

## Draft recommendation to the European Commission in complaint 2437/2004/GG

Recommendation

**Case 2437/2004/GG - Opened on 02/09/2004 - Recommendation on 27/09/2005 - Decision on 06/12/2006**

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

### THE COMPLAINT

#### *Background*

On 2 October 2003, the complainant, a German consultant, applied to the European Commission in response to the latter's Call for proposals 2003-2004 under the Leonardo da Vinci programme. According to the rules laid down in the Call for proposals, projects had to be submitted by 3 October 2003.

The relevant rules are laid down in Council Decision 1999/382/EC of 26 April 1999 establishing the second phase of the Community vocational training action programme 'Leonardo da Vinci' (OJ 1999 L 146, p. 33). For proposals submitted under Procedure C (such as the complainant's), the relevant rules provide for a two-step selection process, namely (i) the selection of pre-proposals and (ii) the selection of full proposals, and the involvement of a management committee (the "the Leonardo da Vinci Committee").

The relevant steps to be taken are described as follows in these rules:

"(i) Under the rules defined in the call for proposals, pre-proposals are to be submitted by the promoters to the Commission. (...)

(ii) The Commission will evaluate all the pre-proposals and, having sought the opinion of the [Leonardo da Vinci Committee], make a selection. (...)

(iii) Only promoters of successful projects will be invited to submit a full proposal to the Commission. (...)

(iv) The Commission, with the assistance of independent experts, will undertake a transnational appraisal of the proposals received and establish a short-list of projects. (...)

(v) In accordance with the procedure set out in Article 7 of the Decision, the Commission shall



seek the opinion of the [Leonardo da Vinci Committee] on this short-list.

(vi) The Commission will establish the final list of proposals selected and inform the [Leonardo da Vinci Committee]. (...)

(vii) (...)

(viii) The selection of pre-proposals has to be carried out within three months after the end of the period for submission of proposals as specified in the call for proposals; the process on stages (iii) to (vi) should not take more than five months."

On 22 December 2003, the Commission informed the complainant that his project could not be selected since he had failed to comply with the deadline for submitting proposals.

The complainant considered that he had complied with this deadline, given that he had sent his proposal by registered mail on 2 October 2003.

The complainant contacted the Commission by telephone on 29 December 2003. In a letter sent the same day, he requested the Commission to confirm by 5 January 2004 that his project had been submitted in time, failing which he would turn to the courts for help. In his letter to the Commission, the complainant also lodged complaints ("Dienstaufsichtsbeschwerden") against the person in charge of his project and against the head of the relevant department of the Commission.

#### *Complaint 33/2004/GG*

The complainant forwarded a copy of his letter to the Commission of 29 December 2003 to the Ombudsman on the same day. In his cover letter, he asked the Ombudsman to examine the matter. This letter was therefore registered as a complaint by the Ombudsman (complaint 33/2004/GG).

Given that the complainant's letter to the Commission had been sent on the same day as the letter to the Ombudsman, it was clear that the Commission had not yet had sufficient time to consider the matter. The complaint was therefore rejected on the basis of Article 2 (4) of the Ombudsman's Statute on 13 January 2004.

#### *Complaint 221/2004/GG*

On 15 January 2004, the complainant wrote to inform the Ombudsman that he wished to renew his complaint. This letter was therefore registered as a new complaint (complaint 221/2004/GG). The complainant did not submit any allegations but simply asked the Ombudsman to examine the matter. It appeared, however, that he considered that the Commission had failed to handle his application properly.

In its opinion, the Commission accepted that a mistake had been made. According to the Commission, a closer examination of the envelope sent by the complainant had shown that there was a hardly legible postmark bearing the date of 2 October 2003. The Commission pointed out that in order to remedy this mistake, it had selected the complainant's project pre-proposal for the presentation of a full proposal. The complainant had originally been given



until 1 March 2004 to submit this full proposal. After the complainant had pointed out that he would thus dispose of less time for the presentation of the full proposal than other promoters, the Commission accepted that he should be given the same number of days to prepare his full proposal as all the other candidates.

Together with its opinion, the Commission submitted a copy of the internal note dated 28 January 2004 in which the Commission explained the approach that was suggested in the present case.

In his observations on this opinion, the complainant stressed that he had not benefited from the same amount of information as other applicants since the Commission had not transmitted any information as to how, in the view of the Commission, the project set out in the pre-proposal could be improved in the full proposal, something which the Commission had done with regard to all other applicants. According to the complainant, this was a serious disadvantage that he would take into account in his final appraisal after the application procedure had terminated and in order to decide as to whether any further steps would be necessary to defend his rights. The complainant also pointed out that the Commission had not replied to his complaints ("Dienstaufsichtsbeschwerden") against the person in charge of his project and against the head of the relevant department of the Commission.

The Ombudsman considered that the Commission's failure to reply to the "Dienstaufsichtsbeschwerden" appeared to be due to a misunderstanding on the part of the Commission. In view of the latter's constructive and expeditious approach to the present case, the Ombudsman took the view that there was no need to pursue this issue in the present inquiry. The complainant was however informed of the possibility to submit a new complaint regarding this issue if, contrary to expectation, the Commission should fail to deal with this matter.

As regards the substance of the case, the Ombudsman considered that the Commission had acted rapidly and constructively in order to correct the mistake that had occurred. The Ombudsman noted that the complainant had submitted that, contrary to what the Commission had said, he had not received as much information as other applicants. The Ombudsman considered that the complainant had thus submitted a new, additional allegation. In the Ombudsman's view, it was not appropriate to deal with this new allegation in his inquiry into complaint 221/2004/GG for at least two reasons. First, the complainant did not appear to have raised this issue with the Commission before submitting it to the Ombudsman. The Commission thus had not yet had the possibility to consider the matter. Second, the complainant remained free to submit a new complaint to the Ombudsman in case the Commission's alleged failure to provide him with information should negatively affect the Commission's decision on his full proposal. The Ombudsman therefore concluded that (subject to the said proviso) there was no longer any maladministration after the steps taken by the Commission. He therefore closed the case on 5 May 2004.

#### *Further developments*

On 21 June 2004, the Commission informed the complainant that his proposal had not been selected.



The complainant objected to this decision in a letter sent on 26 June 2004. In this letter, he criticised the fact that the persons against whom he had lodged complaints ("Dienstaufsichtsbeschwerden") had, contrary to his repeated requests, been involved in assessing his proposal. The complainant further submitted that the rejection of his proposal had been arbitrary, given that the persons who had evaluated this proposal did not appear to have the necessary expertise. He also requested access to the Commission's file and pointed out that he would ask for damages on account of the rejection of his proposal after having had access to this file.

The complainant further submitted that if his pre-proposal had been handled properly, there would have been no need for him to submit a complete proposal involving high costs. He further stressed that if his pre-proposal had been evaluated positively, he would have received (as all other applicants had done) the results of this first evaluation that would have enabled him to take account of additional problems, in his proposal, which had now been brought to his attention for the first time. The complainant noted that the damage that had been caused by this aspect of the Commission's handling of his case could already be expressed in precise terms. He therefore claimed EUR 2 275 for the costs related to his efforts to make the Commission consider his pre-proposal (30 hours' working time at a rate of EUR 75 per hour plus a lump sum of EUR 25 for the costs of sending faxes and making telephone calls) and EUR 8 752,60 on account of the (as it emerged) futile effort to prepare a proposal (20 working days at a rate of EUR 409 per day plus a lump sum of 7 % for costs). The total thus amounted to EUR 11 027,60.

In his letter of 26 June 2004, the complainant also pointed out that he had already asked for access to the Commission's file on several occasions and called on the Commission to set a suitable date, within three days, for the inspection of this file on the Commission's premises in Brussels.

On 14 July 2004, the complainant wrote to the Commission in order to remind it that his request for access had not yet been dealt with. The complainant therefore expressly renewed this request. He also informed the Commission that he wished to lodge complaints ("Dienstaufsichtsbeschwerden") against the person responsible for his request for access to documents and against the director in charge of the relevant unit of the Commission.

On 19 July 2004, the Commission replied to the complainant's letter of 26 June 2004. In this reply, the Commission pointed out that the complainant's full proposal had been evaluated by three independent external experts. In the Commission's view, the process had thus been objective and transparent and had respected the principle that all applicants should be treated equally. The Commission submitted that the problem that had occurred as regards the examination of the complainant's pre-proposal did not affect this conclusion. It pointed out that it had reconsidered its decision to declare the complainant's application inadmissible. The Commission also noted that, in order to avoid any discrimination as compared to other applicants, it had invited the complainant to contact its services with a view to discussing further questions in relation to his application. The Commission stressed that the complainant had not



made use of this possibility. It also noted that it had given the complainant an additional amount of time to prepare his proposal. As regards access to documents, the Commission interpreted the request as asking for access to the assessments of the complainant's proposal that had been prepared by the above-mentioned experts. This request was rejected on the basis of Article 4 (3) of Regulation 1049/2001. In so far as the "Dienstaufsichtsbeschwerden" were concerned, the Commission explained that it was not aware of any legal basis for such complaints in Community law. It therefore invited the complainant to provide more precise indications as to the basis of such complaints.

On 30 July 2004, the complainant made a confirmatory application, by way of fax transmission to the Secretary-General of the Commission, for access to documents under Regulation 1049/2001.

*The present complaint*

Also on 30 July 2004, the complainant submitted a further complaint to the Ombudsman which was registered under reference 2437/2004/GG.

In his complaint, the complainant did not make any precise allegations and claims. However, it appeared that the complainant wished to allege that he had been discriminated against compared to other applicants. It was also clear that he considered that the Commission should pay the damages claimed in his letter of 26 June 2004 and that it should reply to the "Dienstaufsichtsbeschwerden".

As regards the Commission's argument that it had invited him to discuss any relevant issues before the latter had submitted his proposal but that he had failed to make use of this possibility, the complainant submitted that, at the time, he had not had any questions as to the substance of his application, given that he had not received any preliminary evaluation from the Commission. The complainant further pointed out that it was the Commission's established (and reasonable) practice not to engage in such "discussions with a view to optimising applications" during an ongoing procedure. He therefore asked the Ombudsman to examine whether the Commission had indeed engaged in such discussions in the present case.

In these circumstances, the Ombudsman understood the complainant as (1) alleging that he had been discriminated against compared to other applicants, (2) claiming that the Commission should pay the damages set out in his letter of 26 June 2004 and (3) claiming that the Commission should reply to the "Dienstaufsichtsbeschwerden". The Commission was therefore asked to provide an opinion on this allegation and these claims. The complainant was informed accordingly.

The Ombudsman informed both the complainant and the Commission that the complaint did not appear to extend to the issue of access to the documents in the file.

*The complainant's fax of 31 August 2004*

In a fax of 31 August 2004, the complainant informed the Ombudsman that he also wished to complain about the Commission's refusal to grant him access to documents. On 13 September 2004, the Ombudsman forwarded a copy of this fax to the Commission and asked the latter for an opinion on the additional allegation as well.



#### *The complainant's fax of 12 September 2004*

On 12 September 2004, the complainant informed the Ombudsman that he had received a letter dated 2 September 2004 in which the Commission had noted that the period for replying to the complainant's confirmatory application of 30 July 2004 (which according to the Commission had been registered on 12 August 2004) had to be extended by another 15 working days (until 23 September 2004) due to the fact that several officials whose expertise was needed in order to deal with the application were on holiday. The complainant took the view that the decision taken by the Commission was not correct, given that the Commission should not be allowed to increase the time for dealing with applications by delaying the registration of applications and that the reason indicated by the Commission could be used to circumvent any deadline. He also expressed doubts as to whether the Commission's letter (which he claimed to have received on 11 September 2004) had indeed been sent on 2 September 2004. On 4 October 2004, the Ombudsman forwarded a copy of the complainant's fax to the Commission.

## **THE INQUIRY**

### **The Commission's opinion**

In its opinion, the Commission provided a chronology of events. According to this description, the complainant's proposal had been declared inadmissible by the Commission's selection committee at its meeting of 16 October 2003 whereas the letter informing the complainant thereof had been sent on 22 December 2003. Still according to this chronology, the complainant's fax of 30 July 2004 had been received by the Commission on 6 August 2004.

In addition to that, the Commission presented the following comments:

The selection of proposals under the Leonardo da Vinci programme comprised two steps. The applicant first submitted a pre-proposal that was subsequently evaluated by the Commission with the help of independent external experts. On the basis of the results of this evaluation, the applicants with the best pre-proposals were invited to submit a complete proposal.

The complainant's pre-proposal had initially been rejected on account of the fact that it seemed to have been submitted after the relevant deadline. This decision had been reversed after the complainant had objected to it in his letter of 29 December 2003. However, since this appeal had been received after the evaluation exercise had already been completed, the complainant's pre-proposal had, contrary to other pre-proposals, not been evaluated by external experts. In order to avoid that the complainant should suffer any disadvantage on account of the Commission's original decision, he was nevertheless invited to present a complete proposal and to contact the Commission's services as regards any question that he might have concerning his proposal. In order to avoid any discrimination as compared to other applicants, the complainant had furthermore been given more time to submit his complete proposal.

It was acknowledged that a certain period of time had lapsed between the opinion of the selection committee and the Commission's letter informing the complainant of the inadmissibility of his application. This delay had been due to the fact that the decision of the Commission on pre-proposals was, within the framework of 'Procedure C', adopted after having obtained the



opinion of the Leonardo da Vinci Committee and after the expiry of the period foreseen for the exercise of the European Parliament's right of control.

This was the reason why the Commission had introduced an exceptional procedure with the aim of allowing the complainant to submit a full proposal. The Commission accepted that it had been induced into error by the illegible post stamps (on the complainant's application) when examining the admissibility of the application, and it had apologised for this to the complainant. It had however seen to it that this error was corrected by accepting, on an exceptional basis, that the complainant could submit a full proposal, by inviting him to contact its services with regard to any question concerning the pre-proposal and by granting him a special period of time for submitting the full proposal.

The complainant had not suffered any damage due to the fact that his application had initially been declared inadmissible. It should be noted that, between the submission of the pre-proposal and the submission of the full proposal, several messages had been exchanged between the Commission's services and the complainant. It appeared, however, that the complainant had not made any requests regarding the possible comments by the external experts concerning his pre-proposal or the possibilities to improve his proposal during this period.

There was also no direct link between any recommendations made by external experts for the improvement of pre-proposals and the selection of proposals, given that the rate of success between the phase of pre-proposals and the phase of proposals amounted to around 50 %.

It should also be noted that there was no "right" to a subsidy in Community law. The Commission therefore did not compensate persons who had applied for a subsidy for the time they had spent preparing their proposals.

The Commission did not, therefore, share the complainant's view that he was entitled to compensation.

After having received the complainant's letter of 29 December 2003, the Commission had proceeded to a re-evaluation of the case. The Commission had revised its position in an appropriate way and concluded that no reproach could be made to the official in charge or the selection committee, which had made an error acting in "good faith". The Commission had set out its position in its letter of 19 July 2004 in which it had explained that it was not aware of any legal basis for "Dienstaufsichtsbeschwerden" in Community law and invited the complainant to provide more precise indications as to the basis of such complaints. The complainant had not replied to this invitation.

As regards the issue of access to the file, the confirmatory application of 30 July 2004 had been registered on 12 August 2004. The period of 15 working days for replying had thus expired on 2 September 2004. On that very day, the Commission had written to the complainant in order to inform him that the relevant period had been extended. The reason that had been invoked by the Commission was perfectly legitimate. Upon a re-examination of the request, the





Commission had decided to release the evaluation forms of the external experts to the complainant, without however disclosing the identity of these experts. The final reply had been sent to the complainant on 24 September 2004.

### **The complainants' observations**

In his observations, the complainant made the following comments:

The Commission accepted that the incorrect handling of his application of October 2003 was entirely its responsibility. It had however not established its allegation that this had been due to illegible postmarks on the envelope containing that application, for example by submitting a copy of the document concerned. No access had yet been granted to the document. On the basis of the evidence available, it had therefore not been shown that the circumstance alleged by the Commission had resulted in the incorrect handling of the application.

Already before the pre-proposal had been submitted, he had drawn the Commission's attention to the fact that determining 3 October 2003 as the deadline would result in German applicants being treated in a different way, given that the German post offices were not opened on that day which was a national holiday. However, the Commission had refused to accept his request to change the deadline.

The claim for access to the whole file was therefore maintained.

If the Commission should indeed have had doubts as to whether his application had been sent in time, it would have been obliged to request him to submit, within 48 hours, evidence to show that the letter had been dispatched in time. However, the Commission had failed to do so.

If an evaluation by external experts should not indeed have been possible when it had emerged that the pre-proposal had been admissible, the Commission would have been obliged, of its own initiative and without any need for a request to that effect, to inform him of *its* evaluation of the pre-proposal and of *its* suggestions as to how to improve the latter.

In the absence of such a communication from the Commission, he had assumed that the Commission had had no fundamental objections as regards substance or form and that the Commission did not consider that the pre-proposal needed to be optimised in a fundamental way. It was on the basis of this expectation that he had prepared the full proposal.

### **Further inquiries**

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

#### *The Ombudsman's request for further information*

On 17 January 2005, the Ombudsman therefore asked the Commission (1) to comment on the complainant's argument that the Commission had failed to deal with the full scope of his request for access to the Commission's file, (2) to provide a copy of the envelope containing the complainant's pre-proposal that was sent to the Commission in October 2003 and (3) to provide more specific information (a) as to the legal provisions that obliged it to consult the Leonardo da Vinci Committee and possibly the European Parliament also in the case of applications that were held to be inadmissible on the grounds that they had been submitted late and (b) as to





when the Leonardo da Vinci Committee had given its opinion and as to the expiry of the period foreseen for the European Parliament's right of control.

*The Commission's reply*

In its reply sent on 14 March 2005, the Commission made the following comments:

In his letter of 26 June 2004, the complainant had asked for access to the Commission's file to the extent that he contested the objectivity of the evaluation of his proposal by questioning the quality or the existence of the evaluations of external experts. The Commission had dealt with this request by its letter of 24 September 2004. Together with this letter, it had transmitted to the complainant the anonymised evaluation sheets of the external experts concerning his proposal. The complainant did not mention a specific document that the Commission should transmit to him. The Commission's services were therefore unable to see what the complainant meant when he indicated that the Commission had failed to grant him full access to the file.

The Leonardo da Vinci Committee had to be consulted by the Commission on the draft list of selected pre-proposals. The Committee had given a positive opinion on 17 November 2003. The draft decision had been submitted to Parliament on 17 November 2003, and the period for exercising Parliament's control rights had expired on 16 December 2003.

A copy of the envelope containing the complainant's pre-proposal that was sent to the Commission in October 2003 was submitted by the Commission together with its letter of 14 March 2005.

*The complainant's observations*

In his observations, the complainant maintained his complaint and made the following further comments:

Given that he had asked for access to the Commission's entire file, there had been no need for him to designate specific documents.

One of the postmarks on the envelope containing his pre-proposal was dated 2 October 2003 and was legible. It was therefore incomprehensible why the Commission had rejected the application as inadmissible. Given that the applications had to be submitted by registered letter, it would have been possible to ascertain the correct date. Applying the Commission's own procedural rules, the Commission ought to have asked him, within 48 hours of taking knowledge of the relevant circumstances, to prove that the letter had been sent in good time.

The Commission incorrectly created the impression that it would have been unable to inform him of the fact that his application had been rejected as inadmissible on account of its obligation to consult the committee and the European Parliament.

## **THE DECISION**

### **1 The relevant facts**

1.1 On 2 October 2003, the complainant, a German consultant, applied to the European Commission in response to the latter's Call for proposals 2003-2004 under the Leonardo da



Vinci programme.

The relevant rules are laid down in Council Decision 1999/382/EC of 26 April 1999 establishing the second phase of the Community vocational training action programme 'Leonardo da Vinci' (OJ 1999 L 146, p. 33). For proposals submitted under Procedure C (such as the complainant's), the relevant rules provide for a two-step selection process, namely (i) the selection of pre-proposals and (ii) the selection of full proposals, and the involvement of a management committee (the "Leonardo da Vinci Committee"). The Commission first evaluates all the pre-proposals that it receives and, having sought the opinion of the Leonardo da Vinci Committee, makes a selection. It appears that the Commission uses external experts already at the stage of selecting pre-proposals and that any recommendations for the improvement of proposals made by these experts are forwarded to the applicants.

Only applicants whose pre-proposals have been selected are invited to submit proposals. The Commission then, again with the help of external experts, carries out an appraisal of the proposals received and establishes a short-list of projects. After having sought the opinion of the Leonardo da Vinci Committee, the Commission establishes the list of successful projects that have been selected.

The European Parliament exercises control rights over this procedure.

It appears that the selection of pre-proposals has to be carried out within three months after the end of the period for submission of pre-proposals specified in the call for proposals, whereas the remainder of the process should not take more than five months.

1.2 According to the rules laid down in the Call for proposals concerning the present case, pre-proposals had to be submitted by 3 October 2003. At its meeting of 16 October 2003, the Commission's selection committee declared the complainant's pre-proposal inadmissible on the grounds that it had been submitted too late. The complainant was informed accordingly by letter of 22 December 2003, after the Commission had made the selection of pre-proposals, after the Leonardo da Vinci Committee had been heard as regards this selection and after the period during which the European Parliament could intervene had lapsed.

1.3 Considering that he had complied with this deadline, given that he had sent his proposal by registered mail on 2 October 2003, the complainant turned to both the Commission and to the Ombudsman on 29 December 2003. Given that the Commission had not yet had sufficient time to consider the matter, this first complaint (complaint 33/2004/GG) was rejected as inadmissible by the Ombudsman on 13 January 2004.

1.4 On 15 January 2004, the complainant submitted a new complaint to the Ombudsman (complaint 221/2004/GG), and the Ombudsman opened an inquiry. In its opinion, the Commission accepted that a mistake had been made and that the complainant's pre-proposal had indeed been submitted in time. The Commission noted that in order to remedy this mistake, it had selected the complainant's project pre-proposal for the presentation of a full proposal. The complainant had originally been given until 1 March 2004 to submit this full proposal. After the



complainant had pointed out that he would thus dispose of less time for the presentation of the full proposal than other applicants, the Commission had accepted that he should be given the same number of days to prepare this full proposal as all the other candidates.

In his observations on this opinion, the complainant stressed that he had not benefited from the same amount of information as other applicants since the Commission had not transmitted any information as to how, in the view of the Commission, the project set out in the pre-proposal could be improved in the full proposal, something which the Commission had done with regard to all other applicants. According to the complainant, this was a serious disadvantage that he would take into account in his final appraisal after the application procedure had terminated and in order to decide as to whether any further steps would be necessary to defend his rights. The complainant also pointed out that the Commission had not replied to his complaints ("Dienstaufsichtsbeschwerden") against the person in charge of his project and against the head of the relevant department of the Commission.

The Ombudsman considered that the Commission's failure to reply to the "Dienstaufsichtsbeschwerden" appeared to be due to a misunderstanding on the part of the Commission. In view of the latter's constructive and expeditious approach to the present case, the Ombudsman took the view that there was no need to pursue this issue in the present inquiry. The complainant was however informed of the possibility to submit a new complaint regarding this issue if, contrary to expectation, the Commission should fail to deal with this matter.

As regards the substance of the case, the Ombudsman considered that the Commission had acted rapidly and constructively in order to correct the mistake that had occurred. The Ombudsman noted that the complainant had submitted that, contrary to what the Commission had said, he had not received as much information as other applicants. The Ombudsman considered that the complainant had thus submitted a new, additional allegation. In the Ombudsman's view, it was not appropriate to deal with this new allegation in his inquiry into complaint 221/2004/GG for at least two reasons. First, the complainant did not appear to have raised this issue with the Commission before submitting it to the Ombudsman. The Commission thus had not yet had the possibility to consider the matter. Second, the complainant remained free to submit a new complaint to the Ombudsman in case the Commission's alleged failure to provide him with information should negatively affect the Commission's decision on his full proposal. The Ombudsman therefore concluded that (subject to the said proviso) there was no longer any maladministration after the steps taken by the Commission. He therefore closed the case on 5 May 2004.

1.5 On 21 June 2004, the Commission informed the complainant that his proposal had not been selected.

1.6 In a letter sent on 26 June 2004, the complainant objected to this decision and also requested access to the Commission's file. The complainant further indicated that he considered that the Commission should pay him compensation amounting to EUR 11 027,60.



In its reply of 19 July 2004, the Commission took the view that it had proceeded properly in the present case. As regards access to documents, the Commission interpreted the complainant's request as asking for access to the assessments of the complainant's proposal that had been prepared by experts. This request was rejected on the basis of Article 4 (3) of Regulation 1049/2001.

On 30 July 2004, the complainant made a confirmatory application for access under Regulation 1049/2001.

1.7 Also on 30 July 2004, the complainant submitted a further complaint to the Ombudsman which was registered under reference 2437/2004/GG. On 31 August and 12 September 2004, the complainant submitted further information and extended the scope of this complaint. On the basis of these letters, the Ombudsman identified the following allegations and claims: the complainant (1) alleged that he had been discriminated against compared to other applicants, (2) alleged that the Commission had failed to grant him access to its file in conformity with Regulation 1049/2001, (3) claimed that the Commission should pay the damages claimed in his letter of 26 June 2004 and (4) claimed that the Commission should reply to the "Dienstaufsichtsbeschwerden".

## **2 The scope of the present inquiry**

2.1 In his letter to the Commission of 26 June 2004 on which the present complaint is based, the complainant explained that the amount of EUR 11 027,60 that he claimed to be due to him was derived from what he considered to be the incorrect handling of his pre-proposal by the Commission. The complainant noted that he reserved the right to claim damages for the way in which his proposal had been evaluated.

2.2 Given that the complainant has not submitted any further information or precise figures in this respect, the Ombudsman considers that the complainant's potential claim for damages arising from the Commission's *evaluation* of his full proposal is not covered by his complaint. The present inquiry will therefore only deal with the complainant's claim for damages arising from the Commission's *handling of his pre-proposal*, including the invitation to submit a full proposal.

2.3 In his letter of 26 June 2004, the complainant also submitted that persons against whom he had lodged complaints ("Dienstaufsichtsbeschwerden") had, contrary to his repeated requests, been involved in assessing his proposal.

2.4 The Ombudsman considered that this allegation was not part of the complaint that the complainant submitted to him in the present case. He therefore did not ask the Commission to provide an opinion on this issue. The complainant, who was informed about the allegations and claims on which the Ombudsman had asked the Commission to provide an opinion, did not object to this approach. In these circumstances, the present inquiry will not deal with this issue.

2.5 In his complaint, the complainant suggested that the Ombudsman should examine whether the Commission had engaged in discussions with other applicants during the course of the procedure with a view to enabling these applicants to optimise their applications. It appears that



the complainant's remark concerns the stage after the submission of the full proposals. In view of his conclusions on the complainant's main allegations and claims (see below), the Ombudsman considers that there is no need to deal with this issue in the present inquiry.

2.6 In his observations on the Commission's opinion in the present case, the complainant noted that he had drawn the Commission's attention to the fact that determining 3 October 2003 as the deadline would result in German applicants being treated in a different way, given that the German post offices were not open on that day, which was a national holiday in Germany. The complainant pointed out that the Commission had however refused to accept his request to change the deadline.

2.7 The Ombudsman takes the view that the complainant's above-mentioned remark appears to have been intended for his information and that it does not constitute an additional allegation. This aspect of the case will therefore not be covered by the present inquiry. The Ombudsman considers it useful to add that the mere fact that the end of a period for submitting applications falls on a public holiday in one of the Member States would not appear to be an indication of maladministration, provided that applicants from all Member States disposed of a sufficient period of time for preparing and submitting their applications.

### **3 Alleged discrimination**

3.1 The complainant alleged that he had been discriminated against compared to other applicants. This allegation was based on the fact that the Commission had not examined his pre-proposal before he had been invited to submit a full proposal. The complainant submitted that if his pre-proposal had been handled properly, there would have been no need for him to submit a complete proposal involving high costs. He further stressed that if his pre-proposal had been evaluated positively, he would have received (as all other applicants had done) the results of this first evaluation that would have enabled him to take account of additional aspects, in his proposal, which had now been brought to his attention for the first time.

3.2 In its opinion, the Commission pointed out that the complainant's pre-proposal had initially been rejected on account of the fact that it seemed to have been submitted after the relevant deadline. This decision had been reversed after the complainant had objected to it in his letter of 29 December 2003. However, since this appeal had been received after the evaluation exercise had already been completed, the complainant's pre-proposal had, contrary to other pre-proposals, not been evaluated by external experts. In order to avoid that the complainant should suffer any disadvantage on account of the Commission's original decision, he had nevertheless been invited to present a complete proposal and to contact the Commission's services as regards any question that he might have concerning his proposal. In order to avoid any discrimination as compared to other applicants, the complainant had furthermore been given more time to submit his complete proposal.

The Commission submitted that the complainant had not made any requests regarding the possible comments by the external experts concerning his pre-proposal or the possibilities to improve his proposal during this period. According to the Commission, there was also no direct link between any recommendations made by external experts for the improvement of proposals and the selection of proposals, given that the rate of success between the phase of



pre-proposals and the phase of proposals amounted to around 50 %.

3.3 In his observations, the complainant submitted that if an evaluation by external experts should not indeed have been possible when it had emerged that the pre-proposal had been admissible, the Commission would have been obliged, of its own initiative and without any need for a request to that effect, to inform him of *its* evaluation of the pre-proposal and of *its* suggestions as to how to improve the latter.

3.4 The Ombudsman notes that the Commission accepted that it made a mistake when it considered the complainant's pre-proposal as having been submitted late and that it apologised for this mistake. He further notes that the Commission acted rapidly and constructively when the mistake was brought to its attention. In order to correct the negative effects of that mistake, the Commission offered the complainant the possibility of submitting a full proposal that was to be handed in by 1 March 2004, the date set for the submission of full proposals from those applicants whose pre-proposals had been selected. The Ombudsman further notes that when the complainant pointed out that this would give him less time to submit a full proposal than the other promoters, the Commission accepted that the same time should be given to him and that his full proposal should be submitted by 19 March 2004.

3.5 In the Ombudsman's view, it is nevertheless clear that this way of proceeding did not ensure that the complainant was treated as all the other promoters whose pre-proposals had been selected. In the course of the present inquiry, the Commission confirmed that it had examined the pre-proposals with the help of external experts. It further appears that comments made by these experts, including proposals as to how to improve the pre-proposals, were forwarded to the applicants by the Commission (2) . These applicants thus had the possibility to benefit from expert advice when deciding on whether and how to submit a full proposal to the Commission. It is not disputed that no such advice was given to the complainant. In these circumstances, the Commission failed to treat the complainant in the same way as the other applicants whose pre-proposals had been selected.

3.6 The Ombudsman considers, however, that regard must be had to the circumstances of the present case in order to determine whether this difference of treatment could be justified. It appears that the relevant rules provide that pre-proposals have to be assessed within a specific period of time. This period of time had lapsed when the Commission became aware of the mistake that had occurred, and the Commission explained that it was for this reason that the complainant's pre-proposal was not assessed by external experts. The Ombudsman further notes that together with its opinion on complaint 221/2004/GG, the Commission submitted a copy of the internal note dated 28 January 2004 in which the Commission explained the approach that was suggested in the present case. According to this note, it was at this stage "materially impossible" to carry out an evaluation of the complainant's pre-proposal in view of the time that was needed to contract external experts and the fact that the full proposal should reach the Commission before the end of the "full proposal evaluation exercise" which was to take place, still according to the note, between 1 and 26 March 2004. According to this note, it had therefore been decided to declare the pre-proposal as selected for the presentation of a full proposal and "to take appropriate measures towards the [complainant] in order to grant equal





treatment."

3.7 In the Ombudsman's view, it is not beyond doubt whether it was indeed impossible to have the complainant's pre-proposal evaluated by external experts in the present case. It should be noted that the relevant rules do not appear to set binding time-limits as regards the assessment of the second stage of the process, i.e., the assessment of the full proposals. However, in the absence of further information regarding these issues and in view of his subsequent conclusions the Ombudsman considers that it is best to proceed on the assumption that it was indeed "materially impossible" for the Commission to have recourse to external experts in order to assess the complainant's pre-proposal.

3.8 On that basis, the Ombudsman considers that the solution outlined in the Commission's note of 28 January 2004 was indeed reasonable in the circumstances, provided that the Commission took "appropriate measures (...) in order to grant equal treatment". In the Ombudsman's view, however, the Commission did not do everything that was necessary and appropriate in the circumstances in order to ensure that the complainant was treated in the same way as the other applicants. This is certainly true as concerns the time that was granted to applicants. It should be noted that the complainant was originally given until 1 March 2004 to submit his full proposal. It was only after the complainant objected to this that he was given the same number of days as the other applicants. Whilst this defect was thus swiftly remedied by the Commission and is thus irrelevant for present purposes, the Commission's approach gives rise to doubts as to whether it was fully aware of what was needed in order to ensure equal treatment of all applicants. More importantly, in view of the importance that the evaluation of the pre-proposal had for the submission of the full proposal, the Commission should have been aware of the fact that the complainant was at a disadvantage compared to the other applicants whose pre-proposals had been evaluated and selected. In these circumstances, it would have been good administrative practice for the Commission to try and ensure that this disadvantage was minimised as far as possible. As the complainant submitted, the Commission could in particular have informed him of *its* evaluation of the pre-proposal and of *its* suggestions as to how to improve the latter. In view of the circumstances of the present case, the Ombudsman considers that such a way of proceeding could indeed be expected of an administration desirous to undo the consequences of a mistake that it had committed. However, no such steps appear to have been taken. It is true that in its letter of 2 February 2004 informing the complainant of the decision it had taken, the Commission noted that he could contact its Directorate-General "for further information". In the Ombudsman's view, however, this rather general offer was not sufficient to guarantee that the complainant was treated in substantially the same way as those applicants whose pre-proposals had been evaluated and selected.

3.9 For the avoidance of doubt, it should be noted that the Ombudsman is aware of the fact that the complainant proceeded to submit a full proposal without having insisted on or obtained an evaluation of his pre-proposal. In the Ombudsman's view, however, this circumstance (whilst relevant for the question as to whether the complainant is entitled to damages) does not affect his conclusion that the Commission failed to ensure that the complainant was granted treatment equal to that afforded to other applicants whose pre-proposals had been selected and who had been invited to submit a full proposal. The Commission's failure to ensure such equal treatment





therefore constitutes maladministration.

#### **4 Alleged failure to grant access to the Commission's file**

4.1 The complainant alleged that the Commission had failed to grant him proper access to its file. In a further letter to the Ombudsman of 12 September 2004 (which was forwarded to the Commission by the Ombudsman), the complainant informed the Ombudsman that he had received a letter dated 2 September 2004 in which the Commission had noted that the period for replying to the complainant's confirmatory application of 30 July 2004 (which according to the Commission had been registered on 12 August 2004) had to be extended by another 15 working days (until 23 September 2004) due to the fact that several officials whose expertise was needed in order to deal with the application were on holiday. The complainant took the view that the decision taken by the Commission was not correct, given that the Commission should not be allowed to increase the time for dealing with applications by delaying the registration of applications and that the reason indicated by the Commission could be used to circumvent any deadline.

4.2 In its opinion, the Commission pointed out that the confirmatory application of 30 July 2004 had been registered on 12 August 2004. The period of 15 working days for replying had thus expired on 2 September 2004. On that very day, the Commission had written to the complainant in order to inform him that the relevant period had been extended. According to the Commission, the reason that had been invoked by it had been perfectly legitimate. Upon a re-examination of the request, the Commission had decided to release the evaluation forms of the external experts to the complainant, without however disclosing the identity of these experts. The final reply had been sent to the complainant on 24 September 2004.

4.3 In his observations, the complainant maintained his allegation.

4.4 In a request for further information sent on 17 January 2005, the Ombudsman asked the Commission to comment on the complainant's view that it had failed to deal with the full scope of his request for access to the Commission's file.

4.5 In its reply, the Commission submitted that the complainant had asked for access to the Commission's file to the extent that he contested the objectivity of the evaluation of his proposal by questioning the quality or the existence of the evaluations of external experts. The Commission had dealt with this request by its letter of 24 September 2004 with which it had transmitted to the complainant the anonymised evaluation sheets of the external experts concerning his proposal. The Commission pointed out that the complainant had not mentioned a specific document that the Commission should transmit to him. The Commission's services were therefore unable to see what the complainant meant when he indicated that the Commission had failed to grant him full access to the file.

4.6 In his observations, the complainant submitted that there had been no need for him to designate specific documents, given that he had asked for access to the Commission's entire file.

4.7 The Ombudsman considers that it is useful to distinguish between the procedural aspects of



this allegation and the substantive issues it involves.

4.8 As regards *procedural* aspects, the Ombudsman notes that in his letter to the Commission of 26 June 2004, in which he asked for access to documents, the complainant also pointed out that he had already asked for access to the Commission's file on several occasions. No further information was submitted as regards these previous attempts to gain access to the Commission's file. The Ombudsman notes, however, that the arguments that the complainant submitted to him concern the handling of his application of 26 June 2004. It is therefore this request for access (and the subsequent confirmatory application) that will be examined here.

In the absence of a reply to his request for access, the complainant submitted a confirmatory application to the Commission that was sent by fax on 30 July 2004. According to the information provided by the Commission in its opinion, this confirmatory application was received on 6 August 2004, i.e., a week later, and registered on 12 August 2004. The Ombudsman notes that the Commission has not submitted any explanations for these delays.

By letter of 2 September 2004, the Commission informed the complainant that the deadline of 15 working days for replying to the confirmatory application (which expired that day) had to be extended by another 15 working days (until 23 September 2004) due to the fact that several officials whose expertise was needed in order to deal with the application were on holiday. Article 8 (2) of 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 (3) provides that the time-limit for replying to confirmatory applications can be extended by 15 working days "[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents". The Ombudsman considers that the absence of staff on holidays cannot be considered to constitute an "exceptional" case within the meaning of this provision that would justify an extension of time.

In any event, in its letter of 2 September 2004 the Commission noted that the extended deadline was 23 September 2004. However, the Commission's reply to the confirmatory application was only sent on 24 September 2004.

In these circumstances, the Ombudsman concludes that the Commission failed to handle the complainant's request for access properly as regards procedural aspects.

4.9 As regards the *substance* of this claim, it should be noted that the complainant had asked for access to the file ("Akteneinsicht") in his letter of 26 June 2004. In his confirmatory application of 30 July 2004, the complainant unambiguously stated that his request did not concern "single documents, but the whole file". In the present case, it is clear that the Commission has so far only granted access to the (anonymised) evaluation sheets of the external experts concerning his proposal. Despite being specifically invited to comment on this issue, the Commission has still not dealt with the complainant's request for access to the extent that it concerns the other documents on its file. The Commission submitted that the complainant had not specified the documents he wished to have access to. The Ombudsman does not find this argument convincing. The complainant has asked for access to the whole of the



Commission's file concerning his case. In the Ombudsman's view, the complainant's request was thus precise enough to allow the Commission to understand the scope of access that the complainant wished to obtain.

The Ombudsman therefore finds that the Commission has still failed to deal with the full scope of the complainant's request for access.

4.10 In these circumstances, the Ombudsman's conclusion is that the Commission has failed properly to deal with the complainant's request for access, both as regards procedural aspects and in so far as the substance is concerned. The Ombudsman therefore makes a draft recommendation below.

## **5 Claim for damages**

5.1 The complainant claimed that the Commission should pay the damages set out in his letter of 26 June 2004.

5.2 In its opinion, the Commission acknowledged that a certain period of time had lapsed between the opinion of the selection committee and the Commission's letter informing the complainant of the inadmissibility of his application. According to the Commission, this delay had been due to the fact that the decision of the Commission on pre-proposals had been adopted, within the framework of 'Procedure C', after having obtained the opinion of the relevant committee and after the expiry of the period foreseen for the European Parliament's right of control.

The Commission further submitted that the complainant had not suffered any damage due to the fact that his application had initially been declared inadmissible (see the arguments already set out in point 2.2 above). It also stressed that there was no "right" to a subsidy in Community law. The Commission therefore did not compensate persons who had applied for a subsidy for the time they had spent preparing their proposals.

5.3 In his observations, the complainant maintained his view.

5.4 Given that the Commission's initial decision to declare the pre-proposal inadmissible forms the background (and the origin) of the present complaint, the Ombudsman considers it necessary to start his examination of the present claim by considering this issue more closely. Following a request made to this effect by the Ombudsman, the Commission presented a photocopy of the envelope containing the complainant's pre-proposal that was sent to the Commission in October 2003. Judging from this photocopy, it was indeed difficult to establish whether the complainant's pre-proposal had been submitted in time. The Ombudsman finds it difficult to understand, however, why the complainant was not contacted and invited to submit evidence to establish the date on which he had sent his pre-proposal to the Commission. Given that applicants had been required to use registered mail, the issue could have been clarified easily. The Ombudsman finds it even harder to understand why the letter informing the complainant of the (presumed) inadmissibility was only sent on 22 December 2003, more than two months after the Commission's selection committee had decided on the issue on 16 October 2003. In its opinion, the Commission appeared to argue that it had to consult the



Leonardo da Vinci Committee first and wait until the time during which the European Parliament can exercise its control rights had expired before it could write to the complainant. The Ombudsman thereupon asked the Commission to provide more specific information as to the legal provisions on which this view was based. In the Ombudsman's view, the Commission's reply fails to provide convincing information to show that it would have been unable to inform the complainant in good time of its decision of 16 October 2003. In these circumstances, the Ombudsman considers that the Commission must be held accountable for the delay that occurred between its decision of 16 October 2003 and the date on which this decision was brought to the complainant's attention.

5.5 As noted above (point 3.4), the Commission accepts that its initial decision (of 16 October 2003) to reject the complainant's pre-proposal as inadmissible was due to a mistake. The Ombudsman has further found that the Commission can be held accountable for the delay that occurred between its decision of 16 October 2003 and the date on which this decision was brought to the complainant's attention (see point 5.4). Finally, the Ombudsman concluded that the Commission had subsequently failed to ensure equal treatment between the complainant and the other promoters whose pre-proposals had been selected and who had been invited to submit a full proposal (point 3.11). In view of these circumstances, the Ombudsman considers that a claim for damages is well-founded in principle.

5.6 As regards the *quantum* of damages, the complainant has submitted a calculation in which he claimed EUR 2 275 for the costs related to his efforts to make the Commission consider his pre-proposal (30 hours working time at a rate of EUR 75 per hour plus a lump sum of EUR 25 for the costs of sending faxes and making telephone calls) and EUR 8 752,60 on account of the (as it emerged) futile effort to prepare a proposal (20 working days at a rate of EUR 409 per day plus a lump sum of 7 % for costs).

5.7 As regards the first of those items, the Ombudsman considers that it cannot be excluded that a citizen can ask the administration to compensate him for specific costs that he has incurred in pursuing his rights. However, it is difficult to see why the complainant should have needed to spend 30 working hours on the issue. The complainant's letter to the Commission of 29 December 2003 comprises less than 2 pages and its preparation cannot have required a disproportionate amount of time and work. The same applies to the two complaints that the complainant lodged with the Ombudsman (complaint 33/2004/GG and complaint 221/2004/GG). In the Ombudsman's view, the complainant has not submitted sufficient evidence to show that the efforts he had to make in order to make the Commission accept that his pre-proposal had been submitted in time went beyond what can reasonably be expected of a citizen who approaches an EU institution with a view to obtaining a subsidy.

5.8 The Ombudsman considers that different considerations should apply as regards the costs of preparing the full proposal. As the complainant correctly argues, it is possible that he could have prepared a better proposal, or decided to refrain from making a proposal at all, if he had received an evaluation of his pre-proposal.

The Ombudsman considers, however, that the following aspects should be considered as well:



- Even if the Commission had provided the advice that the complainant claims he ought to have been given, there is nothing to prove that the complainant would have refrained from submitting a full proposal. However, making a full proposal did not guarantee success, given that only 50 % of the promoters who were invited to submit a proposal seem to have been selected in the end.

- In his observations on the Commission's opinion, the complainant submitted that he had assumed that the Commission had had no fundamental objections as regards substance or form and that the Commission did not consider that the pre-proposal needed to be optimised in a fundamental way. It was on the basis of this expectation that he had prepared the full proposal. It should be noted, however, that the Commission's letter of 2 February 2004 inviting the complainant to submit a full proposal unambiguously stated that there was no guarantee that a subsidy would be paid.

- As the Commission submitted, there is no "right" to a subsidy in Community law. Persons who apply for a subsidy can only hope to obtain the amount sought without having any guarantee of success. Applicants thus run the risk that the time they spent preparing their proposals was spent in vain.

- In the present case, the complainant accepted to submit a full proposal despite the absence of an evaluation of his pre-proposal. The complainant must thus be presumed to have accepted part of the risk that his proposal would be unsuccessful in the circumstances.

5.9 In view of the above, the Ombudsman considers that it would be good administrative practice for the Commission to offer the complainant fair compensation in respect of the adverse consequences for him of the maladministration that occurred. The Ombudsman therefore makes a draft recommendation below. In the Ombudsman's view, however, the amount that could be considered to be fair in the circumstances of the present case is certainly much lower than the amount claimed by the complainant.

#### **6 Claim for a reply to the "Dienstaufsichtsbeschwerden"**

6.1 The complainant claimed that the Commission should reply to his "Dienstaufsichtsbeschwerden" (complaints against individual members of the Commission's staff).

6.2 In its opinion, the Commission submitted that after having received the complainant's letter of 29 December 2003, it had proceeded to a re-evaluation of the case. According to the Commission, this examination had led to the conclusion that no reproach could be made to the official in charge or the selection committee, which had made an error acting in "good faith". The Commission noted that it had set out its position in its letter of 19 July 2004 in which it had explained that it was not aware of any legal basis for "Dienstaufsichtsbeschwerden" in Community law and invited the complainant to provide more precise indications as to the basis of such complaints. According to the Commission, the complainant had not replied to this invitation.



6.3 The Ombudsman considers that by lodging his "Dienstaufsichtbeschwerden", the complainant wished to complain about the behaviour of the individual officials concerned, and not about the behaviour of the institution as such. However, the Ombudsman considers that there is indeed nothing to suggest that these officials had not acted in "good faith". In the Ombudsman's view, the Commission's position thus appears to be reasonable.

6.4 No maladministration can thus be found as regards this aspect of the case.

## **7 Conclusion**

Article 3 (5) of his Statute directs the Ombudsman to seek, as far as possible, a friendly solution in order to satisfy the complainant. In its opinion, the Commission took the view that the complainant was not entitled to any damages. The complainant, however, maintains that he should received damages amounting to more than EUR 10 000. Given the fact that the respective positions of the complainant and of the Commission lie far apart, the Ombudsman considers that it is unlikely that a proposal for a friendly solution would be successful in the present case.

In view of the above, the Ombudsman therefore makes the following draft recommendations to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

### **The draft recommendations**

- (1) The Commission should deal with the full scope of the complainant's request for access to documents.
- (2) The Commission should offer the complainant fair compensation in respect of the adverse consequences for him of the Commission's failure to grant him treatment equal to that afforded to other applicants whose pre-proposals had been selected and who had been invited to submit a full proposal.

The Commission and the complainant will be informed of these draft recommendations. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 December 2005. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendations.

Strasbourg, 27 September 2005

P. Nikiforos DIAMANDOUROS

- (1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

- (2) The Ombudsman presumes that this kind of information was only given to those promoters whose pre-proposals had been selected and only after the decision on this selection had been



adopted.

(3) OJ 2001 L 145, p. 43.