ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
22 May 2000 *

In Case T-103/99,

Associazione delle Cantine Sociali Venete, established in Padua, Italy, represented by I. Cacciavillani, of the Venice bar, and A. Cimino, of the Padua bar, with an address for service in Luxembourg, at the chambers of A. Lorang, 51 rue Albert 1er,

applicant,

v

European Ombudsman, represented by G. Grill, principal administrator at the secretariat of the Ombudsman, acting as agent, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

and

European Parliament, represented by H. Krück and A. Caiola, members of the Legal Service, acting as agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendants,

* Language of the case: Italian.

APPLICATION for a declaration that the Ombudsman and, as the case may be, the Parliament unlawfully failed to make a finding of maladministration on the part of the Commission,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, M. Vilaras and N. Forwood, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

1 Article 138e of the EC Treaty (now Article 195 EC) states that:

'1. The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person

residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

4. The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.'

2 On 9 March 1994, in accordance with the fourth paragraph of Article 138e of the Treaty, the Parliament adopted Decision 94/262/ECSC, EC, Euratom, on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

3 Article 14 of Decision 94/262 provides that the Ombudsman is to adopt the implementing provisions for that Decision.

4 The Ombudsman's Annual Report for 1997 (OJ 1998 C 380, p. 1) states that on 16 October 1997, in accordance with Article 14 of Decision 94/262, he adopted implementing provisions which came into effect on 1 January 1998. The text of these provisions has been published in all the official languages of the Union on the Ombudsman's web site.

5 The procedure for examining a complaint to the Ombudsman is thus laid down by Article 138e of the Treaty, by Decision 94/262 and by the provisions for implementing that decision. It follows from these provisions as a whole that when he establishes a case of maladministration in the activities of an institution, the Ombudsman is to co-operate so far as possible with the institution in order to find a friendly solution capable of eliminating the instance of maladministration and of satisfying the citizen. If such a solution is found, the Ombudsman closes the case with a reasoned decision and informs the citizen and the institution in question (hereinafter 'the parties concerned').

6 On the other hand, if the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned 'decision', which may include a critical remark, or makes a report with draft recommendations. In particular, the Ombudsman makes such a remark if he considers that it is no longer possible for the institution concerned to eliminate the instance of maladministration and that the instance of maladministration has no general implications. If this is not the case, he makes a report with draft recommendations to the institution concerned (see Articles 7(1) and 8(1) of the implementing provisions).

7 The Ombudsman sends a copy of this report and his draft recommendations to the parties concerned. The institution concerned must send the Ombudsman a detailed opinion within three months. The opinion may accept the report and, in appropriate cases, describe the measures taken to implement the recommendations in the decision. If the Ombudsman does not consider that the detailed opinion is satisfactory he draws up a special report to the European Parliament in relation to the instance of maladministration. That report may contain recommendations. A copy of the report is also sent to the parties concerned.

Facts and procedure

8 The Associazione delle Cantini Sociale Venete is an association governed by Italian law, whose membership comprises wine-producing companies and co-operatives. Its objects include the promotion and defence of the interests of its members.

9 On 3 June 1997, the applicant lodged a complaint with the Ombudsman following the Commission's refusal under Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58) to give it access to a number of documents which formed the basis for the regulations which determined, for each Member State in respect of the marketing year 1993/94, the quantities of table wines requiring obligatory distillation.

10 On 25 July 1997, the Ombudsman sent the applicant's complaint to the Commission, which gave its opinion on 24 September 1997.

11 On 2 December 1997, the applicant provided the Ombudsman with its observations on that opinion.

12 On 15 December 1998, in accordance with Article 175 of the EC Treaty (now Article 232 EC), the applicant called upon the Ombudsman to define his position on the complaint.

13 As it had received no response within the period of two months laid down by Article 175, the applicant brought the present action by application lodged with the Court Registry on 27 April 1999.

14 By document lodged with the Court Registry on 17 June 1999, the Parliament raised a preliminary objection of inadmissibility under Article 114 of the Rules of Procedure.

15 By letter of 30 April 1999, the Ombudsman informed the applicant of the result of his enquiry which followed the complaint. By separate document, lodged with the Court Registry on 18 June 1999, he requested an order from the Court under Article 113 of the Rules of Procedure that there was no need to adjudicate on the application.

16 On 11 August 1999, the applicant submitted its observations on this request and on the objection of inadmissibility raised by the Parliament.

Forms of order sought

17 The applicant claims that the Court should;

— dismiss the objection of inadmissibility:

— adjudicate in accordance with the law on the request for an order that there is no need to adjudicate on the application;

— declare that the Ombudsman and, as appropriate, the Parliament unlawfully failed to make a finding of maladministration on the part of the Commission;

— make an order as to costs.

18 The Parliament claims that the Court should:

— dismiss the application as manifestly inadmissible;

— make an order as to costs in accordance with the Rules of Procedure.

19 The Ombudsman claims that the Court should:

— find that there is no need to adjudicate on the application;

— make an equitable order as to costs.

The objection of inadmissibility

Arguments of the parties

20 The Parliament submits that the application is manifestly inadmissible.

21 First, it maintains that it follows from the provisions of the EC Treaty that the Ombudsman is not a Community institution within the meaning of Article 4 of the EC Treaty (now Article 7 EC), but an organ of the European Communities empowered to receive complaints, in accordance with Article 138e of the Treaty, from natural or legal persons residing or having their registered office in the Union, concerning instances of maladministration in the activities of the institutions.

22 It is apparent from Article 138e of the Treaty that the Ombudsman has no connection with the Community institutions. Furthermore, under Article 175 of the Treaty, an action for failure to act may be brought only against the Parliament, the Council and the Commission. In that regard, the Parliament submits that the effect of Article 1(3) of Decision 94/262 is that the Ombudsman may not intervene in cases before the courts or question the soundness of a court's ruling.

23 According to the Parliament, the Ombudsman is not its organ, and even though he is appointed by it he nevertheless performs his duties completely indepen-

dently. The absence of any connection between the Parliament and the Ombudsman is likewise shown by the fact that it is the Court of Justice, at the request of the Parliament, which dismisses him if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

24 The Parliament further argues that, since measures taken by the Ombudsman are not acts within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 CE), the applicant cannot complain of any failure to act in regard to it (Joined Cases T-169/98 and T-170/98 *Schiocchet* v *Commission*, (not published in the ECR).

25 Secondly, the Parliament claims that in so far as the application refers to it as a defendant 'as appropriate' it does not comply with the requirements of Article 44(1)(b) of the Rules of Procedure. Both the principle of legal certainty and the principle of good administration require that a defendant be defined clearly and unequivocally.

26 Thirdly, the application is likewise inadmissible because, contrary to Article 175 of the Treaty, the applicant has not first called upon the Parliament to act. On any view, the Parliament would have been plainly incompetent to act and to intervene in a case involving an alleged refusal by the Commission to provide access to its documents. The fact that the Ombudsman is required under Article 3 of Decision

94/262 to send a report to the Parliament where he finds there has been maladministration by an institution does not mean that the Parliament may intervene in the inquiries carried out by the Ombudsman. Such a report is addressed to the Parliament only for information purposes, to enable it to exercise control over the activities of the Ombudsman.

27 Lastly, the Parliament observes that the Court could decide that there is no need to adjudicate given that the Ombudsman defined his position on the applicant's complaint on 30 April 1999, after the application was lodged.

28 The Ombudsman submits that the letter of 30 April 1999, which was sent to the applicant and informed it of the result of his investigation, ended the inactivity on his part of which the applicant complained. Consequently, and independently of the fact that measures taken by him are not binding, there is no need to adjudicate on the application.

29 While it disputes that the exception of inadmissibility raised by the Parliament is well founded, the applicant defers to the judgment of the Court as regards the defendants' request for an order that there is no need to adjudicate on the application.

30 In particular, having regard to the legal status of the Ombudsman, the applicant disputes that he cannot be considered to be an 'organ' of the Parliament.

31 It observes in this connection that the status of the Ombudsman is described in Part Five, Title I, Chapter 1 of the Treaty, relating to the Institutions, and in particular in Section 1, concerning the Parliament.

32 It also refers to the fact that the Parliament appoints the Ombudsman for the duration of the legislature and that it has the power to fix his rights and duties and the general conditions applying to the performance of his duties, and to request the Court of Justice to dismiss him. It states that the Ombudsman, whose seat is that of the Parliament, must submit to it an annual report and, in particular cases of maladministration in the activities of an institution, a special report. Lastly, the applicant points out that the Ombudsman's budget appears in an annex to Section 1 (Parliament) of the general budget of the European Communities (see Articles 12, 13 and 16 of Decision 94/262).

33 The applicant states that, even from a functional point of view, the activities of the Ombudsman are connected with those of the Parliament and are complementary to them (as is evidenced by his co-operation with the Parliament's Committee on Petitions). Furthermore, the Parliament has the power to issue instructions to the Ombudsman when it scrutinises his annual report.

34 It follows that, since the Ombudsman is an organ of the Parliament, the application relates in reality to the Parliament's failure to act, and accordingly that the application complies with the requirements as to admissibility laid down by Article 175 of the Treaty.

35 According to the applicant, even if the Ombudsman is not an organ of the Parliament, it is nevertheless the case that an evolutionary interpretation of the

relevant provisions would lead to the conclusion that an action for failure to act against the Ombudsman would be admissible in order not to deprive his extra-judicial function of all effect (Case 294/83 *Parti écologiste 'Les Verts'* v *European Parliament* [1986] ECR 1357).

36 In this context, the applicant refers to Article 138e of the Treaty and also to Decision 94/262, from which it is evident that the Ombudsman has a duty and not a power to act to resolve cases of maladministration. Furthermore, it follows from Decision 94/90 that the Commission's decision rejecting a request for access to its documents should be properly reasoned and indicate to the interested party 'the means of redress that are available, i.e. judicial proceedings and complaints to the Ombudsman, under the conditions specified in, respectively, Articles 173 and 138e of the Treaty establishing the European Community'. If the Ombudsman were not required to act following the lodging of a complaint regarding a refusal by the Commission to provide access to its documents, his role would be deprived of meaning.

37 As regards the question whether the acts of the Ombudsman produce legally binding effects, the applicant submits that the acts cannot be likened to mere 'opinions' or 'recommendations'. The Ombudsman's intervention is designed to provide a form of 'extrajudicial justice', which can be clearly distinguished from traditional 'non-binding' interventions by the Community institutions. Thus, in the case of access to documents (see paragraph 36 above), the complaint lodged with the Ombudsman represents a form of 'action through official channels' whose aim is to resolve conflicts between the citizen and the institution concerned. In this context, the applicant refers to the Ombudsman's letter of 30 April 1999, in which he concludes that the critical comments made against the Commission mean that the Commission should reconsider the applicant's confirmatory application and give it the access to the documents it had requested, save where one of the exceptions listed in Decision 94/90 applied.

38 According to the applicant, even if the measures taken by the Ombudsman were to have no binding legal effect, the case-law requires that an action for failure to

act may also relate to an omission on the part of the institution concerned to adopt such measures, when these represent a necessary condition for the adoption of other legally binding measures (Case 8/71 *Deutscher Komponistenverband* v *Commission* [1971] ECR 705). Where, as in the present case, the Commission, following a decision of the Ombudsman confirming a case of maladministration, is required to reconsider a request for access to its documents, a failure by the Ombudsman to take such a 'decision' represents a failure to act within the meaning of Article 175 of the Treaty, as this decision is a necessary condition for the purposes of the abovementioned case-law.

39 In any event, to rule out the possibility of lodging an action for failure to act against the Ombudsman represents, according to the applicant, a denial of justice.

40 Lastly, as regards the Parliament's claim that it has not been invited to act, the applicant states that it is unfounded, because the Ombudsman should, for the reasons given above, be considered to be an organ of the Parliament.

Findings of the Court

41 It should first be recalled that when, in the context of an action for failure to act, the act whose omission is the subject matter of the dispute has been adopted after the lodging of the application but before the delivery of a judgment, the application is deprived of its purpose with the result that there is no longer any need to adjudicate (Case T-212/95 *Oficemen* v *Commission* [1997] ECR II-1161). Nevertheless, in the present case, for the Court to declare that there is no need to adjudicate on it and to give its decision as to costs, the rules governing the admissibility of the application, based on Article 175 of the Treaty,

must first be satisfied. It is therefore necessary to consider the objection of inadmissibility raised by the Parliament.

42 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court may decide the question of inadmissibility as a preliminary issue. By virtue of Article 114(3), the remainder of the proceedings are to be oral, unless the Court otherwise decides. In the present case, the Court is of the view that it is sufficiently well informed by the documents before it to answer the question without initiating the oral procedure.

43 According to the third paragraph of Article 175 of the Treaty, '[a]ny natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the [Court of First Instance] that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion'.

44 According to Article 4 of the Treaty, the realisation of the tasks entrusted to the Community are to be carried out by the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. Each of these institutions is to act within the limits of the powers conferred on it by the EC Treaty. In addition, the Treaty provides for a European Central Bank (Article 4a of the EC Treaty (now Article 8 EC)) and also for a European Investment Bank (Article 4b of the Treaty (now Article 9 EC)), which are also to act within the limits of the powers and responsibilities conferred on them by the Treaty and the statutes annexed to it.

45 Lastly, under Article 11(4) of Decision 94/262, 'in matters concerning his staff, the Ombudsman shall have the same status as the institutions within the meaning of Article 1 of the Staff Regulations of Officials of the European Communities'.

46 It follows from these provisions that the Ombudsman is not a Community institution within the meaning of Article 175 of the Treaty, so that the application, to the extent that it refers to a failure to act on the Ombudsman's part, must be declared inadmissible.

47 As regards the question whether it is nevertheless admissible to the extent that it is directed against the Parliament, it should be observed that, even if for the purposes of this application the Ombudsman were in fact to be considered as an organ of the Parliament, an action for failure to act made by a natural or legal person is nevertheless admissible only when the institution in question has failed to address to that person an act other than a recommendation or an opinion or to adopt a measure which would have concerned him directly and individually (Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, paragraph 59).

48 It follows from an examination of Article 138e of the Treaty, of Decision 94/262 and of the provisions implementing that decision, that when the Ombudsman makes a finding of maladministration in the activities of an institution he is required to provide a report to the Parliament in which he may, if he considers it appropriate, make recommendations. The person lodging the complaint is simply informed by the Ombudsman of the outcome of the enquiries and of the opinion expressed by the institution concerned (see paragraph two of Article 138e(1) of the Treaty and Article 3(7) of Decision 94/262).

49 The action for failure to act would therefore be admissible only if the report in question constituted, with respect to the applicant, a challengeable act of direct and individual concern to it within the meaning of the fourth paragraph of Article 173 of the Treaty.

50 In so far as the report sent to the Parliament merely finds a case of maladministration in the activities of an institution and, where appropriate, makes recommendations, it does not, by definition, produce legal effects *vis-à-vis* third parties within the meaning of Article 173 of the Treaty, and is furthermore

not binding on the Parliament, which is free to decide, within the framework of the powers conferred on it by the Treaty, what steps are to be taken in relation to it. The same applies *a fortiori* to the annual report which the Ombudsman must also submit to the Parliament at the end of each annual session relating to the outcome of his enquiries (see the second paragraph of Article 138e(1) of the Treaty and Article 3(8) of Decision 94/262).

51 The application must therefore be dismissed as inadmissible because the only measure by which the applicant could have gained satisfaction would have been, under Article 138e of the Treaty, the submission to the Parliament of a report finding a case of maladministration in the activities of the Commission, and such a report is not capable of being classified, by reason of its form or of its nature, as a measure capable of being challenged in annulment proceedings (Case T-167/95 *Kuchlenz-Winter* v *Council* [1996] ECR II-1607, paragraphs 20 and 21, Case T-201/96 *Smanor and Ségaud* v *Commission* [1997] ECR II-1081, paragraph 25).

52 This conclusion is not altered by the applicant's argument that it follows from the code of conduct on access to Commission and Council documents, annexed to Decision 94/90, that the defining of a position by the Ombudsman is a necessary condition for the Commission to reconsider its decision to refuse access to its documents. As has just been stated, while the report which the Ombudsman is required to send to the Parliament when he has found a case of maladministration in the activities of an institution may have the effect of influencing the Commission's attitude to the request for access to the applicant's documents, it produces no legally binding effects, in the sense of requiring the Commission to accept the report's conclusions and, where appropriate, to adhere to the recommendations in it. Nor is an obligation of this kind imposed on the Commission by any provision of the applicable regulations.

53 Lastly, the fact that the code of conduct on access to Commission documents annexed to Decision 94/90 refers to the 'means of redress that are available' as

including both an action for annulment and complaints to the Ombudsman does not, in the absence of an express provision in the Treaty, in any way alter the status of the Ombudsman as it is set out in Article 138e of the Treaty, nor does it make the effects of the submission of a complaint to the Ombudsman equivalent to those of the lodging of an application for annulment. While Article 176 of the Treaty (now Article 233 EC) states that the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaty is required to take the necessary measures to comply with the judgment of the Court of Justice, Article 138e of the Treaty provides only that if the Ombudsman establishes an instance of maladministration in the activities of an institution he is required to forward a report to this effect to the Parliament.

54 It follows from the above that the applicant's argument that the impossibility of bringing an action against the Ombudsman for failure to act amounts to a denial of justice is founded on false premises regarding both the status of the Ombudsman and the extent and nature of his powers as laid down in Article 138e of the Treaty and must accordingly be dismissed.

55 It follows from all the above that the application must be declared inadmissible.

Costs

56 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In this case, the Parliament has requested the Court to make an order as to costs in accordance with the provisions of the Rules of Procedure. This form of order sought cannot be regarded as a request that the applicant should be ordered to pay the costs (Case C-255/90 P *Burban* v *Parliament* [1992] ECR I-2253, paragraph 26). The parties must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. The action is dismissed as inadmissible;

2. The parties shall bear their own costs.

Luxembourg, 22 May 2000.

H. Jung — Registrar

B. Vesterdorf — President