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Is an Illegal Community Act Necessarily an Instance of Maladministration, in the Sense of Article 195 EC?

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Abstract

Under Article 195 EC, the European Ombudsman inquires into cases that involve possible instances of maladministration in the activities of the Community institutions or bodies. The Ombudsman has indicated that illegality necessarily implies maladministration. However, this principle does not appear to be absolute. Indeed, as analysed in the present paper, there seem to be, at least, three categories of Community acts which may not fall within its scope. The first one concerns the notion of '(mal)administration,' in relation to 'non-administrative' activities of the Community. The second category encompasses cases of (possibly) illegal interpretation of Community acts of legislative/regulatory nature or cases of compliance of a Community institution with such (possibly) illegal acts. The last category refers to cases where there is not a sufficient causal link between the illegality and the behaviour of the relevant institution.

I Introduction – Maladministration and Illegality

Article 195 of the EC Treaty empowers the European Ombudsman to inquire, either on his own initiative or on the basis of complaints submitted to him, into cases that may involve 'instances of maladministration in the activities of the Community institutions or bodies, with the exception of the [Community Courts] acting in their judicial role.' The term 'maladministration,' which is of central importance for the Ombudsman's mandate and work, is defined neither in the EC Treaty nor in the Statute of the Ombudsman. In his Annual Report for 1997,[2] and in response to a call for clarification by the European Parliament, the first European Ombudsman, after consulting his national counterparts, adopted the following definition: 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.'[3] This

[1] The present document expresses the author's personal views.

[2] See p. 22-23. The Ombudsman's annual reports, draft recommendations and decisions following an inquiry are published on his website: www.ombudsman.europa.eu.

[3] The term 'public body' in this definition should be deemed, for the purposes of applying Article 195 of the EC Treaty, as referring to 'Community institutions and bodies.' Pursuant to Article 41 of the EU Treaty, Article 195 of the EC Treaty is also applicable to the areas of police cooperation and judicial cooperation in criminal matters, provided for in Title

definition did not identify the nature of the rules or principles referred to therein and left open the fundamental question of the relationship between 'maladministration' and illegality. The current European Ombudsman has explained, in a keynote paper,[4] that good administration leads to obligations that may go beyond legal obligations, for example when it comes to courtesy and service-mindedness, and hence, maladministration does not automatically entail illegality.[5] At the same time, he has also referred to the rule that illegality implies maladministration.[6]

If the notions of maladministration and illegality are illustrated by two circles, the possible relationship between these two notions may be presented as corresponding to one of the following five alternatives: 1) the two circles are completely distinct and do not coincide; 2) the two circles are not distinguishable and coincide perfectly; 3) the circle of illegality surrounds the circle of maladministration; 4) the circle of illegality is included in toto in the broader circle of maladministration; 5) the two circles coincide, but only partially.

Under Article 195 EC, as interpreted and applied by the European Ombudsman and the Community courts,[7] the first three alternatives have to be excluded. Furthermore, the Ombudsman's approach in his paper referred to above could be seen as favoring the fourth model. I would argue, however, also taking into account the Ombudsman's case-law, that the principle 'illegality implies maladministration' is not absolute and that there are at least three categories of cases which may not fall within its scope, as discussed below. Consequently, I conclude that the above-mentioned fifth model is the one to be selected.

VI of the EU Treaty ('third pillar' activities). Hence, maladministration in the activities of Europol and Eurojust also comes within the Ombudsman's remit. By contrast, the Ombudsman's mandate does not cover the area of the 'second pillar' (common foreign and security policy).

4 See P. Nikiforos Diamandouros, 'The relationship between the principle of good administration and legal obligations,' in *Liber Amicorum in honour of Bo Vesterdorf* (Bruylant 2007), p. 315 et seq.

5 See also Joined Cases T-219/02 and T-337/02 *Herrera* v. *Commission* [2004] ECR-SC I-A-319, II-1407, para. 101; Case T-193/04 *Tillack* v. *Commission*, [2004] ECR II-3575, para. 128; Case C-167/06 P *Komninou and others* v. *Commission* [2007] ECR I-141, para. 44.

6 *Op. cit.*, p. 329.

7 See footnotes 4 and 5.

II '(Mal)Administration,' Non-Administration and the Ombudsman's Mandate

A General Considerations

Article 195 of the EC Treaty refers to 'instances of maladministration in the activities of the Community institutions or bodies.' The concept of '(mal)administration' in Article 195 is, thus, substantive: it refers to elements or aspects of the functioning of Community institutions or bodies, rather than to the Community 'Administration.' Moreover, the use of the term '(mal)administration' clearly indicates that the relevant (problematic) aspect of the Community's functioning is one involving 'administration.' This remark, which is of central importance for the interpretation and application of Article 195 EC, reflects not only its wording but also its historical background. Indeed, the essential, if not exclusive, role of national Ombudsmen in the European States which had already created such an institution at the time of the Treaty of Maastricht, was the monitoring of public administration (activities), as a mechanism supplementing parliamentary monitoring instruments.[8] This still seems to be case.[9]

Although it is risky to draw analogies between the institutional system and the arrangements in the Community and in its Member States, one should not disregard the aforementioned general characteristics of the ombudsman's institution. Taking the above properly into account, it is reasonable to reach the conclusion that Article 195 concerns, at least in principle, the types of activities that are normally performed by the public administration, in particular, activities involving implementation/execution of legislative rules. This remark will be elaborated further below, in regards to political and normative activities. In relation to the judiciary, Article 195 provides explicitly that, when the Community Courts carry out their judicial role, they are exempted from the Ombudsman's supervision. Hence, acts which are closely related to the performance of the Courts' judicial function, such as decisions on requests for access to documents in the file of a court case, are excluded from the Ombudsman's mandate,[10] even if they might concern matters of procedure before the courts or the 'administration' or justice. By contrast, tender or recruitment procedures organised by the Community Courts are 'administrative' activities clearly severable from

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[8] See Hans Gammeltoft-Hansen, 'Trends leading to the establishment of a European Ombudsman,' in *The European Ombudsman – Origins, establishment, evolution, Commemorative volume published on the occasion of the 10th anniversary of the institution* (OPOCE 2005), p. 14-15; Gabrielle Kucsko-Stadlmayer, 'The Competences of European Ombudspersons – A Survey,' published on the Internet (www.oio-europe.org/news/OmbVortr%20Kucsko.pdf), p. 3.

[9] See Gabrielle Kucsko-Stadlmayer, *op. cit.*, p. 7.

[10] See decision on complaint 126/97/VK.

the performance of their judicial role and amenable to the Ombudsman's review.[11]

B 'Administrative' as Opposed to 'Political' Activities

Although the element of 'administration,' as discussed above, is not included, at least explicitly, in the definition of maladministration adopted by the Ombudsman in 1997 and has not been defined in the Ombudsman's case-law, it appears to have been recognised by him as an essential part of the concept of 'maladministration,' under Article 195 EC. In this regard, and for the purposes of assessing whether a case involves a possible instance of maladministration, the Ombudsman has made, in particular, a distinction between 'decisions of a political rather than administrative nature' and an activity which 'cannot be entirely considered as a political activity,' but constitutes, from a certain perspective, 'an administrative activity subject to relevant Community rules.'[12] This last holding, in conjunction with the aforementioned definition of maladministration, could give the impression that any activity of a Community institution may involve 'maladministration' to the extent it is subject to (not necessarily legal) rules or principles that the institution has to respect. Nevertheless, such a conclusion would be erroneous. Indeed, the Ombudsman has consistently held that the European Parliament's Committee on Petitions' dealing with a letter registered as a petition[13] forms part of Parliament's political work and, as such, falls outside his mandate. In this context, it is the nature and subject-matter of a certain *type of activity* which is crucial and justifies its exemption, *in its entirety*, from the Ombudsman's review for maladministration,[14] although aspects of the activity itself could involve violations of rules binding on the institution, including legal rules. For example, there might be a legal error in the Committee's report or opinion on a petition concerning a Commission decision rejecting a complaint about infringement of Community law by a Member State.

In addition, the Ombudsman recently suggested that an 'administrative' decision of the European Parliament (like one refusing access to documents held by it), may subsequently become 'political' in nature, if its content is approved, in essence, by a decision made by Parliament's Plenary, in the

[11] See, e.g., decision on complaint 2451/2005/DK; decision on complaint 1442/2003/GG.

[12] See decision on complaint 1163/97/JMA (concerning a recruitment procedure for the selection of temporary agents by the European Parliament's political groups).

[13] Pursuant to Article 156(1) of the Rules of Procedure of the European Parliament, a petition may refer to any matter which comes within the European Union's fields of activity and affects the petitioner directly.

[14] It is clear that other activities of the European Parliament, such as its decisions on applications for access to documents held by it or to its premises, may be examined by the Ombudsman for maladministration.

exercise of a political function (such as a decision on the discharge of the implementation of the EU budget). In a case of this kind, given that MEPs are directly elected by the peoples of Europe and therefore politically responsible *vis-à-vis* the electorate as regards political decisions of the Plenary, 'the concept of political responsibility, rather than the one of possible maladministration, comes into play.'[15] The Ombudsman went on to point out that '[t]his is an element of central importance in the functioning and in the system of checks and institutional balances of the European Union.' This statement clearly indicates that the notion of 'maladministration' is to be viewed, in particular, in light of the institutional system of the EU.

C Administration and Rule-Making

As explained above, an illegal 'political' Community activity might, thus, still not constitute maladministration, at least of the kind that would be amenable to the Ombudsman's review. But what about Community rule-making[16] activities? Is their nature sufficient, I would say 'political' enough, to exclude them, *in toto*, from the Ombudsman's supervision or can such activities involve (and to what extent) '(mal)administration' of the kind referred to in Article 195 EC?

Primary EC law is established by the Treaties which are signed and ratified by the Member States. Quite naturally, draft Treaty provisions may be prepared by Community institutions and bodies. In this context, the Ombudsman has held that the 'European Convention,' which originated from the Laeken Declaration of the European Council and was assigned with the production of a draft EU Constitution, was a Community body, in the sense of Article 195 of the EC Treaty, but its work was 'political' and could not, therefore, raise an issue of possible maladministration.[17] In light of this holding, it is reasonable to consider that Community activities pertaining to the drafting of primary law are so pervasively 'political,' in view of their nature and subject-matter, that their review is excluded, *en bloc*, from the Ombudsman' remit. However, the fact that these activities, as such, cannot be examined for maladministration does not mean that any Community decision concerning these activities is equally excluded from the Ombudsman's mandate. For example, decisions rejecting, totally or partially, applica-

[15] See decision on complaint 655/2006(SAB)ID.

[16] For the purposes of the present paper, I am using the term 'rule-making' as referring to the following three levels of normative activities of Community institutions or bodies: (a) preparation of draft primary Community law; (b) enactment of secondary Community legislation; and (c) implementation of secondary Community legislation, including through policies or practices reflecting measures of general and abstract application, or through the enactment of rules applicable to a specific procedure (rather than to a certain type of procedures/situations), such as rules contained in a tender or recruitment notice.

[17] See decision on complaint 1795/2002/IJH.

tions for access to documents prepared in the context of the aforementioned activities and held by a Community institution or body would be severable from these activities and subject to the relevant Community legislation on access to documents, such as Regulation 1049/2001. Acts of this kind, which involve application of existing rules in a specific case, constitute a normal part of the function of 'administration,' even if they relate somehow to 'political' matters and activities.

The above approach seems to be reflected, at least to a certain extent, in the Ombudsman's notable decision in a case (2395/2003/GG) concerning Community legislation. The complaint was about the fact that the meetings of the Council acting in its legislative capacity were only public to the extent foreseen by Articles 8 and 9 of the Council's Rules of Procedure of 22 July 2002. In its opinion on the complaint, the Council noted, in particular, the following. Its contested practice concerning the publicity of its meetings was in accordance with its Rules of Procedure. However, the adoption of these Rules, which had their legal basis in Article 207(3) of the EC Treaty, was a 'political and institutional matter.' The Council's conclusion was that the issue raised by the complainants went beyond the Ombudsman's mandate. The Ombudsman reached the opposite conclusion, by observing, in particular, that (a) the adoption of the Council' Rules of Procedure, on the basis of Article 207(3) of the EC Treaty, was a political and institutional matter, but the complaint did not concern the way the Council organised its internal procedures, but the question whether the public could be excluded from the Council's meetings in its legislative capacity; (b) the Council did not establish that this issue was a 'purely political' one that should therefore not be subject to any scrutiny; (c) Article 1(2) of the EU Treaty clearly directs the institutions and bodies to see to it that all decisions at the level of the EU are taken as openly 'as possible,' and, under this principle, it should be ascertained whether opening all the meetings of the Council acting in its legislative capacity would be possible and, if so, whether there are nevertheless good reasons for not doing so. To avoid any possible misunderstanding, the Ombudsman added that the complaint did not concern 'the legislative activity of the Council as such.'

This last statement clearly indicates that the Ombudsman's approach and assessment about the existence of a possible instance of maladministration would likely be different, if a complaint concerned the Council's legislative activity 'as such.' Since the case at hand referred to a procedural aspect of the Council's legislative activity, it is reasonable to assume that the term 'as such' was intended to cover the substance and content of the institution's legislative activity. Relatedly, one should bear in mind that the legality of secondary Community legislation, may be reviewed by the Community Courts. For example, a Community Regulation might not have the appropriate legal basis or might not be compatible with the general principles of Community law concerning the respect of fundamental rights, including

the principle of equal treatment. At the same time, it may be observed that this level of Community normative activities is, in many respects, analogous to the one of legislation enacted by the national Parliament (or similar legislative body) in Member States, which seems to be excluded, in general, from the review of national Ombudsmen.[18] This is not a normal part of the function of 'administration' and, as such, I would argue that it may not be examined, at least in principle, by the European Ombudsman. In this sense, a piece of secondary Community legislation vitiated by a legal error, such as in the cases mentioned above, would not amount to maladministration, under Article 195 of the EC Treaty.

In light of the Ombudsman's aforementioned decision on complaint 2395/2003/GG, it seems that procedural aspects of the enactment of secondary Community legislation, at least so fundamental as the one which was at issue in that case, may come within his review. I believe that this is so not only because there would be fundamental rules or principles binding on the institution concerned as regards the 'administration,' namely the organisation, of its legislative activity. In this context, it is also relevant that one of the basic reasons for the creation of the Ombudsman's institution in European countries, during the second half of the 20th century, was the realization of the key political goal in a democracy of bringing the State closer to its citizens and increasing transparency in its activities.[19] Moreover, the general 'physiognomy' of the Ombudsman's institution in European States does not preclude his dealing with the 'administration' of, that is procedural matters in, an activity which constitutes one of the three government functions (justice), other that the administrative/executive. The above factors, in conjunction with the democratic deficit in the Community, the relevant fact that legislative works of national legislative bodies have traditionally been open to the public and the principle of 1(2) of the EU Treaty, made it reasonable for the Ombudsman to review the issue raised by the complainant in case 2395/2003/GG.[20]

An essential, usual function of any public administration is the implementation of legislative rules (rules laid down by the legislative body). One of the principal ways of doing so is through the enactment of implementing provisions, on the basis of (explicit or implicit) legislative delegations. Administrative policies or practices reflecting measures of general and abstract application are another means. More specific rules may also be set

[18] Relatedly, it is worth noting that the Ombudsman pointed out in his draft recommendation in case 2395/2003/GG that the legislative bodies in all the Member States of the European Union appeared to meet publicly, thereby making an analogy between the Council's legislative activity and the one of national legislative bodies.

[19] See Gabrielle Kucsko-Stadlmayer, *op. cit.* (footnote 8), p. 3.

[20] The Ombudsman's relevant Draft Recommendation and Special Report, which incorporated this decision, were subsequently endorsed by the European Parliament (Resolution of 4 April 2006 (P6_TA(2006)121)).

out for a certain administrative procedure (rather than to a certain type of administrative procedures/situations), such as rules contained in a tender or recruitment notice. In all these cases, the normative activity should be undertaken with due respect of the applicable binding rules or principles, for example of the (explicit or implicit) limits of the relevant legislative delegation, as regards the subject-matter and substantive content of the implementing provisions that may be adopted. One can infer from the Ombudsman's case-law that this type of Community rule-making, involving implementation, at various levels, of secondary Community legislation, is an activity which may be examined for maladministration, in the sense of Article 195 EC. For example, in case 2107/2002/PB, the Ombudsman held that the provision for an (upper) age limit of 30 years in the Commission rules governing its traineeships programme constituted unjustified discrimination. In the context of complaint 3346/2004/ELB, the Ombudsman examined EPSO's compulsory on-line registration and information system for recruitment competitions. He concluded that the requirement that candidates apply to EPSO and communicate with EPSO via the Internet did not, as such, violate the principle of equal treatment of potential candidates or candidates, but EPSO's failure to provide for an exception for (non-disabled) persons who had considerable and objectively justifiable difficulty in having access to the Internet was not compatible with the principle of non-discrimination and amounted to an instance of maladministration. And in case 3131/2006/PB, he dealt with the length of the deadline for the submission of applications in the context of a recruitment, noting that the principles of fairness of the procedure and of equal treatment of (potential) candidates implied, *inter alia*, that a deadline of this kind should be such as to give, in general, a reasonable opportunity to well-informed and normally diligent (potential) candidates to take note of the relevant call, properly prepare their applications and submit them in good time.

III Significant Legal Uncertainty in Regards to the Interpretation and Presumption of Validity of the Applicable Community Legislation

The application of Community legislation by the Community institutions or bodies, a normal part of their activities, presupposes an interpretation of the relevant legal rules, at least where the meaning of these rules is not evident. An erroneous legal interpretation, leading to an erroneous application of the legal rule, quite naturally involves an instance of maladministration, at least when such interpretation is not an integral part of a 'political' or legislative act excluded from the Ombudsman's review, in light of the analysis made in part II of the present paper.

Nevertheless, there seems to be an exception to the above consideration. When the allegation inquired into by the Ombudsman concerns possible violation of legislative rules in a context where there is, objectively, considerable legal uncertainty as to their meaning, and there seem to be two (or more) reasonable solutions to the problem, a finding of maladministration may not be justified, if the institution's approach corresponds to one of these solutions.[21] Indeed, when there is substantial ambiguity in the legal rules involved, the Administration's legal interpretation is more fairly assessed for maladministration on the basis of a relaxed standard, less stringent than lawfulness, the exact content of which is, objectively, particularly difficult to discover. In such cases, if the institution's interpretation is subsequently discredited by a court decision, a Community act based on this interpretation, although illegal, in view of the relevant posterior case-law, would still not be an instance of maladministration. This conclusion should not, of course, prevent the Ombudsman from asking the institution concerned, possibly through a friendly solution proposal, to re-examine its contested act, after properly taking into account, in particular, the recent developments in the case-law.

A similar question is whether the application by a Community institution or body of a legal rule which has (allegedly) been established in violation of a (procedural or substantive) hierarchically superior legal norm might be considered as a possible instance of maladministration. In this context, due regard must be had not only to the fundamental principle of the rule of law, but also to the fundamental principle of legal certainty, which implies that a Community normative act, which has not been annulled by a court decision, normally carries with it a presumption of validity.[22] Accordingly, I would argue that, when a Community institution or body applies, in the context of its administrative activities, a legal rule, that has not been invalidated by a court decision and which was established allegedly in violation of a superior norm, the challenged application of the rule would amount to maladministration only if a Community court has already accepted a relevant exception of illegality, pursuant to Article 241 of the EC Treaty, and in general, if the alleged violation is otherwise flagrant. This is likely to be the case when it comes to a Community act tainted by such an obvious and serious irregularity that it should be regarded as legally non-existent,[23] and, hence, as not justifying the Administration's reliance on the aforementioned presumption. In light of the above, an administrative decision which is based on an unlawful Community rule is tainted by the illegality of its basis but would, most probably, not be, *in itself*, an instance of maladministration. What might be maladministration is rather the establishment of the illegal rule, in light of the analysis made in part II of the present paper.

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[21] Cf., in particular, Ombudsman's decision on complaint 2851/2005/PB.

[22] See Case C-137/92 P *Commission* v. *BASF and others* [1994] ECR I-2555, paras. 48-50.

[23] Idem.

IV Insufficient Causal Link Between the Illegality and the Behaviour of the Institution Concerned

There may be rules providing for a decisive participation of a third party, such as a Member State in the Community decision-making process. In such cases, the eventual illegality of the relevant Community decision maybe cannot fairly be attributed to the institution which issued it, if the content of the contested decision has, in essence, been dictated by the behaviour of the third party which participated, in accordance with the applicable rules, in the decision-making process. A good example for this kind of cases, where there might not be a sufficient causal link between the illegality of the contested Community act and the behaviour of the relevant institution in the course of its adoption, is given by the Community rules on access to documents.

Regulation 1049/2001 establishes the principle of access to documents held by the European Parliament, Council and Commission, including documents originating from a Member State. Article 4(1) to (3) of the Regulation provides certain exceptions to this principle. Article 4(4) further provides that 'As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable [...],' while Article 4(5) provides that 'A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.' In Case C-64/05 P,[24] the ECJ held the following, as regards the interpretation and application of Article 4 (5) of Regulation 1049/2001: (a) the prior agreement of the Member State referred to in Article 4(5) resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present (para. 76); (b) the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to the applicant by the institution in reply to the request he/she has made for access to a document in its the institution's possession (para. 94); (c) if the Member State concerned objects to disclosure of the document in question, it is obliged to state reasons for that objection with reference to those exceptions (para. 87); (d) if the Member State gives a reasoned refusal to allow access to the document in question, the institution is consequently obliged to refuse the request for access (cf. paras. 50, 90).

The above holdings imply that, although the institution's decision rejecting an access application might be illegal, this illegality would not be fairly attributed to the institution and, hence, amount to maladministration on its part, if and to the extent that it is due to the behavior (reasoned objection) of the Member State concerned. The Court's judgment imposes a number of obligations on the institution as regards the decision-making process and its compliance with these obligations would be amenable to the

[24] Case C-64/05 P (Grand Chamber) *Sweden* v. *Commission and others* [2007] ECR I-11389.

Ombudsman's review. In particular, the institution should insure that the Member State's objection is formulated in terms of the exceptions listed in Article 4 (1) to (3) of the Regulation, namely that the objection refers to one of those exceptions. I would argue that the institution should furthermore make a reasonable effort to ensure the *adequacy* of the reasons provided by the Member State in support of its objection, in view of the relevant standards set out in the case-law concerning rejection of applications for access to documents, under Regulation 1049/2001.[25] If, despite such an effort, the reasons given by the Member State, which will have to be reproduced in the institution's decision on the initial or confirmatory access application, are still not adequate, this shortcoming will not be attributed to the institution and amount to an instance of maladministration on its part.[26]

V Conclusion

The European Ombudsman has eloquently remarked that there is 'life beyond legality.'[27] 'Life,' in this sense, seems to refer to 'administrative' life and more specifically to what would correspond to 'good administration,' as opposite to 'maladministration.' The above expression clearly implies that Community 'maladministration goes beyond illegality.' But is the opposite proposition true? May an instance of illegality in the activities of the Community institutions or bodies not involve an instance of maladministration coming within the Ombudsman mandate? The answer to this question should be a positive one. This implies that there is also 'illegality beyond (the concept of) maladministration.'

[25] Case T-84/03 *Turco* v. *Council* [2004] ECR II-4061, paras. 81-84; Case T-36/04 *API* v. *Commission* [2007] ECR II-3201, paras. 93-100; Case T-194/04 *Bavarian Lager* v. *Commission* [2007] ECR II-4253, para. 151.

[26] However, it is likely to constitute an instance of maladministration on the part of the Member State concerned and, as such, might fall within the mandate of the competent national Ombudsman.

[27] See P. Nikiforos Diamandouros, *op. cit.* (footnote 4), p. 329.