Médiateur européen

Décision dans l'affaire 793/2007/(WP)BEH - Refus d’accorder l’accès à des documents du Parlement

Décision
Affaire 793/2007/(WP)BEH - **Ouvert le** 27/03/2007 - **Recommandation le** 21/07/2009 - **Décision le** 13/09/2010

En 2006, le plaignant a demandé au Parlement européen l’accès à certains documents relatifs au financement de l’acquisition par le Parlement des bâtiments dits D4-D5 à Bruxelles. Il s’agissait notamment des documents suivants: l’appel d’offres, la liste des banques contactées, ainsi qu’un rapport d’un cabinet d’audit comptable évaluant les offres reçues. Le Parlement a refusé l’accès à ces documents.

Dans sa plainte adressée au Médiateur, le plaignant a, en substance, fait valoir que le Parlement n'avait pas traité de façon appropriée sa demande d'accès. Il a également allégué que le Parlement pourrait avoir formulé des déclarations incorrectes et trompeuses concernant l’applicabilité des directives de l’UE en matière d’attribution de marchés publics.

Dans son avis, le Parlement a maintenu son refus d’accorder l’accès aux documents. En ce qui concerne ses déclarations, il a indiqué que, compte tenu de l’interdiction faite aux institutions de l’UE de souscrire des emprunts, le seul moyen à sa disposition pour financer l’acquisition était d’établir un accord de financement par le biais d’une société privée. Le Parlement a également souligné que, même si les directives sur la passation de marchés publics ne sont pas applicables aux contrats de droit privé, il avait néanmoins respecté les principes de base applicables à une procédure d’appel d’offres. Le Médiateur a toutefois estimé que le refus du Parlement d’accorder l’accès aux documents s’apparentait à un cas de mauvaise administration. Dans un projet de recommandation, il a appelé le Parlement à divulguer les documents demandés. En outre, il a demandé au Parlement de rectifier ou de clarifier ses déclarations, notamment en ce qui concerne la pertinence d'un arrêt de la Cour de justice relativement à l'accord financier choisi.

Dans son avis détaillé, le Parlement a déclaré qu'il avait décidé de rendre public les documents demandés par le plaignant. Tout en insistant sur le fait que ses déclarations n’étaient en aucune façon incorrectes ou trompeuses, le Parlement a toutefois présenté des commentaires détaillés supplémentaires sur la pertinence dudit arrêt, en précisant pourquoi il avait estimé que celui-ci était inapplicable. Le Parlement a également fourni des informations complémentaires sur la procédure qu’il a suivie pour obtenir un financement externe. Le Médiateur a estimé que le Parlement avait suffisamment clarifié sa déclaration selon laquelle il avait pleinement respecté

les principes de base d'une procédure d'appel d'offres.

Après examen de l'avis détaillé du Parlement, le Médiateur a estimé qu'il n'était pas nécessaire d'engager de nouvelles actions concernant les déclarations du Parlement. En ce qui concerne l'accès aux documents demandés par le plaignant, il a conclu que le Parlement avait accepté son projet de recommandation.

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a journalist. On 27 November 2006, he applied to the European Parliament for access to certain documents relating to the financing of its D4-D5 buildings in Brussels. He requested access to the following documents:

(i) the pre-information notice of the Call for financing the said building published in the Official Journal of the European Communities ('the Official Journal');

(ii) the call for tenders and the list of banks contacted;

(iii) a report by the accounting and consulting firm KPMG, containing an evaluation of tenders submitted;

(iv) Parliament's decision on the award of the public contract to Fortis bank; and

(v) a copy of the contract awarded.

2. By letter of 18 December 2006, Parliament informed the complainant that its D4-D5 buildings were built by the private developer *Société Promotion Léopold* . As a consequence, the Community directives on public procurement did not apply to the financing of the buildings, since, pursuant to a contract between Parliament and the developer, the latter was in charge of ensuring the external financing of the building project. Parliament, therefore, did not have to organise a tender for the financing of the building project. Against this background, Parliament stated that the documents mentioned under (i), (ii) and (v) were held by the developer. Given that no tender had been published in the Official Journal, the document mentioned under (iv) did not exist. As regards the report prepared by KPMG, Parliament explained that it was to be considered as a third-party document within the meaning of Article 4(4) of Regulation 1049/2001 [1] . Consequently, Parliament was under an obligation to consult KMPG regarding the possibility of disclosure and had already done so. Parliament promised to keep the complainant informed of further developments following its contacts with KPMG.

3. On 8 January 2007, the complainant submitted a confirmatory application for access to the documents covered by his initial application. As regards the document mentioned under (iv), the complainant took note of Parliament's position that it did not exist. Consequently, instead of asking for access to this document, he requested access to the letters exchanged between

Parliament and the developer in the framework of Parliament's consultation with it.

4. On 18 January 2007, Parliament informed the complainant that, following a thorough examination of the report prepared by KPMG, it considered that the report contained information concerning the commercial interests of the banks involved. Therefore, on the basis of Article 4(2) first indent of Regulation 1049/2001, it could not grant access.

5. On 16 March 2007, the complainant submitted a complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

6. The complainant made the following allegations.

(1) Parliament failed to deal properly with, and reply to, his confirmatory application for access to documents.

(2) Contrary to Article 7(1) of Regulation 1049/2001, Parliament's two letters in reply to his initial application for access did not indicate the possibility of submitting a confirmatory application.

(3) Parliament wrongly changed its reasoning as regards its rejection of access to one of the documents concerned by his request. According to the complainant, the later reasoning was furthermore insufficient, given that it failed to indicate how the commercial interests of the banks concerned would be *undermined* .

(4) Parliament infringed Article 6(4) of Regulation 1049/2001 by not indicating clearly if it held copies of three of the documents to which he had requested access.

(5) Parliament possibly made incorrect and misleading statements concerning the applicability of the directive for the award of public contracts.

7. As regards the complainant's fifth allegation, the Ombudsman considered that the complainant had not raised this issue in his contacts with Parliament. Given that he had, therefore, not made the appropriate prior administrative approaches required by Article 2(4) of the Statute of the European Ombudsman, his fifth allegation was inadmissible.

8. On 7 April 2007, the complainant informed the Ombudsman that he had received Parliament's decision on his confirmatory application for access to the documents in question. While he pointed out that he wished to maintain his complaint, he also stated that his fourth allegation had been dealt with satisfactorily by Parliament and had thus become obsolete. In view of Parliament's decision on his confirmatory application, the complainant submitted the following new allegations.

(6) Parliament's rejection of access to the call for tenders and the list of banks contacted by the developer [2] was not properly reasoned.

(7) Parliament wrongly changed its reasoning as regards its rejection for a second time of access to one of the documents. Furthermore, the new reasoning was still not plausible.

(8) Parliament ignored the complainant's request, made in his confirmatory application, that he should be given access to a certain correspondence conducted by Parliament, if a certain other document did not exist.

(9) Parliament's argument that there was no overriding public interest in the disclosure of the documents concerned was incorrect.

9. On 17 June 2007, the complainant informed the Ombudsman that he had contacted Parliament regarding his fifth allegation. However, he had still not received a reply after two months. He, therefore, asked the Ombudsman to include the fifth allegation in his inquiry. Given that the complainant's fifth allegation was now admissible, the Ombudsman decided to include it in his ongoing inquiry.

THE INQUIRY

10. The complaint was forwarded to Parliament for an opinion, which it sent on 12 July 2007. As regards the complainant's fifth allegation, the Ombudsman asked Parliament for an opinion on 2 July 2007. In a further letter of 12 July 2007, Parliament referred to a letter sent to the complainant on 5 July 2007, in which it explained its position on his fifth allegation. Both Parliament's opinion and its additional letter were forwarded to the complainant with an invitation to make observations, which he sent on 2 August 2007.

11. By letter of 24 September 2008, the Ombudsman informed the complainant that complaint 1450/2007/(WP)BEH against OLAF, which he submitted on 21 May 2007, related to legal issues similar to those raised by his fifth allegation in the present complaint. A uniform approach was therefore desirable. Given that the Ombudsman was pursuing further inquiries in complaint 1450/2007/(WP)BEH, he asked for the complainant's understanding for the fact that he had not taken further steps as regards the present complaint since the time the complainant submitted his observations. However, he pointed out that, once OLAF's reply to his request for further information arrived, he would proceed with his inquiry into the present complaint as rapidly as possible.

12. In a letter of 19 October 2008, the complainant brought to the Ombudsman's attention two further documents relating to his case. During a telephone conversation on 28 May 2009, the Ombudsman's services discussed the possibility of a friendly solution with the complainant.

13. On 21 July 2009, having concluded that a friendly solution was not possible and that the appropriate next step was a draft recommendation, the Ombudsman issued a draft recommendation to Parliament and asked it to send a detailed opinion by 31 October 2009. By letters of 23 September 2009, and 11 January 2010, Parliament, referring mainly to the

complexity of the file and the number of services and external bodies involved, requested extensions of the deadline granted by the Ombudsman. Parliament sent its detailed opinion on 1 February 2010, which was forwarded to the complainant for possible observations. The complainant sent observations on 23 March 2010.

14. On 19 October and 6 November 2009, the complainant forwarded to the Ombudsman two letters which he had addressed to OLAF in relation to the Ombudsman's draft recommendations in the present case, and complaint 1450/2007/(WP)BEH.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

As regards certain comments made by Parliament in relation to the Ombudsman's publication policy

15. In its detailed opinion on the Ombudsman's draft recommendation, Parliament submitted that, disregarding his own classification of this document as 'confidential', the Ombudsman chose to issue a press release on 17 September 2009, publishing the text of the draft recommendation which he had sent to Parliament on a confidential basis. According to Parliament, the Ombudsman therefore created the impression that he had taken a final position on the complaint. In Parliament's view, this was at odds with Article 3(6) of the Statute of the European Ombudsman and Article 228 of the Treaty on the Functioning of the EU. These two Articles allow a period of three months for the institution concerned to submit a detailed opinion on a draft recommendation. According to Parliament, the Ombudsman's press release led to allegations circulating in the media at a time when Parliament was unable to discuss the substance of the matter, pending completion of the procedure. Parliament expressed astonishment at the Ombudsman's media policy which, in its view, undermines procedural guarantees foreseen by the applicable rules. It also took the view that such action led to its detailed opinion losing part of its relevance.

16. In his observations on Parliament's detailed opinion, the complainant stated that Parliament should, from past experience involving other complaints made against it through the Ombudsman, be sufficiently aware of the fact that confidentiality in such cases applies to the identity of the complainant, but not to the contents of a complaint. Parliament's remarks could, therefore, be interpreted as nothing less than a malicious attack on the Ombudsman's work. The complainant found it astonishing that the President of Parliament was prepared to rubber-stamp such an attack.

17. The Ombudsman understands Parliament's concern to be essentially two-fold: It appears to question whether the publication and media policy pursued by the Ombudsman is in line with (i) the requirement of confidentiality, and (ii) an institution's rights of defence. In responding to Parliament's remarks, the Ombudsman would like to use the opportunity to explain and clarify

his approach to confidentiality and an institution's rights of defence.

18. Information on the Ombudsman's media policy has been published on his website. The Ombudsman aims to be as transparent and accessible as possible for journalists and other stakeholders in order to allow the public to follow his work. For example, he provides the media with information on the start of investigations, friendly solutions accepted by institutions, important draft recommendations addressed to institutions, and decisions closing inquiries.

19. Turning to the first aspect raised by Parliament, the Ombudsman recalls that, pursuant to Article 2(3) of the Statute of the European Ombudsman, a complainant may ask for his or her complaint to be treated as confidential, as occurred in the present case. As a consequence, the draft recommendation made to Parliament was also marked confidential. It appears from Parliament's detailed opinion that, in its view, the fact that a document is marked confidential means that it cannot be made public and/or that information about its contents cannot be published. This is not the Ombudsman's understanding of confidentiality, as provided for in Article 2(3) of his Statute. It appears useful to add that Parliament's view would be difficult to reconcile with the precepts of a transparent and accountable administration, since it would further imply that the Ombudsman would also be prevented from publishing decisions closing his inquiries in confidential cases. The Ombudsman, while endeavouring to make his work as transparent as possible, has to respect the legitimate demands of complainants who choose to have their cases treated confidentially. Thus, in the case of confidential complaints, the Ombudsman's decisions, including draft recommendations, are published only once *any information which could lead to the identification of the complainant* has been removed. However, save for duly substantiated grounds, as a matter of principle, the Ombudsman sees no reason to refrain from publishing any other information.

20. In relation to the second aspect raised by Parliament, the Ombudsman recalls that Article 3(6) of his Statute provides that, once an institution has been informed of a draft recommendation, it shall send the Ombudsman a detailed opinion within three months. It is worth noting that nothing in Article 3(6) of the Statute prohibits the publication a draft recommendation, or a relevant press release. It is also self evident that the mere fact that a draft recommendation is published does not mean that the Ombudsman has made a final decision on a case. The same is true of the press release entitled " *Ombudsman asks for investigation into financing of European Parliament buildings* ", which reports on the Ombudsman's draft recommendations in the present case, as well as complaint 1450/2007/(WP)BEH. The last sentence of its first paragraph reads as follows: " *The Ombudsman has asked the EP and OLAF to submit detailed opinions by 31 October 2009.* " Otherwise, the press release contains merely a brief description of the facts not in dispute between the parties, and a summary of the Ombudsman's draft recommendation, consisting of two sentences. In view of these circumstances, the Ombudsman fails to see a basis for Parliament's view that, by making his draft recommendation public, he took a final position on the complaint, and, in so doing, caused Parliament's opinion to lose part of its relevance. In view of his consistent publication practice, which is in line with his Statute, and must be considered as known to Parliament, the Ombudsman considers Parliament's concerns to be unfounded.

As regards new allegations raised by the complainant in the course of the inquiry

21. In his observations on Parliament's opinion, the complainant submitted that Parliament may have breached Article 9(3) of the Rules governing public access to European Parliament documents which, as regards consultation of third parties concerning third-party documents, requires third parties to make their position known within five working days. It appears that the complainant has not raised this issue in his contacts with Parliament. Given that he has, therefore, not made the appropriate prior administrative approaches required by Article 2(4) of the Statute of the European Ombudsman, the Ombudsman considers that he is not entitled to deal with this aspect in the present inquiry.

22. In his observations the complainant pointed out that, in light of the Ombudsman's draft recommendation and Parliament's detailed opinion, he re-examined the award of the contract for the construction of the D4-D5 buildings. He submitted that Parliament awarded this contract to the developer following a negotiated procedure, without publishing a relevant notice. He considered that this amounted to a grave infringement of Article 89 of the Financial Regulation [3] , which provides that all public contracts financed in whole, or in part, by the EU budget shall comply with the principles of transparency, proportionality, equal treatment, and non-discrimination (Article 89(1) of the Financial Regulation). Moreover, pursuant to Article 89(2) of the Financial Regulation, all procurement contracts shall be put out to tender on the broadest possible base, except when use is made of the negotiated procedure. The complainant believed that Parliament evaded a tendering procedure " *on the broadest possible base* " by using the negotiated procedure for the construction of the D4-D5 buildings, even though the conditions for using such a procedure were not met. The complainant further submitted a number of detailed arguments in support of this view.

23. The Ombudsman recalls that, apart from examining the manner in which Parliament handled the complainant's requests for access to documents, the scope of the present inquiry extends to examining the allegation that Parliament may have made incorrect and misleading statements concerning the applicability of the directive for the award of public contracts (the complainant's fifth allegation). The Ombudsman's inquiry therefore includes an assessment of certain of Parliament's statements. However, it does not extend to an assessment of whether or not Parliament complied with the Financial Regulation when awarding certain contracts.

24. The complainant's submissions that the contract awarded for the construction of the D4-D5 buildings allegedly breached Article 89 of the Financial Regulation must, therefore, be considered to be a new allegation. From the documents submitted to the Ombudsman, the complainant does not appear to have raised this issue with Parliament. It would, therefore, appear that he has not made the appropriate prior administrative approaches to Parliament. Even if the complainant had already raised this issue with Parliament, the Ombudsman would nevertheless have to ask Parliament to submit a further opinion on this new allegation if he wished to include it in his inquiry. Given the advanced stage of the inquiry relating to the complainant's other allegations, the Ombudsman considers that it would be preferable not to include this new allegation in the present inquiry. The complainant remains free to submit a new complaint in relation to his new allegation, once he has made the appropriate administrative

approaches to Parliament.

As regards the contents and structure of the present decision

25. On 7 April 2007, the complainant informed the Ombudsman that, in light of Parliament's decision on his confirmatory application for access, his fourth allegation had become obsolete. The Ombudsman understood this to mean that the complainant wished to drop his fourth allegation. Thus, the present decision only deals with the complainant's allegations (1)-(3) and (5)-(9).

26. The complainant's fifth allegation relates to Parliament's statements on the applicability of the directives for the award of public contracts. His other allegations concern various aspects of Parliament's handling of his applications for access to certain documents. Therefore it seems useful to start by considering the complainant's fifth allegation, in part I of the present decision, before turning to his other allegations, in part II of the present decision.

27. As regards the complainant's allegations concerning Parliament's handling of his applications for access, the Ombudsman deems it useful to address them in chronological order, following the sequence of procedural stages for requests for access to documents provided for in Regulation 1049/2001. Thus, he will first consider the allegation relating to Parliament's decision on the complainant's initial application (second allegation). He will then turn to the allegations relating to Parliament's decision on the confirmatory application (in chronological order, the complainant's first, eighth, third, seventh, and sixth allegations). Given that the third and seventh allegations both raise the question concerning the extent to which Parliament, wrongly in the complainant's view, changed the reasoning underpinning its decision to refuse access, they will be addressed together. Finally, the Ombudsman will analyse the question regarding the existence of an overriding public interest in disclosure (the ninth allegation).

I. The complainant's allegation concerning Parliament's statements

A. Allegation of possibly incorrect and misleading statements (the complainant's fifth allegation)

Arguments presented to the Ombudsman

28. The complainant stated that, according to Parliament, the directives for the award of public contracts did not apply to the financing of Parliament's D4-D5 buildings, given that, pursuant to a contract between Parliament and the developer, the latter was in charge of ensuring the external financing of the building project. He submitted that this statement appeared to contradict the jurisprudence of the Court of Justice. It followed from the Court's case-law that " *a contract … cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority* " [4]

. Furthermore, he pointed to Article 8 of Directive 2004/18/EC [5] ('the Directive'), which provides that the Directive applies to contracts subsidised directly by contracting authorities by more than 50 %. In the complainant's view, contracting authorities thus had to ensure that the provisions of the Directive were complied with, if third parties selected by them entered into contracts with other parties.

29. Against this background, the complainant alleged that Parliament possibly made incorrect and misleading statements as regards the applicability of the Directive.

30. Instead of submitting a separate opinion on the present allegation, Parliament referred to its letter, sent to the complainant on 5 July 2007 (see point 10 above). In this letter, Parliament replied to three specific questions raised by the complainant, namely:
- whether Parliament subscribed to the view that the Directive, which it had itself adopted as a co-legislator, did not apply to its own building projects;
- whether, in the event of an affirmative reply to the first question, Parliament did not consider this to be a circumvention of the personal scope of application of the Directive, which was incompatible with its aim and purpose; and
- in the event of a negative reply to the first question, which steps Parliament had taken or intended to take to ensure that the developer complied with the provisions of the Directive in carrying out the project.

31. In respect of the complainant's first question, Parliament took the view that its public contracts were not subjected to the directives on the award of public contracts. Instead, they were governed by the Financial Regulation which, according to its Article 14(2), did not allow Community institutions and bodies to raise loans. This was why Parliament did not organise a tendering procedure. The same reasons rendered equally immaterial the complainant's views on the provisions of the Directive, as well as on the judgment referred to by him.

32. In reply to the complainant's second question, Parliament essentially stated that, in view of the prohibition for Community institutions and bodies to raise loans, only a financing arrangement via a contract between the developer and a bank could be envisaged for the financing of Parliament's D4-D5 buildings. The directives on the award of public contracts did not apply to private law contracts. As a consequence, a tendering procedure in line with these directives was not possible. Nevertheless, in its negotiations with the developer, Parliament successfully ensured that a transparent consultation of the banking sector on as large a scale as possible took place. As a consequence, the basic principles of a tendering procedure were fully complied with.

33. As regards the complainant's third question, Parliament stated that Article 119 of the Financial Regulation did not oblige it to publish building contracts in the Official Journal. At the same time, it regretted that the contract in question had not been published on Parliament's website.

34. In his observations, the complainant submitted that the directives on the award of public contracts did not contradict the Financial Regulation. Instead, the Financial Regulation rendered

them fully applicable. In support of his reasoning, the complainant relied, in particular, on recital 24 of the Financial Regulation, which reads as follows: " *As regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply* …" He equally pointed out that a number of provisions of the Financial Regulation made express reference to these directives.

35. In addition, the complainant submitted that the fact that Community institutions and bodies were not allowed to raise loans did not render inapplicable the rules on the award of public contracts. If the Financial Regulation were to be interpreted as prohibiting all forms of external financing, Parliament could not authorise a private company to ensure such financing, since it could not delegate powers which it did not have. If, on the other hand, a delegation of powers was possible, the delegating authority had to ensure that the contracted private company complied with the rules governing the award of public contracts.

36. The complainant also took the view that Parliament appeared to consider the contract relating to the D4-D5 buildings as a building contract within the meaning of Article 119(2) of the rules for the implementation of the Financial Regulation [6] ('the Implementing Rules'). However, Article 16(a) of the Directive in fact only excluded from its scope of application building contracts relating to *existing* buildings. Given that, in 2004, at the time when the relevant contract was concluded, the D4-D5 buildings did not yet exist, Parliament wrongly relied on this exception to the application of the Directive.

37. According to the complainant, the rules on the award of public contracts did not only apply to the financing of the D4-D5 buildings, but also to the building and supply contracts concluded in the framework of the project. As a consequence, contrary to what Parliament had stated, his reference to the judgment of the Court of Justice in Case C-44/96 was not irrelevant.

38. The complainant referred to Parliament's statement, according to which the basic principles of a tendering procedure had been fully complied with. To his knowledge, basic Community law principles regarding tendering procedures provided that the list of those invited to submit a tender bid could not be pre-determined at the outset. However, Parliament's remarks showed that a list of 15 banks to be contacted was in fact established at the outset. In this regard, he questioned why only three of the fifteen banks had reacted, given that Parliament was clearly a creditworthy client.

The Ombudsman's assessment leading to a draft recommendation

39. Before assessing Parliament's statements regarding the applicability of the directives concerning the award of public contracts, the Ombudsman considered it useful to summarise them as follows.

(i) Public contracts awarded by Parliament are not governed by the directives on the award of public contracts, but instead by the Financial Regulation (Parliament's first statement).

(ii) The directives on the award of public contracts do not apply to private law contracts. This notwithstanding, the basic principles of a tendering procedure were fully complied with as regards the contract between the developer and the bank (Parliament's second statement).

40. In its letter of 5 July 2007 to the complainant, to which it referred instead of writing a separate opinion on the complainant's fifth allegation, Parliament also stated that building contracts do not have to be published in the Official Journal. The Ombudsman considered that this statement does not relate to the applicability of the public procurement directives, but rather to a consequence of the said directives being applicable or not. As such, it is not covered by the present allegation, and the Ombudsman therefore saw no need to deal with it in his draft recommendation.

As regards Parliament's first statement

41. In order to ascertain whether or not Parliament's first statement is correct, the Ombudsman had to analyse the legal relationship between the directives on the award of public contracts and the Financial Regulation. Given that the complainant referred to the Directive, from the outset, as the applicable legislation, the Ombudsman therefore focused on the relationship between the Financial Regulation and the Directive.

As regards the relationship between Directive 2004/18 and the Financial Regulation

42. The Ombudsman noted that, as is the case with all directives, the Directive is addressed to the Member States (see Article 84 of the Directive and Article 288 of the Treaty on the Functioning of the EU). Pursuant to its Article 7, the Directive shall, subject to certain exceptions, apply to public contracts which have a value estimated to be equal to, or greater than the thresholds set by it. A public contract is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities with a given object set by the Directive (Article 1(2)(a)). The term " *contracting authority* " is defined in Article 1(9) of the Directive as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities, or one or several of such bodies governed by public law.

43. Turning to the Financial Regulation, Title V of its Part I, entitled 'Public Procurement', consists of two chapters, the first of which is entitled 'General provisions'. This chapter is further subdivided into the following sections: 'Scope and award principles', 'Publication', 'Procurement procedures', and 'Guarantees and control'. The second chapter is entitled 'Provisions applicable to contracts awarded by the Community institutions on their own account'.

44. In the Ombudsman's view, therefore, the Directive provides rules on the award of public contracts which, at first sight, only apply to contracts awarded by Member State authorities or bodies. Parallel to that, the Financial Regulation provides rules on the award of public contracts by EU institutions. Therefore, the rules on public procurement contained in the Financial Regulation appear to specifically govern the award of contracts by EU institutions. The

complainant pointed out that recital 24 of the Financial Regulation states that "[a] *s regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply …*" However, this does not mean that the directives on the award of public contracts, as such, apply to contracts awarded by the institutions, but rather, the said recital suggests that the Financial Regulation should, in principle, follow the approach of the directives. The rules of the directives for the award of public contracts could therefore only be relevant for contracts awarded by the institutions to the extent that they are incorporated in the Financial Regulation. Thus, as pointed out by the complainant, the Implementing Rules made occasional reference to provisions of the procurement directives, for example in Article 118(5). However, it seemed clear that such references to individual provisions of the procurement directives could not amount to a general reference to the said directives. For the sake of clarity, it appeared useful to add that this legal situation was different from the one which prevailed under the old Financial Regulation [7] , where Article 56 outlined that " *each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives* ".

45. The Ombudsman considered that the case-law of the Court of Justice confirmed this view of the relationship between the Financial Regulation and the Directive. Without explicitly addressing the relationship between these two bodies of rules, the Court, in a number of judgments, considered that it is the Financial Regulation which governs contracts awarded by EU institutions [8] .

46. This view was further corroborated by the position taken by the European Commission. In reply to a parliamentary question, and answering on behalf of the Commission, the then Commissioner Grybauskaite explained that "[t] *he provisions on procurement of the Financial Regulation have been inspired by the provisions of Directive 2004/18/EC of Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.* " [9] In the same answer, she also referred to certain differences between the Financial Regulation and the Directive.

As regards the correctness of Parliament's first statement

47. Against this background, the Ombudsman concluded that he saw no reason to doubt the correctness of Parliament's first statement, according to which public contracts awarded by it are not governed by the directives concerning the award of public contracts but, instead, by the Financial Regulation. In view of the above, he saw no reason to assume that Parliament's first statement was misleading.

As regards Parliament's second statement

48. Turning to Parliament's second statement, the Ombudsman stated that it had to be borne in mind that the complainant's allegation covers two different contractual relationships, namely, Parliament's contract with the developer, and the contract between the developer and the financing bank. Although, in its letter of 5 July 2007 to the complainant, Parliament appeared to

focus only on the latter contractual relationship, the complainant, in his letter of 10 April 2007 to Parliament, underlined Parliament's role in the financing of the D4-D5 buildings. Therefore, when assessing whether or not Parliament's second statement was incorrect or misleading, both contractual relationships had to be considered.

As regards Parliament's obligation to organise a tendering procedure

49. As regards Parliament's award of the contract to the developer, the Ombudsman considered that, in line with the above findings on the relationship between the Financial Regulation and the Directive, the rules contained in the Financial Regulation had to be considered applicable. In contrast, for the reasons stated above, the Directive could not apply. It followed that the complainant's argument that Article 16(a) of the Directive only excludes building contracts regarding *existing* buildings from its scope of application, and thus not Parliament's D4-D5 buildings, was irrelevant. The same was true for the complainant's reference to Article 8 of the Directive, which provides that the Directive applies to contracts which are subsidised directly by contracting authorities by more than 50 %.

50. As regards the contractual relationship between the developer (contracted by Parliament) and the bank, the Ombudsman took the view that, in light of its scope of application (as argued by Parliament), the Directive could not be considered to apply to contracts between two private companies. At the same time, the Ombudsman noted that Article 89(2) of the Financial Regulation stipulates that all procurement contracts shall be put out to tender on the broadest basis possible. Against this background, it needed to be considered how far the involvement of the developer, a private party, in the financing of the D4-D5 buildings, could have an impact on Parliament's obligation under the Financial Regulation to organise a tender.

51. The complainant repeatedly underlined the relevance of a judgment of the Court of Justice in the given context. In the relevant judgment, the Court held that " *a contract … cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority* " [10] . Parliament took the view that this judgment was irrelevant, given that the directives on the award of public contracts did not apply to contracts awarded by Parliament.

52. The said judgment relates to Directive 93/37, which was repealed by the Directive (see Article 82 of the Directive). More precisely, it interprets Article 1(a) of Directive 93/37, which defines the notion of a " *public works contract* " in the following terms: " *'public works contracts' are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority … which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority* ". This definition appears largely to match the definition of a " *public contract* " pursuant to Article 88 of the Financial Regulation. According to this provision, "[p] *ublic contracts are contracts for pecuniary interest concluded in writing by a contracting authority within the meaning of Articles 104 and 167, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the*

execution of works or the provision of services. " Against the background of essentially analogous provisions, it appeared unclear why the thrust of the Court's judgment should not apply to the interpretation of the Financial Regulation.

53. Parliament also pointed out that, in its negotiations with the developer, it successfully ensured that a transparent consultation of the banking sector took place on as large a scale as possible. It added that, as a consequence, the basic principles of a tendering procedure were fully complied with. In reply, the complainant stated that, to his knowledge, basic Community law principles on tendering procedures require, among other things, that the list of those invited to submit a tender is not pre-determined from the outset. In this regard, he argued that the financing of the D4-D5 buildings was indeed pre-determined from the outset. The Ombudsman recalled that, under the heading 'Principles of awarding contracts', Article 2 of Directive 2004/18 stipulates that contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way. [11] Thus, he considered that, as a matter of principle, tendering procedures should be open to all interested economic operators, without a pre-selection being carried out by the contracting authority. Against this background, he shared the complainant's concerns.

As regards the correctness of Parliament's second statement

54. In light of the above, the Ombudsman concluded that there was no reason to doubt the correctness of Parliament's statement, according to which the directives on the award of public contracts do not apply to private law contracts. However, he found that, (i) by failing to address the implications of the said judgment of the Court of Justice, and (ii) by taking the view that the basic principles of a tendering procedure were fully complied with, whereas only a pre-determined number of banks was apparently contacted, Parliament made statements which were not entirely correct. Given this finding, the Ombudsman saw no further need in the draft recommendation to address the question of just how far Parliament's statement may have been misleading.

55. Given these circumstances, the Ombudsman found that Parliament's second statement was not entirely correct. This constituted an instance of maladministration. He therefore made the following draft recommendation to Parliament, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" *Parliament should correct or clarify the second statement made in its letter of 5 July 2007, in line with the considerations set out in paragraphs 37 - 43* [of his draft recommendation]."

The arguments presented to the Ombudsman after his draft recommendation

Parliament's detailed opinion

56. In its detailed opinion, Parliament provided background information on the acquisition of its D4-D5 buildings, but also in relation to its D3 building. The financing for the acquisition of the D3 building was investigated by OLAF (OF/2003/0026). On 21 July 2009, the Ombudsman made a

draft recommendation to OLAF (complaint 1450/2007/(WP)BEH).

57. In relation to its D3 building, Parliament explained that, in the 1990s, it opted for a policy of purchasing its main buildings. This policy was prompted by (i) the scope for generating savings in costs, to which the Court of Auditors had repeatedly drawn its attention, and (ii) the availability of substantial subsidies from the Belgian state. Following discussions with the Commission and the European Investment Bank, the possibility of direct financing by means of public borrowing was judged to be most appropriate, given that it was the only way to ensure full transparency by means of calls for tenders. In October 1996, the Commission forwarded a communication to Parliament and the Council [12] in order to obtain their agreement to direct financing for Parliament's acquisition of its buildings. The Council rejected this proposal and advocated indirect financing instead. Given that direct financing had thus been ruled out, Parliament decided to ask the owner of the D3 building, the developer, to arrange financing for the purchase. The latter, not being a public authority, was not bound by the EU legal framework on public procurement, which foresees, among other things, calls for tenders and publication of notices in the Official Journal of the EU. The developer nevertheless agreed to consult a large number of financial institutions (about 30) which were selected on the basis of objective criteria proposed by an independent consultant. In light of the sums involved, and the specific nature of property projects, only a small number of banks were in a position to make a tender. Standard practice was to consult fewer than five financial institutions. The owner chose the bid it considered the most attractive, in keeping with the concurring assessments of the Belgian Ministry of Finance [13] and the external consultant. The Council and the Commission were informed of this decision and, on the basis of a mandate issued by the Commission, Parliament purchased the D3 building in May 1998.

58. Parliament pointed out that when the market consultation for financing the D3 building was carried out, at that time, the Financial Regulation did not contain specific provisions authorising or prohibiting borrowing by the EU institutions. However, Parliament could not override the Council's rejection of the direct financing proposal, given that the Council acted in its capacity of the other arm of the budgetary authority.

59. Parliament further submitted that in 2000, the Commission issued a proposal for a revision of the Financial Regulation. This proposal contained an explicit authorisation for borrowing for the purchase of buildings. However, the Council, enjoying sole decision-making power in this matter, amended the Commission's proposal. The new Financial Regulation, as adopted on 25 June 2002, absolutely precluded the possibility to raise loans for the acquisition of immovable property. When the Financial Regulation was further revised in 2006, the Commission again proposed that borrowing should be authorised. Parliament endorsed this proposal and, in support of its long-standing position, provided the following justification: " *To carry out their building projects, the various institutions have had to make use of indirect-financing arrangements, whereas direct financing through bank loans ought to make it possible to secure better rates and greater transparency* ". The Council, nevertheless, maintained the absolute ban on borrowing.

60. Parliament submitted that, as a result of the Council's ban on borrowing, which went against

the Commission's and its own wishes, it had to negotiate with the developer in order to finance the D4-D5 buildings. The arrangement chosen was based on the model used for financing the D3 building. Thus, the developer carried out a financial market consultation, and Parliament drew on the expertise of an independent consultant (KPMG). However, in the case of the D4-D5 buildings, the buildings still had to be erected, whereas the D3 building project had already been completed. Thus, the developer was required to secure financing in order to meet its obligation to construct the buildings. The market consultation covered 15 banking institutions and culminated in the selection of the tender submitted by Fortis, which the external consultant judged to be the best. Ultimately, the developer did not require bank financing and no contract with a bank was signed, unlike the case of the D3 building. This was because the works were fully financed by Parliament. It used its own budgetary resources, resulting from rent Parliament paid to the developer under the long lease, and through advance payments made during the construction work. Parliament stated that this information was also relevant in relation to the complaint against OLAF which the complainant submitted to the Ombudsman (complaint 1450/2007/(WP)EBH), and it expressed its intention to forward a copy of its detailed opinion to OLAF.

61. Turning to the interpretation of its letter of 5 July 2007, to which the Ombudsman's draft recommendation referred, Parliament submitted the following remarks. In his letter of 10 April 2007, the complainant raised a number of questions concerning the applicability of the Directive to the financing arrangements for its D4-D5 buildings. In addition to two of the Directive's provisions, the complainant also referred to the judgment of the Court of Justice in Case C-44/96. Parliament pointed out that it was clear from the complainant's letter that he was unaware of the existence of the Financial Regulation and the ban it imposes on borrowing by EU institutions. In its reply dated 5 July 2007, Parliament explained that its procurement procedures are not governed by the Directive itself, but by the Financial Regulation, which prohibits EU institutions from raising loans. Parliament quoted the relevant provision from the Financial Regulation and explained that the ban on raising loans explained why it did not issue a call for tenders. Moreover, this legal situation rendered irrelevant the complainant's subsidiary questions relating to specific provisions of the Directive and the judgment of the Court of Justice in Case C-44/96.

62. In its letter dated 5 July 2007, Parliament went on to state that, in spite of the ban on raising loans, it had endeavoured, in its negotiations with the developer, to ensure that the consultation of the banking market was as broad and transparent as possible. Parliament stated that the complainant raised two points about the envisaged contract between the developer and the bank which, ultimately, was not signed. First he stated that it must be regarded as a public contract, in line with the judgment of the Court of Justice in Case C-44/96, and, second, it should have been open to tendering. Referring to point 42 of the Ombudsman's draft recommendation, Parliament argued that the Ombudsman endorsed this analysis.

63. In relation to the first point, Parliament drew attention to the fact that the Ombudsman's draft recommendation was based on an extract from the judgment (paragraph 43) [14] , from which both the complainant and the Ombudsman appeared to deduce that all contracts concluded between the contractor, acting on behalf of a contracting authority (including the EU

institutions), and another private undertaking, must be considered to be public contracts. According to Parliament, however, this was clearly not the thrust of the judgment which is much more limited in its effect.

64. Parliament subsequently entered into a detailed discussion of the Court's judgment in Case C-44/96. As regards the facts underpinning the judgment, it stated that an Austrian public-sector body, the State Printing Office, purchased a private printing firm, which later set up another private printing firm. A tender issued by the State Printing Office in 1995 foresaw that the latter could at any time transfer all its rights and obligations under future contracts to a third party of its choice. This tender was withdrawn and a fresh tender was issued, this time by the private printing firm purchased by the State Printing Office. There was disagreement as to whether or not the tender issued by the private company should be conducted in accordance with the national law on public works contracts. Mannesmann Austria, a tenderer, brought a legal action before the competent Austrian authority, the *Bundesvergabeamt* , which submitted a number of questions for a preliminary reference to the Court of Justice, the third of these questions being worded as follows:

" *If a contracting authority starts a project and that project is therefore to be classified as a public works contract within the meaning of Directive 93/37/EEC, may the intervention of a third party who prima facie does not fall within the personal scope of the directive have the effect of altering the classification of a project as a public works contract, or should such a proceeding be regarded as an evasion of the personal scope of the directive and incompatible with the aim and purpose of the directive?* "

Parliament pointed out that the Advocate-General in that case clarified the relevant question by stating that " *the Bundesvergabeamt raises the possibility of fraudulent evasion of statutory provisions through the use of a third party to circumvent Community law on public procurement* ".

65. Parliament pointed to the Court's reply to the relevant question in paragraphs 42-46 of its judgment which read as follows:

" *42. By its third question, the national court is seeking to ascertain whether a project which must be classified as a public works contract within the meaning of Article 1(a) of Directive 93/37 continues to be subject to the provisions of that directive when, before completion of the work, the contracting authority transfers its rights and obligations in the context of a call for tenders to an undertaking which is not itself a contracting authority within the meaning of Article 1(b) of that directive.*

43. In that respect, it is clear from Article 1(a) of Directive 93/37 that a contract which satisfies the conditions set out in that provision cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority. The aim of Directive 93/37, which lies in the effective realisation of freedom of establishment and freedom to provide services in the field of public works contracts, would be undermined if the application of the rules in the directive could be excluded on the sole

ground that the rights and obligations of a contracting authority in the context of a call for tenders are transferred to an undertaking which does not satisfy the conditions set out in Article 1(b) of Directive 93/37.

44. The contrary would be true only if it were to be established that, from the outset, the whole of the project at issue fell within the objects of the undertaking concerned and the works contracts relating to that project were entered into by the contracting authority on behalf of that undertaking.

45. It is for the national court to ascertain whether that is the case here.

46. The answer to the third question referred by the national court must therefore be that a public works contract is not subject to the provisions of Directive 93/37 when it relates to a project which, from the outset, falls entirely within the objects of an undertaking which is not a contracting authority and when the works contracts relating to that project were entered into by a contracting authority on behalf of that undertaking. "

66. Against this background, Parliament submitted that the judgment relates to the following specific situation:
- a contracting authority is in a position to issue a call for tenders (according to Parliament, this follows from paragraph 42 which refers to " *its rights and obligations in the context of a call for tenders* ");
- after launching the tendering procedure, it transfers its rights and obligations to a third party which is not a contracting authority;
- the third party does not consider itself to be bound by the legislation on public procurement in the context of the call for tenders;
- a tenderer challenges this position, taking the view that the legislation in question applies, despite the transfer of rights and obligations.

The Court stated that the law on public procurement remains applicable where a contracting authority which is in a position to issue a call for tenders transfers its rights and obligations in the context of that call for tenders to a private undertaking. However, the law on public procurement does not apply if the following two conditions are met:

(i) the project which is the subject of the call for tenders falls fully within the objects of the private undertaking concerned; and

(ii) the contracts are entered into on behalf of that undertaking.

67. Parliament pointed out that, by imposing the above-mentioned requirements, the Court sought to rule out artificial arrangements which would create a real risk of fraudulent evasion of the law. At the same time, it defined the circumstances under which a contracting authority, competent to conclude a public contract, may transfer its rights and obligations to a private undertaking not bound by the law on public procurement.

68. Against the background of the above analysis, Parliament pointed out that the Court's judgment in Case C-44/96 was clearly not applicable to the financing arrangements for its D4-D5 buildings. According to Parliament, this was due to the fact that, (i) unlike in the case covered by the Court's judgment, Parliament was not a contracting authority and, given the ban on raising loans, was not in a position to issue a call for tenders; and (ii) Parliament had no choice but to involve a third party, and therefore the financial arrangement chosen could not constitute a fraudulent evasion of the law.

69. Parliament moreover submitted that, even if it had been able to issue a call for tenders, the proposed financing contract would have remained a private contract, given that the developer met the two conditions laid down in the judgment in Case C-44/96. This was due to the fact that (i) the financing of a building project falls within the objects of a property development undertaking and (ii) the operation was planned on the developer's behalf, the financing being needed to meet the costs of the works. In relation to the second condition, Parliament added that this assessment remained unchanged, even if subsequently the costs of financing the project would have been passed on to Parliament.

70. Parliament went on to state that its own analysis of the said judgment was confirmed in the legal literature. Most commentators had focused on other aspects of the case. However, all commentators addressing the relevant part of the case agreed that it had to be interpreted in light of the issue of fraudulent evasion of the law through the artificial involvement of a private individual, even though the contracting authority could perfectly well have issued a call for tenders in due form. In support of this view, Parliament reproduced three verbatim excerpts taken from the *Journal des tribunaux - Droit européen* , the *Common Market Law Review* and the *Revue du marché unique européen* .

71. As regards the requirement to open up the tendering procedure to all economic operators in the EU, Parliament inferred from the draft recommendation that the Ombudsman considered this to be a mandatory requirement. However, Parliament considered such a view to be manifestly incorrect for the following reasons.
- No legal text imposes such a requirement in connection with contracts concluded between private parties.
- Given that the judgment in Case C-44/96 does not apply in the present case, the view that the proposed contract between the developer and a bank is a public contract is wrong;
- The suggestion that Parliament should have imposed a requirement on the developer to open up the tendering procedure to all economic operators in the EU disregarded the fact that (i) no such requirement existed, and (ii) Parliament was not legally in a position to impose any such requirement. It could only negotiate such a course of action with the developer, which it did to the best of its abilities.

72. Parliament further submitted that the developer held sole title to the land where the D4-D5 buildings were to be built, and that it therefore had no other choice than to negotiate every aspect of its contractual relationship with the developer. As regards the latter's involvement in obtaining financing, Parliament secured the developer's agreement to consult a broad range of banks. Initially, the developer proposed consulting a very small number of banking institutions,

but Parliament requested and secured the consultation of 15 institutions active in the area of property financing, namely, two German banks, two Spanish banks, four Belgian banks, three British banks, two Dutch banks, and two French banks. These banks were chosen by Parliament on the basis of an opinion issued by the external consultant, KPMG, which identified the institutions on the European market best able to finance a project of this scale. KPMG also assessed the tenders received. However, for the reasons set out above, Parliament was able to dispense with bank financing.

73. In conclusion, Parliament submitted that all the additional information requested in the Ombudsman's draft recommendation had been provided and that, moreover, its reply of 5 July 2007 had already contained the necessary explanations, and had in no way been " *incorrect and misleading* ". Parliament found the allegation that it had made possibly incorrect or misleading statements to be " *very surprisingly* " based on the complainant's and the Ombudsman's completely incorrect analysis of the case-law. Parliament submitted that, in any event, the mere fact that the Ombudsman and Parliament did not agree on how the law should be interpreted could certainly not be considered to be an instance of maladministration, and therefore this issue would fall outside the scope of the Ombudsman's competence. Otherwise, the distribution of competences as foreseen by the Treaties would be called into question.

The complainant's observations

74. The complainant noted that Parliament considered the Court's judgment in case C-44/96 to be inapplicable to the financing of the D4-D5 buildings, given that Parliament was not a contracting authority and the ban on raising loans meant that it was not in a position to issue a call for tenders. According to Parliament, it therefore had no choice but to involve a third party, which could not constitute a fraudulent evasion of the law. The complainant pointed out that it was absurd to submit that Parliament did not act as a contracting authority, given that it was inconceivable that it would enter into negotiations with a private company other than in its role of contracting authority. This was equally true of Parliament's negotiations with the developer. In the given context, the complainant reiterated a point he made earlier, and submitted that, if the Financial Regulation was to be interpreted as prohibiting all forms of external financing, Parliament could not authorise a private company to ensure such financing, since it could not delegate powers which it did not have. If Parliament maintained its strict interpretation of the Financial Regulation, this would mean that involving a private company amounted to a fraudulent evasion of the law.

75. The complainant further noted Parliament's position that, even if it had been able to issue a call for tenders, the proposed financing contract would have remained a private contract, given that the developer met the two conditions laid down in the judgment in Case C-44/96 (see point 69 above). In his view, this reasoning was based on an incorrect rendering of paragraph 46 of the said judgment by Parliament. In relation to the second condition (the contracts are entered into by a contracting authority on behalf of an undertaking), Parliament omitted to refer to the crucial requirement of having been entered into *by a contracting authority,* and therefore misrepresented the said judgment.

76. In conclusion, the complainant maintained his view that the said judgment was applicable to the financing of the D4-D5 buildings.

The Ombudsman's assessment after his draft recommendation

77. In its detailed opinion, Parliament took the view that it was not within the Ombudsman's competence to decide on a mere difference in how he and Parliament interpreted the law. Before the substance of Parliament's detailed opinion is assessed, it is therefore appropriate to address Parliament's remark.

78. Article 228 of the Treaty on the Functioning of the EU entrusts the Ombudsman with the task of examining complaints concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies. In his work, the Ombudsman has consistently relied on the definition of 'maladministration' given in his Annual Report for the year 1997. According to this definition, which has been approved by Parliament, " *maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it* ". Given that good administration therefore first and foremost rests on respect for the rule of law, it follows that the Ombudsman, in fulfilling his mandate, is able, and indeed obliged, to review the legality of the behaviour of the public bodies under his purview. With this in mind, Parliament's suggestion that the Ombudsman cannot make a finding of maladministration when his interpretation of the relevant legal rules is not shared by the Union institution concerned, is therefore clearly incorrect.

79. However, the Ombudsman is mindful of the fact that, pursuant to Article 19 of the Treaty on European Union, the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. There can thus be no doubt that it is the Court, and the Court alone, which can authoritatively interpret EU law. The Ombudsman bears this in mind when he has to take a view on the legality of an institution's behaviour. He will, therefore, not normally find maladministration in this regard if the interpretation of the relevant legal rules put forward by an institution does not appear to be without merit.

80. In the present case, the Ombudsman is not being called upon comprehensively to assess the legality of Parliament's behaviour with regard to the way in which it financed its acquisition of the D4-D5 buildings. Similarly, he is not required to address the question as to whether the rules on the award of public contracts, as provided for in the Financial Regulation, should have been applied (see points 23-24 above). The Ombudsman recalls that his draft recommendation was based on the following two considerations, namely, (i) by failing to address the implications of the judgment of the Court of Justice in Case C-44/96, and (ii) by taking the view that the basic principles of a tendering procedure were fully complied with, whereas, apparently, only a pre-determined list of banks was contacted, Parliament made statements which were not entirely correct. On that basis, he called upon Parliament to correct or clarify those statements. The Ombudsman will therefore analyse Parliament's detailed opinion in relation to both of these aspects and assess whether Parliament sufficiently corrected or clarified its relevant statements.

81. In its submissions to the Ombudsman prior to the draft recommendation, Parliament

dismissed the relevance of the said judgment , the reason being that the directives on the award of public contracts do not apply to contracts awarded by Parliament. Considering that the Financial Regulation essentially contains provisions which are analogous to those in the directives on the award of public contracts, the Ombudsman considered it to be unclear why the thrust of the Court's judgment should not apply to the Financial Regulation (see point 41 of the Ombudsman's draft recommendation). Consequently, the Ombudsman considered that, by failing to address the implications of the said judgment, Parliament made statements which were not entirely correct. To put it more simply, in the Ombudsman's view, Parliament, in its relevant statements, essentially disregarded the said judgment, without giving plausible reasons.

82. In its detailed opinion, Parliament submitted reasons in support of its view that the said judgment is not applicable to the present case. In short, Parliament stated that, unlike in the case covered by the Court's judgment, Parliament was (i) not a contracting authority and, given the ban on raising loans, was not in a position to issue a call for tenders, and (ii) it had no choice but to involve a third party, for which reasons the financial arrangement chosen could not constitute a fraudulent evasion of the law.

83. At the outset, the Ombudsman agrees with Parliament's analysis that the judgment in Case C-44/96 addresses the situation where a contracting authority, having entered into a public contract, transfers its rights and obligations arising from that contract to an undertaking which is not itself a contracting authority. The parties to the dispute appear to agree that, in such a situation, the rules on public procurement remain, in principle, applicable.

84. As regards Parliament's first reason in support of its statement, the Ombudsman understands Parliament's position to be that it was not a contracting authority, and it was not in a position to issue a call for tenders. The complainant expressed the view that it was inconceivable that Parliament would enter into negotiations with a private company other than in the role of a contracting authority. The Ombudsman notes that, according to Article 88 of the Financial Regulation, a public contract must be concluded " *by a contracting authority within the meaning of Articles 104 and 167* ". The notion of a 'contracting authority' is defined in Articles 104 and 167 of the Financial Regulation. While Article 167 of the Financial Regulation does not appear to be applicable to Parliament in the given circumstances [15] , Article 104 of the Financial Regulation stipulates that the " *Community institutions shall be deemed to be contracting authorities in the case of contracts* awarded on their own account " [16] . It follows that the Financial Regulation does not provide a basis for the view that Parliament, in all its dealings with private companies, is to be considered to be a contracting authority. However, there is no need for the Ombudsman to take a definitive position on this matter, given Parliament's reference to the ban on raising loans. The existence of this ban in relation to direct financing does not appear to be in dispute between the parties. In the Ombudsman's view, the ban on raising loans reasonably accounts for Parliament's view that it could not issue a call for tenders, nor act as a contracting authority in the financing of the acquisition of the D4-D5 buildings. Parliament's argument that it was not in a position to issue a call for tenders in relation to the relevant project is, therefore, a plausible interpretation of the law.

85. The Ombudsman takes the view that second reason in support of its statement results from its belief that it was not in a position to issue a call for tenders. Parliament's interpretation of the law was that the ban on raising loans gave rise to its ensuing inability to issue a call for tenders. It therefore had no choice but to involve a third party. This is a plausible interpretation of the law. It follows that it was also plausible for Parliament to consider that the financial arrangement chosen could not constitute a fraudulent evasion of the law. Parliament's argument amounts to the fact that it would not have entrusted the developer to organise a call for tenders if it could have done so itself.

86. In view of the above considerations, there is no need for the Ombudsman to comment on Parliament's view that, even if it had been able to issue a call for tenders, the proposed financing contract would have remained a private contract.

87. The Ombudsman therefore considers that Parliament's detailed opinion provided detailed comments on the relevance of the judgment in Case C-44/96 to the present case, and it sufficiently clarified its reasons for stating that this judgment is not applicable. Parliament can therefore no longer be considered as having failed to address the implications of the said judgment of the Court of Justice. As a consequence, the Ombudsman takes the view that his finding of maladministration in his draft recommendation can no longer be maintained.

88. The Ombudsman notes that, in its detailed opinion, Parliament went so far as to claim that the Ombudsman's assessment in his draft recommendation was based on a " *completely incorrect* " analysis of the case-law. In the Ombudsman's view, this criticism is unfounded. As explained above, the Ombudsman accepts as plausible the interpretation of the law Parliament put forward in its detailed opinion. It should, however, be underlined that this is not the only plausible interpretation.

89. As regards the issue of whether or not the basic principles of a tendering procedure were complied with , the Ombudsman based his draft recommendation on the view that, as a matter or principle, tendering procedures should be open to all interested economic operators, without a pre-selection being carried out by the contracting authority. Parliament stated that the Ombudsman was wrong to consider that a tendering procedure was mandatory. The Ombudsman would like to point out that his draft recommendation took issue with Parliament's statement that the basic principles of a tendering procedure were fully complied with, whereas, in fact, only a pre-determined number of banks were apparently contacted. The Ombudsman's assessment clearly did not, therefore, address the question as to whether a tendering procedure was mandatory. Parliament's remarks in this respect must, therefore, be considered irrelevant.

90. As regards the substance of the foregoing, the Ombudsman notes that Parliament's detailed opinion provides additional information on the procedure it followed to secure external financing. Parliament provided the following clarifications.

(i) In spite of the developer's initial proposal, a broad range of banks was consulted.

(ii) In light of the sums involved, and the specific nature of property projects, only a small number of banks are in a position to respond to an invitation to tender of this kind.

(iii) Prior to the consultation, the external consultant identified those institutions on the European market best able to finance a project of this scale, and issued a relevant opinion.

(iv) 15 banking institutions active in the area of property financing were consulted. Parliament indicated their nationalities.

(v) The banks were chosen by Parliament on the basis of an opinion issued by the external consultant, KPMG.

(vi) The external consultant assessed the tenders received.

The complainant did not comment on these clarifications in his observations. In the Ombudsman's view, Parliament's statement that only a small number of banks are in a position to respond to an invitation to tender of this kind is particularly relevant in this context. In its detailed opinion, Parliament provided detailed information on the procedure it followed. The Ombudsman therefore considers that Parliament sufficiently clarified its relevant statement.

91. In view of the above the Ombudsman concludes as follows: (i) as regards the relevance of the judgment in Case C-44/96, the finding of maladministration can no longer be maintained and (ii) as regards the issue of whether or not the basic principles of a tendering procedure were complied with, the additional information provided by Parliament in its detailed opinion sufficiently clarifies the position. No further action by the Ombudsman is therefore necessary.

II. The complainant's allegations concerning Parliament's handling of his requests for access

Preliminary remark

92. In its detailed opinion, Parliament stated that it had decided to make public the documents requested by the complainant. It explained that, in light of a second consultation with the banks and the developer, it had come to the conclusion that disclosure of the economic information contained in the documents requested is unlikely to undermine the protection of commercial interests within the meaning of the first indent of Article 4(2) of Regulation 1049/2001. Parliament explained that its decision to disclose relevant documents was motivated by (i) the time which had elapsed since the drafting of the documents; (ii) the fact that the proposed financing arrangements never came to fruition; and (iii) its new lending policy stemming from the crisis in the banking sector in 2008/2009. Parliament therefore disclosed the following documents which it annexed to its detailed opinion:
- the text of the call for tenders issued by the developers;
- the list of banks consulted;
- the text of the 'Report analysing the financial tenders' drawn up by KPMG.

93. In his observations on Parliament's detailed opinion, the complainant welcomed Parliament's decision to disclose the requested documents. At the same time, he deplored the fact that it had taken Parliament more than three years to do so. Moreover, it was only due to the Ombudsman's massive intervention that Parliament decided to grant access. The Ombudsman does not understand from the complainant's relevant statements that he wishes to submit a new allegation.

B. Allegation of failure to indicate the possibility of a confirmatory application (the complainant's second allegation)

Arguments presented to the Ombudsman

94. The complainant alleged that, contrary to Article 7(1) of Regulation 1049/2001, Parliament's two letters of reply to his initial application for access did not indicate the possibility for him to submit a confirmatory application.

95. In its opinion, Parliament acknowledged that it did not inform the complainant in its reply about the possibility to submit a confirmatory application. It expressed its regret in this regard, but pointed out that this omission did not have any negative consequences for the applicant, who was fully conversant with Regulation 1049/2001.

96. In his observations, the complainant acknowledged Parliament's regret.

The Ombudsman's assessment

97. The Ombudsman recalls that Article 7(1) of Regulation 1049/2001 requires that, in the event of a refusal to grant access, the institution inform the applicant of his or her right to make a confirmatory application. It seems useful to point out that this obligation applies regardless of whether or not an applicant is familiar with this right. The Ombudsman notes that Parliament regretted its omission to do so in the present case and that the complainant has acknowledged its regret. He therefore takes the view that there is no need to examine this issue further.

C. Allegation of a failure to deal properly with his confirmatory application (the complainant's first allegation)

Arguments presented to the Ombudsman

98. The complainant stated that, on 8 January 2007, he submitted to the President of Parliament by registered mail a confirmatory application for access. However, at the time of submitting his complaint to the Ombudsman, he had neither received a reply nor an acknowledgement of receipt. Against this background, he alleged that Parliament failed to deal properly with, and to reply to, his confirmatory application for access to documents.

99. On 7 April 2007, the complainant informed the Ombudsman that he had received

Parliament's reply dated 14 March 2007. Given that, contrary to Article 8 of Regulation 1049/2001, Parliament had taken more than two months to reply to his confirmatory application, he stated that he wished to maintain his allegation. He further pointed out that he had not received an acknowledgment of receipt to his confirmatory application, as required by Regulation 1049/2001.

100. In its opinion, Parliament stated that it received the complainant's confirmatory application on 30 January 2007. It pointed out that it registers mail on the date of receipt. An acknowledgment of receipt was sent on 2 February 2007. The time limit for Parliament's reply was determined as 22 February 2007. On 19 February 2007, Parliament sent an e-mail to the complainant in which it informed him, in accordance with Article 8(2) of Regulation 1049/2001, of an extension of the time limit until 14 March 2007. Parliament sent its reply to the complainant on 14 March 2007. Parliament therefore considered that it had dealt correctly with the complainant's confirmatory application.

101. In his observations, the complainant pointed out that Parliament's assertion that it received his confirmatory application on 30 January 2007 was not credible, given that he sent the letter in question by registered mail from Luxembourg on 9 January 2007. He submitted a corresponding receipt to the Ombudsman. He further pointed out that none of the two e-mails allegedly sent by Parliament had reached him. He took the view that this could be due to the fact that the address field of the e-mails submitted by Parliament showed his e-mail address in inverted commas.

The Ombudsman's assessment leading to a draft recommendation

102. The complainant provided evidence to show that he sent his confirmatory application for access from Luxembourg on 9 January 2007. In its opinion, Parliament explained that it did not receive the complainant's confirmatory application until 30 January 2007. The Ombudsman considered that, although a period of more than 20 days for a letter to travel from Luxembourg to Brussels appears to be excessively long, there was no evidence to suggest that the complainant's confirmatory letter arrived before the date indicated by Parliament. He therefore saw no reason to doubt Parliament's relevant statement.

103. Parliament submitted with its opinion copies of the e-mails it claims it sent to the complainant on 2 February and 19 February 2007. However, the complainant explained that he did not receive those e-mails. In the Ombudsman's view, at first sight, it could not be excluded that, by putting the complainant's e-mail address in inverted commas, Parliament addressed the e-mails incorrectly.

104. The Ombudsman noted that he would have to carry out further inquiries in order to clarify this point. However, considering that (i) he would make a draft recommendation and, (ii) the points at issue here seemed of limited importance, the Ombudsman found that there would be no need to examine this issue further if Parliament were to accept his draft recommendation.

The arguments presented to the Ombudsman after his draft recommendation

105. In its detailed opinion, Parliament stated that it could not explain why the complainant's letter dated 8 January 2007 arrived only on 30 January 2007, but confirmed that it registers correspondence on the day of its arrival. As regards the complainant's e-mail address, Parliament pointed out that inverted commas were displayed by the IT system only. However, its e-mails were sent to the correct e-mail address and no 'undeliverable' message was received. Therefore, if the complainant did not receive its e-mails, it had to be for reasons beyond Parliament's control.

106. In his observations, the complainant did not comment on this issue.

The Ombudsman's assessment after his draft recommendation

107. Parliament accepted the Ombudsman's draft recommendation (see below) and granted access to the documents requested by the complainant. The Ombudsman therefore sees no need for further action on his part in relation to the complainant's first allegation.

D. Allegation of ignoring certain aspects of his confirmatory application (the complainant's eighth allegation)

Arguments presented to the Ombudsman

108. In its decision on the complainant's initial application for access, Parliament informed the complainant that one of the documents, namely, Parliament's decision on the award of the public contract to the Fortis bank, did not exist. In his confirmatory application, the complainant took note of the fact that the said document did not exist. In view of the explanations given by Parliament, according to which there had been a consultation between itself and the developer, he requested access to the letters exchanged in the framework of this consultation. Against this background, the complainant alleged that Parliament ignored his request, made in his confirmatory application, to be given access to a certain correspondence exchanged between Parliament and the developer if a certain other document did not exist.

109. In its opinion, Parliament stated that, as explained in its reply to the complainant's confirmatory application, it had a right of access to the developer's financing conditions. By signing a long-term lease agreement including a purchase option with the developer, Parliament accepted, without an exchange of letters, that the developer's financing conditions should become applicable.

110. In his observations, the complainant accepted that Parliament may have consented to the developer's financing conditions by signing the contract on the long-term lease. At the same time, he submitted that this was not a valid reason to refuse access to the consultation documents pre-dating the signature of the contract.

The Ombudsman's assessment leading to a draft recommendation

111. As regards access to the letters exchanged in the framework of the consultation between

Parliament and the developer, the complainant does not appear to have submitted a confirmatory application for access to Parliament. According to Article 8 of Regulation 1049/2001, the Ombudsman can normally deal with a complaint only after a confirmatory application for access has been submitted to the institution concerned. However, Parliament did not raise this point, and the documents here at issue are closely related to certain documents to which the complainant requested access in his initial application. The Ombudsman therefore saw no reason to refrain from dealing with the present allegation regarding its substance.

112. The Ombudsman understood from Parliament's decision on the complainant's confirmatory application, to which it referred in its opinion, that Parliament accepted the developer's financing conditions by signing the relevant contract, but that letters were not exchanged with the developer in this regard. Parliament explained that it consented to the promoter's financing conditions by signing the contract, but not by sending a letter.

113. In his confirmatory application, the complainant requested access to certain documents in lieu of other documents which, according to Parliament, did not exist. Referring to the developer's consultation with Parliament on the financing conditions, he requested access to the letter which was written to consult Parliament (" *Schreiben, mit dem das Parlament konsultiert wurde* "), as well as the letter containing Parliament's opinion in the framework of the consultation (" *Schreiben, mit dem das Parlament im Rahmen dieser Konsultation Stellung genommen hat* "). Given that the parties did not dispute that Parliament was consulted before signing the contract, it was clear that the complainant's subsidiary application for access was made in relation to documents which, if extant, pre-date the contract signed by Parliament. In its opinion, Parliament stated that it accepted the developer's financing conditions by simply signing the contract and that there was no separate exchange of letters in this regard. The Ombudsman understood Parliament's position to be that its consent to the developer's financing conditions did not involve an exchange of letters. In his observations, the complainant accepted Parliament's view. He pointed out, however, that the mere reference to having granted its consent by means of signing the contract could not serve as an argument for refusing to grant him access to consultation documents which preceded the signing of the contract. The Ombudsman noted that it could not be inferred with certainty from Parliament's opinion whether or not such consultation documents exist. In view of these circumstances, the Ombudsman concluded that, by referring to the signing of the contract alone, Parliament did not sufficiently address the complainant's subsidiary application for access to the two letters referred to above. At the very least, Parliament left unanswered the question as to whether or not the said correspondence actually exists.

114. In light of the above, the Ombudsman found that Parliament failed sufficiently to address the complainant's confirmatory application for access. This constituted an instance of maladministration. He therefore made the following draft recommendation to Parliament, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" *Parliament should (i) clarify whether there are any documents relating to its consultation with the developer pre-dating the signature of the contract with it, and (ii) in case of an affirmative response, process the complainant's request for access to these documents.* "

The arguments presented to the Ombudsman after his draft recommendation

115. In its detailed opinion, Parliament stated that no document exists in which it explicitly outlined its position on the offer submitted by Fortis. However, it was clear from KPMG's report that this offer was the most attractive. Parliament granted access to this report (see point 147 below). Parliament specified that, by signing the contract with the developer, which established rights *in rem* with a purchase option in respect of the buildings, it accepted the developer's financing conditions. It further stated that the relevant notarial deed (' *Convention d'emphytéose avec option d'achat* ') was registered with the Fifth Section of the Brussels Mortgage Registry on 14 December 2004 (No 14438), and was accessible to the public. One of the annexes forming an integral part of that document was Fortis' successful financing tender. Parliament moreover stated that it identified a number of letters, sent to the developer during the negotiations and prior to the signing of the contract, which were annexed to the call for tenders (annexes 7, 9, 10 and 11). Parliament granted access to the call for tenders, including its annexes (see point 157 below). Parliament further pointed out that information concerning the value of the contract appears on Parliament's website [17] .

116. In his observations, the complainant did not specifically comment on this aspect of the case.

The Ombudsman's assessment after his draft recommendation

117. The Ombudsman understands Parliament's position to be that, other than a number of letters, sent to the developer during the negotiations and prior to the signing of the contract, which were annexed to the call for tenders (annexes 7, 9, 10 and 11), no other documents exist, specifically relating to its consultation with the developer, which pre-date the signature of the contract. Parliament granted access to the call for tenders, including its annexes.

118. Given that Parliament clarified that there are no documents relating to its consultation with the developer pre-dating its signing of the contract, other than those annexed to the call for tenders, to which Parliament granted access, the Ombudsman concludes that Parliament has accepted the relevant part of his draft recommendation, and that the measures taken by Parliament to implement it are satisfactory.

E. Allegation of inconsistent/insufficient reasoning (the complainant's third and seventh allegations)

Arguments presented to the Ombudsman

119. As regards the complainant's request for access to the report of the accounting and consulting firm KPMG evaluating the tenders submitted ('the report'), Parliament, in its decision on the complainant's initial application, took the view that this was a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. Thus, before a decision on the possibility of granting access could be taken, its author had to be consulted. Parliament, therefore,

contacted the consulting firm regarding this matter. In a letter of 18 January 2007, Parliament informed the complainant that, following an in-depth analysis of the report, it had concluded that it concerned the commercial interests of the banks involved. As a consequence, and pursuant to Article 4(2) first indent of Regulation 1049/2001, access could not be granted.

120. Against this background, the complainant alleged that Parliament wrongly changed its reasoning regarding its refusal of access to one of the documents concerned by his request. According to the complainant, the subsequent reasoning was furthermore insufficient, given that it failed to indicate how the commercial interests of the banks concerned would be *undermined* .

121. In its decision on the complainant's confirmatory application, and on the basis of Article 4(2) first indent of Regulation 1049/2001, Parliament stated that access could not be granted. This was because banks would have been able to obtain knowledge of their competitors' business strategies on the financial market. This would in turn weaken the competitive positions of the banks involved in future tendering procedures. Against this background, the complainant alleged that Parliament wrongly changed, for a second time, its reasoning as regards its rejection of access to one of the documents. In support of his allegation, he took the view that it was inherent in the logic of Regulation 1049/2001 that the decision on an initial application for access had to exhaustively address the reasons justifying a refusal to grant access. According to him, processing of the confirmatory application only served the purpose of examining whether the reasons for a refusal of access given in the decision on the initial application were plausible. In addition, he alleged that the new reasoning was still not plausible.

122. In its opinion, Parliament reiterated its view that the report was to be considered a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. Thus, Parliament consulted KPMG in order to ascertain its views on granting access. KPMG confirmed that the report contained a financial analysis of the offers submitted by the banks which the developer had contacted. As a result, the information concerned the financial interests of certain banks. According to Parliament, KPMG also felt that its intellectual property rights should be protected, pursuant to Article 4(2) first indent of Regulation 1049/2001. Parliament explained that it saw no reason to deviate from KPMG's assessment and refused access on the basis of Article 4(2) first indent of Regulation 1049/2001. In its decision on the complainant's confirmatory application, Parliament confirmed its position and explained how the commercial interests of the banks concerned " *might be compromised* ".

123. In response to the complainant's seventh allegation, Parliament again confirmed its view that access could not be granted, given that the information contained in the document (to which it referred as document PE 229.331/BUR) was covered by the exception foreseen by Article 4(2) first indent of Regulation 1049/2001. The fact that the complainant held a copy of the document did not mean that he had obtained it with Parliament's consent.

124. In his observations, the complainant pointed out that Parliament had acquired the report and thus obtained the right to freely dispose of it. This included the right to grant access to third parties. Although confidentiality of the report could have been stipulated, the complainant took the view that Parliament had not submitted credible evidence that the report was covered by a

confidentiality agreement.

125. The complainant further pointed out that, at the time he obtained access to document PE 229.331/BUR, Regulation 1049/2001 was not yet in force. As a consequence, he could not submit an application for access to this document. Moreover, the document was not marked confidential and Parliament did not submit any evidence to show that it had been classified as confidential.

The Ombudsman's assessment leading to a draft recommendation

126. The Ombudsman inferred from the statements made by both parties in the course of his inquiry that a copy of the document covered by the present allegation was apparently in the complainant's possession. Nevertheless, Parliament took the view that access to the document could not be granted. The Ombudsman recalled that access to documents within the meaning of Regulation 1049/2001 is public access. Thus, granting access to a document means that this document is subject to public disclosure. The fact, therefore, that the complainant may already have a copy of the document in question, which has not been publicly disclosed in line with Regulation 1049/2001, does not prevent the Ombudsman from considering whether or not Parliament gave sufficient reasons as to why access could not be granted. It furthermore seemed important to recall that the subject-matter of the complainant's third and seventh allegations was not how the complainant obtained access to document PE 229.331/BUR. Consequently, there was no need to comment on this aspect, which was addressed in both Parliament's opinion and the complainant's observations. Instead, the issue the Ombudsman addressed was whether Parliament wrongly changed its reasoning regarding its refusal to grant access to the report, and whether Parliament's reasoning was sufficient. The Ombudsman first analysed whether Parliament wrongly changed its reasoning. He then examined whether Parliament's reasoning was sufficient.

As regards the alleged change in Parliament's reasoning

127. Parliament qualified the report as a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. However, the complainant asserted that, since it was Parliament that acquired the report, this would normally mean that it could freely dispose of it, and grant access to it. Moreover, he stated that Parliament had not submitted credible evidence to establish that the report was covered by a confidentiality agreement.

128. Article 4(4) of Regulation 1049/2001 reads as follows:

" *As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.* "

The Ombudsman considered that, in relation to third-party documents, Article 4(4) places the institutions under an obligation to consult the third party concerned, with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document

should or should not be disclosed [18] . Given that Regulation 1049/2001 only applies to documents held by an institution (Article 2(3) of Regulation 1049/2001), there can be no doubt that only documents in an institution's possession may be considered to be third-party documents. Pursuant to Article 3(b) of Regulation 1049/2001, " *third party* " shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries. The Ombudsman took the view that, at first sight, the fact that a document is owned by an institution does not rule out that the same document could be qualified as a third-party document, given that Regulation 1049/2001 appears to be indifferent to the aspect of ownership. Instead, the Regulation focuses on the origin of third-party documents (see Article 4(5) of Regulation 1049/2001). At the same time, the fact that a document is owned by an institution strongly suggests that an institution could, in principle, dispose of it freely. In its decision on the complainant's confirmatory application for access, Parliament expressly stated that it owned the report. However, in its opinion, Parliament did not comment on the aspect of ownership, but instead relied exclusively on Article 4(4) of Regulation 1049/2001.

129. Considering that ownership, understood as a right, vests the sole power of disposal in the owner, the Ombudsman considered whether the application of Article 4(4) of Regulation 1049/2001 could limit the owner's sole power of disposal by means of a procedural obligation to consult the author of the document. The fact that Parliament is the owner of the report could imply that Article 4(4) of Regulation 1049/2001 is not applicable. The Ombudsman also noted the complainant's view that Parliament did not establish that the report was covered by a confidentiality agreement. The Ombudsman saw no need to take a definitive stance on the implications of Parliament's ownership of the report. However, he considered that, despite the fact that it was the owner of the document in question, Parliament did not sufficiently explain why it considered Article 4(4) of Regulation 1049/2001 to be applicable.

130. However, bearing in mind that the complainant alleged that Parliament wrongly changed its reasoning concerning its refusal to grant access to one of the documents concerned by his request, the Ombudsman needed to examine whether, by first relying on Article 4(4) of Regulation 1049/2001, and later invoking the exception relating to commercial interests, Parliament actually changed its reasoning. For the purpose of this analysis, the question whether Parliament's reliance on Article 4(4) of Regulation 1049/2001 was justified, was of no direct relevance, given that Parliament did not appear to have changed its designation of the report as a third-party document.

131. The Ombudsman noted that it follows from the case-law of the Union Courts that, as a general rule, consultation of the third party is a precondition for determining whether the exceptions to the right of access provided for in Regulation 1049/2001 are applicable. The only case in which institutions are under no obligation to consult with the third party is where it is clear that the document should or should not be disclosed [19] . It appeared useful to add that the outcome of the consultation of a third party is not binding on the institution but is designed to enable it to assess whether an exception is applicable [20] .

132. By letter of 18 December 2006, Parliament informed the complainant that it had contacted

KPMG with a view to consulting it on the report. By letter of 18 January 2007, Parliament informed the complainant that the exception provided for in Article 4(2) first indent of Regulation 1049/2001 applied to the report, since it contained information which concerned the commercial interests of the banks involved. Access could not, therefore, be granted.

133. In light of these facts, and the case-law of the Union Courts, which considers that a third party must be consulted as a precondition for determining whether an exception applies, the Ombudsman was unable to endorse the complainant's view that, by first consulting the third party and then afterwards relying on an exception contained in Regulation 1049/2001, Parliament wrongly changed its reasoning. Consulting the third party is, in fact, a procedural requirement. However, it does not, as such, concern the question as to which of the exceptions actually applies. The complainant also criticised the fact that Parliament did not inform him about the outcome of the consultation. In this regard, the Ombudsman noted that the complainant could request access to the consultation documents. However, given that he had apparently not yet done so, the Ombudsman was not entitled to deal with this aspect of the complaint.

134. Turning to Parliament's decision on the complainant's confirmatory application, the complainant pointed out that Parliament changed its reasoning again. In his view, this was not in line with Regulation 1049/2001. Parliament considered that its decision on the complainant's confirmatory application confirmed the reasoning of its decision on the initial application.

135. The Ombudsman noted that both Parliament's letter of 18 January 2007, and its decision on the confirmatory application relied on the same legal basis, namely, Article 4(2) first indent of Regulation 1049/2001. In its letter of 18 January 2007, Parliament explained that, in its view, the report concerned the commercial interests of the banks. In its decision on the complainant's confirmatory application, Parliament reiterated this reasoning. It added that disclosure might lead to the risk that competitors of the banks involved could obtain information about the latters' business strategies. The Ombudsman considered the fact that, in its decision on the complainant's confirmatory application, Parliament specified why it considered Article 4(2) first indent of Regulation 1049/2001 applied. This additional information merely spelled out why Parliament considered that the commercial interests of the banks involved would be affected.

136. In any event, the Ombudsman considered that Regulation 1049/2001 does not prevent an institution, when deciding on a confirmatory application, from relying on another exception not contained in its decision on an initial application, if it considers that the exception initially relied on cannot sufficiently justify its decision. Equally, the Ombudsman was not aware of a rule which would prohibit Parliament from giving further details on the reasons for refusing access in its decision on a confirmatory application. It followed from the case-law of the General Court that, when an institution replies to a confirmatory application, it is *obliged* to state why facts, which call into doubt its initial decision, cannot be applied to make it change its position [21] . However, conversely, this does not mean that an institution is not entitled to give further reasons for its decision, which may later be reviewed by the Union Courts or the Ombudsman.

137. In view of the above findings, there was no need to consider whether Parliament *wrongly*

changed its reasoning.

138. Therefore, the Ombudsman considered the complainant's allegation to be unfounded that Parliament wrongly changed the reasoning of its decision for refusing access to the report.

As regards the alleged insufficiency of Parliament's reasoning

139. The Ombudsman recalled that, according to Article 1(a) of Regulation 1049/2001, one of the purposes of Regulation 1049/2001 is to ensure the widest possible access to documents. It emerged from the settled case-law of the Union Courts regarding Regulation 1049/2001 that the exceptions to the general right of access to documents must be interpreted and applied strictly [22] . The mere fact that a document concerns an interest protected by an exception does not, in itself, justify the application of that exception. Therefore, before an institution can lawfully rely on an exception, it is required to assess (i) whether access to the document would specifically and actually undermine the protected interest, and (ii) whether there is no overriding public interest in disclosure. That assessment must be apparent from the reasons underpinning the decision [23] .

140. According to the complainant, Parliament's letter of 18 January 2007 did not explain how the protection of commercial interests of the banks involved would be affected. As regards Parliament's decision on his confirmatory application, he pointed out that, to his knowledge, the banks submitted their offers in spring 2004. It thus appeared highly unlikely that these offers would allow inferences to be made on business strategies in the year 2007. Moreover, he pointed out that Parliament had granted access to a similar report relating to its D3 building. Disclosure of that report had clearly not resulted in Parliament not receiving any further offers. The Ombudsman therefore examined whether Parliament had established that granting access would undermine commercial interests.

141. In its letter of 18 January 2007, Parliament referred to Article 4(2) first indent of Regulation 1049/2001, and stated that the report contains information concerning the commercial interests of the banks involved. In its decision on the complainant's confirmatory application, Parliament stated that access could not be granted because competitors of the banks involved would be able to obtain knowledge of the latters' business strategies. This would, in turn, weaken the positions of the banks involved in future tendering procedures.

142. The Ombudsman considered that the commercial interests of the banks involved may indeed be at stake. However, bearing in mind that exceptions to the right of access to documents are to be interpreted narrowly, and taking Parliament's explanations into account, he failed to see how granting access would *specifically and actually undermine* commercial interests, thereby satisfying the condition set by the case-law of the Union Courts. Moreover, he considered the fact that Parliament did not contest the complainant's argument that a report on offers apparently submitted in 2004 would not allow any inferences to be made on business strategies deployed in 2007. It appeared useful to add that, in order to be relied upon, the risk of an interest being undermined must be reasonably foreseeable, and not purely hypothetical [24] .

143. In its opinion, Parliament explained that KPMG felt that its intellectual property rights should be protected, pursuant to Article 4(2) first indent of Regulation 1049/2001, and it saw no reason to deviate from KPMG's assessment. This led the Ombudsman to understand that Parliament also appeared to consider that the exception relating to intellectual property provided for in Article 4(2) first indent was applicable. However, given that, in the context of the allegations here under review, the Ombudsman had to ascertain whether, in its decision on the complainant's confirmatory application, Parliament gave sufficient reasons for refusing access. He did not have to take a definitive view on the exceptions relied upon by Parliament in the course of this inquiry. In any event, and in light of Parliament's explanations, the Ombudsman failed to see, at first sight, how granting access would *specifically and actually undermine* the intellectual property rights of the consultancy firm. This was even more so, bearing in mind that Parliament owns the report.

144. In light of the above, the Ombudsman found that Parliament had given insufficient reasons for its decision to refuse access to the report. This constituted an instance of maladministration. He therefore made the following draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman, to Parliament:

" *Parliament should grant access to the report … or, bearing in mind the complainant's arguments regarding an overriding public interest, provide a convincing explanation as to why the exceptions relied on by it are applicable.* "

The arguments presented to the Ombudsman after his draft recommendation

145. In its detailed opinion, Parliament stated that it had decided to make the report public. With its detailed opinion, it enclosed a copy of the report.

146. The complainant did not submit specific observations in relation to this matter.

The Ombudsman's assessment after his draft recommendation

147. Given that Parliament granted access to the report, the Ombudsman concludes that Parliament accepted the relevant part of his draft recommendation and that the measures taken by Parliament to implement it are satisfactory.

F. Allegation of insufficient reasoning as regards access to the call for tenders (the complainant's sixth allegation)

Arguments presented to the Ombudsman

148. The complainant alleged that Parliament's refusal to grant access to the call for tenders and the list of banks contacted by the developer [25] was not properly reasoned.

149. In its opinion, Parliament submitted that, in line with its statements contained in its decision on the confirmatory application, it had a right of access to these documents subject to

confidentiality. Given that the documents contained information considered as business secrets, Parliament was bound by its legal obligation of professional secrecy [26] .

150. In his observations, the complainant noted that, in support of its view that it was bound by professional secrecy, Parliament referred to a judgment of the Court of Justice. He stated, however, that only one of the three criteria given by the Court was fulfilled in the present case. He furthermore reiterated his argument mentioned in point 143 above.

The Ombudsman's assessment leading to a draft recommendation

151. The Ombudsman noted that, in its decision on the complainant's confirmatory application, Parliament relied on Article 4(2) first indent of Regulation 1049/2001 in order to justify its refusal to grant access to the said documents. According to Parliament, disclosure would undermine the commercial interests of the developer and the banks involved. It also pointed out that the said documents had been provided subject to confidentiality. After consulting the developer, in accordance with Article 4(4) of Regulation 1049/2001, Parliament pointed out that the developer also felt that disclosure would undermine its commercial interests, and that it therefore expected Parliament to comply with its duty of confidentiality.

152. As regards the applicability of Article 4(2) first indent of Regulation 1049/2001, the Ombudsman recalled that it follows from the case-law of the Union Courts that, if an institution decides to refuse access, it must explain how access to that document could specifically and actually undermine the interest protected by the exception relied upon [27] . In the present case, the Ombudsman considered that Parliament's reasoning essentially concluded that the exception contained in Article 4(2) first indent of Regulation 1049/2001 is applicable. However, it did not give reasons why granting access would specifically and actually undermine the commercial interests of the developer and the banks involved. The Ombudsman considered it useful to recall that the mere fact that a document concerns an interest protected by an exception cannot, in itself, justify the application of that exception. Finally, he recalled that the reply given by a third party, when consulted by an EU institution in connection with a request for access to documents, is not binding on the institution. It allows the institution to assess whether an exception is applicable [28] . Merely referring to the fact that a third party was consulted could not, therefore, be considered to be a satisfactory explanation as defined by the case-law of the Union Courts.

153. The Ombudsman noted Parliament's reference to a judgment of the General Court in support of its view that the documents in question were covered by the obligation of professional secrecy. After analysing this judgment, the Ombudsman considered that it links the obligation of professional secrecy to, among other things, Regulation 1049/2001. Thus, the Court held that "*… to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the obligation of professional secrecy* " [29] . Given the Ombudsman's view that Parliament did not provide a sufficient explanation as to why Article 4(2) first indent of Regulation 1049/2001 is applicable, it followed from the case-law of the Union Courts that Parliament did not provide sufficient reasons as to why the documents at issue are covered by the obligation of

professional secrecy.

154. In light of the above, the Ombudsman found that Parliament failed to provide sufficient reasons for its decision to refuse access to the documents in question. This failure constituted an instance of maladministration. He therefore made the following draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman, to Parliament:

" *Parliament should grant access to … the Call for tender and the list of banks contacted by the developer or, bearing in mind the complainant's arguments regarding an overriding public interest, provide a convincing explanation as to why the exceptions relied on by it are applicable.* "

The arguments presented to the Ombudsman after his draft recommendation

155. In its detailed opinion, Parliament stated that it had decided to make public the call for tenders issued by the developer, and the list of banks contacted by the developer. With its detailed opinion, it enclosed copies of these documents.

156. The complainant did not submit specific observations in relation to this matter.

The Ombudsman's assessment after his draft recommendation

157. Given that Parliament granted access to the call for tenders issued by the developer, and the list of banks contacted by the developer, the Ombudsman concludes that Parliament accepted the relevant part of his draft recommendation, and that the measures taken by Parliament to implement it are satisfactory.

G. Allegation of incorrect reasoning as to the existence of an overriding public interest (the complainant's ninth allegation)

Arguments presented to the Ombudsman

158. The complainant alleged that Parliament's argument that there was no overriding public interest in the disclosure of the documents concerned was incorrect. In support of his allegation, he submitted that there was indeed an overriding public interest in disclosure, given that, in the absence of a tendering procedure, the risk of manipulation at the taxpayers' expense was significant.

159. In its opinion, Parliament submitted that, in his request for access, the complainant did not invoke an overriding public interest in disclosure. It referred to the case-law of the General Court and pointed out that an overriding public interest was to be considered distinct from the general public interest in access [30] . Its nature had to be objective rather than subjective. Although public scrutiny of the use of public funds constitutes a public interest, this in itself was not sufficient to justify disclosure. In this regard, Parliament stated that its Committee on Budgetary Control and the European Court of Auditors enforce applicable rules on behalf of the public.

160. In his observations, the complainant essentially took the view that it was not for him to demonstrate the existence of an overriding public interest, given that applications for access do not have to be reasoned. He further considered that Parliament did not address his argument, according to which the risk of manipulation was high. Manipulations could only be uncovered if access to the documents was granted. The fact that Parliament's Committee on Budgetary Control and the European Court of Auditors monitor the application of the rules in place did not diminish the overriding public interest, since Parliament did not establish that these bodies had actually exercised their control with regard to the facts at hand. Even if such control had taken place, there was still an overriding public interest to verify whether the results achieved were correct.

161. In reply to Parliament's argument that disclosure could jeopardise its credibility and its ability to negotiate with future contractors, the complainant stated that, in light of the case-law of the Court of Justice, this argument was entirely unconvincing. Companies entering into contracts with institutions normally accepted that there are different transparency requirements than in contracts between private entities. A developer benefiting from Parliament's contraventions of the rules on the award of public contracts could not rely on legitimate interests.

The Ombudsman's assessment leading to a draft recommendation

162. The Ombudsman recalled that, pursuant to Article 6(1) of Regulation 1049/2001, an applicant requesting access to documents is not obliged to state reasons for the application. Furthermore, it followed from the Court's case-law that an institution which invokes one of the exceptions provided for in Article 4 of Regulation 1049/2001 is required to ascertain whether there is an overriding public interest justifying disclosure [31] .

163. Against this background, Parliament's argument that the complainant did not invoke the existence of an overriding public interest in his applications for access, could not be considered convincing.

164. In its opinion, Parliament relied on a judgment of the General Court in support of its view that an overriding public interest was to be considered to be distinct from the general public interest in access. Indeed, in its judgment in Case T-84/03 *Turco* , the General Court stated the following:

" *83. The overriding public interest, under Article 4(2) of Regulation No 1049/2001, capable of justifying the disclosure of a document which undermines the protection of legal advice must therefore, as a rule, be distinct from the above principles which underlie that regulation. If that is not the case, it is, at the very least, incumbent on the applicant to show that, having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question. That is not, however, the case here.* "

165. The judgment of the General Court in *Turco* was subject to an appeal to the Court of

Justice. In its judgment of 1 July 2008 [32] , the Court partly set aside the judgment under appeal and held as follows:

" *45. In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*

…

74. As has been held in paragraphs 44 to 47 and paragraph 67 of this judgment, the Court of First Instance misinterpreted Article 4(2) of Regulation No 1049/2001 in deciding that the overriding public interest capable of justifying the disclosure of a document, must, as a rule, be distinct from the principles which underlie that regulation.

75. It is clear that the provisions of a legislative act must be applied in the light of the principles underlying it. "

166. According to Parliament, an overriding public interest is distinct from the general public interest in access. This statement accords with the case-law as it stood at the time it was made. However, in light of the judgment of the Court of Justice in *Turco* , it can no longer be considered to be correct for the following reasons. First, a judgment rendered by the Court authoritatively interprets EU law with retroactive effect, and second, the complainant submitted plausible and concrete arguments suggesting the existence of an overriding public interest. The Ombudsman therefore found Parliament's argument, namely, that there was no overriding public interest in the disclosure of the documents concerned, to be based on an incorrect premise. This constituted an instance of maladministration. He therefore made the following draft recommendation to Parliament, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" *Parliament should grant access to the report, the Call for tender and the list of banks contacted by the developer or, bearing in mind the complainant's arguments regarding an overriding public interest, provide a convincing explanation as to why the exceptions relied on by it are applicable.* "

The arguments presented to the Ombudsman after his draft recommendation

167. In its detailed opinion, Parliament stated that it had decided to make public the documents requested by the complainant. With its detailed opinion, it enclosed copies of these documents.

168. The complainant did not submit specific observations in relation to this matter.

The Ombudsman's assessment after his draft recommendation

169. Given that Parliament granted access to the documents requested, the Ombudsman concludes that Parliament accepted the relevant part of his draft recommendation, and that the measures taken by Parliament to implement it are satisfactory.

H. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

First draft recommendation. (*"Parliament should correct or clarify the second statement made in its letter of 5 July 2007, in line with the considerations set out in paragraphs 37 - 43."*)

As regards the relevance of the judgment in Case C-44/96, the finding of maladministration on which the draft recommendation was based can no longer be maintained. As regards the issue of whether or not the basic principles of a tendering procedure were complied with, the additional information provided by Parliament in its detailed opinion sufficiently clarifies the position. No further action by the Ombudsman is therefore necessary.

Second and third draft recommendations. (" *Parliament should (i) clarify whether there are any documents relating to its consultation with the developer pre-dating the signature of the contract with it, and (ii) in case of an affirmative response, process the complainant's request for access to these documents* " and " *Parliament should grant access to the report, the Call for tender and the list of banks contacted by the developer or, bearing in mind the complainant's arguments regarding an overriding public interest, provide a convincing explanation as to why the exceptions relied on by it are applicable.* ")

Parliament has accepted the draft recommendations, and the measures taken by Parliament to implement them are satisfactory.

As regards the complainant's first and second allegations, the Ombudsman sees no need for further action on his part.

The complainant and Parliament will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 13 September 2010

[1] Regulation (EC) No 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[2] In the letter extending his inquiry to the complainant's new allegations, the Ombudsman referred to a " *list of banks contacted by Parliament* ". However, from the submissions made in the course of the inquiry, it became clear that the allegation in fact relates to a list of banks contacted by the developer.

[3] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

[4] Case C-44/96 *Mannesmann Anlagenbau* [1998] ECR I-73, paragraph 43.

[5] Directive (EC) No 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

[6] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357, p. 1.

[7] Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, as last amended on 9 April 2001 and as appealed by Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

[8] See, for instance, Case T-271/04 *Citymo SA v Commission* [2007] ECR II-1375, paragraphs 68 et seq.

[9] Commission's answer to parliamentary question E-2295/2008 of 9 June 2008, available online at:
http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-2295&language=EN [Lien]

[10] Case C-44/96 *Mannesmann Anlagenbau* [1998] ECR I-73, paragraph 43.

[11] See also Article 89(1) of the Financial Regulation: " *All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination.* "

[12] COM(1996)518 final.

[13] According to Parliament, Belgium contributed to the indirect financing arrangement by subsidising the cost of the land and the development of the sites, amounting to a total of approximately EUR 180 Mio.

[14] See the full text of paragraph 43 in point 65 below.

[15] Article 167(1) of the Financial Regulation reads as follows: "... *The contracting authorities for the purposes of this chapter shall be: (a) the Commission on behalf of and for the account of one or more beneficiaries; (b) the beneficiary or beneficiaries; (c) a national or international public sector body or natural or legal persons who are beneficiaries of a grant for the implementation of an external action.* "

[16] Ombudsman's emphasis.

[17] http://www.europarl.europa.eu/tenders/march_immob_2004.htm [Lien]

[18] Case T-168/02 *IFAW v Commission* [2004] ECR II-4135, paragraph 55.

[19] Case T-168/02 *IFAW v Commission* [2004] ECR II-4135, paragraph 55; Case T-380/04 *Terezakis v Commission* [2008] ECR II-11 (summary publication), paragraph 54.

[20] Case T-380/04 *Terezakis v Commission* [2008] ECR II-11 (summary publication), paragraph 60.

[21] Case T-188/98 *Kuijer v Council* [2000] ECR II-1959, paragraph 46.

[22] See, for instance, Case T-403/05 *MyTravel Group v Commission* [2008] ECR II-2027, paragraph 32.

[23] See Case T-403/05 *MyTravel Group v Commission* [2008] ECR II-2027, paragraph 33.

[24] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 43.

[25] These are the documents listed under (ii) in point 1 above.

[26] Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraphs 29 and 71-75.

[27] See Case T-403/05 *MyTravel Group v Commission* [2008] ECR II-2027, paragraph 33.

[28] Case T-380/04 *Terezakis v Commission* [2008] ECR II-11 (summary publication), paragraph 60.

[29] Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraph 74.

[30] Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 82.

[31] Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 44. This part of the judgment has not been set aside by the Court of Justice in Joined cases C-39/05 P and C-52/05 P *Turco v Council* [2008] ECR I-4723 (see below).

[32] Joined cases C-39/05 P and C-52/05 P *Turco v Council* [2008] ECR I-4723.