



Decisión en el asunto 2365/2009/(MAM)KM - Negativa a publicar cartas en el foro de debate interno de la Comisión y no investigación de un presunto sistema nacional de clasificación de altos funcionarios de la Comisión

Decisión

Caso 2365/2009/(MAM)KM - Abierto el 16/10/2009 - Recomendación sobre 06/12/2011 - Decisión de 17/12/2012

El demandante, un antiguo funcionario de la Comisión Europea, presentó tres cartas para su publicación en el foro de debate de Intracomm, la intranet de la Comisión. La primera de ellas contenía una serie de citas de artículos de prensa que informaban de que un funcionario de la Comisión se había reunido con periodistas que se habían hecho pasar por representantes de empresas chinas y les había comunicado información confidencial. La segunda tenía que ver con otro artículo de prensa escrito en el contexto de ese asunto, que mencionaba que el Gobierno alemán había establecido un sistema de evaluación de los funcionarios de alto rango de la Comisión de nacionalidad alemana. La tercera carta criticaba el hecho de que no todos los comunicados de prensa de la Comisión estuvieran disponibles en la base de datos RAPID. El demandante también pidió a la Comisión que investigase el sistema de evaluación alemán y garantizase que todos los comunicados de prensa estuvieran disponibles en línea en la base de datos RAPID.

La Comisión rechazó las solicitudes y argumentó que no podía publicar las cartas en su foro interno porque contenían acusaciones que podían menoscabar la presunción de inocencia. El demandante reclamó ante el Defensor del Pueblo Europeo, que inició una investigación.

En su dictamen, la Comisión mantuvo su opinión de que no podía publicar las cartas. Añadió que no había motivos para investigar el « *presunto sistema de evaluación alemán* » ya que *ella misma designaba a sus propios funcionarios* . Explicó por otra parte que los comunicados de prensa mencionados por el demandante no se incluían de forma automática en la base de datos RAPID, pero se comprometió a velar por que se hiciera de forma manual. En sus observaciones, el demandante mantuvo su reclamación.

El Defensor del Pueblo observó que en su política editorial la Comisión establece que las cartas deben publicarse íntegras en la intranet, a menos que sean difamatorias, hagan acusaciones o puedan perjudicar de cualquier otro modo los intereses de la institución. Dado que no parecía que el demandante, aun citando o haciendo referencia a artículos de prensa y al propio comunicado de la Comisión al respecto, creyera o quisiera inducir a los



lectores a creer que la persona afectada era de hecho culpable, y no había hecho él mismo las acusaciones contenidas en dichos artículos, el Defensor del Pueblo concluyó que la Comisión no había acreditado que las cartas vulneraran su política editorial. Asimismo, consideró que, puesto que un sistema de evaluación nacional puede menoscabar la lealtad de los servicios de la Comisión, merecía ser investigado. Por último, comprobó que, en efecto, no todos los comunicados de prensa estaban disponibles en la base de datos RAPID. Por consiguiente, recomendó que la Comisión publicara las cartas en cuestión, investigara el « sistema de evaluación» presuntamente implantado por el Gobierno alemán y garantizara que todos sus comunicados de prensa estuvieran disponibles en línea.

En su respuesta, la Comisión mantuvo su opinión de que debía proteger la presunción de inocencia y no podía publicar la primera carta. No obstante, anunció que, como solución de compromiso, publicaría la segunda y la tercera cartas eliminando todas las referencias al asunto y al funcionario afectado. Además, confirmó que los comunicados de prensa a los que el demandante había hecho referencia estaban ya disponibles en línea y que estaba « *redoblando sus esfuerzos*» para que en el futuro estuvieran todos disponibles.

El Defensor del Pueblo concluyó que la Comisión no había seguido su proyecto de recomendación de publicación íntegra de todas las cartas e investigación del presunto sistema de evaluación de funcionarios de alto rango alemanes. Por consiguiente, formuló dos comentarios críticos. En lo que respecta a la publicación de todos los comunicados de prensa en línea, observó con satisfacción que la Comisión había aumentado sus esfuerzos en ese sentido. Por lo tanto, consideró que no había motivos para proseguir la investigación al respecto y procedió a archivar el asunto.

The background to the complaint

1. The complainant is a former official of the European Commission. On 2 February 2009, when he was still working at the Commission, he sent a letter entitled "@europa.de" for publication on a discussion forum on Intracomm, the Commission's intranet. The letter concerned a Sunday Times article, according to which a high-ranking Commission official had met journalists posing as representatives of a Chinese business and provided them with information on ongoing anti-dumping proceedings [1]. The letter, which included comments made by the complainant, was not published. No explanation was given to the complainant. On 4 February 2009, the complainant submitted a revised version of the letter, which, at that stage, contained quotes from several newspaper articles only. Again, the letter was not published and the complainant did not receive an explanation.

2. On 9 February 2009, the complainant sent a letter to the person in charge of the relevant discussion forum ('the Editor'), asking him to publish his letter, in the edition of 4 February 2009 at least, or to explain why the letter was not published. On 25 February 2009, he received a reply in which the Head of Unit for Communication and Information Management in the then Directorate-General ('DG') for Administration explained that the editorial policy for publishing letters on the relevant discussion forum on Intracomm was as follows:

"Letters will be published in full on the intranet site unless they are deemed by the Head of Unit for Internal Communication or the Editor in Chief of Commission en Direct, acting under



her authority, to be:

- libellous or potentially libellous;
- insulting or making accusations against named or easily identifiable individuals;
- otherwise likely to prejudice the interests of the Institution or breach commonly held standards of decency."

3. The Head of Unit also indicated that the complainant's letter made a number of comments regarding a named colleague "on a matter which is currently subject of an on-going internal OLAF inquiry". The Commission was obliged to protect this official from a public debate on the intranet because of the presumption of innocence. It added that "[t]his has nothing to do with censorship as you should know. Freedom of speech does not mean an obligation for others to publish."

4. On 10 and 23 March 2009, the complainant sent another letter, entitled "Made in Germany". In this letter, he highlighted an article published by the Spiegel, a German news magazine, according to which the German government operates a system that evaluates top officials of German nationality in international organisations, including the EU, to determine whether they are fit for higher tasks in the international arena [2] . This letter was not published either, and again no explanation was given.

5. On 2 April 2009, the complainant sent a further letter, entitled "Rapid, but inaccurate", alleging that the Commission was hiding certain inconvenient press releases and indicating that a number of press releases, including one related to the Sunday Times article, could not be found on the Commission's database for press releases ('the RAPID database'). This letter, again, was not published and the complainant received no information as to the reasons for this rejection.

6. On 14 April 2009, the complainant therefore wrote to the Editor requesting an explanation. The Editor replied on 21 April 2009 stating that, in general, the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". As the rules and recommendations on the site showed, the relevant discussion forum was supposed to be a place for positive interaction among colleagues and not a place for accusations.

7. On 27 April 2009, the complainant lodged a complaint under Article 90(2) of the Staff Regulations for civil servants of the EU, asking for the decisions not to publish the abovementioned letters to be annulled. In relation to his first letter ("@europa.de") he argued that, even though the Commission could reject letters only if they breached the editorial policy, it had not explained how his letter could fall into this category. The complainant submitted that his letter was not insulting and did not make any libellous accusations, but, rather, collected a series of quotations from publicly available sources. In any event, the editorial policy had to respect the fact that freedom of speech was a value upheld by the Staff Regulations. In that regard, he referred to the fact that a Belgian court had rejected an application by the Commission official mentioned in his letters to prevent an NGO from mentioning his name in the context of an award which intends to highlight lobbying activities around the EU institutions.



8. The complainant also challenged the justification given by the Editor for not publishing his other letters ("Made in Germany" and "Rapid, but inaccurate") on Intracomm. He argued that these letters did not contain any innuendo or accusations against colleagues. His quotations from the *Spiegel* article had not, to his knowledge, been challenged by the German government, and in "Rapid, but inaccurate" he was in fact citing from a Commission press release. There was therefore no basis for the Commission's assertion that the letters contained "innuendo or accusations against colleagues".

9. In relation to the matters raised in his letter entitled "Made in Germany", the complainant further asked the Commission to investigate to what extent the German government's assessment of top German officials undermined their impartiality. He also asked the Commission to bring an action against Germany for carrying out this evaluation process, which in his view undermined fundamental principles of the European civil service, and to ensure that all press releases are available on the RAPID database at all times.

10. On 27 May 2009, the Commission rejected the Article 90(2) complaint as inadmissible because none of the issues raised constituted an act that could be challenged by such a complaint.

11. On 17 September 2009, the complainant therefore turned to the European Ombudsman as regards his complaint.

The subject matter of the inquiry

12. The complainant submitted the following allegations and claims:

Allegations:

- 1.** The Commission wrongly refused to publish three articles written by the complainant on Intracomm. It failed to give a proper reason for its rejection of the articles.
- 2.** The Commission wrongly refused to investigate whether top German Commission officials were compromised in their impartiality by the fact that Germany operated an evaluation system of top German officials in international institutions.
- 3.** The Commission wrongly refused to commence court proceedings against Germany for undermining fundamental principles of the European civil service by operating such an evaluation system.
- 4.** The Commission wrongly failed to ensure that all press releases are available on the RAPID database at all times.

Claims:

- 1.** The Commission should publish the letters submitted by the complainant on Intracomm.
- 2.** The Commission should investigate whether top German Commission officials are



compromised in their impartiality by the German evaluation system.

3. The Commission should commence proceedings against Germany for undermining fundamental principles of the European civil service by operating such an evaluation system.

4. The Commission should ensure that all press releases are available on the RAPID database at all times.

The inquiry

13. On 16 October 2009, the Ombudsman opened an inquiry and asked the Commission for an opinion on the complaint.

14. On 3 March 2010, the Commission sent its opinion. Having examined this opinion, the Ombudsman reached the conclusion that he needed further information to deal with this case. On 9 March 2010, he therefore asked the Commission to provide this information.

15. On 17 May 2010, the Commission sent its reply, which was forwarded to the complainant with an invitation to submit observations. The complainant's observations on this reply and the Commission's opinion were received on 25 May 2010.

16. On 15 December 2010, the Ombudsman asked the Commission for further information. The Commission sent its reply on 8 February 2011 and the Ombudsman forwarded it to the complainant, with an invitation to submit observations. The complainant's observations were received on 24 February 2011. In these observations, the complainant essentially maintained his complaint and did not raise any new issues.

17. On 6 December 2011, the Ombudsman made a draft recommendation. The Commission submitted its detailed opinion on the draft recommendation on 25 April 2012. On 8 May 2012, the Ombudsman forwarded it to the complainant with an invitation to make observations. The complainant submitted his observations on 24 May 2012.

The Ombudsman's analysis and conclusions

Preliminary remarks

18. In his observations on the Commission's detailed opinion on the Ombudsman's draft recommendation, the complainant stated that the Commission had, in his view, deliberately delayed its replies to the Ombudsman, even though these replies were always very short. The complainant therefore called upon the Ombudsman to make a special report to Parliament in order to criticise the Commission.

19. In that regard, while it is clear from the exchange of correspondence that followed the opening of the inquiry (see paragraphs 13-17 above) that the Commission's replies to the Ombudsman's requests for information were indeed provided with some delay, there is in nothing to suggest that the delays in question were indeed deliberate. The Ombudsman therefore does not consider that these delays raise an issue of principle. In these circumstances, a special report is not warranted.



A. Allegation that the Commission wrongly refused to publish three articles written by the complainant on Intracomm and failed to give a proper reason for its decision and related claim

Arguments presented to the Ombudsman

20. The complainant argued that the Commission could only reject letters if they breached the editorial policy. In the complainant's view, however, none of his letters did breach the Commission's editorial policy, given that they consisted mainly of quotes from publicly available newspaper articles. In fact, the quotation from the press in his letter entitled "Made in Germany", which the Commission had rejected because "*reproduction of articles from the press accusing or using innuendo against colleagues is [to be] avoided*", did not even contain any innuendo or accusation. The letter entitled "Rapid, but inaccurate" did not cite from the press but from a Commission press release. In any event, the complainant considered that freedom of speech was more important than the presumption of innocence, and noted that by not publishing his letters, the Commission was breaching the aforementioned right which was also reflected in Article 17a of the Staff Regulations.

21. In its opinion, the Commission referred to its decision on the complainant's Article 90(2) complaint, which rejected the complaint as inadmissible. It further reiterated the reasoning it had set out in its letters of 25 February and 21 April 2009.

22. In its response to the Ombudsman's request for an opinion on the substance of the relevant allegation and claim, the Commission noted that officials did not have a right to have their letters published. The editorial policy, which was published on the site, was perfectly clear in this respect and members of staff could therefore be expected to understand the limits of what could be published. In the present case, it would have been unacceptable for the Commission to publish any letter which could affect the presumption of innocence of a member of staff under investigation. The Commission underlined that this had been made very clear in its communication with the complainant.

23. Having analysed this reply, the Ombudsman asked the Commission to confirm that, by stating that it would have been unacceptable for it to allow the publication of a letter that would affect the presumption of innocence of a member of staff, it was referring to the third bullet point of the document setting out its editorial policy (letters which are deemed likely to prejudice the interests of the institution). The Commission confirmed that this was the case and noted that the second bullet point (letters which are deemed to be insulting or to be making accusations against named or easily identifiable persons) was also relevant. This was because the complainant's letters mentioned a "named or easily identifiable individual" who was subject to an ongoing investigation by the Investigation and Disciplinary Office of the Commission ('IDOC'). The Commission, as guardian of the Treaties, had to uphold at all times the presumption of innocence, a fundamental principle of the rule of law.



24. In relation to the letter entitled "@europa.de", the Ombudsman asked whether the Commission could now consider publishing it on the discussion forum, bearing in mind that the subject matter of the letter had been discussed in two publicly available judgments of the Civil Service Tribunal, and that the Commission official in question had admitted meeting the " *Chinese businessmen* " and providing them with information on ongoing anti-dumping procedures. The Commission replied that its obligation to protect the presumption of innocence remained relevant even though the case in question had been covered by the press. It added that it did not, in any event, intend to accept debates on its intranet about the behaviour, character or merits of individual members of staff.

25. As regards the letters entitled "Made in Germany" and "Rapid, but inaccurate", the Ombudsman noted that they related to the Spiegel article about a German rating system for top Commission officials, and to the availability of Commission press releases, respectively. He therefore asked the Commission to explain how publication of these letters could "affect the presumption of innocence of an individual member of staff" and how these letters could be considered to "accuse or use innuendo against colleagues". In its reply to the Ombudsman's request for further information, which concerned other points as well, the Commission did not address these questions.

26. In his observations, the complainant maintained his complaint and rejected the Commission's argument that officials had no right to have their letters published on the discussion forum. The editorial policy stated that "letters will be published in full unless" any of the exceptions apply. In that regard, the Commission had still not explained its view that his letters were insulting or libellous or made accusations against named or easily identifiable individuals.

27. In his letter entitled "@europa.de", he was merely citing from publicly available sources. "Made in Germany" did not even concern named individuals and did not even mention the Commission official whose presumption of innocence the Commission stated it had to protect. Instead, it related to the rating system operated by the German State. In fact, in both letters entitled "Rapid, but inaccurate" and "@europa.de", he cited a press release published by the Commission itself, the very press release which the Civil Service Tribunal did not consider to breach the presumption of innocence. This made it absurd for the Commission to refuse to publish this particular letter by reference to this principle. Further, his letters presented facts which remained relevant whether or not the official in question was found guilty, and they did not give " *the preconceived idea that the accused has committed the offence charged* " [3] .

28. The fact that a letter named an individual or made him or her easily identifiable was not sufficient for it not to be published. Rather, the editorial policy required the Commission to show that the letter contained insults or accusations against that individual. It would thus seem that the Commission was interpreting its editorial policy too widely. In fact, in its opinion, it announced a policy of systematic censorship when it stated that it did " *not intend to accept debates on its Intranet about individual staff members, their merits, behaviour, character, etc.* " It did not seem to care whether it was respecting its own editorial policy and



thus breached the principle of freedom of expression.

29. In relation to the Commission's assertion that publishing the letter entitled "@europa.de" would prejudice its interests, the complainant argued that these interests had to be defined clearly. The Commission had, in this context, referred to the presumption of innocence of an official who " *is the subject of an on-going investigation by the Investigation and Disciplinary Office of the Commission (IDOC)* ". However, the European Anti-Fraud Office ('OLAF') had closed its investigation into the relevant official's behaviour described in the Sunday Times article on 29 January 2009. It had then opened another investigation into the allegations concerning DG Trade and, on 25 February 2010, informed the complainant that the opening of disciplinary proceedings by the Commission with regard to the official concerned would depend on "the outcome of our procedure and our recommendation" in relation to this procedure. On 22 September 2010, OLAF informed the complainant that this investigation was now also closed and that its recommendation was that no follow-up action be taken.

30. The complainant submitted that, in any event, his letter entitled " @europa.de " did not breach the presumption of innocence. The Commission itself had cited the Sunday Times article he was relying on to justify its decision to suspend the official in question. In its judgment on the matter, the Civil Service Tribunal had referred to the fact that this article was "very detailed and on numerous occasions reports, and in quotation marks, the applicant's replies to the questions put to him by the reporters" [4] and that the official in question had actually "admitted some of the facts reported in the article in The Sunday Times", in particular, having communicated information on anti-dumping procedures to the "Chinese businessmen".

The Ombudsman's assessment leading to a draft recommendation

31. Before examining the Commission's position with regard to each of the letters the complainant submitted to it for publication on the discussion forum, the Ombudsman considered it appropriate to make a number of preliminary remarks.

32. First, the Commission argued that officials have no right to have letters published on the discussion forum. The Ombudsman noted, however, that the Commission laid down an editorial policy in this context. According to this document, letters "will be published" unless one of three exceptions applies. In these circumstances, the Commission's decision not to publish the letters submitted by the complainant had to be assessed against the rules the Commission set itself in this regard; that is, the editorial policy, and the principles which it implements.

33. Second, the complainant did not challenge the rules laid down by the Commission in its editorial policy. Instead, he argued that these rules were interpreted and applied too broadly. The Ombudsman's analysis therefore focused on the question of whether the decisions not to publish the letters submitted by the complainant could be justified by reference to the editorial policy, which the Commission itself adopted and announced to its staff.



34. Third, and as the complainant correctly pointed out, the editorial policy states that letters submitted for publication will be published on the discussion forum in full, unless one of the exceptions applies. Publication is therefore the rule and non-publication the exception.

35. Fourth, it is true that the Commission was not obliged to adopt such a general policy. Furthermore, it could alter that general policy, because, as the Commission rightly pointed out, freedom of speech does not mean an obligation for others to publish. However, the fact remained that the Commission adopted, and communicated to its staff, the general policy referred to above. This policy could only be understood as a decision to make Intracomm forum in which officials can express their views freely, subject only to the announced exceptions. This reflects the freedom of expression, which is a fundamental right guaranteed by Article 10 of the European Convention on Human Rights ('ECHR') and Article 11 of the Charter of Fundamental Rights of the EU ('the Charter'). It is also one of the rights of officials guaranteed by the Staff Regulations (Article 17a). According to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by this Charter must be "provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." In the Ombudsman's view, it resulted from this that the Commission cannot, when applying the editorial policy, interpret the exceptions foreseen in it in an overly broad manner, thereby limiting the ability of a civil servant to express himself freely in the forum set up for this purpose.

36. Fifth, in its submission in the present case, the Commission stated that it did not intend to accept debates about the behaviour, character or merits of individual members of its staff on the relevant discussion forum. The Ombudsman noted that the editorial policy laid down by the Commission does not include any such exception. In these circumstances, the Commission's decisions in the present case could only be justified if they are covered by one of the three exceptions that are set out in its editorial policy and the Commission cannot make *ad hoc* exceptions which go beyond those, since to do so would be to unduly limit freedom of expression.

37. Sixth, in his reply of 21 April 2009, the Editor explained that the Commission "was against reproduction of articles from the press accusing or using innuendo against colleagues". In this context, the Ombudsman pointed out that the second exception set out in the Commission's editorial policy refers to letters that are deemed to be "making accusations against named or easily identifiable individuals". It was thus clear that the accusation had to be made by the letter itself and that the relevant exception would not apply in cases where a letter merely reports on an accusation made by someone else. However, it was also clear, according to the Ombudsman, that it is a matter of interpretation whether this is the case or whether a letter, though purporting merely to report about an accusation made by someone else, in reality makes it clear that its author shares the view expressed by that third party and, thus, makes the said accusation his own. The Ombudsman added that it should also be noted that publication of a letter merely reporting on accusations made by a third party can still be refused if the third exception applies.



38. Seventh, as regards this third exception, the Commission referred to the need to protect the presumption of innocence in order to justify not publishing the complainant's letters. The Ombudsman noted that the ECtHR has made it clear that a balance needs to be struck between the freedom of expression and the need to protect the presumption of innocence:

"Freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 para. 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected." [5]

39. In the Ombudsman's view, it was thus clear that an institution would act incorrectly if it were to publish statements that encroach upon the presumption of innocence. In these circumstances, the Ombudsman considered it plausible for an institution to take the view that statements made by members of its staff on a discussion forum run by its services would be likely to prejudice its interests. Still, it had to be kept in mind that respect for the fundamental right of free expression requires that this exception, like all others, be interpreted carefully so as not to deprive the general rule, based on that principle, of all meaning.

40. Finally, he noted that a distinction had to be made between the complainant's allegations and his claim, in so far as the relevant point in time was concerned. As regards the Commission's decisions to refuse to publish the complainant's letters, it was clear that the Ombudsman had to examine whether these decisions were correct when they were taken. In other words, the Ombudsman's examination had to be based on the facts that were or could have been known to the Commission at that stage. The complainant's claim that his letters should be published, however, concerned an action that the Commission should, in the complainant's view, take now or in the future. In order to assess this claim, the Ombudsman therefore also had to take into account any developments that may have occurred since the Commission adopted its decisions not to publish the said letters.

41. Having set out his analysis of these more general points, the Ombudsman then proceeded to examine the Commission's decisions to reject the complainant's letters in relation to each of these letters.

(1) Letter entitled "*@europa.de*"

42. The Commission argued that the "*@europa.de*" letter could not be published because it made a number of comments regarding a named or easily identifiable colleague on a matter which was subject to investigation by IDOC. It submitted that it was obliged to protect the presumption of innocence and could not publish anything which would undermine this principle. In response to the Ombudsman's second request for further information, it explained that it was, in this regard, referring to both the second and the third exceptions set out in the editorial policy.



43. The complainant questioned whether this argument was based on a true account of the facts. He added that it was doubtful whether the Commission official to whom his articles referred was subject to an ongoing IDOC investigation. In this context, it should be recalled that, when deciding whether the Commission's decision to refuse to publish the relevant letter was correct, the Ombudsman must have regard to the situation at the time when this decision was taken, that is to say, in February 2009. However, the complainant does not appear to dispute the Commission's claim that an inquiry was ongoing at that time.

44. The Commission's argument that the letter fell under both the second and the third exception listed in the editorial policy therefore remained to be examined.

45. First of all, however, it had to be recalled that there are two versions of the "*@europa.de*" letter. In both versions, the complainant introduced the Sunday Times article by its title and subtitle and provided the link to it. He then went on to cite from the Commission press release issued two days before the publication of the article. According to the text thus cited, the Commission had been approached with allegations that one of its officials had had contacts with journalists posing as businessmen and the Commission had asked the newspaper to make the evidence available so that it could investigate the matter. The complainant's letter noted that OLAF was not sure whether it could in fact listen to the tapes which had been provided, given that it was not clear whether the recording had been legal. It then referred to a *Spiegel* report describing a system, which rates top German Commission officials, operated by the German government. A link to this article, which mainly deals with the affair uncovered by the Sunday Times, was also provided. The complainant's letter proceeded to cite Article 11 of the Staff Regulations (according to which officials have to act impartially and independently and must be loyal to the Commission) and called upon the Commission to investigate the matter. It further reported that the official who met the Sunday Times journalists posing as business representatives attempted to prevent an NGO from publishing his name in an awards ceremony publication, but that the Belgian court dealing with the question ruled that freedom of expression was more important in this case. It finally mentioned that the official concerned was the vice-president of the association of current and former *référéndaires* at the European Courts.

46. In addition, the original version of the complainant's letter contained some "*conclusions*" and comments by the complainant on the matter and on what he perceived to be the Commission's unwillingness to investigate it. Thus, after the introduction to the *Sunday Times* article, the complainant noted how long the official involved in the affair had occupied his post and presented his "*first conclusion*", namely, that the Commission was wrong to allow him to remain in his sensitive position for as long as he did. After reporting that OLAF was analysing whether it had the right to listen to the tapes, he concluded that it was inclined not to use the evidence which the Commission had requested from the *Sunday Times*. Further, the complainant suggested that the fact that the official in question had a leading position in an association of former *référéndaires* would have an influence on the outcome of the case which the official had brought against the Commission's decision to suspend him. In the Ombudsman's view, these "*conclusions*" create the impression that the behaviour of the official in question was such that he should not have been allowed to occupy the sensitive post he had held, and clearly not for such a long period of time. Against this background, the



remainder of the text, although merely reporting what had been published elsewhere, was likely to be understood by readers as criticising the Commission official in question.

47. In light of the above, the Ombudsman considered that the Commission was entitled to conclude that the original version of the relevant letter contained accusations against the official in question. The Ombudsman stated that it further follows that, in relation to the third exception, the Commission's understanding of this version of the letter as undermining the protection of the presumption of innocence of the official under investigation, also appeared reasonable. In the Ombudsman's view, the Commission's decision not to publish this version of the "*@europa.de*" letter on the relevant discussion forum was thus justified.

48. On the other hand, the revised version of the complainant's letter, from which the complainant's abovementioned conclusions and comments were removed, consequently consisted mainly of quotes from press articles and the Commission press release on the matter. It concluded by emphasising that all the facts it mentioned stem from publicly available sources and were not intended to prejudge whether the Commission official was "guilty or innocent". It resulted from a reading of this text, which was summarised in paragraph 45 above, that the complainant reported the affair and, in the course of doing so, cited the titles and subtitles of the relevant articles and the reason for which the official was nominated for the "Worst Conflict of Interest Award"; namely, according to the organisers of this award, "for revealing inside information on trade tariffs to "lobbyists" who were in fact journalists working under cover". However, while the complainant referred to and repeated such statements and the relevant articles which could be considered as making accusations against the official, it did not result from the text that he shared the views he reported on or made any such accusations his own.

49. It therefore could not be considered as an established fact that the complainant, in the second, edited version of his letter, was making accusations against the official in question.

50. As regards the third exception, the Ombudsman noted that it is true that, as stated above, the letter reported on the Sunday Times affair at a time when the investigations in this regard had not yet been finalised. However, that in itself cannot be considered sufficient for the letter to be considered as undermining the presumption of innocence. In fact, the Ombudsman considered that to prohibit all reporting on a matter under investigation until the investigation has come to a conclusion would excessively curtail freedom of speech. It should be noted that, as far as the reporting of the facts of the affair is concerned, the complainant cited the Commission's own press release, which uses careful wording, stating that the newspaper was "alleging" that a transfer of money was "supposedly" offered in exchange for advice and information. In addition, it could not be inferred from the remainder of the text that the complainant thought, and was aiming at making his readers think, that the official in question was in fact guilty. The Ombudsman concluded that there are thus no indications that the text would breach the interest protected by the third exception.

51. It resulted from the above that the allegation that the Commission wrongly refused to publish this letter and failed to reason its decision could not be upheld in relation to the first version of the complainant's letter, but had to be considered founded in relation to the



second version.

52. As regards the complainant's claim that his letter should be published, this claim had to be assessed, as stated above, by taking account of any developments that may have occurred since the date of the Commission's decision in 2009, whereby it refused to publish the said letter. In this regard, the Ombudsman noted that, in the meantime, the matter to which this letter referred had been brought before the European courts in two instances. In the first of these cases, the Civil Service Tribunal was called upon to assess the Commission's decision to suspend the official in question. In its judgment of 30 November 2009, it noted that the official had admitted, in a hearing before the Commission, to having been invited to and attended dinners with the " *Chinese businessmen* " in restaurants on a number of occasions, without informing his superiors. He had also admitted that he had "communicated to those reporters, in the course of the dinners to which he had been invited or during telephone conversations, certain information, in particular the names of two Chinese companies involved in the manufacture of candles which, following an anti-dumping procedure then in progress, were likely to obtain MET status." [6] In view of these circumstances, it could not therefore be excluded that a fresh assessment of the matter might now lead the Commission to the conclusion that even the initial version of the " @europa.de " letter could be published on the relevant discussion forum.

53. The Ombudsman considered, however, that there was no need for him to pursue this issue in the present case. The complainant phrased his claim as being for the publication of his " @europa.de " letter, " *at least in the second, edited version* ". The Ombudsman therefore considered that it was legitimate for him to focus on this second version of the relevant letter. However, it resulted from the analysis set out above that the second version of this letter did not breach the editorial policy and that it thus ought to be published.

54. According to Article 3(5) of his Statute, the Ombudsman shall, " *as far as possible* ", seek a friendly solution to eliminate the maladministration and satisfy the complaint. However, as shown above, in the present case the Ombudsman decided to uphold the complaint. It further appears from the above that the Commission rejected the Ombudsman's suggestions for a conciliatory approach and decidedly maintained its view. A friendly solution was thus not possible. The Ombudsman therefore made a draft recommendation to the Commission, calling on it to publish the second version of the complainant's letter entitled "@europa.de".

(2) Letter entitled " *Made in Germany* "

55. The Editor had argued that this letter could not be published because the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". In reply to the Ombudsman's question, the Commission explained that its decision not to publish the letters was based on both the second and the third exceptions set out in the editorial policy. However, in response to the Ombudsman's question as to how the publication of this letter could prejudice the Commission's interest by affecting the presumption of innocence or by accusing or using innuendo against colleagues, the Commission did not provide any specific arguments, apart from stating that it did not intend



to allow debates about the merits and behaviour of individual members of its staff on the intranet.

56. The Ombudsman stated that, in determining whether the said letter could fall under the second exception, it should be noted that the letter did not relate to any individual official in particular, but instead merely reported on the assertion set out in the *Spiegel* report, according to which, the German government had set up a group of officials which was given the task to rate high-ranking German officials in international organisations. It is true that, when introducing this subject, the complainant's letter cited and translated the title of the Spiegel report in which this issue was mentioned ("German Top Official in Brussels under Corruption Suspicion") and provided a link to that article. The article details the events surrounding the Sunday Times article. However, it does not present the accusations as facts (apart from the fact that meetings took place in restaurants in Brussels), but reports on allegations such as the one that information was passed on or that the official accepted a promise of remuneration for this information as such, making it clear that these are allegations and not facts. The Ombudsman added that, in any event, the mere fact that the complainant's letter cites the title of that article does not mean that this letter contained any accusations against the Commission official whose behaviour gave rise to the *Spiegel* article.

57. The complainant's letter referred to two further "*easily identifiable individuals*", namely, the president of the Commission and the director of OLAF. However, the letter merely suggested that, in the complainant's view, these two persons would be likely to suffer negative consequences if an investigation of the evaluation system allegedly set up by the German government were carried out. The Ombudsman considered that this statement could hardly be interpreted as an accusation or innuendo against those two persons.

58. Finally, it was conceivable that the letter could be interpreted as meaning that, as a consequence of the evaluation system allegedly set up by the German government, certain high-ranking German officials at the Commission might be induced to breach their duty of loyalty to the EU. However, even if one were to interpret this as an accusation, the fact remained that the relevant officials were neither named nor easily identifiable. The Ombudsman therefore did not consider that the refusal to publish this letter could be based on the second exception in the editorial policy.

59. It thus remained to be examined whether the third exception could justify the Commission's decision not to publish the letter. However, and for the reasons already set out in the context of his assessment of the second version of the "*@europa.de*" letter, the Ombudsman did not consider that a letter that merely reported on certain allegations against a given official made in other publications, without creating the impression that the author of the letter considered these allegations to be well-founded, could be considered as capable of undermining the presumption of innocence. In this context, it was also noted that the Ombudsman asked the Commission to specify in what way the publication of this letter could prejudice the interests of the Commission by undermining the presumption of innocence in relation to the official concerned. As already mentioned above, the Commission failed to comment on this issue in its reply. It therefore had to be concluded that the third exception could not be invoked as a reason for refusing to publish this letter.



60. In light of the above, the Ombudsman found that the Commission wrongly rejected this letter for publication on the relevant discussion forum. He considered this to constitute another instance of maladministration. He therefore made a draft recommendation, calling on the Commission to also publish the letter "*Made in Germany*".

(3) Letter entitled "

Rapid, but inaccurate

"

61. In the "*Rapid, but inaccurate*" letter, the complainant reported that, while all Commission press releases should be available on the RAPID database at all times, a number of them could not be found there. The Commission had thus, according to the complainant, either made a mistake or was deliberately hiding inconvenient press releases. The complainant illustrated his point by referring to two examples. The first was the press release already referred to above and published by the Commission after it had been approached by the Sunday Times. The other example concerned a ban on Chinese dairy products. The complainant concluded that the Commission had learnt from George Orwell's Nineteen Eighty-Four, citing a paragraph about "manufacturing the past".

62. The Editor argued that this letter could not be published because the Commission was "against reproduction of articles from the press accusing or using innuendo against colleagues". In its opinion, the Commission elaborated that its decision not to publish the letters was based on both the second and third exceptions set out in the editorial policy. However, when the Ombudsman asked it to explain how the decision not to publish this letter could be justified by using these two exceptions, the Commission did not provide any specific arguments.

63. As regards the second exception, the Ombudsman considered that it is true that the letter mentions an easily identifiable individual, namely, the official whom the Sunday Times article concerned, who is identified by his position within the Commission. It is also true that the letter quotes the title and sub-heading of the relevant Sunday Times article. However, there is nothing to suggest that readers would form the impression that the complainant wished to make the accusations raised in that article his own. The more general criticism of the Commission raised in the letter is not directed at any named or identifiable individual. The second exception set out in the editorial policy could therefore not be used by the Commission as a justification for not publishing the letter.

64. In relation to the third exception, the Ombudsman agreed with the complainant that it would be absurd to consider that the publication on the relevant discussion forum of quotes from a press release published by the Commission itself, which does not distort the message of that press release, could be considered as capable of undermining the protection of the presumption of innocence. It was recalled in this context that, as already mentioned above, and even though the Ombudsman had asked the Commission for further explanations on



this issue, the latter did not provide a reply in this regard.

65. The Ombudsman acknowledged that the letter criticised the Commission in a very harsh manner, alleging that it was "*manufacturing the past*" and suggesting that it was behaving like the kind of totalitarian regime depicted in George Orwell's *Nineteen Eighty-Four*.

66. However, the Ombudsman further recalled that it followed from the Commission's own editorial policy that decisions not to publish letters should be the exception. In the present case, the Commission did not refer to the abovementioned criticism levelled at itself in order to justify its decision not to publish the relevant letter. Nor did it establish that this criticism would entitle it to invoke one of the three exceptions laid down in its editorial policy.

67. In light of the above, the Ombudsman found that the Commission did not establish that it was entitled to refuse to publish this letter. This constituted a further instance of maladministration. The Ombudsman therefore made a draft recommendation, calling on the Commission to publish also the letter "*Rapid, but inaccurate*".

The arguments presented to the Ombudsman after his draft recommendation

68. In its detailed opinion, the Commission maintained that its decision not to uphold the complainant's complaint was "*perfectly justified*". The Commission stressed that it had to observe the presumption of innocence. However, it was clear from the letters which the complainant wanted to have published that they related to a case involving a "*former colleague*" which was pending before a Belgian court. Therefore, the Commission could not publish, on its intranet forum, a press article which could undermine the right of that person to be considered innocent until proven guilty.

69. This reasoning applied not only to the letter entitled "*@europa.de*", but also to the letters entitled "*Made in Germany*" and "*Rapid, but inaccurate*". It was true that these letters, while making reference to the case of the former colleague, also dealt with other issues, namely, the "*past functioning*" of the Commission's RAPID database, and the "*alleged German rating system*". Still, the Commission maintained its view that its forum was not a place for questioning the loyalty of other Commission staff, such as a group of officials from one Member State, even if this was done by referring to a newspaper article.

70. The Commission indicated, however, that it had decided, by way of compromise, to publish the two last-mentioned letters with the exception of any reference to "*the said case/colleague*", which it would delete.

71. In his observations, the complainant maintained his view that the Commission was unduly censoring his letters. He fully agreed with the Ombudsman's draft recommendation on this point. He also underlined that the Ombudsman had considered that the first version of his letter "*@europa.de*" could be published, which meant that the Commission's insistence on censoring the second version of this letter could not be accepted. The



complainant furthermore reiterated his claim that the Commission should also publish his other letters in full. In that regard, the complainant pointed out that the Commission had not brought forward any new arguments. He, therefore, asked the Ombudsman to maintain his finding of maladministration in relation to the refusal to publish the three letters.

The Ombudsman's assessment after his draft recommendation

(1) The letter entitled " *@europa.de* "

72. It is clear from the above-mentioned reply that the Commission has not accepted the Ombudsman's draft recommendation and has thus decided not to take the opportunity to address the instance of maladministration which the Ombudsman identified, namely, that the Commission's decision not to publish the second version of the complainant's letter " *@europa.de* " was not justified by the Commission's own editorial policy. The Ombudsman regrets that the Commission has neither addressed his arguments nor put forward any new arguments in that regard. The Ombudsman therefore maintains his finding of maladministration in that regard.

(2) Letters entitled "

Made in Germany

" and "

Rapid, but inaccurate

"

73. First of all, the Ombudsman is pleased to note that the Commission has taken steps to comply with his draft recommendation by deciding to publish the above-mentioned two letters. However, the Commission has also decided to remove from those letters, before publishing them, any references to the *Sunday Times* affair and to the former official concerned. The Ombudsman underlines that the only references which could be considered relevant in this regard are to be found, as far as the letter entitled " *Made in Germany* " is concerned, in the title of the article featured in the *Spiegel* magazine, which the complainant translated as " *German Top Official in Brussels under Corruption Suspicion* " and the link to that article, and, as far as the letter entitled " *Rapid, but inaccurate* " is concerned, in the title and subtitle of the *Sunday Times* article and the link to that article.

74. The Ombudsman has already explained, in his analysis leading to his draft recommendation, that the fact that the letter entitled " *Made in Germany* " cites the title of the *Spiegel* article and contains a link to it cannot be understood to mean that the letter contains accusations against the official concerned, nor that it undermines the presumption of innocence. He therefore maintains his view that a decision not to publish the relevant article " *in full* " cannot be justified by reference to the Commission's editorial policy.



75. As regards the letter entitled "*Rapid, but inaccurate*", it is true that it links to and cites the title of the *Sunday Times* article. However, as already stated in the Ombudsman's analysis leading to his draft recommendation, there is nothing in that letter which would indicate that the complainant included this title in order to make an accusation. Nor is there any reason to consider that it falls under the third exception contained in the Commission's editorial policy. The Ombudsman therefore does not consider that a decision to remove references to the *Sunday Times* affair and thus not to publish the letter in full can be justified by reference to the Commission's editorial policy.

76. In view of the foregoing, the Ombudsman reiterates his finding of maladministration as regards the Commission's refusal to publish the said articles in full.

B. Allegation that the Commission wrongly refused to investigate whether top German Commission officials were compromised in their impartiality by the alleged German evaluation system and related claim

Arguments presented to the Ombudsman

77. The complainant argued that the reason why the Commission did not want to publish his letter entitled "Made in Germany" on its intranet was that it was trying unduly to protect high-ranking German officials. The Spiegel article to which he referred in this letter described a rating system by which the German government evaluated the performance of high-ranking officials in international organisations, using criteria which had not been made public. This clearly undermined the independence and loyalty of the European civil service, in breach of Article 11 of the Staff Regulations. Germany had not disputed the information contained in this article. The complainant had therefore asked the Commission to investigate its top German officials to determine to what extent this system undermined their independence.

78. In its opinion, the Commission did not comment on this issue, save to refer to the reasons for which the complainant's Article 90(2) request on the matter had been rejected. The Ombudsman therefore asked it to comment on the substance of the complaint.

79. In its reply to this first request, the Commission elaborated on the fact that, even if the matter could have been investigated independently of this inadmissible individual complaint, the fact remained that there were no grounds for doing so. The complainant had referred to certain articles which had appeared in the German press in relation to allegations made against his former supervisor. The Commission had taken appropriate measures in relation to these allegations. However, the articles to which the complainant had referred did not contain any evidence in relation to the existence or relevance of the alleged rating system. The complainant did not provide such evidence either. The Commission was therefore not in



a position to take a view on this question, and still less to take action.

80. Having analysed this reply, the Ombudsman noted that the Spiegel article had given a fairly detailed account of the alleged German rating system for senior officials in international organisations; so much so that it was unclear what further evidence the complainant could have submitted in this regard. He also noted that he considered the possible impact of such a system on the EU administration to merit investigation. He therefore asked the Commission: (i) whether it had contacted Germany in order to obtain more information; and (ii) to inform him of the position it would take if such a rating system were to exist.

81. In its reply, the Commission stated that it did not consider that the alleged German rating system for officials could have a possible impact on the functioning of the EU. It emphasised that it appointed its senior officials itself and followed a transparent selection procedure, which assessed the candidates' merits. It therefore did not intend to contact national authorities on these issues.

82. In his observations, the complainant maintained his allegation and claim, noting that it would be difficult not to consider the evaluation system as an indicator of a "network of trafficking of influence" and criticised the Commission's failure to investigate the matter. It was unlikely that the German government was rating top officials highly for acting in the Union interest; rather, the highest ratings were, in all probability, given to those officials who acted in the German interest. In this context, the Commission's response that it appointed its officials itself was irrelevant.

83. The complainant also noted that it was illogical for the Commission to investigate the actions of a high-ranking official on the basis of a newspaper article, but to refuse to do so in relation to the matter he had raised and which had been reported by an equally credible newspaper. In this context, the complainant objected to the Commission's reference to an "alleged rating system", noting that the matter had been reported on a factual basis and that the contents of the article had not been challenged by the German government. The Commission's continued inaction was a threat to the rule of law and showed that it was not truly independent.

The Ombudsman's assessment leading to a draft recommendation

84. As already indicated in his second request for further information, the Ombudsman considered that the Spiegel article indicates that the German government may be operating a rating system for high-ranking officials in the EU and other international organisations, with a view to proposing them for appointment to high-profile international posts. In the Ombudsman's view, it would be perfectly understandable if a Member State decided to keep an eye on its nationals who hold high-ranking posts in international organisations and to assess their merits, so as to have a database of potential candidates it could use when considering how to fill certain positions involving high responsibilities. However, such a



national rating system could have repercussions on the functioning of the institutions, bodies, offices and agencies of the EU. This is because, as the complainant pointed out, the prospect of attaining high-profile jobs might influence the behaviour of the EU officials who are covered by such a rating system.

85. The Ombudsman considered that it is of course perfectly possible that the rating system does not, as the complainant fears, rate officials highly for acting in the national interest, but evaluates their leadership or diplomatic skills and how well they perform their task as officials in their institution. Further, the possible impact of any such rating system on officials working for the EU will be likely to depend on whether and in what detail these officials know about the rating they receive. In the absence of further information, it is thus impossible to ascertain whether the rating system allegedly operated by the German government could have any negative consequences for the EU. The Ombudsman accepted that there was, at that time, no evidence to prove that such a system exists. However, a reputable national news magazine reported that a Member State operates such a system which could have a negative impact on the loyalty of Commission staff to the EU. The Ombudsman agreed that the Commission clearly has a discretion in deciding whether to take action when it believes that there is, or could be, an infringement of EU law. However, this discretion can only be usefully exercised after the Commission has examined the matter and established the facts. In the Ombudsman's view, the information provided by the complainant should thus have led the Commission to investigate the matter.

86. The Commission referred to the fact that it appoints its officials itself and that it does so following a procedure which assesses their merits. However, the possible danger of national rating systems such as the one reported in the *Spiegel* article lies in its potential effect on officials after they are appointed. The Commission's argument thus did not show that no inquiry is needed into the matter raised by the complainant.

87. The Ombudsman therefore found that the Commission had not adequately addressed this allegation and claim. He still considered that national rating systems merited investigation and therefore found that the Commission's refusal even to investigate the matter constituted an instance of maladministration. He thus made the draft recommendation that the Commission should investigate the potential impact which the rating system of high-ranking German Commission officials allegedly operated by the German government may have on the performance of their duties, in particular on their independence, impartiality and loyalty to the EU.

The arguments presented to the Ombudsman after his draft recommendation

88. In its detailed opinion on the draft recommendation, the Commission reiterated that it appointed staff on the basis of their performance. It added that it also evaluated and promoted its staff on the same basis and without regard to nationality or the opinion of a Member State. It stated that it is not possible for external stakeholders to exercise undue influence, given the Commission's relevant procedures and the rules contained in the Staff



Regulations. The Commission therefore did not intend to open such an investigation.

89. In his observations, the complainant maintained his complaint, underlining that the Commission's independence would be jeopardised if it were to accept that a Member State run a parallel evaluation system with regard to high-ranking Commission officials. In relation to the Commission's argument that it selected and promoted its officials without any outside influence, the complainant pointed out that (i) the Ombudsman was clearly aware of this fact when he made his draft recommendation, and (ii) this did not eliminate the impact the German rating system could have on the Commission's independence, since, as the Ombudsman had already stated, such a system might " *influence the behaviour of the EU officials* " concerned.

90. As regards the Ombudsman's statement that it was unclear whether and to what extent German high-ranking officials were informed about the rating system, the complainant argued that, after the *Spiegel* article, it was impossible for them not to know about it. In addition, the fact that that system was not public further encouraged German officials to act in the interest of Germany rather than that of the European Union in order to enhance their career prospects. This undermined their independence, impartiality and loyalty to the Commission.

91. The complainant also noted that the German officials had not " *denounced* " the German parallel rating system. He therefore reiterated his request for the Ombudsman to recommend that disciplinary proceedings be initiated against the Commission officials concerned, that is to say, high-ranking officials of German nationality, in accordance with Article 4(2) of the Ombudsman's Statute and Article 10.4 of the Implementing Provisions.

The Ombudsman's assessment after his draft recommendation

92. In its detailed opinion on the Ombudsman's draft recommendation, the Commission simply reiterated the arguments it had put forward before the Ombudsman made the draft recommendation. In particular, in reply to the Ombudsman's argument that parallel national rating systems, if they did indeed exist, were more of a concern once officials were appointed rather than during the selection process, the Commission merely pointed out that it evaluates and promotes its officials without being subject to any external influence.

93. However, as stated in the analysis leading to the draft recommendation, the Ombudsman's preoccupation with the alleged German rating system or similar systems that may be in place in other Member States, is not that a Member State selects individuals for the Commission to appoint or promote. Rather, his preoccupation is that officials may not always act in the EU interest if they let their behaviour be influenced by the thought of how it might be assessed by the administration of their own Member State. This is why the Ombudsman considered and still considers that allegations of such a parallel system merit an investigation.



94. It is true that the Ombudsman can, as the complainant claimed he should, also inform institutions of "*facts calling into question the conduct of a member of their staff from a disciplinary point of view*". However, while the Ombudsman considers that the potential concerns raised by the allegation should give rise to an investigation by the Commission, he has not found, in the course of the present inquiry, any established facts which would call into question the conduct of a particular official or even of a group of officials. He further underlines that the Commission enjoys broad discretion when deciding whether to initiate disciplinary proceedings. The Ombudsman therefore does not find it appropriate, in the present case, to call upon the Commission to initiate disciplinary proceedings.

95. It must be concluded from the above that the Commission has not implemented the Ombudsman's draft recommendation. Therefore, the instance of maladministration identified in it still exists.

C. Allegation that the Commission wrongly failed to commence proceedings against Germany in relation to the rating system for high-ranking officials and related claim

Arguments presented to the Ombudsman

96. The complainant considered that, by operating a rating system of top officials as described above, Germany was undermining fundamental principles of the European civil service, in particular the impartiality of European civil servants, their independence and loyalty to the EU. The Commission had an obligation to ensure that these principles and the measures it had taken to implement them were applied. It should therefore "bring an action before the appropriate court" against Germany which was breaching the Staff Regulations.

97. As stated above (see section B), the Commission did not comment on this issue in its opinion. When asked by the Ombudsman to address this issue, it stated that it did not intend to contact national authorities on such issues because it appointed its senior officials itself and because it did not consider that an alleged rating system for officials could have an impact on the functioning of the EU.

98. In his observations, the complainant maintained his allegation and claim.

The Ombudsman's assessment

99. It is settled case-law that the Commission has considerable discretion in deciding whether and in what way to pursue allegations that a Member State has breached the Treaties. While the Ombudsman does consider, as indicated above, that the rating system allegedly operated by Germany merits an investigation, he does not consider that the fact that the Commission has not brought Germany before a court in this regard constitutes



maladministration. As already mentioned above, it is perfectly possible that an investigation would lead the Commission to the conclusion that any such rating system did not have a negative effect on the EU's civil service. In any event, any legal action would have to be preceded by the step discussed in section B above, namely, an investigation of the relevant rating system.

D. Allegation that the Commission wrongly failed to ensure that all press releases are available on the RAPID database at all times and related claim

Arguments presented to the Ombudsman

100. The complainant submitted that not all the Commission's press releases were available on the RAPID database. In his letter entitled "*Rapid, but inaccurate*", he referred in particular to two Commission press releases from September 2008, which could not be found through the search function on the RAPID website [7]. In the first of these, the Commission stated that it had been approached by a British newspaper which stated that it had tapes of meetings between a Commission official and journalists posing as businessmen. The second concerned a ban on imports of Chinese dairy products.

101. In its opinion, the Commission did not comment on this issue. It merely referred to the reasons for which the complaint that the complainant had submitted to it on the matter pursuant to Article 90(2) of the Staff Regulations, had been rejected. The Ombudsman therefore asked it to comment on the substance of the complaint.

102. In its reply, the Commission "*took note*" of the complainant's criticism and explained that RAPID was an interinstitutional database of press releases which contained all Commission press releases since 1985, as well as press releases of other European institutions. The Spokespersons' service was responsible for the Commission press releases published on RAPID. The Commission added that it did not consider that the issue concerned the complainant individually or personally and that, in particular, it did not change his legal position.

103. Having analysed this reply, the Ombudsman noted that the complainant had referred to two press releases, which could not be found on the RAPID database, and had provided a copy of one of those press releases. The Ombudsman therefore asked the Commission to: (i) explain why the press releases were not available on the RAPID database or, alternatively, provide a link to where they could be found; and (ii) explain the measures it had taken to ensure that all press releases were available in full on the database.

104. In its reply to this second request for information, the Commission repeated that all Commission press releases since 1985 were available on RAPID. However, it admitted that the press release mentioned by the complainant could not be found on RAPID. It explained



that press releases issued through e-mail, referred to as 'espresso', were not automatically included on the RAPID database. It went on to add that the Commission's Spokespersons' Service had begun to insert all 'espresso' press releases into the RAPID database in a systematic manner. This included the press release mentioned by the complainant.

105. In his observations, the complainant maintained his allegation and claim and criticised the fact that it had taken the Commission almost two years to admit that not all press releases could be found on the RAPID database. He wondered how long it would take them to make all press releases available.

The Ombudsman's assessment leading to a draft recommendation

106. The " *about* " section of the RAPID website [8] states that the database contains " *all the Press Releases of the Commission since 1985* ". It was only in reply to the Ombudsman's second request for information that the Commission acknowledged that not all press releases were in fact available on the RAPID database. The Commission added that it was working on inserting all press releases and that the press release referred to by the complainant was now available.

107. A search of the database confirmed that the Commission press release of 5 September 2008 relating to the approaches by the Sunday Times is now available on the RAPID database. However, the complainant also referred to another press release he could not find. This second press release, which is mentioned in his letter entitled "Rapid, but inaccurate", concerns measures taken in relation to Chinese melamine-contaminated milk [9] . On 11 November 2011, this press release was not available on the RAPID database.

108. It was thus clear that the Commission, even though it began inserting all press releases into the RAPID database before February 2011, had not yet completed this task. The Ombudsman was unaware of how many press releases may have to be added to the said database to make it complete. He noted, however, that the Commission did not claim that the work involved was such that it could not be completed until November 2011. In any event, the Ombudsman failed to understand why the second press release referred to by the complainant was still not available on the RAPID database, more than two and a half years after the complainant drew the Commission's attention to the fact that it was missing from that database.

109. In light of the above, the Ombudsman found that the Commission had, in spite of its declared intention, hitherto failed to ensure that all its press releases be made available on the RAPID database. It followed that there was a gap between the statement that all press releases since 1985 are available and the reality. This constituted an instance of maladministration. The Ombudsman therefore recommended that the Commission should ensure that all its press releases are available on the RAPID website.



The arguments presented to the Ombudsman after his draft recommendation

110. In its detailed opinion, the Commission stated that the press release on the 'Chinese milk affair' was in fact available on the RAPID database, through the 'midday express' press releases for 26 September 2008. However, in order to allay the complainant's concerns, it had decided to insert it as a separate press release in the RAPID database. The Commission further stated that it was "*stepping up its efforts*" to ensure that all newly issued '*espresso*' press releases were inserted into the RAPID database manually.

111. In his observations, the complainant concluded from this statement that the Commission had still not inserted all past press releases into the RAPID database and that the database remained incomplete. In fact, the Commission had not indicated a date by which the database would be fully updated. He added that the Commission should thus insert an appropriate warning on the RAPID website. Moreover, he invited the Ombudsman to conclude that the maladministration he had identified had not been remedied because he could not be sure that all past '*espresso*' press releases had been included in RAPID. All he knew for certain was that the two press releases to which he had referred were now available on the database.

The Ombudsman's assessment after his draft recommendation

112. The Ombudsman is pleased to note that the press releases to which the complainant referred in his complaint are now available on the RAPID database which is intended to contain "*all the Press Releases of the Commission since 1985*". He also notes that the Commission referred to the complainant's letter "*Rapid, but inaccurate*" as describing the "*past functioning*" of the RAPID database. He deduces from this that the Commission is actively working on achieving a situation where not only all past press releases, but also new ones, including the '*espresso*' press releases, are inserted into the database within a reasonable period of time after they are published. In these circumstances, the Ombudsman concludes that the Commission appears to have taken steps to comply with his draft recommendation concerning this issue.

E. Conclusions

113. If the Ombudsman does not consider that the detailed opinion he receives from an institution or body in response to a draft recommendation is satisfactory, he is empowered by Article 3(7) of the Ombudsman's Statute to submit a special report to the European Parliament. The submission of a special report gives Parliament, as a political body deriving its legitimacy from its direct election by citizens and exercising an important role in the Union's constitutional order, the opportunity to take a position on the Ombudsman's views and conclusions.



114. In his Annual Report for 1998, the Ombudsman pointed out that being able to present a special report to the European Parliament is of inestimable value for his work. He added that special reports should not, however, be presented too frequently, and they should be put forward only in relation to important matters where Parliament is able to take action in order to assist the Ombudsman [10] . The Annual Report for 1998 was submitted to, and approved by the European Parliament.

115. In the present case, the Commission did not follow the Ombudsman's draft recommendation in relation to (a) the publication of letters on its intranet and (b) the investigation of the potential impact of a parallel national rating system of some of its high-ranking officials.

116. While the issue of the publication of the complainant's letters on the Commission's intranet raises important issues, the Ombudsman also notes that the circumstances which have given rise to the present complaint are rather unusual. The Ombudsman further notes that the Commission in the end agreed to publish at least parts of two of the relevant letters. In these circumstances, he does not consider that this aspect justifies his submitting a special report to the European Parliament.

117. The second matter, that is, the Commission's refusal to investigate allegations that there exists a parallel national rating system for some of its high-ranking officials, which might undermine their loyalty, could, in principle, give rise to a special report. However, as stated above, many of the parameters of the alleged rating system alluded to by the *Spiegel* article are uncertain and it is therefore not clear how serious the impact of the system (if it indeed exists) really is. The Ombudsman therefore considers that it would not be appropriate to make a special report on this issue.

118. However, the Ombudsman will send a copy of this decision and a summary thereof to the European Parliament in order to inform it of this case and to enable it to take any action it might consider necessary.

119. Accordingly, the Ombudsman closes his inquiry into this complaint with the following conclusion and critical remarks:

(a) It constitutes good administrative practice properly to reason decisions not to publish letters to the editor by reference to the published editorial policy and taking into account the principles which this policy implements. In the case at hand, the Commission refused to publish on the discussion forum on Intracomm (the Commission's Intranet) the full versions of three letters that the complainant had submitted to it (the second version of the letter entitled " @europa.de "; the letter entitled " Made in Germany "; and the letter entitled " Rapid, but inaccurate ") without providing adequate justifications for its refusal to do so. This amounts to an instance of maladministration.



(b) It constitutes good administrative practice to investigate the potential impact which a rating system of high-ranking Commission officials allegedly operated by the government of a Member State may have on the performance of their duties, in particular their independence, impartiality and loyalty to the EU. In the present case, the Commission refused to do so, even though there were sound reasons for initiating such an investigation. This amounts to an instance of maladministration.

(c) The Commission has taken steps to comply with the Ombudsman's draft recommendation that it ensure that all its press releases are available on the RAPID website. There are therefore no grounds for further inquiries into this aspect of the complaint.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 17 December 2012

[1] <http://www.timesonline.co.uk/tol/news/politics/article4692906.ece>

[2] <http://www.spiegel.de/politik/ausland/0,1518,577597-2,00.html>

[3] Translation of the original French version by the European Ombudsman's Office.

[4] Case F-80/08 *Wenig v Commission*, judgment of 30 November 2009, not yet published in the ECR, paragraph 68.

[5] Case *Allenet de Ribemont v. France*, judgment of 10 February 1995 (A series nr 308, paragraph 38).

[6] Case F-80/08, cited in footnote 4 above, paragraphs 11 and 69.

[7] <http://europa.eu/rapid/searchAction.do>

[8] <http://europa.eu/rapid/showInformation.do?pageName=about>

[9] This press release used to be available on the website of then Commissioner for Health, Androulla Vassiliou. While the title of the press release and the link to the pdf document still exist at http://ec.europa.eu/dgs/health_consumer/dyna/vassiliou/press_releases.cfm, the link leads back to the index page for the Barroso I Commission, which, according to a label on the top of that page, was archived on 16 February 2010.



[10] Annual Report for 1998, pages 27-28.