

Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/6/2007/MHZ concerning the European Commission

Recommendation

Case OI/6/2007/MHZ - **Opened on** 17/12/2007 - **Recommendation on** 26/06/2009 -
Decision on 19/06/2009

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

THE BACKGROUND TO THE OWN-INITIATIVE INQUIRY

1. Article 195 of the Treaty establishing the European Community empowers the European Ombudsman to conduct inquiries, on his own-initiative, in relation to possible instances of maladministration in the activities of Community institutions and bodies.
2. The present own-initiative inquiry relates to the Ombudsman's joint inquiry on complaints 2075/2005/(ELB)MHZ, 2079/05/MHZ, 2274/05/MHZ, 2275/05/MHZ, 2276/05/MHZ, 2349/2005/(OV)MHZ, 2354/05/MHZ, 2666/2005/(BB)MHZ and 3685/2004/MHZ ('the joint inquiry'). The said complaints were submitted by scientists working as temporary agents in three of the institutes of the Joint Research Centre (JRC), a Directorate-General (DG) of the Commission. They all concerned a procedure leading to the establishment of temporary agents as permanent officials in the JRC institutes. This involved approximately 300 internal competitions, which were launched in the JRC on 19 February 2004.
3. In his decisions closing the joint inquiry, dated 16 December 2006, the Ombudsman concluded that the Commission had not put forward any convincing explanations regarding how the needs of the service justified the way in which the aforementioned competitions were organised. He considered that these competitions demonstrated "*prima facie evidence of maladministration*." In this respect, he referred to the term "*sham competition*", used by the Court of First Instance [2] when referring to a competition in which a successful candidate is designated in advance.
4. When assessing whether the maladministration could have general implications, the Ombudsman took note of the Commission's statement, contained in its opinion on the complaints of the joint inquiry, in which it outlined that there were no plans for such exercises in



the future and that it would review in detail the JRC's past recruitment practices and incorporate any possible lessons learned into future competitions.

5. In light of the above, the Ombudsman considered that no additional inquiries were necessary in the framework of the individual complaints. Given that the complainants had submitted claims asking that they may be allowed to take part in the competitions, and that the Ombudsman found "*prima facie evidence of maladministration*" with respect to such claims, he could not, as a result, reasonably propose a friendly solution or draft recommendation. As a result, he decided to close the joint inquiry.

6. In his decisions closing the joint inquiry on individual complaints, he found it useful, however, to refer to the complainants' situation in the joint inquiry. Accordingly, he emphasised, in his first further remark, that he welcomed the Commission's statement that it may organise, on a case-by-case basis, internal competitions should the interests of the service require it. In this context, the Ombudsman considered that it would be useful if the Commission were to review "*the status of the members of the JRC research staff, who occupy, as temporary agents, permanent posts with contracts of indefinite duration.*" ('the 16 Temporary Agents' [3])

7. In his second further remark, the Ombudsman informed the Commission that he "*will consider whether it could be useful to open an own-initiative inquiry into the management of human resources at the JRC.*"

8. On 27 June 2007, the Commission replied to both of the Ombudsman's further remarks, stating that:

" [it] confirms that improvements in the practices for recruitment in the JRC have been implemented, which resulted in better quality control of vacancy notices and the establishment of clear guidelines on their drafting. The Appointing Authority with respect to officials is now exercised jointly by DG ADMIN and the JRC (for example, for all new recruitment of officials within the JRC.) Relating to a possible own-initiative inquiry into the management of human resources at the JRC, the Commission takes note and remains at the disposal of the European Ombudsman. "

The Commission also stated that it "*could plan the organisation of internal competitions on a case-by-case basis; though such competitions would not be organised at the request of the temporary staff but solely on the basis of the requirements of the service*" and added "*i.e. if the interest of the service requires so.*"

9. Bearing in mind the gravity of the "*prima facie evidence of maladministration*" he identified in his decisions closing the joint inquiry, the Ombudsman concluded that the Commission's above reply was too general. In addition, the said decision did not allow the Ombudsman to understand the scale of the "*introduced improvement*" of the human resources management in the JRC and whether this improvement could be reasonably considered precautionary enough to avoid similar allegations of maladministration in the future.



10. Moreover, in the course of the joint inquiry, the complainants and the Commission referred to (a) the Commission's Communication to the Council and to Parliament entitled "*Research staff policy changes in the context of the reform of the Commission's human resources*" of 2001 [4] , and (b) its internal Memorandum entitled "*Review of Research Staff Policy.*" [5] The Commission openly admitted that it had not respected the proposals contained in the Memorandum [6] , but failed to offer any explanations as to whether, in the meantime, any other guidelines had been made binding upon it. This statement by the Commission raised an additional question about the openness and transparency of the current JRC human resources policies for research staff and about the general organisation and governance of this important sector of the Commission's activities.

11. In light of the findings mentioned in paragraphs 6, 9 and 10 above, the Ombudsman decided to open the present own initiative-inquiry.

THE SUBJECT MATTER OF THE INQUIRY

12. In his letter to the Commission announcing the opening of the present own-initiative inquiry, the Ombudsman asked the Commission to provide him with specific information relating to the two following issues.

13. *First* , the Ombudsman referred to the Commission's general human resources policy in the scientific field and to the entities responsible for it.

He asked the Commission to:

- explain the objectives and principles of its policy concerning the management of human resources and how those objectives and principles are operationalised as regards recruitment, mobility and career development;
- indicate the specific documents on which the management of scientific staff is currently based and whether new policy decisions or guidelines have been adopted in the context of the implementation of the new Staff Regulations;
- develop the statement, made in the Commission's reply to the Ombudsman's further remarks in the decisions closing his joint inquiry, namely, that "*improvements in the practices for recruitment in the JRC have been implemented*";
- explain the division of responsibilities within the Commission and the respective degree of autonomy concerning staff management between the Brussels Headquarters of the JRC, the different research sites and the Commission's DG for Personnel and Administration (DG ADMIN). In this respect, the Ombudsman requested information on whether the JRC had encountered any problems with the system of shared responsibility and whether it considered this system to constitute a long-term solution.

14. *Second* , the Ombudsman referred to the situation of the 16 Temporary Agents, asking the Commission the following questions:

- How are the interests of the service identified in the above system of shared responsibility and how they affect the situation of the complainants in the joint inquiry?



- What are the conclusions and lessons that the Commission drew from the announced review of its past recruitment practice in the JRC, particularly with respect to the numerous competitions of the JRC 2004 establishment procedure, in relation to which the Ombudsman found " *prima facie evidence of maladministration* " in his joint inquiry.
- What is the breakdown of persons carrying out scientific tasks at the JRC, namely, officials, temporary agents (and of which kind), contract agents, researchers, fellows, trainees, seconded national experts?

THE INQUIRY

15. On 18 July 2008, the Commission submitted its opinion on the Ombudsman's inquiry. This happened after the Commission twice requested an extension of the deadline for its reply, which the Ombudsman duly granted.

16. On 30 September 2008, the Ombudsman asked the Commission for further explanations concerning the *second* issue of his inquiry, namely, the situation of the 16 Temporary agents.

17. On 5 December 2008, the Commission provided that explanation.

18. After a thorough consideration and analysis of the Commission's opinion and further reply, the Ombudsman came to the following conclusions.

THE OMBUDSMAN ANALYSIS AND CONCLUSIONS

*Arguments submitted to the Ombudsman by the Commission in its opinion outlining its policy on human resources (HR) management in the scientific field (**first** issue of the inquiry)*

19. The Commission's HR policy in the scientific field must comply with the rules contained in the Commission's general HR policy. It must also ensure that the JRC's specific mission, namely, to provide a high level of impartial scientific expertise is complied with, and that the best and most adequate HR are available to carry out that mission.

20. The recruitment, training, mobility and career development of new employees constitute priorities for the JRC's HR management policy. The procedure applied by the JRC in this respect is based on the Commission's general standards.

21. In the area of recruitment , the JRC aims to ensure that highly competent staff are available when needed. Given the JRC's diverse range of tasks, a combination of different categories of staff is required simultaneously (permanent, temporary, statutory and non-statutory). The Commission provided the relevant statistics in its opinion.

22. Although, in general terms, the training complies with the Commission's policy in this respect, it needs to be specific because the JRC's scientific staff need to constantly keep



up-to-date with the latest innovations in their respective scientific and technical fields. The JRC identifies its own training priorities on an annual basis and staff are encouraged to take part in external training, scientific conferences, boards for peer reviewed publications and short-term stays outside the JRC.

23. Mobility and career development , which are both linked, satisfy the JRC's requirements in terms of performance, efficiency and quality of service, as well as its staff members' individual preferences. In the JRC's view, well managed mobility can be beneficial both to the JRC and to its staff members. The JRC' s Career Guidance service helps individuals plan their career. The HR Unit and Director of Resources are open to individual discussions in this respect. However, mobility within the JRC and between the JRC and other of the Commission's services is not as easy to implement for a specialised service, with specialised personnel. It is therefore important to from the outset identify the posts in relation to which mobility should be applied. A document entitled "*JRC policy concerning sensitive posts* ", available to all staff via the JRC Intranet, shows the posts which have been occupied by the same person for more than 5 years, meaning that that person should be transferred. However if this person is a Head of Unit or a Director, the requirement for his/her transfer may be waived.

24. In accordance with the Commission's general rules, an annual review of each of the permanent and temporary staff members' performance is carried out within the career development review.

25. Following the coming into force of the new Staff Regulations in 2004, the relevant rules on the management of the JRC's staff became formalised in a number of relevant guidelines, handbooks and policy papers, all of which are available via the Intranet. Together with its opinion, the JRC provided copies of many HR documents, such as an information package for potential candidates for JRC posts; ISPRA welcome desk documents; documents on the equal opportunities action plan for women and men; and a staff satisfaction survey.

26. Since the Ombudsman's joint inquiry, the JRC has undertaken "*several actions* " aimed at making its policy for HR management "*even more* " efficient and transparent, whilst ensuring consistency with general principles of good administration and requirements laid down by DG ADMIN.

27. In relation to HR management, the operational division of responsibilities between the JRC and DG ADMIN is clearly defined.

28. Since 2006, the Appointing Authority's power has been jointly exercised by the JRC and DG ADMIN in relation to officials, while temporary staff, contractual staff and new recruitments are dealt with by the JRC.

*Arguments submitted to the Ombudsman by the Commission in its opinion and further reply in relation to the 16 Temporary Agents (**second** issue of the inquiry)*

29. In reply to the Ombudsman's further question concerning how the JRC's specific and



unique mission [7] can be efficiently carried out if the JRC's interests of the service are subordinated to the overall interests of the Commission, whose employees are not scientists by definition and do not carry out scientific research, the Commission admitted that the JRC's mission requires that " *certain elements* " of its HR management have to be specific to the Centre.

30. However, such a specific approach must be in line with the general principles established by DG ADMIN. The JRC therefore needs to find " *an appropriate balance between the principles of continuity and flexibility on one side, and excellence, impartiality and experience on the other side,* " when complying with the general policies rules and standards established by DG ADMIN. Nevertheless, the JRC and the Commission both aim to recruit the best candidates overall.

31. In its opinion, the Commission also stated that it had been agreed " *for the time being* " that internal competitions would not be held for the 16 Temporary Agents. However, a number of " *measures* " have been introduced to ensure that the career development prospects of these staff members are not disadvantaged in comparison to those of the permanent staff members.

32. Since 2008, the career development prospects of the above temporary agents includes the possibility of promotion along the same lines and criteria as permanent staff (the same career development review and the same system of points).

33. Mobility for these members of staff also exists, but only in relation to the posts financed from the research budget (at present managed by five DGs, including the JRC.) Nevertheless, their expertise corresponds to the posts under the research budget. In addition, these staff members may take part in open competitions for officials.

34. In reply to the Ombudsman's specific question, (a) inquiring whether such (substitute and temporary) *measures* would indeed give the 16 Temporary Agents the same scientific career development prospects as if they were permanent members of staff and (b) asking what their views were in this respect, the Commission clarified that these measures contribute to ensuring a " *similar* " career path to that of officials with respect to their advancement in grade and the possibility of being reclassified at a higher grade. As from 2008, the 16 Temporary Agents have been provided, with a " *virtual rucksack* " of points based on an evaluation of their contributions to the JRC, which is carried out in parallel with those done for officials. " *The only difference* " in terms of their career development, when compared to officials, is in fact advantageous because, in accordance with the Conditions of Employment of Other Servants of the EC (CEOS), they do not need to demonstrate their knowledge of a third Community language.

35. Regarding a possible internal competition to fill the permanent posts occupied by temporary agents with indefinite contracts, the Commission stated that it could potentially organise internal competitions on a case-by-case basis " if [these] *were in the interest of the service* " (emphasis added). It also stated that, in accordance with the CEOS, temporary agents with indefinite contracts constitute only one of the categories of staff; the administration launches internal competitions only " *if there is a service need for a competition as such and for an internal competition in particular.* " The Commission emphasised that " *there is currently no service*



need " to organise an internal competition for the 16 Temporary Agents.

36. Furthermore, the temporary agents in question have the highly specialised skills necessary for carrying out specific tasks relating to the JRC's mission. As long as they work for the JRC, they contribute to the realisation of that mission and their presence is in line with the JRC's and the Commission's overall interest. The JRC considers that " [by introducing career prospects for these temporary agents which are similar to those of the officials] *the JRC's needs and its interest of the service are satisfied by this solution.* "

37. Finally, the Commission recalled the relevant case-law concerning the Appointing Authority's wide discretionary powers when deciding to launch the internal competitions [8] .

The Ombudsman's assessment

38. The Ombudsman is pleased that the Commission answered his queries in a detailed manner.

39. He also notes with satisfaction the recent efforts made by the JRC to make the management of its scientific human resources transparent and efficient to the extent that the working conditions and the recruitment, training, mobility and career development of its staff allow the fulfilment of the JRC's specific tasks. A considerable number of guidelines, procedures and rules governing the human resources in the JRC have recently been agreed upon and are now apparently accessible to JRC staff.

40. The Ombudsman notes, in particular, that a significant number of such rules were introduced after he opened his joint inquiry and issued his decision. These include, for instance:

- the general rules on the human resources management policy in the JRC, which were produced on 26 October 2007, that is, one year after the Ombudsman closed his the joint inquiry on individual complaints [9] ;
- the in depth analysis, recruitment flowcharts and detailed breakdown of processes and time analysis [10] ;
- the rules governing the traineeship scheme of the JRC, which were issued on 16 March 2007 [11] ;
- the rules for the recruitment of grantholders in the JRC, which were agreed upon on 18 February 2008 [12] ;
- the Commission's Guidelines for the implementation of flexitime, dated 19 December 2006, which started to be applied to the JRC as from 1 April 2007;
- the JRC's implementing measures for teleworking, which were revised on 28 January 2008;
- the Observatory for the psychological and social support, which was established in JRC's Ispra site on 2 April 2007 [13] ;
- the principles on the mobility of senior management and middle management in the JRC, which were agreed upon on 21 March 2007 [14] ; and
- the special measures on stricter supervision concerning the drafting of vacancy notices, which were introduced on 13 November 2006 [15] .



41. The Ombudsman concludes, therefore, that the project on the modernisation of the research staff management, as announced in the Commission's internal Memorandum and Communication to Parliament and the Council in 2001 (referred to in paragraph 10 above), has received adequate follow up.

42. In addition, the above documents and the Commission's opinion clearly show that, on the one hand the JRC has very specific duties relating to its scientific work, which imply specific HR needs and, on the other hand, it is a DG of the Commission like any other and has to comply with the Commission's general HR management rules.

43. The Commission did not refer, however, to any concrete difficulties which may arise from such a dichotomy. It has only underlined that the particular interests of the JRC should be subordinated to the general interests of the service as established by DG ADMIN, even if "*there is room for some minor derogations and exceptions compared to the policies applied in other of the Commission's services to ensure the JRC's continued success.*" [16]

44. Among such exceptions and "*derogations*", the Ombudsman distinguishes, on the basis of the material collected within his inquiry, the following:

- The tailoring of specialised competitions, organised for permanent officials, to the particular needs of the JRC where staff members are recruited to carry out research projects rather than to manage research policy or programmes. In order to select such staff, "*more freedom should be given to the selection board during the interview phase and more candidates should progress to this phase*".
- In the JRC, the number of temporary agents with permanent posts and other non-permanent staff (contract agents, research fellows with national employment contracts, detached national experts and trainees) is higher than in other DGs. The number of temporary agents on permanent posts in the JRC could be up to 15%, while in the Commission's other services the limit is 3%. In addition, the number of other non-permanent staff may reach 35% of the total number of JRC staff, whether they are employed on a permanent or temporary basis.
- Since 2007, the new scheme permitting (a) unpaid visiting scientists to work in the JRC and (b) JRC staff to benefit from short-term stays in other of the Commission's DGs or in other scientific and research organisations to maintain or update their scientific knowledge has been introduced.

45. The Ombudsman understands that the above list of "*derogations*" is not exhaustive.

46. In addition, in its opinion and further reply, the Commission did not refer to any difficulties which could objectively result from the exercise of the joint Appointing Authority by the JRC and DG ADMIN. The Ombudsman trusts therefore that the mechanism of a joint Appointing Authority contributes to ensuring that "*the derogations*" for the JRC human resources can be swiftly and smoothly decided upon in order to allow the JRC to respond quickly to the promotion of science.

47. It is indisputable that, to be globally competitive in the field of science, the JRC needs not only to undertake research actions covered by Community funding, but also based on external



funding. In order to do this, it needs to attract the best human resources in science and keep those it already has. These goals may only be achieved if its staff are satisfied with their working status. In this respect, 'money', is often not the most important consideration.

48. The JRC appears to be the only Appointing Authority for the temporary agents working at the Centre. For this reason, the Ombudsman does not see why, if the JRC considers that the competences and work performed by the 16 Temporary Agents correspond to its needs, it has to comply with the general interest of the Commission not to organise internal competitions and why a relevant " *derogation* " would not be applicable.

49. Even if, as argued by the Commission, the career development and mobility of the 16 Temporary Agents are now similar to those of the officials, the Ombudsman is not convinced that the *measures* making their situation similar may be entirely satisfactory for them if they carry out the same tasks as officials and have the same (or even higher) competences than the officials working on research projects similar to theirs. Even if, following such *measures* , their professional situation were somehow similar to that of officials, their status , in the full meaning of this term, is still very different.

50. In addition, the said *measures* are not entirely convincing as such. The JRC states that it has a " *realistic and efficient mobility policy* " and appears to argue that the limitation on the mobility of temporary agents to permanent posts covered by the research budget is not 'painful' because, by definition, scientists work under the research budget. However, the Commission did not assure the Ombudsman that the research budget posts, for which the 16 Temporary Agents could apply internally, would not be given to officials to begin with and then, only if none of them were interested, to the temporary agents. On the other hand, the Commission stated that " [it] *recognizes the importance of voluntary mobility of its staff, both in terms of benefit to the institution and to the individual* " and that " *voluntary mobility [occurs] where an individual seeks a change of job in order to enhance his/her competences or change his/her working environment.* " [17]

51. In light of the above, the Ombudsman recalls the recent judgment of the Civil Service Tribunal concerning the institutions' duty to have regard to the welfare of their staff [18] . The Tribunal pointed out that, when the institution takes a position on an official's position, it has to take into consideration not only the interest of the service, but also the interest of the official concerned.

52. It follows that the two interests are not necessarily the same. However, the Commission appears to consider otherwise when stating, in its further reply, that " [by introducing career prospects for these temporary agents which are similar to those of the officials] *the JRC's needs and its interest of the service are satisfied by this solution.* "

53. The Ombudsman regrets that, in its further reply, the Commission did not refer to the complainants' views in the joint inquiry on their present professional situation and status, despite the Ombudsman's clear request for the Commission to do so (paragraph 34 above, underlined).



54. Nevertheless, in light of the above case-law and his above findings, the Ombudsman takes the view that, by deciding not to organise the internal competitions for the permanent posts occupied by the 16 Temporary Agents, the Commission failed to take their interests into consideration because it deprived them of an opportunity to apply for the status to which they aspire. The Commission failed to explain openly why, considering its indisputable discretionary powers in this respect, it does not find it useful to organise such internal competitions. This is an instance of maladministration and the Ombudsman will make a draft recommendation below.

55. Finally, the Ombudsman regrets that, in spite of having already presented its position on the results of his joint inquiry (the Commission's reply to the Ombudsman's further remarks is referred to in paragraph 8 above), the Commission, in its opinion on the present own-initiative inquiry, stated that it did not agree with the Ombudsman's finding in his decision on the joint inquiry that the internal competitions of the 2004 establishment procedure demonstrated "*prima facie evidence of maladministration*." On the contrary, the Commission now finds that the above establishment procedure complied with the HR procedures at that time and states that they were followed by all of the Commission's research DGs, including the JRC.

56. The Ombudsman recalls that he based his finding of "*prima facie evidence of maladministration*" on the following deficiencies he detected in the 2004 establishment procedure in question: (a) the launching of approximately 300 competitions at the same time; (b) the widely varying requirements as regards conditions of seniority within the Communities; and (c) the existence of other requirements, stipulated in the notices of competitions concerning, for example, professional experience, education and knowledge of languages, which could give the impression that they were based on the profiles of the persons then occupying the relevant posts. The Ombudsman does not see any useful outcome which further discussion with the Commission would bring in this respect. He wishes, however, to point to the Commission's earlier assurances that the 2004 establishment procedure was a "*one-off-exercise*".

THE DRAFT RECOMMENDATION

On the basis of his present own-initiative inquiry, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should organise internal competitions to fill the permanent posts currently occupied by the 16 Temporary Agents or, alternatively, explain in a clear and open manner why it cannot do so.

The Commission and the complainants in the joint inquiry will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 May 2009. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.



P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 10 February 2009

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

[2] Joined Cases T-66/96 and T-221/97 *Mellet v Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraph 115.

[3] Nine of them were complainants in the joint inquiry.

[4] COM(2001)792 final.

[5] SEC (2001)1869.

[6] The Commission stated that " [the establishment procedure to which the joint inquiry referred] took place contrary to a specific policy (SEC(2001)1869) ". (emphasis added)

[7] According to the Commission, the full mission statement of the JRC " *is to provide customer driven scientific and technical support for the conception, development, implementation and monitoring of European Union policies. As a service of the European Commission, the JRC functions as a reference centre of science and technology for the Union. Close to the policy-making process, it serves the common interest of the Member States, while being independent of special interests, whether private or national.* "

[8] Case C-16/07C-409/02 *Pflugradt v ECB* [2005] ECR I-9873, paragraph 42.

[9] Document CA(07)37 " *Note for the attention of the Members and participants of the JRC Board of Governors: Human Resources policy and management in the JRC* ", drafted on 26 October 2007, attached to the opinion.

[10] This document, attached to the opinion, does not include a date or reference.

[11] This document, attached to the opinion, does not include a reference.

[12] Note of the Director-General of the JRC, dated 21 February 2008 (JRC-B00-RM-B01-DWA/gaD(08)No.03372 and its annexes: 2008-03372 " *Administrative rules applicable to the recruitment of grantholders under national law contracts within the framework of the research programmes managed by the Joint Research Centre* " and " *Vademecum for grantholders for ISPRA site grantholders* " (Annex D (2008) No 03372, dated 18 February 2008 and attached to the opinion.



[13] Note of the Director of the JRC's Ispra site, dated 2 April 2007, C00-ISD/DR W/D(2007)8147/mg/56 and attached to the opinion.

[14] Note of the Director-General of the JRC, dated 21 March 2007 (JRC/b00-PRM/MR/mvh/D(07)6353) and its annexes, attached to the opinion.

[15] Document JRC/B00-PRM/MR/mvh/D(06)/27735, dated 13 November 2006 and issued by the Director of Programme and Resource Management of the JRC, entitled " *Note for the attention of JRC directors - JRC recruitment policy-vacancy notices* " and its annexes, attached to the opinion.

[16] Quotation from the document referred to in footnote 6.

[17] Document referred in footnote 6, page 6.

[18] See Case F-135/07, *Smadja v Commission* , judgment of 11 September 2008, paragraph 37, not yet published in the ECR, and the case-law cited therein.