specified in the invitation is even envisaged, are entitled. Yet, the Commission's interpretation of the Rules deprives applicants from the third category who have been able to return to the place specified in the invitation before midnight within a single day of any daily allowance, thus in fact discriminating against these applicants. Again, this is not the case and the Rules clearly entitle all applicants from the third category to a flat-rate daily allowance of EUR 50 even in cases where the competition, etc., took only a single day.

All of the above confirms my claim that **I comply with the eligibility criterion for daily allowance of EUR 50** (the distance between my place of residence and Brussels is about 280 km and I only needed one day for the interview and related travel), and **I am entitled to receive daily allowance for only one day, i.e. EUR 50.**

Further to the above, and in particular in view of the Commission's repeated statement that it had made the disbursement of the subsistence expenses "*in order to show the Ombudsman our genuine willingness to solve the problem*" (section 3(2) of the opinion) and "*as a gesture of goodwill by the Commission towards the Ombudsman*" (section 4 of the opinion), I would like to bring up the following facts:

- A) In its letter dated 19.08.2008 (Appendix 7), the Director of the PMO informed me that the payment of the remaining part of the reimbursement is made "*in the light of the additional explanations that [I] have provided*".
- B) In your letter No 059060 of 16.10.2008 you informed me that you had contacted the Commission and had been informed by it that the missing amount had already been paid to me on 05.09.2008 – long before you contacted it on the issue.

The Commission's above statements are manifestly inappropriate since by that time it could not have known of my complaint and is, therefore, inadmissible.

- C) The Commission's reference to my earlier complaint lodged with the Ombudsman in the context of this payment is manifestly inappropriate since the respective complaint to the Ombudsman was

never submitted to the Commission and, hence, the latter could not have known of it when taking the decision to transfer the money.

Therefore, this reference is inadmissible.

3. *As regarding the Commission's observation on my third statement submitted to it by you, namely that it provided me with contradictory information*

In its opinion the Commission distinguishes between "receiving" and "recording" data. While I generally agree with the argumentation in the respective section, I must point out that even in its present opinion the Commission confuses the two terms: while in section 3(3) it explicitly states that my reimbursement claim was "*received ... on 4 December 2007*" and my "*personal and financial data were recorded on 11 December 2007*", in the last paragraph on page 2 the Commission states that my spouse's name "*was given on the financial identification form received on 11 December 2007*" (emphasis added).

In that relation I must admit that as a sovereign of the European institutions, whom these are deemed to serve, and a taxpayer, funding these institutions, respectively – their staff, through my taxes, I cannot decide which idea I like less: that the Commission's staff is mixing the terms on purpose in order to confuse me or that they really do not know what they write about.

4. *As regarding the Commission's observation on my fourth statement that you submitted to it, namely that it failed to reply to my complaint of 29 April 2008 within the deadlines set out by the Code of Good Administrative Behaviour*

The Commission alleges that I have "*made a number of simultaneous complaints at various levels, which ... made it difficult to keep a clear overview of how far each of those responses had progressed.*"

I most strongly disagree with this allegation since I never submitted simultaneous complaints. My complaints followed strictly the hierarchy of the Commission and I only submitted a complaint to the next higher level after having exhausted all possibilities for reaching a satisfactory solution at the lower level: I first contacted Mr. Bigard from the PMO on 14.12.2007 and then again on 17.12.2007; having not received any reply from him even though he had read both my communications, I contacted the Director of the PMO on 21.12.2007.

My last communication to the PMO, with which I seek to find a solution through direct negotiations and which was duly delivered to its intended recipients, and to which I never received a reply, is dated 29.01.2008.

Not having received any reply to my last communication to the PMO (see above) for three months, on 29.04.2008 I submitted a formal complaint to the President and the Secretary-General of the Commission, which was received by the Commission on 05.05.2008. Since over a month later I still had not received any reply from the Commission to my complaint, on 16.06.2008 I submitted a respectful reminder to the Commission, which was received the very same day (see the respective appendices to my Complaint 2000/2008/TN re-registered as 2851/2008/TN).

It was only on 26.08.2008 that I finally heard anything from the Commission regarding my formal complaint (see Appendix 7); however, the letter merely informed me that "*in the light of the additional explanations that [I] have provided*" the Director of the PMO had ordered the payment of the remaining part of the reimbursement and did not at all elaborate on the other issues described in my complaint.

Therefore, this argument is manifestly incorrect and inadmissible.

5. As regarding the Commission's conclusion

The Commission concluded that my “*various complaints ... relate to a single reimbursement request, for which an additional payment has now been made.*”

This conclusion is manifestly inappropriate to Complaint 2851/2008/TN since the opinion is submitted on a single complaint (Complaint 2851/2008/TN) as noted both in the Commission's cover letter and in section 2 of the opinion and is therefore inadmissible.

The Commission further states in its conclusion that “*That payment was justified solely for the sake of resolving the complaints made by the complainant at various levels and as a gesture of goodwill by the Commission towards the Ombudsman.*”

This statement is manifestly incorrect and inadmissible (i) since the wrongly withheld subsistence expenses payment was not at all a subject of the said complaint, and (ii) in view of the arguments brought up in section II.2 above.

III. CONCLUSIONS

- The Commission uses manifestly incorrect, irrelevant, inappropriate and inadmissible arguments in its opinion.
- By bringing up the subject of the wrongly withheld subsistence expenses reimbursement, the Commission simply attempts to sidetrack the argument about its failures resulting in instances of maladministration as described.
- The Commission admits that a part of the unnecessary delay in the reimbursement process subject of Complaint 2851/2008/TN has been due to its internal failure.
- The Commission claims to have taken steps to eliminate the cause of the above particular part of unnecessary delay.
- The commission has not provided any explanation on the remaining delay in the reimbursement of the return ticket.
- Maladministration issues remain, including confusing terminology even in the Commission's opinion subject to these observations (see section II.3 above).

Dear Mr. Ombudsman,

I trust that, based on your findings in relation to this complaint, you will suggest actions to be taken by the Commission in order to improve its work.

Should you have any questions in relation to the above or need further clarifications in relation to my complaint, please do not hesitate to contact me by e-mail at [confidential] or on my cell phone: [confidential].

Looking forward to your reply, for which I thank you in advance.

Sincerely,

Svetoslav Apostolov

Appendices: As per text (19 pages altogether).