

## Decision of the European Ombudsman on complaint 3006/2004/BB against the European Commission

Decision

**Case 3006/2004/BB - Opened on 18/11/2004 - Decision on 10/04/2008**

Strasbourg, 10 April 2008

Dear Mr X,

On 1 October 2004, I received a complaint from Mr V., Attorney at a law firm, about the enlargement of the scope of Framework Contract DI-04030-00 (1) . This contract had been awarded following an open tender procedure (Contract Notice 2002/S 161-129304), concerning "*the supply of licenses for a web content management software product*" and associated services, such as initial installation and design. The Framework Contract was subsequently extended to a "new product", namely, the document management system.

Subsequently, Mr V. informed me that you, as his colleague from the law firm, would act as the complainant before the Ombudsman.

On 18 November 2004, I opened an inquiry into the complaint.

The Commission sent its opinion on 28 February 2005.

The Commission's opinion was forwarded to you on 21 March 2005 with an invitation to make observations.

On 20 April 2005, I received your observations on the Commission's opinion.

On 13 December 2005, I made further inquiries in which I asked the Commission for additional explanations.

On 7 February 2006, the Commission sent me its further opinion which, on 20 February 2006, was forwarded to you for observations. You sent me your observations on 31 May 2006.

On 24 May 2007, I made a request to the Commission for my services to inspect the Commission's files in relation to this complaint. The inspection took place on 7 June 2007. My report on the inspection was subsequently sent to you and to the Commission.



On 4 July 2007, I requested from the Commission additional information and the Commission replied on 6 November 2007, following one request for an extension of my original deadline, which was granted. On 12 November 2007, I forwarded to you the above reply from the Commission. On 24 December 2007, I received your further observations on the additional information.

I regret the length of time it has taken to complete the analysis of this inquiry.

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

## THE COMPLAINT

In his complaint, the complainant referred, in summary, to the following facts and arguments.

The European Commission, acting on behalf of the European Parliament, the European Court of Justice, the Office of Harmonisation in the Internal Market and itself, issued a Call for Tenders for a Corporate Web Content Management System (Call for Tenders DI-0115-CWCMS) (2) in August 2002. The purpose of this call for tenders was to acquire a Web Content Management System to enable the EU institutions to publish content on the central web servers managed by the EU institutions services.

Fujitsu Consulting SA (hereafter "Fujitsu"), a company which sold a software package known as Documentum, won the Call for Tender and, as a result, entered into the Framework Contract DI-04030-00 with the Commission in September 2003. This contract granted the Commission a license to use the Web Content Management software of Fujitsu (3) .

On 2 April 2004, the complainant sent a letter to DG DIGIT seeking confirmation that the Commission would not use the Framework Contract signed with Fujitsu in order to obtain licenses to use additional products or features offered by Fujitsu in areas other than the area covered by the call for tenders. It also sought confirmation that the Commission would " *open the market* " to all interested vendors in the event it decided to " *implement other solutions* " in areas such as document management. Finally, it sought confirmation that, in the event the Commission wished to undertake pilot projects to evaluate software products offered on the market, all interested suppliers would have the opportunity to carry out such pilot projects and that these pilot projects should be evaluated in a clear and objective manner.

On 17 June 2004, the Director-General replied by explaining that " *after the date of publication of the contract notice, the market has experienced an important consolidation; indeed the former areas of "Document Management" (...) and "Web Content Management" (...) have now evolved to merge into a single domain, generally referred to as "Enterprise Content Management" (ECM)(...)* For the above-mentioned reasons, it would be extremely difficult to maintain a clear-cut distinction between the former areas of document management and web content management over the whole lifetime of Framework Contract DI-04030-00 (foreseen end date: September 2008)(...) The Commission will ensure the opening of the market whenever



*possible. Services associated to ECM projects, for instance, might be procured through calls for tenders in the forthcoming years ".*

The Commission subsequently decided to extend the original contract with Fujitsu by purchasing a license to use the document management functionality of Documentum.

In his complaint, the complainant alleged that the Commission:

(1) breached the Financial Regulation by extending Framework Contract DI-04030-00 to include document management, although this was not provided for in the Contract Notice and by accepting the product of Documentum as suitable to become the standard document management product for the whole Commission.

(2) infringed rules on free competition and acted unfairly, thereby creating problems for suppliers of IT services and products.

The complainant claimed that the Commission should agree to limit the scope of Contract DI-04030-00 strictly to the areas of "Web Content Management System" and open the market in the area of "Document Management" to free competition, in accordance with the provisions of the Financial Regulation (4) .

## THE INQUIRY

### **The Commission's opinion dated 28 February 2005**

In its opinion, the Commission first challenged the admissibility of the complaint and expressed its view as to the scope of the Ombudsman's inquiry.

As regards the issue of admissibility, the Commission argued that Article 2(3) of the Statute of the European Ombudsman requires that the complaint should be declared inadmissible because " (...) *the complainant should be identified by the Institution receiving the complaint, even if the complainant has full right to be represented by a lawyer and ask for confidentiality of its complaint (...)* ". The Commission also stated that " *[t]he identity of the complainant would help the Commission in its understanding of the issues raised by the complainant* " and to allow a more specific and detailed answer to the complaint.

Moreover, the Commission was of the view that the scope of the Ombudsman's inquiry was limited to whether the Commission had breached the requirements of its *Code of Good Administrative Behaviour* as regards the principle of lawfulness and the obligation to act objectively and impartially in respect of the decisions it has taken in this file. According to the Commission, the discussion as to whether or not web content management and document management should be considered as a single market or as distinct markets was technical and, therefore, outside the scope of for a complaint lodged with the Ombudsman.

The Commission explained that Open Call for Tenders DI-0115-CWCMS was launched in 2002. As a result, Framework Contract DI-04030-00 was signed with Fujitsu in 2003. On 17 June 2004,



the Directorate-General for Informatics (DIGIT) informed Fujitsu of its intention to open a "negotiated procedure" in order to extend the scope of the market originally set out in Open Call for Tenders DI-0115-CWCMS. The legal basis for this decision was Article 126.1(g)(i) of the Implementing Rules to the Financial Regulation (hereinafter, the "Implementing Rules"). On 2 July 2004, Fujitsu was invited to meet the Commission to open the negotiated procedure. The negotiation meetings were held in July and August 2004. On 22 September 2004, the award decision was signed by the awarding officer. On 14 October 2004, an amendment to the contract with Fujitsu was signed. On 4 November 2004, the award notice was published in order to enlarge the scope and increase the ceiling of the supply contract (5) .

The Commission underlined that internal consultation took place between the Commission's services: the Legal Service, DG Internal Market (DG MARKT) and DG Budget (DG BUDG) in order to decide on the opening of the negotiated procedure with Fujitsu. DG BUDG was in favour of extending the contract with Fujitsu provided a negotiated procedure based on Article 126.1(g)(i) of the Implementing Rules would be opened. Based on the result of the technical analysis provided by DG DIGIT, DG MARKT answered that the use of a negotiated procedure appeared well-founded. Besides, the consultation made with the Legal Service, upon receipt of the first letter from the complainant's law firm, confirmed the opinion expressed by DG MARKT and DG BUDG. Furthermore, the GAMA ( *Groupe d'Analyse des Marchés Administratifs* ), which was composed of officials from DG ADMIN, the Brussels and Luxembourg Infrastructure and Logistics Offices and the Payment Office, was requested to provide an analysis of the negotiated procedure file. The GAMA did not express any reservations as regards the validity of the extension of the scope of the original market. It followed that, not only did the awarding officer act lawfully, but he took all the precautions which were available to him in these circumstances to ensure that his decision was fair and reasonable. These precautionary measures allowed for a fair and reasonable decision to be taken in full respect of the *Code of Good Administrative Behaviour* as regards the obligation to act objectively and impartially.

The Commission refuted any allegations of breaching the Financial Rules and infringing the rules of free competition.

The Commission concluded that Call for tenders DI-0115-CWCMS, as well as the negotiated procedure, were dealt with according to the Financial Regulation and the Implementing Rules. Thus, the Commission respected the principle of lawfulness laid down in its *Code of Good Administrative Behaviour* ; the complainant's allegations were unfounded; and the claim to limit the scope of Framework Contract DI-04030 to web content management was unjustified.

#### **The complainant's observations dated of 20 April 2005**

In his observations, the complainant pointed out that the extension of Framework Contract DI-04030 to cover document management software reflected the fact that the Commission already "locked" itself into the Documentum technology for all its internal activities and would, as a result, only use Documentum products for all its software needs. The complainant stated that the eventual outcome would be a "monopoly situation" harming all vendors of alternative software operating in the EU.

The complainant stated that the Commission chose the Documentum document management



product after conducting two limited pilot projects.

He argued that when the Commission invoked the applicability of Article 126.1 (g) (i) of the Implementing Rules, it did not make reference to any facts that fulfil the requirements and conditions of that provision.

The complainant also requested to be provided with all the documents related not only to the internal consultations held by the Commission in order to prepare its replies to him, but also with an explanation as regards the procedure to be followed in relation to the extension of the contract.

Moreover, the complainant alleged that the Commission had not replied to his letter of 12 November 2004 in which he, in essence, questioned the applicability of Article 126.1(g) (i) of the Implementing Rules.

## FURTHER INQUIRIES

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman considered that further inquiries were necessary.

### **The Ombudsman's letter to the Commission dated 13 December 2005**

On 13 December 2005, the Ombudsman wrote to the Commission. Concerning the issue of admissibility of the complaint, the Ombudsman confirmed that the complaint was admissible. The Ombudsman also stated that the scope of his inquiry was to examine whether the Commission's decision to apply Article 126.1(g) (i) of the Implementing Rules was adequately reasoned.

The Ombudsman also requested further information and comments from the Commission on the arguments and new allegation put forward by the complainant in his observations, namely:

- (a) the grounds for the applicability of Article 126.1(g)(i) of the Implementing Rules;
- (b) the proof-of-concept studies (called "pilot projects" by the complainant) carried out by the Commission prior to the extension of the contract, and
- (c) the complainant's new allegation regarding alleged failure to reply to his letter of 12 November 2004.

The Ombudsman also invited the Commission to comment, should it wish to do so, on any other aspects of the complainant's observations.

### **The Commission's further opinion dated 7 February 2006**

On 7 February 2006, the Commission sent its further opinion.

#### *Admissibility of the complaint*

The Commission first of all argued that the Ombudsman should declare the complaint inadmissible on the grounds that, in the Commission's view, it was an anonymous complaint.



### *Extension of the scope of the Contract*

As regards the substance of the complaint, the Commission clarified that it awards most IT contracts through open calls for tender, as required by the Financial Regulation. However, in well-defined exceptional situations — such as the extension of the contract at issue — the applicable legislation foresees the possibility to use the negotiated procedure, subject to stringent conditions. The Commission maintained that the situation was assessed carefully both from technical and legal points of view and that, in this context, the awarding department was prudent enough to consult all the other internal departments that could offer useful guidance. The Commission decided to initiate a negotiated procedure in order to adjust the description of the object of the contract to the realities of the market and to take into account its needs for the whole of the "enterprise content management" area.

In relation to the "enterprise content management" area, the Commission stated that when Call for Tenders DI/0115 -CWCMS was being prepared in 2001, "web content management" and "document management" were considered to be distinct "markets". This Call for Tenders covered "web content management" needs alone. Accordingly, the Framework Contract DI-04030-00, signed in 2003, only mentioned "web content management" as its object. By 2004, however, the former web content management and document management "markets" had merged into one single "market", namely, the "enterprise content management" market. As a result, the functionality of the products included in the contract now covered, *de facto*, the whole enterprise content management functionality (6). This, according to the Commission, made a new call for tenders inappropriate.

The Commission provided the Ombudsman with further factual details about the process which led it to hold the view that the web content management and document management markets had merged into a single consolidated market (namely, enterprise content management).

The Commission explained that it had also informed the complainant about the fact that the negotiated procedure had by then been completed and that, in conformity with Article 126.1(g)(i) of the Implementing Rules, the maximum duration of the contract had been reduced to three years as from the signature of the amendment, that is, until October 2007 instead of September 2008 as initially planned.

The Commission rejected the argument that the extension of the contract reflected a Commission policy of "*self locking*" into one technical solution forever. However, it pointed out, certain strategic choices in the IT field have to be made for a period of time, thereby ensuring the adequate protection of the considerable investments made.

### *Pilot projects/Proof-of-concept studies*

The Commission pointed out that it did not carry out any "pilot projects", but rather carried out proof-of-concept studies in order to gather information on potential solutions to its software needs. The proof of concept studies were carried out using software products already in use within the Commission because there was already a considerable degree of technical know-how in-house in relation to these software products. Further, by using software already in use within the Commission for the proof-of-concept studies, the Commission could verify compatibility with its existing IT infrastructure.



A first proof-of-concept prototype was built in 2003. After Framework Contract DI-04030-00 was signed with Fujitsu in September 2003, a second proof-of-concept prototype, based on Documentum, was produced.

The proof-of-concept study based on Documentum demonstrated that the software products which offered web content management functionality also met the document management needs. This, the Commission pointed out, reflected the fact that the web content management and document management markets had "merged" into one consolidated market, namely, the enterprise content management market.

The above facts led the Commission to study, from a legal perspective, whether Article 126.1(g)(i) of the Implementing Rules could apply in this area.

#### *Standards and concepts*

The Commission agreed with the complainant in that it should define and promote standards and concepts in all fields, such as web content management and document management, and all the other areas, in order to allow all vendors and IT firms to compete lawfully.

#### *Request for access to documents*

As regards the complainant's new request to have access to all the documents of the file, the Commission noted that it was in his observations that the complainant made, for the first time, a request for access to these documents " *under Regulation 1049/2001* ". The Commission maintained that, in the context of its further opinion to the Ombudsman, it took a decision as regards the complainant's request on access to documents pursuant to Article 7(1) of the Regulation (EC) 1049/2001 (7) . Its decision was that the documents were covered by the exceptions provided for by Article 4(2) second indent and Article 4(3) second paragraph of Regulation (EC) 1049/2001 (8) .

#### *Dealings with the complainant*

The Commission underlined that it has shown a very high standard of good administrative behaviour in this file. It has handled all of the complainant's letters and requests diligently and transparently, and often went far beyond its strict legal obligations. More generally, the Commission considered that it has also shown " *considerable patience, especially taking into account the fact that it was dealing with an anonymous party* ".

The Commission also maintained that it had provided the complainant with extensive reasoning, even if it was not required to do so. The Commission explicitly informed him about its intention to open a negotiated procedure and about the legal basis it was going to use before it had taken the final decision. Therefore, it offered him the chance to challenge the decision. The Commission concluded in this respect that by doing so, it put the complainant, for more than three months, in an advantageous position in comparison with the rest of the IT industry.

Moreover, the Commission had replied to the complainant's subsequent letters and requests after the decision had been taken, and repeatedly proposed meeting with him in order to clarify any remaining issues. The Commission rejected the insinuation that its repeated offers to arrange a meeting in order to clarify issues had as their purpose the intimidation of the complainant's client.





As to the complainant's new allegation regarding an alleged failure to reply to his letter of 12 November 2004, the Commission observed that the complainant sent the letter in question six days before the Ombudsman informed the Commission on 18 November 2004 about the complainant's complaint dated 1 October 2004. On 25 November 2004, the Commission formally replied to the complainant's letter of 12 November 2004 stating that, since the Commission would have to answer, through the Ombudsman, the arguments raised in that complaint, there was no point in continuing a parallel correspondence. The Commission maintained that the complainant's new allegation that it did not answer his letter of 12 November 2004 was unfounded.

The Commission's further opinion was forwarded to the complainant on 20 February 2006.

**The complainant's complementary observations dated 31 May 2006** *Burden of Proof*

In his complementary observations, the complainant argued that, rather than the complainant having to show that the Commission infringed the Financial Regulation, it was for the Commission to prove that it respects the Financial Regulation.

The complainant also argued that it was for the Commission to put together convincing information to demonstrate that its decision to extend the scope of the contract was well grounded. The complainant also considered that the grounds on which the Commission's decision was based were unreasonable.

*Web content management and document management*

The complainant maintained that the Commission's argument that it was no longer possible to maintain a clear-cut distinction between web content management and document management markets was not true. In fact, all major vendors who provide solutions and products in the fields of web content management and document management markets make such a distinction and make modular and independent offerings of their document management software and web content management software. As to the trends of the enterprise content management market, the complainant agreed that vendors provide software "packages" that can cover both web content management and document management needs. The complainant called into question, however, the validity of awarding the document management market to a vendor with whom the Commission had a web content management contract, without going through transparent procurement procedures. The complainant pointed out that, even if the Commission already had obtained a license for web content management software from a particular vendor, it cannot use this as the reason to also obtain licenses for any other software product the same vendor happens to offer.

The complainant also pointed out that it assumed that even though the software purchased to meet web content management needs may also have document management functionality, the vendor of this software charges a separate fee for the use of the document management functionality. It was for this reason the Commission negotiated a new contract and paid an extra fee.

The complainant pointed out that while it is true that vendors offer integrated solutions for web content management/document management needs, vendors also offer independent solutions





which can " *integrate between each other* " through interfaces. This applies to web content management/document management, but also to products which serve other purposes, such as Workflow Management, Reporting Management or Records Management. If the Commission's rationale were followed through, a vendor could, through a single web content management contract, supply its entire range of products to the Commission. This would not be reasonable and be against the basic principles of public procurement rules.

The complainant also pointed out that the Commission could not have validly come to the conclusion that it was in its own interest and also in the interests of the taxpayer to extend the existing contract without having first allowed the market to provide its best offers for addressing the Commission's web content management/document management needs.

" *Proof of concept studies* "

As regards what the Commission referred to as " *proof of concept studies* ", the complainant argued that the terms used to refer to these studies (that is, "pilot projects", "proof of concept studies", "prototypes" ...) are irrelevant. What is relevant is that these studies served as a basis for evaluation as regards whether the Commission would extend the web content management contract also to cover document management needs. Such studies are not, the complainant argued, an adequate means of ensuring that tax payers' money is used in the best possible way. The complainant also repeated his argument regarding how the "pilot projects" were conducted. The complainant argued that the methodology used in these "pilot projects" was not impartial and accurate.

*Access to documents*

As regards the request for access to the documents, the complainant believed that the Ombudsman should indeed be allowed access to all the necessary information in order to assess alleged maladministration. The complainant considered that the exceptions provided for by Article 4(2)(ii) and Article 4(3)(2) of Regulation (EC) 1049/2001 were not applicable in the present case, since there was a serious public interest at stake. According to the complainant, if the Ombudsman considered that the complainant should not have access to such documents or parts of it, the complainant would respect that consideration. However, the complainant argued that the Commission should disclose these documents to the Ombudsman. In turn, the complainant expressed interest in obtaining these documents from the Ombudsman. The complainant invited the Commission to disclose to the Ombudsman all correspondence exchanged with the contractor, as well as reports and deliverables of the projects, including time-plans.

The complainant considered that the Commission should disclose to the Ombudsman the amount it paid for the web content management software and the document management software to allow the Ombudsman to evaluate the seriousness of the situation.

The complainant also pointed out that if the Commission already knew, when the tender was still on-going, that it would use the web content management contract also to purchase a license to use document management software, it should have extended the scope of the tender at that time also to cover document management needs.

The complainant repeated his argument that the choices made by the Commission in this area



would have consequences outside the Commission, namely, in other institutions, and even at national level.

#### **The Ombudsman's inspection of the Commission's file dated 7 June 2007**

On 24 May 2007, the Ombudsman requested that his services be allowed to inspect the Commission's file. On 7 June 2007, the Ombudsman's services conducted an inspection of the relevant files at the Commission's premises in Brussels. A number of relevant files were thoroughly inspected. The report on the inspection was sent to the complainant and to the Commission.

#### **The Ombudsman's request for complementary information in his letter to the Commission dated 4 July 2007**

On 4 July 2007, the Ombudsman sent a request for additional information to the Commission. The Ombudsman referred to Article 126.1(g)(i) of the Implementing Rules which provides as follows:

*" Contracting authorities may use the negotiated procedure without prior publication of a contract notice (...) for supply contracts (...) in the case of additional deliveries which are intended either as partial replacement of normal supplies or installations or as extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance ; the length of such contracts may not exceed three years ". (Ombudsman's emphasis)*

Based on the above provision, the Ombudsman requested the Commission to explain and duly justify whether it would have to make disproportionate investments, in terms of time and money, to overcome technical difficulties (such as in retraining costs, adaptation of existing infrastructure *et cetera* ) in order to use document management software offered by alternative suppliers.

#### **The Commission's comments dated 6 November 2007 on the Ombudsman's request for complementary information**

The Commission provided, in summary, the following further comments on the complainant's observations.

First, the Commission accurately identified the legal basis which justified the use of the negotiated procedure, namely, Article 126.1(g)(i) of the Implementing Rules.

Second, the Commission indicated that it had considered the possibility of maintaining two software platforms in parallel, but reached the conclusion that this possibility would oblige it " to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance ". It underlined the " technical complexity of maintaining two products which cover the entire (enterprise content management) spectrum " and, in such a context, " trying to maintain an artificial distinction between their (web content management functionality) and (document management functionality) ". It also noted that such a strategy would require the development of interfaces which would not be necessary if only one *enterprise content management* product were used. The Commission provided an overview of the technical reasons supporting this



view. In sum, it noted that a "two technology solution" was difficult since each product implements its own repository and hence its own means of organising, controlling and delivering the repository content. The development of IT solutions built on two products was thus extremely difficult. Issues related to using two technologies in parallel included:

- maintaining copies of all documents in both repositories, with the development of interfaces;
- the different structure of each repository, which, because of the need for constant synchronisations, would lead to inconsistencies;
- discrepancies in results by internal search engines;
- duplication in the management of users, groups, permissions *et cetera* ;
- duplication of interfaces;
- risks linked to product evolution - any new version of either product would jeopardise interoperability between the two products and require a significant reworking of the interfaces between the two products.

The Commission also summarised a number of difficulties linked to maintaining two separate hardware platforms. Finally, it summarised the difficulties that would arise in connection with the training of its staff, development and software implementation. It noted that using the same product for both web content management and document management would avoid such difficulties. It underlined, in this context, that the costs of using a different technology would be disproportionate in comparison with the potential benefits.

With specific reference to costs, the Commission provided a detailed assessment of the financial impact of two alternative solutions: namely, (i) obtaining a license to use the document management functionality of Documentum from Fujitsu by means of a negotiated procedure; and (ii) obtaining an alternative document management system from another vendor by means of an open tender. The Commission took into account the licence and maintenance costs, product support and technical training, infrastructure costs and information systems development and support. As a conclusion, the Commission provided a detailed table summarising the total cost of both alternatives during a four-year period (the normal duration of a framework contract resulting from a new call for tenders).

The Commission stated, in summary, that the benefits of using the product provided by Fujitsu for both web content management and document management could be estimated at EUR 6 221 721 over a period of four years. In addition, the Commission listed factors which could have increased the potential savings of this choice, but which were not taken into account in the calculation. The Commission pointed out that the information provided in its reply to the Ombudsman was supported by information contained in the documents inspected by the Ombudsman's services.

Third, the Commission drew attention to the complainant's own statement " *that vendors provide product suits that can cover both (web content management) and (document management) as part of a wider (enterprise content management) suit of products*" and that " *many vendors provide solutions that may integrate these fields* ". The Commission further highlighted that it was not unreasonable, under these circumstances, to maintain its view on the convergence of the market.



Fourth, the Commission argued that some of its statements regarding proof-of-concept studies had been misrepresented by the complainant. In particular, it denies that, at the time, Call for Tenders DI-0115-CWCMS was still on-going, it had already decided to use the contract which would result from that Call for Tenders also to purchase document management software.

Fifth, the Commission refuted the complainant's statements that the web content management project was a failure by including an annex of websites which have been created using the web content management software. Finally, the Commission noted that the complainant did not follow the procedure to make a confirmatory application under Regulation (EC) 1049/2001 regarding his request made in his further observations to have access to certain documents.

In addition, the Commission expressed its concerns that that the question raised by the Ombudsman following the inspection of the file might suggest that the Ombudsman was going beyond the scope of this inquiry as specified in the Ombudsman's letter of 13 December 2005. It expressed the view that the question was targeted at finding out whether the decision taken by the Commission was the right one. Thus, the Commission respectfully submitted that the Ombudsman might in practice be substituting his own judgment for that of the Commission in the context of a particular set of facts, rather than attempting to cover a potential instance of maladministration. This in the Commission's view would involve a quasi-judicial approach which could exceed the duties conferred to the Ombudsman and encroach on the Commission's competences as an awarding authority. In conclusion, the Commission strongly considered that the present inquiry should remain within the limits of Article 2.1 of the Statute of the European Ombudsman.

The Commission maintained its position as regards the inadmissibility of the complaint.

The Commission's letter was forwarded to the complainant on 12 November 2007.

**The complainant's further observations dated 24 December 2007**

The complainant maintained his position on the admissibility of his complaint.

The complainant sought to demonstrate that all the Commission's arguments set out in its reply to the Ombudsman's request for complementary information were false.

First, the complainant challenged the fact that the market had converged, arguing that vendors continued to offer web content management software and document management software separately.

Second, he pointed out that using web content management software and document management software from the same or from different suppliers had both advantages and disadvantages. These advantages and disadvantages should be considered in order to arrive at an optimal decision. He pointed out that vendors could limit interface problems by constantly developing new interfaces. He noted that Documentum technology was, in its view, "obsolete technology" which limited the Commission's choices dramatically.



Third, the complainant also noted that the issue of synchronisation between different systems already existed for the Commission. The various problems that might arise (interfaces, searches ...) can be addressed if adequate design architecture is in place. The complainant stated that the whole product evolution was an important issue, but it existed even if one were to use web content management software and document management software from the same source. It went on to note this may be a problem for the web content management software of the Documentum platform.

The complainant disagreed with the argument that it would be necessary to purchase different hardware in order to host the two different systems. It pointed out that the two products could use the same servers and the same hardware.

The complainant considered that the prices quoted by the Commission for license fees and maintenance, as well as for product support and training were arbitrary and unsubstantiated. In relation to licence fees, it noted that certain open source software was offered for no license fees. In relation to training, it pointed out that training costs were not dictated by vendors, but by the organisational arrangements to be put in place by the Commission.

According to the complainant, the Commission, in sum, infringed the applicable rules of the Financial Regulation, acted in a discriminatory manner favouring one particular vendor and a specific contractor offering its products, and acted in an inconsistent manner.

The complainant also argued that Fujitsu was not the only vendor of Documentum software. Thus, the Commission should have, at least, allowed competing vendors of Documentum software the opportunity to win the contract for the supply of document management software/functionality.

As regards access to documents, the complainant was of the view that the procedure for requesting access to documents provided by Regulation (EC) 1049/2001, applies only in cases where the requesting party has not filed a complaint with the Ombudsman on the same issue. The complainant argued that in the present case the complainant was not obliged to follow the aforementioned procedure, since the documents requested should be disclosed to the Ombudsman in the context of the inquiry.

The complainant also considered that the view taken by the Commission, whereby when an issue is of a complex technical nature it should not be considered by the Ombudsman at all, to be particularly worrisome. The complainant stated that it is not necessary for the Ombudsman to open a complex technical debate. Rather, the Ombudsman should consider whether the Commission abused or not the provisions of Article 126.l(g)(i) of the Implementing Rules.

## THE DECISION

**1 Preliminary remarks** *The extent of the Ombudsman's review and the admissibility of the present complaint*

1.1 The Ombudsman notes that the Commission expressed its concerns in the course of the



inquiry as regards the admissibility of the present complaint and the extent of the Ombudsman's review.

The Commission noted that the client of the lawyer submitting the complaint wished to remain anonymous. The Commission argued, in substance, that knowledge of the identity of the complainant's client would allow it to give more specific and detailed answers to the complaint. The Commission also argued that Article 2(3) of the Statute of the European Ombudsman requires that a complaint should be declared inadmissible if it is anonymous.

1.2 The Ombudsman explained his position as regards the admissibility of the present complaint in his letter to the Commission of 13 December 2005. The Ombudsman, however, considers it useful to explain his position again in the present decision.

The Ombudsman first of all recalls that, in accordance with Article 2(2) of his Statute, a person can submit a complaint to the Ombudsman even if that person is not personally affected by the alleged maladministration. As such, any physical or legal person (such as a lawyer or a law firm) is entitled to bring an instance of alleged maladministration to the attention of the Ombudsman. Article 2(2) of his Statute does not require complainants to identify to the Ombudsman the persons or the interests they may represent.

With specific reference to Article 2(3) of the Statute of the European Ombudsman, which states that "[t]he complaint must allow the person lodging the complaint (...) to be identified", the Ombudsman notes that in the present case, the person lodging the complaint is a named lawyer of the firm. The complaint therefore meets the requirements of Article 2 (3).

As regards the Commission's argument that knowledge of the identity of the complainant's client would allow it to give more specific and detailed answers to the complaint, the Ombudsman takes the view that, in some cases, practical considerations of this kind could lead him to consider that no inquiry was justified if the complainant was unwilling to reveal the identity of the person adversely affected by the alleged maladministration. In the present case, however, the Commission has been able to provide useful answers, which have enabled the Ombudsman to deal adequately with the allegations presented by the complainant. Furthermore, the Ombudsman notes that the complainant was the interlocutor with the Commission in all the correspondence which preceded the complaint and which constituted the appropriate administrative approaches required by Article 2(4) of the Ombudsman's Statute.

#### *Scope of the Ombudsman's inquiry*

1.3 The Commission also expressed concerns as regards the scope of the Ombudsman's inquiry. The Commission submitted that a question asked by the Ombudsman was targeted at finding out whether the Commission's decision as an awarding authority was the "right one" and that the Ombudsman might, in practice, be substituting his own judgment for that of the Commission, rather than attempting to discover a possible instance of maladministration. This, in the Commission's view would involve a "quasi-judicial" approach.

The Ombudsman, first, does not fully understand what the Commission means by a "quasi-judicial" approach.





The Ombudsman also recalls that the Community Courts do not substitute their judgement for that of the Commission in cases involving complex technical and economic evaluations. The Ombudsman recalls, in this respect, the recent judgment of the Court of First Instance in case T-201/04 (9) , in which the Court held that:

*" (...) in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court which means that the Community courts cannot substitute their own assessment of matters of fact for the Commission's. However, while the Community Courts recognise that the Commission has a margin of appreciation in economic and technical matters, that does not mean that they must decline to review the Commission's interpretation of economic and technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. "*

The institution of the Ombudsman provides an alternative non-judicial remedy, which does not necessarily have the same objective as judicial proceedings. However, in dealing with alleged instances of maladministration that involve complex technical and economic evaluations, the Ombudsman may consider it appropriate to adopt an approach similar to that adopted by the Court. In the present case, the Ombudsman informed the Commission that the scope of his inquiry was to examine whether the Commission's decision to apply Article 126.1(g) (i) of the Implementing Rules was adequately reasoned. The present decision will, therefore, examine whether the explanations given by the Commission in support of its decision were sufficient and coherent. The Ombudsman does not, therefore, ask whether the Commission's decision was "right", nor does he seek to substitute his judgment for that of the Commission.

1.4 The Ombudsman notes that, in the very last observations submitted by the complainant, he raised, for the first time, the argument that, *even if* technical constraints required the Commission to use Documentum for its documents management needs, other firms besides Fujitsu could have supplied the Commission with a licence to use the document management functionality of Documentum.

This new argument was never presented to the Commission by the complainant during the prior administrative approaches. It was also not part of the original complaint presented to the Ombudsman. Further, it was not previously raised during this long inquiry, and was therefore never commented upon by the Commission.

The Ombudsman is of the view that this new argument is therefore inadmissible at this stage of the procedure. It will, therefore, not be dealt with in the present decision

*New allegation regarding lack of reply the complainant's letter of 12 November 2004*

1.5 The Ombudsman notes that, in the complainant's observations, which were forwarded to the Commission for further comments, the complainant made a new allegation against the Commission, concerning its alleged failure to reply to its letter of 12 November 2004. Given that





this allegation was strictly linked to the original complaint, the Ombudsman decides to deal with it in the present decision.

*Request for access to documents/disclosure of information and internal documents*

1.6 In his observations on the opinion of the Commission, the complainant also made a new request to have full access to all the documents in relation to this case. Moreover, in his further observations the complainant made a request that all the relevant internal documents should be made available to the Ombudsman and, through the Ombudsman, to the complainant.

1.7 The Ombudsman, first, underlines that the original complaint did not concern access to documents. Rather, the complainant made, in the context of the on-going inquiry, a request to have access to documents. The Ombudsman informed the complainant, in his letter of 13 December 2005, of the correct procedure to follow as regards access to documents. The Ombudsman, in sum, informed the complainant that if he wished to be granted access to documents held by the Commission, he should address a request for access to documents directly to the Commission, under Regulation (EC) 1049/2001, and follow the procedure established therein (10) .

In its additional comments to the Ombudsman dated 7 February 2006, the Commission informed the Ombudsman that, in relation to the complainant's request for access, the documents in question were covered by the exceptions provided for by Article 4(2) (ii) and Article 4(3) (2) of the Regulation. The Commission informed the Ombudsman, that the complainant had not subsequently submitted a confirmatory application for access in accordance with Regulation (EC) 1049/2001.

In his last observations, the complainant argued that the procedure under Regulation (EC) 1049/2001 does not apply in the present case, as the issue was before the Ombudsman.

1.8 Notwithstanding the fact that the present complaint does not concern access to documents, the Ombudsman, in any case, finds it useful to point out that he does not deal with complaints regarding access to documents until the appeal procedure set out in Regulation (EC) 1049/2001 has been exhausted (that is, until a confirmatory application for access in accordance with Regulation (EC) 1049/2001 has been either rejected or ignored by the institution concerned) . The complainant did not make a confirmatory application for access in accordance with Regulation (EC) 1049/2001.

In light of the above, the Ombudsman decides not to deal with the complainant's request for access to documents in the present decision.

1.9 The Ombudsman carried out an inspection of the file in the present case. It is necessary to underline that the inspection of the file did not concern the complainant's request for access to documents and the Commission's decision to refuse that access on the basis of the exceptions of Regulation (EC) 1049/2001. Rather, the inspection was carried out to allow the Ombudsman sight of information necessary for him to evaluate the complainant's original allegations and claims. In any event, the Ombudsman recalls that, in accordance with Articles 13.3 and 14.2 of his Implementing Provisions, complainants shall not have access to any confidential documents



or confidential information obtained as a result of the Ombudsman's inspections.

## **2 Alleged lack of reply to the complainant's letter of 12 November 2004**

2.1 The complainant alleges that the Commission failed to reply to his letter of 12 November 2004.

In that letter, the complainant questioned the applicability of Article 126.1(g) (i) of the Implementing Rules and the authenticity of the information provided on the pilot projects. The complainant also requested that the Commission's decision concerning the extension of the relevant contract with Fujitsu be cancelled immediately.

2.2 The Ombudsman observes that, in its opinion dated 28 February 2005, the Commission explained that, on 25 November 2004 it sent a formal reply to the complainant explaining that it has "*been informed of [ the ] parallel complaint before the European Ombudsman, and will according to the rules to be applied, communicate [ its ] answer through the Ombudsman.*"

The Commission has indeed, in its opinions and further replies to the Ombudsman, provided further information regarding the substance of the issues raised by the complainant. The complainant acknowledged in his further observations that the Commission had, particularly through its further opinion to the Ombudsman, provided replies as regards the issues raised by the complainant in his letter of 12 November 2004.

The Ombudsman considers, therefore, that the present aspect of the complaint was settled in the course of the inquiry and that no further inquiries are justified into this allegation.

## **3 Alleged breach of the Financial Regulation, of the rules on free competition and alleged unfairness and the related claim**

3.1 In 2002 the European Commission launched an open Call for tenders DI/0115-CWCMS for the provision "web content management" software. The Call was won by Fujitsu, which is a supplier of the software product known as "*Documentum*" (11). In 2003, the Commission subsequently signed Framework Contract DI-04030-00 with Fujitsu.

In 2004, the Commission decided to extend, through the use of a "negotiated procedure", the scope of the Framework Contract to cover "document management". The *Documentum* software, which was used to provide "web content management" functionality, also had "document management" functionality incorporated within it. In this context, extending the scope of the Framework Contract to cover "document management" involved obtaining from Fujitsu a licence to use the "document management" functionality of *Documentum*.

On 2 April 2004, the complainant sent a letter to the Commission contesting the Commission's decision to extend, through the use of a "negotiated procedure", the scope of the Framework Contract. On 17 June 2004, the Commission replied, in summary, that, after the Framework Contract with Fujitsu was signed, the web content management and the document management areas had merged into a single area called "*enterprise content management*" and that, therefore, "*it would be extremely difficult to maintain a clear-cut distinction between the former areas of DM and WCM over the whole lifetime of Framework Contract DI-04030-00 (foreseen end date: September 2008)(...).*"



The complainant was not satisfied with the reply and turned to the Ombudsman.

The complainant alleged that the Commission had breached the Financial Regulation (12) when it extended the scope of the Framework Contract to include also document management.

The complainant also alleged that, by doing so, the Commission infringed rules on free competition and acted unfairly.

The complainant claimed that the Commission should agree to limit the scope of the Framework Contract to the areas of web content management and, in accordance with the provisions of the Financial Regulation, open the market in the area of document management to free competition.

3.2 In its opinion on the complaint, the Commission explained, in summary, that on the basis of Article 126.1 (g)(i) of the Implementing Rules, it was allowed to apply the negotiated procedure instead of launching a new tender for the document management system. This was justified because, if it had used a tender, it would have faced a " *new market situation* ". It would also have faced technical difficulties. It also stressed that the solution it had chosen (that is, the negotiated procedure) involved the lowest cost.

The Commission stressed that the Call for tenders, as well as the negotiated procedure extending the Framework Contract with Fujitsu, were dealt with according to the Financial Regulation and the Implementing Rules, and that they did not infringe the rules of free competition. In sum, the Commission, in its reply of 7 February 2006 to the Ombudsman's request for further information, maintained its position.

After carrying out an inspection of the file on 7 June 2007, the Ombudsman sent the Commission a request for additional information on 4 July 2007. In its reply of 6 November 2007, the Commission provided a detailed assessment of the financial impact of two alternative situations: first, if the document management functionality of *Documentum* were used, or, second, if the document management functionality were to be obtained from another supplier through a call for tender. The Commission took into account licence and maintenance costs, product support and technical training, infrastructure costs and information systems development and support. The Commission stated, in summary, that the cost benefits of using the product already obtained from Fujitsu, for both web content management and document management, could be estimated at EUR 6 221 721 over four years. In addition, the Commission listed factors which could have increased the potential savings of this choice, but which were not taken into account in the calculation.

In his various observations sent to the Ombudsman, the complainant disagreed with the assessment of the Commission and argued that the Commission should not have used the negotiated procedure to extend the scope of the Framework Contract. Rather, it argued, the Commission should have made recourse to a new call for tenders in order to choose the optimum solution for its document management needs (13) .



*Relevant provisions of Community law*

3.4 Article 27 of the Financial Regulation (14) , which enshrines the general principle of the Commission's sound financial management, provides that:

*" 1. Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.*

*2. The principle of economy requires that the resources used by the institution for the pursuit of its activities shall be made available in due time, in appropriate quantity and quality and at the best price.*

*The principle of efficiency is concerned with the best relationship between resources employed and results achieved.*

*The principle of effectiveness is concerned with attaining the specific objectives set and achieving the intended results. (...) "*

3.5 Article 89 of the Financial Regulation prescribes, in summary, that public contracts financed in whole or in part by the Community budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination. It also states that all procurement contracts shall be put out to tender on the broadest possible base, except when use is made of the "negotiated procedure".

3.6 Article 91(2) states that, for contracts where the value exceeds the thresholds provided for in Article 105 or Article 167, use of the negotiated procedure shall be authorised only in the cases provided for in the Implementing Rules (15) .

3.7 Article 126.1(g)(i) of the Implementing Rules (16) provides, that:

*" Contracting authorities may use the negotiated procedure without prior publication of a contract notice (...) for supply contracts (...) in the case of additional deliveries which are intended either as partial replacement of normal supplies or installations or as extension of existing supplies or installations, where a change of supplier would oblige the contracting authority to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts may not exceed three years. "*

*The complainant's allegations*

3.8 The Ombudsman understands that the complainant's allegations are all linked and amount to the view that the contract for the provision of a document management system should have been awarded by means of an open tender. In the complainant's view, by opening a negotiated procedure with Fujitsu for the provision of a document management system, instead of launching a new call for tender, the Commission acted unfairly towards potential suppliers of competing software and infringed the rules on open competition.

3.9 The Ombudsman points out that the Commission recognises that it normally awards the



largest part of its IT contracts through open calls for tender, as required by the Financial Regulation. However, it considers that, in the particular circumstances of the present case, it was exempted from this general rule by virtue of Article 126.1(g)(i) of the Implementing Rules.

3.10 It must first be noted that any derogation from the general public procurement rules intended to ensure the effectiveness of the rights conferred by Community law in relation to public procurement must be interpreted narrowly. In addition, the burden of proving the existence of exceptional circumstances justifying the derogation which they provide lies with the person seeking to rely on those exceptional circumstances (17) .

3.11 According to the Commission, web content management and document management have merged into one single market (enterprise content management) . The Commission also argued that it would be technically difficult and costly for it to use the web content management functionality resulting from the first call for tender and the document management functionality of a product resulting from a (potential) second call for tender.

3.12 The Ombudsman first finds it necessary to point out that he is not convinced of the relevance, in relation to the justification for the application of Article 126.1(g)(i) of the Implementing Rules, of the fact that the "markets" for web content management and document management may or may not have "merged". The Ombudsman understands the reference to "markets" having "merged" as reflecting the fact that buyers of software have come to require an integrated solution to their web content management and document management needs, and that suppliers of software have produced integrated products to meet such needs. *Documentum* appears to be one such integrated product.

The Ombudsman also understands from the Commission that, any software solution capable of satisfying the buyers of web content management and document management must be an "integrated solution". In other words, the web content management and document management functionalities in such a solution must, if they are to meet a buyer's needs, work together seamlessly (18) .

However, it cannot be assumed that such an "integrated solution" can *only* be met by using a single software package incorporating both web content management and document management functionalities (such as *Documentum* ). In order to show that an "integrated solution" can only be met by using a single software package incorporating both web content management and document management functionalities it would, in the Ombudsman's view, be necessary to show that it would be impossible, or at least disproportionately difficult, to integrate into the existing software in use by the Commission (that is, into *Documentum* ), alternative software with document management functionality. In this respect, the Ombudsman draws attention to the fact that Article 126.1(g)(i) of the Implementing Rules provides that the negotiated procedure can only be used where a change of supplier would oblige the contracting authority to acquire equipment which " (...) would result in incompatibility or disproportionate technical difficulties in operation and maintenance (...) " (Ombudsman's emphasis)

3.13 The Ombudsman points out that, in its reply dated 6 November 2007, the Commission



stated that it had considered the possibility of maintaining two software platforms in parallel, but reached the conclusion that this possibility would oblige it " *to acquire equipment having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance* ". The Commission also underlined the " *technical complexity of maintaining two products which cover the entire (enterprise content management) spectrum* ", and, in such a context, the difficulties of " *trying to maintain an artificial distinction between their (web content management functionality) and (document management functionality)* ". The Commission also noted that such a strategy would require the development of interfaces which would not be necessary if the only one *enterprise content management* product were used. The Commission provided an overview of the technical reasons supporting this view. In sum, it noted that a two technology solution was difficult since each product implements its own repository and hence its own means of organising, controlling and delivering the repository content. The development of IT solutions built on two products was thus extremely difficult. Issues related to using two technologies in parallel included:

1. maintaining copies of all documents in both repositories, with the development of interfaces;
2. the different structure of each repository, which, because of the need for constant synchronisations, would lead to inconsistencies;
3. discrepancies in results by internal search engines;
4. duplication in the management of users, groups, permissions ...;
5. duplication of interfaces;
6. risks linked to product evolution - any new version of either product would jeopardise interoperability between the two products and require a significant reworking of the interfaces between the two products.

The Commission also summarised a number of difficulties linked to maintaining two separate hardware platforms. Finally, it summarised the difficulties that would arise linked to the training of its staff, for development and software implementation. It noted that using the same product for both web content management and document management would avoid such difficulties. It underlined, in this context, that the costs of using a different technology would be disproportionate in comparison with the potential benefits.

With specific reference to costs, the Commission provided a detailed assessment of the financial impact of two alternative solutions: the use of the document management functionality of *Documentum* obtained from Fujitsu by means of the negotiated procedure and the use of a document management system offered by another firm by means of the open tender. The Commission took into account licence and maintenance costs, product support and technical training, infrastructure costs and information systems development and support. As a conclusion, the Commission provided a detailed table summarising the total cost of both alternatives during a four year period (which is the normal duration of a Framework Contract



resulting from a new call for tenders).

The Commission stated, in summary, that the benefits of using the product provided by Fujitsu for both web content management and document management could be estimated at EUR 6 221 721 over a period of four years. In addition, the Commission listed factors which could have increased the potential savings of this choice, but which were not taken into account in the calculation. The Commission pointed out that the information set out in its reply to the Ombudsman was supported by information contained in the documents inspected by the Ombudsman's services.

3.14 In the observations submitted in response to the Commission's reply of 7 November 2007, the complainant called into question whether the explanations of the Commission were sufficient and coherent.

The complainant considered, first, that the prices quoted by the Commission for licence fees and maintenance, as well as for product support and training, were arbitrary and unsubstantiated.

#### *Training*

In relation to training, the complainant pointed out that training costs were not dictated by vendors, but by the "organisational arrangements" to be put in place by the Commission.

The Ombudsman notes, in this respect, that complainant has not provided any evidence to call into question the Commission's evaluation of these extra costs. The Ombudsman also points out that internal training costs are precisely the type of additional costs which the Commission is entitled to take into account when seeking to determine if there are " *disproportionate technical difficulties in operation and maintenance.* "

#### *Different hardware*

The complainant disagreed with the argument that it would be necessary to purchase different hardware in order to host the two different systems. It pointed out that the two products could use the same hardware.

The Ombudsman understands, however, that the Commission's argument was that, while the same type of hardware could be used for alternative systems, extra server capacity would be needed to host an additional system.

#### *Interface problems*

The complainant pointed out that vendors of competing software could limit interface problems by constantly developing new interfaces.

The Ombudsman interprets this statement as implying that the complainant agrees that the issue of effective interfaces was a real issue which would have to be resolved if alternative software were used.

#### *Synchronisation*

The complainant also noted that the issue of synchronisation between different systems already existed for the Commission. The various problems that might arise (interfaces, searches ...) could, however, be addressed if " *adequate design architecture* " were in place.





The Ombudsman notes that the complainant appears to agree that it would be necessary to put in place "*adequate design architecture*" in order to deal with the issue of synchronisation between different systems. The Ombudsman understands, therefore, that the complainant appears to agree that synchronisation between different systems is a real technical issue, which would have to be resolved by modifying "*design architecture*".

*The complainant's view about the Commission's "limited choices"*

The complainant took the view that the *Documentum* technology was an "*obsolete technology which limited the Commission's choices dramatically*".

The Ombudsman considers that, if the complainant's view is accurate, it would follow that the Commission was indeed limited as regards which document management software it could use. If this were the case, the argument of the complainant rather militates in favour of the Commission being correct in using the "negotiated procedure".

*Licence fees*

In relation to licence fees, the complainant called into question the amounts referred to by the Commission, and noted that certain open-source software is even offered for free.

The Ombudsman notes that vendors are free, in a competitive market, to set the price of their software. Certain vendors may offer products at very low prices. However, even in the most extreme scenario of an offer being made at zero cost (for example, by an open-source software supplier (19) ), the Commission could still justify its position on the basis of its additional internal costs referred to above (20) .

3.15 As regards the complainant's argument regarding the alleged use of so-called "pilot projects" or "proof-of-concept studies", the Ombudsman is of the view that the Commission is entitled to carry out studies at any time in order to gather information on technical developments and possibilities, such as information on the possibility/concept of integrating web content management and document management. Such "studies" cannot be interpreted as constituting a *de facto* comparative evaluation of the various products on offer in the market.

In the context of the inquiry, the Commission provided, an explanation as regards why it used *Documentum* software for its so-called "proof-of-concept" studies - the studies were carried out using *Documentum* because this software was readily available to its staff ( *Documentum* was already in use within the Commission) and because there was already a considerable degree of technical know how in-house in relation to it. The Ombudsman considers that the Commission's explanation is convincing.

3.16 In light of the arguments and evidence set out in points 3.13 and 3.14 above, the Ombudsman considers that the Commission has provided a sufficient and coherent explanation that it would have encountered "*disproportionate technical difficulties*", namely, as regards training, management, infrastructure and maintenance, in the event it had opted to use a different document management system.

The Ombudsman also notes that the Commission's arguments, as set out in its reply of 7



November 2007, are substantiated by information which the Ombudsman's services had sight of in the context of his inspection of the file (21) .

3.17 The Ombudsman further notes that the Commission argued that, by using the "negotiated procedure", substantial savings were made. In this respect, the Ombudsman recalls that Article 27 of the Financial Regulation enshrines the general principle of sound financial management.

3.18 The Ombudsman finally recalls that one of the main aims of the public procurement rules is to enable the contracting authorities and firms throughout the EU to benefit from the possibilities offered by the European market and that the market can only be tested by means of a call for tender. The Ombudsman also notes and welcomes the Commission's statement that it has made no long-term commitment in relation to the software platforms to be used for Enterprise Content Management services and that, in the future, it will issue calls for tender for procurement of such services.

3.19 In light of the arguments and evidence described above, the Ombudsman does not find an instance of maladministration as regards the complainant's allegations.

*The complainant's claim*

3.20 As regards the complainant's claim, on the basis of the conclusion set out in point 3.16 above, the Ombudsman does not find that the Commission infringed the provisions of the Financial Regulation by extending the scope of the Framework Contract to the area of document management. Therefore, the complainant's claim cannot be sustained.

3.21 The Ombudsman further notes that, according to the Commission, the commitment with Fujitsu in relation to the use of *Documentum* is limited in time (22) . As a result, the Ombudsman understands that the Commission will seek solutions for its enterprise document management needs through a new call for tenders in the future.

The Commission also reaffirmed that it is defining and promoting standards and concepts in all IT fields in order to allow all vendors and IT firms to compete lawfully.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries, there appears to be no maladministration by the Commission regarding the complainant's allegations and claim. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Contract award notice 2004/S 215-184367.



(2) OJ S 161 of 21 August 2002.

(3) The Ombudsman understands that Documentum is a "platform" for "content management". Documentum is made up of various components or "functionalities". The Ombudsman understands that a license to use Documentum can involve a license to use only some of these components or functionalities. It is understood that the Framework Contract DI-04030-00 originally allowed the Commission to use the "web content management" software of the Documentum "platform", but not the "document management" software of the Documentum "platform".

(4) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

(5) See Contract award notice 2004/S 215-184367, Section II.5 " *Short description: Negotiated procedure: enlargement of the scope and ceiling increase* ".

(6) The Ombudsman understands, from this explanation, that Documentum, which originally contained web content management functionality, was regularly upgraded, and that, by 2004, these upgrades had introduced document management functionality into the software.

(7) Article 7 on the processing of initial applications provides that: " 1. *An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.* "

(8) These two Articles provide, respectively, that:

" *The institution shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice* ".

" *Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure* ".

(9) Case T-201/04 *Microsoft v Commission* , Judgment of the Court of First Instance of 17 September 2007 (not yet published), paragraphs 88 and 89 and the case-law cited therein.

(10) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 3.



(11) The Ombudsman understands that Fujitsu is a vendor of software products and a provider of support services. It sells the software products of EMC, a manufacturer of software and systems for information management and storage. EMC produces Documentum, which is software that provides the infrastructure for developing and deploying content applications. The software product Documentum was originally developed by a company known, itself, as Documentum.

(12) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

(13) A detailed description of the arguments put forward by the Commission and the complainant can be found above in the Ombudsman's description of his inquiry.

(14) Reference cited above.

(15) The Ombudsman notes that the applicable threshold was surpassed in the present case.

(16) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation No 1605/2002, OJ (2002) L 357, p. 1.

(17) Cf. e.g. C-84/03 *Commission v. Spain* [2005] I-0139, paragraphs 47-48; C-394/02 *Commission v Greece* [2005] ECR I-4713, paragraph 33 (regarding derogations from the common rules for the award of public procurement contracts).

(18) The complainant has pointed out that suppliers continue to offer modular and independent web content management and document management products. No information provided by the Commission would appear to contest this assertion. If this assertion is indeed true, it can be assumed that there are at least some buyers for modular and independent web content management and document management products. As such, it can be assumed that the purported convergence of the markets is a process which is not yet complete. The Ombudsman notes, however, that even it were true that such convergence was not yet complete in 2004, the Commission was entitled to determine that, for *its* particular needs, an "integrated solution" was required.

(19) The Ombudsman does not make any assumption that it would, in fact, be possible to obtain an effective open-source product, that is, an open-source product which would integrate seamlessly with the Commission's existing software.

(20) In sum, the cost savings would still, on the basis of the Commission's figures, amount to EUR 2 508 146 (that is EUR 6 221 721 less EUR 3 713 575 (EUR 3 713 575 is the cost, estimated by the Commission in its further reply to the Ombudsman, for a licence for another document management product)). It is important to note that, on the basis of these figures, if the Commission had made recourse to a tender process, the vendor of Documentum could have increased its bid beyond its normal price, taking advantage of these extra costs which the



Commission would have to incur if it were to opt for alternative software. This observation is confirmed by a Commission document inspected by the Ombudsman's services: " *Evaluation Report* " of 6 September 2004 (Ref. DIGIT/R2-CTR/PR-FLP) (in particular, page 6 thereof).

(21) The Ombudsman refers to the following Commission document inspected by his services: " *Stratégie ECM considérations sur l'utilisation du contrat DI/04020 Fujitsu/Documentum* " of 14 April 2004 (Ref. DI8(2004) D/10077) (in particular, Sections 9 and 10 thereof).

(22) The Ombudsman notes that the term of the Framework Contract was for a maximum of five years. It will therefore expire in 2008.