European Ombudsman

Draft recommendations of the European Ombudsman in her inquiry into complaint 1125/2011/ANA against the European Network and Information Security Agency (ENISA)

Recommendation
Case 1125/2011/ANA - **Opened on** 12/07/2011 - **Recommendation on** 05/02/2014 - **Decision on** 03/09/2014 - **Institution concerned** European Union Agency for Cybersecurity (Draft recommendation accepted by the institution) |

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

The background to the complaint

1. This complaint is about the manner in which ENISA handled personnel matters which arose within the context of its reorganisation.

2. The complainant has been working for ENISA as a temporary agent since 1 September 2005. Since May 2009, the complainant worked as personal secretary to the Head of the Department X and provided secretarial support at the Secretariat of Department X.

3. From 22 February 2010 to 17 May 2010, the complainant was on sick leave and on part-time work, at the end of which the complainant returned to full-time work.

4. On 19 May 2010, the complainant was orally informed of the decision to re-assign her to a position of personal secretary to the Head of Unit Y.

5. In correspondence sent between 19 and 31 May 2010 to the Head of Department D, the complainant disagreed with the decision and highlighted the impact this had on her health. The complainant enclosed a letter from her doctor dated 27 May 2010, which advised against the transfer. On 1 June 2010, the complainant's reassignment was announced on the intranet.

6. By e-mail dated 13 July 2010 addressed to the Head of Department Z, the complainant complained about the fact that, contrary to Article 25 of the Staff Regulations ('SR'), she was not informed in writing of the reassignment decision nor of the grounds on which that decision was based.

7. On 30 August 2010, the complainant submitted a complaint in accordance with Article 90(2) SR. In her complaint, she asked (a) to receive the official decision and the grounds on which that decision was based; (b) to receive " *an apology for the mismanagement and the disrespectful way* [she] *was treated by the agency in breach of the Staff Regulations* "; (c) to receive " *an apology for having taken an adverse decision affecting her on the basis of her health condition, contrary to the medical advice she provided to the agency* "; (d) compensation of EUR 1 000 for financial damage and for increased costs for medication and medical visits.

8. On 15 October 2010, ENISA's Executive Director ('ED') informed the complainant that she was now being given the tasks of administrative secretary at Department X for 50% of her working time and at Unit Y for the remaining 50%.

9. On 16 December 2010, the ED rejected the complainant's Article 90(2) complaint in its entirety. Specifically, in that decision, ENISA's ED denied that the decision to reassign the complainant to Unit Y was based on health reasons and stated that it was taken in order to improve the use of staff resources and in the interest of the service. Moreover, the job description and duties the complainant had to perform remained unchanged and the complainant did not require additional training. In relation to the complainant's reassignment to Department X and Unit Y on a 50-50% basis that had taken place in the meantime, ENISA's ED explained that this was based on the need to use resources in the most flexible and efficient way possible. The solution chosen to this end was to create a pool of two secretaries which could provide services to both Department X and Unit Y.

10. On 12 January 2011, the Head of Department X informed the complainant that the ED had decided to move her to Department X on a 100% basis. The complainant informed the Head of Department X that she disagreed with the move and asked to meet the ED. The Head of Department X stated that he would discuss the issue with the ED and asked the complainant to send him an e-mail setting out the reasons for her disagreement with the move. On 13 January 2011, the complainant sent the requested e-mail and, on the evening of the same day, she received a reply informing her that she would be working at Department X for 90% of her working time and at Unit Y for the remaining 10%.

11. At the end of February 2011, the complainant was informed that, in addition to her duties in Unit Y and Department X, she was being entrusted, as of 1 March 2011, with the task of secretarial support for the new deputy Head of Department X.

12. On 28 March 2011, the Head of Department X informed the complainant that she was being given the additional task of Financial Mission Coordinator in ENISA's Department Z for the duration of the incumbent's sick leave. By e-mails dated 29 and 31 March 2011, the complainant made representations to the Head of Department X regarding the difficulties which the continuously increasing and changing tasks assigned to her caused and openly expressed her disagreement with the manner in which she was being treated by her superiors.

13. By e-mail dated 5 April 2011, the Head of Department X informed the complainant that, with

effect from 18 April 2011, she was being moved to Department Z on a 100% basis and her new post included the task of Financial Mission Coordinator.

14. On 15 May 2011, the complainant lodged the present complaint with the European Ombudsman.

The subject matter of the inquiry

15. The Ombudsman opened an inquiry into the following allegations and claims.

Allegations:

1) ENISA failed properly to communicate to the complainant the decisions concerning the changes in her professional situation.

2) ENISA failed to provide grounds for its decisions.

3) ENISA failed to consult the complainant before adopting the decisions in question.

4) ENISA failed to reply to the complainant's requests.

5) ENISA failed to observe the duty to have regard for the welfare of officials.

Claims:

1) ENISA should properly communicate the decisions in question to the complainant;

2) ENISA should provide grounds for its decisions;

3) ENISA should apologise for the omission to communicate its decisions, provide the grounds thereof, consult the complainant and reply to the complainant and undertake not to repeat the same conduct in the future;

4) ENISA should apologise for the infringement of its duty to have regard for the complainant's welfare and undertake not to repeat the same maladministration in the future; and

5) ENISA should grant EUR 3 000 as *ex gratia* compensation to the complainant for the psychological hardship she went through because of the problems in her professional environment and the expenses she incurred in order to restore her mental health balance.

16. In her observations, the complainant made a further allegation that ENISA failed to observe due diligence in the preparation of its opinion in the context of the present inquiry. Specifically, the complainant argued that there are errors concerning (a) the complainant's employment record with ENISA, and (b) a quoted passage from a judgment of the Court of Justice [2] . As

regards (a), the complainant argued that ENISA is in possession of all the relevant information about her career in its service and, in light of the fact that ENISA requested an extension of time to submit its opinion, the errors made demonstrate that it does not take the Ombudsman's inquiry seriously. As regards (b), the complainant argued that the error in the quotation distorts the content of the Court's judgment in a way that supports the Agency's arguments.

17. It should be pointed out that, without doubt, diligence is an essential element of good administration and forms an inalienable part of the highest standards of behaviour which the Ombudsman aims to foster within the EU institutions. From an EU constitutional viewpoint, diligence is inherent in the principle of mutual sincere cooperation that the EU institutions must practice among themselves, in accordance with Article 13(2), second sentence of the Treaty on European Union ('TEU'). Specifically, within the context of an inquiry carried out by the Ombudsman, EU institutions " *may submit any useful comment to him* " [3] and are " *obliged to supply the Ombudsman with any information he has requested from them* " [4] . The Ombudsman understands this to mean that the EU institutions must ensure that they address the complainants' allegations and claims raised in an Ombudsman inquiry, as well as deal with any specific questions asked and submit an opinion within the required timeframe. The evaluation and eventual assessment of the information provided is the Ombudsman's own responsibility. In case of errors or inaccuracies or in the event of unjustified delay, the Ombudsman will assess the situation, draw the necessary conclusions and proceed accordingly [5] .

18. In the present case, the Ombudsman takes note of the arguments raised by the complainant. However, given that there is sufficient documentary evidence concerning the complainant's employment on the file, any mistakes that ENISA may have made in this regard would not prevent the Ombudsman from establishing the true record. Moreover, given that the Court of Justice's judgment concerned has been published, any discrepancies identified by the complainant are not likely to affect the substantive examination of the complainant's allegations and claims. Consequently, the Ombudsman does not find sufficient grounds to include the complainant's further allegation in her inquiry.

The inquiry

19. On 14 July 2011, the Ombudsman asked ENISA to submit an opinion on the complainant's allegations and claims. On 30 November 2011, ENISA sent its opinion, which was forwarded to the complainant for observations. On 28 December 2011, the complainant submitted her observations.

20. On 9 July 2013, the Ombudsman made a proposal for a friendly solution involving the making of an *ex gratia* payment to the complainant of EUR 1 000. ENISA sent its reply on 30 August 2013, which was forwarded to the complainant for observations. The complainant sent her observations on ENISA's reply on 16 September 2013.

The Ombudsman's analysis and conclusions

Preliminary remarks

21. In its opinion, ENISA pointed out that the complainant complained to the Ombudsman about the Agency's decisions of 1 June 2010, 18 October 2010, 13 January 2011, end of February 2011 and 5 April 2011, which allegedly infringed her rights. However, the complainant had submitted a complaint in accordance with Article 90(2) SR only against the first decision but not the subsequent four ones. ENISA, therefore, argued that the complaint against the subsequent four decisions is inadmissible, in accordance with Article 2(8) of the European Ombudsman's Statute [6] .

22. Moreover, ENISA argued that the complaint is inadmissible also in relation to the first decision because, when the complainant lodged the complaint with the Ombudsman, that decision had been replaced by another which moved the complainant to Unit Y. In accordance with the Court of Justice's case-law, given that the first decision was no longer in force and had been replaced by a decision that satisfied the complainant, she had no legal interest in submitting the complaint to the Ombudsman [7] .

23. In her observations, the complainant argued that the purpose of Article 2(8) of the European Ombudsman's Statute is to ensure that the Ombudsman's intervention takes place after the possibilities for reaching an understanding between the administration and the official have been exhausted. It is clear that no such possibilities existed in the present case because the instances of maladministration that occurred in relation to the first decision were repeated in relation to the subsequent four decisions. If she had made an Article 90(2) complaint against each of the four subsequent decisions, these complaints would, in light of ENISA's approach to her first complaint, also have been rejected. In addition, the complainant argued that the Ombudsman has already opened an inquiry into the entirety of the complaint, thereby giving a positive response to the question of admissibility. Moreover, the complainant argued that the provisions in the Ombudsman's Statute should not be interpreted in a formalistic manner that is likely to dissuade citizens from turning to him. In the alternative, the complainant argued that the Ombudsman could still examine the complaint against the subsequent four decisions on her own initiative pursuant to Article 228 of the Treaty on the Functioning of the European Union ('TFEU') and Article 3(1) of her Statute.

24. As regards, first, ENISA's argument that the complaint should be rejected in its entirety because the complainant lacks legal interest to challenge the first decision, the Ombudsman notes that lodging a complaint with her constitutes a fundamental right protected by Article 43 of the Charter of Fundamental Rights of the European Union. Moreover, neither the TFEU nor the Statute of the Ombudsman requires that a complainant have a legal interest in order to be able to make use of that right. ENISA's argument, which is based on the requirements for bringing an action before the EU courts, cannot, therefore, be upheld.

25. As regards, second, ENISA's objection to the admissibility of the complaint concerning the

subsequent four decisions, which is based on Article 2(8) of the Ombudsman's Statute, it is undisputed that a complaint concerning work relationships with an EU institution can only be brought before the Ombudsman after the complainant has exhausted all the possibilities for the submission of internal administrative requests and complaints. It is further true that the complainant did not bring internal complaints based on Article 90(2) SR against the last four decisions adopted by ENISA in her regard. However, and as the complainant correctly observes, it clearly emerges from ENISA's submissions that, on the basis of the position adopted by the Agency, any such further complaints would also have been rejected [8] . It follows that requiring the complainant to submit complaints against the subsequent reassignment decisions would thus constitute an empty formality. The Ombudsman furthermore cannot help observing in this context that ENISA's strict insistence on formalities would appear to differ from the rather informal manner in which ENISA itself moved the complainant from one post to another. In any event, it should be recalled that the Ombudsman can also inquire into possible instances of maladministration on her own initiative. In view of the above, ENISA's objections to the present inquiry must be rejected.

26. Before proceeding to the analysis of the complaint, it should be added that, because of overlaps between the complainant's first four allegations and the arguments put forward by both the complainant and ENISA in their support they shall be examined together. To comply with the temporal order in which the alleged instances of maladministration would occur, the Ombudsman will examine the complainant's allegations in the following order: ENISA's alleged failure to (a) consult, (b) give reasons, (c) communicate in writing and (d) reply to the complainant's requests.

A. ENISA's alleged failure to (a) consult, (b) give reasons, (c) communicate its decisions to the complainant in writing, and (d) reply to the complainant's requests

(a) Arguments presented to the Ombudsman

27. Regarding (a), the complainant argued that the obligation to consult staff derives both from the undertaking given by ENISA at the third stage of its restructuring plan and from the right to be heard [9] . The complainant argued that ENISA failed to fulfil this obligation and instead chose a top-down managerial style, without consulting the complainant at all.

28. Regarding (b), the complainant argued that the decisions to reassign her were detrimental to her and should therefore, in light of the settled case-law of the Union courts and Article 25 SR, have stated the grounds on which they were based [10] . Bearing in mind that the first decision was taken only two days after her return to full-time work, the complainant argued that ENISA was led to this decision because of her health problems.

29. Regarding (c), the complainant argued that, by failing to communicate the reassignment decisions in writing, ENISA infringed both the four-stage plan outlined by the Executive Director

concerning the reorganisation of the Agency and Article 25(2) SR.

30. Regarding (d), the complainant argued that she had asked for the first, the second and the third decisions to be formally communicated to her. In her view, by refusing to respond to these requests ENISA infringed the principles of good administration.

31. In its opinion, **ENISA** argued regarding (a) that the first decision was a simple measure of re-organisation and as such not a measure adversely affecting the complainant [11] . As such, it was nothing more than a management decision falling within the wide discretionary power which each administration has to allocate duties among the members of its staff. Because that decision did not affect the official's position under the Staff Regulations or infringe the principle that the post to which an official is assigned should correspond to his grade, it could not be regarded as constituting a measure adversely affecting the complainant within the meaning of the Staff Regulations and, therefore, the administration was not obliged to give her a hearing [12] . In any event, although there was no obligation of prior hearing, the exchanges of e-mails between the complainant and the Head of the Department X from 21 May to 31 May 2010 demonstrate that the complainant was informed before the first [13] decision was taken.

32. Regarding (b), ENISA argued that the first decision was well-founded and reasoned. ENISA argued in support of this position that, according to the case-law, EU institutions have a broad discretion to organise their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, provided, however, that such assignment is made in the interest of the service and conforms with the principle of assignment to an equivalent post. In ENISA's case, the complainant's reassignment constituted a rationalisation measure designed to improve the management of the Agency's limited human resources and was therefore in the interest of the service. The complainant's assignment to the post of personal secretary to the Head of Unit Y involved work and functions of the same nature as previously.

33. In addition, ENISA argued that, according to the settled case-law of the Court of Justice, the administration is not required to give reasons for a measure of internal organisation which is taken in the interest of the service while respecting the principle of correspondence of the post to the official's grade [14] . ENISA added that the complainant did not complain about the content of her new duties but about the fact that she was being " *tossed about* " from one post to another. ENISA also argued that it is settled case-law that the reasons given for a decision are sufficient if that decision was adopted in circumstances known to the official concerned, which enable him to understand the scope of the measure concerning him. This happens, in particular, when the official is in a position to know the context within which the decision adversely affecting him was taken [15] . As regards the first decision, ENISA explained that it had to face important structural challenges which entailed a reallocation of resources so that the orderly functioning of the different departments could be assured. ENISA argued that it emerges from the exchanges of correspondence between the complainant and the Head of the Department X that she was aware of the re-organisation that was ongoing. Finally, ENISA argued that the ED's decision of 16 December 2010 rejecting the complainant's Article 90(2) complaint is fully reasoned. In this way, the administration had fully complied with the obligation to state reasons

and its reasoning in that decision is considered to coincide with the decision transferring the complainant to Unit Y [16] .

34. Regarding (c), ENISA argued that, according to the judgment of the Court of Justice in *Ditterich* , Article 25(2) SR does not specify the method for the communication of a decision [17] . A decision should be considered as having been communicated from the moment it came to the staff member's knowledge whatever the means used. ENISA argued that, in this regard, the first decision was published on the intranet in accordance with ENISA's practice for communicating decisions reassigning staff members. In any event, the complainant had been orally informed of the decision before it was published on the intranet. According to the Court of Justice's judgment in *Kohler* , the possibility that a decision may have oral form is not in principle precluded either by a provision of general scope or by any special provisions in the Staff Regulations [18] .

35. Regarding (d), ENISA pointed out that, because the decision was already published on the intranet, the complainant's request to have the decision communicated to her in writing served no purpose. This is because the complainant knew already of the decision. ENISA confirmed that reassignment decisions are communicated orally to affected staff members and are published on the intranet. It further contended that, given the small size of the Agency, flexibility was necessary and that excessive formalism would risk paralysing it.

36. In her observations, the **complainant** rejected the arguments put forward by ENISA.

37. As regards the need to consult her before the decisions were taken, the complainant argued that even if there had been no legal obligation to do so, ENISA should have still consulted her in accordance with the requirements of good faith and mutual confidence, which should characterise the relationship between officials and the administration. The complainant further contested ENISA's view that the sharing of information, orally and in an informal manner, concerning a decision that had already been taken, without affording her the possibility of actively responding to it, could, in fact, qualify as consultation.

38. As regards the obligation to state reasons, the complainant argued that the wide discretionary powers that ENISA has do not exonerate the Agency from reasoning its decisions. On the contrary, in such cases it is even more important to indicate the reasons on which a decision is based. According to the complainant, ENISA merely made a vague reference to the need for rationalisation and better use of limited human resources, without however explaining how the decisions in question would serve these objectives. What was more, the complainant contested ENISA's view that the first decision did not adversely affect her. The complainant emphasised that that decision was taken just two days after her return to full-time work following health problems and that this made her feel that she was removed from her post because of these health problems, for which the Agency was, in fact, responsible. Moreover, the complainant argued that the cumulative effect of the five reassignment decisions was particularly negative for her. While in November 2006 she was working as secretary to the Head of a Department, in December 2011, she was a simple administrative secretary. In the complainant's view, her downgrading was therefore obvious.

39. The complainant also contested ENISA's arguments that (1) the context of the decision was known to her and that (2) the reasons provided in the ED's decision of 16 December 2010 rejecting her Article 90(2) complaint constitute a sufficient statement of reasons. A vague reference to rationalisation, structural changes and better use of human resources does not provide a sufficient statement of reasons to the affected staff member. Moreover, the complainant argued that it was unclear how these " *structural changes* " would be served by the continuous rotation of the complainant in different positions of multiple and changing tasks.

40. As to the need to communicate the decisions to her, the complainant contested ENISA's interpretation of the relevant case-law of the EU courts. The complainant also disagreed with what she considered to be ENISA's blurring of the requirements of the second (" *communication in writing* ") with those of the third (" *publication* ") paragraph of Article 25 SR. The complainant argued that the fulfilment of the latter does not exonerate an institution from fulfilling the former and from formally communicating to an official its decisions having an adverse effect.

41. As regards ENISA's failure to comply with her requests for a copy of the relevant decisions, the complainant disputed ENISA's view that sending a reply to an e-mail, enclosing with that reply the reassignment decision or providing a link to that decision on the intranet, would risk paralysing the operation of the Agency.

(b) The Ombudsman's preliminary assessment leading to a friendly solution proposal

42. The Ombudsman's role is not limited to reviewing the legality of a decision adopted by an EU administration but to examine whether there has been an instance of maladministration in the process leading to that decision's adoption. In this regard, the Ombudsman has consistently taken the view that, while it is undisputed that good administration requires compliance with legal rules and principles, principles of good administration go further, requiring EU institutions and bodies to act in a reasonable, proportionate, fair and service-minded manner.

43. It was on that basis that the Ombudsman examined the complainant's allegations and claims.

44. As regards (a) ENISA's alleged failure to consult the complainant, the Ombudsman noted that, according to settled case-law, observance of the rights of the defence constitutes, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting him or her, a fundamental principle of Union law which must be guaranteed, even in the absence of any rules governing the procedure in question. That principle, which reflects the requirements of good administration, demands that the person concerned should have been afforded the opportunity to effectively make his or her views known on any matters which might adversely affect him or her [19] .

45. In the present case, ENISA argued that reassignment decisions do not constitute a measure adversely affecting a member of staff, provided that such a decision does not affect the official's position under the Staff Regulations or infringe the principle that the post to which an official is assigned should correspond to his or her grade. The Ombudsman considered that ENISA's position is in conformity with the case-law of the Union courts [20] . She furthermore noted that the complainant did not submit any arguments or evidence to show that ENISA's decisions concerning her did not respect the two above-mentioned conditions.

46. However, the fact that ENISA's approach might be correct from a legal point of view does not mean that it was also in conformity with the principles of good administration. In fact, the Ombudsman considered it obvious that it is good administrative practice to consult a member of staff before reassigning him or her to other duties within an institution. Members of staff are human beings who deserve to be properly respected. Consulting these members of staff before deciding on a reassignment would appear to be the most basic sign of such respect. As ENISA correctly observed, the complainant does not principally complain about the new duties that were assigned to her but about the fact that she was " *tossed about* ". It is precisely such a negative feeling that can be avoided by consulting the member of staff concerned before reassigning him or her to new duties.

47. The Ombudsman noted that there seemed to have been a genuine and detailed exchange between the Head of the Department X and the complainant in relation to the first reassignment decision. However, that exchange took place only after the decision in question had been orally communicated to the complainant. The Ombudsman therefore made a preliminary finding that ENISA did not afford the complainant a genuine opportunity to be consulted before the reassignment decisions were taken.

48. As regards (b) the need to provide grounds for its decisions, the Ombudsman noted that Article 25(2) SR provides that "[a] *ny decision adversely affecting an official shall state the grounds on which it is based* ." Given that ENISA's view that the relevant reassignment decisions did not adversely affect the complainant within the meaning of that provision would appear to be correct (see point 45 above), the Ombudsman was led to the conclusion that ENISA would not have violated any legal obligation by failing to provide the complainant with the reasons for its decisions.

49. From the point of view of good administrative behaviour, however, the Ombudsman considered that the administration may not take decisions which are based on vague grounds or which do not contain individual reasoning [21] . This is particularly so as regards reassignment decisions that, as ENISA correctly observed, fall within its broad discretionary power. The Ombudsman has consistently held that discretionary power is not the same as arbitrary power. An administration which has a margin of discretion should always be in a position to justify, on the basis of objective criteria, why it chooses a particular option [22] . According to the settled case-law of the Union courts, the legal duty to give reasons is respected if the decision was adopted in circumstances known to the official concerned which enable him or her to understand the scope of the measure concerning him [23] . The Ombudsman considered that a similar standard can be applied when examining whether there has been an instance of

maladministration.

50. Mindful of the above, the Ombudsman accepted that it emerges from the information provided to her that the reassignment decisions concerning the complainant appear to have been linked to the context of ENISA's reorganisation and that this context was well-known to the complainant. However, the fact remained that the complainant was informed of the first reassignment decision two days after she had returned to full-time work. In his decision on the Article 90(2) complaint, however, ENISA's ED denied that the decision to reassign the complainant to Unit Y was based on health reasons and explained the importance of flexible and efficient use of resources within the context of ENISA's reorganisation. It should also be noted that the complainant was the subject of five reassignment decisions within a period covering less than ten months. In these circumstances, the Ombudsman was not convinced that the complainant's general knowledge of the reorganisation of ENISA meant that the Agency could take the view that no specific reasons needed to be given for the individual decisions.

51. As regards (c) and (d), the complainant's criticism that ENISA failed to communicate its reassignment decisions to her in writing and to reply to her requests for a copy of the relevant decisions, the Ombudsman considered it obvious that any such decision should be properly recorded, also with a view to including it in the personal file of the official concerned. Although a communication of a reassignment decision through a publication on the Agency's intranet may serve useful information purposes, it can hardly substitute for the need to inform the person most directly concerned. The Ombudsman did not consider that insisting on recording a reassignment decision in a proper document and communicating this document to the person concerned would constitute 'excessive formalism' that would risk paralysing ENISA. In any event, it appeared that the complainant would already have been satisfied if ENISA had replied to her requests by a simple e-mail with a link to the intranet.

52. In light of the foregoing, the Ombudsman's provisional conclusion was that ENISA's omission to (a) consult the complainant, (b) give reasons, (c) communicate its decisions to the complainant in writing and (d) reply to her relevant requests could constitute maladministration. She therefore made a proposal for a friendly solution, in accordance with Article 3(5) of her Statute. This proposal, involving an *ex gratia* payment of EUR 1 000, reflected the Ombudsman's provisional findings on all of the allegations and claims made by the complainant (see paragraph 65 below).

B. ENISA's alleged failure to observe the duty to have regard for the welfare of officials

(a) Arguments presented to the Ombudsman

53. The complainant argued that it follows from the Court's case-law that "... *a particular consequence of the duty to have regard for the welfare of officials and the principle of good administration is that when the competent authority takes a decision concerning the situation of*

an official it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned ." [24]

54. In the complainant's view, ENISA infringed the duty to have regard for the welfare of officials because it failed (a) to take the necessary and effective measures to address the problems in the secretariat of Department X already known to it in May 2009, and (b) to take into account her interest in light of the psychological problems she was facing. This was particularly the case in relation to the first reassignment decision which was orally communicated to the complainant only two days after her return to full-time work and after recovering from psychological problems. Furthermore, the complainant argued that the frequent moves between departments and units and changes to the task allocation were not conducive to her re-integration into her working environment after the health problems she had faced.

55. In its opinion, ENISA reiterated the wide discretionary powers the administration enjoys in organising its work. Although the administration is required to take into account not only the interest of the service but also those of the official concerned, this does not imply that the appointing authority would be precluded from reassigning an official, even against the latter's wish [25] . In the present case, the ED explained, in his decision of 16 December 2010, the steps taken before reassigning the complainant. He stated that he aimed to take into account not only the interest of the service but also his duty to have regard to the welfare of the staff members that were affected by his reassignment decisions. Moreover, the ED took into account that the complainant's tasks would remain the same and that no further training was necessary in order to perform them.

56. The complainant argued that, even if ENISA's argument that it took her interest into account when taking the first reassignment decision were to be accepted, the timing of that decision itself negatively affected her recovery from the health problems she was suffering from. Had ENISA genuinely taken into account the complainant's interest, it could have cancelled the adoption of the reassignment decision or, at least, postponed it. In more general terms, the complainant argued that ENISA failed to address the problems at the Secretariat of the Department X which had emerged in 2009 and were at the source of the complainant's health problems and, moreover, it took four subsequent decisions reassigning her to different units with varying distribution of tasks and changing responsibilities. In this way, ENISA did not help the complainant's productivity and gave the impression of treating her as if she were dispensable.

(b) The Ombudsman's preliminary assessment leading to a friendly solution proposal

57. The Ombudsman noted that ENISA and the complainant are in agreement as to the interpretation of the duty to have regard for the welfare of officials, the point of disagreement being whether, in the present case, ENISA adequately took into account the complainant's interest. The question arises in relation to (a) the first reassignment decision that was communicated orally to the complainant only two days after her return to full-time work,

following an absence due to ill health and (b) all the five reassignment decisions. Regarding point (a), the Ombudsman took the view that reassigning the complainant against her will just two days after return to full-time work is not suggestive of a very caring administration. Regarding point (b), even if the Ombudsman were to accept that reassigning a staff member five times in little more than ten months was in the interest of the service, it could hardly be argued that the interest of the staff member concerned had properly been taken into account in this context.

58. In light of the foregoing, the Ombudsman made the provisional finding that ENISA did not adequately observe the duty to have regard to the complainant's welfare. She therefore made a proposal for a friendly solution below, in accordance with Article 3(5) of her Statute.

C. The complainant's claims

(a) Arguments presented to the Ombudsman

59. The Ombudsman noted that neither ENISA nor the complainant submitted any comments in relation to the first four claims.

60. Regarding the complainant's fifth claim, ENISA argued, in its opinion, that the Ombudsman is not competent, in accordance with his mandate, to impose fines on EU institutions. In any event, a claim for compensation requires that there must be a causal link between the damage suffered by the complainant and the illegal act of the EU institution, which according to ENISA was not the case at present. ENISA pointed out that it did not doubt that, regrettably, the complainant had gone through sensitive health problems and was pleased that she had now fully recovered. However, ENISA doubted that the complainant's difficulties could be attributed to any illegality on its part. Given that, in its view, the decision of 1 June 2010 was not an act adversely affecting the complainant, ENISA wondered how that act could be considered the cause for any damage. Therefore, ENISA argued that the complainant's fifth claim should be rejected.

61. The complainant argued that there are many examples in the body of European Ombudsman decisions in which the EU institution in question has agreed to make an *ex gratia* payment. The complainant added that *ex gratia* compensation does not imply admission of liability and does not establish a precedent. Consequently, the complainant's fifth claim should be dissociated from any discussion as to whether there has been an illegal action or omission on the part of ENISA.

(b) The Ombudsman's preliminary assessment leading to a friendly solution proposal

62. In the present case, the Ombudsman drew the provisional conclusion that ENISA's

omission to (a) consult the complainant before adopting the reassignment decisions, (b) give reasons, (c), communicate the reassignment decisions to the complainant in writing, (d) reply to the complainant's relevant requests and (e) have regard to duty for the welfare of officials could constitute maladministration. The Ombudsman noted that it is good administrative practice to ensure that, if an institution commits an error, it acknowledges it, undertakes not to repeat it in the future and offers an apology to the affected person [26] . Having regard to the complainant's first four claims, ENISA could consider doing exactly this. To this end, the Ombudsman made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of his Statute below.

63. As regards the complainant's fifth claim, the Ombudsman considered that an instance of maladministration, which does not meet the criteria for non-contractual liability, can nonetheless merit the award of an *ex gratia* payment. Such an *ex gratia* compensation serves the important purpose of recognising that the institution has indeed committed an error. The payment of compensation *ex gratia* shows, without establishing any precedent, that the institution cares for the complainant and, at the same time, provides a positive response to a specific complaint [27] .

64. The Ombudsman noted that her inquiry revealed that ENISA's conduct and, more specifically, the five reassignment decisions may have contributed unintentionally to the complainant feeling that she has been treated unfairly. The Ombudsman considered it appropriate and fair for ENISA to recognise the inconveniences suffered by the complainant and alleviate this feeling of unfairness by making an appropriate *ex gratia* payment to her. In view of the facts outlined above, the Ombudsman took the view that an amount of EUR 1 000 would be appropriate.

D. The proposal for a friendly solution

65. In light of the above analysis, the Ombudsman made the following proposal for a friendly solution:

" *Taking into account the Ombudsman's findings, ENISA could consider (i) acknowledging that it failed to (a) consult the complainant before adopting the reassignment decisions, (b) give reasons, (c) communicate the decision concerning the complainant's professional situation in writing, (d) reply to the complainant's relevant requests, and (e) have regard for the complainant's welfare; (ii) offering the complainant an apology, and (iii) making an ex gratia payment of EUR 1 000 to the complainant.* "

(a) The arguments presented to the Ombudsman after her friendly solution proposal

66. In its reply to the Ombudsman's proposal for a friendly solution, ENISA thanked the Ombudsman for confirming that it had acted in conformity with the Staff Regulations. Referring

to the Ombudsman's statement in paragraph 45 above, ENISA stated that compliance with the law is a necessary prerequisite for the actions of the administration to be in line with the principle of good administration. ENISA argued that, " *for decisions to be in conformity with the principle of good administration, they must be solidly and validly based on well-established rules* ".

67. As regards the Ombudsman's findings of possible maladministration, ENISA considered that this concerned ENISA's failure to properly communicate its decisions to the complainant. In response, ENISA briefly summarised its position as it was expressed in the course of the inquiry and stressed that the complainant kept the same duties and functions in the period under consideration and no substantial change was made to the tasks assigned to her. Consequently, according to ENISA, the impression given that she was " *tossed about* " does not correspond to reality or is, at least, excessive. Being a small Agency, ENISA admitted that the degree of flexibility required from its staff members is sometimes higher than that from officials of bigger institutions who enjoy more stability in the performance of their duties.

68. Next, ENISA acknowledged that it may need to revisit its internal communication strategy in order to identify possible weaknesses of communication regarding this kind of decision. However, in the case of the first reassignment decision, it said it was unable to identify an objective justification for the present complaint. ENISA expressed its readiness, in line with the Ombudsman's proposal, to offer additional explanations to the complainant in order to close the matter and contribute to improving the working atmosphere in the Agency. ENISA also stated that the complainant's concerns and suggestions will be taken into consideration for future cases. In addition, ENISA proposed that the complainant actively participates in a working group that the Agency will establish to advise on what improvements may be needed.

69. As regards the Ombudsman's proposal to make an *ex gratia* payment of EUR 1 000 to the complainant, ENISA informed the Ombudsman that it cannot accept it. According to ENISA, this was not a situation in which any legal liability existed. In these circumstances, being under the obligation to properly manage its financial resources, ENISA said that it could not accept the Ombudsman's proposal " *which lacks both legal and factual basis* ".

70. In her observations on ENISA's reply, the complainant expressed her dissatisfaction on the following grounds: (1) ENISA implied that compliance with the principles of good administration would run counter to the law; (2) ENISA took the view that the proposal for a friendly solution only concerns its failure to properly communicate its decisions to the complainant; (3) ENISA argued that the complainant kept the same duties and functions in the posts she was assigned, without, however, submitting any evidence to support this contention; (4) ENISA sought to distort the Ombudsman's friendly solution proposal by stating that it is willing to provide additional explanations for a reassignment that took place three years ago, to take into consideration the complainant's concerns and suggestions for future cases and to assign her to a work group that will study proposals for improvement; (5) ENISA still maintained that *ex gratia* compensation presupposes the unlawfulness of its conduct; and (6) ENISA is unwilling to follow the Ombudsman's proposal that would help in closing the case and in improving the complainant's working conditions.

(b) The Ombudsman's assessment after her friendly solution proposal

71. It should be noted that ENISA made some constructive statements to the Ombudsman's friendly solution proposal. Nevertheless, the Ombudsman finds ENISA's reply most disappointing overall.

72. First, ENISA appears not to have engaged seriously with the content of the proposal. In fact, as the complainant correctly pointed out in her observations, ENISA appears to understand the Ombudsman's preliminary finding of maladministration as concerning its failure to properly communicate its reassignment decisions to the complainant only, when the Ombudsman's finding in fact concerns all five of the complainant's allegations.

73. Second, as the complainant observed, ENISA appears to imply that compliance with the principles of good administration would run counter to the law. This is a most worrying misunderstanding by an EU Agency about the nature and scope of its responsibilities. For ENISA's benefit, the Ombudsman considers it useful to emphasise that compliance with the law is necessary but that it represents only the basic standard of behaviour by which the EU institutions are expected to abide in fulfilling the tasks entrusted to them by the Treaties and by legislation. In addition to compliance with the legal rules and principles, EU institutions must comply with principles of good administration requiring them to act in a reasonable, proportionate, fair and service-minded manner.

74. Third, in spite of the Ombudsman's explanations, ENISA appears to confuse the principles underpinning EU institutions' liability, that are clearly established in the case-law of the Court of Justice [28] , with the principles concerning *ex gratia* compensation in the Ombudsman's established practice [29] . It is firmly established in that practice that if an EU institution wishes to remedy the maladministration it has committed, it could, in appropriate circumstances, make an *ex gratia* payment to the citizen that has suffered prejudice from the instance of maladministration concerned. *Ex gratia* compensation, as the complainant correctly observed, does not require an unlawful behaviour on the part of the institution and does not establish a precedent as regards the instance of maladministration concerned.

75. Fourth, the Ombudsman underlines that ENISA's counter-proposal to offer additional explanations to the complainant for its first re-assignment decision, helpful as that may be, does not suffice to remedy the complainant's grievances because it is limited in scope and reach and, more importantly, it appears to be premised on the assumption that ENISA did nothing wrong. The same applies to ENISA's counter-proposal that the complainant should participate in a working group to study the need for improvement in ENISA's practices. While ENISA in future might well benefit from the advice of such a working group, this would not remedy the complainant's grievances which concern the past. Accordingly, this could not be an alternative to the implementation of Ombudsman's proposed friendly solution in this case. It follows, on the basis of ENISA's unconvincing reply and in light of the above remarks, that, to a large extent,

ENISA has not addressed the Ombudsman's proposal for a friendly solution. It is clear therefore that the Ombudsman's search for a friendly solution has not been successful in the present case.

76. In these circumstances, and following the reasoning set out already above, the Ombudsman confirms her finding that ENISA's actions amount to maladministration in that it;
- (a) failed to consult the complainant before adopting the reassignment decisions,
- (b) failed to give reasons for its actions,
- (c) failed to communicate the reassignment decisions to the complainant in writing,
- (d) failed to reply to the complainant's relevant requests, and
- (e) failed in its duty to have regard for the welfare of officials

In order to eliminate these instances of maladministration, and in accordance with Article 3(6) of the Statute of the Ombudsman, the Ombudsman will make draft recommendations below.

77. Having regard to the content of ENISA's reply to her proposal, the Ombudsman is concerned that the informal style of management that has been identified in the present case might have general implications. Therefore, the Ombudsman considers it appropriate to recommend to ENISA to give the Ombudsman a formal undertaking that it will not commit such instances of maladministration again in the future.

E. The draft recommendations

On the basis of her inquiries into this complaint, the Ombudsman makes the following draft recommendations to ENISA:

1) ENISA should acknowledge that it failed (a) to consult the complainant before adopting the reassignment decisions, (b) to give reasons for its actions, (c) to communicate its reassignment decisions to the complainant in writing, (d) to reply to the complainant's relevant requests, and (e) to have proper regard for the complainant's welfare;

2) ENISA should offer the complainant an apology;

3) ENISA should make an *ex gratia* **payment of EUR 1 000 to the complainant;**

4) ENISA should give the Ombudsman a formal undertaking that it will not commit such instances of maladministration again in the future.

ENISA and the complainant will be informed of these draft recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, ENISA shall send a detailed opinion by 30 April 2014. The detailed opinion could consist of the acceptance of the draft recommendations and a description of how they are being implemented.

Emily O'Reilly

Done in Strasbourg on 5 February 2014

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

[2] Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641, paragraph 9.

[3] Article 3(1) of the European Ombudsman's Statute, available at http://www.ombudsman.europa.eu/resources/statute.faces [Link]

[4] Article 3(2) of the European Ombudsman's Statute.

[5] In complaint 676/2008/RT the Ombudsman made a Special Report to the European Parliament concerning lack of cooperation by the European Commission and, specifically, the excessive delays which occurred in responding to the Ombudsman. The Special Report is available on the Ombudsman's website at http://www.ombudsman.europa.eu/cases/specialreport.faces/en/4639/html.bookmark

[6] " *No complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90(1) and (2) of the Staff Regulations, have been exhausted by the person concerned and the time limits for replies by the authority thus petitioned have expired* ."

[7] Order of the Court in Case T-128/96 *Lebedef v Commission* [1996] ECR II-1679, at paragraphs 19-21.

[8] Mention should be made of the fact that, in his decision on the complainant's Article 90(2) complaint against the first reassignment decision of 1 June 2010, ENISA's ED took a position also on the second reassignment decision of 15 October 2010, that had been taken in the meantime.

[9] Case T-237/00 *Reynolds v Parliament* [2002] ECR II-163.

[10] Case T-404/06 P *Landgren v ETF* [2009] ECR II-2841; Case F-74/07 *Meierhofer v Commission* [2008] ECR SC-I-A-1-319; SC-II-A-1-1745.

[11] Case 280/87 *Hecq v Commission* [1988] ECR 6433, at paragraphs 9-10.

[12] *Ibid* . at paragraph 11.

[13] In its opinion, ENISA only commented on the complaint to the extent that the latter concerned the decision of 1 June 2010.

[14] Case F-4/09 *de Britto Patricio -Dias v Commission* , judgment of 15 April 2010, not reported in the European Court Reports ('ECR'), at paragraph 61; Case T-339/03 *Clotuche v Commission* [2007] ECR-SC I-A-2-29, II-A-2-179, at paragraphs 153 and 195.

[15] Case T-218/02 *Napoli Buzzanca v Commission* [2005] ECR-SC I-A-267, II-1221, at paragraph 65.

[16] Case F-40/10 *Lebedef v Commission* , judgment of 26 May 2011, not reported in the ECR, at paragraph 38.

[17] Case 86/77 *Ditterich v Commission* [1978] ECR 1855, at paragraph 38.

[18] Joined Cases 316/82 and 40/ *83 Kohler v Court of Auditors* [1984] ECR 641, at paragraph 9.

[19] Case F-51/07 *Phillippe Bui Van v Commission* [2008] ECR SC I-A-1-289, II-A-1-1533, at paragraphs 72-73 and the case-law cited there.

[20] See, for example, Joined cases T-78/96 and T-170/96 *W v Commission* [1998] ECR SC-I-A-239; SC-II-745, at paragraph 46: " *An official is adversely affected by an act only where it is such as to have a direct effect on his position in law and thus goes beyond measures which, concerning only the internal organisation of the departments, do not adversely affect the position of the official concerned under the Staff Regulations* .".

[21] Article 18(2) ECGAB.

[22] Decision of the European Ombudsman closing his inquiry into complaint 1874/2008/BB against the European Centre for the Development of Vocational Training, at paragraph 43.

[23] See, for example, Case C-294/95 P *Ojha v Commission* [1996] ECR I-5902, at paragraph 35.

[24] Case T-416/04 *Kontouli v Council* [2006] ECR SCI-A-2-181, II-A-2-897, at paragraph 141.

[25] Order of the Court in Case C-12/05 P *Herbert Meister v OHIM* [2005] ECR SC-B-2-23, II-B-2-143, at paragraph 55.

[26] Decision of the European Ombudsman closing his inquiry into complaint 1051/2010/BEH against the European External Action Service (EEAS), at paragraphs 55-56, Decision of the European Ombudsman closing his inquiry into complaint 3800/2006/JF against the European

Commission, at paragraph 74.

[27] Decision of the European Ombudsman closing his inquiry into complaint 2904/2005/(TN)FOR against the European Commission, at paragraph 64.

[28] Case C-352/98 P *Bergaderm v Commission* [2000] ECR I-5291.

[29] Decision of the European Ombudsman closing his inquiry into complaint 2904/2005/(TN)FOR against the European Commission, Decision of the European Ombudsman on complaint 2111/2002/(BB)MF against the European Commission, Decision of the European Ombudsman on complaint 1878/2002/GG against the European Commission, Decision of the European Ombudsman closing his inquiry into complaint 3031/2007/(BEH)VL against the European Commission.