

## Draft recommendation to the European Parliament in complaint 3051/2005/(PB)WP

Recommendation

**Case 3051/2005/(PB)WP - Opened on 21/10/2005 - Recommendation on 14/06/2007 -  
Decision on 10/01/2008**

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

### THE COMPLAINT

#### *Background*

The complainant is an official at the European Parliament. He used to work in Directorate-General ("DG") II before he was seconded, in the interest of the service, as of 1 January 2002.

According to Article 37 of the Staff Regulations of officials of the European Communities (the "Staff Regulations"), an official on secondment " *shall continue to enjoy all his rights under the conditions contained in Articles 38 and 39 (...) as an official of his parent institution* ". According to Article 38(f), this includes eligibility for promotion for officials seconded in the interest of the service.

Promotions within Parliament take place on the basis of an annual staff assessment procedure, in which a staff report is made and a maximum of three merit points are awarded.

On 3 May 2004, Parliament's Bureau adopted a decision on the " *Politique de promotion et de programmation des carrières* " (2) (the "Bureau's Decision"). It contains the following provisions:

" I.1 Mérite et progression de la carrière

*Le mérite d'un fonctionnaire/agent définit le rythme de progression de sa carrière. (...)*

I.3 Continuité du mérite

*(...) La notion de mérite recouvre, par exemple, la manière dont le fonctionnaire/agent s'acquitte des tâches qui lui sont confiées (...), le niveau des services rendus, une mobilité réussie, le niveau de responsabilité exercée, (...) la capacité d'assumer davantage de responsabilités.*

I.4 Évaluation du mérite

*I.4.1 Le mérite du fonctionnaire/agent est évalué chaque année.*

*Tout fonctionnaire/agent méritant reçoit des points de mérite dans une fourchette de 1 à 3 points (...). (...)*



#### *1.4.5 Ces principes s'appliquent à:*

- tout fonctionnaire et tout agent temporaire visé à l'article 2, point a), du RAA (3), de grade 1 à 13;*
- tout agent temporaire visé à l'article 2, point b), du RAA, de grade 1 à 13, et lauréat d'un concours de la même catégorie/du même groupe de fonctions;*
- tout agent contractuel visé à l'article 3 bis, paragraphe 1, et à l'article 87 du RAA et appartenant au groupe de fonctions I conformément à l'article 80, paragraphe 2, du RAA.*

#### *1.5 Attribution annuelle des points de mérite*

##### *1.5.1 Chaque direction générale/unité autonome (...) reçoit, pour l'ensemble du personnel (4) visé:*

- au point 1.4.5, premier et deuxième tirets ci-dessus, un nombre total de points - à distribuer par grade - égal au double de son effectif (promouvable ou non), à l'exception des grades 14 à 16. À ce nombre s'ajoute une enveloppe de troisièmes points de mérite calculée sur la base de 1 point multiplié par 3% de l'effectif concerné (5). Le nombre total de points ainsi obtenu ne peut être dépassé;*
- au point 1.4.5, troisième tiret ci-dessus, un nombre total de points - à distribuer par grade - égal au double de cet effectif (promouvable ou non), à l'exception du grade 3.*

##### *1.5.3 Les points sont distribués au sein de chaque groupe de fonctions et grade à la suite d'un examen comparatif, grade par grade, des mérites des fonctionnaires/agents.*

#### *1.6 Réserve du Secrétaire général*

*1.6.1 Afin de corriger les distortions dues au nombre restreint de fonctionnaires d'un groupe de fonctions et d'un grade donnés existant dans certaines entités fonctionnelles, le Secrétaire général détient une réserve de points de mérite. Il peut l'utiliser, sur saisine dûment motivée des responsables d'entités fonctionnelles, en attribuant au plus, pour chacune d'entre elles, un point supplémentaire par grade dans un groupe de fonctions déterminé.*

*1.6.2 Cette réserve est également destinée à récompenser, le cas échéant, le mérite exceptionnel de fonctionnaires exerçant temporairement des fonctions spécifiques et dont le travail est difficilement comparable à celui d'autres notés. (...)*

#### *II.2 Les étapes de la procédure sont les suivantes :*

- La proposition d'attribution des points de mérite est établie par le responsable d'entité fonctionnelle lors d'une réunion du collège des notateurs de cette entité. Ce collège a pour mission d'assurer la cohérence entre les points de mérite qui sont proposés au fonctionnaire/agent et l'évaluation résultant du dernier exercice de notation.*
- Les propositions d'attribution de points sont communiquées aux notés et transmises, pour avis, au Comité des rapports.*



*- Le Secrétaire général transmet, pour avis, au Comité des rapports les propositions d'attribution de points de mérite sur sa réserve, établies conformément au point I.6 ci-dessus.*

*- Le Secrétaire général arrête sa décision d'attribution de points de mérite sur sa réserve après avis du Comité des rapports.*

*- Les responsables d'entité fonctionnelle arrêtent les décisions d'attribution de points après avis du Comité des rapports et les communiquent aux notés. (...) ".*

The annex to this decision contains the detailed timetable for the exercise:

*" 1.6 Du 1er au 15 mars: validation, impression et signature des rapports de notation*

*Le notateur final valide les rapports (...). Enfin, le noté lui-même est invité à signer son rapport selon la procédure actuellement en vigueur. (...)*

*1.7 Du 15 au 30 avril: délai de saisine du Comité des rapports sur le contenu du rapport de notation*

*Le noté a 10 jours ouvrables pour introduire un recours auprès du Comité des rapports.*

*1.8 Troisième semaine d'avril: établissement d'un classement par ordre de mérite et réunion du collège des notateurs au sein de chaque DG (...)*

*Lors de la réunion du collège des notateurs par direction générale, les propositions d'attribution de points de mérite sont arrêtées. (...)*

*1.9 Dernière semaine d'avril - première semaine de mai: information des notés sur les propositions de points de mérite*

*Chaque noté reçoit (...) la proposition qui est faite en ce qui le concerne. (...) Sur ce courrier figurent de façon très précise les modalités et le délai de saisine du Comité des rapports, pour le cas où le noté serait en désaccord avec la proposition. (...)*

*1.10 Mois de mai: examen des recours sur le contenu des rapports par le Comité des rapports*

*1.11 Mi-mai - fin juillet: examen des recours quant aux propositions de points de mérite par le Comité des rapports (...)*

*1.12 Deuxième semaine de septembre: décision d'attribution des points de mérite par les DG (...)*

*Sur ce courrier [le courrier informant le noté de la décision] figurent aussi de façon très précise les modalités de réclamation (article 90, paragraphe 2, du statut des fonctionnaires), pour le cas où le noté serait en désaccord avec la décision. (...) ".*

*The complaint to the Ombudsman*



In his complaint to the European Ombudsman, the complainant submitted that, for the years 2002 and 2003, merit points had been awarded to him *before* his staff reports had been drawn up and without a proper assessment of his performance in comparison to that of his colleagues in the same category who had been awarded a third merit point.

Furthermore, he submitted that, for both years, he had been deprived of the possibility of obtaining the Reports Committee's assessment as to whether the proposed number of merit points to be awarded to him was in line with his staff report before the relevant decision was taken. He also submitted that, when deciding on the award of merit points, Parliament had failed to take into account the level of responsibilities he exercised.

According to the complainant, the relevant facts were the following:

For the year 2002, he had, under Article 90(2) of the Staff Regulations, submitted a complaint to Parliament which had decided to consult the Reports Committee. After having examined his file and compared his staff report with those of his category A colleagues who had received a third merit point, the Committee had concluded that the award of a third merit point was justified, and the Secretary-General had thereupon decided to award him a third merit point.

Regarding the year 2003, the complainant had submitted a complaint to the Reports Committee on 5 June 2004 because he had been sent a proposal that two merit points be awarded to him but he had not been sent a staff report.

In its opinion of 9 June 2004, the Reports Committee concluded that the relevant procedure had not been respected. It appeared from this opinion that (i) the proposal for the award of merit points had been signed on 18 May 2004 and sent to the complainant on 24 May 2004, whereas the staff report had been finalised only on 18 May 2004 and submitted to the complainant for an opinion only on 9 June 2004; and (ii) that the assessors for the complainant's DG had met already on 12 May 2004 to discuss the award of merit points.

On 24 June 2004, Parliament's Secretary-General informed the complainant that (i) he shared the view of the Reports Committee that the relevant procedure had not been complied with; (ii) he would ask the complainant's Director-General to re-initiate the procedure "*from the stage of the staff report*" ("*de reprendre la procédure au stade du rapport the notation*"); and (iii) a new proposal for the award of merit points would be made at a meeting of the assessors.

On 16 July 2004, a new version of the complainant's staff report was sent to him, which was identical to the one that had been sent to him previously. He signed and returned this staff report on 19 July 2004. He expressly stated that he intended to turn to the Reports Committee in case the new proposal for the award of merit points should differ from the decision concerning the year 2002, that is, in case he should not be awarded three points.

However, no new proposal for the award of merit points was sent to the complainant. On 8 November 2004, he received the decision of his Director-General that he had been awarded two merit points for 2003.



On 14 January 2005, the complainant lodged a complaint under Article 90(2) of the Staff Regulations. On 21 June 2005, Parliament rejected the complaint and informed him that neither procedural errors nor manifest errors of assessment had been revealed in his case. It appeared from Parliament's decision that the complainant's staff report had not been compared to those of his colleagues. Instead, the Director-General had requested a third point to be awarded from the Secretary-General's reserve, which the latter had apparently rejected. Furthermore, it appeared that two of his colleagues had been awarded a third point from the Secretary-General's reserve, which had been justified on the basis of their excellent and continuously improving performance.

The complainant considered that there had been manifest errors concerning both the procedures and Parliament's decision on the award of merit points itself. He grouped them under three aspects: (i) the alleged lack of a comparative assessment of his performance; (ii) Parliament's alleged failure to send him a correctly drawn up proposal concerning the award of merit points, which had effectively deprived him of the possibility of turning to the Reports Committee; and (iii) Parliament's alleged failure to take the level of his responsibilities into account.

(A) The alleged lack of a comparative assessment

The complainant stated that his performance had not been compared to that of his colleagues in his DG. In its decision on his Article 90(2) complaint, Parliament had justified this on the basis of point I.6.2 of the Bureau's Decision concerning the Secretary-General's reserve.

The complainant argued that the wording and context of the provisions on the Secretary-General's reserve suggested that this reserve was meant as an *additional* option in the procedure, designed to correct possible injustices in individual cases *after* the procedure within the DGs had been concluded. It did not preclude the application of the procedure under point I.5, from which officials who had been seconded in the interest of the service were not excluded. Nothing in these provisions permitted the conclusion that seconded officials were to be excluded from the outset from comparative assessment, as had been done in his case.

(B) The alleged failure to send a correctly made proposal

The complainant stated that the Reports Committee had had decisive influence, to his advantage, on Parliament's decision to award him merit points for the year 2002. On the other hand, the fact that he had not been given the possibility to turn to the Committee as regards whether the proposed merit points for 2003 were in line with the assessment of his performance and that, in contrast to the approach it had adopted in 2002, the Appointing Authority had apparently not turned to the Committee, had clearly had negative consequences for him. Parliament's course of action was a clear infringement of the relevant rules, in particular of point 1.9 of the annex to the Bureau's Decision, which provided that a proposal for the award of merit points had to be sent to the staff member to be assessed, explaining the modalities of appealing to the Committee.

The infringement of the procedural rules also constituted a breach of the principle laid down in Article 43 of the Staff Regulations, according to which an official had to be granted the right to lodge an appeal within the reporting procedure, which had to be exercised before lodging a



complaint under Article 90(2).

The complainant recalled that, in his letter of 24 June 2004, the Secretary-General had stated that procedural rules had not been complied with in his case. However, the reply to his Article 90(2) complaint had not mentioned this letter or dealt with the question as to why the commitments made in it had not been kept. Even if the Secretary-General had been wrong in his assessment regarding the procedural rules - which was hardly likely - the complainant could legitimately have expected that the said commitments would be kept.

(C) The alleged failure to take the level of his responsibilities into account

In his Article 90(2) complaint, the complainant had pointed out that, in the comparative assessment of his performance, the nature of the tasks carried out had to be taken into account. This obligation derived from Article 45(1) of the Staff Regulations, which provided that, "*where appropriate, the level of responsibilities exercised*" had to be taken into account. As regards the year 2002, the Reports Committee had done this by pointing to the high level of responsibilities exercised by him. He added that this was one of the reasons why it considered that a third merit point should be awarded.

His level of responsibilities in 2003 had been even higher than in 2002 because he had had to carry out additional tasks, due to the long-term illness of a director. Furthermore, he had been involved in the renegotiation of an important inter-institutional agreement and had done extensive work in connection with the introduction of the new Financial Regulation.

Notwithstanding these facts, which were mentioned in his staff report, and his express request in his Article 90(2) complaint, this question had not been addressed at all in Parliament's decision.

The complainant claimed that a friendly solution should be found which could consist in Parliament's adopting a similar course of action as had been taken by the Secretary-General concerning the year 2002. He thus claimed that the Appointing Authority should reconsider his case and ask the Reports Committee for an opinion. This opinion should be formulated on the basis of a comparison with all his colleagues in the same DG who had received a third merit point for 2003. He should be given the opportunity to present his point of view before the Committee. In the final decision, the level of responsibilities exercised by him should duly be taken into account.

In summary, the complainant made the following allegations and claims (6) :

- Parliament breached the applicable procedural rules by failing to compare his merits to the ones of his colleagues with respect to the year 2003.
- Parliament breached the applicable procedural rules because it did not give him a correctly drawn up proposal regarding the award of merit points *before* the decision concerning the award of merit points was taken.
- The commitments made to him in the Secretary-General's letter of 24 June 2004 were not respected, although he could legitimately have expected that they would be respected.
- Parliament breached Article 43 of the Staff Regulations by not giving him the opportunity to lodge an appeal within the reporting procedure.



- When it assessed his performance, Parliament wrongly failed to take into consideration the amount of his responsibility in 2003, although this factor was expressly mentioned in Article 45(1) of the Staff Regulations.
- The decision not to compare his staff report with the reports of his colleagues was a breach of the principle of equality, since Articles 37 and 38 of the Staff Regulations provide that an official shall continue to enjoy all his rights in the promotion procedure.
- Parliament treated him unfairly by depriving him of the possibility of appealing to the Reports Committee as regards the question whether the merit points proposed for him were consistent with his performance.

The complainant claimed that the Appointing Authority should re-assess his performance for 2003, and for this purpose obtain, as it had done in connection with the appraisal for the year 2002, an opinion from the Reports Committee. This opinion should be based on a comparison with all the complainant's colleagues who obtained a third merit point for 2003. In this respect, the complainant claimed to be given the opportunity to present his point of view before the Committee.

## THE INQUIRY

### Parliament's opinion

In its opinion, Parliament stated that the College of Assessors in DG External Policies had met on 12 May 2004 and, after taking into account their respective merits and the number of points available, it had decided to award nine category A officials a third merit point. In the case of two of those officials, the additional points had become available after it was established that two officials in the same category merited only one point. For five other officials, the third points were taken from the DG's additional allocation. Lastly, two category A officials had been given a point each from the Secretary-General's reserve, in recognition of their input into the work of the Convention.

Following the Secretary-General's letter to the complainant of 24 June 2004 and despatch of the final version of the staff report on 16 July 2004, a further meeting of the assessors in DG External Policies had been held on 2 September 2004. After considering the difficulty of comparing merits between seconded officials and DG's officials, the Director-General, Mr N., had suggested that the complainant be awarded two merit points and that a request be made to have a third point awarded from the Secretary-General's reserve. The purpose of this reserve was to reward merit in very small units and in the case of staff on secondment. However, the Secretary-General had not acted on this proposal.

### *As to the procedure*

In this case, it was not contested that there had been no comparison of the complainant's merits with those of his colleagues. The reason for this was that a comparison would have been awkward because of his secondment. That was why the College of Assessors had proposed that an additional point be awarded from the Secretary-General's reserve, one purpose of which, according to point I.6.2 of the Bureau's Decision, was " *to reward, where appropriate, exceptional merit displayed by colleagues seconded to an entity whose work is hard to compare with that of other assesseses* ".





Because of his secondment, it was difficult to compare the complainant's merits with those of his colleagues who were working in Parliament. Although the assessment criteria were identical, it would have been inappropriate to compare work carried out in different institutions, in particular as, in this instance, the complainant's position involved specific duties. Therefore it was appropriate to apply point I.6.2 of the Bureau's Decision and to request that a point be taken from the Secretary-General's reserve.

In this connection, Parliament stressed that the respective merits of the DG's two category A officials who were each given a point from the Secretary-General's reserve and of their other colleagues had not been compared, either.

Furthermore, the complainant had failed to show a breach of Articles 37 and 38 of the Staff Regulations. In fact, he had suffered no discrimination as a result of his secondment. Moreover, he retained his eligibility for promotion.

There was established precedent that equality of treatment meant that servants in identical legal circumstances must be treated identically. It was entirely legitimate, however, for officials in different circumstances to be treated differently. As regards the awarding of points, the Secretary-General's reserve was specifically intended for such situations.

For these reasons, the irregularities identified by the Reports Committee in its opinion of 9 June 2004 were in practice immaterial. In any event, comparison with the complainant's Parliament colleagues had not been required and would not have been relevant.

Accordingly, the procedure laid down by Parliament's internal rules had been followed correctly. *As to the complainant's inability to challenge the proposal awarding points and the alleged breach of Article 43 of the Staff Regulations*

The complainant's argument as to an alleged breach of Article 43 of the Staff Regulations was neither admissible nor relevant. The new Staff Regulations, which came into force on 1 May 2004, could not be applied to the 2003 staff reporting exercise. While, furthermore, Article 43 did indeed stipulate that any appeal lodged before a complaint is filed must be submitted as part of the staff reporting procedure, failing which the complaint would be inadmissible, it was for each institution to adopt internal rules concerning such appeals. Such rules had been adopted by Parliament on 6 July 2005 and were therefore not applicable to the complainant's circumstances. The new Article 43 circumscribed the admissibility of complaints. However, the complainant had been able to make use of Article 90(2) in order to enforce his rights. Lastly, Parliament pointed out that the complainant had had no interest at all in contesting the proposal before the Reports Committee because a third point had been proposed for him from the Secretary-General's reserve. Accordingly, the lack of notification of a proposal to award points did not constitute a material procedural error.

*As to the procedure followed for awarding points in 2002*

The complainant could not legitimately submit that it was reasonable for him to expect his merits to be systematically compared with those of his Parliament colleagues. In 2002, the College of Assessors had not requested that a third point be awarded from the Secretary-General's





reserve. It had therefore been appropriate to check whether any manifest error had been made when "ordinary" additional points had been awarded. Since the procedure for the 2003 exercise had been different, the Appointing Authority had therefore in no way been bound by previously adopted decisions.

*As to the case for the decision to award two merit points (in particular in light of Article 45 of the Staff Regulations)*

The possibility that a comparison of merits was made difficult because of secondment to another institution was specifically allowed for by point I.6.2 of the Bureau's Decision. In such a situation, the Secretary-General could, where this was warranted, reward the exceptional merits of officials on secondment. In this instance, it was to be considered whether, for the 2003 exercise, the complainant's merits had been exceptional or not.

His staff report contained factual comments pointing to a high standard of performance. His manager's appraisal was the following: "*Given the nature of [ his ] tasks and the high standard of his performance, I strongly recommend awarding to him a total of three promotion points.*" The final assessor had stated that he was impressed by the level of the appraisal. Apart from the addition of two tasks, however, the complainant's staff report for 2003 was identical to that for 2002.

The complainant seemed to consider that the fact that the reports were equivalent was enough to justify awarding an additional point for 2003, as an additional point had been awarded for 2002. While it was entirely conceivable for an official to receive three points in successive years, as a result of maintaining a very high standard of performance, this could not be expected as of right. It was therefore helpful to look at the staff reports for 2002 and 2003 of the two officials who had been given a third point from the Secretary-General's reserve and whose work was also less easily comparable to that of their colleagues, given that they were involved in the proceedings of the Convention. In their reports, there were a few changes in the remarks, and, above all, in the assessors' appraisals, which suggested an improvement in their performance. In the case of one of the officials, two tasks had been added to this duties and the assessor's appraisal was as follows: "*Proved exceptionally able and very highly motivated, both at the Convention (during the final stage) and during the complex negotiations at the IGC, with a very positive outcome for Parliament's position and image.*" In the staff report for 2003 for the other official, it could be seen that the tasks carried out had expanded. His/her manager had given the following appraisal: "*Exceptionally able in complicated circumstances and under constant pressure (IGC and Convention). Good teamworking ability.*" Undeniably, both officials had improved their level of performance.

Awarding points from the Secretary-General's reserve was an option that came under the Appointing Authority's discretionary powers: provision was made for the Secretary-General's reserve to be used on an exceptional basis only. In this instance, the Appointing Authority had reasonably considered that the complainant's merits for 2003 were not such as to warrant the awarding of a third point.

In this connection, Parliament drew attention to the Ombudsman's decision 1634/2003/(ADB)GG, following a complaint by an official who had not been awarded a third



point from the quota of points allocated to each category. In this decision, the Ombudsman had clearly acknowledged the Appointing Authority's discretion, provided that no manifest error of appraisal had been made. It was reasonable to consider that the awarding of points from the Secretary-General's reserve was also a discretionary matter.

In this instance, however, as the complainant's performance had not improved while those of his two colleagues performing specific duties had improved further, the Secretary-General had been correct in his appraisal of the staff report for the complainant by giving him confirmation that two points were to be awarded.

With regard, lastly, to the alleged breach of Article 45 of the Staff Regulations, under which the level of responsibilities exercised must be taken into account, the inevitable conclusion was that this argument was inadmissible and unfounded. The complainant again cited the new Staff Regulations, which had not been applicable to the 2003 staff reporting exercise. In addition, Article 45 related expressly to promotions. The awarding of points was a different procedure, however, which did not come under Article 45.

In conclusion, consideration of the case in its entirety showed that the decision to award two merit points had been adopted at the close of a properly conducted procedure and that it was well founded.

#### **The complainant's observations**

In his observations, the complainant firstly pointed out a number of what he considered to be inaccuracies and mistakes in Parliament's opinion. The description of his position in Parliament and of his new position had been inaccurate. The object of the complaint that he submitted to the Reports Committee on 5 June 2004 had been distorted. Furthermore, Parliament had, in its opinion, stated that Mr N. had *suggested* at the meeting of assessors of 2 September 2004 that two merit points be awarded to him. However, from the minutes of this meeting enclosed with Parliament's opinion, it appeared that he had in fact *decided* to award him two points (7) .

This was not in line with the procedural rules. According to these rules, a proposal would have had to be made first. This proposal would have had to be submitted to him following which he would have had to be granted ten working days to turn to the Reports Committee.

In Parliament's quotation from the Bureau's Decision, two footnotes were missing. The footnotes were of special importance to his case because they laid down who was to be eligible to receive points and who was to be excluded from the exercise from the outset (8) .

The minutes of the assessors' meeting on 2 September 2004 contained the following quotation from one participant: " (...) *M. X fait référence (...) au retard avec lequel le supérieur hiérarchique [du plaignant] (...) a soumis le projet de rapport.* " In fact, his superior had only been asked for an appraisal on 29 April 2004, which had been transmitted on 6 May 2004. Therefore, the delay was not to be attributed to his superior, but to Parliament.

#### *Concerning the comparison with his colleagues*

It appeared from Parliament's opinion that his DG had awarded third merit points to seven category A colleagues, five of which came from the DG's additional allocation. The other two



points had become available after it had been established that two officials in the same category only merited one point. He had been excluded from the distribution of these seven points *from the outset* . At no point in time, had there, at least, been an attempt to compare his staff report with those of his colleagues.

As he had submitted in his complaint, this was an infringement of the principles laid down in point I.5 of the Bureau's Decision. Parliament had not commented on these rules and their implications. Therefore, he maintained that there was nothing in the provisions on the Secretary-General's reserve that barred the procedure under point I.5 from the outset. Had it been the intention of the Bureau to exclude seconded officials from the procedure under point I.5 from the outset, this would have been explicitly mentioned, as, for example, had been done in the case of officials who were on leave for personal reasons.

*Concerning the comparability of his performance*

The complainant submitted that there were certainly cases in which the work of officials who carried out special duties was difficult to compare with the work of the other assesses as, for example, in the case of colleagues who were seconded to NGOs. However, he argued that, in his case, a comparative assessment would not have been very difficult. His present tasks were similar to those connected with certain posts in Parliament's DG II. The complainant enclosed a job description for his post.

There had apparently been no difficulties in evaluating his performance when his staff report was drawn up. The first assessor had explicitly endorsed his superior's appraisal in its entirety: "*Same assessment as the immediate superior* ". The final assessor did not appear to have had any doubts either ("*I am impressed by the assessment [...]*").

Furthermore, the Reports Committee had not had any difficulties in comparing his performance with that of his colleagues in DG II, after it had explicitly been asked to do so by the Secretary-General during the 2002 procedure (9) . For the year 2004, the Committee had again compared his performance to that of his colleagues without any apparent difficulties. The complainant enclosed a copy of an opinion of the Committee, delivered on 27 September 2005, which contains the following statement:

*" Le Comité des rapports estime, sur la base d'une analyse comparative avec les trois fonctionnaires du grade A\*11 ayant été proposés pour 3 points de mérite par sa Direction générale, que le noté a des mérites équivalents voire supérieurs au moins à deux d'entre eux. "*  
*The Secretary-General's letter of 24 June 2004*

As in the reply to his complaint under Article 90(2), Parliament had again failed to comment on the significance of the Secretary-General's letter of 24 June 2004.

*The involvement of the Reports Committee*

The complainant maintained that the fact that he had been deprived of the possibility to turn to the Reports Committee was a grave procedural error which had had negative consequences for him. Parliament had not explained why the Committee had not been involved during the entire procedure, although his wish that this be done had been clear. In particular, there was no explanation as to why it had not even been considered necessary to involve the Committee when deciding on his complaint under Article 90(2). When he had lodged his Article 90(2)



complaint as regards 2002, the Appointing Authority had turned to the Committee. This would have been an evident way to proceed in relation to the 2003 exercise as well.

#### *The applicability of the Staff Regulations*

Parliament had argued that the new Staff Regulations, which had come into force on 1 May 2004, were not applicable to the 2003 reference period. The new Staff Regulations indeed contained a number of transitional provisions. However, these did not concern Articles 43 and 45 of the Staff Regulations. Therefore, it was to be assumed that they were in force and applicable as of 1 May 2004. It could not be held against him that Parliament's Bureau had, in its Decision, apparently failed to take full account of the new provisions and that this had, in the case of Article 43, apparently only been taken into account on 6 July 2005. Furthermore, if one were to follow the argument that the new Staff Regulations were not applicable, one would also have to conclude that the Bureau's Decision of 3 May 2004, which Parliament had relied on in its opinion, was not applicable for the 2003 reference period.

#### *The level of responsibilities*

The complainant maintained that, as regards the distribution of points from the Secretary-General's reserve, he had been discriminated against because the evaluation had not taken into account the level of responsibilities he had exercised, although this was explicitly provided for in Article 45(1) of the Staff Regulations.

Parliament had stated that the distribution of points was a different procedure that did not fall under Article 45. However, the distribution of points was not provided for at all in the Staff Regulations. It was a procedure developed by Parliament in order to establish a connection between assessment and promotion.

According to point I.1 and I.4.1 of the Bureau's Decision, promotion depended decisively on the number of merit points awarded. The level of responsibilities exercised had to be taken into account already in the distribution of merit points in order for this criterion to play the role in the decision on promotions that was now explicitly provided for in the new Staff Regulations.

Apart from Article 45 of the Staff Regulations, point I.3 of the Bureau's Decision contained an obligation to take the level of responsibilities into account ("*La notion de mérite recouvre [...] le niveau de responsabilités exercée [...]* "). The comparison of his staff reports with those of his colleagues who had been awarded a third point from the Secretary-General's reserve showed that the level of responsibilities exercised had apparently not been taken into account in the Secretary-General's decision. It was easy to see that neither of these two colleagues had carried out management tasks or tasks with financial responsibility.

#### *The assessment of his staff report*

Parliament had stated that, apart from two new tasks, his staff reports for 2002 and 2003 had been "identical". This was the basis for Parliament's contention that his performance had not improved, whereas his colleagues' performance had improved. However, his staff reports for 2002 and 2003 were not identical at all. While his staff report for 2002 stated under "Ability to run his/her department and manage a team": "*Fully copes with his tasks even under difficult circumstances*", the entry in the same section for 2003 was: "*Managed successfully additional tasks due to the prolonged absence of a director*". Therefore, he had successfully shown his capacity to take over new responsibilities as required under point I.3 of the Bureau's Decision.



This showed that his performance had improved in 2003, which the Appointing Authority had not noticed because it had apparently failed to examine his staff report with due diligence. This was an evident assessment error, which had had negative consequences for him.

The complainant confirmed his wish that a friendly solution should be found. Since Parliament had not commented on his suggestion that the Appointing Authority could re-examine his case on the basis of an involvement of the Reports Committee, he assumed that Parliament did not at least exclude this option.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

### **The Ombudsman's considerations**

After careful consideration of Parliament's opinion and the complainant's observations, the Ombudsman was not satisfied that Parliament had responded adequately to the complainant's arguments. This view was based on the following considerations:

1. The Ombudsman recalled that it emerges from the established case-law of the Community Courts that

*" in assessing the interests of the service and the qualifications and merits of the candidates to be taken into consideration in making a promotion decision pursuant to Article 45 of the Staff Regulations, the appointing authority possesses a wide discretion, and in that connection the Community Court's review must be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Community Court cannot therefore substitute its assessment of the qualifications and merits of the candidates for that of the appointing authority " (10) .*

In his decision on complaint 1634/2003/(ADB)GG, the Ombudsman had taken the view that his own review should be based on the same approach. Consequently, the review in the present case was limited to ascertaining whether Parliament followed correct procedures in arriving at its decision and whether this decision was tainted by a manifest error.

The complainant had made seven allegations and one claim. However, since some of the allegations were related, they were dealt with under four headings: (i) The alleged lack of a comparative assessment of the complainant's merits; (ii) Parliament's alleged failure to respect the commitments made in a letter from its Secretary-General of 24 June 2004; (iii) the alleged failure to respect correct procedures during the staff evaluation exercise in relation to 2003; and (iv) Parliament's alleged failure to take into account the level of responsibilities exercised by the complainant in 2003.

2. As regards the alleged lack of a comparative assessment, the Ombudsman noted that Parliament did not contest that there had been no comparison of the complainant's merits with those of his colleagues. Parliament had submitted that a comparison would have been awkward



because of the complainant's secondment. This was why the College of Assessors had proposed that an additional point be awarded from the Secretary-General's reserve, one purpose of which, according to point I.6.2 of the Bureau's Decision, was " *to reward, where appropriate, exceptional merit displayed by colleagues seconded to an entity whose work is hard to compare with that of other assesseses* ".

However, the Ombudsman also noted that there appeared to be nothing in the Bureau's Decision to indicate that officials seconded to other institutions were to be excluded from the comparative evaluation according to its point I.5. As the complainant correctly observed, footnote 3 to point I.5.1 only excludes staff members who have been absent during the whole reference period, because of sickness or CCP (absence for personal reasons), from the " *ensemble du personnel* " to which point I.5 applies. Furthermore, the French version of point I.6.2 of the Bureau's Decision on the Secretary-General's reserve was clearer than the English version quoted in Parliament's opinion. It reads: " *Cette réserve est également destinée à récompenser, le cas échéant, le mérite exceptionnel de fonctionnaires exerçant temporairement des fonctions spécifiques et dont le travail est difficilement comparable à celui d'autres notés.* " (emphasis added) This would indicate that both conditions, namely, the exercise of special functions and the difficulty to compare the work, have to be fulfilled cumulatively in order for this provision to apply. The mere fact that officials exercise special functions would therefore not in itself justify the conclusion that their work is difficult to compare with that of their colleagues, as appears to be Parliament's view.

On the basis of the materials provided to him, the Ombudsman was not in a position to ascertain whether the work connected with the complainant's present post and that connected with a certain post within Parliament are indeed similar, as the complainant argued. However, he noted that the Reports Committee, which is certainly better placed to provide an opinion on this issue, did not appear to have any difficulties in comparing the complainant's work to that of his colleagues within Parliament. In its opinion of 4 May 2004 concerning the 2002 exercise, Parliament reached its conclusion " *après examen du dossier et comparaison de son rapport de notation avec ceux de ses collègues de catégorie A de la Direction Générale des Commissions et Délégations du Parlement européen ayant reçu un troisième point* ". In an opinion of 27 September 2005, concerning the 2004 exercise, which the complainant submitted along with his observations, Parliament made " *une analyse comparative avec les trois fonctionnaires du grade A\*11 ayant été proposés pour 3 points de mérite par sa Direction générale* ".

The Ombudsman furthermore noted that, as regards the 2002 exercise, the Secretary-General had, in a letter of 26 April 2004, explicitly asked the Reports Committee to proceed " *à un examen comparatif de vos mérites avec ceux de vos collègues de catégorie A de la Direction Générale des Commissions et Délégations s'étant vus attribuer un troisième point de promouvabilité* ". Therefore, Parliament itself appeared to accept that a comparison of the complainant's merits with those of his colleagues was possible.

Parliament's remark that the respective merits of the DG's two category A officials who were given a point from the Secretary-General's reserve and of their other colleagues had not been compared either did not appear to constitute a valid argument in the Ombudsman's view. The





fact that a certain practice was consistently applied in similar circumstances did not necessarily imply that it was correct.

Therefore, the Ombudsman's provisional conclusion was that Parliament's failure to compare the complainant's merits with those of his colleagues could constitute a failure to follow correct procedures and thus an instance of maladministration. Furthermore, on the basis of this conclusion, it could not be excluded that this failure could constitute an infringement of the principle of equality in that the complainant might not have been treated equally with colleagues in identical legal circumstances.

3. As regards Parliament's alleged failure to keep commitments made in the Secretary-General's letter of 24 June 2004, the Ombudsman noted that, in his letter, the Secretary-General had stated that he agreed with the opinion of the Reports Committee that the relevant procedural rules had not been respected in the complainant's case. The letter went on to note:

*"J'adresse donc une note en ce sens au directeur général des Politiques externes en lui demandant de reprendre la procédure au stade du rapport de notation. Puis, après validation de l'exercice de notation par les différents intervenants, une nouvelle proposition d'attribution des points de mérite vous concernant devra être établie lors d'une réunion du Collège des notateurs de votre direction générale. "*

The Ombudsman considered that this passage was unequivocally clear as regards the Secretary-General's view and as regards the re-initiation of the complainant's evaluation procedure. He therefore considered that the complainant could indeed legitimately have expected that the commitments made in this letter would be kept.

Parliament had not contested that the complainant did not receive a new proposal for the award of merit points. Indeed, as the complainant correctly noted, it appeared from the minutes of the Assessors' meeting on 2 September 2004 that the award of two merit points had not been *suggested* as Parliament stated in its opinion but this award had been *decided* (see footnote 7 above).

Therefore, the Ombudsman's provisional conclusion was that Parliament's failure to meet the complainant's legitimate expectations could also constitute an instance of maladministration.

4. As regards Parliament's alleged failure to send a correctly made proposal, the Ombudsman noted that it appeared clearly from the procedural rules, in particular from point II.2 of the Bureau's Decision and from the annex to this Decision, that a proposal for the award of merit points has to be sent to the assessees before a decision on these points can be taken and that the assessee has to be given the possibility to turn to the Reports Committee if he does not agree with the proposal (point 1.9 of the annex to the Bureau's Decision).

Parliament argued that the fact that the complainant was not sent a new proposal did not constitute a material procedural error. It further argued that the complainant would not have had





an interest in turning to the Reports Committee, given that a third point from the Secretary-General's reserve had been requested for him. The Ombudsman did not find this argument convincing. The fact that such a request was made did not, as the present case shows, necessarily mean that this third point would be awarded. Furthermore, the complainant had made it very clear that he considered that a comparison should have been made between his performance and that of those seven colleagues of his DG who had been awarded an "ordinary" third point. Therefore, Parliament was in no way entitled to believe that the complainant would not have an interest in challenging the proposal.

The complainant also alleged that it was unfair to deprive him of the possibility of turning to the Reports Committee. The Ombudsman noted that the Committee indeed appears to have played an important role in the complainant's case as regards the 2002 exercise and took the view that, in general, it would appear to be a body that is well placed to detect possible injustices in the staff assessment procedure. Given that all assessees are granted the possibility to turn to the Committee after having obtained the proposal for the award of merit points, it could indeed be unfair for the complainant not to be granted this possibility.

Therefore, the Ombudsman's provisional conclusion was that, given that the complainant could legitimately expect that the procedure would be re-initiated from the stage of the staff report, Parliament's failure to send the complainant a new proposal for the award of merit points could constitute a breach of the applicable procedural rules and could thus also be an instance of maladministration.

5. As regards Parliament's alleged failure to take into account the complainant's level of responsibilities, the Ombudsman considered that it was not entirely clear from the materials submitted to him whether Parliament had actually failed to take this criterion into account when assessing the complainant's performance in 2003. Since, in any event, the Ombudsman had come to the provisional conclusion that there could have been maladministration as regards the three other aspects of the complaint, he did not consider it necessary to inquire further into this matter.

The Ombudsman's provisional conclusion, therefore, was that Parliament's failure to compare the complainant's merits with those of his colleagues, its failure to fulfil his legitimate expectations as regards the Secretary-General's letter of 24 June 2004, and its failure to send the complainant a correctly made proposal for the award of merit points could be instances of maladministration.

#### **The proposal for a friendly solution**

Article 3(5) of the Statute of the European Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant.

The Ombudsman therefore made the following proposal for a friendly solution to Parliament:

Parliament could consider revisiting its decision on the award of merit points to the complainant for 2003 by sending him a correctly made proposal for the award of merit points for that year, by



resuming the procedure at that stage, and by carrying it to its end in conformity with the rules established for that purpose by Parliament.

#### **Parliament's reply to the Ombudsman's proposal**

In its reply to the Ombudsman's proposal, Parliament took the view that it had complied with the procedure laid down in its internal rules.

It pointed out that, in his letter of 24 June 2004, the Secretary-General had informed the complainant that his case was going to be re-examined by the College of Assessors. This review had indeed been carried out at the College's meeting of 2 September 2004. Therefore, the Appointing Authority had honoured the undertaking it had made towards the complainant.

Parliament furthermore submitted that Article I.6.2 of the Bureau's Decision had been correctly applied to the complainant's case.

However, in the interest of resolving the matter, Parliament proposed that the complainant's file be forwarded to the Reports Committee for a comparative assessment of his merits for 2003 " *with those of his category A colleagues in DG External Policies who received a third point* ". Upon completion of that assessment, the Appointing Authority could take a new decision relating to the complainant, against which a complaint could be submitted according to Article 90(2) of the Staff Regulations.

#### **The complainant's observations**

In reaction to Parliament's reply, the complainant informed the Ombudsman that he would agree to Parliament's proposal on two conditions:

- First, that his merits should not only be compared to those of his colleagues in today's DG External Policies but to those of all his colleagues in the former DG II, who had received a third point for 2003; and
- second, that a note, which he enclosed with his letter, should be presented to the Reports Committee before it decided on its opinion.

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

In view of the complainant's submission, the Ombudsman asked Parliament for its views on the conditions formulated by the complainant.

#### *Parliament's reply*

Parliament informed the Ombudsman that the Secretary-General had already referred the complainant's case to the Reports Committee.

As regards the complainant's first condition, Parliament stated that, " *for 2003, [ the complainant ] was employed in the Directorate-General for External Policies. Thus it would be contrary to [ the relevant ] rule to compare the merits of [ the complainant ] with those of his colleagues outside his Directorate-General.* "

As regards the complainant's second condition, Parliament informed the Ombudsman that, in accordance with the complainant's wishes, a copy of the relevant document had been enclosed with the referral to the Reports Committee.

#### *The complainant's comments*

In a further letter to the Ombudsman, the complainant stated that, as he had already pointed out



in his previous letters to the Ombudsman, he had worked in Parliament's DG II (Committees and Delegations) before having been seconded. This DG had, in the meantime, been divided into two. The post to which he would be assigned after the end of his secondment was located in DG Internal Policies. The complainant stressed that he had never worked in DG External Policies.

He added that the award of merit points for the year 2003 had still been decided upon jointly by all assessors of the former DG II. This was clear from the minutes of the assessors' meetings of 17 May 2004 and 6 September 2004. Therefore, the complainant maintained that his merits should be compared to those of all his colleagues in the former DG II, who received a third point in 2003.

*The Ombudsman's second request for further information*

In view of these contrasting positions, the Ombudsman decided to ask Parliament for further information. He asked it to explain the changes that had taken place in the course of the re-organisation of its structure of DGs, which appeared to form the basis of the problem that still remained in the present case.

The Ombudsman asked Parliament to clarify in which DG the complainant had been employed in 2003 and to comment on the complainant's submission that all assessors of the former DG II had jointly taken the decision on the award of merit points for the year 2003.

*Parliament's reply*

In its reply, Parliament stated that, in 2003, whilst being seconded, the complainant had, for administrative purposes, been assigned to DG II, headed by Mr N.

On 1 January 2004, this DG had been split into two in order to create the DG for Internal Policies, headed by Mr W., and the DG for External Policies, headed by Mr N. Since that date, the complainant had for administrative purposes been assigned to the DG for Internal Policies.

As regards the assessment of staff assigned to DG II in 2003, the Secretary-General had decided that Mr N. was to supervise the assessment procedure and chair the meeting of the College of Assessors. This solution had made it possible for all colleagues in the former DG II to be assessed by the hierarchical superiors under whose authority they had been working throughout the 2003 reference period, irrespective of which DG they were assigned to in 2004. According to Parliament, it was therefore "*indisputable that, for the 2003 reference period, [ the complainant's ] merits were compared with those of his colleagues in the former DG II Committees and Delegations*". This was clear from the minutes of the assessors' meetings.

Furthermore, Parliament stated that, likewise, when the complainant's complaint was considered, his merits had been compared with those of his colleagues in the former DG II who had been awarded a third point. The same procedure had been followed by the Reports Committee when it reviewed the matter.

Parliament argued that, for these reasons, the procedure followed in this matter had been valid.

It informed the Ombudsman that the Secretary-General had, following the opinion given by the



Reports Committee, now adopted a new decision on the award of merit points to the complainant for 2003. If the complainant so wished, he could lodge a complaint against this decision pursuant to Article 90(2) of the Staff Regulations.

*The complainant's further letters*

In a letter of 23 April 2007, the complainant informed the Ombudsman about recent developments in his case. He stated that, on 15 January 2007, the Secretary-General had informed him that, having received and assessed the opinion of the Reports Committee, he had decided not to award him a third merit point. According to the complainant, it appeared from this decision that the Secretary-General had only assessed the Committee's opinion. However, he had not compared his merits with those of his colleagues of the DG in which he worked at the relevant time.

The complainant also reported that, on 6 February 2007, he had been granted access to the Committee's opinion, in which the Committee had, following a comparative assessment of his staff report with those of his colleagues, drawn the conclusion "*que le rapport de notation [ du plaignant ] est d'un niveau excellent et que les mérites du noté sont d'un niveau comparable à ceux des collègues précités*". Furthermore, the Committee had pointed out that it had already pronounced itself to the same effect in an opinion of 13 October 2004.

The complainant submitted that, up to that point, Parliament had led him to believe that there had been no such opinion of the Reports Committee. He informed the Ombudsman that he had asked Parliament for access to that document. He also stated that, on 7 April 2007, he had lodged a complaint under Article 90(2) of the Staff Regulations against the Secretary-General's decision of 15 January 2007.

As regards Parliament's reply, the complainant welcomed the fact that Parliament had now acknowledged that he had belonged to DG II in 2003 and to DG Internal Policies in 2004. He recalled that Parliament had repeatedly claimed the opposite in its letters to the Ombudsman. However, he stated that Parliament's new submission unfortunately contained new misinformation, namely, that Parliament had now suddenly submitted that it was "*indisputable*" that his merits in 2003 had been compared to those of his colleagues in the former DG II, both at the assessors' meetings of 17 May 2004 and 6 September 2004 and during the handling of his complaint.

The complainant submitted that this statement was clearly contrary to Parliament's comments in its opinion on the present case and to statements the President of Parliament had made in his letter to him of 21 June 2005. He argued that the fact that Parliament had now suddenly taken a position that was contrary to its previous position created confusion and increased the risk that those responsible within Parliament would draw the wrong conclusions. Furthermore, he suspected that the new statement would serve the Appointing Authority as a justification for not having carried out a comparative assessment of his merits in the framework of the approach to a friendly solution agreed upon with the Ombudsman.

The complainant concluded by stating that he considered the proposal for a friendly solution to have failed. Additionally, he considered that the following new instances of maladministration



had occurred:

- The Appointing Authority had again not carried out a comparative assessment of his merits with those of his colleagues in DG II. This meant that Parliament had repeated the infringement of its internal procedural rules against which he had complained to the Ombudsman.
- Parliament had incorrectly claimed that his merits had already been compared to those of his colleagues in earlier phases of the procedure.
- It appeared that Parliament had been in possession of an opinion of the Reports Committee on his case since October 2004. It was an infringement of principles of fair procedure that Parliament had kept this information from him until now.

The complainant thanked the Ombudsman for his support and asked him to " *call Parliament to order in an appropriate way* " so as to ensure that at least his new complaint under Article 90(2) of the Staff Regulations would be dealt with in line with the applicable rules.

In another letter of 9 May 2007, the complainant informed the Ombudsman that he had now obtained access to the opinion of the Reports Committee of 13 October 2004. He stated that it appeared from this opinion that the Committee had taken the view that a third merit point should be awarded to him and that it had found that a third point was available ("*avis positif avec point disponible*").

## THE DECISION

### 1 Introductory remarks

1.1 The complainant is an official at the European Parliament. He used to work in Parliament's Directorate-General ("DG") II (Committees and Delegations) (11) before he was seconded, in the interest of the service, as of 1 January 2002. In his complaint to the European Ombudsman, the complainant alleged that there had been a number of irregularities in his staff evaluation procedure for the year 2003 and in particular in the award of merit points to him.

1.2 In his latest letters to the Ombudsman, the complainant alleged that two new instances of maladministration had occurred. First, he alleged that Parliament had incorrectly claimed that his merits had already been compared to those of his colleagues in the former DG II in earlier phases of the procedure. In this respect, the Ombudsman notes that Parliament's new submission indeed appears to be contrary to its earlier submissions in this respect, notably its opinion, in which it stated that " (...) *it is not being contested that there was no comparison of the merits of [ the complainant ] with those of his colleagues (...) on the ground that a comparison would have been awkward because of his secondment (...)* ". Second, the complainant alleged that Parliament had kept from him the information that an earlier opinion of the Reports Committee concerning the award of merit points to him for 2003 existed. On the basis of the materials presented to the Ombudsman, there appears indeed to be nothing to suggest that Parliament mentioned this opinion in its earlier contacts with the complainant.

The Ombudsman considers that there would thus be sufficient grounds for him to investigate the complainant's new allegations. However, in order to include these new aspects in his assessment of the present case, he would have to ask Parliament for an opinion on them, which



would inevitably delay his decision on the complainant's original allegations. Therefore, the Ombudsman does not consider it appropriate to pursue these issues further in the framework of the present case. However, the complainant remains of course free to submit a new complaint to the Ombudsman, if he so wishes.

## **2 Alleged irregularities in the award of merit points**

2.1 Parliament was asked for an opinion on seven allegations and on one claim, which essentially concerned (i) the alleged lack of a comparative assessment of the complainant's merits; (ii) Parliament's alleged failure to respect the commitments made in a letter sent to the complainant by its Secretary-General on 24 June 2004; (iii) Parliament's alleged failure to respect correct procedures during the staff evaluation exercise for 2003; and (iv) its alleged failure to take into account the level of responsibilities exercised by the complainant in 2003.

2.2 Having received Parliament's opinion and the complainant's observations, the Ombudsman thoroughly assessed all aspects of the complaint. He came to the provisional conclusion that Parliament's failure to compare the complainant's merits with those of his colleagues; its failure to fulfil his legitimate expectations as regards the Secretary-General's letter of 24 June 2004; and its failure to send the complainant a correctly made proposal for the award of merit points, could constitute instances of maladministration.

2.3 Therefore, the Ombudsman addressed the following proposal for a friendly solution to Parliament:

*" Parliament could consider revisiting its decision on the award of merit points to the complainant for 2003 by sending him a correctly made proposal for the award of merit points for that year, by resuming the procedure at that stage, and by carrying it to its end in conformity with the rules established for that purpose by Parliament. "*

2.4 In its reply to the Ombudsman's proposal, Parliament took the view that it had complied with its internal rules. However, in the interest of resolving the matter, Parliament proposed that the complainant's file be forwarded to the Reports Committee for a comparative assessment of his merits for 2003 *" with those of his category A colleagues in DG External Policies who received a third point "*. Upon completion of that assessment, the Appointing Authority would take a new decision relating to the complainant.

2.5 The complainant informed the Ombudsman that he would agree to Parliament's proposal on two conditions:

- First, that his merits should not only be compared to those of his colleagues in today's DG External Policies but to those of all his colleagues in the former DG II, who had received a third point for 2003; and
- second, that a note, which he enclosed with his letter, should be presented to the Reports Committee before it decided on its opinion.

2.6 Parliament accepted the second condition. However, as regards the first condition, it stated that *" for 2003, [ the complainant ] was employed in the Directorate-General for External Policies. Thus it would be contrary to [ the relevant ] rule to compare the merits of [ the complainant ]*





*with those of his colleagues outside his Directorate-General. "*

2.7 The complainant insisted on the first condition, recalling that he had worked in Parliament's DG II before his secondment. DG II had, in the meantime, been divided in two. The post to which he would be assigned after the end of his secondment was located in DG Internal Policies. The complainant stressed that he had never worked in DG External Policies. Furthermore, he argued that the award of merit points for the year 2003 had still been decided on jointly by all assessors of the former DG II.

2.8 In reply to a request for further information from the Ombudsman, Parliament confirmed that, in 2003, the complainant had, for administrative purposes, been assigned to DG II. On 1 January 2004, the DG had been split in order to create the DG for Internal Policies and the DG for External Policies. However, the former head of DG II had supervised the assessment procedure for 2003, which had made it possible for all colleagues in the former DG II to be assessed by the hierarchical superiors under whose authority they had been working throughout the 2003 reference period. According to Parliament, it was therefore "*indisputable that, for the 2003 reference period, [ the complainant's ] merits were compared with those of his colleagues in the former DG II Committees and Delegations. "* Furthermore, Parliament stated that, likewise, when the complainant's complaint had been considered, his merits had been compared with those of his colleagues in the former DG II who had been awarded a third point. The same procedure had been followed by the Reports Committee when it reviewed the matter.

2.9 In two further letters, the complainant informed the Ombudsman that, in the meantime, Parliament's Secretary-General, having received and assessed the opinion of the Reports Committee, had decided not to award him a third merit point. The complainant also informed the Ombudsman that he had been granted access to the Committee's opinion, in which the latter had drawn the conclusion "*que le rapport de notation [ du plaignant ] est d'un niveau excellent et que les mérites du noté sont d'un niveau comparable à ceux des collègues précités "*. Furthermore, the Committee had pointed out that it had already pronounced itself to the same effect in an opinion of 13 October 2004. In this opinion, to which the complainant had also been granted access, the Committee had taken the view that a third merit point should be awarded to him and had found that a third point was available ("*avis positif avec point disponible "*).

The complainant welcomed that Parliament had now acknowledged that he had belonged to DG II in 2003. However, he submitted that the Appointing Authority had again not carried out a comparative assessment of his merits with those of his colleagues in DG II. This meant that Parliament had repeated the infringement of its internal procedural rules against which he had complained to the Ombudsman. The complainant took the view that the proposal for a friendly solution had failed.

Furthermore, the complainant informed the Ombudsman that, on 7 April 2007, he had lodged a complaint under Article 90(2) of the Staff Regulations against the Secretary-General's new decision on the award of merit points to him.

2.10 The Ombudsman notes that, in response to his proposal for a friendly solution, Parliament





has taken certain steps to accommodate the complainant's concerns. However, given that the complainant is not satisfied with the result of these steps, the Ombudsman is obliged to conclude that it has not been possible for him to achieve a friendly solution in this case.

2.11 The Ombudsman considers that he therefore has to examine whether the steps taken by Parliament have been sufficient to eliminate the maladministration identified in the proposal for a friendly solution or whether, in view of the steps taken by Parliament, there is no need for further action on his part.

2.12 In his proposal for a friendly solution, the Ombudsman had taken the view that it would be appropriate for Parliament to prepare a new proposal for the award of merit points for 2003 and to resume the procedure for the award of promotion points for that year at that stage. This proposal was in conformity with the approach outlined by the Secretary-General in his letter to the complainant of 24 June 2004. In order to prepare such a new proposal, the complainant's merits would have had to be compared to those of his colleagues in the service to which he belonged at the time. Throughout the present inquiry, the complainant has pointed out that at that time, and notwithstanding his secondment, he had belonged to DG II. The Ombudsman regrets the unnecessary confusion that was created by Parliament's insisting, in its letter to the Ombudsman of 6 December 2006, that "*for 2003, [ the complainant ] was employed in the Directorate-General for External Policies*". However, he notes that, in its reply of 12 March 2007 to the Ombudsman's request for further information, Parliament confirmed that, in 2003, the complainant had been assigned to its DG II and that the head of DG II had supervised the assessment procedure for 2003. It thus no longer appears to be disputed by Parliament that the complainant's merits had to be compared to those of his colleagues at the former DG II.

2.13 It appears that instead of resuming the relevant procedure at the stage of the preparation of a new proposal for the award of promotion points for 2003, Parliament decided to consult the Reports Committee. The Ombudsman therefore has to examine whether the approach adopted by Parliament resulted in the complainant's merits being compared to those of his colleagues in DG II at the relevant time.

According to Parliament, the Reports Committee compared the complainant's merits to those of his colleagues in the former DG II who had received a third merit point. However, the Ombudsman notes that the Committee's opinion dates from 14 December 2006 and was thus drawn up shortly after Parliament sent the letter to the Ombudsman in which it insisted that the complainant's merits should only be compared to those of his colleagues in DG External Policies. Furthermore, the Committee's opinion itself refers to the complainant as being part of "*DG Politiques externes*" and does not specify which colleagues served as a reference group for the comparison of his merits. Therefore, the Ombudsman considers that it is not entirely clear whether the Reports Committee did indeed compare the complainant's merits to those of his colleagues in his former DG. The following considerations are based on the assumption that this is the case.

2.14 As to Parliament's new decision following the consultation of the Reports Committee, the Ombudsman recalls that, according to point I.5.3 of the Bureau's Decision, merit points are



distributed within Parliament following a comparative assessment of the relevant officials' merits. This implies that officials having shown equivalent merits should be awarded the same number of merit points. In case the number of merit points available is not sufficient in order to award third points to all deserving officials, it is clear that a decision needs to be taken as to which officials will receive a third promotion point and which ones will not. As regards the latter, the possibility of awarding a third promotion point under the Secretary-General's reserve provided for under point I.6 of the Bureau's Decision might then have to be considered.

2.15 It follows from the opinion of the Reports Committee that the complainant's merits appeared to be of a level comparable to those of his colleagues who had received a third merit point. In order to decide on the award of the third points, Parliament thus needed to proceed to a careful comparison of the merits of the officials concerned and decide, on the basis of all relevant facts, who should be awarded a third merit point. It is clear that this decision necessarily entails a large margin of discretion. However, in his new decision on the complainant's case, Parliament's Secretary-General appears to have based himself on the view that, in order to justify the award of a third merit point to the complainant, the complainant's merits needed to be *superior* to those of his colleagues who received a third promotion point. The Ombudsman considers that such an approach would not be correct. If the complainant's merits were, as the Reports Committee found, *comparable* to those of his colleagues, Parliament had, as mentioned above, to proceed to a careful comparison of the merits of the officials concerned and decide, on the basis of all relevant facts, who should be awarded a third merit point. There is nothing to suggest that such an examination was carried out in the present case. Therefore, the Ombudsman is not convinced that Parliament's approach is sufficient in order to eliminate the maladministration identified by him.

2.16 The Ombudsman notes that Parliament has in the meantime taken a new decision in the complainant's case and that the complainant has challenged this decision by way of a complaint under Article 90(2) of the Staff Regulations. These circumstances raise the question of whether it would be appropriate for the Ombudsman to discontinue his assessment of the present case at this stage, given that the complainant remains free to turn to him again, should he not be satisfied with the outcome of the procedure under Article 90(2) of the Staff Regulations.

2.17 It should be noted, however, that the issues underlying the complainant's dispute with Parliament have already been the subject of a careful and detailed examination by the Ombudsman, including a proposal to achieve a friendly solution. If the present inquiry were discontinued and if the complainant were then to submit a complaint against Parliament's decision on his Article 90(2) complaint concerning the new decision, the Ombudsman would have to envisage opening a new inquiry and again have to ask Parliament for an opinion. Given the further delays and the supplementary work that such a course of action would entail for all parties concerned, it would not appear to be the most economical and appropriate one. In the Ombudsman's view, it would therefore only be sensible to close the present case without further action if it could safely be assumed that Parliament's forthcoming decision on the complainant's Article 90(2) complaint will definitively and satisfactorily resolve the issues raised by the present case. However, the Ombudsman considers that it is far from clear whether this will indeed be the case.



2.18 On the basis of these considerations, the Ombudsman takes the view that it would not be appropriate for him to close the present case at this advanced state of his inquiry. He further considers that the approach he suggested in his proposal for a friendly solution still constitutes an appropriate way of settling the matter and will therefore restate his proposal in the form of a draft recommendation.

2.19 It appears useful to add that Parliament will, in line with Article 8(3) of the Ombudsman's Implementing Provisions, be given a period of three months in order to submit a detailed opinion on his draft recommendation. It appears that the complainant's Article 90(2) complaint was submitted to Parliament in April 2007. According to Article 90(2), Parliament has to notify the complainant of its decision within four months from the date on which the complaint was lodged. This means that Parliament will in any event have to have adopted a position on this complaint before its detailed opinion on the Ombudsman's draft recommendation is due.

### **3 Conclusion**

In view of the above, the Ombudsman makes the following draft recommendation to Parliament, in accordance with Article 3(6) of the Statute of the European Ombudsman:

#### **The draft recommendation**

Parliament should revisit its decision on the award of merit points to the complainant for 2003 by sending him a correctly made proposal for the award of merit points for that year, by resuming the procedure at that stage, and by carrying it to its end in conformity with the rules established for that purpose by Parliament.

Parliament and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, Parliament shall send a detailed opinion by 15 September 2007. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 14 June 2007

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) PE 339.512/BUR. The version of this decision that was made available to the Ombudsman is in French and, quotations from it in the present text are rendered in French.

(3) "Régime applicable aux autres agents" (Conditions of employment of other servants).

(4) "À l'exception des fonctionnaires/agents absents pendant toute l'année de référence pour



raison de maladie ou de CCP, dont les points éventuels sont attribués par la DG Personnel et des fonctionnaires/agents n'ayant pas accompli une période minimale de trois mois de travail dans une institution européenne pendant l'année de référence, pour lesquels l'entité reçoit 1 point."

(5) "L'ensemble des fonctionnaires/agents pouvant recevoir des points, le total obtenu étant, le cas échéant, arrondi selon le principe mathématique."

(6) In a letter of 5 November 2005, the complainant asked the Ombudsman to clarify three of his allegations (numbers 2, 3 and 5) and to add two further allegations (numbers 6 and 7). The Ombudsman decided to accept this request and forwarded the modified allegations to Parliament. The present version is the final version.

(7) The relevant passage in the minutes reads: "*(...) M. N. propose de s'en tenir à la jurisprudence constante de cette Direction générale à travers les années, c'est-à-dire d'attribuer 2 points de promouvabilité et de s'en remettre pour un éventuel 3ème point au Secrétaire général. Il prend, par conséquent, la décision d'attribuer 2 points de promouvabilité pour l'année 2003 à [ le plaignant ] et d'inviter le Secrétaire général à considérer l'attribution d'un 3ème point de mérite de sa réserve.*"

(8) See footnotes 4 above.

(9) In a letter of 26 April 2004, which the complainant had enclosed with his complaint, the Secretary-General stated that, concerning the 2002 exercise, he had decided to ask the Reports Committee to proceed "*à un examen comparatif de vos mérites avec ceux de vos collègues de catégorie A de la Direction Générale des Commissions et Délégations s'étant vus attribuer un troisième point de promouvabilité*". In an opinion of 4 May 2004, the Reports Committee came to its conclusion "*après examen du dossier et de comparaison de son rapport de notation avec ceux de ses collègues de catégorie A de la Direction Générale des Commissions et Délégations du Parlement européen ayant reçu un troisième point*".

(10) Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, paragraph 35.

(11) On 1 January 2004, DG II was split into two parts in order to create the DG for Internal Policies and the DG for External Policies.