

# THE EUROPEAN OMBUDSMAN

P. NIKIFOROS DIAMANDOUROS

## **SPECIAL REPORT FROM THE EUROPEAN OMBUDSMAN TO THE EUROPEAN PARLIAMENT FOLLOWING HIS DRAFT RECOMMENDATION TO THE EUROPEAN COMMISSION IN COMPLAINT 185/2005/ELB**

(Made in accordance with Article 3(7) of the Statute of the European Ombudsman<sup>1</sup>)

### **INTRODUCTION**

1. The Ombudsman considers that the present case raises an important issue of principle. He takes the view that the Commission infringes the principle of non-discrimination on the basis of age, by imposing an absolute ban on hiring freelance auxiliary conference interpreters over 65 years of age. This constitutes an instance of maladministration, the importance of which justifies the submission of a special report to Parliament.

### **THE BACKGROUND TO THE COMPLAINT**

2. The complainant worked for the European institutions for more than 35 years as a freelance auxiliary conference interpreter ('ACI'), translating into French from Dutch, English, German, Italian and Spanish. Freelance interpreters are hired for specific conferences and meetings. The period of each specific engagement is short, normally lasting no more than a few days.
3. On 13 July 1999, the Bureau of the European Parliament established rules for the hiring of ACIs ('the Rules of 1999'). On 28 July 1999, the Commission and Parliament signed a convention on working conditions and financial terms for ACIs ('the Convention of 1999'). Subsequently, Council Regulation No 628/2000<sup>2</sup> provided for the recruitment of ACIs as "*auxiliary agents*".

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<sup>1</sup> Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

<sup>2</sup> Council Regulation No 628/2000 of 20 March 2000, amending Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, OJ 2000 L 76, p. 1. Article 1 of this Regulation reads as follows:

*"(...) (2) All conference interpreters should consequently be engaged as auxiliary staff covered by Title III of the Conditions of Employment of Other Servants of the European Communities (...)*

*The following paragraph shall be added to Article 78 of the Conditions of Employment of Other Servants of the European Communities:*

4. In this context, the European Commission and the European Parliament decided to stop hiring ACIs older than 65 years of age. They based their respective decisions on Article 74 of the Conditions of Employment of Other Servants of the Communities ('the CEOS').<sup>3</sup> Subsequently, certain ACIs<sup>4</sup> initiated legal proceedings before the Court of First Instance against the Commission and Parliament (Joined Cases T-153/01 and T-323/01,<sup>5</sup> Case T-275/01<sup>6</sup> and Case T-276/01<sup>7</sup>).
5. In Joined Cases T-153/01 and T-323/01, the Court of First Instance stated, *inter alia*, that:

*"(...) employment contracts for conference interpreters (...) are characterised by the fact that they are signed for specific days, so that the date of the beginning and the date of the termination of the contract constitute essential elements as regards the recruitment of the said auxiliary agents.*

*(...) since the termination of the contract is always established by the indication, in the contract, of the specific days of work, it is not necessary to use Article 74(1)(b) of the CEOS to determine the termination of the employment (...)*

*It follows that Article 74 of the CEOS is one of the provisions of Title III of the CEOS from which Parliament departed when it adopted the Rules of 1999.*

*Consequently, the Commission is wrong to consider that Article 74(1)(b) of the CEOS applies to the applicant (...)*

*(...) the age of the interpreter is not a relevant element as regards the performance of the tasks in question. It follows that the stipulation of an age limit is not an essential element of an interpreter contract requiring the application of Article 74 of the CEOS."<sup>8</sup> (Emphasis added)*

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*The same conditions of recruitment and remuneration applied to conference interpreters engaged by the European Parliament shall apply to auxiliary staff engaged by the Commission as conference interpreters on behalf of the Community institutions and bodies."*

<sup>3</sup> Article 74 of the CEOS (in the version applicable at that time) provided as follows: "Apart from cessation on death, the employment of auxiliary staff shall cease: 1. where the contract is for a fixed period: (...) (b) at the end of the month in which the servant reaches the age of 65 years (...)"

<sup>4</sup> The complainant was not a party to these court proceedings.

<sup>5</sup> Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* [2004] ECR-SC I-A-161 and II-719.

<sup>6</sup> Case T-275/01 *Alvarez Moreno v Parliament* [2004] ECR-SC I-A-171 and II-765.

<sup>7</sup> Case T-276/01 *Garroni v Parliament* [2004] ECR-SC I-A-177 and II-795.

<sup>8</sup> This case is only published in French. The English translations used herein are by the Ombudsman's services. Paragraphs 84-89 of Joined Cases T-153/01 and T-323/01 state the following in French:

6. On 27 August 2004, the Commission launched an appeal before the Court of Justice (Case C-373/2004 P<sup>9</sup>) against the judgment delivered by the Court of First Instance in Joined Cases T-153/01 and T-323/01.

## THE SUBJECT MATTER OF THE INQUIRY

7. The complainant stated that the Commission, even subsequent to the ruling of the Court of First Instance, refused to hire him as an ACI. In this context, he alleged that the Commission failed to comply with Article 21 of the Charter of Fundamental Rights<sup>10</sup> and with Article 5(3) of the European Code of Good Administrative Behaviour,<sup>11</sup> both of which prohibit, *inter alia*, discrimination on the basis of age.

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"84. Or, les contrats d'engagement des interprètes de conférence conclus en application du troisième alinéa, comme du premier alinéa, de l'article 78 du RAA se caractérisent par le fait qu'ils sont conclus pour certains jours spécifiques, de sorte que tant la date du début que celle de la fin de l'engagement constituent des éléments indispensables du recrutement des agents auxiliaires en question.

85. En effet, d'une part, étant donné que le terme du contrat d'engagement est toujours fixé par l'indication dans celui-ci, des jours spécifiques des prestations, aucun recours à l'article 74, paragraphe 1, sous b), du RAA n'est nécessaire pour déterminer la fin de l'engagement. D'autre part, dans le contexte de ce type de contrat, la prescription de cet article constitue une des "conditions de recrutement" visées à l'article 78 du RAA, dès lors que la durée précise de l'engagement est fixée, conformément à l'article 56 du RAA, en tant que condition d'engagement. En d'autres termes, s'agissant d'un contrat limité à des jours spécifiques, la fin de l'engagement constitue une condition caractéristique et indispensable du recrutement de l'interprète, inhérente à celui-ci.

86. Il s'ensuit que l'article 74 du RAA constitue une des dispositions du titre III du RAA auxquelles le Parlement a dérogé lorsqu'il a adopté la réglementation de 1999.

87. Par conséquent, c'est à tort que la Commission a considéré que l'article 74, paragraphe 1, sous b), du RAA était applicable à la requérante et qu'il ne s'agissait pas d'une condition de recrutement au sens de l'article 78 du RAA (...)

89. Il est vrai que l'article 8 de la réglementation de 1999 renvoie aux dispositions du RAA et aux règles applicables à l'ensemble du personnel pour toute question non prévue par ladite réglementation ou par la convention de 1999. Toutefois, étant donné que la raison d'être de la réglementation de 1999 est de permettre au Parlement d'engager les interprètes auxiliaires de session pour des jours spécifiques, la "fin de l'engagement" au sens de l'article 74 ne constitue par une question non prévue par la réglementation de 1999. En outre, au vu du caractère occasionnel de tels engagements et du fait que les institutions n'ont pas l'obligation d'engager un interprète particulier à un moment donné pour une période minimale, l'âge de l'interprète ne saurait constituer un élément pertinent pour ce qui est de l'exécution des services en question. Il s'ensuit que la stipulation d'une limite d'âge ne constitue pas une clause indispensable dans un contrat d'engagement d'un interprète et rend nécessaire le recours à l'article 74 du RAA."

<sup>9</sup> Case C-373/04 P *Commission v Alvarez Moreno* [2006] ECR I-1.

<sup>10</sup> Article 21 of the Charter of Fundamental Rights states that: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

<sup>11</sup> Article 5(3) of the European Code of Good Administrative Behaviour states the following: "The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation."

8. The complainant claimed that the Commission should put an end to the discrimination to which he has been subjected since he reached the age of 65. He also claimed compensation of EUR 14 619 from the Commission (EUR 10 932 corresponding to loss of earnings and EUR 3 687 corresponding to contributions to the "*Caisse de prévoyance des interprètes de conférence*") and assessed the moral damage he had suffered to be EUR 20 000.
9. The complainant also alleged that the Commission failed to comply with Article 19 of the European Code of Good Administrative Behaviour (concerning the indication of possibilities to appeal). Since this aspect of the complaint does not raise an issue of principle, the Ombudsman will deal with it in the decision closing his inquiry into this complaint, which will be sent to the complainant.

## **THE INQUIRY**

10. The complainant submitted the complaint on 16 January 2005. On 8 June 2005, the Commission sent its opinion, which was forwarded to the complainant for his observations. On 13 July 2005, the complainant sent his observations.
11. On 13 December 2005, the Ombudsman requested further information from the Commission. On 20 March 2006, the Commission replied to his request. On 2 April 2006 and 19 May 2006, the complainant sent his observations.
12. On 1 December 2006, the Ombudsman wrote to the President of the Commission seeking a friendly solution to the complaint. The Commission sent its reply on 16 March 2007 and the complainant sent his observations on 25 May 2007.
13. On 31 March 2008, the Ombudsman addressed a draft recommendation to the Commission. On 26 June 2008, the Commission sent its detailed opinion concerning this draft recommendation. The complainant made his observations on the Commission's opinion on 31 July 2008.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### A. Allegation of a general policy of discrimination against ACIs over 65 years of age and related claim

#### *Arguments presented to the Ombudsman*

14. The Commission stated that, prior to the entry into force of the Convention of 1999 on working conditions and financial terms for ACIs, no formal age limit for ACIs existed. Nevertheless, Directorate-General for Interpretation (DG Interpretation) had a policy of only hiring ACIs over 65 years of age when specific demands so required. This occurred for the so-called "*itinerant missions*", or in order to respect interpretation commitments for certain languages. The aim of this policy was to maintain an adequate supply of work for newly-qualified young interpreters, thereby ensuring a supply of new entrants for the profession.
15. The Commission stated that, with the entry into force of the Convention of 1999, ACIs came within the scope of the CEOS. It considered that they were therefore subject to the statutory age limit set out in Article 74 of the CEOS.<sup>12</sup> Consequently, recruitment of ACIs over 65 years of age was phased out. Furthermore, their access to the "Web Calendar" online recruiting system was withdrawn.
16. The interpretation that ACIs fell within the scope of the CEOS was challenged in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*. The Court of First Instance concluded that the age limit set out in the CEOS did not apply to ACIs. Consequently, in order to comply with the Court of First Instance's ruling, DG Interpretation allowed ACIs over 65 years of age access to the recruitment system (upon individual request). ACIs who reached the age of 65 years after the judgment kept their access to the Web Calendar. The recruitment policy, put in place subsequent to the ruling of the Court of First Instance, was the same as the recruitment policy in place before 1999. The Commission stated that it would continue to comply with this policy, pending the judgment on its appeal before the Court of Justice, which seeks to overturn the ruling of the Court of First Instance.
17. As a result of the above, the Commission recommenced recruiting ACIs according to the "needs of the Service", taking into account their language combination, residence and general competence. The policy of DG Interpretation was, as the Commission explained, to ensure, as far as possible, recruitment opportunities for young interpreters. It noted that as the demographic developments in the profession were alarming, steps had been taken to maintain an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term. As an example, the

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<sup>12</sup> See footnote 3.

Commission explained that the average age in the three largest language booths (English, French and German) was approximately 50. The Commission explained that other arguments could be used to corroborate this policy. These included:

- (a) the institutions' longstanding and diversified financial support for the training of young interpreters;
- (b) the necessity for young colleagues to acquire enough experience and practice so that they can enter future open competitions with a reasonable chance of passing them and, in so doing, improve the age pyramid;<sup>13</sup> and
- (c) the increased likelihood of young interpreters being in a position to add to their language combinations new languages, which the Service needed.

18. In accordance with the Ombudsman's request for information, the Commission provided statistical data indicating the number of contract days for ACIs over 65 years of age in absolute terms, and as a percentage of the ACI's total contract days for each of the years 1987-2006.

*The Ombudsman's preliminary considerations leading to a friendly solution proposal*

19. The Ombudsman first observed that the Court of Justice has stated that the principle of non-discrimination on grounds of age, embodied in Article 21 of the Charter of Fundamental Rights, constitutes a general principle of Community law.<sup>14</sup> Pursuant to this principle, when the Commission recruits ACIs, it may not treat candidates differently on the basis of their age, unless it shows that such treatment is adequately justified, as being suitably tailored to serve a legitimate and sufficiently important Community interest.
20. In the context of the Ombudsman's inquiry into the present complaint, the Commission clearly admitted that, when it offers ACI contracts, it disfavours and, thus, treats differently, interpreters over 65 years of age. A difference in treatment on the grounds of age constitutes discrimination on the grounds of age, unless that difference in treatment is objectively justified. Hence, the Commission was asked to prove that this differential treatment was adequately justified.
21. The Ombudsman noted that, in its response to the Ombudsman, the Commission emphasised that demographic developments in the profession were

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<sup>13</sup> For this purpose DG Interpretation created a newcomers' scheme, which guaranteed young ACIs a certain number of consecutive recruitment days.

<sup>14</sup> See Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75.

alarming. Accordingly, the Commission argued that the different treatment was justified by its need to recruit young interpreters and to train them, with a view to maintaining an adequate and qualified pool of freelance interpreters, who would act as a source of interpreters in the long term. The different treatment improved the age pyramid of the interpreter-officials. In addition, young interpreters had the possibility to acquire enough experience and practice to enable them to succeed in future open competitions.

In this context, the Ombudsman accepted that the interest invoked by the Commission, that is, the creation and training of a new generation of competent interpreters, was a legitimate Community interest. Nevertheless, the Ombudsman pointed out that the Commission did not provide him with adequate data and evidence to substantiate its argument.<sup>15</sup> Moreover, the Commission failed to establish the required balance between the interests of interpreters over 65 years of age and the above interest. He noted that the policy objective of creating and training a new generation of competent interpreters could be achieved by means that are considerably less burdensome on interpreters over 65 years of age. For example, one such means could be the balanced reduction of contract days given to all the other "not young" candidates, independently of whether they are under or over 65 years of age, in order thereby to create opportunities to offer work experience to "young" interpreters.

22. In light of the above, the Ombudsman considered that the Commission failed adequately to justify its treatment of interpreters over 65 years of age, such as the complainant. This could constitute an instance of maladministration. Therefore, the Ombudsman made a friendly solution proposal as regards this aspect of the case, which read as follows:

The Ombudsman stated that the Commission could:

- (1) abandon its policy of discriminating against interpreters over 65 years; and
- (2) offer the complainant reasonable financial compensation for having discriminated against him.

*The arguments presented to the Ombudsman after his friendly solution proposal*

23. In its reply to the friendly solution proposal, the Commission explained that a new development needed to be considered. It pointed out that the judgment of the Court of First Instance in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* had recently been annulled by the Court of Justice.<sup>16</sup> The

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<sup>15</sup> Such evidence could have included specific information on the number of work days available to allocate to "young interpreters".

<sup>16</sup> Case C-373/04 P *Commission v Alvarez Moreno* [2006] ECR I-1.

Commission thus argued that its original interpretation of the rules, whereby it did not offer *any* work to *any* ACIs over 65 years of age, was correct, and that it would continue to be correct until a decision based on that interpretation was annulled by a judgment of a Community court. Consequently, the Commission stated that it could not accept the Ombudsman's friendly solution proposal.

24. Additionally, the Commission pointed out that the Court of First Instance had concluded that:

*"the Commission had no obligation to recruit [the applicant] again. An institution is free not to offer a new auxiliary agent contract to an interpreter whom it recruited before whatever her age and the reasons for this."*<sup>17</sup>

25. Moreover, the Commission underlined that it had a policy aimed at ensuring the renewal of the profession of interpreters. That policy promoted the training of young interpreters and guaranteed employment opportunities for these interpreters.

26. In his observations on the Commission's reply, the complainant indicated that, a few days after rejecting the Ombudsman's proposal, the Commission issued an information note, dated 29 March 2007, on the recruitment of freelance interpreters over 65 years of age. The note contained the following statement:

*"Consequently, the Commission intends to return to its initial position and no longer recruit ACIs aged over 65."*

#### *The Ombudsman's assessment leading to a draft recommendation*

27. The Commission's rejection of his friendly solution proposal was based on the Court of Justice's judgment in Case C-373/04 P. The Ombudsman notes that the Court of Justice annulled the ruling of the Court of First Instance on the grounds that the latter should have considered the application to be *inadmissible*. The Court of Justice did not rule on the *substance* of the case and did not, therefore, take any view on the legal interpretation set out in the ruling of the Court of First Instance.
28. The Court of First Instance had held that Article 74 of the CEOS was not applicable to ACIs, essentially because the rules applicable to ACIs were set out in specific Rules adopted by the Bureau of the European Parliament on 13 July 1999 and in a Convention signed on 28 July 1999 (see paragraph 3 of this Special Report). While the Commission was correct in stating that it was no

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<sup>17</sup> Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* [2004] ECR-SC I-A-161 and II-719. Paragraph 105 states the following in French: "*la Commission n'avait, en tout état de cause, pas l'obligation de faire appel à nouveau à ses services. Il demeure en effet toujours loisible à l'administration de ne pas conclure de nouveau contrat d'agent auxiliaire avec un interprète auquel elle avait précédemment fait appel, et cela quels que soient l'âge de ce dernier et les motifs qui la conduisent à cette décision.*"



longer *legally bound* by the annulled ruling of the Court of First Instance, the Ombudsman is of the view that the Commission had not explained why it should not, on the basis of the relevant facts and the applicable legal provisions, *choose to* arrive at a conclusion which was identical to the conclusion the Court of First Instance had arrived at in relation to the substance of the cases.

29. As regards the relevant facts, the Ombudsman recognised that, in addition to relying on the ruling by the Court of Justice, the Commission, in its reply to the Ombudsman's friendly solution proposal, again explained that its policy was designed to ensure the "renewal" of the pool of interpreters at its disposal. It also stated that its policy as regards recruiting ACIs gives its services the possibility to respond to a fluctuating workload. In this respect, the Ombudsman recognised that the Commission did enjoy a wide margin of discretion when recruiting staff. In particular, it could not be required to continue to contract specific ACIs simply because it had contracted them in the past. However, the Commission's wide margin of discretion could not be exercised in such a way as to infringe the principle of non-discrimination, which requires that different situations must not be treated in the same way, unless such treatment is objectively justified.
30. According to the Court of Justice, the principle of non-discrimination on grounds of age, embodied in Article 21 of the Charter of Fundamental Rights, constitutes a general principle of Community law.<sup>18</sup> Pursuant to this principle, when the Commission recruits ACIs, it may not treat them differently on the basis of their age, unless it shows that such treatment is objectively justified.<sup>19</sup> The Ombudsman pointed out that, as regards a compulsory retirement age leading to the automatic termination of an employment contract, the Court of Justice has also stated that:

*"the (...) encouragement of recruitment [of young persons] undoubtedly constitutes a legitimate aim of social policy (...) Therefore, [such] an objective (...) must, in principle, be regarded as objectively and reasonably justifying (...) a difference in treatment on grounds of age (...). It remains to be determined whether (...) the means employed to achieve such a legitimate aim are appropriate and necessary".<sup>20</sup>*

31. The interest invoked by the Commission in its opinion to the Ombudsman, that is, the need to create recruitment opportunities for newcomers and to train them, appeared to be a "legitimate aim". However, the Ombudsman was not convinced that the means employed by the Commission, namely, a *complete ban* on the recruitment of ACIs over 65, was "*appropriate and necessary*" to achieve that legitimate aim. In order to constitute an "*appropriate and*

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<sup>18</sup> See footnote 14.

<sup>19</sup> Case C-344/04 *International Air Transport and others* [2006] ECR I-403, paragraph 95.

<sup>20</sup> Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraphs 64-67.

*necessary*" means to achieve that aim, the Commission would at least have to substantiate, with specific data and evidence, that it would be necessary to reserve specific translation work for newcomers. Such specific data and evidence should relate, for example, to the number of hours necessary in order to make a "newcomers' scheme" viable. Furthermore, the Commission would have to demonstrate that the same aim could not be achieved by less restrictive means, such as those which would impact on trained interpreters of all ages, rather than only on trained interpreters over 65 years of age.

32. As a result, the Ombudsman maintained that the Commission had failed adequately to justify its ban on recruiting interpreters over 65 years of age. This constituted an instance of maladministration. As a result, the Ombudsman made a draft recommendation.
33. In his draft recommendation, the Ombudsman recalled that if an inquiry leads to a finding of maladministration, he may consider it appropriate for the institution concerned to offer financial compensation to a complainant that has suffered injury as a result of that maladministration.
34. The complainant claimed compensation for a total amount of EUR 34 619. The Ombudsman noted, however, that it could not be presumed that the complainant would have been offered the same amount of work which he had been previously offered. The Ombudsman considered that the precise losses incurred by the complainant would be dependent on numerous factors, which might, *inter alia*, include: the extent to which the complainant's specific language profile matched the specific needs of the service during the relevant period; the volume of interpretation work contracted out to ACIs with the same language profile as the complainant during the relevant period; the number of candidates for work which corresponded to the complainant's language profile during the relevant period; and the relative quality of such candidates. The Ombudsman also recognised that the Commission enjoys a wide margin of discretion when recruiting its staff. In particular, it could not be required to continue to contract specific ACIs, simply because it had contracted with them in the past. However, the Commission's discretion could not infringe the principle of non-discrimination. As the Commission had failed adequately to justify the challenged discrimination against interpreters over 65 years of age, the Ombudsman considered it appropriate for the Commission to contact the complainant to agree on suitable compensation for losses incurred by the complainant due to the application of a discriminatory policy by the Commission.

*The arguments presented to the Ombudsman after his draft recommendation*

35. The Commission disagreed with the Ombudsman's view that it breached the principle of non-discrimination when it did not recruit ACIs over 65 years of age. It considered that it should apply the CEOS to ACIs. It pointed out that,

according to Article 119 of the CEOS,<sup>21</sup> the employment of contractual staff shall cease when the agent reaches the age of 65 years. In these circumstances, and for purely legal reasons, the Commission *could not* change its recruitment policy and *could not* offer compensation to the complainant.

*The Ombudsman's assessment after his draft recommendation*

36. According to Article 21 of the Charter of Fundamental Rights, any discrimination, based on any ground, such as discrimination based on age, shall be prohibited. Moreover, according to the European Court of Justice, the principle of non-discrimination on grounds of age, embodied in Article 21 of the Charter of Fundamental Rights, constitutes a general principle of Community law.<sup>22</sup> According to the principle of non-discrimination, the Commission may not treat citizens differently on the basis of their age, unless it shows that such treatment is objectively justified and the means to achieve it are appropriate and necessary.<sup>23</sup> As regards the issue of a compulsory retirement age leading to the automatic termination of an employment contract, the European Court of Justice has also stated that:

*"the (...) encouragement of recruitment [of young persons] undoubtedly constitutes a legitimate aim of social policy (...) Therefore, [such] an objective (...) must, in principle, be regarded as objectively and reasonably justifying (...) a difference in treatment on grounds of age (...). It remains to be determined whether (...) the means employed to achieve such a legitimate aim are appropriate and necessary".<sup>24</sup>*

37. The Commission maintains its position that the age limit mentioned in the CEOS applies to ACIs. Further, as explained in the draft recommendation, it tried to justify the difference in treatment accorded to ACIs over 65 years of age, by referring to the need to create recruitment opportunities for newcomers and to train them. While the Ombudsman did not exclude the possibility that such an aim could be a "legitimate aim", he doubted that the means employed to achieve that aim, namely, a *complete ban* on the recruitment of ACIs over 65 years of age, was appropriate and necessary.
38. The Ombudsman does not agree with the argument put forward by the Commission that, for legal reasons, it had no option but to stop recruiting ACIs over 65 years of age. He is of the view that the Commission does not hire ACIs over 65 years of age because it *chooses* not to do so.

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<sup>21</sup> Version applicable since 1 May 2004.

<sup>22</sup> See footnote 14.

<sup>23</sup> See footnote 20.

<sup>24</sup> See footnote 20.

39. The Ombudsman would like to emphasise that he does not question the ruling of the Court of Justice. In this regard, he strongly underlines that the Court of Justice overruled the Court of First Instance's judgment<sup>25</sup> on a procedural issue, and not on the substance of the *Alvarez Moreno v Commission* case. The Ombudsman's findings in the present case are therefore fully consistent with the rulings of the Court of First Instance and the Court of Justice.
40. Further, the Ombudsman would also like to emphasise that he does not question the rules adopted by the legislator (such as the Staff Regulations and the CEOS). It does not fall within the Ombudsman's mandate to question the right of the legislator to establish a recruitment policy which may take age into account. In this respect, the Ombudsman takes due note of the fact that the Staff Regulations and the CEOS do contain rules which require officials (Article 52 of the Staff Regulations) and other agents (Articles 47, 74 and 119 of the CEOS) to retire at 65 years of age (or 67 years in exceptional cases for officials). The Ombudsman underlines that the present case does not ignore Article 74 of the CEOS. Rather, it is based on the view, shared by the Court of First Instance when it ruled on the substance of the *Alvarez Moreno v Commission* case, that Article 74 of the CEOS does not apply to ACIs.
41. The Ombudsman does recognise that the Commission is not legally *obliged* to follow an annulled ruling of the Court of First Instance. However, the Ombudsman stresses that the annulment of a ruling on a point of procedure does not imply that the interpretation put forward by the Commission in relation to the substance of the case is automatically valid. He notes that the Commission has put forward no argument, in the context of the present inquiry, which deals with the reasoning of the Court of First Instance concerning the substance of the case.
42. The Ombudsman expresses his regret for the fact that, although he made every effort to help the Commission avoid the instance of maladministration which its current policy has created, it did not respond to his efforts in a positive way.
43. The Ombudsman considers that this instance of maladministration is sufficiently important so as to justify the submission of a special report to Parliament.
44. Finally, the Ombudsman notes that, in a similar inquiry he conducted into the practices of the European Parliament concerning the hiring of ACIs over 65 years of age, he made a similar draft recommendation to Parliament, as a result of which Parliament accepted his position and changed its practice as regards the hiring of ACIs over 65. In reaching such a position, Parliament interpreted the applicable rules, which, it should be stressed, are the same rules the Commission considers *oblige* it not to hire ACIs over 65 years, in a manner that

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<sup>25</sup> See point 27 above.

does not lead to a ban on the hiring of ACIs over 65 years. In doing so, Parliament eliminated the potential instance of maladministration identified by the Ombudsman.

### **B. The Ombudsman's recommendation**

On the basis of his inquiries into this complaint, the Ombudsman re-states his draft recommendation below as a recommendation to the Commission.

The Commission should change its current policy of imposing a ban on the recruitment of ACIs over 65 years of age and should compensate the complainant for the losses he incurred due to the application, in his case, of that policy.

The European Parliament could consider adopting a resolution accordingly.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 4 December 2008