

Draft recommendation of the European Ombudsman in his inquiry into complaint 2365/2009/(MAM)KM against the European Commission

Recommendation

Case 2365/2009/(MAM)KM - Opened on 16/10/2009 - Recommendation on 06/12/2011 - Decision on 17/12/2012

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant is a former official of the European Commission. On 2 February 2009, when he was still working at the Commission, he sent a letter entitled "@europa.de" for publication on a discussion forum on Intracomm, the Commission's intranet. The letter concerned a Sunday Times article, according to which a high-ranking Commission official had met journalists posing as representatives of a Chinese business and provided them with information on ongoing anti-dumping proceedings. [2] The letter, which included comments made by the complainant, was not published. No explanation was given to the complainant. On 4 February 2009, the complainant submitted a revised version of the letter, which, at that stage, contained quotes from several newspaper articles only. Again, the letter was not published and the complainant did not receive an explanation.

2. On 9 February 2009, the complainant sent a letter to the person in charge of the relevant discussion forum ('the Editor'), asking him to publish his letter, in the edition of 4 February 2009 at least, or to explain why the letter was not published. On 25 February 2009, he received a reply in which the Head of Unit for Communication and Information Management in the then Directorate-General ("DG") for Administration explained that the editorial policy for publishing letters on the relevant discussion forum on Intracomm was as follows:

"Letters will be published in full on the intranet site unless they are deemed by the Head of Unit for Internal Communication or the Editor in Chief of Commission en Direct, acting under her authority, to be:

- libellous or potentially libellous;
- insulting or making accusations against named or easily identifiable individuals;
- otherwise likely to prejudice the interests of the Institution or breach commonly held standards



of decency."

3. The Head of Unit also indicated that the complainant's letter made a number of comments regarding a named colleague "on a matter which is currently subject of an on-going internal OLAF inquiry". The Commission was obliged to protect this official from a public debate on the intranet because of the presumption of innocence. It added that "[t]his has nothing to do with censorship as you should know. Freedom of speech does not mean an obligation for others to publish."

4. On 10 and 23 March 2009, the complainant sent another letter, entitled "Made in Germany". In this letter, he highlighted an article published by the Spiegel, a German news magazine, according to which the German government operates a system that evaluates top officials of German nationality in international organisations, including the EU, to determine whether they are fit for higher tasks in the international arena. [3] This letter was not published either, and again no explanation was given.

5. On 2 April 2009, the complainant sent a further letter, entitled "Rapid, but inaccurate", alleging that the Commission was hiding certain inconvenient press releases and indicating that a number of press releases, including one related to the Sunday Times article, could not be found on the Commission's database for press releases ('the RAPID database'). This letter, again, was not published and the complainant received no information as to the reasons for this rejection.

6. On 14 April 2009, the complainant therefore wrote to the Editor requesting an explanation. The Editor replied on 21 April 2009 stating that, in general, the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". As the rules and recommendations on the site showed, the relevant discussion forum was supposed to be a place for positive interaction among colleagues and not a place for accusations.

7. On 27 April 2009, the complainant lodged a complaint under Article 90(2) of the Staff Regulations for civil servants of the EU, asking for the decisions not to publish the abovementioned letters to be annulled. In relation to his first letter ("@europa.de") he argued that, even though the Commission could reject letters only if they breached the editorial policy, it had not explained how his letter could fall into this category. The complainant submitted that his letter was not insulting and did not make any libellous accusations, but, rather, collected a series of quotations from publicly available sources. In any event, the editorial policy had to respect the fact that freedom of speech was a value upheld by the Staff Regulations. In that regard, he referred to the fact that a Belgian court had rejected an application by the Commission official mentioned in his letters to prevent an NGO from mentioning his name in the context of an award which intends to highlight lobbying activities around the EU institutions.

8. The complainant also challenged the justification given by the Editor for not publishing his other letters ("Made in Germany" and "Rapid, but inaccurate") on Intracomm. He argued that these letters did not contain any innuendo or accusations against colleagues. His quotations from the *Spiegel* article had not, to his knowledge, been challenged by the German government,



and in "Rapid, but inaccurate" he was in fact citing from a Commission press release. There was therefore no basis for the Commission's assertion that the letters contained "innuendo or accusations against colleagues".

9. In relation to the matters raised in his letter entitled "Made in Germany", the complainant further asked the Commission to investigate to what extent the German government's assessment of top German officials undermined their impartiality. He also asked the Commission to bring an action against Germany for carrying out this evaluation process, which in his view undermined fundamental principles of the European civil service, and to ensure that all press releases are available on the RAPID database at all times.

10. On 27 May 2009, the Commission rejected the Article 90(2) complaint as inadmissible because none of the issues raised constituted an act that could be challenged by such a complaint.

11. On 17 September 2009, the complainant therefore turned to the Ombudsman as regards his complaint.

The subject matter of the inquiry

12. The complainant submitted the following allegations and claims:

Allegations:

1. The Commission wrongly refused to publish three articles written by the complainant on Intracomm. It failed to give a proper reason for its rejection of the articles.
2. The Commission wrongly refused to investigate whether top German Commission officials were compromised in their impartiality by the fact that Germany operated an evaluation system of top German officials in international institutions.
3. The Commission wrongly refused to commence court proceedings against Germany for undermining fundamental principles of the European civil service by operating such an evaluation system.
4. The Commission wrongly failed to ensure that all press releases are available on the RAPID database at all times.

Claims:

1. The Commission should publish the letters submitted by the complainant on Intracomm.



2. The Commission should investigate whether top German Commission officials are compromised in their impartiality by the German evaluation system.
3. The Commission should commence proceedings against Germany for undermining fundamental principles of the European civil service by operating such an evaluation system.
4. The Commission should ensure that all press releases are available on the RAPID database at all times.

The inquiry

13. On 16 October 2009, the Ombudsman opened an inquiry and asked the Commission for an opinion on the complaint.

14. On 3 March 2010, the Commission sent its opinion. Having examined this opinion, the Ombudsman reached the conclusion that he needed further information to deal with this case. On 9 March 2010, he therefore asked the Commission to provide this information.

15. On 17 May 2010, the Commission sent its reply, which was forwarded to the complainant with an invitation to submit observations. The complainant's observations on this reply and the Commission's opinion were received on 25 May 2010.

16. On 15 December 2010, the Ombudsman asked the Commission for further information. The Commission sent its reply on 8 February 2011 and the Ombudsman forwarded it to the complainant, with an invitation to submit observations. The complainant's observations were received on 24 February 2011. In these observations, the complainant essentially maintained his complaint and did not raise any new issues.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission wrongly refused to publish three articles written by the complainant on Intracomm and failed to give a proper reason for its decision: and related claim

Arguments presented to the Ombudsman

17. The complainant argued that the Commission could only reject letters if they breached the editorial policy. In the complainant's view, however, none of his letters breached the Commission's editorial policy, given that they consisted mainly of quotes from publicly available newspaper articles. In fact, the quotation from the press in his letter entitled "Made in Germany",



which the Commission had rejected because " *reproduction of articles from the press accusing or using innuendo against colleagues is [to be] avoided* ", did not even contain any innuendo or accusation. The letter entitled "Rapid, but inaccurate" did not cite from the press but from a Commission press release.

In any event, the complainant considered that freedom of speech was more important than the presumption of innocence, and noted that by not publishing his letters, the Commission was breaching the aforementioned right which was also reflected in Article 17a of the Staff Regulations.

18. In its opinion, the Commission referred to its decision on the complainant's Article 90(2) complaint, which rejected the complaint as inadmissible. It further reiterated the reasoning it had set out in its letters of 25 February and 21 April 2009.

19. In its response to the Ombudsman's request for an opinion on the substance of the relevant allegation and claim, the Commission noted that officials did not have a right to have their letters published. The editorial policy, which was published on the site, was perfectly clear in this respect and members of staff could therefore be expected to understand the limits of what could be published. In the present case, it would have been unacceptable for the Commission to publish any letter which could affect the presumption of innocence of a member of staff under investigation. The Commission underlined that this had been made very clear in its communication with the complainant.

20. Having analysed this reply, the Ombudsman asked the Commission to confirm that, by stating that it would have been unacceptable for it to allow the publication of a letter that would affect the presumption of innocence of a member of staff, it was referring to the third bullet point of the document setting out its editorial policy (letters which are deemed likely to prejudice the interests of the institution). The Commission confirmed that this was the case and noted that the second bullet point (letters which are deemed to be insulting or to be making accusations against named or easily identifiable persons) was also relevant. This was because the complainant's letters mentioned a "named or easily identifiable individual" who was subject to an ongoing investigation by the Investigation and Disciplinary Office of the Commission ("IDOC"). The Commission, as guardian of the treaties, had to uphold at all times the presumption of innocence, a fundamental principle of the rule of law.

21. In relation to the letter entitled "@europa.de", the Ombudsman asked whether the Commission could now consider publishing it on the discussion forum, bearing in mind that the subject matter of the letter had been discussed in two publicly available judgments of the Civil Service Tribunal, and that the Commission official in question had admitted meeting the " *Chinese businessmen* " and providing them with information on ongoing anti-dumping procedures. The Commission replied that its obligation to protect the presumption of innocence remained relevant even though the case in question had been covered by the press. It added that it did not, in any event, intend to accept debates on its intranet about the behaviour, character or merits of individual members of staff.



22. As regards the letters entitled "Made in Germany" and "Rapid, but inaccurate", the Ombudsman noted that they related to the Spiegel article about a German rating system for top Commission officials, and to the availability of Commission press releases, respectively. He therefore asked the Commission to explain how publication of these letters could "affect the presumption of innocence of an individual member of staff" and how these letters could be considered to "accuse or use innuendo against colleagues". In its reply to the Ombudsman's request for further information, which concerned other points as well, the Commission did not address these questions.

23. In his observations, the complainant maintained his complaint and rejected the Commission's argument that officials had no right to have their letters published on the discussion forum. The editorial policy stated that "letters will be published in full unless" any of the exceptions apply. In that regard, the Commission had still not explained its view that his letters were insulting or libellous or made accusations against named or easily identifiable individuals.

24. In his letter entitled "@europa.de", he was merely citing from publicly available sources. "Made in Germany" did not even concern named individuals and did not even mention the Commission official whose presumption of innocence the Commission stated it had to protect. Instead, it related to the rating system operated by the German State. In fact, in both letters entitled "Rapid, but inaccurate" and "@europa.de", he cited a press release published by the Commission itself, the very press release which the Civil Service Tribunal did not consider to breach the presumption of innocence. This made it absurd for the Commission to refuse to publish this particular letter by reference to this principle. Further, his letters presented facts which remained relevant whether or not the official in question was found guilty, and they did not give " *the preconceived idea that the accused has committed the offence charged* " [4] .

25. The fact that a letter named an individual or made him or her easily identifiable was not sufficient for it not to be published. Rather, the editorial policy required the Commission to show that the letter contained insults or accusations against that individual. It would thus seem that the Commission was interpreting its editorial policy too widely. In fact, in its opinion, it announced a policy of systematic censorship when it stated that it did " *not intend to accept debates on its Intranet about individual staff members, their merits, behaviour, character, etc.* " It did not seem to care whether it was respecting its own editorial policy and thus breached the principle of freedom of expression.

26. In relation to the Commission's assertion that publishing the letter entitled "@europa.de" would prejudice its interests, the complainant argued that these interests had to be defined clearly. The Commission had, in this context, referred to the presumption of innocence of an official who " *is the subject of an on-going investigation by the Investigation and Disciplinary Office of the Commission (IDOC)* ". However, the European Anti-Fraud Office ('OLAF') had closed its investigation into the relevant official's behaviour described in the Sunday Times article on 29 January 2009. It had then opened another investigation into the allegations concerning DG Trade and, on 25 February 2010, informed the complainant that the opening of disciplinary proceedings by the Commission with regard to the official concerned would depend



on "the outcome of our procedure and our recommendation" in relation to this procedure. On 22 September 2010, OLAF informed the complainant that this investigation was now also closed and that its recommendation was that no follow-up action be taken.

27. The complainant submitted that, in any event, his letter entitled "*@europa.de*" did not breach the presumption of innocence. The Commission itself had cited the Sunday Times article he was relying on to justify its decision to suspend the official in question. In its judgment on the matter, the Civil Service Tribunal had referred to the fact that this article was "very detailed and on numerous occasions reports, and in quotation marks, the applicant's replies to the questions put to him by the reporters" [5] and that the official in question had actually "admitted some of the facts reported in the article in The Sunday Times", in particular, having communicated information on anti-dumping procedures to the "Chinese businessmen".

The Ombudsman's assessment

28. Before examining the Commission's position with regard to each of the letters the complainant submitted to it for publication on the discussion forum, the Ombudsman considers it appropriate to make a number of preliminary remarks.

29. First, the Commission has argued that officials have no right to have letters published on the discussion forum. It should be noted, however, that the Commission has laid down an editorial policy in this context. According to this document, letters "will be published" unless one of three exceptions applies. In these circumstances, the Commission's decision not to publish the letters submitted by the complainant must be assessed against the rules the Commission has set itself in this regard; that is, the editorial policy, and the principles which it implements.

30. Second, the complainant did not challenge the rules laid down by the Commission in its editorial policy. Instead, he argues that these rules were interpreted and applied too broadly. The Ombudsman's analysis will therefore focus on the question of whether the decisions not to publish the letters submitted by the complainant can be justified by reference to the editorial policy, which the Commission has itself adopted and announced to its staff.

31. Third, and as the complainant has correctly pointed out, the editorial policy states that letters submitted for publication will be published on the discussion forum in full, unless one of the exceptions applies. Publication is therefore the rule and non-publication the exception.

32. Fourth, it is true that the Commission was not obliged to adopt such a general policy. Furthermore, it could alter that general policy, because, as the Commission rightly pointed out, freedom of speech does not mean an obligation for others to publish. However, the fact remains that the Commission has adopted, and communicated to its staff, the general policy referred to above. This policy can only be understood as a decision to make Intracomm a forum in which officials can express their views freely, subject only to the announced exceptions. This reflects the freedom of expression, which is a fundamental right which is guaranteed by Article 10 of the European Convention on Human Rights ('ECHR') and Article 11 of the Charter of Fundamental



Rights of the EU ('the Charter'). It is also one of the rights of officials guaranteed by the Staff Regulations (Article 17a). According to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by this Charter must be "provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." In the Ombudsman's view, it results from this that the Commission cannot, when applying the editorial policy, interpret the exceptions foreseen in it in an overly broad manner, thereby limiting the ability of a civil servant to express himself freely in the forum set up for this purpose.

33. Fifth, in its submission in the present case, the Commission stated that it did not intend to accept debates about the behaviour, character or merits of individual members of its staff on the relevant discussion forum. The Ombudsman notes that the editorial policy laid down by the Commission does not include any such exception. In these circumstances, the Commission's decisions in the present case could only be justified if they are covered by one of the three exceptions that are set out in its editorial policy and the Commission cannot make *ad hoc* exceptions which go beyond those, since to do so would be to unduly limit freedom of expression.

34. Sixth, in his reply of 21 April 2009, the Editor explained that the Commission "was against reproduction of articles from the press accusing or using innuendo against colleagues". In this context, it should be pointed out that the second exception set out in the Commission's editorial policy refers to letters that are deemed to be "making accusations against named or easily identifiable individuals". It is thus clear that the accusation needs to be made by the letter itself and that the relevant exception would not apply in cases where a letter merely reports on an accusation made by someone else. However, it is also clear that it is a matter of interpretation whether this is the case or whether a letter, though purporting merely to report about an accusation made by someone else, in reality makes it clear that its author shares the view expressed by that third party and, thus, makes the said accusation his own. It should also be noted that publication of a letter merely reporting on accusations made by a third party can still be refused if the third exception applies.

35. Seventh, as regards this third exception, the Commission has referred to the need to protect the presumption of innocence in order to justify not publishing the complainant's letters. The Ombudsman notes that the ECtHR has made it clear that a balance needs to be struck between the freedom of expression and the need to protect the presumption of innocence:

"Freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 para. 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected." [6]

36. In the Ombudsman's view, it is thus clear that an institution would act incorrectly if it were to publish statements that encroach upon the presumption of innocence. In these circumstances,



the Ombudsman considers it plausible for an institution to take the view that statements made by members of its staff on a discussion forum run by its services would be likely to prejudice its interests. Still, it must be kept in mind that respect for the fundamental right of free expression requires that this exception, like all others, be interpreted carefully so as not to deprive the general rule, based on that principle, of all meaning.

37. Finally, regard should be had to the fact that a distinction needs to be made between the complainant's allegations and his claim, in so far as the relevant point in time is concerned. As regards the Commission's decisions to refuse to publish the complainant's letters, it is clear that the Ombudsman must examine whether these decisions were correct when they were taken. In other words, the Ombudsman's examination must be based on the facts that were or could have been known to the Commission at that stage. The complainant's claim that his letters should be published, however, concerns an action that the Commission should, in the complainant's view, take now or in the future. In order to assess this claim, the Ombudsman must therefore also take into account any developments that may have occurred since the Commission adopted its decisions not to publish the said letters.

38. Having set out his analysis of these more general points, the Ombudsman will now examine the Commission's decisions to reject the complainant's letters in relation to each of these letters.

(1) Letter entitled

"@europa.de

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39. The Commission argued that the " @europa.de " letter could not be published because it made a number of comments regarding a named or easily identifiable colleague on a matter which was subject to investigation by IDOC. It submitted that it was obliged to protect the presumption of innocence and could not publish anything which would undermine this principle. In response to the Ombudsman's second request for further information, it explained that it was, in this regard, referring to both the second and the third exceptions set out in the editorial policy.

40. The complainant questioned whether this argument was based on a true account of the facts. He added that it was doubtful whether the Commission official to whom his articles were referring was subject to an ongoing IDOC investigation. In this context, it should be recalled that, when deciding whether the Commission's decision to refuse to publish the relevant letter was correct, the Ombudsman must have regard to the situation at the time when this decision was taken, that is to say, in February 2009. However, the complainant does not appear to dispute the Commission's claim that an inquiry was ongoing at that time.

41. The Commission's argument that the letter fell under both the second and the third exception listed in the editorial policy therefore remains to be examined.

42. First of all, however, it must be recalled that there are two versions of the " @europa.de "



letter. In both versions, the complainant introduces the Sunday Times article by its title and subtitle and provides the link to it. He then goes on to cite from the Commission press release issued two days before the publication of the article. According to the text thus cited, the Commission had been approached with allegations that one of its officials had had contacts with journalists posing as businessmen and the Commission had asked the newspaper to make the evidence available so that it could investigate the matter. The complainant's letter notes that OLAF was not sure whether it could in fact listen to the tapes which had been provided, given that it was not clear whether the recording had been legal. It then refers to a *Spiegel* report describing a system, which rates top German Commission officials, operated by the German government. A link to this article, which mainly deals with the affair uncovered by the Sunday Times, is also provided. The complainant's letter proceeds to cite Article 11 of the Staff Regulations and calls upon the Commission to investigate the matter. It further reports that the official, who met the Sunday Times journalists posing as business representatives, attempted to prevent an NGO from publishing his name in an awards ceremony publication, but that the Belgian court dealing with the question ruled that freedom of expression was more important in this case. It finally mentions that the official concerned is the vice-president of the association of current and former *référéndaires* at the European Courts.

43. In addition, the original version of the complainant's letter contained some " *conclusions* " and comments by the complainant on the matter and on what he perceived to be the Commission's unwillingness to investigate it. Thus, after the introduction to the *Sunday Times* article, the complainant noted how long the official involved in the affair had occupied his post and presented his " *first conclusion* ", namely, that the Commission was wrong to allow him to remain in his sensitive position for as long as he did. After reporting that OLAF was analysing whether it had the right to listen to the tapes, he concluded that it was inclined not to use the evidence which the Commission had requested from the *Sunday Times* . Further, the complainant suggested that the fact that the official in question had a leading position in an association of former *référéndaires* would have an influence on the outcome of the case which the official had brought against the Commission's decision to suspend him. In the Ombudsman's view, these " *conclusions* " create the impression that the behaviour of the official in question was such that he should not have been allowed to occupy the sensitive post he had held, and clearly not for such a long period of time. Against this background, the remainder of the text, although merely reporting what had been published elsewhere, is likely to be understood by readers as criticising the Commission official in question.

44. In light of the above, the Ombudsman considers that the Commission was entitled to conclude that the original version of the relevant letter contained accusations against the official in question. It further follows that, in relation to the third exception, the Commission's understanding of this version of the letter as undermining the protection of the presumption of innocence of the official under investigation, also appears reasonable. In the Ombudsman's view, the Commission's decision not to publish this version of the " *@europa.de* " letter on the relevant discussion forum was thus justified.

45. On the other hand, the revised version of the complainant's letter, from which the complainant's abovementioned conclusions and comments have been removed, consequently



consists mainly of quotes from press articles and the Commission press release on the matter. It concludes by emphasising that all the facts it mentions stem from publicly available sources and were not intended to prejudge whether the Commission official was "guilty or innocent". It results from a reading of this text, which is summarised in paragraph 43 above, that the complainant reports the affair and, in the course of doing so, cites the titles and subtitles of the relevant articles and the reason for which the official was nominated for the "Worst Conflict of Interest Award"; namely, according to the organisers of this award, "for revealing inside information on trade tariffs to "lobbyists" who were in fact journalists working under cover". However, while the complainant refers to and repeats such statements and the relevant articles which could be considered as making accusations against the official, it does not result from the text that he shares the views he reports on or makes any such accusations his own.

46. It therefore cannot be considered as an established fact that the complainant, in the second, edited version of his letter, is making accusations against the official in question.

47. As regards the third exception, it is true that, as stated above, the letter reported on the Sunday Times affair at a time when the investigations in this regard had not yet been finalised. However, that in itself cannot be considered sufficient for the letter to be considered as undermining the presumption of innocence. In fact, the Ombudsman considers that to prohibit all reporting on a matter under investigation until the investigation has come to a conclusion would excessively curtail freedom of speech. It should be noted that, as far as the reporting of the facts of the affair is concerned, the complainant cites the Commission's own press release, which uses careful wording, stating that the newspaper was "alleging" that a transfer of money was "supposedly" offered in exchange for advice and information. In addition, it cannot be inferred from the remainder of the text that the complainant thinks, and is aiming at making his readers think, that the official in question is in fact guilty. There are thus no indications that the text would breach the interest protected by the third exception.

48. It results from the above that the allegation that the Commission wrongly refused to publish this letter and failed to reason its decision cannot be upheld in relation to the first version of the complainant's letter, but must be considered founded in relation to the second version.

49. As regards the complainant's claim that his letter should be published, this claim must, as stated above, be assessed by taking account of any developments that may have occurred since the date of the Commission's decision in 2009, whereby it refused to publish the said letter. In this regard, it should be noted that, in the meantime, the matter to which this letter refers has been brought before the European courts in two instances. In the first of these cases, the Civil Service Tribunal was called upon to assess the Commission's decision to suspend the official in question. In its judgment of 30 November 2009, it noted that the official had admitted, in a hearing before the Commission, to having been invited to and attended dinners with the "*Chinese businessmen*" in restaurants on a number of occasions, without informing his superiors. He had also admitted that he had "communicated to those reporters, in the course of the dinners to which he had been invited or during telephone conversations, certain information, in particular the names of two Chinese companies involved in the manufacture of candles which, following an anti-dumping procedure then in progress, were likely to obtain MET status." [7] In



view of these circumstances, it cannot therefore be excluded that a fresh assessment of the matter might now lead the Commission to the conclusion that even the initial version of the "*@europa.de*" letter could be published on the relevant discussion forum at present.

50. The Ombudsman considers, however, that there is no need for him to pursue this issue in the present case. The complainant has always phrased his claim as being for the publication of his "*@europa.de*" letter, "*at least in the second, edited version*". The Ombudsman therefore considers that it is legitimate for him to focus on this second version of the relevant letter. However, it results from the analysis set out above that the second version of this letter did not breach the editorial policy and that it thus ought to be published.

51. According to Article 3(5) of his Statute, the Ombudsman shall, "as far as possible", seek a friendly solution to eliminate the maladministration and satisfy the complaint. However, as shown above, in the present case the Ombudsman has decided to uphold the complaint. It further appears from the above that the Commission rejected the Ombudsman suggestions for a conciliatory approach and decidedly maintained its view. A friendly solution is thus not possible and the Ombudsman will therefore make a corresponding draft recommendation below.

(2) Letter entitled "

Made in Germany

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52. The Editor had argued that this letter could not be published because the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". In reply to the Ombudsman's question, the Commission explained that its decision not to publish the letters was based on both the second and the third exceptions set out in the editorial policy. However, in response to the Ombudsman's question as to how the publication of this letter could prejudice the Commission's interest by affecting the presumption of innocence or by accusing or using innuendo against colleagues, the Commission did not provide any specific arguments, apart from stating that it did not intend to allow debates about the merits and behaviour of individual members of its staff on the intranet.

53. In determining whether the said letter could fall under the second exception, it should be noted that the letter does not relate to any individual official in particular, but instead merely reports on the assertion set out in the *Spiegel* report, according to which the German government had set up a group of officials which was given the task to rate high-ranking German officials in international organisations. It is true that, when introducing this subject, the complainant's letter cites and translates the title of the Spiegel report in which this issue is mentioned ("German Top Official in Brussels under Corruption Suspicion") and provides a link to this article. This article details the events surrounding the Sunday Times article. However, it does not present the accusations as facts (apart from the fact that meetings took place in restaurants in Brussels), but reports on allegations such as the one that information was passed on or that the official accepted a promise of remuneration for this information as such, making it



clear that these are allegations and not facts. In any event, the mere fact that the complainant's letter cites the title of this article does not mean that this letter contains any accusations against the Commission official whose behaviour gave rise to the *Spiegel* article.

54. The complainant's letter refers to two further " *easily identifiable individuals* ", namely, the president of the Commission and the director of OLAF. However, the letter merely suggests that, in the complainant's view, these two persons would be likely to suffer negative consequences if an investigation of the evaluation system allegedly set up by the German government were carried out. The Ombudsman considers that this statement can hardly be interpreted as an accusation or innuendo against these two persons.

55. Finally, it is conceivable that the letter could be interpreted as meaning that, as a consequence of the evaluation system allegedly set up by the German government, certain high-ranking German officials at the Commission might be induced to breach their duty of loyalty to the EU. However, even if one were to interpret this as an accusation, the fact remains that the relevant officials are neither named nor easily identifiable. The Ombudsman therefore does not consider that the refusal to publish this letter could be based on the second exception in the editorial policy.

56. It thus remains to be examined whether the third exception may justify the Commission's decision not to publish the letter. However, and for the reasons already set out in the context of his assessment of the second version of the " *@europa.de* " letter, the Ombudsman does not consider that a letter that merely reports on certain allegations against a given official made in other publications, without creating the impression that the author of the letter considers these allegations to be well-founded, can be considered as capable of undermining the presumption of innocence. In this context, it should also be noted that the Ombudsman asked the Commission to specify in what way the publication of this letter could prejudice the interests of the Commission by undermining the presumption of innocence in relation to the official concerned. As already mentioned above, the Commission failed to comment on this issue in its reply. It must therefore be concluded that the third exception cannot be invoked as a reason for refusing to publish this letter.

57. In light of the above, the Ombudsman finds that the Commission wrongly rejected this letter for publication on the relevant discussion forum. This constitutes another instance of maladministration. He therefore makes a corresponding draft recommendation below.

(3) Letter entitled "

Rapid, but inaccurate

"

58. In the " *Rapid, but inaccurate* " letter, the complainant reported that, while all Commission press releases should be available on the RAPID database at all times, a number of them could not be found there. The Commission had thus, according to the complainant, either made a



mistake or was deliberately hiding inconvenient press releases. The complainant illustrated his point by referring to two examples. The first was the press release already referred to above and published by the Commission after it had been approached by the Sunday Times. The other example concerned a ban on Chinese dairy products. The complainant concluded that the Commission had learnt from George Orwell's *Nineteen Eighty-Four*, citing a paragraph about "manufacturing the past".

59. The Editor argued that this letter could not be published because the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". In its opinion, the Commission elaborated that its decision not to publish the letters was based on both the second and third exceptions set out in the editorial policy. However, when the Ombudsman asked it to explain how the decision not to publish this letter could be justified by using these two exceptions, the Commission did not provide any specific arguments.

60. As regards the second exception, it is true that the letter mentions an easily identifiable individual, namely, the official whom the Sunday Times article concerned, who is identified by his position within the Commission. It is also true that the letter quotes the title and sub-heading of the relevant Sunday Times article. However, there is nothing to suggest that readers would form the impression that the complainant wished to make the accusations raised in that article his own. The more general criticism of the Commission raised in the letter is not directed at any named or identifiable individual. The second exception set out in the editorial policy could therefore not be used by the Commission as a justification for not publishing the letter.

61. In relation to the third exception, the Ombudsman agrees with the complainant that it would be absurd to consider that the publication on the relevant discussion forum of quotes from a press release published by the Commission itself, which does not distort the message of that press release, could be considered as capable of undermining the protection of the presumption of innocence. It should be recalled in this context that, as already mentioned above, and even though the Ombudsman had asked the Commission for further explanations on this issue, the latter did not provide a reply in this regard.

62. The Ombudsman acknowledges that the letter criticises the Commission in a very harsh manner, alleging that it was " *manufacturing the past* " and suggesting that it was behaving like the kind of totalitarian regime depicted in George Orwell's *Nineteen Eighty-Four* .

63. However, the Ombudsman further recalls that it follows from the Commission's own editorial policy that decisions not to publish letters should be the exception. In the present case, the Commission has not referred to the abovementioned criticism levelled at itself in order to justify its decision not to publish the relevant letter. Nor has it established that this criticism would entitle it to invoke one of the three exceptions laid down in its editorial policy.

64. In light of the above, the Ombudsman finds that the Commission has not established that it was entitled to refuse to publish this letter. This constitutes a further instance of maladministration. The Ombudsman therefore makes a corresponding draft recommendation below.



B. Allegation that the Commission wrongly refused to investigate whether top German Commission officials were compromised in their impartiality by the alleged German evaluation system and related claim

Arguments presented to the Ombudsman

65. The complainant argued that the reason why the Commission did not want to publish his letter entitled "Made in Germany" on its intranet was that it was trying unduly to protect high-ranking German officials. The Spiegel article to which he referred in this letter described a rating system by which the German government evaluated the performance of high-ranking officials in international organisations, using criteria which had not been made public. This clearly undermined the independence and loyalty of the European civil service, in breach of Article 11 of the Staff Regulations. Germany had not disputed the information contained in this article. The complainant had therefore asked the Commission to investigate its top German officials to determine to what extent this system undermined their independence.

66. In its opinion, the Commission did not comment on this issue, save to refer to the reasons for which the complainant's Article 90(2) request on the matter had been rejected. The Ombudsman therefore asked it to comment on the substance of the complaint.

67. In its reply to this first request, the Commission elaborated on the fact that, even if the matter could have been investigated independently of this inadmissible individual complaint, the fact remained that there were no grounds for doing so. The complainant had referred to certain articles which had appeared in the German press in relation to allegations made against his former supervisor. The Commission had taken appropriate measures in relation to these allegations. However, the articles to which the complainant had referred did not contain any evidence in relation to the existence or relevance of the alleged rating system. The complainant did not provide such evidence either. The Commission was therefore not in a position to take a view on this question, and still less to take action.

68. Having analysed this reply, the Ombudsman noted that the Spiegel article had given a fairly detailed account of the alleged German rating system for senior officials in international organisations; so much so that it was unclear what further evidence the complainant could have submitted in this regard. He also noted that he considered the possible impact of such a system on the EU administration to merit investigation. He therefore asked the Commission: (i) whether it had contacted Germany in order to obtain more information; and (ii) to inform him of the position it would take if such a rating system were to exist.

69. In its reply, the Commission stated that it did not consider that the alleged German rating system for officials could have a possible impact on the functioning of the EU. It emphasised that it appointed its senior officials itself and followed a transparent selection procedure, which



assessed the candidates' merits. It therefore did not intend to contact national authorities on these issues.

70. In his observations, the complainant maintained his allegation and claim, noting that it would be difficult not to consider the evaluation system as an indicator of a "network of trafficking of influence" and criticised the Commission's failure to investigate the matter. It was unlikely that the German government was rating top officials highly for acting in the Union interest; rather, the highest ratings were, in all probability, given to those officials who acted in the German interest. In this context, the Commission's response that it was appointing its officials itself was irrelevant.

71. The complainant also noted that it was illogical for the Commission to investigate the actions of a high-ranking official on the basis of a newspaper article, but to refuse to do so in relation to the matter he had raised and which had been reported by an equally credible newspaper. In this context, the complainant objected to the Commission's reference to an "alleged rating system", noting that the matter had been reported on a factual basis and that the contents of the article had not been challenged by the German government. The Commission's continued inaction was a threat to the rule of law and showed that it was not truly independent.

The Ombudsman's assessment

72. As already indicated in his second request for further information, the Ombudsman considers that the Spiegel article indicates that the German government may be operating a rating system for high-ranking officials in the EU and other international organisations, with a view to proposing them for appointment to high-profile international posts. In the Ombudsman's view, it would be perfectly understandable if a Member State decided to keep an eye on its nationals who hold high-ranking posts in international organisations and to assess their merits, so as to have a database of potential candidates it could use when considering how to fill certain positions involving high responsibilities. However, such a national rating system could have repercussions on the functioning of the institutions, bodies, offices and agencies of the EU. This is because, as the complainant has pointed out, the prospect of attaining high-profile jobs might influence the behaviour of the EU officials who are covered by such a rating system.

73. It is of course perfectly possible that the rating system does not, as the complainant fears, rate officials highly for acting in the national interest, but evaluates their leadership or diplomatic skills and how well they perform their task as officials in their institution. Further, the possible impact of any such rating system on officials working for the EU will be likely to depend on whether and in what detail these officials know about the rating they receive. In the absence of further information, it is thus impossible to ascertain whether the rating system allegedly operated by the German government could have any negative consequences for the EU. The Ombudsman accepts that there is, at present, no evidence to prove that such a system exists. However, a reputable national news magazine has reported that a Member State operates such a system which could have a negative impact on the loyalty of Commission staff to the EU. The Ombudsman agrees that the Commission clearly has a discretion in deciding whether to take



action when it believes that there is, or could be, an infringement of EU law. However, this discretion can usefully only be exercised after the Commission has examined the matter and established the facts. In the Ombudsman's view, the information provided by the complainant should thus have led the Commission to investigate the matter.

74. The Commission has referred to the fact that it appoints its officials itself and that it does so following a procedure which assesses their merits. However, the possible danger of national rating systems such as the one reported in the *Spiegel* article lies in its potential effect on officials after they are appointed. The Commission's argument thus does not show that no inquiry is needed into the matter raised by the complainant.

75. The Ombudsman therefore finds that the Commission has not adequately addressed this allegation and claim. He still considers that national rating systems merit investigation and therefore finds that the Commission's refusal even to investigate the matter is an instance of maladministration. He thus makes a corresponding draft recommendation below.

C. Allegation that the Commission wrongly failed to commence proceedings against Germany in relation to the rating system for high-ranking officials and related claim

Arguments presented to the Ombudsman

76. The complainant considered that, by operating a rating system of top officials as described above, Germany was undermining fundamental principles of the European civil service, in particular the impartiality of European civil servants, their independence and loyalty to the EU. The Commission had an obligation to ensure that these principles and the measures it had taken to implement them were applied. It should therefore "bring an action before the appropriate court" against Germany which was breaching the Staff Regulations.

77. As stated above (see section B), the Commission did not comment on this issue in its opinion. When asked to address this issue by the Ombudsman, it stated that it did not intend to contact national authorities on such issues because it appointed its senior officials itself and because it did not consider that an alleged rating system for officials could have an impact on the functioning of the EU.

78. In his observations, the complainant maintained his allegation and claim.

The Ombudsman's assessment

79. It is settled case law that the Commission has considerable discretion in deciding whether and in what way to pursue allegations that a Member State has breached the Treaties. While the Ombudsman does consider, as indicated above, that the rating system allegedly operated



by Germany merits an investigation, he does not consider that the fact that the Commission has not brought Germany before a court in this regard constitutes maladministration. As already mentioned above, it is perfectly possible that an investigation would lead the Commission to the conclusion that any such rating system did not have a negative effect on the EU's civil service. In any event, any legal action would have to be preceded by the step discussed in section B above, namely, an investigation of the relevant rating system.

D. Allegation that the Commission wrongly failed to ensure that all press releases are available on the RAPID database at all times and related claim

Arguments presented to the Ombudsman

80. The complainant submitted that not all the Commission's press releases were available on the RAPID database. In his letter entitled "*Rapid, but inaccurate*", he referred in particular to two Commission press releases from September 2008, which could not be found through the search function on the RAPID website. [8] In the first of these, the Commission stated that it had been approached by a British newspaper which stated that it had tapes of meetings between a Commission official and journalists posing as businessmen. The second concerned a ban on imports of Chinese dairy products.

81. In its opinion, the Commission did not comment on this issue. It merely referred to the reasons for which the complaint that the complainant had submitted to it on the matter pursuant to Article 90(2) of the Staff Regulations, had been rejected. The Ombudsman therefore asked it to comment on the substance of the complaint.

82. In its reply, the Commission "*took note*" of the complainant's criticism and explained that RAPID was an interinstitutional database of press releases which contained all Commission press releases since 1985, as well as press releases of other European institutions. The Spokesperson's service was responsible for the Commission press releases published on RAPID. The Commission added that it did not consider that the issue concerned the complainant individually or personally and that, in particular, it did not change his legal position.

83. Having analysed this reply, the Ombudsman noted that the complainant had referred to two press releases, which could not be found on the RAPID database, and had provided a copy of one of those press releases. The Ombudsman therefore asked the Commission to: (i) explain why the press releases were not available on the RAPID database or, alternatively, provide a link to where they could be found; and (ii) explain the measures it had taken to ensure that all press releases were available in full on the database.

84. In its reply to this second request for information, the Commission repeated that all Commission press releases since 1985 were available on RAPID. However, it admitted that the press release mentioned by the complainant could not be found on RAPID. It explained that



press releases issued through e-mail, referred to as 'espresso', were not automatically included on the RAPID database. It went on to add that the Commission's Spokespersons Service had begun to insert all 'espresso' press releases into the RAPID database in a systematic manner. This included the press release mentioned by the complainant.

85. In his observations, the complainant maintained his allegation and claim and criticised the fact that it had taken the Commission almost two years to admit that not all press releases could be found on the RAPID database. He wondered how long it would take them to make all press releases available.

The Ombudsman's assessment

86. The " *about* " section of the RAPID website [9] states that the database contains " *all the Press Releases of the Commission since 1985* ". It was only in reply to the Ombudsman's second request for information that the Commission acknowledged that not all press releases were in fact available on the RAPID database. The Commission added that it was working on inserting all press releases and that the press release referred to by the complainant was now available.

87. A search of the database has confirmed that the Commission press release of 5 September 2008 relating to the approaches by the Sunday Times is now available on the RAPID database. However, the complainant also referred to another press release he could not find. This second press release, which is mentioned in his letter entitled "Rapid, but inaccurate", concerns measures taken in relation to Chinese melamine-contaminated milk. [10] On 11 November 2011, this press release was not available on the RAPID database.

88. It is thus clear that the Commission, even though it began inserting all press releases into the RAPID database before February 2011, has not yet completed this task. The Ombudsman is unaware of how many press releases may have to be added to the said database to make it complete. He notes, however, that the Commission has not claimed that the work involved is such that it could not be completed by now. In any event, the Ombudsman fails to understand why the second press release referred to by the complainant is still not available on the RAPID database, more than two and a half years after the complainant drew the Commission's attention to the fact that it was missing from that database.

89. In light of the above, the Ombudsman finds that the Commission has, in spite of its declared intention, hitherto failed to ensure that all its press releases are available on the RAPID database. It follows that there exists a gap between the statement that all press releases since 1985 are available and the reality. This is an instance of maladministration. The Ombudsman therefore makes a corresponding draft recommendation below.

B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft



recommendation to the Commission:

(a) The Commission should publish:

- (i) the second version of the complainant's letter entitled " @europa.de ";**
- (ii) the complainant's letter entitled " Made in Germany ";**
- (iii) the complainant's letter entitled " Rapid, but inaccurate "**

on the discussion forum on Intracomm, the Commission's Intranet.

(b) The Commission should investigate the potential impact which the rating system of high-ranking German Commission officials allegedly operated by the German government may have on the performance of their duties, in particular their independence, impartiality and loyalty to the EU.

(c) The Commission should ensure that all its press releases are available on the RAPID website.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 March 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 6 December 2011

[1] 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.

[2] <http://www.timesonline.co.uk/tol/news/politics/article4692906.ece> [Link]

[3] <http://www.spiegel.de/politik/ausland/0,1518,577597-2,00.html> [Link]

[4] Translation of the original French version by the European Ombudsman's Office.

[5] Case F-80/08, *Wenig v Commission*, judgment of 30 November 2009, paragraph 68.

[6] Case *Allenet de Ribemont v. France*, judgment of 10 February 1995 (A series nr 308, paragraph 38).



[7] Case 80/08, cited above, paragraphs 11 and 69.

[8] <http://europa.eu/rapid/searchAction.do> [Link]

[9] <http://europa.eu/rapid/showInformation.do?pageName=about> [Link]

[10] This press release used to be available on the website of then Commissioner for Health, Androulla Vassiliou. While the title of the press release and the link to the pdf document still exist at http://ec.europa.eu/dgs/health_consumer/dyna/vassiliou/press_releases.cfm [Link], the link leads back to the index page for the Barroso I Commission, which, according to a label on the top of that page, was archived on 16 February 2010.