

Decision of the European Ombudsman closing his inquiry into complaint 1342/2010/MHZ against the European Defence Agency

Decision

Case 1342/2010/MHZ - **Opened on** 27/07/2010 - **Decision on** 23/03/2011 - **Institution concerned** European Defence Agency (Critical remark) |

The background to the complaint

1. At the time the complainant submitted his complaint to the Ombudsman, he was the Corporate Services Director of the European Defence Agency ('EDA') and a member of EDA's Management Board. He was responsible for Human Resources. His employment with EDA ended on 31 July 2010.
2. On 25 February 2010, he addressed a letter to Ms Catherine Ashton, as Head of EDA ('Head of EDA'), reporting a number of irregularities which, in his view, were committed by EDA's Chief Executive ('the CE').
3. In his letter dated 25 February 2010, the complainant first referred to Article 26 of EDA's Staff Regulations [1] ('the EDA SRs') which provide that "[a]ny member of temporary staff who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegitimate activity, ... or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of members of temporary staff of the Agency shall without delay inform either his immediate superior or, if he considers it useful, the Chief Executive of the Agency." He went on to state that he wished to report irregularities to the Head of EDA for which the CE may have been responsible.
4. He further stated that EDA had introduced only a very limited number of implementing provisions to the EDA SRs. One such provision was contained in a letter dated 4 June 2007 which the CE sent to the Central Points of Contact ('the CPC'). The CE stated that it is imperative for EDA to provide for "regular rotation as especially relevant to the policy posts. For support staff, e.g. in the Corporate Services area, we see the balance more weighted towards continuity, and on that basis have already authorised a number of contract extensions ...". The complainant pointed out in this regard that the first contract temporary EDA staff receive is for



three years, which may be extended by one year, and further renewed by a maximum of two years. Extensions and terminations of a contract are all decided by the CE. However, Article 3 of the EDA SRs does not allow an EDA temporary staff member's contract to be renewed for a second time. Then the complainant referred to the case of the Head of Planning and Policy Unit, Mr DZ, who was an EDA temporary staff member. He had his contract renewed twice, on each occasion by one year. His contract was due to an end on 31 March 2010, but, "due to a falsification" which occurred during the first half of November 2009, his contract reads as if it were due to end on 31 March 2011. The complainant considered that this "falsification" not only contravenes Article 3 of the EDA SRs, but also constitutes a serious case of misconduct and a crime, which should be pursued in accordance with the EDA SRs and criminal law. The complainant reported the foregoing to the CE. The complainant found the CE's reply unsatisfactory. Moreover, the CE's reply contained an assessment of the complainant's performance. The CE's arguments were in this respect "simply late and specious, if not slanderous. In the complainant's view, EDA's contract renewal procedure lacks transparency and objectively defined criteria. It appears to be more despotic than balanced, and it has a negative impact on staff morale.

5. The complainant further stated in his letter that Mr CM, *the Assistant Director Capability*, was granted an installation allowance and payment for removal expenses, despite the fact that he was not obliged to change his place of residence as a result of his recruitment, and that this contravened Article 5 of Annex V of the EDA SRs. The complainant explained that, since Mr CM was recruited in Brussels, he was not entitled to receive an installation allowance unless he was obliged to leave his apartment as a result of being recruited to work for the EDA. The complainant then referred to the declaration provided by the Swedish authorities that " ... *the contract of the house that presently is rented by the Permrep of Sweden to provide housing for the [CM] Family is renounced. Mr [CM] is thus obliged to make his own arrangements for future housing and he will be moving before 1 October 2009* ".

6. Finally, the complainant stated in his letter that, since the commencement of his duties as Corporate Services Director in April 2007, he had never been assessed by the CE, and that, when he had requested such an assessment, his request had not been satisfied.

7. The complainant concluded his letter by asking the Head of EDA to open an administrative inquiry.

8. The Head of EDA did not reply to the complainant's letter and no investigation was started. On 16 March 2010, the complainant renewed his complaint by addressing a letter to the Head of EDA's Cabinet ('the Head of Cabinet'), but to no avail. Therefore, on 11 June 2010, he decided to turn to the Ombudsman.

9. On 26 July 2010, that is, four days before the end of his contract with EDA, the complainant received a letter from the CE in the form of an internal note. In that note, the CE stated that (i) EDA had recently learned of the complainant's communication which he sent to the Head of EDA and to the Ombudsman, which "discloses unauthorised information"; (ii) the information had been disclosed without the prior consent of the Authority Authorised to Conclude Contracts,



and that it appeared to " *impinge the provisions of Articles 24 and 26 of the Staff Regulations of the EDA* "; (iii) in the note of 15 February 2010 which the CE sent to the complainant, the latter had already been formally requested to improve his behaviour and " *loyalty* " towards EDA. The CE concluded that he was considering whether to launch of an administrative investigation, within the meaning of Article 138 of EDA's SRs, and the possibility of taking " *appropriate disciplinary measures* ". Finally he stated that the complainant's access to EDA's databases would be withdrawn.

10. The complainant replied to the CE on the same date, also in the form of an internal note, stating that the CE's internal note showed that the CE had gone beyond his competence since Article 26 of the EDA SRs indicates that EDA shall not cause any temporary member of staff who makes a whistleblower complaint to suffer any prejudicial effects.

The subject matter of the inquiry

11. On 20 July 2010, an inquiry was opened into the following allegation and claim:

The complainant alleged that the Head of the EDA failed to reply to his letter of 25 February 2010 concerning matters covered by the "whistleblower" provision of Article 26 of the SR EDA.

The complainant claimed that the Head of EDA should take appropriate action in response to his "whistleblower" complaint.

12. Subsequently, on 5 September 2010, the complainant informed the Ombudsman that his access to EDA's databases had been withdrawn. The Ombudsman decided to include this issue in his inquiry.

The inquiry

13. On 11 June 2010, the complainant lodged his complaint with the Ombudsman. On 20 July 2010, the Ombudsman opened the inquiry. A simplified procedure was started, whereby, on 21 July 2010, the Ombudsman's Secretary General telephoned the Head of Cabinet in order to obtain a rapid reply to the complainant's letter to the Head of EDA dated 25 February 2010. As a result of his intervention, that same day, a holding reply was sent to the complainant.

14. On 27 July 2010, the Ombudsman asked the Head of EDA to provide an opinion on the complaint by 31 October 2010. He also informed OLAF about the case, given the complainant's reference in his complaint to alleged falsification of documents, and irregularities relating to work contracts.

15. By e-mail of 30 July 2010 (sent again on 20 August 2010), EDA provided the Ombudsman with copies of both the holding reply and the substantive reply which the Head of Cabinet sent to the complainant on 29 July 2010. On the same date, the complainant sent the Ombudsman



an e-mail confirming that he had received the above-mentioned replies.

16. On 5 September 2010, the complainant forwarded to the Ombudsman copies of two EDA internal notes: the first was the CE's note to the complainant dated 26 July 2010, the second, was the complainant's reply of the same date. On 20 September 2010, the Ombudsman wrote to the Head of EDA, asking her to comment on the content of the aforementioned notes in her pending opinion on the complaint.

17. On 29 October 2010, the Head of EDA sent the Ombudsman a letter which was forwarded to the complainant for observations. The complainant submitted his observations on 9 December 2010.

The Ombudsman's analysis and conclusions

A. Allegation of failure to reply to the whistleblower complaint and claim that appropriate action should be taken in response to it. Withdrawal of the complainant's access to the EDA databases.

Arguments presented to the Ombudsman

18. After waiting for almost four months for a reply to his whistleblower complaint, but to no avail, the complainant concluded that EDA had simply ignored his whistleblower complaint, and decided to turn to the Ombudsman.

19. In the Head of Cabinet's substantive reply dated 29 July 2010, which was sent to the complainant as a result of the Ombudsman's intervention (a copy of which was sent to the Ombudsman), the Head of Cabinet first noted that he had looked into the issues raised in the complainant's letter dated 25 February 2010, and that had asked the CE for a response. The Head of Cabinet clarified that his reply to the complainant of 29 July 2010 was based on the response he received from the CE.

20. **As regards the renewal of Mr DZ's contract**, the Head of Cabinet stated that the CE had found that the complainant's "suggestions", namely, that EDA had not acted in accordance with the applicable EDA SRs and /or established contract practices, and that documents had been falsified, were incorrect. The Head of Cabinet concluded that, by 31 March 2011, Mr DZ would have served six years in the EDA and that the duration of his employment was in line with Article 3 of the EDA SRs, which provides that temporary agents may be employed for a period not exceeding six years. Mr DZ's first contract had a duration of three years, extending from 1 April 2005 to 31 March 2008. By decision of the CE, made on 30 June 2007, that first contract was extended by one year, namely, until 31 March 2009. The contract was extended once again by one year, that is, until 31 March 2010. With the consent of Mr DZ, and in the interest of



the service, this last decision was amended on 30 June 2009 by a decision backdated to 30 June 2008. The effect of this last decision was to renew Mr DZ's contract for a period of two years instead of just one year, thereby proving for the contract to end on 31 March 2011. This correction lies within the discretionary power of the CE as established by Article 1.2 of the EDA SRs and Article 11 of the Joint Action (copies of these provisions were attached to the letter). The Head of Cabinet stated that it would have been useful if there had been an explanatory note outlining the rationale for the amendment, and that he had asked EDA to update Mr DZ's personal file with such information.

21. As regards Mr CM's installation allowance , the Head of Cabinet rephrased the complainant's concerns by stating that what the complainant was suggesting was that EDA "wrongfully administered part of its administrative budget by granting a particular allowance unduly and on the basis of favouritism." He then referred to the sequence of events preceding the adoption of the decision to award Mr CM the installation allowance provided for by Article 5, Annex V of the EDA SRs. The events which led to that decision were (i) Mr CM's recruitment on 3 July 2009; (ii) Mr CM's clarification of certain facts relating to his entitlements; (iii) Mr CM's formal request of 29 July 2009 for an installation allowance; (iv) EDA's request of 4 August 2009 for additional documents; (v) Mr CM's submission of a certificate dated 4 September 2009, issued by the Permanent Representation of Sweden to the EU; (vi) Mr CM's commencement of duties in EDA on 16 September 2009. The Head of Cabinet then stated that, on the basis of the certificate issued by the Swedish authorities, the CE, in consultation with EDA's Corporate Services Directorate, decided to grant the installation allowance to Mr CM. The Head of Cabinet concluded that the above sequence of events shows that the decision in question was "carefully considered following a thorough review of the available elements". He emphasised that, before the allowance was granted, EDA's Corporate Services Directorate consulted its administrative counterparts in the Commission and in the Council. Furthermore, the decision to grant the allowance was based on the consideration as to whether the nature of Mr CM's domicile was provisional or permanent. The decision to grant the installation allowance to a person already residing in the country of employment is consistent with the General Court's case law (Case T-74/95 Monteiro da Silva v Commission [1996] ECR-SC I-A-583, II-1559 and Case T-33/95 [2] Lozano Palacios v Commission [1996] ECR-SC I-A-575, II-1535).

22. As regards the issue of the probationary period, to which the complainant referred, the Head of Cabinet stated that, as a rule, EDA enforces probationary periods for its entire staff, but that the absence of such probationary periods for Directors is compliant with Article 38 of the EDA SRs ("*A member of temporary staff may be required to serve [a] probationary period ...*").

23. As regards the extension of the complainant's contract , the Head of Cabinet stated that this is a matter for the CE to decide. On the basis of the correspondence which the complainant attached to his letter, it appeared that his attention had, on several occasions, been drawn to the fact that the CE expected "*more factual and neutral advice in recruitment matters and the establishment of the detailed Functioning Budget Planning system.*" The CE reported to the Head of Cabinet that the complainant had not undertaken any action to create a transparent, functioning Budget Planning system. Moreover, the CE informed the Head of Cabinet that, on



30 June 2009, the complainant was informed orally why his contract would not be extended beyond 31 July 2010, and that the oral explanation was reiterated in a note dated 15 February 2010. The contract was renewed for not more than four months in order to align it with the average employment term of other members of EDA's Management Board. Finally, as regards transparency and the criteria chosen for decisions concerning the extension and renewal of staff contracts, the CE agreed that decisions concerning the duration of contracts should, as far as possible, be transparent, and be based on objective criteria. Pursuant to the EDA's legal basis and the EDA SRs, this decision-making procedure falls under the auspices of the Authority Authorised to Conclude Contracts. That Authority considered that EDA's interests were best served by not extending the complainant's contract.

24. The Head of Cabinet concluded his letter to the complainant by thanking him for bringing "*these issues*" to the attention of the Head of EDA.

25. In her letter to the Ombudsman dated 29 October 2010, the Head of EDA stated that, in February 2010, the complainant, in his capacity as EDA's Corporate Services Director, had released "*personnel confidential and other sensitive*" information to "*an outside actor*" without any consultation or discussion with the EDA. This act was considered, "*at the time*", to be an infringement of Articles 24 and 26 of the EDA SRs. EDA "*acknowledged*" that the measures taken by "*the then CE*" [3], namely, the decision to withdraw the complainant's rights of access to various Human Resources, and other databases, had no basis in the EDA SRs. EDA "*regretted*" that such a decision was taken "*even if it [had] only applied for four days*" before the complainant's contract ended on 31 July 2010. Finally, the Head of EDA stated that EDA had not launched an administrative investigation, and that it had not considered the possibility of appropriate disciplinary measures mentioned in the then CE's internal note of 26 July 2010. Finally, the Head of EDA stated that EDA (i) apologised "*for the inappropriate measure taken by the then CE*", and (ii) thanked the complainant for his contributions during his term of office.

26. The complainant's observations referred both to the reply of the Head of Cabinet dated 29 July 2010 and to the letter of the Head of EDA dated 29 October 2010. The complainant was not satisfied with the way in which the EDA had conducted its investigation, as this was reported in the Head of Cabinet's reply dated 29 July 2010. In the complainant's view "*no investigation had been launched to understand*" what really happened in the case of Mr DZ's contract renewal. The complainant stressed that he was the only person who could testify on the matter, and he had not been heard. In his reply, the Head of Cabinet merely reiterated the CE's arguments. In the complainant's view, EDA's investigation into this issue should not have been closed only on the basis of such arguments. According to the complainant, the External Auditors suggested in their audit report that a specific investigation should be carried out into the renewal of Mr DZ's contract. Moreover, the lack of transparency in the contract renewal procedure had been highlighted by the EDA Staff Committee and the Internal Auditor. As regards the decision that Mr CM should be granted an installation allowance, the complainant stated that the Head of Unit for Human Resources had given the exact opposite advice. Moreover, the complainant took the view that the determination of his own grade at AD 13, as Corporate Services Director, was contrary to the EDA SRs (Annex VII), which foresaw grade AD 14 for such a post.



27. As regards the Head of EDA's letter to the Ombudsman, the complainant noted in his observations that the Head of EDA referred only to the withdrawal of his IT access, but failed to address the matter of the whistleblower complaint which he had submitted to her. Although the Head of EDA acknowledged that the withdrawal of the complainant's IT access was a mistake, she did not consider that " *it was a punitive action taken against the rules.* " She also failed to comment on whether the former CE had already been, or would be, subject to disciplinary measures prescribed in this respect by the EDA SRs. The complainant also found that the Head of EDA had been misled to believe that no administrative action had been taken against him. " *According to some Agency rumours* ", a few days before he left his office, the former CE had approved the relevant document in this respect and, at that time, had mandated his successor to carry out such an administrative investigation.

28. The complainant pointed out that the withdrawal of his IT rights was a major offense to his reputation, dignity, and pride, precisely because it was done only a few days before he ended his duties with EDA and left " *his staff* ". He took the view that, given the circumstances, it would be appropriate for him to receive a letter of apology from the Head of EDA stating clearly that " *in all this occurrence* " he had acted in full accordance with the EDA SRs (in particular, Articles 10 [4] , 24 [5] and 26 [6]).

The Ombudsman's assessment

Preliminary remark

29. At the outset, the Ombudsman points out that his inquiries into 'whistleblower cases' normally focus on the quality of the investigations carried out by the services involved regarding the matter reported by a whistleblower. In his review, the Ombudsman follows the standards laid down in the relevant case-law of the courts [7] . In the present case, the Ombudsman will thus check how EDA reacted to the complainant's whistleblower complaint and whether EDA examined his allegations as completely and thoroughly as could be expected in the light of their seriousness. He will finally check whether the protection granted to whistleblowers by the EDA SRs was indeed ensured by EDA in the complainant's case.

Alleged failure to reply to a whistleblower complaint

30. Against the above background, the Ombudsman regrets that, as rightly argued by the complainant, EDA initially ignored the complainant's whistleblower complaint of 25 February 2010, and that it was only as a result of the Ombudsman's intervention that EDA took action regarding that complaint. Nevertheless, the Ombudsman acknowledges that, immediately after his Secretary General contacted the Head of Cabinet, the latter sent the complainant a holding reply and, a few days later, a substantive reply. By taking such action, EDA settled the complainant's allegation that EDA failed to reply to his letter dated 25 February 2010.



Internal investigation following the whistleblower's complaint (the claim)

31. As regards the complainant's claim, the Ombudsman notes that EDA sent him the Head of Cabinet's substantive reply, which referred to the Agency's investigation into the complainant's whistleblower complaint, but that the Head of EDA failed to comment on this issue in her letter dated 29 October 2010. The Ombudsman understands, therefore, and accepts that the opinion on the present complaint which EDA sent to the Ombudsman consists, in fact, of two documents: first, the Head of Cabinet's reply to the complainant, and, second, the letter dated 29 October 2010, which the Head of EDA sent to the Ombudsman. For procedural reasons, and for the sake of clarity, it would, however, have been better if the Head of EDA had explained in her letter what actions EDA had, in fact, taken to investigate the matters reported by the complainant in his whistleblower complaint.

32. From the Head of Cabinet's reply, it emerges that EDA's investigation into the matters reported to it by the complainant was limited to the questioning of the former CE by the Head of Cabinet, ostensibly on behalf of the Head of EDA. Taking into account the CE's duties, as established in Article 11 of the Joint Action, in conjunction with Article 1.2 of the EDA SRs [8] , the Ombudsman considers that limiting the investigation to such questioning could be considered to constitute sufficient action if the clarification received from the former CE allowed a comprehensive, and full assessment of the facts which gave rise to the whistleblower's complaint. It is worth recalling here that the complainant's whistleblower complaint basically covered three issues: (i) his own professional position as Corporate Services Director (grade, probation period, termination of contract with EDA); (ii) the installation allowance granted to Mr CM, and (iii) the renewal of Mr DZ's contract.

33. As regards issue (i), the Ombudsman considers that, since it concerns solely the complainant's own working relationship with EDA, it would be more appropriate for it to be dealt with in terms of the appeal procedure as foreseen in the EDA SRs, and not as part of the whistleblower complaint. Given that, on the basis of the complainant's complaint to the Ombudsman, it is not certain whether the complainant has indeed exhausted the internal appeal procedure, the Ombudsman will not take a position on issue (i), which appears to be inadmissible at this stage. [9]

34. As regards the installation allowance awarded to Mr CM, that is, issue ii, the Ombudsman points out that, pursuant to the relevant case law [10] , the installation allowance should be paid if the expatriation allowance is granted. The Ombudsman further points out that Article 4.1 (a) second indent of Annex V to the EDA SRs provides that "*circumstances arising from work done for another State* [other than Belgium, which is where Mr CM was residing when he entered EDA's service] ... *shall not be taken into account* [for granting the expatriation allowance]". Finally, the Ombudsman notes that the relevant certificate issued by the Swedish authorities [11] suggests that, before he was recruited to work for EDA, Mr CM's apartment in Brussels was rented for him by the Swedish Permanent Representation to the EU. In light of the above, the Ombudsman considers that, when clarifying issue (ii), the CE should have first informed the



Head of Cabinet whether the expatriation allowance was granted to Mr CM. The Head of Cabinet failed to refer to such clarification in the letter dated 29 July 2010. This gives rise to doubt as to whether the investigation concerning issue (ii) was thorough and complete.

35. As regards the renewal of Mr DZ's contract (issue iii), the Ombudsman understands that Mr DZ had a three-year contract which ended in March 2008. In June 2007, Mr DZ's contract was extended by one year ('first renewal'), thereby ending in March 2009. In June 2008, this extended contract was extended by one more year ('the second renewal'), to end on 31 March 2010. On 30 June 2009, the second renewal was annulled, since it was considered to be a mistake, and was "replaced", in such a way that on this second renewal the contract was renewed for two years, to end in March 2011. The second renewal was thus backdated to 30 June 2008.

36. The Ombudsman recalls in this respect that, in principle, unlawful administrative measures can be revoked and, if they create subjective rights, revocation must be made under very strict conditions [12]. Such revocation cannot, however, mean that a **new** unlawful measure can take the place of the revoked unlawful measure, even if the person concerned were to agree to the revocation. In the present case, the withdrawal of the decision on the second renewal was followed by a new renewal, while the first renewal took place in June 2007.

37. However, Article 3 of Annex I to the EDA SRs provides that "[t]emporary staff shall not be engaged for more than four years but their engagement may be limited to any shorter duration. Their contracts may be renewed **not more than once** for a maximum period of two years if the possibility of renewal had been provided for in the initial contract and within the limits provided for in that contract. At the end of that time, they shall no longer be employed as temporary staff under these provisions." (Emphasis added)

38. In light of the above provision it is clear that only the first renewal was lawful. Any further renewal, either for one or two years, would infringe the EDA SRs. The second renewal of Mr DZ's contract, and the subsequent renewal replacing the second one, were thus both unlawful. The clarification provided by the former CE to the Head of Cabinet in this respect, and referred to in the latter's letter dated 29 July 2010, cannot therefore be accepted, and the investigation into issue (iii) cannot be considered to have been thorough and complete.

39. In light of the above considerations, in particular in paragraphs 34 and 38, the Ombudsman takes the view that the investigation carried out by the EDA regarding the issue of the award of the installation allowance to Mr CM, and the issue of the renewal of Mr DZ's contract was not as complete and as thorough as could be expected in light of the seriousness of the allegations made in the complainant's whistleblower complaint dated 25 February 2010. This is a first instance of maladministration and a critical remark will be made in this respect below.

Withdrawal of the complainant's access to EDA databases - EDA's protection of the whistleblower



40. The Ombudsman is puzzled by the measure EDA took against the complainant, namely, the withdrawal of his right of access to EDA's databases just a few days before the end of his contract.

41. The Ombudsman first recalls that, pursuant to Article 26 of the EDA SRs "[a] *ny member of temporary staff who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegitimate activity, ... or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of members of temporary staff of the Agency shall without delay inform either his immediate superior or, if he considers it useful, the Chief Executive of the Agency.* "

42. Moreover, Article 27 of the EDA SRs, provides that "[a] *member of temporary staff who further discloses information as defined in Article 26 to the President of the Council of the EU or of the European Parliament, shall not suffer any prejudicial effects on the part of the Agency provided that both of the following conditions are met: (a) the member of temporary staff honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) the member of temporary staff has previously disclosed the same information to the Agency and has allowed the Agency a period time set by the Agency given the complexity of the case to take appropriate action. The member of temporary staff shall be duly informed of that period of time within 60 days.* " (Emphasis added)

43. The Ombudsman understands that Articles 26 and 27 of the EDA SRs are "whistleblower" provisions, analogous to those of Article 22a and 22b of the Staff Regulations of officials of the European Communities [13] . The main differences between the two are that, in Article 26 EDA SRs, OLAF is not mentioned, while Article 27 EDA SRs refers only to the President of the Council of the European Union and the President of the European Parliament. These differences reflect the fact that EDA was established under the "second pillar" of the Common Foreign and Security Policy, for which OLAF, the Court of Justice, the Court of Auditors and **the Ombudsman** were not competent at the time EDA was established. With the entry into force of the Treaty of Lisbon, the former pillar structure disappeared, and the Ombudsman, in particular, is now competent to deal with maladministration in relation to the activities of the Union institutions, bodies, offices, and agencies, including activities concerning the Common Foreign and Security Policy. In light of the above, the Ombudsman does not consider that he is an " *outside actor* " to whom " *personnel confidential and other sensitive information* " could not be submitted in a complaint made against EDA [14] .

44. The Ombudsman considers that the withdrawal of the complainant's right of access to EDA's databases was intended to be a sanction against a whistleblower, and is therefore in clear breach of Article 27 of the EDA SRs which provides that a whistleblower " *shall not suffer any prejudicial effects on the part of the Agency* ". This measure thus constituted a second instance of maladministration.

45. The Ombudsman notes the apologies which the Head of EDA made to the complainant in her letter dated 29 October 2010 regarding the withdrawal of his right of access to EDA's



databases. In his observations, the complainant did not accept these apologies. The Ombudsman considers, therefore, that EDA has not successfully settled this aspect of the complaint. A second critical remark will thus be made below.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remarks:

The EDA failed to carry out a thorough and complete investigation into the whistleblower complaint regarding Mr CM's installation allowance and the second renewal of Mr DZ's contract.

By withdrawing the complainant's right of access to EDA's databases, EDA acted contrary to Article 27 of its Staff Regulations which provides that a whistleblower " *shall not suffer any prejudicial effects on the part of the Agency* ".

The complainant and the Head of EDA will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 23 March 2011

[1] 2004/676/EC: Council Decision of 24 September 2004 concerning the Staff Regulations of the European Defence Agency, OJ L 310, 7.10.2004, p. 9–63.

[2] This judgment was appealed (C-62/97 *Lozano Palacios v Commission* [1998] ECR I-3273. In paragraph 22 of its judgment, the Court of Justice confirmed the findings of the then Court of First Instance.

[3] This emphasis was added by the Ombudsman. He understands that by using this term the Head of the EDA wished to convey to the Ombudsman that the [former] CE had in the meantime resigned or was no longer working for EDA.

[4] Article 10.1 of the EDA SRs reads: " *A member of temporary staff shall carry out his duties and conduct himself solely with the interests of the Agency in mind: he shall either seek not take instructions from any government, authority, organisation or person outside the Agency. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of*



loyalty to the Agency. "

[5] Article 24 of the EDAs SRs reads: "*A member of temporary staff who receives orders which he considers to be irregular or likely to give rise to serious difficulties shall inform his immediate superior, who shall, if the information is given in writing, reply in writing. Subject to paragraph 2, if the immediate superior confirms the orders and the member of temporary staff believes that such confirmation does not constitute a reasonable response to the grounds of his concern, the member of temporary staff shall refer the question in writing to the hierarchical authority immediately above. If the latter confirms the orders in writing, the member of temporary staff shall carry them out unless they are manifestly illegal or constitute a breach of the relevant safety standards. 2. If the immediate superior considers that the orders must be executed promptly, the member of temporary staff shall carry them out unless they are manifestly illegal or constitute a breach of the relevant safety standards. At the request of the member of temporary staff the immediate superior shall be obliged to give such orders in writing.*"

[6] This article is referred to in paragraph 3 of this Decision.

[7] Case T-4/05, *Strack v Commission*, order dated 22 March 2006, paragraph 40. In that order, the then Court of First Instance looked at a final case report by OLAF and noted several elements that were supportive of the view that OLAF's investigation had been adequate. The Court referred to (a) the thoroughness of the investigation and the analysis in the report; (b) the clear identification of the allegations made by the whistleblower, as well as (c) the specific measures adopted by OLAF to carry out its investigation; and (d) the use of relevant sources of information, including specific individuals with whom it had held meetings.

[8] Article 11 of the Joint Action reads: "*(...) the staff of the Agency shall be selected by the Chief Executive on the basis of relevant competence and expertise.*" Article 1.2 of the SR EDA reads: "*For the purpose of these Staff Regulations, the authority authorised to conclude contracts (...) shall be determined in accordance with the relevant provisions of the Joint action 2004/552/CFSP.*"

[9] Article 2.8 of the Ombudsman's Statute provides that "*No complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all possibilities for submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90(1) and (2) of the Staff Regulations, have been exhausted by the person concerned (...).*"

[10] C-62/97 *Lozano Palacios v Commission* [1998] ECR I-3273 paragraph 21.

[11] The complainant described the content of this certificate in his whistleblower complaint of 25 February 2010.

[12] See Case T- 416/04 *Kontouli v Council* [2006] ECR SCI-A-2-181 and II-A-2-897, paragraph 161; C--365/89 *Cargill* [1991] ECR -I-3045, paragraph 18; C -90/95 P *De Compte v Parliament* [1997] ECR I-1999, paragraph 35 and C-15/87 *Consorzio Cooperative d' Abruzzo v*



Commission [1987] ECR 1005, paragraphs 12 to 17.

[13] Article 22a of the Staff Regulations of Officials of the European Communities provides:

" 1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.

Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed."

Article 22b of the Staff Regulations of Officials of the European Communities provides:

" 1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.



2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed. "

[14] Nevertheless, he points out that, in the present case, the complainant chose not to attach to his complaint to the Ombudsman copies of EDA's internal documents, to which he referred in his whistleblower complaint of 25 February 2010.