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101/2004/GG



EUROPEAN COMMISSION

THE SECRETARY GENERAL

MÉDIATEUR EUROPÉEN



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Brussels, 28 May 2004

SGE/PhG/mbp/D/4773 - A897

Dear Mr Diamandouros,

Subject: complaint by Mrs [REDACTED]
ref. 101/2004/GG

Thank you for your letter of 26 January 2004 to President PRODI about this case.

I am instructed to transmit to you the enclosed comments of the Commission on the above-mentioned complaint. A translation into the language of the complainant (German) will be transmitted shortly.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

[REDACTED]

David O'SULLIVAN

Enclosure

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28.5.2004

Comments of the Commission on a request for information from the European Ombudsman**- Complaint by Mrs [REDACTED] ref. 101/2004/GG**

The complaint concerns the Commission's handling of the complainant's request for the opening of an administrative enquiry made in her letter of 16.9.2002 and a request for access to documents held by the Commission's services. The Ombudsman will find hereafter the Commission's observations on both claims:

I. Observation of the Commission with regard to the allegation and claims of the complainant concerning the Commission's handling of her request for the opening of an administrative enquiry**SUMMARY OF THE FACTS**

By letter of 16.9.2002 (registered under No. R/481/02 but dealt in this respect under D/538/02), the complainant asked for an internal enquiry regarding alleged irregularities concerning security measures and rules on transport of radioactive material in the ITU Institute (Institute for Transuranium Elements - Karlsruhe). She annexed a list of nine alleged incidents which occurred in the ITU Institute between 1992 and 1999.

She also contested an over-lenient approach by the Commission towards [REDACTED] Sellafield (and the UK) *"though numbers of incidents and cases of non respect of rules concerning security and the registration of nuclear material, particularly having regard to the fact that Mr [REDACTED] after his departure from the Commission (Directorate-General Environment - DG ENV), received a management position in [REDACTED] Sellafield and Mr [REDACTED] ex-employee of [REDACTED] Sellafield and then Euratom Inspector for Sellafield, is a Head of Unit in DG ENV ([REDACTED]) and always keeps good relations with [REDACTED]"* (translated extract).

By note of 16.10.2002, dealt with in the framework of the above request No. D/538/02, the complainant asked to be exonerated from her obligations under Articles 17 and 19 of the Staff Regulations in relation to the above allegations.

With respect to the allegations by notes of 16.9.2002, she was given the opportunity to express herself at IDOC on 6.11.2002 within the context of an administrative verification in order to assess the conclusiveness of the complainant's allegations.

All information (notes of 16.9.2002 and 16.10.2002) was sent to the European Anti-fraud Office (OLAF) by note of IDOC dated 18.11.2002.

OLAF heard the complainant on 8.1.2003 under Article 4(2) of Regulation No. 1073/99.

By note of 13.2.2003 to Directorate-General Personnel and Administration (DG ADMIN), OLAF stated that it had not opened an investigation relating to the complainant's allegations but had informed the German authorities (the Ministry for Environment of Baden-Württemberg) about the alleged irregularities in ITU-Karlsruhe.

In the framework of the enquiry held by the German authorities, the complainant was heard by the Ministry for Environment of Baden-Württemberg on 5.3.2003. In order to participate in this hearing and to confirm all information sent to the Appointing

Authority, as well as the information already provided during the hearing by OLAF, the complainant asked for and received an authorisation by the Appointing Authority under Article 19 of the Staff Regulations (decision of 28.2.2003). An inspection at the ITU-Institute Karlsruhe by the German authorities took place on 7.4.2003.

By note of 6.03.2003, the Appointing Authority communicated to the complainant that she would be kept informed about the results of the enquiry by the German authorities and of any administrative measures adopted in this respect.

By note of 29.4.2003, the Ministry for Environment of Baden-Württemberg sent to OLAF the final report of its enquiry.

The conclusions of this report are the following:

"The claims made by the complainant are credible on the whole. Documentation for internal training on dangerous goods legislation is missing for the period under consideration since 1993, and in some cases there were delays in training 'responsible persons' designated pursuant to dangerous goods legislation, as well as in notifying those values to external firms and notifying shipments to the BAFA in some cases.

In none of the nine cases, however, were errors caused by a lack of specialist knowledge or by inadequate staff training. In none of the cases referred to was it possible to identify a punishable infringement of radiation protection legislation or dangerous goods legislation by ITU staff.

In future, Department 77 of the UVM and the SGAA Karlsruhe will, as part, of their routine checks, devote greater attention to the areas of weakness at the ITU mentioned here."

By two e-mails to the Director General for Personnel and Administration of 14.7.2004 and 18.7.2003, the complainant:

1. claimed not to have received a definitive answer to her note of 16.9.2002;
2. contested the appointment of Mr [REDACTED] (one of the two persons concerned by her allegations) as a Director
3. stated that the case [REDACTED] was not communicated to the German authorities or to other national authorities.

By note of 31.7.2003 the Appointing Authority answered – inter alia that, with regard to all the above and the results of the investigation by the German authorities, no further internal measure would be taken in respect of allegations contained in her notes of 16.9.2002 and 16.10.2002.

As far as the above e-mails of the complainant are concerned, the Appointing Authority pointed out, in its note of 31.7.2003, that it could not take any action on the basis of the allegations, which the complainant herself indicated, by her note of 16.9.2002, as "suspects" or "indirect information".

The Appointing Authority also informed her that a general audit was on-going in the Joint Research Centre (JRC), which demonstrated the Commission's will to respect relevant legislation in the field.

By further notes of 29.7.2003 and 12.8.2003, the complainant raised the following points:

1. She contests (by note of 12.8.2003) the decision of the Appointing Authority by note of 31.7.2003 not to take any further measures following the final report of the German authorities. She makes detailed technical comments on the above final report of the Ministry for Environment of Baden-Württemberg;
2. Concerning the case of Mr [REDACTED] and Mr [REDACTED] she points out that she does not have any direct information as she never dealt with procedures concerning infringement of contract rules, with the Inspection in Sellafield under Article 35 nor with the fault quality information on material produced by [REDACTED] Sellafield for Japan. She also heard about the situation from third parties (officials or servants of the services concerned) and affirms that a good administration should have launched audits in the services concerned.

By her note of 29.7.2003, she refers particularly to an irregular transport from Geel via Luxembourg to the UK, which took place in 1999.

Her above notes of 29.7.2003 and 12.8.2003 were registered by DG ADMIN B.2 on 30.7.2003 under No. R/421/2003 and on 14.8.2003 under No. R/484/2003, respectively.

By note of 21.11.2003, Vice-President [REDACTED] replied to the above notes in the terms set out hereafter.

Since by note of 28.2.2003 the complainant contested the implicit rejection of her requests/complaints set out in her notes of 16.9.2002 and 16.10.2002 (R/481/02 and D/538/02), her complaint No. R/421/03 is inadmissible. In fact, according to Article 90 (2) of the Staff Regulations, a complaint may be lodged against the implicit or reasoned rejection of a request but not of a complaint. According to Article 91 of the Staff Regulations, the official concerned can form an appeal before the Court of First Instance against the implicit or reasoned rejection of a complaint. He/she cannot lodge a second complaint.

Furthermore, Vice-President [REDACTED] noted that her note of 28.2.2003 concerns an application for an enquiry to be undertaken. Any decision rejecting such a request does not constitute a measure directly and personally affecting the complainant.

By note of 12.8.2003 (R/484/03) the complainant contested the Appointing Authority's decision of 31.7.2003 not to take any further measures following the final report of the German Authority (note of the Ministry for Environment of Baden-Württemberg of 29.4.2003) in relation to her requests/complaints No. R/481/02 and D/538/02. Again in respect of complaint R/484/03, Vice-President [REDACTED] pointed out that such a complaint is inadmissible. In fact, it is directed against the Appointing Authority's decision of 31.7.2003, which does not adversely affect the complainant's situation personally and directly. Therefore, the Commission stresses once more that it is not affecting the complainant personally.

Furthermore, the complainant made detailed technical comments on the above final report of the Ministry for Environment of Baden-Württemberg and asked for further administrative measures to be taken and enquiries made in respect of the so-called [REDACTED] case.

Insofar as she mentioned an irregular transport of materials from Geel via Luxembourg to the UK, which took place in 1999, Vice-president [REDACTED] pointed out that, following that incident (an inadvertent shipment of a sample containing a dose of plutonium), an internal audit was initiated. It concluded that immediate action had been taken by the

IRMM (Institute for Reference Materials and Measurements) to improve the operating instructions and procedures in order to prevent similar incidents or irregularities.

Concerning her allegations in respect of Mr [REDACTED] and Mr [REDACTED] the complainant confirmed that she did not have any direct information *as she never dealt with procedures concerning infringement of contract rules, with the Inspection in Sellafield under Article 35 nor with the faulty quality information on material produced by [REDACTED] Sellafield for Japan*. She also pointed out that she heard about the alleged behaviour from third parties (officials or servants of the services concerned) and she considered that a good administration should have launched audits in the services concerned.

As far as the latter allegations are concerned, Vice-President [REDACTED] informed the complainant that her above mentioned complaints were sent to IDOC, OLAF and JRC. By note of 22.9.2003, OLAF indicated that it had received and taken note of complaints No. R/421/03 and R/484/03. OLAF also stated that none of the above complaints contained allegations which could lead it to re-open the initial case OF/2002/0549 or to open a new investigation. It further indicated that the control of the JRC-ITU Institute in Karlsruhe as performed by the "Ministerium für Umwelt und Verkehr Baden-Württemberg" on the initiative of OLAF had not brought to light any facts that would justify further measures from the side of OLAF. Her complaints did not bring forward any new facts in this respect. Furthermore, OLAF indicated that it had no knowledge of what the complainant refers to as the "Case [REDACTED]". No evaluation or investigation of any allegations in this context is under way by OLAF. In respect of the [REDACTED] allegations, IDOC contacted OLAF again on 21.11.2003 and on 28.1.2004, and given the absence of any circumstantial evidence of possible infringement of regulations, no administrative enquiry was opened.

In this connection, Vice-President [REDACTED] referred to the terms of the aforementioned decision of the Appointing Authority of 31.7.2003 and, with regard to the conclusions of the German authorities, confirmed the decision to consider any further measures concerning such conclusions to be inappropriate.

He confirmed furthermore that the JRC Internal Audit unit had recently initiated an Audit on Radiation Protection at the ITU. The fieldwork started in October 2003. Even if the audit was not specifically aimed at responding to the complainant's above mentioned complaints, the points she had raised would be addressed in the course of this audit and she would be kept informed of the outcome.

THE COMPLAINT

In her notes of 26.1.2004 and 20.2.2004 to the attention of the Ombudsman, the complainant makes the following allegations and claims with regard to the treatment of her above requests and complaints.

1. The Commission refuses to duly investigate and take action concerning the instances of maladministration listed in her letter of 16.9.2002 from the ITU Institute at the JRC, as well as on infringements of the German Nuclear Power Act and the Radiation Protection Order when dealing with nuclear fuels and related regulations.
2. The Commission is unwilling and unable to ensure that its own departments follow the rules.
3. The Commission conducted internal investigations, audits and quality assurance measures in connection with nuclear power in an incompetent way.

4. The Commission rewards managers who fail to follow rules.
5. She suspects that DG ADMIN only partially transmitted her complaints to IDOC or/and further to OLAF.
6. DG ADMIN attempted to silence and harassed her.

REPLIES TO THE COMPLAINANT'S ARGUMENTS

The Commission wishes firstly to draw the attention of the Ombudsman to the procedural differences between the "whistle blowing" procedure and complaints and requests lodged by officials under Article 90 (1) and 90 (2). The latter are subject to deadlines so that officials can decide whether they wish to pursue cases further by complaint or court claim respectively set out in Article 90 and 91 of the Staff Regulations. The above deadlines do not apply to the "whistle blowing" procedure.

Following the provisions of Article 2 of the Commission's decision of 4.4.2002 on 'whistle blowing', the official wishing to bring to the attention of the Ombudsman or the Parliament facts which he/she knows by way of his/her duties, has to inform the Commission first, in order to give it sufficient time to take the appropriate measure in respect of the alleged facts.

The "whistle blowing" procedure does not define the notion of sufficient time which depends on the complexity of the facts alleged and can therefore vary from case to case.

As far as points 1) to 4) of the complainant's allegations are concerned¹, the Commission wishes to distinguish two different aspects:

- a) The first aspect concerns the allegations she made before her note of 12.8.2003 about certain irregularities at the ITU Institute in Karlsruhe. With regard to the conclusions of the German authorities (note of the Ministry for Environment of 29.4.2003), the Commission considers that no further measures are useful in this respect. The JRC Internal Audit unit has also carried out an Audit on Radiation Protection at the ITU Institute. Even if the audit was not specifically aimed at responding to her complaints, the points raised in the complaints were addressed in the course of their enquiries. A copy of the final report of the above Audit on Radiation Protection at the ITU Institute is attached.
- b) The second aspect concerns the indirect allegations which the complainant develops in general terms in her note of 12.8.2003 in respect of Mr [REDACTED] and Mr [REDACTED]. Even if she confirms that she has no proof she adds in very general and indirect terms allegations concerning infringements of contracts, faulty quality information of [REDACTED] material for Japan and refers to an inspection under Art. 35 on which she asks for an audit. As far as this point is concerned and as it has already been mentioned, the complainant's notes of 29.7.2003 and of 12.8.2003 were sent to IDOC, OLAF and JRC. OLAF indicated that it had no knowledge of what the complainant referred to as the "Case [REDACTED]". No evaluation or investigation of any allegations in this context is under way by OLAF.

¹ Having regard to the complainant's letters of 16.9.2002, 16.10.2002, her e-mails of 14.7.2003 and 18.7.2003, her letters of 29.7.2003 and 12.8.2003

As regards the allegations mentioned under point 5), the Commission wishes to point out that both notes of the complainant of 16.9.2002 and 16.10.2002 were sent from DG ADMIN to IDOC, by note of 28.10.2002, and from IDOC to OLAF, by note of 18.11.2002.

Concerning allegations mentioned under point 6), the Commission also wishes to point out that it never tried to harass or intimidate the complainant as she alleges. There is no evidence supporting such allegations in the facts exposed here above. Indeed, these allegations are contradicted by the facts as set out above. Rather than attempting to silence her, the Commission in fact supported the complainant in raising her concerns on possible irregularities by giving her authorisation, on 28.2.2003, to participate in the hearing of the Ministry on 5.3.2003. The hearing at the Ministry was a direct result from the statements made by the complainant at IDOC on 6.11.2002, the subsequent involvement of OLAF with the allegations on 18.11.2002 and the transmission of documents to the relevant national authorities by OLAF. The Commission would further point out that the complainant herself appeared to be satisfied with the approach of the services of IDOC and OLAF: she stated in her complaint of 29.7.2003 that "Dies ist ausdrücklich nicht als Kritik an OLAF bzw. IDOC zu verstehen, die mit der Materie keinerlei Erfahrung hatten und sich im Rahmen ihrer Möglichkeiten bemüht haben." [*"This should not be understood as a criticism towards OLAF or IDOC that did not have experience on this matter and made their best within the limits of their possibilities"*].

CONCLUSION

- 1) The Commission considers that it has taken all appropriate measures in respect of the complainant's allegations by:
 - giving her the appropriate authorisations under Article 17 and 19 of the Staff Regulations
 - supporting her in raising her concerns about possible irregularities to IDOC and the German authorities
 - informing OLAF
- 2) For the reasons set out above, the Commission considers the allegations and claims of the complainant concerning the Commission's handling of her request for the opening of an administrative enquiry totally unfounded.

II. Observation of the Commission with regard to the allegations and claims of the complainant concerning her requests for access to documents, i.e. the application of Regulation 1049/2001

SUMMARY OF THE FACTS

On 16.10.2003, the complainant sent an e-mail to the Secretariat-General with a confirmatory application for access to a large number of categories of documents from DG ADMIN, OLAF and JRC. In this e-mail, the complainant affirmed that she had already sent an initial application on 20.9.2003. Since the Commission had never received any initial application from the complainant dated 20.9.2003, her request was registered on 22.10.2003, not as a confirmatory application but as an initial application, and attributed to the three services concerned, DG ADMIN, JRC and OLAF. The same day an acknowledgment of receipt was sent by e-mail to the complainant.

On 16.11.2003, the complainant introduced a confirmatory application by e-mail, since she had not received any reply from the Commission to the above-mentioned initial application within the prescribed time-limit. This confirmatory application was registered on 19.11.2003.

Meanwhile, DG ADMIN replied to the initial application on 13.11.2003, OLAF on 17.11.2003 and JRC on 20.11.2003.

On 1.12.2003, the complainant sent an e-mail to the Secretariat General with a second confirmatory application ("Drittantrag") concerning the documents to which DG ADMIN had denied access.

On 3.12.2003, the complainant sent an e-mail with a complementary confirmatory application ("Nachtrag zum Drittantrag") concerning the documents held by the JRC.

In order to clarify the situation and avoid any further confusion with regard to all the different requests introduced by the complainant, the Secretariat-General sent her an explanatory letter on 10.12.2003. Firstly, it was confirmed that, even though the deadlines for reply were not quite respected, the complainant had in the meantime received replies from the three services concerned, and that the confirmatory application of 16.11.2003, therefore, had become devoid of purpose, since it was motivated by the absence of reply. Secondly, she was informed that her e-mails of 1.12.2003 and 3.12.2003 had been registered on 3.12.2003 as confirmatory applications regarding the documents to which access had been refused by DG ADMIN and the JRC, respectively.

On 17.12.2003, the complainant sent yet another e-mail to the Secretariat-General in which she questioned the procedural steps it had taken in handling her request.

The Secretariat-General replied by e-mail on 19.12.2003, making a further attempt to clarify the situation and also extending the deadline for reply with another 15 working days, in accordance with Article 8(2) of Regulation 1049/2001.

On 27.1.2004, the Secretary-General replied to the confirmatory application concerning the documents from DG ADMIN and also explained that the very large scope of the request for the JRC documents made it impossible to reply within the deadline for these documents.

On 19.2.2004, the Secretary-General replied to the confirmatory application concerning the documents from the JRC.

THE COMPLAINT

On 2.1.2004, the complainant lodged a complaint with the European Ombudsman making the following allegations and claims with regard to the treatment of her request for access to documents under Regulation 1049/2001:

- 1) The replies to the initial application of 16.10.2003 did not respect the deadline.
- 2) The fact that the Commission declared that the confirmatory application of 16.11.2003 was devoid of purpose would constitute a refusal to act and an abuse of power ("Rechtsbeugung, Rechtsverweigerung und Machtmissbrauch").
- 3) The complainant contends that she has been denied her right of access to documents under Regulation 1049/2001. She contests the assessments made by DG ADMIN and JRC at the initial stage. She affirms that there can be only one reason for denying her access to the requested documents, namely that the documents would show that no transport of non-radioactive material to the US has taken place but only an illegal transport of radioactive material and that the Commission wants to hide this.

- 4) The complainant claims that the documents she requested should be sent to her or that she should be informed if any of the requested documents do not exist.

On 26.3.2004, the complainant lodged a complementary complaint with the European Ombudsman making the following further allegations and claims with regard to the treatment of her request for access to documents:

- 5) Access is still being refused to some of the requested documents.
- 6) It is hard to believe that some of the requested documents do not exist.
- 7) The fact that an intervention from the European Ombudsman and the European Parliament should be needed to obtain a semi-constructive attitude from the Secretariat-General of the Commission is regrettable and indicates weaknesses in the Commission's internal proceedings.

REPLIES TO THE COMPLAINANT'S ARGUMENTS

As regards the first allegation, the deadline for replying to the complainant's initial application expired on 12.11.2003. DG ADMIN replied on 13.11.2003, OLAF on 17.11.2003 and JRC on 20.11.2003. It is, therefore, true that the replies to the complainant's initial application did not respect the prescribed time-limit of 15 working days. From a formal point of view, it is clear that, before the expiration of the deadline, the services should have extended the deadlines with another 15 working days, in accordance with Article 7(3) of Regulation 1049/2001. It would have been justified to invoke, respectively, the very large number of documents requested, the very large scope of the requests and the complexity of the applications, since it had to be assessed to what extent disclosure of the documents held by one service could undermine the purposes of the inquiries carried out by the others. However, the services did not extend the deadline. Instead, they tried to reply as swiftly as possible without resorting to a holding reply. In the above-mentioned explanatory letter of 10.12.2003 and e-mail of 19.12.2003, the Secretariat-General expressed its regrets on behalf of the Commission for the fact that the three services had not been able to respect the deadline in first instance.

As regards the second allegation, the complainant introduced a confirmatory application on 16.11.2003. The only ground for this confirmatory application was the absence of a reply to her initial application. This confirmatory application was just a repetition of the initial application. Had the Commission not declared this confirmatory application devoid of purpose, despite the fact that the replies to the initial application had been sent in the meantime, the complainant would have been deprived of her right to motivate her confirmatory application according to the arguments set out in the replies to the initial application, i.e. she would then not have been able to develop her arguments as to why she did not agree with the assessment made in first instance. Had the replies to her initial application been sent in time, she would not just have repeated her initial application, which is proved by the fact that she did develop her arguments in the two e-mails of 1.12.2003 and 3.12.2003 that were registered as confirmatory applications. Considering these circumstances, the Commission drew the conclusion that the confirmatory application introduced in the absence of a reply was devoid of purpose, since it crossed with the replies that were sent slightly outside the time-limit, and that, instead, the e-mails of 1.12.2003 and 3.12.2003 were to be treated as the real confirmatory applications. In other words, the complainant has never been denied her right to introduce a confirmatory application.

As regards the allegations set out in points 3-7 above, the following has to be clarified:

- Regulation 1049/2001 and the Commission Decision 2001/937 (the detailed rules for the implementation of the Regulation) clearly set out how applications for access to documents are to be handled by the Commission and the remedies available, when the applicant is not satisfied with the decision taken by the institution at the initial stage and at the internal appeal stage. In the present case, the conditions for appealing against a decision taken by the Commission, as laid down in Article 8(3) of Regulation 1049/2001, were not met, since the complainant introduced her complaint on 2.1.2004, registered on 9.1.2004, while the time-limit for the Commission to reply to the confirmatory applications expired on 26.1.2004. Therefore, the Commission will not comment on the complainant's allegations concerning the assessments made by the JRC and DG ADMIN in the first instance, but refers to the replies given by the Secretary General on behalf of the Commission on 27.1.2004 and 19.2.2004 following the two confirmatory applications registered on 3.12.2003, in which the Commission, eventually, managed to treat exhaustively these extremely complicated applications. For this reason, it goes without saying that the allegation under 7 is not only groundless but also defamatory.
- The general rule is that the citizen has a right of access to all documents held by the Commission. The only exceptions to this general rule are listed in Article 4 of Regulation 1049/2001. If these exceptions apply, the Commission has an obligation not to disclose the document concerned. Thus, the right of access is not an absolute right. The above-mentioned replies of 27.1.2004 and 19.2.2004 clearly set out why access is not granted to all requested documents. Therefore, the complainant's allegations set out in point 3 above are completely unfounded.
- The right of access to documents is a right of access to existing and identifiable documents held by the Commission. In the present case, the Commission can but confirm that its staff has invested a huge amount of time identifying the documents that correspond to the complainant's different requests, assessing whether they could be disclosed or not and making photocopies of the documents to which access could be granted.
- Moreover, once a document is disclosed under Regulation 1049/2001, it has to be disclosed to anyone upon request. Therefore, contrary to what the complainant seems to believe, Regulation 1049/2001 does not give her any privileged right of access to "her" files or to any document whatsoever, in order for her to carry out her own enquiry. Obviously, this does not prevent her from carrying out any enquiry she wants with the documents to which she is granted access under this Regulation.

CONCLUSION

- 1) Taking into account the very large number of documents requested, the scope of the requests and the complexity of the applications, as well as the fact that, despite these circumstances, the replies were sent only slightly outside the time limit, without the services resorting to an extension of the deadline when replying to the initial application, the Commission considers that the complainant's rights have, in practice, been respected.
- 2) For the reasons set out above, the Commission considers the allegation concerning the "Rechtsbeugung, Rechtsverweigerung und Machtmissbrauch" with regard to the fact that the confirmatory application of 16.11.2003 was declared devoid of purpose as completely unfounded.

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- 3) Equally, the Commission considers that the allegations and claims set out under 3) and 4) are inadmissible, since the complainant introduced her complaint before the expiration of the deadline for the confirmatory reply and before she received the above-mentioned replies to her confirmatory applications, thereby depriving the Commission of the possibility to review, internally, the assessments made in the first instance. For the same reason, the allegation set out under 7) is completely groundless.
- 4) Finally, as indicated above also the allegations set out under 5) and 6) are clearly unfounded.

Enclosures