Draft recommendation of the European Ombudsman in his inquiry into complaint 2904/2005/TN against the European Commission

Recommendation
Case 2904/2005/(TN)(FOR)(TN)FOR - Opened on 05/10/2005 - Recommendation on 26/02/2009 - Decision on 05/08/2010

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

THE BACKGROUND TO THE COMPLAINT

Complaint 687/98/BB

1. The complainant made his first complaint to the European Ombudsman in June 1998, complaining that he had failed the oral exam of an internal competition (COM/T/A/98) organised by the European Commission because he was under the influence of medication capable of causing fatigue and reducing his ability to concentrate. He had been prescribed this treatment following an accident which occurred some weeks prior to the oral exam. In his decision of 21 October 1999, the Ombudsman concluded that there was no maladministration by the Commission when it refused to allow the complainant to retake the oral exam. The Ombudsman, however, made a critical remark stating that the Commission should include a clause in the invitations to oral exams informing candidates that the Commission is prepared to take all possible measures to ensure that oral exams are properly carried out, especially in the event exceptional circumstances were to prevent a candidate from attending on the day indicated in the invitation [2].

Court cases

2. The complainant lodged an action against the Ombudsman and the European Parliament before the Court of First Instance on 9 August 2000 (Case T-209/00 Lamberts v Ombudsman [3]), claiming compensation for material and non-material damage allegedly suffered as a result of the manner in which the Ombudsman dealt with complaint 687/98/BB. The Court of First Instance dismissed the action as unfounded since the complainant did not demonstrate that the Ombudsman committed any breach of his administrative duties in dealing with complaint 687/98/BB.

3. The Ombudsman lodged an appeal with the Court of Justice on 24 June 2002 (Case
C-234/02 P Ombudsman v Lamberts [4] regarding the fact that the Court of First Instance had declared the complainant's action for damages admissible. The complainant made a cross-appeal asking the Court to order the Ombudsman to pay him damages. The Court of Justice delivered its judgment on 23 March 2004, dismissing both the appeal and the cross-appeal.

Complaint 2331/2004/MA

4. By letter of 13 July 2004, the complainant submitted a new complaint to the Ombudsman, asking for help in obtaining compensation from the Commission. The complainant referred, in particular, to a letter sent by the Ombudsman to the Commission on 16 October 2002, concerning the need for compensation to victims of maladministration in cases where it is not possible to undo the damage they have suffered. The complainant also referred to the Commission's reply which stated that, in certain instances, financial compensation could be envisaged.

5. The complaint was closed as inadmissible since the complainant had not, as required by Article 2(4) of the Ombudsman's Statute, made prior administrative approaches to the Commission concerning the subject-matter of his complaint [5]. More specifically, the complainant had not turned directly to the Commission with his claim for compensation [6]. The complainant was advised to turn to the Commission with his complaint.

Complaint 842/2005/TN

6. Having, on 26 November 2004, written to the Commission regarding the matter, the complainant again complained to the Ombudsman in March 2005, alleging that the Commission failed to reply to his letter.

7. Following the Ombudsman's intervention, the Commission replied to the complainant by letter of 18 March 2005 and asked him for clarification regarding his claim for compensation. Since the Commission had, through its letter of 18 March 2005, provided a reply to the letter of 26 November 2004, the Ombudsman closed the case.

The present complaint

8. On 29 April 2005, the complainant wrote again to the Commission regarding the claim for compensation. The Commission did not reply to his letter. The complainant submitted a new complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

9. In the present complaint, the complainant alleged, in substance, that the Commission failed to handle properly his request for compensation, as detailed in his letters of 26 November 2004 and 29 April 2005.
10. The complainant also stated in his complaint that he considered that a satisfactory solution to his case could only be achieved through "active mediation" by the Ombudsman.

11. In this regard, in order to avoid any misunderstanding as regards the role and powers of the Ombudsman, the Ombudsman clarified to the complainant that his inquiry into a complaint follows certain procedures laid down by Article 195 of the EC Treaty, the Ombudsman's Statute and the implementing regulations adopted by the Ombudsman. The Ombudsman therefore examines complaints submitted to him by way of an inquiry, in the course of which he asks the institution concerned for an opinion and then gives the complainant the opportunity to make observations on this opinion. Where it proves to be necessary, the Ombudsman conducts further inquiries in order to obtain all the information he needs to assess the case. If the Ombudsman arrives at the conclusion that there is maladministration, he endeavours, where this is still possible, to eliminate the instance of maladministration. In order to do so, the Ombudsman can make a proposal for a friendly solution or address a draft recommendation to the institution involved.

THE INQUIRY

12. The complaint was forwarded to the Commission for an opinion. The Commission's opinion was sent to the complainant with an invitation to make observations, if he so wished. No observations were received from the complainant.

13. The Ombudsman asked the Commission for further information in relation to the complaint. The Commission's reply was forwarded to the complainant, who sent the Ombudsman his observations.

14. The Ombudsman concluded that one particular aspect of the case remained to be explored. He therefore wrote to the Commission again, asking it for further information. Specifically, the Ombudsman asked the Commission to consider whether it considered that the recent case-law of the Community Courts concerning "loss of an opportunity" applied to the complainant's case.

15. The Commission sent its reply, which was forwarded to the complainant with an invitation to make observations, if he so wished. No observations were received from the complainant.

16. After careful consideration of the information provided by the parties, the Ombudsman was not satisfied that the Commission had responded adequately to the substantive aspect of the complainant's request for compensation. He therefore made a proposal for a friendly solution to the Commission. The Commission's reply was forwarded to the complainant, who submitted observations.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS
A. The alleged failure to handle the request for compensation properly

Arguments presented to the Ombudsman

17. The complainant argued that his letter of 29 April 2005 provided the Commission with the information and clarifications it had requested, thereby enabling it to assess his claim for compensation. In his letter, the complainant argued that, if the letter inviting him to the oral examination in Internal Competition COM/T/A/98 had not unequivocally excluded the possibility of changing the date of the exam, he would have requested a delay, thereby affording himself an adequate period to recover from the accident.

18. It is fair, he argued, to assume that if he had been able to somewhat delay the date of the oral exam, he would easily have reached the required number of points necessary to have been placed on the reserve list of successful candidates. Although placement on such a list is not in itself a guarantee that a candidate will be recruited as an official, the complainant stated that he was sure that, in his case, he would have received at least one employment offer. He was thus the victim of the maladministration brought about by the Commission's letter inviting him to the oral exam in Internal Competition COM/T/A/98, which unequivocally excluded a change of date for the said exam.

19. Furthermore, the Commission continued to fail to take his case seriously. The Commission failed to make an analysis addressing his case in the context of the correspondence between the Commission and the Ombudsman concerning cases of maladministration in which the Commission cannot take corrective action to undo the damage caused. According to the complainant, the Commission undertook, in its correspondence with the Ombudsman, to consider awarding financial compensation for damage caused by instances of maladministration.

20. In his view, the complainant suffered enormous material damage as a result of having failed the exam. Apart from the direct loss of income, feelings of injustice and frustration had significant negative effects on him and on his wife. The fact that the Commission, in response to the Ombudsman's critical remark in case 687/98/BB, undertook, for future competitions, to change the letters of invitation to oral exams, in no way undid or alleviated the damage and mental anguish he had suffered as a result of the Commission's maladministration in the letter of invitation.

21. The complainant stated that he received no reply from the Commission to his letter of 29 April 2005.

22. The Commission argued that the Ombudsman's decision in complaint 687/98/BB did not find maladministration on the part of the Commission as regards to the refusal of the Selection Board to allow the complainant to re-sit the oral exam. This was subsequently confirmed by the Court of First Instance.
23. The Commission further recalled that the complainant based his request for compensation on the fact that his failure in the exam marked the end of his career because of his age and his specialisation in the area of environment. In relation to this point, the Commission recalled that all recruitment as a permanent official is subject to passing a competitive exam. Engagement as a temporary agent, even if it gives access to certain internal competitions, does not open any right to permanent employment if the individual fails the exam.

24. In addition, although the complainant failed Internal Competition COM/T/A/98, he would have been able to sit numerous other later competitions, including one in the field of environment, his area of specialisation. The complainant's age was not an obstacle for participating in competitions. The complainant therefore had every opportunity, on an equal footing with all other European Union citizens, to pass a competition and be employed on a permanent basis by the institutions.

25. The Commission acknowledged, however, that it had been lax in not replying to the complainant's letter of 29 April 2005. It apologised for its administrative oversight.

26. As regards the Ombudsman's question related to the recent case law concerning "loss of an opportunity" [7], the Commission first pointed out that it is settled case-law, in proceedings for compensation, that in order for the Community to incur liability, a set of conditions must be fulfilled regarding the unlawfulness of the institution's conduct, the existence of the alleged damage as well as of a causal link between the conduct and the damage.

27. It went on to note that in the three cases concerning "loss of an opportunity" referred to by the Ombudsman (cases T-402/03, T-430/03 and T-166/04), the starting point for the Court's analysis was that the disputed act was illegal. However, according to the Commission, unlike in the three Court cases, no such illegality was found in the complainant's case. The fact that the Commission had not informed the complainant of the possibility of changing the date of the oral exam was by no means "illegal".

28. Moreover, according to the Commission, the complainant has provided no evidence to prove that the damage for which compensation is sought is actual and certain. The complainant's argument that if the Commission had informed him of the possibility of changing the date of his oral exam, he would have been appointed an official of the Commission, is based on three assumptions, namely: (i) that he would have passed the rescheduled test; (ii) that he would then have been put on the reserve list; and (iii) that he would then have been offered employment. The complainant's argument is thus purely speculative.

29. Furthermore, in contrast to the applicant in case T-166/04, for whom, according to the Court, the loss of an opportunity was final, the internal competition in which the complainant participated was not the only opportunity for him to become an official. Since the "loss of an opportunity" was neither final nor certain, the conclusions of the Court in the cases referred to by the Ombudsman are not applicable to the present case.
The Ombudsman’s preliminary assessment leading to a friendly solution proposal

30. The Ombudsman found the complainant's allegation concerning the Commission's handling of his request for compensation to comprise two aspects, one procedural and the other substantive.

31. The procedural aspect pertained to the complainant's argument that the Commission never replied to one of his letters. In its opinion, the Commission acknowledged not having replied to the complainant's letter of 29 April 2005. The Ombudsman recalled that a failure by the Community institutions and bodies to reply to letters within a reasonable time-limit constitutes maladministration [8]. However, in the present case the Commission apologised for its failure in this regard and provided a response in its opinion. The Ombudsman therefore found no grounds to pursue further this aspect of the complainant's allegation.

32. The substantive aspect of the complainant's allegation concerning the Commission's handling of his request for compensation pertained to the content of the Commission's reply to the request, provided through its opinion on the present complaint as well as its replies to the Ombudsman's further inquiries. The Ombudsman took the view that the Commission's replies, concluding in a refusal to provide compensation, had to be examined in the light of, first, the general rules and principles governing the Community's non-contractual liability for damage, including the recent case law concerning "loss of an opportunity" and, second - since used by the complainant as a basis for his request for compensation - the Commission's commitment to eliminate instances of maladministration by way of compensation.

Non-contractual liability

33. The Ombudsman recalled that, according to the Court of Justice, it is settled case-law that in order for the Community to incur non-contractual liability for unlawful conduct of its institutions, a number of conditions must be satisfied, namely: (i) actual damage must have been suffered and (ii) there must be a causal link between the institution's conduct and the damage pleaded and (iii) the institution's conduct must be unlawful [9].

(i) The existence of damage

34. The Ombudsman noted that the alleged damage appeared to consist of (a) material damage allegedly resulting from the complainant’s not having successfully passed internal competition COM/T/A/98 and, thereby, not having been appointed as an official (in his letter of 29 April 2005 to the Commission, the complainant refers to "direct loss (...) of work and income") and (b) non-material damage (in his letter of 29 April 2005, the complainant refers to "feelings of injustice and frustration").

(a) Material damage

35. The Ombudsman noted that the alleged material damage, that is, the "direct loss (...) of
work and income ", was consistent with the damage for which compensation was claimed in *Lamberts v Ombudsman*, that is, damage corresponding to the pay he would have received as an official in (then) Grade A 4 up until pensionable age, together with the social advantages accorded under the Staff Regulations [10].

(b) Non-material damage - "moral damages for loss of an opportunity"

36. The Ombudsman noted that in order for the alleged "*feelings of injustice and frustration*" to give rise to liability for "moral damages for loss of an opportunity", the Court of First Instance has held that the moral damage suffered has to be "real and certain". In the present case, it thus had to be shown that a real and certain "opportunity" to go for a post as an official, in other words, a "serious chance" to obtain a post, was definitively lost to the complainant due to the maladministration found in case 687/98/BB [11].

37. The question as regards whether the complainant actually had a "serious chance" in the internal competition in question could be restated as meaning that it must be shown that the candidature of the complainant was, at least, a serious candidature. The evaluation of whether the candidature of the complainant was, at least, a serious candidature would depend on a multitude of factors. However, since the complainant had put forward a number of arguments in relation to his qualifications and experience, which had not been challenged by the Commission, the Ombudsman considered it reasonable to presume that the complainant's candidature was serious.

38. The Court of First Instance has also established that the loss of an opportunity has to be final [12]. The Ombudsman noted that, at the time he sat the internal competition in question, the complainant was a temporary agent at the Commission. Soon after that internal competition, his contract with the Commission expired. He was thus required to leave the services of the Commission. He could thus, no longer sit internal competitions. While it is true that he may have had the option of sitting external competitions for posts in the Commission subsequent to having left the Commission, such external competitions, which are open to the general public, cannot be considered to be equivalent, to sitting an internal competition. As such, it was reasonable to consider that his loss of opportunity was final.

(ii) The existence of a causal link

39. It was also necessary to show that there existed a causal link between the error of the Commission and the damage. The Ombudsman recalled that a causal link exists where the incident in question is a necessary prerequisite for the damage to occur.

40. In light of this rule, and in order for a causal link to exist in relation to the material damage alleged in the present case, it had to be established that the complainant would necessarily have obtained a post as an official but for the fact that the Commission failed to inform candidates in internal competition COM/T/A/98 that the date indicated for the oral examination could, in exceptional circumstances, be changed.
41. The Ombudsman noted in this regard the complainant's argument that if the letter inviting him to the oral examination had not unequivocally excluded the possibility of changing the date of the exam [13], he would have requested a delay, thereby affording himself an adequate period to recover from the accident he had had. The complainant considered it "fair to assume" that if he had been able to delay the date of the oral exam, he would "easily" have obtained the required number of points necessary to place him on the reserve list of successful candidates.

42. In the Ombudsman's view, it appeared reasonable to assume, given the undisputed fact that the complainant had suffered an accident and that he had been unable to work up until the day of the oral test, that, if the invitation to the oral exam had contained a notice saying that the date indicated could be changed in exceptional circumstances, the complainant would have made a request in this regard and would have been allowed to take the oral exam at a later date.

43. However, the Ombudsman considered that no convincing evidence had been put forward to show that the complainant would necessarily have passed the oral examination, and thus have been placed on the reserve list, if the date of the oral examination had been postponed.

44. Furthermore, the Ombudsman recalled that the inclusion of a candidate on a reserve list does not constitute a guarantee that the candidate will be recruited as an official. While the complainant argued that he would have received at least one employment offer if he had been placed on the reserve list, the Ombudsman noted that the complainant had provided no convincing evidence to support this argument.

45. It had not, therefore, been demonstrated that a causal link existed between the failure of the Commission to inform candidates of the possibility to request the postponement of the exam (that is, the instance of maladministration found by the Ombudsman in case 687/98/BB) and the alleged material damage.

46. As regards the existence of a causal link in relation to the non-material damage, the Ombudsman noted that the Court of First Instance has established very strict rules concerning the standard of proof required as regards the existence of a direct causal link between the error and the non-material damage [14]. This implies that, in the present case, it would be necessary to provide a convincing argument that the "feelings of injustice and frustration" of the complainant would not have existed but for the fact that the complainant was not informed that, because of his state of health at the relevant time, he could have sat the oral exam at a later date.

47. Keeping in mind the position taken by the Court of First Instance, the Ombudsman did not underestimate the difficulties the complainant might encounter when seeking to provide such definitive proof. However, in light of the findings below, as regards the question whether the maladministration identified in case 687/98/BB was "sufficiently serious" so as to incur non-contractual liability, the Ombudsman did not consider it necessary to further analyse the possible existence of a causal link between the maladministration and the
alleged moral damage (see point 61 below).

(iii) Unlawful conduct

48. As regards a finding that certain conduct was unlawful within the meaning of the applicable case-law concerning non-contractual liability, the Court of Justice has maintained that (a) the rule of law infringed must be intended to confer rights on individuals; and (b) the breach must be sufficiently serious [15].

(i) The rule of law infringed must be intended to confer rights on individuals

49. The Ombudsman recalled the finding of the Court of First Instance that the principle of good administration will only confer rights upon individuals where it constitutes the "expression of specific rights" [16]. In that regard, the Court of First Instance ruled that, the principle of sound administration does not, in itself, confer rights upon individuals [17], except where it constitutes the expression of specific rights (such as the right to have affairs handled impartially, fairly and within a reasonable time; the right to be heard; the right to have access to files; or the obligation to give reasons for decisions).

50. In this regard, the Ombudsman recalled that in case 687/98/BB, it was established that the Commission did not, in the invitation to the oral exam, respect the right of candidates to be correctly informed that the date indicated could be changed in exceptional circumstances. Since this constitutes a "specific right", the Ombudsman considered that, in the present case, this condition had been met.

51. The Commission argued that the fact that it had not informed the complainant of the possibility of changing the date of the oral exam was not "illegal". The Ombudsman would like to recall, in this regard, that the fact that the complainant had not been informed of this possibility did constitute an instance of maladministration. It is true that while "illegality" implies maladministration, a finding of maladministration does not automatically mean that there was also "illegality" [18]. Thus, the Ombudsman noted, his finding of maladministration in case 687/98/BB was not dependent on, but nor did it exclude, the existence of illegality.

52. The Ombudsman thus considered that the case law of the Community Courts concerning the conditions for non-contractual liability did not exclude the possibility of the Community institutions agreeing, in the context of an inquiry by the Ombudsman, to make a payment to compensate for loss suffered by a complainant without the need of an Ombudsman's finding of "illegality" (which, by definition, could only be made by a court). An institution making a payment in such circumstances could consider the payment to resolve potential (though not definite) issues of legal liability. Such a payment could be made on an ex gratia basis, without an admission of liability.

(iii) Sufficiently serious breach

53. The Ombudsman recalled that, in accordance with the Court's case law the breach of the
rule of law concerned - or, as alluded to in point 51 above, the breach of a principle of good administration - must be sufficiently serious.

54. The Court of First Instance has found that the designation of an act as an "act of maladministration" does not mean, in itself, that such an act constitutes a "sufficiently serious breach of a rule of law" within the meaning of the case-law. In sum, while an act of maladministration does not necessarily give rise to a "sufficiently serious breach of a rule of law", within the meaning of the case-law, it may, in certain circumstances, do so [19].

55. The Court of Justice has also concluded that in order for the condition as regards a "sufficiently serious breach of a rule of law" to be fulfilled, account must be taken of all the factors which characterise the situation in question [20]. The decisive test for finding that a breach is "sufficiently serious" is whether the Community institution concerned manifestly and gravely disregarded the limits of its discretion. Other factors that may be taken into consideration include: the clarity and precision of the rule breached; the extent of the discretion left by that rule to the Community authorities; whether the infringement and the damage caused was intentional or involuntary; and whether the error was excusable or inexcusable [21].

56. In case 687/98/BB, the Ombudsman found that the Commission had breached the general principle of good administration [22].

57. The general principle of good administration do cover precisely defined "core principles", such as the principle of lawfulness, absence of discrimination and proportionality [23]. However, the finding of maladministration in case 687/98/BB was not made on the basis of such a "core principle" [24]. The maladministration in question consisted in the provision of wrong information as regards the possibility to seek an alternative date for an oral exam when exceptional circumstances may justify such an extension.

58. In relation to the question of whether the obligation on the Commission, to provide sufficient and accurate information to candidates, was a clear and precise obligation, the Ombudsman noted, that the Commission had not been previously made aware of the potential for misunderstandings which might result from the wording of letters calling candidates to an oral exam [25].

59. The Ombudsman also took into account the fact the Commission, in case 687/98/BB, pointed out that if a request for an extension had actually been made, it would have been granted [26].

60. Furthermore, the Ombudsman found no evidence to suggest that the lack of information was intentional.

61. In view of the above, the Ombudsman did not consider that the complainant had succeeded, in this case, in demonstrating that there was a sufficiently serious breach so as to ground a finding of non-contractual liability in relation to the maladministration found in case 687/98/BB. Given this conclusion, it was not, as already mentioned in point 27 above,
necessary to make a definitive finding as to the possible existence of a causal link between the maladministration and the alleged moral damage. Nor was it necessary to determine whether the maladministration should have led the Commission to consider whether there was also illegality (see point 51 above).

62. However, the possibility of an *ex gratia* payment without a definite finding of illegality remained to be explored.

*Ex gratia payment*

63. The complainant had, as a matter separate from the issue of non-contractual liability, formulated a specific argument that the Commission should compensate him specifically on the basis of its commitment to eliminate instances of maladministration by way of financial compensation. The Ombudsman understood this to be a request to be offered an *ex gratia* payment.

64. The Ombudsman considered that there exists a possibility that an instance of maladministration, which does not meet all the criteria for non-contractual liability, can nonetheless merit the award of an *ex gratia* payment. The Ombudsman considered the *ex gratia* compensation to serve an important purpose of recognising that the institution has indeed committed an error. The payment of compensation *ex gratia* shows, without establishing any precedent, that the institution cares for the complainant and, at the same time, provides a positive response to a specific complaint. This is beneficial, not only to the individual, but also to the institution, insofar as it improves the latter's relations with citizens.

65. As regards the present case, the Ombudsman also considered that, even if the maladministration found in case 687/98/BB did not fulfil all the criteria for incurring non-contractual liability, it did, given the circumstances, give rise to a certain moral damage.

66. In light of the above, the Ombudsman therefore arrived at the provisional conclusion that, by not considering the option of making an *ex gratia* payment to the complainant based on its commitment to eliminate instances of maladministration by way of financial compensation, the Commission handled the substantive aspect of the complainant's request for compensation in a manner which could constitute an instance of maladministration.

67. The Ombudsman therefore made a proposal for a friendly solution to the Commission whereby he recommended that the Commission could offer the complainant an *ex gratia* payment of EUR 5 000.

*The arguments presented to the Ombudsman after his friendly solution proposal*

68. In its reply to the Ombudsman's proposal, the Commission underlined that it did not commit an instance of maladministration when refusing to allow the complainant to retake the oral exam in internal competition COM/T/A/98. The Commission also pointed out that it, and subsequently EPSO, had implemented the Ombudsman's suggestion in case 687/98/BB by incorporating a clause in the invitation letters to the oral exams informing the candidates
that it is prepared to take all possible measures for the correct execution of the oral exams, if exceptional circumstances were to prevent a candidate from attending the exam on the day indicated in the invitation. Pursuant to the Ombudsman's proposal, the Commission had thoroughly explored the possibility of providing the complainant an *ex gratia* compensation. It noted that an *ex gratia* payment is recommended only when there is a conflict between a moral obligation and a legal impossibility. However, the Commission did not consider that it had committed an error in the case at hand. In its view it had not, therefore, incurred any moral obligation towards the complainant.

69. The complainant stated that the Commission's response to the proposal for a friendly solution only serves to heighten his feelings of alienation from the Commission, an institution for which he worked with great dedication and full loyalty for many years. In his view, the Commission's attitude towards him stands in stark contrast to the high level of appreciation and respect that he experienced from those with whom he came into contact through his work, that is, his superiors and others within his own service and from other services within the Commission. His feelings, in light of the latest response from the Commission, are not only of heightened disappointment and dismay. In addition, he now feels an even deeper sense of injustice. The Ombudsman's proposal provided the Commission with an opportunity, by means of a very small *ex gratia* payment - and without establishing any precedent - to display some degree of caring for the maladministration that did, indeed, occur. The change that the Commission implemented in its invitation letters to oral exams in no way served, or serves, to alleviate the harm suffered by the complainant. He hopes, however, that the position of the Commission is due to a misunderstanding on its part and that the Ombudsman perhaps could clarify the matter, thereby enabling a resolution within the context of his complaint.

*The Ombudsman's assessment after his friendly solution proposal*

70. The Commission's response to the Ombudsman's proposal for a friendly solution in the present case appears to be based on the view that it did not commit any error in relation to the matter investigated in case 687/98/BB. The Ombudsman notes, however, that maladministration was found in case 687/98/BB and that the Commission did indeed commit an error in how it dealt with the complainant. Indeed, the existence of the maladministration in case 687/98/BB was the basis for the Ombudsman's analysis leading to the proposal for a friendly solution in the present case.

71. The Ombudsman also agrees with the complainant that the attitude of the Commission only serves to heighten the complainant's feelings of injustice and alienation. The Ombudsman is thus reinforced in his view that it would be appropriate for the Commission to take this opportunity to make an *ex gratia* payment to the complainant in recognition of the maladministration that occurred. Such an *ex gratia* payment would not establish any precedent.

72. The Ombudsman finds that, by taking the view that it did not commit an error in relation to the matter investigated in case 687/98/BB, the Commission excluded even the possibility of making an *ex gratia* payment to the complainant. In light of the above, the Commission
has failed to handle properly the complainant's request for compensation. This is an instance of maladministration. The Ombudsman therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should reconsider the possibility of offering the complainant an ex gratia payment of EUR 5 000.

The Institution and the complainant will be informed of my draft recommendation. In accordance with Article 3(6) of my Statute, the Institution shall send a detailed opinion by 31 May 2009. The detailed opinion could consist of the acceptance of my draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 26 February 2009


[2] Following his decision in case 687/98/BB, the Commission, and subsequently the European Personnel Selection Office, implemented the Ombudsman's suggestion by incorporating such a clause into invitation letters.


[5] Article 2(4) of the Ombudsman's Statute states that "[a] complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned."

[6] As stated above, the claim for damages brought during the court proceedings was directed against the Ombudsman and Parliament, not against the Commission.

[7] Asked by way of further inquiries, see point 8, third paragraph, above.


Case T-166/04 C v Commission, cited above, paragraph 71.

See case T-166/04 C v Commission, judgment of 31 January 2007, not yet reported.

The letter of invitation stated the following: "Je précise par ailleurs que l'organisation des épreuves ne permet pas de changer l'horaire qui vous a été indiqué."

See, for example, case T-48/05 Franchet and Byk v Commission, judgment of 8 July 2008, not yet reported.

These conditions were referred to in the judgment by the Court of Justice on the Ombudsman's appeal in the case brought before it by the complainant; Case C-234/02 P Ombudsman v Lamberts [2004] ECR I-2803, paragraph 49. See also Case T-193/04 Tillack v Commission [2006] ECR II-3995, paragraph 117.


The Ombudsman's definition of maladministration in his 1997 Annual Report is that "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it."

[24] The Ombudsman further notes that when taking his decision in case 687/98/BB in October 1999, his own-initiative inquiry into the existence of a Code of Good Administrative Behaviour in the different Community institutions and bodies (OI/1/98/OV), which eventually led to the adoption of the European Code of Good Administrative Behaviour by Parliament, was still ongoing.

[25] It is true that, if the Commission were to ignore this obligation subsequent to the decision in case 687/98/BB, it might then be responsible for ignoring a rule which had become clear and precise.

[26] In practice, the Commission was prepared to take all possible measures to ensure that oral exams are properly carried out, especially if exceptional circumstances prevented a candidate from attending on the day indicated in the invitation.