

Decision of the European Ombudsman on complaint 2111/2004/TN against the European Commission

Decision

Case 2111/2004/TN - Opened on 27/07/2004 - Decision on 06/10/2005

Strasbourg, 6 October 2005

Dear Mr G.,

On 2 July 2004, you made a complaint to the European Ombudsman against the European Commission concerning the alleged delay in completing an open competition and certain implications thereof.

Since the Ombudsman received several similar complaints concerning a number of competitions (COM/A/1/02, COM/A/2/02, COM/A/3/02 and COM/A/9/01), he decided to open a joint inquiry into the matter.

On 27 July 2004, I forwarded your complaint to the President of the Commission. The Commission sent its opinion on 17 December 2004. I forwarded it to you with an invitation to make observations, which you sent on 28 February 2005.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts are, in summary, the following:

The competitions in question were launched in 2001 and 2002, with the notices of competition indicating that they would be completed within approximately one year and that the resulting reserve lists would expire at the end of 2003. However, most of the competitions took much longer to complete. As an example, the final notification of successful candidates in competition COM/A/3/02 was made by letter of 21 April 2004. This delay in completing the competitions resulted in many successful candidates being recruited under the significantly less favourable conditions of the transitional measures in Article 12 of Annex XIII to the new Staff Regulations, which came into force on 1 May 2004.

The original notices of competition contained the following note, indicating that successful



candidates might be subject to new Staff Regulations:

"The Commission has formally transmitted to the Council a proposal to amend the Staff Regulations. This proposal contains, inter alia, a new career system. The successful candidates in this competition could, therefore, be offered a post on the basis of new Staff Regulations, if they have been adopted by the Council."

However, the note did not in any way indicate the big difference in grading and career prospects between people recruited before and after the coming into force of the new Staff Regulations and its Annex XIII. This does not conform to the principle of reasonable expectations. The application of the transitional measures in Article 12 of Annex XIII is furthermore in breach of Article 31(1) of the Staff Regulations.

In addition, the note was incorrect since, in fact, the new Staff Regulations did not apply for the competitions concerned, which instead were governed by an exception clause in an Annex. The note should have explained that the successful candidates were not to be recruited on the basis of the new Staff Regulations, but on the basis of a special clause in an Annex.

At no later point were candidates notified of the big impact of the transitional measures outlined in Article 12 of Annex XIII on those recruited after 1 May 2004. The only information provided was a letter to successful candidates, indicating their new grade of recruitment under the transitional measures. These letters did not contain any information on the factual difference between the new grades and the ones indicated in the notices of competitions. This information was not even brought to the attention of the relevant services within the Commission that had requested the competitions. If the conditions of the future Staff Regulations were uncertain, the Commission should not have launched the recruitment procedures until these conditions were clear. If the conditions came as a surprise to the Commission during the running of the competitions, the Commission should immediately have informed all candidates. In addition, successful candidates were misinformed about whether appointment before 1 May 2004 would be possible. Some internal candidates had their applications rushed through before 1 May 2004. Others were given the divergent information that there were to be no appointments from the lists of successful candidates before 1 May 2004; that only certain types of internal candidates could be recruited before 1 May 2004; or that only external candidates could be recruited before 1 May 2004.

Furthermore, all competitions that were published on 25 July 2002 (COM/A/1/02, COM/A/2/02 and COM/A/3/02) were completed at different dates, resulting in greater opportunities for candidates from some competitions to be recruited under the old Staff Regulations, and then to be transferred to the new Staff Regulations at significantly higher grades than those offered to candidates recruited under the new Staff Regulations. This also meant that certain candidates who had passed an A8 competition, which only required a three year university degree, were recruited before 1 May 2004 at a higher level than successful candidates in an A6/A7 competition being recruited after 1 May 2004. The delay in completing the competitions made this situation of inequality of treatment between candidates all the more likely. It can be questioned whether the Commission did not delay the process with a view to recruiting people



mainly under the new Staff Regulations. In that case, the Commission should not have launched the recruitment procedures until the new Staff Regulations had been made public.

The delay in completing the competitions, and - as a consequence - the application of the transitional measures, also raise issues of age discrimination. Most of the competitions in question were the first to be published after the abolition of age limits. They therefore attracted a large number of senior and more experienced candidates, for whom the original grades, as posted in the notices of competitions, were appropriate. The junior grades that are now being offered are not suitable for these candidates, resulting in irreparably damaged career prospects.

Finally, the application of the transitional measures discriminates against those potential candidates who were excluded from participating in the competitions concerned because of lack of professional experience. These potential candidates would have been eligible to participate on the basis of the new grades of recruitment contained in Article 12 of Annex XIII to the new Staff Regulations.

Affected candidates, supported by the Unions (Alliance confédérale des syndicats libres), wrote a letter to Mr Kinnock on 18 May 2004, explaining the situation and asking for remedial action. However, they received no reply.

The allegations common to all complaints are that the Commission's handling of the competitions concerned has resulted in:

- Unreasonable delay in completing the competitions;
- Lack of transparency through failure to inform candidates about the impact of the transitional measures in Annex XIII, Article 12 of the new Staff Regulations;
- Lack of awareness within the Commission's own services about the impact of the transitional measures;
- Misinformation to successful candidates as to whether appointment before 1 May 2004 would be possible;
- Inequality of treatment as between successful candidates employed before and after 1 May 2004, including:
 - 5a. Age discrimination;
- Discrimination against potential candidates who were excluded from participating in the competitions because of lack of professional experience: such candidates would have been eligible to participate on the basis of the new grades of recruitment in Annex XIII, Article 12 of the new Staff Regulations; and
- Failure to reply to the complainants' joint and individual correspondence regarding the matter.

The common claims are that:

- All successful candidates from lists published before 1 May 2004 should be appointed at grades equivalent to the grades posted in the original notices of competition and that the grading committee should be allowed to take into account qualifications and experience, thereby obtaining equivalency of appointment level and career development prospects for all successful candidates, irrespective of whether they were appointed before or after 1 May 2004; and



- Candidates in ongoing competitions, which were advertised using the old grading system, should be fully informed about the implications of the transitional measures under the new Staff Regulations.

THE INQUIRY

The Commission's opinion

In its opinions, the Commission makes, in summary, the following comments:

Background

Until 30 April 2004, successful candidates in recruitment competitions organised by the institutions were recruited in accordance with the provisions prevailing prior to the entry into force of the new Staff Regulations through the amendments in Council Regulation 723/04 (1). This meant that successful candidates were recruited in one of the career brackets (corresponding to basic posts), each career bracket containing one or more grades.

Under the system prevailing before 30 April 2004, classification on entry into service was determined by Articles 31 (classification in one of the grades of the career bracket) and 32 (additional seniority) of the Staff Regulations. Classification related both to grade (lower or higher career bracket) and step (1, 2 or 3).

The new Staff Regulations brought about a significant change in the staff recruitment process. With the adoption of the linear career principle, the concept of grades linked to the concept of basic posts disappeared. Competitions now relate to specific grades and only the question of additional seniority remains outstanding (limited to step 2 as a maximum).

Upon the entry into force of the new Staff Regulations on 1 May 2004, there were still significant reserve lists of successful candidates drawn up under the old career structure. Transitional provisions were drawn up by the Council within the framework of Annex XIII to the new Staff Regulations, defining, in Article 12 of Annex XIII, the procedures for the recruitment and classification of these successful candidates following the entry into force of the new Staff Regulations.

The common allegations *Allegedly unreasonable delay in completing the competitions*

The information in the notices of competition that the procedures would take approximately 12 months, depending on the number of candidates, was for guidance only. Given that the duration of an open competition depends to a great extent on the number of candidates, it is not possible to give more precise information at the time of publication of the notice of competition. The 12-month duration corresponds to the average length of a competition.

Nearly 19 000 candidates applied for competitions COM/A/1/02, COM/A/2/02 and COM/A/3/02, which were published on 25 July 2002. The deadline for submission of applications was 27 September 2002. The pre-selection tests were held on 21 March 2003. After the results of these tests had been examined, the selected candidates sat their written tests on 11 July 2003 for competitions COM/A/1/02 and COM/A/2/02, and on 12 September 2003 for competition COM/A/3/02. The oral tests took place between November 2003 and February 2004 for competitions COM/A/1/02 and COM/A/2/02, and between January and early April 2004 for



competition COM/A/3/02. Given the fairly high number of applications, the period between the pre-selection tests and the end of the oral tests - between 11 and 13 months - appears perfectly reasonable. It should also be noted that the average of 12 months for a competition organised by the Commission and EPSO is less than that for competitions organised by other European institutions in the past.

The Commission had no wish deliberately to slow down the process for the competitions in question. In order to meet, within strict deadlines, the requirements of the departments and the needs of the institutions, a large number of open competitions had to be prepared and organised concurrently, including those published in the context of the enlargement. The needs expressed by departments in various institutions do not allow for any blockage or slowing-down of the selection procedure.

Alleged lack of transparency

The notices in competitions COM/A/1/02, COM/A/2/02 and COM/A/3/02 contained a note, for the information of all candidates wishing to apply, concerning the proposal to amend the Staff Regulations. The note explained that successful candidates could be offered recruitment on the basis of the provisions of the new Staff Regulations.

The notices of competition in question were published in the Official Journal on 25 July 2002. The new Staff Regulations were approved by the Council on 22 March 2004 and came into force on 1 May 2004. At the time of publication of the notices of competition in question, and given the on-going nature of the reform of the Staff Regulations, the Commission could do no more than provide the information contained in the note.

As regards the complainants' arguments that the Commission failed to inform successful candidates of the consequences of the new Staff Regulations, or that the information was delayed, the Commission points out that the Council adopted the amendments to the Staff Regulations on 22 March 2004. The amendments were published in the Official Journal on 27 April 2004. Moreover, Article 12 of Annex XIII to the Staff Regulations is one of the articles that were discussed in the Council right up until the end of the process. The recruitment departments had no alternative but to await the final adoption of the new Staff Regulations, which would be authoritative for legal purposes. During this period, it was therefore impossible to prejudge the impact of the transitional rules and to give the successful candidates precise information.

The Commission argues, however, that all successful candidates from competitions in which the reserve lists were valid until 31 December 2003 and in which the Commission extended the deadline - including COM/A/9/01 - were sent a personal letter from the Personnel and Administration Directorate-General (DG ADMIN) containing the following warning:

"The Commission has formally submitted to the Council a proposal to amend the Staff Regulations. I would draw your attention to the fact that this amendment of the Staff Regulations includes, among other things, a new career system which would amend the conditions for and the level of recruitment within the institutions.

It is currently envisaged that this amendment will enter into force on 1 May 2004. It is therefore



essential to know that it is expected that every person entering the service of the institutions from that date of entry into force would automatically be recruited on the basis of the provisions of these new Staff Regulations.

I would inform you that the Commission proposal may be consulted on the Commission's website at: http://ec.europa.eu/reform/index_en.htm. Article 11 of Annex XIII to the proposal contains the table of correspondence between careers under current competitions and the recruitment grades following the entry into force of the amended Staff Regulations.

You will understand that at present, with no formal decision having been made, it is impossible for us to provide further information to successful candidates who could take up posts within the institutions after the date of entry into force of this amendment to the Staff Regulations."

The Commission also points out that any offer letter addressed to a successful candidate following the adoption of the new Staff Regulations stated:

"Further to the offer letter sent to you on ..., I would inform you that on 22.3.2004 the Council formally adopted the amendment to the Staff Regulations proposed by the Commission and, as planned, these new provisions will enter into force on 1 May 2004. These new provisions, which also include a new career system, will apply to all persons entering the service from 1 May 2004

Detailed information can be found on the website http://ec.europa.eu/reform/index_en.htm [Link] . Article 12 of Annex XIII sets out the correspondence between the competition grades and the new recruitment grades from 1 May 2004.

As a result, as you will be entering service on ..., as a successful candidate from a career competition ..., you will be recruited at the new grade, step 1 (provisional classification). The gross basic salary corresponding to this classification is ...EUR. The new Staff Regulations lay down that step 2 may be granted in order to take the recruit's professional experience into account and your final classification will be established as soon as possible."*

In view of the above, it is inaccurate to state that there was a lack of transparency in the Commission's information to successful candidates regarding the impact of the transitional measures defined in Article 12 of Annex XIII to the Staff Regulations.

In reply to the argument put forward by some complainants that the Commission should have abstained from organising competitions until the adoption of the new Staff Regulations, the Commission states that the objective of the internal reform, including in particular the amendment of the Staff Regulations, was one of the priorities under President Prodi. This objective was announced at the beginning of his term of office in September 1999. It is clear that the interests of the service did not permit the Commission to abstain from organising competitions between 1999 and 2004.

Alleged lack of awareness within the Commission's own services

The Commission argues that no evidence has been put forward to support the allegation that there was a lack of awareness about the impact of the transitional measures within the



Commission's own services. On the contrary, the Commission considers that it provided its staff with full information. In general, the gestation of the reform process for the Staff Regulations was the subject of an ongoing information operation for all the institution's staff and for the general public. The information was primarily made available on the Commission Intranet and the Internet (<http://europa.eu> [Link]) on sites that were continually updated. Many publications were also distributed to the Commission staff throughout the period in question.

Particular emphasis was placed on the network of heads of human resources for the Directorate-Generals and departments, who met regularly and were consulted and informed on this subject. Their position as a relay to the operational departments enabled them to forward the information to the latter, and to successful candidates who often write to them directly in search for vacancies.

Alleged misinformation to successful candidates

The Commission argues that no evidence has been provided to support the allegation that successful candidates were misinformed about the possibilities to be recruited before 1 May 2004.

The task of DG ADMIN, and in particular of those who are responsible for the recruitment of officials and temporary staff, is to meet, as rapidly and effectively as possible, the institution's human resources needs, with a view to continuity of service in line with budgetary resources and within the limits laid down in the establishment plan. This is therefore an ongoing process guided by the constant need to fill vacant posts, whether additional ones or those arising from the departure of officials.

The following figures show that the Commission certainly did not slow down recruitment during the period in question. The statistics refer to the period between January 2003 (the date on which the reserve lists from the wave of competitions in 2001 can be considered as having begun to give rise to significant recruitment) and 30 April 2004 (just prior to the entry into force of the new Staff Regulations). During this period the Commission recruited 1 563 people in category A, 545 in category B and 601 in category C. Given the possibilities of the establishment plan, it would have been very difficult in categories B and C, if not impossible in category A, to recruit more people during this period, as shown by the number of vacant posts (2) on 1 April 2004: 4 in category A/LA, 173 in category B and 76 in category C. Moreover, the total number of vacant posts (3) declined during the period in question from 459 to 253, essentially owing to a reduction from 283 to 4 in category A/LA. It is also wrong to assert that the Commission artificially filled permanent posts with temporary staff. The Number of type 2b temporary staff is stable in categories A and C (269 and 270 respectively on 1 January 2003, and 265 and 290 on 1 April 2004) and increasing slowly in category B (169 on 1 January 2003 and 232 on 1 April 2004).

It is also inaccurate to state that the Commission delayed recruitment from the reserve lists from the competitions complained about. The Commission provides graphs with statistics on the use of these reserve lists. The Commission argues that these graphs not only have the characteristic "logistic curve" form, but also indicate a slight surplus in recruitment prior to the entry into force of the new Staff Regulations. More generally, monthly recruitment statistics from



the lists of the 15 Member States (EUR-15) over the period 2003/2004 show a similar trend. These statistics, which are also provided as graphs, confirm that the appointment of new officials largely follows the curve showing the number of vacant posts. Here too the situation is contrary to that asserted by the complainants, with a high level of recruitment prior to 1 May 2004.

In view of the above, the Commission argues that any allegation that the recruitment department provided information that only internal candidates could be recruited prior to 1 May 2004 should be refuted. Many successful candidates from outside the institution were also recruited. During the period between 1 January 2004 and 30 April 2004, the Commission recruited 863 A/LA, 354 B and 306 C. If these figures are adjusted by removing the recruitment of temporary staff under the research budget, "actual" recruitment amounts to 222 A/LA, 103 B and 125 C. The number of internal candidates was only 38 A, 44 B and 15 C. In other words, the number of external recruitments during this period amounts to 178 A, 52 B and 107 C. It may certainly be noted that the proportion of internal candidates to external candidates is fairly high, primarily in category B. However, this reflects a well-known phenomenon. It is clear that among the successful candidates in a given competition, those who are already employed by the institution are, on average, recruited more rapidly than external candidates. This fact is related to the interests of the service since internal candidates become operational more rapidly and are therefore more sought after by the Directorates-General. This is not a new phenomenon and it is certainly not linked to the amendment of the Staff Regulations.

Alleged inequality of treatment

As from 1 May 2004, the Commission had no choice but to apply the new Staff Regulations in force, including those relating to recruitment grade. Applying other rules would have been totally illegal. While it is true that successful candidates from the same competition were recruited under different conditions depending on whether the appointment took place before or after 1 May 2004, the fact remains that what the complainants regard as unequal treatment is in fact only the result of two distinct legal and objective contexts. Moreover, the difference in conditions is not restricted to the recruitment grade, but relates to many aspects covered by the Staff Regulations.

A candidate who succeeds in an open competition and is put on a reserve list does not have the right to be recruited. The institution is not obliged to recruit these candidates. In turn, these are also free to refuse any employment offer from the institution. The reserve list merely establishes eligibility for recruitment.

In addition, Article 5 of Annex III ("Competitions") to both the old and the new Staff Regulations lays down that *"[o]n completion of its proceedings, the selection board shall draw up the list of suitable candidates provided for in Article 30 of the Staff Regulations; the list shall wherever possible contain at least twice as many names as the number of posts to be filled "* (emphasis in original). This provision thus demonstrates that i) it is highly possible that there may be insufficient posts to recruit all candidates in a given reserve list before that list expires; and ii) account is also taken of the possibility that some candidates on the reserve list may subsequently no longer wish to enter the institution.



According to the Commission, it therefore follows that i) success in an open competition and entry on a reserve list confers neither a right to recruitment, nor an obligation on the institution to recruit; and ii) candidates who have not been recruited when the reserve list on which their names are entered expires will no longer be eligible for recruitment on the basis of the open competition in question. In practice, it can and does happen that some candidates on a reserve list which expires have not been recruited while others have been recruited. In this case, the former cannot legitimately argue that they have been discriminated against or that there has been an infringement of the principle of legitimate expectations.

Alleged discrimination on the grounds of age

According to the complainants, older candidates are discriminated against since they were to be recruited at a higher grade in their career bracket under the old Staff Regulations and they therefore suffer more under the new Staff Regulations.

The Commission argues that, as stated above, it is not in any event possible for it to derogate from the provisions of Article 12 of Annex XIII to the new Staff Regulations. In addition, the allegation is based on the incorrect hypothesis that under the old system, recruitment to a higher grade was intended for older successful candidates. In reality, under the old system, age was not a consideration when the decision for classification at a higher grade was made. As regards the length of professional experience, which is only very indirectly related to age, it was only one of a number of cumulative criteria taken into consideration for classification at a higher grade, the others being the nature and relevance of academic training, the relevance of professional experience and the scarcity of the candidate's professional background on the labour market.

Alleged discrimination against potential candidates

The Commission finds it difficult to understand the allegation in question. It considers it to be unclear how supposed prejudice against potential candidates that are less qualified than the complainants could adversely affect the complainants.

Alleged failure to reply to the complainants' correspondence

As far as the departments of DG ADMIN are aware, requests made to it have been given individual replies in the form in which they were received (by letter, e-mail, telephone).

The common claims *Recruitment at grades equivalent to the grades posted in the notices of competitions*

The Commission argues that on the basis of the new Staff Regulations, it is legally impossible for the institutions to recruit successful candidates at any grade other than those laid down in Article 12 of Annex XIII to the Staff Regulations. Under the provisions of Annex XIII, the level (grade) of recruitment is determined by the date of appointment.

Information to candidates in ongoing competitions

According to the Commission, each notice of competition published since 25 July 2002 contains a note for the attention of candidates, informing them of the possible consequences for successful candidates of the proposal to amend the Staff Regulations. This procedure appears to be the most appropriate way of informing candidates. For all open competitions published prior to 25 July 2002, i.e., for all notices not containing information concerning the proposal to amend the Staff Regulations, successful candidates received an individual letter from the Commission on the subject.

The complainants' observations



Not all complainants submitted observations on the Commission's opinion and some complainants submitted only short comments. However, a number of complainants submitted a document containing collective observations. Since the collective observations were the most detailed and also covered the content of the shorter comments made by some complainants, the Ombudsman will base all decisions covered by the joint inquiry on the following summary of collective observations:

General observations

The Commission acts as if its mandate is only to apply the existing Staff Regulations and as if it is a different institution from the one that amended the Staff Regulations. However, the complainants' are of the opinion that the Commission has a moral obligation not to propose discriminatory legislation. It is the Commission's responsibility to ensure that its proposals for new legislation to the Council do not cause discriminatory treatment of candidates on reserve lists for recruitment. By stating in its opinion that the Council drew up the transitional provisions, when in fact the Commission proposed the very same provisions to the Council, the Commission is trying to hide the fact that it is guilty of maladministration.

The complainants argue that they are now complaining through the channels available to them, which will eventually imply bringing the Commission before the Community courts, giving rise to an enormous amount of work for the Commission. The complainants therefore question whether it would not be worth finding a solution to the matter at this earlier stage of the procedures.

The complainants further point out that they are complaining as participants in recruitment competitions, not as Commission staff, and that they are complaining mainly about unequal treatment and discrimination.

Specific observations on the Commission's opinion *Allegedly unreasonable delay in completing the competitions*

According to the complainants, the delay is a fact: The period from September 2002 (the deadline for application) to April 2004 (the publication of the reserve lists) amounts to 20 months, not 13, and the damage caused by this delay to participants in the competitions concerned cannot be justified.

The Commission launches hundreds of calls for proposals, tenders and competitions every year, such as the FP6, Leonardo and Socrates programmes. No other service of the Commission is allowed to justify delays on the basis of the Commission's decision-making process or high levels of participation. All Commission services have to make reliable forecasts and implement efficient planning.

Competitions of the nature in question have been organised for many years, which should have allowed the Commission accurately to predict the number of participants in the pre-selection tests. The number of participants in the following stages of the competitions was set out in the notices of competition and was therefore known to the Commission from the outset. It is therefore not reasonable to argue that the number of participants at the later stages of the competitions contributed to the delay. The number of participants at each stage of the competitions was therefore independent of a "high level of participation". The number of participants could only have caused delay in the first phase of the competitions, i.e., the



pre-selection tests. However, those tests were corrected electronically and the correction should therefore have been fast regardless of the number of participants.

The Commission's opinion does not explain why the competitions in question took almost double the average time to complete.

The delay severely devalued the candidates' potential employment grade, it unnecessarily prolonged the uncertainty period during which other professional options were put on hold or were lost, and it increased the stress of candidates having to study over a prolonged period to keep their knowledge fresh. The complainants therefore feel discriminated against vis-à-vis participants in other competitions, which adhered to the expected time frame set out in the notices of competitions.

Alleged lack of transparency

According to the complainants, the Commission's opinion contains contradictory statements. On the one hand, the Commission argues that all relevant information was available on the Europa website. On the other hand, it indicates that the full implications of the new grading system were not known until 22 March 2004. The complainants argue that the initial proposal was known during discussions in the Council and Parliament much earlier than that. The Hungarian position against Articles 2 and 11 of Annex XIII is dated 8 January 2004. Accordingly, the Commission could have indicated to candidates the possible implications of the proposals under discussion already at this time, or even earlier, especially since the Commission, having the legislative initiative, knew about the possible implications at an early stage. The first proposal from the Commission to the Council and Parliament was made before the written exams, i.e., eight months before any concrete information was given to the candidates. Even if the outcome of the proposals was not definite, the Commission should have alerted candidates to the possible implications, given the grave consequences. If the devaluation of recruitment grades had been made clear, many candidates would have chosen to withdraw from the recruitment procedures in question in order to devote their efforts to other professional options.

The mere provision of information in the notices of competition that successful candidates could be offered a post on the basis of the new Staff Regulations was inadequate since the information was not sufficiently concrete. It should also be noted that some of the notices of competition published in 2001 and 2002 contained no reference at all to the proposed new grading structure.

Alleged lack of awareness within the Commission's own services

The complainants argue that the fact that the Commission services were aware of the fact that new Staff Regulations would come into force is not the same as being aware of the implications of Article 12 of Annex XIII.

The websites referred to by the Commission continued to refer to the old grading system well after 1 May 2004. Even on 14 February 2005, the Commission's Intranet section "What will be my grading?" refers to the old system. The complainants argue that they can provide evidence of many cases in which candidates asked, during their interviews, about their potential grade upon recruitment and that they were informed about the old grading system. Several candidates received offers indicating that they would start at the lowest grade with a later re-grading via the



grading committee. Upon recruitment after 1 May 2004, they were told that this was no longer true. One candidate received an invitation for a medical examination on 29 April 2004, which mentioned the grading committee, although it was obvious that the candidate would not be recruited before 1 May 2004. This constitutes conclusive evidence of lack of awareness even within the Commission's DG ADMIN.

Alleged misinformation to successful candidates

The complainants argue that the Commission only provides information on how many staff was recruited before May 2004, but that it does not clarify how many of the persons recruited had passed the competitions complained about. According to the complainants, a high proportion of the successful candidates from the competitions complained about were already working within the EU institutions. Some of them had worked within the institutions for several years, but not long enough to allow them to participate in internal competitions. The Regulation Explanatory Memorandum says: *"Finally, provision is made for transitional agreements to enable the new measures and rules to be applied gradually and to guarantee established rights"*. Many of those people already working within the Commission could have been recruited at short notice, not having to go through a medical exam. However, the Commission did not follow the Council and Parliament recommendation. As a consequence, people already working in the EU institutions were discriminated against since they lost up to five steps in their grade. The complainants would like the Ombudsman to analyse the recruiting of certain people already working in the institutions, which took place before 1 May 2004 on "urgent procedures", to see if privileged information was provided to the recruiting units or to specific candidates. According to the complainants, there are e-mails and minutes of meetings indicating that it was possible to recruit some categories of candidates before 1 May 2004, but not others. It was indicated by DG ADMIN to the human resources units on 23 March 2004 that successful candidates who were already temporary agents could be recruited before 1 May 2004, but no other categories of staff, such as auxiliary agents, could.

Alleged inequality of treatment

The complainants fully understand that successful candidates do not automatically obtain the right to be recruited. However, they should be able to expect to be recruited at the same level as other successful candidates from the same competition.

In an opinion (1/2004, OJ L 124 of 27 April 2004), the Court of Auditors highlighted possible discrimination against new staff under the transitional arrangements for grading: *"Concerning the Commission's amended proposal, as it has been transmitted, the Court notes that the transition to the amended Staff Regulations will give rise to discriminatory anomalies concerning recruitment and grading of new staff. The Commission should propose ways to deal with issues of this nature."* The complainants argue that the Commission's main role is to act as legislative initiator, and they are disappointed with the Commission, for having knowingly made a proposal to the Council and Parliament with the intention of effectively downgrading all ongoing competitions, which specifically contradicted Article 31 of the new Staff Regulations. The complainants are therefore discriminated against vis-à-vis participants in other competitions, in whose cases the Commission respected the grades of employment set out in the notices of competitions.

The fact that the Commission recruited a number of people on 30 April 2004, when it normally



only recruits people on day 1 or 16 of the month, demonstrate the discriminatory effects of the reform of the Staff Regulations.

Alleged discrimination on the grounds of age

According to the complainants, there is no evidence to suggest that the Commission warned the Council or Parliament about the potentially discriminatory effects of Article 12 of Annex XIII to the new Staff Regulations, particularly in light of the fact that the competitions concerned were among the first that were organised since the abolition of the age limits. It was the Commission's duty as legislative initiator to warn about these potentially negative effects.

Failure to exercise this duty made the abolition of the age limits a symbolic gesture without effect, making a mockery of the Ombudsman institution, which pushed for the abolition. Article 12 of Annex XIII means that the Commission is willing to hire people of any age, but that these people will only be treated as if they were 28 years old. Length, relevance, level and quality of professional experience cannot under any circumstances be separated from age.

Alleged discrimination against potential candidates

According to some complainants, their sense of fairness is offended by taking part in competitions leading to recruitment at posts suited for persons who are less qualified. Many junior candidates who were rejected in the selection process could have been appointed to the posts finally offered. Thousands of silent European citizens should feel discriminated against if they were aware of the opportunity that they missed. The complainants would like to complain on their behalf.

Alleged failure to reply to the complainants' correspondence

The complainants argue that they can provide the Ombudsman with documentary evidence of many cases in which candidates asked questions to the Commission and either had no reply at all, or inadequate and late replies.

Claims Recruitment at grades equivalent to the grades posted in the notices of competitions

The complainants understand the Commission's excuse that it is only applying the law. However, it is the interpretation of the law that the complainants are questioning. The complainants do not understand how the Commission can rely on the obligation in Article 12 of Annex XIII to the Staff Regulations, while at the same time it ignores the obligation to apply Article 31 of the same Regulations. Article 31 is not invalidated by Annex XIII and thus still applies to the concerned candidates. Article 31 is in the main body of the Regulations and it therefore has a higher legal value than a provision in an Annex. Article 12 of Annex XIII indicates an administrative procedure for certain competitions, i.e., that participants in certain competitions shall be recruited in a given way. However, Article 31 is a basic principle. The Staff Regulations refer to the new grades as a "change of name". The new Staff Regulations thus only imply a change of name, not new grades. In order to respect Article 31, the complainants find it legally impossible to recruit the successful candidates concerned other than under the new name of the grade in the function group set out in the relevant notice of competition.

The Commission has an obligation to avoid legal contradictions such as the one arising from Article 31 and Article 12 of Annex XIII to the Staff Regulations. The Commission should have either ensured that (a) Article 12 of Annex XIII provided for a direct translation of grades from the old to the new system; (b) not proposed Article 12 of Annex XIII at all; (c) applied Article 31; or, alternatively, that the original timetable for the competitions in question was respected. In



any case, and as stated in the Staff Regulations, the most favourable rule should be applied.

Some complainants suggest that the Ombudsman should propose to the Commission to amend the Staff Regulations.

Information to candidates in ongoing competitions

The complainants do not consider the note in the notices of competition to be sufficient. The note in question only directs candidates' attention to a proposal for an amendment of the Staff Regulations, which is a document of 300 pages. The note does not adequately inform candidates of the possible consequences of the amendment.

THE DECISION

1 Background

1.1 The Ombudsman recalls that Community staff matters, to which the present complaints relate, are governed by the Staff Regulations. The Staff Regulations were amended on 1 May 2004, through Council Regulation 723/04 (4), affecting both existing and newly recruited staff. As regards staff recruited after 1 May 2004, the initial conditions of employment - such as, for instance, pay and pensions - became significantly less favourable, whereas the rights of existing staff were preserved, at least to some extent. Inequality of treatment as between existing and new staff is thus an inherent part of the scheme of the new Staff Regulations. This inequality is the main point of concern underlying the complaints to the Ombudsman. The principal question that arises in this situation is whether the inequality of treatment embodied in the scheme of the new Staff Regulations is objectively justified by reference to a legitimate aim.

1.2 The Ombudsman recalls in this regard that only the Court of Justice is entitled to annul acts such as Council Regulation 723/04, by which the Staff Regulations were amended (5). Moreover, the Ombudsman has become aware of ongoing legal proceedings before the Community Courts in which the applicants have put forward objections of illegality in respect of, in particular, Article 12 of Annex XIII to the amended Staff Regulations in support of their claims relating to their conditions of employment (6).

1.3 In view of the fact that the matter is before the Community courts, the Ombudsman considers that it would be neither useful nor appropriate for him to inquire into the possible unlawfulness of the inequality of treatment brought about by the amendments to the Staff Regulations. However, the other points brought forward in the complaints will be dealt with below.

2 Allegedly unreasonable delay in completing the competitions

2.1 The complaint concerns the Commission's alleged delay in completing an open competition and certain implications thereof. Since the Ombudsman received several similar complaints concerning a number of competitions, he decided to carry out a joint inquiry into the matter.

2.2 According to the complainants, the competitions in question were launched in 2002, with the notices of competition indicating that they would be completed within approximately one year and that the resulting reserve lists would expire at the end of 2003. However, most of the competitions took much longer to complete. It can be questioned whether the Commission did



not delay the process with a view to recruiting people mainly under the new Staff Regulations. The complainants allege that the Commission's handling of the competitions implied unreasonable delay in completing them.

2.3 The Commission argues that the information in the notices of competition that the procedures would take approximately 12 months was for guidance only. Given that the duration of an open competition to a great extent depends on the number of candidates, it is not possible to give more precise information at the time of publication of the notice of competition. The 12-month duration corresponds to the average length of a competition. Nearly 19 000 candidates applied for competitions COM/A/1/02, COM/A/2/02 and COM/A/3/02, which were published on 25 July 2002. The deadline for submission of applications was 27 September 2002. The pre-selection tests were held on 21 March 2003. After the results of these tests had been examined, the selected candidates sat their written tests on 11 July 2003 for competitions COM/A/1/02 and COM/A/2/02, and on 12 September 2003 for competition COM/A/3/02. The oral tests took place between November 2003 and February 2004 for competitions COM/A/1/02 and COM/A/2/02, and between January and early April 2004 for competition COM/A/3/02. Given the fairly high number of applications, the period between the pre-selection tests and the end of the oral tests - between 11 and 13 months - appears perfectly reasonable. The Commission had no wish deliberately to slow down the process for the competitions in question, which is not possible given the needs expressed by the departments.

2.4 In their observations, the complainants argue that the period from September 2002 (the deadline for application) to April 2004 (the publication of the reserve lists) amounts to 20 months, not 13. The Commission is not allowed to justify delays on the basis of high levels of participation. The Commission should have been able accurately to predict the number of participants in the pre-selection tests. The number of participants at the following stages of the competitions was set out in the notices of competition, was therefore known to the Commission from the outset and was independent of a "high level of participation". The number of participants could only have caused delay in the first phase of the competitions, i.e., the pre-selection tests. However, those tests were corrected electronically and the correction should therefore have been fast, regardless of the number of participants.

2.5 The Ombudsman agrees with the complainants' analysis that the number of candidates who would participate in the stages following the pre-selection tests was known from the outset and was therefore independent of a high level of participation. The Ombudsman notes, however, that the longest time-spans as between different stages of the competitions concerned were those between the deadline for submitting applications and the pre-selection tests (about 6 months), and between the pre-selection tests and the written tests (about 4 and 6 months respectively), which are stages that could be affected by the number of participants.

2.6 The Ombudsman also notes the complainants' argument that the Commission is not allowed to justify delays on the basis of high levels of participation. In this regard, the Ombudsman considers that when challenged with an increased workload, the institutions must indeed do their utmost to deal with the situation. The Ombudsman recalls that principles of good administration require the institutions to act within a reasonable time-limit and without delay (7) .



2.7 The Ombudsman further notes that the notices of competition for COM/A/1/02, COM/A/2/02 and COM/A/3/02 informed candidates, under the heading "*approximate timetable*" in section D.3, that "*competition procedures take approximately 12 months, depending on the number of candidates*" (8) .

2.8 In fact, the completion of the competitions in question took considerably longer than 12 months. The Ombudsman has found no evidence, however, to suggest that the Commission deliberately delayed the competitions in question, or that it failed to make appropriate efforts to deal with an increased workload. Moreover, the Ombudsman considers that the wording of section D.3, which refers to an approximate timetable , does not create a legitimate expectation for candidates that the competitions should be completed within 12 months.

The Ombudsman takes the view, however, that when the Commission realized that the competition procedures would take longer than the "approximately 12 months" given in the notices of competition as an estimate of the likely duration of the process, it would have been good administration to provide candidates with updated information as to the timetable. However, since the complainants have not made any allegation in this regard, the Ombudsman will not pursue the matter further.

2.9 In view of the above, the Ombudsman finds no maladministration by the Commission as regards this aspect of the complaint.

3 Alleged lack of transparency

3.1 According to the complainants, the original notices of competition contained a note indicating that successful candidates might be subject to new Staff Regulations. However, the note did not in any way indicate the big difference in grading and career prospects between people recruited before and after the coming into force of the new Staff Regulations and its Annex XIII. This does not conform to the principle of reasonable expectations. In addition, the note was incorrect since the new Staff Regulations did not apply to the competitions concerned, which were instead governed by an exception clause in an Annex. The note should have explained that the successful candidates were not to be recruited on the basis of the new Staff Regulations, but on the basis of a special clause in an Annex. At no later point were candidates notified of the big impact of the transitional measures outlined in Article 12 of Annex XIII to those recruited after 1 May 2004. The only information provided was a letter to successful candidates, indicating their new grade of recruitment under the transitional measures. These letters did not contain any information on the factual difference between the new grades and the ones indicated in the notices of competitions. The complainants allege that the Commission's handling of the competitions concerned implied lack of transparency through failure to inform candidates about the impact of the transitional measures in Annex XIII, Article 12 of the new Staff Regulations.

3.2 The Commission argues that, given the progress of the reform of the Staff Regulations, the Commission could do no more at the time of publication of the notices of competition in question, than provide the information contained in the note. The Commission points out that the Council adopted the amendments to the Staff Regulations on 22 March 2004 and that



Article 12 of Annex XIII to the Staff Regulations is one of the articles that were discussed in the Council right up until the end of the process. The recruitment departments had no alternative but to await the final adoption of the new Staff Regulations, which would be authoritative for legal purposes. During this period, it was therefore impossible to prejudge the impact of the transitional rules and to give the successful candidates precise information. All successful candidates from competitions where the reserve lists were valid until 31 December 2003 and where the Commission extended the deadline - including COM/A/9/01 - were sent a personal letter containing a warning that the proposed amendment of the Staff Regulations would bring about a new career system which would amend the conditions for, and the level of, recruitment within the institutions. The letter also informed the candidates of the website where the Commission proposal could be consulted, indicating that Article 11 of Annex XIII contained a table indicating the correspondence between the old career structure and the recruitment grades following the entry into force of the amendment to the Staff Regulations.

3.3 In their observations, the complainants argue that the initial proposal was known during discussions in the Council and Parliament much earlier than 22 March 2004, especially since the Commission is the body having the legislative initiative. Even if the outcome of the proposals was not definite, the Commission could have indicated to candidates the possible implications of the proposals. The mere provision of information in the notices of competition that successful candidates could be offered a post on the basis of the new Staff Regulations was inadequate since the information was not sufficiently concrete. It should also be noted that some of the notices of competition published in 2001 and 2002 contained no reference at all to the proposed new grading structure.

3.4 The Ombudsman first of all notes that competition COM/A/9/01 was published on 28 August 2001, well before the Commission's proposal for a Regulation amending the Staff Regulations (9), which is dated 24 April 2002. The Ombudsman therefore considers reasonable the fact that the notice of competition in COM/A/9/01 did not contain a note informing candidates about possible new Staff Regulations.

3.5 The Ombudsman recalls that competitions COM/A/1/02, COM/A/2/02 and COM/A/3/02 were published on 25 July 2002, i.e., after the Commission's proposal for a Regulation amending the Staff Regulations. As regards the complainants' argument that the note in these notices of competition did not contain sufficiently clear information about the upcoming change in grading, the Ombudsman notes that, at the time, the Commission proposal merely stipulated, in Article 11 of Annex XIII, that *"correspondence between the published grade and the grade of recruitment shall be fixed by common accord between the institutions, after consulting the Staff Regulations Committee"*. Furthermore, as regards the complainants' argument that the note lacked information about the change in "career prospects", the Ombudsman does not consider the complainants to have explained what kind of information regarding career prospects they believe should have been provided. The Ombudsman is of the view that such prospects depend on a number of aspects and not solely the recruitment grade. In view of the above, the Ombudsman considers reasonable the Commission's explanation that, at the time of publication of the notices of competition in question, it was not possible to provide more information than was in fact contained in the note.



3.6 As regards the complainants' argument that the note was incorrect since the new Staff Regulations did not in fact apply to the competitions concerned, which were instead governed by an exception clause in an Annex, the Ombudsman considers the Annexes to constitute part of the Staff Regulations.

3.7 It thus remains to deal with the complainants' arguments that candidates were not even at a later point informed about the big impact of the transitional measures outlined in Article 12 of Annex XIII to the new Staff Regulations and that even if the outcome of the proposals was not definite, the Commission could have indicated to candidates their possible implications.

3.8 The Ombudsman notes that the complainants do not appear to question that they were sent the letter referred to by the Commission, informing them about the proposed amendment of the Staff Regulations. Nor do the complainants appear to argue that this letter was sent late. The complainants' main concern thus appears to be that the impact and implications of the new Staff Regulations were not communicated to candidates.

3.9 The Ombudsman agrees with the complainants that the new Staff Regulations did indeed have a major impact on career prospects and conditions of service. The Ombudsman therefore considers that it was incumbent on the Commission to alert those likely to be affected by the changes to this fact and to provide the clearest possible information on the matter. The Ombudsman notes that the Commission's letter appears to have explained to candidates that the proposed amendment of the Staff Regulations would bring about a new career system which would amend the conditions for, and the level of, recruitment. The letter explicitly referred to (the then) Article 11 of Annex XIII of the proposed Staff Regulations and gave the website address where this Article could be consulted. The letter explained that Article 11 of Annex XIII contained *"the table of correspondence between careers under current competitions and the recruitment grades following the entry into force of the amended Staff Regulations"* (10) .

3.10 The Ombudsman notes that, by consulting Annex XIII, candidates would not only learn about the proposed grades under which they would be recruited following the entry into force of the new Staff Regulations, but they would also find information on the proposed new grades for people already working as officials in the institutions, as well as tables showing the proposed basic monthly salary for the proposed new grades.

3.11 The Ombudsman further recalls that the final version of Annex XIII to the new Staff Regulations differs from the amended Commission proposal of 18 November 2003, as did the amended Commission proposal of 18 November 2003 differ from the original Commission proposal of 24 April 2002. The Ombudsman further considers that what the complainants refer to as the "implications" of the proposals for new Staff Regulations cannot be considered as the mere change of basic salary.

3.12 In view of the above, the Ombudsman considers that candidates appear to have been provided with sufficient information enabling them to consult the relevant sources of information in order to make an evaluation of the possible implications for themselves of the proposals for



new Staff Regulations that were under discussion in the legislative procedure. The Ombudsman further considers reasonable the Commission's decision not to provide more detailed information on the likely implications for new staff, given that the final version of the new provisions could not be known until the completion of the legislative procedure. The Ombudsman therefore finds no maladministration by the Commission as regards this aspect of the complaint.

4 Alleged lack of awareness within the Commission's own services

4.1 The complainants allege that the Commission's handling of the competitions concerned implied lack of awareness within the Commission's own services about the impact of the transitional measures.

4.2 The Commission considers that it provided its staff with full information. The reform process for the Staff Regulations was the subject of an ongoing information operation addressing all the institution's staff. Information was provided on the Intra- and Internet and many publications were distributed to the staff throughout the period in question. A particular emphasis was placed on the network of heads of human resources for the Directorates-General and departments.

4.3 The complainants argue that the fact that the Commission services were aware of the fact that new Staff Regulations would come into force is not the same as being aware of the implications of Article 12 of Annex XIII. The websites referred to by the Commission continued to refer to the old grading system well after 1 May 2004. The complainants argue that they can provide evidence of many cases in which candidates were provided with misleading information about the applicable rules. Such cases constitute conclusive evidence of lack of awareness even within the Commission.

4.4 The Ombudsman agrees with the complainants that awareness of the fact that new Staff Regulations were about to come into force is not the same as being aware of the detailed implications of the new Staff Regulations. The Ombudsman considers, however, that the evidence provided by the Commission shows that it did make a genuine and proportionate effort to alert staff to the importance of the changes to the Staff Regulations and to inform them of the substance of those changes, given that the final version of the new provisions could not be known until the completion of the legislative procedure. The Ombudsman is aware on the basis of the experience of members of his own services that not all information on the Intranet of the Commission (parts of which are accessible to all EU staff) were updated immediately on 1 May 2004. However, this fact does not alter his overall finding of no maladministration by the Commission as regard this aspect of the complaint.

5 Alleged misinformation to successful candidates

5.1 According to the complainants, some internal candidates had their applications rushed through before 1 May 2004. Others were given the divergent information that there were to be no appointments from the lists of successful candidates before 1 May 2004; that only certain types of internal candidates could be recruited before 1 May 2004; or that only external candidates could be recruited before 1 May 2004. The complainants allege that the Commission's handling of the competitions constituted misinformation to successful candidates as to whether appointment before 1 May 2004 would be possible.



5.2 The Commission argues that the task of those who are responsible for the recruitment of officials and temporary staff is to meet, as rapidly and effectively as possible, the institution's human resources needs, with a view to providing continuity of service in line with budgetary resources and within the limits laid down in the establishment plan. The Commission provides figures that it considers to show that it certainly did not slow down recruitment during the period in question. The Commission also provides statistics on the use of the reserve lists concerned, arguing that these statistics show a slight surplus in recruitment prior to the entry into force of the new Staff Regulations, many of the recruited people not being internal candidates. According to the Commission, this refutes the argument that the recruitment department provided information that only internal candidates could be recruited prior to 1 May 2004.

5.3 In their observations, the complainants argue that the Commission only provides information on how many staff was recruited before May 2004, but that it does not clarify how many of the persons recruited had passed the competitions complained about.

5.4 The Ombudsman notes that the Commission has provided statistics showing that recruitment took place from the reserve lists of each of the competitions complained about both before and after 1 May 2004 (except from the reserve list of COM/A/3/02, which was published on 18 May 2004). Despite the Commission not having produced any figures showing the proportion of the recruited candidates from these competitions being internal candidates, i.e., people already working within the institutions, the Ombudsman has not been provided with any evidence to suggest that internal candidates from the competitions complained about were recruited either only before, or only after, 1 May 2004.

5.5 The Ombudsman is mindful that the above facts do not constitute conclusive evidence as regards any information that the Commission might have provided to candidates concerning the possibilities to be recruited before or after 1 May 2004. However, in the absence of any concrete evidence showing that the Commission misinformed successful candidates, the Ombudsman considers that there appears to be no maladministration by the Commission as regards this aspect of the complaint.

5.6 The Ombudsman notes that, in their observations, the complainants ask the Ombudsman to analyse the recruiting of certain people already working in the institutions, which took place before 1 May 2004 on "urgent procedures", to see if privileged information was provided to the recruiting units or to specific candidates. According to the complainants there are e-mails and minutes of meetings allegedly indicating that it was possible to recruit certain categories of candidates before 1 May 2004, but not others.

5.7 It is not clear to the Ombudsman what kind of "privileged information" the complainants wish to bring to his attention or what allegation of maladministration they would like to put forward in that regard. However, the complainants could consider submitting a new complaint to the Ombudsman, making sure to clearly explain what they consider to be the instance of maladministration and to submit evidence in support of their allegation.

6 Alleged inequality of treatment and age discrimination

6.1 The complainants argue that since all competitions that were published on 25 July 2002



(COM/A/1/02, COM/A/2/02 and COM/A/3/02) were completed at different dates, the result was that candidates from some competitions had greater opportunities to be recruited under the old Staff Regulations and then to be transferred to the new Staff Regulations at significantly higher grades than candidates recruited under the new Staff Regulations. This also meant that certain candidates who had passed an A8 competition were recruited before 1 May 2004 at a higher level than successful candidates in an A6/A7 competition recruited after 1 May 2004. The delay in completing the competitions, and - as a consequence - the application of the transitional measures, also raise issues of age discrimination. Most of the competitions in question were the first to be published after the abolition of the age limits. They therefore attracted a large number of senior and more experienced candidates, for whom the original grades, as posted in the notices of competitions, were appropriate. The junior grades offered after the coming into force of the new Staff Regulations are not suitable for these candidates and result in irreparably damaged career prospects. The complainants allege that the Commission's handling of the competitions concerned implied inequality of treatment between successful candidates employed before and after 1 May 2004, including age discrimination.

6.2 The Commission argues that, as from 1 May 2004, it had no choice but to apply the new Staff Regulations in force, including those relating to recruitment grade. While it is true that successful candidates from the same competition were recruited under different conditions depending on whether the appointment took place before or after 1 May 2004, the fact remains that what the complainants regard as unequal treatment is in fact only the result of two distinct legal and objective contexts. Moreover, the difference in conditions is not restricted to the recruitment grade, but relates to many aspects covered by the Staff Regulations. Furthermore, a candidate who succeeds in an open competition and is put on a reserve list does not have the right to be recruited.

As regards the allegation of age discrimination, the Commission argues that it is based on the incorrect hypothesis that, under the old system, recruitment to the higher grade was intended for older successful candidates. In reality, under the old system, age was not a consideration when the decision for classification at the higher grade was made. As regards the length of professional experience, which is only very indirectly related to age, it was only one of the five cumulative criteria taken into consideration for classification at a higher grade.

6.3 In their general observations on the Commission's opinion and in their observations relating to this particular allegation, the complainants argue that the Commission acts as if its mandate is only to apply the existing Staff Regulations and as if it is a different institution from the one that amended the Staff Regulations. However, the complainants are of the opinion that the Commission has a moral obligation not to propose discriminatory legislation. It is the Commission's responsibility to ensure that its proposals for new legislation to the Council do not cause discriminatory treatment of candidates included on reserve lists for recruitment. By stating in its opinion that the Council drew up the transitional provisions, when in fact the Commission proposed the very same provisions to the Council, the Commission is trying to hide the fact that it is guilty of maladministration.

The complainants are disappointed with the Commission, which knowingly made a proposal to



the Council and Parliament with the intention of effectively downgrading all ongoing competitions and which specifically contradicted Article 31 of the new Staff Regulations. It was the Commission's duty as legislative initiator to warn the Council and Parliament about the potential negative effects of the transitional measures. Failure to exercise this duty made the abolition of the age limits a symbolic gesture without effect, thereby making a mockery of the Ombudsman institution, which pushed for the abolition. Article 12 of Annex XIII means that the Commission is willing to hire people of any age, but that these people will only be treated as if they were 28 years old. Length, relevance, level and quality of professional experience cannot under any circumstances be separated from age.

The complainants understand the Commission's excuse that it is only applying the law. However, it is the interpretation of the law that they are questioning. The complainants do not understand how the Commission can rely on the obligation in Article 12 of Annex XIII to the Staff Regulations at the same time as ignoring the obligation to apply Article 31 of the same Regulations. Article 31 is not invalidated by Annex XIII and thus still applies to the concerned candidates. Article 31 is in the main body of the Regulations and it therefore has a higher legal value than a provision in an Annex. The Staff Regulations refer to the new grades as a "change of name". The new Staff Regulations thus only imply a change of name, not new grades. In order to respect Article 31, the complainants find it legally impossible to recruit the successful candidates concerned other than under the new name of the grade in the function group set out in the relevant notice of competition.

The complainants are now complaining through the channels available to them, which will eventually imply bringing the Commission before the Community courts. Some complainants suggest that the Ombudsman should propose to the Commission to amend the Staff Regulations.

6.5 The Ombudsman has carefully examined the arguments put forward by the complainants in their complaints and observations. Although the Ombudsman does not exclude the general possibility that maladministration could arise in connection with the drawing up of legislative proposals, the Ombudsman takes the view that, in the present case, the complainants' allegations of inequality of treatment and age discrimination mainly call into question the legality of the new Staff Regulations, and in particular Article 12 of Annex XIII.

6.6 Recalling the findings in part 1 above, the Ombudsman considers that no further inquiries are justified into this aspect of the allegation under consideration in this part of the decision.

6.7 As regards the Commission's interpretation and application of the new Staff Regulations, the Ombudsman is not aware of any rule or principle giving the provisions in the Annexes a legal status inferior to the provisions in the main body of the Regulations. As a general principle, the Ombudsman takes the view that Article 12 of Annex XIII contains specific provisions governing a specific situation and it therefore appears reasonable for these provisions to take precedence of a general rule, such as Article 31. However, again the Ombudsman would like to recall in this regard that the legality of Article 12 of Annex XIII to the Staff Regulations is the subject of legal proceedings.



6.8 The Ombudsman further notes that the renaming of grades, as referred to by the complainants, is mentioned in Article 2 of Annex XIII, which only appears to apply to the grades of persons who already worked as officials at the time when the new Staff Regulations came into force on 1 May 2004. The grading of people recruited after 1 May 2004 is governed by Article 12 of Annex XIII, which contains no reference to renaming.

6.9 In view of the above, the Ombudsman considers that there appears to be no maladministration by the Commission as regards the allegation under consideration in this part of the decision.

7 Alleged discrimination against potential candidates

7.1 The complainants allege that the Commission's handling of the competitions concerned implied discrimination against potential candidates who were excluded from participating in the competitions because of lack of professional experience: such candidates would have been eligible to participate on the basis of the new grades of recruitment contained in Article 12 of Annex XIII to the new Staff Regulations.

7.2 The Commission finds it difficult to understand the allegation in question. The Commission considers it to be unclear how supposed prejudice against potential candidates that are less qualified than the complainants could adversely affect the complainants.

7.3 Some complainants essentially argue that their sense of fairness is offended by taking part in competitions leading to recruitment at posts suited for less qualified persons. Many junior candidates who were rejected in the selection process could have been appointed to the posts finally offered. Thousands of silent European citizens should feel discriminated against if they were aware of the opportunity that they had missed. The complainants would like to complain on their behalf.

7.4 The Ombudsman would first of all like to underline that, contrary to what is suggested in the Commission's opinion, one does not have to be personally affected by an alleged instance of maladministration to complain to the Ombudsman about the matter.

7.5 Next, the Ombudsman notes and understands the complainants' concern about fairness. The Ombudsman recalls in this context that inequality of treatment between existing and new staff is an inherent part of the scheme of the new Staff Regulations and that the question of whether or not such inequality is legally justified is before the Community courts.

7.6 As regards the complainants' allegation of discrimination against potential candidates, however, the Ombudsman considers that it was reasonable for the Commission, at the time of drafting and publishing the notices of competition in question, to have applied and relied on the rules then in force, i.e., the "old" Staff Regulations. Furthermore, the Ombudsman does not consider that rules which came into force on 1 May 2004 can be relied upon in order to argue that the selection of eligible candidates was discriminatory, when the selection of eligible candidates for the competitions concerned must have been carried out as early as in 2001 and 2002. The Ombudsman therefore finds no maladministration by the Commission as regards this



aspect of the complaint.

8 Alleged failure to reply to the complainants' correspondence

8.1 The complainants allege that the Commission's handling of the competitions concerned implied failure to reply to their joint and individual correspondence regarding the matter.

8.2 The Commission argues that, as far as the departments of DG ADMIN are aware, requests made to it have been given individual replies in the forms in which they were received (by letter, e-mail, telephone).

8.3 In their observations, the complainants argue that they can provide the Ombudsman with documentary evidence of many cases in which candidates asked questions to the Commission and either had no reply at all, or received inadequate and late replies.

8.4 The Ombudsman notes the complainants' argument that they can provide evidence of the Commission's failure to reply. However, in the absence of any detailed information or concrete evidence in this regard, the Ombudsman does not consider it justified to delay his decision in order to pursue further inquiries into this aspect of the complaints. However, any complainants who wish to do so are free to submit new complaints, supported by appropriate documentary evidence, of failure to reply by the Commission.

9 The claim pertaining to recruitment grades

9.1 The complainants claim that all successful candidates from lists published before 1 May 2004 should be appointed at grades equivalent to the grades posted in the original notices of competition and that the grading committee should be allowed to take into account qualifications and experience, thereby obtaining equivalency of appointment level and career development prospects for all successful candidates, irrespective of whether they were appointed before or after 1 May 2004.

9.2 The Commission argues that on the basis of the new Staff Regulations, it is legally impossible for the institutions to recruit successful candidates at any grade other than those laid down in Article 12 of Annex XIII to the Staff Regulations. Under the provisions of Annex XIII, the level (grade) of recruitment is determined by the date of appointment.

9.3 On the basis of the above findings of no maladministration, and of the analysis made in point 6.7 above regarding the Commission's interpretation and application of the new Staff Regulations, the Ombudsman finds no grounds to further pursue this claim.

10 The claim pertaining to information to candidates in ongoing competitions

10.1 The complainants claim that candidates in ongoing competitions, which were advertised using the old grading system, should be fully informed about the implications of the transitional measures under the new Staff Regulations.

10.2 The Commission argues that each notice of competition published since 25 July 2002 contains a note for the attention of candidates, informing them of the possible consequences for successful candidates of the proposal to amend the Staff Regulations. This procedure appears to be the most appropriate way of informing candidates. For all open competitions published prior to 25 July 2002, i.e., for all notices not containing information concerning the proposal to



amend the Staff Regulations, successful candidates received an individual letter from the Commission on the subject.

10.3 The complainants do not consider the note in the notices of competition to be sufficient. The note in question only directs candidates' attention to a proposal for an amendment of the Staff Regulations, which is a document of 300 pages. The note does not adequately inform candidates of the possible consequences of the amendment.

10.4 In relation to this claim, the Ombudsman recalls his analysis and findings in part 2 above. The Ombudsman further notes that notices of competition published closer to the coming into force of the new Staff Regulations, such as EPSO/A/12/04 (11) , EPSO/A/13/04, EPSO/A/14/04 and EPSO/A/15/04 (12) , which were published on 2 and 3 March 2004 and still are ongoing, refer to Article 12 of Annex XIII and inform potential candidates about the concrete recruitment grades applicable as from 1 May 2004. In view of the above, the Ombudsman finds no grounds to further pursue this claim.

11 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

The Ombudsman recalls, however, that the question of the legality of the inequality of treatment inherent in the new Staff Regulations is before the Community courts.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ L 124/1, 27.4.2004.

(2) Not including posts intended for EUR-10 nationals, which are not relevant to the complaints.

(3) Not including posts intended for EUR-10 nationals, which are not relevant to the complaints.

(4) OJ L 124/1, 27.4.2004.

(5) Articles 230 and 231 of the EC Treaty.

(6) See e.g., cases T-58/05 and T-192/05.

(7) See e.g., Article 17 in the European Code of Good Administrative Behaviour, available at the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link].



(8) As regards competition COM/A/9/01, no timetable was provided in the notice of competition.

(9) COM(2002) 213 final.

(10) The Ombudsman notes that a table of corresponding grades appears to have been introduced in Annex XIII by the amended Commission proposal for new Staff Regulations of 18 November 2003, COM(2003) 721 final.

(11) OJ C 54 A/1, 2.3.2004.

(12) OJ C 55 A/13, 3.3.2004.