Draft recommendation of the European Ombudsman in his inquiry into complaint 258/2009/(AF)GG against the Education, Audiovisual and Culture Executive Agency

Recommendation
Case 258/2009/(AF)GG - **Opened on** 17/03/2009 - **Recommendation on** 08/12/2010 - **Decision on** 26/07/2011

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

The background to the complaint

1. The complainant, a registered association, is the town-twinning organisation of the German city of Nidda.

2. In November 2007, the complainant submitted to the Education, Audiovisual and Culture Executive Agency ("EACEA") a grant application for a project under the 'Europe for Citizens' Programme 2007-2013 of the European Commission. This project fell within Measure 1.2 ("Thematic networking of twinned towns") of Action 1 ("Active citizens for Europe") of the said programme. The relevant project concerned a meeting that was to be attended by citizens from Germany, the UK, France, Italy and Austria. The complainant asked for a contribution of around EUR 10 500.

3. Applications for projects that were due to begin between 1 April 2008 and 31 March 2009 had to be submitted by 1 December 2007. The project planned by the complainant was due to take place from 10 to 13 April 2008. According to the complainant, the relevant rules foresaw that the lists of successful projects were to be published by 1 March 2008.

4. By letter dated 27 December 2007, the EACEA acknowledged receipt of the complainant's application. The EACEA further informed the complainant that the lists of the projects selected for funding would be published on its website by 14 March 2008 at the latest and that unsuccessful applicants would be informed in writing.

5. In a letter sent by fax and e-mail on 17 March 2008, the complainant asked the EACEA whether any funding could be expected from the EU and, if so, what the amount of funding would be. In its reply sent by e-mail on 19 March 2008, the EACEA informed the complainant

that it was unfortunately not yet able to answer its questions. The complainant was advised to consult the relevant website on a regular basis.

6. On 1 April 2008, the complainant again turned to the EACEA, stressing the matter was urgent.

7. By letter sent on 6 May 2008, the EACEA informed the complainant that its application had not been successful, since it had been considered to be weaker than other applications as regards (i) the expected results of the action and (ii) the public impact of the project and of its planned follow-up action. According to the complainant, it received this letter on 13 May 2008.

8. On 30 May 2008, the complainant objected to this decision. It criticized in particular the delay that had occurred and stressed that this had ultimately made it impossible to cancel the project. The complainant also objected to the grounds put forward by the EACEA for rejecting the application. On 3 June 2008, the complainant also addressed itself to Mr A., the Programme Manager at the EACEA. The complainant stressed that, without any fault of its own, it had been placed in a financially threatening situation.

9. In its reply of 10 July 2008, the EACEA expressed its regrets for the delay that had occurred. The EACEA submitted, however, that information on the reasons for this delay had been posted on its website. According to the EACEA, the delay had been caused by the fact that decisions on the selection of projects could only be taken and published after consulting the Member States and the European Parliament. According to the EACEA, this procedural requirement had not yet been announced at the time when the 'Europe for Citizens' Programme 2007-2013 was initially introduced. The EACEA further reiterated its view that the rejection of the complainant's application was correct. It added that applicants who carried out projects without having received information on the results of their application were acting at their own risk.

10. On 8 August 2008, the complainant renewed its criticism. It argued that the EACEA ought to have informed it in accordance with the schedule originally foreseen, thereby affording it the opportunity to change or cancel the project. According to the complainant, the EACEA's behaviour infringed the duty of equal treatment of all applications, given that the EACEA knew that the project planned by the complainant was due to take place in early April 2008.

11. On 6 October 2008, the complainant reiterated its position and asked the EACEA to reconsider its application.

12. In a letter sent on 4 November 2008, the EACEA confirmed its position.

13. On 15 November 2008, the complainant again turned to the EACEA. In its letter, the complainant inter alia noted that around EUR 300 000 had been granted for applications from Italy but only around EUR 200 000 for applications from Germany. In the complainant's view, this constituted a lack of balance and it was thus doubtful whether the applications had been assessed properly.

14. In its reply of 2 December 2008, the EACEA again expressed its regret at the delay that had occurred. It also pointed at the fact that all applications had been assessed by a committee assisted by independent experts.

The subject matter of the inquiry

15. In its complaint to the Ombudsman, the complainant basically alleged that the EACEA failed to handle its application properly. In this context, the complainant submitted that (i) the EACEA failed to comply with its own announcements by postponing the date for publishing the lists of the successful projects from 1 to 14 March 2008; (ii) the EACEA failed to comply with the deadline of 14 March 2008 and only informed the complainant of the rejection of its application nearly two months later; (iii) the reasons put forward to explain these delays were unconvincing; (iv) the rejection of its application was unfounded, given the quality of the project carried out; and (v) there was a lack of balance concerning the allocation of funds to the respective Member States, which made it doubtful whether the applications had been assessed properly.

16. The complainant claimed that the EACEA should reconsider its application and in any event grant funding for its project.

The inquiry

17. The complaint was lodged on 29 January 2009. On 25 February 2009, and, at the request of the Ombudsman's Office, the complainant submitted the necessary supporting documents.

18. On 17 March 2009, the Ombudsman asked the EACEA for an opinion on this complaint.

19. The EACEA sent its opinion on 29 June 2009. The opinion was forwarded to the complainant, who submitted observations on 20 August 2009.

20. On 28 September 2009, the Ombudsman asked the EACEA to provide him with further information concerning this case. The EACEA sent its reply on 25 November 2009. The reply was forwarded to the complainant, who submitted observations on 27 January 2010.

21. On 21 April 2010, the Ombudsman addressed a proposal for a friendly solution to the EACEA. The EACEA sent its reply on 25 August 2010. This reply was forwarded to the complainant, who presented observations on 30 October 2010.

The Ombudsman's analysis and conclusions

A. Alleged failure to handle application properly

Arguments presented to the Ombudsman

22. In its opinion, the EACEA provided the following explanations:

23. The relevant applications were first examined as to their eligibility. Of the 96 applications that were received, 23 were rejected as ineligible. The complainant's application was considered eligible. All eligible applications were then examined by two independent experts (7-13 February 2008). Where the difference between the two evaluations was significant, a third evaluation was carried out. The evaluation committee, which met on 14 February 2008, confirmed the results of the experts' assessment and proposed to the Authorising Officer that applications with an evaluation of 50/100 points or more should be selected for funding. The complainant's project was awarded 46/100 and 44/100 points, resulting in an overall result of 45/100 points. On the whole, the evaluation committee proposed funding amounting to a total of EUR 922 353.38 for 58 applications, whereas 15 applications were to be rejected.

24. On 28 February 2008, the list of the projects proposed for funding was submitted to the 'Programme Committee' for its opinion (to be delivered by 7 March 2008) and subsequently to the European Parliament to exercise its right of scrutiny. On 18 April 2008, and following the expiry of the period for Parliament to exercise its right of scrutiny, the Commission signed the selection decision. The list of selected projects was published on the EACEA's website immediately afterwards.

25. The EACEA submitted that the delay that occurred was due to the comitology requirements that were imposed on it in June 2007. This procedure, which lengthened the selection process by 6-8 weeks, was not foreseen when the application procedure was initially launched.

26. According to the EACEA, the following notice was published on its website in March 2008:

"The evaluation of projects (...) has been finalised by the Executive Agency. However, as the selection decisions will only be taken after consulting the Member States and the European Parliament, the final decisions on the selection results are still under way. Advance information on the lists of projects selected for funding will be published on this site as soon as the European Parliament has given its approval to the process (**Mid April**).

Please consult this website regularly on the progress in finalising the selection decisions. In the meantime, please do not contact the services of the Executive Agency/Citizenship Unit, as it is not possible to provide any further information at this stage."

27. The EACEA submitted that, in accordance with Article 116 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2] (the "Financial Regulation"), applicants may only be informed of the outcome of their application after the formal decision is taken. It added that, as soon as it received the formal decision dated 18 April 2008, it proceeded to publish the selection results on its website.

28. The EACEA pointed out that the complainant's application had been evaluated by two experienced independent experts against a formal set of award criteria that had been clearly explained in the relevant guide.

29. The EACEA further stated that grant applications are selected for funding according to merit and not by a quota system with pre-determined levels of budget attributed to eligible countries in advance. However, there was nevertheless generally a relationship between the number of applications received per country and the grants awarded, and this also as regards Germany. As regards the figures for 2008, German applicants submitted 19.7 % of the total applications received and obtained 19.1 % of the grants awarded.

30. The EACEA accepted that, due to the unforeseen application of the comitology procedure, it had failed to meet its own deadline for the publication of the selection results. It added that, in order to inform applicants of the delay, it had published an information notice on its website. This had been done before the initial deadline for the publication of the selection results, and indicated a new date for the publication that was respected.

31. The EACEA submitted that it believed that the rejection of the complainant's application was well-founded and that there was no basis for the claim that there was a disproportionate allocation of funds in relation to German applicants and beneficiaries.

32. The EACEA added that, bearing in mind the adverse impact of the length of time taken by project selection decisions, the Commission had decided to propose the replacement of the lengthy comitology arrangements by a simpler information procedure. The process of amending the legal basis had begun in 2007 and was completed in 2008. It had effect as from January 2009. The EACEA pointed out that, in that light, the previously published calendar for the submission of applications, which was valid for a period of seven years, remained valid and was therefore not changed.

33. In its observations, the complainant submitted that the EACEA could have informed it earlier about the result of the assessment of its application. In its view, a pre-decision had been taken on 14 February 2008, and at least those applicants that had not received an assessment sufficient for funding ought to have been informed at that stage. Information could further have been provided after the relevant list had been established on 28 February 2008. The complainant added that the information that had been provided in March 2008 was untrue or completely misleading. It further submitted that, if a notice had been published on the EACEA's website, it was to be asked why its attention was not drawn to this fact in response to its queries of 17 March and 1 April 2008. The complainant stressed that the EACEA had thus contributed to the serious financial problems in which it found itself now, given that in the end the project could not be cancelled. It further argued that it was not convinced that its project had been properly assessed, given that there could hardly have been many projects as its own, envisaging participants from five Member States and developing so many activities. The complainant pointed out that in 2008 it had received a distinction for its work.

34. Having examined the EACEA's opinion and the complainant's observations, the Ombudsman decided that he needed further information to deal with this case. He therefore asked the EACEA to reply to the following two questions:

(1) In its opinion, the EACEA explained that the consultation of the Programme Committee and the European Parliament could take from six to eight weeks. The EACEA further noted that the duty to proceed to these consultations had been imposed on it in June 2007, i.e., more than five months before the deadline for submitting applications as regards projects beginning on or after 1 April 2008. In these circumstances, the Ombudsman considers that it must have become clear to the EACEA fairly soon that the deadline of 1 or 14 March 2008 for informing applicants of the result of the procedure was hardly realistic. Could the EACEA please explain why applicants were nevertheless only informed in March 2008 that there would be a delay? Could the EACEA please also comment on the complainant's assertion that it was originally foreseen to inform applicants by 1 March 2008 at the latest?

(2) In its opinion, the EACEA invoked Article 116 of the Financial Regulation to explain why it had not informed the complainant earlier. However, this provision merely stipulates that applicants are to be informed of the decision on their applications and that reasons need to be given in case of a rejection. Could the EACEA please specify why this provision would have prevented it from informing the complainant, when responding to the questions it had put forward in March 2008, that the final decision had not yet been taken but that it did not consider that the complainant's project should be selected for funding? In this context, regard should be had to the fact that, according to the EACEA itself, the consultation of the Programme Committee and the European Parliament only concerned the list of projects proposed for funding.

The Ombudsman also asked the EACE to provide anonymised copies of the evaluations of the complainant's project prepared by its experts.

35. In its reply, the EACEA provided the documents the Ombudsman had asked it to submit and made the following further comments.

36. At the time of the adoption of the 'Europe for Citizens' Programme 2007-2013, both the EACEA and the Commission's Directorate-General Education and Culture understood that the comitology procedure did not apply to town-twinning actions. However, in 2007, and following a review of the legal basis, the Commission concluded that comitology procedures should apply to all such selection decisions. Steps were thus taken to amend the legal basis in order to avoid the lengthy comitology arrangements. The new rules were in force since January 2009. In light of this process, it was decided to maintain the calendar originally foreseen in order to avoid multiple and successive changes to the timetable for grant applications, which would, in the view of the EACEA, have been more damaging to potential applicants who often prepare their proposed activities 9-12 months in advance.

37. The EACEA pointed out that for the selection procedure concerned 96 applications had been received. However, only one complaint appeared to have been lodged.

38. The EACEA acknowledged that the programme guide valid at the time had been indicated that the selection results would be published "on 1 March at the latest".

39. The EACEA further submitted that the comitology procedure applied to the whole selection procedure, including both selected and rejected projects. Before the formal selection decision had been taken, it was therefore not possible to provide information either to those applicants whose projects were proposed for funding or to those where the proposal was to refuse funding.

40. In its observations, the complainant expressed the view that the position adopted by the EACEA was not citizen-friendly. It also criticized the fact that it had not been awarded any points as regards "quantitative criteria" due to the lack of involvement of citizens from Member States that joined the EU in or after 2004, even though its application had foreseen the participation of citizens from five Member States.

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

41. The present case basically concerns three issues, i.e., (i) the way in which the complainant's application was handled, (ii) the substantive assessment of the complainant's application, and (iii) a perceived imbalance as regards the allocation of funds under the relevant programme. Before dealing with the procedural issue, which constitutes the core of the present case, the Ombudsman considered it appropriate briefly to discuss the other two issues.

42. As regards the substantive assessment of the complainant's application, the EACEA explained that all applications were examined by an evaluation committee assisted by independent experts. It further explained that each application was evaluated by two independent experts. This was confirmed by the anonymised copies of the evaluations of the complainant's application, which the EACEA kindly provided at the Ombudsman's request. Given the margin of appraisal that is necessarily inherent in such evaluations, the Ombudsman took the view that maladministration could only be found as regards the outcome of this assessment if the evaluators or the evaluation committee had committed a manifest error. No such manifest error had been alleged or established in the present case.

43. That having been said, the Ombudsman understood the complainant's frustration at the fact that no points were awarded to its application as regards what the relevant programme guide and the evaluation form referred to as 'quantitative criteria'. The EACEA provided excerpts from the version of the programme guide that was applicable to the complainant's application. According to this information, the programme guide contained the following information under the heading 'quantitative criteria': "Projects involving partners from Member States which joined the EU before 1 May 2004 and those which acceded as from that date will be given special attention." The 'quantitative criteria' accounted for 10 out of the maximum of 100 points that could be given to an application. In the evaluation forms provided by the EACEA, the following text is set out under the heading 'quantitative criteria': "1. does the project involve partners from

Member States which joined the EU before 1 May 2004 and those which acceded as from that date? YES/NO".

44. Both the wording of the evaluation form and the outcome of the evaluation of the complainant's application strongly suggested that points were only available as regards 'quantitative criteria' if a project involved participants from a Member State that joined the EU in or after 2004. The Ombudsman had considerable doubts whether this approach represented an appropriate interpretation of the statement made in the programme guide according to which projects involving new Member States "will be given special attention". In effect, if such projects were to be given "special" attention, one would have expected that other projects would also be given some attention under the relevant heading, which however did not appear to have been the case. The Ombudsman considered it useful to point out that the version of the programme guide that appeared to be in use when he made his proposal for a friendly solution stipulated that 'quantitative criteria' even accounted for 20 % of the points available within the evaluation procedure. For the sake of completeness, it had to be added that the criterion that appeared to have been applied in this context could hardly be called a quantitative one, since it did not focus on the number of Member States involved, the number of participants or other quantitative aspects, but rather on whether or not one partner from one of the 'new' Member States participated in the proposed project.

45. Given the conclusions at which he arrived as regards the procedure as such, the Ombudsman considered, however, that there was no need for further inquiries concerning this issue.

46. As regards the alleged lack of balance concerning the allocation of funds between Member States, the EACEA provided a precise answer to show that the complainant's concern was unfounded. The Ombudsman considered this answer to be convincing. He noted that the complainant had not reverted to this issue in its observations.

47. Before turning to the core of the case, the Ombudsman considered it useful to make one further comment. In its reply to the Ombudsman's request for further information, the EACEA pointed out that, even though 96 applications had been received as regards the selection procedure concerned, only one complaint appeared to have been lodged. The Ombudsman presumed that the EACEA made this statement in order to highlight what it seemed to consider the limited relevance of the problem that occurred in this case.

48. The Ombudsman did not consider the EACEA's argument to be convincing. It appeared obvious that, although all applicants were likely to have found the delay that occurred in the present case to be unsatisfactory, its potentially negative effects were most acute as regards those applicants whose projects were not selected for funding. In order to obtain a clearer picture, the 58 applicants who received funding should therefore be disregarded. In addition to that, no specific information was available as regards the 23 applications that were rejected as being ineligible. However, the EACEA kindly provided a list of those 15 applications that were eligible but which did not receive any funding. Of these applications, 10 concerned projects that were to take place in May, June, July, August or even September 2008. The EACEA explained

that the list of successful applications was published on its website immediately after the relevant decision had been signed on 18 April 2008. It was therefore not difficult to see that the said 10 applicants were in a more favourable position than the complainant, whose project had already been completed by that date.

49. In addition to that, the above-mentioned argument put forward by the EACEA failed to take into account the fact that a virtually identical problem had already been raised in complaint 1537/2008/(TJ)GG. This case concerned a meeting to be held within the context of a project under the 'Europe for Citizens' Programme 2007-2013, which fell within Measure 1.1 ("Town twinning Citizens' meetings") of Action 1 of the said programme. The relevant meeting was due to start on 12 April 2008. In that case, applicants were to be informed by 1 April 2008. However, it was only on 10 April 2008 that the EACEA informed the complainant in that case that its application was considered ineligible. In that case, the EACEA also invoked the lengthiness of the comitology procedure in order to explain the delay that had occurred.

50. As regards the core of the present case, the Ombudsman noted that the EACEA did not dispute that it failed to comply with the deadline for informing applicants of the outcome of the procedure of 1 March 2008 that was foreseen in the programme guide. Nor did the EACEA deny that it also failed to comply with the deadline of 14 March 2008 that it had mentioned in its letter to the complainant of 27 December 2007.

51. The EACEA did not dispute the complainant's statement that it received the letter of 6 May 2008 informing it of the rejection of its application only on 13 May 2008. However, it was fair to acknowledge that, in its e-mail to the complainant of 19 March 2008, the EACEA advised the latter regularly to check its website where the list of successful applications was to be made available. As already mentioned, the EACEA submitted, without being contradicted by the complainant, that the list of successful applications was published on its website immediately after the relevant decision had been signed on 18 April 2008. Given that the complainant's application was not mentioned in this list, the latter would have had to understand from that list that its application had been unsuccessful. The complainant did not specify when it became aware of that list. The Ombudsman considered, however, that there was no need to pursue this detail, which was without relevance for the overall assessment. In effect, it was clear that the complainant was in any event informed or became aware of the rejection of its application only after its project had already been completed.

52. In order to explain the delay that occurred in the present case, the EACEA referred to the comitology requirements that were imposed on it in June 2007. According to the EACEA, this procedure, which lengthened the selection process by six to eight weeks, was not foreseen when the application procedure was initially launched.

53. The Ombudsman did not find the EACEA's position convincing, and this for two reasons.

54. First, although it appeared clear that the EACEA needed to comply with the relevant procedural requirements and thus had to accept the fact that consulting the Member States and the European Parliament would lengthen the selection process by six to eight weeks, it could

not be said that this necessarily meant that delays could not be avoided. As a matter of fact, the EACEA had two possibilities to avoid any such delays. The first alternative would have been to adjust the relevant deadline from the very beginning, so as to include the time that was necessary for complying with the requirements under the comitology procedure. Given that the EACEA acknowledged that it became aware of these requirements already in June 2007, whereas the deadline for submitting applications was 1 December 2007, there was clearly ample time to do so. It was true that the EACEA had argued that it refrained from doing so in order to "avoid multiple and successive changes to the timetable for grant applications", as this would not have been in the interest of applicants. The Ombudsman noted, however, that in practice the EACEA did precisely what it claimed it wished to avoid, i.e., proceed to multiple and successive changes to the timetable, by first extending the deadline originally foreseen from 1 March to 14 March 2008 and then by extending it even further without giving any more specific date than the indication 'mid April'. Setting a realistic deadline from the very beginning would also have given those applicants whose projects were envisaged to take place within the first half of April 2008 the chance to try and postpone these projects. In any event, setting a realistic deadline would have created the clear and easily intelligible conditions on which applicants wishing to organise such projects depend. It should not be forgotten that these applicants very often are associations of devoted citizens, such as the present complainant, which can hardly be expected to have the flexibility that may be expected of commercial undertakings.

55. Second, whilst it was clear that the EACEA had no direct control over the way in which the third parties it needed to consult dealt with the matter, this did not alter the fact that it was the EACEA that was in charge of handling applications under the 'Europe for Citizens' Programme. In the Ombudsman's view, it followed from this that it was the EACEA's responsibility to arrange the procedure in a manner that avoided unnecessary delays and that it was the EACEA that had to be held responsible for any delays that did occur. According to the EACEA, the consultation of the Member States and the European Parliament could take from six to eight weeks. In these circumstances, the EACEA should have seen to it that the deadline(s) of 1 (or 14) March 2008 could be met even if the said consultation took eight weeks.

56. The information available to the Ombudsman suggested that this duty was not sufficiently respected in the present case. It took more than two months before the eligible applications were evaluated by independent experts and the evaluation committee. Even taking into account the fact that this period included the Christmas vacation, the Ombudsman could not but conclude that this was far too much in order merely to establish the eligibility of applications. If it took the experts and the evaluation committee merely a week to evaluate the 73 applications that had been declared eligible, it was difficult to see why more than two months were needed to ascertain the eligibility of all 96 applications.

57. A further two weeks appeared to have lapsed between the date when the evaluation committee concluded its work on 14 February 2008 and the date when, on 28 February 2008, the Authorising Officer submitted the list of projects proposed for funding to the Programme Committee and subsequently the European Parliament. No explanations had been provided for this further delay.

58. In view of the above, it seemed highly likely that the EACEA could have organised the procedure in such a way that, even with the six to eight weeks added by the need to consult the Member States and Parliament, the deadlines of 1 or 14 March 2008 could have been respected.

59. The Ombudsman understood that the EACEA was not in a position to inform those applicants who were to receive Community funding before the formal decision to that effect had been was adopted. However, he remained unconvinced that no information could have been given before that date to applicants whose applications had not been supported by the evaluation committee. In particular, the Ombudsman considered that no convincing reason had been put forward as to why the EACEA would have been unable to provide any useful information in its e-mail of 19 March 2008 by which it replied to the complainant's query. [3] What was more, no reply appeared to have been given to the complainant's e-mail of 1 April 2008, even though it was marked as a 'cry for help' ("Hilferuf") and even though the complainant clearly stressed how urgent the matter was. This was not the way a citizen-friendly and service-minded administration ought to behave. The Ombudsman could not help thinking that the EACEA decided to follow a formal course of action, without paying due regard to the interests of the complainant and of the citizens it represented.

60. In light of the above, the Ombudsman made the preliminary finding that the EACEA failed to handle the complainant's application properly, and that such failure amounted to an instance of maladministration. He therefore made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman.

61. It appeared useful to add a few additional comments in order to allow the EACEA to deal with the Ombudsman's proposal.

62. In the course of his inquiry into complaint 1537/2008/(TJ)GG, the Ombudsman also arrived at a provisional finding of maladministration as regards the delay that had occurred there. In that case, the Ombudsman only suggested that the EACEA apologize to the complainant for the delay. This approach was motivated by the consideration that, in that case, the EACEA had rejected an application as ineligible, that the Ombudsman considered this decision to be wrong and that, in his proposal for a friendly solution, he also suggested that the EACEA should reconsider the application. Against this background, no further proposals needed to be made at the time in so far as the issue of delays was occurred.

63. The present case was different in that the complainant's application was rejected not as ineligible, but as not meriting Community funding and that the Ombudsman considered, accepting the margin of appraisal that is necessarily inherent in such evaluations, that this decision did not constitute maladministration.

64. The fact remained, however, that, in the interest of furthering the interests of the European Union and of EU citizens, an association of citizens was led to incur considerable expenditure which could easily have been avoided if the EACEA had proceeded properly and paid due regard to the complainant's difficult situation. It was true that the complainant could probably

have limited the damage by cancelling the whole project at a late stage, even though it rightly observed that even then some expenses would most likely have had to be incurred. To that extent, the EACEA was correct in arguing that applicants who carry out projects without having received information on the results of their application are acting at their own risk. However, the Ombudsman could not but stress that using this formal argument in each and every case was bound to have a chilling effect on the readiness of European citizens to engage in the work of building up Europe. The present case highlighted this negative effect. The complainant indicated that it had incurred debts and was unable to envisage any further projects for the benefit of EU citizens. A body that was meant to propagate a 'Europe for citizens' should therefore think very carefully before invoking the above argument in a situation where it failed to comply with its duties.

65. In view of the above, the Ombudsman considered that the EACEA should provide an *ex-gratia* payment in order to try and offset the negative consequences resulting from the way in which the complainant's application was handled. The Ombudsman trusted that the way in which this was done and the amount of the sum to be offered could be left to the institution concerned. He therefore addressed a proposal for a friendly solution to that effect to the EACEA.

The arguments presented to the Ombudsman after his friendly solution proposal

66. In its reply, the EACEA recalled that it had recognised that it failed to meet initially foreseen deadlines. It thus understood most of the points raised by the Ombudsman in this regard. However, the EACEA submitted that in its view the present case could nevertheless not be considered as maladministration, given that the Commission and itself had taken corrective measures during the selection, as well as preventive measures designed to avoid any similar delays in the future.

67. The EACEA pointed out that, as a first corrective measure, a proposal was made to replace the lengthy comitology arrangement by a procedure under which Parliament and the Member States would only be informed. The relevant decision, which had been adopted in 2008 and which was in force since January 2009, should prevent similar delays in the future.

68. As regards its decision to maintain its calendar for the submission of applications, the EACEA stressed that the relevant information had been planned for seven years and widely published. Amending the calendar would have led to many more changes for town-twinning organisations, one of which would have been that a specific period in 2008 would not have been covered anymore.

69. The EACEA added that, in parallel with the decision not to change the calendar, transitional measures had been put in place, like shortening its own procedure and reducing Parliament's right of scrutiny, so as to minimize the effects of the comitology procedure on the selections that took place during that period and to respect as much as possible the deadlines that had been

fixed.

70. The EACEA pointed out that the decision not to publish the selection results before any formal decision had been taken was a precautionary measure in order to avoid the negative impact of any possible change which could occur during the decision-making process. This approach was followed in all programmes managed by the EACEA. The EACEA considered that it could not be regarded as bad practice.

71. The EACEA recognised that it failed to reply to the complainant's e-mail of 1 April 2008. This was regrettable, but also exceptional, as the complainant had been in contact with its services through various exchanges of letters, e-mails and telephone calls during which it was informed of the situation. Moreover, the information made available on its website in March 2008 clearly stated that the decision on the selection would be taken in mid-April. The complainant was thus aware that this decision would be taken after the scheduled starting date of its project.

72. The EACEA submitted that when the complainant received the information about the delay in March 2008, it should have considered postponing the starting date of its project, as other candidates in the same situation had done in good faith.

73. The EACEA further submitted that the period of three months that had lapsed between the deadline for the submission of proposals and the date when the Programme Committee and Parliament had been informed was reasonable, given the number of proposals received and the work involved at each step of the evaluation. As regards the time it took to evaluate the eligibility of applications, the EACEA pointed out that the relevant period included two weeks during which it still received valid proposals through the post. The time between the date on which the evaluation committee concluded its work and the date when the Programme Committee and Parliament had been informed was devoted to the preparation of the documentation needed for the comitology procedure.

74. The EACEA stressed that it had at no time suggested that the complainant's application would be funded. There was therefore no possible legitimate expectation on the complainant's side.

75. An *ex-gratia* payment would result in unequal treatment as regards other projects that had not been funded, notably those that had received a higher score than the project in question. In addition, making such a payment could, in the future, be perceived as an incentive to anticipate projects in order 'to increase the chances of obtaining a grant'.

76. The EACEA further argued that such a payment would be in contradiction with Article 112(1) of the Financial Regulation, as it would lead to retroactively subsidising a project which had not even been selected.

77. The EACEA noted, however, that it would exceptionally be willing to provide assistance to the complainant by sending speakers for a future event, if the complainant considered this to be useful. In addition, the EACEA was willing to meet the complainant in order to assist it by

explaining the weaknesses of its proposal. Finally, if the complainant wished to submit another proposal, which the EACEA would welcome, it was advised to seek assistance from the Europe for Citizens Point for Germany, whose role it is to provide support to applicants under the Europe for Citizens Programme.

78. In its observations, the complainant explained that it had hoped that, in light of the Ombudsman's proposal, the EACEA would at least grant half of the contribution it had requested. The EACEA's categorical refusal was an affront towards the complainant, who had worked for a Europe resting on citizens for over three decades and who had received several distinctions for its work.

79. The complainant stressed that whilst it could not legitimately expect that its project would be selected for funding, it could legitimately expect that the EACEA would respect its own deadlines. It recalled that the evaluation committee had finalized its work on 14 February 2008 and that Parliament and the Programme Committee were informed on 28 February 2008. However, and despite various requests for information, the EACEA had not considered it necessary to draw the complainant's attention to the fact that a negative decision was likely. The complainant submitted that at least a hint to that effect would have been possible.

80. The complainant reiterated its criticism concerning the fact that the EACEA had awarded 10 points for 'quantitative criteria' only to projects involving participants from the new Member States.

81. The complainant concluded by stating that it could only set its hope in the Ombudsman. It added that it could not help feeling that the EACEA had failed to accord the Ombudsman the attention that was due to him.

The Ombudsman's assessment after his friendly solution proposal

82. The Ombudsman notes that the EACEA has again confirmed that it accepts his conclusion that it failed to comply with its own deadlines in the present case. He is therefore surprised to learn that the EACEA nevertheless considers that its behaviour should not be considered as constituting maladministration on account of the corrective and preventive action undertaken by it. It is true that no finding of maladministration should be made where the administration has taken action to remedy a mistake that occurred. In fact, the very purpose of making a proposal for a friendly solution is to encourage the administration to take steps to undo the maladministration that has occurred and thereby to satisfy the complainant. However, in order to be relevant in this context, the action taken by the administration must indeed have remedied the mistake that was made. This is not the case here. Whatever 'corrective' measures the EACEA may have taken during the selection process, they did not prevent the EACEA's failure to respect its own deadlines. The procedural reform brought about at the EACEA's instigation, according to which the comitology procedure no longer applies to the selection of proposals for grants under town-twinning programme, is clearly likely to help the EACEA to comply with

deadlines in future cases. However, this reform does not nullify the maladministration that occurred in the present case.

83. The Ombudsman made it clear that one possibility to avoid the problems highlighted by the present case would have been to adjust the relevant deadline in good time. In its reply to his proposal for a friendly solution, the EACEA suggested that amending the calendar would have led to further changes negatively affecting town-twinning organisations, one of which would have been that a specific period in 2008 would not have been covered anymore. The Ombudsman is unable to understand this argument. The present case concerns projects that were to take place between 1 April 2008 and 31 March 2009. The EACEA had informed applicants that the lists of successful projects would be published by 1 March 2008. Changing the date for the publication of the results would not necessarily have required that the period during which projects could be carried out had to be changed as well. If the EACEA had informed applicants in good time that the results would only be published on 18 April 2008, projects that had already taken place after 1 April 2008 could still have been funded. The only difference would have been that applicants who had envisaged projects for that period might have felt it prudent to consider postponing these projects. Although not ideal, this would clearly have been far better than the solution adopted by the EACEA, which was to postpone the relevant deadline first to 14 March 2008 and then even further, without specifying a precise date.

84. The EACEA had originally argued that it was not possible to inform applicants before the formal decision was taken. In his proposal for a friendly solution, the Ombudsman made it clear that he doubted whether this really meant that no information could be given before that date to applicants whose applications had not been supported by the evaluation committee. In its reply, the EACEA pointed out that the decision not to publish the selection results before any formal decision was taken constituted a precautionary measure in order to avoid the negative impact of any possible change with could occur during the decision-making process. The Ombudsman considers that this approach is not unreasonable as such. However, given that the EACEA must have been aware, and was indeed made aware, of the fact that the delays it had incurred caused difficulties to applicants whose projects were envisaged to take place on or shortly after 1 April 2008, it would clearly have been courteous and indeed good administration to modify the said approach. When the complainant asked for urgent feedback, informing it that its proposal had not been proposed for funding by the evaluation committee would clearly have been extremely useful to the complainant. It is difficult to see why the EACEA could not, in the circumstances of the present case, provide this information to the complainant whilst making it clear that the final decision had not been taken yet.

85. In its reply to the friendly solution proposal, the EACEA suggested that when the complainant learnt about the delay in March 2008, it should have considered postponing the starting date of its project, as other candidates in the same situation had done in good faith. The Ombudsman trusts that by making this comment, the EACEA did not intend to call into question the complainant's good faith. As regards the argument as such, the Ombudsman cannot but recall that the relevant selection concerned projects that were envisaged to take place in the period starting on 1 April 2008. It was thus clearly essential to provide timely information to

applicants. However, and as mentioned before, the EACEA was unable to respect either the original deadline of 1 March 2008 or the revised deadline of 14 March 2008. In these circumstances, the Ombudsman considers that the EACEA's suggestion that applicants should have reacted to this failure on its own part by postponing their projects at short notice manifests a regrettable lack of respect for these applicants and, ultimately, for the citizens they represented. It is worthwhile recalling that the complainant's project concerned a meeting that was to be attended by citizens from Germany, the UK, France, Italy and Austria. In the Ombudsman's view, it is difficult to see how such a project could easily be postponed less than four weeks before the date on which it is scheduled to take place.

86. It should further be recalled that what the Ombudsman had proposed was for the EACEA to make an *ex-gratia* payment, i.e., a payment that is made without recognising a legal obligation to do so. The Ombudsman's proposal was based on his finding that there had been maladministration, given that the EACEA had failed to comply with its own deadlines. It is thus irrelevant that the complainant did not have any legitimate expectation that its project would be funded. Moreover, and as the complainant correctly observed, it could legitimately expect that the EACEA would respect its own deadlines.

87. As regards the EACEA's argument that making such a payment would result in unequal treatment with respect to other applicants whose projects were not selected, the Ombudsman considers that this could only be relevant if the complainant was in the same position as these other applicants. The date envisaged for the complainant's project had already passed when the EACEA published the results of its selection. The EACEA has not shown that the other applicants whose projects were not selected were in the same position. The EACEA also argued that making such a payment might be an incentive for future applicants to anticipate projects in order 'to increase the chances of obtaining a grant'. The Ombudsman considers that this argument is manifestly unfounded, given that no problems of the type encountered in the present case can arise if the EACEA complies with its own deadlines.

88. The EACEA also argued that making an *ex-gratia* payment would be in contradiction with Article 112(1) of the Financial Regulation, as it would lead to retroactively subsidising a project which had not even been selected. Article 112(1) of the Financial Regulation provides that a grant may be awarded for an action which has already begun "only where the applicant can demonstrate the need to start the action before the agreement is signed". It further provides that no grant "may be awarded retrospectively for actions already completed". The Ombudsman finds it useful to underline that making an *ex-gratia* payment in order to remedy an instance of maladministration cannot be equated with retroactively providing a grant to a project. He therefore fails to understand how making such a payment could violate Article 112(1) of the Financial Regulation.

89. The Ombudsman is pleased to note that the EACEA has made certain proposals to help the complainant. However, it is obvious that the possibility to turn to the Europe for Citizens Point for Germany for assistance as regards the submission of a new request for a grant for a town-twinning measure does not offset the maladministration that occurred in the present case. The EACEA's further offers to provide the complainant with speakers for a future event and to

meet the complainant in order to assist it by explaining the weaknesses of its proposal would appear to be well-meant. However, these offers need to be seen against the background of the other statements made by the EACEA. In particular, the Ombudsman notes that the EACEA has not presented the complainant with a clear apology for its failure to respect its own deadlines. On the contrary, the EACEA has even taken the view that its behaviour should not be considered as constituting maladministration.

90. In view of the above, the Ombudsman considers that the EACEA has failed to take appropriate action to remedy the maladministration that occurred in this case. He very much regrets the fact the EACEA has not made use of his proposal for a friendly solution in order to settle this matter The Ombudsman will therefore make a draft recommendation, again calling on the EACEA to make an ex-gratia payment to the complainant. The complainant suggested that the EACEA should make a payment amounting to at least half of the contribution it had requested, that is to say, at least EUR 5 250. The Ombudsman considers that this is not unreasonable.

91. In his proposal for a friendly solution, the Ombudsman pointed out that the evidence available to him suggested that, when evaluating the applications, points as regards 'quantitative criteria' were only given if a project involved participants from a Member State that joined the EU in or after 2004. The Ombudsman noted that he had considerable doubts whether this approach represented an appropriate interpretation of the statement made in the programme guide according to which projects involving new Member States "will be given special attention". He concluded, however, that there seemed to be no need for further inquiries concerning this issue in the present case, given that he had in any event arrived at a finding of maladministration as regards the EACEA's failure to comply with its deadlines. The Ombudsman will decide whether this issue will need to be examined in more detail within the framework of an own-initiative inquiry, after having received the EACEA's detailed opinion on the present draft recommendation.

92. In light of the above, the Ombudsman finds that the EACEA's failure to comply with its own deadlines constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The draft recommendation

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

Taking into account the Ombudsman's findings, the EACEA should endeavour to help the complainant solve the financial problems caused by the way in which it handled the latter's application, by making an appropriate *ex-gratia* **payment.**

The Institution and the complainant will be informed of this draft recommendation. A copy will

also be sent to the European Commission. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 March 2011. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 8 December 2010

[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] OJ 2002 L 357, p. 1.

[3] By the way, the Ombudsman found it difficult to understand why the EACEA did not at least mention in this e-mail that it had in the meantime published a notice according to which the results of the selection procedure were only expected by mid-April.